

IN THE CHILDREN'S COURT  
OF NEW SOUTH WALES  
AT CAMPSIE

Swain CM

27 February 2006

IN THE MATTER OF CRISTIAN, TAMSIN, JENNIFER and KAREN (NO 2)

JUDGMENT

1. During proceedings pursuant to Section 73(4) Children and Young Persons (Care and Protection) Act 1998 for Notification for breach of an undertaking and an Application for leave to vary an existing order pursuant to Section 90 of the same Act, the respondent natural Father, "Mr Jones" challenged the validity of the final orders made on 21<sup>st</sup> June, 2005 in relation to the above mentioned children, inter alia, accepting the undertakings of the natural mother.
2. Such undertakings were accepted pursuant to Section 73(1)(a) of the Children and Young Persons (Care and Protection) Act 1998.
3. The definition of the term "parent" as it is used in Section 73(1)(a) is the subject of this Judgment.

**History**

4. A brief summary follows of the important events which are relevant to this issue.
5. "Ms Brown" ("the mother") and "Mr Davis" parented a child, Cristian, born 1997.

The mother and Mr Jones parented four children:

Tamsin, born 2000  
Jennifer, born 2001  
Karen, born 2003  
Raymond, born 2005

6. On 11<sup>th</sup> August 2004 the Department of Community Services filed a care application at Lidcombe Children's Court, in respect of the four children, Cristian, Tamsin, Jennifer and Karen (Raymond was unborn).
7. The applications changed as time went on, due to the changing circumstances of the mother. It is not necessary for me to give a detailed history of these proceedings for the purpose of this challenge, save for some important and significant orders made at various times during its course.
8. On 7<sup>th</sup> September 2004 an Interim Order was made at Lidcombe Children's Court. Parental Responsibility was granted to the Minister of the four children Cristian, Tamsin, Jennifer and Karen "until further order". Another Interim Order was made on 3<sup>rd</sup> May 2005 granting Parental Responsibility to the Minister.
9. No other orders were made with respect to Parental Responsibility until 21<sup>st</sup> June 2005. Parental Responsibility therefore remained with the Minister from 7<sup>th</sup> September 2004.
10. It has already been established that the four children were in need of care and protection. It is not clear from the file when this was established. Proceedings in this jurisdiction have no computer file or history and so the only source to determine the history of a matter is the file itself and through transcripts of Court proceedings (which are not routinely prepared). That the four children are in need of care and protection however, is not in dispute.

11. On 21<sup>st</sup> June 2005 final orders were made with respect to the four children Cristian, Tamsin, Jennifer and Karen, in the following terms:

*The children be placed under the parental responsibility of the Minister for three years.*

***"I make an order accepting undertakings from the Mother for a period of three years."***

*Contact orders in terms of the draft Minute marked A.*

The Undertakings made by the mother were:

*not to use any physical form of discipline on the children;*

*to inform the Department (of Community Services) if any violence occurs towards her or her children;*

*to work with the Department of Community Services and to accept referrals to appropriate support services;*

*to advise the Department of Community Services if she proposes to resume a relationship with Mr Jones and/or allow him to reside at her residence.*

12. On the same day 21<sup>st</sup> June 2005, separate orders were made with respect to the child Raymond. Raymond remained under the Parental Responsibility of the Mother, supervised by the Minister. Those orders are not the subject of any challenge in this part of the proceedings.

### **Current Proceedings**

13. On 30<sup>th</sup> August 2005 the Director General commenced proceedings by way of Notice of Breach of undertakings, pursuant to Section 73(4) Children and Young Person (Care and Protection) Act 1998 alleging that the mother had breached the undertakings made by her pursuant to the orders made on 21<sup>st</sup> June, 2005.

14. At the same time the Director General also filed an application pursuant to Section 90 of the same Act, alleging that the breach of the undertakings had brought about a change in circumstances since the making of the final orders on 21<sup>st</sup> June 2005.

