

CITATION: *In the matter of JA* [2012] NTMC 011

PARTIES: CEO – DEPARTMENT OF CHILDREN AND FAMILIES

v

LW

AND

RA

AND

PP

TITLE OF COURT: LOCAL COURT

JURISDICTION: Family Matters

FILE NO(s): 21031342

DELIVERED ON: 26 April 2012

DELIVERED AT: Darwin

HEARING DATE(s): 22 March 2012

JUDGMENT OF: Ms Sue Oliver SM

**CATCHWORDS:**

CARE AND PROTECTION OF CHILDREN – PARENTAL RESPONSIBILITY  
DIRECTION – PARENTAL RESPONSIBILITY TO MORE THAN ONE PERSON –  
EXTENSION AND VARIATION APPLICATIONS

*Care and Protection of Children Act* ss 93, 123, 132, 136, 138 and 139

*Interpretation Act* s 24(2)

**REPRESENTATION:**

*Counsel:*

Applicant:	Ms Terrill
Third Respondent:	Mr Snell
Child's Representative:	Ms Orwin

*Solicitors:*

Applicant:	Terrill & Associates
Third Respondent:	NTLAC

Judgment category classification:	A
Judgment ID number:	[2012] NTMC 011
Number of paragraphs:	48

IN THE LOCAL COURT  
AT DARWIN IN THE NORTHERN  
TERRITORY OF AUSTRALIA

No. 21031342

[2012] NTMC 011

BETWEEN:

**CEO – DEPARTMENT OF CHILDREN  
AND FAMILIES**  
Applicant

AND:

**LW**  
First Respondent

AND:

**RA**  
Second Respondent

AND:

**PP**  
Third Respondent

REASONS FOR DECISION

(Delivered 26 April 2012)

Ms Sue Oliver SM:

1. This matter concerns an application by the CEO for a variation of a Protection Order for JA with a long term parental responsibility direction giving parental responsibility to a specified person being the CEO (“the current variation application”). The order is sought to have effect until the child turns 18 years of age. The child was born on 24 December 1996 and is presently 15 years of age.
2. The parties named in the application are the mother and father of the child and PP as the third respondent to the proceedings. PP is an uncle by

marriage to the child having been married to the sister of the child's mother. Although he separated from his wife in 2008, according to his affidavit he remains on good terms with the child's extended family. PP has been the primary carer for the child for a substantial part of his life, commencing from around 2002. From 2008 to September 2010, following PP's separation from his wife, the child lived in Nhulunbuy with PP. The child has seldom resided with his father or mother due to their issues which include alcohol abuse and homelessness.

3. In early September 2010, PP found himself in a position where he was no longer able to provide a home for JA as a result of the breakdown of his accommodation in a nearby Aboriginal community. There is no suggestion that PP has ever neglected JA or subjected him to any form of harm. The protection concerns arose out of the inability of the parents to provide a safe and secure environment for JA and PP's inability to provide appropriate accommodation for himself and JA in 2010.
4. On 7 October 2010 a Protection Order giving short term parental responsibility jointly to the CEO and PP for a period of 12 months was made. JA became a boarder at a local school in Darwin and spent some holiday time with PP including travelling over the 2010 – 2011 Christmas holidays to spend time with PP's family in Adelaide.
5. On 3 October 2011 the CEO filed an application for the variation of the Protection Order seeking a further order until the child was 18 years of age but with parental responsibility only to the CEO (the "first variation application"). Curiously, the application was supported by an affidavit of the child's caseworker headed "Affidavit of grounds for an extension of protection order" that deposed that the "DCF assessment is that an ongoing shared Guardianship arrangement is required" and that "DCF is seeking an **extension** of the **current** order..." (my emphasis). It appears that on the first return of that application on 10 November 2011, the court was advised

that the CEO would file an amended application seeking a parental responsibility direction to both the CEO and PP. That application (the “second variation application”) was filed on 17 November 2011.

6. However, on 17 February 2012, before the finalisation of the application for shared parental responsibility, a further variation application was filed (the “current variation application”) by the CEO seeking a variation of the protection order giving sole parental responsibility to the CEO. The supporting affidavit gave no ground for what appeared to be a change in the view expressed in the earlier affidavit of 30 September 2011 that was said to support both the first and second applications that ongoing shared guardianship was required.
7. PP filed an affidavit in response to the third variation application. He seeks an order with parental responsibility direction to the CEO and to himself. He says that the reason given for the change in the applicant’s view was contained in an email that he received from a DCF case worker on 16 February 2012 which stated that DCF “has decided not to continue with joint application for guardianship as the new act doesn’t allow for it.” The submissions that I heard support that being the reason for the change in application.
8. The issues are first, whether the application is properly brought. If so, whether PP retains standing as a respondent to the proceedings and whether the Act allows for a parental responsibility direction to be given to more than one person. If so, the question then remains whether, in this case, such an order is in the child’s best interests.

