Children's Court

New South Wales

Case Name:	DFaCS & the Steward Children
Medium Neutral Citation:	[2019] NSWChC 1
Hearing Date(s):	13 March 2019
Date of Orders:	13 March 2019
Decision Date:	13 March 2019
Jurisdiction:	Care and protection
Before:	Judge Peter Johnstone, President of the Children's Court of NSW
Decision:	There is no realistic possibility of restoration of the children to either of the parents
Catchwords:	CHILDREN - Care and Protection - whether there is a realistic possibility of restoration of children to their parents following their removal-s83 Care Act
Legislation Cited:	Children and Young Persons (Care and Protection) Act 1998
Cases Cited:	Department of Community of Community Services v "Rachel Grant", "Tracy Reid", "Sharon Reid" and "Frank Reid" [2010] CLN 1 In the matter of Campbell [2011] NSWSC 761 Re Jayden [2007] NSWCA 35 Re Saunders and Morgan v Department of Community Services The Secretary of the Department of Family and Community Services re Nicole [2018] NSWChC 3
Category:	Procedural and other rulings
Parties:	The Secretary The Mother The Father

	The Children
Representation:	Ms S Nasti, solicitor, for the Secretary Ms Harrod, solicitor, for the Mother Father, in person (unrepresented) Mr Samuel, solicitor, for the Children as the ILR
File Number(s):	2018/00087432
Publication Restriction:	Pseudonyms have been used in order to anonymise the children and parties

JUDGMENT

1 This is an ex tempore judgment relating to restoration of the Steward children to the parents.

2 These proceedings relate to the four Steward children removed or assumed into care on 13 March 2018, in respect of whom these proceedings were commenced on 19 March 2018 and for whom interim orders allocating parental responsibility to the Minister were made, the current order being for parental responsibility to the Minister until further order.

3 A finding was made following a hearing on 9 May 2018 by the Children's Court pursuant to which the matter was established and the children were found to be in need of care and protection.

4 Care plans were filed on 13 August 2018 and in each of the Care plans the Secretary made the assessment that there was no realistic possibility of restoration. In subsequent case management it appears that the parents disputed the Care plans and the mother, at least until today, was seeking restoration.

5 And the father also continued to seek restoration.

6 The father is unrepresented and I explored that with him but it appears that the reality is that he was refused legal aid and cannot afford to pay for a solicitor of his own. He sought an adjournment to enable him to sell his house to pay for legal fees but, unfortunately, it is far too late for that sort of development at this stage of these Care proceedings in an Act which requires the Court to deal with matters as expeditiously as possible in the interests of the children.

7 I refused his application.

8 It is also apparent from the papers that there is an AVO against the father which prevents the children from having any contact with the father and which also prevents the father from having any contact with the mother.

9 I found out today from the father that that AVO was appealed to the District Court, but unsuccessfully.

10 As far as the mother is concerned, she has conceded today that there is no realistic possibility of restoration to her.

11 Section 83 of the *Care Act*, that is the *Children and Young Persons (Care and Protection) Act 1998,* was recently amended.

12 Section 83(2) now provides:

> "If the Secretary assesses that there is a realistic possibility of restoration within a reasonable period, the Secretary is to prepare a permanency plan involving restoration and submit it to the Children's Court for its consideration."

13 Section 83(3) provides:

> "If the Secretary assesses that there is not a realistic possibility of restoration within a reasonable period, the Secretary is to prepare a permanency plan for another suitable long-term placement for the child or young person and submit it to the Children's Court for its consideration."

14 Section 83(5) now provides:

> "The Children's Court is to decide whether to accept the Secretary's assessment of whether or not there is a realistic possibility of restoration within a reasonable period..."

15 The amendments involved the addition of the words "within a reasonable period" to those subsections. The transition provisions for those amendments provide that they apply to current proceedings. Accordingly, it is the new wording including those additional words which applies to these proceedings.

