AN OUTLINE OF RELEVANT ISSUES AND COURT PROCESSES IN THE CHILDREN'S COURT OF NEW SOUTH WALES

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Robert was admitted to practice 35 years ago. He has worked as a litigation solicitor in Advocate for the whole of that period in diverse areas of work. He has been an Accredited Specialist in Advocacy since 1996 and an Accredited Specialist in Children's Law since 2003.

He has practised almost exclusively in care and care related matters for the last 20 years and has lead him to be involved in Court proceedings for either the Department, parents, children, grandparents and other interveners in the Children's Court, District Court, Supreme Court, ADT and occasionally in the Family Court.

He has prepared and presented various papers related to the care related jurisdiction and various conferences including a number of Legal Aid Care conferences. A number of his papers have been published and can be found on the Children's Law News website of the Children's Court.

This brief outline paper compliments an oral presentation provided on a variety of relevant issues to assist in the understanding of some of the relevant processes within the Children's Court. It is by its very nature general in its form and content. The reader is invited to reference more detailed analysis of these matters contained in various articles published in Children's Law News and the Children's Court website.

A. Legal Representation

As would be appreciated, many of the parental figures and other persons having an interest in proceedings relating to children are, inter alia, financially deprived. As a consequence the vast majority of parties appearing in the Children's Court are funded pursuant to grants of Legal Aid provided for by the Legal Aid Commission Grants Section.

In addition to private practitioners who appear pursuant to such grants, the Legal Aid Commission has a panel of in-house Lawyers who appear for interested parties on a means tested basis.

Legal Aid therefore plays a highly relevant role in both funding the representation to parties through their own internal officers and by the provision of funding to private practitioners. The current prescription on funding from Governments has meant that Legal Aid has been obliged to incorporate a significant merits test. Regrettably this can and does cause delays in obtaining grants of aid with the usual timeframe being between two to four weeks and occasionally longer where requisitions are sought, particularly on the issue of merit. Another relevant matter that affects the role particularly of private Lawyers pursuant to grants is the limited amounts of grants. Most practitioners exhibit a high degree of professionalism and carry out significant work above and beyond the limitations of the grant. Both the delays and limits as to amounts do affect their capacity to carry that work out.

B. ALS (Aboriginal Legal Service)

This important service has a number of officers within the city and in localities within the country to provide assistance for ATSIC identified parties. It also briefs work out to private practitioners on the Legal Aid scale pursuant to grants obtained from Legal Aid. Its model of work is similar to the in-house Lawyers engaged by the Legal Aid Commission.

It takes a broad view of whether a person is Aboriginal or not. It generally accepts an assertion of Aboriginality is sufficient to establish a basis for representation. This sometimes may seem at odds with the description of Aboriginality as contained within the Act (see Section 5).

C. Representation of Children

Section 98(1) identified that in care proceedings the child or young person has a right to appear in the proceedings. The need for the child or young person to be informed of proceedings and to be served is also reinforced by other provisions of the Act.[i]

The Legal Aid Commission has a system of rosters for Solicitors to appear on a duty basis on list and other days where new proceedings may be commenced. The proper practice is for those Lawyers appearing in that capacity to ask for an appointment by the Court to appear for the child on the first return date and then to appear thereafter in that capacity (see Section 99).

The role of a legal representative for children has been divided between whether the child is under 12 years or 12 years or older. The distinction between those roles are contained within the provisions of Sections 99(a) to 99(d) inclusive.

The Act deems that any child under 12 is incapable of giving proper instructions and that any legal representative to be appointed to that child is to act in the best interests of that child, although to reflect their views and wishes to the Court.

In respect of the children 12 or older, there is a legal presumption (Section 99(c)) that they are capable of giving proper instructions. There is a similarity in the obligations of ensuring views and wishes being expressed on behalf of that child and the testing of relevant evidence. Perhaps the most controversial aspect of acting for children over the age of 12 years is the prescription that the legal representative is to act on the instructions of the child or young person (see Section 99(d)(iii)). This can often lead to a fairly facile representation of the views of the child who is not conversant with or fully aware of many of the issues. Additionally, such children may simply be a cypher to reflect their parents' views. Notwithstanding those issues the Act reflects the principles of CROC[ii] that children should have a real voice in the proceedings and participate in them.

The delineation between the two roles is not without its controversies.

