CC v The Minister for Family and Community Services of the Northern Territory and JC and KK
[2007] NTSC 54

PARTIES:	CC v THE MINISTER FOR FAMILY AND COMMUNITY SERVICES OF THE NORTHERN TERRITORY AND JC AND KK
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA 21 of 2007 (20504276) JA 23 of 2007 (9725549)
DELIVERED:	30 October 2007
HEARING DATES:	30 October 2007
JUDGMENT OF:	OLSSON AJ
ON APPEAL:	Order of the Family Matters Court, 25 July 2007

CATCHWORDS:

Appeal against an order of the Family Matters Court – competency of appeals – whether jurisdiction of the Community Welfare Act enlivened – appeals dismissed as incompetent.

CC v Minister for Territory Health Services, Michael Carey SM, KK and JC [2006] NTSC 68; *Warbrooke v McGregor, TF and ML* [2001] NTSC 18, cited.

Community Welfare Act 1983 (NT), s 48

REPRESENTATION:

Counsel:

Appellant:	In person
First Respondent:	M Heitman
Second Respondent:	A Whitelum

Solicitors:

First Respondent:	M Heitman
Second Respondent:	Morgan Buckley

Judgment category classification:	C
Judgment ID Number:	ols200702
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

CC v The Minister for Family and Community Services of the Northern Territory [2007] NTSC 54
Nos. JA21 & JA23 (20504276, 9725549)

BETWEEN:

CC

AND:

THE MINISTER FOR FAMILY AND COMMUNITY SERVICES OF THE NORTHERN TERRITORY

AND:

JC

AND:

KK

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 30 October 2007)

Introduction

[1] These are composite reasons related to files 9725549 and 20504276 respectively, which I now publish on the basis indicated to the parties on 30 October 2007.

[2] In each case the matter before me is a notice of appeal lodged by the biological mother of a child of which the respondent Minister has sole guardianship pursuant to orders of a stipendiary magistrate made on 31 May 2006 ("the guardianship orders"). I will refer to the two children as KK and JC respectively.

[3] The appellant (to whom I will refer as "CC") has also filed separate applications for extension of time within which to file and serve the notices of appeal.

[4] The notices of appeal seek to impugn the decision of another stipendiary magistrate published on 25 July 2007, whereby he dismissed applications by the appellant to vary the guardianship orders in respect of KK (now almost nine years of age) and JC (now two years of age).

[5] The two children have together been in long-term foster care since September 2005. This is sought, by the Minister, to be permanent until they are 18 years of age.

[6] The guardianship orders were the subject of appeals to this Court which came before me in mid-2006. Those appeals were dismissed for reasons that I published on 21 July 2006 (*CC v Minister for Territory Health Services, Michael Carey SM, KK and JC* [2006] NTSC 68). In such reasons I traced the relevant lengthy history in considerable detail. I do not propose to now unnecessarily re-traverse the same ground.

[7] It will suffice to say that, by reason of findings at first instance that the appellant was incapable of parenting the two children, due to a personality disorder that she suffered, the Minister was granted sole guardianship of KK and JC upon the footing that the appellant was accorded limited access to them for identification purposes. This access was subject to stringent conditions, including the attendance of case workers and stipulations concerning the appellant's behaviour while in the company of her children.

[8] The appellant was granted access to KK on not less than two nor more than four occasions per calendar year, subject to the child's desire to attend. She was granted access to JC on not less than four and not more than six occasions per calendar year, at the discretion of the Minister.

[9] On 22 November 2006 the appellant made applications, pursuant to s 48 of the Community Welfare Act, for a variation of the guardianship orders. In terms of the formal applications, the appellant sought custody of the two children, but the learned magistrate recited that, during the hearing, it was apparent that she really sought increased access, notwithstanding that, since the making of the guardianship orders, she had only sought and obtained access on one occasion, namely on 22 December 2006.

[10] When the matters came before the learned magistrate, the applications were resisted by the Minister. A resultant hearing extended from 14 to 16 March 2007. The learned magistrate received a report dated 13 March 2007 from Ms Turnbull, a psychologist who had been treating the appellant, and reports

written by Acting Professor Dr Leon Petchkovsky, a clinical psychiatrist. The latter is Clinical Director of the Central Australian Community Mental Health Service.

[11] As I understand the reasons published by the learned magistrate, both of those experts gave evidence before him. Evidence was also received from the applicant and the team leader of the out of home care team in the Family and Community Services (FACS) office in Alice Springs.

