

CITATION: *Rigby v LH* [2023] NTLC 10
PARTIES: LH
v
RIGBY (NTPOL)
TITLE OF COURT: LOCAL COURT
JURISDICTION: CRIMINAL
FILE NO(s): 22225603
DELIVERED ON: 17 April 2023
DELIVERED AT: DARWIN
HEARING DATE(s): 15 March 2023
JUDGMENT OF: Acting Judge Oliver

REDACTED

CATCHWORDS:

Criminal Law - Criminal Code - Defendant mother charged with both abduction and attempted abduction of a child under 16 years - application for a permanent stay of proceedings.

Family Law Act - failure to return a child in breach of a Federal Circuit and Family Court of Australia order - whether only that Court can deal with a breach - whether there is inconsistency between the Northern Territory Criminal Code and the Family Law Act - where Commonwealth law provides a regime for the resolution of disputes between parents with respect to their children and the Criminal Code provides for an offence of abduction of a child

Care and Protection of Children Act - where father had been given sole parental responsibility for a child - attempt to remove the child from the father.

*Surrogacy Act 2022 (NT)
Criminal Code Act 1983 (NT)
Family Law Act 1975 (Cth)
Care and Protection of Children Act 2007 (NT)
Interpretation Act 1978 (NT)
Criminal Law Consolidation Amendment Act 1982 (NT)
Family Court Act 1997 (WA)
Local Court (Criminal Procedure) Act 1928 (NT)*

Barton v The Queen (1980) 147 CLR 75
Walton v Gardiner (1993) 177 CLR 378; [1993] HCA 77
Northern Territory of Australia v GPO [1999] 196 CLR 553
Work Health Authority v Outback Ballooning Pty Ltd [2019] HCA 2
Ex Parte McLean (1930) 43 CLR 472; [1930] HCA 12
Sahari v Sahari (1976) 11 ALR 679 (1976) 25 FLR 475

REPRESENTATION:

Counsel:

Prosecution	Mr Read SC
Defendant:	Mr Mohammed
Judgment category classification:	A
Judgment ID number:	[2023] NTLC 10
Number of paragraphs:	85

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 22225603

BETWEEN:

LH

Applicant

v

Kerry Leanne RIGBY (NTPOL)

Respondent

APPLICATION BY DEFENDANT FOR PERMANENT STAY OF CRIMINAL CHARGES

**REASONS FOR DECISION
REDACTED**

(Delivered 17 April 2023)

1. The Defendant in these proceedings is charged with two offences on Information pursuant to section 202(1) of the Criminal Code, namely that on 7 August 2022 at Darwin she
 - i. Took GH, who was under the age of 16 years, namely 5 years, out of the custody and against the will of the victim's father and lawful guardian.
 - ii. Did attempt to take PH, who was under the age of 16 years, namely 11 years, out of the custody and against the will of the victim's father and lawful guardian.
2. The Defendant is the mother of the two children. The children are hereafter referred to as G and P.
3. The Defendant has made application for a permanent stay of these proceedings. Her application provides 6 grounds upon which she says such order would be justified. These are:

Ground 1 Ambiguity in Territory Law.

Ground 2 Interpretation of the Territory law where it does not apply to a parent.

Ground 3 Interpretation of the Territory law where it applies to a parent.

Ground 4 Inconsistency between Commonwealth and Territory Law.

Ground 5 Inherent unfairness to the applicant.

Ground 6 Public Policy Grounds.

What Is Required For A Permanent Stay Of Proceedings?

4. An order for a permanent stay is not a very common application in criminal proceedings. It is well recognised to only be granted in extreme cases where nothing can be done to remedy the issue. As was said in *Barton v The Queen*¹

“To justify a permanent stay of criminal proceedings, there must be a fundamental defect which goes to the root of the trial 'of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences”.

5. The test for a permanent stay has also been expressed as whether, in all the circumstances, the continuation of the proceedings *would* involve unacceptable injustice or unfairness.²
6. In determining whether to permanently stay proceedings, a court must consider a number of factors, for example the need to hear and determine serious charges and ensure that a defendant is able to receive a fair trial. There is a substantial public interest in determining the truth or otherwise of allegations through the process of a trial.

