[2016] WACC 6

JURISDICTION	**:**	CHILDREN'S COURT OF WESTERN AUSTRALIA IN PROTECTION & CARE
LOCATION	**:**	PERTH
CITATION	**:**	THE CHIEF EXECUTIVE OFFICER OF THE DEPARTMENT FOR CHILD PROTECTION AND FAMILY SUPPORT -v- JMG [2016] WACC 6
CORAM	**:**	JUDGE REYNOLDS
HEARD	**:**	6 MAY 2016
DELIVERED	**:**	6 MAY 2016
FILE NO/S	**:**	CC/GER 14 of 15 CC/GER 15 of 15 CC/GER 24 of 15 CC/GER 25 of 15 CC/GER 26 of 15
BETWEEN	**:**	THE CHIEF EXECUTIVE OFFICER OF THE DEPARTMENT FOR CHILD PROTECTION AND FAMILY SUPPORT Applicant AND JMG Respondent 1 JPB Respondent 2 (A CHILD) Child Representative

Catchwords:

Child protection - Application to President to review refusals by Magistrate - s.28(1) of the Children's Court of Western Australia Act 1988 - Whether application is competent

Legislation:

Acts amendment (Children's Court) Act 1988
Child Welfare Act 1947
Children's Court of Western Australia Act (No 2) 1988
Children's Court of Western Australia Act 1988
Children and Community Services Act 2004
Criminal Appeals Act 2004
Sentencing Act 1995
State Children Act 1907
State Children Act Amendment Act 1919
State Children Act Amendment Act 1927
Young Offenders Act 1994

Result:

Application dismissed - Refusal to make an order is not an order - s.28(1) only applies to final orders and not interlocutory orders

Representation:

Counsel:

Applicant	:	Ms T McAllen
Respondent 1	:	Ms R Cohen
Respondent 2	:	Unrepresented
Child Representative	:	Ms J Johnston

Solicitors:

Applicant	:	Department for Child Protection and Family Support
Respondent 1	:	Legal Aid (WA)
Respondent 2	:	Unrepresented
Child Representative	:	Calverley Johnston Lawyers

Case(s) referred to in judgment(s):

PR v Chief Executive Officer of the Department for Child Protection [2008] WASC 228

JUDGE REYNOLDS:

1 The applicant's application came before me on an urgent basis on 6 May 2016. I dismissed the application, outlined my reasons why, and said that I would publish reasons later. These are those reasons.

The Application and the threshold issue of the President's jurisdiction

2 This is an application by the Chief Executive Officer of the Department for Child Protection and Family Support (the CEO) made pursuant to section 28 of the *Children's Court Act 1988* (the CC Act) for me, as President of the Court to review the decisions of a Magistrate of this Court on 4 and 22 April 2016 refusing (a) to vacate the final hearing of protection order applications listed 19 to 25 May 2016 and (b) to vary the contact order made on 9 December 2015 in the course of those proceedings.

3 When the application was received by the Court, I directed that it be listed for hearing before me on an expedited basis and that the hearing be limited to the jurisdictional issue of whether the President of the Court has jurisdiction pursuant to section 28 of the CC Act to consider and determine applications for the review of a Magistrate's decision made in proceedings seeking the grant of a protection order pursuant to the *Children and Community Services Act 2004* (the CCS Act).

Background

4 The CEO is the applicant in protection proceedings before the Court seeking protection orders in relation to five children of the respondents. The five children range from one to eight years of age. On 9 December 2015 a Magistrate of the Court made an order in the course of the protection proceedings that the CEO, by an officer of the Department for Child Protection and Family Support (DCPFS), facilitate contact as particularised in the order, between the children and the respondent parents. The final hearing for the applications for protection orders in relation to the children is listed to be heard for five days commencing on 19 May 2016.

5 I do not propose to set out in these reasons a detailed factual history of the issues the subject of those protection proceedings. That is because the only issue before me for the moment is the threshold issue of whether the jurisdiction of the President is enlivened to thereby empower the President to move on and determine the merits of the application. Suffice

to mention that there are factual issues in relation to contact and also that all of the parties consented to the final hearing being adjourned.