### **Current Issue**

15. As stated earlier, a preliminary issue has been raised by the representative of Mr Jones. The issue relates to whether the Children's Court was empowered to accept the undertakings of the mother pursuant to s. 73(1)(a) of the Children and Young Persons (Care and Protection) Act, 1998. The mother, Mr Davis and the separate representative of the children join in this issue.

16. Briefly, it is submitted that the Children's Court had no power to accept the undertakings of the mother because, at the time of the accepting of the undertakings, on 21<sup>st</sup> June 2005 the mother, did not have parental responsibility of the children and therefore did not fall within the definition of "parent" under the Act.

17. The Director General does not agree with the submission made by Mr Braine on behalf of the natural father, Mr Jones.

### **The Arguments**

18. The representative of the natural father Mr Jones argues that the acceptance of the undertaking of the mother is beyond power.

19. Pursuant to s. 3 of the Act, "parent" is defined as follows:

***"parent of a child or young person means a person having parental responsibility for the child or young person."***

As at 21<sup>st</sup> June 2005, the respondents argue, the mother did not have parental responsibility of the four children Cristian, Tamsin, Jennifer or Karen. It is argued therefore, that the Court could not accept the undertakings of the mother because she did not have parental responsibility.

20. Despite the final order on 21<sup>st</sup> June 2005, granting parental responsibility to the Minister, parental responsibility rested with the Minister on an interim basis since 7<sup>th</sup> September 2004.

21. Further, it is argued, that if that is the correct interpretation, there can be no breach proceedings of undertakings which could not, at law, be accepted by a Court. So, it is argued, those proceedings must fail. It is further argued that the s. 90 application should fail because the change in circumstances relied on by the Director General is the breach of the undertakings it claims were made by the mother.

22. The Director General argues to the contrary. It is argued that to read Section 73 in accordance with the definition of parent in Section 3 is a misreading of the Act. It is argued that notwithstanding the definition of "parent" in Section 3, a number of other sections are unintelligible if the term "parent" used in them, is read as defined by s. 3 instead of its common meaning. Further, that other sections in the Act which do not have their own definitions included (such as s. 83 and 84) clearly intend the notion of "parent" to have its common meaning rather than the definition contained in Section 3. Sections 69, 79 and 82 are given as such examples.

23. Therefore, the Director General argues, Section 73 should be read as meaning that a Court is empowered to accept undertakings from natural or adoptive parents even when they do not have parental responsibility.

24. It is further argued, that in situations such as this (where parental responsibility has been temporarily removed but eventual restoration is envisaged) it is reasonable to expect "parents" (natural mothers, fathers or adoptive parents) to make undertakings to facilitate restoration.

## Discussion

25. Undertakings can be accepted by a Children's Court pursuant to Section 73(1)(a) of the Act:

*s. 73 (1) If the Children's Court, after inquiring into a care application in relation to a child or young person, is satisfied that the child or young person is in need of care and protection: it may make an order accepting such undertakings (given by a parent of the child or young person) as it thinks fit with respect to the care and protection of the child or young person, or it may make an order accepting such undertakings (given by the child or young person) as it thinks fit with respect to the child's or young person's conduct, or it may make an order accepting undertakings under both paragraphs (a) and (b).*

*(2) an undertaking referred to in this section: is to be given in writing signed by the person giving it, and remains in force for such period (expiring on or before the day on which the child or young person attains the age of 18 years) as may be specified in the undertaking.*

26. Section 73(1)(a) of the Act was amended by the Statute Law (Miscellaneous Provisions) Act 2002 Number 53. It was amended by the omission of the words "person having parental responsibility for" and the insertion instead of "parent of". So, until this amendment was made, undertakings could only be accepted by a Court if they were made by a person having parental responsibility. Is it different now?

