LM v Chief Executive Officer Department of Health and Families
[2010] NTSC 73

PARTIES:	LM
	v
	CHIEF EXECUTIVE OFFICER DEPARTMENT OF HEALTH AND FAMILIES
RE:	KM, TM, KMM and MM
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	12 of 2010 (21004286)
DELIVERED:	20 December 2010
HEARING DATES:	11 August 2010
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

FAMILY LAW – Child welfare – judicial review – *Care and Protection of Children Act* – powers of the Chief Executive Officer of the Department of Health and Families to place children in his care with interstate carers – best interests of the children – application dismissed

Care and Protection of Children Act s 13, s 21, s 22(1), s 22(2)(a), s 22(2)(b), s 42(2), s 67(1)(b), s 70(1), s 70(2), s 73, s 77, s 78(1), s 81, s 128, s 135(1)(a)(i), s 135(1)(a)(ii), s 135(2), s 137(1), s 137(2), s 137(3), s 140, s 155(f) s 155(g), s 155(h), s 157(1)(b), s 160(e), s 160(f), s 161(b), s 163(b)(viii), s 177, s 319(1), s 319(2)(a), s 319(4)(b), s 320

Community Welfare Act s 43(5)(d)
Interpretation Act s 46A(3)
Northern Territory (Self-Government) Act 1978 (Cth) s 6

Minister for Aboriginal Affairs v Peko Wallsend (1986) 162 CLR 24
PVS v Chief Executive Officer, Department for Child Protection [2010] WASCA 168
RL v Minister for Health and Community Services [2006] NTSC 34
Union Steamship Co of Australia Pty Ltd v King (1988) 166 CLR 1
Youngman v Lawson (1981) 1 NSWLR 439

REPRESENTATION:

Counsel:

Plaintiff:	M Abbott QC
Defendant:	S Brownhill
Children:	M Giacomo

Solicitors:

Plaintiff:	North Australian Aboriginal Justice Agency
Defendant:	Legal Services Division Department of Health and Families
Children:	Ward Keller

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

LM v Department of Health and Families [2010] NTSC 73
No. 12 of 2010 (21004286)

BETWEEN:

LM
Plaintiff

AND:

CHIEF EXECUTIVE OFFICER DEPARTMENT OF HEALTH AND FAMILIES
Defendant

RE:

KM, TM KMM and MM

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 20 December 2010)

Introduction

[1] This is an application for judicial review of two decisions made by a delegate of the defendant under *Care and Protection of Children Act*[1]. The application is made by an originating motion filed on 3 February 2010.

[2] The plaintiff seeks the following orders. First, five principal declarations:

[1] Hereafter referred to as "the Act".

(1) The defendant has no power under the Act to remove a child declared "in need of care" from the Northern Territory when he has not made a lawful decision to remove the child.

(2) The defendant has no power under the Act to remove a child declared "in need of care" from the Northern Territory in the absence of an order of the Local Court allowing him to remove the child.

(3) The defendant has no power under the Act to remove a child declared "in need of care" from the Northern Territory when the protection order in respect of the child has not been transferred to the relevant participating State under Ch 2, Pt 2.4, Div 2 of the Act.

(4) The defendant has no power under the Act to remove a child declared "in need of care" from the Northern Territory.

(5) The defendant's decision to remove KM, TM, KMM and MM from the Northern Territory and relocate then in Queensland was unlawful.

[3] Secondly, orders in the nature of certiorari removing the decisions of the delegate of the defendant made on 16 November 2009 and 8 January 2010 to the Court and quashing them on the basis that each order was unlawfully made in breach of the Act. Thirdly, orders in the nature of mandamus directing the defendant to return KM, TM, KMM and MM to the Northern Territory and to comply with his obligations under the Act.

[4] The defendant is the Chief Executive Officer of the Department of Health and Families[2]. Under the Act the defendant has certain powers and functions which are to be exercised for the protection and well-being of children. The plaintiff is the biological mother of KM who is a 15 year old

[2] Hereafter referred to as "the Department".

boy, TM who is a 14 year old girl, KMM who is a 12 year old girl, and MM who is an 11 year old boy[3].

[5] On 22 December 2008 the Local Court in Darwin declared that each child remains "a child in need of care" and made directions under the Act granting parental responsibility for each child to the defendant until each child attains the age of 18 years. In accordance with the Act, the defendant placed the children in the day to day care of carers who were residing in Darwin.

[6] In February 2009 the children's carers decided to move to Queensland. On 8 January 2010 Ms Leonie Jane Warburton, the Acting Director of 'Out of Home Care Services' within the Northern Territory Families and Children Division of the Department, permitted all of the children to go to Queensland with their carers permanently. Ms Warburton is a delegate of the defendant under the Act[4]. The children wanted to go to Queensland with their carers, with whom they had formed a close bond, and the children's father consented to the children going to live in Queensland. However, Ms Warburton permitted the children to go to Queensland without obtaining the plaintiff's consent or an order of the Local Court transferring the children's protection orders to Queensland.

[7] In the absence of either the plaintiff's consent or orders of the Local Court transferring the children's protection orders to Queensland, the plaintiff

[3] Hereafter referred to jointly as "the children".
[4] Powers of delegation are granted by s 303 of the Act. See also s 46A(3) *Interpretation Act.*

contends that the defendant and his delegate had no authority or power to permit the children to go to Queensland with their carers.

The Issue

[8] There are two principal issues in the proceeding. First, did the defendant have power to permit the children to go interstate without the consent of the plaintiff and without obtaining a transfer order from the Local Court under Ch 2, Pt 2.4 of the Act? Second, did Ms Warburton have a delegation from the defendant which authorised her to permit the children to go to Queensland?

[9] In my opinion both the defendant and his delegate had the power to permit the children to go to Queensland. It is in the best interests of the children that they remain in the care of their primary carers.

