CITATION:	*NB & Ors v SB & Ors* [2020] NTCA 2
PARTIES:	NB, MB and PB v SB, MS, CF, RF and CEO, TERRITORY FAMILIES
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	AP 7 of 2019 (21815404)
DELIVERED:	31 January 2020
HEARING DATE:	17 October 2019
JUDGMENT OF:	Grant CJ, Coulehan and Graham AJJ

CATCHWORDS:

CHILD WELFARE – Protection order – Parental responsibility direction – Best interests of the child

Appeal from decision of the Supreme Court – Whether Local Court erred in the interpretation of "family" – Whether Supreme Court erred in determining the application of "underlying principles" – appeal dismissed.

Care and Protection of Children Act 2007 (NT) s 4, s 5, s 6, s 8, s 10, s 12, s 87, s 89, s 90, s 130, s 140, s 142, s 143
Interpretation Act 1978 (NT) s 24AA, 62A
Supreme Court Act 1979 (NT) s 51, s 54, s 55

Barclay Bros Pty Ltd v Sellers [1994] NTSC 57, *BJW v EWC & Ors* (2018) 335 FLR 372, *CEO, Department of Children and Families v LB & Ors* [2015] NTSC 9, *CSL Australia Pty Ltd v Minister for Infrastructure and Transport (No 3)* [2012] FCA 1261, *Development Consent Authority v*

Phelps (2010) 27 NTLR 174, *Director of Public Prosecutions v Mattiuzzo* (2011) 29 NTLR 189, *Kizon v Palmer* (1997) 72 FCR 409, *Lawrie v Lawler* [2016] NTCA 3, *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31, *MV v CEO Department of Children and Families & Ors* [2012] NTSC 68, *Nguyen v Minister for Immigration & Multicultural Affairs* (1988) 88 FCR 206, *Phelps v Development Consent Authority & Ors* [2012] NTCA 2, *REF and SJP v CEO, Territory Families* [2019] NTSC 4, *RG v DG & Ors* [2013] NTSC 66, *Ross v Munns* [1998] NTSC 33, *S v Australian Crime Commission* (2005) 144 FCR 431, *Tiver Constructions Pty Ltd v Clair* (1992) 110 FLR 239, *WM & FM v CEO Department of Children and Families & Ors* [2012] NTSC 67, *YC v United Kingdom* (2012) 55 EHRR 33, referred to.

REPRESENTATION:

Counsel:

First, Second and Third Appellants:	A Wyvill SC
First Respondent:	M Chalmers
Second Respondent:	M Philip
Third and Fourth Respondents:	A Boe with T Lee
Fifth Respondent:	L Peattie

Solicitors:

First, Second and Third Appellants:	Piper Ellis Lawyers
First Respondent:	Margaret Romeo
Second Respondent:	Katherine Women's Legal Service
Third and Fourth Respondents:	Michael Whelan & Associates
Fifth Respondent:	Solicitor for the Northern Territory

Judgment category classification: B
Number of pages: 97

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

NB & Ors v SB & Ors [2020] NTCA 2
No. AP 7 of 2019 (21815404)

BETWEEN:

NB
First Appellant

MB
Second Appellant

PB
Third Appellant

AND:

SB
First Respondent

MS
Second Respondent

CF
Third Respondent

RF
Fourth Respondent

CEO, TERRITORY FAMILIES
Fifth Respondent

CORAM: GRANT CJ, COULEHAN and GRAHAM AJJ

REASONS FOR JUDGMENT

(Delivered 31 January 2020)

GRANT CJ:

[1] This appeal is from the decision of the Supreme Court delivered on 25 July 2019[1] dismissing an appeal from a decision of the Local Court delivered on 11 April 2019[2]. The order made at first instance was that "Long Term Parental Responsibility for the child until the child reaches 18 years of age is given to the third and fourth respondents".

[2] The third appellant is the biological father of the child (**the biological father**). The first appellant is the biological father's sister (**the aunt**). The second appellant is the aunt's husband (**the uncle**).

[3] The first respondent is the child the subject of the application (**the child**). The second respondent is the biological mother of the child (**the biological mother**). The third and fourth respondents are the child's foster carers (**the foster carers**). The fifth respondent is the Chief Executive Officer (**the CEO**) of the Agency (**Territory Families**) which administers the *Care and Protection of Children Act 2007* (NT) (***CAPOC Act***).

Background

[4] The facts are largely uncontentious. The child was born on 26 July 2013 and is now six years of age. The biological mother is Aboriginal and the biological father is Caucasian. He was cared for variously by

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1 Reasons for Judgment were delivered on 2 August 2018 in *NB & Ors v SB & Ors* [2019] NTSC 61.

2 *Chief Executive Officer of Territory Families v MS and Ors* [2019] NTLC 012.

his biological mother and his biological father in the early years of his life.

[5] In April 2014, the CEO received a report which raised concerns about the child's care involving alcohol misuse, medical neglect and one incident involving domestic violence while living at the Binjari Community approximately 15 minutes outside Katherine. Thereafter the child lived primarily with his biological father.

[6] In November 2015, the biological father was reported to behave in an aggressive manner at the local health clinic and to exhibit symptoms of paranoia. He was taken to hospital for assessment and the child was left in the care of his paternal half-sister. The biological father was hospitalised between November 2015 and January 2016 with a diagnosis of major depressive episode. The biological father had previously been hospitalised on three occasions since 2006 with similar diagnoses. The biological father was subsequently hospitalised between June and July 2016 with a diagnosis of major depression with psychotic features; between July and September 2017 with a diagnosis of severe depressive disorder; and between August and September 2018 with a diagnosis of acute psychosis.

[7] The child came into the care of the CEO on 18 February 2016 because the biological father was unable to care for the child by reason of his serious mental illness and the biological mother could not be located.

The paternal half-sister was unwilling to assume responsibility for the child's care. The child was placed with the foster carers at the time he came into the care of the CEO.

[8] On 19 February 2016, the CEO applied to the Local Court for a protection order under Part 2.3 of the *CAPOC Act*. Territory Families subsequently made efforts to locate the child's extended maternal family to determine whether some kinship care arrangement could be put in place. Those efforts were unsuccessful. No attempt was made at that stage to locate the child's extended paternal family.

[9] As a consequence, on 15 April 2016 the Local Court made a protection order with a short-term parental responsibility direction giving care of the child to the CEO for a period of two years. The placement with the foster carers was extended in accordance with that order to 15 April 2018, and further extended in the context of the proceedings. The application for a short-term parental responsibility order of two years' duration was made and granted in the hope that the biological father's condition would improve so that he could resume care of the child. That did not eventuate. It is unlikely that the biological father will recover sufficiently from his condition to resume care of the child.

[10] The child has been with the foster carers since February 2016. The foster carers were living in Katherine at that time and continue to do so, although at the time the matter came before this Court they were

planning to relocate to Adelaide. At the time of the proceedings before the Local Court the foster mother was 29 years old and the foster father was 31 years old. The foster father is a member of the Royal Australian Air Force and had been posted to the Tindal Air Force Base near Katherine for 12 years. The foster carers had developed extensive connections in the Katherine community. The foster carers' family unit comprised the parents, the child, another Aboriginal child of similar age in their care, and a biological son who was one year old at the time of the hearing in the Local Court. The foster mother gave birth to another child in or about March 2019.

[11] When the child came into the care of the foster carers he showed signs of malnourishment and some developmental delay. By March 2017 it was observed that the child had established a strong relationship with the foster carers, called them "Mum" and "Dad", and interacted with them in a comfortable and safe manner. At that time the biological father advised Territory Families that he did not want the possibility of a kinship placement to be explored given the child's positive relationship with the foster carers. The biological father reiterated that position in June 2017, even in the understanding that the foster carers might at some stage move interstate with the child. While indicating their support for the child's reunification with the biological father if possible, the foster carers expressed a willingness to provide long-term care for the child.

[12] By September 2017 it was recorded that the child demonstrated positive behaviours and emotional well-being attributable to the stable care arrangement, and expressed the wish to stay with the foster carers. During the period of care the foster carers had facilitated fortnightly visits with the biological father, which the child enjoyed. The foster carers also facilitated contact with the biological father and the child's paternal half-sister at the family home, including at Christmas time. Up to that point at least, the biological father continued to express his wish that the child remain in the care of the foster carers on a long-term basis due to the close attachment they had formed.

[13] In January 2018, the biological mother made contact with Territory Families staff in Katherine and advised she had been living in Kununurra and had not seen the child for four years. She advised that she had returned to live in Katherine and wished to have contact with the child, but did not want him to live with her. The biological mother subsequently attended three access visits with the child in February, May and July 2018, but did not attend any further access visits. The biological mother has a chronic problem with alcohol misuse.

[14] In March 2018, the biological father advised Territory Families that he no longer wanted the child to move interstate with the foster carers and that he wanted the child returned to his care. Territory Families did not consider that to be a viable option having regard to the biological father's mental condition.

[15] On 5 April 2018, shortly before the existing order was due to expire, the CEO applied pursuant to s 121 of the *CAPOC Act* for a protection order with a long-term parental responsibility direction until the child turned 18. The foster carers were to be the specified persons under that order and it was at that time envisaged by the CEO, Territory Families, the biological father and the foster carers themselves that the child would remain with the foster carers until he turned 18.

[16] In June 2018, the biological father made contact with the aunt and expressed distress that he had lost care of the child. The aunt and uncle were 45 years old and 47 years old respectively at the time of the hearing before the Local Court. They live in regional Victoria, they have been married for 24 years, and they have four children who range in age from 22 to high school age. The aunt and uncle are tertiary-educated and work as a teacher's aide and primary school teacher respectively. They have had only sporadic contact with the biological father over the years, largely due to the geographical separation and the biological father's mental health issues.

[17] The child has a paternal grandmother who lives approximately 300 km from the aunt and uncle in regional Victoria and who was 83 years old at the time of the hearing before the Local Court. The aunt had been informed by the paternal grandmother at some point in 2016 that the child had been placed in care. For various reasons which presented at

that time, the aunt and uncle did not then make any concerted effort to contact the biological father or to determine the child's circumstances.

[18] In July 2018, the biological father asked the aunt if she was willing to assume parental responsibility for the child. She agreed to contact Territory Families to explore the possibility.

[19] In August 2018, the biological father met with officers from Territory Families and advised that he wanted the aunt to care for the child. It was at that time that Territory Families first became aware of the aunt's existence. The child's case worker made telephone contact with the aunt. The aunt advised that she was aware of the child but had never met him. Territory Families then began assessing the aunt as a potential carer for the child.

[20] The biological father's relationship with the foster carers broke down from at or about that time. That culminated in a restraining order against the biological father and his readmission to hospital with a diagnosis of acute psychosis.

[21] In September 2018, the aunt and uncle travelled to the Northern Territory, met with the child and discussed his future care with the biological father and officers from Territory Families. Up to that point in time the foster carers had been unaware of the existence of the aunt and uncle. The foster carers facilitated the child's engagement with the aunt and uncle during the course of their visit to Katherine, and

thereafter they encouraged the child to engage in weekly Skype sessions with the aunt and uncle.

[22] On 4 October 2018, the CEO amended the application which had been made in April 2018 to seek a protection order with a short-term parental responsibility direction giving care of the child to the CEO for a period of two years during which it was proposed that the child would transition into the care of the aunt and uncle in Victoria. The foster carers contested that application, and sought a protection order with a long-term parental responsibility direction giving the care of the child to them until he turned 18.

[23] In December 2018, the aunt and uncle and their four children visited Katherine and had extended contact with the child over the course of 12 days. They continued to maintain contact with the child by Skype calls after their return to Victoria.

[24] On 28 January 2019, the child met with his court-appointed legal representative. The representative gave a brief report of the wishes of the child which stated:

> The young boy was quite shy however he was aware that his Foster Carers and his Paternal Aunt and Uncle each wanted him to live with them. The young boy was clear in saying he wants to stay with his carers who he considers to be his mum and dad.
>
> The young boy referred to his biological mother as "Mummy S" and his biological father as "Daddy P" and he does not wish to live with either of them.

[25] Both the biological father and the biological mother want the child to be cared for by the aunt and uncle. The biological father has indicated his intention to live with his mother in the event that care is granted to the aunt and uncle.

[26] The child has three biological half-siblings.

[27] The paternal half-sister to whom reference has already been made was 23 years old at the time of the hearing before the Local Court. The paternal half-sister lived with the paternal grandmother in Victoria until she was about four years of age, before returning to live with relatives in the Northern Territory. She knew the aunt and uncle from her childhood, but there had been no further contact between them until the aunt and uncle sought caring responsibilities for the child. As described above, the paternal half-sister had some involvement in the care of the child in his very early years but is unwilling to assume care of the child. There was some evidence before the court at first instance to suggest that she has attended residential rehabilitation on a number of occasions to address issues with alcohol.

[28] The child has a maternal half-sister who was 19 years old at the time of the hearing before the Local Court. There was no evidence of any contact between her and the child. There is also a maternal half-brother who was 12 years old at the time of the hearing before the Local Court and living at the Binjari Community. The foster carers

arranged for the child to meet the half-brother and his family on one occasion, but attempts by the foster carers to arrange further visits were unsuccessful.

[29] The child has a maternal grandmother who lives near Timber Creek and was 60 years old at the time of the hearing before the Local Court. In November 2017 she advised Territory Families that she was not willing to be assessed as a carer for the child. She has not otherwise sought to initiate contact with the child.

The decision at first instance

[30] The contested applications proceeded to hearing before the Local Court over four days in February and March 2019. In the reasons delivered on 11 April 2019, the Court drew a number of conclusions concerning the respective positions of the foster carers and the aunt and uncle.

[31] The Local Court found that the aunt and uncle presented as well-grounded, caring, intelligent, educated and family-oriented people. Over the period the child had been in care prior to September 2018 the aunt and uncle had not made any attempt to monitor the child's welfare or establish any relationship with him, albeit for valid reasons. During that time, the child developed strong emotional attachments to the foster care family. Although the aunt and uncle had subsequently initiated a relationship with the child, the Local Court was of the view that he had not developed a parental or familial bond to them. While

the child might develop an attachment of that sort to the aunt and uncle, there remained a risk that if they were granted care of the child that the attachment would not progress and deepen as hoped.

[32] The Local Court received evidence from the aunt. In that evidence she expressed the wish that she had "stepped into the situation earlier". She described the factors which prevented them from doing so when they first became aware that the child had been taken into care, and stated that their situation was now different. If given caring responsibility for the child, the aunt and uncle plan for him to attend the school where they work and which their younger children still attend, and to encourage and support him to play guitar, attend the local church, join the gymnastics club and involve himself in other sporting activities. The aunt deposed to their means and ability to support and raise another child, their successful parenting of their four biological children, and the importance of their "blood" connection to the child. Placement with them would afford the child opportunity to spend time with his paternal grandmother and the other relatives on the biological father's side of the family who are resident in Victoria.

