CITATION:	*BJW v EWC & Ors* [2018] NTSC 47
PARTIES:	BJW v EWC and CEO, TERRITORY FAMILIES and LP and EMC
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 55 of 2017 (21617616)
DELIVERED:	24 July 2018
HEARING DATES:	16 and 29 March 2018
JUDGMENT OF:	Hiley J

CATCHWORDS:

APPEAL - Local Court - *Care and Protection of Children Act (2007)* - protection order until child turns 18 - onus of proof on CEO - role of child's representative - child's representative is not confined to expressing the

views of the child - court is required to attach weight to submissions of child's representative - Law Society Northern Territory *Protocols for lawyers representing children*.

APPEAL - Local Court - *Care and Protection of Children Act (2007)* - protection order until child turns 18 - underlying principles - emphasis upon maintaining the child's relationship with his mother and young sisters - need to consider and plan reunification - need to make predictive assessments before making long-term order.

APPEAL - Local Court - *Care and Protection of Children Act (2007)* - protection order until child turns 18 - requirement for care plans and other material demonstrating how the best interests of the child should be met - should be produced and provided to the parent and child's representative soon after proceedings commenced - *Local Court Practice Direction No 1 of 2015*.

Care and Protection of Children Act (NT) s 8, s 10, s 129, s 130, s 138, s 140, s 143, s 143B.
Children and Young Persons (Care and Protection) Act 1998 (NSW) s 78, s 80.
Criminal Code Act (NT) s 43ZO.
Family Law Act 1975 (Cth) s 61C, s 68L.

The CEO Department of Children and Families v LB & Ors [2015] NTSC 9, *In the Marriage of Bennett* (1990) 102 FLR 370, *WM & FM v CEO Department of Children and Families* [2012] NTSC 67, *MV v CEO Department of Children and Families* [2012] NTSC 68, applied.

CEO Department of Children and Families v MGM & Ors [2012] NTSC 69, distinguished.

Duffy v Gomes [2015] FCCA 1121, *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29, *Re Tracy* (2011) 80 NSWLR 261, referred to.

REPRESENTATION:

Counsel:

Appellant:	A Wyvill SC and A Srinivas
First Respondent:	A Koulianous
Second Respondent:	G Brown
Third Respondent:	Self represented
Fourth Respondent:	No appearance

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
First Respondent:	Maleys Barristers & Solicitors
Second Respondent:	Solicitor for the Northern Territory
Third Respondent:	Self represented
Fourth Respondent:	No appearance

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

BJW v EWC & Ors [2018] NTSC 47
No. LCA 55 of 2017 (21617616)

BETWEEN:

BJW
Appellant

AND:

EWC
First Respondent

AND:

CEO, TERRITORY FAMILIES
Second Respondent

AND:

LP
Third Respondent

AND:

EMC
Fourth Respondent

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 24 July 2018)

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Introduction

[1] On 12 October 2017 the Local Court, exercising Family Matters Jurisdiction, (the **Court**), made a protection order under s 129 of the *Care and Protection of Children Act* (NT) (the **Act**) in relation to EWC (the **protected child**) with a long-term parental responsibility direction[1] giving parental responsibility for EWC to the Chief Executive Officer of Territory Families (the **CEO**) until he reaches 18 years of age (the **Protection Order**).[2] This is the longest order possible under the Act.

[2] EWC was born on 17 December 2013. Accordingly he was almost four years of age when the Protection Order was made, and about two and a half years old when the CEO applied for that order. EWC has two younger sisters, IWC born 22 January 2016 and CWC born 24 May 2017.

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1 Defined in s 123(1)(d) of the Act.

2 AB 157.

[3] EWC was removed from his mother, BJW, the appellant, on 22 January 2015 when he would have been about 13 months old. The CEO has effectively had parental responsibility for him ever since then, and will continue to have that responsibility until 17 December 2031 unless the Protection Order is revoked or varied.

[4] On 27 April 2015 a one-year protection order was made in relation to EWC and his two older half-siblings, a girl MP born 2 January 2005 and a boy JP born 28 September 2010.[3] On 8 April 2016, shortly before the expiry of that protection order, the CEO brought this application (the **Application**) that eventually resulted in the making of the Protection Order.[4] The Application was adjourned on a number of occasions pursuant to s 138 of the Act, and interim orders were made under s 139(1)(a)(ii) giving daily care and control of the child to the CEO.[5]

[5] EWC has been cared for by his paternal grandmother, LP, the third respondent, since 29 April 2015,[6] presumably under one or more placement arrangements made under s 77 of the Act. All parties agree that LP is performing that role admirably and that EWC is much better

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3 MP and JP now live with their paternal grandmother in Adelaide.

4 AB 1-8.

5 Further Submissions of the Second Respondent (CEO Territory Families) dated 11 April 2018 (**CEO's Submissions**) [57]. Those submissions incorporated and superseded the Submissions of the Second Respondent (CEO Territory Families) dated 9 March 2018.

6 Reasons for Judgement 11 October 2017 (**Reasons**) [2].

off being cared for by her at least in the shorter term. It is apparent that the principal purpose of the longer term protection order was to facilitate EWC remaining in the care of LP for the balance of his childhood.[7]

[6] EWC and his younger sisters, IWC and CWC, have the same parents, BJW and EMC, the fourth respondent. Apart from two days in August 2016 when IWC was taken into provisional protection,[8] both girls have been in their mother's care since they were born. BJW and EMC separated in or before September 2016.[9]

[7] Although all parties accept that a protection order in relation to EWC was and is still appropriate, the appellant (EWC's mother) and the child's representative who had been appointed under s 143A of the Act to represent EWC, contended that the protection order should have been for a much shorter duration. In short there was no basis for the Court making a decision which effectively precluded EWC from ever returning to the parental care of his mother and growing up with his two younger sisters.

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7 See for example Reasons [42] – [44].

8 IWC was subject to provisional protection for 2 days from 9 August 2016 due to concerns regarding BJW's drug use which impacted upon her ability to provide adequate supervision to IWC and BJW's 2 older children MP and JP. IWC was subsequently the subject of child protection investigations following certain alleged conduct of EMC the most recent being a domestic violence incident between EMC and BJW in October 2016. AB 59.

9 Reasons [11].

[8] Accordingly the appellant seeks that this Court set aside the Protection Order and requests the opportunity to negotiate, or have determined, a protection order of much shorter duration. The object of such an order would be to maximise the chance of EWC being able to return to his family unit and live with his mother and his younger sisters.[10]

Grounds of appeal

[9] The appellant advanced the following grounds of appeal:

1. ***Ground 1*** – having concluded that the views of [EWC's] legal representative "cannot be given much weight in all the circumstances" (judgment at [40]), the Judge erred in proceeding to make a final decision.
2. ***Ground 2*** – the Judge erred in failing to place any weight or any sufficient weight on the importance for [EWC's] safety, welfare and wellbeing of living with his family unit and establishing and maintaining:

   2.1 a normal relationship with his mother; and further

   2.2 a normal relationship with his younger sisters, [IWC] and [CWC];

   and as a result the Judge failed to give a proper consideration to the matters listed in s 10(2)(c), (f) and (g) and further the Judge's satisfaction for the purposes of s 130(2)(a) was erroneously formed.
3. ***Ground 3*** – the Judge erred in making long-term parental responsibility direction giving parental responsibility to the CEO until the Child turns 18 without evidence from the CEO as to the CEO's proposed Care Plan for [EWC], particularly as to the "decisions" for contact between [EWC] and his mother and younger sisters, contrary to s 122(d) and s 130(1)(c)(i) of the Act.[11]

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10 Appellant's Submissions dated 5 March 2018 (**Appellant's Submissions**) [5].

11 In [1] of the Appellant's Reply Submissions the appellant sought to add the words "contrary to s 122(d) and s 130(1)(c)(i) of the Act" to Ground 3. This amendment was not objected to.

4. ***Ground 4*** – the Judge undervalued the prospect of a successful reunification between [EWC] and his mother and sisters, and overvalued the importance of a long term order to 18 years of age for [EWC's] care arrangements with his grandmother, including by concluding:

   4.1 …

   …

   4.5 at [26] that "there was no reason not to give full weight to (the child psychologist, Ms Dixon's) findings given no contrary expert evidence was given";

   4.6 at [36] that "in a best case scenario at least three and half years would be required before [EWC] could be returned to his mother" and that even then, it would "be necessary to retain further monitoring";

   4.7 at [38] that, as she does not agree with Ms Dixon's evidence, "it is difficult to determine whether (the mother) is ever likely to engage with recommended services to fully address substance issues and mental health issues and if so what period of time would be needed to both address the issues and demonstrate sustained change";

   4.8. by failing to place any weight on:

      4.8.1. the parties agreement that "the mother… is taking appropriate steps to address (the concerns of Territory Families)";

      4.8.2. the evidence of the mother, Dana Cartmill and Mary Jane Baya as to the mother's progress in dealing with these concerns and in providing proper care for [IWC] and [CWC].

      4.8.3. the fact that, with the CEO's approval, the mother was caring for [IWC] and [CWC].

[10] Counsel for the appellant accepts that this is an appeal in the true sense where the appellant must establish a material error of fact or law. If such an error is established, this Court "has power … to substitute

findings made on (those) questions …".[12] None of the respondents have suggested that the grounds do not raise such appealable issues or that the appeal is otherwise incompetent or deficient.[13]

Relevant legislation and onus of proof

Underlying principles

[11] Section 4 of the Act identifies as objects of the Act:

(a) the promoting of the well-being of children, including their protection from harm and exploitation, and maximising opportunities for them to realise their full potential; and

(b) assisting families to achieve that object.

[12] Sections 7 to 12 of the Act set out the "underlying principles of this Act" which are to be applied by the Court and by the CEO when exercising their powers under the Act.

[13] Section 8 refers to the important role of family and includes the following:

(1) The family of a child has the primary responsibility for the care, upbringing and development of the child.

(2) …

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12 *The CEO Department of Children and Families v LB & Ors* [2015] NTSC 9 at [15].

13 See s 140 of the Act concerning the right of appeal and s 143 concerning the powers of this Court.

(3) A child may be removed from the child's family only if there is no other reasonable way to safeguard the well-being of the child.

(4) As far as practicable, and consistent with s 10, if a child is removed from the child's family:

(a) contact between the child and the family should be encouraged and supported; and

(b) the child should eventually be returned to the family.

[14] The fundamental core of a child's family would normally be the child's parents, as it is they who normally have legal parental responsibility for the child.[14] The "family of a child" is defined to include other relatives of the child and anyone who is closely associated with the child or with another family member of the child.[15] Needless to say LP is part of EWC's family so defined.

[15] Section 10(1) requires that "the best interests of the child are the paramount concern." Section 10(2) lists matters that should be taken into account in determining the best interests of the child. These include:

(a) the need to protect the child from harm and exploitation;

(b) the capacity and willingness of the child's parents or other family members to care for the child;

(c) the nature of the child's relationship with the child's family and other persons who are significant in the child's life;

(d) the wishes and views of the child, having regard to the maturity and understanding of the child;

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14 See s 61C *Family Law Act 1975* (Cth). See too s 22 of the Act.

