CITATION:	*REF and SJP v Chief Executive Officer, Territory Families* [2019] NTSC 4
PARTIES:	REF AND SJP v CHIEF EXECUTIVE OFFICER, TERRITORY FAMILIES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	113 of 2017 (21756092)
DELIVERED:	9 January 2019
JUDGMENT OF:	Barr J

REPRESENTATION:

Counsel:

Plaintiff:	A Boe
Defendant:	T Moses

Solicitors:

Plaintiff:	Ryan Kruger Lawyers
Defendant:	Solicitor for the Northern Territory

Judgment category classification:	B
Judgment ID Number:	Bar1901
Number of pages:	28

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

REF and SJP v Chief Executive Officer, Territory Families [2019] NTSC 4
No 113 of 2017 (21756092)

BETWEEN:

REF and SJP
Plaintiff

AND:

CHIEF EXECUTIVE OFFICER, TERRITORY FAMILIES
Defendant

CORAM: BARR J

REASONS FOR DECISION ON COSTS

(Delivered 9 January 2019)

Background

[1] The child, PG, born 9 June 2012, is and was at all material times subject to a protection order made by the Local Court at Alice Springs on 2 April 2014, with a long-term parental responsibility direction giving parental responsibility for the child to the defendant CEO until the child turns 18.[1]

[2] PG is an Aboriginal child from the Central Desert region. She was born prematurely, suffered meningitis and spent the first eight weeks of her life in the special care nursery of the Alice Springs Hospital. She first entered

---

1 *Care and Protection of Children Act 2007*, s 129, s 123(1)(d).

the care of the CEO on 10 August 2012, and was immediately placed in the care of the plaintiffs pursuant to a "placement arrangement".[2] The plaintiffs continued to be the child's foster carers to the date of commencement of proceedings. The child enjoyed a strong and trusting relationship with them. They were the only primary caregivers she has known.

[3] The first plaintiff is a specialist paediatrician and the second plaintiff is a senior social worker. They met and formed a relationship while working at the Alice Springs Hospital in 1995. They have two children of their own, born in 2001 and 2004. Both plaintiffs have had significant professional experience working with Aboriginal children and their families in Central Australia. The second plaintiff speaks basic Pitjantjatjara.

[4] PG lived with the plaintiffs in Alice Springs until January 2014, when they moved to Brisbane. The child's relocation with the plaintiffs to Brisbane was approved by the Department of Children and Families.

[5] As at November 2017, PG remained living in Brisbane with the plaintiffs. She was receiving support, treatment and care for Autism Spectrum Disorder (Level 2 or 3, associated with significant speech and language delay), Attention Deficit Hyperactivity Disorder and a Generalised Anxiety Disorder.[3] The child demonstrated a number of aspects in her behaviour resulting from developmental difficulties, including: unreliability going to

---

2 *Care and Protection of Children Act 2007*, s 77(1), s 78.

3 Report Dr Catherine Anne Llewellyn, 13 September 2016, provided to Department of Children and Families in Alice Springs. See annexure 'RF-18' to the affidavit of the first plaintiff affirmed 30 November 2017.

the toilet on her own; heat intolerance, leading to unusual levels of distress when feeling 'hot'; clothing intolerance, with a preference not to wear clothes at all; self-imposed dietary restrictions (for example, she would only eat strawberries and cheese); high levels of distraction resulting in inability to carry out the tasks of daily living without supervision; anxiety, particularly where routines may be changed or if she heard unusual noises; and inappropriate social interaction, for example, overly familiar behaviour with people, with no concept of body part privacy.

[6] Following the diagnosis of Autism Spectrum Disorder made by a specialist child psychiatrist in late 2016, PG was referred to an Educational and Developmental Psychologist in March 2017.[4] The evidence indicates that she had attended 10 sessions with the psychologist and was progressing satisfactorily, although still beset with significant difficulties and challenges. She had been assessed and treated by a speech pathologist and had also been referred for occupational therapy to assist with her intended transition from kindergarten to primary school in 2018. She was enrolled to start school in Brisbane in 2018. She had visited the proposed school on two occasions and had been assessed by staff in relation to her extra needs. The school staff had also visited the child's kindergarten to meet her teacher and observe her in her pre-school environment.

---

4 The diagnosis of Autism Spectrum Disorder enabled PG to receive assistance through the Helping Children with Autism Early Intervention Funding Package through Autism Queensland Limited, for the period March 2017 to June 2019.

[7] Meanwhile, Territory Families, previously the Department of Children and Families, was working towards implementation of a revised "Out of Home Care Plan" for the child. A copy of such Plan (somewhat curiously dated on each page "June 2014") was said to have been provided to the plaintiffs on 23 November 2016.[5] The goal of the Plan was stated as follows: "a stable, long-term placement with maternal grandparents if and when it is practicable". The intent of the Plan was to place the child with her grandparents (or 'kinship carers') at a remote Central Australian community, population about 300, situated about 450 km or some five to six hours drive from Alice Springs. This was consistent with a previously formulated "Out of Home Care Plan".[6]

[8] The Plan recognised that PG had the specific diagnosed disabilities referred to in [5] above.