The Alleged Facts

7. The allegations that are made with respect to the criminal charges may be summarised as follows.
8. On 31 May 2022 the Federal Circuit and Family Court of Australia (Division 2)(“Federal Circuit & Family Court”)³ made an interim parenting order that the child G was to live with her father. The mother was to spend supervised time with G at times and dates as directed by the Children’s Contact service.⁴
9. On Sunday 7 August 2022, a supervised visit with the two children was organised for the mother at a visitation centre. The Defendant attended with her older son “I” and Juliet Oldroyd.⁵ At the conclusion of the visit Oldroyd is alleged to have entered the visitation centre. Photos of the Defendant and the children were taken both by her and Oldroyd. The defendant left the visitation room holding the two children’s hands while Oldroyd and “I” walked ahead. Instead of turning left to the reception area where the children were to be returned to the father, the party turned right towards the exit. The visitation supervisor challenged the Defendant about what she was doing and told her it was time to take the

¹ (1980) 147 CLR, at p 111,

² *Walton v Gardiner* (1993) 177 CLR 378 at 392; [1993] HCA 77).

³ The Statement of Alleged Facts refers to “the Federal Family Court” but it is clear from the orders that have been tendered that this has been used as an abbreviation for the Federal Circuit and Family Court of Australia.

⁴ Although not mentioned in the alleged facts the child P was at the time of the alleged offence under an order made by the Local Court in its Family Matters Jurisdiction and the Federal Circuit & Family Court had ordered that upon expiry of that order he was to live with his father. He was to spend time and communicate with the mother as may be recommended by his treating mental health, medical practitioner or behavioural expert. See Orders 5 and 6 of the consent orders of the FC&FC dated 31 May 2022 tendered by the Applicant in her legal submissions.

⁵ Ms Oldroyd is also charged with offences arising out of this incident.

children back to their father. She was ignored and the party proceeded to a Toyota Kluger that Oldroyd had parked at the front of the visitation centre.

10. The visitation supervisor again questioned what she was doing and the child G told the mother that they were meant to go the other way to her father and began walking in that direction. The Defendant approached G and picked her up and walked her to the vehicle. Oldroyd opened both the driver's side doors. The Defendant placed G in the vehicle through the open rear door. G got out of the vehicle as the Defendant was attempting to get P into the vehicle. P resisted. G was again placed by the Defendant into the vehicle. P started yelling and called for help from his father. P removed his sister G from the vehicle. He started striking towards Oldroyd. The visitation supervisor realised that they were trying to abduct the children and called for help from her two colleagues. They approached the vehicle and attempted to intervene.
11. The father then ran to the vehicle and picked up G. The Defendant attempted to pull her from his arms. Oldroyd intervened placing her arms around the father's neck to try and pull him away from the Defendant. The father let go of G to avoid her being harmed. Oldroyd then put the father in a headlock and pushed him against the wall. The child P attempted to intervene striking Oldroyd to her body. The father let go of Oldroyd and separated P from her. There was a continued scuffle between Oldroyd and the father.
12. Meanwhile the Defendant re-entered the back seat of the vehicle with G. The father again attempted to remove the child from the car but Oldroyd pushed him away and closed the door. Oldroyd entered the driver's seat and the father stood in the way of the door to stop it closing but eventually she was able to close the door and drove off with the Defendant and G in the back seat and the child "I" in the front passenger seat.
13. A photograph showing the struggle by the mother and Oldroyd to take the child G and those attempting to intervene is included with the statement of alleged facts.
14. The last sighting of the party was later that day in the Acacia area. The whereabouts of the Defendant and G remained unknown until 19 August 2021 (12 days) when the Defendant surrendered to police.
15. There is significance in understanding the **nature** of the taking of G and the attempted taking of P that will be referred to later in this decision.

THE NORTHERN TERRITORY AND FEDERAL COURT ORDERS AT THE TIME OF THE ALLEGED OFFENCES

16. At the time of the alleged offences section 202⁶ of the Criminal Code provided:

⁶ Since its introduction the text of section 202 had been amended only twice as at the date of the alleged offences. Once in 2004 to remove a reference to a child "to whom he is not married" and in 2016 to change the word "crime" to "an offence".

Abduction of child under 16 years

- (1) Any person who takes a child who is under the age of 16 years out of the custody or protection of that child's mother or father or other person having the lawful care or charge of the child and against the will of such father or mother or other person is guilty of an offence and is liable to imprisonment for 3 years.
 - (2) If the offender is an adult or if the child is under the age of 14 years, he is liable to imprisonment for 7 years.
 - (3) It is immaterial that the offender believes the child to be of or above the age of 16 years or 14 years.
 - (4) It is immaterial that the child was taken with the child's consent or at the child's suggestion.
17. Regrettably, the first written submissions of the Defendant's counsel in this matter were based on section 202 in its current form rather than on the provision at the time of the alleged offences. The *Surrogacy Act 2022* which commenced on 20 December 2022, amended section 202 of the Criminal Code by deleting the reference to the "child's mother or father" and inserting "child's parent" and omitting "such father or mother" and inserting "the parent". The Defendant's counsel's submissions consequentially focused on the interpretation of section 202 by reference to the amended wording that replaced "mother or father" with "parent". The prosecution in its written submissions correctly identified section 202 as it was at time of the alleged offences. The Defendant's counsel was alerted to this at the hearing and made oral submissions based on the correct version of section 202.