6 In relation to an adjournment of the final hearing of child protection proceedings listed before the Court, the consent of all of the parties to the proceedings being adjourned is not binding on the Court. That said, however, clearly the consent of all of the parties is a relevant factor to be taken into account by the Court in deciding whether or not to adjourn the hearing. Ultimately, whether or not the final hearing of any proceedings is adjourned is a matter for the Court.

7 That said, it seems to me that on the material before the Magistrate in these particular child protection proceedings, that she refused to embark on an interlocutory hearing concerning contact because of the amount of time required and the complexity of it, and also because of the close proximity to the final hearing. It also seems to me that she refused to vacate the final hearing because she considered that a final resolution of the protection proceedings was in the best interests of the children, or put another way, that she considered that any delay in the final resolution of the protection proceedings was not in the best interests of the children. As a general proposition, there is much to be said in favour of that approach by the Magistrate.

Section 28 of the CC Act

8 Section 28 of the CC Act provides as follows:

> 28. Court may re-hear proceedings
>
> (1) Subject to this section, the Court may order that any original proceedings in which an order (not being an order made following conviction on indictment) was made against a child under the *Young Offenders Act 1994* or the *Children and Community Services Act 2004* are to be reheard.
>
> (2) An order may be made under subsection (1) by the Court when constituted by the President of the Court's own motion or upon cause being shown on the application of —
>
> (a) the CEO (young offenders) or the CEO as defined in section 3 of the *Children and Community Services Act 2004*; or
>
> (b) a parent or guardian of the child against whom an order may be made in those proceedings; or
>
> (c) a child to whom the proceedings relate; or

> (d) the prosecutor in those proceedings.
>
> (3) The Court rehearing any proceedings under this section —
>
> (a) is not required to be constituted in the same manner as the Court before which the original proceedings were heard; and
>
> (b) shall not be constituted by JPs sitting alone; and
>
> (c) has power to set aside or vary any finding or order made in the original proceedings; and
>
> (d) has power to make any finding or order which could have been made in the original proceedings.
>
> (4) Except where the Court considers that it is just to do so, no new evidence shall be admitted at the rehearing of any proceedings under this section.
>
> (5)Where any proceedings are re-heard under this section the proceedings as so re-heard shall not be taken to have been original proceedings for the purposes of any further application under this section, but nothing in this section derogates from any right that may be available to any person by way of appeal.
>
> (my emphasis)

Analysis of the Statutory Provisions

9 Pursuant to s28(2) of the CC Act, an order to re-hear proceedings pursuant to s28(1) can only be made by the Court when constituted by the President. An order for a re-hearing can be made by the Court, constituted by the President of its own motion or upon cause being shown on the application of any of the persons specified in s28(2)(a) to (d) inclusive. Pursuant to s28(2)(a), the CEO is one of the persons specified as being able to apply for a re-hearing.

10 In the context of child protection proceedings, for the Court to order a re-hearing pursuant to s28(1) of the CC Act, it must be satisfied:

1. that an order was made in the original proceedings; and

2. that the order was made against a child under the CCS Act; and

3. that there is good cause for the original proceedings to be re-heard.

11 I will deal with each of those three requirements in turn.

12 The first requirement is that an order was made in original proceedings. The Magistrate refused to hear and determine each and both of the applications to vacate the final hearing and to vary the contact order. As mentioned, both applications were made very proximate to the final hearing.

13 The question then, is whether each refusal to make an order is an order for the purpose of section 28(1) of the CC Act?

14 The authority of ***PR v Chief Executive Officer of the Department for Child Protection*** [2008] WASC 228 Jenkins J, concerned amongst other things whether a refusal to make an order joining a person as a party in child protection proceedings is a 'finding, order, or other decision' for the purposes of section 42(1) of the CC Act. That section concerns appeals from a Magistrate of this Court to the Supreme Court in relation to proceedings in this Court, under Part 4 or Part 5 of the CCS Act, which include child protection proceedings. In PR the appellant appealed from the refusal of a Magistrate of this Court to grant an order that she be joined as a party to protection proceedings relating to her grandson.

