

CITATION: *In the matter of SN* [2012] NTMC 035

PARTIES: CEO – DEPARTMENT OF CHILDREN AND FAMILIES

v

VB

TITLE OF COURT: LOCAL COURT

JURISDICTION: Family Matters

FILE NO(s): 21209862

DELIVERED ON: 6 September 2012

DELIVERED AT: Darwin

HEARING DATE(s): 16 July, 17 July, 18 July, 19 July 2012

JUDGMENT OF: Ms Sue Oliver SM

CATCHWORDS:

CARE AND PROTECTION OF CHILDREN – PARENTAL RESPONSIBILITY
DIRECTION – PARENTAL RESPONSIBILITY TO MORE THAN ONE PERSON –
SUPERVISION DIRECTION

Care and Protection of Children Act ss 93, 123, 132, 136, 138 and 139

REPRESENTATION:

Counsel:

Applicant: Mr Fisher
Respondent Mother: Mr Woodcock
Child's Representative: Ms Morgan

Solicitors:

Applicant: Solicitor for the Northern Territory
Respondent Mother: NAAJA
Child's Representative: Maley's Barristers and Solicitors

Judgment category classification: A
Judgment ID number: [2012] NTMC 035
Number of paragraphs: 19

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

No. 21209862

[2012] NTMC 035

BETWEEN:

**CEO – DEPARTMENT OF CHILDREN
AND FAMILIES**

Applicant

AND:

VB

Respondent Mother

REASONS FOR DECISION

(Delivered 6 September 2012)

Ms Sue Oliver SM:

1. The Chief Executive Officer of the Department of Children and Families (DCF) seeks a Protection Order in relation to SN with directions that short term parental responsibility be given to specified people being the CEO and AD for a period of two years with a supervision direction under section 123(1)(a)(i) requiring that the CEO oversee the medical needs and treatment of the child and that AD complete registration as a foster carer for the child. The order is sought to have effect for a period of 24 months.
2. SN is four years old having been born on 14 February 2008. Her mother is VB and her father is deceased. She is the third child of four children to those parents. She has lived between Maningrida and Goulburn Island all her life.
3. There has been ongoing involvement with SN and her siblings by the DCF arising out of the mother's inability to properly care for her children due to

alcohol misuse. SN's three siblings do not live with the mother but with other relatives on Goulburn Island and in Maningrida and SN has likewise passed between relatives in these communities.

Protection Issues

4. The primary issue for SN's care and protection is that she has suffered malnutrition. According to the medical notes tendered, malnutrition was first diagnosed in June 2009 when she was admitted to hospital with severe wasting and malnutrition. SN also suffered from intrauterine growth retardation and was born with a low birth weight. Overall she has been admitted to hospital three times for malnutrition prior to the admission in 2012 that resulted in her being placed under care of the CEO.
5. During 2011 DCF had extensive involvement with SN's extended family to try to address her needs without resorting to removal. A family member, BM was nominated to be SN's carer and certain arrangements were agreed around her personal care, including feeding. This arrangement was put in place mid October 2011. The Medical clinic notes from Maningrida during 2010 and 2011 record ongoing problems with SN's failure to gain weight (and on some occasions losing weight) with nutritional supplements being provided and family encouraged to ensure that she was being properly fed. Some records indicate concern about the nutritional supplements going to other family members rather than SN. Other health concerns such as infected scabies are recorded from time to time.
6. In early January 2012 DCF received a notification that too many people were "looking after" SN and DCF met with BM to review the plan.
7. A month later DCF found that SN had not been taken regularly to the clinic and she was taken there by DCF. Around 12 days later she was admitted to hospital and on admission weighed only 9.4kgs. The Department sought and was granted a temporary protection order and nine days later she was

discharged into a foster care placement weighing 10.25kgs. DCF then applied for a protection order seeking long term parental responsibility to the CEO of DCF. That application has since been amended to seek the orders currently sought.

