SECRETARY OF DEPARTMENT OF HEALTH AND HUMAN SERVICES & RAY AND ORS

(2010) FLC ¶93-457

Family Court citation: [2010] FamCAFC 258

In the Family Court of Australia at Hobart

Judgment delivered 22 December 2010

Family Law — Appeal — Children — Where trial judge joined the Secretary of Tasmanian Department of Health and Human Services as a party to the proceedings without consent of Secretary.

This was an appeal by the Secretary of the Tasmanian Department of Health and Human Services against an order that he be joined as a party to parenting proceedings under the ***Family Law Act 1975*** without his consent and a consequential order giving him leave to apply to be removed as a party.

The Secretary asserted that a number of errors had been made by the trial judge which included:

[85238]

- that there was no power in the Family Court to order his joinder as a party to proceedings in question
- that the trial judge erred when considering the asserted requirement for the Secretary to be willing to assume responsibility for the subject children, and to consent to being joined in the proceedings, and
- that the provisions of the Act on their true construction do not apply to a person such as the Secretary who exercises “powers and duties in right of the State of Tasmania”.

The primary question considered on appeal was whether the trial judge had the power to join the Secretary absent his consent.

Held: appeal allowed.

Bryant CJ, Finn and Ryan JJ

None of the sources of power relied upon by Benjamin J, or on behalf of the Commonwealth Attorney-General and the independent children's lawyers, would be available to support the making of an order for parental responsibility in favour of the Secretary, absent his consent. Accordingly, the order joining the Secretary should not have been made. The appeal against that order and the consequential order should be allowed and the orders set aside.

[Headnote by the CCH FAMILY LAW EDITORS]

Appearances: Mr Sealey SC and Mr Turner of Counsel (instructed by Crown Law) appeared on behalf of the appellant; Ms Ray (first respondent) appeared in person; Mr Males (second respondent) appeared in person; Ms Males (third respondent) appeared in person; Mr Gageler SC and Mr Lewis (instructed by Australian Government Solicitor) appeared on behalf of the intervenor; Mr P Fitzgerald of Counsel (instructed by Legal Aid Commission of Tasmania) appeared on behalf of the independent children’s lawyer for “A”; Mr

T Fitzgerald of Counsel (instructed by Fitzgerald & Browne Lawyers) appeared on behalf of the independent children's lawyer for "J".

Before: Bryant CJ, Finn and Ryan JJ.

Full text of judgment below.

Bryant CJ, Finn and Ryan JJ:

ORDERS

(1) The appeal against Orders 1 and 2 of the orders made by the Honourable Justice Benjamin on 31 March 2009 be allowed.
(2) The orders be set aside.
(3) There be no order for costs in relation to the appeal.
(4) The Court grants to each of the Independent Children's Lawyers a costs certificate pursuant to the provisions of s 6 of the *Federal Proceedings (Costs) Act 1981* (Cth) being a certificate that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under that Act to each of the Independent Children's Lawyers in respect of the costs incurred by them in relation to the appeal.

IT IS NOTED that publication of this judgment under the pseudonym *Secretary of the Department of Health and Human Services & Ray and Ors* is approved pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

Bryant CJ, Finn and Ryan JJ:

Introduction

1. On 31 March 2009 Benjamin J ordered that the Secretary of the Tasmanian Department of Health and Human Services ("the Secretary") should be joined as a party to certain parenting proceedings under the *Family Law Act 1975* (Cth) ("the Act"). This is an appeal by the Secretary (in his own name, being David Roberts, but in his capacity as Secretary of the Department of Health and Human Services) against that order. The appeal is also against a consequential order giving leave to the Secretary to apply to be removed as a party.

2. The proceedings in which the orders now appealed were made related to the future living arrangements for a boy, J, then aged 15 and his sister, A, then aged 9, and were between the

[85239]

children's father and his current partner as applicants, the children's mother as respondent, and their paternal aunt as intervenor. It is relevant, having regard to certain of the submissions made to us, to mention that the children's father and mother are, or were, married.

The circumstances in which the orders appealed were made

3. As Benjamin J recorded in the first paragraph of his reasons for judgment delivered on 31 March 2009 in relation to the orders now appealed, he was concerned that "at the time of final determination of these parenting proceedings there may not be any person or party suitable to care for and/or be responsible for one or both of the children".

4. Because of these concerns his Honour had, in orders made by him on 20 November 2008, made a request pursuant to s 91B of the Act that the Secretary intervene in the proceedings.

5. Section 91B provides as follows:

> (1) In any proceedings under this Act that affect, or may affect, the welfare of a child, the court may request the intervention in the proceedings of an officer of a State, of a Territory or of the Commonwealth, being the officer who is responsible for the administration of the laws of the State or Territory in which the proceedings are being heard that relate to child welfare.
> (2) Where the court has, under subsection (1), requested an officer to intervene in proceedings:
>
> > (a) the officer may intervene in those proceedings; and
> > (b) where the officer so intervenes, the officer shall be deemed to be a party to the proceedings with all the rights, duties and liabilities of a party.

6. In his orders of 20 November 2008, his Honour also noted that on 10 December 2008 he would "take argument" as to whether he had "power to require the Secretary of the Department of Health and Human Services to become a party to the proceedings" and as to whether he had "power to make orders for parental responsibility in favour of the Secretary … either with or without consent of the Secretary".

7. Again as his Honour recorded in his reasons for judgment (at paragraph 28), Counsel for the Secretary appeared before him on 10 December 2008 and informed him that the Secretary did not wish to intervene in the proceedings; that the Secretary was not willing to accept any obligations under any order for parental responsibility made in his favour, and thus would not consent to such an order; and that the Secretary considered that any such parenting order would be *ultra vires* the powers of the Family Court.

