

No Special
Consideration

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

X
NO. M.363/81

722

BETWEEN KATHLEEN MAY GAGE
Appellant

A N D DEPARTMENT OF SOCIAL WELFARE
Respondent

Hearing: 8 October 1981

Counsel: M. Withers for Appellant
 D.J.L. Saunders for Respondent
 R.J. Murfitt for Children.

Judgment: 11 4 OCT 1981

JUDGMENT OF COOK J.

Following the hearing of complaints that, in respect of each of her four children, Kathleen May Gage had failed or was failing to exercise the duty and care of parenthood, orders were made on 7th April 1981 placing the four children under the guardianship of the Director-General of Social Welfare.

She now appeals upon two grounds:

(1) That the facts put before the Court went outside the matters set out in the complaint and covered approximately the last five years during which she had custody of the children; that they were not restricted to the reasons given in the complaints or to the events leading to, or associated with them; and, should that not succeed -

(2) That the guardianship orders were inappropriate in the circumstances and that supervision orders under Section 46 of the Children and Young Person's Act would have been more appropriate.

(1) It was first submitted that, what counsel referred to as "the rules relating to the laying and prosecuting of offences under the Children and Young Person's Act", were governed by the Summary Proceedings Act; that Section 99(1) of the former Act states that the provisions set out in the First Schedule are to apply with such modifications as are indicated in that Schedule or are necessary to Children and Young Person's Courts and to proceedings in such Courts, as the case may require. In particular, it was submitted that Section 17 of the Summary Proceedings Act requires that every information shall contain such particulars and shall fairly inform the defendant of the substance of the offence with which he or she is charged.

For reasons which are about to be mentioned, this submission must fail, however. Certainly, Section 99(1) provides in the manner mentioned and the First Schedule refers to Part II of the Summary Proceedings Act, with the exception of certain sections and other matters which have no present relevance. In respect of complaints, Section 74 of the same Act certainly provides:-

"Subject to the provisions of any other Act, the provisions of this Part of this Act, as far as they are applicable and with the necessary modifications, shall apply to proceedings brought by way of complaint as if they were proceedings brought on an information, and as if references in this Part to the informant were references to the complainant, as if references to a charge or to an offence were references to the ground of the complaint, and as if references to a conviction were references to an order."

and, if these submissions were to succeed, Section 17 would have to be read as follows:-

"Every complaint shall contain such particulars as will fairly inform the person against whom the complaint is made of the substance of the complaint against him."

but remembering that the Section is to apply:-

"with such modifications as
..... are necessary as the
case may require."

In the present case we are concerned with a
complaint under Section 27 of the Children and Young Person's
Act. This Section commences:-

"(1) any Social Worker who
reasonably believes that any child
or young person is in need of care,
protection, or control may make a
complaint under this Section requiring
the child or young person to be brought
before a Children and Young Person's
Court to have the matter heard and
determined in accordance with the
provisions of this Act."

The Section then lists a number of possible reasons why a
child or young person may be in need of care, protection or
control and these include:-

"2.(d) His parent or guardian or
the person for the time-being
having care of him, -

(i) Has failed or is failing to
exercise the duty of care of
parenthood;"

the allegation made in respect of Mrs Gage's children.

To understand what has happened in the present
case it is necessary first to consider the prescribed forms
of complaint and summons. Both are set out in the 1975
Regulations and the form of complaint is as follows:-

Form 3

COMPLAINT THAT CHILD OR YOUNG PERSON IS IN NEED OF CARE,
PROTECTION, OR CONTROL

Section 27, Children and Young Persons Act 1974

I, [Full name] of [Address], a member of the Police (or a Social Worker) say on oath that I reasonably believe that [Full name of the child or young person to whom the complaint relates] is a child (or young person) who is in need of care, protection, or control in that [Here enter specific allegations being one or more of paragraphs (a) to (f) section 27 (2) of the Children and Young Persons Act 1974].

*And that the person to whom this complaint should be addressed is [Full name], a parent (or a guardian or a person having the care) of the child (or young person).

*And that I do not know the whereabouts of any parent or guardian or person having the care of the child (or young person).

*And that the person caring for the child cannot reasonably be regarded as having continuing responsibility for the upbringing, care, and control of the child (or young person) because: [Give reasons].

Complainant.

Sworn at this day of 19..... before me:

Magistrate (or Justice of the Peace or Registrar (not being a constable)).

*Delete if inapplicable.

