

CITATION: *CEO for Children and Families v RN and TW* [2012] NTMC 006

PARTIES: CHIEF EXECUTIVE OFFICER,
DEPARTMENT OF CHILDREN AND
FAMILIES

v

RN and TW

TITLE OF COURT: Local Court

JURISDICTION: Family Matters

FILE NO(s): 21138647

DELIVERED ON: 29 March 2012

DELIVERED AT: Darwin

HEARING DATE(s): 23 February 2012

JUDGMENT OF: Ms Sue Oliver SM

CATCHWORDS:

CHILD PROTECTION -- DURATION OF PARENTAL RESPONSIBILITY
DIRECTION -- PROSPECTS OF REUNIFICATION OF PARENTS WITH CHILD

CHILD PROTECTION -- BEST INTERESTS OF THE CHILD -- APPLICATION OF
THE PRINCIPLES IN PART 1.3 OF THE CARE AND PROTECTION OF
CHILDREN ACT.

Care and Protection of Children Act, s 6, 8, 10, 11, 12 and 90

REPRESENTATION:

Counsel:

Applicant: Ms Yellub
Child: Ms Morgan

Solicitors:

Applicant:: Solicitor for the Northern Territory
Child: Maleys

Judgment category classification: A
Judgment ID number: [2012] NTMC 006
Number of paragraphs: 42

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21138647

[2012] NTMC 006

BETWEEN:

Chief Executive Officer, Department of
Children and Families

AND:

RN and TW

REASONS FOR DECISION

(Delivered 29 March 2012)

Ms Sue Oliver SM:

1. This is an application by the CEO of the Department of Children and Families for a Protection Order for the child, JW, pursuant to section 121 of the *Care and Protection of Children Act*. The parents of the child were given notice of the application as required by the Act and each was represented on a duty solicitor basis at the first mention of the application. They did not appear in person and have not subsequently appeared on any further occasions when the matter has been mentioned nor at the final hearing. An order was made for the separate legal representation of the child.
2. There is no disagreement between the CEO and the child's legal representative that the child is in need of protection within the meaning of the Act. I am satisfied that the child is in need of care and protection on the basis that he has suffered harm because of acts, omissions and the circumstances of the parents. As will be clear from the facts referred to later in this judgment, the child has suffered both significant physical neglect and has been exposed to physical violence by the parents. Each of these matters amounts to harm within the meaning of section 15 of the Act.

The Issue – Length of the Parental Responsibility Direction

3. The issue is the length of the parental responsibility direction that the Act requires to be specified in a Protection Order. The CEO seeks a short-term parental responsibility direction giving parental responsibility for the child to the CEO for a period not exceeding two years. The child's representative argues that such a direction is not in the best interests of the child and that in the circumstances the Court should make a long-term parental responsibility direction to 18 years of age.
4. The Act does not provide for the term of a protection order itself. However, once a protection order is made, the Court must then specify one or more of the directions set out in section 123. In summary these are a supervision direction, a daily care and control direction and either a long term or short term parental responsibility direction. Short term directions are for a period not exceeding two years whilst long term parental responsibility directions are ones that exceed two years but end before the child turns 18 years. By implication then, a protection order terminates on the expiration of the parental responsibility direction, because on that expiration parental responsibility would revert to the parent or parents.
5. There is no power under the Act for the Court to review the circumstances of the family and child at the expiration of a protection order giving parental responsibility to the CEO. The child must be returned to the parent or parents unless a further application is brought for a protection order.

The Circumstances that Necessitate a Protection Order

6. The child was born on 11 April 2011. The first report of concerns of neglect was made on 29 June 2011 when the child was about 10 weeks old. The report was that the mother was homeless and not attending to the child's daily care needs or seeking treatment for his scabies or obtaining medical checks on the child. No action appears to have been taken to remove the child at this point as the mother, when seen, had taken the child to a health

clinic and had medication to treat the child's scabies. The parents and child were residing at One Mile Dam Community.