[33] So far as contact with extended family is concerned, the aunt maintained that they were best placed to ensure that the child had contact with his Aboriginal family by reason of their relationship with the biological father and paternal half-sister. In that respect the Local Court found that the aunt and uncle had no connection to Katherine

specifically or the Northern Territory generally, and would be reliant on the biological father to ensure that the child established and maintained contact with his Aboriginal family.

[34] In relation to the foster carers, the Local Court found that they had been careful to include the child's biological father and paternal half-sister in the child's life, despite the difficulties that presented in doing so. They had also worked with Territory Families to ensure that the child saw his mother and had the opportunity for contact with his extended Aboriginal family. There was obviously a limit to which they could initiate that contact, and the child's care plans allocated responsibility for arranging "cultural identity" contact to the biological father and mother, assisted by an Aboriginal caseworker. As already described, there had been a limited response to attempts to facilitate contact with the child's Aboriginal family.

[35] The Local Court received evidence from the foster mother in which she described the child's integral place in their family and his development since the time he came into their care. That evidence described the educational, sporting and other recreational activities undertaken by the child as part of the family. The foster mother deposed to her family's awareness of the child's Indigenous heritage, and their responsibility to ensure that he developed and maintained contact with his biological family and an understanding of his cultural background.

[36] The Local Court also received evidence from the foster father in which he described the deep bond they had established with the child. The foster father also described the child's integration into the family, and the educational and recreational opportunities which the child had enjoyed. The foster father said that if the child moved with them to South Australia the RAAF Indigenous Liaison Officer there would facilitate the family's attendance at Indigenous community events and outreach programs so that the child could maintain contact with Aboriginal culture. The foster father expressed the fear that the child would be deeply traumatised if he was removed from their family because of the mutual attachments which they had developed.

[37] The Local Court found that the foster carers' commitment to the child's well-being was demonstrated by the exceptional care they had provided to him and their mutual attachment. That commitment was also demonstrated by the fact that they had twice delayed the foster father's promotional transfer to South Australia pending the finalisation of the care proceedings.

[38] The Local Court also received expert evidence concerning the application.

[39] The first body of expert evidence came from Dr Kerri Thomas, a Clinical Psychologist who had been engaged by Territory Families to conduct a parenting assessment in late-July 2018. At the time Dr

Thomas prepared a report she was unable to interview the biological father as he was hospitalised with an acute psychotic condition, unable to interview the biological mother as she did not present for assessment, and unable to interview the paternal half-sister as she was then incarcerated. She was aware, however, that the biological father no longer supported the child remaining with the foster carers in any long-term arrangement, and that the biological mother did not support the child remaining with the foster carers because they were not Aboriginal persons.

[40] For the purpose of preparing her assessment, Dr Thomas interviewed the foster carers and the child's case worker, and observed the child in the home environment. Her conclusions in that respect may be summarised as follows:

(a) the foster mother presented as a stable, strong, resilient, caring and loving woman who enjoyed a close support network;

(b) the foster father presented as a genuine, calm, down-to-earth and friendly man who values and prioritises his family, and whose interactions with the foster mother and the three children were gentle, supporting and loving;

(c) the foster carers were perceptive and had insight into the child's emotional state, had proactively prepared the child for visits with his family, and had nurtured his emotional health and supported his emotional resilience during periods of uncertainty;

(d) the child had a “great relationship” with the foster carers and his foster siblings, and the home was a loving and nurturing environment in which he was thriving on a physical, emotional and psychological level;

(e) secure childhood attachment is predictive of superior emotional regulation, confidence in navigating different environments and the development of empathy, and the child’s secure attachment to the foster carers was the greatest predictor of his well-being going into the future;

(f) a child’s best interests lie in the preservation of attachment ties and repeated ruptures of such ties constitute severe trauma;

(g) it would be detrimental and traumatic if the child was to be removed from the foster carers, and it was important for the child’s well-being that permanency, stability and continuity of care be the principal considerations in his long-term care arrangements;

(h) while kinship care has many advantages, including cultural considerations, the likelihood of more frequent contact with parents and a tendency to facilitate eventual reunification, a kinship placement with a relative unknown to the child would not be in his best interests;

(i) reunification with one or other of the child’s biological parents was not a reasonable goal as neither the biological father nor the

biological mother had demonstrated an ability to provide consistent, secure and nurturing care over any extended period;

(j) a long-term parenting order granting parenting responsibility to the foster carers until the age of 18 years was a permanent core arrangement which would provide the best outcome for the child; and

(k) the foster carers understood the importance of keeping the child connected to his biological parents, culture and country.

[41] The second body of expert evidence came from Ms Louise McKenna, who is also a psychologist. For the purpose of preparing her assessment Ms McKenna interviewed the aunt and uncle. They recognised that moving the child from the foster carers would represent a significant loss, but expressed the view that the move would be in the child's best interests in the longer term because he would be raised by his biological family and would have an enhanced ability to maintain contact with his biological parents and siblings. The biological father expressed a similar view during the course of interview. The aunt and uncle described themselves as loving, patient, child-focused and having an extensive support network through their Christian faith and school community.

[42] Ms McKenna also interviewed the foster carers and observed the child in the home environment. She found that the foster carers considered the child to be a member of their family, and that the carers' extended

family had also embraced the child. In the home environment, the child was observed to be busy, engaged, tactile and comfortable with his family members. He referred to the foster carers as "Mum" and "Dad" and the interactions between them were spontaneous, warm and inclusive. Ms McKenna accepted that the foster carers were the child's "emotional family".

[43] Against that background, Ms McKenna's conclusions may be summarised as follows:

(a) the child's long-term interests would be best served if he was placed in the care of the aunt and uncle;

(b) biological family was important to the development of a child's personal identity and sense of connection, and a disconnection with biological family would likely result in negative consequences later in the child's life;

(c) the aunt and uncle were demonstrably competent caregivers, and placement with them would assist the child to develop relationships with his paternal grandmother and extended paternal family;

(d) the aunt and uncle would be better placed to ensure the child maintained contact with his Indigenous family and cultural heritage;

(e) while the foster carers had provided a high standard of care and demonstrated commitment to the child, they would not be able to

maintain and support regular contact with the child's Aboriginal family to the same extent as the aunt and uncle, principally because of opposition by the biological father and mother to the placement;

(f) if removed from the foster carers the child would experience distress in the short term and his behaviour would likely regress, but the aunt and uncle had the ability to support the child and reduce the levels of distress experienced; and

(g) because the child had formed a "secure attachment template" to the biological father and mother during the critical period for the development of attachment (six months to two years of age), he had an enhanced ability to transition and attach securely to the aunt and uncle.

[44] That last conclusion was subject to particular attention by the Local Court. As the court observed, that conclusion was based largely on information provided by the biological father, and failed to take proper account of the fact that Territory Families had received six notifications of concern about the child's circumstances before he was taken into care, and the fact that the child's physical state when taken into care was one of neglect and malnourishment. The court concluded that the child's attachment template was likely to be less robust than assessed by Ms McKenna, and that the risks associated with

transitioning him to a new family situation were consistent with the evidence and opinions of Dr Thomas.

[45] By the time the matter came before the Local Court, Dr Thomas had considered the evidence of the aunt and uncle and the report prepared by Ms McKenna. Dr Thomas expressed surprise that she and Ms McKenna had reached very different conclusions regarding the child's care. She remained of the view that removing the child from the foster carers would cause severe trauma and detriment to the child's physical and mental health given the nature of the attachment and the extended period over which it had developed. In drawing that conclusion, Dr Thomas also had regard to the close relationships the child had formed with his foster siblings. A transition to the aunt and uncle would disrupt the child's secure attachment to his foster family, particularly in circumstances where the child did not at that point have a secure attachment to the aunt and uncle which had developed over a period of time.

[46] After describing that expert evidence, the Local Court went on to consider the statutory regime.

[47] The court found the biological mother and father were the "parents" of the child within the meaning of ss 17 and 153 of the *CAPOC Act*; and the paternal and maternal grandmothers, the half siblings, and the aunt

and uncle and their children were "relatives" of the child within the meaning of s 18 of the *CAPOC Act*.

[48] The court then went on to consider the definition of "family" in s 19 the *CAPOC Act*. That section provides:

> **Family of child**
>
> The family of a child includes:
>
> (a) the relatives of the child; and
>
> (b) the members of the extended family of the child in accordance with:
>
> (i) any customary law or tradition applicable to the child; or
>
> (ii) any contemporary custom or practice; and
>
> (c) anyone who is closely associated with the child or another family member of the child.

[49] The court observed that the constituents of a child's family were to be determined at the time the proceedings were before the Court, rather than the time at which the child came into the care of the CEO; that on a literal interpretation the definition of "family" appeared sufficiently broad to accommodate the foster carers; and that result would not be inconsistent with the objects and principles of the *CAPOC Act*. At that point in the reasons, the principal significance attributed to that finding was that a placement with the foster carers would be consistent with the purpose of s 8(4) of the *CAPOC Act* concerning the role of the

family[3], and that greater weight would not necessarily be accorded to the evidence, wishes and claims of the biological family[4].

[50] The Local Court then went on to consider the application of the Aboriginal child placement principles set out in s 12 of the *CAPOC Act*. Those principles require that an Aboriginal child should, as far as practicable, be placed, in order of priority, with a member of the child's family, with an Aboriginal person in the child's community, with any other Aboriginal person, or another person sensitive to the child's cultural needs. The Local Court made a number of findings in the application of those principles. First, the CEO is required to have regard to the principles in any decision involving a child, but they must be read subject to s 10(1) of the *CAPOC Act*, which dictates that the best interests of the child are the paramount concern.[5] Secondly, the application of the principle accords placement priority to a member of the child's family, and Aboriginal family does not take priority over non-Aboriginal family. Thirdly, priority was to be given to biological family over non-biological family.

[51] The Local Court then went on to consider the matters specified in s 10 of the *CAPOC Act*, which it considered bound to take into account in determining the best interests of the child. In that assessment, the

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3 *Chief Executive Officer of Territory Families v MS and Ors* [2019] NTLC 012 at [125]-[126].

4 *Chief Executive Officer of Territory Families v MS and Ors* [2019] NTLC 012 at [127]-[128].

5 Following the decision of the Supreme Court in *REF and SJP v CEO, Territory Families* [2019] NTSC 4 at [27].

court considered that both the foster carers and the aunt and uncle had the capacity and willingness to care for the child; would provide permanency in the child's future living arrangements; would provide nurturing relationships with the child; and had the capacity to meet the child's physical, emotional, intellectual, spiritual, developmental and educational needs. The court found that the principal point of distinction between the two potential arrangements was that breaking the existing familial attachment to the foster carers would be traumatic for the child, and carried with it a real and not a remote risk of detrimental mental and physical outcomes for him. The court then expressed its decision in the following terms:[6]

> This has been a difficult and sometimes emotional matter. I have carefully considered the evidence. I have considered the matters required to be considered in assessing what is in the best interests of the child. I have considered and given weight to the Aboriginal Child Placement Policy. I have considered and given weight to the wishes of the parents, but gave extra weight to the wishes of [the biological father]. I have considered the wishes of the Paternal Aunt and Uncle and the Foster Carers. I have evaluated the evidence of the experts. Having considered and weighed all those matters, I am firmly of the view that it is in the best interests of this young boy to remain with the Foster Carers.
>
> Over a three year period, more than half this young boy's life, the Foster Carers have proven their ability to prioritise and meet the needs of the young boy. They have placed the young boy's best interests ahead of other choices which would have benefited the Foster Father's career and the family's finances. They have provided him with a loving and stable home. They have an established, healthy, nurturing parental relationship with the young boy. Their relationship with him is the most significant relationship in his life and in my view the stability of this relationship is central and critical to his future well-being.

6 *Chief Executive Officer of Territory Families v MS and Ors* [2019] NTLC 012 at [138]-[144].

In addition, this decision eliminates the potential risks to [the] young boy's psychological and physical well-being arising from the trauma he would otherwise be exposed to if his secure attachment to the Foster Carers was weakened or broken. The decision eliminates the risk concerning the young boy's capacity to reattach. I consider these risks and the associated potential for harm to be real and not remote, particularly in light of the evidence of some instability in his care before living with the Foster Carers.

I am satisfied that the Foster Carers have a good understanding of the significance of the young boy's Aboriginality, and will encourage and foster the young boy's engagement with his Aboriginal family and culture in a genuine and meaningful way. I am persuaded that the Foster Carers will work with [the biological father], [the paternal half-sister] and other family members to promote such connections and opportunities.

This decision in no way diminishes the role of the young boy's biological family. Relatives have an important part to play in a child's life. Although their role will not encompass parental responsibility, it will involve a continuing commitment to strengthening their existing relationships with him. I encourage the biological family not to be disheartened by the outcome of these proceedings or to feel devalued. I consider that the young boy needs to know his biological family, to know that he is part of their lives, to know that he is loved and valued by them, and to know that they are always there for him. That knowledge and those feelings will significantly contribute to his understanding of who he is, his sense of security and belonging, and his overall well-being. Based on the evidence in these proceedings, I am confident that the young boy's biological family will continue to play a significant part in this young boy's life.

This decision does not turn on the definition of family. Even if my interpretation of family is wrong, in my view the best interests of the young boy are that he stays with the Foster Carers. (Emphasis added)

Finally, I find that it is in the best interests of the young boy that he have permanency and stability in his familial relationships. I consider that is best achieved by granting long-term parental responsibility to the Foster Carers. In coming to that conclusion I am satisfied that giving long-term parental responsibility to the Foster Carers is the best means of safeguarding the young boy's well-being and there is no one else who is better-suited to be given that responsibility [*CAPOC Act*, s 130(2)].

[52] In accordance with the decision, on 18 April 2019 the Local Court ordered that:

> Long Term Parental Responsibility for the child until the child reaches 18 years of age is given to the third and fourth respondents.

The decision at intermediate level

[53] The aunt, uncle and biological father brought an appeal against that determination pursuant to s 140 of the *CAPOC Act*. A notice of appeal filed under that section must specify the grounds for the appeal and the facts on which the appeal is based.[7] An appeal against an order or decision of this nature must be decided on the evidence before the Local Court when the order or decision was made unless the Supreme Court otherwise directs.[8] The Supreme Court may confirm the original decision, vary the original decision, set aside the original decision, or set aside the original decision and replace it with a new order or decision.[9] The better view is that an appeal of that nature is not restricted to a question of law by s 19 of the *Local Court (Civil Procedure) Act 1989* (NT), and no party to the appeal submitted otherwise. That being so, and although appellate intervention is conditioned on the establishment of error on the part of the Local Court, the Supreme Court has power to substitute findings made on questions of both fact and law in reaching its own conclusion on the

7 *CAPOC Act*, s 140.