D. Joinder of Interested Parties

Reference has been made to the right of children and indeed those exercising parental responsibility along with the Department to appear as of right as a party to care proceedings. Frequently there are relatives and other persons who have a real and significant interest in the welfare of a child who wish to intervene and be heard as a party. Section 98(3) is the relevant provision that deals with the tests that should be applied in respect of such an application. The section incorporates a discretionary test based on establishment that the Court is satisfied the person has a genuine concern for the safety, welfare and wellbeing of the child. Usually a Court will look to see what different voice or issue such party may bring to the proceedings and the impact upon the proceedings and their timely disposition.[iii]

This may be a relevant consideration for carers falling under the umbrella of an NGO's management who seek to be heard separately and distinctly from the Department and indeed from the NGO and/or with the NGO's support as a voice in the interests of the child. Undoubtedly this role in that manner will play a larger significant role in future proceedings. It is different from but not dissimilar to the right to be heard under Section 87. The major distinction is that the right to be a party would appear to give unfettered involvement in the proceedings whereas the right to be heard under Section 87 can be prescribed by the way in which the court allows the person who establishes a criteria to be heard under that section to participate in any Court process.

E. Section 87 Re: June (no.2)[iv]

In Re: June the Supreme Court was called to consider the implications of Section 87 in terms of the right of a non-party to be heard and the obligations upon the Court to allow a reasonable opportunity for that to occur.

When one looks at Section 87 the case clearly reinforced the provisions although it did raise questions as to how the section might be implemented. In effect Section 87 exists to ensure that parties, including it would be suggested, NGO's with case management and their carers fall within the category of a party defined under sub-section 1. It may be, dependent upon whether they have a divergent view, that the NGO and carer can be characterised as a group under sub-section 2.

Speaking for myself, it had been my practice for some time in acting for the Department to request caseworkers to ensure that carers and other interested parties were aware of what was proposed in any Care Plan and to obtain their views and comments in respect of it. I also advise and continue to advise that those persons should be invited to be given the opportunity of seeking their own independent legal advice as to the implications and effect of any proposal or plan and orders that formed part of it. I think that remains good practice.

Re: June has raised the question of not only what might be seen as a procedurally fair process but also to the extent of what the right to be heard entails. It seems to me as a matter of fair interpretation that would require, for instance, a copy of any relevant Care Plan or Assessment of a carer that is being relied upon which they have not seen to be provided to them for them to be allowed to comment. It may, however go further than that and allow a right to not only see other documents in the discretion of the Court that are seen to be relevant, such as a Children's Court Clinic report or redacted version of it but also a right to physically come to Court and express those views.

The caveat in sub-section 3 seems to me to introduce a line where those rights end at where consideration of party status under 98(3) commences. To have a full set of pleadings, to attend a hearing and to cross examine witnesses in my view would require a party status rather than simply a right to be heard. However, it remains a

fertile ground for agitation and has recently caused some hearings to both be adjourned and extended where the parities so affected have been given the right to be heard.

F. Court Processes

The jurisdiction of the judicial officers appointed to the Children's Court, the President and Children's Magistrate, as founded under the Children's Court Act (1987 as amended), there are both regulations and rules under that Act which assists with its implementation and the conduct of the Court.

In recent times the Court has promulgated a number of practice notes and other directions to facilitate and direct how proceedings should be managed and controlled. Of these the most important it would appear to be and include Practice Note 5 which covers the general conduct of proceedings and matters related to it.[v]

That practice note reinforces that the Court is a document based jurisdiction where Applications, Reports and principally Affidavits are the prime form of evidence to be relied upon.

The Court also requires parties to be fair to others and to identify by either appending them to Affidavits or preparing a schedule the relevant subpoenaed material that is sought to be adduced or cross examined upon.[vi]

While the dictates of the legislation require the Court to conduct proceedings in accordance with, inter alia, the provisions of Section 93, a statement that the proceedings are not to be conducted in an adversarial manner does not derogate from the fact that they are not as, for example, like as a Coroner's hearing, an inquiry but rather are proceedings of inter-parte, albeit of a special kind because they are dealing with the rights, interests and paramount welfare of children.[vii]

A hearing determining issues of importance as to placement or contact is not an informal discussion but rather a legal hearing conducted with as much informality as the proceedings allow but being mindful that significant rights and interests of children are being considered along with the impact upon their relationship with the parents.

As a matter of practice the Court will follow the usual procedure of allowing relevant objection and permitting reasonable cross examination of parties concerning the issues at hand. This sometimes can be confronting for witnesses that are not familiar with the Court process.

At no stage should any advocate conduct themselves in an aggressive or offensive manner and it would be expected that such conduct would not be permitted by any presiding Magistrate.

