

IN THE CHILDREN'S COURT OF VICTORIA
FAMILY DIVISION

APPLICANT: Department of Health & Human Services (DHHS)

CHILD: Oscar (a pseudonym)*

MAGISTRATE: JENNIFER BOWLES

DATE OF HEARING: 20 December 2019

DATE OF JUDGMENT: 23 December 2019

CASE MAY BE CITED AS: DHHS and Oscar (a pseudonym) [2019] VChC 4

REASONS FOR DECISION

Catchwords: Child protection – child seven years of age – application for revocation of long-term care order – s. 306 *Children, Youth and Families Act 2005* – submissions made regarding determination of the application by evidence contest or submissions – *DHHS v Sanding* [2011] VSC 42 distinguished – procedural rights of parties – whether child could be placed on an interim accommodation order – parental responsibility conferred on the Secretary – exceptional circumstances – order for child to be legally represented (Independent Children's Lawyer) – s. 524(4) *Children, Youth and Families Act 2005*.

APPEARANCES: Counsel

DHHS: Mr Chen (20/12/2019), Ms Buchanan (23/12/2019)

Mother: Ms O'Grady

Father: Mr Katz

* This judgment has been anonymised by the adoption of pseudonyms in place of the names of the children and relevant family members.

HER HONOUR:

Background

1. Oscar is currently seven years of age. He has an older sibling Kent who is currently eight years of age. Their parents are Isabella Moten and Jake Sharp. They have a half-sister, Caitlyn Moten, who is two years of age. She resides with their mother, Ms Moten.
2. In relation to Kent and Oscar, protection applications by emergency care were issued on 4 January 2016 when Kent was four and a half years old and Oscar was three years of age. The protective concerns in relation to Ms Moten according to DHHS reports included substance abuse, physical violence towards Mr Sharp and an inability to supervise the children, for example, Oscar had allegedly been found wandering unsupervised in the street in the early hours of the morning. In relation to Mr Sharp, the protective concerns of DHHS included substance abuse, family violence and criminal offending including for offences of violence.
3. Kent and Oscar were initially placed on interim accommodation orders to Ms Moten, their mother, with a condition that she reside with Sara Campbell, unless otherwise assessed by DHHS.
4. On 13 January 2016, less than a fortnight after the protection applications were issued, breach proceedings were initiated. The boys were placed on interim accommodation orders to their maternal grandmother, Ms Samantha Preiss. They have continued to reside with their maternal grandmother, step maternal grandfather, Adam Preiss, and at times their two adult children since that date.
5. On 23 November 2016, family reunification orders were made until 12 January 2017. On 30 March 2017, the family reunification orders were extended until 29 September 2017. On 6 September 2018, Kent was placed on a permanent care order to Samantha and Adam Preiss. On the same date, Oscar was placed on a long-term care order to Samantha and Adam Preiss rather than a permanent care order. The rationale for the long-term care order was that the carers required DHHS to provide ongoing support to the placement due to Oscar's special needs – including navigating NDIS and engaging disability support services.

Oscar Sharp

6. Oscar has very special complex and high needs. According to DHHS reports, he has been diagnosed with autism spectrum disorder and has an intellectual disability. He has been assessed as functioning at approximately the age of a four year old.
7. His behaviours include –
 - an eating disorder diagnosed as Pica Disorder – which involves eating items which are not typically identified as food and which are not nutritious e.g. hair, dirt, paint chips, walls, furniture, toys and other equipment at childcare. The Disposition Report dated 17 December 2019 provides “*diligent supervision is required to ensure that he does not swallow objects*”;
 - he requires a special diet and can consume only white foods. He requires formula to ensure he receives the nutrition he requires;
 - he is not toilet trained and continues to wear nappies. He engages in faecal smearing and in response to him placing his hands in his mouth, he now wears ‘onesies’ to preclude him being able to put his hands into his clothing;
 - he will attempt to abscond through doors and windows and has demonstrated an ability to learn quickly if he is motivated, for example, dragging furniture or climbing on furniture to open locks. Deadlocks on doors need to be out of reach;
 - he loves water but has no sense of water safety; and
 - he can become violent towards adults and other children, if he does not get his way.
8. He attends a special school [details removed] – and attends sessions with a psychologist.
9. The DHHS reports indicate that Mr and Ms Preiss have provided exceptional care and support for Oscar. The increasing challenges of Oscar’s behaviours have put pressure on the placement. In the DHHS most recent report, increasing difficulties have been described by Ms Preiss since January 2019.

