EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.

IN THE FAMILY COURT
AT PAPAKURA

FAM-2015-055-000249
[2016] NZFC 10455

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Applicant
AND	PA EE Respondent
AND	JA Other Party
AND	BJ Child the Application is About

Hearing: 21 November 2016

Appearances: Mr Bali for the Chief Executive
H Ellis as Lawyer for the Child

Judgment: 9 December 2016 at 11.00 am

RESERVED JUDGMENT OF JUDGE A J TWADDLE
[Application for Declaration]

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[1] This is an application for a declaration in respect of BJ aged 12 months.

[2] BJ is living with a maternal whanau member, AL and her husband. It is anticipated by the Chief Executive that this will be a permanent placement.

[3] BJ's parents are PA and EE. They are both minors. Ms PA is 16½; Mr EE is 17½.

[4] Ms PA was served on 30 December last year and on 22 April this year her mother, JA, was appointed to be her litigation guardian.

[5] DNA testing undertaken in March this year confirmed that Mr EE is BJ's father.

[6] On 2 June the Court made this minute:

> [1] Efforts to involve EE in these proceedings have been significant and unsuccessful;
>
> [2] The matter needs to progress without further delay;
>
> [3] Substituted service of any documentation is to occur by way of service upon EE's mother;
>
> [4] The FGC should proceed, provided EE's mother has been invited to attend. It will be expected that this will occur prior to the DC on 14 July 2016.

[7] There is no indication on the Court file that Mr EE's mother has been served with the proceedings.

[8] Ms Fuata'i was appointed counsel to assist. She met Mr EE at his mother's home on 11 July. He told Ms Fuata'i he would like to act for himself because "everyone else was too busy". Ms Fuata'i prepared various documents for him (I infer an application under Rule 90A(2) of the Family Courts Rules for Mr EE to take part in the proceedings without a representative) but was not

able to make further contact with him. As a result no representative has been

appointed to act for Mr EE, and he has not applied to the Court to take part in the proceedings without one.

[9] The FGC was held on 2 August. Mr EE did not attend. The record of those present does not refer to the child's paternal grandmother and it is not clear whether she was invited to attend. The conference agreed that BJ is in need of care or protection on the grounds in s 14(1)(a) and (b) of the Act, but no agreement was reached about a plan.

[10] An initial plan dated 30 September and a social worker's report have been filed. The Chief Executive proposes that the s 78 interim custody order should be discharged, a s 101 custody order made in favour of the Chief Executive and the Chief Executive should be appointed to be an additional guardian.

[11] An order dispensing with service of the disposition documents on Mr EE was made on 25 October.

[12] Mr Bali applied orally on 2 November for an order dispensing with service of the application for a declaration and the s 78 order on Mr EE.

[13] As I have noted, substituted service of any documentation was directed on 2 June by service on Mr EE's mother but there is no proof of service on her.

[14] I heard brief evidence from BJ's social worker, who said she had no current knowledge as to Mr EE's whereabouts. His mother told her she does not have contact with him and had not heard from him for some time.

[15] The issue to be decided is what can be done to progress the proceedings, which are now well outside the requirements of s 200 of the Act.

Submissions

[16] Ms McCormick submitted for the Chief Executive:

(a) If Rule 125 of the Family Courts Rules applied, the proceedings are irregular (Mr EE not being represented by a litigation guardian) but are not nullified and the Judge may make any order he or she thinks appropriate: Rule 17;

(b) If Mr EE has been served, the Court could appoint a litigation guardian in his absence: Rule 19C(1) and (2);

(c) It was accepted the FGC was "a further step in the proceedings", and was taken contrary to Rule 125(2), but this irregularity could also be dealt with under Rule 17(1) and an order made confirming the validity of the FGC.

[17] Ms Ellis submitted:

(a) Mr EE would only need a representative if he wanted to start, defend or take other active steps in relation to the proceedings: Rule 89;

(b) To consider appointment of a representative for a parent who does not want to be involved in the proceedings would be artificial;

(c) As EE has chosen not to be involved in the proceedings, Rule 125(2) is not triggered and the Court does not need to appoint a representative or litigation guardian;

(d) If the Court does not need to appoint a representative or litigation guardian for Mr EE, there is no problem with the FGC and the Court would be able to consider making the declaration and disposition orders;

(e) In this event, the making of a declaration and disposition orders would be appropriate.

Family Courts Rules

[18] Rule 89 defines "taking part in proceedings" as including commencing or defending proceedings.

[19] Rule 90 relevantly provides:

> **90 Minor must be represented by next friend or litigation guardian**
>
> (1) A minor under the age of 18 years must not take part in proceedings without—
>
> (a) a next friend; or
>
> (b) a litigation guardian.

