Children's Court of New South Wales

DISTRICT COURT ANNUAL CONFERENCE 2016
Wollongong: Wednesday 29 March 2016

JUDGE PETER JOHNSTONE
PRESIDENT OF THE CHILDREN'S COURT OF NSW

CARE APPEALS FROM THE CHILDREN'S COURT

INTRODUCTION

1. Proceedings relating to the care and protection of children and young persons in NSW, including first instance matters before the Children's Court, and appeals from the Children's Court, are public law proceedings, governed, both substantively and procedurally, by the *Children and Young Persons (Care & Protection) Act* 1998 (the *Care Act*).

2. Care proceedings[1] involve discrete, distinct and specialised principles, practices and procedures which have regard to their fundamental purpose, namely the safety, welfare and well-being of children in need of care and protection. The rules of evidence do not apply, the proceedings are non-adversarial and they are required to be conducted with as little formality and legal technicality and form as the circumstances permit.

3. The purpose of the paper is to provide those Judges who will be hearing appeals from decisions of Children's Court Magistrates with an overview of the key concepts in the Act, particular aspects of the Care jurisdiction, and procedural considerations on appeal, including the use of Children's Registrars for Dispute Resolution Conferences and the use of expert clinical evidence from the Children's Court Clinic.

[1] Children and Young Persons (Care and Protection) Act 1998: s 60

THE CARE ACT

The guiding principles

4. Decisions in Care proceedings, at first instance and on appeal, are to be made consistently with the objects, provisions and principles provided for in the *Care Act*, and where appropriate, the United Nations Convention on the Rights of the Child 1989 (CROC).[2]

5. The Act contains an inextricable mixture and combination of both judicial and administrative powers, duties and responsibilities. It is often difficult to precisely discern where the Department's powers and responsibilities begin and end as opposed to those of the Court. In summary, however, the Act establishes a regime under which the primary, and ultimate, decision-making as to children rests with the Court.[3] I will be concentrating, in this paper, on the judicial aspects of the legislation.

6. The objects of the *Care Act*, are to provide[4]:

   (a) that children and young persons receive such care and protection as is necessary for their safety, welfare and well-being, having regard to the capacity of their parents or other persons responsible for them, and

   (b) that all institutions, services and facilities responsible for the care and protection of children and young persons provide an environment for them that is free of violence and exploitation and provide services that foster their health, developmental needs, spirituality, self-respect and dignity, and

[2] Re Tracey [2011] NSWCA 43; Re Henry; JL v Secretary, DFaCS [2015] NSWCA 89 at [208]ff

[3] Report of the Special Commission of Inquiry into Child Protection Services in NSW, November 2008 (the "Wood Report") at 11.2.

[4] Children and Young Persons (Care and Protection) Act 1998: s 8

(c) that appropriate assistance is rendered to parents and other persons responsible for children and young persons in the performance of their child-rearing responsibilities in order to promote a safe and nurturing environment.

7. The *Care Act* sets out a series of principles governing its administration. These principles are largely contained in s 9, but also appear in other parts of the Act.

8. First and foremost is what is sometimes referred to as the paramountcy principle: s 9(1). This principle requires that in any action or decision concerning a child or young person, the safety, welfare and well-being of the child or young person are paramount.

9. This principle, therefore, is the underpinning philosophy by which all relevant decisions are to be made. It operates, expressly, to the exclusion of the parents, the safety, welfare and well-being of a child or young person removed from the parents being paramount over the rights of those parents.

10. It is now well settled law that the proper test to be applied is that of "unacceptable risk to the child": *M v M* [1988] HCA 68 at [25]. That case dealt with past sexual abuse of a child but the principles there set out apply to other forms of harm, such as physical and emotional harm.[5] A positive finding of an allegation of harm having been caused to a child should only be made where the Court is so satisfied according to the relevant standard of proof, with due regard to the matters set out in *Briginshaw*. Nevertheless, an unexcluded possibility of past harm to a child is capable of supporting a conclusion that the child will be exposed to unacceptable risk in the future from the person concerned.[6]

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[5] A v A (1998) FLC 92-800

[6] M v M at [26]

11. The Secretary, will not fail to satisfy the burden of proof on the balance of probabilities simply because hypotheses cannot be excluded which, although consistent with innocence, are highly improbable: *Secretary of Department of Community Services; Re "Sophie"* [2008] NSWCA 250 at [67] - [68], per Sackville AJA.