THE ORDERS PERTAINING TO EACH CHILD AT THE TIME OF THE ALLEGED OFFENCES

18. The Defendant says that the offences cannot be found to have been committed because there is a presumption of shared parental responsibility under the *Family Law Act* which the defendant retained despite the court orders that had been made.

The Child P

19. The Defendant's submissions have primarily focused on the child G rather than on each of the children noting that there are separate criminal charges with respect to each child and that there were orders from the Local Court of the Northern Territory (the Local Court) with respect to P and from the Federal Circuit and Family Court with respect to both children.
20. The Defendant has pointed to Section 61C of the *Family Law Act* submitting that at the relevant time there was a presumption of shared parental responsibility for each of the children. Whilst section 61C(1) of the *Family Law Act* provides that each parent has parental responsibility for a child, section 61C(3) provides that this rule has effect **subject to any order of a court for the time being in force (whether or not made under this Act** and whether made before or after the commencement of this section) (emphasis added). There is significance that the provision refers to "any order of a court". If it was intended that section

61C apply only to orders of the Federal Circuit and Family Court, the provisions would have referred to “the” court. As will be referred to below, the *Family Law Act* both recognises and provides for the circumstances where there is an order of another court affecting children who are also the subject of proceedings under the Act.

21. On 17 February 2022 the Local Court made a 6 month Protection Order pursuant to section 123(1)(c) of the *Care and Protection of Children Act 2007* [REDACTED] with a direction that the father have short term parental responsibility for a period of 6 months from the date of the order. The effect of that order was to override any orders to the contrary under the *Family Law Act*.⁷ That circumstance is clearly reflected in the interim order of the Federal Circuit and Family Court made on 31 May 2022 that the court’s order [REDACTED] [REDACTED] was only to take effect on the expiry of the order made under the *Care and Protection of Children Act*. At the time [REDACTED] the order of the Local Court remained in force. That order gave full parental responsibility [REDACTED] to the father.
22. Parental Responsibility is defined in section 22 of the *Care and Protection of Children Act*.

Parental responsibility for child

- (1) A person has parental responsibility for a child if the person is entitled to exercise all the powers and rights, and has all the responsibilities, for the child that would ordinarily be vested in the parents of the child.
 - (2) Without limiting subsection (1), a person who has parental responsibility for a child:
 - (a) has daily care and control of the child; and
 - (b) is entitled to exercise all the powers and rights, and has all the responsibilities, in relation to the long-term care and development of the child.
 - (3) To avoid doubt, a reference in this Act to a person who has parental responsibility for a child includes a person who has been given parental responsibility for the child under a law of another jurisdiction.
23. Consequently, at the time of the alleged attempted abduction [REDACTED] the mother did **not** have shared parental responsibility [REDACTED]. The effect of the Protection Order was to divest the mother of her parental rights [REDACTED] and confer parental responsibility exclusively on the father.

⁷ See ss 60CH & 69ZK *Family Law Act* and *Northern Territory of Australia v GPAO* [1999] 196 CLR 553

24. The Local Court order did however further provide that the mother was permitted
- “not less than 1 access per week, until the details of these access arrangements to be agreed. between the parent’s solicitors.”[sic]
25. However in my view, this did not and could not have the effect of conferring on the mother any parental rights because those rights had been conferred solely on the father.
26. Whilst a Protection Order may, in addition to conferring parental responsibility, include various supervision directions, in my view the “access” order that the Court purported to make was not one within the power of the Court under the *Care and Protection of Children Act 2007*.
27. Section 128 of the Act provides for the orders that the court may make when determining an application for a protection order. The Court may make a protection order for a child either as proposed by the CEO and/or specify other directions mentioned in section 123 as the Court considers appropriate or dismiss the application. The Court is limited to those orders. Where the Court proposes to specify other directions, the Court must hear submissions from the parties in relation to those directions.⁸
28. Section 123(1)(a) and (2) provides for the supervision directions that the court may make. The proposed order must specify one or more of the following directions⁹:
- (i) that a person must do, or refrain from doing, a specified thing directly related to the protection of the child;
- (ii) that the CEO must supervise the protection of the child in relation to specified matters;
- (iii) that the CEO must do, or refrain from doing, a specified thing related to the care of the child.
29. Neither subsection (ii) nor (iii) have application to the purported order as it did not involve the CEO.
30. The order requires that the mother be “permitted” to have access. The permission then would have to be given by the father but if he was bound by the order that would in effect narrow the parental rights that had been conferred solely on him by the Court. The “access” was to be agreed between the parent’s solicitors. Certainly the father, through his legal representative, could agree to the mother having access to the child but in my view he could not be compelled by that order to do so.