8 *CAPOC Act*, s 142(2).

9 *CAPOC Act*, s 143.

matter.[10] The Supreme Court is not limited to setting aside the decision of the Local Court in the event that some error is found, and is not precluded from dismissing the appeal based on its own assessment of the evidence below.[11]

[54] The grounds of appeal pressed by the appellants at intermediate level may be summarised as follows:

(a) the Local Court erred in concluding that the foster carers were members of the child's family within the meaning of s 19(c) of the *CAPOC Act*;

(b) the Local Court erred in making the order without first considering and concluding that there was no other reasonable way to safeguard the well-being of the child for the purposes of s 8(3) of the *CAPOC Act*;

(c) the Local Court erred in making the order without first considering and providing for the encouragement and support of contact between the child and his family for the purposes of s 8(4)(a) of the *CAPOC Act*;

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10 See *CEO, Department of Children and Families v LB & Ors*, [2015] NTSC 9.

11 So much is apparent from the conferral of power to receive fresh evidence and the power to set aside the original decision and replace it with a new order or decision. The decision in *WM & FM v CEO Department of Children and Families & Ors* [2012] NTSC 67 at [29] it is to no different effect. In that case it was necessary for the Supreme Court to receive further evidence in order to make a determination as there was no evidence before the Local Court in relation to the views and wishes of the children.-The determinations in *BJW v EWC & Ors* (2018) 335 FLR 372 at [172] and *RG v DG & Ors* [2013] NTSC 66 at [16] involved the Supreme Court allowing the appeal on the basis of error and making a different order based on its own view of the evidence below. It is also open to the Supreme Court to find some error of fact or law on the part of the Local Court, but to confirm the original decision based on the evidence below.

(d) the Local Court erred in making the order without first considering that as far as practicable the child should be placed with a member of his family in accordance with s 12(3)(a) of the *CAPOC Act*;

(e) the Local Court erred in concluding that pursuant to ss 10(1) and (2) of the *CAPOC Act* the best interests of the child were for him to be placed in the care of the foster carers; and

(f) the Local Court erred making a permanent care order pursuant to s 137A of the *CAPOC Act* in circumstances where the preconditions to the making of an order of that nature had not been fulfilled and the Court had no power to do so.

[55] On 25 July 2019 the Court at intermediate level confirmed the decision of the Local Court. The Reasons for Judgment were published on 2 August 2019.

[56] The substantive part of those Reasons commences with a consideration of the matters to which a court is required to have regard in the exercise of its powers and in making orders for children under Part 2.3 of the *CAPOC Act* (with particular reference to ss 90 and 130), and the extent to which a court is bound to the application of the principles underlying the Act specified in Part 1.3 of the *CAPOC Act*. That examination was in response to those grounds of appeal which asserted error on the part of the Local Court in failing to consider and apply those principles.

[57] At the risk of some disservice to the careful and extensive analysis of the matter undertaken by the Court at intermediate level, that examination may be summarised as follows:

(a) Part 2.3 of the *CAPOC Act* creates a judicial process for safeguarding the well-being of children who are or might be in need of protection.[12] In doing so it establishes the family matters division of the Local Court to hear and determine matters under the *CAPOC Act* and provides for that court's powers to make various orders for children.[13]

(b) Section 90 of the *CAPOC Act* provides that in the conduct of those proceedings the Local Court must regard the best interests of the child as paramount, and must give priority to the rights of the child in the case of conflict with the rights of an adult.[14]

(c) Division 4 of Part 2.3 of the *CAPOC Act* specifies the procedures and considerations which the Local Court must take into account when determining whether to make one of the four kinds of orders available. Subdivision 3 deals with protection orders of the type under consideration in this appeal, and s 130 of the *CAPOC Act* states the matters which the Local Court must consider in making its decision.[15]

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12 *CAPOC Act*, s 87.

13 *CAPOC Act*, s 89.

14 *NB & Ors v SB & Ors* [2019] NTSC 61 at [10].

15 *NB & Ors v SB & Ors* [2019] NTSC 61 at [11]-[14].

(d) In granting a person who is not a parent of the child parental responsibility under a long-term parental responsibility direction, the Local Court must take into account, among other things, "the needs of the child for long-term stability and security"[16]; and cannot make the order unless satisfied that it "is the best means of safeguarding the child's well-being" and "there is no one else who is better suited to be given the responsibility"[17].

(e) Neither s 90 nor s 130, nor any provision in Part 2.3, makes reference to the principles specified in Part 1.3 of the *CAPOC Act* (which comprises ss 6 to 12).[18]

(f) The reference in s 6 to "anyone exercising a power or performing a function under this Act", and the attendant requirement that such a person uphold the principles as far as practicable, would not commonly be understood to include or bind a court exercising judicial power. While it might extend to the executive of a body politic, courts are independent of the body politic.[19]

(g) Section 10(1) is in almost identical terms to s 90(1), except that the latter provision is directed expressly to court proceedings and the exercise of judicial power while the latter provision is not, and

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16 *CAPOC Act*, s 130(1)(c)(iii).

17 *CAPOC Act*, s 130(2).

18 *NB & Ors v SB & Ors* [2019] NTSC 61 at [16].

19 *NB & Ors v SB & Ors* [2019] NTSC 61 at [16].

the mandatory requirement under the latter provision is not expressly subjected to the considerations listed in s 10(2).[20]

(h) Similarly, while parts of s 130 replicate the provisions of s 10(2), other parts of that former section create different tests and criteria to the principles specified in Part 1.3, suggesting a legislative intention to enact a discrete regime governing and informing the exercise of the Local Court's power.[21]

(i) Even if Part 2.3 does not "cover the field" in terms of the matters informing the exercise of the Local Court's power, it must by reason of its specificity and mandatory language prevail in the event of a conflict with principles expressed in directory and qualified terms in Part 1.3.[22]

[58] After exploring the operation of ss 6, 8, 10 and 12 of the *CAPOC Act*, the Court at intermediate level concluded in that respect:[23]

> Having considered all of the above matters, and in order to ensure that the underlying principles of the Act are not interpreted in a way which conflicts with the mandatory provisions of s 90 and s 130 of the Act, it seems to me that the Local Court may have regard to the underlying principles of the Act in accordance with s 130(1)(d) of the Act. That is, to the extent the Local Court considers those principles to be relevant and subject to what is stated in s 90 and s 130(1)(a) to (c) and s 130(2) of the Act.
>
> While the underlying principles of the Act are invariably likely to be relevant to the Local Court's consideration, and should be given due weight because the best interests of the child cannot be

20 *NB & Ors v SB & Ors* [2019] NTSC 61 at [19].

21 *NB & Ors v SB & Ors* [2019] NTSC 61 at [20].

22 *NB & Ors v SB & Ors* [2019] NTSC 61 at [21].

23 *NB & Ors v SB & Ors* [2019] NTSC 61 at [30]-[31].

> determined in the abstract [*AMS v AIF* (1999) 199 CLR 160 at [144]] and the legislature has specified a number of principles which provide some guidance, the provisions of s 6(2), s 90 and s 130 of the Act mean that in a case involving parental responsibility for an Aboriginal child under a protection order: (a) if it is not practicable to uphold the underlying principles of the Act they are to be given little or no weight; (b) the Local Court must regard the best interests of the child to whom the proceeding relates as paramount; (c) the Local Court must consider whether there is a person other than the family member who is better suited to be given the parental responsibility for the child; and (d) parental responsibility for the child under a long-term parental responsibility direction must not be given to a family member unless the Local Court is satisfied (i) giving the responsibility to the family member is the best means of safeguarding the child's wellbeing, and (ii) there is no one else who is better suited to be given the responsibility.

[59] The Court at intermediate level then went on to determine that the Local Court fell into error in finding that the foster carers were members of the child's "family" within the meaning of s 19 of the *CAPOC Act*. That determination was based on the reasoning that in the context of the *CAPOC Act* the concept of "family" connoted a relationship with a significant level of permanency which could not extend to a relationship which was the product of a placement by the CEO under a temporary protection order which could be changed at any time.

[60] Despite that finding of error, the Court at intermediate level found further that the Local Court had given proper attention to the principles expressed in s 8(4) of the *CAPOC Act*, and particularly the principle that if a child is removed from the child's family the child should as far as practicable eventually be returned to the family. In those

considerations, the Local Court did not proceed on the basis that the foster carers were family for that purpose. The Court at intermediate level also found that the Local Court gave consideration to the Aboriginal child placement principles in s 12 of the *CAPOC Act*, and correctly determined that they were subject to the paramountcy of the best interests of the child. So far as the expert evidence was concerned, the Court at intermediate level found that the Local Court had correctly rejected the evidence of Ms McKenna, and that the findings made by reference to the expert evidence were clearly supported by that evidence.

[61] The Court at intermediate level ultimately concluded:[24]

> Other than making the order made by the Local Court, there is no other reasonable way to safeguard the wellbeing of the child [*CAPOC Act*, s 8(3)]. As far as practicable, contact between the child and the child's family will be encouraged and supported [*CAPOC Act*, s 8(4)]. It is impracticable and not in the best interests of the child to eventually return the child to the child's family [*CAPOC Act*, s 8(4)]. The child's parents are incapable of caring for the child. The child's Maternal Grandmother is unable to care for the child and the child's extended Aboriginal family have shown no real interest in the child. It will be very detrimental to the child's wellbeing to place the child in the care of the first and second appellants and it is impracticable to attempt to do so. The child has been placed with carers who are not of Aboriginal descent, but are sensitive to child's needs and capable of promoting the child's ongoing affiliation with the culture of the child's community and, when possible, contact with the child's family [*CAPOC Act*, s 12(4)]. It was not practicable and not in the best interests of the child to place the child with a member of the child's Aboriginal family and it would harm the child's wellbeing to place the child with the first and second respondents [*CAPOC*

24 *NB & Ors v SB & Ors* [2019] NTSC 61 at [114]-[115].

> *Act*, s 12(3)]. The Local Court's order was in the best interest of the child [*CAPOC Act*, s 10].
>
> Despite making an error in the interpretation of s 19(c) of the Act, it is apparent from a careful reading of the Local Court Judge's Reasons for Judgment that her Honour complied with the provisions of s 90 and s 130 of the Act and gave careful consideration to the factors raised by the principles set out in s 8, s 10, and s 12 of the Act in this case. [The grounds asserting a failure to apply ss 8(3), 8(4), 10(1), 10(2) and 12(3)] cannot be sustained and ground 1 of the appeal was not a vitiating error. Neither can [the ground asserting an invalid order pursuant to s 137A] be sustained. It is clear that her Honour made an order under s 128 of the Act specifying a long-term parental responsibility direction giving parental responsibility for the child to specified persons which ends before the child turns 18 years of age.

[62] Whatever argument might be made concerning the possibility that the error of law made by the Local Court affected its decision, it is clear that the Court at intermediate level concluded on the basis of its own assessment of the facts and law that the order by the Local Court was properly made.

The appeal to this Court

[63] The appeal to this Court is brought pursuant to s 51 of the *Supreme Court Act 1979* (NT). As the right of appeal from the Local Court to the Supreme Court was not limited to a question of law, the appeal to this Court is similarly not confined to a question of law.[25] In those circumstances, the section confers a right of appeal on fact and law on the evidence received in the proceedings out of which the appeal arose,

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25 Cf *Tiver Constructions Pty Ltd v Clair* (1992) 110 FLR 239 at 255; *Development Consent Authority v Phelps* (2010) 27 NTLR 174 at [9].

with power to receive further evidence.[26] The dispositive powers of this Court are at least as wide as the powers of the Supreme Court on the appeal to it.[27]

[64] However, the right of appeal is subject to two qualifications. First, when considering an appeal from the decision of the Supreme Court, this Court is concerned with whether the Supreme Court committed error. It is not concerned with whether the Local Court committed error, although a failure by the Supreme Court to rectify an error committed by the Local Court may constitute error on the part of the Supreme Court. This will depend upon whether the original error vitiated the determination at first instance[28] and, if so, whether there was error on the part of the Supreme Court in determining to confirm the original decision.[29] Secondly, s 51 of the *Supreme Court Act* does not permit an appeal against the reasons for the decision of the Supreme Court. It permits an appeal against the correctness of the order or judgment made by the Supreme Court, although that challenge may involve attacking the reasons given for the order or judgment.[30] The order made by the Court in this case was to dismiss the appeal and

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26 *Barclay Bros Pty Ltd v Sellers* [1994] NTSC 57 at [3]-[4]; *Supreme Court Act*, s 54.

27 *Ross v Munns* [1998] NTSC 33; *Supreme Court Act*, s 55.

28 *Development Consent Authority v Phelps* (2010) 27 NTLR 174 at [9]-[11]; *Phelps v Development Consent Authority & Ors* [2012] NTCA 2 at [7].

29 Noting the breadth of the dispositive powers of the Supreme Court under the *CAPOC Act* (s 143), and that, as already stated above, although appellant intervention is conditioned on the establishment of error on the part of the Local Court, the Supreme Court has power to substitute findings made on questions of both fact and law.

30 *Lawrie v Lawler* [2016] NTCA 3 at [49].

confirm the decision of the Local Court. In order to succeed in this appeal the appellants must establish that order was wrong.

[65] The grounds of appeal pressed are that the Court at intermediate level erred in concluding:

(a) that the Local Court Judge was not a person "exercising a power or performing a function under this Act" within the meaning of s 6(2) of the *CAPOC Act*;

(b) that s 90 was inconsistent with the application of Part 1.3 of the *CAPOC Act* to the exercise of the Local Court's jurisdiction;

(c) that there was a conflict between Part 1.3 and Part 2.3 of the *CAPOC Act*;

(d) that the principles contained in ss 7 to 12 of the *CAPOC Act* are only "guides to action" that may be given "little or no weight";

(e) that an order for the purpose or with the object of placing a child with family in the long term could only be made under s 130 of the *CAPOC Act* and, therefore, only if it was found that there was no one else better suited to be given the responsibility;

(f) that the Local Court had decided the matter in accordance with the *CAPOC Act*; and

(g) that there was no real possibility that the Local Court's error in relation to the meaning of "family" had affected the decision to make the order.