**Is a variation of the protection order the proper order to have been sought in these proceedings?**

9. The Act provides for applications for extension of a protection order and for applications for variation of a protection order. Section 136 provides that the CEO may, before the order ceases to be in force, apply to the Court for the order to be extended for a further specified period. An extension order can be made more than once. It seems clear to me that this provision is intended to operate to allow for the extension of a protection order where reunification of the child with the parent/s has not been achieved within the time frame of the existing order. It would allow for a protection order that previously provided a short term parental responsibility direction to be extended to a long term order.
10. In addition, section 138 of the Act provides for variation of an existing order. Before the order ceases to be in force, a party to the proceedings for the making of the order may apply to the Court for the order to be varied; revoked or revoked and replaced by a new protection order.
11. In my view, given that there is a discrete provision (s136) that provides the power for the court to extend a protection order, the variation power is not one that includes an order for the extension of a protection order. A variation in my view is one that varies a direction under s123, for example, giving parental responsibility to another person or changing daily care and control or changing or applying a supervision direction. It does not in my view allow for the change of an order from one of short term to long term because such an order would amount to an extension of a protection order.
12. There is nothing to preclude an application seeking both an extension and a variation of the directions under the order. Although expressed only as a variation application this appears to be the intent of the current application.

**Does a protection order expire at the end of the term of the parental responsibility direction notwithstanding the commencement of extension and/or variation proceedings?**

13. There is no express power contained within either section 136 or 137 to make an interim order extending or varying an existing order. Where the application is contested and the proceedings not resolved within the time frame of the initial protection order, it may be that the protection order, or at the least any direction made under the order, lapses. This view seems to be supported by the adjournment provisions of the Act. The adjournment provisions specifically apply to applications for extension and variation (s138(1)).
14. Section 139 provides

**Order on adjournment**

(1) On granting the adjournment, the Court may make one or more of the following orders:

- (a) an order giving daily care and control of the child:
  - (i) to the CEO if the proceedings relate to an assessment order;
  - or
  - (ii) to the CEO or a family member of the child if the proceedings relate to a protection order;
- (b) an order that a report about the child and the child's family be prepared and filed in the Court;
- (c) an order authorising a medical examination of the child and the filing of a report of the examination in the Court;
- (d) an order restricting the contact between the child and specified persons;
- (e) an order that a mediation conference be convened for the child.

(2) Each of the orders has effect during the adjournment.

15. In my view, the proper order to be made during the adjournment of either an application for extension or variation of a protection order is a daily care and control order under section 139(1)(a)(ii) once the parental responsibility direction has ceased to have effect. Whether care and control is given to the

CEO or to a family member including a parent, will depend on the affidavit material filed in support of the application and may be reviewed on subsequent adjournments and further material filed in the course of the proceedings.

16. In this case, I note that on the adjournments of this matter from the first variation application, to and including the current variation application, (including an order made by me on the last occasion), parental responsibility has been given on an interim basis to the CEO. In accordance with the views I have expressed above, such an order cannot be made. The power to direct parental responsibility pursuant to section 123 is in my view confined to the making of a protection order including an order for extension or variation of an existing order.
17. A further consideration then is whether, the protection order itself expires once the period of the parental responsibility direction has ended. The Act provides in section 132 that the order has effect as specified by the Court unless the Court extends, varies or revokes the order. In other words, the period of a protection order will derive from s123 by reference to the length of the parental responsibility direction.
18. Absent an express power to make an interim variation order or extend an order, particularly in light of a clear limitation on the orders that can be made on an adjournment of proceedings, it seems to me that once the original parental responsibility direction expires, the protection order itself comes to an end, regardless of whether an extension or variation application is before the court.
19. This creates a considerable difficulty that arises out of the making of short term orders, particularly those for 12 months, as in this case. If the extension application is brought only at the very end of the initial order (here the “variation” application was made only 3 days prior to expiration) it will in many, if not most cases, not be capable of resolution prior to expiry



of the order. Indeed, often the application will not even be served on the parties before the expiration of the order.

**Can the Court hear and determine an extension or variation application once the initial protection order has expired?**

20. What follows from that is the question of whether the Court may continue to hear and determine an application for extension or variation of a protection order if the order has come to an end during the course of the proceedings?
21. If it is accepted that the view I have expressed is correct regarding variation applications, that is, that variations that can be made do not include ones that would change the duration of the order, then it does not seem logical that an application for variation of an order can continue to be determined once the original order has expired. In my view, a variation application must lapse on the expiration of the order as there is no longer anything to vary.
22. With respect to extension applications, on one view, if there is no longer an order, then again there is nothing that can be extended and the extension application must lapse. If that were the case, then no basis would continue to exist for an order for the CEO to have daily care and control of the child under an adjournment order. The outcome would be that the CEO would be required to abandon the extension application upon its lapse and make and serve a fresh application for a protection order. At some point there is a possibility that no authority to continue holding the child exists and the child would have to be returned to the parent/s pending an application being brought before the court.
23. The alternative procedure would be for a temporary protection order (TPO) to be sought immediately on the expiration of the protection order. However an application for a TPO cannot be made if a protection order is in existence (s103(1)(a)(iii)). Again there would be no authority to continue to hold the child until an application could be made.

