PARTIES:	MINISTER FOR TERRITORY HEALTH SERVICES OF THE NORTHERN TERRITORY OF AUSTRALIA v L G And H B BRADLEY CM
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM FAMILY MATTERS COURT
FILE NO:	No 35 of 1998 (9815112)
DELIVERED:	18 August 1998
HEARING DATES:	7 August 1998
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Statutory interpretation – Community Welfare Act – s44(2) – narrow in scope – allows for orders which are limited and short term in nature.

Statutory interpretation – Community Welfare Act – s47 – contains broad power to make interim orders – words allow Court not yet seized of matter to make orders – initial 2 month interim order and extension of 2 months.

Statutory interpretation – Community Welfare Act – s43(4)(a) declaration is condition precedent to power to make order pursuant to s43(5).

Statutory interpretation – Community Welfare Act – s43 requires a strong *prima facie* case prior to interim "in need of care" order – s44(2) *prima facie* case need not be as strong.

Statutory interpretation – Community Welfare Act – Family Matters Court – s17(b) requires physical presence of child in court – child's presence not necessary after initial order made - decision regarding presence is matter for Court.

Legislation

Community Welfare Act – ss 47; 11; 11(4); 4(3)(b); 44; 17; 24(1); 25; 28; 29; 35(1); 43(4); 43(5); 43(7); 48; 48(3); 49; 50; 43(5)(d); 43(5)(c); 44(2)(b)

Cases

1) *Bailey v Bacher* (unreported, 22 July 1995, Thomas J) referred

2) *Accident Compensation Commission v Murphy* (1988) VR 444 referred

3) *Beecham Group Limited v Bristol Laboratories Pty Ltd* (1967-1968) 118 CLR 618 referred

4) *The Minister for Territory Health Services v Brown and Deland* (SC No 47 of 1995, unreported, 22 September 1995, Kearney J) referred

REPRESENTATION:

Counsel:

Applicant:	Mr J Stirk
First Respondent:	Mr R Goldflam
Second Respondent:	No appearance
Separate Representative:	Ms J Carney

Solicitors:

Applicant:	McBride & Stirk
First Respondent:	NT Legal Aid
Second Respondent:	NT Attorney-Generals Department
Separate Representative:	Ms J Carney

Judgment category classification:	B
Judgment ID Number:	MIL98015
Number of pages:	19

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

No. 35 of 1988 (9815112)

BETWEEN:

MINISTER FOR TERRITORY HEALTH SERVICES OF THE NORTHERN TERRITORY OF AUSTRALIA
Applicant

AND:

L G
First Respondent

and

H B BRADLEY CM
Second Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 18 August 1998)

MILDREN J:

This is an application by originating motion for a declaration that an interim order under s47 of the *Community Welfare Act* placing a child, L G, in the custody of the Minister for a period of three months be declared *ultra vires* and for an order in the nature of *certiorari*.

On 9 April 1998 the child was taken into care under s11 of the *Community Welfare Act* and a holding order for two weeks was made on that day with respect to the child pursuant to s11(4) of the Act.

On 23 April 1998 an application was brought before the Family Matters Court seeking orders that the child be found in need of care in accordance with s4(3)(b) of the Act. On 23 April 1998 Ms Deland SM set the matter down for hearing on 22 May 1998. Ms Deland SM made an interim order that the child remain in the custody of the Minister until the hearing of the matter.

On the 22 May 1998 the matter was listed before Mr Bradley CM. Counsel appeared on behalf of the Minister, on behalf of the child, and on behalf of the child's mother.

On that day, counsel for the Minister announced he was seeking orders by consent declaring the child to be in need of care, that custody of the child remain with the Minister for a period of three months, that order to be reviewed at the conclusion of that time, and that access between the child and his mother continue as arranged between the Department and the mother in the interim.

Counsel for the child advised the learned Chief Magistrate that her client wished a six-month order but was prepared to agree to a three-month order.