[9] In a box headed "Family Relationships and Connections", the Plan listed the child's needs as follows:

> For PG to have meaningful contact with family (in particular her maternal grandparents …) in order to build positive relationships and ensure PG is able to access the knowledge and wisdom of her Aboriginal heritage which will contribute to her strong sense of identity as she grows up....

---

5 See the affidavit of Sarah-Jane Zaichenko affirmed 12 January 2018, par 16, Annexure 'SJZ-3'. There is a problem with accepting that the original of the annexed copy Plan 'SJZ-3' was provided to the plaintiffs on 23 November 2016, because the copy proposed Plan contained an endorsement confirming approval by the Manager (Sarah Codrington) on 3 March 2017. Therefore, if an earlier version of the plan had been provided to the plaintiffs on 23 November 2016, it was not at that stage approved by the Manager, and was possibly a draft.

6 The previous "Out of Home Care Plan" for the child was dated on each page "April 2016" but signed and dated 22 June 2016 at the end.

> The overall goal is for PG to be able to visit her maternal family in [*remote community*], that she will be able to confidently move between her foster care family and biological family, recognising that this will be a long journey as PG struggles with change, transitions and social skills – all features of ASD.

[10] In relation to meeting the needs referred to in the previous paragraph, the Plan suggested that the maternal grandparents – residing in their remote community – "learn more skills in relating to a child with autism and anxiety" and that they "access education materials which could assist them to understand ASD".

[11] The Plan also had a box headed "Culture and Identity", which identified a need for PG "to be surrounded by images, language and art from her country and culture." The proposed Plan suggested or recommended that the need be met as follows:

> PG will be surrounded by images, language and art from her country and culture during family contact visits in Alice Springs and [*remote community*] as far as practicable.
>
> When away from her country PG will have access to artworks, images and language from her country and culture through the videos and photos taken during her trips to Alice Springs and during an upcoming visit from her maternal grandparents in Brisbane.
>
> The video of [remote community] will be sent with the family to the family contact in Brisbane.

[12] The Plan noted that the plaintiffs had images (presumably photos) of PG's family which they regularly showed and talked about with the child. This was said to have been effective in helping PG know who her grandparents are when she visits them. The Plan noted that the video referred to had not been edited, because of technical difficulties, and thus not sent.

[13] The Plan did contain some pragmatic recommendations. For example, although the CEO had made a decision in September 2015 (which in retrospect appears somewhat unrealistic), that PG was to have access to her grandparents on four occasions per calendar year, with total access of 49 days, the Plan read:

> A memo has been prepared for the CEO asking that the position of 49 days per year be reconsidered as it will be difficult for all parties to comply.

[14] It is difficult to understand how and when the stated goal of the Plan was intended to be achieved, given the tensions in the Plan itself. The goal of a stable, long-term placement with PG's maternal grandparents was qualified by the words "if and when it is practicable". The Plan stated that Territory Families did not regard a remote placement of PG "as a practicable option at the moment". I assume that "the moment" referred to the date of approval of the Plan in March 2017. The Plan identified the need for the child's "bond and attachment" with the plaintiffs and her relationship with her foster siblings "to be supported and nurtured", and acknowledged that separating her from her existing family environment (that is, the 'family' constituted by the plaintiffs, their two children and PG) would "expose [her] to distress and trauma if not managed in a very slow and considered way with a full consideration of her diagnosis".

[15] The Department of Children and Families was in possession of a report written by a forensic psychologist in October 2014, in which various

methods of transition were considered. The expression 'transition' meant placing the child with her maternal grandparents. In relation to a simple handover of the child to her grandparents, followed by return to the remote community, the report contained the following observations:

> This would obviously be a traumatic experience for PG that would involve a high level of distress and a deep sense of loss and grief on her part. The onus would rest upon the maternal grandparents to settle and soothe PG and to provide her with the support, physical comfort and reassurance that she required. The extent to which such an abrupt transition would have a long-term detrimental impact upon PG's overall welfare and adjustment is difficult to determine. It is evident though that it would initially involve a high level of emotional distress and confusion and anxiety on the part of PG. It is also possible that, in the days that follow, her distress will diminish and she will adapt to her changed life circumstances. Much will depend upon how PG's distress is managed by the maternal family and how quickly PG can adapt to the routines of her new home and community....
>
> Although there is a high level of distress caused to PG by such an abrupt transition it is possible that this may pass relatively quickly and thereby avoid the prolonged, emotional and less reliable process of attempting to implement a graduated transition. Such a process may simply prolong PG's distress and suffering over an extended period of time with very uncertain outcomes.