24. Neither outcome is consistent with the entire tenor of legislation that seeks to protect children from harm.
25. An alternative view is that although the protection order has ended due to the expiration of the parental responsibility direction, the extension application may remain on foot and if granted “resurrects” the protection order from the date that the extension is made. What lends some weight to this unusual outcome is that the adjournment provisions provide for the order for care and control during adjournments and specifically applies it to extension applications. If an order is still in force giving parental responsibility to the CEO (or another) there is no need for a care and control order on the adjournment because parental responsibility encompasses care and control. It will only be after the expiration of the order that an order for care and control would be necessary.
26. There being some doubt in my view as to the ability to extend an order after its expiration, in my view the better procedure to be adopted for matters where a short term order has been made and that order will shortly expire so that an extension application is unlikely to be finalised before the expiration of the order, is for the CEO to make a fresh application for a protection order.

### **How should this matter proceed?**

27. There are the dual difficulties with this application that it seeks a variation of a now expired order and a variation both by extension and by a change in its terms from shared parental responsibility to parental responsibility to the CEO alone.
28. However, at all times it has been clear to each of the parties what the intent of the applications has been and the issues arising out of the applications. These are first, that the child remains under a protection order and that the CEO be a person who has parental responsibility with respect to the child.

Second, that the protection order should continue until the child is 18 years old. Third, whether parental responsibility under that order should also be given to the third respondent, PP.

29. Section 93 of the Act directs that court proceedings must be conducted with as little formality and legal technicality as the circumstances permit.
30. Given that all parties have at all times understood the issues that arise from the applications and have addressed them, it would in my view be an insistence of undue legal technicality at this stage to require the applicant to amend the current application from a “variation” application to one for a protection order. Insistence on the proper form of the application at this time will not advance the best interests of the child and is contrary to section 138(3) that the court must have regard to the principle that it is in the best interests of the child for the application to be decided as soon as possible.
31. There has already been considerable delay in resolving this matter due to the different applications made during the proceedings. I propose to proceed on the basis that what is sought at this time is a protection order with a long term parental responsibility direction to the CEO. What the third respondent seeks is that he also be given a long term parental responsibility direction under a protection order for the child. Each of these parties and the mother expressly agree that it is in the child’s best interests for a protection order to continue. The child’s representative likewise supports a protection order. These issues are clear and can be resolved notwithstanding the technical difficulties of the form of the applications.

**Can the Court make an order in which a parental responsibility direction is given to more than one person?**

32. The issue is whether the Court has power to give parental responsibility to more than one person.

33. The applicant says that the terms of section 123 preclude more than one parental responsibility direction because the provision is expressed in the singular. Section 123 provides

**123 Directions in protection order**

- (1) The proposed order must specify one or more of the following directions:

(a) a direction (a **supervision direction**) requiring one or more of the following:

(i) that a person must do, or refrain from doing, a specified thing directly related to the protection of the child;

(ii) that the CEO must supervise the protection of the child in relation to specified matters;

(b) a direction (a **daily care and control direction**) giving daily care and control of the child to a specified person;

(c) a direction (a **short-term parental responsibility direction**) giving parental responsibility for the child to a specified person for a specified period not exceeding 2 years;

(d) a direction (a **long-term parental responsibility direction**) giving parental responsibility for the child to a specified person for a specified period that:

(i) exceeds 2 years; and

(ii) ends before the child turns 18 years of age.

- (2) Without limiting subsection (1)(a)(i), a supervision direction may:

(a) require a person not to have any direct or indirect contact with the child; or

(b) require a person not to have any direct or indirect contact with the child except when a specified person or a person belonging to a specified group is present.

34. The applicant says that the use of the expression “specified person” is intentionally singular. The third respondent disagrees and submits that consistent with the *Interpretation Act* the term includes more than one person. Section 24(2) of that Act provides:

- (2) In an Act:

(a) words in the singular include the plural; and

(b) words in the plural include the singular.

