Trew v Minister of Family and Community Services of the NT
[2005] NTSC 63

PARTIES:	TREW, Isobel and TREW, Brendan v MINISTER OF FAMILY AND COMMUNITY SERVICES OF THE NORTHERN TERRITORY OF AUSTRALIA AND: JOHN BIRCH SM AND: TREW, Benjamin
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE FAMILY MATTERS COURT exercising Territory jurisdiction
FILE NO:	JA 19 of 2005 (20409357)
DELIVERED:	7 October 2005
HEARING DATE:	22 September 2005
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

MAGISTRATES – Appeals from Magistrates
FAMILY LAW AND CHILD WELFARE – Children – Intervention - Appeals

Appeal from Family Matters Court – validity of a declaration that a child was in need of care – whether the Family Matters Court has expressed or implied power to make a final declaration that a child is in need of care nunc pro tunc – appeal allowed in part - order of Family Matters Court set aside – child declared in need of care as at 23 March 05

Community Welfare Act; Justices Act

Connelly v DPP [1964] AC 1254 at 1301; *Coulton v Holcomb & Ors* (1986) 162 CLR 1; *Grassby v R* (1989) 168 CLR 486 at 502; *McLachlan v Pilgrim* [1980] 2 NSWLR 422 at 435; *Minister for Territory Health Services v LG* (1988) 146 FLR 397, applied

Emanuele & Anor v Australian Securities Commission (1997) 188 CLR 144; *Hartley Poynton Ltd v Ali* [2005] VSCA 53, referred to

REPRESENTATION:

Counsel:

Appellant:	D Hepburn
First Respondent:	R Anderson
Child:	T Whitelum

Solicitors:

Appellant:	CAALAS
First Respondent:	Povey Stirk
Child:	Morgan Buckley

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Trew v Minister of Family and Community Services of the NT
[2005] NTSC 63
No. JA 19 of 2005 (20409357)

IN THE MATTER OF the *Community Welfare Act*

AND IN THE MATTER OF an appeal from the Family Matters Court

BETWEEN:

ISOBEL TREW AND BRENDAN TREW
Appellants

AND:

MINISTER OF FAMILY AND COMMUNITY SERVICES OF THE NORTHERN TERRITORY OF AUSTRALIA
First Respondent

AND:

JOHN BIRCH SM
Second Respondent

AND:

BENJAMIN TREW
Child

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 7 October 2005)

Introduction

[1] This is an appeal from orders of the Family Matters Court that were made on 23 March 2005. The orders were:

1. The child is declared to be in need of care. The finding is made nunc pro tunc as of 2 June 2004.

2. The child is to be placed under the joint guardianship of the Minister of Family and Community Services of the Northern Territory, Isobel Trew and Brendan Trew.

3. Pursuant to section 43(4)(c) of the Community Welfare Act, the Minister is directed to convene a Care Plan conference with all interested parties for the purpose of arranging and implementing a regime of regular and increased contact between the child and Isobel Trew and Brendan Trew.

4. The Care Plan conference will occur within three weeks of making these orders.

5. The matter is adjourned to 22 June 2005 at 9.30 am for review with liberty to apply.

[2] The orders were made with the consent of the appellants and in accordance with minutes of orders that were given to the presiding magistrate, the second respondent, by counsel for the first respondent.

[3] The appeal is brought by notice of appeal filed on 19 April 2005. It is brought pursuant to s 50 of the Community Welfare Act and s 163 of the Justices Act. Pursuant to s 50(2) of the Community Welfare Act and s 177 of the Justices Act the Supreme Court has the power to affirm, quash, or vary the orders appealed from, or substitute or make any orders which ought to have been made in the first instance.

GROUNDS OF APPEAL

[4] The appellants argue that the declaration that was made on 23 March 2004 that the child was in need of care was invalid. The argument is based on three grounds. First, the declaration was made nunc pro tunc and the Family Matters Court does not have power to make a final declaration that a child is in need of care nunc pro tunc. Secondly, the declaration was made without a hearing in accordance with s 39 of the Community Welfare Act and without the consent of the appellants. Thirdly, the jurisdiction of the Family Matters Court to make a final declaration that a child is in need of care expires if the Family Matters Court exceeds its powers to make an interim order pursuant to s 47 Community Welfare Act and the Family Matters Court exceeded those powers on 15 September 2004.

[5] The appellants' second and third grounds of appeal are unsustainable. There was a hearing in accordance with s 39 of the Community Welfare Act on 23 March 2005 and the jurisdiction of the Family Matters Court to hear and determine an application for a final declaration that a child is in need of care does not expire merely because the Family Matters Court makes an interim order which has an operational period longer than that stipulated by s 47(b) of the Community Welfare Act. The Family Matters Court retains jurisdiction over such an application until it is either permanently stayed or final orders are made in accordance with s 43 of the Community Welfare Act.