[16] The writer's speculation, that PG's high level of distress would possibly pass "relatively quickly" is very problematic. The writer did recommend that more work be done to explore the viability of the several handover options identified by him. Moreover, the report was written before the child was diagnosed with Autism Spectrum Disorder, Attention Deficit Hyperactivity Disorder and Generalised Anxiety Disorder in late 2016. However, from the point of view of Territory Families, the red flags identified in the forensic psychologist's report of October 2014 ought to have been raised again,

arguably brighter red, after the Department was provided with the report of Dr Catherine Llewellyn, specialist child and adolescent psychiatrist, in September 2016.[7] In that report, Dr Llewellyn set out the DSM-V diagnostic criteria for Autism Spectrum Disorder and explained in detail how PG met those criteria. Dr Llewellyn further explained that children with Autism Spectrum Disorder require the support of a multidisciplinary team to maximise their development. She explained that PG had the additional problems of her Generalised Anxiety Disorder and Attention Deficit Hyperactivity Disorder, which combined to make her treatment for Autism Spectrum Disorder even more complex, requiring intensive and regular support and therapies. Dr Llewellyn expressed the opinion that PG's multidisciplinary treatment would probably run over several years, and that the degree of improvement would only become clearer after two to four years. Even with intensive interventions, PG would "likely always experience developmental delays compared to her peers in relation to language, social skills and emotional regulation skills". Dr Llewellyn considered that those impairments were more than likely to remain throughout childhood and adolescence, causing academic, linguistic and social difficulties.

[17] Dr Llewellyn described PG as a "vulnerability risk (to abuse or neglect)" if she were not living in a safe, emotionally attuned and stable environment

7 See footnote 3 above.

which was able to meet her high-level needs. That vulnerability was in part due to her Autism Spectrum Disorder diagnosis, exacerbated by her inability to communicate feelings in words, or to describe the things which triggered her distress. Of particular concern was Dr Llewellyn's description of the child's likely reaction to separation:

> For PG, marked episodic emotional dysregulation can manifest in a variety of ways... Her caregivers need to possess a detailed knowledge of her nuanced way of perceiving and relating to the world around her to be able to adequately meet her needs. This would be best managed by caregivers actively anticipating triggers and assertive management of the same to avoid PG experiencing pervasive distress. Put simply, PG will not cope with a reactionary approach to her difficulties. History indicates that PG is at risk of marked regression and distress with stressors (such as separation from one or both caregivers, as evidenced by her response to relatively minor attempts at separation with her kindergarten).

[18] The Plan discussed in paragraphs [7] – [14] above, which probably came into effect formally upon being approved on 3 March 2017,[8] stated, at the very end, that the date of the next Care Plan review was to be 22 June 2017. However, no further Plan was prepared in June 2017, or at any time prior to the commencement of the within proceeding.

The decision to transition PG to her maternal grandparents

[19] On 14 November 2017, the plaintiffs received an email from Sarah-Jane Zaichenko, Acting Child Protection Manager, Territory Families, headed 'MEETING – TRANSITION PLAN', which then read: "Please see

---

8 At page 20 of the document, there appears the signature or initials of a person designated as the "Manager Approving Plan" with the date of approval shown as 3 March 2017 – see affidavit of Sarah-Jane Zaichenko affirmed 16 January 2018, Annexure 'SJZ-3'.

attachment for the agenda for the meeting that Territory Families would like to have with the two of you". The attached document, headed "Meeting Agenda", with the sub-heading '[PG]'s Transition', contained proposed agenda items such as 'Transition Plan Proposal', 'Timeframes of Transition', 'Logistics of Transition', and 'Support [PG] Requires to Transition'.

[20] Upon receipt of the email referred to in the previous paragraph, the first plaintiff (presumably both plaintiffs) believed that a decision had been made by Territory Families to remove PG from their care and place the child with her grandparents. That belief was well-founded, as subsequent events demonstrated. The first plaintiff was greatly concerned because she did not see how such a process was in the child's best interests given her circumstances, background and needs. As well as being concerned, the plaintiffs were surprised because they had not received any "previous substantive indication from the Department that such a decision was imminent".[9] The evidence of the first plaintiff in this respect is consistent with the contents of the letter dated 15 November 2018 sent by the plaintiffs' solicitors to Ms Zaichenko.[10]

[21] From 14 November 2017, the parties corresponded through their legal representatives, as the plaintiffs sought clarification or confirmation as to

---

9 Affidavit of the first plaintiff affirmed 30 November 2017, par 60.

10 Affidavit of Sarah-Jane Zaichenko affirmed 16 January 2018, annexure 'SJZ-6'.

the decisions actually made in relation to PG and their legal and factual basis. In relation to the decision (but not reasons), the position was clarified on 28 November 2017 by a senior lawyer in the Department of the Attorney-General and Justice, acting for Territory Families, in her letter to the plaintiffs' solicitors, as follows:

> Territory Families would like to give your clients notice that [PG] will be transitioned to the care of [her maternal grandparents] during the next access in the Northern Territory which is scheduled for December/January school holiday period. The timeliness of this transition is important to [PG] as it will enable her to attend ceremonial events (funeral) which are expected to occur during this period and be ready to commence school in [remote community] in January 2018.
>
> It is confirmed that Territory Families has made the decision in the best interest of [PG] and would prefer to involve your clients in enacting that decision.