Counsel for the mother submitted that although his client was prepared to consent to the arrangements there was no necessity for a declaration that the child be in need of care. After some further discussion with the learned Chief Magistrate, the Court adjourned to enable the parties to reconsider their positions. Upon resumption, after hearing further from the parties the learned Chief Magistrate said:

> I note in passing that I'm not embarking on the hearing, so I'm not actually adjourning under s44. What I'm doing is I'm going to make an interim order under s47 without finally determining that the child is a child in need of care. I do so as a way of trying to interpret the full intentions of the legislation.

His Worship then made orders adjourning the hearing of the application to the 19 August 1998 for hearing; he made an interim order under s47 that the child remain in the custody of the Minister for a period of three months; and he made some further procedural orders.

The question raised by these proceedings is whether an interim order under s47 of the Act can be made without the making of an order declaring the child, in relation to whom the application is made, is in need of care. In order to answer this question it is necessary to consider the provisions of the Act in some detail.

The preamble of the Act provides that it is:

An Act to provide for the protection and care of children and for the promotion of family welfare, and for other purposes.

S11 of the Act provides:

11. TAKING CHILD IN NEED OF CARE INTO CUSTODY

(1) The Minister, an authorized person or a member of the Police Force may, where he believes on reasonable grounds that a child is in need of care and that no other action would ensure the adequate care of the child, take the child into custody.

(2) For the purposes of subsection (1), the Minister, an authorized person or member of the Police Force may, without warrant, enter a place where a child is or is reasonably believed to be located and, unless he is satisfied that adequate steps will be taken to ensure that the child will cease to be in need of care should the child remain at that place, remove the child, and may use such force as is reasonably necessary for those purposes.

(3) A person taking a child into custody under subsection (1) -

(a) may have the child held in a place of safety for a period not exceeding 48 hours; and;

(b) shall, as soon as practicable, but not later than 48 hours after so taking the child into custody, apply to a Justice of the Peace for a holding order under subsection (4).

(4) On application by the person referred to in subsection (3) or a person in charge of a hospital acting under section 15, where a Justice of the Peace is satisfied on the oath of the person that there are reasonable grounds for believing that the child to whom the application relates is in need of care, he may make an order authorizing the holding of the child in a place of safety for such period, not exceeding 14 days, as he thinks fit.

(5) A person taking a child into custody under subsection (1) or in charge of a hospital acting under

section 15 shall, within 48 hours after so taking the child into custody or taking action under section 15, in writing, notify the Minister of the action taken.

S17 provides:

17. RESPONSIBILITY OF MINISTER WHEN NOTIFIED OF ACTION UNDER SECTION 11(5)

Where the Minister is notified under section 11(5) of the removal of a child in need of care or of the detaining of a child in a hospital, he shall -

(a) assume responsibility for the care, protection and maintenance of the child;

(b) cause the child –

(i) to be taken before the Court within the period of the holding order, if any, under section 11(4) but in any case not later than 14 days after the removal or detention of the child; and

(ii) to remain in or be removed to a place of safety approved by the Minister that, in his opinion, is suitable to ensure that the welfare of the child is provided for;

(c) as soon as practicable, cause the parents, guardians or persons who had the custody of the child at the time of the removal or detention to be notified of the removal or detention of the child and of any subsequent action taken or intended to be taken in respect of the child; and

(d) take such other action under this Act, including securing medical examination and treatment, if required, for the child, as the Minister thinks fit.

Part VI is headed “FAMILY MATTERS COURT”. The court is established by s24 (1). Each magistrate is a magistrate of the court and by s25 the jurisdiction of the court is to be exercised by a magistrate sitting alone. S28 provides that:

> Subject to this Act, the *Justices Act* applies to the proceedings and orders of the Court as if the Court were the Court of Summary Jurisdiction established by that Act.

S29 provides that:

> Subject to this Act, the Court shall hear and determine all applications under this Act.

S35(1) provides that:

> Subject to subsection (2), the Minister has the sole authority to make an application to the Court that a child be found to be in need of care.

S43(4) provides that:

> Subject to this section, the Court may, on the hearing of an application under this Part, make an order –
>
> (a) declaring the child in relation to whom the application is made to be in need in care; or
>
> (b) dismissing the application.