It will be seen that it comprises two parts; the first, sets out the complaint and the second contains three possibilities, each marked with an asterisk. The purpose of these becomes apparent when one turns to Section 27(5):-

"Where there is no parent, guardian, or other person whose whereabouts are known or where the person caring for the child or young person cannot reasonably be regarded as having continuing responsibility for the upbringing, care and control of the child or young person, a complaint can be made and heard and determined in the name of the child or young person only and, in that case, the member of the Police or Social Worker making the complaint shall, unless excused by the Court, be required to ensure that the child or young person is present at the hearing."

As I see it, the purpose of the second portion of the complainant is to indicate whether the parent in question can be summoned or what the procedure should be. The situation is envisaged where no parent can be found and where the children are, informally, in the care of someone for a limited time. It

is in respect of the latter situation and, when it exists, that there is the final requirement to "give reasons".

It should be noted that the form of summons, also prescribed by the Regulations, is designed to repeat the contents of the first part of the complaint only.

The first question is whether the prescribed form of complaint which provides for one or more of the allegations from Section 27 without more particulars, is sufficient; is it enough for a parent to be told that a complaint has been made that he has failed or is failing to exercise the duty and care of parenthood without further particulars. A complaint under Section 27 is a very different matter from an information laid in respect of an offence. It is not a question of charging that a person did or failed to do a certain thing at a certain time or over a certain period; rather, it initiates an enquiry into a state of affairs which may have existed over a considerable time. It may be necessary to consider a course of conduct and the relationship which has existed between a parent and child over many years. While the hearing of any such complaint may develop into an adversary situation between the parent and the Department, it is to be remembered that under Section 27 it is the child or young person who, in theory at least, is brought before the Court so that a decision may be made in his or her best interests. It seems to me that what is intended is that an allegation in accordance with Section 27(2), should be made indicating, in a general way, what the nature of the complaint is and that this should lead to an enquiry as far-reaching as may be necessary in the particular circumstances.

If anything further is needed to demonstrate the difference between a complaint under Section 27 and an information charging an offence, it may be found in Subsection (7) which provides that any parent or guardian or other person having the care of the child may be examined in respect of the upbringing and control of that child.

Turning to the complaints made in this case,

each contains a specific allegation in accordance with the instructions on the printed form. As to the further information, each states:-

"That the person to whom this complaint should be addressed is Kathleen May Gage, a parent of the child."

On two of the complaints, the next statement is left untouched. On two it is crossed out. Why this should be, is not clear but it does not appear to be material. Again, on two, the third statement is left untouched and on two it is struck out; in each case reasons are given. In two, where the statement remains, they appear to indicate why "the person in actual care of the child cannot reasonably be regarded as having continuing responsibility". In the other two they would appear to serve the same purpose and would do so if the preceding printed statement had not been struck out. Possibly they were intended to be reasons why the parent had failed or was failing to exercise the duty and care of parenthood, i.e. in the manner that Mr Withers appears to have construed them. Certainly, the way the children were left with others was given considerable prominence, and rightly so, at the hearing and by the District Court Judge in his judgment. That information as it appeared on the form of complaint, however, is not carried onto the form of summons which was served on Mrs Gage and I am unable to see that it can be regarded as limiting the extent of the enquiry in any way.

On this aspect of the matter, I would only add that it appears that Section 204 of the Summary Proceedings Act would have application and, if there were any defects in the complaints, I do not consider that they brought about any miscarriage of justice.

(2) Turning to the other aspect of the appeal, I have heard submissions by counsel for the appellant and the Department and, in addition, have had the assistance of counsel for the children making submissions from their point of view. In the light of these, I have gone through the evidence and read the oral judgment of the District Court

Judge and, in particular, his remarks on final determination of the complaints. I can only say that there appears to have been a thorough enquiry into the questions raised by the complaints and most careful consideration given to the problem by the Judge as to the orders he should make. I notice, in particular, the care with which he approached the problems of Nicola.

I have now seen and talked with Nicola, which has provided confirmation of the difficulties in her case and made apparent her strong urge to be with her mother. In this respect I note what Mr Saunders has said, that the Department has in mind the question of Nicola returning home and that it has made a start towards that becoming a reality. I can only hope that this may prove to be in her interests and possible of attainment, but it is something which must be handled by the Department - it would not be right for the Court to interfere at this stage, particularly when there has been no opportunity to see and hear the mother in the witness box or otherwise to gain a proper assessment of the present situation in all its facets.

I see nothing which would warrant the conclusion that the District Court Judge was wrong in the orders which he made. The appeal is dismissed.

Solicitors:

Messrs Rhodes & Co., Christchurch, for Appellant
Messrs Raymond Donnelly & Co., Christchurch, for Respondent
Messrs D.H. Stringer & Murfitt, Christchurch, for Children.