

CHILDRENS COURT OF QUEENSLAND

CITATION: *Director of Child Protection Litigation v SYA & Anor* [2021] QChC 5

PARTIES: **DIRECTOR OF CHILD PROTECTION LITIGATION**
(Appellant)
v
SYA
(Respondent)
DRF
(Separate Representative)

FILE NO: 494/21

DIVISION: Childrens Court of Queensland

PROCEEDING: Appeal

ORIGINATING COURT: Children's Court, Brisbane

DELIVERED ON: 17 March 2021

DELIVERED AT: Brisbane

HEARING DATE: 15 March 2021

JUDGE: Richards P

ORDER: **Appeal is dismissed.**

CATCHWORDS: APPEAL – CHILD PROTECTION ACT 1999 – CHILD WELFARE AND GUARDIANSHIP – ERROR OF LAW – where at the Childrens Court constituted by a magistrate, the learned Magistrate made a long term guardianship order for the child's sibling but not the child – where the appellant submits the learned Magistrate failed to give regard to issues of parity between the siblings by finding the child's sibling was a child in need of protection and subject to a long term guardianship order but that there was no utility in the child being subject to the same order – where the appellant submits the learned Magistrate did not have paramount consideration to the safety, wellbeing and best interests of the child – where the child turns 18 on 18 March 2021 – where the Department contends the child would benefit from their assistance package available until the child turns 25 – where the child has suffered significant family trauma as well as physical trauma after a serious accident – where the child has stable living conditions – where the child has expressed a clear wish not to have a long term guardianship order made – where the child has strong acrimonious feelings about the Department – whether the learned Magistrate failed to take into account

relevant considerations – whether the child is in need of protection from harm – whether a long term guardianship order promotes the safety, wellbeing and best interests of the child

LEGISLATION: *Child Protection Act 1999 (Qld) s 9, s 10, s 59*

COUNSEL: G Murray for the Appellant
 SYA appeared self-represented
 S Seth for the Separate Representative

SOLICITORS: Director of Child Protection Litigation for the Appellant
 Seth Solicitors for the Separate Representative

Introduction

- [1] This is an appeal from an order made on 25 February 2021 dismissing an application seeking long term guardianship to the Chief Executive (Child Safety) in respect of a child, JYG, born on 18 March 2003.
- [2] JYG had previously been subject to an interim order granting temporary custody to the Chief Executive (Child Safety) and was ultimately placed with his paternal grandmother DY and his siblings.

Background

- [3] SYA is the mother of four children: RY born on 28 July 2003, JYG born on 18 March 2003, MY born 8 August 2006 and LY born 3 December 2008. RY and MY have been subject to long term guardianship orders although RY has, since that order was made, attained the age of majority.
- The family has endured significant trauma. SYA suffered two brain bleeds in 2011 which greatly impacted her daily functioning. As a result of those bleeds she was hospitalised and had to learn to function again. On 17 November 2013 the children’s father PY, was killed after sustaining fatal injuries from a fallen tree whilst on a family camping trip. This happened in front of the children. Having lost her husband in such sudden and tragic circumstances meant she found herself unable to look after her children. SYA spiralled into drug use and criminal activity and the children were taken from her. SYA is currently in custody serving a sentence and she has other charges pending.

- [4] RY and MY were given to the care of their paternal grandmother DY in February 2014. JYG has been there since July 2017 and LY since May 2019. LY had a long term order made in favour of the Department on 25 February 2021. JYG has clearly expressed a wish that an order not be made in relation to him and he does not wish to avail himself of any assistance package from the Department designed to assist his transition to adulthood. He intends to remain living with his grandmother after he turns 18 on Thursday.

Grounds of Appeal

- [5] The appellant maintains that the Magistrate erred in finding that LY was a child in need of protection and therefore a child who should be subject to a long term guardianship order but JYG was in a position where there was no utility to an order being made.
- [6] The notice of appeal sets out three grounds namely:
1. The Children’s Court Magistrate was misdirected with respect to the relevant statutory test contained in *Child Protection Act 1999 (Qld)* s 59(1)(a).
 2. The Children’s Court Magistrate failed to have regard to all relevant considerations in determining whether an order was appropriate and desirable.
 3. The Children’s Court Magistrate placed too much weight on the view and wishes of JYG to the extent that the Court did not have the paramount consideration as being the safety, wellbeing and best interests of JYG, both through childhood and for the rest of his life.

The Act

- [7] Section 59 of the *Child Protection Act 1999 (Qld)* provides:

“59 Making of child protection order

- (1) The Childrens Court may make a child protection order only if it is satisfied—
 - (a) the child is a child in need of protection and the order is appropriate and desirable for the child’s protection; and
 - (b) there is a case plan for the child—

- (i) that has been developed or revised under part 3A; and
 - (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; and
- (c) if the making of the order has been contested—
- (i) a conference between the parties has been held or reasonable attempts to hold a conference have been made; or
 - (ii) because of exceptional circumstances, it would be inappropriate to require the parties to hold a conference; and

Example of exceptional circumstances—

The court may be satisfied the risk to the safety of a party if a conference were held outweighs the potential benefit of holding the conference.

