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

PARTIES:	CHIEF EXECUTIVE OFFICER DEPARTMENT OF CHILDREN AND FAMILIES v MGM and RG and MG
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY IN THE MATTER of an appeal under s 140 of the *Care and Protection of Children Act 2007* (NT)
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 5 of 2012 (21140836)
DELIVERED:	21 SEPTEMBER 2012
HEARING DATES:	11 SEPTEMBER 2012
JUDGMENT OF:	KELLY J
APPEAL FROM:	H HANNAM CM

CATCHWORDS:

APPEAL – Local Court – *Care and Protection of Children Act 2007* ("the Act") – Chief Executive Officer Department of Children and Families ("CEO") made application under s 121 of the Act to be given long term parental responsibility for the child until age 18 – the CEO sought to withdraw the application – leave to withdraw the application was refused – no explicit or implied requirement for leave to withdraw in the Act – whether leave from the court necessary to withdraw an application by the CEO for a protection order – jurisdiction of the court enlivened by an application by the CEO only if the CEO holds beliefs set out in s 121, if the CEO no longer holds those beliefs the CEO can withdraw application without leave of the court – appeal allowed on this ground

APPEAL – Local Court – *Care and Protection of Children Act 2007* ("the Act") – Chief Executive Officer Department of Children and Families ("CEO") made application under s 121 of the Act to be given long term parental responsibility for the child until age 18 – the CEO sought to withdraw the application – if leave from the court was necessary to withdraw the application should leave have been given – error in principle – irrelevant consideration taken into account (namely erroneous view that placement with father is a "family way" placement "outside the law")

APPEAL – Local Court – *Care and Protection of Children Act 2007* ("the Act") – Chief Executive Officer Department of Children and Families ("CEO") made application under s 121 of the Act to be given long term parental responsibility for the child until age 18 – if matters prescribed in the act taken into account weight given to those matters is a matter for the magistrate

Remarks on proper role of child's representative – query appropriateness of ordering that a two year old infant be separately represented

Care and Protection of Children Act s 8, s 8(3), s 12(2)(b), s 12(3), s 20 (a), s 20 (b), s 20 (c), s 103, s 121, s 123, s 128, s 128 (1), s 138(2), s 138(3), s 139, s 146(1), s 146(7)

Local Court Rules r 1.12, r 5.18, r 5.18 (1)

Supreme Court Rules

Interpretation Act s 43

Contender 1 Ltd v International Pty Ltd (1988) 63 ALJR 26; *House v R* (1936) 55 CLR 499; *WM & FM v CEO Department of Children and Families & Ors* [2012] NTSC 67; followed.

Schipp v Herfords Pty Ltd [1975] 1 NSWLR; *Blackmore v Flexhide* [1979] 1 NSWLR 103; referred to.

REPRESENTATION:

Counsel:

Appellant:	G Brown
Respondent – Child's Representative:	S Brownhill
Respondent (RG):	A Kudra
Respondent (MG):	J Truman

Solicitors:

Appellant:	Solicitor for the Northern Territory
Respondent – Child's Representative:	Maleys Barristers & Solicitors
Respondent (RG):	CridlandsMB
Respondent (MG):	Northern Australian Aboriginal Justice Agency

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

CEO Department of Children and Families v MGM & Ors [2012] NTSC 69
No. LA 5 of 2012 (21140836)

BETWEEN:

CHIEF EXECUTIVE OFFICER DEPARTMENT OF CHILDREN AND FAMILIES
Appellant

AND:

MGM
Child

AND:

RG
First Respondent

AND:

MG
Second Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 21 September 2012)

[1] The child MGM was born on 20 May 2010. Her mother suffers from an intellectual disability and the child was monitored by the appellant (the Chief Executive Officer Department of Children and Families ("CEO")) while in the mother's care.

[2] MGM had heart surgery in December 2010. After the surgery MGM and her mother moved to Nhulunbuy and then to Dhalinybuy to live with the mother's extended family. The CEO continued to monitor the child during this time.

[3] The mother was able to care for MGM while she was a baby in arms. However, as she grew to be a toddler, the mother became increasingly unable to care for her as a result of her own intellectual disability. She was reported to be smacking the child in response to stressors or frustration of her own, yelling at the child if woken by her, not feeding her solids but relying on bottle and breast feeding, and showering her in a way that caused her to gasp for breath. The child was observed clinging to strangers and avoiding the mother. Officers of the department offered counselling and assistance and made arrangements for the mother to live with members of her extended family but, eventually, the CEO brought the child into provisional protection and placed her in foster care, because the child was considered to be at risk of physical harm from the mother due to the smacking. (There were also concerns that the mother did not appear to be able to understand or meet MGM's needs as a toddler, including her need for appropriate discipline, supervision, stimulation and her changing nutritional needs, and about the possibility that the child might develop an attachment disorder due to the smacking.)

