SHORT TERM CARE ORDERS

SYNOPSIS – JUNE 2020

In late January 2020 the rains finally came, washing away the ominous smog that had blanketed much of the state in the preceding weeks. This was, arguably, an appropriate metaphor for what was happening in the NSW Children's Court as the DCJ's Short(er) Term Care Order (STCO) campaign reached fever pitch. Time will tell whether the portentous news starting to emerge from China at the time was also symbolic.

The purpose of this paper is to capitalise on the enforced *rallentando* in judicial activity and take stock of the current case law insofar as it applies to applications for STCOs.

The uncertainty and confusion surrounding the legitimacy of STCOs is due in no small measure to the fact that at the outset it was not entirely clear what was intended. Therefore this discussion begins with a recap on their genesis and the competing arguments about their appropriateness and consistency with legislation.

SHORTER TERM CARE ORDERS 1: VIEW FROM THE DCJ

The DCJ (then DoCS/FACS) first birthed the phrase 'Short/Shorter Term Care/Court Orders' in the late 2000s in a program which did not graduate from regional pilots. The context for its current incarnation is what the DCJ describes as its *Permanency Support Program*.

In a factsheet entitled *Shorter Term Care Orders* published by FACS in December 2018 (in additional to numerous other resources on the subject published that year), the imminent changes to section 79 and their intention were foreshadowed[1]:

> The amendments make it clear that shorter term court orders can be made to support the objectives of the Permanency Support Program in achieving earlier permanency for children and young people.

By way of reminder, the *Children and Young Persons (Care and Protection) Amendment Act 2018,* made a number of changes to the *Children and Young Persons (Care and Protection) Act 1998* (and

[1] Reflecting the explanatory notes to Children and Young persons (Care and Protection) Amendment Bill 2018

to a lesser extent the *Adoption Act 2000)* which came into effect on 29 January 2019. Crucially for the purposes of this discussion, the following subsections were added to section 79:

> (9) The maximum period for which an order under subsection (1) (b) may allocate all aspects of parental responsibility to the Minister following the Court's approval of a permanency plan involving restoration, guardianship or adoption, is 24 months.
>
> (10) Subsection (9) does not apply if the Children's Court is satisfied that there are special circumstances that warrant the allocation being for a longer period.

The Factsheet continues:

> Shorter term court orders mean that the Department of Family and Community Services (FACS) needs to focus on achieving the permanency plan goal earlier to reduce the time that children spend in out-of-home care. This will lead to better outcomes for children.
>
> Where the Children's Court has approved a permanency plan involving restoration, guardianship or adoption, the maximum period of an order giving parental responsibility to the Minister will be 24 months, unless the Court is satisfied that special circumstances exist.
>
> Previously, long term parental responsibility orders were often sought until a child turned 18 years of age. This practice did not support ongoing assessment and service delivery where the case plan goal is restoration, guardianship or adoption.
> Shorter term court orders will provide greater certainty that a child's permanency plan will be achieved within 24 months after the order is made by the Children's Court.

Whilst applications for STCOs began to emerge in 2018, the program really gained traction throughout 2019. Most typically applications were made for an order allocating parental responsibility to the Minister for up to 2 years during which time it was foreshadowed that the assessment work, which had traditionally *preceded* the making of a longer final order, would be carried out. The remarkable feature of these new applications was not that the duration of parental responsibility to the Minister was limited to two years or less (which of course was neither new nor unusual) but the fact that there was nothing proposed to take effect *thereafter* . In other words at the end of the two years (or less) of parental responsibility there would be a sheer cliff face beyond which the court had no jurisdiction.

SHORTER TERM CARE ORDERS 2: REACTION

The DCJ narrative in support of STCOs reproduced above begins with:

> Where the Children's Court **has approved a permanency plan involving restoration, guardianship or adoption**, the maximum period of an order giving parental responsibility to the Minister will be 24 months, unless the Court is satisfied that special circumstances exist.
>
> [Emphasis added]

What has tended to happen in practice is that the DCJ has presented documents titled 'care plan' which mention and/or allude to the possibility that one or more of these placement options may be recommended at some time in the future. Whether these can be classed as permanency plans is moot, not least because the legislation itself offers little assistance in defining the concept. The *Care Act* is of course not generally regarded as a linguistic triumph. Described by the President[2] as an:

> inextricable mixture and combination of both judicial and administrative powers, duties and responsibilities…

it is cancerous with present participles such as *including* and *involving* which fall spectacularly short of the standard of certainty that an act of parliament should at least strive for in setting out a definitive code for an advanced and orderly society.

