SUPREME COURT OF QUEENSLAND

CITATION:	*Dept of Communities (Child Safety Services) v CAR & Anor* [2010] QCA 105
PARTIES:	**CAR & CAS** (respondents/appellants) **v** **DEPARTMENT OF COMMUNITIES (CHILD SAFETY SERVICES)** (applicant/respondent)
FILE NO/S:	Appeal No 3025 of 2010 DC No 631 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	7 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	22 April 2010
JUDGES:	Chesterman JA and Atkinson and Ann Lyons JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	FAMILY LAW AND CHILD WELFARE – CHILD WELFARE UNDER STATE LEGISLATION – CHILDREN IN NEED OF PROTECTION – PROCEEDINGS RELATING TO CARE AND PROTECTION – APPLICATIONS – where the Chief Executive was granted custody of the appellants' child under a temporary assessment order – where a Magistrate of the Childrens Court refused an interim order granting the Chief Executive temporary custody – where the Department's initial appeal against that order was held to be irregular – where the Department duly instituted a new appeal in the Childrens Court constituted by a District Court Judge – where the Judge made interlocutory orders by consent pending a hearing of the appeal on its merits – where the appellants are appealing against those orders – where the respondent's appeal against the Magistrate's orders has been abandoned – whether the appeal to this Court has merit *Child Protection Act* 1999 (Qld), s 28, s 29, s 54, s 67, s 68(1)(c), s 68(5), s 99 *District Court of Queensland Act* 1967 (Qld), s 118

CAO v Dept of Child Safety & Ors [2009] QCA 169, followed
KAA & Anor v Schemioneck & Anor (No 2) [2007] QCA 449, followed
SBD v Chief Executive, Department of Child Safety [2008] 1 Qd R 474; [2007] QCA 318, followed
Spann v Starwell Pty Ltd [1984] 1 Qd R 29, cited

COUNSEL: The appellants appeared on their own behalf
J W Selfridge for the respondent

SOLICITORS: The appellants appeared on their own behalf
Court Services Unit, Department of Communities (Child Safety) acting as agent for Crown Solicitors Office for the respondent

[1] **CHESTERMAN JA**: The appellants are the parents of a child KVS who was born on 22 December 2009. That day she was removed from the custody of her parents and given into the custody of the respondent's Chief Executive pursuant to s 28 of the *Child Protection Act* 1999 (Qld) ("the Act") which authorises a Magistrate to make a temporary assessment order "to take (a) child into … the chief executive's custody while the order is in force".

[2] By s 29 such an order "must state the time when it ends", and the stated time "must not be more than 3 days after … the order is made". However by s 99 if a child is in the Chief Executive's custody pursuant to a temporary assessment order and, before the expiration of the order, an application is made for a child protection order the custody continues until the application is decided.

[3] The temporary assessment order made in respect of KVS was expressed to end on 25 December 2009. On the previous day, 24 December, the respondent applied to the Childrens Court pursuant to s 54 of the Act for a child protection order seeking custody of the child until her 18th birthday.

[4] The application came on before Magistrate Ryan in Toowoomba on 8 January 2010. The purpose of the hearing was apparently to have interim orders and directions made to facilitate the determination of the anticipated contested hearing of the respondent's application. The respondent sought an interim order pursuant to s 67 of the Act granting her temporary custody of the child until a final order was made. The Magistrate declined that application and instead ordered that the appellants, the child's parents, have custody during the interim.

[5] Later that evening the appellant purported to appeal Magistrate Ryan's order by way of an ex parte approach to the Childrens Court constituted by a judge in Brisbane. The proceedings were conducted by telephone and without notice to the appellants. No notice of appeal had been filed or served.

[6] The District Court judge found that the Magistrate's decision was against the weight of the evidence and was not in the best interests of the child. His Honour set aside the Magistrate's decision and made orders granting temporary custody to the Chief Executive. He directed the child's father not to have any contact with the child and that the child's mother not have any contact with the child except when accompanied by the person authorised by the respondent.