[4] On 26 November 2011 the CEO made application under s 103 of the *Care and Protection of Children Act* ("the Act") for a temporary protection order

and an order that the daily care and control of the child be with the CEO while that order was in force. It was made on that date for a period of 14 days.

[5] On 29 November 2011 the CEO made application under s 128 of the Act for a protection order with a long term parental responsibility direction giving parental responsibility for MGM to the CEO until she reached the age of 18.

[6] On 5 December 2011 the mother was placed under an adult guardianship order.

[7] To this point MGM's father, who lived at Galiwinku on Elcho Island, had played no part in her daily care and upbringing other than to see her on occasional visits. He was not aware that there were any protection concerns in relation to MGM due to the mother's parenting until he was served with the affidavit in support of the CEO's application for a protection order on 7 December 2011.

[8] In January 2012 department staff met with the father to discuss care arrangements for the child. The father, who works full time as a baggage handler, indicated that he would like MGM to come and live with him and his mother (the child's paternal grandmother) in Galiwinku. Department staff made arrangements to assess the suitability of the father and paternal grandmother to be full time carers for MGM. Department staff also met with the mother and maternal family. The mother and her family supported the plan for the father and his family to care for the child. The two families

discussed these matters together. It appears that relations between the mother and father have been amicable.

[9] The department arranged for the father and paternal grandmother to have daily access with the child at Gove and the father was observed to be affectionate and meeting the child's needs. The mother continued to have access to the child twice weekly.

[10] The matter came before the Local Court on 22 March 2012 at which time counsel for the CEO sought an adjournment for four months to enable these family negotiations and assessments to be completed. Details of the meetings, negotiations and assessments which had been (and were still being) carried out were set out in an affidavit by an officer of the department sworn on 14 March 2012. The court was informed that the department was trying to find a suitable family placement, that the aim was for the child to have "a long term placement" with her father who lived on Elcho Island, and that the adjournment was for the purpose of assessing the suitability of that proposed placement and monitoring the transition of the child to her father's care – one would have thought all eminently sensible propositions.

[11] The adjournment application was supported by counsel for the father and for the mother, through her adult guardian. However, the learned Chief Magistrate who was hearing the matter refused to grant the adjournment for reasons that are not easy to understand. On hearing that the Chief

Magistrate was not in favour of a four month adjournment, the child's representative opposed it.

> "HER HONOUR: No, but four months seems to be a very excessive period of time. What do you say Ms Morgan?
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> MS MORGAN: It does seem to be a long time to me, your Honour. [MGM] is 17 months old. I am not sure if she is still in the same placement at the moment. If she were to remain in the same placement for the period of the extension, or of the adjournment, I suppose in one sense it wouldn't impact on her, but on the other hand I would like this matter finalised sooner rather than later.
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> I should also indicate to the court that I don't have the affidavit my friend speaks of, 14 March, so I would need to see a copy of that. I would rather that this matter be dealt with sooner rather than later given the length of the order that is being sought which I agree with."

[12] With respect, that attitude seems to be quite extraordinary. The child's representative did not know where the child was being cared for, and had not seen the latest affidavit material which she was told set out the steps that had been and were being taken to see if the child could be cared for by her father, yet she announced she was in favour of the court making a long term protection order placing the child in care until she was 18. Moreover, she opposed adjourning the matter to enable family negotiations and monitoring to take place and wanted the matter finalised – and presumably a long term protection order made - "sooner rather than later given the length of the order that is being sought". 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.[1]

[13] Shortly thereafter, the following exchange occurred between bench and bar table, Ms Terrill being counsel for the CEO and Ms Blosfelds counsel for the mother through her adult guardian:

> "HER HONOUR: …. The lawyer who represents [MGM] does agree with the application that is being made for a long term order by the Department. Now what is, now I am just asking the lawyer here who is for [the mother's] guardian, what she thinks about the order that is being asked for by the Department, and I will also ask her about the adjournment.
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> MS BLOSFELDS: Your Honour, as far as the adjournment goes, the purpose of the adjournment is to commence, monitor the transition of the child to the child's biological father who ---
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> HER HONOUR: No that is not what Ms Terrill said, she said it is to identify placement.
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> MS BLOSFELDS: That is right, your Honour, there has been discussion, much discussion between the Department and the biological father for the child, my ---
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> HER HONOUR: Well if that is the intention of the Department, I am not adjourning this for four months to monitor something, because that is not how these proceedings work. I have

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1 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 of the child, or there are other strong reasons for doing so. 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.

been asked by Ms Terrill that it is to be adjourned for the purpose of identifying the placement, is that right Ms Terrill?

