IN THE MATTER OF INGRID

IN THE CHILDRENS COURT
OF NEW SOUTH WALES
AT BROADMEADOW

TRUSCOTT CM

4 MAY 2006

Judgment

1.On 25 November 2005 the father of the child filed an Application for leave to rescind/vary Orders made on 26 September 2001. Those Orders placed the child in the parental responsibility of the paternal grandmother pursuant to s79 of the Childrens Care and Protection Act 1998 ("the Act") and with monthly physical contact and weekly telephone contact with each parent respectively (pursuant to s86 of the Act).

2. The Application was first mentioned in this Court on 2 February 2006 and the Department, the paternal grandmother, the mother the child's representative indicated their opposition to the Application. The hearing of the leave application was set down for 15 March 2006 and I gave directions for the Department to file any evidence by 16 February and the Respondents by 23 February. I set 23 February as the date upon which any subpoenae could be returned as well as to confirm that the directions had been complied with and to confirm the hearing date. On 23 February the parties were granted access to a number of subpoenae. The grandmother and mother were given a further date to file by 9 March as there had been difficulties for the solicitors to settle Affidavits as their clients lived a significant distance away. The Department indicated that they would consent to leave to vary the contact orders only. The proceedings were adjourned to 9 March for a further compliance check.

3. On that date it was queried whether the father really intended to seek the restoration of the child or whether he was wishing to vary contact orders. He was directed to advise the parties of his intentions. Parties were granted access to a number of subpoenae. The hearing date of 15 March was again confirmed.

4. The Applicant sets out in his Affidavit that since the Final Orders were made the paternal grandmother relocated some 6 hours drive from where he lives, he has married and has two children. He has not had contact with the child since 3 May 2004 except for a telephone call in November 2005 because the paternal grandmother has refused him contact. His Application sets out that he wishes to have the child placed with him and that this is supported by the Departmental Caseworker. He does not make any mention of his plans for the child other than that he live with him after a staged reintroduction and that he would stay with the paternal grandmother half of each school holiday period.

5. I note that at the time the final orders were made the father had been married for 11 months and the elder child was born about a month before proceedings were finalised. The Caseworker in her Affidavit, denies ever suggesting to the Applicant she supported the child being moved into his care, indeed she is of the contrary view. Both the caseworker and the paternal grandmother dispute that the father has been denied contact and indeed the Caseworker's Affidavit sets out quite significant arrangements to assis the father to have contact of which he has not availed himself. The father sets out that he wasn't in a position to provide an adequate standard of care for the child at the time of final orders but states that he now is. I note that the paternal grandmother and her partner's affidavit and the Caseworkers Affidavit set out the child's special needs and how his care caters to those needs, (the father's material does not refer to any of the child's needs or circumstances). The Departments and the grandparents' material demonstrate that the child is settled in the current placement where he has been since April 2000. It also sets out that the grandmother relocated some 6 months prior to the Orders being made, which contradicts the Applicant's evidence that her relocation occurred after the making of the Final Orders (being relevant for significant change of circumstances).

6. On 15 March, Mr Ticehurst who appears as an agent for the father's representatives raised an issue as to whether the parties had any standing to file evidence in s90 leave proceedings. That issue was ventilated in so much as it could be given that he had not given the parties or the Court any notice that he was going to raise such an objection. The course that I chose to take was to hear submissions in relation to that issue as well as to the issue of the Application substantively. By that I refer to the leave application not the substantive issue should leave be granted. I note that no party attempted to tender any material produced on subpoenae and I do not believe that the parties clearly made their submissions as a result of being taken by surprise by Mr Ticehurst's objection.