⁸ Section 128(1A)

⁹ Section 123(1)(a)

31. Section 123(2) of the Act is likewise not applicable. It is a provision that allows the court to make a supervision direction that forbids contact either completely or only in specified circumstances that are not relevant to the “access” order that was made.
32. It is somewhat difficult to see how an “access” order can be “directly related” to the **protection** of a child as required by section 123(1)(a) considering that the primary object of the Act is to protect children from harm and safeguard their wellbeing.¹⁰ It does so primarily by empowering the court to make orders divesting a parent or parents of their parental responsibility and conferring that responsibility on another. Most commonly this is on the CEO of the relevant Department or less often on other relatives or persons who have a direct interest in the child or on one of the parents. Section 20 provides the grounds for determining whether a child is in need of protection.¹¹
33. It is worth observing that this legislation is not directed at determining rights as between parents. It is directed at a determination of whether a child is in need of protection entirely on the grounds provided in section 20 of the Act.
34. Leaving aside the question of whether such an “access” order could be made, the other problem with the order is that it may in any event have been invalid for uncertainty. An access agreement requires specificity. There is no detail as to what the once a week access required. For example, was it to be for an hour or more? Was it overnight? Was it to be in the presence of the father? Where it would take place? How was the father to facilitate the access?
35. The proviso that the access was to occur until the parent’s solicitors agreed the “details” of the arrangement emphasises the problem with the lack of detail that would enable such an order to be carried out.
36. It further suffers from the problem as to what was to happen in the event that the solicitors failed to reach agreement? The matter could not be returned to the Court because the order was a final order and the Court therefore *functus officio*.
37. A question also arises as to whether there was a conflict between that order, assuming its validity, and the order of the Federal Circuit and Family Court of 31 May 2022 that made different provision for the circumstances in which P could spend time with the mother. The parties appear to have been acting in accordance with the Federal order at the time of the alleged offences that provided that P “spend time with and communicate with the mother as may be recommended by P’s treating mental health, medical practitioner or behavioural expert”.¹²

¹⁰ Section 5 *Care and Protection of Children Act 2007*

¹¹ Section 129 of the *Care and Protection of Children Act 2007* provides that the Court must make a protection order for a child if it is satisfied that the child is in need of protection or would be in such need but for the fact that the child is currently in the care of the CEO.

¹² Order 6 of the Parenting Arrangements in the order made 31 May 2022.

38. Consequently, at the time of the alleged attempted abduction of the child P on 7 August 2022, the mother was not vested with any parental responsibility for P. Those rights were entirely vested in the father pursuant to the Protection Order made by the Local Court.

The Child G

39. With respect to the child G, no order for her had been made by the Local Court. Her circumstances and the legal rights of each of the parents were, at the time of the alleged abduction, entirely governed by the order of the Federal Circuit and Family Court of 31 May 2022 that provided *inter alia* that the child G live with the father and restricted the mother's time with G to times and dates as directed by the Children's Contact Service and upon particular rules that applied for that time, including compliance with all reasonable requests or directions of the staff of the Centre.
40. The mother's assertion that she retained full shared parental responsibility of G with the father cannot be sustained in face of that order. Although her parental responsibility had not been removed, it had clearly been limited because the Federal Circuit and Family Court order provided that G was to "live" with the father and that the mother have only "supervised time" with the mother.
41. As previously noted section 61C(1) of the *Family Law Act* provides that each parent has parental responsibility for a child but section 61C(3) provides that this rule has effect subject to any order of a court for the time being in force. Additionally the note to subsection (1) provides

"This section states the legal position that prevails in relation to parental responsibility **to the extent to which it is not displaced by a parenting order made by the court.** See subsection (3) of this section and subsection 61D(2) for the effect of a parenting order."

42. It may well be that the Order of 31 May 2022 did not completely remove shared parental responsibility¹³ for G. However, as noted above, the Court may make orders that affect the **degree** of parental responsibility exercised by each. Relevantly, section 61D provides
- (1) A parenting order confers parenting responsibility for a child on a person, but only to the extent to which the order confers on the person duties, powers, responsibilities or authority in relation to the child.
 - (2) A parenting order in relation to a child does not take away or diminish any aspect of the parenting responsibility of any person for the child except to the extent (if any):

¹³ Parental Responsibility is defined in section 61B. Parental responsibility, in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.

(a) expressly provided for in the order; or

(b) necessary to give effect to the order.