The Second Reading Speech contains this:

*"Schedule 1 contains amendments arising from policy changes of a minor and non-controversial nature that the Minister responsible for the legislation to be amended considers to be too inconsequential to warrant the introduction of a separate amending bill. The schedule contains amendments to 28 Acts. I will mention some of them to give honourable members an indication of the kinds of amendments that are included in the schedule. ...*

*Schedule 1 amends that Children and Young Persons (Care and Protection) Act 1998 in a number of respects. Many of the amendments are made to ensure consistency of terminology or consistency with other provisions of the Act, or to clarify the meaning of a term. ...*

*Schedule 1 (Attached to the Amending Act)*

*Meaning of Parent*

*Section 3 of the Act defines parent of a child or young person as “person having parental responsibility for” the child or young person. Items [7], [12], and [13] of the proposed amendments replace references to persons having parental responsibility for children or young persons with the defined term “parent”.*

*Items [2], [9] – [11], and [14] of the proposed amendments clarify the meaning of parent in provisions of the Act in which that term carries a meaning other than that given it by the definition in Section 3...”*

27. Item [7] referred to above relates to the amendment of Section 73(1)(a) as well as Sections 96(1) and 152(5).

28. Items [9] and [10] of the amending Act, relate to Sections 83 and 84 in which “parent” is defined differently to that found in Section 3. Item [11] which relates to Section 148 also amended the definition of “parent”. Section 148 defines “parent” differently to the definition found in Sections 83 and 84. And all are different to the meaning found in Section 3.

29. Despite searches and requests, the policy or policy recommendations which I assume preceded these amendments, were not able to be obtained.

30. The Director General argues that the term “parent” should be given its ordinary meaning. Sections 69, 79 and 82 are cited as examples of where such ordinary meaning is given in the Children and Young Persons (Care and Protection) Act 1998.

31. Section 69 is not given the ordinary meaning as argued on behalf of the Director General. On the contrary the term “parent” in that section is a parent who has parental responsibility; the section refers to the parent (with parental responsibility) or “other persons having parental responsibility”.

32. Section 79 does use the term “parent” in the ordinary way and different to Section 3. However, the context is important here. This section deals with the allocation of parental responsibility and to whom it may be given. The ordinary meaning of “parent” in this context does not assist in the meaning of the term “parent” as used in Section 73.

33. Section 82 also uses “parent” in the ordinary way and different to Section 3. Again this section concerns parental responsibility, specifically the monitoring of the allocation where the person given parental responsibility is not the parent. The meaning of the term “parent” here must be viewed in its specific context. Such interpretation in this context cannot apply to other provisions in the Children and Young Persons (Care and Protection) Act, 1998.

34. Where general words are used in a statute they will be given their plain and ordinary meaning, unless a contrary intention is shown. *Cody v JH Nelson Pty Ltd (1947) CLR 629 per Dixon J at 647.* In the amendments to the Act, “a contrary intention” by Parliament has clearly been shown. In *R v Young (1999) 436 NSWLR 681* James J remarked on issues relating to statutory interpretation. McHugh JA in *Kingston v Kiprose Pty Limited (1987) 11 NSWLR 404 at 421-424:*

*“A purposive and not a literal approach is the method of statutory construction which now prevails. In most cases the grammatical meaning of a provision will give effect to the purpose of the legislation. A search for the grammatical meaning still constitutes the starting point. But if the grammatical meaning of a provision does not give effect to the purpose of the legislation, the grammatical meaning cannot prevail. It must give way to the construction which will promote the purpose or object of the Act. The Acts Interpretation Act, 1901 (Cth) s15AA and the Interpretation Act, 1987 (NSW) s. 33 both require this approach to statutory construction.”*

35. Further, in *Saraswati v The Queen (1991) 172 CLR 1* McHugh J said at p. 21:

*"In many cases, the grammatical or literal meaning of a statutory provision will give effect to the purpose of the legislation. Consequently, it will constitute the "ordinary meaning" to be applied. If, however, the literal or grammatical meaning of the provision does not give effect to that purpose, that meaning cannot be regarded as "the ordinary meaning" and cannot prevail. It must give way to the construction which will promote the underlying purpose or object of an Act: Interpretation Act s. 33....Moreover, once a court concludes that the literal or grammatical meaning of a provision does not conform to the legislative purpose as ascertained from the statute as a whole including the policy which may be discerned from its provisions, it is entitled to give effect to that purpose by addition to, omission from, or clarification of, the particular provision..."*