[6] The principle issue in the appeal is whether the Family Matters Court has either express or implied power to make a final declaration that a child is in need of care nunc pro tunc. In my opinion the Family Matters Court does not have the power to make such a declaration nunc pro tunc. The appeal should be allowed in part. Order one of the Family Matters Court of 23 March 2005 should be varied so that the declaration ceases to be made nunc pro tunc.

THE JURISDICTION OF THE FAMILY MATTERS COURT TO DECLARE A CHILD IN NEED OF CARE

[7] The Family Matters Court is a specialist court that is created by statute for the purpose of hearing and determining applications about children who are in need of care and making orders which will secure the proper care and welfare of children who the court declares to be in need of care. The Family

Matters Court is created by s 24 of the Community Welfare Act. It can only exercise the jurisdiction and powers expressly or impliedly granted to it by the Community Welfare Act.

[8] Subject to the Community Welfare Act and the Justices Act (to the extent that the latter Act is made applicable by s 28 and s 50(2) Community Welfare Act), the Family Matters Court becomes seized with jurisdiction to declare that a child is in need of care and to make ancillary orders for periods of up to 12 months to secure the proper care and welfare of a child, when an application is duly made to the Family Matters Court by the first respondent or some other party with the leave of the Family Matters Court: s 29, s 35 and s 36 Community Welfare Act. The Family Matters Court retains its jurisdiction until the application before it has been finally determined. S 29 Community Welfare Act provides that subject to this Act, the court shall hear and determine all applications under this Act. An application is determined by the Family Matters Court either when it is dismissed or when a final declaration is made that a child is in need of care and orders are made to secure the proper care and welfare of the child.

[9] S 43(4), s 43(5) and s 43(6) of the Community Welfare Act provide:

> "(4) Subject to this section, the Court may, on the hearing of an application under this Part, make an order –
>
> (a) declaring the child in relation to whom the application is made to be in need of care; or

(b) dismissing the application.

(5) Where the Court makes a declaration under subsection (4)(a), the order may include one of the following:

(a) a direction to the parents, guardians or persons having the custody of the child to take the necessary steps to secure the proper care and welfare of the child (including a direction that they comply with the direction, if any, of the Minister in relation to the child's care and welfare), as it thinks fit, subject to review by the Court at the end of a period not exceeding 12 months after the date of the making of the order;

(b) a direction that the child reside with a person whom it considers suitable, for such period, subject to subsection (6), not exceeding 12 months, as it thinks fit;

(c) a direction that the child be under the guardianship of the Minister and the parents, guardians or persons having the custody of the child (including a direction relating to the custody of and access to the child while under that guardianship) for such period, subject to subsection (6), not exceeding 12 months, as it thinks fit;

(d) subject to subsection (7), a direction to transfer the sole rights in relation to the guardianship of the child to the Minister or such other person, for such period, not extending beyond the eighteenth birthday

of the child, as it thinks fit (including a direction relating to access of the parents, and such other persons as the court thinks fit, to the child).

(6) A period specified in an order under subsection (5)(b) or (c) may be extended from time to time, as the Court thinks fit, for further periods, each not exceeding 12 months, and not extending beyond the eighteenth birthday of the child."

[10] How the Family Matters Court becomes seized of jurisdiction to determine an application for a declaration that a child is in need of care is different to the manner in which courts ordinarily become seized of jurisdiction in a particular proceeding. Ordinarily a court does not become fully seized of jurisdiction over a proceeding until the respondent to an application before the court has entered an appearance and thereby become a party to the proceeding. S 36(4) of the Community Welfare Act provides that in an application in relation to a child, the Minister, the child and the parents, guardians or persons having the custody of the child are, or shall be deemed to be, parties to the application. S 37 of the Community Welfare Act makes it mandatory for the parents, guardian or person having the custody of a child the subject of an application before the Family Matters Court to attend the proceedings in court until excused from attending by the Family Matters Court.

[11] In addition to its jurisdiction to make a declaration that a child is in need of care the Family Matters Court has an ongoing jurisdiction to review and, if

appropriate, to vary the orders that it has made as the circumstances of the child and the child's parents change over time: s 48 and s 49 Community Welfare Act. The function of the Family Matters Court's jurisdiction to review and vary its orders is to ensure that the interests of the parents are recognised, that the child is appropriately cared for at all times and if at all possible the child is returned to its parents.