[22] The plaintiffs' lawyers pressed for further information. By letter dated 28 November 2017, they attempted to analyse the decision communicated to their clients and to once more seek reasons:

> Your statements ... confirm that Territory Families have made a decision concerning the placement of [PG]. That decision is to cancel [PG]'s current placement arrangement and enter into a new placement arrangement for her with [the maternal grandparents].
>
> Under s 77(2) of the *Care and Protection of Children Act* (NT) this decision is one to be made by the CEO, or his delegate. As previously requested, please provide to us written reasons for this decision and what material was taken into account by the decision-maker in making it.

> We reiterate that our clients are entitled to written notice of the decision and its reasons before responding to Territory Families' several requests of our clients in the correspondence.[11]

[23] The response from the senior lawyer acting for Territory Families was, relevantly, as follows:[12]

> As your clients will be aware, [the maternal grandparents] are authorised kinship carers for [PG] and the case plan has been to transition [PG] into their care.
>
> This decision has been communicated to your clients in writing via care plans and previous correspondence.
>
> The reasons have also been communicated to your clients in writing, most recently in our letter dated 28 November 2017. All information available to Territory Families held on [PG]'s file has been considered in the making of the decision.
>
> Territory Families acknowledge the love and care [the plaintiffs] provide to [PG] and appreciates the difficulties they are currently experiencing. It is Territory Families preference to meet with your clients personally to give them the opportunity to provide valuable input into the transition planning.
>
> …….
>
> While this is not the preferred option please be advised that in the event that the [proposed] meeting [on Thursday, 7 December 2017] is unable to occur Territory Families gives notice that on Thursday, 14 December 2017 delegates of the Chief Executive Officer will attend in person and return with [PG] to Alice Springs.

[24] It is clear from all the evidence, although not expressly stated in the letter dated 28 November 2017, that a placement decision pursuant to s 77 *Care and Protection of Children Act* had been made, with implementation to occur within a few weeks. Territory Families made no attempt to explain

---

11 The reference to "several requests" made by Territory Families included a request made in the letter of 28 November that the plaintiffs be involved in PG's transition in terms of discussing "roles and supports …to support [PG] in a successful transition".

12 Letter dated 1 December 2017, annexure 'SJZ 11' to the affidavit of Sarah Jane Zaichenko.

that decision by reference to the matters set out in s 10(2) *Care and Protection of Children Act 2007*, which a decision maker is required to consider in determining the best interests of a child. I say more about that in [27] below. Moreover, the assertion in the second paragraph extracted in [23] was untrue insofar as it claimed that the decision had been communicated to the plaintiffs in writing via care plans. As mentioned in [18], the most recent Care Plan provided to the plaintiffs had been that approved on 3 March 2017. No further Care Plan had been provided. Although the March 2017 Care Plan had, as its stated goal, the long-term placement of PG with her maternal grandparents (subject to such placement being practicable), the Plan expressly stated that Territory Families did not regard the placement of PG in the remote community as a practicable option at that time. Thus, the decision referred to in [21], contained in the letter dated 28 November 2018, had not previously been communicated to the plaintiffs.

[25] Evidence subsequently provided to the Court indicates that a decision "to transition [PG] into the care of her grandparents within the short term" had actually been made some three months previously, on 16 August 2017, at a meeting attended by Sarah-Jane Zaichenko and two senior departmental officers in Alice Springs.[13] The decision appears to have been made for the

13 Affidavit of Sarah-Jane Zaichenko affirmed 16 January 2018, pars 19-22. Ms Zaichenko deposed in par 23 that the decision of 16 August 2017 was "not a final placement decision". However, that is not reflected in the draft amended Care Plan subsequently prepared by Territory Families, referred to in par 51 of Ms Zaichenko's affidavit, a copy of which is the annexure 'SJZ-12'. The draft amended Care Plan reads "Placement with Kinship

reason that officers of the Department were concerned that "the current arrangements for contact were not supporting [PG] to develop a meaningful relationship with her grandparents … based on the limited frequency and duration of contact and the lack of progress in establishing a relationship between [PG] and her grandparents in which [PG] appeared comfortable". The Department acknowledged that the child's special needs were being met in the placement with the plaintiffs, and that they loved and supported her. However, in the words of Ms Zaichenko:

> … in that placement [with the plaintiffs] she will not have a strong relationship with her family and develop positive cultural identity. She will grow up an outsider to her own family and Indigenous culture. She will be an outsider because she has not experienced her culture, is unfamiliar with her country and has limited language. Exposure to Indigenous artwork and Indigenous community networks in Brisbane is a very poor substitute for a lived cultural experience. …. A placement at [remote community] will allow PG to grow up being part of her family and knowing and living her Indigenous culture.[14]

[26] On the evidence available to Territory Families in late 2017, PG was autistic, affected by ADHD, and suffering a mental illness (high levels of anxiety). She had behavioural problems, language acquisition delays and special education needs, for which she was receiving specialist treatment and therapies (occupational therapy, speech therapy) in Brisbane. She had been introduced to the school where she would be a student in 2018. She was being cared for by the plaintiffs, with whom she had a very close bond.

