

“PARENT”

The Practical Effects of Having an Extended Definition

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“PARENT”- A WORD WHICH EVERYBODY WOULD CONSIDER AXIOMATIC.

The role of the parent and the ability to become a parent without any qualification or training, has led the various jurisdictions of Australia to define “parent” in terms of “parental responsibility”.

The Northern Territory legislature under the *Care and Protection of Children Act 2007* (“the Act”) extends the definition in relation to an Aboriginal child to include persons who are regarded as a “parent” of the child under Aboriginal customary law or Aboriginal tradition.¹

This article explores the consequences in terms of proceedings involving children having regard to the definition of parent.

This article should not be viewed as an exhaustive tryst on the subject but is written to highlight situations which the Courts should consider when deliberating over what is in the best interest of the child pursuant to the Act.

The issue of who is a parent of the child has to be determined to

ensure that the proper process of natural justice and notice of proceedings have been given to each parent of the child.²

When the court is operating pursuant to the Family Matters jurisdiction³ each parent of the child is a party to the proceedings.

When the court is considering a Protection Order⁴ the parents are Respondents in the proceedings for the Application.

If a practitioner is therefore taking instructions from a person who has an interest in proceedings involving a child, then the first step the practitioner must take is to ascertain whether or not that person comes under the definition of “parent”. This would then result in that person having to attend the proceedings involving the child.⁵

In saying this, if the person is found not to come under the definition of “parent”, they may still apply to be a party to the proceedings.⁶ A person may apply to be a party to the proceedings if the court determines that the person has a direct and significant interest in the

wellbeing of the child.

Definition of Parent

The definition of “parent” pursuant to Section 17 of the Act states:

- “(1) A parent of a child is the child’s father, mother or any other person who has parental responsibility for the child.*
- (2) A parent of an Aboriginal child includes a person who is regarded as a parent of the child under Aboriginal customary law or Aboriginal tradition.*
- (3) However, any of the following must not be regarded as a parent of a child:*
 - a) The CEO;*
 - b) A person who has responsibility for the care of the child only on a temporary basis;*
 - c) A person, such as a teacher or childcare worker, who has responsibility in relation to the child*



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because of a professional relationship.

- (4) *To avoid doubt, a reference in this Act to the parents of a child includes a reference to the parent of a child who has only one parent."*

The Explanatory Statement which accompanied the *Care and Protection of Children Bill 2007* at Clause 17 "Parent of a child" states:

"This clause defines "parent" for the purposes of the Act as meaning a child's father, mother, or any other person, other than the CEO, who has parental responsibility for the child. It includes a person who, under Aboriginal customary law or Aboriginal tradition, is regarded as a parent of the child."

What the Explanatory Statement does not mention is that Section 17(1) of the Act incorporates into the term "parent", the term parental responsibility. This raises the question that, if the court determines that the mother or father should not have parental responsibility for the child; then under the definition, are they considered the child's "parent" for the purposes of the Act?

Whilst this seems controversial, the effect of a mother or father not having parental responsibility was considered in New South Wales in, *In the Matter of Cristian, Tasmin, Jennifer & Karen (No 2) (2006 CLN 3). Campsie Children's Court, Swain CM.*

The issue in this case⁷ was that the Children's Court "had no power to accept the undertakings of the mother because, at the time of the accepting of the undertakings, on 21st June 2005 the mother did not have the parental responsibility of the children and therefore did not fall into the definition of "parent" under the Act". The Court made

the following findings:

"44. That the term "parent" in Section 73 of the Children and Young Person (Care and Protection) Act 1998 is to be defined in accordance with the definition of "parent" in Section 3 of the Act.

45. Accordingly the Children's Court was not empowered to make orders on 21st June 2005, accepting the undertakings given by the mother, a parent who did not have parental responsibility of the four children Cristian, Tasmin, Jennifer and Karen.

46. The Children's Court therefore acted beyond power when accepting the undertakings of the mother and the Notice of Breach of Undertaking pursuant to Section 73(4) must fail."

Parental responsibility is defined in Section 22(1) of the Act as "the person who is entitled to exercise all the powers and rights, and has all the responsibilities, for the child that would ordinarily be vested in the parents of the child. Section 22(2) seeks to clarify Section 22(1) without limiting it by referring to parental responsibility as:

- a) *Daily care and control of the child; and*
- b) *Is entitled to exercise all the powers and rights, and has all the responsibilities, in relation to the long-term care and development of the child".*

Having regard to the above, the writer submits that if the Application is an Initial Application seeking to have parental responsibility transferred, then the ramifications to the parents have to be recognised and their ability to continue in the proceedings and enter into any undertakings carefully scrutinised.

It is interesting to note the qualification contained in Section

17(3) where undertaking the duties outlined in Section 22 in certain circumstances does not allow that person to be regarded as a parent.

Section 17(2) extends the definition of "parent" involving an Aboriginal child.