- (d) the child’s wishes or views, if able to be ascertained, have been made known to the court; and
- (e) the protection sought to be achieved by the order is unlikely to be achieved by an order under this part on less intrusive terms.

...

- (6) In addition, before making a long-term guardianship order or a permanent care order for a child, the court must be satisfied—
- (a) there is no parent able and willing to protect the child within the foreseeable future; or
 - (b) the child’s need for emotional security will be best met in the long term by making the order.

...

- (8) Before the court extends or makes a further child protection order granting custody or short-term guardianship of the child, the court must have regard to the child’s need for emotional security and stability.”

[8] A child who is in need of protection is defined in s 10 of the Act as:

“10 Who is a *child in need of protection*

A child in need of protection is a child who—

- (a) has suffered significant harm, is suffering significant harm, or is at unacceptable risk of suffering significant harm; and
- (b) does not have a parent able and willing to protect the child from the harm.”

[9] Harm is defined in section 9 of the Act as:

“9 What is *harm*

- (1) ***Harm***, to a child, is any detrimental effect of a significant nature on the child’s physical, psychological or emotional wellbeing.
- (2) It is immaterial how the harm is caused.
- (3) Harm can be caused by—
 - (a) physical, psychological or emotional abuse or neglect; or
 - (b) sexual abuse or exploitation.
- (4) Harm can be caused by—
 - (a) a single act, omission or circumstance; or
 - (b) a series or combination of acts, omissions or circumstances.”

Submissions

[10] The Appellant’s submissions are to the effect that the Children’s Court Magistrate in dismissing the application in respect of JYG, focused excessively on the utility of the order given JYG’s attitude and his proximity to 18 years of age and thereby misdirected herself in respect of the relevant statutory test contained in the *Child Protection Act 1999 (Qld)*, s 59(1)(a). She did not, it was submitted, have as her paramount consideration the safety, wellbeing and best interests of JYG both through childhood and for the rest of his life and thereby did not have regard to all relevant considerations in determining whether an order was appropriate and desirable.

[11] The appellant relies on the reasons given by the Magistrate as proof that she did not apply the appropriate test which the appellant submits is a two-pronged test, namely

whether the child is a child in need of protection and then whether the order is appropriate and desirable for the child's protection.

[12] Chiefly, it seems that the principal argument by the appellant is that whilst JYG is resistant to any assistance from the Department that this is an immature approach consistent with his age and that he may regret that decision given that the Department is able to offer him assistance in his transition to adulthood until the age of 25. To this end they rely on the following factors:

- That a child protection order for JYG would maximise his chance for stability and permanency particularly in offering support in his placement with DY and his siblings;
- That JYG has unresolved complex trauma and grief which the Department could assist him with by obtaining counselling for him;
- He has suffered a serious injury as a result of a motor vehicle accident in 2018 where he sustained significant injuries and required long-term hospitalisation. Those injuries included fractured vertebrae, sternum, right arm and wrist and eviscerated bowel and lacerations to his kidneys, spleen, liver and right ankle;
- His immaturity is evident in the fact that he is refusing to engage and attend appointments for his health (although his mother tells me he has now undertaken some of the appointments necessary to assist him with further health issues);
- He has at times smoked marijuana to cope with the stresses in his life;
- He has an ongoing difficult relationship with Child Safety.

[13] Once he turns 18, if an order for his care is made, the Department would be able to help him with ongoing case management support including flexible funding, assistance with youth housing over a three year period of up to \$3,850 per year, a transition to independent living allowance of \$1,500, and a support service from Child Safety & Support with referrals to appropriate services such as housing, mental health and medical services.

- [14] The separate representative maintains that the appeal should be dismissed on the basis that there is little assistance that can be gained from the Department by JYG not only because of his attitude but also because that assistance is voluntary and of limited practical help. Given the factors contained in s 59 particularly s 59(6)(b) of the Act it was submitted that the Magistrate was correct in her decision and the appeal should be dismissed.
- [15] SYA, who appeared for herself, was adamant that the appeal should be dismissed in relation to JYG as he was very resistant to being under the care of Child Safety, that he was able to make his own decision in that regard and that he should be allowed to do so.

The Decision in the Childrens Court

- [16] The Magistrate after hearing some evidence in this matter on 17 February 2021 adjourned and reserved her decision until 25 February 2021. On that date she outlined the principles under the Act and the relevant background of the children and SYA. On that day she was considering orders in relation to both JYG and LY [who was 12 years of age at the time of the hearing].
- [17] In relation to LY she made a finding that he has suffered significant harm and is at an unacceptable risk of suffering significant harm now. She decided his need for emotional security was best met in the long term by making a long term order in favour of the Department of Child Safety and that an order on less intrusive terms would not be in LY's best interests.
- [18] In relation to JYG her reasoning was as follows:

“With respect to JYG on the balance of probabilities that and noting LY's – or rather JYG's particular views, and that he is turning 18 on 18 March 2021. In my view, there is no utility in an order being made with respect to JYG.”

