



Childrens Court New South Wales

Medium Neutral Citation: **Re Mary [2014] NSWChC 7**

Hearing Dates:	13 November 2014
Decision Date:	21/11/2014
Jurisdiction:	Care and protection
Before:	Children's Magistrate Graham Blewitt AM at Port Kembla
Decision:	Application dismissed
Catchwords:	CHILDREN - Care and Protection - Interim orders - powers to amend - whether s 90 application required
Legislation Cited:	Children and Young Persons (Care and Protection) Act Sections 69,70A and 90
Cases Cited:	Re Timothy [2010] NSWSC 524
Category:	Interlocutory applications
Parties:	Department of Family and Community Services The Mother The Father The Child
Representation:	Ms Askew for the Secretary Mr Hill for the mother Mr Clowry for the father Ms Lobegeier - agent for Ms Ung for the child (ILR)
File Number(s):	2014/43
Publication Restriction:	Pseudonyms have been used in order to anonymise the children and parties

JUDGMENT

BACKGROUND

- 1 These proceedings relate to a young child, Mary Smith, who was born on 27 May 2012. Care proceedings were commenced by Family and Community Services (FaCS) on 23 July 2014 in circumstances where the Department held concerns that the child's mother, Kerry Smith, was not protective of the child, following criminal charges being brought against the child's father, Neil Smith, in relation to allegations that he had sexually assaulted his nine year daughter, Sally Smith, in April 2013.
- 2 Very briefly, Sally's parents were separated and Sally and her brother regularly spent weekends with her father in Narooma. In October 2013 Sally disclosed to her mother that the father had been sexually assaulting her over a three to four year period, commencing when she was in Year 1 at school, and that the last incident had occurred during the last weekend contact visit that had occurred in April 2013. The matter was reported to the police and following an investigation the father was charged with two counts of aggravated sexual assault, alleging assaults between 1 March and 30 April 2013.
- 3 In light of these circumstances Departmental caseworkers made a home visit to the parent's home on 9 January 2014 to assess Mary's welfare. A safety plan was developed, and accepted by the parents, that involved the mother supervising all contact between the father and Mary.
- 4 A safety review was conducted on 3 June 2014 following the father being classified as a person who may cause harm

to children (PCH). As a consequence the mother agreed to leave the family residence and to reside with her aunt and uncle, and that all contact between Mary and her father would be supervised by the maternal aunt and uncle.

- 5 In July 2014 the mother breached the safety plan of 3 June 2014. She deceitfully informed her aunt and uncle that the Department had authorised her and Mary to return to reside with the father. No such authorisation had been given. The mother left the residence of her aunt and uncle and returned with the child Mary to reside with the child's father at his residence.
- 6 On 18 July 2014 Departmental case workers made a home visit to the father's residence, where the mother and Mary were sighted. The mother denied that the father was present in the premises. Shortly after, the father emerged from another room, not realising the presence of the caseworkers. The father became aggressive. It subsequently came to light that when the mother was living with her aunt and uncle, she had told them that she was taking Mary to visit the maternal grandparents, however, that was not the case. Instead the mother was staying with the father during those periods, with Mary. This was in breach of the safety plan.
- 7 In the circumstances, the Department caseworkers formed the view that the mother was not complying with the safety plan, and as a consequence, Mary was at risk of harm, by reason of the unresolved criminal charges against the father, involving allegations that he had sexually assaulted another daughter. These care proceedings were lodged by way of an initiating application filed on 23 July 2014.

INTERIM ORDER

- 8 The proceedings were first before this Court on 25 July 2014, when an Interim Order was made, pursuant to s 69 of the *Children and Young Persons (Care and Protection) Act 1998* (the *Care Act*), allocating parental responsibility to the Minister until further order.

THE CRIMINAL TRIAL

- 9 The trial involving the father's criminal charges commenced at the Bega District Court on 29 July 2014 but the trial was aborted on day 2, on 30 July, when Sally's mother inadvertently raised the father's criminal record before the jury when she was giving evidence.
- 10 A second trial commenced during the same sittings of the District Court, commencing on 4 August and ending on 6 August when the presiding judge directed the jury to enter an acquittal.
- 11 This Court does not have a copy of the indictment, however, it appears from a perusal of the trial transcript, which has been tendered in these proceedings, that it was framed narrowly in terms of the dates of the alleged offences. There was a discrepancy in Sally's evidence relating to the events she said had occurred during her last contact visit to her father's home, which lead to a reasonable doubt being created, and hence the directed acquittal.

