MV v CEO Department of Children and Families & Ors [2012] NTSC 68

PARTIES:	MV v CEO Department of Children and Families & Ors
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION IN THE MATTER of an appeal under s 140 of the *Care and Protection of Children Act 2007*
FILE NO:	LA 10 of 2011 (21120925)
DELIVERED:	14 SEPTEMBER 2012
HEARING DATES:	22 MAY AND 8 AUGUST 2012
JUDGMENT OF:	KELLY J
APPEAL FROM:	H HANNAM CM

CATCHWORDS:

APPEAL – Local Court – *Care and Protection of Children Act 2007* ("The Act") – reasonable notice to parties of the kind of order contemplated not given – failure to accord procedural fairness – no opportunity for parties to make submissions on the order made – if a magistrate is contemplating making an order different from orders proposed by parties fairness requires the parties are given fair warning providing an opportunity for submissions on point – child taken into protective care under the Act – CEO Department of Children and Families ("CEO") sought short term protection order under

the Act giving parental responsibility to the CEO for 12 months – order made giving parental responsibility to the CEO for the child until he reached the age of 18 years – appeal allowed on this ground

APPEAL – Local Court – order made that CEO must not move the children from their current placement without notifying the legal representative of the children 28 days in advance – impermissible fetter on the discretion of the CEO and inconsistent with CEO's parental responsibility – appeal allowed

Care and Protection of Children Act s 10, s 103, s 121, s 123, s 123(1)(c), s 123(1)(a)(ii), s 128, s 129

Interbulk Ltd v Aiden Shipping Co Ltd (The "Vimeira") 2 Lloyd's Rep 66; *Sugar Australia Pty Ltd v Mackay Sugar Ltd* [2012] QSC 38; applied.

J v Lieshke [1987] HCA 4; (1987) 162 CLR 447; followed.

REPRESENTATION:

Counsel:

Appellant:	A Wyvill SC & A Snell
First Respondent:	J Tippett QC & L Morgan
Third Respondent:	C Smyth

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
First Respondent:	Maleys Barristers and Solicitors
Third Respondent:	Solicitor for the Northern Territory

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

MV v CEO Department of Children and Families & Ors [2012] NTSC 68
No. LA 10 OF 2011 (21120925)

BETWEEN:

MV
Appellant

AND:

CEO DEPARTMENT OF CHILDREN AND FAMILIES & ORS
Third Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 14 SEPTEMBER 2012)

[1] On 23 June 2011, the child MV was taken into protective care pursuant to a temporary protection order made under s 103 of the *Care and Protection of Children Act* ("the Act"), and on 28 June 2011 the third respondent ("the CEO") made an application to the Local Court under s 121 of the Act for a short term protection order with a direction pursuant to s 123(1)(c) giving parental responsibility for MV to the CEO for a period of 12 months.

[2] The CEO's application for a protection order was adjourned by consent a number of times and in the mean time daily care and control of the child was given to the CEO and the child was placed in foster care with a family in Darwin.

[3] The application was heard by the learned Chief Magistrate on 16 November 2011. The application was opposed by the appellant (the child's father) who submitted that the child should be returned to his care and a supervision order made under s 123(1)(a)(ii) of the Act. The child's legal representative submitted that there should be a protection order for "at least 2 years". However, her Honour made a long term protection order with a direction pursuant to s 123 (1)(c) giving parental responsibility for MV to the CEO until MV reaches the age of 18, the longest order possible under the Act. MV was five years old at the time the order was made, meaning that the order was to take effect for around 13 years.

[4] The appellant has appealed against the order on a number of grounds. At the hearing of the appeal on 22 May 2012 I indicated that I was of the view that the appeal should be allowed, made directions for the filing of further affidavit material, and adjourned the proceedings to 8 August 2012 for submissions on the type of order that should be made.

[5] On 8 August 2012 I made orders allowing the appeal, setting aside the order of the learned Chief Magistrate and in lieu thereof made a protection order with a direction giving parental responsibility for each of the children to the CEO for a period of two years. I indicated that I would publish reasons at a later date. These are those reasons.

[6] The first ground of appeal (Ground 3.1) was that her Honour erred by adopting a two stage process to the exercise of the power under ss 128 and

129 by considering and ruling first whether the child was in need of protection and, having made that finding, subsequently considering whether and if so what protection order should be made. The appellant contended that ss 128 and 129 provide for the single exercise of a power on one occasion.

[7] I do not agree. The Court must make a protection order if satisfied 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 care of the CEO. I agree with the submission by counsel for the CEO that there is nothing in the Act which requires the determination that a protection order of some kind must be made and the making of the actual order to be simultaneous. Particularly if the order sought by the CEO is contested, it may often be necessary for a consideration of the type of order to be made to be adjourned to enable further material to be placed before the court.

