64/1980

SUPREME COURT OF VICTORIA

TAYLOR v REILLY and ANOR

Gray J

27 November 1979

CHILDREN - PROTECTION APPLICATION - PROCEDURE - SERVICE OF APPLICATION - POWERS OF MAGISTRATE OR JUSTICE OF THE PEACE - "SOME RESPECTABLE PERSON" - MEANING CONSIDERED: *COMMUNITY WELFARE SERVICES ACT* 1970, S32(3); *CHILDREN'S COURT ACT* 1973.

An order for safe custody of a child was signed by a JP after hearing and reading a summary of events which had recently transpired in relation to the child. It was alleged that the child had been ill-treated and a member of the Children's Protection Society sought to apprehend the child without a warrant and cause him to remain in hospital pending the hearing of a protection application. The JP failed to make the application returnable in the next sittings of the Children's Court. Upon appeal—

HELD: The Safe custody order was made without jurisdiction.
1. Orders which have the effect of taking a child from the custody of his parents should only be made strictly in accordance with the legislation which authorises such a step.

2. Following the child's apprehension, s32(3) of the *Community Welfare Services Act* 1978 required that an application in the prescribed form be made forthwith to the Children's Court for a Protection Order. Alternatively, the authorised person could have served upon the child's parents a notice in writing of an intended application to the Children's Court for a Protection Order. By failing to adjourn the hearing of the application to the next sitting of the Children's Court, the safe custody order was made without jurisdiction.

3. The Justice purported to make a placement order in circumstances where the Act gave him no power to do so. Accordingly, for that reason alone, the order was made without jurisdiction and could be used to support the detention of the child.

GRAY J: On 19th October 1979, Glenda Anne Taylor (hereinafter referred to as "the applicant") made application to the Court for relief concerning the apprehension of her son Troy Taylor (hereinafter referred to as "Troy"). In the result, an order nisi for prohibition was made against Duncan Cameron Reilly, a Justice of the Peace. A further order nisi for *habeas corpus* was made against the Medical Superintendent of the Royal Children's Hospital. These orders nisi were returnable on 23rd October 1979.

Upon the return of the orders nisi, Mr Monester of Queen's Counsel appeared, with Mr Curtain of Counsel, for the applicant. Mr Kimm of Counsel appeared for Mr Reilly, Mr Gurvich of Counsel appeared for the Medical Superintendent. Mr Osborne of Counsel appeared for Jennifer Glare, who had been given leave to appear upon the return of the orders nisi. The evidence before the Court was contained in affidavits of the applicant and Miss Glare. For present purposes that evidence can be shortly stated.

The applicant swore that she and her husband have been married for seven years. They live together in their own home in Sunshine. They have two children, David Taylor born on 31st January 1979 and Troy born on 22nd October 1977. The applicant said that she was happily married. At the time of these events, both parents were engaged in full time employment. The child David attends kindergarten. Since February 1979, both children have been left at a creche conducted by Mrs V Dalton in Sturt Street. Sunshine. On 1st October 1979, the applicant took both children to the creche in the morning and proceeded on to work. She returned to pick the children up at 5.20 p.m. Mrs Dalton told the applicant that Troy's penis was "swollen again". The applicant assumed that there had been a recurrence of a penile infection from which Troy had suffered some time earlier. The applicant forthwith took Troy to the medical clinic which the family attended. Troy was seen by a Dr McGoldrick. When his napkin was removed, it was obvious that he had severe bruising in the pelvic region.

The doctor said that Troy had a hernia and told the applicant to take him to the Royal Children's Hospital. The doctor armed the applicant with a note in a sealed envelope and she took this and Troy to the hospital. At the hospital the applicant was told that Troy would need an operation, She was directed to the casualty area where she and Troy waited several hours. Eventually Troy was examined by a Dr Johnston, who said that the child would have to be admitted. He secured the applicant's signature to a document authorising the admission. The doctor raised the question of child abuse and the applicant denied any responsibility in this regard. Troy was taken away and put in a cot. The applicant was introduced to a Dr Beebe, who said that he would be looking after Troy. The applicant finally left the hospital at 1.20 am.

The applicant said that she and her husband were terribly distressed. The applicant forthwith gave up her employment to enable her to attend daily at the hospital. She expected an operation to take place. In the days which followed, the applicant, often accompanied by her husband, was a constant visitor to the hospital. It was further suggested that she or her husband had maltreated the child. This was stoutly, and sometimes angrily, denied. The applicant expressed the belief that Mrs Dalton's unmarried daughter was responsible. The applicant and her husband were interviewed by a hospital social worker. They were later asked to see a psychiatrist, one Dr Hain. This they did. They were asked a series of questions about their marriage.

