CITATION:	*CEO for Children and Families v CH, XHC, SC, JH, JWC* [2013] NTMC 002
PARTIES:	CHIEF EXECUTIVE OFFICER, DEPARTMENT OF CHILDREN AND FAMILIES v CH, XHC, SC, JH, JWC
TITLE OF COURT:	Local Court
JURISDICTION:	Family Matters
FILE NO(s):	21248641, 21248684, 21248688, 21248640, 21248690
DELIVERED ON:	22 February 2013
DELIVERED AT:	Darwin
HEARING DATE(s):	7 February 2013
JUDGMENT OF:	Ms Sue Oliver SM

CATCHWORDS:

CARE AND PROTECTION OF CHILDREN
Order an adjournment – care and control of children – care outside the jurisdiction

REPRESENTATION:

Counsel:

Applicant:	Ms Dawson
Children:	Ms Orwin
CEO	Ms Muccitelli
Father:	Ms McLaren

Solicitors:

Applicant:	NAAJA
Children:	Orwin & Associates
CEO:	Solicitor for the NT
Father:	McLaren & Associates

Judgment category classification:	A
Judgment ID number:	[2013] NTMC 002
Number of paragraphs:	33

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

No. 21248641, 21248684, 21248688, 21248640, 21248690

BETWEEN:

Chief Executive Officer, Department of Children and Families

AND:

CH, XHC, SC, JH, JWC

REASONS FOR DECISION

(Delivered 22 February 2013)

Ms Sue Oliver SM:

Background

1. The Chief Executive Officer of the Office of Children and Families (the CEO) has made applications for a Protection Order for each of the children in this matter on 20 December 2012 under the *Care and Protection of Children Act*. The CEO seeks an order with a parental responsibility direction giving parental responsibility to the CEO for a period of 2 years.

2. On 21 December 2012 an adjournment order was made giving care and control of each of the children to the CEO during the adjournment period. The children were ordered to be separately represented.

3. On 10 January 2013 the proceedings were further adjourned with orders that the mother file and serve any application regarding the interim daily care and control of the children with affidavits in support by close of business on

17 January 2013. Daily care and control of each child was ordered to remain with the CEO during the adjournment.

4. On 17 January the mother made application that daily care and control of each child be given to the child's aunt, AH on adjournment of further proceedings on the application for a Protection Order pursuant to s139(1)(a)(ii) of the Act. The application was supported by affidavits of the mother, the maternal aunt AH and AH's partner CL. AH and CL are residents of Kununurra, Western Australia. I gave leave for AH to attend the Court proceedings by video link from Kununurra. In the course of the proceedings she was able to expand on some of the matters contained in her affidavit.

5. The father filed an affidavit opposing the mother's application on 7 February 2013.

6. The mother's application was heard on 7 February 2013. As submissions were unable to be completed on the day, I asked for further submissions on the issue of the Court's power to make an adjournment order for care and control of a child that would place a child outside the Northern Territory and whether a parent continued to exercise parental responsibility when an adjournment order for care and control to another person has been made.

Can an order be made giving care and control to a person not resident in the Northern Territory?

7. As I indicated at the hearing I had some reservations about the Court's ability to make an order placing the children in the care and control of a person outside the jurisdiction and invited further written submissions from those parties who wished to do so. I have received written submissions from the applicant and from the father.

8. The applicant says that such an order may be made relying primarily on *Melville v CEO Department of Health and Families* [2011] NTCA 8 as

authority for that proposition. In *Melville* the children were under orders from an Act that was replaced by the *Care and Protection of Children Act* and which, by virtue of the transitional provisions, became a protection order giving long term parental responsibility to the CEO until they reached the age of 18 years. That order was subsequently confirmed by the Court.

9. The children had progressively been placed with the same carers until altogether in that placement. The carers wanted to relocate with the children to Queensland for reasons not relevant to these proceedings. Following a refusal by the Court to grant an injunction sought by the mother to prevent the children from being taken interstate, the CEO approved the move. The matter proceeded through to the Court of Appeal.