7. On 21 September 2011, the child now being around five months old, a notification was received that the mother had been involved in a domestic violence incident. The report was that shortly after midnight, the mother was lying on a footpath on Smith Street having been hit on the head with a rock by the father. The child was present as part of a group of persons. Whilst waiting for the ambulance, the mother breastfed the child and in the course of doing so, vomited due to the level of her intoxication. The child was taken from the mother by others present and noted to have blood on its body, a dirty nappy and scabies on his legs. The mother and child were taken to the hospital but before the Department of Children and Families (DCF) workers could arrive there, she left the hospital with the child having refused to remain for treatment. She was found the next day at One Mile Dam but again the child was not removed.
8. On 11 October 2011 further information was received that the child had health issues in that he had scabies and weeping sores including weeping sores on the soles of his feet. He was in a distressed state. The DCF workers observed that the parents were living with the child at One Mile Dam in a structure with no enclosed walls and several mattresses in a sleeping area. They refused an offer of alternative accommodation. Although the child was, on that occasion, taken to the health clinic after discussion with DCF workers, on 20 October DCF was advised that the child had not been returned for a follow up appointment. The following day a Temporary Protection Order was sought and granted with respect to the child. A medical check up following the grant of the Temporary Protection Order noted that the child had a fever, poor appetite, ongoing skin infections from scabies, with open sores on both feet and a fungal skin infection on his chest, stomach, groin and thigh area. He was given antibiotics for a possible ear and chest infection.

9. A second Temporary Protection was made on 4 November 2011 and on 16 November 2011 the present application was brought.

The applicant's submissions as to why a two year parental responsibility direction is appropriate

10. The applicant seeks only a two year order on the basis that the child is still less than 12 months old and has been of the care of the CEO from the age of six months. The applicant says that a long-term order is not in his best interests given his young age and that a two year order would enable the Department to encourage and play a role to empower the respondent mother and father to address the issues of concern such as substance abuse, domestic violence, transient lifestyle, homelessness and lack of adequate parenting skills and allow for the provision of support to the parents in engaging in counselling, therapy and participation in a drug and alcohol rehabilitation program that has been identified and is available to this family. The Department has made a referral for family management support with Save the Children. The referral has been accepted and the parents have been invited to commence attendance at this program.
11. DCF believes that a short term direction will allow it to work with the child's parents and extended families, ensuring that they remain engaged with the child and DCF to maintain a connection and to avoid the child being separated from family and cultures.
12. The proposal is to enable reunification to commence 18 months after the order is made, so that a further period of six months would then be provided for the Department to monitor the progress of the child's reunification with the parents and assess whether it is in the best interests of the child to remain with the parents or whether a long-term order better protects the child's interests.
13. The applicant submits that an Order to the child turning 18 years of age would exacerbate the risks of the child "drifting in care". The applicant

submits that a long term order would result in a shift of focus from reunification to a focus on permanency planning for the child to settle into foster care.

14. The applicant maintains that a long-term order is not in the best interests on the child because:
 - (a) The Department has not had sufficient opportunity to work with the parents, extended family and protective carers towards reunification;
 - (b) Is mindful of cultural considerations and how a long-term order may impact on the child's identity; because it makes it harder to maintain cultural links
 - (c) The applicant's focus is to reinforce the child's sense of identity and self-esteem by maintaining a connection with his family, culture and community.
15. Those views are said to be in keeping with section 8 of the Act:

8 Role of family

(1) The family of a child has the primary responsibility for the care, upbringing and development of the child.

(2) In fulfilling that responsibility, the family should be able to bring up the child in any language or tradition and foster in the child any cultural, ethnic or religious values.

(3) A child may be removed from the child's family only if there is no other reasonable way to safeguard the wellbeing of the child.

(4) As far as practicable, and consistent with section 10, if a child is removed from the child's family:

(a) contact between the child and the family should be encouraged and supported; and

(b) the child should eventually be returned to the family.