12. His Honour said in that decision:

> "The reasoning process I have outlined involves an error of law. The primary Judge, although stating the principles governing the burden of proof correctly did not apply them correctly. It was appropriate to take into account the gravity of the allegation of sexual misconduct made against the father, as required by s 140(2) of the *Evidence Act* 1995.
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> It was not appropriate to find that the Secretary had failed to satisfy the burden of proof on the balance of probabilities simply because his Honour could not exclude a hypothesis that, although consistent with innocence, was highly improbable.
>
> To approach the fact-finding task in that way was to apply a standard of proof higher than the balance of probabilities, even taking into account the gravity of the allegation made against the father": [67].
>
> "As the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* at 171, statements to the effect that clear and cogent proof is necessary where a serious allegation is made are not directed to the standard of proof to be applied, but merely reflect the conventional perception that members of society do not ordinarily engage in serious misconduct and that, accordingly, a finding of such misconduct should not be made lightly. In the end, however, as Ipp JA observed in *Dolman v Palmer* at [47], the enquiry is simply whether the allegation has been proved on the balance of probabilities": [68].

13. Whether there is an "unacceptable risk" of harm to the child is to be assessed from the accumulation of factors proved: see *Johnson v Page* [2007] Fam CA 1235. This is an exercise in foresight. The Court must examine what the future might hold for the child, and if a risk exists, assess the seriousness of the risk and consider whether that risk might be satisfactorily managed or otherwise ameliorated, for example, the nature and extent of parental contact, including any need for supervision.[7] Thus, one needs to examine the likelihood of the feared outcome occurring, and secondly, the severity of any possible consequences. The risk of detriment must be balanced against the possibility of benefit to the child.

14. Secondary to the paramount concern, the *Care Act* sets out other, particular principles to be applied in the administration of the Act. These are set out in ss 9(2), 10, 11, 12 and 13. There are also special principles of self-determination and participation to be applied in connection with the care and protection of Aboriginal and Torres Strait Islander children: ss 11, 12 and 13.

- Wherever a child is able to form their own view, they are to be given an opportunity to express that view freely. Those views are to be given due weight in accordance with the child's developmental capacity, and the circumstances: s 9(2)(a). See also s 10.

- Account must be taken of the culture, disability, language, religion and sexuality of the child and, if relevant, those with parental responsibility for the child or young person: s 9(2)(b).

- Any action to be taken to protect the children from harm must be the least intrusive intervention in the life of the children and their family that is consistent with the paramount concern to protect them from harm and promote their development: s 9(2)(c).

[7] From a paper by Justice Stewart Austin delivered at the 2015 Hunter Valley Family Law Conference

- If children are temporarily or permanently deprived of their family environment, or cannot be allowed to remain in that environment in their own best interests, they are entitled to special protection and assistance from the State, and their name, identity, language, cultural and religious ties should, as far as possible, be preserved.

- Any out-of-home care arrangements are to be made in a timely manner, to ensure the provision of a safe, nurturing, stable, and secure environment, recognising the children's circumstances and, the younger the age of the child, the greater the need for early decisions to be made s 9(2)(e). Unless contrary to the child's best interests, and taking into account the wishes of the child, this will include the retention of relationships with people significant to the children: s 9(2)(f).

- Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young persons with as much self-determination as is possible: s 11(1).

- Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Minister, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under this Act that concern their children and young persons: s 12.

- Where possible, any out-of-home placement of an Aboriginal or Torres Strait Islander child is to be with a member of the extended family or kinship group.

- If that is not possible, the Act provides for a descending process of placement with an appropriate Aboriginal and Torres Straits Islander carer before, as a last resort, placement with a non-Aboriginal and Torres Straits Islander carer, after consultation: s 13(1).

- In determining where a child is to be placed, account is to be taken of whether the child identifies as an Aboriginal or Torres Strait Islander and the expressed wishes of the child: s 13(2).

- A permanency plan must address how the plan has complied with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles in s 13: s 78A(3).

15. The *Care Act* is not the most precise or orderly piece of legislation one could hope for. There are, however, a number of key concepts that principally occupy the exercise of the Care jurisdiction, about which I will say something. They include:

- Removal of children
- The need for care and protection
- Permanent placement
- Realistic possibility of restoration
- Parental responsibility
- Out-of-home care
- Contact

Removal of children from their parent(s) or carer(s)

16. If the Secretary forms the opinion that a child is in need of care and protection, he or she may take whatever action is necessary to safeguard or promote the safety, welfare and well-being of the child: s 34(1).