7. In his submissions Mr Ticehurst referred the Court to the decision of *Re Edward*, Kirby J, 20 April 2001, Supreme Court of NSW, Common Law Division. Mr Ticehurst also provided a copy of Part 41 of the High Court Rules 2004 which sets out the rules for Applications for Leave or special leave to appeal. I think the reason for referring to the Rules was to seek to demonstrate that an Applicant is required to serve the persons who were party to the earlier proceedings, that the Application was required to contain specified documents, and that the Respondents have an entiltement to file and serve and written response to the Application as well as a right of appearance and to be heard on the Application for leave. Further, that nowhere in the Rules does it set out an entitlement or requirement for the Respondent to file any evidence. Having read *re Edward* and having perused a number of cases reported in the Childrens Legal News and other authorities, as well as having perused the Rules, it is more than evident that *re Edward* is authoritive that the nature of a leave application is one which is not *inter partes* but can be opposed. That proposition has been clearly adopted by the Childrens Court (see for example *Jordan, Joshua and Michelle (No 2)* – Zdenkowski CM – 2003 CLN 4 April, *In the Matter of J,K,C* – Crawford CM 14 December 2001,*In the Matter of OM, ZM, BM and PM* Mitchell CM 28 May 2002 CLN Vol 2 Number 4 July 2002, *In the Matter of Jack.* Hunt CM, 2002

CLN 8). See also the District Court (see *X v Y* Ainslee Wallace, DCJ 28 November 2003,) and the Supreme Court (see *S v Department of Community Services,* Heydon JA, Hodgson JA, Davies AJA 2002 NSWCA 151).

8. Given that the proceedings are not inter partes, does it mean that the only evidence that the Court can consider is that provided by the Applicant? The difference between an application for leave under s90 of the Act and an application for leave to appeal in the High Court is that there is an onus upon the Applicant to establish a change of circumstances which by necessity requires a filing of fresh evidence since the proceedings from which final Orders were made. In contrast in an application for leave to appeal, the decision for which leave to appeal is sought, has already been filed. It is an analysis/challenge of that evidence which makes up a leave to appeal in the High Court, whereas, quite a different approach is required for an application for leave under section 90 of the subject Act.

9. The matters the Court must consider in a leave application is set out in s90(2A) :

> **90. Rescission and variation of care orders**
>
> **(1)** An application for the rescission or variation of a care order may be made with the leave of the Children's Court.
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> **(2)** The Children's Court may grant leave if it appears that there has been a significant change in any relevant circumstances since the care order was made or last varied.
>
> **(2A)** Before granting leave to vary or rescind the care order, the Children's Court must take the following matters into consideration:
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> (a) the nature of the application, and
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> (b) the age of the child or young person, and
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> (c) the length of time for which the child or young person has been in the care of the present carer, and
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> (d) the plans for the child, and
>
> (e) whether the applicant has an arguable case."

10. In the Court of Appeal, in *S v Department of Community Services* (2002) NSWCA 151, Davies AJA (with whom Heydon JA and Hodgson JA agreed) said:

> *" I should observe that a person seeking leave to apply for the rescission or variation of a care order is not required to prove on such an application that, if leave be granted, the person would be entitled to the order sought. The first step is simply to establish that there has been a change of sufficient significance to justify the consideration of an application for rescission or variation of the care order."*

His Honour noted that:

> *"Section 90(2) uses the expression 'a significant change in relevant circumstances'. This requires a comparison between the situation at the time when the application was heard and the facts underlying the decision when the order was made or last varied."*

11. Mitchell CM said *In the Matter of OM, ZM, BM and PM*

"Perhaps the best view of "arguable case" where it appears in section 90(2A)(3) is that it means much the same thing as "probability" as defined by Mahoney JA. and "reasonable prospect" and falls somewhat short of prima facie case. It certainly falls far short of a case established on the balance of probabilities. It seems to me to be inconsistent with section 90 as a whole and with the evident intention of Parliament that, in the context of an application for leave, consideration of any of the factors raised by sections 90(2) and 90(2A) necessitates findings beyond the level of prima facie findings".

