Children's Court

New South Wales

Case Name:	Department of Communities and Justice (DCJ) and Teddy
Medium Neutral Citation:	[2020] NSWChC 1
Hearing Date(s):	29 January 2020
Date of Orders:	29 January 2020
Decision Date:	29 January 2020
Jurisdiction:	Care and protection
Before:	Judge Peter Johnstone, President
Decision:	A short term order is neither necessary or desirable
Catchwords:	CHILDREN – Care and Protection – “Short Term Orders” – s 79(9) of the Care Act
Legislation Cited:	Children and Young Persons (Care and Protection) Act 1998
Category:	Procedural and other rulings
Parties:	The Secretary The Mother The Father The Baby
Representation:	Ms Power, solicitor, for the Secretary Ms Marjanic, solicitor, for the Mother Mr S Herridge, solicitor, as agent for Mr Hewitson for the Father Mr S Nasti, solicitor, Independent Legal Representative for the Baby
File Number(s):	2019/00259445
Publication Restriction:	Pseudonyms have been used to anonymise the baby

and other parties

JUDGMENT

1 The baby who is the subject of these proceedings was born on 13 August 2019. The mother is now aged 20, the father is now aged 15. The baby is of Maori/Filipino origins.

2 On 15 August 2019 the Secretary's delegate assumed the care responsibility of the newborn baby at Hospital due to child protection concerns, including allegations of domestic violence on the part of the father; and inadequate pre-natal care and homelessness issues relating to the mother. The father, having been aged about 14 at the time of conception and 15 at the time of the baby's birth, is recorded as having made threats of violence against the mother when she was pregnant.

3 The mother has an older child who had previously been removed from her care and is now in the care of the maternal grandmother, due to a previous relationship during which the mother was exposed to violence and substance abuse. It is not clear at the moment whether that is a reference to the father of the older child or to a subsequent partner. For the purposes of the present case it does not matter because it has been determined, and the mother has conceded, that there is no realistic possibility of restoration of the baby to her.

4 An Application was filed in the Children's Court on 20 August 2019 then on 22 August 2019 an Interim Order was made allocating parental responsibility to the Minister until further order. On 19 September 2019 the Children's Court found the baby was in need of care and protection and the matter was established. The matter then proceeded to the "placement phase". As part of that placement phase the Secretary prepared various Care Plans, the first of which appears to have been filed on 28 October 2019 although it seems to have the word "draft" at the top of it, so I do not know whether it is an actual Care Plan or a draft Care Plan but in any event it was followed by an Amended Care Plan filed on 12 November 2019 and a Further Amended Care Plan filed on 18 December 2019.

5 This matter was set down for hearing today before me, due to ongoing issues, to which I will make reference in a moment. At the outset this morning I was informed that the Secretary now proposed to file an Addendum to the second Amended Care Plan, to deal with issues of contact in particular, and following discussion with me, to address a number of other inadequacies apparent in that Care Plan.

6 In particular, it emerged that the Secretary proposed to reduce the minimum regime for contact with the mother and father and neither of the legal representatives nor the Independent Legal Representative knew about that prior to today. I granted a short adjournment to enable discussions to be undertaken to see whether that issue could or might be sorted out today.

7 Following that adjournment the Secretary's solicitor indicated to me that the Secretary did wish to have further time to prepare either a further Amended Care Plan or an Addendum to the Care Plan, to deal specifically with some of the issues that have been discussed this morning, in particular the contact issue and secondly the guardianship issue. Regard will also be had to some of the deficiencies in the Care Plan to which I have referred and to which the solicitors for the parents and the ILR have pointed out to me in the submissions that took place before me this morning.

8 It seemed to me, however, important to proceed to make a final determination as to what was the central issue, namely the making of a short term order as proposed in the Care Plan which is currently before the Court.

9 The Bench Sheet from 19 December 2019 (when the matter was set down for hearing today) indicated that the issue for determination today arose pursuant to s 79(9) of the *Care Act* and therefore I prepared my preliminary thoughts on that basis. It seems to me that the situation has changed somewhat following the submissions that I received this morning. In any event, the matter was set down for hearing today and I am sitting as the President of the Children's Court exercising its powers pursuant to the *Children's Court Act*.