MS TERRILL: Well it is a long term placement with the father, your Honour.

HER HONOUR: Yes, but I am now being told about the transition is to be monitored, I am certainly not adjourning for that purpose. What is the purpose?

MS TERRILL: With the extensive negotiations being carried out with the father, your Honour, who is in a different place a different town altogether from the mother, so it is a matter of seeing whether the father can look after this very young child.

HER HONOUR: Yes, but I am not adjourning it for that purpose."

[14] Counsel for the father informed the court that he opposed the making of a long term protection order and that the father wanted to be assessed as to whether he is able to take care of the child. Her Honour essentially said that he should file affidavit material in his own case opposing the making of the order. In other words, her Honour was not prepared to allow time for negotiations to occur, for a proper assessment by the CEO of the father's capacity to care for the baby to be made, and a monitoring of the proposed transition into his care if all went well - all of which was proceeding amicably and co-operatively with both parents and the department. Instead, her Honour wanted to force the parties into a contested hearing, diverting the father's resources away from his work and the process of assuming the care of his child into preparation for such a contested hearing – and likewise the resources of the department.

[15] Eventually a six week adjournment was granted.

[16] In the mean time, arrangements were made for the child to visit her father and family overnight. He was observed by department staff to demonstrate a high level of capacity to care for the child with the support of his extended family. A seven day visit was arranged and the father was observed to demonstrate a high level of ability to care for the child. He also actively engaged with the clinic for the child's medical treatment.

[17] On 30 April 2012 the CEO moved the child to her father's care. The child was observed to have a strong bond with her father. Both the father and grandmother were in employment and the child was placed in child care during the day while they were at work. The father and/or grandmother dropped her off and picked her up each day. The department's assessment at that stage was that there were no protective concerns in relation to the father's ability to provide care and protection for his child. The mother and her family supported these arrangements and it was understood that the mother would continue to have access to the child when visits could be arranged.

[18] Accordingly, at the next court appearance on 3 May 2012 counsel for the CEO informed the court that the CEO was "seeking to withdraw" the application. Counsel who was appearing for the father indicated that the father consented to the application being withdrawn and said the father was

fully prepared and fully capable of caring for his young child himself and was presently doing so.

[19] Her Honour took umbrage at the child having been placed in the care of the father by the CEO. She said:

> "I do actually think it's quite extraordinary for the Department to pre-empt the decision of the Court."

Her Honour also said:

> "Well, even so, the child shouldn't have been moved. The other issue that I think raises is, the court made an order that daily care and control to the CEO was to continue. Now, under s 139 the court has got the option to continue daily care and control to a family member or the CEO. Now in making an order that it's the CEO who has daily care and control, the court has obviously considered whether any other person should be given daily care and control and isn't it in fact the reality that the CEO has, by placing the child with the father, gone contrary to one of the options that – if the court had intended that to happen the court would have made that order."

Just before the proceeding was adjourned that day, her Honour remarked:

> "Now as far as the issue of daily care and control is concerned, I make an order that daily care and control to the CEO is to continue. Now whether or not having placed the child with the father represents a breach of that order of the court and what consequences flow from that is a matter which probably also needs to be considered on the next occasion."

[20] With respect to the learned Chief Magistrate, such a comment misconstrues the nature of an order giving daily care and control of a child to the CEO. It is obvious that the CEO cannot exercise daily care and control of a child personally. She does so by finding a placement for the child which might be a member of the child's family or a foster family. There is no reason why,

in appropriate circumstances, that placement ought not to be with a biological parent of the child. It is a matter for the CEO to determine what is an appropriate placement for a child for whom she has daily care and control, bearing in mind the principles set out in the Act and ensuring that the best interests of the child remain paramount in her consideration. Such a placement does not pre-empt a decision of the court. Nor is it inconsistent with the order giving daily care and control to the CEO.

[21] The matter was adjourned and came back before the court again on 14 May 2012. At that time counsel for the CEO informed the court that the CEO did not seek any further order. She said:

> "The position so far as the CEO is concerned, your Honour, is that the CEO doesn't see there's any protective concerns for the child. She's been placed with the biological father who of course has proved responsible for her. At the moment, of course, the CEO still has daily care and control until there's a further order of the court, but what the CEO states is that the information that it – when it took out the protection order the information they've now found since means that there – they no longer have any protective concerns for the father – for the child sorry, your Honour."

[22] On that occasion counsel for the CEO submitted that it was not necessary for the CEO to obtain leave to withdraw the application.