S43(5) provides:

> Where the Court makes a declaration under subsection (4)(a), the order may include –
>
> (a) a direction to the parents, guardians or persons having custody of the child to take the necessary steps to secure the proper care and welfare of the child (including a direction that they comply with the direction, if any, of the Minister in relation to

the child's care and welfare), as it thinks fit, subject to review by the Court at the end of a period not exceeding 12 months after the date of the making of the order;

(b) a direction that the child reside with a person whom it considers suitable, for such period, subject to subsection (6), not exceeding 12 months, as it thinks fit;

(c) a direction that the child be under the guardianship of the Minister and the parents, guardians or persons having the custody of the child (including a direction relating to the custody of and access to the child while under that guardianship) for such period, subject to subsection(6), not exceeding 12 months, as it thinks fit; or

(d) subject to subsection (7), a direction to transfer the sole rights in relation to the guardianship of the child to the Minister or such other person, for such period, not extending beyond the eighteenth birthday of the child, as it thinks fit (including a direction relating to access of the parents, and such other persons as the court thinks fit, to the child).

S43(7) provides:

(7) An order shall not be made under subsection (5)(d) unless the Court is satisfied that -

(a) no other order that it may make will adequately provide for the welfare of the child; or

(b) the parents of the child have, without reasonable excuse, failed to maintain substantial contact with the child during the period of 12 months before the application as a result of which the order is made.

S44 provides:

44. ADJOURNMENT OF PROCEEDINGS, &c.

(1) The Court may adjourn the hearing of an application under this Part for such periods, not exceeding 14 days, as it thinks fit.

(2) During a period of adjournment under subsection (1), the Court shall, having received the recommendation of the Minister, direct that the child in relation to whom the application is made –

(a) live, or continue to live at home;

(b) be placed, or remain in, the custody of a person specified in the direction;

(c) live, or continue to live, in a place of safety specified in the direction; or

(d) be detained in a hospital specified in the direction.

S47 provides:

47. INTERIM ORDERS

Where the Court thinks fit, it may make an interim order in accordance with this Part which shall include particulars of the date, time and place fixed by the Court for a further hearing of the application to which it relates and it shall remain in force –

(a) subject to paragraph (b), for such period not exceeding 2 months, as the Court thinks fit; or

(b) where the Court thinks fit, for a further period not exceeding 4 months from the making of the first interim order.

S48 provides that Minister or the parents, or any other person interested in the welfare of the child may apply to the Court for a variation or further variation of an order made under s43 if the circumstances that resulted in the making of the order have changed significantly since the order sought to be varied, was made.

S48(3) provides that on such an application the Court may vary or revoke the order or make any other order it could have made under s43 on the original application.

S49 provides for a system of review of the circumstances of a child in relation to whom an order under section 43(4) has been made from time to time.

S50 provides for a right of appeal to the Supreme Court.

Part VII is headed "CHILD IN CARE OF MINISTER" and the provisions of that Part deal with the responsibilities of the Minister where the sole rights in relation to the guardianship of the child have been placed in the Minister pursuant to s43(5)(d) or in the Minister and another person pursuant to s43(5)(c).

The submission of Mr Stirk, counsel for the Minister, was that the reference in s47 to "an interim order in accordance with this Part" was a reference to an order pursuant to s43(4)(a), which is a precondition to any further direction which might be made pursuant to s43(5). Further, he submitted that an interim order could only be made when the hearing had already commenced, as the section envisages that when an interim order is made the court shall fix a date, time, and place for a *further hearing* of the application. In this case, the learned Chief Magistrate had not commenced the

hearing and all he could have done was adjourn the hearing of the application pursuant to s44(1), but then only for a period not exceeding fourteen days.

Ms Carney, who appeared on behalf of the child, supported the application on the basis that an interim order was only possible if the hearing had actually commenced. However, she submitted that an interim order under s47 does not require the making of an order under s43(4)(a).

