CHILDRENS COURT OF QUEENSLAND

CITATION:	*DFG v Director of Child Protection Litigation* [2020] QChC 34
PARTIES:	**DFG** (appellant) **v** **DIRECTOR OF CHILD PROTECTION LITIGATION** (first respondent) and **MR Z (a pseudonym)** (second respondent) and **PATRICK DOOLEY, SEPARATE REPRESENTIVE** (third respondent) and **ROS BYRNE, DIRECT REPRESENTATIVE FOR MARY (a pseudonym)** (fourth respondent)
FILE NO/S:	95/20
DIVISION:	Childrens Court of Queensland
PROCEEDING:	Appeal under s 117(2) of the *Child Protection Act* 1999
ORIGINATING COURT:	Childrens Court of Queensland at Southport
DELIVERED ON:	13 November 2020
DELIVERED AT:	Southport
HEARING DATES:	10 November 2020
JUDGE:	Barlow QC DCJ
ORDER:	**The decisions of the Childrens Court of Queensland on 4 February 2020 and 11 February 2020 be confirmed**
CATCHWORDS:	FAMILY LAW AND CHILD WELFARE – CHILD WELFARE UNDER STATE OR TERRITORY JURISDICTION AND LEGISLATION – CHILDREN IN NEED OF PROTECTION – PROCEEDINGS RELATING TO CARE AND PROTECTION – RELEVANT CONSIDERATIONS – supervision order made, by consent in respect of one child – appellant appeals that order – whether magistrate erred in making such an order FAMILY LAW AND CHILD WELFARE – CHILD WELFARE UNDER STATE OR TERRITORY JURISDICTION AND LEGISLATION – CUSTODY – APPEALS – short-term custody orders made, by consent, in respect of two children – appellant appeals those orders – whether magistrate erred in making such

	orders
	Child Protection Act 1999 s 117, s 118, s 121
COUNSEL:	J Ashcroft for the third respondent
	DE Pendergast for the fourth respondent
SOLICITORS:	Self-represented appellant
	Office of the Director of Child Protection Litigation for the first respondent
	Self-represented second respondent
	Dooley Solicitors for the third respondent
	WP Lawyers for the fourth respondent

Introduction

[1] On 4 February 2020, Magistrate Philipson, sitting as the Childrens Court, made three orders, by which she granted the Chief Executive short-term custody, for a period of 18 months, of each of Emma[1] (born on 15 May 2014) and Jessica (born on 16 June 2017) and long-term guardianship of Lucy (born on 4 March 2016) until she turns 18 years old. On 11 February 2020, Magistrate Philipson made an order that the Chief Executive supervise Mary (born on 15 November 2006) in relation to certain specified matters for a period of 12 months.

[2] The orders were all made under section 61 of the *Child Protection Act* 1999. They were made without a trial, as the parties had informed her Honour that they all agreed that the orders were appropriate and requested her to exercise her discretion to make them. Her Honour was satisfied that the parents, who were all present, understood and agreed with the orders being made. She nevertheless was obliged to, and did, consider whether the orders were appropriate and she gave short reasons for her decisions to make the orders.

[3] On 3 April 2020, the appellant, who is the mother of all four children, filed a notice of appeal in this court, appealing against all of those orders. Her appeal was out of time, as s 118 requires that an appeal be filed within 28 days after the decision is made. However, the court may at any time extend the period for filing the notice of appeal.[2] The Director opposed leave being granted but, at the hearing of the appeal on 10 November 2020, I granted the appellant leave to appeal, retrospective to the date of filing.

[4] The appellant's grounds of appeal are not stated in any detail in the notices of appeal. However, her amended outline of submissions sets out grounds that I and the parties have addressed. In substance, they are the following.

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1 All members of the family have been given pseudonyms.

2 Section 118(4) of the *Child Protection Act* 1999.

(a) She did not receive a fair trial, because she was coerced by her solicitor and counsel to agree to the proposed orders and she did not have a proper opportunity to consider them. She was told that, if she did not agree and the matters proceeded to judgment, the likely orders would be worse from her perspective.

