IN THE CHILDREN'S COURT OF VICTORIA

FAMILY DIVISION

Principal Officer of Authorised Aboriginal Agency (PAA) Applicant

and

HJ (a pseudonym) Child

MAGISTRATE: STEAD

DATE OF HEARING: 30 October – 3 November & 8 – 9 November 2023

DATE OF DECISION: 17 November 2023

CASE MAY BE CITED AS: PAA v HJ (a pseudonym) [2023] VChC 1

Applications for:

1) Revocation of long-term care order, and recommendation that a CBSO be made: filed by PAA
2) A finding WG is the psychological father of HJ and an order placing HJ in the care of WG: sought by the child and WG

Catchwords: Child protection – 16 year old Aboriginal child HJ in care of foster carer WG since 2014 and under long-term care order since 2017 – child removed from WG's care in 2021 as consequence of a report of alleged sexual abuse of a younger child by WG – whether there is evidence of a sexual offence by WG against that child at any level – whether WG is a 'parent' within s.3(1) of the *Children, Youth and Families Act 2005* – whether it is in HJ's best interests that the long-term care order be revoked – whether the grounds still exist for a finding that HJ is in need of protection – whether return of HJ to WG's care poses an unacceptable risk of harm to HJ – whether WG supports HJ culturally – whether a family preservation order placing HJ in WG's care is in HJ's best interests

APPEARANCES: Counsel

For PAA: Ms Susan Buchanan

For the child: Mr David Ewart

WG in person

HER HONOUR:

1. HJ was born in 2007. He is the biological child of the mother HR and the father GM.

2. The Department of Human Services (as it was then) has been involved in HJ's life since December 2008 due to protective concerns about his mother's ability to care for him safely. The DHS removed HJ from his mother's care in 2012. HJ has never had a relationship with his father, and PAA report that his father has stated he wants nothing to do with HJ.

3. After being removed from the care of his mother, HJ had at least 10 foster care placements, before he was placed into residential care when he was only 6 years old.

4. In 2014 WG joined Anglicare as foster carer. His first foster child was HJ, who came into his care from the residential unit. A long-term care order was made on 16 January 2017 with the case plan of HJ remaining in WG's care until adulthood. WG has cared for approximately 20 children since becoming a foster carer. MW, who was placed on a permanent care order to WG, remains living with him as an adult.

5. The Secretary authorised the PAA to perform the functions of the Secretary in relation to HJ on 16 February 2020.

6. PAA was authorised as HJ is Aboriginal. His Aboriginality comes from his paternal family. PAA identify that HJ is a Latje Latje and Wadi Wadi young man. The documents tendered during this hearing confirm that his Aboriginality was not recognised until after he was placed in WG's care, and HJ himself became aware of his indigenous status when he was about 9 years old.

7. On or about 18 October 2021 PAA removed HJ from WG's care following a report that WG had touched the penis of another 6 year old child in his care.

8. There had been no prior concerns about the safety and wellbeing of any child in his care before, and no complaints about how he conducted himself in his dealings with either Anglicare, DFFH, VACCA or PAA.

9. HJ had been in WG's care for over 7 years at the time he was removed. He had only had sporadic contact with his maternal family by choice, and none with his paternal family. HJ was placed with a non-Aboriginal carer known to him.

10. Despite the relationship with WG being the only enduring care relationship with an adult ever experienced by HJ, after he was removed PAA determined to not allow ***any*** contact between HJ and WG, for 12 months.

11. PAA now seek that the long-term care order be revoked, and that the Court make a care by Secretary order until the eve of HJ's 18th birthday. Should that order be made, it is the unambiguous intention of PAA to prevent all contact between HJ and WG. PAA also intends

to continue with the current placement until such time as an Aboriginal family member is identified to care for HJ.

12. The application to revoke the long-term care order was filed with the Court on 30 March 2022, almost 5 months after PAA had removed HJ from WG's care. The legislation required the Secretary (or authorised officer under s.18) to file an application to revoke the long-term care order once a period of 3 months has elapsed since HJ was removed from his long-term home and they were case planning non-reunification. It is of great concern that the application was not filed until almost 5 months had passed. Further, HJ was not served with the application until 10 May 2022.

13. HJ has indicated to PAA, his current carer, the Children's Court Clinician, and a neuropsychologist that his removal from WG's care has been an intensely distressing experience for him, and the withholding of contact has compounded his distress. It is his desperate wish to return 'home' to live with WG, and MW whom he considers his brother.