[7] The appellants appealed to the Court of Appeal which on 23 February 2010 allowed their appeal against that order on the basis that the proceedings in the District Court were not an appeal as defined by s 118 of the Act, were irregular, and that the parents had been denied procedural fairness.

[8] In giving the judgment of the court Fraser JA said:

> "[25] I have concluded that the Department's evidence was sufficient justification for urgent, ex parte orders which continued the Chief Executive's custody of the child, but for the reasons I gave earlier the judge should not have made an ex parte order allowing the appeal. The evidence did justify an ex parte order staying the orders made by the Magistrate for a short period to enable the Department's proposed appeal to proceed on notice to the applicants. It is appropriate to make orders now which reflect that conclusion. The period within which the Department was permitted to appeal from the Magistrate's orders has now expired, but that situation was contributed to by the applicants' delay in bring (sic) their proposed appeal to this Court. That being so, I would extend time to enable the Department to pursue its intended appeal to the Childrens Court constituted by a judge of the District Court and grant a stay of the operation of the Magistrate's orders pending the hearing of that appeal."

[9] The orders made by the court were:

> "1. Grant the applicants an extension of time until 8 February 2010 to enable them to appeal to this Court against the orders made in the Childrens Court constituted by a judge of the District Court on 8 January 2010, allow that appeal, set aside those orders, and instead make the following orders.
>
> 2. Grant the respondent Department an extension of time until 4 pm on Friday 26 February 2010 within which to file a notice of appeal in the Childrens Court constituted by a judge of the District Court from the orders made in the Childrens Court constituted by a Magistrate on 8 January 2010.
>
> 3. Order that:
>
> (a) The order made in the Childrens Court constituted by a Magistrate on 8 January 2010 which refused the application by the respondent Department for an interim order pursuant to s 67 of the *Child Protection Act* 1999 (Qld) granting temporary custody of the child KVS to the Chief Executive be stayed.
>
> (b) Temporary custody of the child KVS be granted to the Chief Executive.
>
> (c) The applicant father not have any contact, direct or indirect, with the child and the applicant mother not have any contact, direct or indirect, with the child other than in the presence of a person approved by the Department.

(d) The orders in paragraphs (a), (b) and (c) are to remain in force until 4 pm on Friday 26 February 2010 or until such other time as may be ordered in the Childrens Court, being a time which is no later than the determination of the Department's appeal to the Childrens Court constituted by a judge of the District Court."

[10] On 25 February 2010 the respondent duly instituted an appeal against Magistrate Ryan's orders to the Childrens Court constituted by a Judge. The orders sought were:

"(1) The decision to not grant an interim order granting temporary custody of (KVS) to the chief executive and a directive in relation to the father … to not have any contact, direct or indirect, with (KVS) and that the mother … is not to have any contact, direct or indirect, other than when a departmentally authorised person is present be set aside.

(2) The following Order and Direction be made in relation to the child …

An interim order granting temporary custody of (KVS) to the Chief Executive.

The father … not have any contact, direct or indirect, with (KVS) and that the mother … is not to have contact, direct or indirect, with (KVS) other than in the presence of a person approved by the Department.

(3) The matter otherwise be remitted back to the Childrens Court;

(4) Such other order as the Court deems appropriate."

[11] The appeal was mentioned the next day, 26 February 2010, before Judge Dick for the purpose of making directions for an expedited hearing of the appeal. The child's mother was represented by counsel and a solicitor. The father was not represented. Neither appellant attended court but both participated in the proceedings by telephone.

[12] Following discussions between the respondent's counsel and counsel for the mother the court made orders in these terms:

"(1) Order 3 (a) (b) and (c) as ordered by the Supreme Court of Queensland on 23 February 2010 are to remain in force until the earlier in time of either final determination of the appeal or order of the Childrens Court Magistrate granting temporary custody to the Chief Executive.