That is typified by some of the definitions in section 3 including the startling revelation that a *permanency plan* is:

> a plan that makes provision with respect to permanency planning.

Therefore a consensus as to what a *"…permanency plan involving…"* means in this context was never likely. The statutory ambiguity appears to have been taken by the DCJ as licence to use the phrase 'permanency plan' in the STCO context as a synecdoche for *a scheme of work leading to a permanency plan*.

The DCJ narrative continues:

> Previously long term parental responsibility orders were often sought until a child turned 18 years of age. This practice did not support ongoing assessment and service delivery where the case plan goal is restoration, guardianship or adoption.

The implication that the ongoing assessment and service delivery was not occurring because orders allocating PR to the Minister to 18 were being sought is a troubling one for the following reasons:

[2] In DFACS (NSW) and the Colt Children [2013] NSWChC 5

1. **The basic premise that the seeking of PR to the Minister to 18 impacts casework and service delivery:** From a legal perspective, it is of course not the *seeking* of the order that determines the outcome but the *making* of the order by the court. That much is obvious when said out loud. No less obvious to those in the know is that the court only *makes* orders allocating PR to the Minister to 18 where
    a. The Secretary has assessed that restoration is not realistic (because remedial service delivery had been attempted and failed) and
    b. The court has accepted that assessment and
    c. The court has approved a permanency plan other than restoration

    Crucially therefore, the making of the order is a *product of* service delivery and assessment rather than an impediment to it taking place. Furthermore, the making of that order does not, by any means, prevent further assessment. Therefore, the statement:

    This practice did not support ongoing assessment and service delivery where the case plan goal is restoration, guardianship or adoption

    is arguably a euphemistic admission that the DCJ had identified a need for changes in their internal policy and practice but was using the court to force those changes. If that premise is accepted, what was being sold to the community as a bold and progressive child welfare initiative was in fact merely a deflection of responsibility.

2. **Restoration** In cases where the service delivery and assessment has resulted in a recommendation of restoration, it was never the case, and continues not to be, that orders allocating PR to the Minister for greater than two years were sought or made. This is not least because if a longer period of PR Minister was deemed necessary then it was could not be characterised as a restoration case in the first place (even through the lens of the considerable latitude now allowed by section 83).

3. **Guardianship** In cases where Guardianship is assessed as appropriate it is a guardianship order that is made not an order allocating PR to the Minister.

4. **Adoption** The reference to adoption in this context (and indeed in section 10A) is incongruous because adoption is not an order that can be made by, and therefore not recommended to, the Children's Court.

Back to the narrative:

> Shorter term court orders will provide greater certainty that a child's permanency plan will be achieved within 24 months after the order is made by the Children's Court.

This statement too appears not to stand up to examination for two reasons:

1. If it is accepted that once the eyes of the court had been averted and the matter is left to compliance with a section 82 order rather than ongoing judicial oversight, this arguably *reduces* the certainty that permanency will be achieved more promptly rather than provide *greater certainty*.
2. If one assumes that the DCJ's intention was that this phrase is intended to foreshadow achieving permanency more quickly after final orders, that still does not explain how that would be quicker than the existing scheme where the court will not let go of the case until permanency has been achieved.

If these arguments are accepted then it follows that the DCJ promotional material offered limited assistance in truly understanding how these new applications would look in practice. That has only become possible as they started to emerge: As alluded to above, typically an order allocating PR to the Minister is sought pursuant to a care plan which mentions section 79A guardianship, adoption or restoration as a future possibility but stops short of recommending it as an order that can be made now. Instead these applications come with a promise that a later application for a further order will be made before the expiry of the current one. In other words, the care plan combined with an order for PR for 2 years is intended to defer the critical assessment and permanency decision until after the final order is made.

