

48/93

## SUPREME COURT OF VICTORIA

***PATERSON v SMITH and ANOR***

Harper J

29 June 1993

**CHILDREN'S COURT – JURISDICTION – REQUEST FOR REPORT AS TO PATERNITY – DEPARTMENT ASKED TO PREPARE REPORT – UNABLE DUE TO INSUFFICIENT RESOURCES – WHETHER COURT HAS POWER TO REQUIRE DEPARTMENT TO PROVIDE REPORT: *CHILDREN AND YOUNG PERSONS ACT 1989*, s50.**

Section 50 of the *Children and Young Persons Act 1989* ('Act') does not empower a Children's Court to order that:

(i) a person not directly before the Court provide and pay for reports prepared pursuant to the Act; or

(ii) a body such as the Department of Health and Community Services provide and pay for directly or indirectly, reports which the Department cannot prepare and provide from its own resources.

**HARPER J: [1]** This is an application pursuant to Order 56 of the *Rules of the Supreme Court* for judicial review of orders made by a Magistrate, sitting in the Children's Court of Victoria on 8 June 1993. His Worship then had before him an application the precise nature of which was not made clear to me but the purpose of which was to consider and possibly determine the proper disposition of a child. The disposition of that child depended in part at least upon questions of the future custody of the child. As I understand the material before me, the magistrate then had before him evidence that a man named Keith Smith would be prepared to accept custody of the child were he, Keith Smith, satisfied that he was the father of the child. It was in these circumstances that the paternity of the child became an issue in the proceedings before His Worship. One means of determining that parentage was to take blood samples of the child and also of Mr Smith and, by testing colloquially known as "DNA" testing, determine whether the blood of the child so closely matched the blood of the father as to establish the paternal link between the two. It was in those circumstances that His Worship thought it appropriate to order that paternity testing by use of blood samples be undertaken and the results of that testing, incorporated in an additional report prepared pursuant to s50 of the *Children and Young Persons Act 1989*, be furnished to him.

The question had already come before His Worship on a number of occasions. By 7 April His Worship was concerned to examine the question of paternity of the child [2] further, and when adjourning the matters then before him to 28 April His Worship added to the order granting the adjournment the following words:

"Request additional report pursuant to s50 *Children and Young Persons Act* which should include a report as to the paternity of the child. Mother consents to complying with requests for blood samples."

No doubt with these words in mind His Worship on 8 June 1993 added to the orders he then made the following order as order 3:

"I am satisfied that the report provided to the court on this day pursuant to my order made on 7 April 1993 is inadequate and incomplete because of the failure to include report as to paternity testing by use of blood samples, a matter I am satisfied is understood by the applicant." (I interpolate to say the reference to the applicant is a reference to the Department of Health and Community Services) "to include if necessary the payment of the costs of such testing. I therefore require an additional report to be prepared according to those arrangements. I am further satisfied that the failure of the applicant to provide a report in the form requested may be a contempt of this court. I reserve the question of this matter to the next date."

It was submitted by Mrs Morgan for the Secretary to the Department, Dr. John Paterson,

who is the plaintiff in the present proceedings before me, that His Worship in making the orders to which I have just referred was acting beyond his jurisdiction. Accordingly, she submits, Order 56 of the orders of the Supreme Court can appropriately be invoked as a vehicle by which this court can grant relief in the nature of *certiorari* directed to the magistrate. In my opinion Order 56 has been appropriately invoked in this case. The Magistrates' Court and, of course, the [3] Children's Court of Victoria, is a creature of statute. Its powers are therefore to be found within the legislation setting up the court and within any other legislation which confers powers on the court. It is, of course, also true that the court has such additional powers as are necessary in order to give effect to the powers directly conferred. The general proposition however remains true: the Children's Court of Victoria cannot exercise any powers which are not directly nor by implication conferred upon it by statute.

The relevant statutory provision in this case is s50 of the *Children and Young Persons Act* 1989, a provision to which I have already referred. That section is found within Subdivision 3 of Division 8 of Part 2 of that Act. Subdivision 3 is headed "Disposition reports and additional reports." The first section in that subdivision is s48, which is headed "Disposition reports". Insofar as is presently relevant, that section provides that the Secretary to the Department of Health and Community Services must prepare and submit to the Family Division of the Children's Court, Victoria a disposition report if the court becomes satisfied that the child with which the court is then concerned is in need of protection or there has been a failure to comply with a supervision order, or if the court is satisfied that a person has applied for variation or revocation of a supervision order, a custody to a third-party order or the other orders set out in paragraph (b) of sub-s.(1) of s48. In turn, s49 of the Act, which is headed "Content of disposition report", provides that a disposition report must include, among other things, any information that the [4] court directs to be included. Finally, s50, headed "Additional report", provides that in any proceeding in which a disposition report is required, the court is of the opinion that an additional report is necessary to enable it to determine the proceeding, it may order the preparation and submission to the court of an additional report by the Secretary or, amongst other persons, any other person specified by the court.

