RE ALAN
DO THE REQUIREMENTS OF SECTION 90 APPLY TO ANY APPLICATION SEEKING TO VARY OR RESCIND AN INTERIM ORDER?

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1. In *Re: Alan (2008) NSW SC 379* Justice Gzell was concerned with an application made by a parent seeking, inter alia, the discharge of Interim Orders that had previously been made in the Children's Court. Those orders placed the children in the parental responsibility of the Minister.

2. While the relief was sought on a number of bases, the primary basis of the application was the exercise of the Court's parens patriae jurisdiction. Such jurisdiction is specifically reserved under the *Children and Young Persons (Care and Protection) Act 1998* (hereinafter referred to as the care legislation) as a result of the provisions of Section 247.

3. At the outset of those proceedings the Court was concerned as to whether it found the circumstances justified the application of the parens patriae jurisdiction. The Court referred to the decision of *Re: Victoria (2002) NSW SC 647* and adopted the statement of principle by Justice Palmer that such an application should only entertain in *"the most extraordinary circumstances"* and that *"it (sic) is highly inappropriate for appeals from the decisions of Magistrates in the Children's Court to be made as a matter of course for this Court under the guise of invoking the wardship jurisdiction"*. The Court in finding that exceptional circumstances were not made out and applying the principles referred to, specifically adopted comments made by Justice Palmer *in Re: Elizabeth (2007) NSW SC 729 that "the fact there is no appeal from an interim care order of the Children's Court (see Section 91(1)) does not in itself justify resort to the parens patriae jurisdiction"*. His Honour then went on to hold, in terms adopted by Justice Gzell, that:-

> *"Section 90 provides for rescission or variation of an Interim Order by the Children's Court itself if there has been a significant change of circumstance."*

4. It is unclear from the judgment of *Re: Elizabeth* and *Re: Alan* to the extent to which the Court's attention was taken and their Honours minds were turned to the question of the jurisdiction for making Interim Care Orders under the care legislation.

5. Undoubtedly dicta of the kind referred to carries significant weight and is not to be disregarded or ignored easily. A view has therefore taken hold that any party wishing to discharge an Interim Order must firstly satisfy the criteria of Section 90 in all of its parts before such Interim Order would be discharged.

6. The question is does that represent the law and are the dicta to be given their full weight and authority. It is suggested they should not.

7. As indicated, neither case appeared to invoke a development of the argument as to the effects of earlier decisions as to the meaning of Section 69 and 70 which is the source power for making Interim Orders under the legislation.

8. It will be remembered those provisions provide as follows:-

> ***69 Interim Care Orders***

(i) The Children's Court may make Interim Care Orders in relation to a child or young person after a Care Application is made and before the Application is finally determined.

(1A) The Children's Court may make an Interim Care Order prior to determining whether the child or young person is in need of care and protection, if the Court is satisfied that it is appropriate to do so.

(2) The Director-General, in seeking an Interim Care Order, has the onus of satisfying the Children's Court that it is not in the best interests of the safety, welfare and well-being of the child or young person that he or she should remain with his or her parents or other persons having parental responsibility.

70 Other Interim Orders

The Children's Court may make such other Care Orders, as it considers appropriate for the safety, welfare and well-being of a child or young person in proceedings before it pending the conclusion of the proceedings.

70A Consideration of Necessity for Interim Care Order

An Interim Care Order should not be made unless the Children's Court has satisfied itself that the making of the order is necessary, in the interests of the children or young person, and is preferable to the making of a Final Order or an Order dismissing the proceedings.

9. These two provisions form part of the general legislative frame work contained under chapter 5 which deals with the Children's Court proceedings.

10. It is suggested that both Section 69 and 70 are drawn in wide discretionary terms. While a making of an order that removes it, based on an Application by the Director General, there appears to be additional criteria applied before the Court should remove a child (see Section 69(2)). The Court is otherwise invested with a wide discretion as to what, if any, orders it should make as long as "it is appropriate to do so".

11. The legal basis for making Interim Orders was considered respectively in *Re: Edward (51 NSW LR 502)* and in respect of Section 69 in *Re: Fernando; Re: Gabriel 53 NSW LR 494.*

12. It is suggested that both cases, which were specifically focused on the making of the Interim Orders, are instructive as to some of the issues about how such orders should be varied or rescinded. In *Re: Edward* the Court was primarily dealing with the powers under Section 90 and upon what basis a Court could make an Interim Order pending the exercise of those powers. The Court held that Section 70 was the appropriate provision where dealing with an Interim Order before leave had been given under Section 90(2). Justice Kirby held (at page 513) that *"I believe the terms of the Care Order (or Wardship Order) may be varied under Section 69 and Section 70. To the extent the Court can go outside the scheme in Section 90 and "undo" one of its own Final Orders. It can, moreover, do so by reference to the criteria in Section 70 rather than Section 90(6) where orders are made under that Section."*

13. While some of the matters contained in that Judgment have been affected by the amending provisions including Section 90(2A) and by subsequent authority suggesting that an Application for Leave does involve an inter-partes exercise, it appears to be unchallenged as to its interpretation of the basis of power for making an Interim Order under Section 70.