As the days passed, the applicant and her husband became increasingly upset. It became apparent that Troy was not to be operated upon. Indeed, he seemed to be in perfect health. On 11th October, there were some angry exchanges between the Taylors and members of the hospital staff. The Taylors said that they were taking Troy home. They were told that, if they did so, a custody order would be issued within the hour. In the result, the Taylors were persuaded to leave Troy at the hospital.

On the 12th October, the hospital contacted Miss Glare. She is a social worker who has been employed by the Children's Protection Society since January 1979. She is a person authorised by the Minister under Section 32 of the *Community Welfare Services Act* to apprehend without warrant a child who has been ill-treated. Miss Glare received a report from the hospital staff to the effect that Troy had been ill-treated and should remain at the hospital pending the hearing of a protection application.

Miss Glare was also given various medical reports, photographs and other written material. A summary of all the material was made. This summary was presented to Mr Reilly, JP, together with what purported to be a form of Protection Application. Mr Reilly, who is a Justice of the Peace, conducts a chemist shop. This shop is nearby the office of the Children's Protection Society, in Gertrude Street, Fitzroy, It appears that the written summary and the Protection Application were taken to Mr Reilly's shop by some person other than Miss Glare. Mr Reilly was given some oral version of what the summary contained and was invited to sign an Order for Safe Custody. A form of such an order appears at the foot of the form of Protection Application. Mr Reilly did as he was invited. The order signed by Mr Reilly required that Troy be kept in safe custody at the hospital until the hearing of the Protection Application at the Children's Court at Melbourne on 1st November 1979.

This order, together with the Protection Application, was served upon the applicant and her husband on 16th October 1979 when they were at the hospital in order to see Troy. Miss Glare swore that the practice which she followed is that which has been followed by her employer Society over a long period, She also asserts that is the practice which "is most appropriate to deal with cases where children have been battered by their parents". In a moment, I will return to consider whether the practice followed was in accordance with the legislative provisions which alone can authorise it. But before doing so, I should make it clear that this Court is not concerned to any extent at all with the question of who was responsible for Troy's injuries. It was clear enough that the question is a live issue. It will have to be determined if and when a Protection Application is properly brought before the Children's Court.

After hearing argument from all interested parties on 23rd October. I was quite satisfied that the safe custody order was made without jurisdiction. It followed that Troy's detention in the hospital was unlawful. I made the orders appropriate to that conclusion and I shortly stated my reasons for doing so. As the matter was urgent, it was desirable that it be disposed of promptly.

I made it clear that the orders made by me did not stand in the way of a fresh application for a Protection Order. However, during the hearing before me, it became apparent that a good deal of uncertainty existed as to the procedures provided for in the relevant legislation. The view was expressed from the Bar table that it might be helpful to have my considered opinion upon the questions raised by this application. Accordingly, I have taken the unusual course of delivering considered reasons for the orders made on 23rd October 1979. I have done so because of the great importance of this area of activity. Orders which have the effect of taking a child from the custody of his parents should only be made strictly in accordance with the legislation which authorises such a step. It thus becomes necessary to look closely at the relevant statutory provisions.

The title of the *Social Welfare Act* 1970 was altered in December 1978 by Act No. 9248. It is now known as the *Community Welfare Services Act* 1978. Section 31 of the Act (as amended by Acts No. 9248 and No. 9266) is, so far as relevant, in the following terms:

> "31(1) Every child or young person under seventeen years of age who is in need of care by reason of any of the following may be admitted to the care or protection of the Department, namely
> (a) The child or young person has been or is being ill treated or is likely to be ill treated or is being exposed or neglected";

Section 32 provides that a child found by an authorised person in circumstances within s31(1)(a) may be immediately apprehended without warrant. I assume that on 12th October 1979, Miss Glare satisfied herself that Troy's circumstances fell within s31(1)(a) and notionally apprehended the child. In the physical sense, the child remained in the hospital at all material times. Following the child's apprehension, s32(3) required Miss Glare to forthwith make an application in the prescribed form to a Children's Court for a Protection Order. Section 32(4) provides that a child who is apprehended shall, if under the age of 15 years, be taken to the nearest reception centre or other accommodation considered appropriate by the Director-General. Section 32(5) provides for an alternative procedure, whereby the authorised person may, in lieu of apprehending the child, serve upon the child's parent or guardian a notice in writing of an intended application to the Children's Court for a Protection Order. Section 33(1) empowers the Children's Court hearing the application, if satisfied that the child is in need of care and protection, to order that he be admitted to the care of the Department.