(b) The magistrate erred in concluding that the appellant was, or had been, an habitual user of illicit drugs and a prostitute, as there was no evidence supporting those allegations.

(c) The magistrate erred in finding that there was sufficient evidence to demonstrate emotional abuse of and harm (or risk of harm) to the children.

(d) The magistrate erred in finding that there was sufficient evidence to demonstrate physical abuse of and harm (or risk of harm) to the children.

[5] I preface my consideration by noting that Lucy has since died. Therefore it is unnecessary to consider the appeal concerning the guardianship order for her.

Ground (a)

[6] As to the first ground, the following matters are relevant. The Director was originally seeking custody orders for two years in respect of each of Mary, Jessica and Emma. It appears that, when the trial was due to start on 3 February 2020, the parties had some discussions that led to agreement in principle to the orders that were ultimately made. The next morning, the magistrate made the orders concerning all children other than Mary. Mary's matter was adjourned to the following week so that a case plan could be prepared and the terms of a supervision order could be discussed. Those terms were agreed and put to the magistrate on 11 February 2020.

[7] The appellant was represented, at the hearing and during the discussions, by experienced and competent counsel and solicitor. I do not accept that she was coerced into agreeing to the terms of the proposed orders. I have no doubt she was advised about the possible outcomes if orders were not agreed. She had overnight to consider the terms of the proposed custody orders for Emma and Jessica and she had the following week to consider the terms of the supervision order for Mary. Counsel would not have indicated her consent without being satisfied that she understood the options and agreed to those orders.

[8] I find that there is no substance to her first ground.

[9] The Director contended that, if I were to dismiss that ground of appeal, then I should not consider the other grounds, as the orders were made with the parties' consent, the appellant was represented and consented to the orders without demur and she should be bound by the consequences of that consent. Ms Diefenbach, appearing for the Director, relied on the principles of acquiescence discussed in *South Black Water Coal Ltd v McCullough Robertson* [1997] QSC 77, at pages 22

to 23 and principles elucidated by Gleeson CJ, Heydon and Crennan JJ in *Smits v Roach* (2006) 227 CLR 423 at [46].

[10] Those principles, while applicable in ordinary adversarial litigation, may not be of such strength in child protection litigation, where the parties can agree in principle to a form of orders, but the court must satisfy itself that the orders sought (or other orders) are appropriate and has a discretion whether to make orders in all the circumstances. I do not consider that I should shut out the appellant from appealing simply because she, through her counsel, informed the court that she agreed with the proposed orders. I shall, therefore, consider each of the other grounds of appeal.

Ground (b)

[11] Before considering this ground, it is appropriate to set out the particularly relevant parts of her Honour's reasons for making the orders.

[12] In her reasons given on 4 February, concerning Emma and Jessica the magistrate said:[3]

> There have been further concerns raised about [the appellant]'s insight into her emotional and, arguably, physically abusive parenting practices which have caused emotional harm to the children. These practices have been corroborated, made by the child [Lily] and [Mr Z]'s son, [Tom], who was in her care when he was first incarcerated, as well as her son [Jack].
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> At this stage, the respondent mother has not demonstrated changed behaviour to her lifestyle choices and – nor prioritising her children's needs over her own. She continues – and has, in my view, supported an environment in relation to the children, of secrecy and that has, in my view, had a significant emotional effect upon the children.
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> …
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> I'm satisfied that if the children were to be returned to the care of [the appellant], that there's an unacceptable risk of suffering harm that would have a detrimental effect on their physical and emotional wellbeing. I also note that whilst [Mr Z] [the father of Emma, Jessica and Lucy] has pleaded guilty, the versions in relation to how [Lucy] sustained her injuries provided by [Mr Z] and [the appellant] have never been tested.

[13] Her Honour went on to say:[4]

> … I'm further satisfied that the protection sought to be achieved by the orders is unlikely to be achieved by orders on less intrusive terms.
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> I'm also satisfied that the orders being sought are consistent with the principles as contained in the *Child Protection Act*. Most particularly, the paramount principle under section 5A and those principles contained in 5B, 5B(a) and 5D of the Act.

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3 T3:8-19, 26-30.
4 T4:18-25.