15 S 19.

(e) the child's need for permanency in the child's living arrangements;

(f) the child's need for stable and nurturing relationships;

(g) the child's physical, emotional, intellectual, spiritual, developmental and educational needs;

(h) the child's age, maturity, gender, sexuality and cultural, ethnic and religious backgrounds;

(i) other special characteristics of the child;

(j) the likely effect on the child of any changes in the child's circumstances.

Protection orders

[16] Section 121 of the Act permits the CEO to apply to the Court for a protection order for a child if the CEO reasonably believes that the child is "in need of protection" or "would be in need of protection but for the fact that the child is currently in the CEO's care" and "the proposed order is the best means to safeguard the well-being of the child."

[17] Section 122 requires that the CEO specify in such an application:

(a) the proposed order;

(b) when the order is proposed to have effect;

(c) why the CEO considers the order is necessary; and

(d) the proposed arrangement for the care and protection of the child under the order.

[18] The proposed order must also specify one or more of a number of directions such as a "short-term parental responsibility direction" which gives parental responsibility for the child to a specified person for a specified period not exceeding two years, or a "long-term parental responsibility direction" giving parental responsibility for the child to a specified person for a specified period that exceeds two years and ends before the child turns 18 years of age.[16] In other words the CEO can seek an order which will continue until the child turns 18 years of age (which for convenience I shall refer to as a **maximum duration protection order**) or an order for a shorter period (which for convenience I shall refer to as a **shorter duration protection order**).

[19] A protection order removes parental responsibility from the child's parents and confers it upon the specified person, in this case the CEO. Parental responsibility for a child would normally be held by each of the parents of the child until he or she turned 18.[17] The Act also permits the Court to make a "permanent care order" giving the parental responsibility to someone else.[18]

[20] Under s 22(2) of the Act a person who has parental responsibility for a child has "daily care and control of the child" and is entitled to

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16 S 123(1)(c) and (d).

17 S 61C *Family Law Act 1975* (Cth).

18 Ss 137A – 137M. That is not what has occurred in the present case.

exercise all the powers and rights, and has all the responsibilities, in relation to the long-term care and development of the child.

[21] As a consequence of the CEO having daily care and control of the child under a protection order the child is "in the CEOs care".[19] This results in a number of obligations imposed upon the CEO. These include obligations to:

(a) prepare and implement a care plan and to conduct regular reviews of such a plan;[20]

(b) enter into a placement arrangement with other persons or bodies (defined as the "carer"), who could be a parent of the child, a "family member" of the child or an individual approved by the CEO;[21]

(c) "provide opportunity for the child to have contact with the parent and other family members of the child as often as is reasonable and appropriate in the circumstances."[22]

[22] The CEO has extensive powers in relation to children who are in the CEO's care. These include powers to:

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19 S 67(1)(b).

20 Ss 69 – 74.

21 Ss 77 – 78(1).

22 S 135(1)(b).

(a) monitor the well-being of the child, including by conducting inspections and investigations and apprehending the child;[23] and

(b) apply for a protection order to be extended for a further specified period[24] and or apply for a protection order to be varied, revoked or revoked and replaced by a new protection order.[25]

[23] In the Application the CEO sought a "long-term parental responsibility direction giving parental responsibility for EWC to the CEO of the Department of Children and Families" until the child turns 18, in other words a maximum duration protection order. Under the heading "family background" the application stated that "the child is of Aboriginal descent" and that "the child's mother has three other children." The Application stated that the child's current care arrangements were that "the child lives with his paternal grandmother in Jabiru." Under the heading "Proposed care arrangements if Order is granted by the Court" the Application stated that: "The child will continue to live with his paternal grandmother in Jabiru."[26]

[24] The Application identified two grounds. Ground 1 was that "the child has suffered or is likely to suffer harm or exploitation because of an act or omission of a parent of the child". This ground relates to s 129(a) of

23 Ss 83A – 85.

24 S 136.

25 S 137.

26 AB 1-2.

the Act and also refers to s 20(a).[27] Ground 2 was that "the order sought is the best means of safeguarding the well-being of the child", the wording in s 129(b) of the Act.

[25] Section 129 provides as follows:

> The Court must make the protection order if the Court is satisfied:
>
> (a) the child:
>
> (i) is in need of protection; or
>
> (ii) would be in need of protection but for the fact that the child is currently in the CEOs care, and
>
> (b) the order is the best means of safeguarding the well-being of the child.[28]

[26] Section 130 of the Act imposes specific obligations upon the Court when making a protection order:

> (1) In making the decision, the Court must consider:
>
> (a) any matters arising from a mediation conference for the child; and
>
> (b) the wishes of the following:
>
> (i) the child;
>
> (ii) a parent of the child;
>
> (iii) a person proposed to be given daily care and control of, or parental responsibility for, the child under the order;
>
> (iv) any other person considered by the Court to have a direct and significant interest in the wellbeing of the child; and

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27 S 20(a) provides that a child is in need of care and protection if the child has suffered or is likely to suffer harm or exploitation because of an act or omission of a parent of the child.

28 S 14 states that: "The well-being of a child includes the child's physical, psychological and emotional well-being."

(c) if the CEO proposes that daily care and control of, or parental responsibility for, the child be given to a person (including, for example, the CEO):

(i) any report or recommendation given to the Court by the CEO about the proposal; and

(ii) whether there is another person who is better suited to be given daily care and control of, or parental responsibility for, the child; and

(iii) the needs of the child for long-term stability and security; and

(d) any other matters the Court considers relevant.

(2) Without limiting subsection (1)(c), the Court must not give a person who is not a parent of the child parental responsibility for the child under a long-term parental responsibility direction unless the Court is satisfied:

(a) giving the responsibility to the person is the best means of safeguarding the child's wellbeing; and

(b) there is no one else who is better suited to be given the responsibility.

Onus of proof

[27] Clearly it is the CEO who bears the onus of proof of satisfying the Court of the matters set out in s 129 of the Act. This includes the onus of addressing the matters referred to in ss 121(1) and 130 and establishing the matters contained in the proposed order, in particular the proposed duration of the protection order. Section 130(2) imposes additional requirements upon the Court where the CEO seeks a long-term parental responsibility direction, namely an order giving parental responsibility to a person who is not a parent of the child for a period exceeding two years. The CEO bears the onus of establishing those additional matters.

[28] Some of the submissions on behalf of the CEO, and some of the views expressed by the Court,[29] seem to assume that the mother and the child's representative had the onus of satisfying the Court that a shorter duration protection order should be made. They seem to assume a default position to the effect that a maximum duration protection order should be made, and that if at some future time there is a relevant change in the mother's circumstances she could then apply to have the order revoked or varied.

[29] Such assumptions are misconceived. They were considered and rejected by Kelly J in *WM*[30] where her Honour concluded that the trial judge had wrongly taken the view that she should make a protection order to age 18 unless she was satisfied that there was evidence before the Court that reunification and return of the children to the parents would be possible within 12 months, that being the length of the order sought in that matter.

[30] Counsel for the CEO pointed out that under s 137 of the Act a party, relevantly the mother, can apply to the Court for the Protection Order to be varied, revoked or replaced by a new protection order. This would enable the mother to demonstrate that she is able to care for the

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29 For example at [39] of the Reasons, reproduced below.

30 *WM & FM v CEO Department of Children and Families* [2012] NTSC 67 (***WM***) at [20] – [26].

protected child and take over parental responsibility, and, if successful, persuade the Court that the child should be returned to her.

[31] Section 137(2) places some limits upon the ability of a parent to seek such an order. However there seems to me to be no reason why such an application could not be made in those kinds of circumstances. But such a process would be very difficult, expensive and risky for a parent to embark upon, particularly if the application was not supported by the CEO.

[32] Further there appears to be no scope for the child to make such an application, or to participate in such an application, unless and until the Court appointed a child's representative for that purpose.[31] Although the child is "a party to the proceedings for the making of the order" and therefore entitled to make an application under s 137(1) it would appear that the appointment of the person who had been appointed as the child's representative during the proceedings for the protection order would have expired when the protection order itself was made.[32]

[33] On the other hand, counsel for the appellant and counsel for EWC point to the statutory responsibilities of the CEO and the ability of the CEO

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31 The child's representative in the present matter informed the Local Court that it would be unlikely that she would get legal aid funded representation to make and pursue such an application. AB 250.

32 Ss 143D(1)(a) and 143D(2)(b).

to seek such orders under s 137, not limited in the same way as is a parent seeking such an order, and also to seek extensions of an existing protection order under s 136 of the Act. Such powers are readily available to the CEO if a shorter duration protection order is made and it appeared necessary to have it extended.

[34] Indeed as Kelly J has pointed out, in *WM* (at [24] – [25]) and again in *MV v CEO Department of Children and Families*[33] (at 27]), the CEO is under a duty not to return a child to the care of the parents if that would not be in his or her best interests and would have a duty to apply to the Court for an extended protection order in such circumstances.

[35] It is not appropriate for a court to treat an order to age 18 (the maximum allowed under the Act) as the default position just because the Court does not have sufficient evidence from which it could be satisfied that the protected child could be safely returned to his parent(s) at some earlier time. This would place an impermissible onus upon the parent(s), and also upon the child's representative, to provide evidence at the hearing that will predict when that is likely to occur.

[36] It would not be permissible for a court to make a maximum duration protection order without there being a proper basis for such an order, for example while there is some possibility of the parents becoming

33 [2012] NTSC 68 (***MV***).

suitable at some later stage, by simply assuming that the parents could and should use a provision such as s 137 to remedy the situation.

[37] Moreover, the Court must give consideration to making a shorter term protection order if that may be in the best interests of the child, having regard of course to the principles set out in ss 8 and 10 of the Act. That would provide a strong incentive and enable the parent(s) to work towards reunification and maximise the well-being of the child. Of course the need for stability in the child's living arrangements is important, but there is no reason to assume that this will be impaired by the making of a shorter duration protection order. This, together with all of the other factors relevant to the well-being of the child, would obviously be an important consideration if and when the CEO decided to apply for an extension of such an order.[34]

The Court's reasons

[38] After summarising the relevant facts her Honour considered whether EWC was in need of protection. It was clear that the mother was not able to care properly for EWC at the present time, although she still has the care of her two younger daughters. It was also clear that EWC has been very well cared for by LP, his grandmother, and has been progressing well while in her care. Her Honour said that "the mother is not willing at this time to care for EWC and his grandmother does

34 See too *WM* at [25] and [35], and *MV* at [26] – [29].

not wish to do so except with an order for parental responsibility to the CEO."[35]

[39] Unless some kind of protection order was made removing parental responsibility from EWC's parents, there would be a risk of EWC suffering harm "because of the potential for sudden removal from his grandmother by either the mother or the father."[36] Further, giving parental responsibility to the CEO would better facilitate any contact between EWC and his mother and father.[37] I agree with those conclusions.