36. Section 34 of the Interpretation Act 1987 provides for the use of extrinsic material when interpreting a provision of an Act or a statutory rule. Whilst I do not propose to re-produce the legislation here, Section 34(2) provides a list of material which may be used in such interpretation. Relevant here are the following provisions:

*s. 34(2)(a) - all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government printer*

*s. 34(2)(e) - any explanatory note or memorandum relating to the Bill for the Act, or any other relevant document, that was laid before, or furnished to the members of, either House of Parliament by a Minister or other member of Parliament introducing the Bill before the provision was enacted or made*

*s. 34(2)(f) - the speech made to a House of Parliament by a Minister or other member of Parliament on the occasion of the moving by that Minister or member of a motion that the Bill for the Act be read a second time in that House*

37. The Second Reading speech refers to the Schedule 1 which is attached to the amending Act. Accordingly and pursuant to the provisions of Section 34 (2) referred to above, I am entitled to use that extrinsic material in interpreting the meaning of the term "parent" in Section 73 Children and Young Persons (Care and Protection) Act 1998.

38. The ordinary grammatical meaning of the term "parent" cannot prevail in Section 73. The intention of Parliament here is clear. The term "parent" is to be given the meaning as defined in Section 3. Where the term "parent" is not to be given that meaning, Parliament has made separate provision; for example Section 83, 84 and 148(2).

39. Further, the Second Reading Speech stated that the purpose of the amendment to this Act was to "ensure consistency of terminology or consistency with other provisions of the Act or to clarify the meaning of a term".

## **Conclusion**

40. I do not consider the omission of the words "person having parental responsibility for" and the insertion of the words "parent of" to mean that the term "parent" should now be given its ordinary grammatical meaning. The term "parent" has been specifically defined in Section 3 and where it is not to have that meaning, separate definitions have been provided. As stated in *Kingston v Kiprose*, "the grammatical meaning cannot prevail. It must give way to the construction which will promote the purpose or object of the Act". And further, "Moreover, once a court has ascertained that the literal or grammatical meaning of a provision does not conform to the legislative purpose ....it is entitled to give effect to that purpose by...clarification of, the particular provision..." *Saraswati v The Queen*.

41. The legislative purpose of the Children and Young Persons (Care and Protection) Act 1998 are set out in Sections 8 and 9 which provides inter alia for the care, welfare and protection of children and young persons taking into account the rights, powers and duties of their parents (as defined by section 3) or other persons responsible for them, that children and young persons be provided with a safe environment and that their needs be fostered and that appropriate assistance is given to those who care for them.

42. The interpretation of the meaning of the term "parent" in Section 73 in accordance with the definition provided in Section 3 of the Act is not at odds with the purpose and object of the Act. Those

with parental responsibility can make undertakings which can be accepted by a Children's Court with respect to the care and protection of children. Those without parental responsibility therefore cannot.

43. The intended use to be made by the Department of Community Services, of undertakings made by parents without parental responsibility, where restoration of the children is envisaged, was clearly not within contemplation of Parliament.

### **Finding**

44. That the term "parent" in Section 73 of the Children and Young Persons (Care and Protection) Act 1998 is to be defined in accordance with the definition of the term "parent" in Section 3 of the Act.

45. Accordingly the Children's Court was not empowered to make orders on 21<sup>st</sup> June 2005, accepting the undertakings given by the mother, a parent who did not have the parental responsibility of the four children Cristian, Tamsin, Jennifer and Karen.

46. The Children's Court therefore acted beyond power when accepting the undertakings of the mother and the Notice of Breach of Undertaking pursuant to Section 73 (4) must fail.

47. I make no findings at this stage in relation to the application pursuant to Section 90.