

12/84

## SUPREME COURT OF VICTORIA

**MITTRA v KEYTE**

Brooking J

27 October 1983 — [1984] VicRp 27; [1984] VR 357

**CHILD – WHERE CARE PROCEEDINGS IN CHILDREN'S COURT AND WARDSHIP PROCEEDINGS IN SUPREME COURT – WHETHER SUPREME COURT DEPRIVED OF POWER TO DEAL WITH CHILD – INTERVENTION GENERALLY BY SUPREME COURT IN CHILDREN'S COURT MATTERS: CHILDREN'S COURT ACT 1973, SS16, 22; COMMUNITY WELFARE SERVICES ACT 1970, SS31, 32.**

M. applied to the Supreme Court to have his 2 children made wards of Court and for an order giving him their custody or care and control. Since January 1983, one of the children, Ranjit, had been living with a Mrs King; however, K. (Ranjit's mother) sought to transfer him to his grandparents, Mr & Mrs Brown. A dispute concerning the transfer arose and, subsequently, a care and protection application was taken out by the Children's Protection Society, in order to prevent the child's removal from Mrs King's care. When the application came on for hearing, an adjournment was granted and the child was later placed in a reception centre. When the application for interim custody came before the Supreme Court, it was argued that the Court had no jurisdiction concerning interim custody, until the protection application had been finally disposed of.

**HELD: (1) Neither the pendency of a protection application, nor any order that may be made on that application admitting the child to the care and protection of the Department of Community Welfare Services deprives the Supreme Court of its power to deal with the wardship and care and control of the child.**

*Johnson v Dir-Gen. of Soc. Welfare* [1976] HCA 19; [1976] 135 CLR 92; 9 ALR 343; (1976) 50 ALJR 562, applied.

*Webb v Johns* [1983] VicRp 70; [1983] VR 739; (1982) 8 Fam LN N12, not followed.

**(2) Section 16(1) of the Children's Court Act 1973 deals with matters of concurrent jurisdiction; that is, cases where the same proceeding could, but for s16(1), be entertained on the one hand by another court or on the other, by a Children's Court. S16(1) does not oust the jurisdiction of the Supreme Court in wardship matters.**

**(3) Obiter: In an appropriate case, the Supreme Court may intervene in the hearing of a Children's Court matter by means of prohibition or certiorari.**

*R v The Children's Court; ex parte Carroll* [1957] VicRp 21; [1957] VR 161; [1957] ALR 449, applied.

**BROOKING J:** *[After setting out the nature of and background to the Applications, His Honour continued]:* ... [5] Mr Thompson, for the Children's Protection Society, submits that if I have the usual discretion to deal with interim custody until this motion can be finally heard in one of the lists I should leave the boy in the reception centre. He submits, however, that the result of s16(1) of the *Children's Court Act 1973* is that until the protection application has been finally disposed of I may not exercise the jurisdiction to deal with the interim custody of Ranjit.

Mr Harris, for the respondents, invites me to give interim custody or care and control of the boy to the respondent's parents in Horsham. As to s16(1), he submits that it does not affect the exercise by this Court of its jurisdiction in respect of wardship and custody or care and control, and that it does no more than prevent the making by [6] this Court of an order which "interferes in" the care and protection application. Mr Kellam, for the applicant, submits that I should make an interim custody of care and control order in favour of Mrs King, and adopts the submissions of Mr Harris in relation to the effect of s16(1). That provision is as follows:

"The jurisdiction of every other court and of every justice in respect of the matters as to which a children's court has jurisdiction shall cease to be exercised by every other court or justice but no conviction order or proceeding made or given by or had before a court or justice in contravention of this section shall be invalidated or affected by reason only of that contravention".

In *Webb v Johns* [1983] VicRp 70; [1983] VR 739; (1982) 8 Fam LN N12 a protection application to the Children's Court had been adjourned to 2nd December 1981 and, I would infer, had been further adjourned and was still pending when on 9th December 1981 a wardship motion came before Crockett J. An order that the child be a ward of court had already been made on that motion. Crockett J made an interim custody order, and ordered that the proceedings before the Children's Court be not further prosecuted, save for the purpose of discharging any existing order.

