

IN THE CHILDREN'S COURT OF VICTORIA
FAMILY DIVISION

APPLICANT: Department of Health and Human Services (DHHS)

CHILD: Oliver (a pseudonym)*

MAGISTRATE: GAIL HUBBLE

DATES OF HEARING: 12-13 August 2019, 26-27 August 2019

DATE OF JUDGMENT: 30 August 2019

CASE MAY BE CITED AS: DHHS and Oliver (a pseudonym) [2019] VChC 5

REASONS FOR DECISION

Catchwords: Child in need of protection – risk of emotional or psychological harm – Family Reunification Order (FRO) – change in care arrangements for the child — application for revocation of FRO – Ms Cardell as sole carer for the child an untested scenario – protective concerns unresolved – the child's best interests – application refused – Care by Secretary Order granted.

REPRESENTATION: Legal representative

DHHS: Ms Benson

Mother: Ms Stead/Mr Brown

Ms Samantha Cardell: Ms Jones

* This judgment has been anonymised. The pseudonyms used herein mirror those used by the Court of Appeal in *Cardell (a pseudonym) v Secretary, Department of Health and Human Services* [2019] VSC 781, in which case Maxwell P affirmed this judgment.

HER HONOUR:

1. Oliver is the child of Rebecca Day. The identity of his father is unknown.
2. The Department of Health and Human Services (**the Department**) filed a Protection Application in respect of Oliver on 16 August 2017, 7 days after his birth. Oliver was initially placed on an Interim Accommodation Order (**IAO**) to the Royal Women's Hospital. Upon discharge on 28 August 2017, Oliver was placed in the care of his mother under an IAO. On 28 September 2017, the Department filed a breach of that IAO and on 2 October 2017, the court made an IAO to Ms Kerry, a family friend and the former domestic partner of Ms Samantha Cardell.¹ While the IAO was in Ms Kerry's name only, it was understood by all parties that Ms Kerry and Ms Cardell jointly cared for Oliver, and that Ms Cardell provided sole care when Ms Kerry, who held full time employment, was at work.
3. On 8 January 2018 the court found that Oliver was in need of protection on the basis that he was likely to suffer emotional or psychological harm, pursuant to section 162(1)(3) of the *Children, Youth and Families Act 2005* (**the Act**). On the same day, the court made a Family Reunification Order (**FRO**), which was to expire on 27 September 2018. On 1 April 2019 this order was extended until 26 September 2019. On 16 May 2019, the Department endorsed a non-reunification case plan, and on 22 May 2019, the Department filed an application for a Care by Secretary Order.
4. Oliver remained in the care of Ms Kerry and Ms Cardell until 8 July 2019 when the Department, having been informed that Ms Kerry and Ms Cardell were no longer in a relationship, and having conducted an assessment of Ms Cardell as a potential sole carer, determined that Oliver should not remain in the sole care of Ms Cardell. Oliver was removed from the care of Ms Cardell and currently resides in a home based care placement administered by the Berry Street agency.
5. On 22 July 2019 Oliver's mother, Ms Day, filed an application to revoke the Family Reunification Order. This application was triggered by the Department's decision to remove Oliver from the care of Ms Cardell. She does not seek Oliver to be placed in her care but seeks that Oliver be returned to Ms Cardell's care. Ms Day has agreed to provide an undertaking to the court that she will not remove Oliver from Ms Cardell's care until Ms Cardell has obtained parenting orders from the Family Court (or Federal Circuit Court) of Australia.
6. Ms Cardell, who was joined to the proceeding for the purposes of the revocation application, agrees with Ms Day's submissions but also argues that the court could, if it revokes the Family Reunification Order, make an IAO placing Oliver in her care. She argues that the IAO could

¹ Ms Kerry and Ms Cardell also provided care to Oliver's older half-sister Amy at the time.

remain in place until interim parenting orders under the *Family Law Act 1975* (Cth) are obtained.

Power to revoke a Family Reunification Order

7. Section 308 of the Act empowers the court to revoke a family reunification order if it is in the best interests of the child. The best interests test enables the court to consider a wide range of matters, including the considerations set out in section 10 of the Act. Relevant principles include the need to protect Oliver from harm (section 10(2)), the need to strengthen the relationship of Oliver to people significant to him (section 10(3)(b)), the desirability of continuity and permanency in Oliver's care (section 10(3)(f)), the desirability of making decisions as expeditiously as possible (section 10(3)(fa)), and the capacity of a potential care giver to provide for Oliver's needs (section 10(3)(j)).
8. In my view, the need to protect Oliver from harm is a critical matter to consider, particularly in light of the protection history in respect of Oliver. Oliver has been subject to court orders almost since birth. In those circumstances, the power given to the court to revoke the FRO requires the court to be satisfied either that the protective concerns have been adequately resolved and that Oliver is no longer in need of protection, or that any remaining protective concerns are balanced out by other best interests considerations.
9. The Department argues that Oliver is still in need of protection. The matters relied on by the Department include the following:
 - (a) Oliver's mother has not addressed the protective concerns which pertain to her, including mental health and substance abuse concerns. These concerns mean that her contact with Oliver must be supervised, and that a non-reunification case plan is appropriate.
 - (b) Ms Cardell has been assessed by the Department as unsuitable to care for Oliver on her own. The Department submits that Ms Cardell suffers from mental and physical health concerns which are likely to impact negatively on her care of Oliver. The Department submits that there have been quality of care concerns for some time, including concerns about inadequate supervision (resulting in 3 or 4 falls over a 6-12 month period), cleanliness and environmental neglect. In this respect, the Department relies primarily on the evidence of Ms C, the Practice Leader who has had oversight of Oliver's case since July 2018, and who conducted an updated assessment of Ms Cardell in June/July this year. Ms C's concerns are outlined in a draft document called Assessment of Samantha dated 23 July (exhibit 4). That document outlines numerous concerns, including Ms Cardell's diagnosis of