15 Section 42(1) of the CC Act provides as follows:

> 42(1) Subject to this Act, where the Court, when constituted so as not to consist of or include a judge, makes any finding, order, or other decision on the hearing of an application under Part 4 or 5 of the *Children and Community Services Act 2004* the finding, order or decision may be the subject of an appeal made in accordance with Part 2 of the *Criminal Appeals Act 2004* , as if it were a decision by a court of summary jurisdiction, by —
>
> > (a) the CEO as defined in section 3 of the *Children and Community Services Act 2004* ; or
> >
> > (b) the parent or guardian of the child in relation to whom the application was made; or
> >
> > (c) the child in relation to whom the application was made; or
> >
> > (d) the person by whom the application was made.

16 In PR, Jenkins J set out the following in paragraphs 34 to 41 inclusive of her judgement:

> In order to give the CC Act s 42(1) meaning, it must include the right to appeal findings, orders or decisions made in respect to applications for

> interlocutory orders in protection proceedings, such as orders for the joinder of parties.
>
> However, the magistrate did not make the order applied for by the appellant, rather he refused to make such an order. Is a refusal of an application for an order joining a person as a party a 'finding order or other decision' for the purposes of the CC Act s 42(1)?
>
> It does not appear to me that a refusal to make an order is a finding, as that word would usually be defined. As to the term 'order', in ***Director of Public Prosecutions (NSW) v Roslyndale Shipping Pty Ltd*** (2003) 59 NSWLR 210, Spigelman CJ of the New South Wales Supreme Court determined that:
>
> > In its natural and ordinary meaning the word 'order' would not encompass a refusal to make an order.
>
> He continued on to explain why that was so.
>
> I perceive that the legislature, in using the phrase, 'any finding, order or other decision' on the hearing of an application under pt 4 or pt 5 of the Act, has used a particularly broad phrase, which appears designed to avoid the controversies that were referred to in ***Roslyndale Shipping*** as to the meaning of the word 'order'.
>
> It seems to me that I am justified in relying upon the decision of the ***State of Western Australia v JJS (a child)*** (2004) 145 A Crim R 403, where the Full Court of this State considered whether a dismissal by the President of the Children's Court of an application by the prosecution for compensation orders in respect to offences of criminal damage was a 'decision' as to the jurisdiction of the Children's Court.
>
> At that time the CC Act s 43(1) provided that in criminal proceedings an appeal lay from a 'decision' of the Children's Court. A 'decision' was defined to be a decision relating to certain specified matters. Nevertheless, the question before the Full Court was whether a refusal of the President of the Children's Court to make a compensation order was a decision. By a majority, the Full Court determined that it was a decision.
>
> I conclude that the magistrate's refusal to make an order joining the appellant as a party amounts to 'any other decision' made on the application for an order under pt 5 of the Act. I therefore am of the view that the appeal is competent and I am prepared to determine it on its merits.

17 In my view the meaning given to 'order' in section 28(1) should be the same as the meaning given to 'order' in section 42(1). Accordingly, in this case, each of the Magistrate's refusals to make an order vacating the hearing and also to make an order varying the contact order, is not an order for the purpose of section 28(1).

18 That finding is of itself fatal to this application to review. That is because the operation of section 28(1) is limited to when an order is made, and no order was made in this case.

19 Unlike section 42(1), which expressly refers to 'any finding, order or other decision', section 28(1) only expressly refers to 'an order' and no reference to 'any finding' or 'any other decision' can be implied.

20 Further to all of that, and without having to decide the point to determine this application, in my view, section 28(1) can only apply if a final order is made in any original proceedings and not if an interlocutory order is made in any original proceedings. I am of that view because section 28(1) provides for the re-hearing of any original proceedings and not for the re-hearing of any application made during the course of any original proceedings. That view is also consistent with, and further supported but without the need for any further support, by the provisions in sections 28(3)(c) and (d), 28(4) and 28(5). It is also consistent with the history of the relevant legislation preceding section 28(1). I will refer to the history later.

21 I now turn to comment on the second of the three requirements previously mentioned. In the context of child protection proceedings, the order must be an order made 'against a child' under the CCS Act. Because I have already found that the refusals by the Magistrate are not orders, it is not necessary to decide whether this requirement is satisfied in order to determine this application.

22 That said, I nevertheless wish to make the following comments. Clearly, even if each refusal amounted to an order, it could not be said to be 'against a child' under the CCS Act'.

