CHILDRENS COURT OF QUEENSLAND

CITATION:	*STC v The Director of Child Protection Litigation* [2016] QChC 19
PARTIES:	**STC** (appellant) v **THE DIRECTOR OF CHILD PROTECTION LITIGATION** (respondent) and **RAELENE ELLIS** (separate representative)
FILE NO/S:	3/16
DIVISION:	Children's Court Appeals
PROCEEDING:	Appeal
ORIGINATING COURT:	Children's Court, Hervey Bay
DELIVERED ON:	16 December 2016
DELIVERED AT:	Children's Court of Queensland at Brisbane
HEARING DATE:	22 April 2016 and 23 November 2016
JUDGE:	Dearden DCJ

ORDER:

1. **Confirm the decision of the Children's Court Magistrate made 8 April 2016 to transfer the long-term guardianship of YPC to New South Wales.**
2. **Vary the terms of the order made by the learned Children's Court Magistrate on 8 April 2016 as follows:**

> **"It is ordered that the child protection order made in the Hervey Bay Children's court on 15 August 2006, granting long-term guardianship of YPC, (DOB …), to the Chief Executive of the Department of Communities, Child Safety and Disability Services until YPC turns 18 years of age, be transferred to the New South Wales**

Minister of Family and Community Services."

CATCHWORDS: APPEAL AND NEW TRIAL – NEW TRIAL – IN GENERAL AND PARTICULAR GROUNDS – where there is an appeal from the Children's Court constituted by a magistrate – where the order of the learned magistrate was amended ex parte – whether there was a procedural error in failure to comply with the *Child Protection Act 1999* (Qld) - whether the Children's Court constituted by a judge, exercising appellate jurisdiction, may hear the matter afresh

FAMILY LAW AND CHILD WELFARE – CHILD WELFARE UNDER STATE OR TERRITORY JURISDICTION AND LEGISLATION – CHILDREN IN NEED OF PROTECTION – PROCEEDINGS RELATED TO CARE AND PROTECTION – where the learned magistrate ordered the transfer of a care and protection order interstate – where the appellant appealed against the transfer of the order – where the subject child has been in the care of Department approved carers since he was 9 days old – where the subject child moved interstate with his carers in 2010 – whether procedural requirements under the *Child Protection Act 1999* (Qld) were complied with – where the subject child's views were taken into account – whether the transfer of the care and protection order is in the subject child's best interest

CASES:

Cousins v HAL & Anor [2008] QCA 49

Dale v Scott; Ex Parte Dale [1985] 1 Qd R 406

Obrenovic v McCauley [1985] FLC 91-655

PAV v Director of Child Protection Litigation & Ors [2016] QCA 234

PAV v Director of Child Protection Litigation [2016] QCA 271

Re K (Infants) [1965] AC 201

SRG v PGB & Anor (1988) 12 Fam LR 225

LEGISLATION:

Child Protection Act 1999 (Qld) ss 110, 214, 215, 239

Children's Court Rules 2016 r 78

Director of Child Protection Litigation Act 2016 (Qld) s 45

District Court of Queensland Act 1967 (Qld) s 118

COUNSEL:	P Beehre for the appellant
	I Anderson (sol.) for the respondent
	J Selfridge for the separate representative
SOLICITORS:	Richard Gray and Associates for the appellant
	The Director of Child Protection Litigation for the respondent
	Raise Law for the separate representative

Introduction

[1] On 21 April 2016, the learned magistrate at the Hervey Bay Children's Court made an order "that the child protection order granting long-term guardianship of the child, YPC, to the Chief Executive made in the Hervey Bay Children's Court on 14 August 2006 be transferred to the Family and Community Services, New South Wales."[1]

[2] Subsequently, on an ex parte basis, without notice to the appellant, and apparently as a result of the receipt of an email from the Department of Family Community Services (New South Wales) forwarded through the Department of Communities, Child Safety and Disability Services (Queensland), the order was amended as follows:

> "It is ordered that the child protection order granting long-term guardianship of the child YPC to the Chief Executive made in the Hervey Bay Children's Court on 14/08/2006 be transferred to the Family and Community Services New South Wales" (sic).[2]

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1 Decision p 2, 8 April 2016.