Mr Goldflam, for the mother of the child, submitted that an order declaring a child to be in need of care could not be made on an interim basis. The circumstances under which a child may be found to be in need of care are set out in s4(2) of the Act and include, for example, that the parents have abandoned the child and cannot after reasonable enquiry be found; that the parents are unwilling or unable to maintain the child; that the child has suffered maltreatment; or, that the child is not subject to effective control and is engaging in conduct which constitutes a serious danger to his health or safety. He pointed to s43(2) which requires that before making an order that the child be in need of care the court must be satisfied that such an order would ensure that the standard of care of the child, as a result of the order, would be significantly higher than the standard presently maintained in respect of the child. He submitted that an order declaring that a child is in need of care carries no other consequences other than to open the way for the court to make directions under s43(5). Consequently, he submitted, such an order was like a finding of guilt in criminal proceedings and could only be made after the hearing has concluded. If an interim order under s43(4)(a) could be made

before the hearing had progressed to the stage where the parents had had an opportunity to present their case, they would be denied procedural fairness. He also submitted that the legislative intent of s47 is to grant a breathing space to the parties and its real purpose was to enable orders of the type contemplated by s44(2) to be made during a period which was longer than that contemplated by s44(1). He based this submission, in part, upon the consideration that the scheme of the Act is one of graduated intervention by the state, so that the policy is that no more should be done than what is really necessary. Consequently if this submission is correct, whilst the Court could make an interim order directing that the child be placed in or remain in the custody of the Minister for a short period, an order could not be made effecting guardianship rights.

I have only briefly set out the main points of the very helpful submissions made by counsel and which were elaborated upon in considerable detail in argument.

Although the drafting of the Act gives rise to some difficult questions of construction, I think that the policy and purpose of the Act is not difficult to identify. Clearly the Act is designed for the protection and care of children who are in need of care. The Act gives important powers to police officers, hospital authorities, and the Minister to take appropriate steps to protect children who are believed to be in need of care, both before and after a court order is made. The focus of the Act is not upon the custody or guardianship of children generally but on the protection of children who are abandoned,

maltreated, or otherwise in need of the special protection of the state. It is clear also that the policy of the Act is that the state should only interfere when it is really necessary to do so. The rights of parents, who are the natural guardians of their children, are to be jealously protected because it is recognised that the aim of the intervention by the state should be not only to protect the child, but if at all possible, to return the child to its parents or other guardians. As Thomas J said in *Bailey v Barker* (unreported 22 July 1995):

> The court will start with a strong presumption that it is in the interests of a child to stay with its natural parents, if they are capable of discharging the responsibilities of parenthood to a degree that can be described as even adequate: *Beck and Another v Phillips and Another* 6 Fam LR 837. This statement must be tempered by the fact that the underlying consideration in cases of this nature is that the child's welfare is paramount: *Danci v Danci* (1984) FLC II 91-560 at 79527.

The scheme of the Act is that the Minister, an authorised person or a member of the police force may, when he believes on reasonable grounds that the child is in need of care and that no other action will ensure the adequate care of the child, take the child into custody, if necessary by force and without a warrant (s11(1) and (2)). Clearly the expression "taking a child into custody" means detaining the child against the child's will or the will of the parents, notwithstanding the defined meaning of the word "custody" in s4(1). Once this occurs the person taking the child into custody may have the child held in a "place of safety" as defined by s4(1) for a period not exceeding forty-eight hours and is required, as soon as practicable, but not later than that

period of forty-eight hours, to apply to a Justice of the Peace for a holding order under s11(4). If the Justice of the Peace is satisfied that there are reasonable grounds for believing that the child is in need of care, an order authorising the holding of the child in a place of safety may be made for a period not exceeding fourteen days (s11(4)). The person taking the child into custody is required to notify the Minister of the action taken within forty-eight hours: s11(5). When that occurs the Minister is required, under s17 to assume responsibility for the protection, care, and maintenance of the child, and within fourteen days after the removal or detention of the child the Minister is required to make the decision whether or not to make an application to the court for an order declaring the child to be in need of care and for any other consequential directions under s43: see s36(1) and s17(b)(i). If the Minister decides not to seek an order and no other person is granted leave to seek an order, it would appear that the Minister is required to return the child, notwithstanding that s17(b)(i) requires him to cause the child to be taken before the Court, as it appears that the Family Matters Court has no jurisdiction to deal with the child unless an application is made to it by the Minister for an order under s43(4), or if the Minister does not make such an application, unless some other person is granted leave to make the application: see s35. If the Minister decides to make the application then he is required to give notice in writing of the application to the parents or guardians or other persons having custody of the child, and, where the child is ten years of age, to the child (s36(2)), and those parties are then deemed to be parties to the application: s36(4).

