Children's Court

New South Wales

Case Name:	Department of Communities and Justice (DCJ) and Jack and Jill
Medium Neutral Citation:	[2020] NSWChC 3
Hearing Date(s):	28 February 2020
Date of Orders:	3 April 2020
Decision Date:	3 April 2020
Jurisdiction:	Care and protection
Before:	Children's Magistrate D Williams
Decision:	The Department is to file new permanency plans
Catchwords:	CHILDREN - Care and protection – permanency plan involving guardianship
Legislation Cited:	Children and Young Persons (Care and Protection) Act 1998
Cases Cited:	Department of Communities and Justice (DCJ) and Teddy [2020] NSWChC 1
Category:	Principal judgment
Parties:	The Secretary The Children
Representation:	Mr Schier, solicitor, for the Secretary Ms Smith, solicitor, Direct Legal Representative for Jill Mr Amos, solicitor, Independent Legal Representative for Jack
File Number(s):	2019/00292984-001
Publication Restriction:	Pseudonyms have been used to anonymise the children and parties

JUDGMENT

1 Jack and Jill are brother and sister. Jack is 6 years old, and Jill is 13. In October 2014, the Court made a final order placing Jill under the Guardianship of her maternal grandmother. In early March 2019, the maternal grandmother sadly passed away.

2 Jack lived in the care of his mother from his birth until she also sadly passed away in April 2019. He then lived for a short time in the care of his father, but the father relinquished care in May 2019. He has not participated in these proceedings.

3 The Department brought these proceedings in September 2019, seeking care orders for both Jill and Jack. The Department have assessed that there is no realistic possibility of restoring either child to the father within a reasonable period of time. The legal representatives for each of the children accept that assessment, as does the Court.

4 Jack and Jill are now being cared for by their maternal cousin. The legal representatives for the children each agree that this is an appropriate placement. The maternal cousin has agreed to care for the children in the long-term, and the Department consider that this is an appropriate placement as well.

5 The Department filed care plans for each child on 20 December 2019. Accompanying the care plan is a proposed minute of care order. In the care plans and in the minute of care order, the Department seeks an order allocating parental responsibility for each of the children to the Minister for a period of two years. The minute of care order also seeks an order for a section 82 report.

6 The Department invites me to make final orders for Jack and Jill in accordance with their proposed minute of care order. Jill's Direct Legal Representative (DLR) supports the Department's proposed orders. Mr Amos, the Independent Legal Representative (ILR) for Jack, opposes the Department's proposed orders, submitting that I would not be satisfied that permanency planning has been appropriately and adequately addressed. In short, Mr Amos submits that

the appropriate order is one of parental responsibility to the Minister until age 18.

7 The care plans suggest that the Department would like to progress towards guardianship in the future. The carer, the maternal cousin, does not want an order of guardianship. On page 23 of the care plan for Jack and page 24 of the care plan for Jill, under the heading, "Guardianship", the care plan poses the question, "*Will guardianship provide a safe, nurturing, stable and secure environment for the child?*" The highlighted answer in the care plan is, "*No.*" The care plan goes on to say this:

> "Guardianship is not being considered at this stage due to the wishes of the carer, the maternal cousin, advising that she would like Jill and Jack to remain in the care of the Minister until age 18. She has stated that she needs ongoing support from Department of Communities and Justice given she has three other members of her family in her care as well as her own children... It should be noted that the Department of Communities and Justice will continue to work with the maternal cousin over the next two years to strengthen the household and either apply for section 90 guardianship or apply to the Court to extend the current order. It should be noted that guardianship is a long-term goal plan that will be reviewed."

8 The material in the care plans is supplemented by an affidavit filed by the caseworker on 27 February 2020. In that affidavit under the heading, "Housing", the caseworker indicates that the sleeping arrangements in the maternal cousin's house are not ideal, presumably because of a degree of overcrowding. The affidavit sets out some steps the caseworker has taken to assist her to get a more suitable property through housing New South Wales.

9 Under the heading, "Guardianship", the affidavit notes, at paragraph 31, that during the kinship carer assessment process in November 2019, the maternal cousin said she did not want a guardianship order because she might lose the support of the Department. Paragraph 32 reiterates that she does not feel that guardianship is currently appropriate because she needs the support of the Department in relation to contact with the father, and behavioural and medical needs of Jack and Jill. In paragraph 34, the caseworker says that she has discussed guardianship with the maternal cousin at length and indicated that it does not mean that guardianship will occur now. The affidavit says, "*She now understands that the Department of Communities and Justice would like to*

contemplate the proposal of a guardianship application to be made in the future."