43. The order made by the Court on 31 May 2022 altered the parenting arrangements by ordering that the child G live with the father and, as previously noted, limited the mother's time and the circumstances to apply to that time with G in accordance with the parenting orders that are available to be made under section 64B(2). These may have been interim orders but that does not alter the strength of them while they were in force.

Ground 1 Ambiguity in Territory Law.

44. The argument advanced in the first written submissions of the Defendant were, as previously noted, based on the incorrect version of section 202 of the Criminal Code and argued that as the offence required the taking of a child from a parent there could be no offence as the mother was a parent. That argument has no relevance because the applicable version of section 202 refers to the taking of a child "out of the custody or protection of that child's mother or father or other person having the lawful care or charge of the child".
45. In oral submissions the Defendant asserted that the correct provision strengthened the argument about the parent's rights. That position has already been discussed above.
46. The approach to statutory interpretation is no longer based on a literal approach to the interpretation of the words of a statute. What is required is a consideration of context and purpose. This may involve interpreting the words in a statute different to their literal or grammatical meaning. As the Honourable Michael Kirby noted in an article in the *Melbourne Law Review*¹⁴ "that in deriving meaning from the text, so as to fulfil the purpose of Parliament, it is a mistake to consider statutory words in isolation. The proper approach demands the derivation of the meaning of words from the legislative context in which those words appear. Specifically, it requires the interpreter to examine at the very least the sentence, often the paragraph, and preferably the immediately surrounding provisions (if not a wider review of the entire statutory context) to identify the meaning of the words in the context in which they are used."
47. In my view, an available interpretation of s202(1) is that "mother or father or other person having the lawful care or charge of the child" is a reference to a taking by a person who does not have legal responsibility for the child (or what might be termed "parental responsibility" noting the use of different terminologies across the legislation in reference to parent/child relationships) and who has removed the child from someone who does have that legal responsibility. It is a matter of common knowledge that the biological relationship of "mother" or father" does not always carry with it full parental rights as these can be altered by court orders amongst other things, either in protection matters or under the *Family Law Act*. In my view that interpretation is open to the court on the hearing.

¹⁴ (2011) *Melbourne University Law Review* 113

48. Even if it could be said that the correct provision is ambiguous, this would not be sufficient to found a stay of proceedings unless the ambiguity is such that it could not be resolved. The interpretation of the provision is a matter for determination at the final hearing.

Ground 2 Interpretation of the Territory law where it does not apply to a parent.

49. This ground relies on the interpretation that was advanced by the Defendant with respect to Ground 1. For the reasons expressed above, this ground is also dismissed.

Ground 3 Interpretation of the Territory law where it applies to a parent.

50. This ground advances an argument that where one parent takes a child and fails to return the child to the other parent that amounts only to a breach of orders under the *Family Law Act* because the sole legal source of the requirement for one parent to return the child to another parent is derived from a *Family Law Act* order.
51. The first thing to note is that again this submission appears to ignore the fact that the offences involve two children and that while the child ■ was only the subject of the orders made under the *Family Law Act*, at the time of the alleged offences ■■■■■ was subject also to a Protection Order that had been made under the *Care and Protection of Children Act* which had given sole parental responsibility to the father.
52. Secondly, the Defendant asserts that if the alleged conduct amounts to a contravention of a parenting order under the *Family Law Act*, the contravention proceeding must be brought under Commonwealth jurisdiction under the *Family Law Act* and not under a Territory law because “the sole legal source of the requirement for one parent to return the child to another parent is derived from a *Family Law Act* order”.
53. Once again the circumstances of each child needs to be distinguished because of the different orders that applied to them at the time of the alleged offences.
54. With respect to the child G, the Defendant has submitted that the prosecution of a parent for failure to return a child to another parent under Territory laws, when solely in breach of a Commonwealth parenting order, is doomed to fail. In support of that contention, reference is made in the Appellant’s second set of written submissions to a record of Parliamentary debates “when drafting the Criminal Code” that showed “a clear intention for abduction laws to apply to ‘strangers’ or ‘people not known to the abductees’.” There are several problems with that submission. First and foremost, what is said in parliamentary debates is not a tool that can be used in statutory interpretation for the obvious reason that members of parliament may have quite different views about the intent, interpretation and operation of the proposed Bill. What is contained in a second reading speech or an explanatory memorandum though may be used in certain circumstances to interpret legislation.¹⁵

¹⁵ Section 62B(2)(e)&(f) *Interpretation Act 1978*.