14. At the commencement of the hearing HJ's Counsel raised two paths for the return to WG's care that HJ viscerally desires: refusing the PAA application to revoke the long-term care order, or the making of a finding that WG is HJ's psychological parent, and a further order allowing his return to WG's care. In his concluding submissions, his Counsel acknowledged that the long-term care order should be revoked, but for reasons different to those put forward by PAA and submitted that there was sufficient evidence to find that WG is a psychological parent.

15. Section 309 of the *Children, Youth and Families Act 2005* (Vic) empowers the Court to revoke a long-term care order if it is satisfied that it is in the best interests of the child to do so. The powers of this Court upon revocation of a long-term care order are set out in s.310(6):

> If the Court revokes a long-term care order, it may, if satisfied that the grounds for the finding under section 274 still exist, make -
>
> (a) an order requiring a person to give an undertaking; or
> (b) a family preservation order; or
> (c) a care by Secretary order.

16. Thus, the central questions that arise are:

    a. Is WG a parent under the Act?

    b. Is it in the best interests of HJ that the long-term care order be revoked?

    c. Do the grounds for the finding under s.274 still exist? If yes, what order is in HJ's best interests?

Is WG a parent under the Act?

17. Determining whether WG is a parent under the Act first is pivotal in terms of the options available under the legislation for orders should I grant the revocation application, therefore it must be determined first.

18. The definition of parent under the *Children, Youth and Families Act 2005* is broad. It does not impose biological limits: "parent", in relation to a child, includes—

> (a) the father and mother of the child; and
> (b) the spouse of the father or mother of the child; and
> (c) the domestic partner of the father or mother of the child; and
> (d) any person who has parental responsibility for the child, other than the Secretary; and
> (e) a person whose name is entered as the father of the child in the register of births in the Register maintained by the Registrar of Births, Deaths and Marriages under Part 7 of the Births, Deaths and Marriages Registration Act 1996; and
> (f) a person who acknowledges that he is the father of the child by an instrument of the kind described in section 8(2) of the Status of Children Act 1974; and
> (g) a person in respect of whom a court has made a declaration or a finding or order that the person is the father of the child.

19. The inclusive concepts of parenthood in the definition are not exhaustive. Whether a person will be able to be determined to be a parent for the purposes of the Act will be a matter of evidence in each unique case.

20. In *Re G* (2006) 1 WLR 2305 Baroness Hale of Richmond described the three main types of *natural* parenthood: genetic, gestational and psychological. It is her description of how psychological parenthood is established, with reference to the seminal work of Goldstein, Freud and Solnit, *Beyond the Best Interests of the Child (1973)*, that is of most relevance to HJ's and WG's relationship:

> The third is social and psychological parenthood: the relationship which develops through the child demanding and the parent providing for the child's needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later at the more sophisticated level of guiding, socialising, educating and protecting. The phrase "psychological parent" gained most currency from the influential work of Goldstein, Freud and Solnit, Beyond the Best Interests of the Child (1973), who defined it thus:
>
> "*A psychological parent is one who, on a continuous, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfils the child's psychological needs for a parent, as well as the child's physical needs. The psychological parent may be a biological, adoptive, foster or common law parent*."[1]

21. The reasoning of Baroness Hale was cited with approval by the High Court of Australia in *Masson v Parsons* [2019] HCA 21; (2019) 266 CLR 554 at [29], when considering the question of how parenthood is assessed:

[1] *Re G* (2006) 1 WLR 2305 at 35

> The significance of her Ladyship's analysis for present purposes, however, is that, just as the question of parentage under the legislation with which she was concerned was one of fact and degree to be determined by applying contemporary conceptions of parenthood to the relevant circumstances, the question of whether a person qualifies under the *Family Law Act* as a parent according to the ordinary, accepted English meaning of "parent" is a question of fact and degree to be determined according to the ordinary, contemporary Australian understanding of "parent" and the relevant circumstances of the case at hand. The primary judge and the Full Court were correct so to hold.[2]

22. There is a fourth type of parenthood – legal parenthood – that can arise from child protection orders, where the nurturing and legal decision-making aspects of parenthood are separated, such as occurs in care by Secretary or long-term care orders.

23. To answer the question of whether the daily nurturing that WG has provided HJ over the 7 years he cared for him has created a psychological parent-child dyad requires seeing the relationship from HJ's perspective.

24. HJ is now 16 years old. He has invariably been described as a polite, kind and respectful young man by those who know him and have given evidence.