APPLICATION TO WITHDRAW CARE PROCEEDINGS

- 12 Following the father's acquittal, the Department sought to withdraw the care proceedings on 14 August 2014. This application was opposed by the Independent Legal Representative (ILR) of Mary, on the basis that Sally had disclosed sexual impropriety by her father over a three to four year period, however, the Crown had elected to bring an indictment confining the allegations to two incidents that had occurred over one weekend at the end of April 2013.
- 13 Following submissions from the parties, this Court refused to grant leave for the Department to withdraw the care proceedings involving Mary.
- 14 The matter was then adjourned to enable the Department to obtain further information, including transcripts of the criminal trial, which would further clarify the basis of the directed acquittal following the criminal trial before the Bega District Court.

APPLICATION TO VARY INTERIM ORDER

- 15 The proceedings were last listed before this Court at Nowra on 13 November, when other orders were made regarding material either produced or being sought under subpoena.
- 16 The parents maintained their earlier position that they were opposing the making of a finding that the child Mary was in need of care and protection and that accordingly these proceedings should be dismissed. A hearing was fixed, to consider the question of "establishment", on 15 January 2015.
- 17 Towards the conclusion of the proceedings on 13 November, Mr Hill, appearing for the mother, made an oral

application to the Court for a variation of the Interim Order that had been made on 25 July this year, and which had allocated parental responsibility for the child Mary to the Minister, until further order.

- 18 The Court reminded Mr Hill of the decision in *Re Timothy* [2010] NSWSC 524 and the need for the mother to file an application under s 90 of the *Care Act* if a variation was sought in relation to the current interim order.
- 19 Mr Hill submitted to the Court that the decision of Rein J in *Re Timothy* is not finally conclusive on the issue, that this Court does have power to amend the current interim order without the need to enliven the provisions of s 90 of the *Care Act*. Mr Hill submitted that the Court's power to make an interim order placing the child Mary in the parental responsibility of the natural parents is to be found in sections 69 and 70A of the *Care Act*.
- 20 In respect to this aspect of Mr Hill's submissions, Ms Askew for the Secretary, relied on the decision in *Re Timothy* and submitted that it was necessary for the mother to file an application under s 90 if a variation of the interim order was sought. The agent for Ms Ung (ILR) was not instructed in relation to the application.
- 21 Each of the parties made submissions in relation to the question of the status of the current Interim Order and whether it should be varied, however, I will deal with this issue later in this judgment.
- 22 On 13 November, when the matter was before the Court as one of the matters listed for mention in the Care list, and with no notice being given regarding the application to vary the Interim Order, and taking into account the materials that had been filed recently in the proceedings, which had not been read by the Court, I adjourned the proceedings to the Port Kembla Children's Court on 21 November for a decision regarding the question of the need for a s 90 application to vary the interim order, and in the event that the Court held that a s 90 application was not required in the circumstances, for a decision in relation to the oral application to vary the Interim Order.

DISCUSSION

- 23 Following the Supreme Court decision of Rein J in *Re Timothy* [2010] NSWSC 524 it has been the practice in the Children's Court to require a party seeking to vary an interim order to do so through the procedures set out in s 90 of the *Care Act*.
- 24 The relevant part of the decision of Rein J in *Re Timothy* appears at paragraphs 59 and 60 of the judgment, which states:

59 There is potentially a difficulty with the conclusion that Baptie CCM had no power to revisit the question of what orders should be made in the absence of an application by the Director-General or an application for leave by the parents under s 90. The first relates to the question of whether multiple applications can in any event be made by the Director-General, and the second is whether s 90 is available to parties who wish to challenge interim orders. There is no doubt that leave is required under s 90(1), but there is also an issue as to whether s 90 can be availed of in respect of interim orders. In *Re Elizabeth* [2007] NSWSC 729, Palmer J commented that s 90 provided for rescission or variation of an interim care order by the Children's Court if there has been a significant change of circumstances, a view endorsed by Gzell J in *Re Alan* (2008) 71 NSWLR 573. A different view was taken by Kirby J in *Re Edward* (2001) 51 NSWLR 502 at 513 ([55]).