10 Ms Power is the solicitor appearing for the Secretary. Ms Marjanic is the solicitor for the mother. Mr Herridge is the solicitor representing Mr Hewitson

who is the solicitor for the father. The baby is represented by Mr S Nasti as the Independent Legal Representative appointed by the Court (the ILR).

11 All of those solicitors, other than the solicitor for the Secretary, oppose the making of a short term order as contemplated in the Care Plan and in the proposed Minute of Care Order, which I should add was handed up this morning at the commencement of the proceedings and which, as discussed, differed substantially from what is in the Care Plan, another of those matters that requires to be addressed in any further Care Plan. In particular, for example, the Care Plan before me at the moment only proposes one s 82 report at seven months.

12 As I say, the solicitors appearing for the parents and the ILR all oppose the making of a short term order which is proposed in the Care Plan, being a proposed order of two years, being the short term order proposed in the new Minute of Order handed up this morning. Either way, those solicitors are opposed to any order other than an order which subsists until the child turns 18.

13 I turn just briefly to refer to some paragraphs of the permanency planning as constituted by the Second Amended Care Plan currently before me filed on 18 December 2019. On page 13 of 22 the Care Plan states:

> "It is anticipated that within 12 months DCJ will undertake a guardianship assessment of the paternal aunt and uncle, the proposed permanent carers."

14 The Care Plan contemplates, in its present form, that the baby will be placed permanently with the paternal aunt and uncle, who have been caring for the baby on an interim basis since 18 September 2019. The Care Plan also makes the assessment that there is no realistic possibility of restoration to either of the parents.

15 I note in passing that the mother was incarcerated on 3 September 2019 due to a breach of an Intensive Corrections Order. More recently she has been residing with a paternal aunt.

16 The father has also proved problematic, but in any event following the filing of the Care Plan on 5 December 2019, the Children's Court did make a finding

that there is no realistic possibility of restoration of the baby to either parent, that issue having been conceded by each of them.

17 The permanency planning, as I indicated does propose that the baby remain with the maternal aunt and uncle until the age of 18. The only issue is, if and when an application might or might not be made for a guardianship order. In the meantime it is proposed that parental responsibility be allocated to the Minister, originally in the Care Plan for 12 months as I indicated, but now for a period of 24 months, for all aspects of parental responsibility except the aspect of religion and culture, which is to be allocated immediately jointly to the paternal aunt and the paternal uncle.

18 The new Minute of Order contemplates that pursuant to s 82 there are to be two reports, one at 5 months and one at 11 months, detailing issues relating to:

(a) The placement and the progress of the placement.

(b) Contact, particularly with the mother and the father but also with extended family members and the older sibling.

(c) Details of progress of the guardianship assessment of the paternal aunt and uncle, including evidence that they have been afforded an opportunity to seek independent legal advice.

(d) Implementation of the Care Plan and,

(e) The general suitability of the arrangements for the care and protection of the baby.

19 The Care Plan currently before me goes on to recite:

At page 14 of 22:

> "The allocation of parental responsibility to the Minister for 12 months is for all aspects other than religion and culture which is to be allocated jointly to the paternal aunt and uncle".
>
> "The Secretary undertakes to file a s 82 report at seven months as to the process of the guardianship assessment".
>
> "The Secretary undertakes to file a s 90 application at ten months with a view to guardianship".

At page 15 of 22:

> "DCJ is of the view that the paternal aunt and uncle are suitable guardians for the baby".

> "Guardianship allocated to the paternal aunt and uncle will allow the baby to have a stable secure long term placement in which he can thrive and form stable and secure attachments to both…"
>
> "Guardianship will provide the baby with the opportunity to have a lifelong placement that extends beyond 18 years".
>
> "The paternal aunt and uncle are genuine in their willingness not only to care for the baby long term but for him to stay with the family. They are continuing to demonstrate that they are able to facilitate and maintain contact and cultural connections for the baby with his older sibling."

20 Page 15 the Care Plan also sets out steps to be taken for the first six months, one of which indicates that assessment for guardianship is not contemplated until after the expiry of six months whilst other things are undertaken.

21 As was further suggested in discussion and submissions before me earlier today, the current Care Plan requires the Secretary not only to file a s 82 report but also, of necessity, to bring a s 90 application for further Final Care Orders, either by way of guardianship or otherwise, with a permanent allocation of parental responsibility, wherever that may be proposed, either with those carers or with the Minister.