[23] The child's representative submitted that leave of the court was required to withdraw the application because of s 128(1) of the Act which provides:

> "(1) The Court may:
>
> (a) make a protection order for the child:

(i) as proposed by the CEO; or

(ii) specifying other directions mentioned in section 123 as the Court considers appropriate; or

(b) dismiss the application."

[24] That section sets out the powers of the court when dealing with an application which is properly before it. It says nothing about the powers and responsibilities of the CEO or whether the CEO requires the leave of the court to withdraw an application for a protection order.

[25] Counsel appearing for the father and counsel appearing for the mother through her adult guardian both agreed that leave was necessary for the CEO to withdraw the application but submitted that leave should be given.

[26] Counsel for the CEO submitted that if leave were necessary then leave ought to be granted because the CEO did not believe on reasonable grounds that the child was in need of protection for the very good reason that she was living with her father who was clearly willing and capable of caring for her and protecting her and the CEO had no protective concerns in relation to the child.

[27] During discussions between the bench and the bar table on that occasion, counsel for the CEO and the learned Chief Magistrate appeared to be at cross purposes in discussing the concept of "in need of protection". Her

Honour pointed out, correctly, that under s 20(a) a child is in need of protection (*inter alia*) if the child has suffered or is likely to suffer harm because of an act or omission of a parent. Sections 20(b) and (c) cover the situation where a child has been abandoned or orphaned. In those circumstances a child is only "in need of protection" if there is no other family member of the child able and willing to care for the child. There is no such qualification in s 20(a).

[28] Counsel for the CEO pointed out, also correctly, that a protection order is not generally appropriate where another parent is available, willing and able to care for the child. She submitted that the state should only intervene in taking a child into care as a last resort and should not intervene if there is a biological parent who is able to care for the child.[2]

[29] In a decision handed down on 16 May 2012 her Honour refused leave to the CEO to withdraw the application for a protection order. At that time she also made a number of procedural orders directing that further information be supplied in relation to:

(a) the support that is and can be provided to the child, in particular in relation to the expectation of an ongoing relationship with the mother;

[2] See s 8 and in particular s 8(3).

(b) the concern expressed in the original affidavits that the child may have an attachment disorder[3];

(c) whether there are any issues in relation to the child's ongoing care in relation to her heart complaint, and what the arrangements are if she is supposed to attend medical appointments and matters of the like;

(d) what role is meant to be played by the extended family on the father's side in Galiwinku;

(e) a care plan;

(f) the relationship the father's extended family has with the mother and how they anticipate contact with the mother occurring; and

(g) whether, and if, and how, travel by the mother to Elcho Island is to be facilitated by the joint guardians.

[30] The CEO applied to the Supreme Court for a stay of these orders and in an affidavit sworn on 13 June 2012 in support of that application, the team leader overseeing MGM's file said, in relation to the requests for information:

> "It is DCF's belief that there is insufficient time to provide the information that has been requested, and that the gathering of such evidence necessitates a high level of unnecessary, inappropriate and unwanted intrusion into the family."

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[3] In fact the affidavit expressed a concern that there might be a risk of such a disorder developing.

[31] Barr J granted the stay of execution on 14 June 2012.

First ground of appeal: was leave to withdraw required?

[32] The first ground of appeal is that her Honour erred in determining that the CEO required the leave of the court to withdraw the application for protection. In my opinion this appeal should be allowed on this ground.

[33] The first point made by the appellant was that there is no explicit requirement in the Act that an application for a protection order may only be withdrawn with the leave of the court. In written submissions counsel for the appellant relied on a number of cases as authority for the proposition that where there is nothing in the relevant Act or Rules to restrict or prevent the withdrawal of an application, a party making an application to a court may withdraw such application at any time before judgment is actually pronounced.[4]

[34] Counsel for the child's representative accepted the general proposition but responded, correctly, that of course this *prima facie* position would have to give way to any implied requirement for leave found in the legislation. For the reasons set out below, in my view the scheme of the legislation does not contain any implied requirement for leave. Quite the contrary.

[35] In the course of discussions with counsel, and in her decision, the learned Chief Magistrate expressed a view of the Act which supposed that the court

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4 *Schipp v Herfords Pty Ltd* [1975] 1 NSWLR 412 per Samuels JA with whom Reynolds JA agreed at 424; *Blackmore v Flexhide* [1979] 1 NSWLR 103 at p 104.

is given under the Act a general supervisory jurisdiction over the performance by the CEO of her functions under the Act. For instance, on 14 May 2012 her Honour made the following comments in discussion with counsel:

> "HER HONOUR: Ms Blosfelds, I'll ask the same question that I asked Mr Snell. The concept of reunification being supported may very well be the conclusion that the court comes to after considering all of the matters, perhaps after further cross-examination, perhaps after further reports, it may very well be the issue.
>
> How is it in the best interests of [MGM] for the court not to have that opportunity to make its own assessment independently of whether that or any other order is in her best interests as opposed to having had – giving – taking that opportunity away from itself by granting leave for the Department to withdraw?
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> MS BLOSFELDS: Your Honour, I do – I do agree that it is – that there is some role for the court to play in an over arching – I mean at the end of the day the decision lies with the court in determining the outcome of this case. Based on the information that I have, and my instructions, I – I don't believe that there are protection concerns currently for the child, and - - -
>
> HER HONOUR: But why should the court not be able to assess that? There are unfortunately a number of cases with parties at the Bar table agree that there are no child protection concerns and yet the court doesn't necessarily agree. So why in this case should the court not be given – why should the court take away its own opportunity to be able to play that important over arching role? Why are the parties so keen to not have the court determine it?
>
> MS BLOSFELDS: I think, your Honour, that we're in a situation now where – and I agree with my – my friend in as far as minimal intervention by the state unless it's warranted. In this situation the facts have certainly changed since the application was brought.

> HER HONOUR: But then isn't that up to the court to decide that on the basis of the things that have changed over time that – this is a matter that was until the changed position an order to 18 that was being asked for by the Department itself.
>
> MS BLOSFELDS: Yes, your Honour.
>
> HER HONOUR: Now the court may very well not ever made that order to 18, the court may have made a much less order, but – and – but allowing the court the opportunity to take into account the things that have changed over time and the father and him coming into the picture, etcetera, why – why doesn't – why should the court not be trusted as it normally is, and in fact empowered, to do the role that it's – it's meant to do?"

[36] In refusing leave to withdraw her Honour made the following remarks:

> "In achieving the object of the Act which is broadly to promote the wellbeing of children, the CEO has powers to investigate reports made to it and take other action to safeguard the wellbeing of the children.
>
> Once the CEO commences proceedings in court, however, by making an application for an order, it is then a matter for the court to determine in its discretion whether or not to make an order. It is in my view, for the reasons set out, not in the best interests of this child for the court not to determine the matter of which it has been seized; especially where the arrangement by which the child has been placed into the care of the father is outside the law and therefore, it does not have the safeguards of the law. Accordingly, leave is refused."

[37] In my opinion, this view of the court's function is mistaken. The court does not have a general supervisory jurisdiction over the performance by the CEO of his or her functions under the Act. The court does not have a roving brief to seek out children it feels may be in need of protection. Nor does the Act allow an application for a protection order to be made by a parent, grandparent, concerned neighbour, or even the child herself. The only

person authorised by the Act to seek a protection order, thus enlivening the jurisdiction of the court, is the CEO and the CEO may only do so if he or she forms the (reasonable) beliefs set out in s 121.

[38] First, the CEO must reasonably believe 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. Secondly, the CEO must reasonably believe that the proposed order is the best means to safeguard the wellbeing of the child. The CEO has a duty to make an application to the court in relation to a particular child if she holds those two reasonable beliefs in relation to the child. Conversely, the CEO has a duty not to make application to the court for a protection order if the CEO does not hold both of those beliefs. It follows, in my view that if, in a particular case, the CEO ceases to hold one of the relevant beliefs, the CEO is empowered, and indeed obliged, to withdraw the application (or to amend it if the CEO still believes that the child is in need of protection, but believes a different type of protection order is the best means of protecting the wellbeing of the child).

[39] That is to say, the scheme of the Act is that the court only becomes involved if the CEO believes both that the child is in need of protection and that the order proposed in the application is the best means to safeguard the wellbeing of the child. The CEO then brings an application thus giving an opportunity for parents and (where appropriate) the child to be heard on the matter. The court scrutinises the application and the affidavit material and

determines whether the child actually is (or is not) in need of protection and, if so, what is the appropriate direction to be made.

[40] If the CEO does not hold both relevant beliefs in relation to a particular child then the matter is not one for the determination of the court. Simply put, if the CEO holds no concern for the safety or wellbeing of a child because the child has a parent or parents willing and able to care for the child, the matter should not be before the court and it is not for the court to enquire into the family's affairs to determine whether the child might be better off under some other arrangement or to enquire into the parents' plans for the child's medical treatment, education, or any other matter relating to the care and upbringing of the child.

[41] The child's representative opposed the appeal. Counsel for the child's representative argued that the family matters jurisdiction was different to the ordinary civil jurisdiction of the Local Court, it is a specialist jurisdiction and the Act gives a great deal of control to the court over proceedings under the Act. She submitted that the scheme of the Act was such that, by implication, leave of the court was required before the CEO could withdraw an application.