Carers – On 16 August 2017 Territory Families *made a decision* to transition PG into the care of her grandparents within the short term ....". [italic emphasis added]

14 Affidavit of Sarah-Jane Zaichenko affirmed 16 January 2018, par s 19-22.

They had raised her from infancy; they understood and were able to meet her complex needs. PG was no ordinary child. Separation from the plaintiffs was likely to cause her to experience a high level of distress and a deep sense of loss and grief. However, notwithstanding a full awareness of all those matters, Territory Families was prepared to send two or more "delegates" of the CEO to Brisbane to remove PG from the plaintiffs' care, after which the child would be subjected to an experiment in a remote community in Central Australia based on (1) her race and (2) concerns held by the Department as to her likely cultural alienation, that is, alienation from the culture of her family (but with whom she had never lived and with whom she had effectively little or nothing in common, let alone a close bond).

[27] 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.[15] There are

15 *Care and Protection of Children Act 2007*, s 10(2)(b).

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.[16] 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.

[28] In making the impugned decision, Territory Families placed considerable reliance on the forensic psychologist's report of August 2014, referred to in [15] above, and the recommendation made by the writer of that report that Territory Families place PG in the care of her grandparents as soon as practicable.[17] However, by the time the decision was made in August 2017, that report was three years old. Further, as mentioned in [16] above, the report had been written before the child had been diagnosed with Autism Spectrum Disorder and the other two diagnosed conditions referred to. The Department had not sought advice from the relevant forensic psychologist as to whether his recommendations still held good in light of the expert psychiatric diagnosis and opinions set out in [16] and [17]. Of greater

16 *Care and Protection of Children Act 2007*, s 10(2)(c), (e), (f), (g), (i) and (j).

17 Affidavit of Sarah-Jane Zaichenko affirmed 16 January 2018, pars 29-30.

significance, in my opinion, it does not appear that the Department or Ms Zaichenko had considered the report of Dr Catherine Llewellyn. In her affidavit explaining the Department's decision, Ms Zaichenko does not mention the opinions expressed by Dr Llewellyn as matters she had taken into account.[18] Indeed, I am satisfied on the available evidence that Territory Families made no contact with Dr Llewellyn after receiving her report in September 2016.[19] I conclude that Territory Families had not sought an opinion or advice from Dr Llewellyn in relation to the Department's plan to transition PG from the plaintiffs to her maternal grandparents.

[29] Notwithstanding my observations in [26] - [28], I remind myself that, if the plaintiffs' case had gone to hearing, it would not have involved a merits review but rather a consideration as to whether the decision made by the defendant CEO (or delegate) to remove the child from her placement with the plaintiffs was so unreasonable as to be in error.[20]

[30] In relation to the provision of reasons for the decision which was communicated to the plaintiffs on 28 November 2018, the letter from the solicitor acting for Territory Families referred to in [23] was vague, and made no attempt to explain what, if anything, had taken place or come about between March 2017 and November 2017 to make the placement of PG with

---

18 Affidavit of Sarah-Jane Zaichenko affirmed 16 January 2018, pars 24-32, esp. par 32.

19 Affidavit of Margaret Mary Kruger sworn 30 November 2017, par 22.

20 See, for example, *Minister for Aboriginal Affairs and Anor v Peko-Wallsend Ltd and Ors* (1985-1986) 162 CLR 24 at 41, referring to *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 230, 233-234.

her grandparents in the remote community a practicable option when previously it had not been.

Commencement of court proceedings

[31] On 30 November 2017, the plaintiffs filed an originating motion seeking relief in the nature of certiorari on the basis that the placement decision made by the defendant was so unreasonable as to be an error. The plaintiffs subsequently applied, by summons filed 12 December 2017, for an injunction restraining the defendant, until the final determination of the plaintiffs' originating motion or further order, from (inter alia) taking any steps to implement the purported placement decision or taking any steps to transition PG to the care of her maternal grandparents.

[32] On 14 December 2017, the defendant applied to have PG's grandparents joined as defendants to the proceeding. That application was not ultimately pursued.

[33] At a mention of the proceeding in court on 14 December 2017, further consideration was adjourned to 19 January 2018. While opposing any injunction, the CEO undertook not to change PG's placement before 26 January 2018. The matter was set down for a two-day hearing on 16 and 17 April 2018.