23 I do not think that any final order open to the Court to make in child protection proceedings seeking the grant of a protection order under the CCS Act could be properly described as an order 'against a child'. Counsel for the applicant has not identified any final order that the Court could make in such child protection proceedings which would satisfy that description. In fairness, that is no surprise. The objects of the CCS Act as provided in section 6 of the CCS Act include the promotion of the wellbeing of children, other individuals, families and communities, and also to care and protect children. Making a final order 'against a child' in such child protection proceedings is foreign to and inconsistent with the objects of the CCS Act.

24 Reference to the relevant history of child protection legislation in Western Australia may provide an explanation for why the words 'against a child' are currently provided in section 28(1) of the CC Act insofar as they relate to the CCS Act.

25 The *State Children Act 1907* (No 31 of 1907), was assented to on 20 December 1907. Its purpose as provided in the preamble was to 'make better provision for the Protection, Control, Maintenance, and Reformation of Neglected and Destitute Children, and for other purposes'. Section 18 provided for the creation of special courts to be called Children's Courts.

26 It is relevant to note the provision of the word 'Control' in the expressed purpose of the *State Children Act 1907*. It is also relevant to note from the provisions of the *State Children Act 1907* as a whole, the approach taken to dealing with children at that time.

27 I think that I only need to briefly refer to sections 23 to 30 inclusive to make the relevant point. Pursuant to section 24, proceedings were commenced by way of complaint being made charging a child as being a destitute child or a neglected child with powers given to the Court to commit a child to the care of the relevant Department, or send the child to an institution specified in the order and to be detained there or otherwise dealt with under the Act until such time as the child attained 18 years of age.

28 Pursuant to section 26 if any child was brought before the Court, charged by his parent or nearest relative with being an uncontrollable or incorrigible child, then the Court being satisfied that the charge was proved could order the child to be sent to an institution to be detained. If the child was a male under the age of 16 years, then the Court had power to order that he be whipped. The Court also had power to release the child on probation.

29 Pursuant to section 27, it was open to an officer of the relevant Department or a police officer to charge a child with being an uncontrollable or incorrigible child. If the Court was satisfied that such a charge was proved it had the same powers to deal with the child as the powers previously mentioned in the case of a charge being brought by the child's parent or near relative.

30 Section 28 gave the Court powers to deal with a child if the child had been found guilty of an offence punishable by imprisonment. The range

of orders open to the Court could be properly described as being orders 'against a child'.

31 Pursuant to section 30, if a child was over 16 years of age at the time of being committed, then the Court had power to order that the child be detained in an institution for a period of two years even if that period extended beyond the time that the child reached 18 years of age.

32 It is clear from that small sample of the provisions in the *State Children Act 1907*, that pursuant to that Act, the Children's Court could make final orders that could be clearly and properly described as being an order 'against a child'.

33 The power for the Children's Court to re-hear a case was introduced by section 11 of the *State Children Act Amendment Act 1919* (No 21 of 1919). Section 11 provided as follows:

> 11. The court, on application made by the Department or by the parent or guardian of any child against whom an order may be made under this Act, may rehear the case and make such recommendation to the Minister thereon as may in its opinion meet the circumstances.
>
> (my emphasis)

34 It can be relevantly noted that section 11 referred to 'any child against whom an order may be made under this Act' and also to 'rehear the case'.

35 In my view, the reference to 'rehear the case' must have been intended to mean rehear the original proceedings because of the final order made.

36 The next relevant legislative enactment is the *State Children Act Amendment Act, 1927*, (No 22 of 1927). This Amendment Act amended what had by then come to be known as the *State Children Act, 1907-1926*. Pursuant to section 2 of the *State Children Act Amendment Act, 1927*, the principal Act was amended by substituting the words 'Child Welfare' for the words 'State Children'.

37 The next relevant legislative enactment is the *Child Welfare Act 1947*, (No 66 of 1947), which was assented to on 10 January 1948. Its purpose as provided in the preamble was to 'consolidate and amend the law relating to the making of better provision for the protection, control, maintenance and reformation of neglected and destitute children, and for

other purposes connected therewith'. Again, 'control' can be noted as an expressed purpose.

38 Again, the *Child Welfare Act 1947* made provision for the creation of Children's Courts. It also included provisions which fell within one or other of the child protection and criminal jurisdictions of the Children's Court. As a general proposition, on the point under consideration, the approach to dealing with children under the *Child Welfare Act 1947* was essentially the same as that under the *State Children Act 1907*. Accordingly, it could again be said that some of the final orders that the Children's Court could have made under the *Child Welfare Act 1947* could clearly and properly be described as orders 'against a child'.