16. Section 8 of the Act is contained in Part 1.3 Principles underlying this Act. It is one of six principles contained in sections 7 through 12. Section 6(2) requires that anyone exercising a power or performing a function under the Act must, **as far as practicable**, uphold the principles (my emphasis).
17. In my view, the purpose of the principles set out in Part 1.3 is to establish a framework of the matters properly to be recognised and considered by those exercising powers or performing functions under the Act, including the Court. However, they are not each absolute directions as to the exercise of powers or the performance of functions either to DCF or to the court. They must be considered as a whole and as to how they apply to individual cases.
18. This is apparent simply from the content of the principles. For example, section 11 provides for a principle that requires a child to be given information in order to express his or her wishes about a proposed decision and the child's view is then to be taken into account having regard to the child's maturity and understanding. This would mean that in some cases the principle (s8(4)) that contact between the child and family should be encouraged and supported and the child eventually returned to the family may, in a particular case, be required to yield to the express wish of a child not to have contact and/or be returned to the family when that wish is expressed in accordance with the principle in section 9.
19. However section 10 provides that when a **decision** involving a child is made, the best interests of the child are the paramount concern. Section 10(2) provides without limitation the matters to be considered in determining the best interests of a child. In my view, the best interests principle applies directly to decisions by the Court and places the best interests of the child above the observation of all other principles to the effect that, where the child's best interests would not be served by adherence to another principle, compliance with that principle is not required. What is required is in reaching a decision the other relevant principles are considered.

20. The applicant says that in asking for a two year order it is “mindful of the best interests of the child principles stipulated by section 10 of the Act”. In my view this suggests a misunderstanding of the effect of section 10. That principle is not one of equal weight with the other principles. It is the paramount concern. To make clear that the best interests principle is paramount to the principle with respect to the role of the family, section 8(4) is expressly limited by the requirement that encouragement and support for contact with the family and eventual return of the child operates only “As far as practicable, and consistent with section 10,…” It may not be “practicable” in all circumstances for contact and/or return to occur. It may also not be consistent with the child’s best interests to be returned to his or her family. In those cases, the principle in respect of the role of the family must yield to the child’s best interest.
21. Most significant is that section 90 of the Act expressly provides that the Court must regard the best interests of a child as paramount in exercising the family matters jurisdiction for the child and that the court must give priority to the child if the rights of the child are in conflict with the rights of an adult. This provision specifically overrides the principles set out in Part 1.3 (save for section 10). Where the principles are in conflict with the child’s best interests the court must give priority to the child and not to the interests of other persons.
22. The applicant also points to the principle set out in section 12 of the Act to support a two year order. The applicant says that it has not had sufficient opportunity to investigate all other family community and kinship support for the child. Section 12 provides:

12 Aboriginal children

(1) Kinship groups, representative organisations and communities of Aboriginal people have a major role, through self-determination, in promoting the wellbeing of Aboriginal children.

(2) In particular, a kinship group, representative organisation or community of Aboriginal people nominated by an Aboriginal child's family should be able to participate in the making of a decision involving the child.

(3) An Aboriginal child should, as far as practicable, be placed with a person in the following order of priority:

(a) a member of the child's family;

(b) an Aboriginal person in the child's community in accordance with local community practice;

(c) any other Aboriginal person;

(d) a person who:

(i) is not an Aboriginal person; but

(ii) in the CEO's opinion, is sensitive to the child's needs and capable of promoting the child's ongoing affiliation with the culture of the child's community (and, if possible, ongoing contact with the child's family).

(4) In addition, an Aboriginal child should, as far as practicable, be placed in close proximity to the child's family and community.

23. Section 12 provides an important principle with respect to recognition and preservation of an aboriginal child's culture and links to family. In my view, this principle operates with respect to the decisions made about a child **once** an order for a child's protection has been made because it deals primarily with the placement of the child. Until such time as a protection order is made and a parental supervision direction or care and control direction given, DCF have no power to make any placement of the child with family or any other person. Once an order and directions are made the principle then operates with respect to that child's placement, although once more it

must yield where necessary to the individual consideration of the child's best interests. There is nothing to prevent the applicant exploring a placement of JW with extended family whatever be the length of the order.