[34] On 16 January 2018 the defendant filed the affidavit of Sarah-Jane Zaichenko, referred to and discussed above. Annexed to that affidavit was a draft amended Care Plan[21] which contained the following statement:

> On 16 August 2017 Territory Families made a decision to transition [PG] into the care of her grandparents within the short term. That decision has been reviewed by Territory Families and Territory Families has decided that a change in [PG]'s placement is currently premature. This is in recognition of [PG]'s current needs and the strong opposition from the carers to the transition resulting in an increase in tension between Territory Families, the grandparents and carers which is not conducive to meaningful family contact visits, a presently viable transition plan, or generally in [PG]'s best interests. The decision to transition [PG] to her grandparents' care is on hold. It remains the goal towards which Territory Families is working. Territory Families will be providing support to kinship carers to help them understand [PG]'s diagnosis and help them learn strategies to support her when the placement move occurs.
>
> On 6 December 2017, Ms Peta Briner, Social Worker/Family Therapist provided a report regarding the plan to transition [PG]. Please refer to the hard file. Ms Briner's opinion was that [PG] should not be transitioned from the current placement due to the time that has lapsed.

[35] The report of Peta Briner dated 6 December 2017, referred to in the draft amended Care Plan, is not in evidence. However, Ms Briner's opinion (as briefly stated) should not have come as a surprise to Territory Families. In a letter to the plaintiffs' solicitors written in late November 2017,[22] Ms Briner stated:

> I was contracted by Territory Families in 2016 to work with [PG] and all relevant stakeholders involved in her care, with particular reference to optimal facilitation of contact with her biological family. I had considerable contact with [PG], her foster carers, departmental officers

---

21 Annexure 'SJZ 12'.

22 Affidavit Margaret Mary Kruger sworn 30 November 2017, par 23 and annexure p 112.

> from Territory Families and on occasions with [PG]'s maternal grandparents. I provided a report on my work in November 2016.
>
> … it is my professional opinion that [PG] should not be transitioned away from the current placement with [the plaintiffs] in Brisbane. The reasons for this are numerous and complex. They focus on the fact that she has lived continuously with these carers since her discharge from hospital at birth and has a strong, secure attachment to them. With a diagnosis of Autism Spectrum disorder and resultant supportive services in place, it is my firm view that [PG]'s best interests would not be served by moving her away from her current placement.
>
> I have expressed this view clearly on numerous occasions to several workers in Territory Families.

[36] At a mention of the proceeding on 19 January 2018, counsel for the defendant submitted that the draft amended Care Plan, specifically the part extracted in [34] above, had the effect of cancelling the decision to transition PG to the care of her grandparents.[23] Counsel submitted that the relief sought by the plaintiffs in the originating motion had become futile because the impugned decision was no longer in place. The defendant applied to have the April hearing dates vacated and the matter discontinued or adjourned sine die. In response, counsel for the plaintiffs argued that the CEO had not formally cancelled the placement decision pursuant to s 77(2) *Care and Protection of Children Act 2007*. Counsel submitted that the draft amended Care Plan had no legal effect in relation to the impugned placement decision, and pointed to the defendant's clear intention to pursue the transition of PG to the care of her grandparents at some unspecified time in the future. The plaintiffs contended that the April hearing dates should be preserved until such time as the placement decision was formally cancelled

23 Affidavit of Sarah-Jane Zaichenko filed 16 January 2018, par [51], [54] & Annexure SJZ-12.

pursuant to the legislation and a new decision made. Further consideration of the matter was adjourned to 1 February 2018.

[37] In my opinion, the plaintiffs were justified in seeking a more concrete concession from Territory Families. Although the draft amended Care Plan was intended to replace earlier plans and the transition decision made (absent any specific Care Plan) in August 2017, it remained "a draft only", in the words of Ms Zaichenko, pending "comment sought from stakeholders".[24]

[38] On 19 January 2018, a delegate of the defendant Chief Executive Officer, Brent Warren, certified in writing that, pursuant to s 77 of the *Care and Protection of Children Act 2007*, the current placement of the child was with the plaintiffs and that any decision, including that of 28 November 2017, to cancel the placement arrangement with the plaintiffs and replace it by a placement arrangement with the maternal grandparents had been revoked.[25] The plaintiffs thus had the certainty which they had sought, and properly conceded that there was no longer a placement decision to be quashed. When the matter returned to court on 1 February 2018, the plaintiffs sought and were granted leave to discontinue the proceedings, with the defendant's consent. The hearing dates were vacated. The issue of costs remained outstanding, and orders were made to ensure that the Court was provided

---

24 Affidavit of Sarah-Jane Zaichenko affirmed 16 January 2018, par 51.

25 Defendant's submissions on costs, 1 February 2018, par 21 and annexure 'C'.

with the parties' written submissions on costs. The parties did not seek to have the matter relisted for oral argument.