The proceedings – legal submissions

10. On 6 December 2019, the DHHS filed an application to revoke the long-term care order in respect of Oscar. It was listed for hearing on 19 December 2019. On that day, the proceeding was adjourned overnight for reserved submissions.
11. On 20 December 2019, the matter came before me. Oscar's mother, father and paternal great grandmother were in attendance at court. There was a sense of urgency which was reflected in the grounds detailed in the application to revoke the long-term care order. They were:

“[Oscar]’s current carer, Ms [Samantha Preiss], has advised that she is no longer able to provide care for [Oscar] beyond 20 December 2019.”

12. The matter proceeded before the Court on the basis that the carer and her family had gone on holidays and she had relinquished care of Oscar.
13. In addition to the parties making submissions regarding where Oscar should be placed, the submissions were primarily focused upon a question of law, as determining the question of law impacted on the placement options. The question of law to be determined concerned the orders which the Children's Court of Victoria can make when an application to revoke a long-term care order is before the Court. The specific issue concerned whether the Court could make an interim accommodation order.
14. Mr Chen, on behalf of DHHS, submitted that the Court was precluded from making an interim accommodation order and that the proper course for this case was for an evidence contest to be conducted to determine whether Oscar continued to be in need of protection and, if so, which protection order should be made. In the meantime, DHHS would continue to have parental responsibility for Oscar. It was submitted, on behalf of DHHS, that Oscar's best interests would be met by him being placed in a contingency unit which DHHS had located.
15. Ms O'Grady submitted, on behalf of the mother, that whilst she agreed that an evidence contest would ultimately be required to determine whether Oscar was still in need of protection and, if so, which protection order was in his best interests, she submitted that the Court did have the power to make an interim accommodation order. She further submitted that it was in Oscar's best interests for an interim

accommodation order to be made to his mother with a condition providing for considerable respite. Her secondary position was for an interim accommodation order to be made to Oscar's paternal great grandmother. Oscar's paternal great grandmother was agreeable to an order being made to her.

16. Mr Katz appeared on behalf of Oscar's father. I had originally understood his position to be that the Court did have the power to make an interim accommodation order and that the father supported an interim accommodation order being made to Oscar's mother and, in the future, there should be a transition placing Oscar on an interim accommodation order to his paternal great grandmother. However, he subsequently clarified that his client's position was that an interim accommodation order should be made to Oscar's father or the paternal great grandmother with the father residing with his grandmother. He also submitted that the Court had the power to place Oscar on a family preservation order to his father. It was Mr Katz's submission that the matter should be determined as a matter of urgency on the basis of the submissions before the Court. He relied upon *DHHS v Sanding*¹.
17. It is clear that the Court is precluded from making an interim accommodation order whilst a long-term care order is in place. Section 262 of the *Children, Youth and Families Act 2005* (CYFA) relevantly provides:

"Despite anything to the contrary in this section, an interim accommodation order must not be made in respect of a child in relation to whom ... a long-term care order is in force."
18. Pending the determination of the application to revoke, the long-term care order remains in place.
19. Ms O'Grady, with whom Mr Katz concurred in relation to this submission, submitted that as their clients' consent to the DHHS application to revoke the long-term care order, then the application should be granted which would result in the long-term care order no longer being in force.
20. It was further submitted that DHHS could issue a new protection application or in view of the disposition recommended in the DHHS Disposition Report dated 17

¹ [2011] VSC 42.

December 2019, being a care by Secretary order, DDHS could make an oral application for a care by Secretary order.

21. The revocation of the long-term care order would remove the prohibition on an interim accommodation order being made. It was submitted that it was in Oscar's best interests for an interim accommodation order to be made to a parent or a family member.
22. It was further submitted that an interim accommodation order or a family preservation order would accurately reflect Oscar's position as distinct from the fiction of a long-term care order remaining in place when the carer has had to relinquish care. In these circumstances, Ms O'Grady submitted that it is not in Oscar's best interests for DHHS to continue to have parental responsibility. She raised significant concerns in relation to DHHS' proposal for Oscar to be placed in a contingency unit.
23. Ms O'Grady further submitted that even if the Court made an interim accommodation order to out-of-home care, it would enable the Court to closely monitor and review at regular intervals what was happening in Oscar's life.
24. Mr Katz supported the submission for the application to revoke the long-term care order being granted urgently. He referred to s. 10(3)(fa) CYFA and submitted it was in Oscar's best interests for decisions to be made as expeditiously as possible and for consideration to be had to the possible harmful effect of delay in making a decision or taking an action.

