



# OFFICE OF THE STATE CORONER

## FINDINGS OF INVESTIGATION

**CITATION:** **Non-inquest findings into the death of Xaviyah Dre Cwaczko**

**TITLE OF COURT:** Coroner's Court

**JURISDICTION:** Brisbane

**DATE:** 4 April 2016

**FILE NO(s):** 2014/322

**FINDINGS OF:** Christine Clements, Brisbane Coroner

**CATCHWORDS:** CORONERS: Investigation, death of a child, swimming pool death, gate propped open, lack of supervision

Xaviyah Dre Cwaczko lived at York Street, Nundah in Queensland with his mother Anouska. He was born on 23 November 2010 and was aged three when he died on 22 January 2014 in Mater Children's Hospital in Brisbane. He died following an immersion incident which occurred at 27 Dalton Road, Tallebudgera. Xaviyah was in the care of his mother's close friend, Dale Merlo at the time he gained unsupervised access to an in ground swimming pool on Sunday, 19 January 2014. The swimming pool was fenced but a safety gate had been propped open.

## **Police investigation**

Police obtained a statement from Xaviyah's mother, Anouska. She described her son, Xaviyah as an amazing, intelligent and compassionate child who could run around and ride his bike and talk with people he met. She confirmed Dale Merlo was her best friend and Xaviyah's godmother. She trusted her to care for Xaviyah and described her as a nurturing mother. She had visited her home many times.

Anouska confirmed an arrangement was made that Dale would look after Xaviyah for the day and stay overnight with her at Tallebudgera on 18 January 2014. She was devastated by the death of her son.

On 9 September 2014, Dale Merlo was interviewed by Acting Detective Sergeant Kayleen James and Detective Senior Constable Craig Andrew. Dale Merlo was cautioned appropriately and provided with all required information prior to the commencement of the recorded interview. Her brother, Darren Campbell attended the interview with Dale to support her. Dale Merlo declined seeking legal representation prior to the commencement of the interview.

At the outset of the interview Detective Sergeant James indicated she was investigating the death of three-year-old Xaviyah Cwaczko who was said to have died following immersion in the swimming pool at 27 Dalton Road, Tallebudgera Valley in Queensland whilst in Dale Merlo's care.

The Detective informed Dale Merlo she was investigating whether Xaviyah's death was an unlawful killing. She highlighted this included acts including possible offences of unlawful homicide, manslaughter and negligent acts. She also stated she was investigating whether Dale Merlo caused Xaviyah's death directly or indirectly.

Dale Merlo confirmed she was attending the interview of her own free will; that she was not under arrest and was aware of her right to remain silent. She had also been informed she could request an appointment at another time if she chose to seek legal representation. Dale Merlo confirmed she was willing to participate in the interview with police about what had occurred.

She confirmed she was 41 years of age and unemployed. She confirmed she lived at rented premises at 27 Dalton Road, Tallebudgera with her two sons aged 16 and 12.

She was also given a copy of her previous statement made on 13 April 2014 at the hospital. Dale Merlo confirmed and adopted that previous statement which she had signed at the time. She confirmed she rented the single story home situated on a 2.5 acre block which included an in ground saltwater swimming pool. The pool is directly adjacent to the house and is accessible from the house by five different glass sliding

doors. The pool itself was surrounded by standard pool fencing accessible through two gates each with childproof locks.

Dale confirmed she had known Anouska Cwaczko for about six years. They first met whilst both were incarcerated at Wacol Women's Correctional Centre in 2008. They became friends and their friendship deepened after both were transferred to Numinbah Prison Farm. They were both in Numinbah for a period of about eight months. Their friendship continued after both were released from prison.

Anouska had three children. Jackson was the oldest child and was aged about seven or eight. Xaviyah was the second child and was aged three. Anouska's third child Ollie (Oliver) died in August 2013 when he was aged about 12 weeks. He had suffered an illness from the time of his birth.

Dale Merlo had previously looked after Xaviyah when Anouska and Xaviyah had stayed with her prior to the birth of Ollie to assist Anouska. This was for a period of some weeks leading up to and following the birth of the baby.