[8] The second ground of appeal (Ground 3.2) was that her Honour erred by not giving reasonable notice that she was considering making the order she made and the grounds on which she was considering making that order. Essentially this was a complaint of failure to accord the appellant natural justice. A number of times during the proceeding her Honour reminded the parties that she was not confined to the positions advocated by the parties, but could make any order specified in the Act.[1] However, the appellant

1 Transcript 16/11/2011 pp 35, 38 and 39

complains that her Honour did not warn the appellant (or the other parties) that she was considering making a protection order for the maximum time possible, namely until the child reached the age of 18, and, as a consequence, the appellant did not have a proper opportunity to make submissions as to why such an order ought not be made.

[9] A reading of the transcript confirms that her Honour gave no such advance indication to the parties and that, it seems to me was a denial of natural justice. If a magistrate is contemplating making an order which is different to the orders proposed by the parties, then fairness requires that the magistrate give the parties fair warning of the order he or she is considering making so that in a real and practical sense the parties have an opportunity to make submissions (and if necessary call evidence) in relation to the proposed order. It is not sufficient to simply remind the parties that all orders under the Act are open.

[10] This principle was recently applied in the Supreme Court of Queensland in the context of a commercial arbitration. In *Sugar Australia Pty Ltd v Mackay Sugar Ltd*[2] the court held that an arbitrator's failure to hear submissions from parties on a matter fundamental to his decision on liability, where neither party had considered the matter relevant and so had not addressed it, amounted to a breach of natural justice sufficient to set aside the award. McMurdo J said:

2 [2012] QSC 38

> "A party is entitled to know of the case put against it and to be given an opportunity of replying to that case. Similarly, a party is entitled to know of a point which although not raised by its opponent, is considered by the arbitrator to be adverse to its case."[3] (Citations omitted)

[11] In so holding, he cited the following passages from *Interbulk Ltd v Aiden Shipping Co Ltd* (*The "Vimeira")*[4]*:*

> "There is plain authority that for arbitrators so to decide a case, without giving a party any warning that the point is one which they have in mind and so giving the party no opportunity of dealing with it, amounts to technical misconduct and renders the award liable to be set aside or remitted ... In truth, we are simply talking about fairness. It is not fair to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts or the law to the tribunal. In my judgment, the arbitrators in the present failed to give that opportunity to the charterers ..."[5]

> "If an arbitrator considers that the parties or their experts have missed the real point ... then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it."[6]

[12] In *Sugar Australia* it was common ground between the parties, and accepted by the court, that the same principles applied to an arbitration as to a court proceeding. However, if anything, it is even more important that parents be given adequate notice of any order being contemplated by the magistrate in proceedings involving their children. As Brennan J (as he then was) said in *J v Lieschke:*

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3 Ibid at [32]
4 [1984] 2 Lloyd's Rep 66
5 Ibid per Goff LJ at 74-5
6 Ibid per Ackner LJ at 76

> "It would offend the deepest human sentiments as well as a basic legal principle to permit a court to take a child from its parents without hearing the parents when they can be heard and when they wish to be heard in opposition to the making of an order."[7]

[13] Accordingly, the appeal is allowed on this ground.

[14] Ground 3.2 was closely connected with ground 3.9 in which the appellant complained that her Honour erred in departing from the issues presented to the court by the parties and in forming her own view independent(ly) of and apart from the assessments, opinions and procedures of the CEO made properly under the Act, thereby going beyond the exercise of an adjudicative function.

[15] I do not agree. Although, as set out above, natural justice requires that, if a magistrate is contemplating making an order which is different to the orders proposed by any of the parties, the magistrate should give the parties fair warning of what she is contemplating, it does not follow that the magistrate exercising a power under the Act must confine him or herself to adjudicating between alternatives proposed by the parties. A magistrate exercising a power under the Act has an over-riding duty to act in the best interests of the child and, after considering all of the relevant material, may conclude that that can only be accomplished by an order different from that proposed by any of the parties.

7 [1987] HCA 4; (1987) 162 CLR 447 per Brennan J at para [12]

[16] In Ground 3.3 the appellant complains that her Honour erred in concluding that the requirement of s 130(2)(a) and (b) had been satisfied in relation to an order to age 18. Section 130(2) provides:

> "(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."

