

21/97

SUPREME COURT OF VICTORIA

DEPARTMENT of HUMAN SERVICES v MAHER and ORS

Hampel J — 18 November, 10 December 1996

COSTS – CHILDREN AND YOUNG PERSONS – PROTECTION APPLICATION ISSUED – LATER WITHDRAWN AND STRUCK OUT – APPLICATION FOR COSTS – WHETHER POWER IN COURT TO ORDER COSTS: CHILDREN AND YOUNG PERSONS ACT 1989, S24; MAGISTRATES' COURT ACT 1989 S131.

The combined effect of s24 of the *Children and Young Persons Act 1989* and s131 of the *Magistrates' Court Act 1989* is to provide a statutory basis for the Magistrates' Court sitting as the Children's Court to award costs where a protection application has been withdrawn and struck out.

Latoudis v Casey [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287, referred to.

HAMPEL J: [1] This is an appeal against an order made by the Magistrate of the Children's Court sitting at Warrnambool, awarding costs to the respondents of \$1,680. On 27 February 1996 the appellant issued a protection application pursuant to the *Children and Young Persons Act 1989*. On 9 August 1996 the Magistrate in a reserved decision ordered costs against the appellant after the protection application was withdrawn and struck out with the consent of the parties. The power of the Magistrate to order costs was not disputed but a submission was made on behalf of the appellant that costs should not be ordered. The substance of those submissions appears from the affidavit material in this appeal and is not in dispute. In summary it was put that such orders were rarely made because the Department's job was a difficult one, that the Department was justified in becoming involved in the matter and issuing a protection application when it did, that the circumstances of the child had changed and the changes justified the withdrawal of the application which was properly issued originally, and that the history of the matter militated against the grant of costs. It was conceded that the amount of costs, if granted, was appropriate.

In my opinion the combined effect of s24 of the *Children and Young Persons Act* and s131 of the *Magistrates' Court Act* is to provide a statutory basis for the jurisdiction in the Magistrates' Court to award costs in a case such as the present. (See also *Wilson v McDougall* (1987) 11 NSWLR 241.) The question remains whether this Court should in this case interfere with the Magistrate's discretion in awarding costs. In my opinion, the "strong presumption in favour of the correctness of the decision appealed from" particularly where it relates to the discretion in respect of costs has not been displaced. It has not been demonstrated that irrelevant considerations have been taken into account or relevant considerations have not been taken into account. Nor is the decision on its face plainly wrong. (See *Australasian Coal and Shale Employees' Federation v Commonwealth* [1953] HCA 25; (1953) 94 CLR 621.)

[2] There was argument before me as to the nature of the discretion to be exercised in relation to proceedings under the *Children and Young Persons Act* where a protection application is involved. I agree with the appellant's submissions that the discretion is to be exercised on grounds different from those referred to in *Latoudis v Casey* [1990] HCA 59; (1990) 170 CLR 534; 97 ALR 45; (1990) 65 ALJR 151; 50 A Crim R 287. Protection application proceedings are not criminal proceedings and by their very nature are for the benefit of the children with whom they are concerned. (See *M and Ors v M and Ors* [1993] VicRp 29; [1993] 1 VR 391.) A protection application may be appropriately brought but by the time the matter comes up for hearing circumstances may have changed so that it may then be equally appropriately withdrawn. This is one matter which may, in an appropriate case, affect the exercise of the costs discretion. Other relevant considerations, given the nature of the jurisdiction, may include the extent of investigation by the Secretary when the application is made, the circumstances in which it is withdrawn, the amount of notice given of intention to withdraw and whether the action taken by the Secretary is in any way irresponsible or mischievous. The appeal stands dismissed with costs.

APPEARANCES: For the Department: Mr D Fanning, counsel. Solicitors: Court Advocacy Unit, Department of Human Services. For the Respondent: Mr P Testart, counsel. Solicitors: Fogarty & Bachetti.