17. Removal of a child into state care may be sought by seeking orders from the Court: s 34(2)(d), by the obtaining of a warrant: s 233, or, where appropriate, by effecting an emergency removal: s 34(2)(c); see also s 43 and s 44.

18. Where a child is removed, or the care responsibility of a child is assumed, by the Secretary, he or she is then required to make a Care application to the Children's Court within 3 working days and explain why the child was removed: s 45. The Court may then make interim Care orders: s 69. The order may be for allocation of parental responsibility pending final orders, or such other order as the Court considers is required. An 'interim order' is an order of a temporary or provisional nature pending the final resolution of the proceedings in which an applicant "generally speaking, does not have to satisfy the Court of the merits of its claim": [77]; see also [78] - [80].[8]

19. The usual interim order is for the allocation of parental responsibility to the Minister until further order.[9] Such an order enables appropriate investigation and planning to be undertaken by Departmental caseworkers while the child is in a protected environment. The making of an interim order in effect puts the position of the parties in a holding pattern, without prejudice, and without any admissions.

The need for care and protection

20. After removal or assumption of a child into care, the first phase of care proceedings is generally referred to as the establishment phase.[10]

21. For care proceedings to be 'established' a finding is required that the child is in need of care and protection for any reason or was in need of care and protection at the time the Application commencing the proceedings was made.[11]

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[8] *Re Jayden* [2007] NSWCA 35 per Ipp J at [71] - [74]

[9] Re Mary [2014] NSWChC 7

[10] Re Henry; JL v Secretary, Department of Family and Community Services [2015] NSWCA 89 at [36]

[11] Children and Young Persons (Care and Protection) Act 1998: s 71(1) and s 72(1)

22. The significance of a finding is that it forms the basis for the making of final Care orders under the *Care Act*. The proceedings then enter a second phase, sometimes referred to as the "welfare phase"[12] during which planning for the child is undertaken.

23. The need for "care and protection" is not conclusively defined, and the concept is at large; a finding may be made for "any reason". But the *Care Act* does specify a range of circumstances that, without limitation, are included in the definition, or to which the definition extends: s 71.

    (a) death or incapacity of parents

    (b) acknowledgement by parents of serious difficulties in caring for a child

    (c) actual or likely physical or sexual abuse or ill-treatment

    (d) a child's basic physical, psychological or educational needs are not being met or are likely not to be met (other than as a result of poverty or disability)

    (e) a child is suffering or is likely to suffer serious developmental impairment or serious psychological harm as a consequence of their domestic environment

    (f) a child under 14 has exhibited sexually abusive behaviours, and needs therapeutic assistance

    (g) the child is subject to a care order of another state (or territory)

    (h) the child is in unauthorized out-of-home care: s 171(1)

[12] Re Henry; JL v Secretary, Department of Family and Community Services [2015] NSWCA 89 at [37]

Permanent placement

24. Once a child has been found to be in need of care and protection the Secretary is required to undertake planning for the child's future. In most cases the Secretary will prepare a formal Care Plan that addresses the needs of the child[13].

25. The Secretary is required to consider what permanent placement is required to provide a safe, nurturing, stable and secure environment for the child[14]. Permanent placement is to be made in accordance with the permanent placement principles prescribed[15]. The 'hierarchy' established might be summarised as follows:

- If it is practicable and in the best interests of the child, the first preference for permanent placement is for the child to be restored to the parent(s).

- The second preference for permanent placement is guardianship of a relative, kin or other suitable person.

- The next preference (except in the case of an Aboriginal or Torres Strait Islander child) is for the child to be adopted.

- The last preference is for the child to be placed under the parental responsibility of the Minister.

- In the case of an Aboriginal or Torres Strait Islander child, if restoration, guardianship or the allocation of parental responsibility to the Minister is not practicable or in the child's best interests, the child is to be adopted.

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[13] Children and Young Persons (Care and Protection) Act 1998: s 3(1)

[14] Children and Young Persons (Care and Protection) Act 1998: s 10A(1)

[15] Children and Young Persons (Care and Protection) Act 1998: s 10A(3)

Realistic possibility of restoration

26. Thus the Secretary must assess whether there is a realistic possibility of restoration of the child to the parent(s), having regard firstly to the circumstances of the child; and secondly, to the evidence, if any, that the parents are likely to be able to satisfactorily address the issues that have led to the removal of the child.[16]

27. The Court must then decide whether to accept the assessment of the Secretary. If the Court does not accept the assessment of the Secretary, it may direct the Secretary to prepare a different permanency plan: s 83(6).