10 Paragraph 35 of the affidavit says this:

> "The maternal cousin is agreeable to a short-term order with the view to guardianship on the provision that:
>
> > (a) Department of Communities and Justice complete a family group conference to make plans for the family to supervise contact should the father decide that he would like this to occur.
> >
> > (b) She receives improved support from Myrrimbarr who will be involved in her family's life for the duration of long-term care orders involving two other children in her care.
> >
> > (c) She receives independent free legal advice before a final order is made so that she is able to make an informed choice."

11 The Department submits on the basis of the material in the care plans and the affidavit of 27 February 2020 that the permanency plan for each of these children is one involving guardianship, and that accordingly, s 79(9) applies to this matter and restricts the maximum period of parental responsibility to the Minister to 2 years.

12 Section 79(9) is in these terms:

> "the maximum period for which an order under subsection (1)(b) may allocate all aspects of parental responsibility to the Minister following the Court's approval of a permanency plan involving restoration, guardianship or adoption, is 24 months."

13 The Department submits that because it is their future intention to progress towards guardianship, these permanency plans involve guardianship for the purposes of s 79(9). Mr Amos, Independent Legal Representative for Jack, submits that they do nothing of the sort. He submits that the Department's desire for guardianship is little more than a vague hope for the future.

What is a permanency plan "involving guardianship"?

14 In *Department of Communities and Justice (DCJ) and Teddy* [2020] NSWChC 1, the President of the Children's Court concluded (paragraph 32) that a care plan which envisaged conducting a guardianship assessment after six months was not a permanency plan involving guardianship. Rather, it was a plan that contemplated the possibility of a guardianship application being made sometime in the future.

15 The President (at paragraphs 33 - 36) considered the meaning of the word "involving". After consulting a dictionary, his Honour came to the conclusion that "involving" means "*having or including something as a necessary or integral part or result.*" At paragraph 35, his Honour said that the permanency plan before him "*does not include guardianship as a necessary or integral part or result. It merely proposes to consider guardianship in six months' time and, if appropriate, make an application*." He identified (paragraph 36) at least two conditions precedent to the making of a guardianship order, namely the consent of the proposed guardians, and a positive guardianship assessment.

16 In these proceedings, despite the clear principles of law enunciated by the President in *Re Teddy*, the Department makes further submissions as to the meaning of the phrase, "*a permanency plan involving guardianship*", the effects of which are directly contrary to what his Honour said in that case. Earlier in these proceedings I expressed significant concern about the Department's conduct in doing so, given that it is said to be a model litigant. I reiterate that concern here. The matters stated by the President in *Re Teddy* represent a clear formulation of legal principle. Noting that the President is the head of this jurisdiction, if the Department, as a model litigant, took issue with his Honour's interpretation of the law, then in my view the appropriate response would be an appeal of his Honour's decision. I am told that no such appeal has been instituted. Instead, the Department has sought to effectively re-agitate the same question of law at first instance before a different judicial officer. That approach immediately creates a risk of divergent first instance views within the jurisdiction, which may have significant implications for the administration of justice, particularly in such a small and specialised jurisdiction as this.

17 Fortunately that risk has not crystallised in this case, since I respectfully agree with the President entirely. None of the additional submissions advanced by the Department have persuaded me that the decision in *Re Teddy* was incorrect.

18 The Department's submissions focus on the word "plan", within the formulation, "*a permanency plan involving guardianship*". The submissions emphasise that a "plan" necessarily involves some degree of speculation about the future. The

submissions reproduce two definitions of the word “plan” from the Oxford Learner’s Dictionary, one of which is, “*Something that you intend to do or achieve*.” The Department appears to place considerable reliance on this definition, and submits that, because the Department wishes or intends to progress the matter to guardianship in the future, this is necessarily a “plan involving guardianship.” Indeed, in its written submissions the Department says, “*it is the plan of achieving guardianship is [sic] what is necessary, not necessarily in determining that the outcome of guardianship be necessarily guaranteed or an inevitable outcome*.”

19 The Independent Legal Representative for Jack rightly criticises this submission. On page 7 of his written submissions, Mr Amos says, “ *it cannot be the intention of the legislature that the mere mention of the word guardianship would be enough to trigger section 79(9) of the Act*.” I agree with that criticism.