14. In *Re: Fernando and Gabriel* the Court was concerned as to the meaning of Section 69 and as to its inter-play with other sections under chapter 5. In those proceedings it was argued on behalf of the Director General, that in addition to the discretionary matters under Section 69, the Court had to be satisfied of other provisions under chapter 5 before it could make Interim Orders. In particular it was alleged that if the Court was to make an Interim Order affecting the allocation of parental responsibility then it had to be satisfied that other provisions dealing with those matters including but not limited to Section 79(1), Section 79(3) and indeed Section 80 (the provision of a Care Plan) had been complied with. It was argued that these were necessary pre-conditions before the Court could exercise its discretion as to an Interim Order.

It will be immediately seen, that whilst not argued for the purposes of that decision, that Section 90 is a provision falling within chapter 5.

At page 503 Justice Bell held

> *"I do not accept that either the requirements of Section 79(1), Section 79(3) or Section 80 are to be made out before the Children's Court may make an Interim Order allocating parental responsibility pursuant to Section 69 or 70 of the Act. The power conferred by Section 69 is to make Interim Orders. A Care Order is an order for the care and protection of a child or young person being one of the orders provided by chapter 5 of the Act. Before an Interim Care Order may be made under Section 69 it is necessary for the Children's Court to be satisfied that it is not in the best interests of the safety, welfare or wellbeing of the child or young person, that he or she remain with his or her parents or other persons having parental responsibility (it should be added the Court's primary focus was on the basis of empowerment for an order allocating parental responsibility to the Minister)" Provided the Children's Court is so satisfied, the power exists to make an Interim Order allocating parental responsibility to the Minister (or to another suitable person".*

Her Honour then expressly accepted and endorsed *Re: Edward* as to the interpretation of Section 70.

15. In each case the Court was concerned with the basis for power for making Interim Orders. In each case it was held that Section 69 and 70 are an independent basis for making such orders. It is submitted that those same sections would empower a re-visiting of those orders or making variations to them as reflected by Justice Bell's comments above.

16. *Re: Alan and Re: Elizabeth* were not concerned with the detail statutory interpretation of chapter 5 or indeed as to a considered determination as to the source and basis of power to vary or rescind an Interim Order. They were concerned as to the exercise of the parens patriae jurisdiction, and in the particular case before them whether the Court should exercise its discretion in applying that jurisdiction. Each case was concerned to avoid doing so in respect of interim issues unless exceptional circumstances existed. A reading of the authorities recited as being placed before the Court in each case does not reveal that either *Re: Edward or Re: Fernando* were argued or considered.

It is suggested therefore that whilst these are important decisions on whether or when the Supreme Court should exercise jurisdiction, under its parens patriae powers, they are neither determinations or persuasive determinations as to the basis and source of power for the Children's Court to vary it or rescind its Interim Orders.

17. It is suggested that if the basis for varying or rescinding an Interim Care Order requires compliance with Section 90 this means a most cumbersome and time-consuming process. Looking at the provisions of Section 90 and assuming its application the following would have to occur:-

(a) The criteria under Section 90(1A) and 90(2) would have to be first satisfied.

(b) A party would have to canvass the matters contained under Section 90(2A).

(c) If the Application is for variation is made by the Director General then the provisions of sub-section (5) would have to be applied even if a finding had earlier been made.

(d) A party would have the obligation before the Court reached a decision to determine the matter in satisfying the matters under sub-section (6).

18. If the sole basis for varying or rescinding an order is a strict adherence to Section 90 then the ludicrous situation can be reached that a party making that application to rescind or vary an order under Section 69 can, upon making the application, seek an Interim Order under Section 70. See *Re: Edward* ante.

19. It is therefore suggested that a party seeking to vary or rescind an Interim Order needs only confine themselves to the provisions of Sections 69, 70 and 70A and the matters relevant under the objects and principles of the Act. It would be necessary for a party to show what has changed since the Court last considered the Application. While there is nothing in the Act that requires this as a pre-condition (save and except for Section 90(2)) Courts have always found that before changing or varying an order there has to be a change in circumstances since the orders were made. See *Rice –v- Asplund 6 FAM LR 570.* Such a principle does not seek to invest the Court with an implied power but really is a proper basis of the Court's exercise of jurisdiction. After all if it has already considered and made an order, why should it allow any party to re-litigate a matter when there is nothing new or fresh before it?