55. However more significantly the debates that are referred to in footnote 5 of the Appellant's submissions¹⁶ are with respect to an Act that amended section 70 of the then *Criminal Law Consolidation Act* by adding to that section a subsection (2) which referred to the abduction of a child for the purpose of committing sexual offences against that child.¹⁷ It has no relevance to the interpretation of a provision of the Criminal Code, noting that in any event, the text of section 70 of the *Criminal Law Consolidation Act* was not replicated in section 202 of the Criminal Code when it was introduced.¹⁸
56. [REDACTED] the order made under the *Care and Protection of Children Act 2007* gave full parental responsibility to the father. A contravention of that order by attempting to remove the child was not one that could be dealt with by way of the sanctions under the *Family Law Act* because the order [REDACTED] did not take effect until the expiry of the Local Court order.

Ground 4 Inconsistency Between Commonwealth And Territory Law.

57. In arguing that s202 of the Criminal Code is inconsistent with the *Family Law Act* and therefore invalid, the Defendant has relied on section 109 of the Australian constitution which provides that where a **state** law is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid. The Northern Territory is not a state and s109 does not have application to this matter.
58. The correct legal approach where there is said to be conflict between a Territory law and a Commonwealth law is explained in *Work Health Authority v Outback Ballooning Pty Ltd*¹⁹

“When a law of a State is inconsistent with a law of the Commonwealth, s 109 of the Constitution resolves the conflict by giving the Commonwealth law paramountcy and rendering the State law invalid to the extent of the inconsistency.

The NT WHS Act is a law of the Northern Territory Legislative Assembly. The Legislative Assembly derives its legislative power from s 6 of the Northern Territory (Self-Government) Act 1978 (Cth), which is enacted under s 122 of the Constitution. The terms of s 109 of the Constitution are not addressed to the relationship between laws of the Commonwealth and those enacted by the legislatures of the Territories. The subordinate status of a Territory law has the result that where it is inconsistent with a Commonwealth law the Commonwealth law will prevail. It is not necessary in this case to further consider the effect of the inconsistency on a Territory law. There is no dispute that cases concerning s 109 inconsistency may be applied by analogy to a case involving a Territory law.”(footnotes omitted).

¹⁶ “Parliamentary record: Part I debates (22 May 1982)”. Northern Territory Legislative Assembly, Darwin. 22 May 1982...”.

¹⁷ Section 2 *Criminal Law Consolidation Act 1982*.

¹⁸ With the exception of the provisions with respect to appeals to the Court of Criminal Appeal, the Criminal Code Act 1983 commenced on 1 January 1984.

¹⁹ [2019] HCA 2 at [29] and [30].

59. The Defendant submits that if the court accepts that s202(1) of the Criminal Code applies to one parent taking a child from another parent is a Territory offence, then there is a conflict between the Territory and Commonwealth laws on the basis that sections 65M(2) and 65N(2) of the *Family Law Act* create the “relevant offences” relating to which parent the child lives with and spends time with in accordance with a parenting order.
60. The Defendant’s argument with respect to inconsistency takes the approach that the *Family Law Act* “covers the field”²⁰ or as the High Court pointed out is more accurately expressed as covering “the subject matter with which it deals,”²¹ because it expresses an intention to say “completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed”.²² This approach is generally referred to as an “indirect inconsistency”.
61. In determining an indirect inconsistency regard may be taken not just to the provision in question but to any other provisions that illustrate the intention of the Legislature that the Commonwealth provision in question was intended to be the exhaustive or exclusive provision on the subject.

“A provision which, expressly or impliedly, allows for the operation of other laws may be a strong indication that it is not so intended. The essential notion of indirect inconsistency is that the Commonwealth law contains an implicit negative proposition that nothing other than what it provides with respect to a particular subject matter is to be the subject of legislation.”²³

62. The Defendant says that although there are many offences that may be committed by a parent against a child such as family violence, assault or sexual assault and that conduct may be in breach of specific Territory laws, a Commonwealth offence and also a breach of a parenting order, the distinction in this matter is that “which parent the child lives with and spends time with are expressly and only covered by the Family Law Act, specifically ss65M(1) & 65N(1) of the FL Act”.

65M General obligations created by parenting order that deals with whom child lives with

- (1) This section applies to a parenting order that is in force in relation to a child to the extent to which the order deals with whom the child is to live with.
- (2) A person must not, contrary to the order:
- (a) remove the child from the care of a person; or

²⁰ See first written submissions at [57].

²¹ Ibid at [33].

²² Ibid citing *Ex Parte McLean* (1930) 43 CLR 472 at 483; [1930] HCA 12.

²³ Ibid at [35].

- (b) refuse or fail to deliver or return the child to a person; or
- (c) interfere with the exercise or performance of any of the powers, duties or responsibilities that a person has under the order.

65N General obligations created by parenting order that deals with whom a child spends time with

- (1) This section applies to a parenting order that is in force in relation to a child to the extent to which the order deals with whom the child is to spend time with.
- (2) A person must not:
 - (a) hinder or prevent a person and the child from spending time together in accordance with the order; or
 - (b) interfere with a person and the child benefiting from spending time with each other under the order.

