

CITATION: *Minister for Health & Community Services v DC & RC* [2008] NTMC 035

PARTIES: MINISTER FOR HEALTH & COMMUNITY SERVICES

v

DC & RC

TITLE OF COURT: FAMILY MATTERS COURT - DARWIN

JURISDICTION: COMMUNITY WELFARE

FILE NO(s): 20605768 & 20605766

DELIVERED ON: 13 MAY 2008

DELIVERED AT: DARWIN

HEARING DATE(s): 21 FEBRUARY 2008

JUDGMENT OF: Dr JA Lowndes

CATCHWORDS:

COMMUNITY WELFARE – MEANING OF ACCESS IN RELATION TO JOINT GUARDIANSHIP ORDERS – APPROPRIATE APPROACHES TO STATUTORY INTERPRETATION

Community Welfare Act ss 4, 43(5)(c) and 43(5)(d)

REPRESENTATION:

Counsel:

Minister:	Ms Terrill
Children:	Mr Kudra
Father, paternal Uncle & Aunt:	Mr Young
Mother:	Ms Blosfield

Judgment category classification: A

Judgment ID number: [2008] NTMC 035

Number of paragraphs: 22

IN THE FAMILY MATTERS COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20605768 & 20605766

[2008] NTMC 035

BETWEEN:

MINISTER FOR HEALTH &
COMMUNITY SERVICES

AND:

DC & RC

REASONS FOR DECISION

(Delivered 13 May 2008)

Dr John Allan Lowndes SM:

THE NATURE OF THE ISSUE

1. The issue in this case turns on the true construction of s 43(5)(c) of the *Community Welfare Act*.
2. To precisely identify the issue the entirety of subsection (5) is set out as follows:

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).

3. It was submitted on behalf of the Minister that pursuant to s 43(5)(c) of the Act the Court can only make directions in relation to the custody or access to the child by the parents, guardians or persons having the custody of the child. According to this submission, the bracketed words in the subsection have to be read as relating to the words preceding the brackets. It was submitted that if the legislature thought that it was appropriate for the Court to make directions in relation to custody and access by other persons then it would have said so, as in s 43(5)(d). It was further submitted that the different wording in the two subsections is “based on the different circumstances that will give rise to the need for the orders and the different effect of the two orders” namely that of joint guardianship and sole guardianship.

4. In a similar vein, it was submitted on behalf of the mother that the difference in the wording between s 43(5)(c) and 43(5)(d) “must be taken to have some meaning”. It was submitted that “the absence of specific wording in section 43(5)(c), such as appears in section 43(5)(d), allowing the Court to make directions as to access in favour of persons other than parents, guardians and persons having custody, tends to indicate that it was not the

intention of the legislature that the Court could make such orders under section 43(5)(c)”.

5. In arguing a narrow construction of s 43(5)(c), the following submission was made on behalf of the mother:

The difference in wording between sections 43(5)(c) and 43(5)(d) reflects a difference in the nature of the orders being made. Section 43(5)(c) relates to access in the context of a joint guardianship arrangement. Section 43(5)(d) relates to access where the child is under the sole guardianship of the Minister.

From a public policy standpoint it makes sense to allow more flexibility in terms of access to children under sole guardianship. Sole guardianship puts all control of the children in the hands of the Minister. A broader access arrangement allows the child or children to maintain links with their family and wider community. In a joint guardianship arrangement, the Minister shares control with (normally) a parent of the child. Decisions about access to the children by particular people can be made by the Minister and the parent together (or other joint guardian) and the Court need not become involved.

