

CITATION: CEO of the Department of Children and Families v LF
[2016] NTLC 011

PARTIES: Chief Executive Officer of the Department of
Children and Families

Applicant

and

MR Mother

and

BF Father
and

MD Grandmother

and

LF Child

TITLE OF COURT: Local Court of the Northern Territory

JURISDICTION: Family Matters Jurisdiction

FILE NO(s): 21547380

DELIVERED ON: 27 May 2016

DELIVERED AT: Katherine

HEARING DATE(s): 18 April 2016

JUDGMENT OF: Judge Sue Oliver

CATCHWORDS: **Local Court – Family Matters Jurisdiction –
Care and Protection of Children Act –
reunification of child with parents –
aboriginal child – objective of parental
responsibility.**

REPRESENTATION:

Counsel:

Applicant: Mr Kudra
Grandmother: Ms Bell

Solicitors:

Applicant:
Grandmother: North Australian Aboriginal Justice Agency

Judgment category classification:

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

No. 21547380

Chief Executive Officer of the Department
of Children and Families

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REASONS FOR JUDGMENT

(Delivered 27 May 2016)

Judge Sue Oliver:

1. The CEO of the Department of Children and Families has made an application for a protection order for the child LF seeking a parental responsibility direction giving parental responsibility to the CEO for a period of two years.
2. Neither of the child's parents has participated in the proceedings.

3. The maternal grandmother, MD, applied for and was joined as a party to the proceedings. She opposes the direction sought by the CEO and seeks an order giving her parental responsibility for a period of two years.
4. Ms D has had daily care and control of L since 25 September 2015 pursuant to an adjournment order direction by the Court. Ms D is an approved kinship carer with the Department of Children and Families and has care of another child in that capacity.
5. It is not in issue between the parties that a protection order should be made.
6. The parties agreed the following matters were at issue. First, whether there has been adequate compliance with the supervision directions made on 25 September 2015. In particular, the applicant believes the following directions have not been complied with:
 - a. the mother and father may only have access with the child that is supervised by Ms D or DCF.
 - b. Ms D is to take the child to the clinic each week for a medical checkup or more often if directed by clinic staff and follow all medical directions.
 - c. Ms D is to ensure the child is not exposed to domestic violence.
7. Secondly, whether the order is proposed by the applicant is the best means of safeguarding the well-being of the child. In particular:
 - a. Whether the applicant or the maternal grandmother is better placed to have parental responsibility for the child.
 - b. Whether supervision directions would adequately safeguard the well-being of the child.

8. L was born on 21 December 2014. The protection issues for L occurred whilst in her parents' care and are the sadly too common issues of alcohol abuse, violence and neglect of the child's physical care. In June 2015 L had pneumonia but was not taken to the clinic for treatment and had to be airlifted to Darwin for emergency treatment. Her blood results Austin Hospital indicated that she had microcytic anaemia requiring iron replacement therapy. In August 2015 L was diagnosed with bronchiolitis resulting in pneumonia. She was not returned to the health clinic in Kalkarinji for a follow-up by her mother. When located two weeks later she had infected scabies and ring worm. She continues to suffer from periodic illness due to bronchiolitis. Affidavit material provides detail of police records showing the history of violence between the parents and the father's criminal history is indicative of alcohol-related offending.
9. In September 2015, L was taken into provisional protection following a report that her mother was intoxicated and that she had been left with other intoxicated adults. When police and a DCF officer located her, the mother was intoxicated and breastfeeding her in the front seat of a vehicle with the child unrestrained. Significant to this event is that the report that led to the child being identified as at risk and located came from the grandmother who was in hospital in Darwin at the time. Having heard of the child's situation she took immediate action to ensure the child's safety. This is not the first time the grandmother intervened to protect the child. According to her affidavit there were other times when she heard the mother was drinking and she would drive from Lajamanu to Katherine to retrieve L and take her back to Lajamanu to look after her. As previously noted she has had care of L following the first court mention of the matter.
10. The grandmother says that it is culturally appropriate for her to raise the child and this is not contested. She says she will continue to raise the child at the expiration of the current order with the parent's consent.

11. The DCF caseworker, Ms M, gave two reasons in her evidence as to why the Department is seeking a parental responsibility direction. First, Ms M said that the Department wishes to see if reunification to either parent is viable. Secondly, further assessment, support and monitoring are required to ensure the child's care.
12. She was asked what steps would need to be taken by the parents to allow for reunification with their child. She identified these as being attending alcohol or drug rehabilitation, staying sober or only engaging in safe drinking, a family home free from violence, addressing financial needs and appropriate parenting. She said that she would rather see the Department taking further active steps to explore reunification. It would appear that no steps have been so far taken to present and discuss with the parents a reunification plan and attempt to put in place the identified measures. Although the Department knows where the father is, they appear to have lost contact with the mother.
13. In her evidence the grandmother said she has spoken to both her daughter and to her son-in-law and both of them have given their consent to her raising L. This is not contested.
14. Mr PS who is a senior protection officer with DCF said that he had made contact with the father who has a steady job and a place to live. He said that when L was first taken into care he expressed a desire to have her but didn't seem so interested when he spoke to him about two months ago. He said that if the CEO obtained parental responsibility the plan would be to hold a family meeting and find out what the views of the family were. He has not been able to meet the mother as she has not been in the community when he has visited.
15. It is readily apparent from the fact that the parents have not participated in the proceedings and have not made any attempt to maintain contact with DCF that they are not taking any active steps to have their daughter

returned to either of their care. Indeed it is not clear how much if ever L was in her father's actual physical care, except perhaps at Kalkarindji.