39 It is also relevant to note that section 27 of the *Child Welfare Act 1947* provided for re-hearings and was drafted in identical terms to section 11 of the *State Children Act Amendment Act, 1919*. It referred to an order made 'against' a child and also to the Court being able to 'rehear the case'. Therefore the comments I made earlier in relation to section 11 apply equally to section 27 in the then new Act.

40 The next relevant legislative changes came with the creation of this Court by the *Children's Court of Western Australia Act (No 2) 1988*, No 69 of 1988 and assented to on 15 December 1988.

41 Sections 24 and 28 of that Act, provided as follows:

> 24 (1) Notwithstanding the provisions of any written law, the Court in awarding punishment to or imposing a penalty upon any child may have regard to the antecedents, character, age, health or mental condition of the child, and may take into account the nature of the offence or any special circumstances of the case.
>
> (2) Subject to subsection (3) the Court may refrain from imposing any punishment, penalty or fine, or without proceeding to conviction dismiss the complaint, but may in either case make an order as to the payment of any costs or charges incurred at or in relation to the proceedings.
>
> (3) The Court may not exercise the power to refrain pursuant to subsection (1) with respect to more than 3 offences. For the purpose of this subsection, multiple offences arising from the one incident shall be treated as one offence.
>
> 28(1) Subject to this section, the Court may order that any original proceedings in which a complaint was dismissed under section 24 or in which an order (not being an order made following conviction on indictment) was made against a child under this Act or the *Child Welfare Act 1947* shall be re-heard.

> (2) An order may be made under subsection (1) by the Court when constituted by the President of the Court's own motion or upon cause being shown on the application of-
>
> > (a) the Director-General of the Department for Community Services;
> >
> > (b) a parent or guardian of the child against whom an order may be made in those proceedings;
> >
> > (c) a child whom the proceedings relate; or
> >
> > (d) the complainant in those proceedings.
>
> (3) The Court re-hearing any proceedings under this section-
>
> > (a) is not required to be constituted in the same manner as the Court before which the original proceedings were heard;
> >
> > (b) shall not be constituted by members sitting alone;
> >
> > (c) has power to set aside or vary any finding or order made in the original proceedings; and
> >
> > (d) has power to make any finding or order which could have been made in the original proceedings.
>
> (4) Except where the Court considers that it is just to do so, no new evidence shall be admitted at the re-hearing of any proceedings under this section.
>
> (5) Where any proceedings are re-heard under this section the proceedings are so re-heard shall not be taken to have been original proceedings for the purposes of any further application under this section, but nothing in this section derogates from any right that may be available to any person by way of appeal.

42 It is particularly relevant to note that the initial section 28(1) as set out above, (1) applied to orders made in each of the criminal and child protection jurisdictions of the Children's Court and (2) expressly limited the operation of the section to orders made 'against a child' 'under this Act or the *Child Welfare Act 1947*'. At that time the administration of the criminal and child protection jurisdictions of the Children's Court came under the one government agency, namely the Department for Community Services. The legislative and administrative separation of the criminal and child protection jurisdictions was to come later.

43 Making an order 'against a child' in the criminal jurisdiction was then, as it is now, easily recognised and understood. Further, some orders

made under the *Child Welfare Act 1947* when section 28(1) was first introduced, could have been clearly and properly described as being made 'against a child'.

44 The *Children's Court of Western Australia Act (No 2) 1988*, was accompanied by the *Acts Amendment (Children's Court) Act 1988*, No 49 of 1988, which was assented to on 22 December 1988. By section 8 of the *Acts Amendment (Children's Court) Act 1988*, section 27 of the *Child Welfare Act 1947* was repealed. Accordingly, section 28 of the *Children's Court of Western Australia Act (No 2) 1988* replaced section 27 of the *Child Welfare Act 1947*. It can be noted that section 28 provided for the rehearing of the original proceedings, whereas section 27 provided for the rehearing of the case. In my view, the new wording did not change the position on what was reheard. Any rehearing was still a rehearing of the case to decide the final outcome and not a rehearing of any interlocutory proceedings.