Consideration of the parties' costs submissions

[39] The plaintiffs seek an order that the defendant pay their costs of and incidental to the proceeding, taxed on an indemnity basis. They argue that the certificate referred to in [38] "has the precise effect of the remedy being sought by the plaintiffs in commencing this litigation, that is, the quashing or revocation of the decision of 28 November 2017". The decision to reinstate the placement agreement with the plaintiffs is said to constitute a full (or unambiguous) reversal of the defendant's position.[26] The plaintiffs contend that the outcome should be determinative of the issue of costs, in reliance on a decision of the Supreme Court of Queensland in *Cornack v Fingleton*.[27]

[40] The defendant contends that, while costs ordinarily follow the event, there was no 'event' in the present case because the matter was resolved without a determination on the merits. That much must be accepted. Counsel for the defendant further contends that (1) the defendant did not act unreasonably and that (2) the defendant did not 'effectively surrender' to the plaintiffs' contention that the placement decision was unreasonable. Accordingly, it is

---

26 Outline of submissions as to costs on behalf of the plaintiffs, par 22.

27 *Cornack v Fingleton* [2002] QSC 391; [2003] 1 Qd R 667 at [52] (Mackenzie J): "Having regard to the comprehensive nature of the undertaking a declaration is now unnecessary. The fact that the underlying proposition relied on by the applicant is established is apparent from the reasons. The fact that the fundamental proposition underlying the applicant's submissions has been established is also determinative of the way in which the discretion as to costs should be exercised."

contended, the parties should bear their own costs, pursuant to the general principle stated by McHugh J in *Re the Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; Ex parte Lai Qin*, [28] as follows:

> If it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continues to be reasonable until the litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings. This approach has been adopted in large number of cases [citations omitted].

[41] I reject the submission that the defendant did not act unreasonably. On the contrary, I am satisfied that, in the period from 16 August 2017 to 28 November 2017, Territory Families acted unreasonably vis-à-vis the plaintiffs in relation to PG. For a period of some three months, Territory Families did not inform the plaintiffs that it was the Department's intention to (almost immediately) remove PG from the plaintiffs' care and enter into an alternative placement arrangement for the child with her maternal grandparents. The Department kept the plaintiffs in the dark. Further, although in possession of the report of a specialist child and adolescent psychiatrist, the Department had not in recent times consulted with that expert or any other medical specialists or psychologists in order to assess the impact on the child of the significant changes in the child's circumstances which the Department's decision would necessarily have brought about. The Department had no evidence that the remote community

28 *Re the Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; Ex Parte Lai Qin* (1997) 186 CLR 622 at 625.

had the necessary facilities or that the grandparents had the capacity to meet the child's complex needs. Alternatively, if the Department had such evidence, it did not see fit to share it with the plaintiffs. When pressed to give reasons for the decision, at the time the decision was communicated in November 2017, Territory Families responded in generalities and did not refer to having considered the matters required to be considered pursuant to s 10(2) *Care and Protection of Children Act 2007*.

[42] I do not make a finding that the decision by Territory Families was so unreasonable that no reasonable decision-maker could have made it. That is a high bar. Such a finding *might* be available on the evidence before me, but, as counsel for the defendant points out, issue was ultimately not joined between the parties; the defendant may not have filed all relevant evidence which might have been relied on, and none of the evidence was tested by a trial.

[43] However, in considering the triggers for this litigation, I consider that the pre-action conduct of Territory Families was unreasonable. On the other hand, the plaintiffs acted reasonably in the lead up to the commencement of proceedings. The plaintiffs were justified in commencing proceedings without first seeking to resolve the matter out of court, because the intended 'transition' was imminent, and because of the threat of forced removal of the child in the event the plaintiffs did not co-operate.

[44] While it may be true that the plaintiffs had a personal, emotional interest in the outcome of the litigation, they acted in what they considered were the best interests of the child in order to avoid a potentially damaging outcome for the child. Indeed, Territory Families seems to have accepted by 12 January 2018 that any previously intended immediate change in the child's placement was premature.[29] That acceptance was probably because Territory Families had reached a fuller understanding of the child's needs.[30] Territory Families also acknowledged that "insufficient transition planning and progress" had been made to prepare for a placement change.[31] Further, Territory Families recognised that the child's transition into the care of her grandparents, which still remained the goal of the draft amended Care Plan, would be less traumatic "if her relationship with her grandparents develops further before any change in placement". Although that acknowledgement is somewhat guarded, part of a carefully drafted affidavit, I interpret it as a concession by Territory Families that it was unwise to attempt to place the child in the care of grandparents with whom she had little, if any, relationship. Finally, Territory Families had become aware of the need to work with a number of services and individual professionals to help the

---

29 Affidavit of Sarah-Jane Zaichenko filed 16 January 2018, par [51]; annexure 'SJZ-12', p 5.

30 The draft amended Care Plan (annexure 'SJZ-12') at p. 5 reads "That decision has been reviewed by Territory Families and Territory Families has decided that a change in PG's placement is currently premature. This is in recognition of PG's current needs and the strong opposition from the carers to the transition." This characterisation of the reasons for the change of decision overlooks the probability that the plaintiffs' "strong opposition" to the Department's transition of the child brought to light evidence in the possession of the Department which caused the Department to recognise or properly recognise the child's needs.

