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IN THE FAMILY COURT
AT MASTERTON

FAM-2016-035-000184
[2017] NZFC 1022

IN THE MATTER OF THE CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT 1989

[redacted]

Children the application is about

Hearing: 26 January 2017

Appearances: Ms V Pearson for applicant
Mr R Pattiaratchi for the Ministry
Ms B Inglis for the children

Judgment: 14 February 2017

JUDGMENT OF JUDGE P R GRACE

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[1] This application was bought by [redacted] ("applicants") who have had the children, who are the subject of this application, in their care since approximately January 2016. Their application seeks:

(a) Leave to bring the proceedings, as the applicants are not the children's biological parents, but rather the great-uncle and great-aunt of the children;

(b) A declaration that the children are in need of care and protection;

(c) An interim custody order pursuant to s 78 of the Act.

[2] The application is opposed by the Ministry of Social Development ("respondent").

[3] One of the initial issues raised by the respondent was whether or not the children's parents' had in fact been served. There was proof of service upon the children's mother, with service being affected on 23 December 2016. The service document indicates that the mother was given an extra copy for the purpose of handing the same on to the father as the children's parents are said to be living together. Neither parent has appeared at this hearing. I made an order dispensing with any further service upon the father, as I consider the matter has been drawn to his attention.

[4] At the conclusion of the hearing, I indicated that I was more than satisfied that the statutory grounds for making a declaration had been made out, and I made a declaration pursuant to s 67 that the children were in need of care and protection upon the ground set out in s 14(1)(f). I also made an order pursuant to s 78 placing the children in the interim care of the Ministry of Social Development, but tagged that order with a condition that the children are to continue to reside with the applicants, pending the filing of a report and plan. For that purpose the matter was adjourned to a case management review on 15 February next in order for that plan and report to be filed. I also directed that Ms Inglis' brief as lawyer for the children could be extended so that she could attend any planning meetings. I also indicated

that Ms Pearson should attend the planning meetings as it is important that the applicants have clear and independent advice, particularly having regard to what has occurred in this particular proceeding.

[5] I indicated at the conclusion of the hearing that I would give my reasons in writing, and these are the reasons.

[6] The hearing proceeded by way of submissions. The respondent's submissions were not filed until late on 25th January and Ms Pearson expressed concern that neither she nor her clients had had a fair opportunity of reading the submissions or indeed had an opportunity to respond to the affidavit filed by the social worker, which affidavit was again filed late on 25th January. Notwithstanding that, the matter proceeded, having regard to the urgency of the situation which has arisen.

[7] These proceedings commenced on 23rd December last, and at that stage, the applicants sought a without notice order abridging the time for filing any affidavits in response. The matter went before a Duty Judge who:

(a) Granted the applicants leave to apply; and

(b) Abridged time for filing any response to 24 hours following service.

[8] The matter was then the subject of a telephone conference with me, early in the New Year. Both the applicants' counsel and the respondent were joined to that telephone conference. Directions were given for the filing of affidavits by the Department and the matter was to be allocated a fixture. Lawyer for the children was appointed. Ms Inglis who was appointed to the position of lawyer for the children filed her report on 24th January.

[9] This matter has proceeded by way of oral submissions from Ms Pearson, Mr R Pattiaratchi addresssing his written submissions and Ms Inglis addressing her written submissions.

[10] The children to whom these proceedings apply have been the subject of a number of family group conferences. The first was on 12 May 2014. That family group conference also considered care and protection matters for an unborn child of [redacted] the children's mother. The family group conference reached a consensus that all children were in need of care and protection.

[11] The second family group conference occurred on 26 November 2014. By that stage the unborn child had been born. Again there was agreement that all children were in need of care and protection.

[12] The third family group conference was on 19 June 2015. This conference only related to the four children who are the subject of these proceedings as the youngest child had been placed with extended family. Again there was agreement that the children were in need of care and protection.

[13] The next family group conference was on 21 December 2015. Again it related to the four children who are the subject of these proceedings. Again there was agreement that the children were in need of care and protection pursuant to s 14(1)(a)(b) and (f).

[14] The next family group conference was on 26 February 2016. Again it related to these four children. Again there was agreement that the children were in need of care and protection pursuant to the same provisions in the Act.

[15] The next family group conference occurred on 21 September 2016. At that family group conference, it was agreed that there was no realistic prospect of the children being returned to the care of their parents. The s 140 agreement was to continue with the children remaining in the care of the applicants, and the plan was to be reviewed by a further family group conference on or before 27 January 2017.