8. On 10 December 2008 his Honour also received submissions from the Independent Children's Lawyers for each of the children, from Counsel for the father and his partner, and from Counsel for the respondent mother - all of whom submitted that his Honour had jurisdiction to join the Secretary as a party and to make an order against the Secretary notwithstanding that the Secretary did not consent to being joined in the proceedings and to the proposed order. Only Counsel for the intervenor aunt submitted that the Court did not have power to join the Secretary without his consent and that it had no power to make an order for parental responsibility in the Secretary's favour even with his consent.

9. Having reserved his decision, his Honour delivered his judgment on 31 March 2009 in which he determined for reasons, which will be later explained, that he had the power to join the Secretary as a party even without the consent of the Secretary and to make an order for parental responsibility in favour of the Secretary again without his consent. Accordingly, his Honour ordered that the Secretary be joined as a party to the proceedings, but he did not make a parenting order in favour of, or against, the Secretary.

The participants in the appeal

10. As already mentioned, the appeal is brought by the Secretary (in his own name). The three respondents to the appeal are, respectively, the father's partner, the father, and the mother. However, none of those persons took any part in the hearing of the appeal, although the father appeared in person at the hearing. Rather it was each child's Independent

[85240]

Children's Lawyer who appeared and made submissions in opposition to the appeal.

11. The Attorney-General for the Commonwealth intervened in the appeal (pursuant to s 91(1) of the Act) in order to support the power of the Court to join the Secretary as a party without his consent. The Attorney-General did not, however, wish to be heard on the issue of whether if that power exists, it had been properly exercised in this case.

12. At the commencement of the hearing of the appeal, we were informed by the Solicitor-General for the Commonwealth, that the Commonwealth had taken the view that a Constitutional issue was raised by material prepared on behalf of the Secretary for the appeal, and that it had therefore issued notices under s 78B of the *Judiciary Act 1903* (Cth) to the States and Territories. However, no State or Territory had chosen to intervene.

The preliminary question as to whether the appeal may now be moot

13. At the commencement of the hearing of the appeal, we were provided (without objection) with copies of various orders which had been made by the Hobart Magistrates Court (Children's Division) under the *Children, Young Persons and Their Families Act 1997* (Tas), after the making of the orders which are the subject of the appeal.

14. Particularly significant for present purposes was an Interim Care and Protection Order made on 23 October 2009 which granted the custody and guardianship of the child, J, to the Secretary, and also a Care and Protection Order made on 15 December 2009 which granted the custody and guardianship of the child, A, to the Secretary for a period of 12 months. Thus, because of the operation of s 69ZK of the Act there are now limitations on the making of orders by courts exercising jurisdiction under the Act in relation to the two children in question.

15. Section 69ZK provides (emphasis added):

> (1) A court having jurisdiction under this Act must not make an order under this Act (other than an order under Division 7) in relation to a child who is under the care (however described) of a person under **a child welfare law** unless:
>
> > (a) the order is expressed to come into effect when the child ceases to be under that care; or
> > (b) the order is made in proceedings relating to the child in respect of the institution or continuation of which the written consent of a child welfare officer of the relevant State or Territory has been obtained.
>
> (2) Nothing in this Act, and no decree under this Act, affects:
>
> > (a) the jurisdiction of a court, or the power of an authority, under **a child welfare law** to make an order, or to take any other action, by which a child is placed under the care (however described) of a person under **a child welfare law**; or
> > (b) any such order made or action taken; or
> > (c) the operation of **a child welfare law** in relation to a child.
>
> (3) If it appears to a court having jurisdiction under this Act that another court or an authority proposes to make an order, or to take any other action, of the kind referred to in paragraph (2)(a) in relation to a child, the first-mentioned court may adjourn any proceedings before it that relate to the child.

16. The expression “child welfare law” used in s 69ZK is defined in s 4(1) of the Act as “a law of a State or Territory prescribed, or included in a class of laws of a State or Territory prescribed, for the purposes of this definition”.

17. The Tasmanian *Children, Young Persons and Their Families Act 1997*, under which, as we have said, orders in relation to the subject children were made, is such a prescribed child welfare law for the purposes of s 69ZK. (See reg 12B(2) and sch 5 (Item 24) of the Family Law Regulations 1984 (“the Regulations”).)

18. It will be convenient in this context also to set out the definition in s 4(1) of “child welfare officer” and the related reg 12BA.

19. Section 4(1) of the Act provides:

[85241]

"child welfare officer", in relation to a State or Territory, means:

> (a) a person who, because he or she holds, or performs the duties of, a prescribed office of the State or Territory, has responsibilities in relation to a child welfare law of the State or Territory; or
> (b) a person authorised in writing by such a person for the purposes of Part VII.

20. Regulation 12BA of the Regulations relevantly provides:

> For paragraph (a) of the definition of ***child welfare officer*** in subsection 4(1) of the Act, each of the following is a prescribed office:
>
> "…
>
> (b) for Tasmania the office of Secretary to the Department of Health and Human Services
>
> …"

21. It was submitted on behalf of the Secretary that the making of the State orders vesting guardianship and custody of the two children in question in the Secretary had not rendered the appeal moot because the order joining the Secretary in the proceedings under the Act remained in force, and thus notwithstanding the limiting provisions of s 69ZK, orders could be made against the Secretary which were either in the terms permitted by the section, or which would come into effect following the discharge of the State orders. This submission on behalf of the Secretary was supported by the Independent Children's Lawyer for each child.