In this case, Miss Glare did not forthwith make an application to the Children's Court under s32(3) or adopt the alternative procedure provided for in s32(5). Miss Glare purported to follow a procedure which is provided for in the *Children's Court Act* 1973.

It is now necessary to look at the relevant sections of that Act. Section 21(1) provides that where a child is apprehended as a child in need of care and protection the child shall, if practicable, be taken before a Children's Court within 24 hours. If no convenient Children's Court sits within that time, the child must be taken before a Justice or Magistrate. This is qualified by s21(5) which provides that, if the child is of tender years (as in this case), he need not be taken before the Court. In such a case, it shall be sufficient compliance with sub-s(1) if an application is made to the Children's Court within 24 hours or the matter of such an application is brought before a justice or magistrate within that time.

Section 21(2) provides that if the application is made to a justice or magistrate, he shall adjourn the hearing of the application to the next sitting of the appropriate Children's Court. In such an event, if the child is not admitted to bail or released to his parent, he shall be placed in a manner provided for in s22. Although not relevant to this case, s21(3) authorises the Children's Court before whom an application is brought, to hear and determine the application or to adjourn it. In the latter event, the Court may deal with the child in accordance with s22.

Section 22 provides that upon the adjournment of an application by a Children's Court or justice or magistrate, the child may be dealt with in a number of alternative ways:

> (i) the child may be released upon his own recognizance or upon the recognizance of his parent or other acceptable person;
> (ii) if the child is not released he may, if under 15 years, be placed in a reception centre or with some respectable person;
> (iii) in serious cases the child may be placed in a prison or lockup but kept apart from other prisoners.

Section 22(5) provides that an order made under s22 shall be a sufficient authority for the detention of the child. It can be seen that the relevant sections of the two Acts provide a procedure, with some alternatives, to be followed by a person who apprehends a child pursuant to s32 of the *Community Welfare Services Act*. There can be no doubt that the legislative purpose is to ensure that the protection application is brought before a Children's Court as soon as possible. To this end, it is provided that the application must be made within 24 hours of apprehension to a Children's Court. If that is not practicable, the application must be made within that period to a justice or magistrate. In that event, he is required to adjourn the application to the next sittings of the appropriate Children's Court.

There are two things to be noticed in that regard. First, it is the application for the protection order which must be made to the Court, when practicable, or to the justice or magistrate, when it is not. It is not a different sort of application when it is made to a justice or magistrate. The only difference is that the justice or magistrate cannot hear and determine the application. He is obliged to adjourn it to the Children's Court for that purpose. Furthermore, he cannot simply choose a convenient date for the adjourned hearing. He must choose the next sitting of the appropriate Court, As all these events occurred in Melbourne, the appropriate Court was the Melbourne Children's Court. This Court sits every week day. In this case, it was presumably practicable to make the application direct to the Children's Court within 24 hours of the apprehension. At least nobody before me suggested the contrary.

Thus the application should have been made direct to the Melbourne Children's Court on the day of the apprehension. If this was impracticable, an application to a justice was authorised by the Act. However, in that case, the application should have been one for a protection order. When the justice adjourns the application to the Children's Court, as he is obliged to do, he is empowered to make a placement order if the circumstances warrant it. It is only upon the adjournment of the application, that the justice has any power to make such an order.

Whatever did happen before the Justice in this case, it is clear that he did not adjourn an application made to him to a Children's Court. He was presented with a form which was expressed to be an application by Miss Glare to the Melbourne Children's Court on 1st November 1979. That date was then about three weeks distant. Apart from the fact that the expressed date of the application was not the next sitting of the appropriate Court, it is apparent that the Justice could not be said to be adjourning the hearing of the application to that date. The application had to be made before it could be adjourned. This application was not to be made until 1st November 1979. The form of Order for Safe Custody which the Justice signed recites "A Protection Application having been made this day by Jennifer Glare etc." This recital is consistent with the requirements of the Act but is quite inconsistent with the form of the Application placed before the Justice.