The interaction between Part 1.3 and Part 2.3

[66] The first four grounds of appeal all involve in one way or another the interaction between Part 1.3 and Part 2.3 of the *CAPOC Act*. The starting point for the consideration of that interaction is s 4 of the *CAPOC Act*, which sets out the objects of the Act in the following terms:

> The objects of this Act are:
>
> (a) to promote the wellbeing of children, including:
>
> (i) to protect children from harm and exploitation; and
>
> (ii) to maximise the opportunities for children to realise their full potential; and
>
> (b) to assist families to achieve the object in paragraph (a); and
>
> (c) to ensure anyone having responsibilities for children has regard to the objects in paragraphs (a) and (b) in fulfilling those responsibilities.

[67] That those objects are intended to inform decisions made under the legislation by both the executive and the Local Court is apparent from the fact that s 5 of the *CAPOC Act* makes reference to the achievement of those objects in the exercise of powers by the Minister, the CEO and other officers under Parts 2.1 and 2.2, and the powers of the Local Court to make orders under Parts 2.3 and 2.4. There is, of course, a limitation on the extent to which an objects clause can govern the interpretation of a provision of the Act in which it appears. An objects clause cannot cut down the plain and unambiguous meaning of a provision if that meaning in its textual and contextual surroundings is

clear.[31] While it may be used to resolve uncertainty or ambiguity, it cannot control clear statutory language or command a particular outcome in the exercise of discretionary power.[32]

[68] The reference to the exercise of powers in s 5 is then picked up in s 6 of the *CAPOC Act*, which provides:

> **Principles**
>
> (1) The underlying principles of this Act are set out in sections 7 to 12.
>
> (2) Anyone exercising a power or performing a function under this Act must, as far as practicable, uphold those principles.
>
> (3) However, those principles do not affect the operation of any law in force in the Territory.

[69] While it may be accepted that the formulation "[a]nyone" would not ordinarily be deployed with reference to a court or the exercise of judicial power, the reference to the exercise of powers by the Local Court in the immediately preceding section suggests a legislative intention to do so. Counsel for the first respondent drew attention to a number of authorities in that respect. In *Kizon v Palmer* the Full Court of the Federal Court stated:[33]

> … The word "person" does not, in ordinary English usage, refer to a court. A court is not an individual. A court is not a body politic. The Australian Constitution does not make the High Court of Australia a body corporate and the *Federal Court of Australia Act*

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31 *S v Australian Crime Commission* (2005) 144 FCR 431 at [22]; *Director of Public Prosecutions v Mattiuzzo* (2011) 29 NTLR 189 at [14].

32 *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31 at 78*; CSL Australia Pty Ltd v Minister for Infrastructure and Transport (No 3)* [2012] FCA 1261 at [99].

33 *Kizon v Palmer* (1997) 72 FCR 409 at 430-431 per Lindgren J (Jenkinson and Kiefel JJ concurring).

> 1976 does not make this Court a body corporate. …. In my view, no intention appears in the TI Act that the word "person" is to import a reference to a court.
>
> ….
>
> Authority also favours the view that the word "person" does not encompass a reference to a court. In *Canadian Pacific Tobacco Co Ltd v Stapleton* (1952) 86 CLR 1, Dixon CJ said, with respect to the prohibition in sub-s 16 (2) of the *Income Tax and Social Services Contribution Assessment Act* 1936 against officers' divulging or communicating certain information "to any person", that courts "would hardly be called persons" (at 6). This view was followed by single judges in Queensland in *Stapleton v Wilson* [1956] QWN 48 and *Geraghty v Woodforth* [1957] QWN 41, and in Victoria in *Cowan v Stanhill Estates Pty Ltd* [1966] VR 604.
>
> ….
>
> In *Hilton v Wells* (1985) 157 CLR 57, the majority (Gibbs CJ, Wilson and Dawson JJ - at 67) and the minority (Mason, Deane JJ - at 87) thought that the similar prohibition in the then sub-s 7 (4) of the *Telecommunications (Interception) Act* against divulging or communicating "to another person" did not catch the giving of the information in question in evidence to a court. …
>
> ….
>
> But for the possible exception of the obiter dictum of Jacobs J in *Miller v Miller*, supra, the authorities to which I have referred all favour the view that at least in contexts such as the present one, a court is not a "person".

[70] That discussion reflects the reservations expressed by the Court at intermediate level in this matter concerning the application to courts of statutory directives to “persons”, or some similar formulation. However, the process of interpretation in *Kizon v Palmer* was undertaken in a particular context and the discussion limits the conclusion reached to that context.

[71] The question whether the Refugee Review Tribunal was a “person” within the meaning of s 481 of the *Migration Act* was addressed in

Nguyen v Minister for Immigration & Multicultural Affairs with similar emphasis on the particular statutory context:[34]

> The word "person" is commonly used in statutes to denote a range of persons including an individual and a body corporate. Section 22(1)(a) of the *Acts Interpretation Act 1901* (Cth) provides that in any Act, unless the contrary intention appears, expressions used to denote persons include a body politic or corporate as well as an individual. The RRT which is established by s 457 of the Act, consists of a number of natural persons (s 458) and does not fall within the definition in s 22(1)(a) of the *Acts Interpretation Act*. However, that definition is an inclusive one leaving open the question as to whether in a particular statutory context a "person" may include persons other than an individual or a body politic or corporate. Accordingly, the range of persons intended to be encompassed by the reference to a "person" in any statute, including s 481(1), will depend upon the context, scope and purpose of the statutory provision in question: see *Kizon v Palmer* (1997) 72 FCR 409 at 430-431 per Lindgren J where his Honour considered whether a "person" included a court.
>
> In my view, when the context, scope and purpose of s 481(1) of the Act is considered it is apparent that the "person" to whom a matter may be referred is a reference to the IRT, the Refugee Review Tribunal ("the RRT") or any other person who has made a decision under the Act or the regulations relating to visas.

[72] Even leaving aside the fact that s 6 of the *CAPOC Act* refers to "anyone" exercising a power or performing a function, rather than to a "person", the definition of "person" in s 24AA(1) of the *Interpretation Act 1978* (NT) must yield to the appearance of a contrary intention in the *CAPOC Act*.[35] As already noted, the subjection of the powers of the Local Court to the objects of the *CAPOC Act*, and the subjection of

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34 *Nguyen v Minister for Immigration & Multicultural Affairs* (1988) 88 FCR 206.

35 *Interpretation Act*, s 3(3).

the exercise of powers generally to the underlying principles, is one indication of a contrary intention.

[73] It is not an impermissible interference with the judicial function that a court's power to make an order must be directed to the achievement of statutory objectives. It is also unremarkable for a statute to provide that judicial power in a particular context must be exercised with reference to certain criteria, which may include "underlying principles". The operation of the *CAPOC Act* in this respect is not unlike the operation of Part VII of the *Family Law Act 1975* (Cth) dealing with "Children".

[74] Section 60B of the *Family Law Act* sets out the objects of the Part and the principles underlying those objects. It is clear in context that the objects and principles are to be applied by a court when making a parenting order. That obligation is subject to the qualification expressed in s 60CA that in deciding whether to make a particular parenting order a court must regard the best interests of the child as the paramount consideration. Section 60CC then specifies the considerations which a court must take into account in determining what is in the child's best interests. In Division 6, which confers power to make parenting orders in particular terms, s 65AA then repeats the requirement that in deciding whether to make a particular parenting order a court must regard the best interests of the child as the paramount consideration.

[75] There is in that structure no conflict between the paramountcy of the best interests of the child, the objects of the legislation, the principles underlying those objects, and the provisions conferring power on a court. By way of example, the underlying principle that a child has a right to be cared for by both parents is no doubt a relevant consideration but must obviously give way if an order in those terms would be contrary to the child's best interests.

[76] Turning then to Part 1.3 of the *CAPOC Act*, a number of matters may be noted. First, the Local Court through its judges exercises powers and performs functions under the Act and on a plain and natural reading s 6(2) would extend to them. There is also no constitutional or practical reason why it would not extend to the exercise of those powers. Second, the obligation to uphold the underlying principles extends only "as far as practicable".[36] Third, those principles relating to the removal from and reunification with family are subject to qualifications of reasonableness, practicality and the paramountcy of the best interests of the child.[37] Fourth, the Aboriginal child placement principles are cast in normative terms, and are also subject to the qualification of practicality.[38] Fifth, 10(1) of the *CAPOC Act* provides that the best interests of the child are the paramount concern in any decision involving that child. While the assessment of the child's best

36 *CAPOC Act*, s 6(2).

37 *CAPOC Act*, s 8(3). (4).

38 *CAPOC Act*, s 12.

interests is no doubt informed by the other underlying principles, that assessment cannot be dictated by them.

[77] It was that interaction between the principles to which the Supreme Court was referring in *REF and SJP v Chief Executive Officer, Territory Families*, where it was stated:[39]

> I bear in mind that the Department was required to have regard to the 'Aboriginal Child Placement Principle', incorporated into s 12(3) *Care and Protection of Children Act 2007*, which requires that an Aboriginal child should, as far as practicable, be placed with a member of the child's family and indeed any other Aboriginal person in preference to someone who is not an Aboriginal person. However, s 12(3) must be read subject to s 10(1) *Care and Protection of Children Act 2007* which dictates that, in any decision involving a child, the best interests of the child are the paramount concern. That involves consideration, not only of the willingness of the child's family members to care for the child, but also their capacity to do so [*Care and Protection of Children Act 2007*, s 10(2)(b)]. There are many other matters to be considered under the Act, including: the nature of the child's relationship with family and with "other persons who are significant in the child's life"; the child's need for permanency in the child's living arrangements; the child's need for stable and nurturing relationships; the child's emotional, developmental and educational needs; any "special characteristics" of the child; and the likely effect of any changes in the child's circumstances [*Care and Protection of Children Act 2007*, s 10(2)(c), (e), (f), (g), (i) and (j)]. Because the best interests of the child are mandated as the paramount concern in decisions involving a child, it follows logically that the Aboriginal Child Placement Principle is an ancillary concern.

[78] Turning then to Part 2.3 of the *CAPOC Act*, the fact that its object is "to create an appropriate judicial process for safeguarding the well-

39 *REF and SJP v Chief Executive Officer, Territory Families* [2019] NTSC 4 at [27].

being of children"[40] creates no tension with a statement of the underlying principles to be taken into account in the exercise of those powers. Similarly, the express provision that in proceedings the Local Court must regard the best interests of the child as paramount[41], while repetitive of the principle expressed in s 10(1), and perhaps even otiose, is consistent with the underlying principles in the manner already described. When it comes to making a protection order, the Local Court is subject to the requirements set out in ss 129 and 130 of the *CAPOC Act*, which provide:

> **129 When Court must make order**
>
> The Court must make the protection order if the Court is satisfied:
>
> (a) the child:
>
> (i) is in need of protection; or
>
> (ii) would be in need of protection but for the fact that the child is currently in the CEO's care, and
>
> (b) the order is the best means of safeguarding the wellbeing of the child.
>
> **130 Court to consider certain matters**
>
> (1) In making the decision, the Court must consider:
>
> (a) any matters arising from a mediation conference for the child; and
>
> (b) the wishes of the following:
>
> (i) the child;
>
> (ii) a parent of the child;
>
> (iii) a person proposed to be given daily care and control of, or parental responsibility for, the child under the order;

40 *CAPOC Act*, s 87(1).

41 *CAPOC Act*, s 90(1).

(iv) any other person considered by the Court to have a direct and significant interest in the wellbeing of the child; and

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

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

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

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

(d) any other matters the Court considers relevant.

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

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

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

[79] Those provisions are best considered as governing the judicial process in the making of a protection order, rather than a discrete and exhaustive statement of the matters which the Local Court must take into account to the exclusion of the statutory objects and underlying principles. It is unsurprising that the legislature would make specific provision and impose additional controls stipulating when the Court must make a protection order and the considerations which must be taken into account for particular types of directions. The underlying principles have application to the exercise of powers and functions

under the *CAPOC Act* generally, while ss 129 and 130 are specific to the exercise of the power to make a protection order.

[80] There is no necessary conflict between the application of the underlying principles and determining such matters as the best means of safeguarding a child's well-being and whether there is anyone else better suited to assume parental responsibility. There may in some circumstances be a tension between the achievement of different criteria and principles, but that tension is to be resolved by according paramountcy to the best interests of the child. That reading is consistent with the approach that has been adopted by the Supreme Court in a number of earlier decisions.[42]

[81] Although the Court at intermediate level considered a "possible interpretation" under which the underlying principles do not bear on the exercise of the Local Court's powers[43], the reasons go on to consider the matter on the basis that the considerations in Part 2.3 do not "cover the field" [44]. Ultimately, the Court at intermediate level determined that the underlying principles were relevant considerations in determining the best interests of the child, but that they could not be interpreted or applied in a way which was inconsistent with the

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42 *WM & FM v CEO Department of Children and Families & Ors* [2012] NTSC 67 at [18]-[19]; *MV v CEO Department of Children and Families & Ors* [2012] NTSC 68 at [28]; *RG v DG & Ors* [2013] NTSC 66 at [42]-[43]; *BJW v EWC & Ors* (2018) 335 FLR 372 at [11]-[37]; *REF and SJP v Chief Executive Officer, Territory Families* [2019] NTSC 4 at [27].

43 *NB & Ors v SB & Ors* [2019] NTSC 61 at [16]-[20].

44 *NB & Ors v SB & Ors* [2019] NTSC 61 at [21]-[29].

mandatory provisions of s 90 and s 130 of the *CAPOC Act*.[45] The statement that "if it is not practicable to uphold the underlying principles of the Act they are to be given little or no weight"[46] is no more than an acknowledgement of the statutory text and that reference to a particular underlying principle cannot command a particular outcome in the exercise of discretionary power if that outcome is not in the best interests of the child.

[82] That approach is little different in its practical application from the approach adopted by the Supreme Court in the earlier decisions. I do not consider that a reading of the relevant part of the reasons discloses operative error on the part of the Court at intermediate level in that respect. That conclusion is subject to one qualification discussed further below concerning the construction of s 130(2) of the *CAPOC Act*. Even allowing that error in one respect is demonstrated, it still remains to determine whether the order dismissing the appeal was wrong.

Whether the Local Court decided the matter in accordance with the *CAPOC Act*

[83] The remaining three grounds of appeal all involve the contention that the Local Court decided the matter otherwise than in accordance with the *CAPOC Act*, and that the Court at intermediate level fell into error by not correcting that result. The error on the part of the Local Court

45 *NB & Ors v SB & Ors* [2019] NTSC 61 at [30]-[31].

46 *NB & Ors v SB & Ors* [2019] NTSC 61 at [31].

is said to arise from the fact that it misconstrued the meaning of "family" and failed to apply the underlying principles in that respect.