2 Curiously, this order, prepared by the Hervey Bay Children's Court purports to be a "verdict and judgment record," Form 44, pursuant to r 62 of the *Criminal Practice Rules*. The order should, in fact, have been made pursuant to the *Child Protection Act 1999* (Qld).

Grounds of appeal

[3] The appellant filed an appeal on 14 April 2016 citing the following grounds:

> "1. It is not in the child YPC's best interests to live so far from his mother.
> 2. I also do not believe what Child Safety Officers have conveyed to me and do not believe the information provided was correct. I also believe there is a conflict of interest."

[4] The appellant identified that "because of the distance between us, I now only see YPC three times a year, where previously it was once each six weeks."

Issues in respect of the amended transfer order

[5] The original transfer order made by the Children's Court at Hervey Bay was made on 8 April 2016 and the appellant, STC, appealed against that order with an appeal filed on 14 April 2016. This appeal, having been filed within the time limit provided for by the *Child Protection Act 1999* (Qld) (**CPA**) s. 239(4)(a) had the effect that the order made on 8 April 2016 was stayed until the conclusion of the appeal proceedings.[3]

[6] The order purporting to be made on 21 April 2016 as a result of the email dated 12 April 2016 from the Department of Communities, Child Safety and Disability Services, is a variation of the original order and was made without any further hearing, and without notice to the appellant. Although the *Children's Court Rules 2016* (Qld) (**CCR**) r. 78 permits the court to vary or set aside an order "if an order contains an error made because of accidental slip or omission", such variation may only be made if:

> "(a) The court gives each party a reasonable opportunity to be heard on whether the order should be varied or set aside, through a hearing or otherwise;
> (b) For a party who has applied to have the order varied or set aside – the party has served notice of the application on the other parties to the proceeding."[4]

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3 *Child Protection Act 1999* (Qld) s. 239(7).
4 *Children's Court Rules 2016* (Qld) r. 78(2)(a) & (b).

[7] With respect, however the "variation" occurred, there was (on my perusal of the Children's Court file) no attempt to comply with the CCR r. 78. I consider in the circumstances that it is appropriate for this court to set aside the purported order made on 21 April 2016, given that that order was made without any opportunity for the appellant to be heard, and consequently, for the purposes of this appeal, the order appealed against is the order of 8 April 2016 from the Children's Court at Hervey Bay.

Background

[8] The original respondent to this appeal was the Department of Communities, Child Safety and Disability Services. On 1 July 2016, the Director of Child Protection Litigation became the respondent in these proceedings pursuant to ss. 45(1)(b)(ii) & (2) of the *Director of Child Protection Litigation Act 2016* (Qld) (**DCPLA**).

[9] The appellant is the mother of the subject child, YPC, (DOB …). There is no father recorded on YPC's birth certificate[5] and the Department is not aware of the identity of YPC's father.[6]

[10] YPC came into the care of the Department and was placed with Department approved cares, QUL and QUJ, on 23 June 2006, aged 9 days old.[7] QUJ and QUL have, at all relevant times, held a Queensland certificate of approval as generally approved foster carers. That approval, having been subject to a renewal assessment every two years, is current until December 2017.[8]

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5 Affidavit of James Lynch, affirmed 21 January 2016; Exhibit A.

6 Affidavit of James Lynch, affirmed 21 January 2016, para 7.

7 Affidavit of QUL, affirmed 27 June 2016, para 1; The Affidavit of James Lynch, affirmed 21 January 2016, para 9 indicates that YPC was taken into care on 1 July 2006 but the respondent concedes that the evidence of QUL should be preferred on this issue. Practically, little or nothing turns on it.