The Facts

[10] The following affidavits were read in evidence: an affidavit of Anthea Jean Motter sworn on 7 January 2010, an affidavit of LM sworn on 6 March 2010, an affidavit of Claire Elizabeth Henderson affirmed on 6 April 2010, an affidavit of Clare Gardiner-Barnes affirmed on 17 May 2010, an affidavit of Chloe Martin affirmed on 20 May 2010, an affidavit of Leonie Jane Warburton affirmed on 24 May 2010, an affidavit of Shelley Maree Neale affirmed on 25 May 2010, a further affidavit of Claire Elizabeth Henderson affirmed on 30 June 2010, a further affidavit of LM sworn on 9 July 2010, and a further affidavit of Leonie Jane Warburton affirmed on 8 August 2010.

In addition, the following exhibits were tendered in evidence: a court book containing various documents, a Substitute Care Case Plan/Case Review dated 19 August 2009, and a Substitute Care Case Plan/Case Review dated 19 March 2010.

[11] Having considered all of the evidence I make the following findings of fact.

[12] Between January 1998 and 17 March 2000, under s 62 of the *Community Welfare Act*, a number of Temporary Custody Agreements involving the care of one, some or all of the children were entered into between the plaintiff and the Minister who administered that Act. The agreements were entered into on the application of the plaintiff and they granted temporary custody of the child or children involved to the Minister.

[13] On 17 March 2000 the Family Matters Court declared each of the children to be "in need of care" under s 43(4)(a) of the *Community Welfare Act* and the sole rights of guardianship in respect of each child were transferred to the Minister for three months[5]. The orders were extended on two occasions. On 6 December 2000 each of the children was again declared "in need of care" under the *Community Welfare Act* and the sole rights of guardianship of each of them were transferred to the Minister for two years. On 20 December 2002 each child was again declared "in need of care" under the *Community Welfare Act* and the sole rights of guardianship in respect of each child were transferred to the Minister until each child attains the age of 18 years.

[5] s 43(5)(d) of the *Community Welfare Act*.

[14] In July 2007 KM was placed in the care of Ms NT and Mr MC. In June 2008 TM was placed with the same carers. She has remained with these carers since that time. On 23 October 2008 KMM was placed with the same carers. She has remained in that placement since that day. On 22 June 2009 MM was placed with the same carers.

[15] On 8 December 2008 the *Community Welfare Act* was repealed by s 311 of the Act. The transitional provisions of the Act provide as follows. A guardianship order made under s 43(5)(d) of the *Community Welfare Act* is to have effect as if it was a protection order under the Act specifying a long term parental responsibility direction.[6] Proceedings and records of the Family Matters Court were transferred to the Family Matters jurisdiction of the Local Court.[7] The Local Court was required to deal with the proceedings and records so transferred as if the *Community Welfare Act* had not been repealed[8]. However, if the Minister would otherwise have been given guardianship of a child, the Chief Executive Officer must instead be given "parental responsibility" for the child[9].

[16] On 17 December 2008 the carers sought assessment by the Department to become the primary carers for the children. On 17 March 2009 the carers were registered as the primary carers for the children. The carers were re-assessed by Departmental staff on 18 March 2010 and they continue to be approved as the primary carers for the children.

[6] Section 320 of the Act.
[7] Section 319(1) of the Act.
[8] Section 319(2)(a) of the Act.
[9] Section 319(4)(b) of the Act.

[17] On 22 December 2008 the Local Court declared each of the children to remain "a child in need of care"[10] and directed that the defendant be granted long term parental responsibility for each of the children until they reach the age of 18 years. The defendant was excused from the obligation under s 135(1)(a)(i) of the Act which required him to give the children's parents information about where the children were residing. The orders made by the Local Court were "protection orders" within the meaning of the Act[11] because they contain a long term parental responsibility direction within the meaning of s 123(1)(d) of the Act.

[18] Since 22 December 2008 the children have been children who are "in the defendant's care"[12]. By virtue of the protection orders made by the Local Court on 22 December 2008, the defendant is entitled to exercise all the powers and rights and has all the responsibility for the children that would ordinarily be vested in the parents of the children[13]. The defendant has daily care and control of the children[14] and is entitled to exercise all the powers and rights and all the responsibilities for the day to day care and control of the children[15]. Further, the defendant is entitled to exercise all the powers

[10] Exhibit CEH-1 to the affidavit of Claire Elizabeth Henderson affirmed on 6 April 2010. The use of the term "a child in need of care" rather than "a child in need of protection", as used throughout the Act, was a consequence of the transitional provisions of the Act.
[11] Section 13 and s 128 of the Act.
[12] Section 67(1)(b) of the Act.
[13] Section 22(1) of the Act.
[14] Section 22(2)(a) of the Act.
[15] Section 21 of the Act.

and rights and has all the responsibilities for the long term care and development of the children[16].

[19] In February 2009 the carers advised the Department that they would like to leave the Northern Territory and live in Queensland. At that time three of the children were permanently residing with the carers.

[20] On 27 October 2009 the Specialist Care Unit of the Families and Children Division of the Department engaged Dr Dianna Boswell to conduct an independent psychological assessment of the children and provide a report. The reasons for obtaining the assessment and the report were to assess the quality of the childrens' and carers' relationships and the extent to which the children wished to remain in contact with their extended biological family, and to obtain information about whether the children should remain in permanent care of their carers when the carers moved to Queensland and advice about support strategies for the children's placement in Queensland.

[21] On 16 November 2009 the childrens' carers met with Ms Warburton. Following the meeting, Ms Warburton sent an email to Ms D Morriss and Ms A Motter who are also employed in the Department. So far as is relevant to this proceeding, the email states:

> An update of my meeting with [Ms NT] and [Mr MC] today -
>
> Couple discussed their plans to relocate to [Queensland].

[16] Section 22(2)(b) of the Act.

- Confirmed that the movement to Queensland is not a decision of the Coroners Court. That as the guardians of the children NTFC can make decisions regarding their short and long term well-being.