Should DCF have parental responsibility so that it can focus on reunification with the Parents?

16. In my view the applicant's focus on reunification with the parents is based on a model of family constituted by a parent or parents and a child or children which is common in Western society rather than the broader model of child raising more common in Aboriginal society. In Western societal terms it might be expected that the primary goal with respect to a child removed from the care of his or her parents is to have the parents address the care concerns with a view to reunifying the child with his or her parents once the concerns have been addressed. This would ordinarily be considered to be in the child's best interests, that is, return to parents as opposed to placement with some other family member.
17. The question is whether primacy of placement with the parents is one that is to be applied to aboriginal children as being in his or her best interests. There are provisions contained within the *Care and Protection of Children Act* that appear to me to be concerned with this issue.
18. Section 8 of the Act sets out a general principle with respect to the role of the family.

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.

19. Read in a western societal context that provision might be interpreted as a reference to immediate family and the need therefore to preserve and return the child to his or her parent/s where that can be achieved. However, that provision needs to be read in conjunction with other provisions of the Act.
20. Section 17 provides a definition of parent of a child.

17 Parent of child

(1) A parent of a child is the child's father, mother or any other person who has parental responsibility for the child.

(2) A parent of an Aboriginal child includes a person who is regarded as a parent of the child under Aboriginal customary law or Aboriginal tradition.

(3) However, any of the following must not be regarded as a parent of a child:

(a) the CEO;

(b) a person who has responsibility for the care of the child only on a temporary basis;

(c) a person, such as a teacher or childcare worker, who has responsibility in relation to the child because of a professional relationship.

(4) To avoid doubt, a reference in this Act to the parents of a child includes a reference to the parent of a child who has only one parent.

21. The provision makes a clear distinction between aboriginal children and children of different ethnic heritage in terms of who is to be regarded as a parent of the child by providing a broader definition of parent for aboriginal children.

22. Section 19 of the Act provides for the definition of “the family of the child”. Again it can be seen that the definition embraces a wider group as “family” in relation to aboriginal children by including those members of the extended family recognised by customary law or tradition.

19 Family of child

The family of a child includes:

- (a) the relatives of the child; and
- (b) the members of the extended family of the child in accordance with:
 - (i) any customary law or tradition applicable to the child; or
 - (ii) any contemporary custom or practice; and
- (c) anyone who is closely associated with the child or another family member of the child.

23. The objects of the Act set out in section 4 are relevant considerations in interpretation of the Act. This section provides

The objects of this Act are:

- (a) to promote the wellbeing of children, including:
 - (i) to protect children from harm and exploitation; and
 - (ii) to maximise the opportunities for children to realise their full potential; and
- (b) to assist families to achieve the object in paragraph (a); and
- (c) to ensure anyone having responsibilities for children has regard to the objects in paragraphs (a) and (b) in fulfilling those responsibilities.

Of note, is that s4(b) does not refer to an objective of promoting the wellbeing of children by assistance to their parents but by way of assistance to their families.

24. In my view, reading these provisions as a whole shows that the Legislature intended to recognise the distinction between what might be described as the nuclear family model of child raising and the broader extended family model of child raising common in Aboriginal society. Consequently, a view that reunification with the biological parents of the child is to be the primary goal for the promotion of the wellbeing of the child and is to be pursued even where the child is already in a stable secure home with an extended family member is not in my view the correct approach for aboriginal children whose family maintain cultural tradition and recognise cultural relationships.

25. The evidence of Mr S took a broader approach to reunification than that of Ms M. Mr S said that the intention was, if DCF were granted parental responsibility, to hold a family meeting because there was an obligation to both sides of the family. This approach is in my view more consistent with the approach to reunification envisaged by the Act for an aboriginal child. However, in this particular case the father's side of the family do not appear to have shown interest in the proceedings. Unlike Ms Ds, there has been no application from the paternal side to be a party to proceedings.
26. Consequently, in my view a grant of parental responsibility to the CEO for the purpose of pursuing reunification with the parent/s when the child is recognised as living with a family member in circumstances that already ensures the wellbeing of the child is not a proper purpose for a grant of parental responsibility.