INTERLOCUTORY AND INTERIM ORDERS

[12] In order to fulfil its functions and to effectively and efficiently exercise its jurisdiction the Family Matters Court has been expressly granted a limited power to adjourn proceedings before the Family Matters Court and a limited power to make interim orders. S 44 of the Community Welfare Act provides:

> "(1) The Court may adjourn the hearing of an application under this Part for such periods, not exceeding 14 days, as it thinks fit.
>
> (2) During a period of adjournment under subsection (1), the Court shall, having received the recommendation of the Minister, direct that the child in relation to whom the application is made –
>
> (a) live, or continue to live at home;
>
> (b) be placed, or remain in, the custody of a person specified in the direction;

(c) live, or continue to live, in a place of safety specified in the direction; or

(d) be detained in a hospital specified in the direction.

(3) The person in charge of the place of safety or hospital specified in a direction under subsection (2) shall accept the child into his custody for the period of the adjournment.

(4) The Court may make such order as to costs of the care and maintenance of a child in relation to whom a direction under subsection (2) is made as it thinks fit.

[13] S 47 Community Welfare Act provides:

"Where the Court thinks fit, it may make an interim order in accordance with this Part which shall include particulars of the date, time and place fixed by the Court for a further hearing of the application to which it relates and it shall remain in force –

(a) subject to paragraph (b), for such period not exceeding 2 months, as the Court thinks fit; or

(b) where the Court thinks fit, for a further period not exceeding 4 months from the making of the first interim order."

[14] The principal limitation on the Family Matters Court's power to adjourn proceedings pursuant to s 44 of the Community Welfare Act is that

proceedings may only be adjourned for a period of up to fourteen days. The principal limitation on the Family Matters Court's power to make interim orders is that in the first instance they may only be made for a period of up to two months and ultimately for a total period of up to four months.

[15] The purpose of the limited power to grant adjournments and to make interim orders is to try and ensure that applications for a declaration that a child is in need of care and ancillary orders pursuant to s 43(5) Community Welfare Act are dealt with expeditiously and efficiently by the first respondent and the Family Matters Court. The Community Welfare Act contemplates that proceedings in the Family Matters Court are to be undertaken promptly, without undue formality and with every endeavour made to ensure that proceedings are not protracted: *Minister for Territory Health Services v LG* (1988) 146 FLR 397 at 402. However, the Community Welfare Act recognises that when an application is first brought before the Family Matters Court, the Court may not be in a position to hear the application immediately either because of the commitments of the magistrates who constitute the Family Matters Court or because of the position of the parties: *Minister for Territory Health Services v LG* (supra) 402 - 403. Otherwise there would be no need for the powers of the Family Matters Court to adjourn proceedings and to make interim orders.

[16] S 47 recognises that there will be further hearings of an application for a declaration that a child is in need of care. The section provides, "Where the Court thinks fit, it may make an interim order in accordance with this Part which shall

include particulars of the date, time and place fixed by the Court for a further hearing of the application to which it relates." It is clear that the section contemplates that a magistrate may not have yet embarked upon a substantive hearing of the application for a declaration that a child is in need of care and that there may be preliminary hearings at which interim orders may be granted: *Minister for Territory Health Services v LG* (supra) 403 - 404.

[17] The Community Welfare Act does not provide for any consequences if s 47 of the Act is breached. There is no provision in the Community Welfare Act that provides that an application shall come to an end and the jurisdiction of the Family Matters Court shall cease if s 47 is not complied with or if an interim order expires. A failure to comply with s 47 of the Community Welfare Act is an irregularity. Such a failure does not bring the substantive proceedings to an end and the jurisdiction of the Family Matters Court does not expire. It would be most unusual for an invalid interim order, made at a preliminary hearing or indeed at any hearing, to have the effect of bringing a substantive proceeding before a court to an end. The very idea that an order is an interim order recognises that it is not a final order, that is, it is not an order which brings a proceeding before a court to an end. Ground 3 of the appeal is unsuccessful.

[18] The effect of the expiry of the time limits prescribed by s 47 is that the interim order may cease to have effect, the Minister may be required to return the child and full custody and guardianship rights will revert to the parents or the existing guardian pending the determination of the substantive

hearing of the application for a final declaration that the child is in need of care.

[19] The onus is on the first respondent to proceed quickly to a hearing in accordance with s 39 of the Community Welfare Act once he has made an application to the Family Matters Court. Primary emphasis is given to the Court expeditiously resolving the question of what is required to ensure the proper care and welfare of a child who is in need of care. However, the rights of parents, who are the natural guardians of their children, are also to be protected. The Community Welfare Act recognises that the aim of intervention by the first respondent should not only be to protect the child, but if at all possible, to return the child to its parents or other guardian. Orders made by the Family Matters Court affecting the guardianship and custody of a child who is in need of care are to be reviewed every 12 months at the latest and sooner if determined by the Court either of its own motion or upon the application of the parties.