- [19] I accept that there were insufficient reasons given in relation to JYG's case in this matter and therefore the only conclusion that can be drawn is that the Magistrate did not fully consider the provisions of s 59 of the Act or alternatively placed undue weight on JYG's wishes. However, it is still necessary to decide whether the final order should be set aside.

Discussion

- [20] This is a tragic case. The family prior to the death of their father was functioning. Although SYA had suffered some health issues and there were some pre-existing child safety concerns but it would appear that there was sufficient safeguards within the family and for the family to stay together. However, it is clear that SYA is not a parent who is currently able to protect the children and has not been for many years. She is currently in custody and she has descended into significant drug use which she has yet been able to control once outside a custodial setting.
- [21] The siblings have strong desire to be together and they are currently together with the exception of RY who is 20 and a regular visitor to the paternal grandmother's house. The paternal grandmother, DY, is not an ideal carer in that, although they having a loving relationship with her, she has health and mobility issues of her own and there are four people living in a two bedroom home with DY sleeping in a recliner at night. However, it is working for the time being.
- [22] The Department's desire to be able to assist JYG beyond 18 is admirable and were JYG more cooperative it would be desirable. However, JYG has shown significant resistance to the Department's help. He was offered counselling with Cornerstones Support and Consultancy and chose not to take it up.¹ JYG remains resistant to any help from the Department although he has developed a transition plan with them. In the affidavit of Kirsty Rowe, an interview with JYG demonstrates his attitude towards the Department.² It is noted during that interview "*JYG hates Child Safety. Does not want to be subject to an order. Child Safety did putrid things to the family by separating them and taking them. Wouldn't let them see each other*". It was noted that JYG was fine when talking about his mother and siblings but his demeanour changed immediately after the interviewer started talking about the likelihood of an application being made for a child protection order. He has previously described the Department as "putrid scum".

¹ Transcript 1-17, 135.

² Affidavit Kirsty Rowe affirmed 14 January 2020, page B60 of the Appeal Record.

- [23] The Department has completed planning for JYG's post school years however he has refused any help to apply to the Department of Housing for accommodation because he wants to stay with his grandmother and siblings. The Department also offered money to purchase a bed of his own but he is sleeping in a bed that belonged to his grandfather and doesn't want to give it up as he has a sentimental attachment to it.
- [24] He has demonstrated a lack of maturity in his inability to attend to his medical needs. However, on the converse side, he has obtained his driver's licence, he has managed to buy a car, and he has used some of the money for his transition to buy accessories for the car. He has employment and a girlfriend. He has completed schooling and is doing additional courses to assist him in his future employment. He has a plan for what he wants to do which involves an apprenticeship. He has stable accommodation with his grandmother in the foreseeable future and he is part of a tightknit group in which encompasses his grandmother and his siblings. He has not been in trouble with the authorities.
- [25] I accept that the Magistrate did not give sufficient reasons for the making of the order. I accept that JYG is a child in need of protection because he has suffered from significant harm and he does not have a parent able and willing to protect him from that harm. However, s 59(1)(a) provides that the Court can only make the order if the Court is satisfied that the child is a child in need of protection **and** the order is appropriate and desirable for the child's protection. Furthermore, the Act mandates that the Court has to take into account the child's wishes or views, that the protection sought to be achieved by the order is unlikely to be achieved by an order under less intrusive terms and that the Court must be satisfied that the child's need for emotional security will be best met in the long term by making the order.
- [26] This is an unusual case. The child has expressed very strong views that he does not wish to engage with the Department or to be subject to an order of guardianship by the Department. He has resisted the Department's assistance in regards to counselling medical treatment. Despite all this, he has managed to finish school and obtain employment and live in a fairly stable situation. If his attitude was different there are services that the Department could provide to him over the years that would be of significant use to him.

- [27] However, given his reaction to a discussion about long term guardianship, the continuing involvement of the Department in his life, in my view, can only lead to emotional instability and resentment given his clear dislike of the Department being involved in his life. The fact that he is nearly 18 means in my view that his attitude should be given significant weight. He is on the cusp of adulthood.
- [28] The appellant suggests that there is a need for parity in this case between LY and JYG and even between JYG and his other siblings RY and MY upon which long term guardianship orders were made, however, in my view this is a different case to his siblings.
- [29] RY is cooperative with the Department and takes advantage of the services that are offered. MY is younger as is LY. LY is also, to an extent, resistant to the intervention of the Department but he is young and the orders are necessary for his protection because of that factor alone.
- [30] JYG is described as happy in his situation at the moment and there is no evidence to suggest that he is especially in need of care in the future. He presents on paper as a young man grappling with some significant issues but able to rise above them and plan a future for himself. The support of the Department is neither wanted nor necessary in his case.
- [31] In the circumstances and given his strong wishes I accept that the order made by the Magistrate was the appropriate order and the appeal is dismissed.