25. The Police Interpose notes of HJ's police interview on 20 October 2021 confirm that HJ has never been touched inappropriately by WG, and highlight his positive parent – child connection to WG:

> SB - How do you feel about [WG]?
> HJ – I love him.
> SB – Love him how? Like a friend? Like family?
> HJ – Like a father.[3]

26. The strength of this relationship, and that it was one of parent and child in quality was acknowledged by the previous PAA case manager, who was planning to refer them for a permanent care assessment, 8 months prior to HJ being removed from WG's care.[4]

27. HJ has also been described by his current carer (M) as wanting to return to WG's care and having significant mood swings related to this. One such incident was recounted to Dr Z, the Children's Court Clinical Psychologist, "*she had recently heard loud noises from his room, which she believed was due to him punching his computer chair. When prompted he told her that it was Father's Day and [MW's] birthday*."[5] M also told Dr Z that "*[HJ] spoke about [WG] all the time, he considered [WG] as his dad" she further advised that HJ doesn't like PAA…he blames them for taking him away*."[6]

---

[2] *Masson v Parsons* [2019] HCA 21; (2019) 266 CLR 554
[3] Exhibit 21 pg.17
[4] PAA Yarning Up Time for HJ 8/2/2021.
[5] Children's Court Clinic Report paragraph 48
[6] Children's Court Clinic Report paragraph 49

28. HJ's current carer has raised her concerns about HJ's wellbeing directly with Anglicare also. In February this year, the carer informed Ms D of Anglicare that HJ "*isn't talking or sleeping. [HJ] came out to [M] and said he can't handle this anymore…being away from [WG]…He was crying*." The carer was so worried about HJ that she thought she might need to "*hide all sharp objects*."[7]

29. During HJ's clinical interview Dr Z noted

> HJ described living with WG as "*Great. I saw him as a father*." When prompted as to what was great, he responded: "*Just being there."* He described WG as "*very supportive, always giving opportunities*," and gave examples of flying, and learning independent skills such as cooking and laundering. There was nothing that he wished for WG to do better or change. He expressed a desire to live with WG and did not believe there was anything needed to allow him to feel safe doing so.[8]
>
> When asked about his biological family, he stated "*I don't see my parents. I see [WG] as my parent and that's it*." He had not spoken with his mother in over a year, and suggested that he did not desire any contact with her. The only family member he hoped to see was his sister S, who he had not seen recently (*"as [WG] normally organises it"*).[9]
>
> *"My family is just [WG] and [MW]".*[10]

30. Psychologist Mr C saw HJ on five occasions and was spoken to by Dr Z as part of his assessment. He reported that HJ "*idolised [WG], called him a father figure, anything spoken regarding [WG] was spoken very highly*."[11]

31. Since the first mention of the PAA application to revoke the long-term care order, HJ has sought to return to live with WG and MW and has opposed the making of a care by Secretary order. Such was the strength of his position that he sought and was a granted an order of the Court (in Bendigo) on 15 August 2022 for him to attend the Conciliation Conference personally, not just as is the usual case, via his legal representative.

32. WG was joined as a party to these proceedings after the conciliation conference. HJ and his mother supported WG's joinder application. This was the last occasion where HJ's mother participated in these proceedings. HJ's father has never participated.

33. Just as HJ has been active in pursuing his return to live with WG, WG has not walked away from HJ – he has maintained his commitment to him in the face of much adversity, and overt hostility from the current case managers of PAA.

---

[7] Exhibit 20, CRISSP note 15 February 2023.
[8] Children's Court Clinic Report paragraph 70
[9] Children's Court Clinic Report paragraph 72
[10] Children's Court Clinic Report paragraph 73
[11] Children's Court Clinic Report paragraph 61

34. Prior to entering WG's care, HJ had been diagnosed with attachment disorder. During the more than 7 years in the care of WG, HJ has been able to develop an attachment to WG that is reciprocated.

35. In his evidence WG informed me that when HJ entered his care, he did not know what attachment disorder was, and he was given no advice or professional assistance in treating it. He became emotional retelling a story of having baked a cake to celebrate HJ having been in his care for a year, with HJ responding "*does this mean I have to go to another carer now*?"[12] WG said it was in this moment that he came to understand trauma caused to HJ through multiple placements and removals, and he told me he was concerned that HJ has been retraumatised by PAA removing HJ from his care.

36. WG has told PAA that if not returned to him earlier, that he believes that HJ will return home when he is 18, and that he will welcome this. He spoke of the pain he felt when HJ was removed to Dr Z.

37. The opinion of Dr Z was that HJ ***has*** suffered significant harm in being removed from WG, being the only parental attachment figure he has,

> For HJ to have been separated from his only parental figure (irrespective of whether the alleged abuse occurred), has been extremely destabilising for him, and likely increased his disconnection from family and culture. A neuropsychological report from March this year describes him as experiencing a major depressive episode, cognitive decline, and social withdrawal in the context of ongoing separation from [WG].[13]

38. Despite the strength of HJ's desire to return home to WG, or at least have weekly contact with him until the Court case concluded, PAA refused to facilitate any contact until October 2022. When contact has been allowed to occur, it has been under intense scrutiny, and has been suspended for lengthy periods for very minor matters. Despite this lack of contact, there has been no diminution of HJ's desire to return to WG's care, no tapering off in commitment to HJ from WG.