THE PROCEEDING IN THE FAMILY MATTERS COURT

[20] The history of the proceeding in the Family Matters Court is as follows. On 23 April 2004 the Registrar of the Local Court made a holding order pursuant to s 11 of the Community Welfare Act authorising the holding of the child in a place of safety for a period beginning on the day the child was taken into custody until 14 days after that date. On 27 April 2004 an application that a child be found in need of care pursuant to s 35(1) of the

Community Welfare Act was filed in the Family Matters Court. On 5 May 2004 Ward DCM made an interim finding that the child be declared a child in need of care pursuant to s 47(a) of the Community Welfare Act and ordered that the child be placed under the joint guardianship of the first respondent and the appellants, custody of the child is at the discretion of the first respondent, the child was to be excused from attending until further order and the matter was adjourned to Wednesday 2 June 2004. Ward DCM made interim orders for a period of less than one month. Such orders were consistent with the time limits prescribed by s 47(a) of the Community Welfare Act. On 2 June 2004 the matter came back before the Family Matters Court and the second respondent made an order pursuant to s 47(b) of the Community Welfare Act that the orders made by Ward DCM be continued for a further three months. The matter was then adjourned to 9.30 am on Wednesday 1 September 2004 for review. The orders made by the second respondent on 2 June 2004 were in accordance with the time limits prescribed by s 47(b) of the Community Welfare Act.

[21] On 1 September 2004 the second respondent made an order that the orders made by Ward DCM continue until 29 September 2004. He then adjourned the matter to 29 September 2004 at 9.30 am for further review. On 15 September 2004 the matter came back before the second respondent and he made an order that the original interim orders made by Ward DCM continue until 9 March 2005. He then adjourned the matter to 9 March 2005 for review and vacated the 29 September 2004 court date. On 9 March 2005

the second respondent made an order that the original order made by Ward DCM continue until 23 March 2005 and that the proceeding is adjourned until 23 March 2005 for review.

[22] Each of the orders made on 1 September 2004, 15 September 2004 and 9 March 2005 were made by consent. Each of the orders was beyond the powers granted to the Family Matters Court pursuant to s 44 and s 47 of the Community Welfare Act. Power or jurisdiction cannot be conferred on a court by consent.

[23] On 23 March 2005 the proceeding came back before the second respondent. On that day Mr Stirk appeared for the first respondent and Ms Hepburn appeared for the appellants. Ms Khan appeared for the child. A further report pursuant to s 46 of the Community Welfare Act was available to the court and to the parties. Mr Stirk on behalf of the first respondent requested that the Family Matters Court continue the orders made by Ward DCM on 5 May 2004. He did so under the misapprehension that on 5 May 2004 Ward DCM had made final orders pursuant to s 43. Mr Stirk asked that the orders be reviewed in 12 months time which would be on 22 March 2006. When he did so the second respondent told him that at that stage only interim orders had been made. Mr Stirk then sought final orders nunc pro tunc. Ms Hepburn then advised the court that she did not agree to a further order being made for a period of 12 months. She said it was the appellants' position that since the child had been in care the case plans had not been followed. She said that the Family Matters Court should only make a

further order for a period of three months to allow for the reintroduction of contact between the appellants and the child on a more regular basis and so that a shared care arrangement could be implemented. Ms Hepburn said that notwithstanding that the appellants say that the child is not a child in need of care, the child has been in care for 12 months and it would be foolish to return the child to the appellants on a full time basis given his medical problems. She said that if the court was minded to make final orders pursuant to s 43(5) for a further period of 12 months the appellants would then ask that the matter be set down for hearing.

[24] After Ms Hepburn made the submissions referred to in par [23] above Mr Stirk sought an adjournment in order to speak to Ms Hepburn. During the adjournment an agreement was reached between counsel for the appellants and counsel for the first respondent. Minutes of Consent orders were drafted and copies of the minutes were made available to each of the parties and the court. The orders contained in the minutes of order were final orders and the declaration that the child was in need of care was to be made nunc pro tunc as of 2 June 2004. The effect of the orders was to make a final declaration that the child was in need of care which operated from 2 June 2004. The appellants consented to final orders being made on 23 March 2005 provided that the orders were to be reviewed within three months and the application was adjourned to 22 June 2005 for review.