6. On behalf of the children’s paternal aunt and uncle and the father it was submitted that s 43(5)(d) should not be read in the narrow sense contended for by the Minister and the mother. It was submitted that a number of considerations favour a broad construction of the subsection – namely that it permits the Court to make directions as to access in favour of persons other than parents, guardians and persons having custody. Those considerations include:

- The emphasis in the Act on the importance, where appropriate, of the role of the extended family in the welfare of children, with particular reference to s 43(1)(d);
- Section 43(1)(e) which requires the Court, in deciding to whom custody of a child or children should be given, to have regard to the criteria imposed on the Minister by s 69 of the Act;
- Section 69 which provides as follows:

Where a child in need of care is an Aboriginal, the Minister shall ensure that –

- (a) every effort is made to arrange appropriate custody within the child's extended family;
- (b) where such custody cannot be arranged to the Minister's satisfaction, every effort is made to arrange appropriate custody of the child by Aboriginal people who have the correct relationship with the child in accordance with Aboriginal customary law; and
- (c) where the custody referred to in paragraph (a) or (b) cannot be arranged without endangering the welfare of the child - after consultation with –
 - (i) the child's parents and other persons with responsibility for the welfare of the child in accordance with Aboriginal customary law; and
 - (ii) such Aboriginal welfare organisations as are appropriate in the case of the particular child,

a placement that is consistent with the best interests and the welfare of the child shall be arranged taking into consideration -

 - (iii) preference for custody of the child by Aboriginal persons who are suitable in the opinion of the Minister;
 - (iv) placement of the child in geographical proximity to the family or other relatives of the child who have an interest in, and responsibility for, the welfare of the child; and
 - (v) undertakings by the persons having the custody of the child to encourage and facilitate the maintenance of contact between the child and his or her own kin and with his or her own culture.

7. The following submission was made on behalf of the paternal aunt and uncle and the father:

The words of section 43(5)(c) should not be read in the restrictive sense proposed. On a plain reading there is no explicit restriction and to restrict an access direction to the named persons, that is the Minister, the guardians or persons having custody, deprives the concept of access of all meaning. The Minister will not seek access, and the guardian and persons having custody would not require access as the definitions of guardianship and custody encompass and exceed the concept of access. The concept of access can only have meaning if applied to persons other than the guardian or custodians.

Further, such a restrictive reading is not only inconsistent with the purpose and object of the Act but it fundamentally contradicts it. It would make the maintenance of a continued link with the extended family or other persons more difficult or even impossible. The legislature cannot have intended such a fundamental limitation on the Court's power or jurisdiction.

8. Consistent with those submissions, it was submitted on behalf of the children that the preferred construction of s 43(5)(c) is that "it contemplates a power to direct access with persons other than parents, guardians or persons having custody as it would be consistent with the objects of the legislation." It was submitted that "in considering the criteria in section 43(1), the object of the legislation is not just to protect and safe guard the welfare and development of the children, but also to promote relationships with all family members".

THE TRUE CONSTRUCTION OF S 43(5)(c) OF THE ACT

9. The meaning and effect of the bracketed words in s 43(5)(c) is a matter of statutory interpretation.
10. In construing a statutory provision it is necessary to read the statute, in which the provision appears, as a whole. This fundamental approach provides a vital textual clue as to the meaning of the words "including a direction relating to the custody of and access to the child while under that guardianship", as appear in s 43(5)(c) of the Act.
11. Section 4 of the Act provides that, unless the contrary intention appears, "access" means "the contact of a child with a person, by way of a visit by or to that person, including attendance for a period at a place other than the child's habitual residence, or by way of a letter, telephone or other means".
12. It is clear that the word "access" in s 43(5)(c) is to be accorded that meaning. The section does not evince a contrary intention in the way that s 43(5)(d) does. That provision refers to "a direction relating to access of the parents, and such other persons as the Court thinks fit, to the child". In that

context, it is apparent that the word “access” is not to be read as meaning the contact of the child with any person, but rather in terms of a child’s contact with his or her parents or such other persons the Court considers appropriate.