12. I am aware that it is practice in some Children's Courts, for the presiding magistrate to not allow the Respondent/s the opportunity to file any evidence in response to a s90 Application whereas in others, evidence is taken. Indeed in the hearing of *Re Nerida* (Dive SCM) CLN Volume 2 Number 7 - September 2002, the presiding magistrate heard significant evidence in the form of Affidavit, oral testimony and cross-examination. In his judgment Dive SCM pointed out the reason for this:

"The Department of Community Services disputes the very existence of the alleged changes in circumstances. Or, adopting the test quoted at page 4, the Department of Community Services submits that the applicant cannot establish that there has been significant changes, and suggests Mr S has lied on oath and fabricated his evidence to try and justify the consideration of his application for rescission of the care order upheld by Puckeridge DCJ. The Department further argues that leave should not be granted on the factual findings the court should make.

Given this rather extraordinary allegation as to the fundamental facts relied on by the applicant, and so as to determine whether the applicant could establish the very existence of the suggested significant changes in circumstances, I heard evidence from the applicant and evidence in reply from witnesses for the Department. Mr S gave oral evidence to supplement his affidavit, and the department called a number of witnesses in response. In the light of this evidence I have made findings of fact, which are set out below".

13. One of Dive SCM's findings included that the father applicant had perjured himself and the papers were referred to the Attorney General. Interestingly, the proceedings before Dive SCM was the third leave application heard in the Children's Court, the earlier two proceedings having been subject to successful appeal in the Supreme Court the latter being *S v Department of Community Services.* The penultimate finding of the applicant's lack of credibility and accordingly merit in his application vindicated the two earlier Children's Court decisions, but one wonders if, had evidence been taken in those proceedings, the lies of the applicant would have been properly established which would have put an end to the matter at a much earlier date.

14. I note Davies AJA's comments in *S v Department of Community Services*

"Section 90(2) uses the expression "a significant change in relevant circumstances". This requires a comparison between the situation at the time when the application was heard and the facts underlying the decision when the order was made or last varied.

The first task was to consider whether there was a change of sufficient significance to justify the consideration of an application for rescission or variation. In some cases, it would not be inappropriate for the Children's Court to consider both the leave application and the substantive application together, if the Court announced at the commencement of the proceedings that that was what it was doing. However, in that event, the Court would need to fully consider all aspects of the application. In the present case that was not done.

*[47]Kirby J (**Re Nerida** [2001] NSWSC 1126 at [39]) was of the view that the Magistrate gave,*

> *"a careful and considered judgment, adverting to the submissions made by Mr S."*

His Honour also considered that (at [46]),

> *"his Worship recognised that the matter needed to be looked at from the viewpoint of Mr S, taking his case at its highest."*

On that basis, he refused relief. In my opinion this was an error. In my opinion, while the Magistrate's judgment may have been careful and considered, it was fundamentally flawed; and the Magistrate did not in fact comply with his own recognition that, in the absence of challenge and cross examination, he should take Mr S's case at its highest".

15. Unless there is evidence to the contrary, an applicant's evidence if taken at the highest, could mean that leave would be granted where it might otherwise not be. Such an event would be contrary to the intent of the legislation. As Mitchell CM sets out when referring to an extract of the Minister's second reading speech *In the matter of OM, ZM, BM and PM*

"in her second reading speech, the Minister seemed to stress the distinction when she spoke of the need to protect the child and sometimes the carers from the unsettling effects of unnecessary litigation. "Current experience suggests" she said, " that a major source of uncertainty and anxiety for children in care is when birth parents apply for a variation of court orders, especially when they have little prospect of succeeding. While there is no intention (in the new legislation) to remove a parent's general right to return to court to seek custody of their child (sic), the bill seeks to balance the merit of such applications with the level of distress and instability which is likely to be generated for the child."

16. I am of the view that there are occasions when the Court can and should receive evidence from the Respondents to a leave application to file evidence. It will obviously depend on the evidence of the Applicant and the attitude of the parties to that application. Though it is an inter partes proceedings and is one of leave only as opposed to a substantive application, the matters that the Court needs to consider under s90 before granting leave, would in my view, require the Court to exercise some scrutiny. As Dive SCM said in *re Nerida* :

"The purpose of leave to proceed provisions is to weed out cases such as this, cases where there is no reliable evidence, where the applicant has proved himself to be dishonest and without regard to the welfare of the child in question. It would be a nonsense for the Department of Community Services and indeed the court to be put to the expense and burden of a the hearing of the substantive case, given the material before me on this leave application".