63. This cannot be correct. The Northern Territory *Care and Protection of Children Act 2007* (and similar legislation in all of the States) provides for the Local Court to make orders that includes vesting sole parental responsibility in one parent and thereby removing parental responsibility from the other. [REDACTED]

[REDACTED] It is without doubt that child protection orders of the Local Court in its family responsibility jurisdiction cannot be overridden by an order pursuant to the *Family Law Act*²⁴ and as has been previously pointed out, the Federal Circuit and Family Court order of 31 May 2022 recognised that.

64. Sections 65M and 65N are contained within a subdivision that provides for general obligations created by certain parenting orders. Neither contain a penalty provision. Section 70NAA empowers a court with jurisdiction under the Act to make orders to enforce compliance with orders under the Act affecting children.

65. There is no single consequence for a failure to comply with a parenting order. The sanctions that can be applied vary depending on whether there is a reasonable excuse and if not the degree of the contravention. Where the court finds that there was a reasonable excuse for the contravention it may nevertheless make orders somewhat in the nature of reparation orders against the parent who has contravened the order, including making a further parenting order to compensate for the time lost with the child and ordering costs.

²⁴ Northern Territory v GPAO [1999] 196 CLR 553

66. With respect to what is termed a “contravention without reasonable excuse (less serious contravention)” in Subdivision E, various sanctions are available including attending a post-separation parenting program,²⁵ make a further parenting order or order a bond or compensation or costs.²⁶
67. Where there has been what is termed a Contravention without reasonable excuse (more serious contravention) under Subdivision F, more serious sanctions can be applied. These include orders more analogous to sentencing orders in a criminal jurisdiction such as bonds, fines, community service and imprisonment but can also order compensation for expenses, make various costs orders.²⁷
68. The sanction of imprisonment is more closely related to orders that can be made for a contempt of court than ordinary criminal penalties. Section 70NFG provides for a specified period of imprisonment of 12 months or less or for a period ending when the person complies with the order concerned or, has been imprisoned under the sentence for 12 months or such lesser period as is specified by the court, whichever happens first.
69. This sanction operates very differently from a criminal sanction imposed by a court. Once sentenced the court is *functus officio*. It cannot re-open the proceedings to change the sentence other than to correct a sentencing error. Section 70NFG however operates to allow for the sentence to be ended once there is compliance with the order concerned. An obvious example would be that the person advises the whereabouts of a child that has been taken in contravention of a court order.
70. Further differences between the Criminal Code and the *Family Law Act* is the difference in penalty between a contravention of the *Family Law Act*, a maximum of 12 months and section 202 of the Criminal Code a maximum of 7 years. Different standards of proof apply. A contravention of an order of the *Family Law Act* must be proved on the balance of probabilities which is the standard applied in civil matters, whilst a contravention of section 202 requires proof beyond reasonable doubt, the criminal standard of proof.
71. In my view these matters are all illustrative of the difference in operation of the two legal regimes that operate in Australian law. The law is divided into private and public law. Under this system, public law deals with relations between individuals and the state, whilst private law deals with relations between individuals, including organisations.
72. Those laws, both statutory and common law operate to, amongst other things, to regulate the conduct of persons to whom the laws are directed. The *Family Law Act* is an example of private law. It regulates the conduct of individuals as between themselves with respect to family matters such as divorce and child maintenance and custody issues.

²⁵ Section 70NEB(1)(a).

²⁶ Sections 70NEB(2)(c)(d) &(e).

²⁷ Section 70NFB(2).

73. The Criminal Code as with all criminal laws is an example of public law.
74. More significantly, it is clear that the *Family Law Act* recognises the criminal jurisdiction of other courts to deal with matters that, in addition to a breach of the federal orders, amount to criminal conduct. Section 70NFH provides a mechanism that requires any contravention proceedings brought under the *Family Law Act* for an **act or omission** that is both a contravention of an order under that Act and which also constitutes an offence against **any** law are to be adjourned until the criminal proceedings have been dealt with or may dismiss those proceedings. Section 70NFH makes it clear that a person can be prosecuted and convicted for such an offence.

70NFH Relationship between Subdivision and other laws

- (1) This section applies where an act or omission by a person:
- (a) constitutes a contravention of an order under this Act affecting children; and
 - (b) is also an offence against any law.
- (2) If the person is prosecuted in respect of the offence, a court in which proceedings have been brought under section 70NFB in respect of the contravention of the order must:
- (a) adjourn those proceedings until the prosecution has been completed; or
 - (b) dismiss those proceedings.
- (3) The person may be prosecuted for, and convicted of, the offence.
- (4) Nothing in this section renders the person liable to be punished twice in respect of the same act or omission.
75. Finally, lest there be any further doubt, the decision of the Full Court of the Family Court in *Sahari v Sahari*²⁸ makes clear that the fact that a person who commits a contempt of court which also amounts to a criminal offence may be dealt with both for the contempt and for the offence concerned.