22. While not adopting "a firm position" on the question of whether the appeal was moot, the Solicitor-General for the Commonwealth raised as an issue the operation of r 6.02(2)(d) of the Family Law Rules 2004 ("the Rules") against the background that the appeal, being an appeal by way of re-hearing, must be determined on the basis of the law and facts as they stand at the time when the appeal is heard. Put simply, the Solicitor-General's point was that because the Rules require that a person in whose custody a child has been placed under State law, should be a party to any parenting proceedings under the Act involving the child, Benjamin J's order, even if erroneous when made, was now no longer erroneous because of the making of the State orders. We will now consider this proposition in more detail.

23. Subrule 6.02(2) prescribes the persons who must be parties to a case which involves an application for a parenting order in relation to a child. Paragraph 6.02(2)(d) provides that if "a State child order" is currently in place in relation to the child, "the prescribed child welfare authority" must be a party to the case, and if not the applicant, be joined as a respondent (r 6.02(3)). (We will later set out r 6.02 in full.)

24. The Dictionary in the Rules provides that the expressions "State child order" and "prescribed child welfare authority" have the meaning given by s 4(1) of the Act, with those meanings being:

"State child order" means an order made under the law of a State:

> (a) that (however it is expressed) has the effect of determining the person or persons with whom a child who is under 18 is to live, or that provides for a person or persons to have custody of a child who is under 18; or
> (b) that (however it is expressed) has the effect of providing for a person or persons to spend time with a child who is under 18; or
> (c) that (however it is expressed) has the effect of providing for contact between a child who is under 18 and another person or persons, or that provides for a person or persons to have access to a child who is under 18.

"prescribed child welfare authority", in relation to abuse of a child, means:

> (a) if the child is the subject of proceedings under Part VII in a State or Territory an officer of the State or Territory who is responsible for the administration of the child welfare laws of the State or Territory, or some other prescribed person; or
> (b) if the child is not the subject of proceedings under Part VII an officer of the State or Territory in which the child is located or is believed to be located who is responsible for the administration of the child welfare laws of the State or Territory, or some other prescribed person.

25.

[85242]

While the apparent limitation in the definition of "prescribed child welfare authority" in s 4(1) to "abuse of a child", may raise some questions regarding the application of the definition (particularly having regard to the definition of "abuse" in relation to a child in s 4(1)), nevertheless, it would seem that the Rules intend that where an order is made under State law for the custody of a child (as has happened in the present case), the officer of the relevant State "who is responsible for the administration of the child welfare laws of the State" should be joined as a party to any parenting proceedings under the Act involving the child.

26. At the risk of further complicating this issue, but having regard to the submissions of the Solicitor-General for the Commonwealth, it has to be said that it is not entirely clear who, at least under the Rules, would in this case be the Tasmanian "officer … responsible for the administration of the child welfare laws of that State".

27. The Solicitor-General for the Commonwealth proceeded on the basis that in order to determine who the State officer was in the present case, it is necessary to rely on the definition of "child welfare law" in s 4(1) of the Act (which we have earlier set out) and its reference to reg 12B(2) and sch 5 of the Regulations which prescribes four Tasmanian "child welfare" Acts, including the *Children, Young Persons and Their Families Act 1997* (Tas) (under which the State orders in this case were made).

28. Therefore, according to the submissions of the Solicitor-General, the officer responsible for the administration of the *Children, Young Persons and Their Families Act 1997* (Tas) would be the officer to be joined in parenting proceedings for the purposes of r 6.02(2). However, it was then submitted by the Solicitor-General that under s 113 of the Tasmanian Act the officer would be the Minister who has administrative responsibility for that Act, apparently now being the Minister for Human Services. Thus, it would be the Minister rather than the Secretary who should be joined as a party to any parenting proceedings under the Act, and accordingly, if the orders now appealed were to stand, an amendment would be needed to those orders to reflect the correct officer.

29. We note that the Solicitor-General for Tasmania agreed that should the orders appealed stand, the Tasmanian officer referred to in them should be the Minister rather than the Secretary. For our part, however, we draw attention to reg 12BA (which we earlier set out) and which provides that the Secretary is the prescribed "child welfare officer" who has responsibility for the child welfare law of Tasmania.

30. Ultimately, because of the view we take as to the outcome of this appeal, it is unnecessary to resolve any controversy which may exist as to whether it is the Minister or the Secretary who should be joined in any parenting proceedings under the Act involving a child who is the subject of a custody order under Tasmanian law.

31. But leaving that issue to one side, the essential point raised by the Solicitor- General for the Commonwealth was whether the appeal against Benjamin J's orders is now moot on the basis that even if erroneous when made, they can stand because of the making of State custody and guardianship orders and the requirements of r 6.02.

32. We consider that the better view is that the appeal is not moot for the reason advanced on behalf of the Secretary and by the Independent Children's Lawyers. That reason is that notwithstanding the limitations which s 69ZK imposes, Benjamin J's orders for joinder remain in force, and so can, or will, have an operation either subject to, or after the discharge, or expiration, of the orders made under Tasmanian law. It is therefore appropriate for us to proceed to determine the appeal against his Honour's orders.

A summary of the reasons of the orders appealed

33. Before considering the grounds on which the Secretary challenges the order joining him as a party to parenting proceedings in the Family Court, some reference is necessary to Benjamin J's reasons for making the order.

34. After setting out some factual background concerning the children, their parents, and their other relatives involved in the proceedings, as well as a history of the

[85243]

proceedings before him, his Honour identified (in paragraph 32 of his reasons) the primary question before him as being whether he had “power to join the Secretary to these proceedings absent his consent”. We observe in passing that this question is now the essential question in this appeal.