[17] This is simply saying that her Honour should not have made a protection order giving parental responsibility to the CEO until the child reached the age of 18. I have found that the appeal should be allowed, and after considering the further affidavit material and submissions by the parties, made a protection order giving parental responsibility to the CEO for two years. However, as set out above, in my view, the error made by her Honour lay in not affording the parties proper notice of her intention to make a long term order to age 18, not in her consideration of s 130(2).

[18] Grounds 3.4, 3.5, 3.6 and 3.7 complain that her Honour erred in failing to place "proper weight" or to give "proper consideration" to various matters. I do not consider that the appeal should be allowed on any of these grounds. Had her Honour accorded procedural fairness to the parties by giving them proper notice of the orders she was proposing to make, and given them the

opportunity to call evidence and make submissions in relation to that proposal, then, unless she totally failed to take into account or give any weight to a relevant matter, weighing up the evidence and taking into account the various matters prescribed by the Act were matters for her Honour, as was the weight to be accorded to the different material factors.

[19] Ground 3.8 complains that her Honour erred in concluding that she had the power, and that it was appropriate, to make an order that the child not be moved from his current placement without his legal representative being given 28 days notice. I agree that the appeal on this ground should be allowed. Such an order was an impermissible fetter on the discretion of the CEO and inconsistent with the CEO's parental responsibility for the child.

[20] Before the adjourned hearing date on 8 August 2012 the parties provided up to date information including a report from Community Corrections about the father, and affidavit material from the father and the CEO. The father was at the time on a suspended sentence of imprisonment due to expire in August 2012.

[21] The further material filed disclosed that the father had been complying with all of the conditions of the suspended sentence imposed on him, including abstinence from alcohol, residence on Bathurst Island, and participation in the Indigenous Family Violence Offender Program. The affidavit by an officer of the Department stated that although these matters were mandatory requirements of the father's suspended sentence, they showed that he had

the ability to make changes in his lifestyle, and that he had made a move towards addressing some of the reasons why the child had been placed in protective care. The officer expressed the view that if such changes could be sustained in the absence of the threat of imprisonment, they should go some way to addressing the concerns in respect to his ability to care for the child. The CEO sought a short term protection order giving parental responsibility for the child to the CEO for two years to enable a detailed re-unification plan to be devised in consultation with the father which would outline the steps to be completed by the father, provide for various stages of reunification, for monitoring and risk assessment of each stage and (if appropriate) ultimately a safe transition from the Department's care to the father's care.

[22] There was no suggestion that the child might be placed in the care of his mother who had no contact with the child or the Department and took no part in these proceedings.

[23] The father sought a short term protection order giving parental responsibility to the CEO for 12 months only. In his affidavit he deposed that he had applied for a job at the Men's Centre and also for a job doing civil construction work, and had put his name down for a Certificate II and III course in civil work. He also expressed the desire to move to Palmerston and get a house with his son – and possibly to do part time study to become a butcher after his suspended sentence was completed. He had been in

contact with his son by phone but was not permitted by the terms of his suspended sentence to visit him in Darwin.

[24] The child's representative filed an affidavit deposing to the fact that the child had settled in well with his foster family, was happy, healthy and living in a stable environment. He had been referring to the foster father as "dad" and the carers' son as his brother. He was also having regular contact with a family member – his aunt. Counsel for the child's representative sought a long term parental order until the age of 18 on the ground that this was the best way of ensuring long term stability in the child's living arrangements.

[25] In my view the best interests of the child would be best served at this time by making a protection order giving parental responsibility to the CEO for two years.

[26] That will involve no immediate change to the child's living and care arrangements. He will continue to be looked after for the time being in an environment in which he is safe, happy and healthy. A two year order will give time for the father to demonstrate that he can maintain the positive changes he has made to his lifestyle for an extended period of time after he is no longer under the compulsion of a suspended sentence of imprisonment, and to carry out the steps required by the CEO to demonstrate that he is able to provide his son with the proper care in a safe, happy and healthy environment. I was informed that while a protection order is in place, the

Department can and will assist the father with practical matters such as obtaining housing to facilitate the process of eventual reunification.

[27] I take into account that the best interests of the child must be the paramount concern of the CEO in making any decision under the Act. The CEO will also be obliged to take into account the matters set out in s 10 of the Act when making the decision whether to return the child to the full time care of the father. Those principles include the capacity and willingness of the child's parents or other family members to care for the child; the nature of the child's relationship with the child's family and other persons who are significant in the child's life; and the wishes and views of the child, having regard to the maturity and understanding of the child. If the CEO is not satisfied (after taking these and other relevant circumstances into account) that the child's best interests are served by a return to the care of the father by the time the two year protection order expires, the CEO will have a duty to apply for a further protection order.

[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.[8]

[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.

8 Section 8(4)