[84] The centrepieces of the appellants' submissions in this respect are ss 8 and 12 of the *CAPOC Act*. Section 8 provides:

> **Role of family**
>
> (1) The family of a child has the primary responsibility for the care, upbringing and development of the child.
>
> (2) In fulfilling that responsibility, the family should be able to bring up the child in any language or tradition and foster in the child any cultural, ethnic or religious values.
>
> (3) A child may be removed from the child's family only if there is no other reasonable way to safeguard the wellbeing of the child.
>
> (4) As far as practicable, and consistent with section 10, if a child is removed from the child's family:
>
> (a) contact between the child and the family should be encouraged and supported; and
>
> (b) the child should eventually be returned to the family.

[85] Section 12 of the *CAPOC Act* provides:

> **Aboriginal children**
>
> (1) Kinship groups, representative organisations and communities of Aboriginal people have a major role, through self-determination, in promoting the wellbeing of Aboriginal children.
>
> (2) In particular, a kinship group, representative organisation or community of Aboriginal people nominated by an Aboriginal child's family should be able to participate in the making of a decision involving the child.
>
> (3) An Aboriginal child should, as far as practicable, be placed with a person in the following order of priority:
>
> (a) a member of the child's family;
>
> (b) an Aboriginal person in the child's community in accordance with local community practice;

(c) any other Aboriginal person;

(d) a person who:

(i) is not an Aboriginal person; but

(ii) in the CEO's opinion, is sensitive to the child's needs and capable of promoting the child's ongoing affiliation with the culture of the child's community (and, if possible, ongoing contact with the child's family).

(4) In addition, an Aboriginal child should, as far as practicable, be placed in close proximity to the child's family and community.

[86] The appellants draw attention to the fact that these underlying principles are consistent with the principles of the *Convention on the Rights of the Child*, and that one of the rights protected by the Convention is the right of a child "to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference".[47] While that Article operates as a statement of general intention, the reference to unlawful interference does not extend to action taken in conformance with child protection legislation. The appellants also draw attention to a decision of the European Court of Human Rights involving the "right to respect for private and family life" [48], in which it was observed that the placing of a child for adoption entailing the permanent severance of family ties should only be done an exceptional circumstances, and it is not enough

47 *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1989] UNTS 1577 (entered into force 2 September 1990), Article 8(1).

48 *European Convention on Human Rights*, Article 8.

to show that a child could be placed in a more beneficial environment.[49]

[87] Against that background, the appellants contend that as a result of its finding that the foster carers were members of the child's "family" the Local Court failed to consider whether there was no other reasonable way to safeguard the wellbeing of the child in accordance with s 8(3) of the *CAPOC Act*; and failed to consider whether it was possible to conclude at this relatively early stage of the child's life that he could not eventually be returned to his family in accordance with s 8(4)(b) and 12(3) of the *CAPOC Act* in a manner consistent with his best interests.

[88] While family reunification is no doubt a primary goal in the child protection context because of the significance of biological family to the development of a child's personal identity and sense of connection, it is not axiomatic that placement with family members is in the best interests of the child. That will depend upon an assessment of the child's past and present circumstances, some predictive assessment of the family situation, and an assessment of the relationship between the child and the family members with whom the placement is contemplated and the effect such a placement might have. As the

49 *YC v United Kingdom* (2012) 55 EHRR 33 at [134].

Supreme Court observed in *WM & FM v CEO Department of Children and Families & Ors* [2012] NTSC 67 at [25]:

> … the court should ask whether making the order … it is in the best interests of the children, having regard to the principles in sections 7 to 12 of the Act, including the principles that, as far as practicable, contact between the child and the family should be encouraged and supported and the child should eventually be returned to the family. In practice that will sometimes mean making a short-term order to give the parents an opportunity to demonstrate to the CEO that they can properly care for the children and give them an incentive to address issues which have made it necessary for the CEO to seek a protection order for their children. Of course, there may come a time when the need for stability outweighs these other factors. What is in the best interests of the child is a question of fact in every case to be determined on the evidence, and it is not an easy task for magistrates to perform.

[89] The issue which presented in this case was not whether a short-term order should be made in favour of the CEO in order to afford time for the biological father or mother to demonstrate that they were able to provide the child with proper care. It was not a case which involved the child's "reunification" with his biological parents or family members with whom he had an existing or previously established attachment. It was also not a case in which the continuation and stability of the child's living arrangements would not be impaired by the making of a protection order in the terms and for the purpose sought by the CEO.

[90] It may be accepted that the CEO's application to the Local Court was for an order of two years' duration to enable the kinship assessment of

the aunt and uncle to be completed and for the child to be transitioned to their care; and that if the transition was successfully effected the consequence would be that the child was no longer "in need of protection" within the meaning of s 20 of the *CAPOC Act*. However, that proposal necessarily involved an arrangement by which the child was taken from the home of the foster carers and placed with the aunt and uncle. That gave rise to a consideration by the Local Court of the impact that separation from the foster carers would have on the child and the bearing of that matter on the best interests of the child. The relevance and significance of that consideration could not be obscured or dictated by the fact that the arrangement was described as a "transition" or that the aunt and uncle were "family" within the meaning of ss 8, 12, 19 and 20 of the *CAPOC Act*.

[91] Both the Local Court and the Court at intermediate level gave extensive consideration to those matters. The essential findings of fact made by the Local Court, and adopted by the Supreme Court, were that the child had been with the foster carers since he was two years of age, was happy and secure with the foster carers, had formed a strong attachment to them and wanted to stay with them. By reason of his mental health the biological father could not properly care for the child. The contact between the child and his biological mother had been so limited that there was little more than a biological bond between them, the biological mother did not wish to assume caring

responsibility for the child, and the biological mother had no relationship with the aunt and uncle. There was no other member of the child's Aboriginal family willing and able to assume caring responsibility for him. The aunt and uncle had no contact with the child until they travelled to Katherine in September 2018, and there was no attachment between them prior to that time. Both the aunt and uncle and the foster carers had the capacity and willingness to care for the child. The capacity of the aunt and uncle to facilitate contact between the child and his Aboriginal family would be limited by distance and circumstance. The foster carers would continue to facilitate the child's contact with his biological family, but that capacity would be similarly limited.

[92] Against that factual background, the only potentially practicable family placement for the child was with the aunt and uncle in accordance with the arrangement contemplated by the CEO's application. The assessment of that potential placement was a matter required under both the CEO's application[50] and the order sought by the foster parents[51], and compelled a consideration of the best interests of the child with particular reference to the nature of the child's relationship with his family and other persons significant in his life; the child's

50 The CEO's application required a consideration of whether there was another person better suited to be given daily care and control of, or parental responsibility for, the child; and the needs of the child for long-term stability and security: *CAPOC Act*, s 130(1)(c).

51 The foster carers' application required a consideration of the best means of safeguarding the child's well-being; and a consideration of whether there was anyone else better suited to be given long-term parental responsibility: *CAPOC Act*, s 130(2).

need for stable and nurturing relationships; the child's emotional needs; and the likely effect on the child of any change in his circumstances.[52] That consideration was informed by expert psychological evidence. The relevant part of Dr Thomas's report stated:

> I find that the Foster Carers were perceptive and had insight into the young boy's emotional state, had proactively prepared the young boy for visits with his family, had nurtured his emotional health, and supported his emotional resilience during a period of uncertainty.
>
> …
>
> In summary, the young boy is a healthy five-year-old boy who appeared confident, well engaged with his family, loving towards his brother and sister and foster parents, and appears securely attached and nurtured within the family unit. Research has shown that secure childhood attachment is predictive of superior emotional regulation, confidence in navigating different environments, and these children are generally empathetic and caring of others. It is expected that the young boy's secure attachment to the Foster Carers will be the greatest predictor of his well-being moving forward.
>
> …
>
> It has now been two years and seven months since the young boy has been in care with the Foster Carers. There is a general consensus that the young boy is developing at an age-appropriate level and he is thriving in his current placement with carers who are positively engaged and nurturing. The research is clear that all children in foster care need secure arrangements, and careful long-term planning is needed to reduce the uncertainty in their lives. Permanency planning focuses on relationships, identity, and a sense of belonging, and is important, as long-term care arrangements for children with families can offer lifetime relationships and a sense of belonging.
>
> A secure attachment with caregivers is the foundation for trust and important for forming relationships throughout life. It is widely understood and acknowledged that children's best interests lie in

52 *CAPOC Act*, s 10(2).

the preservation of their attachment ties and that repeated ruptures of such ties constitute a severe trauma. Undisputedly, the young boy requires a stable, safe and long-term nurturing environment to ensure a secure attachment is maintained with his caregivers. It is evident from my assessment that the young boy has a strong, secure attachment with the Foster Carers and I would consider it detrimental and traumatic if he were to be removed from their care. It is important for the young boy's well-being that permanency, stability and continuity of care be the presiding factors in his long-term care arrangements.

At present, there are no kinship placements available to consider for the young boy… Territory Families are investigating a kinship placement with a relative of F who has never met the young boy. Research has shown that kinship care has many advantages, including children finding a placement with known family members less traumatic than a placement with strangers, cultural and religious practices are more likely to be continued, contact with parents is more frequent, and may facilitate eventual reunification… However, I would not consider a kinship placement with a relative who is unknown to the young boy to be in his best interests…

I am of the view that family reunification is not a reasonable goal for the young boy as neither F nor M have demonstrated an ability to provide consistent, secure, nurturing care, over a long period of time.

Since family reunification does not seem likely, it is necessary to consider a permanent care arrangement for the young boy that promotes lifetime family connections that can be nurtured and preserved. In consequence, I am of the view the Foster Carer's application for a long-term parental order granting parental responsibility until the age of 18 years is appropriate and will provide the best outcome for the young boy's nurturance and well-being…

The Foster Carers are planning an interstate move… This has obvious implications for the young boy and his access and visitation with F and M… It is important that the young boy remain connected to his biological parents, culture, and country.

The Foster Carers reported that they understand the importance of keeping a young boy connected to their heritage and culture…

The Foster Carers maintained that they will ensure the young boy remains connected to his culture and family and recognise the importance of his heritage, and not in a tokenistic way… At present, the young boy is not associated with any community and it is important that Territory Families are able to pinpoint the

cultural identity of his community and the language and customs of his community, to ensure that the Foster Carers can start introducing this into his life, irrespective of whether they live in Katherine or interstate.

The guiding principles of child welfare activity are well established as being based on the premise of maintaining safety, permanency and well-being. Based on the available information I recommend that the Foster Carers be granted a long-term protection order with parental responsibility for the young boy until he turns 18 years of age. I consider this action to be the most suitable protection provided there is a Care Plan that includes: (i) A clear cultural plan… so that the young boy can experience his Aboriginal culture and maintain that aspect of his identity… (ii) Continues to identify age-appropriate cultural events and ceremonies which are crucial to the young boy's identity and development; and (iii) Facilitates access visits with F and M when possible… including regular scheduled facetime/Skype calls to ensure there is regular contact between face-to-face visits.

[93] Dr Thomas's oral evidence contained the following opinions:

… I would consider it to be severe trauma to remove [the child] from the care of [the foster carers], given they have such a secure attachment with them. But also that there is a sibling pack [the child] would be strongly attached to. Ms McKenna stated that given the secure attachment [the child] wouldn't suffer any mental health consequences as a result of moving, which I would strongly disagree with. I think that the overriding concern for [the child's] care and for his well-being would be to continue his attachment with his current caregivers; namely, that they are his family; he stated they are his everything, and that, I think he would be very traumatised if he was forced to leave.

…

… I think his relationship with the siblings, that he has already formed, is very important and a very strong relationship. Certainly, I observed him mostly with [JF], because they are more of a similar age, and he was very loving towards [JF] and also towards [LF].

… he would be losing several relationships.

…

… And I think it is important to note – you know, he is five, so he is forming his identity and disrupting his secure attachment that he

has formed will constitute a severe trauma, which needs to be well managed if he is to transition out of their care.

… But predominantly, in my clinical practice, I see a disruption of this kind to be severely detrimental to the child long-term, and I see them now as adults. And so they have mental health and physical repercussions as a result of moving them from a safe, secure base. So I guess I would stress that, with regard to the attachment, we would hope they would already have a secure attachment with the other party that they were looking to transition them to.

…

[Whether other family members could provide a secure arrangement] would depend as to whether the child has a secure attachment with that person and so a secure attachment is formed over a long period of time. So absolutely and the research is quite clear that kinship placements are preferred, definitely in terms of mental health and physical health outcomes, in children, but in the absence of that being an option, in the early days and the fact that he has now formed this secure attachment with [the foster carers], I wouldn't consider that a suitable arrangement and I would consider the ruptured attachment to be a severe trauma to him.

…

I firmly believe, at this point in time, and from my clinical practice where I see adults now who have moved placements and their secure attachment ties have been ruptured, to be strongly detrimental to the physical and mental health and the research strongly supports that. So yes [placement with the aunt and uncle] would have been the best option if it had happened early in the piece… We know that the more placements there are, the worse the child's mental health outcomes are and their physical health outcomes are but in this case, that's not relevant because he does have a permanent care arrangement in place that could be permanent… There is a lot of research that says we must consider the secure attachment and not rupturing that first and foremost, as being in the child's best interests… If he was to leave the Foster Carer's care, that would be considered a rupture in his attachment with them and I think that would have detrimental long-term outcomes for him.

… There is a lot of evidence, a lot of research, that would support that one rupture would cause severe trauma. And in this instance if there wasn't such a strong attachment and if it hadn't been over such a long period of time that may have been mitigated. But we are talking three years of a secure bond and attachment, and also with siblings.

…

I would propose that the ideal outcome would be that the young boy remained with the Foster Carers and remain with that secure attachment as his home base. And that he have contact with the Paternal Aunt and Uncle and with his parents definitely. And that might be, you know, monthly, school holidays or whatever it is. But I would propose that he stay with his home base. I firmly believe that is in the best interests of the young boy.

[94] As the Court at intermediate level observed, that was very powerful evidence directed to the best interests of the child and the Local Court was correct to accept that evidence and reject Ms McKenna's opinion in coming to a different conclusion. The essential findings made by the Local Court having regard to that evidence were:[53]

> If the young boy was to live with the Paternal Aunt and Uncle, this would necessarily mean changing and weakening his secure attachment to the Foster Carers. That exercise would be traumatic and might result in a severing of that attachment. I am satisfied that exposing the young boy to such a traumatic experience would put his psychological, emotional and physical well-being at risk in both the short and long-term. The young boy might form a new secure attachment with his Paternal Aunt and Uncle but there remains a risk that a similarly secure attachment would not redevelop. Further there is a risk that a new relationship might lack the closeness and security provided by the existing parental relationship with the Foster Carers. As to the likely level of trauma and risk, I was persuaded by and accepted the evidence of Dr Thomas. I was troubled by the evidence of Ms McKenna, and did not accept her opinion concerning the young boy's attachment template. In in my view Ms McKenna's opinion was based on a rosy and unsubstantiated version of the first two and a half years of the young boy's life.
>
> …
>
> I am satisfied that both the Paternal Aunt and Uncle and the Foster Carers have the capacity to provide a nurturing relationship to the young boy. However, the Foster Carers currently provide such a

53 *Chief Executive Officer of Territory Families v MS and Ors* [2019] NTLC 012 at [137].