[14] As to Mary, in her reasons on 11 February her Honour said:[5]

> I am satisfied, in all the circumstances, that [Mary] is a child in need of protection within the meaning of the Act. [Mary] has been subject to a child protection order since – of various types since the 3rd of July 2017.
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> There are significant concerns in relation to the respondent mother coaching [Mary] and her siblings, which has had, in my view, a significant impact on their emotional wellbeing. Further, I do not consider that appropriate provision was made by the respondent mother for the care of [Mary] and her siblings, and she failed to adequately engage with the Chief Executive around the children's needs and assess child protection concerns. She fostered a home environment of secrecy and fear where the children were made to keep secrets, most particularly about the birth of the youngest child, [Jessica], and about the father of some of the children, [Mr Z], residing in the home when he had been charged with grievous bodily harm in relation to one of his children with the respondent mother, [Lucy], and the children getting into trouble and/or punished if they talked to other people about the matters.
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> …
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> Notwithstanding [Mary]'s decision to return to live with [the appellant], I agree with the applicant's submissions that whilst [the appellant] might be willing there are significant concerns about her ability to continue to parent – properly parent [Mary] without an order being made to that effect.
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> …
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> [Mary] has clearly suffered harm, in my view, within the meaning of the Act, and she is at an unacceptable risk of suffering significant further harm if I do not make a protection – a 12-month protective supervision order. That will allow the Chief Executive to monitor [the appellant]'s ability to provide for [Mary]'s care and protection needs and ensure that they are being met whilst constantly monitoring [the appellant]'s parenting practices and lifestyle choices. I note that there is a current case plan in place. That is exhibit 1 to these proceedings, which was developed at a family group meeting on the 4th of February 2020. This case plan supports the new intervention, and a review is not required. I note that both parents participated in developing the case plan, and I, along with Ms Burn [sic] [direct representative for Mary], have taken [Mary] through that and what is hoped to be achieved within the 12 months under that case plan. The case plan, in my view, is clearly appropriate for meeting [Mary]'s assessed protection and care needs, and the overall goal is for [Mary] to remain safely in the home with [the appellant], at this stage.
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> …
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> In all the circumstances, I am satisfied that the protection sought by the order now being sought could not be achieved on an order in less intrusive terms, it being the – essential the least intrusive order that can be made. I note that the Chief Executive will continue to work with [the appellant] to ensure that she does not relapse into illicit substance misuse or poor parenting practices. She will also be able to work

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5 T2:25-40, T3:6-9, 19-31, and T3:44 to T4:3.

> with the Chief Executive so that she is able to implement appropriate and age-appropriate parenting strategies to meet [Mary]'s needs.

[15] Neither in those parts of her Honour's reasons, nor elsewhere, did her Honour mention any allegation, let alone find, that the appellant had been a prostitute. That part of the appeal therefore has no substance.

[16] The only mention of drug use was the brief mention, in her Honour's reasons concerning Mary, of the Chief Executive working with the appellant "to ensure that she does not relapse into illicit substance abuse." While not expressly stating that her Honour found that the appellant had taken illicit drugs, the word "relapse" clearly indicates, at the least, a view that she had previously used such substances. The appellant submitted that there was no evidence from which any such view could be formed by her Honour.

[17] There were allegations in the material before her Honour that the appellant had taken illicit drugs in her children's presence, at least in the past. The Chief Executive's staff appeared to have formed the clear view that she had done so and they expressed views that they were not satisfied that she was not taking such drugs, or excessive alcohol, or would not do so in the future when responsible for the care of her children. The only evidence of former drug use was from one of the appellant's children, Lily, who alleged to an officer of the Department of Child Services that the appellant had taken "crack" in the children's presence (when, is not clear).[6] No steps appear to have been taken to check or obtain details, corroboration or other evidence of that allegation. Of course, it was not tested because a contested hearing did not take place due to the parties' agreement with the proposed orders. In the circumstances, while it was open to the magistrate to accept that evidence, I consider that it had so little weight that it was insufficient to find that the appellant had ever taken illicit drugs.[7]

[18] I do note that, by the time of the hearing, the appellant had undertaken a large number of drug tests that showed no indication that she was taking illicit drugs or excessive alcohol.