[12] Certain aspects of the evidence focused on the conduct of the appellant from about the time of the making of the guardianship orders up to the time of the hearing before the learned magistrate.

[13] In the course of his reasons the learned magistrate described the situation in these terms -

> "…… this Court's attention is directed to 29 occasions between 8 May 2006 and 26 January 2007 when the police were either contacted by the mother or came to her residence as a result of other people complaining about behaviour at that address. In addition the Minister points to:
>
> (a) the period between December 2005 and April 2006 when the mother was away from Alice Springs at times living in Adelaide on the streets and being admitted to a sobering up shelter;
>
> (b) an incident on 17 September 2006 when police were called to her home by a neighbour whom she had, whilst intoxicated, threatened to kill;
>
> (c) an incident at the Gap View Hotel, Alice Springs on 17 November 2006 when the mother was evicted by security staff for being intoxicated on licensed premises, abusive, aggressive and smashing windows;

(d) her admission to the Alice Springs Hospital on 9 June 2006 whilst drunk and in an unstable distressed state;

(e) her further admission to the Alice Springs Hospital on 14 June 2006 after being assaulted whilst intoxicated; and

(f) her behaviour on 9 January 2007 when arrangements were made by FACS to discuss the reasoning behind the orders of 31 May 2006 and the subsequent decision of Olsson J on the appeal".

[14] Against that background the learned magistrate concluded that there was no evidence that the circumstances upon which the former orders were based had changed significantly. He set out in some detail a summation of the effect of the evidence that led him to that conclusion.

[15] The learned magistrate was, accordingly, constrained to dismiss the applications before him.

Competency of the present appeals

[16] On the hearing of the present proceedings, counsel for the Minister contended that the present purported appeals were incompetent and did not enliven any relevant jurisdiction created by the Community Welfare Act.

[17] Formal applications were filed seeking orders that the purported appeals be dismissed as incompetent, having regard to the mode of expression of s 50 of the Community Welfare Act.

[18] Subsection (1) of that section is expressed in these terms:

"(1) The Minister or the parents, or the persons who were, immediately before the order, the guardians or persons having the

> custody of a child, or any other person who has an interest in the welfare of, or acting on behalf of and at the request of, the child in relation to whom an order under section 43(4) or 49 was made, may appeal to the Supreme Court against the order made or as varied under this Part."

[19] Counsel for both the Minister and the children submit that the refusals of the learned magistrate to vary the access provisions of the guardianship orders are not a type of order to which s 50 applies. It follows that the statute does not confer any rights on CC to prosecute appeals of the nature of the purported appeals now before me. It is further argued that there is no other provision of the statute that confers rights of appeal of the nature now sought to be exercised.

[20] Counsel pointed out that the only rights of appeal conferred were in respect of either the making of a primary order declaring a child to be in need of care and any associated order pursuant to subsection (5) of s 43 of the Act or a variation order made in the context of a review by the court under s 49 of the statute.

[21] It was submitted that, the appeals against the relevant earlier orders having been disposed of by my decision of 18 September 2006 and no order of variation of the primary order having been made, the present purported appeals simply could not enliven the jurisdiction conferred by s 50, i.e. the statute did not confer any right of appeal in relation to a bare refusal to make an order of variation or, for that matter, any order made pursuant to s 48.

[22] In my opinion, those submissions accurately reflect the provisions of the statute. Had the learned magistrate made a s 49 variation of a relevant order, a right of appeal would plainly have arisen. However, no appeal lies in respect of any rejection of an application pursuant to s 48, or, indeed, any other order under that section unless it can be said to be an order by way of review under s 49(1). That conclusion accords with the judgment of Thomas J in the case of *Warbrooke v McGregor, TF and ML* [2001] NTSC 18.

[23] In the circumstances, I was constrained, on 30 October 2007, to make formal orders dismissing the purported appeals by CC as incompetent.

[24] In doing so, I made the point to CC that, as was properly conceded by Mr Whitelum, of counsel for the children, she is not bereft of any remedy in the circumstances. As emerges from the judgment of Thomas J in *Warbrooke*, it may be open to her, if so advised, to make application to this Court by way of originating motion to invoke its *parens patriae* jurisdiction to consider the present situation concerning the children.

[25] However, she may be better served by awaiting the next statutory review under s 49 of the Community Welfare Act in May next and seek to ventilate her views in that context. This would be far easier path for her to follow, particularly if she can demonstrate an improvement in her behaviour over the course of the next six months or so.

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