[40] Her Honour added the following comments in her reasons, at [19]:

> It is also the case that the financial burden of [EWC's] care, including day care because the grandmother works, would then fall to the grandmother during whatever period he remained in her care. In my view it is an unreasonable expectation on the part of the mother that she should shoulder that cost until the mother feels ready for his return. It is in many ways indicative of a general lack of appreciation of the practicalities of care for a small child that the mother seems to lack.

[41] Her Honour proceeded to consider and reject a submission on behalf of the mother that the Application be dismissed because the Federal Circuit Court of Australia was the most appropriate forum to determine the matter. Her Honour repeated that the grandmother does not want to

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35 Reasons [16].

36 Reasons [18]. See too [17].

37 Reasons [20].

be given parental responsibility for EWC but wishes to care for him with the safeguard of parental responsibility being held by the CEO.[38] Her Honour then said, at [23]:

> The uncertainty of the outcome of both this submission and the previous one cannot be in [EWC's] best interests because they delay long-term planning for his well-being. That needs to occur now, not at some unspecified future date when the mother feels able to take over his care and at a time of her choosing.

[42] Her Honour then considered the weight to be given to the parenting capacity assessments conducted by a child psychologist, Ms Dixon, one in relation to the mother and one in relation to the grandmother.

[43] In short Ms Dixon identified a number of psychological and cognitive issues in relation to the mother and expressed concerns about her ability "to parent effectively given the level of her personality deterioration."[39] She referred to the fact that she was taking psychotropic medication to reduce her thinking disturbance and mood disorder and recommended that her treatment be carefully monitored by a mental health professional.[40]

[44] Her Honour also quoted the following paragraphs from Ms Dixon's summary of her findings:

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38 Reasons [22].

39 Psychological Report for BJW by R. Dixon, dated 5 April 2017 at paragraph 2 of *Summary and Recommendations*; see also Reasons [29].

40 Psychological Report for BJW by R. Dixon, dated 5 April 2017 at paragraph 3 of *Summary and Recommendations*; see also Reasons [29].

4. [BJW] may at times pose a threat to herself and others given her level of mood dysregulation. **For this reason, the safety of the children cannot be guaranteed within the care of [BJW]** (my emphasis added)[41].

…

9. [BJW's] acknowledged problems with alcohol or drug use should be addressed. Until [BJW] addresses the issues she has in this area contact with the children must be fully supervised.

[45] Her Honour concluded this part of her discussion by saying that "according to Ms Dixon, there are significant traits in the mother's profile such that she would find it difficult to parent successfully."

[46] Her Honour then referred to Ms Dixon's parenting capacity assessment of LP. She noted Ms Dixon's conclusions that LP displayed no neurotic or psychotic symptoms and there was no reason to believe that she had any impaired cognitive ability. Her Honour quoted a number of passages in Ms Dixon's report to the effect that EWC was doing very well in LP's care and that LP "is capable of parenting EWC and will be able to provide a safe and secure home environment for him."[42]

[47] Her Honour completed this part of her considerations, namely regarding the weight to be given to the parenting capacity assessments by Ms Dixon, by saying, at [35] – [36]:

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41 That is, the emphasis by bolding that sentence was added by her Honour.

42 Psychological Report for LP by R. Dixon, dated 7 April 2017 at paragraph 2 of *Summary and Recommendations* ; see also Reasons [34].

35. In her oral evidence, it was Ms Dixon's view that although the mother loved her children, at this time she required professional input to get her life back on the track and that if there were three children in that mix it would be setting her up for failure.

36. In answer to a question from the child's representative as to what sort of psychiatric or psychological assistance would be required if there were to be an order for less that when [EWC] turns 18 years of age, Ms Dixon said this would require a review to get a current mental health assessment, a medical review, a treatment plan and in-house rehabilitation alcohol and other drug use. These would be the priority to be addressed before anything else happened. In a best case scenario, Ms Dixon said a return to the mother would be at least 18 months after those interventions and they would take at least another 18 month turnaround. Consequently, in a **best** case scenario **at least** three and a half years would be required before [EWC] could be returned to his mother with any confidence that she would sustain the improvements to her circumstances. Even then, it would in my view be necessary to retain further monitoring once he were in her care given Ms Dixon's view that she would not just have difficulty caring for three children but that it would set her up for failure.

[48] The "best case scenario" evidence referred to in paragraph [36] of the Reasons emerged during the cross examination of Ms Dixon by the child's representative. Counsel asked Ms Dixon what sort of psychological and psychiatric assistance she thinks the mother requires if there was to be a shorter duration protection order and before the mother would be able to care for the children. The following exchange occurred:

> And if all those things were satisfied and maintained, notwithstanding that it's going to be difficult, would … she… be able to care for the children at some point in the future you think? --- So the standard practice, if somebody was successful and went

through all of that and treatment was going well and they got a clean bill of health, etc, we usually look at around about an 18 month turnaround time where we have supervised access with the children. We check in with the caseworkers making sure that everything is okay. We have an overarching, usually a psychologist, that would check out, make sure the child is working well, the parent is working well. And then make recommendations for [sic] there. So the best case scenario would be an 18 month turnaround after successful treatment of the client.[43]

[49] After counsel had finished their questioning of Ms Dixon her Honour asked Ms Dixon more questions about this point:

> Perhaps I might just ask a question about [EWC], seeming we're here to talk about him.
>
> [EWC's] three and a half now, isn't he? And you've just given I suppose a best case scenario of a timeline which you say would be the least case scenario of returning [EWC] to his mother's care. So let's assume it takes 18 months to go through a treatment program, then 18 months to monitor that, so another three and half years down the track. That would not be an unreasonable period of time would it?---Yeah, that would be best case scenario, yes.
>
> That would be best case scenario. Yes I think that was what I meant to say?---Yes, your Honour.
>
> That would be the least amount of time that we'd be looking at?---Yes
>
> So [EWC] at this point then would be about seven years old, wouldn't he?---Yes.
>
> And he would have been in with the same carer, his grandmother from when he was there at about 13 months I think he first went to his grandmother?---Mm mm.
>
> What impact would that have on [EWC] to be taken from the environment he's lived in for that period of time back to his mother? Would that have an impact on him and if so what would that likely be?---Yeah. So that's why during that 18 month period when that transition might start to occur is when, you know, some advice from a professional dealing with [EWC] at that moment in time would be very important and pertinent to take onboard. It is

43 AB 215.

> a difficult transition period to do but if handled well by supporting professionals, that transition can work quite well. So it needs to sort of be at the grass roots level there making recommendations, making assessments, giving some input. From about seven years onwards children are much more able to, for want of a better word, vote with their feet and give some, you know, some input themselves about how they feel about the situation. Then cognitively they're able to do that. Prior to the seventh year, very – you know, very unreliable in giving sort of any input into that.
>
> And it would be important, wouldn't it, for [EWC] to be able to do that?---Extremely important, yep, absolutely.

[50] Her Honour gave counsel the opportunity of asking further questions of Ms Dixon arising out of that exchange. Counsel for the mother took up that opportunity:

> In your retainer you were asked to provide information about the personal strengths capacities and resilience of [BJW]. Can you please describe those now?---Her personal strengths?
>
> Capacities and resilience?---Just from the clinical interview that I did with [BJW] I think she is a very genuine, very upfront, she was very honest, very open when she came in and talked. I think she's a loving and caring parent. I think she's just going through a very difficult period of time and she can't be fully available to parent her children at this moment in time. Her resiliency, I think struggling at the moment, because of the mental health issues. What was the other one that you said? There was three.
>
> Strengths, capacities and resilience capacities?---Capacity, again same, you know, there's some things that are happening for her that are causing that capacity to be diminished. And I think once she starts taking responsibility for some of the things that are happening in her life and gets on top of that, personally gets on top of that personally, I think that she will move forward and there may be some positive outcomes for that. But that commitment to sticking to the programs that we've suggested today is – and the commitment to do that is really important.
>
> And that would take a minimum of 18 months?---I'd say a minimum of 18 months after she gets a clean bill of health.

> After residential rehabilitation?---Yeah. So after the professional assesses her for her mental health and drug and alcohol staff says yep, all good, fine, this is all working well, she's displayed commitment to it, she's on track with the medication and treatment, 18 months after that, then you start the process of reunification with [EWC].

[51] In her Reasons, her Honour then turned to consider the length of the protection order. Her Honour said:

> 37. Given what I have said with respect to past history and the mother's continued circumstances, and accepting the evidence of Ms Dixon that returning the children to the mother would pose a risk to them (without the interventions she recommends) there is no doubt that [EWC] meets the definition of being a child in need of protection.
>
> 38. The mother has had 2 further children to the father since [EWC] and his older half siblings were taken into care in January 2015. I note that there is evidence of concerns as to the mother's ability to stand up to the father[44] and that she has been told he is not to be at the house provided to her. Although the mother appears to have made considerable progress in difficult circumstances she continues to be reliant on prescription medication and support services in her day to day life. The continued reliance on diazepam is concerning, particularly as she was aware of the risks [sic] benzodiazepines in pregnancy but has continued to use that drug during pregnancies[45]. She admitted to that service that she had been obtaining the drug from "street sources". She does not agree with Ms Dixon's findings given in her report and in evidence before the court, so it is difficult to determine whether she is ever likely to engage with recommended services to fully address substance issues[46] and mental health issues and is so what period of time would be needed to both address the issues and demonstrate sustained change.

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44 For example Ms Dixon said that she discussed [EMC] (the father) with the mother and she said that she didn't know how to say no to him.

45 Report of the Perinatal Mental Health Consultation Service 21 March 2016.

46 In her affidavit of 20 September 2016 she acknowledged that she continued to use marijuana "socially".

39. The child representative's submission was that he would support an order of around 3 years. He was not however able to explain to me why that would be in [EWC's] best interests. He appears to be relying on a response to a question from him to Ms Dixon that at 7 years children tend to vote with their feet and that if handled well, a transition at that age could take place. Children may at many ages "vote with their feet" but it does not mean that they have made a choice that is in their best interests. In any event, it is purely speculative to suggest that [EWC] would choose to go to his mother at that age. He might choose otherwise, leading again to the potential for proceedings to be instituted by the grandmother should the CEO of Territory Families choose not to bring a further application.

40. I am concerned that the child representative did not meet with either the grandmother or the mother or arrange to see [EWC] in company of each of them. He did not cross examine the mother with respect to any of the issues that are identified in this judgment that are significant in terms of her ability to care for [EWC]. It seems to me that the child representative's view cannot be given much weight in all of those circumstances.

41. As Ms Dixon said in her evidence, [EWC] needs a stable, consistent, well thought through environment to reach his potential. This is precisely how she assessed the grandmother's parenting ability in her summary and recommendations.