22 It is pointed out that there is a possibility that the Secretary may overlook his obligation to file a s 90 Application, with the result that parental responsibility would revert under the common law to the parents, which is clearly not what is intended.

23 It was submitted that the permanency planning does not propose guardianship; it merely proposes that guardianship will be considered and investigated, there being a number of steps required prior to such an eventuality being finalised including the guardians either obtaining legal advice or indicating that they do not wish to obtain legal advice; and secondly, as indicated, a guardianship assessment, which would be required to be a positive assessment. As I indicated, that assessment, has not commenced and it is not intended to commence that assessment for at least six months while other matters are attended to.

24 I turn now to consider the law, which I do so in summary form. The principal provisions of the *Care Act* relevant to the current discussion and determination being set out in s 9, s 78A and s 83(7). I will also consider s 79(9), it having been indicated in the Bench Sheet as a matter for consideration.

25 The principles in s 9 are well known and in summary they include the paramountcy principle in s 9(1) that:

> "The *Care Act* is to be administered under the principle that, in any action or decision concerning a particular child or young person, the safety, welfare and well-being of the child or young person are paramount."

26 Secondly, there are a series of other principles to be applied in the administration of the Act, in s 9(2), which include:

> "s 9(2)(c), requiring action (whether legal or administrative) in relation to a child to be the least intrusive intervention in the life of that child or the family, consistent with the paramount concern to protect the child and promote his or her development.
>
> s 9(2)(d), being the requirement to preserve, so as far as possible, the identity, language, cultural and the religious ties of the child and,
>
> s 9(2)(e), that in respect of any child placed in out-of-home care the arrangements be made in a timely manner, recognising the child's circumstances, but that the younger the age of the child the greater the need for early decisions in relation to permanent placement."

27 As I indicated, the Bench Sheet stipulated that the issue for determination today was the application of s 79(9) of the *Care Act.* The provisions of s 79 which may have some relevance today are 79(1), 79(9) and 79(10).

Section 79(1) provides:

> "That the Children's Court may make an order under this section allocating all aspects of parental responsibility, or one or more specific aspects of parental responsibility, for a child or young person who it finds is in need of care and protection for a period specified in the order:
>
> (a) …
>
> (b) Solely to the Minister…
>
> (c) …
>
> (d) …
>
> (e) …
>
> (f) …"

Section 79(9) provides:

> "The maximum period for which an order under subsection (1)(b) may allocate all aspects of parental responsibility to the Minister following the Court's approval of a permanency plan involving restoration, guardianship or adoption, is 24 months."

Section 79(10) provides:

> "Subsection (9) does not apply if the Children's Court is satisfied that there are special circumstances that warrant the allocation for a longer period."

28 Prior to the submissions and in preparing for the hearing today I asked myself what relevance s 79(9) might have to these proceedings and that position was consolidated during the course of submissions this morning as they progressed. That section simply places a limit on any short term order allocating parental responsibility to the Minister which involves restoration, guardianship or adoption, namely a 24 month maximum. It does not of itself prevent the Court from making a short term order of any duration of less than 24 months if that were otherwise thought to be appropriate in any circumstances.

29 To the extent that the subsection were to have any application in the present case the Court would need to be satisfied that the approval sought is for all aspects of parental responsibility to be allocated to the Minister following approval of a permanency plan involving restoration, guardianship or adoption.

30 I cannot be satisfied as to that.

31 Firstly the Care Plan, that is the second Amended Care Plan before me, does not seek approval of a Care Plan involving all aspects of parental responsibility. Rather it seeks the approval of a Care Plan in respect of which parental responsibility is to be allocated to the proposed carers as to religion and culture.

32 More importantly for the present discussion, this is not a permanency plan involving restoration, guardianship or adoption. Rather it is a plan that contemplates the possibility of a guardianship application to be made some time in the future.

33 The word "involving" is crucial to the application of the section. To the extent that I have been able to consult a dictionary in the last few hours I have discovered the following meanings of that word:

The Concise Oxford English Dictionary defines "involve" as "include as a necessary part or result". The word "necessary" is also defined in that dictionary as:

"required to be done, activated or present; needed" or "inevitable, a necessary consequence".