[20] Rule 90A(2) provides that:

> A minor who wishes to take part in proceedings in his or her own name may apply to the Court for authorisation to take part in the proceedings without a next friend or litigation guardian.

[21] Rule 125 provides:

> (1) Service of an application on a party is not invalid just because the party is a person who, under Rule 90, 90E, or 90H, may take part in proceedings only through a representative or manager.
>
> (2) However, no further step may be taken in the proceedings until a representative or manager has been appointed for the person or another order as to the representation of the person has been made.

[22] Rule 17 relevantly provides that if the Rules have not been complied with at any step in the proceedings, the failure to comply must be treated as an irregularity, but does not nullify the proceedings or any step taken in the proceedings. If the Rules have not been complied with, a Judge may set aside, wholly or partly, any step in them, and make any other order (for example, as to costs, or adjourning the proceedings) as he or she thinks appropriate.

Discussion

[23] It is a recurring problem in the Family Court that proceedings are stalled because of the difficulty in finding someone who is willing and able to act as a litigation guardian or next friend for a parent aged under 18 years. In recognition of these practical difficulties, Rule 90A was inserted into the Rules to authorise a minor to take part in proceedings in his or her own name where the registrar is satisfied that the minor is capable of making the decisions required in the proceedings, and no reason exists that would make it in the interests of the minor to be represented by a next friend or litigation guardian.

[24] In *Chief Executive v Gill* [1] Judge Brown held that the Court had no discretion to waive the requirement that a representative be appointed and had no jurisdiction to make an appointment on its own motion.

[25] In *Chief Executive v D D* [2] Judge Smith held that two minors (the child's parents) could only take part in proceedings through a representative (either a next friend or a litigation guardian). Judge Smith said that the making of a declaration was a significant action by the State with respect to a child; irrespective of the parties' wishes to consent, the making of a declaration was "a clear step and simply could not be done without the mandatory requirement for representation of the minors being resolved". Judge Smith held that the Rules prevented the Court of its own volition appointing a litigation guardian without an interlocutory application being brought by the party to the proceeding or intended party. Nor could the Court initiate of its own volition the appointment of a next friend, as such an appointment is triggered by the next friend filing an affidavit.

[26] The present case differs from these cases because Mr EE, with knowledge of the proceedings from his discussion with Ms Fuata'i, told Ms Fuata'i he wanted to act for himself but he has not taken up the opportunity to take part in the proceedings.

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[1] [2013] NZFC 4761

[2] [2013] NZFC 4560

[27] The issue therefore becomes whether s 125(2) applies where, as here, a minor is aware of proceedings but does nothing further, or, as could also happen, following service a minor expressly indicates that he or she does not want to take part in the proceedings.

[28] A careful reading of Rules 90, 90A, 90B, 90C, 90D, 90E and 90F establishes that these Rules are predicated on the basis that the minor or incapacitated person wants to take part in proceedings, and that any next friend or litigation guardian will be able fairly and competently to conduct proceedings. Nowhere in the Rules is there any reference to a minor who does not want to take part in proceedings or who does not take up an opportunity to do so. There is no basis for compelling a minor to take part in proceedings, however desirable that may be from the point of view of the child or children involved.

[29] I find that Rule 125(2) must be read in the context of the Rules referred to in s 125(1) and Rules 90C, 90D and 90F. On this basis I hold that Rule 125(2) applies only in cases where the minor wants to take part in the proceedings and s 125(2) is not triggered in cases in which a minor does not want to take part in the proceedings or does not take up an opportunity to do so.

Disposition

[30] Although there is no proof of service of the proceedings on Mr EE's mother, I am satisfied that Mr EE is aware of the proceedings through his discussions about them with Ms Fuata'i on 11 July, and as a result of Ms Fuata'i sending correspondence about the FGC to him on 29 July.

[31] As Mr EE did not require a representative, there was no impediment to the FGC being held.

[32] I am satisfied that the grounds for making a declaration are made out and that there is no viable option.

[33] I am further satisfied that the proposed disposition orders are in the welfare and best interests of BJ.

Orders

[34] I make the following orders and directions:

(a) Service of the application for a s 78 interim custody order and a declaration, and the s 78 interim custody order, on Mr EE is dispensed with;

(b) A declaration on the grounds in s 14(1)(a) and (b) of the Act;

(c) I approve the plan dated 30 September 2015;

(d) The s 78 interim custody order is discharged;

(e) I make a s 101 custody order in favour of the Chief Executive;

(f) The Chief Executive is appointed to be an additional guardian;

(g) There is to be a review in six months.

A J Twaddle
Family Court Judge