35. Having posed this question, his Honour then suggested that it fell into two “sub- issues”, which he identified as follows:

> • the power of a court exercising jurisdiction under the Act to join a party in parenting proceedings, absent the consent of that party and absent the motion of another party to the proceedings for such joinder. If the court has that power then there is the logical next step, as to whether to exercise the joinder power;
> • in these proceedings the discretion to join the Secretary should only be exercised if there is a power to make parenting or other welfare orders which would bind the Secretary. Without such ability to make an order the joinder would serve no purpose.

36. Again in passing, we observe that the second of these issues identified by his Honour, being that there would be no purpose in an order for joinder of the Secretary unless orders relating to the children could be made against the Secretary absent his consent, was a proposition accepted as common ground in the appeal.

37. Immediately after outlining the primary question and the two sub-issues which he suggested it raised, his Honour expressed (in paragraph 33) his conclusions that the Court had power to join a party to proceedings absent that party's consent, and that in circumstances of “real concerns regarding the interests and the basic needs of a child … it is within the scope of the powers of a court exercising jurisdiction under the Act to join the Secretary as a party.”

38. The remainder of his Honour's reasons for judgment can be read as providing his reasons for those conclusions.

39. He referred first to the power in s 91B (which we have earlier set out) to request the intervention of a State welfare officer in proceedings and said that he did not believe “this is an exclusionary provision”. It is not, with respect, entirely clear to us what his Honour meant by “an exclusionary provision”. But presumably he meant that this provision did not prevent him ordering the joinder of the Secretary.

40. His Honour next referred to, and can be seen as placing some reliance on, the provisions of r 6.02(1), saying:

> 37. Rule 6.02(1) provides a person whose rights may be directly affected by an issue in a case, and whose participation as a party is necessary for the court to determine all issues in dispute of a case, must be included as a party to the case.

> 38. This rule does not appear to prevent the court from joining a party, in fact it encourages a court to impose an obligation on the court to join a party where that parties "participation as a party is necessary for the court to determine all issues".

41. A little later in his reasons, his Honour can be seen as placing further reliance for his proposed orders on s 31 ("Original Jurisdiction of the Family Court") in combination with Division 12A of Part VII of the Act ("Principles for conducting child related proceedings") when he said:

> 53. In addition, the inclusion of Division 12A of Part VII of the Act gives the court greater powers to control its proceedings to meet the best interests of the child. When considering Division 12A, which was inserted into the Act in 2006, it is clear that it sets out principles in relation to court's duties in exercising powers in respect of child related proceedings and in making other decisions about the conduct of child related proceedings.
> 54. Division 12A gives the court broad powers in managing proceedings to give effect to the underlying determination as to where a child lives, who sees and communicates with the child and who has parental responsibility.
> 55. The rhetorical question is, does Division 12A empower the joining of a party?
> 56. S 69ZP provides:-
>
> The Court may exercise the power under this division:-
>
> (a) on the court's own initiative; or
>
> [85244]
>
> (b) at the request of one or more of the parties to the proceedings.
>
> 57. Those powers, including the powers under s 69ZR, are powers to make determinations and findings at any stage, the duties under s 69ZQ gives a court powers in terms of the conduct of the proceedings. It does not give any specific power express power to join a party.
> 58. However, when read with s 31 of the Act in concert with the courts duty to exercise its jurisdiction to make orders in the best interest of the child, if there was no power to join a party prior to 1 July 2006, the power now arises to give real meaning to the provisions of division 12A of the Act. The question of the impact of this division was raised during argument but it was not argued in detail by counsel.

42. Later again in his reasons, his Honour can be read as placing reliance for his proposed orders on the so-called "welfare" power or jurisdiction in s 67ZC. That section provides (notes omitted):

> (1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.
> (2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration.

43. Having observed (at paragraph 70) that this section confers upon the Court "the equivalent of the *parens patriae* powers of the Supreme Courts", his Honour further observed, relying on the High Court decision in *Secretary, Department of Health and Community Services* v *JWB and SMB* (1992) 175 CLR 218 , that the welfare jurisdiction enables the Court to "virtually make any order necessary to protect the welfare of a child", although his Honour did then acknowledge that later High Court decisions, notably *Minister for Immigration and Multicultural and Indigenous Affairs and B and Anor* (2004) 219 CLR 365 (" *MIMIA* v *B* "), establish some limitations on the welfare jurisdiction.

44. However, his Honour considered that the facts of the present case were distinguishable from those in *MIMIA* v *B* , and that he was thus able to conclude:

> 78. … If none of the present parties are found to be able to be responsible for the children or one of them, it could not be the case that this court would simply wash its hands of a child in the hope that the Secretary would change his view and commence proceedings under the State Welfare laws. It must be that when all else fails courts exercising jurisdiction under the Act can vest parental responsibility in a delegate of a State Government to make that officer responsible for the child.

45. Finally, his Honour concluded (in paragraphs 87 to 105 of his reasons) that if the Court had no power to bind the Secretary under the Act, it "probably" had the power "to exercise accrued jurisdiction to exercise the *parens patriae* powers of the State Supreme Court".