Reasons for decision

25. If I deal first of all with the submission that the Court should grant the application to revoke the long-term care order, I accept Mr Chen's submission that if this order was made, there would not be an application before the Court and accordingly not only could an interim accommodation order not be made, but no order could be made.
26. This explains Ms O'Grady's submission that DHHS would need to issue a fresh protection application or make an oral application for a care by Secretary order and then an interim accommodation order could be made. DHHS did not consider it was appropriate to adopt either of these courses.

27. Furthermore, whilst all parties were in agreement for the long-term care order to be revoked, the parties were not in agreement in relation to disposition as DHHS did not agree that it was in Oscar's best interests for him to be placed on an interim accommodation order or a family preservation order to a parent or an interim accommodation order to his paternal great grandmother.
28. It was DHHS' position that, due to the factual issues in dispute, the matter could only be determined by an evidence contest, save and except for if the mother and father consented to or did not oppose a care by Secretary order being made. This was not the parents' position. They did not consider a care by Secretary order was in Oscar's best interests.
29. Section 309 CYFA provides that an application to revoke a long-term care order can only be made if the Court is satisfied it is in the best interests of the child to do so.
30. In my view, determining what is in Oscar's best interests requires evidence to be before the Court in a contested hearing. The Court cannot determine Oscar's best interests on submissions alone for the following reasons.
 - Based on the DHHS reports before the Court and to which reference has previously been made, Oscar's needs are so significant and present unique and difficult challenges for his safety to be assured, that in the absence of the agreement of all the parties and for the Court to be satisfied any proposed order to be made is in Oscar's best interests, evidence is required. In addition to Oscar's special needs, the following matters are either in dispute or unclear in this case – the parents' individual capacity to care for Oscar, the paternal great grandmother's capacity to care for Oscar, whether assessments have been conducted of other family members, for example, there was a reference on the file to a maternal aunt, Claudia Anton, who at the time the notation was made was working with children with autism.
 - In addition, in order to determine Oscar's best interests, the Court would require a greater understanding of the contingency unit in which DHHS considered Oscar's needs would be best met. In the absence of kinship or a foster family being located, DHHS submitted that the contingency unit was a long-term placement for Oscar. It was unclear to me and again would require evidence to gain an understanding of the emotional and psychological impact

on Oscar being placed with strangers and away from his brother. It was most concerning, and even more so as DHHS has parental responsibility for Oscar, that DHHS was unable to indicate to the Court the nature of the co-resident's disability (save for that it was not as severe as Oscar's), the age or gender of the co-resident, the number of staff at the unit and their professional qualifications.

- The submissions proceeded throughout the day on the basis that the long-term carer and her family had left on holidays and had relinquished care of Oscar. At approximately 5.00 pm, just as the matter was to be adjourned, DHHS indicated to the Court that a message had been received that the carer could continue to care for Oscar until he went into respite from 22 December 2019 until 26 December 2019. I do not seek for this observation to be in any way a criticism of the carer. I raise it because it is just another reason that in order for the Court to gain a full understanding regarding Oscar's best interests, an evidence contest is required.

31. Accordingly, I do not accept that it is in Oscar's best interests to follow the procedure adopted by the magistrate in *DHHS v Sanding*² and proceed upon submissions before the Court.

32. I observe that Bell J in *DHHS v Sanding* stated as follows:

*"I think the magistrate came to the view that the critical facts were not in serious dispute and constituted a proper basis for the exercise of the Court's jurisdiction to revoke the order."*³

That is not the case here.

33. In addition, Bell J at [283] stated:

"The procedural powers of the court are not absolute. The court must observe the rules of natural justice and act compatibly with the human right of children, parents and potentially others to a fair hearing under s. 24(1) of the Charter of Human Rights and Responsibilities Act 2006."

² Ibid.

³ Ibid [253].