8. SN's weight has steadily increased in care and she is attending pre-school.

Medical Evidence

9. Dr McLennan is SN's treating paediatrician. She confirmed in her evidence the diagnosis of malnutrition and stressed that the diagnosis of malnutrition should not be confused with "failure to thrive" as that latter condition can be present without a child being malnourished. Based on her extensive experience with malnutrition (both internationally and in the NT) she was strongly of the view that oral hypersensitivity was not the cause of the malnutrition. She said it was highly unlikely that the cause of the malnutrition could be attributed to anything other than that SN was not receiving adequate food because when she does receive adequate food she puts on weight. She had personally seen SN eating well.
10. Dr McLennan described the long term effects of malnutrition. There can be impaired cognitive ability and the proper operation of organs such as the heart and lungs being affected. There is an association of heart and renal problems in adults arising from malnutrition. There may be some impact on the functioning of the immune system.
11. SN will need to be seen on a long term basis until she is no longer malnourished because there are serious health implications if the condition is not resolved.

Other Evidence

12. Affidavits of DCF caseworkers who have had involvement with SN and her family were tendered and those caseworkers gave evidence of their involvement including SN's visits back to family in Maningrida and their knowledge of the living circumstances that AD would be able to provide for SN if the orders sought are granted. Although AD shares a duplex home with many others it is a newer house and Mr Fales, the current caseworker for SN described it as a being clean and tidy, one of the cleaner homes in Maningrida and "not the norm".
13. Ms Michelle Callinan is a Family Educator with a community based program through the Maningrida school. She employs both the mother VB and AD in the Playgroup. Ms Callinan is the person who made the report to DCF in February because she was concerned that SN was very skinny and had sores. She is however supportive of SN returning to Maningrida under AD's care and believes that a two year order would provide VB with an opportunity to redeem herself. She was obviously very aware of VB's alcohol issues. She had involvement in the access visits by SN with her family this year and described SN's attachment to her family and distress when she had to leave. She gave evidence of the good parenting skills AD has in relation to her own children.
14. Both AD and VB gave evidence through an interpreter. They were both nervous as would be expected and at times this affected the clarity of their evidence but they gave a clear impression of their love for SN and desire to see that her needs are properly addressed if she should return to Maningrida. VB appeared to me to recognise the impact that her drinking has had on her ability to parent SN although she seeks to place this in the context of grief over her husband's untimely passing in March 2011 when he died in prison. Although this may have exacerbated matters it is my view on the evidence that problems with alcohol impinging on her parenting ability have existed

long before that unhappy event. SN's medical history alone is evidence that there were matters that affected parenting ability even before her birth, noting that SN had intrauterine growth retardation. She confirmed that SN had been passed by her to various family members and said that she realised now that she was moving from family to family. She has had six children, four to the husband who passed away and two to BM (who are now 17 and 19 year old girls). She seems to have cared for SN herself only for a couple of months in 2007. I am not convinced that she fully appreciates that SN's condition is as a result of not being fed sufficient food as opposed to the idea of her being a "fussy eater" and this causes me some concern, however I am also mindful that there may be difficulty in the interpretation of words and concepts around "eating" and "being fed".

15. She plans to help her sister at meal times with SN and wants to address her alcohol issues. Although she was not asked directly in evidence, she did not show any indication in court over the course of the hearing of having been drinking. The ability to remain sober under the stress of the hearing is a good indication that she is earnest in addressing this problem.
16. AD is married and has five children aged 16, 11, 10, eight and two years old. She does not smoke or drink and has very strict rules around alcohol and will not allow drinkers into her home. She would get the police if someone came home drunk. She is clearly very protective of her children in their home and also attends to their educational needs in a sound way. She described the type of well balanced meals that she typically prepares for her family each day.
17. Her home is crowded with six adults and eight children living there, although this would vary from time to time with people moving to and from outstations. She sleeps in one of the three bedrooms in the house with her children and SN would likewise share that room. The older boys are not

always there. SN has stayed in that accommodation when she has had access visits in Maningrida.