46. His Honour's ultimate conclusion was expressed in the following way:

> 111. In essence the State Government argues that it has the power to protect children but not the responsibility. It is a matter for the State through its executive, legislative and consequential administrative arms to determine whether to exercise that power.
> 112. Thus, the State says, in cases such as this that a child is to be left without someone exercising parental responsibility so be it.
> 113. That cannot be the law in Australia in the twenty first century.
> 114. If the State choses not to become involved in the responsibility for a child when there are no other options then it would beggar belief that a court does not have power to impose that obligation upon the State.
> 115. Having regard to the discussions contained in these reasons and having regard to the best interests of these children I determine that I do have power to impose an obligation of parental responsibility upon the State, when there are no other alternatives.
> 116. Having considered the issues I determine that I have power to join the Secretary of the Department of Health and
>
> [85245]
>
> Human Services as a party to the proceedings. I have power to make orders under the Act or under the *parens patriae* jurisdiction binding the Secretary, as such the joinder of the him as a party will not be meaningless.
> 117. Accordingly I will join the Secretary as a party. As the proceedings progress it may be that circumstances alter and the involvement of the Secretary is no longer necessary, as such I will give leave for him to apply to be discharged as a party if the situation warrants.

The grounds of the Secretary's challenge to the orders appealed and a summary of the submissions in support of, and in opposition to, the challenge

47. The Secretary's first ground of appeal asserts that there was no power in the Family Court to order his joinder as a party to the proceedings in question. The second and third grounds are directed to asserted requirements for the Secretary to be willing to assume responsibility for the subject children, and to consent to being joined in the proceedings. The fourth and additional ground (added by leave at the hearing of the appeal) asserts that the provisions of the Act on their true construction, do not apply to a person such as the Secretary who exercises "powers and duties in right of the State of Tasmania".

48. The fundamental question which arises out of the grounds when considered overall, and which is formulated in light of the submissions of the Solicitor-General for Tasmania, is whether a court exercising jurisdiction under the Act has the power to make an order concerning a child, in favour of (and thus order the joinder in the relevant proceedings of) a person, who is not "a necessary party" to the proceedings, who does not seek to intervene in the proceedings, and who does not consent to an order being made in his or her favour.

49. The expression “a necessary party” as used by the Solicitor-General when posing this fundamental question, is derived from r 6.02 of the Rules which is headed “Necessary Parties” and which although set out in part earlier, is now set out in full (but without including notes):

> (1) A person whose rights may be directly affected by an issue in a case, and whose participation as a party is necessary for the court to determine all issues in dispute in the case, must be included as a party to the case.
> (2) If an application is made for a parenting order, the following must be parties to the case:
>
> > (a) the parents of the child;
> > (b) any other person in whose favour a parenting order is currently in force in relation to the child;
> > (c) any other person with whom the child lives and who is responsible for the care, welfare and development of the child;
> > (d) if a State child order is currently in place in relation to the child — the prescribed child welfare authority.
>
> (3) If a person mentioned in subrule (2) is not an applicant in a case involving the child, that person must be joined as a respondent to the application.

50. A second question which, it was common ground, arises on the appeal is whether if the power referred to in the first question exists, was it properly exercised in the circumstances of this case.

51. At this point, we will provide only an outline of the submissions put on behalf of the Secretary in support of the appeal, and of the submissions put in opposition to the appeal, by the Solicitor-General for the Commonwealth on behalf of the Intervenor Attorney-General (with those latter submissions being adopted by the Independent Children's Lawyers). The submissions will, where necessary, be explained more fully in later discussion.

52. The submissions contained in the written summary of argument on behalf of the Secretary were principally directed to establishing that none of the three bases on which Benjamin J apparently relied to make the order joining the Secretary (being, s 31 coupled with Division 12A of Part VII of the Act; s 67ZC of the Act; or the accrued jurisdiction of the Family Court), would provide power to make the order.

53. In his oral submissions the Solicitor-General for Tasmania argued that the *parens patriae* power as exercised either through the

[85246]

“welfare” power in s 67ZC or through the accrued jurisdiction, could not be relied upon to join and make orders concerning a child against an unwilling stranger; otherwise that power would amount to a form of “civil conscription”.

54. Specifically in relation to s 67ZC, the Solicitor-General relied on the limits on the power in that provision arising from the High Court decision in *MIMIA* v *B* . The Solicitor-General also relied on the provisions of s 69ZK and of s 91B (both of which are earlier set out) as statutory recognition by the Commonwealth of the independence of the State child welfare systems from the federal family law jurisdiction.

55. Junior Counsel for the Secretary also relied on the existence of s 69ZK and s 91B in his submissions in support of the additional ground of appeal, which asserted that Part VII of the Act did not bind the State of Tasmania. Junior Counsel also made submissions directed to establishing (particularly from a historical perspective) that the *parens patriae* jurisdiction of the Tasmanian Supreme Court (if it could be exercised by the Family Court on an accrued basis) did not permit the joinder of a party in circumstances where he or she did not wish to participate, and also did not permit the making of an order against a party once joined which that party “specifically eschewed”.

56. We turn now to the submissions made on behalf of the Intervenor Attorney-General, which were supported and adopted by the Independent Children's Lawyers, who had in addition also each filed their own written submissions.

57. Although it was conceded in the written outline of argument on behalf of the Attorney (paragraph 10), that there is a general presumption “that a Commonwealth Act does not intend to bind (in the sense of imposing obligations on) State officials”, it was submitted that this was not an inflexible rule, and whether or not a Commonwealth Act is intended to bind State officials is a matter of statutory interpretation to be determined largely by the subject matter and purpose of the relevant legislation. It was further submitted on behalf of the Attorney-General, that Part VII is binding on State officials as a matter of necessary implication, and that accordingly, a parenting order or order under s 67ZC (and consequently a joinder order) could be made against the Secretary even without his consent.

58. Support for the proposition that there is power to make an order binding the Secretary even without his consent, was submitted by the Solicitor General for the Commonwealth to be found: first, in s 65D(1) as applied by s 69ZH; secondly, in s 67ZC, again as applied by s 69ZH; and thirdly, and alternatively, in the *parens patriae* jurisdiction of the Tasmanian Supreme Court, which falls within the accrued jurisdiction conferred on the Family Court by s 31(1)(d) of the Act read with s 69H(1).