> relationship to the young boy. The stability of that nurturing relationship will be maintained if the young boy stays with the Foster Carers. If the young boy moves to the Paternal Aunt and Uncle, the existing stability of his relationship with the Foster Carers will be weakened or broken. Having accepted the evidence of Dr Thomas, I consider that there is a genuine risk as to the young boy's ability to reattach and regain stability were he required to move to the Paternal Aunt and Uncle.
>
> …
>
> If the young boy moves to the Paternal Aunt and Uncle, there would need to be a transition period during which his existing familial attachments are broken, and during which it is hoped that he would form new attachments with the Paternal Aunt and Uncle. According to both experts, the breaking of the existing familial attachments will be traumatic for the young boy. It is envisaged this transition would occur in Katherine over a period of time. It is to be hoped that such a transition would be closely monitored and supported by a child psychologist, although in the Court's experience it cannot be taken for granted or assumed that Territory Families have the resources and means to provide the appropriate level of professional assistance or support to the young boy or the transitioning families. In spite of a stated willingness to do so the Court's experience of Territory Families workloads (particularly in the Katherine region) is that they have limited human resources to allocate to contact visits, let alone to lengthy transition periods as proposed. Further the difficulty Territory Families experience in engaging appropriate experts is regularly raised with the Court. At the end of the transition period, the boy would then be subject to further disruption by moving from Katherine to Victoria. Given that the Paternal Aunt and Uncle are in their own home and work at a local school there will be no issues concerning housing or re-enrolment.
>
> In my view, taking into account the evidence of Dr Thomas, any such attempted transition carries with it a real and not a remote risk of detrimental mental and physical outcomes for the young boy.

[95] The Court at intermediate level came to the same conclusion concerning the risk to the child which the CEO's proposal entailed on its own analysis of the expert evidence. It was open on the evidence for the Local Court and the Supreme Court, in the correct application

of the *CAPOC Act*, to conclude that there was no other reasonable way to safeguard the well-being of the child other than a grant of long-term parental responsibility to the foster carers, and that it was not in the best interests of the child for his care to be "transitioned" to the aunt and uncle or otherwise to be returned to his family during his minority.

[96] In asserting error on the part of the Court at intermediate level, the appellants place particular emphasis on the following passage from the reasons:[54]

> Further, the criterion in s 130(2) is a different criterion to the criterion in s 8(3) of the Act. The criterion in s 130(2) applies to both a foster carer and a family member who was not a parent. The test is "*the best means of safeguarding the child's wellbeing*" not "*no other reasonable way to safeguard the wellbeing of the Child*" with a statutory presumption in favour of the child remaining with the child's family. The effect of s 130(2) of the Act is that a court *must not give a family member 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 family member 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.

[97] The appellants have sought to elevate that to a finding that in these particular circumstances an order for the purpose or with the object of placing a child with family in the long term could only be made under s 130 of the *CAPOC Act* and, therefore, only if it was found that there was no one else better suited to be given the responsibility. As noted above, if a transition was successfully effected in accordance with the

54 *NB & Ors v SB & Ors* [2019] NTSC 61 at [20].

CEO's application the consequence would be that the child was no longer "in need of protection" within the meaning of s 20 of the *CAPOC Act* and a long-term parental responsibility direction in favour of the aunt and uncle would have been unnecessary.

[98] A number of matters should be noted concerning the appellants' contention. First, that passage formed part of a general consideration of the interaction between Part 1.3 and Part 2.3 of the *CAPOC Act*. The passage was not an examination of the specific issues arising on the two applications before the Local Court. Second, although the Supreme Court later suggested that one of the issues for determination was whether there was anyone else better suited than the aunt and uncle "to be given the daily care and control of the child" within the meaning of s 130(1)[55], the analysis does not proceed on the basis that the CEO's application implicated s 130(2) of the *CAPOC Act* at that point in the determination[56]. Third, the foster carer's application for long-term parental responsibility required a consideration of whether there was anyone else better suited to be given that responsibility. Any misapprehension by the Court at intermediate level concerning the mechanism ultimately contemplated by the CEO did not bear on the conclusion that taking the child from the home of the foster carers was not in his best interests.

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55 *NB & Ors v SB & Ors* [2019] NTSC 61 at [46].

56 *NB & Ors v SB & Ors* [2019] NTSC 61 at [44], [59], [70].

[99] It was also open to the Court at intermediate level to find that the Local Court had decided the matter in accordance with the *CAPOC Act* notwithstanding the error made in relation to the meaning of "family". The reasons of the Local Court state expressly that even if the foster carers did not form part of the child's family in the relevant sense, the best interests of the child required that he remain with the foster carers.[57] The Court at intermediate level found that statement was borne out by the fact that the issues arising under ss 8 and 12 of the *CAPOC Act* were given consideration in the Local Court's subsequent analysis of the child's circumstances.[58]

[100] On the basis of that analysis, the Court at intermediate level concluded that the Local Court had found: (i) there was no reasonable way other than removing the child from the child's family of safeguarding the well-being of the child; (ii) on either the scenario contemplated by the CEO or the scenario contemplated by the third and fourth respondents it was practicable to maintain, encourage and support contact between the child and the child's family; (iii) it was not practicable for the child to be eventually returned to the child's family, and in any event there was a real and not a remote risk that attempting to do so would be harmful or detrimental to the child's psychological and emotional wellbeing; (iv) it was not practicable for the child to be placed with a

57 *Chief Executive Officer of Territory Families v MS and Ors* [2019] NTLC 012 at [143].

58 *NB & Ors v SB & Ors* [2019] NTSC 61 at [46], [48], [54], [56], [60]-[61], [63]-[65].

member of the child's family or any Aboriginal person in either the short or long-term, and in any event there was a real and not a remote risk that attempting to do so would be harmful or detrimental to the child's psychological and emotional wellbeing; and (v) it was in the best interests of the child to make a protection order with a long-term parental responsibility direction giving parental responsibility to the third and fourth respondents.[59]

[101] It is plain from the analysis of the expert psychological evidence conducted by the Court at intermediate level that it came to the same conclusions concerning the child's psychological and emotional well-being. The Court at intermediate level then conducted its own analysis of the application of the *CAPOC Act* to the facts of the matter and concluded that the order made by the Local Court was correct and in accordance with the proper application of the legislation.[60] In doing so, the Court at intermediate level had due regard to the importance which the statutory scheme attaches to the role of the family. I can discern no operative error in the decision of the Court at intermediate level in coming to that conclusion.

[102] That largely answers the appellant's contention that the Court at intermediate level erred in finding that there was no real possibility that the Local Court's error in relation to the meaning of "family" had

59 *NB & Ors v SB & Ors* [2019] NTSC 61 at [68]-[69].

60 *NB & Ors v SB & Ors* [2019] NTSC 61 at [94]-[114].

affected its decision to make the order. As has already been discussed above in the context of the nature of the appeal from the Local Court to the Supreme Court, even if there was a real possibility that the Local Court's error on the mixed question of fact and law did affect its decision, it was open to the Supreme Court to draw its own conclusions about the correctness of the final order made by the Local Court. Similarly, it is open to this Court to draw its own conclusions concerning the correctness of the order made by the Supreme Court.

[103] This is no doubt a difficult case, involving as it does a competition between the societal and statutory predisposition to the maintenance of familial connection in the interests of the child's identity formation, and the interests of the child in maintaining the emotional bond he has developed with his foster family over almost four years during a crucial phase of his development. Even allowing for the significance which properly attaches to biological family, and the weight properly given to the underlying principles concerning the role of the family, I am unable to find that the Supreme Court erred in dismissing the appeal and confirming the original order made by the Local Court.

Disposition

[104] For these reasons, the appeal should be dismissed.

COULEHAN AJ:

[105] The Child the subject of this proceeding was born on 26 July 2013. His mother is Aboriginal. The Child was from time to time in the care of his Father, Mother and paternal half-sister until he was about two and a half years old. The Father was in poor health and was having difficulty caring for the Child. He relinquished care to Territory Families, the agency administering the *Care and Protection of Children Act* ("the Act"). The Child was found to be in poor physical condition and in need of protection. He was taken into care on 18 February 2016 on a two year short term order and was placed with foster carers ("the Foster Carers") in Katherine, and has remained in their care. The Father remained in contact with the Child when he could, and he appeared to have a good relationship with the Foster Carers.

[106] It became apparent that it would be unlikely that the Child could be reunited with the Father or Mother as carers, and no other suitable family member willing and able to take parental responsibility could be identified. It was proposed that the Child continue to reside with the Foster Carers on a long term basis. By this time the Child had been in the care of the Foster Carers for over two and a half years and was clearly attached to them, and they to him. The Child later expressed a wish to remain with the Foster Carers.

[107] The Chief Executive Officer of the Department ("the CEO") made an application to the Local Court for a long term parental responsibility

direction, to give parental responsibility for the Child to the Foster Carers. At first, the father agreed to this, but he later changed his mind when he became aware that the Foster Carers proposed to move to Adelaide with the Child. The relationship between the Father and the Foster Carers broke down and he asked his sister, who lived in Horsham, Victoria, to take care of the Child. His sister, and her husband ("the Relations"), agreed to do so, and meetings with the Child took place in Katherine after which the Relations told Territory Families that they were willing to take care of the Child. There have been further meetings with the Child in Katherine, and contact by means of Skype and correspondence.

[108] The CEO subsequently amended his Application. It was proposed that the daily care and control of the Child be given to the CEO for a period of two years to enable a kinship assessment to be completed and for the Child to be gradually transitioned to the care of the Relations, if that was deemed suitable. The Foster Carers opposed this order and applied for long term parental responsibility for the Child.

[109] The Act provides that the CEO may apply to the Court for a protection order (section 121). The directions that may be sought include a short term parental responsibility direction giving parental responsibility for a child to a specified person for a specified period not exceeding two years, and a long term parental responsibility direction for a specified

period that exceeds two years and ends before the child turns 18 years of age (section 123).

[110] The Court may make a protection order for a child, as proposed by the CEO, or specifying other directions mentioned in section 123 as the Court considers appropriate (section 128). The Court must make a protection order if satisfied that the child is in need of protection and the order is the best means of safeguarding the wellbeing of the child (section 129).

[111] The applications were heard by a Local Court Judge. There was no dispute that the Child needed protection and that a Protection Order should be made. The Father and Mother supported the CEO's application. The Child's legal representative submitted that it was in the long term interests of the Child that he live with the Relations. Following the hearing it was ordered that long term parental responsibility for the Child be given to the Foster Carers until he turns 18 years of age. In the course of her reasons for judgment, the Local Court Judge found that the Foster Carers were members of the child's family within the meaning of section 19 of the Act.

[112] The Relations and the Father appealed to the Supreme Court pursuant to section 140 of the Act. Following a hearing before a single Judge, it was found, inter alia, that the Local Court had erred in finding that the Foster Carers were members of the Child's family as defined in section

19(c) of the Act, but that this had not resulted in a vitiating error. It was held that the provisions of the Act had been properly applied to the facts. The Appeal was dismissed and the decision of the Local Court was confirmed.

[113] On appeal to this Court, there was no issue as to the Appeal Judge's finding that the Foster Carers were not members of the child's family within the meaning of section 19(c), except to the extent that this error may have influenced the decision of the Local Court Judge. There was also no dispute that the Appeal Judge had applied the correct test as to whether a vitiating error had been made, that is, whether or not there was a real possibility that the error of law could have affected the decision.[61]

[114] It was submitted on behalf of the Relatives that the principal issue in the appeal was the Appeal Judge's construction of the Act. It is necessary to consider the framework of the Act.

[115] Part 1.2 sets out the objects of the Act, which are, broadly, to promote the wellbeing of children, to assist families achieve this object, and to ensure that anyone having responsibilities for children has regard to these objects in fulfilling those responsibilities (section 4). To achieve these objects, the Act provides for a number of matters, including the

61 *Phelps v DCA* (2012) 31 NTLR 51, at [23].

powers of the Court to make orders for the wellbeing of children pursuant to Parts 2.3 and 2.4 (section 5).

[116] Part 1.3 contains what are expressed to be the principles underlying the Act, which are set out in sections 7 to 12. It is provided that anyone exercising a power or performing a function under the Act must, as far as practicable, uphold these principles (section 6). The principles directly relevant to this proceeding include the role of the family (section 8), the best interests of the child (section 10), and provisions relating specifically to Aboriginal children (section 12).

[117] Section 8 provides that the family of a child has the primary responsibility for the care, upbringing and development of the child, and a child may be removed from the family only if there is no other reasonable way to safeguard the wellbeing of the child. So far as practicable, and consistent with section 10, if a child is removed, contact with the family should be encouraged and supported, and the child should eventually be returned to the family. Family includes the relatives of the child, the members of the extended family of the child in accordance with custom or tradition, and anyone closely associated with the child or another family member of the child (section 19).

[118] Section 10 provides that when a decision involving a child is made, the best interests of the child are of paramount concern, and consideration

should be given to a number of stated matters in determining the best interests of a child.

[119] Section 12 provides that, in relation to Aboriginal children, kinship groups, representative organisations and communities have a major role, and should be able to participate in the making of a decision involving the child. An Aboriginal child should, as far as practicable, be placed, in order of priority, with a member of the child's family, another Aboriginal person, or a person who is sensitive to the child's needs and capable of promoting affiliation with the culture of the child's community. In addition, an Aboriginal child should, as far as practicable be placed in close proximity to the child's family and community.

[120] Part 2.3 sets out the Court's powers. The object of this Part is expressed to be to create an appropriate judicial process for safeguarding the welfare of children, particularly children who are or might be in need of protection. This object is to be achieved by providing for a family matters division in the Court, providing for the Court's powers to make various orders for children, and procedural matters (section 87).

[121] Section 90 provides that, in Court proceedings, the Court must regard the best interests of the child as paramount, and must give priority to

the rights of the child if those rights conflict with the rights of an adult.

[122] In deciding whether to make a protection order, the Court must consider a number of matters, including whether there is another person who is better suited to be given parental responsibility and the needs of the child for long-term stability and security (section 130(1)). The Court must not give a person who is not a parent of the child a long-term parental responsibility direction unless satisfied that this is the best means of safeguarding the child's wellbeing, and there is no one else who is better suited to be given the responsibility (section 130(2)).