8 Affidavit of James Lynch, affirmed 21 January 2016, paras 30-31.

[11] A child protection application was filed in the Children's Court at Bundaberg on 21 July 2005 and long-term guardianship was granted to the Chief Executive of the Department on 15 August 2006.[9] The effect of that order continues until YPC turns 18.[10]

[12] On 16 August 2010, the Department authorised YPC to relocate to Queanbeyan, New South Wales, with QUJ and QUL,[11] but the Maryborough Child Safety Service Centre maintained continuous case management for YPC[12] and facilitated contact arrangement between YPC and the appellant.[13]

[13] The New South Wales Department of Family and Community Services was requested to provide case work service to YPC on 17 September 2010, and agreed to that request on 10 December 2010.[14]

[14] On 25 August 2015, the Department decided to transfer the long-term guardianship order and accordingly sought consent from the appellant,[15] but the appellant refused that consent.[16]

[15] On 22 January 2016, an application was filed in the Hervey Bay Magistrate's Court for transfer of long-term guardianship order to New South Wales. The matter came on for hearing before the learned Children's Court Magistrate at Hervey Bay on 8 April 2016.

Initial appeal hearing

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9 Affidavit of James Lynch, affirmed 21 January 2016, para 8 and Exhibit B.
10 *Child Protection Act 1999* (Qld) ss. 61(f)(iii) & 62(2)(c); Affidavit of James Lynch, affirmed 21 January 2016; Exhibit B.
11 Affidavit of James Lynch, affirmed 29 June 2016, para 13.
12 Affidavit of James Lynch, affirmed 29 June 2016, para 7.
13 Affidavit of James Lynch, affirmed 29 June 2016, paras 11-24; Exhibits JL1 and JL2.
14 Affidavit of James Lynch, affirmed 29 June 2016, para 13.
15 *Child Protection Act 1999* (Qld) s. 209 (1)(a).
16 Affidavit of James Lynch, affirmed 29 June 2016, para 15.

[16] When the appeal came before me in the Hervey Bay Children's Court on 22 April 2016, I indicated to the legal representative from Crown Law appearing on behalf of the respondent (as it then was, the Department of Communities, Child Safety and Disability Services) that there had been a complete failure of compliance with s. 215 of the CPA and a substantial failure to comply with s. 214 of the CPA.[17] At that same hearing, I indicated further that the provisions of s. 239 of the CPA did not include a power of remitter back to the original decision maker and accordingly, in my view, the appeal would have to be heard afresh in front of me.[18] I also recommended that assistance be provided by Legal Aid Queensland for the appellant, who was at that stage unrepresented.

[17] The appeal then came before me in Brisbane on 20 May 2016, when directions were made for the filing and serving of affidavits, the holding of a case plan meeting and court-ordered conference, and for the filing of submissions. The appeal came back before me again on 17 August 2016, at which stage I ordered that the parties be provided with relevant documents from the original court file (including the documentation purporting to amend the original order dated 8 April 2016), and I also ordered that the child, YPC, be separately represented, pursuant to s. 110(1) of the CPA. Subsequently, at an appearance before me on 30 September 2016 I made detailed orders for the preparation of a social assessment report by Ms Denise Giles (social worker). The appeal was then further adjourned for hearing before me on 23 November 2016.

THE LAW

Appeals against a decision to transfer a child protection order interstate

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17 Specifically s 214(b) (c) (d) & (e) of the *Child Protection Act 1999* (Qld).

18 *Child Protection Act 1999* (Qld) s. 239(9).

[18] The right to appeal against a decision of the Children's Court (constituted by a magistrate) arises pursuant to CPA s. 239. That appeal, which must be filed within 10 business days after receiving the notice of decision,[19] must "state fully the grounds of the appeal and the facts relied on"[20] and has the effect of staying the original decision until "the appellate court decides the appeal."[21] CPA s. 239(8) provides that "the appeal must be decided on the evidence and proceedings before the Children's Court," although the appellate court has the power to order that "the appeal be heard afresh, in whole or part,"[22] which, given the extensive failures to comply with relevant legislation in the proceedings before the learned magistrate, as well as the subsequent appointment of a separate legal representative for the child YPC, was inevitable in this matter.