42. In my view the stability of [EWC's] care may be influenced by the length of the order. A long term order will allow for the grandmother to make long term plans as to where she will reside and her employment in a way that will accommodate [EWC's] needs as he grows. She may understandably be reluctant to embark on such changes under a short term order. [EWC's] day care and schooling and locality of what will be his home are all matters that will be influenced by these choices.

43. It is fortunate that [EWC] has a grandmother who is both very capable of parenting him as she indicated "at this stage of her life" so that [EWC's] broader family ties will be able to be sustained in a way that does not occur with children who are required to be placed in foster or residential care. His parents should both be grateful for her intervention to protect [EWC] and provide for him at a time when neither were in a state to

look after and provide for a child. It would do well for them to each reflect on what the alternative would have been for [EWC] had she not intervened.

44. I am therefore satisfied that it is [EWC's] best interests for there to be protection order for him until he is 18 years of age giving parental responsibility to the CEO. His stability, his nurturing and emotional and physical needs and the need for permanency in his living arrangements will all be met by that order. Given the grandmother's position on his continued care be one under which the CEO exercises parental responsibility there can be no person at this time better suited to be given parental responsibility than the CEO of the Territory Families.

This appeal

[52] The primary, if not the whole focus of the appeal concerned the making of the maximum duration protection order, rather than making a shorter duration protection order. Although it was common ground that a protection order was necessary, the real question concerned the basis upon which the Court could have concluded that an order should be made that extended, not just to or just beyond the three or four years "best case scenario" referred to by Ms Dixon[47], but for the whole duration of EWC's minority. At various points I sought assistance from counsel for the CEO to direct me to evidence from which rational inferences could be drawn concerning EWC's best interests in the longer term. In particular I was anxious to know the basis of a conclusion that it will be in his best interests to remain in the care of the CEO until he turns 18, notwithstanding the best case scenario

47 See [37] of the Reasons.

referred to by Ms Dixon and the fact that once he is old and mature enough to reach and express his own views about his care he might prefer to be reunited with his mother and younger sisters.

[53] Counsel for the CEO commenced her oral submissions by stressing the appellant's poor conduct extending back as far as 2007, her numerous problems with drugs, her bad relationships including with EMC, her terrible parenting resulting in the removal of her two older children and broken promises to seek and obtain help for her problems. Counsel also stressed the considerable progress which EWC has made since being removed from his mother and being in the care of LP.[48]

[54] Counsel referred to the likelihood of continued uncertainty for LP, and asserted a potentially detrimental effect upon EWC, if the maximum duration protection order was not made and LP was seen to be simply babysitting EWC until his mother could "get her act together". Counsel contended that the mother had not taken up opportunities to demonstrate that she is now capable of looking after EWC.[49] Counsel referred to the evidence of Ms Dixon and asserted that the mother's parenting capacity was very limited and she was unlikely to be able to improve.[50] I requested counsel to indicate where Ms Dixon had given

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48 TS 163.

49 TS 170.7.

50 TS 171.9. See too TS 176.7.

that evidence.[51] Indeed that assertion seems contrary to Ms Dixon's answers reproduced at [50] above.

[55] Counsel referred to Ms Dixon's "best case scenario" evidence to the effect that if the mother does what she has promised to do, takes appropriate advice and undergoes relevant counselling and treatment, she might reach a stage after three or more years when EWC could be returned to her.[52] I asked counsel to direct me to any evidence that suggests that EWC may be in danger of being harmed or exploited if he was returned to his mother if she had reached that stage.[53] Counsel also submitted that there is nobody apart from LP who is capable and will be capable over the next five to seven years of looking after EWC.[54]

[56] Counsel contended that if the mother did get herself to the stage where she could demonstrate her suitability to resume the care of EWC she could apply to the Court to vary the Protection Order and have parental responsibility given back to her.[55] Unless and until that happens, EWC should remain in the care of the CEO and LP until he turns 18.[56]

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51 TS 172.1 and 176.9

52 TS 172-6.

53 TS 196.7.

54 TS 184.7.

55 TS 176.6.

56 TS 196.5.

[57] These contentions misunderstand the fact that the onus is on the CEO to satisfy the Court that a maximum duration protection order is required. They wrongly assume a default position that a maximum duration protection order should be made even in the absence of evidence that justifies the making of such an order, thereby placing the onus on the mother (and or the child's representative, if there is one) to show that such an order should not be made, or, if it is made, that it should later be revoked or varied under s 137.[57]

[58] The CEO seems to be contending that a maximum duration protection order should be made on the assumption that the present status quo will remain unchanged, in particular that the circumstances, particularly of the mother, will never get to the stage where it would be suitable and appropriate for EWC to return to his mother and sisters.

[59] I disagree with these contentions. A primary objective should be to return the child to his family, in this case EWC's mother and two younger sisters, but not unless and before it is in his best interests for that to occur.[58] In my opinion the making of a shorter duration protection order is much more likely to achieve that objective, than the making of a maximum duration protection order with the onus on the mother to apply to have it revoked or varied. A shorter term protection

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57 See my earlier discussion about onus of proof.

58 See ss 8 and 10(1).

order gives the parent a strong incentive to rehabilitate herself and demonstrate that she is capable of caring for the protected child. This is particularly so in the present matter, where the mother has been making some progress in recent times and still has the care of EWC's younger sisters.

[60] In paragraph 62 of her written submissions provided subsequent to the appeal hearing, counsel for the CEO provided detailed references to the evidence that was before the Court and contended that the Court therefore had the material that might otherwise be included in a care plan. These references were provided in the context of Ground 3, in support of the CEO's contention that the Court was not disadvantaged by the absence of a care plan.

[61] As counsel for the appellant pointed out in reply, that evidence concerned the circumstances of EWC, his mother and LP in the past, present and immediate future and what some of the witnesses believed may happen in the future. There was no evidence of the CEO's plans once EWC's case was transferred to the long-term team. There was no evidence to the effect that EWC's best interests required him to be under the care of the CEO until he turned 18.

[62] I turn to address each of the grounds of appeal.

Ground 1

[63] This ground primarily relates to her Honour's references to the child's representative in paragraphs 39 and 40 of the Reasons (quoted in [51] above).

[64] The child's representative had been appointed by the Court pursuant to s 143A(1) of the Act. As counsel for the appellant pointed out this necessarily means that the Court considered that appointing a child's representative was in the best interests of the child.

[65] Counsel for the appellant and counsel for the CEO both contended and agreed with the judge's conclusions to the effect that the child's representative had not complied with his obligations under ss 143B and 143C of the Act. Counsel for the child's representative disagreed with these conclusions, pointing out amongst other things the futility in attempting to obtain meaningful information from a child so young.[59]

[66] Counsel for the appellant referred to the *Protocols for lawyers representing children* published by the Law Society of the Northern Territory in 2017 (the **LSNT Protocols**). The Protocols identify specific duties including to obtain and present relevant evidence, to test evidence by cross examination where appropriate, and to "consider

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59 This is recognised for example in s 143B(3)(a) of the Act and in decisions of this Court such as *WM & FM v CEO DCF & Ors* [2012] NTSC 67 (***WM***) at [11] et ff and *CEO Department of Children and Families v MGM & Ors* [2012] NTSC 69 (***MGM***) at [62] – [64].

the adequacy of the care plan proposed." In relation to the care plan the child's representative is required to consider whether it identifies and addresses the child's needs and whether it sets out "how decisions for the child's long-term and day-to-day care and control will be made".[60]

[67] The failures asserted by the CEO include the child's representative's failures to do a number of things which Territory Families would be expected to have done, for example in relation to obtaining and providing evidence concerning the child's present care and progress. Other failures asserted by the CEO were that the child's representative "did not seek the care plan for the child to consider its adequacy"[61] and did not file the "Statement of views and wishes of the child" as required by the relevant practice direction[62].[63]

[68] Counsel for the appellant contended that once her Honour reached the conclusion which she expressed in [40] of her Reasons and decided that "the child's representative's views cannot be given much weight in all of those circumstances" she should have adjourned the proceedings and given counsel the opportunity to address those concerns and or respond

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60 P 27.

61 Referring to the LSNT Protocols.

62 Local Court Act Practice Direction No 1 of 2015 the Care and Protection of Children Act.

63 CEO's Submissions [3].

to them.[64] Because of the significance that her Honour attached to the omissions of the child's representative her failure to accord him that opportunity amounted to a breach of natural justice. Counsel contended that this amounted to a "practical injustice" and consequently jurisdictional error.[65]

[69] Counsel for the child's representative contended that there was nothing more that the child's representative could or should have done over and above what he did do. There was little point in the child's representative attempting to interview the child, not only because of his age but also because he was able to ascertain the status of his placement and his development by other means. The child was regularly visited by a caseworker and his progress was being monitored by Territory Families. There was ample evidence presented from appropriately qualified persons at the trial in relation to EWC's present care and living arrangements, the parenting capacity of his mother BJW and paternal grandmother LP, and the proposed care arrangements with the grandmother at least for the next few years during which time the mother might successfully complete rehabilitation and other programs

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64 In *WM* the Court adjourned the hearing of another matter concerning a protection order to enable the child's representative to perform various functions in compliance with her obligations. See *WM* at [7] and [9].

65 Referring to *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29; 259 CLR 180 at [82].

and be in a position to resume care for EWC as well as his two younger sisters after a period of three years or so.

[70] It is not necessary for me to make findings as to the adequacy or otherwise of the child's representative's fulfilment of his responsibilities. However it is of concern if he did not see any care plan, particularly where no care plan was provided to the Court by the CEO either.[66] Rather, this ground effectively relies upon her Honour's failure to adjourn the proceeding and to proceed to effectively reject the child's representative's submissions on this fundamental issue, namely the duration of the protection order, as she did.[67]

[71] Counsel for the CEO contends that it does not follow from the failure of the child's representative to comply with his obligations that the judge erred in proceeding to make a final decision, or that her final decision was wrong.[68] Further, no objection was taken or any issue raised by any party at the hearing concerning the performance of the child's representative and no application was made for the proceedings to be adjourned in order that the duties be properly performed.

[72] Like counsel for the child's representative, counsel for the CEO contended that there was nothing more that the child's representative

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66 See discussion about care plans later under Ground 3.

67 See too CEO's Reply Submissions [6].

68 CEO's Submissions [4] and [5].

could have done to comply with his obligations under s 143C(1) because of the young age of the child and his inability to give instructions and express views of his own. I agree with that.

[73] However I do not agree with the CEO's next contention which was to the effect that there was little that the child's representative could do to fulfil his obligations under s 143C(2) to assist the Court over and above what the CEO was expected to do in light of the CEO's statutory duty to treat the best interests of the child as the paramount concern.[69] In support of this contention the CEO referred to some remarks by Kelly J in *MGM*[70] at [64] to the effect that it would rarely be appropriate to order that an infant of less than two years old be separately represented, and to Ms Dixon's evidence referred to in [39] of the Reasons to the effect that a child aged three is not capable of providing meaningful instructions. As I point out later in these reasons, *MGM* was concerned with provisions concerning child's representatives that have subsequently been the amended and expanded. Further, in the present matter, the Court must have considered that it was appropriate to appoint a child's representative for EWC, notwithstanding his young age.