- That an objective, professional assessment of the placement was required to ensure that the very best information was available to inform the long term decision making [about] the children.

- That if the extended family challenged the placement decision, NTFC had the necessary professional assessment to state that it was a carefully planned and assessed decision in the children's best interest.

- The couple will not be leaving prior to the end of the school year and want to make plans to settle before a new school year commences.

- [Ms NT] would, if needs be, stay with the children in Darwin if [Mr MC] had to leave early to source work and a new home.

- The family are experiencing the turmoil of the pending Coronial [Inquest] and uncertainty about what the future holds.

- NTFC recognises the trauma these children have already experienced in their lives and want to minimise the stress on the children and their [carer] family.

- Discussed the importance of the children establishing new beginnings with the rest of the family, and that travelling to a new home was a critical part of a shared 'new beginning'.

- The recommendations from the [Coroner] are not expected to be handed down for a few months *so unreasonable for the family to wait for those prior to making a determination on their relocation* [emphasis added].

Outcome: I have granted approval for the children to travel to Queensland with the family after the school year is finished. This may not occur until early January [2010], unless settlement on their property occurs sooner. The Coronial [Inquest] will be complete by then.

> [Ms NT] and [Mr MC] advised that if any information were to come to hand from the assessment by Dianna that this was not a placement for their long term future, NTFC as guardians would have authority to bring the children home.
>
> Recommendation based on:
>
> - Couple already been assessed as suitable NTFC carers.
> - [Ms NT] previously assessed as suitable Family Day Care carer.
> - Some of the siblings have already been in the placement for [2 years and six months].
> - If any issues of concern about the placement had arisen NTFC would have raised these for discussion.
> - The children had discussed their wishes to relocate to Queensland with their own legal representative.
> - It is in the best interests of the children to retain a sense of stability and continuity in their lives, especially having recently experienced the Coronial [Inquest].
> - The children's representative is advocating that the children have a decision made about the transition to Queensland as it is in their best interests.
> - No other family member placement options have been found suitable.

[22] In the affidavit which she made on 24 May 2010, Ms Warburton stated that at the meeting on 16 November 2009 she told the carers that, subject to the finalisation of the Coronial Inquest into the death of the children's eldest sister and receipt of the report from Dr Boswell, she supported the relocation of the children to Queensland. While this statement may not be completely accurate, it is fair to say that any approval Ms Warburton

granted on 16 November 2009 for the children to travel to Queensland was only granted on an interim basis.

[23] On 23 November 2009 the Coronial Inquest into the death of the children's eldest sister commenced. On 19 January 2010 the Coroner delivered his findings.

[24] On 15 December 2009 the plaintiff instructed Ms Claire Elizabeth Henderson, who was an employed solicitor with the North Australian Aboriginal Justice Agency, to contact the Northern Territory Families and Children Division of the Department and ask if the plaintiff could contact her children before Christmas 2009. This was the first time the plaintiff had asked to have access to the children since 8 January 2008 when she last had access to the children. For a number of years prior to December 2009 the plaintiff's contact with the children was very intermittent and she frequently missed access appointments. At the Local Court on 22 December 2008 the plaintiff asked if she could contact the children while they were in the defendant's care and she was given a contact card to arrange contact with them through the Department. However, it does not appear that the plaintiff attempted to contact her children until she instructed Ms Henderson to do so.

[25] Although it had been some time since the plaintiff had contacted her children, it was to be expected that the plaintiff would want to contact them shortly after the start of the Coronial Inquest into the death of her eldest

daughter. Such a desire is a perfectly human reaction to the tragic circumstances leading to the Coronial Inquest.

[26] At 3.35 pm on 18 December 2009 Ms Henderson had a telephone conversation with Ms Anthea Motter who is employed by the Families and Children division of the Department. Ms Motter is a team leader with the Families and Children Specialist Care Program. Ms Henderson told Ms Motter that the plaintiff would like to contact her children before Christmas. Ms Motter replied that she would discuss the plaintiff's request with more senior staff. At 4.10 pm Ms Motter left a voicemail message for Ms Henderson stating the relevant people in the Department would like to arrange a meeting with the plaintiff after Christmas to discuss her having contact with her children. Contact would not be possible before Christmas.

[27] On 21 December 2009, which was only three days after Ms Henderson first spoke to Ms Motter, Ms Motter sent Ms Henderson an email which states:

> As per our discussion today, as well as on 18 December 2009, we envisage the focus of the meeting with [the plaintiff] to be as follows:
>
> - To provide [the plaintiff] with an overview of the Specialist Care Program;
> - To provide [the plaintiff] with some photographs of the children;
> - To discuss [the plaintiff's] request for access with the children;
> - To discuss the children's request for a gravestone at the cemetery, and [the plaintiff's] wishes with regards to the subject;

- To provide [the plaintiff] with an update regarding the children including the plan that is in motion for the children to relocate interstate in January. We can talk through how/why the decision was made; and

- To provide any information we have in regards to DM's belongings.

As I indicated to you Claire, Deb (Manager) and myself view this meeting as important and want to provide [the plaintiff] with an opportunity to discuss her views and plans.

Can you let me know as soon as possible a date/time/venue for the meeting, whether [the plaintiff] will have a support person with her and any agenda items.

[28] There is a dispute between the parties about whether, during the telephone discussions they had on 18 and 21 December, Ms Motter told Ms Henderson, that there were plans in motion for the children to relocate to Queensland. However, nothing of any significance turns on this difference in recollection.

[29] On 23 December 2009 Ms Henderson wrote to Ms Motter asking if a decision had been made to relocate the children interstate and requesting formal notification of such a decision under s 158 of the Act. The letter also advised Ms Motter that the plaintiff had never been given notice of any such decision and she had not consented, nor did she consent, to the children being placed interstate. On the same date Ms Henderson also sent an email to Ms Motter advising her that the plaintiff and her lawyers would be able to meet with Ms Motter at the offices of the North Australian Aboriginal Justice Agency on 5, 6 or 8 January 2010.

