IN THE CHILDREN'S COURT OF VICTORIA

FAMILY DIVISION

Department of Human Services — Applicant

and

B siblings; H siblings — Respondents

JUDGE:	Grant
WHERE HELD:	Melbourne
DATE OF HEARING:	5 June 2009
DATE OF JUDGMENT:	11 June 2009
CASE MAY BE CITED AS:	DOHS v B; DOHS v H
MEDIUM NEUTRAL CITATION:	[2009] VChC 4

RULING

Catchwords:
Child protection – protection application - custody to Secretary order, whether the Children's Court has power to include a condition on the order that siblings be placed together.

APPEARANCES:	Counsel	Solicitors
For the applicant	Ms K L Walker	Court Advocacy Unit, Department of Human Services
For the B and H siblings	Ms A Mendes Da Costa	Jennifer Davies; Dowling & McGregor
For the mother of the B siblings	Ms Connors	

HIS HONOUR:

Introduction

1. Protection applications were issued in August 2008, in relation to the five B children. Three of the applications have resolved. The applications for NB (aged 10) and AB (aged 7) have not. They were listed before me on 5 June 2009. Counsel for both children advised the Court that there was no opposition to proof of the protection applications. The father of the children is deceased. Counsel for the mother has appeared today and indicated that her client will agree to proof of the applications on particular grounds and does not oppose the making of a custody to Secretary order (CTSO). The Secretary of the Department of Human Services (the Secretary) is seeking proof of the applications and the making of a CTSO for each child. Counsel for the children advised the Court that the children would consent to such an order providing it contained a condition requiring the Secretary to place the children in the same placement.

2. The H children (JH, AH and BH) are each currently on a CTSO. JH is 16 years old, AH is 14 and BH is 13. They are Aboriginal children currently placed at a residential home run by the Victorian Aboriginal Child Care Agency.[1] The applications by the Secretary are for an extension of those orders. An application by the Secretary for dispensation of service of the applications on the father has been filed with the Court. I am satisfied, after reading the Affidavit in support, that that application should be granted. The mother, having been served with the applications of the Secretary and with applications for variation lodged on behalf of the children, has elected not to appear. Counsel for the children has indicated that there is no opposition to the granting of the extension applications. The applications for variation filed on behalf of the children seek a condition on each CTSO requiring the Secretary to place the children together in the same placement.

3. I have permitted the cases to proceed together because they raise the same question, namely whether the Children's Court has the power, when making or varying a CTSO, to attach a condition requiring the Secretary to place siblings together.

[1] See Disposition Report of (name removed) "EN" dated 27 March 2009.

Relevant legislative provisions

4. A CTSO is one of the protection orders that a Court is able to make after a finding that a child is in need of protection.[2]

5. The relevant parts of section 287(1) of the *Children, Youth and Families Act 2005* (the Act) are as follows -

(1) A custody to Secretary order -

(a) grants sole custody of the child to the Secretary; and

(b) does not affect the guardianship of the child; and

(d) may include any conditions that the Court considers to be in the best interests of the child, including-

(i) a condition concerning access by a parent or other person; and

(ii) in the case of an Aboriginal child, a condition incorporating a cultural plan for the child.

6. Custody is defined in s 5 of the Act as follows –

A person (including the Secretary) who has, or under this Act is granted, custody of a child has -

(a) the right to have the daily care and control of the child; and

(b) the right and responsibility to make decisions concerning the daily care and control of the child.

7. Section 172(2)(a) makes it clear that the Secretary has the sole right to custody of a child who is on a CTSO.

8. Section 173 is headed **Placement of Children.** The relevant parts of Section 173 are as follows-

(1) This section applies in relation to a child –

(a) who is in the custody or under the guardianship of the Secretary under this Act;

(2) The Secretary may deal with the child in any of the following ways-

(a) place him or her in an out of home care service;

(b) place him or her in a secure welfare service for a period not exceeding 21

[2] See sections 274 and 275 of the *Children, Youth and Families Act 2005.*

days (and, in exceptional circumstances, for one further period not exceeding 21 days) if the Secretary is satisfied that there is a substantial and immediate risk of harm to the child;

(d) place him or her in any other suitable situation as circumstances require.

9. Section 174 is headed **Secretary's duties in placing child**. The relevant parts of s 174 are as follows –

(1) In dealing with a child under section 173, the Secretary –

(a) must have regard to the best interests of the child as the first and paramount consideration; and

(b) must make provision for the physical, emotional, and spiritual development of the child in the same way as a good parent would; and

(c) must have regard to the fact that the child's lack of adequate accommodation is not by itself sufficient reason for placing the child in a secure welfare service; and

(d) must have regard to the treatment needs of the child.

Summary of submissions

10. The issue for determination is the breadth of power conferred on the Children's Court by s 287(1)(d) of the Act.

11. Counsel for the children submits that a condition requiring siblings to live together is permitted by the section. Whilst a condition specifying a particular place where a child is to be placed would be outside the powers of the Court, a condition requiring siblings to live together is within power. In such a case, the Secretary still has discretion as to placement; it just has to be exercised in a way that makes sure the children will be placed together. Certainly, this would limit the powers of the Secretary in relation to placement options. However, this is no different to well recognised permissible conditions, such as those regarding access or schooling or acceptance of services, all of which could potentially limit the powers of the Secretary in relation to placement.