On Friday, 17 January 2014 Dale Merlo was talking with Anouska by phone and she invited Anouska and her family to come and stay overnight to visit the beach area at Palm Beach, Currumbin which she called the 'doggie beach'. Anouska was feeling very tired and she suggested she would bring Xaviyah from Nundah and he could stay overnight with Dale. On Saturday, 18 January 2014 Dale met Anouska and Xaviyah at the Varsity Lakes train station. Dale had her elder son, then aged 15 with her. They caught up for about 40 minutes before Xaviyah was left in Dale's care.

Dale took Xaviyah and her 15-year-old son to the beach as planned. Dale's dogs did not accompany them to the beach but were left at home. They spent the afternoon there before returning home at about 1700 hours. Dale told police she took Xaviyah outside to visit the chickens and rooster. They fed the chooks, locked them up and returned inside where Dale prepared some food. Photos of Xaviyah and the chickens were sent to Anouska on Dale's phone at 1944 hours.

Dale told police she had about half a bottle of wine while she was preparing dinner that night but did not take any medications or drugs. She said she felt fine.

She slept on a mattress on the lounge room floor with the child Xaviyah. This was apparently a common practice whilst she watched television. Just after 10pm she sent Anouska photos of Xaviyah having dinner and going to sleep. Dale said she turned the television off around midnight.

On Sunday, 19 January 2014 Dale woke at about 0830 hours. She turned the television on for Xaviyah who was already awake.

She said all the sliding doors which gave access to the pool area were shut and locked at this time. They were locked by means of a latch which could be flicked up.

Dale went back to sleep and said she was just dozing. On further questioning by police Dale said she was a little bit tired after spending time at the beach the day before. She just wanted a little more rest before the planned drive to Brisbane.

She heard a message had been received on her phone and she checked it but did not respond to the message. This was at approximately 0923 or 0933 hours. At this time Xaviyah was playing with various musical instruments, a tambourine and a shaker. She spoke to him and told him that she would be getting up very soon. She described herself as 'Narnee' to the child.

The next thing she recalled was a phone ringing which woke her. This was at about 1000 hours. It was the father of her children. Her younger son was with his father and there were discussions about arrangements for her to pick up the younger son to spend some time with Xaviyah and then to return Xaviyah to his mother, Anouska.

In the course of this phone conversation Dale realised it was quiet in her house. She finished the phone call and started calling out to Xaviyah. She thought he might be playing with toys in the bedrooms. She went to the kitchen and was putting the kettle on when she suddenly looked across through the glass sliding doors. The door to her right was open and she looked out to the pool where she saw Xaviyah lying face down in the water.

She was shocked and ran through the open sliding door, through the open pool gate and jumped into the pool to retrieve Xaviyah. She was screaming out to her older son and he woke up and came out to help her. She yelled out to him to call the ambulance and he did so.

She walked up the pool stairs and ran with him back through the same open glass door into the house where she placed him on the floor.

She checked his airway, pinched his nose, tilted his head back and commenced cardiopulmonary resuscitation. She was breathing into his mouth and doing compressions on his chest. She did deep breaths in his mouth and did about ten or more compressions and repeated the sequence over and over.

Her son was with her and he telephoned the ambulance at 1056 hours. He relayed information to Dale to assist her in doing cardiopulmonary resuscitation until the ambulance arrived.

Dale said it seemed like a long time before the three ambulance officers arrived and took over. They worked on Xaviyah for 20 to 30 minutes before taking him to the hospital.

She confirmed police arrived and she spoke with them before herself going to the Gold Coast Hospital. She was told by police not to ring Anouska as police were arranging to contact her themselves.

### **Pool/fencing/gates**

The pool is fenced all the way along the patio and then continuing around the pool. The fencing is aluminium bar fencing described as standard pool fencing construction. Dale described the in ground swimming pool as two to three metres wide and maybe five to six metres long and kidney shaped. She could stand in the deep end with her head above water. There were three stairs in the shallow end of the pool going down

into the pool.

There was also a large wooden plank which went from one side of the pool to the other forming a bridge. Dale had previously placed this plank bridge in position for fun for the children.

Dale confirmed there were two gates entering into the pool area. She described the gates as child safety locked requiring a person to lift up the locking mechanism at the top of the gate and then pull the gate open.