[30] In December 2009 Dr Dianna Boswell conducted a psychological assessment of the children. On 23 December 2009 Dr Boswell informed Ms Deborah Morriss, who is employed by the Department as the Manager of the Families and Children Specialist Care Program, that in her opinion, the children felt safe within their placement with Ms NT and Mr MC and they did not feel that way with their own family. The children wished to move interstate with their carers and the children's needs were being met in the placement with their carers. There were positive interactions between the carers, the children and the biological children of the carers. Further, the children would require ongoing support at critical times in their lives due to having had 'extraordinary lives'.

[31] On 30 December 2009 Ms Motter replied to Ms Henderson by email. In the email Ms Motter stated:

> Thank you for your email. Deb and I are available on Tuesday 5 at 3:00 pm for a meeting with [the plaintiff], her support person and yourself. Still need to confirm if anyone from the legal branch will also be in attendance. We are able to come to NAAJA on this day. There is little room to change the day or the time next week, as we both have very tight schedules, so hopefully this will fit with everyone.
>
> In your letter dated 23 December 2009, you ask whether a 'relevant decision has been made, or if relocation of the children is merely an option being canvassed'. In response to that the children are relocating from the Northern Territory on 8 January 2010.
>
> Can you confirm the time/day suits everyone next week?
>
> We look forward to hearing from you soon.

[32] On 31 December 2009 Ms R Brebner, a solicitor employed by the Legal Services Division of the Department sent an email to Ms Henderson. The email stated that the Families and Children's Division of the Department intended to file applications under s 160(a) and s 160(c) of the Act, asking the Local Court to transfer the children's protection orders to Queensland. The basis of the application was the plaintiff's refusal to consent to the children being placed with their carers in Queensland. Ms Henderson was asked if she would accept service of the applications.

[33] On the same day the defendant filed four applications in the Local Court at Darwin seeking orders that the protection order in respect of each child be transferred to the State of Queensland. The applications were served on Ms Henderson on 4 January 2010. The applications were to be heard in the Local Court on 21 January 2010.

[34] Also on 31 December 2009 Ms Motter and Ms Morriss had a telephone conversation with the children's father, Mr MM. During the telephone conversation they discussed the plans for the children to move interstate with their carers. Ms Morriss and Ms Motter provided Mr MM with an update regarding the children and their long term plans. Mr MM told Ms Morriss and Ms Motter that he had no objection to the children moving interstate with their carers. He stated that they need to listen to what the children want.

[35] On 5 January 2010 Ms Henderson wrote to the defendant's solicitors requesting an undertaking that the children would not be removed from the Northern Territory in the absence of an order of the Court allowing the children to be so removed. She also advised that if the plaintiff did not receive such an undertaking by a specified time the plaintiff would seek an injunction preventing the children from being removed from the Northern Territory.

[36] On 6 January 2010 the children's father participated in a telephone discussion with all of the children. On the same day, as the requested undertaking was not received by the specified time, the plaintiff filed four applications for injunctions in the Local Court. On 7 January 2010 the Local Court refused to grant the injunctions and dismissed the plaintiff's applications.

[37] On 7 January 2010 Ms Warburton received the final report of Dr Boswell which was dated 6 January 2010. In her report Dr Boswell stated that all the children have shown development gains in social functioning and in engagement and participation in a range of satisfying school and community activities. Of particular importance was the development of positive peer friendships. They appeared healthy and happy and they felt good about themselves. With the exception of MM, the children showed age appropriate emotional self regulation, and behavioural outbursts were unusual. At school and at home they appeared to have normal adjustment. This positive picture was in marked contrast with reports that were received during the

children's previous placement in kinship and other care. Dr Boswell stated that, in the medium term, maintaining the stability of the children's current placement was crucial. This entailed finding ways to maintain the level of practical and professional support that was provided to the children's carers to allow them to meet the needs of the children in a therapeutic manner. Immediately, there was a priority in establishing a system of care around the children that allowed ready access to supportive resources in the town they were going to reside in Queensland. The Families and Children's Specialist Care Program and the carers would have to work collaboratively to ensure that the best interests of the children could be met. In particular, school placements and support would have to be arranged and that would involve complex negotiations given the special needs of each of the children.

[38] Dr Boswell stated it was hard to make predictions about what would be in the children's best interest in the long term. The planning framework must be flexible and responsive to the individual child's needs at any particular time. The overall focus should be on providing safety, emotional well-being, security, control, structure and predictability in the children's lives and opportunities for growth and development. It was likely that maintenance of the current stable and therapeutic carer placement for each child would be advisable.

[39] On 8 January 2010 Ms Warburton signed a memorandum approving the children travelling to Queensland with their primary carers. The

memorandum stated that this was a permanent relocation to Queensland. On the same day the children and their carers travelled to Queensland.

[40] On 11 January 2010 the defendant filed notices of discontinuance in the Local Court for each of the applications seeking orders transferring the protection orders of each of the children to State of Queensland.

[41] On 16 February 2010 Ms D Morriss and Ms C Martin, the children's current caseworker, met with the plaintiff and Ms Henderson. Ms Martin is employed in the Department as a Team Leader within the Families and Children's Specialist Care Program. During the meeting they provided the plaintiff with copies of the children's 2009 care plans, school reports for the final term in 2009 and photographs taken of the children just prior to their move to Queensland.

[42] Since the children have been living in Queensland with their carers Ms C Martin has maintained regular telephone contact with them. Ms Martin also arranges appointments for any necessary medical or psychological treatment and confers with the children's school teachers, sporting coaches and counsellors. On 17 and 18 February 2010 she travelled to Queensland to see the children and speak with them individually and meet with their service providers. Ms Martin met with the children's school teachers and she made arrangements for them to provide her with monthly updates about the children's appearance, health, behaviour and achievements. She also met with an agency that was able to provide respite

care for the children. She observed the living arrangements that the carers had made for the children and she interviewed each of the children. Upon her return to Darwin she contacted several agencies and found a suitable child psychologist in Queensland who was able to work with the children and their carers.