The right to cross examination is not absolute but relative and subject to it being relevant and appropriate both in tone and manner. Section 107 specifically empowers the Court in such regard.

The conduct of proceedings is further affected by a primary obligation resting upon the Department, its officers, including both internal and external legal officers to act in accordance with the principles of the model litigant. These principles require a firm and at times forceful presentation of the Department's case but tempered by the obligation to assist the Court, to be open and transparent and to be aware of the significance both as to powers, role and cost that come with the exercise of that. It is suggested that such obligations would pass to NGO's and their obligations in presenting material and putting matters to the Court either through the Department or, perhaps pursuant to matters under Section 87.[viii] The onus of proof rests upon the party making the specific application.[ix] This would usually be the Department but not always (see Section 90 for application for contact or interim orders). The onus simply means that the party seeking a particular outcome has the legal obligation to satisfy the Court that such a relief or outcome is warranted.

The standard of proof in care proceedings at all stages is called the balance of probability.[x] This is usually referred to as the civil standard. While it requires a finding on the balance of probabilities the extent of persuasion required can vary dependent upon the serious nature of the allegations. Examples of that would be if there is an allegation of sexual abuse or physical abuse. A degree of persuasion that the Court might require to make those positive findings of fact are in light of their serious nature greater than if the issue was whether a child attended school on a certain day or not. This is sometimes called the Briginshaw Test.[xi]

It is not a different standard simply a different application of the standard to particular facts before it. In most care proceedings the determination of issues such as sexual abuse or physical abuse will not be required. The Court may be simply satisfied that facts asserted give rise to what is called an unacceptable risk if the evidence is sufficient to reach that standard and the Court does not have to make a decision determining whether sexual or physical abuse has occurred, only that there is an unacceptable risk that it might have or may occur in the future.[xii] The Court is concerned about the welfare of a child and the implications of acts and omissions in that regard in determining the rights or wrongs of actions.

This is why Section 108 makes it clear that Children's Court care proceedings are not to await the determination of criminal proceedings or in effect to be determined by them.

G. <u>Subpoenas</u>

Subpoenas are regularly used in the Children's Court to obtain information from various services and entities, including NGO's and the Department. The Court has established a practice of those Subpoenas being dealt with administratively unless

an objection is taken, for example such as Client Legal Privilege, sexual assault Counsellor, confidential communications with a Counsellor or Psychologist that may give rise to a privilege. The Court frequently has to deal with confidential and personal information being disclosed, the balance at all times being struck and determined is that which the Act requires and the way in which the Court conducts itself, that is the paramount interests of the child to guide and determine the way in which it should approach these matters. It is also affected by the right to give a reasonable opportunity to parties to understand and respond to matters before it, often referred to as inviting procedural fairness to parties.

H. Children's Court Clinic[xiii]

The Children's Court Clinic represents an independent arm of the Children's Court which can provide assistance to the Court by the provision of professional opinions and assessments with children and parental figures in their life.

Its use in proceedings is tempered by the regrettable delays that are frequently encountered in obtaining those reports and whether other available information relevant to those issues can be reasonably obtained such as by way of Subpoena or the production of reports from health professionals.

On occasions parties will obtain their own assessments from their own Psychologist or health professional and these reports and the authors of them will be at times required to be considered in determining the issues before the Court.

The Children's Court Clinic, however does represent an independent entity that can consider the issues that are required of it without being affected by the partisanship or apparent partisanship of being a witness engaged by or hired by a particular party to the proceedings.

It is some regret to practitioners that a model that was introduced to obviate concerns of fairness and transparency is perhaps not as used as frequently as it should be because of delays and availability of appropriate Clinicians to carry out such assessments in a timely manner.

I. Contact Issues

Contact, its adequacy and frequency often represents the most vexed and contentious issue for parents. Often they are able to get to the point of conceding that a child or children cannot be returned to them but in return seek and at times demand more significant contact than is on offer.[xiv]

It is clear that permanency planning involves planning in regard to contact with important others. The Care Plan therefore should be clear on what is proposed both currently and in the future and the mechanism for review.

Because of the vexed nature of contact I think that such a Care Plan should be more explicit and transparent in the way in which contact is to be reviewed. I will frequently recommend to Caseworkers that there should be a mechanism for review connected perhaps in the first 12 months to Section 82 Reports or if longer with a Supervision Order to a Section 76(4) Report in which the outcome of that mechanism of review is reported upon and the proposals for contact until the next review are provided (see attached Contact Review).