20 In my view, the definition of the word “plan” being “*something that you intend to do or achieve*” is not the sense in which the word “plan” is used in s79(9) of the *Children and Young Persons (Care and Protection) Act*. The second definition set out in the Oxford learner’s dictionary, namely “*a set of things to do in order to achieve something, especially one that has been considered in detail in advance*” more closely reflects the sense in which the word “plan” is used in the Act.

21 Section 78A defines “permanency planning” in these terms:

> (1) For the purposes of this Act, “permanency planning” means the making of a plan that aims to provide a child or young person with a stable placement that offers long-term security and that—
>
> > (a) …
> >
> > (b) meets the needs of the child or young person, and
> >
> > (c) avoids the instability and uncertainty arising through a succession of different placements or temporary care arrangements.
>
> (2) Permanency planning recognises that long-term security will be assisted by a permanent placement.
>
> (2A) A permanency plan need not provide details as to the exact placement in the long-term of the child or young person concerned but must be sufficiently clear and particularised so as to provide the Children’s Court with a

reasonably clear picture as to the way in which the child's or young person's needs, welfare and well-being will be met in the foreseeable future.

22 Subsection 2A, in particular, makes it clear that the proper sense of the word "plan" is the second of those set out above, namely "*a set of things to do in order to achieve something, especially one that has been considered in detail in advance.*" When that sense of the word is applied to the formulation "*permanency plan involving guardianship*", it is immediately apparent that the use of the word "plan" does not impact upon the conclusion reached by the President in *Re Teddy* that a permanency plan involving guardianship is one that includes guardianship as a necessary or integral part or result.

23 In my view, contrary to the Department's submissions, for guardianship to be a necessary or integral part or result of a permanency plan, there must be a reasonable degree of inevitability about the ultimate making of a guardianship order. That is not to say that guardianship in the future must be a certainty, since, as noted above, all planning for the future necessarily involves a degree of speculation. But what is required is more than a mere desire or intention to proceed in the direction of guardianship.

24 The things that will be required to demonstrate a reasonable degree of inevitability about the ultimate making of a guardianship order will naturally vary between cases. That is because the precise circumstances surrounding each child or young person before the Court are different. However, I would have thought that a circumstance in which the prospective Guardian is refusing to consent to a guardianship order would in most cases be fatal to characterising the permanency plan as one "involving guardianship".

25 Matters which might demonstrate a reasonable degree of inevitability in an appropriate case might include the consent of the prospective Guardian and a positive suitability assessment. It may be, for example, that guardianship could not progress until an older child had moved out, or a more suitable property acquired. Those things could have about them a reasonable degree of inevitability even though there was also a degree of uncertainty. Much will turn on the precise circumstances relevant to the particular child.

26 For abundant clarity, I would summarise my views on the meaning of the expression "a permanency plan involving guardianship" as follows:

(1) A permanency plan involving guardianship is one that has guardianship as a necessary or integral part or result: *DCJ and Teddy* [2020] NSWChC 1.

(2) For guardianship to be a necessary or integral part or result, there must be a reasonable degree of inevitability about a guardianship order being made at an appropriate time in the foreseeable future.

(3) It need not, and indeed could never, be the case that guardianship is a certainty. That is because all planning for the future involves a degree of speculation which may or may not come to fruition.

(4) The absence of important conditions precedent to the making of a guardianship order may well demonstrate that a permanency plan is not one involving guardianship. Such important conditions precedent may include the prospective guardian's consent and a positive suitability assessment.

(5) There may be some conditions precedent which have not been met but about which themselves there is a reasonable degree of inevitability. In those circumstances it may well be that the permanency plan involves guardianship.

What is the function of s 79(9)?

27 Having dealt with the meaning of the expression "*a permanency plan involving guardianship*", I turn to deal with what seems to me to be a misapprehension about the significance of s 79(9). As His Honour noted at paragraph 28 of *Re Teddy*, s 79(9) is proscriptive, in that it places a limit on the Court's power to allocate parental responsibility to the Minister in certain circumstances. It is not in any way facilitative. That is, it does not provide some additional power to the Court that would not be present if the circumstances set out in 79(9) were not met. Most importantly, it does not do away with the requirement in s 83(7) that the Court must not make a final care order unless it expressly finds that permanency planning for the child or young person has been appropriately and adequately addressed, or the ultimate requirement that the proposed order must be in the child or young person's best interests.