The difficulty with this approach is that it is inconsistent with sections 78A and 83(7A) which combine to require long term security and a reasonably clear picture for the foreseeable future as essential permanency planning components:

> <u>Section 78A</u>
>
> (1) For the purposes of this Act, permanency planning means the making of a plan that aims to provide a child or young person with a stable placement that offers **long-term** security and that:
> (a) has regard, in particular, to the principles set out in section 9 (2) (e) and (g), and

(b) meets the needs of the child or young person, and

(c) avoids the instability and uncertainty arising through a succession of different placements or temporary care arrangements.

(2) Permanency planning recognises that **long-term** security will be assisted by a permanent placement.

(2A) A permanency plan need not provide details as to the exact placement in the **long-term** of the child or young person concerned but **must be sufficiently clear and particularised so as to provide the Children's Court with a reasonably clear picture as to the way in which the child's or young person's needs, welfare and well-being will be met in the foreseeable future.**

Section 83(7A)

83(7A) For the purposes of subsection (7) (a), the permanency plan need not provide details as to the exact placement in the long term of the child or young person to whom the plan relates but **must provide the further and better particulars which are sufficiently identified and addressed so the Court, prior to final orders being made, can have a reasonably clear plan as to the child's or young person's needs and how those needs are going to be met.**

[Emphasis added]

SHORTER TERM CARE ORDERS 3: VIEW FROM THE COURT SO FAR

Department of Family and Community Services and Bethany Smith (Pseudonym) (Unreported 8 August 2018)

Ellis CM was asked by FACS to make an order allocating PR to the Minister for 12 months to give effect to a care plan which proposed that during that time the existing foster carers would be assessed for guardianship which, if found to be suitable, would result in a section 90 application to make it so. The Secretary acknowledged the court's concern that if, somehow, the section 90 application did not eventuate, PR would revert to unsuitable parents. Refusing the application Ellis CM said:

"The Secretary is asking for a short term order, although there is currently no legislative framework for that Order to be made by this Court. The Children's Court is a Court of statute and is obliged to make determinations provided for in legislation, in this case, the Children and Young Persons (Care and Protection) Act 1998…

…Section 78A requires permanency planning to be considered. Subsection (1)(c) states that the Court must avoid the instability and uncertainty through a succession of different or temporary placements. Subsection (2A) requires that it must be sufficiently particularised for an order to be made. Essentially that is not the case in the evidence before me…

…there is no power, for the Children's Court is bound by Section 78A that repeats the "long term" placement of the child. This renders a short-term order as sought by the Secretary impossible under the current legislative framework…

> …I therefore require a new care plan to be filed, specifically one that does not inadequately, inappropriately and against legislative power suggest a short-term order."

Department of Community Services (NSW) and the Stonsky Children [2019] NSWChC 8 (Hayes CM 29 November 2019):

A care plan proposing an order for PR Minister for 2 years in anticipation of an adoption application on behalf of the current carers was opposed by the parents and the ILR who argued that the care plan was 'aspirational'. Whilst finding that the care plan was more than merely aspirational, it was nevertheless rejected because there was no mechanism to ensure that a section 90 application would be made if the adoption is not achieved in 2 years. The DCJ was directed to file a further care plan.

Stonsky, curiously, was cited in support of subsequent applications for STCOs because the Court agreed with the DCJ that the care plan was more than merely aspirational. However rather than assist the cause, it turned out to be a harbinger to the cases that followed which also lamented the absence of a mechanism to return the matter to court to avoid PR reverting to unsuitable parents at common law.