(2) The hearing of this appeal be expedited.

(3) That the requirements of Practice Direction 5 of 2001 are dispensed with.

(4) Upon the Children's Court Magistrate granting temporary custody to the Chief Executive, the Magistrate may make

whatever orders he or she deems fit in relation to the Respondents' contact with the child.

(5) This appeal is adjourned to a date to be fixed."

[13] That afternoon, 26 February 2010, the parties appeared before a Childrens Court Magistrate in Toowoomba. The appellants were then unrepresented. This Court was informed that "Only procedural orders were made … and the matter adjourned", but was not given any detail of what orders were made.

[14] The evident purpose of the orders made, with the agreement of all parties, by Judge Dick was to regularise proceedings and to recommit the hearing of the respondent's application for a child protection order until KVS turns 18 to the Childrens Court constituted by a Magistrate. That course appeared to be recognised by all concerned as sensible and appropriate, as indeed it is.

[15] The orders made by Judge Dick meant there was no utility in prosecuting an appeal from Magistrate Ryan's orders. Accordingly we were informed that the respondent has filed a notice of discontinuance of its appeal, which is now disposed of.

[16] Nevertheless on 24 March 2010 the appellants appealed to this Court against the orders of Judge Dick made 26 February 2010.

[17] The appeal cannot succeed. It faces insurmountable obstacles. The first is that there is no appeal from the decision of a Childrens Court constituted by a District Court Judge determining an appeal from a Childrens Court constituted by a Magistrate. The Act contemplates and allows only one appeal. The orders made by Judge Dick against which the appellants wish to appeal were made in appellate proceedings against the orders of Magistrate Ryan. Three decisions of this Court have established that principle. They are *CAO v Department of Child Safety & Ors* [2009] QCA 169; *SBD v Chief Executive, Department of Child Safety* [2008] 1 Qd R 474 and *KAA & Anor v Schemioneck & Anor (No 2)* [2007] QCA 449.

[18] The cases also establish that s 118 of the *District Court of Queensland Act* 1967 (Qld) has no application and the appellants may not apply for leave to appeal against Judge Dick's orders.

[19] The second obstacle is that the orders were made by consent and no appeal lies from such orders. See *Spann v Starwell Pty Ltd* [1984] 1 Qd R 29 at 35.

[20] In her submissions to the court Mrs CAS appeared to dispute the nature of the orders. She maintained that she did not give instructions to her solicitor or counsel to agree to the orders, nor did she or her husband participate in the proceedings. Though connected by telephone she asserted that on occasions she and her husband could not be heard by those present in court, and on other occasions they could not hear what was being said in court.

[21] The assertion was made only at the hearing of the appeal. It was not made the subject of any affidavits which might have been answered by the respondent. One hopes Mrs CAS did not make the assertion because of an understanding that the previous appeal succeeded only because she and her husband had been denied procedural fairness by the District Court on 8 January which meant that there had been no appeal at all.

[22] A transcript of the proceedings before Judge Dick makes it clear that the appellants participated in the proceedings and gave their consent to the orders.

[23] Mr Selfridge who appeared for the respondent before Judge Dick and in this Court informed her Honour that he had had discussions with counsel for Mrs CAS and that they would "be seeking an order by consent, subject to what the father says." The matter was then stood down to allow telephone contact to be made with Mr CAR. That happened quickly and in answer to a question from the judge Mr CAR said that he and his wife were "before the court". Her Honour then said:

> "Mr Benjamin is here from Legal Aid appearing on behalf of Mrs … CAS and Mr Selfridge is here appearing on behalf of the Department. … some discussions are taking place. … I'm going to step down from the Bench and allow you to speak to Mr Benjamin."

Mr CAR replied that he understood.