16 I am required in these proceedings to make findings in relation to whether or not I accept the Secretary's assessment in the Care plans as to whether or not there is a realistic possibility of restoration within a reasonable period.

17 The practitioners involved in this case have asked me to give some more extensive reasons as to the meaning, or the impact, or the effect of the amendments by way of the addition of those words, for the guidance of practitioners and possibly for the guidance of District Court Judges and Children's Magistrates on just what the new test is, having regard to those changes.

18 I have not prepared a formal judgment so my remarks are made, in effect, ex tempore.

19 It is worth going back to consider the three main decisions that need to be made in any Care proceedings; the first being made at the outset as to whether or not an interim order should be made. The law in that regard is well settled and is articulated in the decision of *Re Jayden* [2007] NSWCA 35 by Ipp JA and I paraphrase what he said in the relevant paragraph: an interim order will be made in any circumstances where it is not in the best interests of the child or children to remain in the care of their parents; or the interim order should be made having regard to the needs of the child or children in respect of their safety, welfare or wellbeing; or thirdly, that an interim order is necessary simply because it is preferable to the alternative, which is the dismissal of the proceedings. To that extent the law, as I said, in respect of that finding, is well settled.

20 The second main decision that any Children's Court needs to make in respect of children who have been removed is whether or not they are in need of care and protection, sometimes referred to as establishment, under s 71 of the *Care Act*.

21 The law in relation to that finding is also reasonably well settled and I do not intend to spend a lot of time on that issue today because I have articulated my reasons in the recent decision of *The Secretary of the Department of Family and Community Services re Nicole* [2018] NSWChC 3, which sets out the law

relevant to that decision, which again is an interlocutory decision for which the threshold is not high.

22 Up until a finding being made establishing proceedings in the Children's Court, that phase is generally described by the Court of Appeal in various decisions as the establishment phase. Thereafter the Court proceeds into what is regarded as the next phase, sometimes referred to as the welfare phase. As I indicated in *Re Nicole*, my preference is to call it the placement phase because one of the considerations for determination in that phase is whether or not there should be a restoration. Indeed, that is the very first consideration having regard to the hierarchy set out in the *Care Act* for placement.

23 The main rationale for making a finding that children are in need of care and protection is simply, firstly, to safeguard against arbitrary intervention by the State in the lives of children and their families; secondly, to enable proper investigation for the future of those children while they are in a safe environment; and thirdly, to ground final Care orders.

24 And then the third decision to be made in any Care proceedings is restoration and that issue arises under s 83(5) in circumstances where Care Plans have been filed dealing with the permanency planning of children in which the Secretary makes the assessment that there is no realistic possibility of restoration.

25 The words "realistic possibility of restoration" have been considered over a period of time starting firstly in an uneported decision made in the District Court on 12 December 2008 in a care appeal, the name of which was anonymized and became known as *Re Saunders and Morgan v Department of Community Services* and was published in Children's Law News under that name.

26 In a subsequent decision of the then President of the Children's Court, his Honour Judge Marien adopted the reasoning in *Re Saunders and Morgan* so as to, in effect, apply that reasoning in all matters in the Children's Court, *Saunders and Morgan* being, as I indicated, a care appeal as opposed to a first instance decision.

27 *Saunders and Morgan* and the reasoning and the explanation as to the meaning of a realistic possibility of restoration drew heavily upon a summary of an earlier submission made by Senior Children's Magistrate Mr Mitchell in a submission to the Wood Inquiry where he said:

"The Children's Court does not confuse realistic possibility of restoration with the mere hope that a parent's situation may improve. The body of decisions established by the Court over the years requires that usually a realistic possibility be evidenced at the time of hearing by a coherent program already commenced and with some significant 'runs on the board'. The Court needs to be able to see that a parent has already commenced a process of improving his or her parenting, that there has already been significant success and that continuing success can be confidently predicted…"

28 The District Court Judge who decided *Saunders and Morgan* happened to be me, before my appointment as President of this Court and in that judgment I said the passage quoted in respect of Senior Children's Magistrate Mitchell had elements that resonated. I said:

"There were aspects of a possibility that might be confidently stated as trite: first, a possibility is something less than a probability, that is, something that is likely to happen; secondly, a possibility is something that may or may not happen. That said, it must be something that is not impossible."