[43] On 21 and 22 April 2010 Ms Martin again travelled to Queensland to continue monitoring the children's adjustment to their new environment. She met with the children and their carers. Three of the children were happy and settled in Queensland. One child was experiencing difficulty from time to time. However, the child stated that the child was able to speak to the carers and the psychologist about the issues that were confronting the child. It was Ms Martin's opinion that when the child was calm, the child appeared to be happy living in Queensland and the child was positive about many aspects of the child's life. The child had a strong bond with the carers. Although the child required more support than the other children, the placement was an appropriate placement.

[44] On 20 May 2010, in consultation with the child who was experiencing difficulty, the carers and the psychologist, Ms Martin made a decision that the child would benefit from an extended period of care outside of the carer's residence. Accordingly, appropriate alternative arrangements were made for the care of the child in Queensland. Ms Martin stated that it was the intention of the Families and Children Specialist Care Program that the child would be returned to reside with the child's siblings and their carers in

due course. The psychologist has expressed concern that the child may be suffering from Aspergers Syndrome.

[45] On two occasions since the carers and the children have been living in Queensland, the carers have been given respite. When this has occurred the children have remained living in their home and other carers have moved into the home to provide care for the children. On the last occasion the respite carers were youth workers who travelled to Queensland from Darwin as this was what the children requested. The youth workers had played an active part in previous respite periods when the children resided in Darwin.

[46] The children have told Ms Martin that they are interested in having some contact with their father. Ms Martin has identified a counsellor who will be able to provide supervision and follow up with the children regarding telephone contact with their father.

[47] In her affidavit of 24 May 2010 Ms Warburton stated that, upon receipt of the written consent of the Queensland liaison officer, the defendant intends to file applications in the Local Court at Darwin seeking orders transferring the children's protection orders to the State Queensland.

The submissions of the defendant

[48] The defendant made the following submissions.

[49] Each of the orders made by the Local Court on 22 December 2008 gave the defendant long term parental responsibility for each of the children until

they attain the age of 18 years. The orders also excused the defendant from the obligation[17] to give the children's parents information about where they are residing.

[50] By virtue of the protection orders made on 22 December 2008 the defendant: (a) is entitled to exercise all the powers and rights and has all the responsibilities for children that would ordinarily be vested in the parents of the children[18]; (b) has daily care and control of the children[19] and the defendant is entitled to exercise all the powers and rights and all the responsibilities for the day to day care and control of the children[20]; and (c) is entitled to exercise all the powers and rights, and has all the responsibilities in relation to the long term care and development of the children[21]. The children are children who are in the "CEO's care" within the meaning of the Act[22].

[51] The defendant's powers and rights under the Act over the children could hardly be more broadly expressed. The powers and rights relate to both the person and the property of each of the children, to the custody, care and control of their person and to the guardianship of their property[23]. Furthermore, those powers and rights are held by the defendant alone. They are not shared with the children's parents.

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[17] s 135(1)(a)(i) of the Act.
[18] s 22(1) of the Act.
[19] s 22(2)(a) of the Act.
[20] s 21 of the Act.
[21] Section 22(2)(b) of the Act.
[22] Section 67(1)(b) of the Act.
[23] *RL v Minister for Health and Community Services* [2006] NTSC 34 at par [45].

[52] In accordance with their natural and ordinary meaning, the provisions of the Act clearly contemplate that the defendant is empowered to decide where and with whom the children are to reside. This is confirmed by Ch 2, Pt 2.2 of the Act, which deals with "children in the CEO's care".

[53] The defendant is obliged to prepare and implement a care plan for each child[24], being a written plan that identifies the needs of the child, outlines the measures that must be taken to address those needs, and sets out decisions about the daily care and control of the child, including decisions about the placement arrangement for the child and about contact between the child and other persons[25].

[54] Counsel for the defendant submitted that obviously the needs of the child include a place of residence. Consistent with this need the defendant must enter into a placement arrangement[26] being an arrangement for placing the child with either his or her parent, a family member, or an individual approved by the defendant[27]. The placement arrangement is the means by which a child's need for a place of residence is met. The children are now all in the care of their primary carers pursuant to a care plan and a placement arrangement entered into by the defendant. It is clear from the provisions of the Act that the defendant has the sole right and power to determine where and with whom the children are able to reside, whether on a temporary or permanent basis until they attain the age of 18 years.

[24] Section 70(1) of the Act.
[25] Section 70(2) of the Act.
[26] Section 77 of the Act.
[27] Section 78(1) of the Act.

[55] The powers under the Act enable the defendant to permit the children to reside interstate with their carers. While the Act does not expressly so provide there are, however, two clear indications in the Act that the defendant may permit a child in his care (being the subject of a protection order under the Act) to reside outside of the Northern Territory. Those provisions are s 155(a) of the Act and s 160(a) of the Act. Section 155(a) of the Act permits the defendant to administratively transfer a child's protection orders to another State or Territory (subject to the satisfaction of certain statutory preconditions including the consent of the parents[28]), if a child is residing or is about to reside in that State or Territory. Section 160(a) of the Act permits the defendant to apply to the Local Court for an order transferring to another State or Territory the protection orders relating to a child who "is residing, or is about to reside in that State or Territory". These provisions expressly contemplate that a child who is in the defendant's care under a protection order may, at a given point in time, be residing in another State or Territory.

