MAGISTRATES COURT OF QUEENSLAND

CITATION:	*Director of Child Protection Litigation v Tony Seymour (a pseudonym)* [2023] QMC 17
PARTIES:	**DIRECTOR OF CHILD PROTECTION LITIGATION** (Applicant) v **TONY SEYMOUR** (Respondent Father)
FILE NO:	CCM 6018/22(0)
PROCEEDING:	Application for Child Protection Order, s61(e)
COURT:	Children's Court, Mount Isa
DELIVERED ON:	19 December 2023
DELIVERED AT:	Beenleigh
HEARING DATE:	31 October 2023
MAGISTRATE:	E. Mac Giolla Rí
ORDER:	The proceedings are adjourned for the preparation of a revised case plan
APPEARANCES:	Applicant: Mr I Anderson, DCPL Respondent: Mr A Prihar, ATSILS (FOC)

Background

1. At a hearing on 31 October 2023 the Director of Child Protection Litigation sought a child protection order for a period of 2 years in relation to the respondent's son, Tim Seymour ('*Tim'*).

2. Tim's mother is deceased and the respondent father took no meaningful part in these proceedings, though ATSILS has kept a watching brief on his behalf.

3. Tim has only just turned seven years of age. Although a formal diagnosis has not been made, it seems likely that Tim has foetal alcohol syndrome. Tim has an NDIS package

and is seeing a speech therapist and psychologist. Tim attends a mainstream school and is well liked by other students.

4. At the time of the hearing Tim was placed in a residential accommodation service or '*resi'*.

5. Without expressing a concluded view, it appeared to me at the time of the hearing that it was uncontroversial that most relevant criteria in s59 were satisfied but I had concerns as to whether the case plan was appropriate for meeting Tim's assessed protection and care needs because of his placement in *resi*.

6. The two live issue at the hearing were:
    a. Whether, as a seven-year-old with an intellectual disability, Tim's placement in *resi* was appropriate; and
    b. If I found that *resi* inappropriate, is it open to me to decline to make an order on the basis that the case plan was inappropriate.

Resi for Seven Year Olds

7. In *Mary Boland*[1] I noted that a senior officer at the Department of Child Safety, Seniors and Disability Services ('*Child Safety*') averred that Child safety has no data to support the efficacy of *resi* as a way of caring for children. No data or evidence was put forward in Tim's case.

8. At the hearing I considered various Child Safety policy documents and it appears that Tim's placement is inconsistent with Child Safety policy, if not a direct contravention of it. The relevant policy being that children under twelve are not to be considered for *resi* except in very particular circumstances, none of which apply to Tim's case.[2] Even if the placement is not contrary to Child Safety policy, it remains necessary for me to be independently satisfied that it is appropriate for the case plan to allow for Tim to be in *resi*.

9. I do not have any evidence about the specific *resi* home where Tim is placed. Generally, *resi* is a form of institutional care for children in the care of Child Safety. It involves one or more children being cared for in a house staffed by paid carers. The carers work in shifts, with one or two day shifts with a set staff to child ratio and a night shift that usually involves a lower staff to child ratio. One limitation of *resi* is that the shift

[1] Mary Boland (a pseudonym) v Director of Child Protection Litigation [2023] QChCM 6 at [37]

[2] See Child Safety's Policy on Residential Care 606-4. At 3.4 of the DCPL's written submissions filed 4 December 2023, it was suggested that I could find that because a particular child had previously been in foster placement with Tim, that Tim is in *resi* with a *foster* sibling and I should therefore find that Tim's placement is in line the sibling exemption to the policy. I can find no basis whatsoever to support a view that *foster* sibling could possibly be contemplated by the policy. Moreover, Exhibit 11 to Ms Briscoe's affidavit suggests that the other child is likely in the same class as Tim and, as such, also under 12. Reliance on the other child to invoke any sibling exception would be bizarre where the exception is designed to allow a younger sibling to be in *resi* with an older sibling, despite being otherwise too young for that form of care.

structure and staff turnover make it difficult for children to develop meaningful relationships with care workers. With the possible exception of teachers, these care workers are often the only pro-social adults in the children's lives.