29 The section requires, however, that the possibility be realistic. That word is less easy to define but clearly was inserted to require that the possibility of restoration is real or practical. It must not be fanciful, sentimental or idealistic or based upon unlikely hopes for the future. Amongst a myriad of synonyms in the various dictionaries consulted, the most apt in the context of the section were the words 'sensible' and 'commonsensical'."

30 I interpolate here to say that one Court of Appeal judge in citing those reasons put the word "sic" behind the word "commonsensical" when citing my judgment. However, having again referred to the dictionary the word "commonsensical" is a word of common use in the English language.

31 As I said, Judge Marien, the former President of the Children's Court, referred to that passage with apparent approval in his decision on 20 September 2010 in the case *Department of Community Services v "Rachel Grant", "Tracy Reid", "Sharon Reid" and "Frank Reid"* [2010] CLN 1.

32 The next event was the decision by Slattery J *In the matter of Campbell* [2011] NSWSC 761 in the Supreme Court where he adopted the decision of Johnstone J in *Saunders and Morgan*. However, Slattery J went on to say that the decision as to whether there is a realistic possibility of restoration needs to be determined as at the date of hearing and in the context of the facts that then exist.

33 In my view what the recent amendment to s 83 has done by adding the words "within a reasonable period", is to restore the law to the state that it was according to Senior Magistrate Mitchell and enables the Children's Court to take into account future likely events subsequent to the day of the hearing which might occur within a reasonable period, such period to be determined according to the facts of each individual case but no longer than a period of two years by virtue of the other limiting sections in the Act, namely to approve restoration in circumstances where a parent has already commenced a process of improving his or her parenting and that there has already been some significant success on the part of that parent which enables a confident assessment that continuing success might be predicted.

34 There is some evidence pursuant to studies that have been conducted - which because this is an ex tempore judgment I do not have with me today - but I am aware of research that says that it is more likely than not that a parent from whom a child has been removed will address his or her parenting deficiencies within the first three months. But if they do not commence to address those parenting deficiencies within that first three months the likelihood of them doing so beyond that period is diminished.

35 Accordingly, it is my view, as I have said, that the words "within a reasonable period" are to be interpreted by reference to the words used by Senior Children Magistrate Mitchell which will require the leading of evidence on the part of the parent concerned that they have already commenced a process of improving

the deficiencies in their parenting identified at the time of removal or in the Summary of Proposed Plan, or in the Care Plan, such that there has been progress towards success in ameliorating their poor behaviour and that continuing success can confidently be predicted.

36 In the present case in respect of the mother who has conceded that there is no realistic possibility of restoration to her, I am so satisfied. She has not yet demonstrated that she has commenced any process of improving her parenting and has not been able to demonstrate any success in addressing her parenting issues, although I note from her solicitor that she wishes to do so and if she does so would be entitled in due course to bring an application under s 90 of the *Care Act.* But all I will say to her at this stage is that she has a lot of work to do before she can get to that point.

37 In respect of the father, he has demonstrated absolutely no insight into his parenting deficiencies or the reasons why the children were removed from him. He does not seem to understand that there is an AVO against him brought by the Police, which he sought to have removed, but which the Court refused to remove and which on appeal again refused to remove. It is clear that AVO restricts him or prevents him from having any contact with his children and any contact with his former partner, the mother. It is intensely obvious that he is not in a position to have the children restored to him at the present time or within a reasonable period and I find that there is no realistic possibility of restoration to him.