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69 CEO's Submissions [10] – [15].

70 *CEO Department of Children and Families v MGM & Ors* [2012] NTSC 69.

[74] Counsel for the CEO submitted that there was ample evidence before the Court to enable the Court to assess and decide what was in EWC's best interests. This included evidence about how EWC was being looked after by LP and how his well-being was being safeguarded and evidence to the effect that he should remain in the care of LP until such time as his well-being would not be impaired if and when he was returned to the care of his mother.[71] Counsel also pointed out that the judge was an experienced Children's Court judge an

[75] that she was fully aware of the need for the Court to give primacy to the best interests of the child.

[76] Counsel for the CEO also stressed the emphasis in the Act for the expeditious disposal of applications for protection orders and the imperatives in s 138 against granting adjournments. Counsel pointed out that the Application had been adjourned on numerous occasions over the preceding 18 months or so[72] and contended that a further adjournment for the purposes of having the child's representative carry out further functions, or for the CEO to prepare and provide a more comprehensive care plan, would have been contrary to those provisions requiring prompt decisions on applications of this kind. Counsel also pointed out that during that 18 months the Court had made orders under

71 CEO's Submissions [16] – [17].

72 This is the period between the making of the Application on 8 April 2016 and the making of the final orders on 11 October 2017.

s 139 the effect of which was that the daily care and control of EWC remained with the CEO and in turn LP. In other words the status quo remained and would be expected to remain until the making of the protection order. When asked what if any prejudice had been thus caused, or would be caused if there was a further adjournment, counsel could only point to the fact that until such time as the final protection order was made there was no certainty for EWC or LP as to whether and when the status quo might be altered.

[77] Bearing in mind the importance placed by the judge upon the failures of the child's representative and the importance of his views concerning the duration of the protection order, a further adjournment would not have caused any prejudice to anyone. Indeed, LP affirmed, and no one disputes, that she would continue to love and support and care for EWC in the same way irrespective of such uncertainty pending the making of the protection order and irrespective of the duration of the protection order.

[78] As Kelly J said in *MGM*, at [12]:

> One would have thought that the fact that one of the options being contemplated was placing a little baby in care till she was 18 would have favoured allowing whatever time was necessary to properly explore the options rather than rushing matters.[73]

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73 Section 138(2) of the Act provides that the court must, to the greatest extent possible, avoid granting adjournments and may grant adjournments only if the court considers doing so is in the best interests if the child, or there are other strong reasons for doing so.

Role of the child's representative

[79] It is appropriate at this stage to pause and consider the proper role of the child's representative. The child's representative performs an important function in proceedings such as these and the views expressed by the child's representative should be given considerable weight.

[80] Kelly J discussed the role of the child's representative in *WM* at [11] and *MGM* at [62] – [64]. In *WM* her Honour said that "the principal role of the children's representative, if one is to be appointed, is to present the views and wishes of the children to the Court."

[81] In *MGM* Kelly J said, at [63] – [64]:

> [63] While s 146(1) provides that the child's representative must act in the best interests of the child regardless of any instructions from the child, it is nevertheless implicit in the role of legal representative that the representative should seek instructions from the child: the child is the client and if the child's representative is of the view that acting on those instructions would not be in the best interests of the child he or she should nevertheless convey to the court the views and wishes of the child and explain, by reference to the evidence and the principles in the Act, why in the view of the representative, acting on those instructions would not be in the best interest of the child. It is not appropriate for the child's representative to simply express his or her own views to the court.

Section 138(3) provides that in deciding the period of adjournment, 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. That does not mean that applications must be rushed through, and parties forced into contested hearings that might be avoided, if there are good reasons why it is in the best interests of the child for a matter to be adjourned to enable negotiations to take place and proper assessments to be made.

> [64] Nor is the role of the child's representative equivalent to the role of counsel assisting in a coronial inquest or proceedings before the Anti-Discrimination Commissioner. The child is the client; not the court. Given this role, it seems to me that it would be in very rare circumstances indeed that it would be appropriate to order that an infant of less than two years old be separately represented. Comprehensive and detailed affidavit material about the child's past history and current situation is placed before the court by the CEO; both CEO and the court have a statutory duty to treat the best interests of the child as the paramount concern; the parents of the child have a right to be heard and will commonly be legally represented; and a very young infant has no capacity to give instructions and likely no views and wishes that can sensibly be conveyed to the court.

[82] That discussion however was in the context of s 146 of the Act as it then was. Section 146 was repealed in 2013, and Division 6A was inserted. And, as already noted, the Law Society of the Northern Territory published protocols for lawyers representing children in 2017.

[83] Section 143A of the Act permits the Local Court to "order the appointment of a legal practitioner to represent a child to whom the proceedings relate if the Court considers doing so is in the best interests of the child." In circumstances where the child is not "of sufficient maturity and understanding to be able to give instructions in relation to the proceedings" the legal representative must:

(a) act in the best interests of the child regardless of any instructions from the child; and

(b) present the views and wishes of the child to the Court.[74]

[84] Section 143C(2) requires the legal representative to "take all reasonable steps to actively and professionally represent the child as if the legal practitioner had been engaged by the child."

[85] In my opinion the new provisions extend the obligations of a child representative beyond simply presenting the actual views and wishes of the child if any, and stating why, if it was the case, the child representative did not consider that acting on those instructions would be in the best interests of the child.[75] Rather, they clearly contemplate the possibility that the child may not be old or mature enough to provide instructions and nevertheless require the child representative to "act in the best interests of the child"[76], as he or she views those interests.

[86] Counsel for the appellant likened the duties and functions of a child's representative under the Act to those of an Independent Children's Lawyer appointed under s 68L of the *Family Law Act 1975*, pointing out that under both regimes the best interests of the child are the paramount consideration.[77] The role of an Independent Children's

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74 S 143B(1)(b).

75 Cf *MGM* [63].

76 Cf ss 143A(1) and 143B(1)(b)(i).

77 Compare ss 10, 90 and 143B and 143C of the Act, with ss 60CA and 68LA of the *Family Law Act 1975*.

Lawyer was considered by the Full Family Court in *In the Marriage of Bennett*[78], and more recently by Judge Harman of the Federal Circuit Court in *Duffy v Gomes*[79]. In relation to the duties and functions of such a person in circumstances where the child is very young, the Full Family Court said, at pp 379 – 380:

> … an advocate at trial normally has a source of instructions. A separate representative has none other than the children (if they are old enough) as to their wishes but may, as in this case, instruct counsel on his or her behalf. We therefore consider that a separate representative must of necessity, form a view as to the child's welfare based upon proper material and, if appearing, may make submissions in accordance with that view or instruct counsel to do so. We think that the role of the separate representative is broadly analogous to that of counsel assisting a Royal Commission in the sense that his or her duty is to act impartially but, if thought appropriate, to make submissions suggesting the adoption by the Court of a particular course of action, if he or she considers that the adoption of such a course is in the best interests of the child. Unless the separate representative does this it seems to us that there is little purpose in having a separate representative.

[87] Counsel for the CEO submits that the responsibilities placed upon an Independent Children's Lawyer in Family Court proceedings are different and greater than those of a children's representative under the Act, and the authorities concerning such responsibilities are therefore irrelevant. This is because in Family Court proceedings the only other parties are usually the child's parents and there is no other person who can speak on behalf of the child, whereas in proceedings under the Act

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78 (1990) 102 FLR 370 at 380.

79 [2015] FCCA 1121.

both the Court and the CEO are bound by s 10 of the Act which provides that the best interests of the child are the paramount concern.

[88] Notwithstanding that distinction, I agree with the appellant's contention that under both regimes the representative of the child is required to focus on and advance what he or she considers to be the best interests of the child. The child's representative under the Act has an important role to play, particularly if he or she has different views about the interests of the child than those of the CEO.

[89] The functions and responsibilities of the child's representative might also be likened to those of other lawyers, or litigation guadians, who are appointed or otherwise engaged to represent the best interests of a person who may not have the capacity, mental and or legal, to represent himself or herself before a court or tribunal. A Northern Territory example would be where a lawyer represents an accused person or a supervised person under Part IIA of the Criminal Code. Such counsel "may exercise an independent discretion and act as he or she reasonably believes to be in the person's best interests."[80]

[90] I do think that the child's representative has a greater role now, following the amendments, than was the case when Kelly J expressed her views in *MGM*.

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80 S 43ZO *Criminal Code*.

Consideration and Conclusions

[91] I agree with the submissions by counsel for the appellant that ss 143A-143D reflect the importance of the role of the child's representative in giving the child a voice in proceedings. They are a statutory enshrinement of an obligation on the Court to afford procedural fairness to a child in cases where the Court considers that representation of the child is in the child's best interests. The order sought in the present case, the longest order possible under the Act, is one of the most serious the Court can make. The Court was right to conclude that it was in the child's best interests to be represented.

[92] Counsel for the appellant contended that if in the course of deciding a matter like the present, the judge becomes concerned that the child's representative may not have discharged his or her statutory duty in representing the child, the judge is not entitled to proceed without considering what an appropriate response might be to that concern. That would include consideration of what further assistance the child's representative should provide or whether a different child's representative should be appointed in order to provide the necessary assistance, what prejudice might be suffered if there was a further adjournment in order for those matters to be rectified, and whether "practical injustice" is likely to result to the child if the Court proceeds to make such a serious order without giving the child's representative

the opportunity to provide such assistance. If practical injustice was likely to so result, procedural fairness was not afforded and the Court lacked jurisdiction to proceed.[81] Counsel also referred to *Stead v State Government Insurance Commission*[82] where the High Court said that where there has been a denial of natural justice act affecting the entitlement of a party to make submissions on an issue of fact a new trial would be ordered if that denial of natural justice deprived it of the possibility of a successful outcome.[83]

[93] Counsel also referred to *Duffy v Gomes*[84] where a judge of the Federal Circuit Court was so concerned about the failure of an Independent Children's Lawyer appointed to represent the children in a *Family Law Act* proceeding to properly perform his functions that he adjourned the hearing of the matter in order that the lawyer could undertake those functions. In that matter the child's representative had failed to properly ascertain the wishes of the children who were teenagers and were therefore old enough to hold and express their own views.

[94] I consider that, even though ECW was not able to give instructions and his legal representative was not able to say anything about EWC's views and wishes, the child's representative still had an important role

81 Citing *SZSSJ* at [82].

82 (1986) 161 CLR 141.

83 P 147.

84 [2015] FCCA 1121.

to play, perhaps more important than if the child had been much older and been able to provide meaningful instructions.