[123] The Appeal Judge carefully considered the statutory framework. He suggested that section 130 governs the exercise of the powers of the Court when deciding to make a protection order. This section contained mandatory criteria and did not contain the qualifications that are found in Part 1.3. Sections 90 and 130 appeared to cover the field for protection orders and there is no mention of Part 1.3 in Part 2.3. Further, the reference to "anyone" in section 6(2) does not usually refer to Judges when constituting and exercising the powers of the Court, and Courts are not included in the definition in section 24AA(1) of the *Interpretation Act*.

[124] His Honour said that sections 90 and 130 were consistent with the object set out in section 4(a) of the Act, and consistent with an intention to largely maintain the doctrine of *parens patriae*, the paramount consideration being the welfare of the child. If section 10 applied to the Court, section 90 would be otiose, save that it is expressly directed to the Court, and section 10 is not. The Court is not expressly constrained by similar matters to those set out in section 10(2).

[125] His Honour further suggested that significant parts of section 130 would be otiose if Part 1.3 applied to the exercise of the Court's powers. The criterion in section 130(2) is different to the criterion in section 8(3), in that section 130(2) refers to the best means of safeguarding the child's wellbeing, whereas section 8(3) refers to no other reasonable way to safeguard the wellbeing of the child. In addition, section 8(3) creates a statutory presumption in favour of the child remaining with family, whereas section 130(2), in effect, precludes a family member from being given parental responsibility under a long term parental responsibility direction, unless the criteria set out are met.

[126] His Honour pointed out that, if there is conflict between Part 2.3 and Part 1.3, the provisions of Part 2.3, being specific provisions, must prevail. He considered that, based on the objects of the Act, the structure of Part 1.3, the subject matter and the qualifications, the

principles contained in sections 7 to 12 were broad general rules adopted as a guide to action. If application of a principle underlying the Act meant that a child's wellbeing would be significantly harmed, then the principle would not be applied. This is reinforced by section 10(1) of the Act, the best interests of the child being of paramount concern.

[127] His Honour concluded that the Court may have regard to the underlying principles pursuant to section 130(1)(d), which provides for any other matters that the Court considers relevant, to the extent that they were considered relevant, and insofar as they did not conflict with the mandatory provisions of section 90 and section 130. These principles are likely to be relevant and should be given due weight because the best interests of the child cannot be determined in the abstract. In cases involving parental responsibility for an Aboriginal child, if it is not practicable to uphold the underlying principles, they are to be given little or no weight.

[128] His Honour’s reasoning is persuasive, but this construction of the Act tends to devalue the effect of the underlying principles. They are expressed to be the principles underlying the Act, which suggests that they are intended to be more than mere guides to action. They apply to the CEO and his authorised officers, who are required to exercise powers and perform functions under the Act. It is difficult to understand why they should not also apply to the Court, which has

responsibility for the wellbeing of children, and exercises powers and functions under the Act.

[129] It is the case that "anyone" does not usually refer to a Court.[62] However, it has been held that the definition in the *Acts Interpretation Act* is inclusive, and may include persons other than an individual or a corporate body, and that the range of persons intended to be encompassed will depend upon the context, scope and purpose of the statutory provision in question.[63]

[130] Further, regard must be had to section 62A of the *Interpretation Act 1978* (NT) which provides:

> In interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) is to be preferred to a construction that does not promote the purpose or object.

[131] The principles referred to in Part 1.3 are fundamental to the scope and purpose of the Act. It is clear that it was intended that such matters as the role of the family, the matters to be considered in determining the best interests of the child, and the provisions relating to Aboriginal children are of prime importance. However, insofar as there may be any conflict between these provisions and those in section 130, the provisions that relate specifically to the Court must prevail. This is so

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62 See section 24AA of the *Acts Interpretation Act* (Cth) and *Kizon v Palmer* (1997) 72 FCR 409, 430-431.

63 See *Nguyen v Minister for Immigration* (1998) 88 FCR 206, 215 and *Project Blue Sky v ABA* (1998) 194 CLR 355, [69] and [78].

by reason of the usual rules of statutory interpretation, and the fact that the provisions in Part 1.3, apart from section 10(1), are generally expressed in qualified terms, while the provisions of sections 90 and 130 are not so expressed. It may be concluded that the preferred construction is that the underlying principles are intended to be upheld by the Court, subject to any qualifications expressed, and the requirement that the best interests of the child are paramount.

[132] This is consistent with a number of decisions of single Judges of this Court who have applied the underlying principles in deciding appeals from the Local Court.[64] The status of the underlying principles do not appear to have been questioned prior to this proceeding. There have been recent amendments to the Act, which are not yet in force. These include amendments said by the Minister to have the aim of reforming the child protection system to achieve better outcomes for children and families. These amendments may be presumed to have been made with the previous decisions of the Courts in mind.

[133] His Honour's analysis of the relevant provisions of the Act acknowledged the underlying principles. In effect, his Honour found that they must be given due weight, but if it is not practicable to apply them, or if applying them was not in the best interests of the child, then they would have little or no weight.

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64 For example, see *BJW v EWC* (2018) 335 FLR 372.

[134] It was submitted on behalf of the Relations that both the Local Court Judge and the Appeal Judge appeared to have misunderstood the nature of the CEO's application. They proceeded on the basis that the application was to move the Child into the care of the Relations, whereas the application sought a protection order for two years to enable a kinship assessment to be completed, and the Child gradually transitioned to the care of the Relations, if that was deemed suitable. Had this been successful, no long term parental responsibility direction was required, because the child would be in the care of a family member and would no longer be in need of protection. It was suggested that this showed a misunderstanding of how the Act operates, which led the Appeal Judge into error.

[135] It is the case that the Appeal Judge referred to a long term parental direction in favour of the Relations, however, this does not necessarily suggest a misunderstanding of the Act. There is little practical difference between a long term parental responsibility direction and the transfer as proposed, as in either case, had the transfer been successful, the child would be in the permanent care of the Relations.

[136] It was further submitted that the Local Court Judge did not give proper consideration to the role of the family, and the provisions relating to the placement of Aboriginal children. It was suggested that this was so because of the erroneous inclusion of the Foster Carers in the definition of family.

[137] It was pointed out that the effect of the order sought by the Foster Carers, and subsequently made, was that the child would not be returned to the family as required by section 8(4)(b). These provisions should have been given careful consideration because the CEO's proposal offered a practical and reasonable alternative. It was argued that her Honour did not ask and answer the questions posed by sections 8 and 12(3), that is, whether there was no other way to safeguard the wellbeing of the Child, and whether it was possible to conclude that it was not practical and consistent with section 10 for the child ever to be returned to the family.

[138] In his reasons for judgment, the Appeal Judge canvassed the issue as to whether the Local Court Judge considered the CEO's proposal. He found that it was when she considered the matters raised by section 10(2) of the Act, and by consideration of the expert evidence.[65] He found that the Local Court did not give detailed consideration to section 8(3) of the Act, but that this was not fatal, and did not result in an appealable error, because of the Local Court's consideration of the expert evidence and the provisions of section 130(2)(a) of the Act.[66]

[139] His Honour had some difficulty in understanding the Local Court Judge's comments, to be found in paragraph [125] of the Reasons for Judgment, in relation to the requirements of section 8(4), but

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65 *NB & Ors v SB & Ors* [2019] NTSC 61 at [59].

66 *NB & Ors v SB & Ors* [2019] NTSC 61 at [61].

concluded that she did not go so far as to say that a protection order in favour of the Foster Carers meant that the child would be returned to the family. He found that the Local Court Judge did give proper consideration to the issues raised by section 8(4) elsewhere in her Reasons for Judgment. He also relied on the statement of the Local Court Judge that, if her interpretation of family was wrong, the best interests of the Child was that he stay with the Foster Carers.[67]

[140] It may be added that in paragraph [125], the Local Court Judge appeared to be contemplating the prospect of the child being returned to the family, in this case, to a family member other than the family member from whom the Child had been removed.

[141] The Appeal Judge concluded that, despite making an error in the interpretation of section 19(c) of the Act, the Local Court had complied with the provisions of section 90 and 130, and had given careful consideration to the principles set out in sections 8, 10 and 12.[68]

[142] The evidence before the Local Court Judge was largely uncontentious. It was unlikely that the Father and Mother, or the Child's sister, would be able to care for the Child in the foreseeable future, and the Aboriginal side of the family appeared to be unwilling or unable to do so. It was not practicable to place the child with an Aboriginal person, or to place the child in close proximity to the child's Aboriginal family

67 *NB & Ors v SB & Ors* [2019] NTSC 61 at [63].

68 *NB & Ors v SB & Ors* [2019] NTSC 61 at [115].

and community. The only viable family members were the Relations, and her Honour's Reasons for Judgment need to be considered in this context.

[143] The Mother and Father expressed the wish that the Child be cared for by the Relations. Her Honour found that the Relations were close family members who would protect the Child from harm and had the capacity and willingness to take care of him. She considered that, if the child lived with them, it would provide additional opportunities for him to develop and maintain a meaningful relationship with his Father, who could assist with facilitating contact with the extended Aboriginal family. The Relations could provide permanency in the child's living arrangements and provide a nurturing relationship, although the child's stability was at risk if he was moved away from the Foster Carers. The Relations would also have the capacity to meet his emotional, developmental and educational needs.

[144] Her Honour also considered what was referred to as the "Aboriginal placement principle", said to be embodied in section 12(3) of the Act. This required that an Aboriginal child should, as far as practicable, be placed with an Aboriginal person in preference to someone who is not an Aboriginal person.[69] The Local Court considered that the application of this principle weighed in favour of the child living with the

69 See *REF v CEO* [2019] NTSC 4 at [27].

Relations. Consideration was also given to the ability and willingness of the Foster Carers and the Relations to promote the child's cultural affiliations and to maintain family contact.

[145] It is apparent that the Local Court Judge carefully considered the suitability of the Relations as future carers of the child. Implicit in this is consideration as to whether there was someone better suited to be given long term parental responsibility, consideration of the Aboriginal placement policy, and the prospect that, if the CEO's application was successful, the child would be returned to the family.

[146] The Local Court Judge also carefully considered the evidence of the expert witnesses. Both witnesses agreed that it was desirable that a child be raised by family members and that the child had become attached to the Foster Carers. They also agreed that transferring the child to the Relations was likely to be distressing for the Child, although Ms McKenna was more optimistic as to the prospects of a successful transfer. She was of the opinion that this was the best option for the Child. Dr Thomas was of the opinion that the proposed transfer was more likely to cause long term damage to the Child.

[147] The consideration given by the Local Court Judge as to the likelihood that the Foster Carers would continue to ensure that the Child had contact with family members and his Aboriginal heritage was relevant to the issues under consideration. To some extent, this would reduce

the possibility that he would grow up not knowing his family, a matter of concern to the expert witnesses.

[148] For plausible reasons, the Local Court Judge preferred the evidence of Dr Thomas. She was of the opinion that the Child's relationship with the Foster Carers was the most significant relationship in his life[70] and she found that the risks associated with the proposed transfer to the Relations were greater than that envisaged by Ms McKenna. The potential for harm was real and not remote.[71] Her Honour concluded that it was in the best interests of the Child that he have permanency and stability in his familial relationships, and that this would be best achieved by granting long term parental responsibility to the Foster Carers. This was the best means of safeguarding the child's wellbeing and there was no one else better suited to be given that responsibility.[72]

[149] These findings were well within her Honour's discretion. She construed the Act in accordance with previous decisions of the Supreme Court and gave proper consideration to the underlying principles. There is nothing in her factual findings to suggest that her judicial discretion miscarried. The Appeal Judge did not err in dismissing the appeal. The appeal to this Court should also be dismissed.

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70 *Chief Executive Officer of Territory Families v MS and Ors* [2019] NTLC 012 at [139].

71 *Chief Executive Officer of Territory Families v MS and Ors* [2019] NTLC 012 at [140].

72 *Chief Executive Officer of Territory Families v MS and Ors* [2019] NTLC 012 at [144].

GRAHAM AJ:

[150] This is an appeal from a judgment of the Supreme Court delivered on 2 August 2019. The judgment arose from an appeal from a Local Court order made on 11 April 2019. The Local Court order was upheld by the Supreme Court and the Appellants now appeal from that judgment.

[151] The case involves an application for a protection order for a six year old Indigenous child who was born on 26 July 2013. The order was made pursuant to the *Care and Protection of Children Act 2007* (NT) (**the Act**).

[152] I will hereafter identify the parties to the appeal as follows:

(a) The First Appellant NB is the sister of the father of SB and the Second Appellant MB is married to the First Appellant (**the relations**).

(b) The Third Appellant PB is the father of SB (**the father**).

(c) The First Respondent SB is the child (**the child**).

(d) The Second Respondent MS is the mother of the child (**the mother**).

(e) The Third and Fourth respondents, CF and RF, are the foster parents of SB (**the foster parents**).

(f) The Fifth Respondent is the CEO of Territory Families (**TF**).

[153] The mother is an Aboriginal woman. The father is Caucasian. The mother and father are not in a relationship but continue to see one another from time to time.

[154] The child lived with either the mother or the father until he was two years and seven months of age. He first came into the care of TF in February 2016. This was because the father was suffering a serious mental illness and could not care for the child and the mother could not be found. By April 2018 TF were convinced that parental reunification with the father was not viable and the child should continue to live with the foster carers who had been caring for the child since February 2016.

[155] The Local Court judge applied the proper test that must be applied in determining a protection application and that is what is in 'the best interests of the child'. Because of the age of the child his wishes do not have substantial weight, though in coming to a conclusion the court must and did take into account his wishes. The child stated positively that he wanted to stay with the foster carers and considered them to be his parents. The Local Court judge also took into account the wishes of the mother who wanted the child to live with the relations. However, the mother had only met the relations on one occasion. The father at first supported the foster carers, but later sought custody himself and finally in August 2018 changed his position and advised TF he wanted the relations to care for the child. The father used to have a good

relationship with the foster carers but this relationship had clearly broken down.

[156] The essence of the dispute is between the relations and the foster parents. This of course does not mean that there is a ‘custody’ dispute between the two sets of competing families. It means that upon determining the best interests of the child, the consequence will be that the child goes to TF, the relations or the foster carers, as these are the best and only options available to a court making a protection order. A statement of issues was filed by the parties with the Local Court and it identified the issues in dispute between the parties as follows:

(a) Orders sought by TF: A protection order in relation to the child with a short term responsibility direction giving parental responsibility to TF for two years.

(b) Orders sought by the father: he filed no document.

(c) Orders sought by the mother: she supported the relations seeking either daily care and control or parental responsibility for the child.

(d) Orders sought by the foster carers: they sought a protection order with long-term parental responsibility in a direction giving parental responsibility of the child to them until he was 18 years of age.