17. When considering the nature of s90 proceedings and then whether evidence can or should be called Crawford CM made the following remarks in *In the matter of J,K and C:*

"As to the procedure that was adopted, Kirby J. observed that "The proceedings were informal, and non-adversarial, as required by the Act (s.93)." In the case of ***R v. Department of Community Services*** *(Supreme Court of NSW, l5th May, 2001 the magistrate had heard evidence from the applicant. There is reference to extracts from a report being also before the court but it is unclear whether it was introduced during the examination of the applicant or otherwise. The nature of a leave application was not an issue in that appeal.*

Something of a side issue in this case is the status of an assessment report prepared by the Children's Court Clinic.

A further point that is raised is the identifying of the relevant time period at which the court is to determine any significant change of relevant circumstances.

*An application for leave is therefore not an inter-party proceeding. Before leave is granted, although the Respondents may be served with a copy of the application they are not prejudiced by not appearing. They are require to present no case. Leave is granted "****if it appears****" to the court it should do so. The court makes no findings of fact binding on the Respondents in the substantive proceeding. Ordinarily the court proceeds informally on the written material filed by the applicant but it is a matter for the court as to whether or not it will be assisted by the hearing additionally of oral evidence from the applicant.*

The court may taken account of the position of the Respondents that the leave application is opposed or not in a practical sense in determining the weight of evidence that may discharge the onus of proof but, ultimately whether leave is granted or not is a decision reached by the court independently of the attitude or agreement of the Respondents.

Although parties other than the applicant may appear at court, their role is a non party one and would ordinarily be confined (perhaps by submissions) to assisting the court to reach a proper evaluation of the applicants case consistent with the terms of section 90(2). The court will not

ordinarily be assisted in that determination by hearing what evidence may be presented by the Respondents at the substantive hearing if leave is granted.

To broaden the hearing of an application for leave to an inter party proceeding would immeasurably extend the duration of such applications and traverse the same evidence and issues which the leave threshold has been introduced to limited the perhaps, unnecessary determination thereof.

The issue here has been raised of identifying the point of time at which this "significant change in any relevant circumstances" is to be determined. I would take the view that the relevant periods are the making of the order (or its last variation) and the hearing of the matter by the Court. If there is no delay in the determination of the leave issue (as has not been the situation here) then evidence is likely to be the same whether the date be the date of filing of the application or the date of its determination. To fix the date as the date upon which the applicant files the application would created somewhat of an artificiality and potentially deprive the court of considering perhaps, important matters that have arisen since that date".

18. The issue of what material the court can receive as evidence was discussed in terms of whether a Children's Court Clinic Assessment Report in *In the matter of J, K and C* and also in *In the Matter of Jasper* (Mitchell SCM, 30 January 2006). In the former it was not taken into account as it did not assist the court whereas in the latter it was taken into account.

19. Likewise, *In the Matter of Jack. 2002 CLN 8, Hunt CM* received evidence from parties other than the applicant:

"Notwithstanding that the proceedings are not inter partes(see the judgment of Mr Justice Kirby in Re Edward unreported SC 20 April 2001) by consent of the applicant and the separate representative, Mr P was permitted to tender material received on subpoena from Dial An Angel (which firm had supervised the applicant's contact with Jack until an argument between the applicant and Dial An Angel which resulted in the police being called and Dial An Angel refusing to continue supervision) and correspondence between Dr Unsen and the applicant's then solicitors predating the order made and undertakings accepted by His Honour Judge Twigg which seem to demonstrate that the applicant had knowledge when she undertook to ensure provision of monthly reports as to her psychiatric condition that Dr Unsen would not supply reports in the fashion agreed by the applicant's undertaking. There was no oral evidence.