12. Counsel for the Secretary submits s 287 must be read in the light of other provisions in the Act, particularly, sections 5, 9, 10, 13, 172(2), and 173(2). An order requiring the children to live together would clearly be outside power because the Act makes it clear that it is for the Secretary alone to determine where a child is to be placed. It is true that

conditions may have some impact on the power of the Secretary to place a child but such conditions do not purport to direct the Secretary where, or how, to place the child. The Secretary is the sole custodian of the child and has the widest possible powers in relation to placement [s 173(2)]. The clear intention of the Act is for the Secretary alone to have power to determine where a child is to be placed. It is the reality of child protection that placement of children can be difficult and may need to change at very short notice. For example, circumstances can arise where a child needs to be placed in Secure Welfare because there is a substantial or immediate risk of harm to that child. Alternatively, a particular placement may break down because the carer is no longer able to support the child. In such cases, the Secretary needs to be able to respond quickly to place a child in another placement. The power of the Secretary is not unfettered. It is the legislation that offers direction on the matters to be considered when making the placement decision.

Ruling

13. I prefer the submissions of counsel for the Secretary.

14. Upon the making of a CTSO, the Secretary becomes the sole custodian of the child [s 172(2)(a)]. By virtue of s 5, the Secretary has the sole right and responsibility to make decisions about the daily care and control of the child. This includes making decisions as to where a child resides, from time to time, during the operation of the order. Under s 173(2), the Secretary is given the widest possible powers in relation to placement of a child on a CTSO, including permitting placement in any "suitable situation as circumstances require." Section 174 provides clear direction to the Secretary in dealing with a child under s 173. The effect of these provisions is to provide the Secretary with the sole right to determine placement of a child on a CTSO. The Court cannot limit that right by requiring the Secretary to place siblings together. A condition directing the Secretary to place siblings together directly affects the placement decision. As would, for example, a condition that a child only be placed with a member of his or her own ethnic community. A purported condition that relates to where or how a child is to be placed is different from a permissible condition that does not seek to direct the Secretary in any way on this issue. To impose a condition directing siblings be placed together fetters the decision-making powers of the Secretary in a way that the legislation does not permit.

15. To interpret the legislation in this way does not mean that the Secretary has an

unfettered power in relation to the placement decision. Under section 174(1)(a) any decision of the Secretary must have regard to the best interests of the child as the first and paramount consideration. In determining what decision or action to take in a child's best interests, the Secretary must consider the matters listed in sections 10(2) and 10(3) of the Act (s 9). **One** of the 18 considerations listed in s 10(3) of the Act, is "the desirability of siblings being placed together when they are placed in out of home care" [s 10(q)]. The secretary is also required to consider other matters such as the child's views and wishes [s 10(3)(d)], the desirability of continuity and stability in the child's care [s 10(3)(f)] and any other relevant considerations [s 10(3)(r)]. Sometimes these considerations are in conflict and it is not always in a child's best interests to be placed with a sibling.

16. Finally, in relation to Aboriginal children (the H children), the Secretary, in making a placement decision, is also required to consider the need to protect and promote the cultural and spiritual identity and development of Aboriginal children by, wherever possible, maintaining and building their connections to their Aboriginal family and community [(s 10(3)(c)]. When making a decision for the placement of Aboriginal children in out of home care, the Secretary (or a community service) must consult an Aboriginal agency and the Aboriginal Child Placement Principle must be applied [s 12 (1) (c)]. The Principles for placement of an Aboriginal child in out of home care are specifically detailed in sections 13 and14 of the Act. In making such a placement, the Secretary must have regard to the advice of a relevant Aboriginal agency, the criteria in s 13 (2) and the principles in s 14. Clearly, these sections recognise that the placement decision for an Aboriginal child in out of home care is always one for the Secretary. The two sections provide detailed guidance as to how the Secretary must exercise that power. This acknowledges the role of the Secretary as custodian of the child. The Court does not have, for example, the power to make it a condition of a CTSO that an Aboriginal child be placed with an Aboriginal family. In the case of an Aboriginal child on a CTSO, the decision as to placement is for the Secretary alone to determine in accordance with the relevant legislative principles. In making the placement decision for an Aboriginal child, the Secretary is bound by best interest principles – including the need to consider the desirability of placing siblings together – and must apply the Aboriginal Placement Principles in s 13 and 14 of the Act. Again, these principles may be in conflict and the Secretary cannot be limited in the application of the Aboriginal Placement Principles by a condition requiring siblings to be placed together. If it is correct that the Court is unable to order Aboriginal children be placed with an Aboriginal family as a condition of a CTSO, it must also be the case that the Court cannot order siblings be placed together as a condition of a CTSO. It would be a

strange result if it were permissible in one case (siblings) and not in the other.

17. For the reasons given, I rule the Court does not have power to make it a condition of a CTSO that siblings be placed together. The applications for variation lodged on behalf of the H siblings will be dismissed. I invite counsel to address me on the future management of these cases.

Judge Paul Grant
President
Children's Court of Victoria.