When the matter came before Beach J, His Honour refused to make an order in terms similar to those of the order of Crockett J on the ground that the result of s16(1) was that, once the Children's Court was seized of the protection application, the Supreme Court had no jurisdiction to interfere in the matter. (See [1983] VR at pp745-746 where His Honour twice referred to the absence of jurisdiction to "interfere with the hearing" of the application, and p747 [7] where His Honour spoke of the absence of jurisdiction to "interfere in the matter").

I do not accept the submission of the Society that while a protection application is pending s16(1) requires this court to refrain from exercising its jurisdiction in relation to wardship and care and control. My present impression is that the sub-section does no more than deal with cases of concurrent jurisdiction, and that it, in effect, makes the jurisdiction of the Children's Court exclusive in such cases. On this view the jurisdiction of the Magistrates' Courts, the County Court and the Supreme Court, in relation to criminal offences alleged to have been committed by children, is not to be exercised in any case in which a Children's Court has jurisdiction. There may be (I have not examined the legislation closely) other examples of concurrent jurisdiction.

The Supreme Court, it must be emphasised, has no jurisdiction "in respect of" a protection application in the sense that the Supreme Court has no jurisdiction to entertain such an application. But whether or not s16(1), is confined, as I am disposed to think it is, to cases of concurrent jurisdiction, that is to say, cases where the same proceeding could, but for s16(1), be entertained either on the one hand by another court or a justice or on the other hand by a Children's Court, I have a clear view that the provision does not oust the jurisdiction of this court which is invoked by the present motion, there being no such unambiguous language as would be necessary to bring about that result. (*Johnson v Director-General of Social Welfare (Victoria)* [1976] HCA 19; [1976] 135 CLR 92 at p97; 9 ALR 343; (1976) 50 ALJR 562 per Barwick CJ). Nor would I, as at present [8] advised, with great respect to Beach J (who was, in *Webb v Johns*, of the contrary opinion) accept the view that s6(1) prevents this court from interfering with the hearing of a matter in the Children's Court.

If I am correct in my tentative view that s16(1) is concerned only with concurrent jurisdiction, it would follow that the sub-section does not have this further effect. Moreover, this court does not have any general power to interfere with the hearing of a matter in the Children's Court. It may, in an appropriate case, intervene by means of prohibition or *certiorari*. (*R v The Children's Court ex parte Carroll* [1957] VicRp 21; [1957] VR 161; [1957] ALR 449), and I think it unlikely that s16(1) was intended to prevent the exercise of this supervisory jurisdiction. In the case cited Smith J was concerned with the *Children's Court Act* 1928, s15 of which corresponded to the present s16(1).

There is authority for the view (in the sense that an order has been made) that this court has power, at all events once a child has become a ward of court, to restrain the prosecution of proceedings in a Children's Court, for Crockett J did so, as I have said, in *Webb v Johns*, whether the order so made is to be regarded as operating, as did Equity, *in personam* or impersonally. The foundation of any such power must, I suppose, be the court's general power to protect the welfare of children. But I need not pursue this question, for no one asks me to make an order restraining the prosecution of the Children's Court proceedings.

[9] Beach J evidently thought that there was such a power, but held that its exercise was prevented by s16(1). One thing is, I think, tolerably clear; neither the pendency of the protection application, nor any order that may be made on that application admitting the child to the care and protection of the Department of Community Welfare Services, deprives or will deprive this Court of its power to deal with the wardship and care and control of the child: *Johnson's Case* (*supra*); *Webb v Johns* (*supra*).

I have given such hasty consideration as time has permitted to certain English authorities cited in Bevan, *Law Relating to Children*, pp411-423, including *Re M (An Infant)* [1961] Ch 328, and *Re T (AJJ) (An Infant)* [1970] Ch 688. I do not think that I should as a matter of discretion decline to exercise jurisdiction in respect of Ranjit.

*[His Honour then referred to the basis of the protection application and made interim custody orders in respect of the children].*

Solicitors for the applicant: Thompson, Francis and Co.

Solicitors for the respondent: Byrne, Jones and Torney.

Solicitors for the Children's Protection Society: Morrow and Morrow.

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