[42] For the reasons set out above, I do not think that this submission accurately characterises the scheme of the Act. Moreover, I do not see the kinds of control over proceedings which the Act confers on the court as anything

more than the usual controls over procedural matters in proceedings properly before the court.

[43] Counsel for the appellant also relied on r 5.18 (1) of the Local Court Rules which provides (*inter alia*) that at any time before the date fixed for the hearing of a proceeding, a party may, without the leave of the Court –

(a) discontinue a statement of claim, counterclaim or claim by third party notice; or

(b) withdraw a notice of defence.

The remaining sub-rules of 5.18 deal with questions of form of a notice of discontinuance and cost consequences. Counsel for the appellant contended that an application under the Act is functionally equivalent to a statement of claim and that accordingly r 5.18 applied.

[44] Counsel for the child's representative pointed out that there were in fact two types of originating process under the Local Court Rules, statements of claim and originating applications and that the Local Court Rules are silent as to whether or not leave of the court is necessary to discontinue a proceeding commenced by originating application. She contended that in those circumstances r 1.12 would apply. That rule provides that where the manner or form of the procedure for commencing or taking a step in a proceeding or by which the jurisdiction, power or authority of the court is to be exercised is not prescribed by the rules or by or under an Act, the court

may adopt and apply with the necessary changes the relevant procedures, rules and forms observed and used in the Supreme Court. She contended that an originating application was equivalent to an originating motion in the Supreme Court Rules and that the Supreme Court Rules require leave of the court for the discontinuance of a proceeding commenced by originating motion.

[45] I do not think it is necessary for me to decide whether an application under the Act is functionally equivalent to a statement of claim or an originating application and, if the latter, whether an originating application is analogous to an originating motion in the Supreme Court, and whether it would be appropriate to apply the relevant Supreme Court Rules to the situation. In any event I note that r 1.12 of the Local Court Rules is facultative only; it provides that the court may adopt and apply relevant procedures used in the Supreme Court. It does not automatically apply the Supreme Court Rules to the particular situation. I do not think it is necessary to decide these matters because it seems to me that the scheme of the Act is quite clear and that as outlined above, it provides for the jurisdiction of the court to be enlivened by an application by the CEO if, and only if, the CEO holds the two relevant beliefs set out in s 121 and it follows that if, for whatever reason, the CEO no longer holds those beliefs she can and should withdraw the application and does not require the leave of the court to do so.

[46] Counsel for the appellant also pointed to s 43 of the *Interpretation Act* which provides that where an Act confers a power to take an action, the

power shall be construed as including a power exercisable in the like manner and subject to the like conditions to rescind, revoke, amend or vary any such action. This would imply that if the CEO has power to make an application for a protection order, she has power to withdraw such an application.

[47] Counsel for the child's representative pointed out correctly that this provision, too, would have to give way to a contrary intention, express or implied in the Act. In my view there is no such contrary intention.

[48] Having determined that the CEO did not need the leave of the court to withdraw the application for a protection order, it is not strictly necessary for me to determine the second ground of appeal, namely that her Honour erred in law in not granting leave to withdraw in the circumstances. Nevertheless, in case I am wrong, in allowing the appeal on that ground, I will proceed to deal with the other grounds of appeal.

Ground 2: Did the court err in refusing leave to the CEO to withdraw the application?

[49] The appellant contended that her Honour erred by incorrectly interpreting the actions of the CEO in placing the child with her biological father as a "family way placement" and finding that this placement was "outside the law" and that she took this incorrect, and hence irrelevant, consideration into account in deciding not to grant leave to the CEO to withdraw the application.

[50] If it had been necessary for me to decide, I would have upheld the appeal on this ground.

[51] It is clear that her Honour categorised placement with the father as a "family way placement" and objectionable for that reason. In her written decision her Honour made the following remarks in refusing leave to withdraw.

> "15. It is a matter of serious concern to the Court that the Departmental Officer was contemplating a so-called "family-way placement".
>
> 16. Family-way placement is a colloquial expression for a DCF practice, whereby the Department reaches an unwritten agreement with the family that the child who has been removed from the parent is placed with another family member as a substitute for bringing an application for a protection order before the Court. In this case, as subsequent events have shown, this form of placement is being pursued as a substitute for continuing with an application that is before the Court. Although this type of placement is seen within the Department as an adaptation of the Aboriginal observance of a whole of family commitment to the shared upbringing of children, it has some significant ramifications, both for its legality and propriety and its implications for the adequate and appropriate care of children.
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> 17. Over the years and at various inquiries, including the most recent Board of Inquiry, there have been criticisms raised about family-way placements, including that there is no ongoing financial support for carers, that proper consent is often not given, that the system operates outside the law so that placements are not assessed or monitored as is usual with foster placements and that the placement may be seen by parents as permanent. Further, as there is no actual shift in parental responsibility, there is nothing to prevent an abusive or neglectful parent from simply removing the child back into their "care". The recommendation of the Board of Inquiry in October 2010 was that the Department <u>immediately</u> review all such placement arrangements, assess the circumstances and either return the children to the parents or have the placement

arrangements formalised. In these circumstances, it is of great concern that this form of placement is still being used as an alternative to pursuing an application which is before the Court.