[19] Section 239(11) of the CPA provides:

> "In deciding the appeal, the appellate court may –
> (a) confirm the original decision; or
> (b) vary the original decision; or
> (c) set aside the original decision and substitute another decision."

[20] As Phillip McMurdo J recently re-affirmed in *PAV v Director of Child Protection Litigation & Ors,*[23] in turn confirmed by the Court of Appeal in *PAV v Director of Child Protection Litigation*,[24] in matters such as this "the *Child Protection Act* contemplates but one level of appeal"[25] and further, "no appeal lies under *District Court of Queensland Act 1967* (Qld) s. 118(3) as a Children's Court constituted by a District Court judge is not a District Court; it is the Children's Court."[26]

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19 *Child Protection Act 1999* (Qld) s. 216(2)(b)(ii).
20 *Child Protection Act 1999* (Qld) s. 239(6).
21 *Child Protection Act 1999* (Qld) s. 239(7).
22 *Child Protection Act 1999* (Qld) s. 239(9).
23 [2016] QCA 234.
24 [2016] QCA 271.
25 *PAV v Director of Child Protection Litigation* [2016] QCA 271 p. 3.
26 *Cousins v HAL & Anor* [2008] QCA 49 cited in *PAV v Director of Child Protection Litigation* [2016] QCA 271 p. 3.

Interstate transfer of long-term guardianship order

[21] Part Two, Division Three of the CPA titled "Judicial transfers" sets out the basis on which a long-term guardianship order can be transferred to a "participating state."[27]

[22] In particular, CPA s. 214 provides:

> "**214 Court may transfer order**
> On receiving the application, the Childrens Court may order the transfer of the child protection order to the participating State if—
> (a) the home order is not the subject of an appeal under chapter 3, part 4 and, if no appeal has been started, the time for starting an appeal has expired; and
> (b) the interstate officer for that State has given written consent to the transfer and to the provisions of the proposed interstate order; and
> (ba) an appropriate case plan has been prepared under chapter 2, part 3A; and
> (c) a family group meeting has been held or reasonable attempts to hold a family group meeting have been made; and
> (d) if the application is contested, a conference between the parties has been held or reasonable attempts to hold a conference have been made; and
> (e) the child's wishes or views, if able to be ascertained, have been made known to the court."

[23] CPA s. 215 provides:

> "**215 Provisions of proposed interstate order**
> (1) If the Childrens Court decides to order the transfer of the child protection order to the participating State, it must decide the provisions of the proposed interstate order.
> (2) The court must be satisfied—
> (a) the proposed interstate order is an order that could be made under a child welfare law of that State; and
> (b) the protection sought to be achieved by the proposed interstate order is unlikely to be achieved by an order on less intrusive terms; and
> (c) the proposed interstate order—
> (i) is of the same or a similar effect as the home order; or
> (ii) is otherwise in the child's best interests.

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27 *Child Protection Act 1999* (Qld) s. 212.

> (3) In deciding the provisions of the proposed interstate order, the court must—
>
> (a) decide the time for which it would be appropriate for the proposed interstate order to have effect in the participating State; and
>
> (b) state the time in the proposed interstate order.
>
> (4) The stated time must not be more than the maximum time for which an order of that type, made under a child welfare law of that State, could be given effect in that State.
>
> (5) In deciding whether the proposed interstate order is of the same or a similar effect as the home order, the court must not take into account the time for which the proposed interstate order is to have effect in the participating State."

[24] At the original hearing before this court on 22 April 2016, the respondent conceded that the learned Children's Court magistrate had made a "procedural error" in making the transfer order which was made, because no conference had been held pursuant to CPA s. 214(d). The respondent also conceded that the appeal should be heard afresh, and that an adjournment was necessary to enable the court-ordered conference to be undertaken.