18. Such crowded accommodation is far from ideal for any child. It remains a sad reality and norm for many, if not the majority, of Aboriginal people living in remote communities until the massive undersupply of housing in communities is fully addressed. I have no doubt that like anyone, AD would like more spacious accommodation for her family but she is not in any position to be able to change her situation for the better. Mr Fale's evidence was that he has a weekly struggle with Territory Housing about the allocation of housing and that it will be years before there are other houses available.
19. If SN were to remain under an order until she is 18 years old and reside in her current foster placement in Darwin she would undoubtedly enjoy a far greater standard of accommodation. However, the protection issues for SN did not arise out of an issue of crowded living circumstances. She has cousins, AD's children, who appear to be growing up well notwithstanding the difficulties the crowded home must present. It is undoubtedly a credit to AD that she has been able to parent her children so well in those circumstances and maintain a clean and tidy residence with all the people who live there.
20. The best interests of a child are not confined to a consideration of the material things that can be provided to them. A child's best interest will also involve whether the home provides a safe and secure environment, their emotional well being through attachment to their parents and extended family, their opportunity for a sound education that will provide for them to develop their full potential and in particular cases the maintenance of their cultural heritage. Most relevantly as in SN's case, it must include ensuring that their physical needs are met so as to allow the child to develop to their full physical potential.

21. Sadly, there are many families across Australia bringing up children in disadvantaged circumstances. It is important to distinguish disadvantage from dysfunction that results in harm. Disadvantage is not of itself a matter that will provide grounds for a protection order unless it is of such a degree and arises from an act or omission by a parent that there is likely to be or there has been a significant detrimental effect on the child's physical, psychological or emotional wellbeing or development.¹.
22. I am satisfied that SN is a child in need of protection due to neglect resulting in physical harm. Her mother has failed to ensure her physical needs have been met as have the family members into whose care SN was entrusted. She commenced life with the effects of intrauterine growth retardation and has suffered malnutrition for the majority of her life; a condition not yet fully resolved notwithstanding the very high level of care she has received in a foster placement.
23. It is an indictment on her extended family members who were given the responsibility to care for her by the mother and with whom DCF attempted to work to ensure SN's care that they failed to provide proper nutrition and for her attendance at the health clinic to monitor her weight. The concept that aboriginal children have a great benefit from being cared for through extended family is only a cultural advantage to them when there is at least one adult taking primary responsibility to ensure that the child's needs are being met by all involved and the child is developing proper attachments to significant adults. Unfortunately, as the courts in the Northern Territory frequently see, not just in the child protection jurisdiction, too many children move from family member to family member without anyone taking overall responsibility for ensuring their needs are met and the child's physical and developmental needs are affected with disastrous long term consequences. In SN's case the outcome of shared care by family members over an extended period is evident.

¹ See section 15 and 20 of the *Care and Protection of Children Act*

24. Considering the best interests of SN requires a balancing of all her needs and the way they can be met. I am satisfied on the evidence of SN's caseworkers who have been involved in taking her for access visits to Maningrida that she maintains a very strong attachment to her family members there and that she was distressed on being separated from them after her visit. Ms Callinan's evidence likewise clearly demonstrated SN's attachment and reluctance to leave. That evidence it seems to me clearly indicates SN's wishes to be with her family.
25. In my view AD seems likely to be able to provide, under the shared parental responsibility protection order that is proposed, for SN's physical, psychological and emotional wellbeing. VB is supportive of the order. Notwithstanding that the level of material comfort in AD's home does not mirror the current care placement for SN, it is a home environment that in my view will support SN's overall wellbeing. I therefore make a protection order with a parental responsibility direction to the CEO and to AD.
26. The order will be for two years as sought. I asked both AD and VB where they thought SN should live at the end of the two years. Both responded that she should stay with AD. However, I do not think that the prospects of reunification with VB are without some possibility notwithstanding her history in relation to all her children, including her problem with alcohol. A two year order will allow for the prospect of reunification with VB if she is able during that period to demonstrate that she has ceased abusing alcohol.
27. The CEO has also sought directions that the CEO oversees the medical needs and treatment of the child and that AD complete registration as a "foster" carer for the child. The term foster carer is not one that is in current use under the *Care and Protection of Children Act* save that there is reference in sections 316 and 317 deeming persons who were registered foster carers under the repealed *Welfare Act* to be a carer under section 78(1)(a)(iii) and an agreement for foster care that was in existence at the