10. The Court of Appeal noted that the Northern Territory has power to pass laws with extra-territorial operation although there is a rebuttable presumption against extra territorial operation.

> "In construing a statute and determining whether or not it has extra-territorial application the Court must look at the Act as a whole, its context, and the objects and purposes of the Act."[1]

11. The Court noted that the Act expressly contemplated in ss 155 and 160 that a child under a protection order for whom the CEO has parental responsibility may be residing outside the Territory noting that it "specifically provides that the CEO may transfer a home order to a participating State if the child to whom the order relates is residing or is about to reside in the State." The section therefore contemplated that a child might already be interstate prior to transfer of an order to that State. The Court found that the CEO could place interstate a child for whom it had parental responsibility.

12. In written submissions the applicant says that the Act also expressly contemplates that a child may be residing outside the Territory prior to the

[1] *CEO v Melville* [2011] NTCA 8 at [37]

final determination of a child protection proceeding. Section 166 deals with applications for transfer of proceedings to another jurisdiction and provides:

> "The CEO may apply to the Court for an order transferring a home proceeding to a participating State if:
>
> (a) the child to whom the proceeding relates is residing, or is about to reside, in the State; and
>
> (b) the interstate officer of the State has consented in writing to the transfer." (emphasis added)

13. I agree with the applicant that the most likely scenario for a child to be residing interstate at the time an application is made for transfer of proceedings is that the child is residing there with a family member who has been given care and control under an adjournment order.

14. I initially had some doubt that the Act should be construed to allow a care and control order to be given that would place the child interstate on the basis that such an order would affect the protective jurisdiction of the Court. The Local Court exercising the family matters jurisdiction does not have power to issue recovery orders for children should there be a failure by the carer to return the children on a further order or the children be removed from the family member's care by a parent. However on reflection it is the power to order a transfer of proceedings that in my view is intended to address those circumstances, amongst others.

15. The father says that the Act should not be construed in that way because the CEO would not be able to exercise any supervisory powers over the children during the adjournment if they are interstate. However the reality is that once an order is made placing the children in the care and control of a family member during an adjournment, the CEO does not have "supervisory powers" over the children whether they be within the jurisdiction or not. It is only a care and control order itself that confers any power on the CEO to

take actions related to the children's day to day situation, including for example monitoring a placement or providing medical care.

Is AH a suitable person to have care and control of the children pending final resolution of the application for a Protection Order?

16. Section 139 of the Act provides for the orders that may be made during any adjournment of the proceedings. 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.

17. Although s 139 does not specify what matters the Court is to take into consideration, it is clear that the Court is required to consider in making a care and control order on an adjournment whether that order will safeguard the wellbeing of the children.[2]

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[2]Section 4 The objects of this Act are:
(a) to promote the wellbeing of children, including:
(i) to protect children from harm and exploitation; and
(ii) to maximise the opportunities for children to realise their full potential; and
(b) to assist families to achieve the object in paragraph (a); and
(c) to ensure anyone having responsibilities for children have regard to the objects in paragraphs (a) and (b) in fulfilling those responsibilities
Section 5 "To achieve those objects, this Act provides for the following:
(a) measures for safeguarding the wellbeing of children (see Chapter 2), in particular:

18. In addition the Court in making a decision under section 139 must uphold the principles set out in the Act. As I said in the matter of *RN and TW* [2012] NTMC 006:

> "The purpose of the principles set out in Part 1.3 is to establish a framework of the matters properly to be recognised and considered by those exercising powers or performing functions under the Act, including the Court. However, they are not each absolute directions as to the exercise of powers or the performance of functions either to DCF or to the Court. They must be considered as a whole and as to how they apply to individual cases"

19. That this is so is clear from s 6(2) which requires that anyone exercising a power or performing a function under the Act must, **as far as practicable**, uphold the principles (*my emphasis*). The principle that is determinative however is that in s 10, by virtue of being repeated in s 90 of the Act which states that the Court must regard the best interests of a child as paramount in exercising the family matters jurisdiction and that the Court must give priority to the child if the rights of the child are in conflict with the rights of an adult.