59. The first of these three arguments is based on s 65D(1) which provides:

> (1) In proceedings for a parenting order, the court may, subject to sections 61DA (presumption of equal shared parental responsibility when making parenting orders) and 65DAB (parenting plans) and this Division, make such parenting order as it thinks proper.

60. Also relevant to the Solicitor-General's argument concerning the operation of s 65D(1) are:

- Section 64C which provides that a parenting order may be made in favour of a parent or other person.
- Section 64B(6) which provides that for purposes of the Act:

> “…
>
> (d) a parenting order that:
>
> (i) allocates parental responsibility for a child to a person; or
> (ii) provides that a person is to share parental responsibility for a child with another person
>
> is **made in favour** of that person.
>
> …”

- Section 65C which provides:

> A parenting order in relation to a child may be applied for by:
>
> (a) either or both of the child's parents; or
> (b) the child; or
> (ba) a grandparent of the child; or

[85247]

> (c) any other person concerned with the care, welfare or development of the child.

61. It was the submission of the Solicitor-General that once the father of the subject children in this case and his partner had made an application under s 65C for parenting orders, the jurisdiction of the Court (provided for in s 31(1)(d); s 69H(1); and s 69ZH) was engaged, and the Court had the power under s 65D(1) to make such parenting order as it thought proper, including in favour of a person who was not an applicant and who did not consent.

62. The Solicitor-General was, however, prepared to concede that it would be an extremely rare case where it would be an appropriate exercise of the power to make an order in favour of a person who did not consent, but he submitted that such discretionary considerations would not limit the power.

63. In relation to s 67ZC (the so-called “welfare” power, which is earlier set out), the Solicitor-General endeavoured to distinguish such limitations as might be seen as having been placed on that provision by the High Court decision in *MIMIA* v *B* , on the basis that in that case, unlike in the present case, there was no application for parenting orders and the orders sought had nothing to do with “parental responsibility” (as defined in s 61B). However, as we understood the Solicitor-General's submissions, he would only seek to rely on s 67ZC, if his first argument based on s 65D(1) failed.

64. The Solicitor-General did, however, make detailed oral submissions to us regarding the jurisdictional and constitutional basis provided by s 69ZH for the application in relation to children of a marriage of the sections of Part VII which he contended would bind the Secretary, being notably s 65D(1) and s 67ZC. We do not consider it necessary to repeat those submissions given our later conclusion in relation to the question of whether the sections just mentioned can be interpreted as permitting an order for parental responsibility to be made in favour of a person in the position of the Secretary, who does not consent to the order. We would, however, observe that the submissions of the Solicitor-General concerning s 69ZH well illustrate the difficulties with the drafting of Part VII, particularly in relation to the jurisdiction conferring provisions, referred to by Gleeson CJ and McHugh J in *MIMIA* v *B* at [2].

65. Finally, and as an alternative to the arguments based on s 65D and s 67ZC, the Solicitor-General submitted that by virtue of the accrued jurisdiction, the Family Court could exercise the *parens patriae* jurisdiction of the Tasmanian Supreme Court, which he submitted, had not been abrogated by Tasmanian Statute law.

66. In relation to the reliance placed on behalf of the Secretary on the provisions of s 69ZK and s 91B as imposing limitations on the power of courts exercising jurisdiction under the Act to make orders placing obligations on him absent his consent, the Solicitor-General submitted that s 69ZK did no more than reflect “a policy choice made by Parliament as to the application of the Act”, and that it would not operate to prevent that joinder order being made, as that was not an order in relation to a child, but merely a procedural order.

67. So far as s 91B is concerned, it was the submission of the Solicitor-General that such a provision providing for voluntary intervention by a State officer was not indicative of a lack of power to bind that officer in the absence of intervention by the officer.

Discussion of the issues arising on the submissions

68. It must be remembered that the only questions which arise on this appeal are whether a court exercising jurisdiction under the Act has the power to make an order in favour of the Secretary requiring him to assume parental responsibility in relation to a child, absent his consent to the order, and absent any current responsibility on his part for the child under State law, and thus to make an order joining the Secretary in the parenting proceedings in which the order in his favour might be made, and if there is such power, whether it was appropriately exercised in this case.

69. There appeared to be no issue before us that in a case in which the Secretary has chosen to intervene (either at the Court's request or at his own initiative), there would be power to make an order in his favour. (See s 91B(2)(b).)

70.

[85248]

There would also appear to be no issue that in a case in which the child is already in the care of the Secretary under a State child welfare order, that an order can only be made under the Act when the Secretary has consented to the institution or continuation of the proceedings in which the order is to be made, unless the order is to take effect when the child is no longer the subject of State orders. (See s 69ZK.)

71. Thus, we repeat, the question for us is whether the Act would permit the making of an order vesting some or all aspects of parental responsibility for a child in the Secretary, absent the Secretary's consent and any current involvement by him with the child under State law.

72. The Act does not give any express or immediately clear answer to this question. The submission made on behalf of the Secretary in this regard was that the terms of s 91B and of s 69ZK were indicative of an intention not to bind the Secretary. We think that there is considerable force in that submission given the language of invitation used in s 91B and the effective paramountcy which s 69ZK gives to State child welfare orders. So far as s 69ZK is concerned, it is important to bear in mind the following observation made about that section by Gummow, Hayne and Heydon JJ in *MIMIA* v *B* (at [109]):

> "… Section 69ZK is a limitation upon the exercise of jurisdiction otherwise exercised under the Family Law Act. It is designed to give some measure of insulation to the operation of the child welfare laws of the States and Territories …"

73. Neither Benjamin J in his reasons, nor the Commonwealth Solicitor-General in his submissions to us, was prepared to accept that s 91B supports the conclusion that an order in relation to children cannot be made in favour of the Secretary without his consent at least to being involved in proceedings under the Act.