anxiety, depression and PTSD, inability to respond to Oliver's needs, parenting capacity issues, Oliver's mental health, and concerns around the state of the house. Ms C gave evidence that Ms Cardell described numerous challenges in managing Oliver's behaviour, and that she described the home situation as a 'war zone'. She also gave evidence that Ms Cardell had previously lied to her about obtaining medical assistance for Oliver on an occasion when he fell and bumped his head. The current worker allocated to Oliver's case, Mr M, also gave evidence that he had concerns around Ms Cardell's presentation and behaviour on several occasions.

- (c) Ms Cardell's capacity to be a sole carer of Oliver is unknown and untested. While the Department acknowledges that Ms Cardell provided the majority of daytime care to Oliver, the Department maintains that Ms Kerry provided critical emotional and physical support to Ms Cardell, and was a vital safety net in the placement.
- (d) The concerns around Ms Cardell's mental health and parenting capacity mean it would not be in Oliver's best interests to be placed in her care without oversight.
- (e) Ms Cardell's capacity to supervise Ms Day's contact with Oliver is unknown. While Ms Cardell supervised Ms Day's contact with Oliver for a few months, the carers had difficulty managing Ms Day's behaviour and requested the Department to take over the role of supervising contact early in 2018. Since that time, the Department has supervised all of Ms Day's contact with Oliver. In addition, Ms Day has previously raised concerns about the quality of care received by Oliver in the placement with Ms Cardell, and in March 2018 she informed the Department that she did not want Ms Cardell caring for Oliver.
- (f) Ms Day has filed an appeal of the non-reunification case plan. At the time of the hearing, that appeal was still outstanding. The Department submits that in those circumstances, and given Oliver's age, an undertaking from Ms Day that she will not remove Oliver from Ms Cardell's care does not provide Oliver with enough protection.
- (g) An IAO is not available in this case due to section 262(5A)(a) of the Act, which states that an IAO must not be made in respect of a child if the court is satisfied that a protection order could be made.
- (h) Oliver has settled into a new placement without difficulty.

10. Ms Day and Ms Cardell both submit that it is in Oliver's best interests to be returned to the care of Ms Cardell, and that the FRO ought to be revoked to permit this to occur. The matters relied upon include the following:
- (a) Ms Cardell has always been Oliver's primary caregiver. As such, Oliver is strongly bonded to her and his removal from her care jeopardises his emotional health. While the IAO was made to Ms Kerry, the Department has always been aware that Samantha was Oliver's main caregiver. Both Ms Cardell and Ms Kerry gave evidence to the court about the care provided by Ms Cardell, not just to Oliver, but to Ms Kerry's biological children, Cody and Irene.
 - (b) During the time that Oliver has been in Ms Cardell's care, the Department has never raised any significant concerns.
 - (c) Ms C's draft assessment of Ms Cardell contained criticisms and concerns which are not supported by the evidence. Further, the assessment is in stark opposition to the Kinship Care Comprehensive Part B Assessment (exhibit 3) which provided a positive assessment of the placement, including the observation that Samantha is very attached to Oliver and that she is highly attentive to his emotions. Further, the Part B Assessment demonstrates that the Department has long been aware of the vulnerabilities of Ms Cardell, and the challenges faced by both carers in caring for Oliver.
 - (d) Ms Cardell's mental health issues are well managed and do not impact on Oliver at all. She has no other health issues which impact on her parenting.
 - (e) The challenges faced by Ms Cardell in parenting Oliver are no different than the challenges which routinely arise in caring for a toddler. Ms Cardell also disputes that she described the home as a 'war zone' and gave evidence that she was referring to her own childhood when she used the term.
 - (f) The report provided by Dr J, a paediatric registrar at the Royal Children's Hospital, states that Oliver suffers from some speech delay due to a moderate hearing loss, but is otherwise well. Dr J noted that Oliver is vulnerable due to early life trauma, and that he should be in a safe, stable and consistent home environment.
 - (g) Oliver has been regularly reviewed by the Maternal Child and Health Nurse service who did not identify any deficits in the care provided to Oliver by Ms Cardell. He was observed to have reached all milestones and the notes provided by the service contain numerous references to the loving bond between Ms Cardell and Oliver,

and the fact that Ms Cardell is attentive to Oliver's needs. Oliver was frequently observed to be clean and appropriately dressed.