60 I do not need to decide the point, but:

- (1) given the absence in s 90(1) of any express restriction of the care orders to final care orders and my view that "care orders" includes interim care orders, except where the terms of the section make it clear that it is only dealing with final orders (for example, s 78), as held in *Re Jayden*;
- (2) the absence of an appeal from the District Court, by virtue of s 91(1), from interim care orders;
- (3) the requirement for leave pursuant to s 90 and the requirement for significant change as filters; and
- (4) the significance of an interim removal order I would respectfully follow the approach of Palmer J in *Re Elizabeth* and Gzell J in *Re Alan*.

- 25 There can be no doubt, in my respectful opinion, that an interim care order is a care order for the purposes of a s 90 application. Nor can there be any doubt that the provisions of s 90 are available in respect of applications to rescind or vary interim orders.
- 26 I am not convinced, however, that it is essential that the provisions of s 90 must be used on every occasion that a party seeks to vary an existing interim order.
- 27 In my experience presiding in Children's Court matters for almost eight years, interim orders are made for varying periods. Although it is not my personal practice, I have nevertheless seen other Magistrates make interim orders that are to remain in place "until final orders" are made. It is very common in my experience, and it is my usual practice, for interim orders to be made until "further order". It is also very common in my experience, particularly in cases where fresh care proceedings are commenced, and where there are compelling reasons in the initiating care application, for an interim order to be made, in favour of the Minister, for a limited duration, namely until the next occasion that the

matter is listed before the Court. This practice provides procedural fairness and enables the parties, usually the parents, to consider the application. It also provides them with an opportunity to file a response to the application, and to prepare submissions in relation to the need for an interim order. It also enables for the matter to be set down for a hearing on the issue, in accordance with Practice Direction 5, if there is a dispute.

- 28 The very nature of the last mentioned type of interim order contemplates that it is only a time limited interim order that is in place. There has never been any suggestion in my experience that an application pursuant to s 90 is required to vary the initial interim order.
- 29 Neither the *Care Act*, nor the decision in *Re Timothy*, allude to the nature of the terms of interim orders as set out in paragraph 27. In my view the Court has inherent powers to make such orders to ensure procedural fairness to the parties.
- 30 I am satisfied that where an interim order is made in terms that it will remain in force until "further order" also contemplates that circumstances may arise, before the making of final orders, where it is necessary to vary the initial interim order.
- 31 Such circumstances would not preclude a party bringing an application under s 90, but in my view it is not an essential requirement.
- 32 The process of applying the provisions of s 90 to an application to vary an existing interim order does create additional litigation for the parties, and tends to slow the proceedings down, as there are separate processes involved to satisfy the requirements of a s 90 application. These additional steps are, in the ordinary run of cases, unnecessary in my view. The Court is able to cope with oral applications to vary interim orders in matters that are before the Court, and to do so in a manner that provides the necessary opportunities for all of the parties to address and respond to the application. The matter currently before the Court is a case in point.

DETERMINATION OF QUESTION REGARDING S 90

- 33 In the absence of express provisions in the *Care Act* that require the application of the provisions of s 90 to vary an existing interim order, and having regard to the inconclusive remarks of Rein J in *Re Timothy*, I find that the Court does have the power to entertain an oral application for varying of an existing interim order, without the need for the moving party to file an application pursuant to s 90.

THE ORAL APPLICATION TO VARY THE EXISTING INTERIM ORDER

- 34 I now turn to the application that was made on 13 November to vary the interim order made on 25 July this year, which order allocated interim parental responsibility to the Minister until further order.
- 35 Having regard to the material contained in the initiating care application which was filed on 23 July 2014, it is clear in my view that there was ample evidence or information provided to the Court that justified the making of the interim order mentioned in the preceding paragraph. The making of the interim order clearly was justified having regard to the requirements of s 69 and 70A of the *Care Act*, which provide:

69 Interim care orders

(1) The Children's Court may make interim care orders in relation to a child or young person after a care application is made and before the application is finally determined.

(1A) The Children's Court may make an interim care order prior to determining whether the child or young person is in need of care and protection, if the Court is satisfied that it is appropriate to do so.

(2) The Director-General, in seeking an interim care order, has the onus of satisfying the Children's Court that it is not in the best interests of the safety, welfare and well-being of the child or young person that he or she should remain with his or her parents or other persons having parental responsibility.

70A Consideration of necessity for interim care order

An interim care order should not be made unless the Children's Court has satisfied itself that the making of the order is necessary, in the interests of the child or young person, and is preferable to the making of a final order or an order dismissing the proceedings.