39. Over the years, WG has facilitated HJ's involvement in many activities and fostered his self-confidence and participation in activities of his interest such as flying lessons. WG understands that HJ has learning challenges, but he believes in his capacity to succeed – and HJ feels this love and support.

40. Despite more than 2 years lapsing since HJ was in the daily care of WG, he still views him as his father, and MW as his brother. WG in his evidence demonstrated that the strong attachment is mutual. WG impressed as a man who loves HJ as a son.

41. PAA have alleged that WG has been 'grooming' HJ. The current workers are unable to see the supportive commitment WG has shown to HJ. They hear criticism if WG asks if HJ,

[12] Evidence in chief of WG
[13] Children's Court Clinic Report paragraph 96.

whom WG engaged in flying lessons to foster his dreams and motivate him to achieve academically, is still having lessons – they do not register that he is genuinely interested and share the goal of HJ becoming "*the first Aboriginal pilot*".

42. Counsel for PAA correctly conceded that the definition of "***parent***" in the *Children, Youth and Families Act* does encompass psychological parents, but then submitted that the Court should not make such a finding as it would amount to a usurpation of the Aboriginal placement principles in the Act. This submission must be rejected as s. 14 of the Act sets out the principles for placement considerations where a choice between parents of differing Aboriginal communities, or between an Aboriginal and non-Aboriginal parent is in issue. Section 14(1) requires that account be taken of the expressed wishes of the child in determining where they are placed. Section 14(4) refers to where a child has Aboriginal and Non-Aboriginal parents, and requires not only the Court, but the Secretary (and Authorised Agency under s.18), to place the child with the parent with whom it is in the best interests of the child to be placed.

43. WG is very much a psychological parent to HJ, a reality even HJ's mother accepts. I note that not only has she told PAA that she supports HJ's wish to return to WG's care,[14] she previously attended Court to support WG being joined as a party to these proceedings.

44. Accordingly, I make a finding under the definition of ***parent*** in s.3(1) of the *Children, Youth and Families Act 2005* that WG is a parent of HJ.

45. Counsel for PAA further submitted that the quality of care investigation by Anglicare that has not finalised, creates an insurmountable hurdle in HJ returning to live with WG. According to the PAA report of 7 July 2023, the review could take up to 18 months[15], and Anglicare case manager Ms D told Dr Z that she considered that the Anglicare decision would override any Court outcome.[16]

46. WG's evidence was that he no longer wanted to foster any children, he was participating in the Anglicare review as he was willing to do anything for HJ.

47. Having found that WG is a parent to HJ under the definition of parent in the Act, WG is not a foster carer, therefore there is no impediment created by the duration or outcome of the Anglicare review to making appropriate orders for HJ's well-being that promote his rights as the paramount consideration.

[14] Exhibit 1 pg. 8
[15] Exhibit 8 pg.1
[16] Children's Court Clinic Report paragraph 58.

Is it in HJ's best interests that the long-term care order be revoked?

48. Yes. The hostility of PAA to WG's significant parental role in HJ's life makes the long-term care order no longer one that can function in HJ's best interests. The ongoing separation of daily nurturing parenting and legal decision-making powers is not in HJ's best interests.

49. The impact of removal from the care of his sole safe parental figure, and the ongoing demonisation of him has caused significant harm to HJ. The opinion of Dr Z was that neither PAA nor Anglicare should be involved in the management of any order made in future, due to the gross breaches of trust that had occurred in their conduct towards HJ.

50. Dr Z made specific reference to both PAA and Anglicare telling HJ on one hand that his sessions with psychologist Mr C were confidential[17], and then Mr C experiencing what Dr Z quoted in his reports as PAA "*pushing heavily to seek information during the assessment against [HJ's] wishes*"[18] as well as the multiple instances of the insensitivity these agencies had shown to HJ's wants and needs. Dr Z noted that the Anglicare worker who spoke negatively of WG during the Clinic assessment had *never* met him or had any personal interactions with him but had adopted the negativity of PAA.

51. A further breach of trust can be observed in both PAA and Anglicare telling HJ that whether he can return to live with WG will be up to the Court, then intimating in Court reports and to Dr Z that the Anglicare "investigation" will take so long as to render the outcome of this hearing nugatory.