24. What is concerning however, is what appears to be implicit in the applicant's submission that a two year order will suffice for JW's protection. It seems to me that what is suggested is that over a two year period extended family may be assessed and if found suitable JW "placed" with the family with no further protection order required. If this is the view of the operation of section 12 it is, in my view, misconceived. As I have said, section 12 operates as a principle to guide the placement of aboriginal children. It does not stand alone as a power of the CEO to give long term care and control and/or parental responsibility to extended family. Once the order expires, parental responsibility reverts to the parents and there is nothing to prevent the parents resuming physical custody of the child. Neither the extended family member with whom the child may have been placed or the CEO have lawful authority to direct otherwise.
25. Whilst it has been put to me that an order to 18 years would exacerbate the risk of the young child "drifting in care", in my view there is an equal risk if the child is placed with extended family without the ongoing oversight of the child's circumstances under a protection order, of the child drifting in the community. The circumstances of JW's older half sibling AF, which I will mention later, exemplify the problems for child protection with this approach.
26. Finally, the applicant says that there are currently no available carers to take on parental responsibility for a young child on a long-term basis and for that reason an 18 year old order is not appropriate. In my view this is not a proper matter for consideration in determining the length of a parental responsibility direction. The availability of long term carers is clearly a matter that will vary from time to time.

The Child Representative's submissions as to why an order to 18 years is appropriate

27. The child's representative pointed to the risk matters and harm associated with this child. These are neglect, a lack of provision of even basic medical care, poor parenting, alcohol abuse, severe domestic violence, homelessness and a lack of commitment to the child.
28. The child's representative points to the circumstances of two older half siblings of the child to demonstrate that the risk matters in relation to the parenting of this child are long standing. As the applicant had not provided any current history of the older siblings including the contact and/or reunification that had taken place with those children I asked for a further affidavit to be filed. I requested also that the current status of a criminal charge that the mother had been said to be facing be provided. Each of these matters seemed to me to be relevant to a consideration of the prospects of short term reunification.

AF

29. AF was born on 1 December 2006. She has a different father to JW. The first notification of neglect and emotional harm for AF was made on 26 January 2007 when she was about two months old. Police had attended a domestic violence incident at which the baby was present and the mother was taken into protective custody due to her level of intoxication and the father was arrested because of outstanding warrants. He was likewise intoxicated. The baby was left with an aunt. On 18 April 2007 a report was made that AF had infected blister sores on her body and had required hospitalization. The matter was investigated but according to the affidavit, neglect was not substantiated.
30. On 9 June 2007 there was a further notification of neglect. The baby had been left in the care of an unsuitable person and neither parent was willing to care for the baby. Both were intoxicated. AF was taken into protective

custody by the applicant and remained in care until 2 October 2007 when she was returned to the care of a family member at Bulman. She did not remain under any protection order. On 14 April 2008 the Department received a further notification with respect to AF and substantiated neglect due to a failure to provide nursing and medical aid by the mother and the aunt who is still believed to have the care of AF, although not under any order. The CEO was unable to provide any further information of AF other than that the mother had advised that she resides with family members.

TR

31. On 2 October 2009 the mother gave birth to a further child TR. The paternity of TR is unclear. TR is under a current two year protection order having been taken into care at the age of two months. In December 2009, TR had been hospitalized with infected scabies and had been abandoned while the mother went drinking. He was taken into care on 10 December 2009. On 6 December 2010 a Protection Order was made for TR with a two year parental responsibility direction. It is not explained as to why it took such a lengthy time for a final order to be made.
32. TR has now been in care for about two years and three months. The last contact recorded by the CEO of the mother with TR was four visits in October 2010.
33. The child's representative says the history of the other children are evidence of a history of poor parenting that has not improved from 2007 with the Departments first involvement a child of the mother and has continued through a subsequent child, TR, and then to JW. Alcohol abuse by the mother and the respective fathers is apparent with each of the children. Physical neglect is apparent with all the children. Those issues do not appear to have altered over the last five years.
34. There is considerable evidence of ongoing violence in the relationship between JW's parents as a result of alcohol abuse. The further affidavit of