“Where the alleged facts constituting the contempt also constitute a crime the court has a careful and considered discretion to exercise. In some cases protection of the applicant will demand urgent action. In others the applicant's protection can be left to the processes of the criminal law. Where only the affront to the court's authority is involved and the same facts constitute a crime, the criminal processes should first be

²⁸ (1976) 11 ALR 679 (1976) 25 FLR 475 at [50] – [56].

allowed to take their course. When they are concluded the court may then turn to the question whether the disobedience of its order merits further punishment in the public interest.”²⁹

Ground 5 Inherent unfairness to the applicant.

76. The Defendant submits that the prosecution should be stayed on the grounds that it is inherently unfair to her because she had been advised only of the consequences of contravention of the *Family Law Act* when she was served with the Federal and Family Court Order and was therefore unaware that she could face “State or Territory” consequences for breaching a parenting order.
77. It is submitted that section 65DA(2) of the *Family Law Act* required that she should have been informed of that. Section 65DA provides for parenting orders. Subsection (2) provides

“It is the duty of the court to include in the order particulars of:

- (a) the obligations that the order creates; and
- (b) the consequences that may follow if a person contravenes the order.”

78. That provision was complied with by attaching to the Order a fact sheet detailing “Parenting orders – obligations, consequences and who can help”. It included a paragraph that is headed “Penalties for failing to comply with a parenting order”. It includes a warning that if a court finds that you have failed to comply with a parenting order without reasonable excuse, it may impose a penalty. Thereafter are listed a range of penalties up to and including a sentence of imprisonment. In my view the Act does not compel the Court to advise a parent that they may also face criminal consequences if they act in disobedience to an order.
79. Even if the Defendant may not have been aware that she could also be charged with criminal offences arising out of conduct that was in breach of the Federal and Territory orders that limited her ability to be with the children, that does not prevent the bringing of criminal charges. It is a trite observation that ignorance of the law is no excuse.³⁰

Ground 6 Public Policy Grounds.

80. The Defendant asserts that for the “Territory government”³¹ to attempt to criminalise the breach of an interim parenting order by a parent by using legislation which is clearly drafted to criminalise the abduction of a child *from* a parent³² or another person with lawful authority

²⁹ Ibid at [55].

³⁰ Section 202 is in Part VI Division 6. It is not included in Schedule 1 of the Criminal Code that provides for the offences to which Part IIAA applies. The applicable provision of the Code is therefore section 30(1) which, subject to exceptions that do not appear to have application, provides that ignorance of the law does not afford an excuse.

³¹ The Defendant presumably means the independent office of the Director of Public Prosecutions.

³² The text of the relevant version of section 202 “mother or father or another person with lawful care or charge of the child” has previously been noted.

is a blatant abuse of power, which too goes against the public interest". It is further submitted that for the "Territory Government to arbitrarily usurp the Commonwealth jurisdiction and to attempt to enforce parenting orders by proxy "abduction laws" is against public interests."

81. This is a similar argument to others advanced, that the purpose of the *Family Law Act* is consistency of outcomes across the nation where unified laws apply. Firstly, this ignores the fact that the *Family Law Act* jurisdiction in Western Australia is not the same as in the other States and Territories. In that state, the Commonwealth legislation applies to married people who want to divorce and make arrangements for children, property and spousal maintenance. However, with respect to unmarried parents, the *Family Court Act 1997* (WA) covers child and property matters for de facto relationships. There is a separate Family Court of Western Australia. There is therefore not, as asserted, a single system that governs issues in relation to children across the nation.
82. Whether or not section 202 is "against the public interest", the provision is a valid exercise by a Legislature.

CONCLUSION

83. None of the grounds for a permanent stay of proceedings are sufficient to warrant an order for a permanent stay of proceedings. In particular, there is no basis at law with respect to the inconsistency argument advanced. Indeed, as has been pointed out, in any event, it had no application to the child P who was subject at the time of the alleged offence to an order of the Local Court.
84. In the alternative, the Defendant has sought certification of the application to the Supreme Court of the Northern Territory in the event that the stay application is not granted on points of law pursuant to s162 *Local Court (Criminal Procedure) Act 1928*.
85. The reservation of points of law for consideration by the Supreme Court is a discretionary power of the Local Court. They have been considered and ruled on in this decision. It would not in my view be in the interests of justice for there to be further delay in these matters occasioned by a reservation to the Supreme Court.