time of repeal to be deemed to be a placement arrangement under section 78. Although the term foster care is still used colloquially, I assume that the direction actually sought is in keeping with the terminology of the Act, an order that AD complete the steps that need to be taken for her to become a registered carer. These matters are provided for in the *Care and Protection of Children (Placement Arrangement) Regulations*. Regulation 13 specifies the duties of a carer.

13 Care of child

The carer must:

- (a) have interest in, and respect for, the child; and
- (b) provide a safe, caring and stable environment for the child; and
- (c) provide appropriate accommodation for the child; and
- (d) provide the child's material requirements; and
- (e) ensure the child receives appropriate medical attention when required; and
- (f) encourage the development of the child; and
- (g) if the child is enrolled in school – ensure the child attends school; and
- (h) assist the child to maintain or recover his or her personal, familial and cultural identity; and
- (i) comply with, and assist with the implementation of, the care plan for the child; and
- (j) attend training or information sessions as directed by the CEO.

28. Section 22 of the Act defines parental responsibility

22 Parental responsibility for child

(1) A person has parental responsibility for a child if the person is entitled to exercise all the powers and rights, and has all the responsibilities, for the child that would ordinarily be vested in the parents of the child.

(2) Without limiting subsection (1), a person who has parental responsibility for a child:

- (a) has daily care and control of the child; and
- (b) is entitled to exercise all the powers and rights, and has all the responsibilities, in relation to the long-term care and development of the child.

29. The latter direction sought with respect to “foster care” seems to me to be inconsistent with the Act and confuses both the role and the legal responsibilities of a carer under a placement by the CEO in circumstances

where the CEO has parental responsibility and a situation where there is to be shared parental responsibility of a child.

30. AD is proposed to be given shared parental responsibility for SN and therefore will be entitled to exercise “all the powers and rights, and has all the responsibilities, in relation to the long-term care and development of the child.” This would include the matters set out in regulation 13 except those matters in regulation 13(i)(h) and (j). Importantly, as a person exercising parental responsibility, AD does not have to “comply with, and assist with the implementation of, the care plan for the child” as parental responsibility as defined in section 22 provides for an entitlement to exercise broader powers in conjunction with the CEO if there is shared parental responsibility, a power not confined to what the CEO has determined to be the care plan. Consequently I decline to make the supervision direction sought with respect to registration as a “foster carer”.
31. I am also not satisfied that the direction in relation to the CEO overseeing SN’s medical needs and treatment goes far enough to ensure that there is no relapse involving her nutritional needs when she returns to Maningrida. Given the history of the involvement of family members in SN’s care, and the failure, even with the previous oversight of DCF into her circumstances, to prevent the ongoing detriment to her health by malnutrition, it is my view that a stricter regime of monitoring by the Health Clinic needs to occur at least for the first six months. I therefore make a supervision direction that for six months after SN’s return to Maningrida she is to be taken to and be weighed at the Health Clinic each fortnight. The direction is aimed at ensuring her continued weight gain.
32. The orders therefore are as follows:
 1. A protection order for the child SN born 14 February 2008 giving short term parental responsibility to the CEO and to AD for a period of two years from this date.

2. A supervision direction that the CEO is to have responsibility for oversight of the child's medical needs and treatment to ensure they are met and that both the CEO and AD must ensure that the child is taken each fortnight to the Health Clinic at Maningrida to be weighed for the first six months of the protection order to monitor her weight.

Dated this 6th day of September 2012.

Sue Oliver
STIPENDIARY MAGISTRATE