[25] Further, there was a failure to comply with s. 214(b) of the CPA, which requires that "the interstate officer for that state [the participating state] has given written consent to the transfer and to the provisions of the proposed interstate order." In addition, there was a failure to comply with CPA s. 214(e) which requires that: "the child's wishes or views, if able to be ascertained, have been made known to the court."

[26] The material placed before the learned Children's Court magistrate demonstrated a complete failure of compliance with the provisions of CPA s. 215 (provisions of proposed interstate order). In particular s. 215(2)(a), (b) & (c) of the CPA were not complied with, nor was s. 215(3) complied with.

[27] Relevantly, CPA s. 198 provides (in determining this appeal on a "rehearing" basis):

> "**198 Explanation and purpose**
> (1) Chapter 2 provides for the making of child protection orders and the conduct of child protection proceedings in the Childrens Court.
> …
> (3) The purpose of this chapter is to provide for the transfer of the orders and proceedings between Queensland and other States, and between Queensland and New Zealand—
> (a) so that children in need of protection may be protected if they move from one jurisdiction to another; and
> …
> (4) The transfer of an order from one jurisdiction to another enables the law of the receiving jurisdiction to provide for the administration and enforcement of the order as if it were made in the receiving jurisdiction."

[28] The CPA s. 199 then provides (when determining the appeal):

> "**199 Further guiding principle**
> (1) This chapter must be administered under the principle that it is desirable for an order relating to the protection of a child to have effect, and to be enforced, in the State in which the child resides.
> (2) In exercising its jurisdiction or powers under this chapter, the Childrens Court must observe the principle mentioned in subsection (1).
> (3) This section does not limit the application of chapter 1, part 2, division 1 or section 104."

[29] Pursuant to CPA s. 104, this court is obliged to have regard to the principles of the CPA as set out in s. 5A, which provides:

> "**5A Paramount Principle**
> The main principle for administering this Act is that the safety, wellbeing and best interests of a child are paramount."

[30] Detailed general principles are then set out in CPA s. 5B(a) – (n), and s. 5C of the CPA contains "additional principles for Aboriginal or Torres Strait Islander children." In the appeal before me, the child YPC is not an Aboriginal or Torres Strait Islander, although he resides with a family (QUJ and QUL) who do identify as Aboriginal.

[31] Pursuant to CPA s. 108B, the public guardian has a right of appearance, but no application was made for such an appearance. There was, however, an order of this

court for the appointment of a separate representative pursuant to CPA s. 110, and the detailed report of Ms Denise Giles,[28] together with the submissions of the separate representative,[29] are critical components of the evidence and submissions to be considered by this court in this appellate/rehearing process.

[32] Pursuant to CPA s. 105, the Children's Court is not bound by the rules of evidence "but may inform itself in any way it thinks appropriate."[30] CPA s. 105(2) provides:

> "If, on an application for an order, the Childrens Court is to be satisfied of a matter, the court need only be satisfied of the matter on the balance of probabilities."

[33] The paramount purpose of the proceedings is to determine what is in the best interests of the child.[31] In particular, Kelly J adopted with approval a passage from Lord Devlin in *Re K (Infants)*[32] where he stated:

> "However, where the paramount purpose is the welfare of the infant, the procedure and rules of evidence should serve and certainly not thwart that purpose."[33]

[34] In addition, hearsay evidence may be admissible in these proceedings.[34]

[35] Where there is a conflict between the child's safety, wellbeing and best interests and the interests of a parent of the child, then the conflict must be resolved in favour of the child.[35] However, in making decisions about the welfare of a child, the court should exercise due caution and adopt a course which exposes the child to the least risk.[36]

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28 Affidavit of Denise Giles, affirmed 7 November 2016, Exhibit A.
29 Exhibit 5.
30 *Child Protection Act 1999* (Qld) s. 105(1).
31 *Dale v Scott; Ex Parte Dale* [1985] 1 Qd R 406, pp 413-414 per Kelly J.
32 [1965] AC 201.
33 *Re K (Infants)* [1965] AC 201, 240.
34 *SRG v PGB & Anor* (1988) 12 Fam LR 225, 228 per McPherson J.
35 *Child Protection Act 1999* (Qld) s. 5A (Example).
36 *Obrenovic v McCauley* [1985] FLC 91-655.