[95] His primary focus (like that of the Court)[85] was required to be "the best interests of the child", regardless of any instructions from the child.[86] He had a particular responsibility to act in EWC's best interests, albeit without instructions, in relation to matters of the kind set out in s 10(2) of the Act, safeguarding EWC's well-being,[87] and encouraging and supporting contact between ECW and his mother and younger sisters in the hope that he would eventually be returned to the family.[88] The child representative's position concerning the appropriate duration of the protection order was different to that of any of the other parties, particularly that of the CEO and the grandmother which effectively left no opportunity for EWC to be reunited with his mother and younger sisters.

[96] During final submissions her Honour asked the child's representative whether he had spoken to or met EWC or visited LP's house to observe EWC in his home. Counsel said that because he was so young such an exercise would not have been of assistance to the Court. Her Honour said that usually with a young child the child's representative will visit

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85 See s 10(1) as to the Court's "paramount concern".

86 See s 143B(1)(b)(i) as to the legal representative's obligation.

87 S 8(3).

88 S 8(4).

the home, talk to the carer and make some observations about the child within the home and present the Court with a view as to what they have seen.[89] Apart from that exchange nothing further was said and no concern was expressed by her Honour until her Reasons were provided. Nor did the appellant or CEO express such concerns or ask that the matter be adjourned so that such concerns as they have now expressed could be addressed.

[97] I consider that her Honour erred in several respects.

[98] Although not raised as a separate ground of appeal it seems to me from her Honour's exchanges with the child's representative during final submissions and from paragraph 39 of the Reasons that she wrongly placed the onus upon the child's representative to establish why the duration of the order should be only three years. See my discussion earlier at [27] to [37] about onus of proof.

[99] Second, I consider that her Honour should have identified what additional evidence she required from the child's representative in order that she could attach "much weight" to his "view" and to his submissions. This is particularly so where, as counsel for the child's representative has pointed out, the other parties, especially the CEO, had already tendered a substantial body of evidence about the present

89 AB 249.

circumstances of EWC, his mother and his grandmother. That additional evidence might include a detailed care plan and proposals that contemplate the possibility of reuniting EWC with his mother and younger sisters.

[100] Third, her Honour seems to have assumed that his submissions would have no weight unless he had done the things which she identified in paragraph 40 of the Reasons. There is no reason why counsel's submissions should carry any less weight because they are based upon evidence adduced by other parties.

[101] Indeed it was the child's representative who had elicited important evidence from Ms Dixon about the "best case scenario" and about the effect of abandonment on the development of a young person. Such was her Honour's interest in the best case scenario evidence at the time when that evidence was given that she asked further questions about that topic and about the impact upon ECW if he was returned to his mother after such a transition period.

[102] The Court was required by s 130(1)(b)(iv) of the Act to consider the wishes of the child's representative, he being a person who the Court had appointed to perform that important role with specific interest in the well-being of the child. His views and submissions should have

been given considerable weight and not effectively disregarded by the Court.

[103] Had her Honour indicated her views and assumptions referred to in paragraphs [98] to [100] above, the child's representative could have sought an adjournment and attempted to address her Honour's concerns by making such further enquiries as he considered necessary and made further submissions concerning onus of proof and the weight that should be attached to his submissions in the circumstances.

[104] In light of the importance which the judge attached to the child representative's omissions to make further enquiries, the importance which should have been attached to the submissions of the child's representative in any event, and the additional failures asserted by the appellant and CEO of the child's representative to comply with the LSNT Protocols including to seek, obtain and consider the adequacy of a care plan for the child[90] I consider that the judge erred in proceeding to make the maximum duration protection order before giving the child's representative the opportunity to address the matters which concerned the Court and the CEO.

[105] Her Honour's decision to proceed and make that order which was so clearly inconsistent with and adverse to the shorter term protection

90 See [66] and [67] above.

order contended for by both the appellant and the child's representative, without giving the child's representative those opportunities, did in my view constitute a breach of natural justice.

[106] I uphold this ground.

Grounds 2 and 4 – EWC's relationship with his mother and sisters and reunification

[107] It is convenient to address these two grounds together as they concern similar and overlapping issues.

Ms Dixon

[108] The main focus of the appellant's submissions in relation to Ground 4 was her Honour's acceptance of Ms Dixon's evidence, in particular that "in a best case scenario at least three and a half years would be required before EWC could be returned to his mother with any confidence."[91] I have already set out and referred to that evidence in [48] to [50] above. Counsel for the appellant was critical of Ms Dixon's evidence and consequently her opinions that it would take at least that long for the mother to be in a position to safely care for EWC. These submissions go to the appellant's contentions to the effect that the protection order should have been for a duration somewhat less than three years. However I am not being asked to determine that issue at this stage. Accordingly I do not propose to descend into the detailed

91 Reasons [36] quoted above.

contentions made by counsel regarding the adequacy or otherwise of Ms Dixon's assessments. These reasons only concern whether or not the Protection Order should be set aside. They do not address sub-grounds 4.5, 4.6 or 4.7.

[109] However it is appropriate to address some of the other points made by counsel in relation to Ms Dixon. She was the only expert to give evidence and thus was potentially in a better position than any lay person to express relevant opinions. It is clear that she was not engaged to form and express opinions concerning the longer term interests of ECW.

[110] Ms Dixon is a child psychologist. She was (only) engaged to conduct comparative "parenting capacity assessments" of the mother and the paternal grandmother. These assessments were to deal with the cognitive capacity and functioning of each of those people, their personal strengths, capacities and resilience, and their ability to perceive and respond to the needs of EWC (and also, in relation to the mother, the needs of her two older children). Ms Dixon's assessments were contained in reports dated 5 April 2017 and 7 April 2017 respectively.[92]

92 See AB 73 et ff and AB 82 et ff.

[111] Ms Dixon did not attempt to provide any predictive assessment of the prospects of a viable reunification of ECW with his mother even within the next two years. When she was asked to comment on the length of the protection order ("whether that's to 18 or not") she said she could not comment on that and emphasised that her opinion was with respect to "this point in time".[93]

Contentions

[112] Counsel for the appellant contended that the effect of the Protection Order is to remove, for the balance of his minority, any prospect of EWC being returned to his mother and sisters, who apart from LP are his only real family, and to restrict his contact with those important family members. These are consequences inconsistent with the intent of important provisions such as ss 8(4) and 10(2)(c), (f) and (g). Counsel also stressed the requirements in s 130(2) of the Act that the Court be satisfied that giving parental responsibility to the CEO (for the balance of his minority) "is the best means of safeguarding the child's well-being"[94] and that "there is no one else who is better suited to be given [that parental] responsibility."

[113] These matters required the Court to make a predictive assessment of such matters, including the mother's prospects of proving to be a

93 AB 202, 204 and 215. See too passage at AB 217 quoted in [50] above.

94 S 130(2)(a).

suitable carer for EWC (and his two younger sisters) and the benefits that would generate for EWC if he was reunited with his family at some time within the next 13 years or so.[95]

[114] While accepting her Honour's view in the first sentence of [42] of the Reasons that the stability of EWC's care may be influenced by the length of the order, counsel contended that there was no evidence to support the other conclusions expressed in that paragraph. Those conclusions were to the effect that a long term order would allow the grandmother to make long term plans as to where she will live and work in order to accommodate EWC's needs as he grows, and that she may be reluctant to embark on such changes under a short term order. Nor did the grandmother (or the CEO) make that submission to the Court.[96]

[115] Further, although her Honour did consider the prospects of the mother being able to properly care for EWC within the next three and a half years or so, she did not attempt to make a predictive assessment of the kind that would justify the making of the maximum duration protection order. Nor did she consider and then make a finding that it would not be "practicable" that EWC "eventually be returned to" his mother and

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95 Appellant's submissions [26].

96 Appellant's submissions [27.1].

younger sisters. In this respect, her Honour failed to comply with the underlying principles in s 8(4) of the Act.[97]

[116] Nor did her Honour consider and bring to account the impact on EWC of growing up in a different home away from his mother and his two younger sisters until he turned 18. That too was a matter that should have been addressed in the evidence and considered by her Honour under s 10(2)(c), (f) and (g) before she could be satisfied under s 130(2)(a) that giving parental responsibility to the CEO until EWC turned 18 was the best means of safeguarding his well-being.[98]

[117] Nor did her Honour have any reliable evidence as to the likely contact that EWC would be able to enjoy with his mother and two younger sisters, whether in the form of a care plan or otherwise. These too were matters that should have been taken into account under s 10(2)(c), (f) and (g) for the purposes of reaching satisfaction under s 130(2)(a).[99]

[118] Counsel referred to the evidence of Ms Dixon concerning the possible impact on EWC of not being able to return to live with his mother and sisters:

> What kind of emotional impact would there be on [EWC] if he was never to live with his siblings and mother? --- Quite difficult, and I think I state in [BJW's] assessment that he does need contact

97 Appellant's submissions [27.2].

98 Appellant's submissions [27.3].

99 Appellant's submissions [27.4].

with his biological family. Siblings and mum. Any child has abandonment issues when not with biological parents or siblings and that would be the case for [EWC], as with any other child.

Would those issues be exacerbated because his two siblings, [IWC] and [CWC], are in the mother's care? --- I don't think they'll be exacerbated, as long as the process that's used for contact is consistent and stable and well thought out and well-planned.[100]

[119] Counsel submitted that it seems her Honour's predominant concern was "stability" and "permanency".[101] Counsel referred to the following observations by Kelly J in *MV v CEO Department of Children and Families*.[102]

> [28] I did not consider that it would be appropriate in the present circumstances to make a protection order giving long term parental responsibility to the CEO until the child reaches the age of 18. Stability in the child's living arrangements is not the only matter which needs to be considered. I must also give weight to the other matters required to be taken into account under the Act including the principle that as far as practicable, and consistent with the best interests of the child being the overriding concern, if a child is removed from the child's family, contact between the child and the family should be encouraged and supported, and the child should eventually be returned to the family.
>
> [29] Moreover, the child is very young. If a staged reunion with his father occurs successfully over the next two years, he will be only seven or eight years old when his father resumes full time care for him, which means that there will be long term stability in his living arrangements for 10 or more years within the family.

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100 AB 207-208.1.

101 Referring to [41], [42] and [44] of the Reasons.

102 [2012] NTSC 68 at [28] and [29].

[120] Those comments have greater relevance in the present matter where the relevant "family" comprises not only EWC's parent but also his two younger sisters (and of course his grandmother LP).

[121] Counsel for the appellant also submitted that her Honour failed to consider and place any weight on a number of important matters including:

(a) the parties' agreement that "the mother … is taking appropriate steps to address (the concerns of Territory Families)"[103]; and

(b) the evidence of the mother[104], Dana Cartmill[105] and Mary Jane Baya[106] as to the mother's progress in dealing with the CEO's concerns and in providing proper care for IWC and CWC;

(c) the mother's acknowledgement that she did not want to take over care from LP immediately and that it would be a gradual process.[107]

[122] Counsel for EWC[108] stressed the considerations in s 10(2)(b) of the Act, as well as those in ss 10(2)(c) and 8(4). Counsel pointed out that despite her present problems and therefore her inability to care for

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103 AB 89 [1].