35. Section 3 of the *Interpretation Act* provides that the provisions of the *Interpretation Act* apply to other Acts except that these provisions will yield to the appearance of an intention to the contrary in another Act (s3(3)). The use of the singular expression is therefore a common drafting practice. In my view it would require a very clear intent to the contrary to depart from the interpretation provided by the *Interpretation Act*.
36. The addition of the word “specified” does not in my view lend any support to “person” being confined to a singular meaning. In my view the purpose of “specified” is to ensure the person (or potentially) persons given daily care and control or parental responsibility are properly identified in the order. An order can equally specify any number of persons as it can a single person.
37. If I were to accept that the intention in terms of parental responsibility directions as expressed in section 123(1)(c)&(d) is confined to a single person, it seems to me that I would also have to find that “person” carries the same singular meaning throughout the section, relevantly in section 123(1)(a). It would be extremely difficult to construe the section as having a plural intent in one paragraph of section 123(1) and a singular meaning in other paragraphs. If I accept that “person” throughout section 123 is intended to be singular that would create an absurdity with respect to supervision directions. A supervision direction may require a person not to have any direct or indirect contact with the child. It clearly enables the court to prevent further contact between a parent or the parents of a child with a child where contact is considered not to be in his or her best interests. If “person” is singular then the court could direct non contact with respect to one person only. The limitation this would place on disallowing contact between the child and both parents is obvious and would not be consistent with the protection of the child.

38. Although the expression ‘specified’ is not used to describe the person subject to a restraint, but does use that description in relation to those who must be present during contact (123(2)), I am not able to discern from that an intent that ‘specified person’ is intended to be singular. Again it would place, in my view, undue restriction on the practicality of orders. For example, the Court may decide that contact between the child and a parent should be supervised. If only one person could be named as the person to be present to supervise, contact might be extremely limited by that order, whereas an order that contact takes place in the presence of the grandmother or grandfather, for example, would provide a flexibility that seems to me to be in the best interests of the child.
39. The idea that parental responsibility cannot be given to more than one person is inconsistent with the way in which parental responsibility operates within a family. In two parent families, even where there is parental separation, each parent has parental responsibility absent any legal order to the contrary. There is nothing problematical with shared parental responsibility as a concept and no reason why it should not be capable of existence in respect of a child under a protection order.
40. I am satisfied that the court has power to make a parental responsibility direction to more than one person.

**Should a parental responsibility direction be made that gives parental responsibility to PP as well as to the CEO?**

41. The court has power to make more than a single parental responsibility direction. Whether it should do so is a matter that requires determination on the individual circumstances of a case. It is not likely to be an order commonly made because generally there is unlikely to be a person suited to that task in addition to the CEO.

42. It is apparent from PP's affidavit, and that of the affidavit filed on behalf of the CEO, that PP has retained a strong interest and involvement in this child's life. He says that it was about 2001 when JA first came into his care with his siblings with JA being about four years old at that time. He says that he made a commitment to see the kids through their schooling. He clearly takes an interest in JA's schooling having regular contact with the schools he has attended and attended there when there have been issues with respect to JA. He has had JA stay with him during school holidays. He also most recently paid for JA to fly to Adelaide for his father's 80<sup>th</sup> birthday in February this year. He clearly treats JA as part of his family. PP has been absent from the Northern Territory due to the illness of his father but plans to return and stay in Darwin from April 2012. He wants it to be possible for JA to stay with him where possible and appropriate.
43. The applicant has not placed in evidence any material to suggest that PP is in any way unsuited to continue to exercise parental responsibility with respect to the child. There is no evidence that the previous shared parental responsibility order created problems for the child's care. The issue appears to be that the CEO has most recently taken the view that the legislation does not permit a joint parental responsibility direction to be given. If that is the sole issue from the CEO's perspective it is answered by my finding on the law.
44. The child's representative does not raise any objection to PP also having parental responsibility observing that even if the order is not made he is likely to remain interested and involved in JA's life.
45. The mother has also filed an affidavit in response to the sole parental responsibility application. The mother's view is that she wants shared parental responsibility to continue as she says that she feels more comfortable getting updates on the child from PP as "he is family" and that she is not confident that the Department will keep regularly updated.

Whether or not the latter concern is real, she is clearly supportive of PP's continued involvement.

46. PP has been a constant in this child's life. JA is entitled to have maintained for his benefit the authority of PP to be involved in making decisions for his future and, in my view, can only benefit from knowing of that stability. PP clearly has the child's best interests at heart in this regard. There may indeed come a time when PP returns to a position where JA desires to return to his care and this can be agreed between the CEO and PP.
47. I am satisfied that a protection order should be made because but for the fact that the child is currently in the CEO's care he would be in need of protection as his mother is not able to properly provide for him and has not taken part in his care for the greatest part of his life. PP for reasons related to his family and accommodation circumstances is not presently able to care for him though he has done so for many years. The order is the best means to safeguard the wellbeing of the child at this time.
48. I make a protection order for JA giving a parental responsibility direction to both the CEO and to PP until the child is 18 years of age.

Dated this 26th day of April 2012.

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**Sue Oliver**  
STIPENDIARY MAGISTRATE