the applicant filed at my request provides information as to the mother's current situation with respect to criminal charges. On 8 December 2011 the mother was found guilty of offences of criminal damage and use of an offensive weapon and sentenced to one month imprisonment suspended for twelve months. The affidavit also provided fresh information of allegations that on 16 January 2012, arising of a domestic violence incident in Katherine, the mother was charged with aggravated assault having stabbed the father with scissors. Further it is alleged that on 17 January 2012 there was a further attendance by police at a domestic violence incident which involved the paternal grandparents. The mother has been charged with aggravated assault as result of that incident. I had not been provided with any further information as to the outcome of those criminal charges. They give rise however, to great concern about the exposure of the child to violence in the family group in the presence of ongoing alcohol abuse by the mother and father. They also strongly suggest that no change appears to have yet occurred in the parents alcohol abuse.

35. The parents, at the time of the hearing, were reported as long grassing in the Katherine area. They have previously, according to the affidavit of the applicant, refused alternative accommodation both at a hostel and elsewhere and continue to live a transient lifestyle.
36. The parents have had limited contacted with JW since he was taken into care. The applicant's affidavit of 21 December 2011 states that the parents did not attend scheduled access visits on 23 November, 13 December and 15 December. They were 45 minutes to one hour late for the visits on 16 and 26 November 2011. On 27 February 2012 the mother called JW's caseworker advising they had returned to Darwin. She expressed interest in access and working with "Save the Children" towards reunification. The caseworker arranged to meet with the parents and extended family the next day. The scheduled appointment was not attended.

Conclusion

37. The applicant quite properly is concerned to assist the parents of JW to address the poor parenting they have displayed over the short duration that JW remained in their care from birth. An organisation (Save the Children) has been identified to work with the parents to address issues necessary to proceed towards reunification but no contact has been made between the organisation and the parents.
38. Prospects of reunification must be based in reality, otherwise the Court is simply delaying the inevitable outcome of a long term order. The interests of a child in being kept in a secure, safe and stable environment are not, in my view, served by a series of short term orders unless there is evidence that short duration orders will advance and result in reunification.
39. In this matter, the parents have not attended on any occasion the matter has been before the court. There has been no contact with JW, who is now almost 12 months old since October 2011 when he was six months old. Access visits were organised after that date but none were attended by either parent. The parents were last reported to be long grassing in Katherine though the mother advised the caseworker by phone on 27 February that they had returned to Darwin. On the available evidence neither parent has shown any willingness to address issues of alcohol abuse and the associated transient lifestyle that they have adopted in order to bring about their reunification with their child. This pattern of behaviour, at least on the part of the mother, has existed since at least 2007 when the mother's oldest child was initially taken into care, through the birth and short period of care of the second half sibling and then with this child JW. How long the father has lived that lifestyle is unknown.
40. In my view the idea that within the next 18 months there will be sufficient progress by the parents in addressing these issues to bring about their reunification at that time with JW is completely unrealistic. To seek to monitor that situation for only six months after return of the child would not

provide appropriate ongoing protection for the child's safety given that he would still be a very young and vulnerable child of two and a half years at the time of the proposed return. Neither parent has taken any step to change their lifestyle notwithstanding the offers of assistance and accommodation over the period of contact with the Department from when JW was about 10 weeks old. There is not a single indication that anything will change in the next 18 months.

41. A long term parental responsibility direction will not prevent the Department continuing to attempt to engage the parents to address their issues.
42. I am satisfied that I should make a protection order giving long term parental responsibility of JW to the CEO until JW is 18 years of age. JW's health concerns have resolved whilst in care. He has gained and maintained a healthy weight and has no further skin, ear or chest infections. For that and the other reasons I have expressed, in my view giving responsibility to the CEO under a long term parental responsibility direction is the best means of safeguarding JW's wellbeing and at present there is no-one better suited to be given that responsibility.

Dated this 28th day of March 2012.

Sue Oliver
STIPENDIARY MAGISTRATE