(e) Orders sought by the relations: they had not filed a response but had filed an interlocutory application seeking either daily care and control or parental responsibility of the child.

(f) It was agreed by all parties that the child was in need of 'protection'.

(g) The document identified that the issue in dispute was whether parental responsibility should be with TF, the foster carers or the relations.

(h) The document itself [T298-300] was lodged on behalf of all the parties to the litigation.

[157] The Local Court judge pointed out that the relations were raising their own family and had only limited contact with the father since the birth of the child. On the other hand, the relations were prepared to move to Katherine for six months to effect a smooth transfer of the child to them. The relations presented to the Local Court judge as being caring family-oriented people, though she noted correctly that they had not established a relationship with the child or even actively checked on his well-being for two years even though they knew he was in foster care. Furthermore, the child had never lived with the relations and does not have a pre-existing relationship or attachment to them.

[158] The Local Court judge concluded that the foster carers not only cared for the child well but ensured that he maintained a relationship with his father and that he saw his mother whenever she returned to the area.

They were not aware of the existence of the relations prior to 2018. The Local Court judge found that the foster carers demonstrated that they recognised the importance of the child knowing and spending time with his extended biological family and thought that they could repair their relationship with the father.

[159] Two experts gave evidence before the Local Court judge. Dr Kerri Thomas supported a conclusion that the child remain with the foster parents and Ms Louise McKenna supported a conclusion that the child live with the relations. The latter expert made no criticism of the foster carers but placed great emphasis on the importance of biological family to the development of a child's personal identity. The Local Court judge preferred the former expert and she expressed the view that there were aspects of Dr McKenna's opinion that were troubling. In particular the Local Court judge said: *'In my view Ms McKenna's opinion was based on a rosy and unsubstantiated version of the first 2½ years of the young boy's life'*.[73] The Local Court judge heard both experts and it was within her discretion to prefer one over the other.

[160] When considering what was in the best interests of the child, there were two important issues that arose in this case. In the first place there was the issue of the child remaining with foster parents as opposed to being placed with blood relatives. The Local Court judge

73 *Chief Executive Officer of Territory Families v MS and Ors* [2019] NTLC 012 at [137].

took this factor into account and concluded, as she was entitled to, that in the circumstances the best interests of the child were served by him remaining with the foster parents. The second factor that is significant in this case arises out of s 12 of the Act. This section deals with the principles of placement applicable to Aboriginal children. The Local Court judge concluded that the principle favoured the relations but that it must be read as being subject to s 10(1) of the Act. I do not agree that s 12 is to be read subject to s 10(1). Rather, a court must apply the 'best interests' test including a consideration of the factors set out in s 12. This error does not vitiate the decision of the Local Court judge as she correctly applied the 'best interests' test in arriving at her conclusion.

[161] Before any order is made for protection the court must be satisfied that the child is in need of protection. In this case there was no dispute as to this fact.

[162] Without limiting the general principle, there are a number of factors set out in s 10 of the Act that a court must take into account in concluding what is in the best interests of a child. They are set out as follows.

(a) **The need to protect a child from harm and exploitation**. The Local Court judge was satisfied that both competing parties would protect the child.

(b) **The capacity and willingness of the child's parents or other family members to care for the child**. The Local Court judge was satisfied that the relations were close biological family members and had the capacity to care for the child. I conclude the Local Court judge was wrong in including the foster carers in her consideration of this subsection as they are not family members and she was wrong in concluding that they were.

(c) **The nature of the child's relationship with the child's family and other persons who are significant in the child's life**. It is in this area of the section that the strength of the foster parents' position is found. Though the child sees them as his parents he knows who his mother is and refers to her as 'Mummy M'. He knows who his father is and calls him 'Daddy P'. In the past the paternal aunt, one of the relations, had had difficulty maintaining contact with her brother, the father, by phone. The future movements of the father were doubtful. Most importantly, the child had lived with the foster carers for over three years – more than half his life. He has a secure attachment to them and the Local Court judge found that this was the most consistent, important and significant relationship in his life. She found that to move the child would expose the child to the risk of being removed from the secure attachment he has with the foster parents. The Local Court judge said she considered the potential risks to the child's

psychological and physical well-being arising from the trauma of being moved was real and not remote, and this was particularly so because of the instability associated with his life before he joined the foster carers.

(d) **The wishes and views of the child having regard to his maturity and understanding**. He is very young and his wishes are not likely to be a determinant.

(e) **The child's need for permanency in his living arrangements**. Both families are financially sound and both marriages are committed and strong.

(f) **The child's need for stable and nurturing relationships**. Although both couples have the capacity to provide a nurturing relationship it is the foster carers who provide such a relationship.

(g) **The child's needs including physical, emotional, intellectual, spiritual, developmental and educational.** Both couples had the capacity to meet these needs.

(h) **The child's age, maturity, gender, sexuality and cultural, ethnic and religious background**. Both couples have the capacity to provide these needs.

(i) **Other special characteristics**: The female foster carer has experience in early childhood care having managed a day care centre. The male

relation is a primary school teacher and the female relation is a teacher's aide.

(j) **The likely effect on the child of any change in the child's circumstances.** The foster carers were moving to Adelaide. The move was to be facilitated by the RAAF who employs the male foster carer and the transition would be likely to be smooth. On the other hand, a transition to the relations would mean that present attachments are broken. It was the Local Court judge's factual conclusion that an attempt to transition to the relations carried with it a real risk of detrimental mental and physical outcomes to the child.

[163] The Local Court judge's conclusion was that for more than half the child's life the foster carers had proven their ability to prioritise and meet the child's needs. They provide him with a loving and stable home and have established a healthy and nurturing parental relationship with him. This, she found, is the most significant relationship in his life. In addition, she concluded, they have a good understanding of the significance of his Aboriginality and will encourage and foster it.

[164] Upon appeal to the Supreme Court, the Supreme Court judge concluded that the appeal should be dismissed. However, there were aspects of the judgment that raised issues that are alive in this appeal.

[165] The Supreme Court judge determined that s 6(2) did not apply to a Local Court judge.[74] This section of the Act deals with the principles underlying the Act. Under s 6(2), anyone exercising a power or performing a function under the Act must uphold those principles. It is my view that this reference to 'anyone' would include a court and that the underlying principles set out in Part 1.3 inform the provisions of Part 2.3.

[166] The Supreme Court judge also concluded that there was a conflict between Part 1.3 and Part 2.3 of the Act. His Honour decided that s 90 and s 130 are consistent with the first object of the Act, and the controlling principle of the *parens patriae* jurisdiction. His Honour also concluded that if s 10 applied to the Local Court when exercising its powers under the act then s 90 would be otiose. I do not agree.

[167] The Supreme Court judge stated that under the doctrine of *parens patriae* the welfare of the child is paramount. The 'welfare' test has been overtaken by the 'best interests' test. The latter test is derived from Article 3 of the United Nations *Convention on the Rights of the Child* [75] This is the test contained in s 60CA of the *Family Law Act 1975* (Cth), and is the test that is clearly adumbrated in the Act.

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74 *NB & Ors v SB & Ors* [2019] NTSC 61 at [26].

75 *Convention on the Rights of the Child*, opened for signature 20 November 1989, [1989] UNTS 1577 (entered into force 2 September 1990), Article 3.

[168] There is no conflict in my view between Part 1.3 and Part 2.3. Pursuant to s 90 of the Act the Court must regard the best interest of the child as being paramount. The principles underlying the Act are set out in Part 1.3. Under s 10 the best interests of the child are paramount and the factors set out in sub-section (2) are not to be held to be exhaustive. In addition, s 12 relates specifically to Aboriginal children. In coming to her conclusion the Local Court judge correctly applied s 10 and s 12.

[169] In *WM & FM v CEO Department of Children and Families & Ors*, Kelly J, referring to the Act, stated:[76]

> The principles to be applied by the court in making its determinations under the Act are to be found in sections 7 to 12. Section 6 provides that anyone exercising a power or performing a function under this Act must, as far as practicable, uphold those principles. That means that as well as the court, the CEO is bound by those principles when exercising his (or her) powers under the Act, and the court can and should take cognisance of that.

[170] In the subsequent decision of *RG v DG & Ors*, also referring to the Act, Kelly J said:[77]

> When a decision involving a child is made, the best interests of the child are the paramount concern. The Act provides that a child may be removed from the child's family only if there is no other reasonable way to safeguard the wellbeing of the child and, as far as practicable (and consistent with the interests of the child being the prime consideration), 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.

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76 *WM & FM v CEO Department of Children and Families & Ors* [2012] NTSC 67 at [18].

77 *RG v DG & Ors* [2013] NTSC 66 at [43].

[171] I would conclude that her Honour, with respect, has correctly defined how one goes about determining a dispute under the Act. In summary, the test is first of all to determine whether a child is in need of protection and then to make an order, provided an application for such order is alive and before the court, in the best interests of the child. In coming to that decision the court must consider s 10 and s 12 and must take into account any factor that bears upon the best interests test.

[172] The Supreme Court judge upon hearing the appeal from the Local Court concluded that the appeal should be dismissed. His Honour concluded that it was not practicable and would be detrimental to the child's well-being to place the child in the care of the relations. He concluded the foster carers were sensitive to the child's needs and capable of promoting the child's ongoing affiliation with his culture and, when possible, to enable contact to take place with his family. In short, his Honour concluded that the Local Court judge was not in error and her decision was within her discretion.

[173] A substantial ground of appeal was that the Supreme Court judge misconstrued the Act in that his Honour concluded that there was inconsistency between Parts 1.3 and 2.3 of the Act, and that therefore his Honour could not have safely determined that there was no real possibility that the Local Court judge's error in defining 'family' affected her decision. The difficulty with this submission is that the Local Court judge herself made clear that her decision did not turn on

her inclusion of the foster carers as 'family' within the meaning of the Act. She stated as follows: *'This decision does not turn on the definition of family. Even if my interpretation of family is wrong, in my view the best interests of the young boy that he stays with the foster carers.'*[78] Any misapprehension by the Supreme Court judge as to the relationship between Parts 1.3 and 2.3 of the Act was therefore irrelevant.

[174] It is further argued that the Local Court judge fell into error in her consideration of s 8 of the Act. Her reference to this section is at [125] of her reasons for judgment. Upon a reading of the whole of this paragraph it seems to me that she has considered situations where persons who are not family members but who are closely associated with the child could care for the child. She gives the example of refugee families with close support of connections and communities. It is my view that there was no error in those observations.

[175] The most initially attractive ground of appeal, in my view, is whether the Local Court judge considered whether or not a kinship assessment of the relations was a condition precedent that had to be completed before a protection order could be made. In other words, should she have considered whether the prospects that the child could be

78 *Chief Executive Officer of Territory Families v MS and Ors* [2019] NTLC 012 at [143].

eventually be returned to the family was a practicable alternative before coming to a decision as to long term placement.

[176] When one examines the material that was before the Local Court judge it becomes clear that the order eventually made was one of the alternative orders that was alive before the Local Court judge. Pursuant to s 123 of the Act a Protection Order can specify long-term parental responsibility direction. This was the order made in this case and upon a review of the evidence it is clear that all parties were well aware that a decision granting long-term responsibility to the foster carers was one of the options open to the Local Court judge. It is my view that this order was well within the ambit of the Local Court judge's discretion and power.

[177] It was also submitted that the Supreme Court judge's construction of the Act is erroneous. In my view the appellant's argument in this respect is well-founded. I conclude there is no conflict between s 8 and s 130(2) of the Act and that the principles set out in ss 8 and 12 of the Act expressly underlie the Act and reflect its objects as set out in s 4. I further agree that s 90 is therefore not otiose as it simply confirms the basis upon which the court exercises jurisdiction. However, I also conclude that if I am correct and there was an error it has not affected the result in the Supreme Court. The judge concluded that the Local Court correctly determined that the long-term responsibility for the child should rest with the foster carers.

[178] The foster carers submit that the Supreme Court's disposition of the appeal followed an examination of the evidence and the manner in which the case was disposed of by the Local Court. It was further submitted that the decision of the Local Court judge was well within the ambit of her discretion and the Supreme Court's consideration of her decision was unexceptionable. I would conclude that this submission is correct.

[179] TF did not seek to be heard at the appeal.

[180] The father, by his counsel, filed submissions but did not otherwise join in the appeal. The submissions state that the father continues to support an order with long-term parental responsibility in favour of the relations. It should also be noted that counsel for the father submitted that s 6(2) of the Act would include the Local Court when referring to 'anyone'. I accept that this submission is correct.

[181] In summary, there is no dispute that the child is in need of protection. The only issue before the Local Court was what order should be made in support of the protection order. In other words, taking into account that the best interests of the child were paramount, what order should be made to give effect to this principle. The Local Court judge determined that the appropriate order was to grant the foster carers long-term parental responsibility. The Supreme Court judge, upon appeal, ultimately agreed with this conclusion, although I am unable to

accept some aspects of his Honour's interpretation of the Act. The decision of the Local Court was made after hearing evidence and coming to conclusions as to the evidence that should be accepted or rejected. Counsel for the relations made it clear at the outset of the case before the Local Court judge that the foster carers could not be afforded family status. During opening remarks before the Local Court it was made clear by the parties that the foster carers were applying for a long-term order with parental responsibilities [see T 019]. On the other hand, the paternal aunt and uncle were seeking either short-term or long-term parental responsibility [see T 020]. This was clearly the ambit of the dispute. No party sought to cavil with this. In fact, immediately after the Local Court judge confirmed that these were the issues she commenced hearing the evidence. I add that the Local Court had before it a statement of issues from the parties. Those issues included the following:

> A protection order in relation to the child with a long-term parental responsibility direction giving parental responsibility to [the foster parents] until the child is 18 years of age.

[182] This statement of issues was signed by all parties.

[183] The judgment at first instance was a discretionary judgment. The only basis on which it can be overruled is if the decision was beyond or outside the limits of the discretion or if the Supreme Court determined the case upon an unlawful premise. It is my view that the decision was

well within the ambit of the discretion available to the Local Court judge. One must emphasise that the issue was not a ‘custody’ contest between the relations and the foster parents. The determination of the Local Court judge was the application of a consideration of the various factors that must be taken into account to determine the best interests of the child, and then consequent upon that determination to make an order for protection of the child. In my view the Local Court judge did just that and the Supreme Court upheld that decision. In my view any error by the Supreme Court judge in his analysis of the various parts of the Act has no bearing on either his conclusion or the conclusion made earlier by the Local Court judge.

[184] The appeal is therefore dismissed.

GRANT CJ:

[185] The order of the Court is that the appeal is dismissed.

[186] We will hear the parties in relation to costs if need be.

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