The Justice purported to make a placement order in circumstances where the Act gives him no power to do so. Accordingly, for that reason alone, the order was made without jurisdiction and cannot be used to support the detention of the child. I have some sympathy for the Justice, who no doubt thought he was merely providing a service for the Children's Protection Society. I have no doubt he relied upon the Society's assurances that all was in order. Nevertheless, justices should bear in mind that they are given important responsibilities under this legislation. The legislative purpose will be defeated if justices see themselves merely as "rubber stamps" in a situation such as this. Persons such as officers of the Children's Protection Society may be over zealous in a particular case. That is why the Act requires that a custody order should only be made if an independent, responsible person is satisfied that it should. The justices are given a very wide power and should exercise a proper degree of caution in its exercise. A Justice should also satisfy himself that the relevant legislation empowers him to make the order he is being asked to make and that the circumstances justify the order sought.

The printed form which is used for both the Protection Application and the Order for Safe Custody is far from satisfactory. In this case, it probably contributed to the departures from the statutory procedure. The form appears in the First Schedule to the *Social Welfare Regulations* 1962. It can be found in Vol. 2 *Government Gazette* at p2825. At that time, the relevant provisions of the *Children's Welfare Act* 1958 and the *Children's Court Act* 1958 were somewhat different from their modern counterparts, although the basic procedure was the same. It may be desirable to set out the terms of the document which was employed in this case:

Form No. 730

Second Schedule
SOCIAL WELFARE ACT 1970 (Section 31)
CHILDREN'S COURT ACT 1958 (Section 23)

In the Children's Court at Melbourne
I, Jennifer Glare, authorised under Section 32 of the *Community Welfare Services Act* 1970 of Childrens Protection Society in Victoria

(1) Name of child.

having this day apprehended (1) Troy Taylor a boy aged 2 years, for that he (2) "has been ill-treated or is being exposed" hereby apply to the Children's Court at Melbourne on the 1st day of November 1979, at 10 o'clock in the forenoon, that the said (3) Troy Taylor be deemed to be a child in need of care and protection.
Dated at Fitzroy this 12th day of October 1979.

(2) Insert words of applicable paragraph of Sec. 31 Social Welfare Act 1970

Applicant

(3) Full Name of child.

Member of the Police Force at . . . . . .
or Person authorized under Section 31(1) as

(Signed) JENNIFER R. GLARE

Applicant to send this portion immediately to the Clerk of the Children's Court named herein

The parents have been notified of the apprehension and of the date of hearing of the case.

(Jennifer Glare)

ORDER FOR SAFE CUSTODY

(4) Name of child

A Protection Application having been made this day by Jennifer Glare of the Children's Protection Society in respect of (4) Troy Taylor a boy aged 2 years,
I do hereby order that the within named child be kept in safe custody at the Royal Childrens Hospital in Victoria until the hearing of the said application at the Children's Court at Melbourne on the 1st day of November 1979, at 10 o'clock in the forenoon.

This portion to be retained at Reception Centre

Dated at Fitzroy this 12th day of October 1979.
Bail allowed in the sum of $)
with one surety of $) refused
)

(Signed) D.C.REILLY JP
Justice of the Peace

In my opinion, it would be helpful to members of the police force and other authorised persons if the form was readily adaptable to the particular procedure selected in a given case. Where the words "Children's Court" appear in the body of the Protection Application, a blank should be left. Opposite the blank there should be a marginal note saying "Insert 'Children's Court' 'Magistrate' or 'Justice'".

Thus, in the present case the form, when filled in, would read "hereby apply to a Justice at 18 Gertrude Street, Fitzroy at 2 o'clock in the afternoon, etc," The form of Order for Safe Custody is satisfactory, However, in a case such as the present when the application is made to a Justice, the date of the next sitting of the appropriate Children's Court should be filled in by the Justice. Even if the date is suggested to him by the applicant, the Justice should satisfy himself that the suggested date is, indeed, the next sitting of the appropriate Children's Court. I again emphasise that it is not for the applicant to choose some date which may be convenient to him or her. The Justice has the responsibility to adjourn the application in accordance with the Act.

I have already stated my reasons for the conclusion that the Safe Custody Order made in this case was made without jurisdiction. That conclusion is sufficient to justify the Orders which I made on 23rd October 1979. However, a quite separate attack was mounted against the Safe Custody Order upon the ground that Troy's parents were not notified of the proposed application.

In the circumstances, I should say something about this additional ground. Section 23(1) of the *Children's Court Act* provides that, where a child is apprehended as a child in need of care and protection, the person by whom he is apprehended and by whom an application is made shall cause the parent of the child, if he can be found, to be advised to attend at the hearing. Section 23(2)(a) gives the parent the right to be heard upon the application and to cross-examine and examine witnesses.