28. The phrase "realistic possibility of restoration", therefore, involves an important threshold construct, which informs the planning that is to be undertaken in respect of any child that has been removed from parents or assumed into care and found to be in need of care and protection.

29. There is no definition of the phrase in the *Care Act*. However, the principles concerning the interpretation and application of the phrase were comprehensively considered in the Supreme Court by Justice Slattery in 2011: *In the matter of Campbell* [2011] NSWSC 761. This decision has recently been cited with approval by the Court of Appeal: *Re Henry; JL v Secretary, Department of Family and Community Services* [2015] NSWCA 89 at [44].

30. I have discussed the principles in a number of judgments including *Department of Family and Human Services (NSW) re Amanda & Tony* [2012] NSWChC 13 at [29] - [32] and *DFaCS re Oscar* [2013] NSWChC 1 at [29] - [34], *Department of Family and Community Services (NSW) and the Bell-Collins Children* [2014] NSWChC 5 at [78], and in *DFaCS and the Youngest M Children* [2014] NSWChC 4 at [51].

[16] Children and Young Persons (Care and Protection) Act 1998: s 83(1)

31. The principles relating to the phrase “a realistic possibility of restoration” may be summarised as follows:

- A possibility is something less than a probability; that is, something that it is likely to happen. A possibility is something that may or may not happen. That said, it must be something that is not impossible.

- The concept of realistic possibility of restoration is not to be confused with the mere hope that a parent's situation may improve.

- The possibility must be 'realistic', that is, it must be real or practical. The possibility must not be fanciful, sentimental or idealistic, or based upon 'unlikely hopes for the future'. It needs to be 'sensible' and 'commonsensical’.

- It is at the time of the determination that the Court must make the assessment. It must be a realistic possibility at that time, not merely a future possibility.

- It is going too far to read into the expression a requirement that a parent must always at the time of hearing have demonstrated participation in a program with some significant "runs on the board": *In the matter of Campbell* [2011] NSWSC 761 at [56].

- There are two limbs to the requirements for assessing whether there is a realistic possibility of restoration. The first requires a consideration of the circumstances of the child or young person. The second requires a consideration of the evidence, if any, that the parent(s) are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care.

- The determination must be undertaken in the context of the totality of the *Care Act*, in particular the objects set out in s 8 and other principles to be applied in its administration, including the notion of unacceptable risk of harm.

Permanency planning

32. Where the Secretary assesses that there is a realistic possibility of restoration to a parent, and the Court accepts that assessment, the Secretary is to prepare a permanency plan[17] that includes a description of the minimum outcomes that need to be achieved before the child is returned to the parent, services to be provided to facilitate restoration, and a statement of the length of time during which restoration should be actively pursued[18].

33. If the Secretary assesses that there is no realistic possibility of restoration to a parent, the Secretary is to prepare a permanency plan for another suitable long term placement in accordance with the permanent placement principles discussed above, as set out in s 10A of the *Care Act.*

34. Permanency planning means the making of a plan that aims to provide a child with a stable, preferably permanent, placement that offers long-term security and meets their needs[19]. The Court must not make a final Care order unless it expressly finds that permanency planning has been appropriately and adequately addressed[20].

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[17] Children and Young Persons (Care and Protection) Act 1998: s 83(2)

[18] Children and Young Persons (Care and Protection) Act 1998: s 84

[19] Children and Young Persons (Care and Protection) Act 1998: s 78A(1)

[20] Children and Young Persons (Care and Protection) Act 1998: s 83(7)

35. The permanency plan must have regard to the principle of the need for timely arrangements, the younger the child, the greater the need for early decisions, and must avoid the instability and uncertainty that can occur through a succession of different placements or temporary care arrangements.[21]

36. The planning must also make provision for the allocation of parental responsibility, the kind of placement proposed, the arrangements for contact, and the services that need to be provided[22].

37. A permanency plan does not need to provide details as to the exact placement in the long-term, but must be sufficiently clear and particularised so as to provide the Court with a reasonably clear picture as to the way in which the child's needs, welfare and well-being will be met in the foreseeable future[23].

