MAGISTRATES COURT OF QUEENSLAND

CITATION:	*Department of Child Safety, Seniors and Disability Services v Mia Buckley (a pseudonym)* [2023] QChCM 8
PARTIES:	**DEPARTMENT OF CHILD SAFETY, SENIORS AND DISABILITY SERVICES** (Applicant) v **MIA BUCKLEY** (Respondent Mother) and **TRACEY COLE** (Mia Buckley's guardian, s113 party)
FILE NO:	Mount Isa CCM 530/23
PROCEEDING:	Application for Temporary Custody Order
COURT:	Children's Court, Mount Isa
DELIVERED ON:	7 November 2023
DELIVERED AT:	Mount Isa
HEARING DATE:	30 & 31 October 2023
MAGISTRATE:	E. Mac Giolla Rí
ORDER:	Temporary Custody Order
APPEARANCES:	Applicant: B. Kelly, OCFOS Mother: Not legally represented. Ms Cole: V. Knox, ATSILS

ORDER

1. On 31 October 2023 I made a temporary custody order in the Department's favour in this matter. This judgement explains my reasons for doing so.

Background

2. This application is in relation to the newborn son of Mia Buckley. Mia is, herself, a 14 year-old indigenous girl with an intellectual disability in the care of the Department of Child Safety, Seniors and Disability Services (*'the Department*'). In these reasons, I will refer to Mia's as yet unnamed son as *'the baby'*.

3. The circumstances under which Mia became pregnant are not entirely clear on the material before me but it is likely that the baby was conceived shortly before or at the time Mia came into the care of the Department.

4. Ms Cole became Mia's legal guardian in March 2014 but Ms Cole became unable and/or unwilling to deal with Mia's anti-social behaviour in the early part of 2023 and relinquished her care of Mia to the Department in March 2023. Mia seems to have left Ms Cole's care for respite in February, with the Department taking over legal custody in March.

5. Separate litigation is on foot in relation whether Ms Cole should continue to be Mia's legal guardian.

The First Application

6. On Friday, 27 October 2023, the Department of Child Safety, Seniors and Disability Services, applied for a Temporary Custody Order in relation the baby.

7. At that time, the Department's plan for Mia's care involved providing Mia with around the clock assistance in caring for the baby under the auspices of a residential care home where Mia and the baby would reside. The model of care anticipated a dedicated carer for Mia.[1]

8. I dismissed that Application on the basis that the baby was not at any risk of suffering harm if an Order was not made.[2] Although Mia's intellectual disability is significant, the evidence before me suggested that the care arrangements for Mia and the baby were good and that there was little or no risk of Mia declining that assistance.

9. In effect, I found that I could not have made an order against a mother with the same degree of disability in circumstances where that mother had a supportive family. In my view, the support for Mia foreshadowed by the Department meant that the baby was not at any material risk of harm.

10. That earlier decision to dismiss the Application was not appealed.

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[1] Sworn application

[2] Child Protection Act s51AE

The Present Application

11. On Monday, 30 October 2023 the applicant applied a second time for a temporary custody order. Although the Application contains additional information about Mia's disability, that additional information was implicit in the earlier information provided about Mia and does not advance the applicant's case in a material way.

12. The only material change in the basis of the Application is that the Department now advises that the residential care facility will not take the baby unless the Court makes an Order placing the baby into the care of the Department.

13. In fact, by the time the matter came on before me just after 6pm on 30 October 2023, Mia had been discharged from hospital and although she had intended going to the residential care home, she was told that she could not take her baby there. Faced with that situation she went to the home of her previous carer, Ms Cole.

14. The precise reason for refusing care to the baby is in the following quote contained in the Application:

> *"[T]he placement provider would be carrying significant risk as without an order they would not have* a *legislative framework around the child to take action. They would only be able to notify and would not have any authority to step in and take action if something were to go wrong".* (Quotation marks and italics in original)

15. On the face of the material, the quote above seems to be attributed to both the residential service provider and Child Safety's internal Placement Services Unit. I requested copies of the correspondence and it transpired that the statement was made by an internal Departmental officer.