45 Other than the change from 'members' to 'JPs', the provisions of sections 28(3), (4) and (5) are the same now as they were when section 28 was first enacted.

46 The next relevant legislative change came with the *Young Offenders Act 1994*, No 1 of 1994, assented to on 11 January 1995. It made provision for young people who committed offences against the law and it also amended certain other Acts. By section 227, it amended section 28 of the *Children's Court of Western Australia Act (No 2) 1988*, by repealing subsection (1) and substituting it with the following subsection:

> (1) Subject to this section, the Court may order that any original proceedings in which an order (not being an order made following conviction on indictment) was made against a child under the *Young Offenders Act 1994* or the *Child Welfare Act 1947* are to be reheard.

47 This substituted section 28(1) removed the express reference to dismissals and substituted the prior reference to 'this Act', which was a reference to the *Children's Court of Western Australia Act (No 2), 1998*, with a reference to the *Young Offenders Act 1994* which then took over as the relevant statute on how children could be dealt with and what sentences could be imposed by the Court when exercising its criminal jurisdiction.

48 Given the legislative history to this point in time, 1995, it would have been open for the Court to have made a final order in one or other of the criminal jurisdiction of the Court, under the *Young Offenders Act 1994*, or

the child protection jurisdiction of the Court, under the *Child Welfare Act 1947*, which could have been clearly and properly described as being 'against a child'.

49 The next relevant legislative change came with the repeal of the *Child Welfare Act 1947*, and the enactment of the *Children and Community Services Act 2004*, No 34 of 2004, assented to on 20 October 2004, substantive provisions of which came into force on 1 March 2006. I have previously mentioned how the *Children and Community Services Act 2004* significantly changed the philosophy and approach to child protection in this state. Commencing proceedings by application replaced commencing proceedings by complaint and charge. The Court making orders legislatively referred to as protection orders replaced the Court making orders committing children to the care of the relevant Department or placing them under the control of the relevant Department.

50 While it may have been open to describe some orders made by the Court for the purpose of child protection under the *Child Welfare Act 1947* as being 'against a child', the range of orders that would fit that description has at least narrowed since the introduction of the *Children and Community Services Act 2004*. A protection order made in child protection proceedings under the CCS Act does not fit the description of an order made against a child.

51 The words 'against a child' in s28(1) continue to be relevant in relation to orders made under the *Young Offenders Act 1994*. That said, however, in practice applications pursuant to section 28 concerning the criminal jurisdiction of the Court have been extremely rare. Indeed, it has been a very long time since one was made. The Office of the Director of Public Prosecutions and defendants seek reviews by the President of sentences imposed by Magistrates pursuant to section 40 of the CC Act. Further in relation to final orders made in the criminal jurisdiction which were not lawfully open under the relevant legislation, such orders can be speedily corrected pursuant to section 37 of the *Sentencing Act 1995* and so without any need to resort to section 28(1).

52 I now move on to comment on the third of the three requirements previously mentioned, namely that there is good cause for the original proceedings to be reheard. I repeat what I stated previously, and the reasons given, that section 28(1) only applies to final orders. While I have not relied on the relevant legislative history to reach that conclusion, it can be noted that the relevant legislative history is consistent with that

conclusion. Clearly the applicant in this case has not shown any such good cause and indeed could not do so given that the final hearing has not even been held.

53 Finally, I wish to say that this decision does not mean that the applicant would be left without any avenue of challenging a decision of the kind made in this case by a Magistrate or an order or decision by a Magistrate in child protection proceedings. That avenue currently exists by way of appeal to the Supreme Court pursuant to section 42(1) of the CC Act.

Conclusion

54 For all of these reasons and particularly given the combination of the following:

55 1. Each refusal to make an order by the Magistrate is not an 'order' as provided in s28(1) of the CC Act;

56 2. For an 'order' to fall within the operation of s28(1) it must be a final order and not an interlocutory order;

57 3. The Magistrate did not make any order 'against a child' as provided in s28(1);

58 4. Section 28(1) has no application to final orders made in child protection proceedings under the CC Act in which a protection order is sought because a child protection order is not an order made 'against a child'; and

59 5. The protection proceedings in this particular case have not even been heard as yet and so they could not be ordered to be reheard,

the application to review is dismissed.