104 AB 37-49, 66-68, 90-96, 225-236.

105 AB 50-57.

106 AB 97-123, 191-196.

107 AB 229.

108 From TS 152.

EWC as well as IWC and CWC at present, the mother is keen to overcome those problems and be in a position to have EWC returned to the family and reunited with her and his younger sisters.

[123] Counsel also submitted that although EWC is in very good care with his grandmother, the opportunities of him having contact with his mother and sisters are and will continue to be limited and may even decrease. This is partly due to the fact that the grandmother and EWC live in Jabiru, some two and a half hours drive from Darwin where the mother and girls live.

[124] Another reason appears to be that following the making of the maximum duration protection order there would be no focus on reunification. Prior to the hearing in July 2017 Ms Behan had recommended fortnightly access. Reunification was and remains an important objective while short-term orders are in place. However Ms Behan was unable to say whether that would continue after a long term order was made and EWC's case was transferred to "the long-term team". After a case is referred to the long-term team "reunification is no longer worked on."[109] She said that access does get reduced in such

109 AB 174.8.

circumstances, apparently because there is no focus upon reunification.[110]

[125] Counsel for EWC submitted that a shorter duration protection order, perhaps of between three and five years, would have enabled the mother sufficient time, opportunity and incentive to overcome the protection concerns, while still ensuring that EWC had stability in his placement that fostered his development. The CEO would be able to assess the mother's progress and develop a reunification plan, to ensure minimal disruption to EWC's development and stability and a meaningful relationship with his mother and sisters.[111] Having a reunification plan in place would mean that there would be benchmarks in place that the mother would need to meet, before each stage of the reunification process commences. This would safeguard EWC's well-being through the process. The CEO would also be able to monitor the progress of the mother throughout this period, and take appropriate action if necessary. Such an approach would ensure that all possibilities of reunification were explored first, before a long term order was made.[112]

[126] Counsel for the CEO acknowledged that EWC's relationship with his mother and his siblings (including his two older siblings in care in

110 AB 176.

111 Child's Representative's Submissions [48] – [49].

112 Child's Representative's Submissions [73] – [77].

Adelaide) is extremely important. But that is secondary to his best interests.[113] I agree with that. Counsel also pointed out that EWC is presently being cared for by LP his grandmother who is also a member of his family for the purposes of applying ss 8 and 10 of the Act. I agree with that too, but consider that the main focus of those provisions is the child's immediate family in the sense of his parents and siblings.

[127] Counsel for the CEO placed particular emphasis on subsections 10(a), (b), (c), (e), (f), (g) and (j). In her written submissions counsel repeated much of what she had said in her oral submissions and provided extensive references to the evidence about the poor conduct of EWC's mother and father since 2007, about the mother's failure to engage in a number of services that she has previously promised to engage with and about EWC's present care arrangements with his grandmother.[114]

[128] Counsel for the CEO acknowledged that there was evidence of recent improvements in the insight and parenting capacity of the mother. Indeed she is and has been parenting EWC's two younger siblings and they are no longer subject to an "open case" with Territory Families.[115]

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113 CEO's Submissions [28].

114 CEO's Submissions [33] – [37].

115 Exhibit A1. See footnote 8 above concerning IWC.

However that has only been with continuing intensive support and assistance from Territory Families and other bodies.[116]

[129] Counsel submitted that the existing order does not prevent the continuation of the relationship of EWC with his mother and his siblings, but that the continuation and development of the relationship is dependent on the ability of the mother to keep him safe from harm by successfully addressing the behaviours that cause him harm.[117] Whilst that is self-evident I do not see any basis for inferring that the mother will not attain that ability and become suitable to take over parental responsibility for EWC well before he turns 18. Indeed, on Ms Dixon's "best case scenario" the mother might achieve that within the next three years or so.

[130] Counsel for the CEO also submitted, and I accept, that until the mother's mental health issues are addressed and she remains consistently drug-free and shows that she is able to properly care for and protect EWC, it is not safe for EWC to be returned to her care.[118] She can then apply to vary the order if she has made the life changes she needs to make.[119] Although that might be so, it would be erroneous to make a maximum duration protection order on that basis alone

116 AB 170.6, 171.7 and 178.

117 CEO's Submissions [36].

118 CEO's Submissions [38] and [41].

119 CEO's Submissions [42].

because such an approach would fail to recognise that the onus is upon the CEO to show why such an order should be made.[120]

[131] Counsel submitted that "the child's need for permanency and a long-term stable, protective, safe and nurturing environment can now only be met by the long term order"[121] and that "the evidence supports the conclusion that the order made is in EWC's best interest and outweighs the other considerations."[122] However I was not directed to evidence that warrants those conclusions, despite having requested such assistance during oral submissions.[123]

Consideration

[132] Where the Court is considering giving parental responsibility for a child to a person who is not a parent of the child (such as the CEO, or someone else[124]) under a long-term parental responsibility direction it needs to be satisfied of the two matters set out in s 130(2) in addition to those mandated in s 130(1). Relevant to the present matter, those two matters requiring the Court's satisfaction are that:

(a) "giving the responsibility to the [CEO] is the best means of safeguarding the child's well-being"; and

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120 See my earlier discussion about onus of proof and the proper application of s 137.

121 CEO's Submissions [39].

122 CEO's Submissions [41].

123 See [54] and [55] above.

124 See for example *CEO Department of Children and Families v LB & ors* [2015] NTSC 9 where parental responsibility was initially given to the children's grandmother.

(b) "there is no one else who is better suited to be given the responsibility."[125]

[133] Although EWC has been and continues to be in the daily care of LP, his paternal grandmother, and she wishes to continue taking care of him, she is not willing to have parental responsibility for him lest she dies or becomes unable to continue to care for him at some time in the future.[126]

[134] There can be no doubt that, at the time of the hearing in the Local Court, giving parental responsibility to the CEO was the best means of safeguarding the child's well-being and there was no one else better suited to be given that responsibility. However I consider that the reference in s 130(2)(a) to "the responsibility" is a reference to the responsibility under a long-term parental responsibility direction, in the present case parental responsibility until EWC turns 18.

[135] Where, as here, the direction was to operate until the child turns 18, namely for the next 14 years or so, the Court was required to have primary regard to the best interests of the child (taking into particular account the matters set out in s 10(2)), the well-being of the child and the ultimate aim of the child returning to the family (as required by s 8(3) and (4)), and to be satisfied that the matters set out in s 130(2)

125 S 130(2).

126 Reasons [16] and [22].

would continue to be appropriate until the child turns 18. I agree with counsel for the appellant that this necessarily required the Court to perform a predictive assessment of such matters.

[136] This would include the Court being satisfied that:

(a) giving the responsibility to the CEO for the next 14 years or so is the best means of safeguarding EWC's well-being[127]; and

(b) there would never be a time when the mother would be better suited to perform appropriate parental responsibility.[128]

[137] In that part of the Reasons that relate to the length of the protection order, and culminated in her conclusions at [44], her Honour:

(a) acknowledged that "the mother appears to have made considerable progress in difficult circumstances", but pointed to a number of ongoing concerns about the mother and concluded that it is difficult to determine whether she is ever likely to overcome her various problems[129];

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127 Cf s 130(2)(a).

128 Cf s 130(2)(b). In relation to this requirement, her Honour only found, at [44] of the Reasons, that "there can be no person at this time better suited to be given parental responsibility than the CEO". (my emphasis).

129 At [38].

(b) rejected the child's representative's submissions to the effect that a shorter duration protection order for about three years would be appropriate[130];

(c) noted that EWC "needs a stable, consistent, well thought through environment to reach his potential"[131];

(d) considered the interests of the grandmother in the event that a long term order was not made and how that might impact upon EWC[132]; and

(e) complimented the grandmother for her care for EWC and stated that the parents should both be grateful for her intervention[133].

[138] None of the reasons leading to her Honour's conclusions expressed in paragraph [44] of her Reasons refer to the desirability of EWC having greater contact and being able to reunite with his mother and sisters or identify how EWC's best interests would continue to be served after the maximum duration protection order was made.

[139] Needless to say I agree with the contentions made by counsel for the appellant referred to in paragraphs [113] to [117] above and those

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130 At [39] – [40].

131 At [41].

132 At [42].

133 At [43]. See too [19] of the Reasons quoted at [40] above where her Honour expressed her sympathy for the grandmother.

made by counsel for EWC referred to in paragraphs [122] to [125] above.

[140] In particular, her Honour did not have evidence that enabled her to be satisfied that it was in EWC's best interests for there to be a protection order giving parental responsibility for him to the CEO until he is 18 years of age. Although there was an abundance of evidence about the current inability of the mother to properly care for EWC as well as his two younger sisters and strong doubts that she would be able to do so within three years or more beyond the date of the hearing, there was no evidence sufficient to justify an inference that she would not be able to perform parental responsibilities for all three children in the longer term and that it would not be in EWC's best interests to be reunited with his mother and two sisters well before he turns 18.

[141] On the other hand there was some evidence to suggest that the mother might be capable of properly caring for EWC after three or four years under Ms Dixon's best case scenario. By that time EWC might be mature enough to provide reliable input as to how he feels about his situation. The practical effect of the maximum duration protection order is to deprive him of any say about his care until he turns 18. This is contrary to the clear intent of the Act, in particular s 10 which states that the best interests of the child are the paramount concern, and s 11 which expressly requires that the wishes and views of the child be

taken into account (having regard to the child's maturity and understanding).

[142] I conclude that the Court erred in that it failed to take into account important considerations mandated by the Act, in particular the prospect of successful reunification of EWC with his mother and younger sisters at a time well before he turns 18. There was no evidence that justified the reaching of a conclusion that his best interests require him to be in the care and custody of the CEO until he turns 18.

Ground 3 – care plans and s 130(1)(c)(i)

[143] Counsel for the appellant contended that all her Honour had in the nature of material of the kind to be considered under s 130(1)(c)(i) was the bald assertion in the Application that "the child will continue to live with his paternal grandmother in Jabiru."[134] The Court should have been provided with one or more care plans. Amongst other things, a care plan in relation to EWC should include decisions and recommendations about contact between EWC and his mother and younger sisters. Such a document would form an important part of the material contemplated by ss 122(d) and 130(1)(c) of the Act.

134 AB 2.

[144] Counsel for EWC also stressed the importance of the Court having the benefit of one or more care plans, particularly before making an order of the kind made in the present matter. Without such information the Court could not made a determination of what was in the best interests of EWC in the longer term. There was insufficient evidence provided as to the proposed care arrangements for the remainder of his youth, and in particular during the various stages of his adolescent life.