16. The only evidence directly from the residential service provider is in an email from an employee of the residential service provider to the Department:

> "*As discussed on the phone with [name] just now, without an ATC [we] are unable to care for Mia and her infant in our residential placement.*

17. There is no exposition of the residential care service's reasons, and the email suggests that the decision followed immediately after phone discussions between the residential care service and Departmental officers.

18. The circumstances of this Application are deeply troubling because if Mia is given the care the Department should be giving her, the baby's circumstances do not meet the criteria for the making of the order sought. The only circumstances justifying the order have come about through the Department's conduct.

19. The Department contends that the need for the order has not arisen as a result of the Department's conduct but because of a position taken by an outside service provider. This may strictly speaking be true but:

a. The Department was on notice since *at least* 13 May 2023 that Mia was pregnant, giving it ample opportunity to plan for Mia and the baby's care.[3]
b. The Department seems to have planned only on the basis that it would necessarily get a protection order for the baby, with no consideration being given to the alternative.
c. In the first Application there was no suggestion that Mia's model of care would be affected by the absence of an order for her baby.[4]
d. The language in the application conflates the views of the residential care provider and the Department's internal Placement Services Unit.[5]
e. The idea that a residential care worker would not be able to intervene to protect the baby without an order is not correct. It seems likely, based on Mia's other conduct, that Mia would provide an authority to the residential care provider to intervene and, in any event, the law allows physical intervention to ensure the safety of others[6] and any perceived risk to the baby's safety could quickly be brought to the Department's attention.
f. I infer from its business model that the residential care service provider's only source of income is the Department and, given the size of the Department's residential care budget, other matters being equal, the residential service provider is likely to be a rule taker rather than a rule setter within that system.

Abuse of process

20. Without coming to a concluded view, I consider that it is likely that, in very limited circumstances, a Magistrate administering the Child Protection Act has an implied power to issue a stay to prevent an abuse of the Court's processes.[7]

21. I consider that an exercise of that implied power would be justified if the Department was, in effect, refusing to care of Mia appropriately for the purposes of forcing the Court to make an order in relation to the baby.

22. Mr Ottaway for Ms Cole sought an adjournment of the proceedings to test the legitimacy of the Department's reliance on the attitude of the residential service provider. Given the urgent nature of the Application, I declined to grant him that time, though should the litigation continue in another form, he may have that opportunity in the future.

23. Ultimately, despite the unfortunate appearance created by how the litigation has proceeded, I accept that the residential service provider has refused to care for the baby unless the Court makes an order. I further find that the refusal is, in all likelihood, a result of the Department's failure to plan appropriately for Mia but that any default on the

[3] I further note the baby was born by c-section, so the Department precise notice of exactly when matters had to be in place.
[4] See in particular [33(d)].
[5] See para 12 of the sworn application.
[6] Criminal Code s273.
[7] *Department of Communities v LE and Ors* [2011] QChC 4, *Brose v Baluskas & Ors* (No 8) [2020] QDC 98, *HDI v HJQ* [2020] QDC 83.

Department's part was not for the purpose of forcing the Court's hand. In those circumstances the question of a stay does not arise.

24. If Mia were taking the baby home to a traditional, supportive home it is highly unlikely that an order could be made because the level of support then available to Mia would exclude a finding that the baby was at an unacceptable risk of harm. The Department's confidence that it would get a child protection order in relation to the baby is troubling because such a stance is, in effect, a bet against the level of care that the Department will provide for Mia.

Is the baby at an unacceptable risk of harm if the order is not made?

25. Mr Ottaway, appearing for Mia's guardian, Ms Cole, contends that Mia will be better cared for by Ms Cole rather than the Department or, in any event, the baby would not be at risk of harm if the order is not made because Ms Cole would care for Mia and the baby.

26. Ms Cole's position is that (a), she is a suitable carer and (b), the Department will not take appropriate care of Mia.