It is clear that the Act contemplates that these procedures are to be undertaken promptly, without undue formality, and with every endeavour made to ensure that the proceedings are not protracted: see s40 and the time limits referred to in s11, s15, s17(b)(i), s44 and s47.

When an application is first brought before the Court, the Act recognises that the Court may not be in a position to hear the application immediately, either because of the Court's own commitments or because of the position of the parties, and accordingly there is power under s44(1) to adjourn the hearing of an application for such periods not exceeding fourteen days as it thinks fit; and during the period of any adjournment the court may make the kind of orders envisaged by s44(2). It is s44 which throws the most light on the powers of the court under s47 to make interim orders.

In practice it would be very rare for a hearing, in the sense of a final hearing at which evidence was received leading to an order under s43(4), to commence the first time a matter was mentioned in the Family Matters Court. The Court is not a specialist court constituted by a magistrates whose only function is to sit in that Court. Indeed the provisions of s31, which require the Court to sit in buildings approved or appointed by the Minister, require the Court's facilities to be adequately separated from the facilities of a magistrate's office or other courts operating in the building, and require the Court not to sit while any other proceeding in or in the vicinity of the office, place, or building is being conducted, place significant constraints on the Court to deal with matters as expediently as Parliament undoubtedly would

like. In the present case I note for example, that on the 23 April 1998 on the first mention of this matter, Ms Deland SM set the matter down for hearing on the 22 May 1998, almost four weeks after the first mention of the matter.

I do not think that an order adjourning a hearing for a period which exceeds fourteen days is void. Although Parliament's intention is that the hearing should not be adjourned for longer than fourteen days, the failure to do so is, in my opinion, an irregularity which does not affect the validity of what the Court has done or might yet do in the hearing of the application: see *Accident Compensation Commission v Murphy* (1988) VR 444. The Act does not provide any consequences for a breach of the section. It is not within the power of the parties to tell the Court to when it must adjourn; that is a matter for the Family Matters Court which must not only consider the practical difficulties which s31 superimposes, but such matters as the period of time needed by the parties to effectively prepare their respective cases, brief counsel and arrange for witnesses to be present so as to ensure a fair hearing, (as to which, of course, the parties are each entitled,) as well as the availability of magistrates and other relevant exigencies. Similarly, I do not think that an order under s44(2) which exceeds fourteen days, but does not exceed the period of the adjournment, would be void.

It is clear, however, that the kind of orders which can be made under s44(2) are fairly limited. There is, for instance, no power to make an order of the kind contemplated by s43(5)(a), or a guardianship order. Clearly the orders contemplated by s44(2) are very short-term temporary orders.

On the other hand, orders contemplated by s47, it seems to me, are intended to be not so confined. In the first place an interim order can be made for a period of up to two months and may be extended for a further two months. Obviously this is a longer period than is envisaged by s44(1), and s47 itself recognises that there is to be a further hearing of the application. One possible interpretation is that "further hearing" envisages that the matter has already been part heard. This submission has some attraction, but I note that the expression used is "a further hearing" rather than "the further hearing". I think that this suggests that the magistrate may not have yet embarked upon the hearing so as to become seized of the matter and that the word "hearing" is not confined to a matter which is part heard in that sense but includes what might be called a preliminary hearing. Consequently it seems to me that the intention is that the Court has a broader power to make orders than just the kind of orders referred to in s44(2), as otherwise, s47 would have little purpose.