Department of Communities and Justice (DCJ) and Teddy [2020] NSW CHC 1 (Johnstone P 29 January 2020):

The DCJ proposed an order allocating parental responsibility to the Minister in all aspects except religion and culture, for 2 years, with undertakings from the Secretary "*…to file a section 82 report at seven months as to the process (sic) of the Guardianship assessment"* and *"…to file a section 90 application at ten months with a view to guardianship…"* In an ex tempore judgment declining the request, the President observed the following:

> "The reality is as follows. The scenario proposed by the Secretary contemplates that of necessity a s90 application will need to be made in these proceedings even if the proposal to investigate a guardianship proves untenable. The alternative proposed by the other solicitors at the bar table, namely an order until age 18, contemplates that a s90 application would not necessarily be required if guardianship eventually provides untenable after assessment and the other precursor steps are undertaken, including the informed consent of the proposed guardians….
>
> The Secretary, if it does wish to proceed with a guardianship proposal in due course, is not precluded in any way from doing so under s 90, so that he is not in any way prejudiced by a long term order to the age 18….It is for this reason that in my view a short term order as proposed is neither necessary or desirable. In my view, the Act contemplates the minimisation of the effect of court proceedings on children and their families: s 94(1). But more importantly and shortly stated it seems to me that a course of action that involves, of necessity, a further application to this Court which might prove unnecessary is not consistent with the Care Act or the best interests of the child..."

In passing, His Honour also found that sections 79(9) and 79(10) did not apply in this case because:

- the Secretary did not seek an order allocating all aspects of parental responsibility but rather

an order sharing aspects with the proposed carers

- the Secretary did not seek the '…approval of a permanency plan involving restoration, guardianship or adoption…' but rather of a plan that

> "…contemplates the possibility of a guardianship application to be made some time in the future"

Nevertheless His Honour took the trouble to provide clarity to the interpretation of 'involving':

> "The word "involving" is crucial to the application of the section… The Concise Oxford English Dictionary defines "involve" as "include as a necessary part or result". The word "necessary" is also defined in that dictionary as: "required to be done, activated or present; needed" or "inevitable, a necessary consequence"…. Google... indicates that the verb, gerund or present participle "involving" means "have or include (something) as a necessary or integral part or result"….The permanency planning in this case…does not include guardianship as a necessary or integral part or result. It merely proposes to consider guardianship in six months' time and, if appropriate, make an application."

Department of Communities and Justice (DCJ) and Jake [2020] NSWCh 2 (Hayes CM 18 March 2020)

The court found, without opposition, that there was no realistic possibility of restoration to either parent and was asked by the DCJ to make an order allocating parental responsibility to the Minister for two years to give effect to a care plan which contemplated an adoption application at the end of that period. Opposed by the ILR, the matter went to hearing. The court distinguished the current case from *Stonsky* where the proposed adopters had been assessed and had considerable experience, neither of which could be said about the current case. In refusing the application the court expressed concern that if an adoption application was not made within the two years then there would be no basis to return the matter to the children's court under section 90 and, thereby, no mechanism to prevent PR reverting to unsuitable parents at common law. The court went on to foreshadow the approval of a care plan that recommended parental responsibility to the Minister to 18.

Department of Communities and Justice (DCJ) and Jack and Jill [2020] NSWCh 3 (D Williams CM 3 April 2020)

The court followed *Teddy* as a "*clear formulation of legal principal"* and was critical of the DCJ's attempts in the current case to critique that decision. The court considered in detail:

- the meaning of a permanency plan involving guardianship
- notwithstanding that definition, the significance of section 79(9) on the permanency planning requirements as a whole

Meaning of a *permanency plan Involving guardianship*

> "(1) A permanency plan involving guardianship is one that has guardianship as a necessary or integral part or result: DCJ and Teddy [2020] NSWChC 1.

(2) For guardianship to be a necessary or integral part or result, there must be a reasonable degree of inevitability about a guardianship order being made at an appropriate time in the foreseeable future.
(3) It need not, and indeed could never, be the case that guardianship is a certainty. That is because all planning for the future involves a degree of speculation which may or may not come to fruition.
(4) The absence of important conditions precedent to the making of a guardianship order may well demonstrate that a permanency plan is not one involving guardianship. Such important conditions precedent may include the prospective guardian's consent and a positive suitability assessment.
(5) There may be some conditions precedent which have not been met but about which themselves there is a reasonable degree of inevitability. In those circumstances it may well be that the permanency plan involves guardianship."

The court found that this particular case fell well short of inevitability not least because the carer herself did not want guardianship.