31 Affidavit of Sarah-Jane Zaichenko filed 16 January 2018, par [53(b)]. I again note the attempt by the Department to attribute part of the responsibility for this to the plaintiffs.

child's grandparents "understand her diagnoses and equip them with strategies to be able to support her".[32]

[45] I am satisfied that the change of heart on the part of Territory Families would not have come about unless the plaintiffs had commenced proceedings and thereby subjected the defendant CEO's decision to appropriate scrutiny. The plaintiffs put on relevant affidavit evidence with comprehensive exhibits and thereby exposed significant deficiencies in the defendant's placement decision. Even then, the defendant did not concede at an early time. That fact confirms the probability that the proceedings were necessary to bring about proper consideration of matters which were not properly or fully considered by Territory Families between August and November 2017.

[46] Further proceeding by the plaintiffs only became unnecessary because the defendant unambiguously reversed the impugned decision. Prior to that time, the plaintiffs had no reasonable alternative other than to commence and continue the proceedings.

[47] The Northern Territory *Supreme Court Rules* provide for an unfettered judicial discretion in relation to costs.[33] Costs are normally awarded in favour of the successful party to a litigation.[34]

---

32 See draft amended Care Plan (annexure 'SJZ-12') at p. 5.

33 *Supreme Court Rules*, O 63.03.

[48] In *Re the Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; Ex Parte Lai Qin*,[35] McHugh identified some exceptional circumstances in which a court will order costs even where there has been no hearing on the merits. One situation described by his Honour is that in which one of the parties had acted so unreasonably that the other party should obtain the costs of the action. Another situation, or a 'sub-set' of the same situation is where a plaintiff had no reasonable alternative but to commence litigation. I consider that this is such a case.

[49] Alternatively, I find that this is a case where the defendant effectively surrendered to the plaintiffs, such that it is clear from a practical standpoint that the plaintiffs have been successful. Given that characterization, I would exercise my discretion in favour of the plaintiffs.[36] I do not accept the defendant's submission that, in effect, 'there was no surrender as such; rather, subsequent events overtook the placement decision'. In this case, the late provision of the certificate referred to in [38] cannot be relied on as a supervening event which modified the nature of the dispute. The issue of the certificate certainly made the proceedings inutile, but was something which

---

34 *Randazzo Investments (NT) Pty Ltd v City of Palmerston* [2018] NTSCC 6 per Kelly J at [20]; *Nitschke v Medical Board of Australia (No 2)* [2015] NTSC 50 per Hiley J at [3]; *Matzat v Gove Flying Club Incorporated* [1998] NTSC 36 per Mildren J.

35 *Re the Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia; Ex Parte Lai Qin* (1997) 186 CLR 622 at 624.

36 *One.Tel Ltd v Deputy Commissioner of Taxation* [2000] FCA 270; 101 FCR 548 at [6]. This authority was referred to with approval in *United Super Investments Pty Ltd v Randazzo Investments Pty Ltd* [2010] NTSC 31 at [33]-[37] and in *Randazzo Investments (NT) Pty Ltd v City of Palmerston* [2018] NTSC 6.

was always within the power of the defendant CEO to issue, before proceedings were commenced, or at any time before 19 January 2017.

[50] For the stated reasons, I am satisfied that a costs order should be made in favour of the plaintiffs. Order 63.28 of the *Supreme Court Rules* provides that the Court should award standard costs. The exercise of the discretion to order costs over and above the ordinary is exceptional, usually reserved for cases where a losing party has been engaged in unmeritorious, or deliberate or high-handed or other improper conduct such as to warrant the Court showing its disapproval and, at the same time preventing the other party being left out of pocket.[37] I do not consider that the conduct of Territory Families in this case was such as to justify an award of indemnity costs.

Orders

[51] The defendant is to pay the plaintiffs' costs of and incidental to the proceeding to be taxed on the standard basis in default of agreement.

[52] With reference to O 63.18 of the *Supreme Court Rules*, I make a specific order that the defendant pay the costs of and incidental to the plaintiffs' application for an interlocutory injunction filed 12 December 2017. Pursuant to O 63.72 (9) of the *Supreme Court Rules*, I certify such application fit for the attendance of counsel, and I certify that the retainer of more than one counsel was warranted, based on the urgency and the volume of materials to be considered.

---

37 *BAE Systems Australia Ltd v Rothwell* (2013) 275 FLR 244 at [85], per Mildren J.