10. It is a curious feature of litigation in Child Protection is that Magistrates are required by the legislation to make decisions in the best interests of children but Magistrates have no formal qualifications in child psychology or child wellbeing. Child protection cases rarely involve any expert evidence in relation to how particular situations might affect a child, particularly where, as here, the respondent has not meaningfully participated in the litigation.

11. The onus being on the applicant, in the absence of some statistical or expert evidence, given the institutional nature of *resi* and Tim's disability and young age, I would find it difficult to conclude that *resi* could be appropriate for Tim, even allowing for the desirability of bringing the litigation to a close, giving appropriate powers to the Department and giving certainty to Tim.

Are living arrangements relevant when considering the appropriateness of a case plan?

12. At the hearing the DCPL submitted that it was not appropriate for me to reject the case plan on the basis of living arrangements. The basis for this submission was said to be the difference in language used between s59(1)(b)(ii) and s59(1)(b)(iii) of the *Child Protection Act* 1999.

13. Section 59 relevantly provides:

> *(1) The Childrens Court may make a child protection order only if it is satisfied—*
>
> *...*
>
> *(b) there is a case plan for the child—*
>
> > *...*
> >
> > *(ii) that is appropriate for meeting the child's assessed protection and care needs; and*
> >
> > *(iii) for a long-term guardianship order or a permanent care order for the child—that includes living arrangements and contact arrangements for the child*

14. The DCPL's argument at the hearing was that where the legislature has expressly included "*living arrangements*" for long-term guardianship and permanent care orders, I should interpret the legislation as excluding those items from consideration when assessing a case plan for any other order.

15. The DCPL submitted that in cases such as Tim's, where only a two-year order is sought, living arrangements are, by necessary implication, not a matter that I should take into account when assessing the appropriateness of the case plan.

16. The DCPL argued that this interpretation was supported by page 12 of the Explanatory Memorandum for the *Child Protection Reform Amendment Bill 2016*[3]. That argument was, to a great extent, undermined by the statement on page 5 of the memorandum that:

> *"... when making an order for long-term guardianship, the Childrens Court must merely be satisfied that living and contact arrangements are included in the child's case plan. As with any child protection order, the Childrens Court must be satisfied there is a case plan for the child that is appropriate for meeting the child's assessed protection and care needs.*"

17. The competing view is that the plain words of the statute require me to find that the whole of the case plan is appropriate and that such an interpretation:
    a. Is consistent with the overall operation of the Act, which empowers and requires the Court to assess and supervise Child Safety's conduct and decisions;
    b. Is consistent with the paramount principle; and
    c. Avoids the absurdity of the Court having no discretion to refuse to make an order even where a placement is grossly inappropriate.

18. Ultimately, the DCPL revised its position and it is unnecessary for me to decide this issue.

Revised position of the DCPL

19. At the conclusion of the hearing on 31 October 2023 I adjourned the proceedings to 5 December consider my decision. I invited further evidence and/or submissions on the correct interpretation of s59(1)(b)(ii) and (iii).

20. By way of further written submissions filed on 4 December 2023, the DCPL revised its position and submitted:

    a. For reasons other than the question of placement, the case plan was not appropriate; and
    b. The proper construction of s 59(1)(b)(ii) *does* allow the Court to consider placement when considering whether a case plan is appropriate for meeting a child's assessed protection and care needs.[4]

[3] Explanatory memorandum to the *Child Protection Reform Amendment Bill 2016* See pages 5 and 12 in particular.
[4] Written Submissions filed 4 December 2023 at [19].

21. On that basis I will not make the two-year order sought at the hearing and I will adjourn the matter to allow for revision of the case plan.