[56] Section 155(a) and s 160(a) of the Act give the defendant power to transfer, or have transferred by the Court, the defendant's authority or jurisdiction over a child to another State or Territory. Under either process, the defendant must be of the view that it is appropriate for the defendant's interstate counterpart to take over and exercise the powers and

[28] Section 157(1)(b) of the Act.

responsibilities over the child conferred by the protection order[29], and the interstate counterpart must be willing to accept those powers and responsibilities and have consented thereto[30]. Once a protection order is transferred and registered in the receiving State's or Territory's Children's Court it ceases to have effect as a Territory order[31] and thereafter has effect as if it were a protection order made in the receiving State or Territory under the applicable State or Territory legislation. The defendant submits that the processes set out in Ch 2, Pt 2.4 of the Act necessarily presuppose the existence of authority held by the defendant over children that are physically present and residing outside of the Northern Territory.

[57] Section 88(1) of the Act confers jurisdiction on the Local Court in respect of family matters. It permits the Local Court in its family matters jurisdiction to hear and determine applications for various orders. There is no express conferral of jurisdiction to hear and determine an application by the defendant to permit a child in the defendant's care to reside in or relocate to another State or Territory.

[58] The protection orders that were made by the Local Court in Darwin on 22 December 2008 have vested in the defendant the rights and responsibilities for the child which would ordinarily be vested in the child's parents. Parents do not, except in unusual or exceptional circumstances, need a court order to permit a child to reside in any particular place, whether

[29] Section 155(f) and s 160(e) of the Act.
[30] Section 155(g) and s 160(f) of the Act.
[31] Section 177 of the Act.

within the same jurisdiction of the parent, or elsewhere. It is antithetical to the conferral on the defendant by the Local Court of "parental responsibility for a child" to suggest that the defendant must obtain an order from the Local Court in order to permit a child to reside interstate. To imply such a requirement into the Act would give rise to significant difficulties in the defendant's administration of the child's care. For example, is a court order required for a temporary relocation, or only for "permanent relocation"? Very few interstate placements can be classed as "permanent" from the outset because most begin on a temporary basis with the view to monitoring and subsequently forming a view as to its impact on the child's well-being. If a court order is implicitly required for temporary relocations, is it also implicitly required for other significant events in the child's care, such as serious medical treatment, or religious or education decisions? These questions demonstrate the unlikelihood of a Legislative intent to impose a requirement for the defendant to obtain an order of the Local Court in order to permit a child to reside in, or relocate to, another State or Territory.

[59] Counsel for the defendant submitted that there is no requirement for the defendant to obtain the children's parents' consent before permitting them to be located interstate. However, in my opinion, that is not to say that consideration should not be given to the obtaining the parents' consent as it may be a factor relevant to whether any transfer interstate was in the best interests of the children.

[60] Once a direction is made under s 123(1)(b), (c) or (d), conferring daily care and control and all parental responsibility upon the defendant the only entitlements which the parents have in relation to a child are those contained in the Act: (a) a right to be given information about where the child is residing[32], unless the Court makes a contrary order[33]; (b) a right to be given information about any arrangement that has been made for the care of the child[34] unless the Court makes an order to the contrary[35]; (c) a right to be given a copy of the care plan in relation to the child, unless the defendant considers that to be inappropriate or impracticable in the circumstances, having regard to the wishes of the child and the safety of the children[36]; (d) the right to be given such information about the placement arrangement in relation to the child as the defendant considers is appropriate in the circumstances, having regard to the wishes of the child and the safety of the child[37]; (e) a right to apply to the court for a variation, revocation or replacement of the protection order[38], although this is limited as to the types of variations etc which a child may apply for[39]; and (f) a right to appeal to the Supreme Court against a protection order within 28 days of making the order[40].

[32] Section 135(1)(a)(i) of the Act.
[33] Section 135(2) of the Act.
[34] Section 135(1)(a)(ii) of the Act.
[35] Section 135(2) of the Act.
[36] Section 73 of the Act.
[37] Section 81 of the Act.
[38] Section 137(1) of the Act.
[39] Section 137(2) and s 137(3) of the Act.
[40] Section 140 of the Act.

[61] In particular, the defendant is not obliged by the Act to consult with parents in relation to the care plan, a placement arrangement or any other matter respecting the child's daily care and control. It follows that the defendant is not obliged by the Act to obtain the parents' consent in respect of such matters.

[62] While s 135(1)(b) of the Act states that the defendant must provide opportunity for the children to have contact with the parents and other family members of the child as often as is reasonably appropriate, this is an opportunity which is to be granted to the children for their well-being. It is not a right granted to the parents.

[63] The express requirement of parental consent[41] (or alternatively, the requirement of a court process in which the parents' wishes are expressly required to be considered by the Local Court[42]) before the defendant can transfer a child's protection order interstate does not support the plaintiff's argument. The requirement simply demonstrates that the parents' views only become relevant when the defendant transfers and thereby relinquishes responsibility for the child's care[43]. The reason for this is that the child's parents lose whatever rights they have under the Act if a child's protection order is transferred interstate.

The submissions of the plaintiff

[64] The plaintiff made the following submissions.

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[41] Section 155(h) of the Act.
[42] Section 163(b)(viii) and s 161(b) of the Act.
[43] *Minister for Aboriginal Affairs v Peko Wallsend* (1986) 162 CLR 24 at 45 – 46.

[65] Neither the defendant nor his delegate had any power to relocate the children outside the Northern Territory in circumstances where the children's protection orders were not transferred to Queensland. The only source of power conferred on the defendant to act in loco parentis in respect of the children was the protection order made by the Local Court on 22 December 2008 and the long term parental responsibility direction contained in that order. The orders made by the Local Court did not give the defendant power to remove the children to another State or Territory.

[66] The defendant may only place a child with carers who reside interstate if the child's protection order has been transferred interstate in accordance with the provisions of Ch 2, Pt 2.4, Div 1 and Div 2 of the Act. The decision to relocate the children in Queensland could only be made in tandem or as a consequence of a decision to transfer the children's protection orders to Queensland. Transfer of the children's protection orders to Queensland required either the consent of both of the children's parents or a court order. There is no evidence in this case that either the defendant or his delegate turned their minds to these matters. The consent of the plaintiff was neither sought nor obtained in this case. Accordingly, the defendant failed to comply with s 157(1) and s 157(3) of the Act. Further, the defendant did not obtain an order of the Local Court transferring the children's protection orders to Queensland. As no arrangements were made in accordance with Ch 2, Pt 2.4 of the Act, no valid decision to relocate the children in Queensland was ever made by the defendant or his delegate. Accordingly,

Ms Warburton's decisions of 16 November 2009 and 8 January 2010 were made in breach of the Act and are invalid.