[24] Forty minutes later the court resumed and Mr Selfridge said:

> "I'm pleased … that there is a draft consent order that we seek to hand up to your Honour and it deals with preserving the integrity of the appeal that's currently on foot. Having said that, it's anticipated that should your Honour make these orders … we seek an order that the appeal be adjourned off to the registry because it might be that it's not necessary to pursue the appeal."

[25] Her Honour indicated that she would make the orders sought and inquired whether Mr CAR was "still on the phone". Both appellants replied that they were. Her Honour said:

> "As long as you know about this, that's fine."

Both appellants replied "yes" and Mr CAR said:

> "It was explained to us."

[26] After some further debate of no present relevance the judge said:

> "The order that I'm making, and I'll read it out to you …"

She was interrupted by Mr CAR who said:

> "Yes, please."

Her Honour then read out the substance of the orders after which Mr CAR expressed some concern about one aspect of them. After some brief discussion Mr Benjamin said:

> "… the intention is, with this order, to get the proceedings back on track before the Magistrate … which is where the decisions really need to be made. … This order is designed so that next week when the Magistrate … will make the orders that effectively end the stay … (and) whatever orders … are appropriate in relation to contact … and once the Magistrate makes those orders … the Department has indicated that the appeal to this Court will ultimately be abandoned because it will no longer be necessary."

[27] There was another discussion between Mr CAR and the judge about whether the appeal should be adjourned to the registry or to a date to be fixed to enable the program described by Mr Benjamin to be implemented. Mr CAR was apparently

satisfied with the explanation given. The judge then made the orders and all parties thanked her Honour for her conduct of the proceeding. Mr CAR said:

> "Thank you, too, your Honour. … I say that on behalf of my wife and my daughter."

Mrs CAS then herself said:

> "Thank you."

[28] It is apparent that the orders were made by consent and that the appellants participated in the hearing.

[29] The third obstacle is that any appeal against Judge Dick's orders would be futile. They were interlocutory orders made pending a hearing of the appeal on its merits. Events have moved on, and orders have been made in the Childrens Court before a Magistrate with respect to KVS's custody pending a final hearing. The respondent no longer wishes to appeal against Magistrate Ryan's orders which have been superseded. The appeal itself has been abandoned. An appeal against the interlocutory orders is pointless.

[30] For these reasons the appeal must be dismissed. Before doing so it may be helpful to address one complaint made by the appellants in their oral submissions. I have already set out the terms of order 3(c) made by this Court on 23 February 2010. The appellants claim that it is ambiguous and has given rise to disagreement with the respondent. The appellants contend that the purport of the order is to allow Mr CAR to have contact with KVS in the presence of a person approved by the respondent. The respondent maintains that the order forbade any contact between Mr CAR and his daughter but permitted such contact between Mrs CAS and the child but only in the presence of a person approved by the respondent.

[31] There is no ambiguity. The order is plain. The Court, on 23 February 2010, ordered that:

> "The applicant father not have any contact, direct or indirect, with the child";

and that:

> "the applicant mother not have any contact, direct or indirect, with the child other than in the presence of a person approved by the Department."

[32] The order which the appellants claim was made, that both parents may have contact with the child in the presence of a person authorised by the Department, could not, in Mr CAR's case have been made. Section 68(1)(c) of the Act provides that the Childrens Court may make orders about a child's contact with its family during the adjournment of the hearing for a child protection order but, by subs 5, no order may be made:

> "… requiring the chief executive to supervise family contact with the child unless the chief executive agrees to supervise the contact."

The Chief Executive refuses to supervise any contact between Mr CAR and KVS. Mr CAR's behaviour before this Court in the conduct of his appeal was so unruly and uncontrolled he had to be removed for a time. One can understand why the Chief Executive would not expose any of her officers to the risk of such behaviour.

[33] The appeal is dismissed.

[34] **ATKINSON J**: I agree with the reasons of Chesterman JA and with the order proposed.

[35] **ANN LYONS J**: I agree with the order proposed by Chesterman JA and with his Honour's reasons.