Significance of Section 79(9)

The court also went on to consider the function of section 79(9) and a *'misapprehension'* about its significance:

"As His Honour noted at paragraph 28 of Re Teddy, s79(9) is proscriptive, in that it places a limit on the Court's power to allocate parental responsibility to the Minister in certain circumstances. It is not in any way facilitative. That is, it does not provide some additional power to the Court that would not be present if the circumstances set out in 79(9) were not met. Most importantly, it does not do away with the requirement in s83(7) that the Court must not make a final care order unless it expressly finds that permanency planning for the child or young person has been appropriately and adequately addressed, or the ultimate requirement that the proposed order must be in the child or young person's best interests….
…In many ways, then, the analysis of s 79(9) in this case is moot. My consideration as to whether permanency planning has been appropriately and adequately addressed does not turn on whether I am of the view that the Department is proposing a permanency plan involving guardianship within the meaning of s 79(9).

For abundant clarity, I reiterate that even if a court determines that a permanency plan is one involving guardianship, that determination does not in any way abrogate the requirement that the Court must expressly find that permanency planning has been appropriately and adequately addressed. Indeed, the two questions are distinct. Even if a permanency plan was not one involving guardianship, a court could make an order of two years or less if by doing so it was satisfied that permanency planning was appropriately and adequately addressed. Conversely, even if s 79(9) did apply, that does not allow the Court to endorse a permanency plan that did not otherwise appropriately and adequately address permanency planning, or was not in the child or young person's best interests."

The court then went on to require new permanency plans for the children applying the same reasoning as in Teddy namely:

- that under the DCJ's plan, further litigation was necessary but avoidable (inconsistent with section 94(1))
- and that without further litigation, parental responsibility would revert to an unsuitable parent at common law (inconsistent with the need for long term security envisaged by section 78A(1))

SHORTER TERM CARE ORDERS 4: THE FUTURE

In summary, the following appear to require attention if the STCO campaign is to continue in its current form:

Technical

1. The court has repeatedly arrived at the conclusion that however advanced or realistic the plan is, the absence of orders *after* the two years (and the inevitable need for further litigation) is the defining issue rather than what may or may not occur *during* the two years because the lack of provision after the two years is inconsistent with sections 78A + 83(7A).

2. Section 79(9) by its own definition does not apply to the kind of case where a period of PR to the Minister for longer than 2 years would be necessary (where guardianship or restoration are *not* indicated). Furthermore, as the court in *Jack and* Jill succinctly put it: it is *proscriptive* rather than *facilitative*. In other words it restricts the ambit of the *Act* (specifically section 79(1)(b)) rather than expand it to enable these orders.

3. In all the cases reported so far the court was unmoved by the DCJ's promises of section 82 reports or the warning that a long term order would result in less casework.

Philosophical

Diverting children from OOHC is a win for everybody – from a child welfare perspective and from a political and commercial one. Therefore it may be that a properly lobbied argument (balancing the tension between delaying the forming of attachments and the hazards of foster care) in favour of extending the time allowed prior to final orders, for a comprehensive plan for permanency to be constructed, would have attracted significant support.

Rather than do that however, ineffectual legislation was pushed through and the court was routinely asked to disenfranchise itself without such a plan which, if successful would have had the effect of:

- bypassing the checks and balances required by the legislation before a permanency plan is approved and final order made and
- rather than a *"achieving the permanency goal earlier"*, actually having the opposite effect by deferring permanency for up to 2 years.

When viewed through that lens, it is perhaps unsurprising that so far the court has, certainly in the reported decisions, given these applications short shrift. If those decisions are accepted as the current state of the law then the journey that saw the promotional material published, tested and ultimately (so far) discredited has caused anxiety, uncertainty and a degree of resentment within the child protection community which the DCJ now needs to recover from. That can only come with a focus on connecting the dots between these new types of application and, as promised,

> …achieving the permanency plan goal earlier to reduce the time that children spend in out-of-home care [leading to] better outcomes for children.

As at the date of this piece, whilst the curve has flattened somewhat, there are still anecdotal reports of these applications being made. Whether the societal reset that flowed from that portentous news from China in late January extends to the STCO campaign, remains to be seen.

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1 June 2020