20. What is required under the Act is that the other principles relevant to a particular case are considered when reaching a decision.

21. AH set out in her affidavit her proposal for accommodating the children with her own two children and her plans for the older children's education. AH has worked part-time with Centre Link for 6 years and provided references from her work supervisor who describes her as reliable and kind and compassionate. Her supervisor has seen her in her role as a mother and describes her as a person who sets boundaries for her own children and ensures their school attendance and sets a good example of the importance of education and a good work ethic.

(i) mandatory reporting requirements for children at risk of harm or exploitation (see Part 2.1, Division 3); and

22. Her medical practitioner completed a foster carer assessment which deems her suitable as a foster carer. The father in his affidavit describes AH having been treated for depression in the past and raises this as a concern as to her caring for the children. This aspect of her medical history is reported by her doctor in the assessment form and I am satisfied that it is not a matter that is present and likely to affect her capacity to care for the children.

23. Personal references were also provided that all speak highly of her good character and strong parenting ability.

24. AH also provided a letter from her employer stating her current leave entitlements and she clarified in the hearing that she planned to take long service leave to settle the children and make the necessary child care arrangements for the younger ones for the days she works. She has set about inquiries for child care places. Her employer states that she will be granted whatever leave she requires to deal with these family matters.

25. CL's affidavit supports AH. He is likewise in stable employment and from what he says has taken on a fathering role with respect to AH's children. He has had Christmas with the children for the last three years (except for 2012) and is keen to involve the children in the activities that he enjoys with AH and her children. He makes a frank admission about minor infringement fines which are matters that would not have been disclosed on a criminal history check.

26. AH has no criminal history and CL's is confined to a $75 fine for a minor traffic matter.

27. Both are realistic about the task of taking on five more children and the crowded home that will result.

(ii) the powers of the Minister, the CEO and other officers to take actions for the wellbeing of children (see Parts 2.1 and 2.2); and
(iii) **the powers of the Court to make orders for the wellbeing of children** (see Parts 2.3 and 2.4) (*emphasis added*)"

28. On everything provided to me, I am more than satisfied that AH would be a suitable person to have care and control of the children pending the outcome of the proceedings. It would be in the children's best interests to be placed under her care and control because she appears on all accounts to be a person with strong parenting skills who could provide a secure, stable and nurturing environment for the children at this time. The children have stayed with her before and her home and her partner are familiar to them. They would be able to engage with their cousins. AH indicated a willingness to allow for the children to have contact with their paternal grandparents in Kununurra and older siblings with whom they reside under a Family Court Order. This would also be to their benefit.

29. Finally, at present the children have been separated with the girls in one placement and the boys in another. Reuniting the children would in my view be to their benefit and promote their best interests.

30. In concluding that it is in the children's best interests to be placed with their Aunt I have not ignored the fact that such an order poses some difficulties for the ongoing management of the proceedings, in particular the child representative's contact with the children to ascertain their wishes. However, I think there are various means to achieve this, noting that the oldest child, the subject of the proceedings is just turning six years old and the youngest two years old so that the ability to ascertain wishes and the weight to be given to them is somewhat limited in any event.

31. Any arrangements for medical examinations or assessments can be organised through AH who has indicated a willingness to accept any assistance offered by the Office of Children and Families.

32. I have also considered that placing the children with their aunt makes contact with the father more difficult however it does not appear to be the case that he has had contact with the children since they were removed from

the mother's care[3]. In any event this is not a final order placing the children interstate and the proceedings will now need to be expedited given the number of adjournments that have already occurred.

33. On the conclusion of today's proceedings I will make an order placing the children in the care and control of their aunt, AH.

Dated this 22nd day of February 2013.

Sue Oliver
STIPENDIARY MAGISTRATE

[3] His affidavit does not depose to the contact he has had other than to say it has been limited (or prevented) since the parents separated)