Dale told police the gate that opened onto the patio was fully open. A metal flat bar was leaned up against it to keep it in the open position. The bar was solid steel or cast iron. Dale Merlo confirmed she placed the bar in position at least a week prior to Xaviyah's visit to maintain the gate in the open position. There had been complaints from neighbours about her dogs causing a nuisance. She had received two or three visits from the local council. (It is noted that the house had fencing on either side which presumably could have contained the dogs on the property.)

Dale said the gate was kept open by a metal weight and was very rarely closed. It had been deliberately left open to allow the dogs to access the whole area surrounding the pool as a toilet.

She told police her dogs were causing a nuisance around the neighbourhood, so she secured them on the patio. She allowed them access to the garden around the pool so they did not excrete on the patio.

She said the pool gate itself was in good working order and self-locks. (Subsequent inspection did not confirm the gates shut reliably.)

She said the last time the pool gate was shut was about one week earlier.

She confirmed to police that the pool gate had been open the whole time Xaviyah had been at her house that weekend.

Dale said she never thought to shut the gate when Xaviyah came to stay. She said she wished she had, and she did not even think about the gate being open.

### **Sliding doors accessing the patio and pool area**

Dale said she was not sure if she had ever seen Xaviyah unlocking and opening the sliding doors from the house out to the pool area. The doors lock by flicking a latch. The sliding doors were not locked by any dead bolt mechanism. Dale was uncertain about Xaviyah's height in comparison to the position of the latch on the sliding doors, but she said he was tall enough to reach the latch with his hands. She described him as a bubbly, very creative, very determined and beautiful boy. He was very playful.

Dale told police that she had all the doors closed when they left the house to go to the beach.

She said the sliding doors were usually closed by the latch because otherwise the dogs could open the doors by pushing the door to come inside. The dogs usually slept

outside in the patio area.

Dale was talking with her (then) 15-year-old son on the way to the hospital after Xaviyah had been discovered in the pool. Dale's son told her he was up at about 3am on the computer with his mates as it was the weekend. He told her he made sure that all the doors were locked and at that time he noticed that the pool gate was open. He thought that he would close it in the morning.

Dale said it was not her son's responsibility to do so. She said it was her responsibility. He simply checked that the doors were locked when he went to bed.

Dale acknowledged that she had not ensured that the gate was closed and this contributed to Xaviyah's death. She felt responsible. She also accepted responsibility for ensuring the sliding doors were properly shut. She did not transfer that responsibility to her teenage son, although she considered he was very responsible and mature.

She acknowledged she had responsibility for Xaviyah's care and safety, including in relation to access to the pool. She could not say exactly how Xaviyah had ended up in the swimming pool. She assumed he must have opened the sliding door although she had never seen him do so before.

The last time she can recall seeing Xaviyah was when he was playing with the musical instruments at approximately 0923 or 0933 hours when she checked an incoming message on her phone.

She told police Xaviyah had previously been in the swimming pool in 2013. At that time Dale was just teaching him to fall in, turn around, crab walk the wall and "monkey monkey" to the stairs. She acknowledged he had not had any swimming lessons at this time and could not swim.

## **Autopsy**

Autopsy examination was conducted on 28 January 2014 by the forensic pathologist Dr Ong.

There were several scratches and abrasions over an area measuring 1.5 cm x 3 cm on the back of his left elbow.

There was also a circular purple red bruise measuring 3 cm in diameter on the outer aspect of the left thigh.

The pathologist noted the period of immersion was unknown before the child was found and resuscitation was commenced. A review of medical records indicated Xaviyah was stabilised in the emergency department of the Gold Coast Hospital before being transferred to the Mater Children's Hospital.

He developed status epilepticus and was medically treated. CT imaging showed swelling of the brain and profound hypoxic injury. Brain death testing was performed on 22 January and confirmed. Subsequently organ donation was consented to and undertaken on 23 January 2014.

Toxicology testing confirmed no alcohol or drugs.

Xaviyah had suffered a near drowning resulting in hypoxic brain injury, otherwise known as hypoxic ischaemic encephalopathy.

The pathologist concluded Xaviyah died due to hypoxic ischaemic encephalopathy as a consequence of near drowning.

### **Pool safety issues**

The pool was subsequently inspected by the council development compliance office on 19 January 2014.