74. It is thus necessary that we consider the other provisions of the Act on which his Honour and/or the Commonwealth Solicitor-General and also the Independent Children's Lawyers relied as possible sources of power for the orders appealed. The question - which was disputed before us — as to whether the sections of Part VII relied on for this power, can bind a State official is also relevant, indeed fundamental, in this context.

75. It will be recalled that the first possible source of power on which his Honour relied was Division 12A of Part VII of the Act in combination with s 31 of the Act.

76. As his Honour recorded in paragraph 54 of his reasons, Division 12A "gives the court broad powers in managing proceedings to give effect to the underlying determination as to where a child lives, who sees and communicates with the child and who has parental responsibility".

77. But as his Honour also recognised in paragraph 57, the Division "does not give any specific express power to join a party". Nevertheless, he concluded that given the jurisdiction conferred on the Family Court, and the Court's duty to make orders in the best interests of the child, the power to join and make orders requiring the Secretary to take responsibility for a child "now arises to give real meaning to the provisions of division 12A of the Act".

78. We do not agree with his Honour that Division 12A either alone, or in concert with any other provision of the Act, would support the order joining the Secretary. In our opinion, the Division (which is headed "Principles for conduct of child related proceedings") is essentially concerned with procedure and evidence; it is not concerned with people who may be parties to proceedings. We note that the Solicitor-General for the Commonwealth did not seek to rely on this aspect of his Honour's reasoning.

79. However, so far as the issue of parties is concerned, the Solicitor-General for the Commonwealth, endeavoured to persuade us, as we have earlier explained, that s 65D(1) in combination with s 64C, s 64B(6) and s 65C (supported by the conferral of jurisdiction in s 69H(1) and s 69ZH) would permit the Commonwealth to impose parental responsibility on a person (including a person in the position of the

Secretary) who did not wish to undertake that responsibility, if that was considered by the Court to be in the subject child's best interests.

80. We are not persuaded that the sections relied on by the Commonwealth

[85249]

Solicitor-General, or indeed any other section in the Act, confers power on the Court to make an order which would impose obligations or responsibilities (other than financial obligations) on a person in relation to a child without that person's consent where that person does not already have parental responsibility for the child.

81. It is, of course, true that the Court can, and does, make orders under the Act against persons who have parental responsibility, but who not only do not consent to the orders, but may have actively opposed the making of the orders. But even then common sense dictates that it would not usually be in a child's interests for the child to be placed in the care or under the responsibility of a person who did not wish to assume that care or responsibility. If the legislature had intended that obligations in relation to, and responsibility, for a child could be imposed on persons who do not already have parental responsibility for that child, it is only to be expected that it would have expressed such an intention in clear terms. It has not done so.

82. We consider that the conclusion we have just reached concerning the absence of power under s 65D(1) (in combination with the other sections relied on by the Commonwealth) to make a parental responsibility order “in favour of” a person who does not otherwise have parental responsibility and who does not consent to that order, applies not only to private persons, but also to a person in the position of the Secretary who has duties and responsibilities in relation to the care of children under State law. Support for the conclusion that an order conferring parental responsibility for a child on a person in the position of the Secretary can only be made where that person is willing to accept such responsibility, is to be found in the decision of the Full Court in *Faulkner and McPherson, CJ* v *Rugendyke; Department of Community Services* (1995) FLC ¶92-630 .

83. Notwithstanding that decision, we note that it was suggested in the written submissions on behalf of the Independent Children's Lawyer for A that there are considerations which would more strongly support the placement of a child within the care or responsibility of an unwilling government or public official or institution rather than placement with an unwilling private person. However, this suggestion overlooks the fact that there will be both State statutory and resource constraints on the freedom of action of a person in the position of the Secretary. In our view, it is not for a federal court to instruct the Secretary as to how he should prioritise the use of his resources or exercise his State powers.

84. Perhaps more fundamentally, however, the difficulty in the present case for those opposing the appeal remains the need to find an intention in s 65D(1) (and the other sections in question) to bind a State official, such as the Secretary. (See in this regard the decisions of the High Court in *Bropho* v *State of Western Australia and Anor* (1990) 171 CLR 1 and *Jacobsen* v *Rodgers* (1994) 182 CLR 572 .) We cannot discern such an intention.

85. As will be recalled, it was the position of the Commonwealth Solicitor-General that if he failed to persuade us that s 65D(1) (and the other sections relied on by him in conjunction with that section) would support the power to order the Secretary to assume parental responsibility for a child absent the Secretary's consent, then he would seek to rely on s 67ZC and its provision that the Court has in addition to other jurisdiction conferred in Part VII, the “jurisdiction to make orders relating to the welfare of children”. Again, it would be necessary to establish that this provision by necessary implication is binding on the Secretary as a State official.

86. We understood it to be accepted in the submissions made by both Solicitors-General that the High Court decision in *MIMIA* v *B* imposes some limits on the potential application of s 67ZC. However, the Commonwealth Solicitor-General sought to distinguish the present case from *MIMIA* v *B* on the basis that that case was not concerned with the parental responsibility of parties to a marriage for a child of the marriage, whereas the present case is concerned with the issue of the parental responsibility of parties to a marriage for their children.