38. If the child is an Aboriginal or Torres Straits Islander there are particular additional requirements to be addressed. The permanency planning must address how the plan has complied with the principles of participation and self-determination set out in s 13 of the *Care Act.*[24] It should also address the principle set out in s 9(2)(d) which requires that the child's identity, language and cultural ties be, as far as possible, preserved. Proper implementation requires an acknowledgement that the cultural identity of an Aboriginal child or young person is 'intrinsic' to any assessment of what is in the child's best interests.[25] It follows that the need to consider Aboriginality and ensure the participation of families and communities must be applied across all aspects of child protection decision making.

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[21] Children and Young Persons (Care and Protection) Act 1998: s 78A(1)

[22] Children and Young Persons (Care and Protection) Act 1998: s 78

[23] Children and Young Persons (Care and Protection) Act 1998: s 78A(2A)

[24] Children and Young Persons (Care and Protection) Act 1998: s 78A(3)

[25] *Department of Human Services and K Siblings* [2013] VChC 1 per Magistrate B. Wallington at p.4

Parental responsibility

39. Parental responsibility means all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children[26]. The primary care-giver is the person primarily responsible for the care and control of a child, including day-to-day care and responsibility.

40. If the Children's Court finds that a child is in need of care and protection, it may make a variety of orders allocating parental responsibility, or specific aspects of parental responsibility[27].

41. For example, the Court can allocate complete responsibility to the Minister, or allocate only some aspects to the Minister and other aspects to the parents, or some other person. Or it might make orders for shared responsibility between the Minister and others[28].

42. The specific aspects of parental responsibility that might be separately or jointly allocated are unlimited, but include residence, contact, education, religious upbringing, and medical treatment[29].

43. When allocating parental responsibility, the Court is required to give particular consideration to the principle of the least intrusive intervention, and be satisfied that any other order would be insufficient to meet the needs of the child[30].

44. Where a person is allocated all aspects of parental responsibility, the Court may make a guardianship order: see sections 79A – 79C.

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[26] Children and Young Persons (Care and Protection) Act 1998: s 3

[27] Children and Young Persons (Care and Protection) Act 1998: s 79(1)

[28] Children and Young Persons (Care and Protection) Act 1998: s 81.

[29] Children and Young Persons (Care and Protection) Act 1998: s 79(2)

[30] Children and Young Persons (Care and Protection) Act 1998: s 79(3)

Out-of-home care

45. Where the Secretary assesses that there is no realistic possibility of restoration, a permanency plan for another suitable long-term placement is submitted to the Court: s 83(3). The Secretary may consider whether adoption is the preferred option: s 83(4).

46. A long-term placement following the removal of a child which provides a safe, nurturing and secure environment may be achieved by placement with a member or members of the same kinship group as the child or young person, or placement with an authorised carer: s 3.

47. Out-of-home care means residential care and control provided by a person other than a parent, at a place other than the usual home: s 135.

48. Decisions concerning out-of-home placement of children in need of care and protection are not decisions that the Court undertakes lightly or easily. But at the end of the day, a risk assessment is required, in accordance with the principle that the safety, welfare, and well-being of the children are paramount.

49. The permanency plan need not provide details as to the exact placement, but must provide sufficient detail to enable the Court to have a reasonably clear understanding of the plan: s 83(7A).

50. The permanency plan will generally consist of a care plan: s 80, together with details of other matters about which the Court is required to be satisfied. The care plan must make provision for certain specified matters: s 78. These are:

    (a) the allocation of parental responsibility between the Minister and the parents of the child for the duration of any period of removal;

(b) the kind of placement proposed, including:

(i) how it relates in general terms to permanency planning,

(ii) any interim arrangements that are proposed pending permanent placement and the timetable proposed for achieving a permanent placement,

(c) the arrangements for contact between the child and his or her parents, relatives, friends and other persons connected with the child,

(d) the agency designated to supervise the placement in out-of-home care,

(e) the services that need to be provided to the child or young person.

Contact

51. Importantly, where there is not to be a restoration, the permanency planning must also include provision for appropriate and adequate arrangements for contact[31].

52. In addition, the Court may, on application, make orders in relation to contact, including orders for contact between children and their parents, relatives or other persons of significance but only for a maximum period of up to 12 months. The Court may make a range of contact orders, both as to frequency and duration, and whether or not the contact should be supervised[32].