20. I agree with Mitchell CM's comments in *OM, ZM, BM and* PM that amendments to s90 made in February 2002 do not change the nature of s90 leave applications into inter parte applications. The

amendments set out matters that the court must consider before granting leave, accordingly, the amendments can hardly be described as changing the nature of a leave application.

21. However, I do note that whether evidence was to be taken in *re Edwards* was not an issue – indeed one of the reasons for the Magistrate adjourning the leave hearing was so the Department and the applicant could assemble more evidence. The issue was whether or not a final order could be suspended and substituted by an interim order. The relevance of whether a leave application was inter partes or not was to consider, not whether the parties could call evidence, but rather whether the application was an application for the care of the child which would empower the court to make an interim order under s69.

22. Given the submissions before him in *Om, ZM, BM, PMI* it seems to me that Mitchell CM was rightly concerned that parties are deemed to have the right or entitlement to put forward evidence in leave applications would be contrary to the intention of the legislation. He noted:

> *"To see section 90(2A)(d) as prompting a full and detailed inquiry is to ignore the legislative intention of providing a barrier to children and young persons and their carers against the unsettling effects of unwarranted litigation".*

23. However, I think there is a distinction between a party having an entitlement to file evidence and the Court allowing the party to file evidence for the Court's assistance. Indeed it may be less unsettling if the matter can be properly resolved, within the terms of natural justice, prior to leave being granted than might otherwise be the case where an Applicant's case is in the circumstances, unnecessarily elevated due to the fact it is unchallenged by any competing or contrary evidence. Submissions by a Respondent, could not in any way diminish the evidence of the Applicant.

24. Having considered the abovementioned cases, it is my view, that the Court is entitled to decide what material or evidence it will receive on a s90 leave application. That material may include evidence from the Respondents which needs to be decided on a case by case basis. The determination of the court as to whether there has been a significant change of circumstances may well necessitate the Court perusing the initial proceedings to ascertain what the issues were, why the child was in need of care and protection and why the Orders were made in the terms so expressed. For example, if the applicant is a parent, who says that the issues facing him at the time of final orders were made are now resolved, the Court may have to determine that those issues were in fact relevant at the time of those Orders. If the Court adopts such a procedure then the Court is required to ensure that the parties are aware of the material that the Court proposes to take into account or consider so that, if the party so seeks, submissions can be made in relation to that material, or if the circumstance fits, may advise the Court of the existence of some relevant and recent material that may assist the Court.

25. The decision of what material will be received and considered is the Court's alone and the Court should be mindful not to go beyond the boundary of the leave application into the substantive application. However, there may be cases where it is appropriate for the court to deal with the material firstly to consider the leave application, and if leave is granted to consider the substantive application, as I could imagine some cases the evidence in the latter is really not much different to what is to be considered in the leave application. What is important is that the parties to the proceedings know at what stage the Court is engaged.

26. Accordingly, in answer to Mr Ticehurst's objection to the Respondents filing evidence and referring to that material in their submissions, I say that having read the material put forward by the Respondents the evidence does assist this Court in determining the leave application and accordingly I will receive the evidence which comprises the Affidavits of the maternal grandmother, her partner and the caseworker from the Department. The father's application has two distinct complexions when viewed on the one hand with his evidence alone and then on the other in light of the evidence of the Repondents. I have also perused the papers on the initial proceedings which indicate some variance between the applicant's claims of change of significant circumstances since the Orders were made, so I indicate that the Court will take into account that material.

27. Some submissions were made on 15 March in relation to whether or not the applicant had established a significant change of circumstances but I think it is fair to say that the parties concentrated more on attempting to assist the Court with Mr Ticehurst's threshold objection. Now that I have dealt with that objection and have indicated that the material on the file is material which I propose to take into account on the application, I adjourn the proceedings for a very short time to provide Mr Ticehurst and the other representatives an opportunity to peruse that material and to consider whether they wish to make any further submissions relevant to the issues the Court is required to address pursuant to s90(2A) before I proceed to determine the leave application upon consideration of the material that I have indicated.