87. But even if this distinction between the facts of *MIMIA* v *B* and the present case is accepted, the judgments of Gleeson CJ and McHugh J and also of Gummow, Hayne and

[85250]

Heydon JJ in the former case pose formidable difficulties for any attempt to rely on s 67ZC to support the orders appealed in the present case.

88. In *MIMIA* v *B* Gleeson CJ and McHugh J, observed at [13] that s 67ZC "does not itself impose any substantive liabilities or duties or confer rights or privileges on any person". Then later at [52] their Honours further observed (emphasis added):

> 52. By necessary implication, the Family Court may also make an order under s 67ZC that is binding on a parent. Under that section it may also make orders such as those made in *Marion's Case* or those analogous to orders traditionally made by courts exercising the parens patriae jurisdiction. **Nothing in that section or in the rest of Pt VII, however, suggests that the Family Court has jurisdiction to make orders binding on third parties whenever it would advance the welfare of a child to do so.** Nothing in s 67ZC, or in Pt VII generally, imposes — expressly or inferentially — any duty or liability on third parties to act in the best interests of or to advance the welfare of a child. Except where Pt VII expressly imposes obligations on third parties — for example, ss 65M, 65N and 65P — that Part is concerned with the relationship between parents and children and parents' duties in respect of their children. We have already set out s 60B(1), which states the object of Pt VII. Section 60B(2) declares:
>
> > "The principles underlying these objects are that, except when it is or would be contrary to a child's best interests:
> >
> > > (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
> > > (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
> > > (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
> > > (d) parents should agree about the future parenting of their children."

89. Gummow, Hayne and Heydon JJ then observed at [105]:

> "… in its terms, s 69ZH confines the operation of s 67ZC to the parental responsibilities of the parties to a marriage for a child of the marriage …"

90. In view of these observations in relation to s 67ZC by the various members of the High Court, it is difficult to understand how the section could be said to bind the Secretary by necessary implication.

91. We have thus concluded that there is no provision in Part VII of the Act which would provide power to make parental responsibility orders in favour of the Secretary to which he did not consent. This conclusion derives support from the following further observations by Gleeson CJ and McHugh J in *MIMIA* v *B* :

> "28. … Nor, when construed as a whole, does anything in Pt VII suggest that the Part was intended to give the Family Court a general jurisdiction over children with the power to make an order against individuals whenever the best interests of a child require such an order to be made."

92. We therefore turn to the remaining source of power relied on by both Benjamin J and the Commonwealth Solicitor-General, being the *parens patriae* jurisdiction of the Tasmanian Supreme Court which might be available to the Family Court through its accrued jurisdiction. We see two difficulties with the attempts to rely on this jurisdiction.

93. First, having regard to the detailed submissions made by Junior Counsel for the Secretary in relation to the history and context of the *parens patriae* jurisdiction of the Tasmanian Supreme Court, we are not persuaded that it would support an order which required the Secretary to assume parental responsibility for the children in question.

94. Secondly, we accept the submission made on behalf of the Secretary that there was, at the time of the making of the order appealed, no claim or proceeding in existence which involved the Secretary under State law and which might form part of the controversy between the children's parents and other

[85251]

relatives which was pending in the Family Court. We understood the Commonwealth Solicitor-General to submit that no such State law claim or even dispute was actually required and that “the matter” pending in the Family Court could be said to encompass all aspects of the children's welfare including State law aspects. We do not accept that submission. In our view, High Court authorities such as *Fencott* v *Muller* (1983) 152 CLR 570 ; *Stack* v *Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 and *Re Wakim* ; *Ex P McNally* (1999) 198 CLR 511 all indicate that some dispute or claim or proceeding must be pending at State law in order for the accrued jurisdiction to be available. There was no such pending dispute, claim or proceeding existing under Tasmanian law at the time the orders appealed were made.

Conclusion

95. We have thus determined that none of the sources of power relied upon by Benjamin J, or on behalf of the Commonwealth Attorney-General and the Independent Children's Lawyers, would be available to support the making of an order for parental responsibility in favour of the Secretary, absent his consent. Accordingly, the order joining the Secretary should not have been made. The appeal against that order and the consequential order should be allowed and the orders set aside.

96. By way of conclusion, we would also say that we appreciate the dilemma which Benjamin J found, or was concerned that he would find himself in, being what arrangements could be made for the care of the children if, and when, all private parties before him were to be found wanting as carers for the children. We acknowledge the co-operation that courts exercising jurisdiction under the Act regularly receive from various State and Territory child welfare departments and agencies, and we also understand the resource problems which such departments and agencies have. But notwithstanding these considerations, we consider it necessary to observe that this case illustrates the need for continuing attempts to harmonise in some way the administration of State and Federal laws concerned with the welfare of children.

Costs of the appeal

97. At the conclusion of the hearing of the appeal, there was discussion concerning the costs of the appeal.

98. The Commonwealth Solicitor-General advised us that as intervenor the Attorney-General would not seek costs and should not be required to pay them. We are prepared to accept that submission in the circumstances of this case.

99. The Solicitor-General for Tasmania was uncertain as to his instructions in relation to costs.

100. The Independent Children's Lawyers both sought certificates under the *Federal Proceedings (Costs) Act 1981* (Cth) in the event that the appeal was successful.

101. Given the outcome of the appeal, the important issues raised in it, and the general rule regarding costs contained in s 117(1) of the Act, we consider it appropriate that there be no order for costs in relation to the appeal.

102. We also consider it appropriate to grant each of the Independent Children's Lawyers certificates under s 6 of the *Federal Proceedings (Costs) Act 1981* (Cth). It remains open to the Secretary to seek such a certificate under s 9 of the *Federal Proceedings (Costs) Act 1981* (Cth) if it is considered appropriate (by letter to the Appeal Registrar).