18. In subsequent affidavits, MGM's father is referred to as a long-term carer, as is his extended family. However, in light of the CEO persisting with seeking leave to withdraw the application, it is clear that this form of care arrangement is not a placement arrangement as set out in Division 4 of Part 2.2 as those placement arrangements relate to placement for children who are in the CEO's care and it is proposed that in withdrawing the application, no care order be made. In other words, this is another form of family-way placement which is being used as a substitute for continuing with the application for a protection order.

19. The CEO submits that the child is now placed with her father who is clearly capable of looking after her. It was also submitted that the CEO is now of the view that the child is no longer in need of protection because another family member, namely her father, is available to care for her. It was also submitted that state intervention should only be reserved for cases where there is no parent available to care for a child."

[52] The first thing to note about that portion of her Honour's decision is that placing the child in the care of her father is not a 'family way placement' of the kind being criticised by her Honour. It has none of the defects or disadvantages identified in her Honour's remarks.

(a) One would not expect there to be ongoing financial support for a father caring for his own daughter, as one would in the case of a foster care placement. Parents are expected to provide financially for their own children.

(b) There can be no issue surrounding “proper consent”. A father needs no-one’s consent to care for his own child.

(c) I am unsure what is intended by the expression “outside the law”, but in the ordinary course, parents are not “assessed and monitored as is usual with foster parents”. In this case, the department was assessing the father’s capacity to care for the child and monitoring her transition from foster care to her father’s care. However, this was not because the placement with the father was to be some kind of foster care arrangement. Rather, the department was determining whether the child was in need of protection and whether a protection order was needed at all. It would not be needed if the father was capable of caring for his daughter.

(d) As for the arrangement being seen as permanent, it is both usual and desirable that (unless there are protection concerns about a parent’s ability to care for his or her child) a child being cared for by a parent should be, and be seen to be, permanent.

(e) Finally, in the case of a father caring for his own child, there is no need for “an actual shift in parental responsibility”; the father has parental responsibility for his child. If there is a dispute about that between parents (and there is none in this case), the appropriate forum for resolving that dispute is the Family Court. If a change in care arrangements was being contemplated which placed the child in need of

protection, then the CEO could make an application for a protection order.

[53] The other thing that needs to be said about this portion of her Honour's reasons is that it betrays a misunderstanding of the position of the CEO. The CEO was not saying that "the child is no longer in need of care and protection because another family member; namely the father, is available to care for her" which is the way the CEO's position was characterised by her Honour. Rather the CEO was saying that she no longer believed that the child was in need of protection.

[54] The child has never been found to be in need of protection. The CEO made application for a protection order because, at the time, the CEO believed the child was in need of protection (and that the proposed order was the best way of safeguarding the child).[5] The CEO later applied for, and the court granted, a temporary protection order because the court was satisfied that, at that time, there were reasonable grounds for believing that the child was in need of protection (and that the proposed order was the best way of safeguarding the child).[6]

[55] As counsel for the CEO frankly admitted in proceedings before her Honour, at the time the application for a protection order was filed, the department had not spoken to the father. When they did, he indicated that he wished to

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5 S121

6 S105

care for his daughter, the department took steps to assess his capacity to do so and found that he was capable. Thereafter it appears the CEO no longer believed that the child was in need of protection, and certainly did not believe that the proposed protection order was the best means of safeguarding the child: she had a father who could and would care for and protect her. Therefore the foundation for bringing an application for a protection order had disappeared.

[56] Section 20(a) provides that a child is in need of 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, and it seems that in this case the CEO's initial belief that the child was in need of protection stemmed from a perceived risk of physical harm from the mother slapping the child (as well as some other concerns – set out at paragraph 3 above). Once the child was being cared for by her father, the CEO no longer believed that that risk (or the other concerns) existed.

[57] It appears that this misunderstanding of the CEO's position affected her Honour's decision to refuse leave to withdraw the application as, in her reasons for that decision she said:

> "21. Section 20 of the Act provides (relevantly):
>
> > a child is in need of care and protection if: (a) the child has suffered or is likely to suffer harm or exploitation because of an act or omission of a parent of the child; or (b) the child is abandoned and no family member of the child is willing and able to care for the child; or (c) the parents of the child are

dead or unable or unwilling to care for the child and no other family member of the child is able and willing to do so.