34 I also consulted Dr Google, given the paucity of the library in this Court House (which actually is non-existent). Google indicates that the verb, gerund or present participle "involving" means;

"have or include (something) as a necessary or integral part or result".

35 The permanency planning in this case, as Mr Nasti correctly submitted, does not include guardianship as a necessary or integral part or result. It merely proposes to consider guardianship in six months' time and, if appropriate, make an application.

36 That will involve, as a minimum, the formal consent of the proposed guardians (following the opportunity to obtain independent legal advice if wished for) and a positive guardianship assessment.

37 I conclude therefore that s 79(9) has no application to the present matter.

38 I therefore come to s 83.

Section 83(7) provides:

> "The Children's Court must not make a final care order unless it expressly finds:
>
> > (a) that permanency planning for the child or young person has been appropriately and adequately addressed…"

39 Then, s 83(7A) provides:

> "For the purposes of subsection (7) (a), the permanency plan need not provide details as to the exact placement in the long term of the child or young person to whom the plan relates but must provide the further and better particulars which are sufficiently identified and addressed so the Court, prior to final orders being made, can have a reasonably clear plan as to the child's or young person's needs and how those needs are going to be met."

40 In my view this Care Plan does identify the exact placement in the long term for the child but it is of course subject to the requirement for the Secretary to bring a s 90 Application to secure that long term placement following the short term placement expiring under the orders as currently proposed.

41 The current Care Plan provides a reasonably clear plan as to the child's needs and how those needs are going to be met and makes it clear that is he is going

to be cared for by the maternal aunt and uncle, subject only to the Secretary complying with his undertaking to bring a s 90 application within the period of the short term order.

42 Section 78A provides:

"Permanency planning

> (1) For the purposes of this Act, permanency planning means the making of a plan that aims to provide a child or young person with a stable placement that offers long-term security and that—
>
> > (a) has regard, in particular, to the principles set out in section 9 (2) (e) and (g), and
> >
> > (b) meets the needs of the child or young person, and
> >
> > (c) avoids the instability and uncertainty arising through a succession of different placements or temporary care arrangements."

43 Clearly the words "temporary care arrangements" have some significance in the current setting.

Section 78A goes on to provide in s 78A(2):

> "Permanency planning recognises that long-term security will be assisted by a permanent placement."

44 Mr Herridge placed importance on the word "security" submitting that a short term order does not necessarily provide long term security as the Act envisages.

45 The reality is as follows. The scenario proposed by the Secretary contemplates that of necessity a s 90 application will need to be made in these proceedings even if the proposal to investigate a guardianship proves untenable. The alternative proposed by the other solicitors at the bar table, namely an order until age 18, contemplates that a s 90 application would not necessarily be required if guardianship eventually provides untenable after assessment and the other precursor steps are undertaken, including the informed consent of the proposed guardians.

46 The Secretary, if it does wish to proceed with a guardianship proposal in due course, is not precluded in any way from doing so under s 90, so that he is not in any way prejudiced by a long term order to the age 18.

47 It is for this reason that in my view a short term order as proposed is neither necessary or desirable. In my view, the Act contemplates the minimisation of the effect of court proceedings on children and their families: s 94(1). But more importantly and shortly stated it seems to me that a course of action that involves, of necessity, a further application to this Court which might prove unnecessary is not consistent with the *Care Act* or the best interests of the child. On that basis I would decline to make a short term order in these proceedings.

48 I will now proceed to entertain discussion as to what the appropriate next step should be against that background.

49 I make a formal finding under s 83(7) that the permanency planning for the child has not been appropriately and adequately addressed and invite the Secretary to prepare and file a further Care Plan.

50 I will order the transcript which will be converted into a formal judgment for placement on Caselaw.

51 I would like the Secretary to prepare a further Care Plan, being a Care Plan that proposes - I suppose there is nothing wrong with him now bringing an application for guardianship, if the caseworkers have got themselves so organised. That would mean expediting it, but I will not shut that possibility out - that proposes either a long term placement to age 18 or a guardianship order. Either way it will avoid the possibility of unnecessary further steps.

52 The Secretary is to file and serve a Further Amended Care Plan on or before 19 February 2020.

53 Stood over for final orders at 9.30am Monday 9 March at Parramatta. The interim orders will continue.