Discussion

[36] The application for order to transfer a child protection order interstate was filed by James Lynch, then an authorised officer under the CPA on 22 January 2016 in the Hervey Bay Children's Court. Pursuant to s 10 of the DCPLA and s 45(1)(b)(ii) & (2) of the DCPLA, the Director of Child Protection Litigation becomes a party to this proceeding in place of the "authorised officer" who commenced the proceedings under the pre-amended CPA Chapter 7, Part 2.

[37] Pursuant to CPA s. 214(a), it is clear that the order of 14 August 2006 from the Children's Court, Hervey Bay granting long-term guardianship of the child YPC to the Chief Executive of the department, is not the subject of an appeal.

Interstate officer to give written consent to the transfer

[38] Ms Annette Paton, Manager Client Services of the Monaro Cluster (containing Queanbeyan CSC and Cooma CSC) with the New South Wales Department of Community Services, is:

> "a category five officer delegated to make a decision to consent to, and [states that she does] consent to, the transfer of the child protection order made in the Queensland Children's Court at Hervey Bay in the state of Queensland, made 14 August 2006 for YPC (DOB 14/06/2005) to the Minister of the New South Wales Department of Family and Community Services and a delegation 22.199."[37]

[39] Pursuant to the document titled "Schedule A – Categories of Delegated Officers", it is uncontested that pursuant to delegation 22.199:

> "The discretion to consent or refuse to consent to the transfer to New South Wales of an interstate child protection order and the terms of the proposed transfer order have been delegated to a 'category five officer' (as Ms Paton asserts she is), subject to the proviso that 'consent must be given in writing to the interstate officer as evidence of consent to the transfer of an interstate child protection order and the terms of a proposed order.'"[38]

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37 Appeal Exhibit 14.
38 Exhibit 16, p 36.

Appropriate case plan

[40] CPA s. 214(ba) requires the court to be satisfied that "an appropriate case plan has been prepared under Chapter 2, Part 3A."

[41] The case plan was developed following a family group meeting held on 16 June 2016, which was convened by Ms Ardelle Alberts,[39] attended by the respondent STC, STF, Ms Marj Speedy (a support person for STC), Mr Gray (STC's solicitor), Child Safety officers Camilla Styles and James Lynch, and the child YPC and QUJ were consulted by telephone following the meeting.[40]

[42] The case plan, running to some eight pages,[41] is comprehensive, appropriate to the child YPC's circumstances, and in my view deals adequately with the arrangements for his future safety, belonging and wellbeing. It is due for review on 16 December 2016.

Court ordered conference

[43] A court ordered conference between the parties was held on 21 June 2016 and a report of that conference was provided to the respondent.[42] The provisions of Chapter 2, Part 5, Division 2 and in particular ss. 69 – 72 of the CPA, were complied with in relation to that conference.[43]

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39 Affidavit of James Lynch, affirmed 29 June 2016, para 38.
40 Affidavit of James Lynch, affirmed 29 June 2016, paras 37, 39.
41 Exhibit JL 3, Affidavit of James Lynch, affirmed 29 June 2016.
42 Appeal Exhibit 3 (submissions of the respondent) para 55.
43 Appeal Exhibit 3 (submissions of the respondent) para 56.

The child's wishes or views

[44] At a hearing before me on 17 August 2016, I ordered a separate representative be appointed, and for that separate representative to obtain a report outlining the child YPC's views and wishes for the purposes of CPA s. 214(e). Ms Denise Giles prepared a social assessment report dated 1 November 2016.[44]

[45] That report is comprehensive and Ms Giles is to be commended for the thorough nature of her enquiries.