[31] Children and Young Persons (Care and Protection) Act 1998: s 9(2)(f), s 78(2)

[32] Children and Young Persons (Care and Protection) Act 1998: s 86

53. The introduction of s 86 into the *Care Act* in 2000 permitted the Children's Court, for the first time, to make contact orders beyond the life of the particular proceedings. The section does not, however, create any right or other entitlement to contact in Care cases. Nor, in my view, does it create any presumption that contact should exist. Contact, although recognised in s 9(2)(f), remains subject always to the safety welfare and well-being of the child. An order under s 86 mandating contact arrangements should, therefore, only be used sparingly, in cases of demonstrated need, such as intransigence, inflexibility, or a failure to have proper regard to the needs and best interests of the child.

54. The issue of appropriate contact for children who have been permanently removed from the care of their parents, particularly young children, remains vexed, and there continues to be a wide range of opinion as to the value of contact.

55. Perceived benefits to be derived by children from contact include developing and continuing meaningful relationships. On the other hand, contact can have an unsettling effect on a child, act as a distraction, impede attachment to new carers, and disrupt the placement.

56. It is generally accepted that a child benefits from some contact with the family of origin (except in extreme cases). Much depends on the level of trust and co-operation that exists between the carers and the birth family. In some cases the birth family can play a positive and supportive role. In other cases, members of the birth family can put the stability of the placement at risk. There is a strong body of opinion that contact should not interfere with a child's growing attachment to the new family. The younger the child, and the less time the child has been with the birth parents, the less the need for other than minimal contact, for identification purposes.

57. There are some relevant judicial pronouncements that guide the resolution of contact issues, including the decisions in *Re Liam* [2005] NSWSC 75, *George v Children's Court of NSW* [2003] NSWCA 389, and *Re Felicity (No 3)* [2014] NSWCA 226 at [42].

58. In 2011 the Children's Court issued Contact Guidelines designed to provide assistance to Judicial Officers, practitioners and parties, which were based upon available research and the Court's "accumulated expertise and experience as a specialist court" in Care proceedings.

59. The issue of contact in Care cases requires the consideration of a range of factors, having regard to the exigencies and circumstances of the particular case, both advantageous and disadvantageous, and balancing the benefits against the risks, the primary focus being on the needs and best interests of the child, and any risk of unacceptable harm: *In the matter of Helen* [2004] CLN 2.

60. The decision should be based on relevant, reliable and current information.

61. Factors include the level of attachment to the relevant member of the birth family, the degree of animosity displayed by the birth family against the carers, the level of demonstrated co-operation and engagement with the carers, and the commitment to supporting the placement, the degree of any abusive experience while in the care of the birth family and any ongoing emotional sequelae, the competing demands of the children's educational, cultural, social and sporting activities, the proposed location of the contact, the travel and other disruption involved, the quality of the contact, the safety of the children during contact, and any other risk factors associated with contact, including the potential for denigration of the carers or other undermining of the placement, and the potential for other negative persons or influences to be present at the visit.

62. Preferably, contact should be left to the discretion of the person having parental responsibility, taking into account the advice of any professionals retained to assist with the children and the views of all those affected, including the children themselves (having regard to their age, their level of emotional and psychosocial development, and other factors).

63. The regime for contact should be flexible, recognizing that circumstances change as children grow older and their emotional, social and other needs develop.

64. Some relevant statements in the Children's Court Guidelines are:

"For some children the benefit of contact will be primarily that they understand who they are in the context of their birth family and cultural background. Contact might also help ensure that the child has a realistic understanding of who their parent is and that the child does not idealise an unsuitable parent and develop unrealistic hopes of being reunited with the parent."

"The focus must always be on the needs of the child and what is in the best interests of the child. How will the child benefit from contact with parents and siblings? Some benefit may be achieved over a long term, i.e. by providing the foundation for a relationship between the child and the parent which will develop later."

"Younger children will usually need more frequent contact for a shorter duration than older children to maintain a relationship. Younger children especially should not be subjected to long travel to attend contact."

"Children and carer families will have their own commitments and patterns involving such things as sport, cultural activities, spending time with friends and church attendance."

"It is important to ensure that a child is not made to feel greatly different from others in the household because they are at contact rather than participating in carer family events. It is also important that the child does not resent attendance at contact because it takes them away from something that they enjoy doing."

"It is very important to see children in the context of their extended family and not just their parents. Particular attention should be paid to supporting sibling relationships. Even if extended family members are unable to care for a child it is still likely that contact will be beneficial - providing information and family and cultural identity. Existing healthy relationships should be supported even if a child is to remain in out-of-home care."