[25] The hearing in the Family Matters Court on 23 March 2005 was a hearing in accordance with s 39 of the Community Welfare Act. The making of such

orders by consent is consistent with s 40 of the Community Welfare Act which provides that the Family Matters Court shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted. It is also consistent with s 39(2) of the Community Welfare Act which provides that in a hearing of an application the Family Matters Court is not bound by the rules of evidence but may inform itself on any matters it thinks fit. There was also evidence contained in the further report that was before the court which supported the final orders that were made.

[26] In any event, the appellants are estopped by their conduct in the Family Matters Court from now arguing that they did not receive a hearing in accordance with s 39 of the Community Welfare Act: *Coulton v Holcomb & Ors* (1986) 162 CLR 1. Since the orders were made on 23 March 2005 and the appeal was filed in this proceeding there have been further reviews in the Family Matters Court and the appellants have consented to further orders being made pursuant to s 43(5) of the Community Welfare Act. Ground 2 of the appeal is unsuccessful.

JURISDICTION TO MAKE A FINAL DECLARATION THAT A CHILD IS IN NEED OF CARE

[27] Superior courts such as the Supreme Court of the Northern Territory have the power to make certain orders nunc pro tunc. That is, the power to make an order which operates from a date earlier than the date on which it was actually made: *Emanuele & Anor v Australian Securities Commission* (1997) 188 CLR 144. The power is part of the inherent power of a superior court to

avoid injustice: *Emanuele & Anor v Australian Securities Commission* (supra); *Hartley Poynton Ltd v Ali* [2005] VSCA 53. The power to make orders nunc pro tunc may also be granted to a court by statute.

[28] Statutory courts such as the Family Matters Court do not have inherent power. They can only exercise the power which is expressly and impliedly granted to them by statute. However, every court has the power necessary to effectively carry out the jurisdiction conferred on it by statute: *Connelly v DPP* [1964] AC 1254 at 1301; *McLachlan v Pilgrim* [1980] 2 NSWLR 422 at 435. These powers are implied from the grant of power by the legislature: *Grassby v R* (1989) 168 CLR 486 at 502. A power cannot be implied if the implication of the power is inconsistent with the express statutory provisions that are applicable to the exercise of a court's power.

[29] The Family Matters Court does not have either express or implied power to make a final declaration that a child is in need of care nunc pro tunc. Neither in the Community Welfare Act nor in the Justices Act is there an express grant of power to the Family Matters Court to make a final declaration that a child is in need of care nunc pro tunc. The implication of a power to make a final declaration that a child is in need of care nunc pro tunc would be inconsistent with the provisions of s 43 of the Community Welfare Act. S 43 requires the Family Matters Court to be satisfied that a child is in need of care and to declare that a child is in need of care before it makes any of the guardianship or custody orders set out in s 43(5) (see par [9] above) which alter the substantive guardianship rights of the parents.

The final declaration that a child is in need of care is a pre-condition to the making of any of the orders contained in s 43(5). The purpose of the pre-condition is to protect the rights of the parents. That is, final orders affecting the guardianship, custody, care and residence of children cannot be made unless there is a final declaration that a child is in need of care. The implication of the power to make an order nunc pro tunc would negate the pre-condition to the making of the orders set out in s 43(5). It would also make the time limitations contained in s 44 and s 47 redundant.

ORDERS

[30] The appeal should be allowed in part and order 1 of the Family Matters Court that was made on 23 March 2005 should be varied so that it ceases to be made nunc pro tunc.

[31] I make the following formal orders:

1. Order 1 made on 23 March 2005 by the Family Matters Court is set aside.

2. The following order is substituted for order 1 made on 23 March 2003,

   "The child is declared to be in need of care as at 23 March 2005."

EFFECT OF THE ORDERS

[32] The effect of the orders that I have made is that the current orders of the Family Matters Court remain on foot subject to further review. Although the Family Matters Court did not have the power to make the orders that it made on 15 September 2004 and 9 March 2005, the appellants plainly

consented to the first respondent exercising rights of guardianship and care of the child. The appellants also have their rights pursuant to s 48 and s 49 of the Community Welfare Act to apply to vary the orders of the Family Matters Court which are currently in force or to request that the Family Matters Court revoke any guardianship or other orders that remain in place.

[33] It is important that parties to proceedings in the Family Matters Court, and the legal representatives of the first respondent, realize that the intention of the legislature which is expressed in the Community Welfare Act is that applications for a final declaration that a child is in need of care should ordinarily be determined within at most four months and two weeks of the application first being mentioned in the Family Matters Court. If an application is not determined within that time frame then pending the final resolution of the application by the Family Matters Court, the guardianship and custody of the child will return to the parents unless otherwise agreed between the parties to an application.