[19] The magistrate's reasons for her decisions were short. They did not need to be as extensive as they would have been at the conclusion of a contested hearing, given that all parties had indicated that they agreed with the proposed orders. However, she was obliged to consider, on the basis of the evidence, whether the proposed orders were appropriate. It is clear that she had read the material before her and she had considered carefully the case plans for each of the children. I am satisfied that she took all the evidence into account. However, I respectfully disagree that the evidence was sufficient to demonstrate any past or present drug use by the appellant. Her comment, in her reasons concerning Mary, that the Chief Executive

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6 Affidavit of Niamh Malanaphy, a child safety officer, filed on 7 November 2019, paragraph 53.

7 Notwithstanding that the court is not bound by the rules of evidence and may inform itself in any way it considers appropriate: s 105.

would work with the appellant to ensure she does not relapse into illicit drug use was unfortunate in the circumstances.

[20] For these reasons, I consider that her Honour erred in taking that factor into account, as it was not capable of being established on the evidence before her. I shall consider later whether that is a sufficient basis for the appeal to succeed overall.

Ground (c)

[21] The magistrate's findings that the children had suffered harm and that there was a substantial risk that they would continue to suffer harm if returned to the appellant (or, in the case of Mary, if she was not supervised) appear mostly to be related to a number of matters that were contended by the Chief Executive to be poor parenting practices. Those practices were said to include:

(a) that the appellant and Mr Z had hidden from the authorities the facts of the appellant's pregnancy and the birth of Jessica and had instructed their children to keep secret both Jessica's birth and that Mr Z had spent a period of time living with the family after being charged with causing grievous bodily harm to Lucy;

(b) that, when the appellant had contact visits with Mary, Jessica and Emma, she had an apparently extra strong bond with Mary and Mary was sometimes involved in "parenting" the younger girls;

(c) that the appellant would often bring her children presents when she had contact visits with them;

(d) that the appellant exchanged a series of text messages with Mary, seeking to meet her in secret and, on one occasion, sending her photographs of the appellant lying in bed with a young man with whom she was in a relationship (the photographs did not show any nudity or sexual conduct);

(e) other conduct that some of her children (not then living with her) reported she would engage in when they did live with her, such as walking around naked, making them do too many jobs, making them look after the younger children, and denigrating their respective fathers in their presence or directly to them.[8]

[22] Some of those complaints, it seems to me, are petty or simply differing parenting practices from those that the child safety officers might consider to be best practice: for example, giving the children presents or making them do household chores. However, others were evidence of concerning behaviour. It was therefore open to the magistrate to take them into account in considering whether, in her

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8 Affidavit of Malanaphy, paragraphs 51 and 52.

judgment, it was appropriate to make orders in the terms to which the parties had agreed.

[23] The magistrate also had before her two social assessment reports from a child psychologist, Denise Giles, who had been engaged by the court appointed separate representative for the children. The reports were said to be for the purpose of providing "a holistic assessment of issues surrounding the ability to parent the children and the parents' willingness to respond to the children's needs. The social assessment report is written to assist the court in determining the most appropriate form of intervention in the best interests of the children." One report concerned Emma, Jessica and Lucy and the other concerned Mary and her brother, Jack.

[24] Many sections of the reports were identical, as might be expected. In both reports, Ms Giles expressed concern about the efforts that the appellant and Mr Z had taken to hide Jessica's birth. She expressed the view that the appellant had continued to deny and minimise the department's concerns and she showed a lack of insight into the concerns that originated from the event resulting in Lucy's injuries.

[25] In the report concerning Emma, Jessica and Lucy, Ms Giles said that the most significant issue for her in respect of those children was the need for there to be a thorough and ongoing assessment of the appellant's capacity to manage the competing needs of her children in a normal household environment. It was inappropriate for the department to require contact visits to occur only at external locations. She concluded that the children had all suffered harm (the nature of which was not expressly stated) and would be at an unacceptable risk of harm if they were then to return to live with the appellant. She recommended that the Chief Executive be granted custody of the children for two years, during which period they have contact with the appellant twice a week, with one occasion each week being in a location suitable for assessing her capacity to parent her children. If the appellant engaged appropriately with the department over the following six to 12 months, then the department should commission a parenting capacity assessment.