[46] Ms Giles interviewed the child, YPC, on 18 October 2016, when he was eleven years and five months old.[45] Ms Giles states that:

> "YPC was assessed as being of an age where he could articulate his views and wishes. He had strong views about the decision regarding spending time with his mother and he was happy to discuss this openly with [Ms Giles]."[46]

[47] YPC expressed the view that although he liked travelling to Queensland and visiting his cousins in Hervey Bay,

> "the only thing he doesn't like about travelling to Queensland is that he has to see [the appellant]. He said that attending contact 'makes me feel weird and I feel sick after contact every time.' He said further 'I don't want to go to the visits anymore, no one will listen to me.'"[47]

[48] YPC did indicate to Ms Giles that "he wouldn't mind sending her short letters" and agreed that "he could send [school photographs] to STC."[48]

[49] Ms Giles expresses that, in her opinion:

> "YPC is currently expressing very clear views and wishes about contact with STC. These views and wishes have been reported to multiple people over a significant period of time. YPC now reports he hates spending time with STC, that he hates it when she tries to

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44 Exhibit A, Affidavit of Denise Giles affirmed 7 November 2016.
45 If YPC had been 12 years old then pursuant to *Child Protection Act* s. 209, he could provide his written consent to the transfer.
46 Affidavit of Denise Giles, affirmed 7 November 2016, Exhibit A para 4.1.
47 Exhibit A, affidavit of Denise Giles, affirmed 7 November 2016, Exhibit A para 4.4.
48 Affidavit of Denise Giles, affirmed 7 November 2016, paras 4.6 and 4.7.

> hug him and he doesn't want to attend contact with STC anymore. YPC is of an age where he has the maturity to make such decisions, and as he gets older, it is likely any child protection authority managing his care will make decisions in line with what he wants to occur."[49]

[50] Although the appellant's wishes are not identified as a relevant factor in CPA s. 214, it is important in my view to note the observations of Ms Giles in the following terms:

> "It is clear to me [Ms Giles] and other people who have worked with YPC that his attachment is clearly to his current carers and he has limited, if any, attachment to STC. It appears from the information I have been provided that YPC appears to have a better relationship with STF than his mother, as STF is more receptive to YPC's needs and allows YPC to direct the contact without transferring his own feelings and emotions towards him."[50]

[51] Ms Giles goes on to observe that:

> "This is a very sad case involving a mother with an intellectual impairment and who has had limited contact with her child. As a result of this limited contact, and her inability to demonstrate she had capacity to parent YPC, YPC has remained with his carers since he was just nine days old. I have assessed that the decision to allow the carers to relocate to New South Wales with YPC in 2010 would have been a difficult one for STC to accept and understand. Her intellectual impairment is greatly affecting her ability to regulate her emotions and to comprehend what is actually in YPC's best interests, even to this date."[51]

Observations

[52] Ms Giles expressed concern about the appellant's capacity to understand these legal proceedings.[52] I queried Mr Beehre of counsel who appeared for the appellant on the appeal hearing, and I accept his assurance from the bar table that the appellant's legal representatives were satisfied that the appellant had the capacity to understand these legal proceedings.

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49 Affidavit of Denise Giles, affirmed 7 November 2016, Exhibit A para 9.8.
50 Affidavit of Denise Giles, affirmed 7 November 2016, Exhibit A para 9.12.
51 Affidavit of Denise Giles, affirmed 7 November 2016, Exhibit A para 9.13.
52 Affidavit of Denise Giles, affirmed 7 November 2016, Exhibit A para 10.1.