[67] The provisions of Ch 2, Pt 2.4 of the Act constitute a code. This is made apparent by what parliament has stated to be the object of the part. Section 152 of the Act states:

> The object of this part is to enable orders in the nature of protection orders and related proceedings to be transferred between different jurisdictions, so that
>
> (a) children may be protected under the orders when moving from one jurisdiction to another; and
>
> (b) the proceeding may be determined expeditiously.

[68] The existence of Ch 2, Pt 2.4 of the Act is a clear indication by parliament that under the Act the defendant's powers stop at the Northern Territory border and the defendant only has power to deal with the children when they are in the Northern Territory and not otherwise.

[69] Chapter 2, Pt 2.4 of the Act is specifically designed to promote the protection and well-being of children. The objects of the Act cannot possibly be advanced or met by the defendant engaging in a course of conduct which results in the children leaving the Northern Territory and going to Queensland in circumstances where the defendant has no control or power in respect of the children while they are in Queensland.

[70] Further, at the time that Ms Warburton made the decisions of 16 November 2009 and 8 January 2010 to relocate the children in Queensland there had been no delegation to her of the defendant's powers of parental responsibility as defined in s 22 of the Act. The instrument of delegation makes no mention of s 22 of the Act. In circumstances the defendant did not delegate his powers of long term parental responsibility for the children to Ms Warburton and she had no power to relocate the children to Queensland. Moreover, because the defendant had no specific power to relocate the children from Northern Territory to another State without recourse to the provisions of Ch 2, Pt 2.4 of the Act, Ms Warburton could not acquire any such power by delegation and her decisions were ultra vires the Act.

[71] Even if it is conceded for the purposes of argument that the power to transfer protection orders from the Northern Territory to another State or Territory carries with it an implied power to relocate children who are the subject of such orders to another State or Territory, in this case no such relocation of the children occurred because the defendant withdrew the only applications he made for transfer of the children's protection orders to Queensland and he has never renewed them. Accordingly, this Court should find that the entire process of removing the children from the Northern Territory and relocating them in Queensland was unlawful.

[72] Further, the plaintiff submitted that the entire process of relocating the children in Queensland was contrary to principle contained in s 12(4) of the Act that an Aboriginal child should, as far as practicable, be placed in close

proximity to the child's family and community. The defendant must at all times have regard to this principle[44].

[73] Finally, the plaintiff submitted that it is irrelevant whether the defendant or members of the Department were able to have contact and render some degree of assistance to the children. The fact of the matter is that neither the defendant nor any member of his Department could exercise any legal right or lawfully discharge any duty once the children were in Queensland. The actions of the defendant and the Department in relation to these children were ultra vires the Act and unlawful.

Were the decisions permitting the children to go to Queensland lawful?

[74] Save for any qualifications contained in what I have stated below, I accept the submissions of the defendant.

[75] Under s 46A(3) of the *Interpretation Act* if a power or function is delegated under an Act, the power or function is, when exercised or performed by the delegate, to be taken to be exercised or performed by the person who delegated it. However, in order for the decisions made by Ms Warburton on 16 November 2009 and 8 January 2010 permitting the children to go to Queensland to be valid, the defendant must have had the power to permit the children to go to Queensland, he must have delegated his relevant powers to Ms Warburton, and she must have made her decisions in accordance with the Act.

[44] Section 42(2) of the Act.

[76] The scope of Ms Warburton's delegated authority is derived from s 303 of the Act and the written instrument signed by the defendant and dated 19 October 2009[45]. The instrument states:

> I, […], Chief Executive Officer of the Department of Health and Families, pursuant to section 303 of the *Care of Protection of Children Act*, and with reference to sections 42 and 43 of the *Interpretation Act*:-
>
> (a) revoke the instrument delegating my powers and functions under the *Care of Protection of Children Act*, dated 2 December 2008; and
>
> (b) delegate to the person from time to time holding, acting in or performing the duties of the office in the Department of Health and Families specified in Column 2 of the Schedule and holding the designation specified opposite Column 1 of the Schedule, my powers and functions under the sections of the Act specified opposite in Column 3 of the Schedule subject to the conditions specified opposite in Column 4 of the Schedule.

[77] Relevantly, the Schedule to the instrument dated 19 October 2009 reveals that the defendant delegated his powers and functions under s 70, s 71 and s 77 of the Act to Ms Warburton. The effect of this is that Ms Warburton had the authority to make the decisions that she made on 16 November 2009 and 8 January 2010.

[78] It is true that the defendant did not have parental responsibility for the children under the Act until the Local Court made the direction that the long term parental responsibility for the children is granted to the defendant. However, the scope and content of the defendant's powers, as the person

[45] Annexure LJW – 1 to the affidavit of Leonie Jane Warburton of 24 May 2010.

who has parental responsibility for the children, is provided by s 22 of the Act and various other provisions in the Act, and the manner in which he is to exercise those powers is regulated by the Act. There is nothing in s 22 of the Act, or any other provisions of the Act, that results in the defendant having any lesser rights and powers of parental responsibility than a biological parent of a child. The intention of the legislature is that the defendant is to possess the same rights and powers in respect of children who are in his care as their parents did.

[79] Section 70 of the Act states:

> (1) As soon as practicable after the child is taken into the CEO's care, the CEO must prepare *and implement* [emphasis added] a care plan for the child.
>
> (2) 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.

[80] Section 71 of the Act states that the defendant may modify the care plan at any time if the defendant thinks it is appropriate to do so and s 77 of the Act

states that the defendant must enter into a placement arrangement with other persons or bodies for a child who is in the defendant's care.