13. Accordingly, s 43(5)(c) does not restrict an access direction to the persons named therein. The Court can make an access direction in relation to any person it considers fit. It follows that, in the present case, the Court has the power to make a direction in relation to access by the paternal aunt and uncle.
14. The above construction of s 43(5)(c) accords with the purpose or object of the Act.
15. It needs to be borne that the purposes or objects of an Act need not be set out in express words:

A court can determine “the object of the legislation from a consideration of the provisions of the legislation”, “by implication” or “by necessary implication.”¹

16. Put another way, a Court may “divine or impute” the purpose or object of an Act.² In such instances:

...the challenge is to deduce the relevant purpose of the Act, or of the provision being interpreted, without [an] explicit starting point. This usually can be achieved by a reading of the rest of the Act.³

17. Section 43(1) – a key provision of the Act – sets out the matters that the Family Matters Court must consider in relation to proceedings concerning a child under Part VI of the Act. Those matters include:

¹ Gifford *Statutory Interpretation*, p 50 citing *Municipal Officers’ Association of Australia v Lancaster* (1981) 37 ALR 559 at 579-580, per Evatt and Northrop JJ (FCA FC); *Byrne v Garrison* [1965] VR 523 at 529; *Bawn Pty Ltd v Metropolitan Meat Board* (1970) 92 WN (NSW) 823 at 842 per Mason JA.

² Gifford n 1 p 52 citing *Black –Clawson International Ltd v Papierwerke Waldhoff- Aschaffenberg AG* [1975] AC 591 at 645; *Farrell v Alexander* [1977] AC 59 at 81; *Hatton v Beaumont* [1977] 2 NSWLR 211 at 225.

³ Pearce and Geddes *Statutory Interpretation 5th ed* at [2.11]. See *Pileggi v Australian Sports Drug Agency* (2004) 138 FCR 107.

- The importance of maintaining and promoting the relationship between the parents, guardians or persons having the custody of the child (and where appropriate the extended family of the child) and the child;
- The desirability of maintaining the continuity of living in the child's usual ethnic and social environment and
- Where the child is an Aboriginal – the person or persons to whom, in its opinion, custody of the child should be given should the child be found in need of care, having regard to the criteria imposed on the Minister by s 69.

18. Section 43(2) which empowers the Court to declare a child in need of care is expressed to be subject to the considerations set out in s 43(1).
19. It is clear from the provisions of s 43(1) and (2) that the Court must have regard to the statutory considerations in subsection (1) when making an order declaring a child in need of care or any of the directions which the Court is empowered to make under subsection (5).
20. I agree with the submissions made on behalf of the paternal aunt and uncle and father, as well as those made on behalf of the children. If the bracketed words in s 43(5)(c) were to be construed narrowly in the way contended for by the Minister and the mother, then that would be inconsistent with and frustrate the statutory directives in s 43(1) and (2) of the Act.⁴ Such a narrow construction of subsection 5(c) would frustrate and defeat the clear purposes or objects of the Act. On the other hand, the broader construction of s 43(5)(3) – which is supported by a plain reading of the subsection when considered in conjunction with the statutory definition of “access” – is consistent with the statutory mandates and purposes or objects of the Act.
21. This is a case where the literal or plain meaning approach and the purposive approach to statutory interpretation yield the same result. Section 43(5)(c)

⁴ The statutory criteria reflect legislative objects or purposes.

clearly contemplates a power to make a direction concerning access in relation to persons other than parents, guardians or persons having custody.

22. The narrow construction of s 43(5)(c) was said to be supported by the different wording in the two subsections. However, the linguistic differences between subsections (5)(c) and (d) can be readily explained in a way that does not require a restrictive construction to be imposed on the former. The purpose of the words “including a direction relating to access of the parents and such other persons as the Court thinks fit”, as used in s 43(5)(d), is to highlight the need for the Court to give primary consideration to access by the parents of a child in cases where the Court is minded to make a sole guardianship direction – an order which by its very nature minimises the involvement of parents with a child.

Dated this 13th day of May 2008.

Dr John Allan Lowndes
STIPENDIARY MAGISTRATE