[53] Ms Giles went on to identify a further series of recommendations which, although technically not forming part of any order of this court, raise significant issues in respect of the ongoing care and support of YPC. These recommendations are as follows:

> "10.2 That should this court determine STC has the capacity to understand these proceedings, the transfer of the order from Queensland to NSW occur as soon as possible.
>
> 10.3 That an urgent foster care assessment of QUJ and QUL occur, and as well as normal domains of the carer assessment being addressed, focus of this assessment be on the carer's understanding of the relationships between children in their care, their relationship with biological families; the carer's health and the carer's ability to foster and support YPC's understanding and communicate (sic) with his mother and extended family.
>
> 10.4 That YPC be urgently referred to a psychologist to assist him [to] understand his relationship with biological family and explore his views and wishes over an extended period of time.
>
> 10.5 That the carers undergo training regarding the importance of positive communication with those significant to YPC.
>
> 10.6 That no changes to contact occur for a period of 12 months to allow the NSW Department to complete their own holistic assessment of the contact between YPC and his mother and stepfather.
>
> 10.7 That should YPC display significant resistance to face-to-face contact occurring, other alternative forms of communication be explored.
>
> 10.8 That YPC be supported by his case worker in NSW to begin letter writing to STC at significant events during the year, such as Mother's Day and [STC's] birthday.
>
> 10.9 That YPC's contact with STC occur in Queanbeyan to prevent YPC from having to travel excessively and that these dates be explored and tentatively provided to STC and be subject to travel arrangements being confirmed.

10.10 That STC and STF travel to Canberra the day before the scheduled contact and contact occur first thing the next morning to allow them to then travel back to Queensland that day. This will prevent flight delays impacting on the contact schedule.

10.11 That STC be provided with all information pertaining to YPC's health and education as these reports or this information becomes available.

10.12 That leave of the court be granted for a copy of this assessment to be provided to FaCS, NSW."[53]

Conclusion

[54] As these reasons identify, the process by which the learned Children's Court magistrate at Hervey Bay came to the decision dated 8 April 2016 was defective for the reasons that have been set out above at paragraphs 24-26. However, the underlying issues in this matter are very clear.

[55] The child, YPC, has been in the custody of QUJ and QUL since he was nine days old (he is now 11 years old); and further YPC has resided with QUJ and QUL in Queanbeyan, NSW for the past six years (more than half of his life). The transfer of the long-term guardianship order will reflect the practical reality that the child YPC has resided in NSW for six years and there is no reason (be it quality of care from QUJ and QUL or otherwise) that he would not continue to reside in NSW. Clearly, it is YPC's wish that he continue to reside with QUJ and QUL. Pursuant to CPA s. 199, "it is desirable for an order relating to the protection of a child to have effect, and to be enforced, in the state in which the child resides."

[56] Given YPC's long-term residence in NSW, and anticipated continuing residence with QUJ and QUL, to whom he is clearly closely attached, in NSW, then in my view there is an overwhelming case, given the importance of a decision based on YPC's best interests and taking into account YPC's wishes, for the interstate

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53 Affidavit of Denise Giles, affirmed 7 November 2016, Exhibit A paras 10.2-10.12.

transfer to proceed, and for the long-term guardianship order to be transferred to NSW.

[57] I accept and understand the appellant's opposition to this course of action, and her genuine and heartfelt concern to maintain a relationship with YPC. In my view, the recommendations of Ms Giles, as extracted in paragraph 53 above, appropriately implemented, will go a considerable way towards maintaining and reinforcing a relationship between the appellant and YPC, while recognising that YPC's interests are paramount.

Orders

1. Confirm the decision of the Children's Court Magistrate made 8 April 2016 to transfer the long-term guardianship of YPC to New South Wales.
2. Vary the terms of the order made by the learned Children's Court Magistrate in April 2016 as follows:

> "It is ordered that the child protection order made in the Hervey Bay Children's court on 14 August 2006, granting long-term guardianship of YPC, (DOB …), to the Chief Executive of the Department of Communities, Child Safety and Disability Services until YPC turns 18 years of age, be transferred to the New South Wales Minister of Family and Community Services."