[16] As part of her inquiry into the matter, Ms Inglis noted that there were over 1000 pages of documentation on the respondent's file. The only documentation that the respondent has placed before the Court are copies of the family group conference outcomes in relation to the conferences referred to earlier in this judgment. Ms

Inglis pointed out that there had been a number of other notifications to the Department raising concerns about the state of the children both as to their health, hygiene and environment. The brief background was that the parents had drug and/or alcohol issues, and there was a significant background of domestic violence within that relationship, and that the children had been exposed to that. There were also hygiene issues which gave cause for concern as far as the children's schooling was concerned.

[17] [redacted]

[18] Another of the children, [redacted] is said to have been diagnosed with ADHD, and is said to be impulsive and requires fairly intensive oversight.

[19] Ms Inglis produced to the Court copies of High Needs Assessments carried out on both [redacted] as an indication of the rather extensive needs that both these children have. The Department stated that these needs assassesments had been prepared for a different purpose, which I understood to relate to the possibility of the children being placed with separate individual caregivers at some earlier point in time. The fact is however, that [redacted] are now placed together and have been together for some time, and their caregivers have been the present applicants for the past 12 or so months.

[20] Matters for [redacted] have not been settled. Initially two of [redacted] were placed with a particular caregiver, and two others with another caregiver. Those arrangements did not suceed and eventually all four [redacted] were placed with one of those caregivers. That arrangement likewise did not succeed as there were allegations of violence. The children were uplifted from that caregiver and placed into the [redacted] family home, before being placed again with temporary caregivers in [redacted]. Following that move the children were placed with another family member who did her best to provide the support and care that these children needed. However that caregiver's relationship was also the subject of domestic violence which resulted in her seeking a protection order against her partner. Following her relationship breakdown she continued to provide care for the

children on her own, until such time as her own health deteriorated, and again it became necessary for the children to undergo another change in care. It was at that point in time that these children moved into the care of the current applicants.

[21] It would appear from the record of the family group conference that took on 21 September 2016 that the respondent was anticipating that the applicants would take over the formal care of the children pursuant to the provisions of the Care of Children Act. I say that because the record of the conference records that the applicants "*are advised to receive legal advice for understanding of special guardianship or parenting order*".

[22] The applicants did not seek that advice until they approached Ms Hunt either late October or early November 2016. Ms Hunt sought information from the respondent so that she could give the applicants advice as to their position. Despite several requests from Ms Hunt information from the respondent was not forthcoming, and as a consequence of the lack of response, the present application was filed.

[23] The position of the applicant's at this hearing is that they do not now agree with the plan which by inference was that they would seek to take formal care of these children under the Care of Children Act, because they consider that they need additional supports from Child Youth and Family in order to manage these four children, particularly having regard to their needs.

[24] The resopndent's position is that as the children are in the care of the applicants, there are now no care and protection issues. The medical needs of the children are capable of being met through the health system, the educational needs of the children are capable of being met through the education system. The respondent therefore takes the view that there is no need for the respondent to be further involved in this family and that there is no legal basis upon which the Court make a declaration. In effect the Department have washed their hands of the situation.

[25] The s 140 agreements have now come to an end. The respondent therefore has no legal standing as far as the children are concerned. Likewise the applicants

have no legal standing as far as the children are concerned. They do not have a custody order in their favour. They have not been made additional guardians of these children.

[26] The legal position is that the parents of the children remain their legal guardians and if they took it upon themselves to uplift the children, by law, they would be able to do so and neither the caregivers nor the respondent could stop them. The only way that the respondent could seek to intervene is to make an application on the basis that the children would be in need of care and protection. The only way that the applicants could intervene is to seek leave to bring proceedings under the Care of Children Act and follow the matter through in that way. This leaves a wholly unsatisfactory situation.

[27] What this case demonstrates to any person, whether they be family or non-kin, is that when they take on the care of somebody's child or children, they need to be careful and quite clear as to what their obligations and commitments will be and what the Ministry of Social Development's responsibilities and commitments will be, and such an arrangement should be clearly documented.

Submissions

Submissions for applicants

[28] Ms Pearson invited the Court to consider the process that has gone on over the past two years and in particular look at the number of family group conferences that have occurred along with the records of the decisions made at those conferences. Ms Pearson point out that initially the plans had been to have the children returned to the care of their parents but subsequent conferences came to the conclusion that the parents were not going to change, and return of the children to their care was not possible, and hence alternative care arrangements needed to be considered.

[29] Ms Pearson raised concerns regarding the lack of long-term planning for the children. The s 140 agreements have now lapsed. There does not appear to have been any assessment of the current caregivers. There has been no suggestion of any

gateway assessment in any of the family group conferences. Ms Pearson pointed out that there had been no detail recorded in the plan that the respondent had ever turned its mind to the transition from the s 140 agreement into permanent placement. As a result of the s 140 agreement lapsing, the children are now in limbo and they have no legal status as far as caregivers go.

[30] Ms Pearson then went on to point out the difficulties that [redacted] has regarding [redacted] health and the fact that [redacted] will require ongoing and intensive support. In her submission the caregivers need the legal authority to assist them in that, but at this stage they have no such legal authority. The respondent is relying merely on the goodwill that the caregivers have shown to date.