52. The combination of the unexplained delay in filing the application to revoke the long-term care order, delay in serving HJ with the application, and telling HJ one thing about the Court process, whilst simultaneously asserting that the administrative processes of a non-judicial, non-government organisation will override any Court decision demonstrates attempts to silence the voice of HJ in decision making about his life.

53. I note that PAA employees chose to prohibit contact between HJ and his psychological parent for almost 12 months, and then when contact was allowed to occur, its conditions were greatly constrained, and then contact suspended for minor matters. Each time PAA staff said the decision to suspend was 'in HJ's best interests'. However, no articulation of how not letting a young man whose mental health was deteriorating seriously regularly see someone so important to him was ever genuinely attempted. I was told that WG brought things of HJ's that had been left behind when he was removed, and thus contact was suspended for infringing their "no gifts" rule, and that contact was also suspended due to a comment WG made about PAA needing to check that he had put nothing inappropriate on the laptop he sought to return to him. This comment was interpreted as a criticism of PAA

[17] Exhibit 20
[18] Children's Court Clinic Report paragraph 62

made in front of HJ – rather than a factual explanation of why the laptop needed to be given to HJ via PAA. I note that this was the last contact that PAA allowed.

54. In my view, whilst supervision of contact was appropriate whilst the SOCIT investigation was unresolved, the reasons provided for cancelation of contact were mercurial, and took no account of the impact of these decisions on HJ.

55. There were conflicting explanations as to why a blanket ban on contact was imposed for approximately 12 months after HJ was removed. In reports to the Court, PAA asserted that no contact was occurring on the advice of Police, then in reply to my question as to why not contact had occurred, Ms KN's evidence was that the reason for no contact was "*to stabilise the placement, and work on [HJ's] mental health and school before contact would be considered.*"[19]

56. There was no evidence led to try to explain how the decision to cease all contact since June 2023, and plan to never allow contact into the future could be in HJ's best interests, nor how it incorporated the voice of the child.

57. In attempting to justify the two decisions to suspend contact prior to the decision in about June 2023 for ceasing all future contact, Ms KN asserted that WG breached the rules she imposed of not discussing PAA decisions and bringing 'gifts' to contact. Ms M further alleged that there was inappropriate touching observed at contact. This inappropriate touching was knees coming into contact under a table in a café where they are seated opposite each other – a seating arrangement imposed by PAA. When asked in cross-examination whether she had ever observed "inappropriate touching," Ms M stated she had, then went on to describe WG giving HJ a hug and rubbing his arm before going into court on one occasion as "inappropriate touching." I could not disagree more. I consider such physical contact between a psychological parent and child to be an entirely appropriate form of comfort in a stressful situation.

58. The refusal to reconsider the ongoing enforced separation of HJ from his psychological father and the delays in filing the application with the Court and serving it upon HJ raises concerns about whether PAA had turned their minds not only to the trauma being suffered by HJ because of this separation, but also to HJ's right to be heard in accordance with Article 12 of the United Nations Convention on the Rights of the Child which provides:

> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either

[19] Evidence of Ms KN

> directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

59. PAA through their reports and Counsel alleged that WG was rude, abusive and or inappropriate towards them. The evidence relied upon focused on an email exchange between WG and Ms M following a contact between him and HJ. WG emailed Ms M to see if she had followed up on a comment HJ made during a contact that concerned him deeply. He reported to Ms M that HJ said he was going to make a will. Ms M was dismissive of WG's attempts to make sure that this is raised with his psychologist and his lawyer. WG was clearly concerned about HJ's mental state and potential for self-harm. Ms M focused on determining whether staff supervising the contact heard HJ make the comment, rather than the pressing concern HJ's mental health and informed WG he will hear nothing further. WG in the final email in the exchange calls Ms M 'petty.'[20]

60. In her evidence Ms M stated that to her, a 15 year old boy, recently diagnosed with major depressive disorder who was contemplating making a will was not a concerning matter requiring any follow-up. This response is simply astonishing. Ms M was so focused on rebuffing WG from playing any role in HJ's life, that she had lost sight of the needs of HJ, who a few months earlier had shown signs for the potential to self-harm.[21]

61. Dr Z noted in his Clinical assessment report that "*PAA and Anglicare appear to have, and no doubt continue to regard [WG] as guilty*,"[22] and he further assessed:

> it was also very apparent to me that PAA, and to a lesser extent Anglicare, do not value the role that [WG] has played in HJ's life, consider him responsible for HJ's poor academic progress and disconnection from his culture, and would prefer he be absent. This may have made it difficult for PAA to understand and accommodate HJ's wishes, which are contrary with their own for him. It may also explain why the threshold for ceasing contact appears to have been somewhat low (e.g., gift-giving and speaking negatively of PAA). HJ has certainly felt that his needs and wishes have been dismissed within this dynamic, leading him to feel increasingly hopeless and isolated.[23]

62. Having heard the evidence, and observed the demeanour of PAA witnesses as best as possible during the WEBEX hearing, not only do I concur with Dr Z's observations, I note that the current PAA case manager and Team leader have been unable, or have refused to engage in any reflection about their attitudes and behaviours, which has blinkered them to HJ's needs, and has had the effect of administratively silencing him.