"Balancing extended family contact and placement stability and normality requires careful consideration. For example, what would be usual contact with grandparents if the child were not in care?"

"Contact can occur in other ways than face-to-face. In some situations it will be necessary to limit or prohibit indirect contact or to ensure that it is supervised. It may also be necessary to prohibit a parent from making any reference to the child on a social networking website. Alternatively, especially if the parent is at some distance from the child, the use of electronic communication should be encouraged."

"A long-term contact order may create problems as a child's circumstances change, particularly if the contact is to be relatively frequent. School, sport, cultural activities and friendship dynamics are just some of the factors which change over time. As a child gets older less frequent but longer contact may be appropriate."

"The need for contact to be supervised may also change as the child and the parents' circumstances change."

PARTICULAR ASPECTS OF THE CARE JURISDICTION

Practice and procedure

65. Care proceedings, including appeals, are to be conducted in closed court: s 104B, and the name of any child or young person involved, or reasonably likely to be involved, whether as a party or as a witness, must not be published: s 105(1)

66. This prohibition extends to the periods before, during and after the proceedings. The prohibition includes any information, picture or other material that is likely to lead to identification: s 105(4).

67. There are exceptions, such as where a young person (i.e. a person aged 16 or 17) consents, where the Children's Court consents, or where the Minister with parental responsibility consents: s 105(3).

68. The media is entitled to be in Court for the purpose of reporting on proceedings, subject to not disclosing the child's identity. But, the Court has a discretion to exclude the media. In my view, the discretion would only be exercised in exceptional circumstances, because the provisions of s 105 of the *Care Act* are usually sufficient protection: *R v LMW* [1999] NSWSC 1111.

69. Under the common law principles of open justice, the balance would lie in favour of the newspaper: *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* [1986] 5 NSWLR 465 at p 476 at G. In *McFarlane v DoCS; ex parte Nationwide News* [2008] NSWDC 16, I held that the common law principle of open justice is secondary to the principles in s 9(a) of the *Care Act*, in particular the paramountcy principle. In that case, I held that the newspaper, which had previously published material tending to identify the children, had not satisfied me that this sort of publication was not likely to re-occur.

70. I excluded the reporter from remaining in Court. I went on to say:

"However, in the interests of a balancing exercise and applying the principle of open justice to the extent that it applies subject to s 9(a), I would be prepared to allow this newspaper to come back with some evidence which might convince me that it would be appropriate for me to be satisfied that, with acceptable undertakings, there could be a basis upon which I might allow its reporters to remain in court during the hearing."

Interestingly, the newspaper concerned did not take up that invitation.

71. Care and protection proceedings, including appeals, are not to be conducted in an adversarial manner: s 93(1).

72. The proceedings are to be conducted with as little formality and legal technicality and form as the circumstances permit: s 93(2).

73. In *Re Emily v Children's Court of NSW* [2006] NSWSC 1009 the Supreme Court set out the manner in which Care proceedings are to be dealt with by the Court.

"The learned Magistrate was required by the explicit terms of the *Care Act* to deal with the matter before him in the manner for which express provision is made in, relevantly, sections 93, 94 and 97 of the *Care Act*. It is no doubt the case that those sections, broadly expressed though they are, do not empower a Children's Court Magistrate to take some sort of free-wheeling approach to an application, proceeding in virtually complete disregard of what ordinary common-sense fairness might be thought to require in the particular case. **The (Court) is, however, both empowered and required to proceed with an informality and a wide-ranging flexibility that might be thought not entirely appropriate in a more formally structured Court setting and statutory context**." (Emphasis added).

74. The Court is not bound by the rules of evidence, unless it so determines: s 93(3). Nevertheless, the Court must draw its conclusions from material that is satisfactory, in the probative sense, so as to avoid decision-making that might appear capricious, arbitrary or without foundational material: *JL v Secretary, Department of family and Community Services* [2015] NSWCA 88 at [148].

75. In *Sudath v Health Care Complaints Commission* [2012] NSWCA 171 Meagher JA said at [79] in relation to a similar provision governing a tribunal :

> "Although the Tribunal may inform itself in any way "it thinks fit" and is not bound by the rules of evidence, it must base its decision upon material which tends logically to show the existence or non-existence of facts relevant to the issues to be determined.
>
> Thus, material which, as a matter of reason, has some probative value in that sense may be taken into account: *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482 at 491-493; *The King v The War Pensions Entitlement Appeal Tribunal; Ex parte Bott* [1933] HCA 30."