[26] In her report concerning Mary and Jack, Ms Giles expressed the view that Mary had also suffered harm (apparently psychological, although it was not expressly stated) while in the appellant's care. Mary required ongoing counselling as a result. She made identical recommendations concerning Mary to those concerning Emma and Jessica.

[27] These reports were, in some respects, inadequate, in my view, to explain the harm that Ms Giles considered had been or may be done to the children. Nor did they consider the effects on the children of living separately to their mother and having minimal contact with her. Of course, as with the other evidence, the views expressed were not tested in cross-examination. However, despite their inadequacies, the reports supported the orders that the parties had proposed to the

magistrate. Her Honour was entitled to rely on them in her consideration and to conclude that the orders sought by the parties were appropriate.

[28] Therefore, this ground of appeal must fail.

Ground (d)

[29] There was ample evidence before the magistrate that Lucy had suffered considerable physical harm when she was about four months old. However, that was not the fault of the appellant, as it occurred when she was not at home and was inflicted by Mr Z. That incident occurred in about July 2016. Mr Z was charged in 2017 and later pleaded guilty to causing Lucy grievous bodily harm. He is currently serving a jail sentence for that offence.

[30] One other incident about which there is evidence occurred when Jessica was about 18 months old (that is, in about December 2018). Mr Z took her to a doctor and reported that she had hit her head against a table while under his care. That led to the department becoming involved again and it was only then that the department found out that Jessica had been born the previous year. The department then removed Mary, Jessica and Emma from the appellant's care.

[31] The appellant herself reported to Ms Giles that, toward the end of her relationship with Mr Z, he became increasingly violent toward her and sometimes the children saw it, despite her attempts to protect them from that exposure.

[32] The appellant's older son, Jack, reported to Ms Giles that, when she was angry, the appellant would sometimes hit him, his younger half-brother Tom and his half-sister Lily.

[33] These matters and some other, less specific, comments reported by some of the children, are evidence of some level of violence in the family, on occasions, including by the appellant. While some incidents may objectively appear to be of little moment or not unusual within ordinary families, I consider that they constituted sufficient evidence to justify the magistrate finding that the children would be at risk of physical harm if they were to live with the appellant, until she had undertaken all steps required of her by the department to demonstrate that she can employ good parenting practices and cope with parental stresses while looking after three children (or four, as Lily has since moved in to live with the appellant and Mary).

[34] Therefore, although another magistrate or judge may not form the same opinion as her Honour as to the risk of harm to the children, on the evidence it was open to the magistrate to form that opinion.

Conclusions

[35] Separating these young children from their mother seems likely itself to cause them psychological harm. There is no evidence that any harm from that separation

has been considered by the department's officers or by Ms Giles in determining what they thought may be in the children's best interests. In the absence of any such evidence, it is difficult to determine how the children might be best protected from harm.

[36] With great respect for the magistrate's opinion, I have some doubts, therefore, that the protection sought to be achieved for Emma and Jessica by the custody orders was unlikely to be achieved by orders on less intrusive terms.[9] An example of such terms might be supervision orders (under s 61(c)) that would enable the supervision and assessment of the appellant's parenting practices in a realistic family environment. Nevertheless, it was open to the magistrate to find otherwise and my doubts do not, of themselves, justify allowing the appeal and setting aside or varying her Honour's orders.

[37] The appellant has succeeded on one of the four grounds of appeal. That conclusion requires me to determine how the appeal should be dealt with, as provided in s 121.

[38] Despite my finding that that appeal ground has been established, I do not consider that it must result in different orders. I have otherwise found that there were grounds for the magistrate to find that the children had suffered harm, or that there was an unacceptable risk of them suffering harm.

[39] That being the case, although I have the doubts that I expressed above, I consider that the appropriate order is to confirm the magistrate's decision.

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9 Section 59(1)(e) of the *Child Protection Act* 1999.