[20] Exhibit 16
[21] Exhibit 27 pg. 3
[22] Children's Court Clinic report paragraph 96
[23] Children's Court Clinic Report paragraph 97

Do the grounds for the finding under s.274 still exist?

63. Having determined that WG is a parent under the Act, and that it is in HJ's best interests for the long-term care order to be revoked, consideration must be given to whether the grounds for a finding under s. 274 still exist.

64. There is no evidence before me that the protective concerns about either of his biological parents have abated such that they could care for him, or safely play an active role in his daily life.

65. There is no evidence before me that the biological father has ever sought to be involved in decision making for HJ.

66. HJ only wants to see his mother occasionally. He does not want to live with her. HJ's mother has told PAA she supports her son's return to WG.

67. I turn then to whether there are protective concerns that would support a finding that HJ is in need of protection from WG.

SOCIT investigation

68. The SOCIT investigation of the report that WG had touched the penis of another child in his care commenced on 18 October 2021 and was concluded on 10 May 2023.

69. The result of the investigation was that no brief against WG was authorised. The letter of the Acting Detective Sergeant who made this decision sets out the lack of evidence, the credibility issues with the complaint, and the reasonable explanation of WG who gave a full record of interview, and the corroborating appointment made to take this other child to see his paediatrician for the injury caused to his penis by excessive masturbation.

70. I have viewed the VARE's and the Record of Interview, and considered the contents of the non-authorised brief and Police Interpose file. Not only did the investigation not produce evidence which would satisfy a Court to the criminal standard that an offence had occurred; an objective appraisal of the investigation materials does not provide evidence of a sexual offence at any standard.

71. The lead investigator assessed the situation as follows:

> The accused has denied the offence, and in my view, has provided what could be described as a plausible reason for touching the complainant's penis, which was claimed to be done under the umbrella of providing him some medical cream to assist with an issue he had with his penis. Further to this, the accused has stated he did seek medical advice / appointment for the complainant's issue, but the complainant was taken out of his care prior to being able to have this appointment facilitated. The accused did not relay this information to Anglicare and subsequently, when this appointment occurred, no discussion was had around the issue with the

> complainant's penis, which, in my view, if it was had would have corroborated the accused's version of events even more so.[24]

72. WG chose to give evidence in these proceedings. I accept his evidence about why he was applying medical cream to the penis of a foster child. Whilst WG should have turned his mind to the need to inform Anglicare of this injury, he did make an appropriate and prompt appointment for that child to see his paediatrician. Not informing Anglicare prior to consulting the paediatrician was an error of judgement that having heard WG give sworn evidence, in my view comes from him not perceiving the agency at that time to be responsive to his concerns about those children's behaviours, and focusing on addressing the young boy's needs without thought to himself.

73. This error of judgement in not informing Anglicare of the child's excessive masturbation prior to attending the paediatric appointment is not an error that would place HJ at risk of harm in WG's care.

Allegations WG does not support HJ culturally

74. Ms KN of PAA is of the opinion that WG has failed HJ in "*every way possible*"[25] and that WG has "*fundamentally let (HJ) down over a number of years*."[26] Any alleged incidents she relied upon to make this statement were never particularised, other than her belief that WG has not supported HJ culturally.

75. This conviction held by Ms KN, and agreed with by Ms M of PAA, is completely contrary to the views held by PAA prior to HJ being removed from his home with WG, and of the Secretary when seeking a long-term care order in 2014 for HJ.

76. In the Yarning Up Time documents tendered by WG, there are no concerns that WG does not support HJ culturally, in fact the opposite is recorded, "[WG] encourages HJ's learning about culture," and that WG was involved in planning for an unsupervised visit with his grandmother … to facilitate HJ participating in a Return to Country.[27]

77. Ms KN and Ms M blame WG for HJ now resiling from learning about and taking pride in his Aboriginal heritage and culture, yet the evidence before the Court is that until HJ was removed from WG's care, he was not only enjoying participating in cultural activities, he was also showing public pride in his heritage, having taken his cultural support plan to school to share.

