IN THE CHILDREN'S COURT
OF NEW SOUTH WALES
AT ST. JAMES.

SCM MITCHELL

15 May 2006

No. 169 of 2006.

In the Matter of Cassandra

MEMORANDUM

1. By an application filed on 14 March, 2006, Mark Trevaskis, the delegate of the Director-General of the Department of Community Services seeks leave pursuant to section 90 to apply for rescission/variation of an order and, subsequently, rescission of that order. The order was made in this court on 17 October, 2005 pursuant to section 38(3) of the *Children and Young Persons (Care and Protection) Act, 1998* and allocated parental responsibility for "Cassandra", born May, 2005, to the Minister for a period of twelve months.

2. The Director-General's application is supported by the affidavit of Cassandra's caseworker, Mariam Maatooq, which was affirmed on 14 March, 2006 to which is annexed a copy of the relevant order, a secondary assessment of 28 December, 2905 and reports of Barnados of 22 December, 2005 and 3 January, 2006. In response, the Mother, for whom Mr. Braine of Counsel appears, has filed an apparently unsworn affidavit on 6 April, 2006. Ms. Rowley appears in Cassandra's interests and Ms. Hall appeared for the Father.

3. As a preliminary point, Mr. Braine of Counsel submitted that section 90 is ineffective to vary or rescind an order made under section 38. He submitted that section 90 relates only to care orders of the kind provided in sections 73 to 79 and 86 and not to orders made, like the present order, as a consent arrangement pursuant to section 38(3). Mr. Braine pointed out that the machinery provided by section 38 is designed to promote alternate dispute resolution as an effective alternative to litigation and *"without the need to be satisfied of the existence of any of the grounds under section 71"* and he contrasted that provision with the provision in section 79 of power to make a care order *"if the Children's Court finds that a child or young person is in need of care and protection."*

4. In Mr. Braine's submission, it is unlikely that the legislature intended that, absent the consent of the parties, a care order could be made without a ground being demonstrated and he cited considerations of procedural fairness and the public policy interest in promoting recourse to consent arrangements, including section 38 arrangements, in preference to litigation. He argued that to allow the Director-General the luxury of procuring a contested care order without the necessity of proving a ground would hardly entice parents to negotiate and compromise with the Director-General and, more likely, would drive parents away from ADR. If section 90 has an operation with regard to orders made under section 38(3), he argued, then the Court will, from time to time, be faced with imposing on children and young persons and their families care orders in circumstances where, had the parents been unwilling to seek compromise and settlement by way of ADR in the first place, such orders could never have been made against them.

5. Additionally, Mr. Braine referred to section 90(5) which requires that any ground to be relied upon in variation proceedings, if it has not already been considered, be proved as if it were a ground for a fresh application. In his submission, that insistence on a finding of need of care and protection would powerfully argue against the proposition that Parliament had intended to dispense with establishment wherever a section 38 order was sought to be varied or rescinded.

6. As against those arguments, Ms. Muggenthaler who appears for the Director-General, took the view that to restrict the operation of section 90 to those care orders where a ground has been established is to leave a party subsequently dissatisfied by consent orders under section 38(3) without any effective means of relief.

7. The chief business of Chapter 4 of the Act is to provide for consent arrangements and arrangements arrived at by way of ADR in which the Court will sometimes have only a peripheral involvement as the footnote to section 61(3), drawing attention to the Director-General's duty under section 34 "to consider a variety of alternative methods of providing for the safety, welfare and well-being of a child or young person before commencing proceedings" emphasises. There is a public interest in encouraging conciliation or mediation and I think that the intention of the Act is that, where adequate consent arrangements are available, the power of the Court should be invoked only where necessary. Not surprisingly, though, the allocation of parental responsibility or aspects of parental responsibility is seen as so important a matter that, even where there is agreement between all the parties, the intervention of the Court is seen as necessary and section 38(2) provides that such approval will be an essential factor in giving effect to the agreement.

8. In contrast to the "voluntary" arrangements offered by Chapter 4, Chapter 5 brings into play the "compulsory" jurisdiction offered by the Act. Chapter 5 provides grounds which, if proven, can lead to the Court making one or several of a variety of care orders which may be opposed by one or other party. By the same token, Chapter 5 provides a number of grounds which may be contested by a party and have to be proven before a care order under any one of sections 73, 74, 75, 76, 79 or 86 will be made.

9. Section 90 is to be found in Chapter 5 of the Act. It is the provision under which, in the present case, the Director-General moves and it provides power to the Court in a proper case, to grant leave and, ultimately, to make an order for rescission/variation of "care order". A "care order" is defined in section 60 as "an order under this Chapter (Chapter 5) for or with respect to the care and protection of a child or young person (including a contact order) under section 86." In the present case, the order sought to be varied/rescinded, namely the order of 17 October, 2005, arose out of section 38(3) which is a mechanism provided in Chapter 4 rather than Chapter 5 but whether or not section 90 has any operation with regard to it may depend on whether, despite its origin, the order is a "care order" in the Chapter 5 sense of the term. In other words, does section 38(3) provide an alternate method of reaching what is, in reality, a Chapter 5 care order?

10. In favour of that proposition is Ms. Muggenthaler's argument that, unless section 90 is available, it is difficult to see how one might enforce or even refine a consent order made under section 38(3) unless, of course, there is consent to the registration of a fresh care plan. I think that a recourse available, when it becomes clear to the Director-General that the safety, welfare and well- being of a child or young person is not secured by an order under section 38(3), might be for him to commence care proceedings as provided in Chapter 5 but it is not so clear what might be the recourse available to other parties who might have their own reasons for wishing to vary or rescind a consent arrangement. In a case involving a section 38(3) order where an honest disagreement between the Director-General, who remains satisfied with the arrangements created under the order, and a parent who maintains that changed circumstances dictate a variation or rescission, it is difficult to see that Parliament intended the order to be immutable and unable to be reviewed no matter how strong the dissatisfied parent's case might appear. Looking at the matter in terms of the obvious public interest in promoting alternate dispute resolution, why would any parent consent to a section 38(3) arrangement which, no matter how much progress a parent might have made or how much his parenting capacity might have improved, might never be able to be changed? One might think that, surely, Parliament did not intend a section 38(3) order, as distinct from any other order under the Act, to be immutable and unavailable, in a proper case, to be revisited by the Court. By the same token, why would Parliament, concerned as it was with the best interests of children, deliberately place many children, whose parents had shown the good sense and the good will to negotiate with the Director-General, in a position where the Children's Court could no longer intervene on their behalf. It is important to keep in mind the protective purpose of the Act.

11. Accordingly, I think the proper way to view section 38(3) is that, where the parties so agree, it can provide a means of arriving at what is, after all, a "care order" in the sense that the order makes provision for the care and protection of a child or young person in the manner provided for in the Act. Section 38(2) is not a warrant for orders of a type other than those provided in Chapter 5 of the Act. It does not, for instance, authorise an AVO no matter how helpful and desirable that might be. In exercising power under section 38(3), the Court is not "at large" but is restricted to orders of a type which, were they to be made in the course of contested proceedings, would be made under Chapter 5

and in accordance with the provisions of that Chapter. I think that, in that sense, an order made under section 38(3) which allocates parental responsibility in accordance with a care plan is an order "under" Chapter 5 although arrived at through Chapter 4. Accordingly, it seems to me that, in a proper case, section 90 will be available to vary/rescind it.