The Explanatory Statement which accompanied the *Care and Protection of Children Bill 2007* at Clause 13 "Definitions" states:

"This clause contains definitions of terms and expressions used throughout the Bill... They have been defined to ensure the provisions of the Bill are interpreted and applied in the manner intended. Sometimes a Chapter or Part of the Bill will have its own definition clause. In those cases, the definitions are meant only to apply to that Chapter or Part. The definitions in clause 13 apply to the Bill as a whole."

Aboriginal customary law- means the customary law of the Aboriginal people of Australia or of the Indigenous inhabitants of the Torres Strait Islands.

Issues involving Aboriginal children in s.12 are to be considered having regard to three key principles:

1. *Self-determination for Aboriginal people,*
2. *Appropriate placement (the section gives a priority list for the placement of Aboriginal children)*
3. *Community participation (community includes kinship groups or representatives*

The effect of the definition of "parent" in the Bill is that proceedings need to be brought by persons who are identified as "parents" of the child. The definitions in clause 13 apply to the Bill as a whole."

organisations.)

In determining whether any person comes within the definition of parent pursuant to Section 17(2), the caseworker will have to make due diligent assessment in determining whether there is any person who may need to be regarded as a parent.

The writer fully appreciates the sensitive nature of this work and the intrinsic difficulties associated with this type of task, but if the exercise is not done then the ability of the Court to proceed may be stymied by the inability to determine if the “parents” have been served with the notice of the proceedings.

The purpose of the definition of “parent” is to be inclusive and to deal with familial circumstances which are not faced in some other Australian jurisdictions.

The effect of the definition means that proceedings need to ensure that persons who are “parents” within the definition are identified and heard and that the rights and obligations of these persons are identified and addressed in the proceedings.

If a person is found not to be a parent for the purposes of the act the Court may still allow a person to participate in proceedings if that person is considered by the Court “to have a direct and significant interest in the wellbeing of the child”.

The ability to appear would require the Court to exercise its discretion.

In NSW the equivalent provision is considered in Section 98(3) of the *Children and Young Persons (Care and Protection) Act 1998* (“the NSW Act”)

There are two cases which consider granting a party leave pursuant to Section 98(3) of the NSW Act. These are *EL & WL v Director-General of the Department of Human Services & Ors* [2010] NSWDC 248 (3 August 2010) and *In the matter of ‘Pamela’* 2003 VOL. 3 No. 3, *Children’s Law News*.

In EL’s case, Truss DCJ refused to grant leave to the former carers of two brothers. The Court found that whilst their application had merit, in the circumstances of that particular case the discretion should not be exercised in favour of the applicants.

In the matter of “Pamela”, Schurr CM considered Section 98(3). Schurr CM stated at page two that the grant of leave under the *Children and Young Persons (Care and Protection) Act 1998* s 98(3) had not been judicially considered. He went on to say:-

“The application for leave to the foster carers Mr and Mrs A to be joined as parties was based on *Children and Young Persons (Care and Protection) Act 1998* s 98(3):

“any other person who, in the opinion of the *Children’s Court*, has a genuine concern for the safety, welfare and well-being of the child”....

Leave was granted to the foster carers to be joined as a party on the basis that

- (a) *The foster carers had demonstrated “a genuine concern for the safety, welfare and well-being of the child”; and*
- (b) *Their case could not be properly presented without them being parties, because the legal representative of Anglicare declined to give an undertaking on 19 March 2003 that Anglicare in its case would present all the evidence sought to be led by the foster carers.*

In EL’s case His Honour Truss DCJ identified that for leave to be granted the application involved two issues;

- a) *Whether the plaintiffs have a genuine concern for the safety, welfare and wellbeing of the children, and*
- b) *Whether the Court ought to exercise its discretion to grant leave.*

The NSW authorities therefore establish a two tier test. The first test is whether the person wishing to participate in the proceedings has a genuine concern; which is a subjective test. Secondly; whether the Court ought to exercise its discretion having regard to all the circumstances; which is an objective test.

The writer submits that the words used in the Northern Territory legislation encompasses both the elements of the NSW provision which makes the entire issue for exercising the Court’s discretion an objective exercise.

In conclusion it is suggested that a check list be prepared and utilised having regard to the above to determine the actual relationship between a particular person and a child and whether that person is a parent, or a person who has a direct and significant interest in the wellbeing of the child. ●

Endnotes

1. See s.17(2) *Care and Protection of Children Act 2007*
2. See s.94(1) and s.125 *Care and Protection of Children Act 2007*
3. See s.88 *Care and Protection of Children Act 2007*
4. See s.121-s.137 *Care and Protection of Children Act 2007*
5. See s.100 *Care and Protection of Children Act 2007*
6. See s.94(1)(e) and s.125(2)(d) *Care and Protection of Children Act 2007*
7. See paragraph 16 of the judgement