Pursuant to these provisions His Worship was supplied with a disposition report and a number of addendums to that report before 7 April 1993. It was on that day that the question of an additional report pursuant to s50 was further considered by His Worship; and it was in that context that His Worship referred to that section in the passage from which I have already quoted. When the matter came before His Worship again on 8 June the Department informed the magistrate that it was not in a position to provide an additional report of the kind which His Worship sought. In that context, on that day, the magistrate made the orders to which I have already referred. In my opinion in so doing His Worship exceeded the powers given to him and the jurisdiction conferred upon him by s50 of the Act.

It was submitted by Mrs Morgan that that section does not confer upon the Children's Court of Victoria jurisdiction to order a report to be provided by the Secretary to the Department of Health and Community Services, in circumstances where the Secretary, and therefore the Department, is not in a position to prepare the report from the resources directly within the command [5] of the Department but where to the contrary the additional report would, as it were, necessarily be contracted out for the attention of some appropriate person or body with the necessary expertise. That, on the evidence before me, is the position in this case.

The resources of the Department do not encompass the ability to perform DNA testing of blood samples. Accordingly, the Department would necessarily have been required, if full effect were to be given to His Worship's order of 8 June, to engage an outside body to perform the work in question; and doubtless would have been required by the other contracting party to pay the costs involved in the carrying out of the tests and in the preparation of the consequential report. In my opinion it was not within the scope of His Worship's jurisdiction to make orders which had that effect. Section 50 in its terms gives the court power to order "another person" as specified by the court to provide an "additional report". It is entirely silent upon the question of the cost of preparation of any report thus ordered. It seems to me that in those circumstances the provisions included within s50 should be construed strictly. The provision of reports pursuant to the *Children and Young Persons Act* 1989 may in certain circumstances be an onerous task. That task is undoubtedly one which in particular circumstances ought to be carried out by the Department.

But where the resources of the Department are clearly not sufficient to generate from within the Department material which is sought to be included in a report prepared pursuant to Subdivision 3 of Division 8 of [6] Part 2 of the Act, then it seems to me that the court should either make an order directly upon the appropriate person requiring that person to prepare the report or should make no order at all.

It may well be that before making an order pursuant to the relevant portion of s50, that is, paragraph (c), the court should receive undertakings as to the meeting of the cost of preparation of that report by, for example, one of the parties then before the court. It may be that other steps can be taken to ensure that the costs are met by the appropriate person. But in any event, given the limited nature of the jurisdiction of the Children's Court, it seems to me that a provision such as s50 should be read so as to limit the court's jurisdiction where without such limits the court would be empowered to impose upon persons not directly before the court the obligation to provide and pay for reports prepared pursuant to the Act; or, alternatively, to require a body such as the Department to provide and pay for, directly or indirectly, reports which the Department cannot prepare and provide from its own resources.

For these reasons it seems to me that in making the order which he made on 8 June last and to which I have already referred, His Worship exceeded his powers and I should so declare. (Discussion ensued.) Declare that s50 of the *Children and Young Persons Act 1989* does not confer on the Children's Court of Victoria jurisdiction to order the Secretary of the Department of Health and Community Services to submit to the court a report as to paternity testing by use of blood samples [7] where the preparation of such report is not within the competence of the Department.

It seems to me that given, as I understand it, that the Department had from 8 June to 18 June to prepare its case, the Department cannot complain that the first defendant was not in a position within 24 hours or so to prepare answering material; and, accordingly, it seems to me that the adjournment was one that in the circumstances was forced upon the first defendant. I will therefore make no order as to costs in the hearing before Mr Justice Southwell. I will order that the first defendant pay the costs of the plaintiff of the hearing before me of both yesterday and today, but I will order that pursuant to s13 of the *Appeal Costs Act* a certificate issue to the first defendant in respect of those costs.

**APPEARANCES:** For the plaintiff Paterson: Mrs S Morgan, counsel. For the first-named defendant Smith: Mr A Marshall, counsel. Campbell & Shaw, solicitors.

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