[145] At the hearing before her Honour, counsel asked Ms Behan, a senior child protection practitioner in the reunification team of Territory Families, about care plans:

> There is no care plan that is filed in this matter? --- They are generally filed, the care plans. We have reunification care plans that in this case would have been helpful that they were filed, maybe … affidavits. … It's something that we can provide copies of.
>
> But as it stands at the present time there is…? --- In this particular case there are no reunification plans in the trial book.[135]

[146] During closing submissions on 3 August 2017 counsel for the mother referred to evidence to the effect that if an order of more than two years duration is made EWC's case would be transferred to the long-term team and that there would be no guarantee that the long-term team will facilitate time between EWC and his mother. Counsel pointed out that the Court had not been provided with a care plan and does not

135 AB 175-6.

have the benefit of any assurance that Territory Families will facilitate time between EWC, his siblings and his mother.[136]

[147] At the commencement of the hearing of this appeal counsel for the CEO provided this Court with three care plans relating to EWC, for the purpose of demonstrating their existence and "what they look like".[137] Two of them, one dated 6 April 2016 and another dated 7 January 2017, clearly predated the hearing before her Honour, but were not provided to or requested by her Honour. The third care plan is dated 12 September 2017.[138] My brief perusal of those care plans reveals that there was at least one other care plan, dated 16 June 2015.

Requirement for care plans

[148] Counsel for the appellant stressed the importance of care plans under Division 2 of Part 2.2 of the Act for ensuring that the objects of the Act are achieved for children in the care of the CEO.

[149] Section 69 provides that Division 2 applies to a child who is in the CEOs care if:

(a) a protection order for the child is in force; or

(b) the CEO has daily care and control of the child under a court order prescribed by regulation.

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136 AB 242.

137 TS 11.

138 For convenience these were marked as Ex CEO 1.

[150] Section 70(1) requires the CEO to prepare and implement a care plan for a child as soon as practicable after the child is taken into the CEOs care. Section 70(2) provides that:

> The care plan is a written plan that:
> (a) identifies the needs of the child; and
> (b) outlines measures that must be taken to address those needs; and
> (c) sets out decisions about daily care and control of the child, including for example:
> (i) decisions about the placement arrangement for the child; and
> (ii) decisions about contact between the child and other persons.

[151] Section 71 permits the CEO to modify the care plan at any time. Section 73 requires the CEO to give a copy of the care plan or modified care plan to the child, each parent of the child, the carer of the child and any other person considered by the CEO to have a direct and significant interest in the well-being of the child. Section 74 requires the CEO to conduct regular reviews of the care plan, firstly within two months after the child is first taken into the CEO's care, and thereafter every six months.

[152] Division 3 of Part 2.2, titled "Interim care plans", applies to a child where the child is in the CEO's care but Division 2 does not apply to the child. Section 76 requires the CEO to prepare and implement an interim care plan for the child. The only difference between an interim

care plan and a care plan (defined in by s 70(2)) is that the former must identify the "immediate" needs of the child.

[153] The importance of care plans in proceedings that involve protection orders under the Act is also apparent from the fact that the Local Court has made a practice direction requiring the production of care plans to the Court and the Law Society has published the LSNT Protocols recommending that the child's representative consider the adequacy of the care plan proposed.

[154] The *Local Court Act Practice Direction No 1 of 2015 Care and Protection of Children Act* (the **Practice Direction**), under the heading "Material supporting an Application" states:

> 3. The following provisions apply in relation to a protection order application unless otherwise directed by the Court –
>
> (a) …
>
> (b) A copy of the child's care plan is to be filed and served within 14 days of its creation or review;
>
> (c) Material in support of the application must be filed in the Court and served on the other parties at least 10 working days before the case conference …
>
> …
>
> 4. In the case of an application seeking a protection order in respect of a child for whom there has been a previous care and protection order, or for the extension or variation of an existing protection order, the material in support of the application must include –
>
> (a) the reports made pursuant to s 74(5) of the Act of the review of the care plan conducted during the operation of the previous order; and

(b) a copy of the most recent care plan implemented, or sought to be implemented, during the operation of the previous order; and

…

[155] As already noted the Law Society Northern Territory has published a 36 page document entitled "Protocols for lawyers representing children". Under the heading "Care plan" the LSNT Protocols state that the child's representative should consider the adequacy of the care plan proposed, and in particular: whether it identifies and addresses the child's needs; whether it sets out how decisions for the child's long-term and day-to-day care and control will be made; and (where relevant) whether the child has been afforded an opportunity to participate in framing his or her current and future care needs.

[156] Counsel for the appellant and counsel for EWC referred to a decision of the New South Wales Court of Appeal in *Re Tracy*.[139] In relation to care plans under s 78 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (the **NSW Act**) Spigelman CJ observed that "the central significance of the care plan is manifest in the legislative scheme"[140]. At [93] Giles JA said[141]:

> … – presentation of a care plan and its consideration by the Court is not a formality. The Court then decides the removal of the

139 (2011) 80 NSWLR 261.

140 Spigelman CJ (at [2]), Beazley JA agreeing (at [50]).

141 Spigelman CJ (at [15]) and Beazley JA (at [50]) agreeing.

child or the allocation of parental responsibility with regard to a plan apt to the current circumstances.

[157] Section 80 of the NSW Act provided that the Children's Court "must not make a final order … for the removal of a child from the care and protection of his or her parents … unless it has considered a care plan presented to it by the Director General." In that case the Court of Appeal concluded that there was jurisdictional error on the part of the court below because the judge did not consider a plan as required by s 80.[142]

[158] Counsel for the appellant correctly conceded that there is no express requirement in the Act of the kind specified in s 80 of the NSW Act, but contended that ss 122(d) and 130(1)(c)(i) of the Act require a similar process. Those provisions require that the Court be informed of what the CEO's plans are for the care of the child, before it can make a protection order, particularly a maximum duration protection order. I agree.

[159] Moreover paragraph 4 of the Practice Direction would have similar effect to s 78 of the NSW Act in circumstances where a care plan has already been prepared for a child who has previously been the subject of a protection order. Notwithstanding the absence of a provision in the Act like that in s 80 of the NSW Act, the Local Court has

142 [94]. See too [15] and [50].

recognised the importance of the Court being provided with one or more care plans by making a practice direction requiring that to be done.

[160] Counsel for the CEO acknowledged that a care plan should have been produced to the Court as required by the Practice Direction. However counsel queried whether Division 2 of Part 2.2 applied to the present circumstances where the earlier protection order had already expired and there was no court order prescribed by regulation under s 69(b).[143] I do not consider that a proper excuse for the CEO's failure to comply with the Practice Direction and the clear intent of that part of the Act. Even if Division 2 did not apply, Division 3 would have applied to require the preparation of an interim care plan.

[161] Further, as previously noted, counsel for the CEO was critical of the child's representative for not having properly performed his functions under the LSNT Protocols by seeking a care plan in order to consider its adequacy. Even if Division 2 and consequently s 73(1) did not apply to require the CEO to provide care plans to the child's representative, the Practice Directions required the CEO to file and serve the care plan(s) well in advance of the hearing, indeed at least 10 days prior to the case conference when the issues in contest were to be determined. Had the CEO done this the child's representative would

143 CEO's Submissions [51] – [57].

have had access to them and been able to comply with this important part of his responsibilities. In particular he would have been able to consider whether the care plans adequately identified and addressed EWC's needs and "set out how decisions for EWC's long-term and day-to-day care and control will be made."[144]

[162] As I have noted there were two care plans in existence by the time of the making of the Application in April 2016, a third by the time of the hearing in July 2017 and a fourth a month before the Court's decision. They should have been provided to the Court, and to the child's representative. In particular, the two earlier care plans should have been filed with or soon after the Application and subsequently made available to the other parties.

Material for the purposes of ss 122(d) and 130(1)(c)

[163] As counsel for the appellant and for EWC pointed out the Court needed to be provided with material demonstrating why the (maximum duration protection) order sought should be made. Ideally this would be contained within a comprehensive care plan.

[164] Counsel for EWC referred to Ms Dixon's response when she was asked whether EWC's abandonment issues would be exacerbated because his younger siblings were in the care of his mother. She said: "I don't

144 LSNT Protocols p 27.

think they'll be exacerbated, as long as the process that is used for contact is consistent and stable and well thought out, and well planned."[145] As there was no well thought out and planned care plan before the Court the judge was not able to assure herself that the proposed care arrangements would not result in the exacerbation of abandonment issues.

[165] I have taken the opportunity of perusing the care plans that were tendered at the commencement of the hearing of this appeal. Under the heading "Plan goal" each of the care plans had the "no" box checked opposite the word "reunification" and the "no" box checked opposite the words "does young person require planning for leaving care?" Presumably this was because each care plan identified an expiry date of the current protection order, the last of which was 22 September 2017. In other words the focus of the care plans was on the shorter term and not the 14 years or so of care that would be necessary following the making of a maximum duration protection order. Further, although I assume these are the documents which Ms Behan referred to as "reunification plans", they do not in fact appear to contemplate reunification.

[166] The care plans say little if anything about EWC's best interests and future care in the longer term. Accordingly, even if they were made

145 AB 208.

available to the Court they would not have provided any or much assistance for the purposes of making the maximum duration protection order. However, had they been provided when they should have been, the parties, and in particular the child's representative, could have identified those deficiencies and requested the provision of a care plan or other materials that did address the longer term interests of EWC. This could and should have happened a long time before the hearing so that the Court would be properly informed before and when considering the making of the order sought. Even when it became apparent during the hearing on 5 July 2017 that no care plan had been produced to the Court the CEO should have then produced the existing care plans and prepared a more comprehensive care plan that addressed the longer term interests of EWC.

Conclusions

[167] In order to comply with the requirements of s 130(1) of the Act, and in particular s 130(1)(c) one would expect the Court to be provided with material concerning "the proposed arrangement for the care and protection of the child under the order", one of the four matters required to be specified in the application for the protection order.[146]

146 S 122(d).

In particular one would expect the CEO to provide one or more reports and recommendations about the proposal.[147]

[168] In a case such as the present, where the protected child has already been in care for some time, and care plans of the kind required under Division 2 are already in existence, one would expect the Court to be provided with them. To the extent that the existing care plans did not address the longer term interests of EWC the Court should have been provided with a more comprehensive care plan, and or other material, containing information and proposals concerning EWC's future care, for so long as the protection order was likely to run.

[169] It is not sufficient, as was the case here, for the Court to be simply informed that there were or are care plans in existence. The Court (and the parties) required this information in order to meaningfully comply with its obligations under s 130 of the Act.

[170] I consider that Ground 3 is made out.

Conclusions and orders

[171] I conclude that the Court erred in making the Protection Order. Accordingly I propose to set it aside.

[172] However, before doing that I need to hear from the parties as to some other kind of protection order that should be put in place at least on an

147 S 130(1)(c)(i).

interim basis. I request the parties to attempt to agree on orders reflecting the outcome of this part of the appeal and directed at resolving the remaining issue concerning the duration of a fresh protection order.

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