This brings me to a consideration of what is meant, in s47, by the expression "it may make an interim order in accordance with this Part". The most likely orders to which those words might refer other than orders under s44(2), are orders under s43(4) and (5). I accept the submission of Mr Goldflam, that notwithstanding the use of the word "direction" in s43(5), such directions are nevertheless in fact orders. Indeed the Act itself does not consistently distinguish between "orders" and "directions": in s43(6) and (7) there are references to orders made under s43(5). The next difficulty is that

orders made under s43(5) are conditioned upon the making of a declaration under s43(4)(a) and I think it is clear that such a declaration is a condition precedent to the power to make an order under subsection (5). Nevertheless I do not accept the submission of Mr Goldflam that an interim declaration under s43(4)(a) cannot be made. The very idea that the order is of an interim nature recognises that it is not a final order, but rather one which is made upon the basis of the material then presently before the Court, which of necessity is likely to be incomplete. Accordingly, it seems to me that the Act still places a heavy onus on the Minister to obtain an interim order in his favour and that the Court is still required to be satisfied that, under subsection (7), no other order it will make will adequately provide for the welfare of the child. In those circumstances it seems to me that the test to be applied resembles the tests discussed in *Beecham Group Limited v Bristol Laboratories Pty Ltd* (1967-1968) 118 CLR 618. If the Minister seeks an interim declaration and a consequential order under subsection (5), the Minister must make out a strong *prima facie* case in the sense that if the evidence remains as it is, there is a strong probability that at the ultimate trial the Minister will be entitled to that relief and that the balance of convenience strongly favours the making of the interim order. If on the other hand, the interim order sought is one of those contemplated by s44(2), the *prima facie* case need not be as strong – it is sufficient that at the end of the trial the Minister will probably be entitled to relief. So it seems to me that the court may make an interim order at any time, whether or not the matter is part heard, and an interim order may be confined to one of the type of orders envisaged by s44(2), or may, if an interim declaration is made pursuant to s43(4), include one of the type of orders

permitted by s44(5). I say one of the type of orders, because it is clear that it is not possible to make more than one of the orders permitted by s44(2) or s43(5): see *The Minister for Territory Health Services v Brown and Deland* (S.C No 47 of 1995, unreported, Kearney J, 22/9/95). It is also apparent that once the Court's jurisdiction is enlivened to make an interim order, the Court may adjourn the hearing of the proceedings for a period of up to two months, and is not confined by the period in s44(1).

Having regard to the above matters I conclude that the orders made by the learned Chief Magistrate were not *ultra vires*. There was no necessity for the learned Chief Magistrate to make an order declaring the child to be in need of care before making an order that the child remain in the custody of the Minister. An order placing the child in the custody of the Minister is an order contemplated by s44(2)(b) and is an order which can be made on an interim basis. The period of the order did not exceed the limits fixed by s47(b) having regard to the original order made by Ms Deland SM, which order, incidentally, is not attacked in these proceedings.

Ms Carney, on behalf of the child, sought a counter declaration to the effect that it was not necessary for the child to be physically present at the hearing.

In my opinion s17(b) requires the Minister to cause the child to be taken before the Court and that means physically brought before the Court. Clearly the purpose of that requirement is that if the Court decides to make an order

directing that the child live or continue to live at home pursuant to s44(2)(a), or dismisses the application under s43(4), the child can be returned to its parents immediately. It seems to me to be sensible that where the very subject matter of the action is the child and who is to have custody or guardianship rights in relation to the child, the child should be present in Court. The Family Matters Court does not have power to issue what is in effect a writ of *habeas corpus*. The Act envisages that it is the duty of the Minister to present the child to the Court and it assumes that the Minister will obey the requirements of s17(b) without the need for any coercive order. At that stage the child is placed in the custody of the Court pending the making of an order either under s43, s44 or s47. Once an order is made there may be no necessity for the child to be physically present in Court thereafter, although the Court would no doubt need to satisfied that it is able to adequately inform itself on the matters referred to in s43(1)(b) without the child being present. That, however, is a matter for the Court. The child having been brought into the Court's custody, the Court has control over the child and is able to require the child's attendance at any further hearing or dispense with it as it seems fit.

Accordingly, the relief sought in the notice of motion and summons is refused. In accordance with the agreement made by all counsel, I make no order as to costs.