[31] In Ms Pearson's submission the respondent had an obligation two years ago to make sure that proper planning was undertaken for these children, and in her submission that has never occurred. Instead, in her submission, the caregivers were pointed in the direction of the health service, the benefit system and the education system, and then "*left to it*".

[32] In Ms Pearson's submission the children cannot return to their parents. The children need to have stability and a legal framework around them. Without that they are clearly in need of care and protection.

[33] She rejected the Ministry's approach which in effect says that the applicants are capable of caring for these children, and that they are obligated to apply under the Care of Children Act to take on the legal responsibility both as to day to day care and guardianship, and that then the applicants can pursue assistance through the various Government agencies.

[34] Ms Pearson also rejected the suggestion from the Ministry that the Court should adjourn the proceedings and join the Ministry of Health and Education into these proceedings.

Ministry's submissions

[35] The Ministry approached the matter on the basis that there are two issues for the Court to consider:

(a) Is there an evidential basis for the making of a declaration?; and

(b) Is the declaration necessary to meet the children's care or protection needs?

[36] The Ministry then went on to refer to s 73 of the Act and made particular reference to s 73(2)(a). The Ministry submitted that the protection needs of the children have been remedied by their transition out of the parent's care and the subsequent plans prepared for the future care of the children. The Ministry submitted that the plans did not contemplate a declaration being sought. The Act provides for the least intervention possible to ensure the children's safety and protection. The Ministry's view is that the children are safe from harm in the care of the applicants and therefore the Court should not make any custody order in favour of the Ministry. They submitted that there was no evidential basis for the making of a declaration.

Submissions of Lawyer for Child

[37] Ms Inglis pointed out that in her view there were a number of gaps in the historical information provided in these proceedings and that there had been other notifications made to Child Youth and Family over and above those disclosed in the proceedings. She drew this information from over the 1000 pages of notes contained on the Departmental file. The notifications had come from professionals, the children's schools, all of which had raised concerns about the welfare of the children. Admittedly these notifications had been made whilst the children were in the care of the parents.

[38] Ms Inglis said it was important in her submission to take into account the number of concerns that had been expressed in the past because the placement of the

children in their current environment has been largely dictated by the disruptive history that they have experienced in the past, and that placement has been influenced quite clearly by that history and by the particular needs of at least two of the children.

[39] Ms Inglis then went through the various placements of the children, particularly [redacted] and [redacted] who were initially, prior to the first family group conference, placed with their grandmother and her partner. However, there were concerns about physical abuse whilst in that particular environment and that was made clear in the record of outcomes of the family group conference.

[40] Ms Inglis then went through the various placements that the children had experienced, and the reasons why the placements broke down, until the children ended up in the care of the current caregivers.

[41] Ms Inglis pointed out that the children have been with the current caregivers since the end of January 2016. Initially the children were under the custody of the Ministry of Social Development pursuant to a s 140 agreement. In her submission the Department must have therefore accepted, and indeed did accept, that the children had needs at that particular time.

[42] Ms Inglis then went through the high needs of both [redacted] and [redacted].

[43] Ms Inglis then pointed out that the record of the family group conference which took place in September 2016 recorded the fact that the caregivers were to consider making an application for care in terms of the Care of Children Act. However, it was noted that the caregivers were to obtain legal advice before making that application. In her submission the Ministry saw it as important that the children would not be left in limbo.

[44] What then appears to have transpired is that the caregivers have sought legal advice, and the lawyer to whom they turned approached the Department seeking information regarding the history of the matter so that the lawyer could give proper and adequate legal advice to the caregivers. At that point the lawyer became

concerned regarding the lack of response from the Department, and the lack of disclose, and indicated to the Department that unless some response was received, the application for declaration would be filed.

[45] In her submission, Ms Inglis said that the children now have no legal status. It is clear that they cannot return to the care of the parents. That in itself in her submission raises clear care and protection issues.

[46] In Ms Inglis' submission if the placement is not supported, it may well be vulnerable, and it would be damaging to the children if it broke down because this would be yet another damaging and unsettling time for the children.

[47] The caregivers have also been left to arrange contact between the parents and the children, but it is clear that that has caused problems even with assistance in place through an outside agency.

[48] In her submission Ms Inglis was in support of a declaration with the matter being adjourned for a plan and report.

Discussion

[49] The Ministry rely on s 73 which makes it clear that the court should not make a declaration "*unless it is satisfied that it not practicable or appropriate to provide care or protection for the child or young person by any other means, including the implementation of any decision, recommendation or plan*" from a family group conference.