78. HJ expressed to Dr Z during his interview with him that he "*didn't care much*" about his Aboriginality at present, possibly attributing it to his absent biological father. HJ also

[24] Exhibit 22
[25] Children's Court Clinic Report paragraph 55.
[26] Evidence of Ms KN (during cross examination by Counsel for HJ) on 30 October 2023
[27] Exhibit 17 - Yarning up time record for 22/4/2021

expressed to Dr Z that in his experience PAA were "*getting in the way and making stupid rules for no reason.*"[28]

79. The current case managers at PAA have been unable or unwilling to reflect upon HJ's recent experiences since being removed, and their role in preventing HJ from having an ongoing relationship with the only person he has experienced as a safe parent, even when provided with this perspective through the assessment of Dr Z of the Children's Court Clinic. Nor the strong connection between their actions and HJ's withdrawing from his cultural identity at this time.

80. Rather than listen to the voice of HJ, and consider the impact of their conduct upon him and what this means for his willingness to engage with them, the PAA allocated worker and her case manager wrote a "report" attempting to discredit the professional assessment of Dr Z – asserting that he gave "*limited time to the voice of the child*."[29] Under cross examination by Counsel for HJ, Ms KN expressed that in her opinion the Clinic assessment was flawed as Dr Z only spent 40 minutes alone with HJ, and the "*voice of the child should be more prominent to speak to the best interests of HJ*."

81. In their report in reply to the Children's Court Clinic assessment, Ms KN and Ms M try to assert that HJ's wishes are *not* to have WG in his life, because they claim he did not mention him during the last cultural support planning meeting with him. They fail to consider that after repeatedly requesting to return home, or at least have weekly contact with his "father" WG and these requests having fallen on deaf ears, that HJ is likely have felt it was futile to engage in further discussions with PAA, when instead he finally had a lawyer representing his instructions to the Court.

82. I have heard HJ's voice clearly, through his Counsel, the Clinic Report, and Neuropsychological assessment, as well as the contact notes and his Police interview.

83. WG has supported HJ to engage in activities such as flying lessons to motivate him to improve his literacy, and to facilitate him following his dreams. These are the types of actions supportive and nurturing parents do to guide children into adulthood.

84. WG's evidence was that if HJ is returned home to his care, he wants to work with PAA to assist HJ with developing his understanding of and connection to his Aboriginal family and culture. Counsel for PAA said I should view this evidence with scepticism. The evidence is that WG has never been provided with the contact details of any of HJ's Aboriginal family members. He has had the contact details of maternal family members and has facilitated contact according to HJ's needs when younger and his wishes as he has matured. I accept that WG is genuine in his desire to, for the benefit of HJ, again work collaboratively with PAA,

[28] Children's Court Clinic Report paragraph 72.
[29] Exhibit 10 pg.1

as he had prior to the removal of HJ from his care. I am less certain that the current PAA case worker and manager can ever work collaboratively with WG to further HJ's overall and cultural wellbeing due to their palpable hostility towards WG.

A family preservation order is the appropriate order

85. WG is a safe parent, however, the lack of evidence regarding the safety of HJ's biological parents creates significant uncertainty and the likelihood of future emotional harm that WG will need court orders to assist him to protect HJ from.

86. The best interest principles in the Act place HJ's wellbeing and safety as the paramount considerations for decision-makers. These principles are required to be considered when determining what orders should be made, and what conditions should be placed on an order if conditions are allowed under the Act.

87. The principles in s.10(3) that are most relevant to the decision about what order will best facilitate HJ's wellbeing, safety, development and rights are:

> (a) the need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention into that relationship is limited to that necessary to secure the safety and wellbeing of the child;

The relationship between HJ and WG is a parent-child dyad, and the level of intrusion into it must be proportionate to his wellbeing needs.

> (b) the need to strengthen, preserve and promote positive relationships between the child and the child's parent, family members and persons significant to the child;

HJ sees WG and MW as his nuclear family. He also has an elder sister with whom he has a relationship that HJ noted was facilitated by WG, as has been his relationship with his mother. There has only been recent contact made with some of HJ's female paternal relatives. HJ will need the support of WG and security in his sense of home to be able to explore and hopefully enjoy these relationships into the future.

HJ's cultural support plan from 2015 states that his mother does not want contact with him. WG has encouraged and facilitated safe contact for HJ with his maternal family.

> (c) the need, in relation to an Aboriginal child, to protect and promote his or her Aboriginal cultural and spiritual identity and development by, wherever possible, maintaining and building their connections to their Aboriginal family and community;

Due to his removal from WG's care and the subsequent insensitivities shown to his needs, it appears as his current carer identified, that HJ blames PAA, and wants nothing to do with them. Dr Z opined; this may also be combined with his feelings of rejection flowing from his

father wanting no role in his life. HJ will need very attuned support to re-engage on his journey of cultural connection and understanding.