Such review mechanism should be more than simple statements of intent but should be explicit as to their frequency (at least annually) but perhaps more frequently if connected to 82 and 76(4) Reports within the first 12 to 24 months of finalisation of a matter, identify who can attend, that an actual meeting will be conducted or at least sought to be conducted, the issues that will be looked at and the criteria that will be considered in determining future contact until the next review.

I think the benefits of such a proposal is that it spells out to any NGO what the appreciation of the Court is as to minimum contact and what the expectations of parents and others are as to how mechanism for review should be implemented.

The Court does have power to make Contact Orders (see Section 86). In my experience upon a finalisation of a matter they are rarely used. I note that a number of amendments, including amendments in respect of contact are to come into effect in late October. They will prescribe the length of time that a Contact Order can be made.

DRC's or Dispute Resolution Conferences[xv] are often a useful tool in trying to develop a model or plan as to how contact can occur, be reviewed and reported upon.

In most cases, although not all, the degree of risk arising from the reasons why a child cannot be returned means that contact, at least at that stage needs to be supervised. Section 86(2) makes it clear that the identity of the supervisor of contact has to be expressed and they have to consent to that task. Without consent any such order would not be operative.

The view taken by most Practitioners is that arrangements spelt out in the Care Plan or noted in orders enveloping the Care Plan and adopting their contents, which provides for a mechanism of review and conditions of exercise, represents a means by which contact can gradually move from supervised to unsupervised if the assessment of risks allow that.

If an order is in place it tends to hamper and restrict that ability to move. Orders on occasions may be required to ensure minimum contact does take place but in the usual arrangement it would be suggested the contact should be best implemented by a flexible arrangement not mandating supervision but allowing it to occur in

discretion of the person exercising responsibility but with a clear understanding of the conditions of exercise and the way in which contact reviews would take place.[xvi]

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[i] See for example Section 64

[ii] United Nations Convention of the Right of Children Section 8 and Section 9 of the Act

[iii] El and Wi –v- Director General of the Department of Human Services and Ors (2010) NSW DC 248 and Joining of Parties in Care and Protection Proceedings by former Magistrate John Crawford 2007 CLN 1

[iv] McDougall J (2013) NSW SC 1111

[v] See in particular Rule 22 and 23

[vi] See Practice Note 5 Rule 16.8

[vii] Talbot –v- Minister for Community Services (1993) 30 NSW LR 487 Young J

[viii] Re: Liam 2005 NSW SC 75

[ix] See for example Section 69(2) as to Interim Care Orders and Section 106A(3) by example

[x] See Section 93(4)

[xi] See Briginshaw –v- Briginshaw (1938) 60 CLR 336, Re: Sophie 2008 NSW CA 250 and Re: Sophie (no.2) 2008 NSW CA 89

[xii] See M and M (1988) 165 CLR 69

[xiii] Section 52 to Section 69 of the Care Act

[xiv] See Section 78(2)(c)

[xv] See Section 65 and Practice Note 3.

[xvi] See Guideline Contact Proposals published by the Children's Court on its website and various articles published on the Children's Law News under the heading contact

CONTACT REVIEW

1. The Minister and/or the NGO with case management responsibility will undertake a formal contact review within 6 months and 12 months of final orders and thereafter not less than on an annual basis.

2. For the purposes of conducting a contact review the following criteria, inter alia, will be taken into account and considered:-

   (a) The views of parents and other significant persons identified as having ongoing contact.

   (b) The views and wishes of any of the children.

   (c) The views and wishes of any physical carer of the children.

   (d) The opinions and recommendations of any professional service or health professional involved in the import and management of any emotional or psychological issue for any of the children.

   (e) An assessment of how contact has gone in the preceding period review including punctuality and appropriateness of the adults attending contact and the benefits and detriments of that contact by a supervisor of that contact.

3. At the time of the contact review the following matters will be specifically considered:-

   (a) The level, frequency and length of contact.

   (b) The level, frequency and length of physical contact.

   (c) The level, frequency and length of any telephone or electronic contact.

   (d) An assessment of whether any of the contact needs to be supervised and an identification of the reasons for that continuing need.

   (e) The outcome of consideration of any nominated person to carry out the supervision of the contact.

(f) The outcome of the contact review will be specifically reported to each of the persons participating in the review and the determination and the reasons for it will be provided to them and where appropriate published in any Court ordered report pursuant to Section 82 and Section 76(4) of the Act.