- (h) Oliver shares a close relationship to Ms Kerry's biological children, Cody and Irene. If he remains in the care of Ms Cardell, he will have regular contact with them.
- (i) The home assessments which occurred on 25 June 2019 and 1 July 2019 occurred when Ms Kerry was moving out of the home, so the house was in a more cluttered and messy state than usual.
- (j) Ms Cardell and Ms Day have healed their relationship and Ms Cardell is confident that she can supervise the mother's contact with Oliver.
- (k) Ms Day has previously given an undertaking (on 24 October 2017) not to remove her older daughter Amy from the placement with Ms Cardell and Ms Kerry, and this was not breached.

11. I first turn to the question of whether it is open to the court to make an Interim Accommodation Order in this case. I have come to the conclusion that it is not. Section 262(5A)(a) of the Act states that an IAO must *not* be made in respect of a child if the court is satisfied that a protection order could be made. This provision was introduced by amendments passed in 2014.² The second reading speech³ which introduced the amendments emphasised that the provision was introduced to reduce delays in the making of final orders, and to impose an obligation on the court to conclude protection proceedings as expeditiously as possible. In other words, an interim accommodation order should only be used if a final order is not possible. This is not such a case.

12. Accordingly, I must be satisfied that it is in Oliver's best interests to revoke the FRO on the basis of Ms Day giving an undertaking not to remove Oliver from the care of Ms Cardell.

13. It is important to note that it is not the role of the court to overturn the Department's choice of carer while a FRO is in place. The only question for the court is whether the protective concerns have resolved sufficiently for the FRO to be revoked. In my view, the court must be careful not to engage in a *de facto* review of the Department's placement decisions under the FRO.

Determination

14. Looking at the evidence as a whole, it is clear to me that Ms Cardell has been the primary carer of Oliver since infancy until the Department removed him from her care on 8 July 2019.

² *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014*.

³ Legislative Council, 21 August 2014.

In my view, the weight of the evidence, including the notes provided by the Maternal Child and Health Service, and the Kinship Part B Assessment demonstrate that Ms Cardell provided Oliver with good care and that the Department was satisfied with the care provided.

15. Ms Cardell clearly did not convey a positive picture when the Department conducted its assessments in June/July this year. Ms Cardell appears to have spent considerable time emphasising the difficulties in caring for Oliver rather than focussing on the positives. In considering the evidence as a whole, I have formed the view that Ms Cardell probably conveyed a somewhat inaccurate view of her experience caring for Oliver. As a result, the Department formed a view of Ms Cardell's caring capacity which was unbalanced and lacking in an adequate reflection of the positives in the placement. In my view, the draft assessment produced by Ms C, even as a draft document, was extraordinarily unfair to Ms Cardell, lacked foundation for its many adverse conclusions, and totally failed to incorporate any acknowledgment of the close bond between Oliver and Ms Cardell, and the good care which she has provided to him. This was then reflected in the Department's decision to withhold contact between Oliver and Ms Cardell until it was court ordered, and then insist that it be supervised only. This deprived Oliver of contact with his primary attachment figure despite the absence of risk factors which would justify such an extreme decision.
16. However, I also acknowledge that Ms Kerry shared the care of Oliver and provided Ms Cardell with physical and mental support. Ms Cardell as sole carer for Oliver is a scenario that is untested. In my view the court should be slow to revoke a FRO in circumstances where the features of the placement have changed in a material way, and those changes have not been tested over time. These changes would also include Ms Cardell supervising Ms Day's contact, something which is also untested. Since the supervision of contact was resumed by the Department, none of the parties had sought to reinstate carer-supervised contact until the application to revoke the FRO was filed. I am concerned about these matters being tested without the oversight of the Department.
17. In addition, I am concerned about the adequacy of an Undertaking by the mother as the sole basis for securing Oliver's placement in circumstances where Ms Day has not addressed the protective concerns pertaining to her and opposes the non-reunification case plan. Further, there are no Family Law proceedings on foot and the question of what Family Law Orders might be made, and when they might be made, is totally unknown.
18. I have formed the view that the protective concerns have not resolved to a degree that permits me to make a finding that Oliver is no longer in need of protection, or that it is in his best interests for the FRO to be revoked.

19. In those circumstances, and in order to advance permanency planning for Oliver, it is also in his best interests to grant the Department's application for a Care by Secretary Order.

Orders

20. I make the following orders:

- (a) Ms Day's application to revoke the FRO is dismissed.
- (b) The Department's application for a Care by Secretary Order of two years duration is granted.
- (c) I direct the Department to review the operation of that order before the end of 12 months, pursuant to section 289(2) of the Act.