(d) the child's views and wishes, if they can be reasonably ascertained, and they should be given such weight as is appropriate in the circumstances;

HJ is 16 years old, his maturity, the clarity and strength of his views justify giving them a great deal of weight and I do so.

(e) the effects of cumulative patterns of harm on a child's safety and development;

By the age of 6 HJ had experienced multiple placements and had been diagnosed with attachment disorder. He has suffered further harm due to the ongoing separation from WG.

(f) the desirability of continuity and permanency in the child's care;

WG offers HJ a stable and supportive home beyond the age limited jurisdiction of Children's Court orders.

(fa) the desirability of making decisions as expeditiously as possible and the possible harmful effect of delay in making a decision or taking an action;

(i) the desirability, when a child is removed from the care of his or her parent, to plan the reunification of the child with his or her parent;

It is in HJ's best interests to be reunified with WG. PAA have not considered it desirable to plan reunification, rather they have told the Court and parties that they will never change their opposition to HJ returning to WG.

(j) the capacity of each parent or other adult relative or potential care giver to provide for the child's needs and any action taken by the parent to give effect to the goals set out in the case plan relating to the child;

WG has shown his ability to nurture and care safely for HJ for more than 7 years, and his ongoing commitment to doing so despite a more than 2 year separation.

(k) contact arrangements between the child and the child's parents, siblings, family members and other persons significant to the child;

WG ensured that HJ maintained safe contact with his sister and mother, and in evidence expressed his willingness to facilitate safe contact with paternal relatives also. There is no evidence that he has refused to facilitate or promote contact with the paternal family. Ms KN conceded that prior to HJ being removed from WG's care PAA had never organised contact between HJ and paternal family members, nor given WG contact details to attempt to do so.

(l) the child's social, individual and cultural identity and religious faith (if any) and the child's age, maturity, sex and sexual identity;

HJ is currently rejecting his Aboriginal heritage. Whilst that is his decision ultimately, he is a 16 year old young man who is in emotional pain due to the ongoing separation from the person he regards as his father (and whom I have made a finding is a parent under the Act) and the refusal of PAA to facilitate contact. It is important that he is given positive encouragement to explore this heritage. This can only be more likely if he returns to live in the home of WG – the person he regards as his father, and they are both supported with opportunities to grow his knowledge of Country, mob and culture.

> (n) the desirability of the child being supported to gain access to appropriate educational services, health services and accommodation and to participate in appropriate social opportunities;

I heard directly from WG that he intends to continue to promote the importance of education to HJ and give him support to achieve his best. There are no issues raised that the home of WG is not appropriate. He has provided HJ with excellent access to social and educational opportunities that met HJ's interests previously and I am satisfied he will continue to do so in future.

> (o) the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance.

Returning HJ to WG's care does not involve any change of school enrolment.

88. The appropriate order to make is a family preservation order returning HJ to the care of his psychological father WG. The circumstances in this case are exceptional, and the FPO shall last until the eve of his 18th birthday.

Magistrate Stead

17 November 2023

ORDERS

A. WG is a parent to HJ under the definition of parent in the Act.

B. The application to revoke the long-term care order is granted.

C. A family preservation order is made placing HJ in the care of WG. The family preservation order will last until the eve of HJ's 18th birthday.

The conditions attached to the order are:

1. PAA must provide WG and HJ with the contact details for the paternal family members who have been assessed as appropriate for HJ to have contact with if those family members consent to be contacted.

2. PAA must provide WG and HJ with a calendar of cultural events in the local area, and on Latje Latje and Wadi Wadi country.

3. WG must ensure that HJ is given opportunities to engage with activities that will further his connection to culture.

4. WG must ensure that HJ is able to have contact with his sister, mother and other maternal relatives in a safe manner at times and places as agreed between WG and maternal relatives from time to time in accordance with HJ's wishes.

5. WG must ensure that HJ is able to have contact with paternal relatives that have been assessed as appropriate by PAA or the Secretary at times and places as agreed with those relatives and in accordance with HJ's wishes.

6. WG must accept visits from PAA or the Secretary.

7. The biological mother must allow WG to make all parental decisions.

8. The biological father must allow WG to make all parental decisions.

OTHER ORDERS

1. WG may make all day to day care decisions for HJ that HJ is not yet mature enough to make himself.

2. WG may consent to medical treatment for HJ if HJ is unable to do so himself.

3. WG may provide all necessary consents for HJ to participate in educational, employment, social and travel activities.