Support and monitoring

27. The grandmother is the young grandmother, 42 years old. She has had the care of the L since late September 2015. She resides in a community with her husband. Although there have been some domestic violence concerns with respect to her husband she has addressed these by taking out a domestic violence order that forbids him contact with her when he has been drinking. She does not drink, works at the Local Council office doing administrative work and is the Centrelink agent for that community. She has two children at home apart from L, her seven-year-old son and a five-year-old son of a cousin. An older son who is 15 years old goes to boarding school. The two children at home go to school every day. Her partner works at the school. None of this evidence is contested.
28. In relation to Ms Ds' husbands alcohol use, she said in her evidence that he seldom drinks however it is noted that he does have numerous high range drink-driving offences. In her evidence, Ms D said that if there were to be continued problems with her husband she would walk away from him. She

impressed me as a strong woman who was more than capable of making decisions to protect both herself and her children.

29. Mr S described Ms Ds' medical care of L as exemplary. Although it has not been in strict compliance with the Direction made by the court on the very first occasion when L was placed in Ms Ds care, the clinic records very clearly indicate that she has properly addressed L's medical issues and needs as they arise, including that the growth issues that were initially a problem when L was in her parent/s care have been resolved.
30. Ms D was described by Mr S as an exemplar in her community. His concern seems to be more that she will be overburdened by demands placed on her by others than her ability to properly parent and care for L. I accept that he holds this as a genuine and well-meaning concern to ensure the ongoing health and wellbeing of both Ms D and L. However, absent any other concerns of Ms D's care of L or evidence that would satisfy the Court that there is a real and apparent risk that L's care would be compromised by Ms D "taking on too much", it is not one that should affect the determination of whether an order for parental responsibility to Ms D is the best means of safeguarding the wellbeing of L. Many parents from time to time "take on too much" for their own wellbeing but generally this does not affect their parenting to a level which would require a protection intervention.
31. To my mind the Department's reservation as to a grant of parental responsibility to Ms D is somewhat curious given that they have placed another child who is within their care under a protection order with her as a kinship carer and do not propose, if granted parental responsibility, to remove L from her care. Were there genuine concerns around some of the family matters that are raised in the caseworkers affidavit then it would be surprising that they would continue allowing her to be a kinship carer. She

has been given that status already against that family background so that it cannot have been considered to pose a risk to a child in her care.

Best interests of the child

32. In considering whether to make a protection order on the terms of that order the court must consider orders that are in the best interests of the child. Section 10 of the Act provides for the matters that the court must consider. Relevant to these proceedings is section 10(b) which provides that the court must consider the capacity and willingness of the child's parents or other family members to care for the child.
33. There is absolutely no doubt in my mind that Ms D is a capable, caring and loving grandmother to L. She has had the sole care of this little girl now for just over eight months, almost half of the child's life. She is fully meeting the child's ongoing medical needs.
34. I do not accept that the CEO is better placed to determine a return of the child to her mother or father than Ms D. DCF do not appear to have been aware of the child's circumstances until Ms D contacted them. She is well aware of her daughter's limitations and is able to identify all that would be needed for a safe return of the L to her mother. Given her intervention, there is no reason to suppose that she would return L to her mother or father unless she was satisfied of the child's safety. In any event, she has no present plan to do so and proposes to bring L up.

Conclusion

35. The objective of obtaining parental responsibility for a period of two years to attempt reunification of L with her mother or father lacks long-term focus. The parents do not show any interest in reunification, indeed Ms Ds' uncontested evidence is that they have individually told her she can grow L up. They have not participated in these proceedings on any occasion. Continuing L in the grandmother's care and giving her grandmother legal

authority as her parent in my view secures L's wellbeing and is the best means to do so at this time. If the mother or father showed any interest in addressing their issues so as to give rise to a realistic prospect that reunification might be possible then that might be a different case, however it is not.

36. I am not able to see how giving the CEO parental responsibility in this matter for two years advances L's interests in any way that cannot be provided by giving Ms D's parental responsibility.
37. L is a child in need of protection because she has been harmed by the acts and omissions of her parents. As the CEO proposes to continue L in the care of the grandmother in the event that she is granted parental responsibility for her, it would appear that the only real purpose for a grant of parental responsibility to DCF is to attempt reunification with the parents. As I have said, in my view, placing this objective above the current stable, secure and long term care proposal of the grandmother is not one that is in L's best interests.
38. The order proposed by the grandmother, that she be given parental responsibility for a period of two years, is in my view the one that is the best means of safeguarding L's wellbeing because it continues the relationship that she has had with her grandmother for half of the young lifetime, thereby providing the security and stability of a nurturing relationship necessary for the ongoing full development of the child. It will not separate her entirely from her parents because I am satisfied that her grandmother will maintain that contact under circumstances which are protective of L.
39. There will be a protection order for LF giving parental responsibility to her grandmother MD for a period of two years.

Dated this 27th day of May 2016

Judge Sue Oliver