- 36 Mr Hill, on behalf of the mother, submits that having regard to the mother's compliance with the initial safety plan that was put in place, by agreement, on 9 January this year, and which was not breached by the mother; and having regard to the apparent arbitrary classification of the father as being a risk to children (a PCH), which led to the second safety plan being put in place on 3 June 2014 (which was breached by the mother); and having regard to the acquittal of the father following the trial in the District Court in August this year; and having further regard to the Department's position in August, to have the care proceedings withdrawn, Mr Hill submits that the Court should now, relying on the powers

set out in sections 69 and 70A of the *Care Act*, vary the current interim order by allocating parental responsibility to the mother in terms that would keep the initial safety plan made on 9 January 2014 in place, namely that the mother would supervise all contact between Mary and her father. Mr Hill further submits that the Department has not discharged the onus that is set out in s 69(2).

- 37 In my respectful opinion, Mr Hill misconceives the nature of the onus set out in s 69(2). In my view the Secretary discharged that onus when the matter was before the Court on 25 July 2014 and the Court put an interim order in place until further order. Once the onus has been discharged and an interim order has been made, there is no continuing onus on the Secretary to satisfy "the Children's Court that it is not in the best interests of the safety, welfare and well-being of the child or young person that he or she should remain with his or her parents or other persons having parental responsibility".
- 38 It is my view, that there is an onus on the mother, in the circumstances where the Court has already made an interim order, to satisfy the Court it is in the best interests of the safety, welfare and well-being of the child to be with her parents pending the Court's final determination of the proceedings.
- 39 Mr Clowry, on behalf of the father, supported the mother's application.
- 40 Mr Askew, for the Secretary, opposes the mother's application to vary the interim order. Ms Askew submits that the application has no merit, pointing out that the Department initially tried to work with the mother; putting in place a safety plan, which was subsequently varied and breached by the mother when she removed the child from the home of the maternal aunt and uncle and returned to live with the father. Following the father's acquittal in the District Court the Department sought to withdraw the proceedings, but the Children's Court refused to grant leave for the matter to be withdrawn. Action was then taken to obtain materials from the trial and this has led to a delay, but not one caused by the Department. In relation to the Department's concerns, the child Sally had made substantiated allegations that she had been sexually assaulted by her father over a 3 to 4 year period, although the father's criminal trial was very narrow in its scope, being confined to two alleged assaults over one weekend in April 2013, when Sally was nine years old. Ms Askew submitted that the child did not waiver in her allegations against her father.
- 41 Ms Lobegeier, acting as agent for Ms Ung, the ILR, was placed in a difficult position as she had no instructions in relation to the application to vary the interim order. Prior notice that such an application was being made had not been given. She did submit, however, that the child's allegations had been substantiated by JIRT, that the mother did breach a safety plan for Mary that had been put in place by the Department, and consequently the mother's protective capacity has been put into doubt. Ms Lobegeier further submitted that neither parent had disclosed that there had been an AVO in place in January 2014 protecting the child Sally from the father. Ms Lobegeier reminded the Court that the safety of the child Mary was paramount, and that she is currently placed with the maternal grandmother, in a family placement.

DETERMINATION OF APPLICATION TO VARY INTERIM ORDER

- 42 The Court has now had the opportunity to read the materials filed recently in these proceedings, which includes the transcripts of the father's two trials in the Bega District Court in August this year.
- 43 It is clear from reading those transcripts that the prosecution chose to run a very narrow case in terms of the period of the two alleged assaults. I also note the comment of the presiding trial judge, Judge Colefax SC, on 30 July (page 81 of the transcript) that the child victim, Sally, was an impressive witness.
- 44 Of major concern is the breach by the mother in July this year, that is prior to the father's trial in the District Court, of the safety plan that had been put in place to protect the child Mary. The breach involved substantial deceit on the part of the mother, deceit of both her aunt and uncle, and the Department.
- 45 In my view having regard to the broad nature of the sexual assault allegations involving the father, which span a number of years; the narrow scope of the criminal trial; and the mother's behaviour in not acting to protect the child Mary in accordance with an agreed safety plan that had been put in place, I am satisfied that it is in the best interests of the safety, welfare and well-being of the child Mary to remain in the parental responsibility of the Minister, which will involve the child remaining in a placement with the maternal grandmother. The child would be at risk if returned to the mother's care.
- 46 Accordingly the application to vary the current interim order is dismissed.