[81] Subsections 78(1) and (2) of the Act state:

> (1) A placement arrangement is:
>
> (a) an arrangement for placing a child who is in the CEO's care with any of the following persons (the ***carer***):
>
> (i) a parent of the child;
>
> (ii) a family member of the child;
>
> (iii) an individual approved by the CEO; or
>
> (b) any other arrangement for placing the child that the CEO considers appropriate in the circumstances.
>
> (2) Without limiting subsection (1)(b), the arrangement can be one under which the child is not directly supervised by an adult.

[82] In order to fulfil the responsibilities and exercise the powers that he has under s 22 of the Act, the defendant is not only required to prepare a care plan but to implement it. Further, the care plan is to set out decisions about the placement arrangement for a child and the defendant is to enter into a placement arrangement for a child. A placement arrangement is an arrangement placing a child with a carer. All such arrangements may be modified at any time if the defendant thinks it is appropriate. There is nothing in s 70, s 71, s 77 or s 78 of the Act which requires a care plan to be implemented in the Northern Territory or a child to be placed only with carers who are residing in the Northern Territory.

[83] Under the delegation Ms Warburton had from the defendant, she had authority to prepare and implement a care plan for the children and to enter into and modify placement arrangements with the children's carers. The purpose of doing so was to fulfil the defendant's responsibilities under s 22 of the Act. In the circumstances there was no need for there to be an express delegation to Ms Warburton of the powers the defendant has over the children under s 22 of the Act.

[84] Under s 22 of the Act a person who has parental responsibility for a child is entitled to exercise all the powers and rights for the child that would ordinarily be vested in the parents of the child including, the daily care and control of the child and all the powers and rights in relation to the long-term care and development of the child. The rights and powers that the defendant has when he is granted parental responsibility for a child are not expressed to be subject to Ch 2, Pt 2.4 of the Act. Parental responsibility includes all rights and responsibilities of parents previously included in the concepts of guardianship and custody.

[85] In *Youngman v Lawson*[46] Street CJ made the following comments about the rights of guardianship:

> Those rights may be exercised by the guardian himself or herself actually having physical custody; or they may be exercised by the physical custody being placed with others. Such other placements might be temporary and casual as, for example, allowing a child to stay with friends for a weekend. They may be on a more regular and extended basis as, for example, placing a child in a boarding school.

[46] (1981) 1 NSWLR 439 at [446].

> They may be of an even more extended character as, for example, allowing the child to live with grandparents. *Such placements do not remove the legal authority of the guardian over the child. Such authority will subsist until displaced by an order of a court or the operation of a statute* [emphasis added].

[86] In *PVS v Chief Executive Officer, Department for Child Protection*[47] the issue was whether a child under a protection order should be permitted to go to Germany with a carer who wanted to visit members of her family. During the course of his reasons Pullen JA made the following statement[48]:

> It is important to note that there has been one very significant change that has taken place since Magistrate Hogan made the observations that he did on 19 November 2009. That is that after the full and lengthy hearing for the protection order, a protection order was made which put S into the care of the respondent which now exercises parental responsibilities. Being armed with that order, it does not require any order of the court to take S out of the country (or to allow the carer to take S out of the country) if a passport can be obtained for S.

[87] In my opinion, in the light of the extensive nature of the powers referred to in s 22 of the Act and the comments in the authorities referred to above, the defendant does have power to place children in his care with carers who are residing interstate. He may exercise that power provided it is in the best interests of the child and provided he and the Department have the capacity to fulfil all of the responsibilities referred to in s 22 of the Act. In this case the decision to permit the children to relocate interstate with their primary carers was in their best interests and the defendant and the Department have been fulfilling their responsibilities in respect of the children.

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[47] [2010] WASCA 168.
[48] [2010] WASCA 168 at [6].

[88] The purpose of Ch 2, Pt 2.4 of the Act is to enable protection orders to be transferred in circumstances where the defendant is unable to carry out the responsibilities imposed on him under s 22 of the Act and where it is in the best interests of the children who are residing interstate to have the full protection of the interstate legislation. The provisions of Ch 2, Pt 2.4 of the Act do not restrict the rights and powers the defendant may exercise under s 22 of the Act. Section 22 of the Act is not expressed to be subject to Ch 2, Pt 2.4 of the Act. Section 22 of the Act puts the defendant in the same position as a parent who has parental responsibility over a child. A parent clearly has the power to place a child with an interstate relative or friend for the purposes of the care and advancement of the child.

[89] To the extent that granting the defendant the same powers over a child, in his care, as a parent has over a child means that the Act has an extra-territorial operation, the legislature plainly intended the Act to have such operation and the Legislative Assembly of the Northern Territory has the capacity to pass such a law[49]. Any presumption to the contrary is rebutted by the text of s 22 of the Act. Parliament intended the defendant to have the same parental responsibility over a child in his care as a parent has for a child.

[90] The reason why the provisions of Ch 2, Pt 2.4 of the Act require either the consent of both parents, or an order of a Court which is required to give

[49] s 6 *Northern Territory (Self-Government) Act 1978* (Cth); *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 9-14.

consideration to the wishes of both parents, is because if a protection order is transferred to an interstate jurisdiction the defendant loses his power over the child and the parents of the child lose their rights under the Act. Parents are at a potential disadvantage if they lose their rights under the Act. For example, if parents wish to enforce their rights under any interstate legislation it would be necessary for them to commence proceedings in an interstate court. This is likely to be substantially more difficult and costly for them than commencing proceedings in the Northern Territory.

[91] Further, the evidence establishes that all of those persons employed by the Department who have been involved with the care of the children have had full regard to the provisions of s 12 of the Act. The current care arrangements were entered into when it became apparent that the members of the children's extended family were either incapable or unable to be the children's carers.

Conclusion

[92] In the circumstances I would dismiss the plaintiff's application.