28 In many ways, then, the analysis of s 79(9) in this case is moot. My consideration as to whether permanency planning has been appropriately and adequately addressed does not turn on whether I am of the view that the Department is proposing a permanency plan involving guardianship within the meaning of s 79(9).

29 The Department's submissions make reference to a contention that after *Re Teddy* the "bar has been set high". This submission clearly illustrates the misconception to which I have referred. When the proscriptive nature of s 79(9) is kept in mind, it is quickly apparent that any concern about the "height of the bar" is misplaced. In circumstances where the Department argues that its plans do come within 79(9), but other parties argue that they do not, the Department is effectively arguing that the decision in *Re Teddy* makes it too difficult for it to demonstrate that the Court's power should be limited in the way set out in s 79(9). There is a degree of perversity in this reasoning.

30 For abundant clarity, I reiterate that even if a court determines that a permanency plan is one involving guardianship, that determination does not in any way abrogate the requirement that the Court must expressly find that permanency planning has been appropriately and adequately addressed. Indeed, the two questions are distinct. Even if a permanency plan was not one involving guardianship, a court could make an order of two years or less if by doing so it was satisfied that permanency planning was appropriately and adequately addressed. Conversely, even if s 79(9) did apply, that does not allow the Court to endorse a permanency plan that did not otherwise appropriately and adequately address permanency planning, or was not in the child or young person's best interests.

Determination

31 In the case before me, I agree with the ILR that the plans proposed for Jack and Jill are not plans involving guardianship. As I have already noted, the carer, does not agree to a guardianship order. The best that can be said, on the basis of the Department's most recent affidavit, is that she is prepared to think about it. Nor is there sufficient evidence to demonstrate, with a reasonable degree of inevitability, that she would be assessed as suitable under a guardianship assessment. Although she has been assessed as a suitable long-term kinship carer, a guardianship order involves additional considerations. I am not suggesting that she is unsuitable; merely that there is no evidence at this time to demonstrate, with a reasonable degree of inevitability, that she will ultimately be found suitable. The Department's plan

may come to fruition in the fullness of time, but that is really a matter of speculation.

32 That is not to say that the proposed order could not be made by the Court if it was otherwise appropriate to do so. What is necessary is for the Court to be satisfied that permanency planning has been appropriately and adequately addressed. Here it seems clear that the maternal cousin will continue to care for Jack and Jill, at least for so long as currently foreseen and foreseeable circumstances allow. The Department submits that the proposed stable long-term placement demonstrates that permanency planning has been appropriately and adequately addressed.

33 In my view, the notion of permanency planning goes beyond the mere physical placement of the children and includes questions as to the legal status of the children's care arrangements. In this case, if the Department's desire for guardianship does not come to fruition, then in reality it will be necessary for these children to remain under the care of the Minister until they are 18. The orders currently proposed by the care plans do not achieve this.

34 In my view, the position in this case is broadly in line with that in *Re Teddy*. In that case, his Honour directed the Department to prepare a new permanency plan. His Honour (at paragraph 47) had regard to the fact that the Act contemplates the minimisation of the effect of court proceedings on children and their families: s 94(1). His Honour was cognizant of the fact that under the Department's plan, further litigation was inevitable, whereas under an alternative order of parental responsibility until age 18, further litigation would only be required if the intention of guardianship came to fruition. His Honour was of the view that the necessary requirement for further litigation, which could be avoided by a different plan, was not in the best interests of the child.

35 With respect, I agree with his Honour's reasoning, which has direct application to this case. The certainty of further future litigation can easily be avoided in this case by an order allocating parental responsibility to the Minister until age 18. Nothing about such an order would prevent the Department from bringing a s 90 application if the maternal cousin eventually agrees to guardianship and is assessed as suitable. But if those matters do not come to pass, then in my

view the inevitable long-term legal position should be established sooner rather than later.

36 I am not satisfied that permanency planning has been appropriately and adequately addressed because, under the Department's plan, without further litigation, parental responsibility would in two years' time revert to the natural father. That is not an outcome sought by anyone. In circumstances where, as I have already found, the likelihood of guardianship in the future falls well short of reasonable inevitability, the Department's proposed short-term order does not offer the long-term security envisaged by s 78A(1).

37 Even if I had been satisfied that permanency planning was in some way appropriately and adequately addressed, the avoidable necessity of further litigation would, as it did the President, draw me inevitably to the conclusion that the proposed orders were not in Jack and Jill's best interests.

38 Accordingly, I direct the Department to file new permanency plans.

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Amendments

14 April 2020 - Date of act on front sheet

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