27. In support of her suitability, Ms Cole puts forward the following:

    a. When Ms Cole surrendered Mia to the Department in March 2023, Mia was engaged in anti-social activities, including committing criminal offences. Since becoming aware that she was pregnant, Mia's conduct has improved dramatically and Ms Cole no longer has any concern about Mia's behaviour.
    b. Ms Cole has a suitable home and has bought a pram and a cot.
    c. Ms Cole has supported Mia throughout her pregnancy and has taken Mia to her to various medical appointments.
    d. The Aboriginal and Torres Strait Island Legal Service '*Throughcare*' program would be available to Mia. Under this program, a highly capable Throughcare worker, with only 2 other clients, would be available to assist Mia, including after-hours. Up to 30 hours of support a week would be available to Mia.

28. Ms Cole also contends that the Department would not be an appropriate carer for Mia and the baby because:
    a. The Department is not accountable, keeps no data on the outcomes for children placed in residential care[8] and judgements of the Court call into serious question the efficacy of residential care as a way of caring for children in Mia's circumstances.[9]
    b. The principles in the Act favour keeping indigenous families together. Although Mia and the baby would stay together under either model of care, having Mia with Ms Cole would best uphold those principles.

[8] *Mary Boland (a pseudonym) v Director of Child Protection Litigation* [2023] QChCM 6 at [37].
[9] *Re Noah Jackson (a pseudonym)* [2023] QChCM 5 & 7.

c. Mia has been sexually active while in the Department's care[10] and that this indicates a want of care by the Department given Mia's age and intellectual disability.[11]
d. Mia would be better off in a family home than a residential facility.
e. The residential care provider had not, at the time of the hearing, bought a pram or cot.

29. The Department contends that Ms Cole is not a suitable support for Mia and her baby, in that:
    a. Ms Cole originally took care of Mia and her siblings with the assistance of her now deceased partner. Since Ms Cole's partner passed away, Ms Cole has had difficulty coping with the children.
    b. All of Mia's antisocial behaviour, which resulted in Ms Cole relinquishing care of Mia, developed while Mia was in Ms Cole's care.
    c. At the time Mia was relinquished, one of Mia's other siblings was also relinquished, suggesting issues with Ms Cole parenting go deeper than issues with Mia's anti-social conduct.
    d. On 7 March 2023, a further sibling who was under Ms Cole's' guardianship ceased being under her guardianship, with that role being transferred by court order to the Chief Executive of the Department.[12]
    e. Ms Cole had other children removed from her care in 2019, suggesting a further adverse judicial finding about Ms Cole parenting abilities.

30. The Department sought to rely on the opinion of its officers in relation to Ms Cole's suitability. Phrases such as "*it is the Department's assessment that…"* or "*it has been assessed…*" are repeatedly used in the sworn application, usually as an alternative to including any evidence of the matters covered by that assessment. Such statements will almost never be appropriate in applications of this kind. I confirm that I have had no regard to the opinion of Departmental officers where so expressed and have relied only on such underlying facts as I can identify in the balance of the application.

Decision

31. On balance, I found that the baby would be at an unacceptable risk of harm if I do not make the order sought. I accept that Mia's intellectual disabilities mean that she will need substantial and reliably assistance to care for the baby appropriately. In the short term, there will be risk to the baby if Mia is alone for a substantial amount of time without supervision. At this stage and on the material before me I cannot conclude that Ms Cole would be sufficiently reliable in that supervisory role, even with the assistance of ATSILS' Throughcare. I am concerned that interpersonal conflict between Mia and Ms Cole could result in Ms Cole alienating Mia, which in turn could result in either:
    a. Ms Cole taking over sole care of the baby which would be inappropriate; or

[10] Sworn application at [37(a)]
[11] Though I note the pregnancy is likely to have arisen from conduct in early February, before Mia was in the custody of the Department.
[12] Sworn application at page 2.

b. Mia taking over sole care of the baby which would be equally inappropriate, even with the assistance of ATSILS' Throughcare.

32. I also found that the DCPL would be able to make a determination within the period of the TCO.

33. The 'best' outcome from these difficult circumstances would have been to have Mia and the baby are cared for by the residential service provider without an order being made giving the Department custody of the baby. In my view, if the Department care for Mia appropriately, such care will necessarily protect the baby. As set out above, the option of having the baby with Mia in residential care is not available without the order sought. In light of my findings that, on the evidence before me, Ms Cole was unsuitable to support Mia and the baby, I was required to make the order sought and I did so.