[50] In deciding whether or not to make a declaration, the Court has to take into account, among other things, any evidence that the kind of harm suffered by the child or young person will neither continue nor be repeated and/or that the parent or guardian or other person having the care of the child will be capable of ensuring that the kind of harm suffered by the child or young person will be neither continued nor repeated.

[51] A number of approaches taken by the Department raise some concern. Firstly they maintain that the disabilities that two of the children suffer from have not been caused by any behaviour of the parents and therefore by implication the children will not suffer from any "*harm*" and therefore no declaration should be made.

[52] The reality however is that these children do have these disabilities. These disabilities do impact on two of the children on a daily basis. Those disabilities will continue to impact on the children if not for the rest of their lives, for many years to come. In my view it is wrong in principle for the Department to take the approach that they can "*wipe their hands*" of the responsibility for the children because the difficulties that the children face, although real and serious, were not "*caused*" by the parents' behaviour towards the children. There needs to be a reality check in my view, adopted by the Department.

[53] The other approach that the Department has taken is that the Court should only intervene if there is no other satisfactory way of resolving the difficulties which have arisen, and in this regard the Ministry say there was a proposal put at the family group conference, which the parties agreed to, and that they should now go down that track. Having said that however, it is quite clear that the Department and the parties both approach this on the basis that the parties would take legal advice. That was a prerequisite before any application for day to day care of the children under the Care of Children Act would be undertaken.

[54] In my view it is not open now to the Department to turn around and say that the caregivers committed themselves to this course of action as did the family group conference, and therefore the caregivers should go down that track. The caregivers were entitled to be fully and fairly informed of the true legal nature and the extent of the responsibility which they were taking on before they embarked on that course of action.

[55] Also it is not open to the respondent to say that because there is no realistic possibility of the children being returned to the care of their parents and that the respondent does not believe there is a risk that the parents will uplift the children from the applicants, there are no concerns about the children's future. That

overlooks the legal reality that these children have no legal status with the applicants.

[56] The Department was remiss in the extreme in their failure to respond to requests from the caregivers' solicitor seeking advice as to what the position was. They did not respond. When they did respond, little information was provided. The explanation for the lack of response seems to a suggestion that the privacy of the parents would be breached if any disclosure was made.

[57] The caregivers did not appear to be seeking extensive intervention by the Ministry. They clearly were seeking to have somebody to whom they could refer to, and somebody who could organise assistance for them from time to time (i.e. respite care). There are other financial issues which have been raised by the caregivers. The Department's approach is that the caregivers should get on with it and that they can organise these matters through the health service and/or the education department.

[58] However the reality is that neither caregiver has any legal status as far as these children are concerned. What has happened here is that the Department have let these children go without any legitimate or legal status in favour of the caregivers so that the caregivers can make decisions, and sign any documentation required. These children are minors, and two of them at least, have severe difficulties.

[59] In my view this is a clear case where care and protection issues are raised. These children are in need of care and protection, and it was for that reason that I made a declaration pursuant to s 67 upon the grounds set out in s 14(1)(f).

[60] The respondent relies on s73 as its way out of this problem. It may well be that with proper planning and proper orders in place that it is practical and appropriate to provide care for these children with the applicants. But this requires those orders and planning to be in place. Those orders and that planning are not in place here.

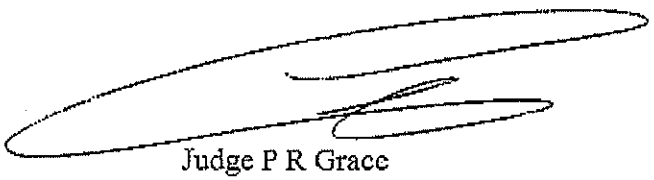
[61] The respondent inferred that if the orders were made then they may give consideration to removing the children from the applicants. Whether this was a serious suggestion I do not know, but it is a concern that such an inference was made. We are talking about the protection of children. Here the respondent has agreed to these applicants having the children in their care, and in my view unless there was some drastic change the children should remain in the care of the applicants. So the s78 order will be tagged with the condition that the children are to remain in the care of the applicants pending the report and plan for disposition.

[62] Such a condition is in the best interests of the children. They have undergone enough changes in their lives in the past and any future changes should be avoided at all cost.

[63] With respect to the respondent much of their opposition seems fiscally driven. I say this because the respondent argues that the Court should "not expend the Chief Executive's money for him". The submission is that the application is bases on a financial motive from the applicants rather than the current care and protection concerns about these children.

[64] Clearly the financial factors are relevant here, but surely common sense dictates that these would be issues that would be discussed when the applicants took legal advice which was clearly anticipated at the September Family Group Conference. The failure by the respondent to provide information which could provide the foundation for that advice suggest the respondent was not open to discussing the issues.

[65] The matter is adjourned to a case management review on a date to be fixed by the Registrar to monitor the receipt of the report and plan from the Department



Judge P R Grace
Family Court Judge