22. It is to be noted that the words "and no other family member of the child is willing and able to care for the child" do not appear in the ground upon which this application has been brought. In other words, unlike a situation where a child is abandoned or the parents are dead, unable or unwilling to care for the child, a child is in need of care and protection if she has suffered harm because of an act or omission by a single parent. In such a case, the ability and willingness of another parent to care for the child does not mean that the child is not in need of care and protection. The submission that this child is no longer in need of protection because another family member is available is, in my view, based on a misunderstanding of s 20(a) of the Act." *[emphasis added]*

[58] However, there had been no finding that the child had suffered harm (ie a significant detrimental effect on her physical, psychological or emotional wellbeing). The application was based on a perceived risk of harm, and the CEO was not saying the child was no longer in need of protection (ie had once been but no longer was), but rather that the CEO no longer believed the child was in need of protection (ie she no longer believed that risk existed in the circumstances).

[59] It is also plain that her Honour took into account her erroneous characterisation of the CEO's placing of the child with the father as a family way placement that was "outside the law" in reaching her decision to refuse leave to withdraw. After making the remarks about family way placements referred to in paragraph [51] above, her Honour said:

"29. In this case, as I have explained, I am very concerned that the placement with the father has occurred in a manner not consistent

> with the Act and the fact that the CEO seeks leave to withdraw the application makes it clear that this form of placement is in substitution for the court determining the application before it. In my view it is not in the best interests of the child for a procedure which is outside the law to be followed in preference to the court determining a matter which was brought before it by the CEO in accordance with the law."

[60] For these reasons, had it been necessary to decide, I would have allowed the appeal on the ground that her Honour was in error in refusing leave to withdraw the application. If the CEO had known at the time the application was filed, that the father was both willing and able to properly provide for, care and protect the child, the CEO would not have filed the application and indeed would not have been authorised under the Act to file the application because she would have lacked one or both of the requisite beliefs. It seems to me then that in those circumstances once the CEO ascertained those facts then she had not only a right but a duty to withdraw the application as the foundation for it no longer existed.

[61] In support of this second ground of appeal the appellant also contended that her Honour erred in failing to give sufficient weight to the wishes of the mother and the father regarding the maintenance of cultural links between the child and her Aboriginal heritage, in light of the provisions of ss 8(3), 10(2)(b) and 12(3) of the Act. Had it been necessary for me to decide, I would not have allowed the appeal on this basis. This is an appeal from the exercise of a discretion, and an appeal court ought not to interfere with the exercise of a discretion unless the court at first instance has acted upon a wrong principle, has allowed extraneous or irrelevant matters to guide or

affect the decision (or has not taken into account a relevant consideration or considerations), or has mistaken the facts.[7] Particular caution must be exercised where (as here) the discretion has been exercised on a matter of practice and procedure.[8] In the absence of error of this nature being demonstrated, the weight to be given to the various relevant circumstances set out in the Act is a matter for the magistrate.

[62] I also want to say something about the role of the child's representative. It is not necessary for a child's representative to be appointed in every case. Sub-section 146(1) provides that the court may order the child to whom the proceedings relate to be separately represented by a legal practitioner if the court considers doing so is in the best interests of the child. Sub-section 146(2) provides that, without limiting subsection (1), the court may order that the child be separately represented if the application relating to the proceedings is opposed by a parent of the child, or the child opposes the application. Subsection 146(6) provides that the legal representative of a child must act in the best interests of the child regardless of any instructions from the child, and must present the views and wishes of the child to the Court. In *WM & FM v CEO Department of Children and Families & Ors*[9] I made the following remarks about the respective roles of the presiding magistrate and the child's representative.

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7 *House v R* (1936) 55 CLR 499.

8 *Contender 1 Ltd v LEP International Pty Ltd* (1988) 63 ALJR 26 at 28.

9 [2012] NTSC 67.

> "It is the magistrate's function to consider the evidence, listen to the submissions of the parties and make a decision about what is in the best interests of the children taking into account the matters specified in the Act. If that is all that is being done by the children's representative, then it adds no additional value to the proceeding. While everyone exercising a power under the Act (including the children's representative) has a duty to act in the best interests of the children, 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. In doing so he or she should exercise the powers given in s 146(7) namely:
>
> (a) interview the child;
>
> (b) explain to the child the role of the legal representative;
>
> (c) present evidence to the Court about the best interests, and the views and wishes, of the child;
>
> (d) cross-examine other parties to the proceedings and their witnesses (where appropriate); and
>
> (e) make applications and submissions to the Court for the child."

[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 interests of the child. It is not appropriate for the child's representative to simply express his or her own views to the court.

[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 the 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.