The pool did not comply with the requirements of the Building Act 1975 with respect to;

1. Both pool gates did not self-close or self-latch as required.
2. The eastern side pool gate latch was defective and the hinge was loose.
3. There were climbable objects on both sides of the pool fencing contrary to requirements.
4. The pool fencing along the southern side was less than 1200 mm in height.

It was also noted by the inspector that child resistant doors must not be used for outdoor pools without exemption approval.

Notice was served on the property owner to remedy the defects by 5 February 2014. The pool was re-inspected on 6 February 2014 and all rectification had been made. No further action was required.

### **Consideration of events**

On 19 January 2014 the pool which Xaviyah accessed was not compliant with the relevant pool safety legislation which aims to reduce the risk of such incidents occurring. However these breaches were not the major precipitating factor leading to 3-year-old Xaviyah entering the pool. One of the gates was deliberately braced in an open position by a steel or cast-iron bar. This action had been taken by the resident tenant to allow her dogs access to the pool garden area for toileting purposes. This was an ongoing situation.

The second major precipitating factor leading to Xaviyah's immersion was lack of supervision.

Xaviyah was a 3-year-old non-swimmer who was visiting the premises overnight from 18 January 2014. He had been left in the care of his mother's close friend Dale Merlo who was herself a mature mother of two.

Dale Merlo acknowledged to police that she forgot the pool gate was propped open throughout the period she was caring for Xaviyah at her home. She acknowledged she did not herself check that all sliding doors were latched shut before she went to sleep in the lounge area with the child Xaviyah. She acknowledged that although she had not seen Xaviyah open the sliding doors previously, he was an active child who could physically reach the latch. She also acknowledged her dogs could physically slide the

doors open if not latched shut.

These background circumstances led to the situation that enabled Xaviyah to exit from the house unsupervised and alone and subsequently enter into the swimming pool where he suffered irreparable hypoxic brain injury causing his death.

Police considered these circumstances and whether or not there was sufficient evidence for a charge to be brought pursuant to section 286 of the Criminal Code of negligent homicide against a person with the care of a child. Although the police were of the view that Dale Merlo had failed to adequately supervise Xaviyah who was entrusted into her care and failed in her duty to protect him from harm, they did not consider the circumstances met the criminal standard required of gross or culpable negligence.

### **Findings section 45 Coroners Act**

**Xaviyah Dre Cwaczko, who was 3 years of age, entered into an in ground swimming pool at Dalton Road, Tallebudgera in Queensland on the morning of 19 January 2014. He was alone and unsupervised and could not swim. The gate was propped open at the time.**

**Xaviyah died on 22 January 2014 in Mater Children's Hospital in Brisbane Queensland.**

**Xaviyah Cwaczko died due to hypoxic ischaemic encephalopathy as a consequence of near drowning.**

### **Conclusion**

Xaviyah's death was a tragedy and completely avoidable.

On 18 December 2015 Deputy State Coroner Lock conducted an inquest into the death of a 15-month-old child who fell into a partially filled backyard pool. At the time the pool gate was propped open with a length of wood. The child died due to exactly the same cause of hypoxic ischaemic encephalopathy following a near drowning as caused Xaviyah's death, and in identical circumstances of a pool gate propped open.

Deputy State Coroner Lock noted recommendations by coroners in New South Wales to introduce new legislation making it a criminal offence where a death or serious harm occurs in the swimming pool where there are intentional breaches to pool safety. It was also noted that current laws relating to offences in the Criminal Code could arguably be sufficient to cover such circumstances. (Section 364 A - leaving a child under 12 unattended, and Section 289 - persons in charge of dangerous things.)

Deputy State Coroner Lock also noted the Queensland government interdepartmental committee for pool safety convened by the Department of Housing and Public Works is currently reviewing a number of aspects of pool safety. The issue pertinent to the death of Xaviyah is;

- Whether there should be new offences for people who commit intentional breaches of pool safety and death or serious harm occurs.

The committee has not completed their deliberations and the Deputy State Coroner

has postponed any recommendations pending the outcome of that committee report.

In these circumstances the findings relating to the tragic death of Xaviyah have been concluded, and published on the State Coroner's website to re-inforce the message of the tragic loss of young lives in swimming pools, particularly when;

- Gates have been propped open, and
- Lack of vigilant supervision.

Christine Clements  
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4 April 2016