In this case, Miss Glare was well aware of the home address of Troy's parents and their respective places of work. By the 12th October 1979, when the apprehension was made, Mrs Taylor had given up work and was attending the hospital daily. It was not suggested by Miss Glare's counsel that there was any difficulty about notifying Mrs Taylor of the apprehension and the proposed application to Mr Reilly.

In my opinion, s23(1) required Miss Glare to notify Mrs Taylor of the apprehension and of her intention to make application to Mr Reilly for a Protection Order and a Safe Custody Order. Clearly, Mrs Taylor was entitled to be heard on the question of whether a Safe Custody Order should be made. In my opinion, Miss Glare's failure to comply with s23(1) provides a further ground for setting aside the Order of the Justice and the consequential detention. It is to be noted that Miss Glare also failed to complete the part of the form of application dealing with this matter.

It was argued that the s23(1) only requires the parent to be notified of the hearing of the application when it finally reaches the Children's Court. But having regard to what I have already said about the nature of the application to the Justice, I do not find this argument acceptable. The fact that the Justice may make a Safe Custody order when he adjourns the application makes it highly desirable that the parent should be allowed to be heard at that stage. Furthermore, the provisions of s22 regarding placement pending the application make it clear that the Act contemplates that, where possible, the child's parent should be present at that stage or, at least, be given the opportunity to be present. Section 22(2) deals with the child being released upon his parent's recognizance. Section 22(3) speaks of the parent as a principal or surety in the matter of bail.

I have earlier emphasised the importance of strict compliance with the statutory requirement when orders are sought which may result in the forcible detention of a child and the detachment of a child from its parents. No doubt, in the area of ill-treatment of children, an emergency situation might well arise, where a person in Miss Glare's position may be tempted to take a short cut, particularly if a well-disposed Justice is at hand. These temptations, if they arise, should be resisted. In this case, no emergency situation existed. There was no excuse for a departure from the statutory procedure. Miss Glare's sworn statement that she followed a long-standing practice of the Children's Protection Society is surprising and gives rise to some concern. Her further expressed opinion that the said practice is the most appropriate in cases of this sort is an opinion which should be reconsidered. Perhaps Miss Glare was merely inexperienced. Perhaps she had not been adequately instructed as to the statutory provisions which alone give her the authority to act. Whatever be the true position, it is to be hoped that she and others doing like work will hereafter act in strict accordance with the law.

In my opinion, the procedures laid down in the Statutes do not present any difficulty to a police member or any other authorised person. If the circumstances call for the apprehension of a child, s32 of the *Community Welfare Services Act* gives that power. Section 32(4), as amended, enables the apprehended child to be placed in a reception centre or other accommodation considered appropriate by the Director-General. Alternatively, the child may be dealt with in any of the ways provided for in s22 of the *Children's Court Act*. Having placed or otherwise disposed of the child, the authorised person must then make application for a protection order within 24 hours of the apprehension. This application must be made to a Children's Court where practicable or to a Justice or Magistrate in other cases. In Melbourne, there should be no difficulty in following these procedures. In a remote country district, there may be some difficulty in finding a Justice within 24 hours. If he is found, there may be some difficulty occasioned by s21(4) of the *Children's Court Act*, which limits the period of the adjournment of the application.

However, the possible difficulties are more apparent than real. If a child is apprehended in a remote district, he can be forthwith brought to the nearest large town and there placed or otherwise

dealt with in accordance with s32(4) until the application is made to the Court or Justice. I can see no reason, given a proper understanding of the Statutory procedures, why any real difficulty should be encountered in this field. If the circumstances do present some insuperable difficulty, the alternative procedure in s32(5) may be adopted.

There is one final matter to which I should refer. In the present case, there was some discussion as to whether the order committing Troy to the custody of the Royal Children's Hospital was within the scope of s22 of the *Children's Court Act*. The only provision in s22 which may be thought to justify the form of order is the power to place the child "with some respectable person" (s22(4)(b)). In my opinion, that expression contemplates a particular human being who could be made liable in, say, *habeas corpus* proceedings. The expression "respectable person" is not apt to describe a public hospital. The difficulty may possibly be got over by nominating the "Superintendent" or "Director" of the particular institution in question. But this is open to question. It is highly desirable that s22 be amended to include a power to place a child in "accommodation considered appropriate by the Director-General" such as appears in s32(4) of the *Community Welfare Services Act*. It seems desirable that the provisions concerning the placement of a child in the two sections should correspond. At present, a person who has apprehended a child has a wider range of placement alternatives than does the Court or Justice to whom an application is made. The foregoing represents my reasons for making the orders that I did on 23rd October 1979.