34. It is my view that to adopt the submissions contest procedure in this case would fall short of being in Oscar's best interests and would also breach the procedural rights of all of the parties.
35. In relation to the concerns raised that the long-term care order remaining in place is a fiction, I raised with Mr Chen whether, as the model litigant, DHHS had concerns that this was the case. Mr Chen indicated that DHHS did not. He relied upon the provisions of the CYFA. In particular, he referred to the Act conferring parental responsibility on the Secretary, providing the same rights, powers, duties, obligations and liabilities as a natural parent of a child would have⁴. Parental responsibility on a long-term care order is conferred on the Secretary, not the carer. I accept Mr Chen's submission that whilst there is an application to revoke the long-term care order before the Court, the Act does not provide for parental responsibility to be taken away from the Secretary unless and until the application for revocation is determined.
36. As a result of the view I have taken in this case, namely that there is a need for an evidence contest to take place and that at this stage the application to revoke is not to be determined, I have not considered the orders which may be available to the Court if the application to revoke was determined. The application to revoke the long-term care order will be adjourned for mention on 13 January 2020.⁵
37. I am satisfied that there are exceptional circumstances in this case and that it is in Oscar's best interests to be represented in these proceedings. I have had particular regard to Oscar's very special needs and the limited placement options which would be available if he cannot reside with family. Pursuant to s. 524(4) CYFA an Independent Children's Lawyer (ICL) will be appointed for Oscar. I gave consideration as to whether I should defer determining the issue before the Court pending the appointment of an ICL. However, in my view, the ICL could not persuade me that any procedure other than an evidence-based contest was in Oscar's best interests.
38. I am concerned about the impact of delay in this case and adjourning the case for an ICL to make submissions would not be in Oscar's best interests. His best interests are served by the matter being given priority and fixing it for a Directions Hearing and

⁴ Section 172(1)(b) CYFA.

⁵ A Directions Hearing will be conducted on 6 February 2020 and a four-day contested hearing was fixed commencing on 16 March 2020.

evidence contest at the earliest possible date. I will be closely monitoring the progress of this case.

39. There were a number of matters raised during the submissions, details of which DHHS was unable to provide to the Court. These included:

- details of when the next review of the NDIS package for Oscar would be conducted;
- the extent to which DHHS had advocated, in its capacity as having parental responsibility for Oscar, for an appropriate NDIS package;
- in addition to the regular respite being available since April 2019 and the additional security being provided to the carers, I am unclear whether the carers have been supported by DHHS in any further way to support them caring for Oscar. Issues regarding difficulties with the placement of Oscar, had been raised by Ms Preiss throughout 2019;
- details of the proposed contingency unit, including the matters to which I have already referred⁶ and also whether Oscar would resume at the same school next year, for example, if he remained residing in the contingency unit.

40. Furthermore, the Court requires DHHS to advise:

- how expeditiously it could conduct an up-to-date assessment of the father's capacity to care for Oscar. He indicated a preparedness to have Oscar in his care and/or to support the paternal great grandmother. He was prepared to move from [location removed] to live with the paternal great grandmother in [location removed];
- whilst it appears DHHS has conducted an updated assessment of the mother's capacity to care for Oscar⁷, it was unclear whether DHHS was aware that the mother has allegedly been caring for Oscar on weekends unsupervised and accordingly a further assessment may be required;

⁶ Refer to [30].

⁷ Disposition Report 17/12/2019.

- how expeditiously DHHS could conclude an assessment of the paternal great grandmother and conduct an assessment of her home. As a measure of the paternal great grandmother's commitment, she was prepared to stay in Melbourne in order to care for Oscar on 20 and 21 December 2019 rather than Oscar being placed in a contingency unit. She stated from the body of the Court that she was experienced in caring for a child or children with disabilities, that her home has bolts on the doors (a requirement raised by DHHS) and that she had sourced a special school for Oscar. Regrettably the assessment could not continue at the weekend as I was told "*DHHS don't work on weekends.*"

41. This case requires urgent attention as Oscar is facing being placed out of the care of any family member and no longer residing with his brother for the first time in his life. I referred during the proceedings to the additional issues this would present for a child with autism. The response, on behalf of DHHS, that Oscar is placed with others during respite with Yooralla on a regular basis, does not in my view address the concern raised.
42. DHHS is required to assess all potential family members, or significant others, in order to determine whether there is an unacceptable risk of harm for Oscar to be placed in any of their care. It may be that, due to Oscar's behaviours, there is an unacceptable risk for any family members or any other person nominated by the family to care for Oscar, but until all of the assessments are completed, we do not know.
43. The Court will require DHHS to prepare an Addendum Report addressing the matters to which I have referred.
44. Upon hearing from the parties, the matter was adjourned to 13 January 2020.

Magistrate Jennifer Bowles
Children's Court of Victoria
23 December 2019