76. It is difficult to imagine circumstances in which a court might make such a determination that the rules of evidence should apply. The only situation that has so far occurred to me, apart from the rule as to relevance, relates to the provisions of the *Evidence Act* 1995 concerning self-incrimination: s 128.

77. The standard of proof in Care proceedings is on the balance of probabilities: s 93(4) of the *Care Act*. The High Court decision in *Briginshaw v Briginshaw* [1938] HCA 34 is relevant in determining whether the burden of proof, on the balance of probabilities, has been achieved: *Secretary of Department of Community Services; Re "Sophie"* [2008] NSWCA 250.

78. The provisions of the United Nations Convention on the Rights of the Child 1989 (UNCROC) are capable of being relevant to the exercise of discretions under the *Care Act*: *Re Tracey* [2011] NSWCA 43.

79. The circumstances in *Re Tracey* were unusual and unique. Nevertheless, it may be important to draw the parties out on the question of whether any aspect of CROC is specifically relied upon. If so, it will need to be addressed, to the extent that it raises some question for additional consideration. Otherwise, it is prudent to advert to UNCROC, in any Reasons, as not having any additional relevance. I usually add a paragraph along the following lines:

> "Most, if not all, of the provisions in UNCROC have been incorporated into or are reflected in the *Care Act*. The parties in the present matter made no submissions based on the Convention.
>
> Nor did anything occur to me as to any provision in UNCROC such that there was some different requirement, some additional principle, or some gloss that required the Court to have particular regard to, in determining this case or in considering the permanency planning proposed, such that I was required to go beyond the *Care Act* and the case law interpreting it."

80. The Court of Appeal approved a similar statement in *Re Kerry (No 2)* [2012] NSWCA 127.

81. More recently, in *Re Henry; JL v Secretary, DFaCS* [2015] NSWCA 89 at [208] - [220], Justice McColl discussed the application of the Convention, confirming that its provisions are capable of being relevant in Care proceedings but the circumstances in which that might occur were limited. Not all failures to refer to CROC in the context of the *Care Act* will attract relief on appeal: at [217].

Expeditious administration of proceedings

82. Time is of the essence for the disposal of care cases. The *Care Act* provides that all Care matters are to proceed as expeditiously as possible: s 94(1). The Court is required to avoid adjournments, which should only be granted where it is in the best interests of the child or there is some other cogent or substantial reason: s 94(4). The Children's Court aims to complete 90% of Care cases within 9 months of commencement and 100% of cases within 12 months.

83. The timetable for each matter is to take account of the age and developmental needs of the child: s 94(2). Directions should be made with a view to ensuring that the timetable is kept: s 94(3). Practice Note 5 deals with Case Management in Care Proceedings. It deals with each of the stages of a Care application and provides for a series of standard directions at [15.6] with prescribed times for the completion of various interlocutory processes, leading to the earliest resolution or allocation of a hearing date in contested matters.

Child legal representatives

84. The *Care Act* provides for the participation of a child or young person in the proceedings through their representation by either an independent legal representative (ILR) or a direct legal representative (DLR): s 99A. An ILR will be appointed to act as the representative for a child under 12: s 99B. An ILR must consult with the child, but their duty is to act in accordance with the paramountcy principle. Whereas, a DLR may be appointed for any child at the age of 12 or over who is capable of giving proper instructions: s 99C. The DLR must then advocate as instructed by the child.

85. In addition to these provisions, the Law Society of New South Wales has prepared 'Representation Principles for Children's Lawyers'.[33] These guidelines set out a number of important duties and obligations for practitioners representing children.

86. I will not traverse the document in full, however I will canvass some of the principles these guidelines detail. The guidelines set out the following: a definition of who is the client; the role of the practitioner; determining whether a child has the capacity to give instructions; taking instructions and appropriate communication; duties of representation; confidentiality; conflicts of interest; access to documents and reports; interaction with third parties and ending the relationship with the child.

87. Importantly, Principle D6 (dealing with communication) emphasises the importance of tailored communication to practitioners. The commentary to the principles state:

> "It is important that practitioners are prepared and informed before any meeting with the child. The child must always be treated with respect – this involves listening and giving the child the opportunity to express him or herself without interrupting, addressing the child by his or her name, accepting that the child is entitled to his or her own view etc."[34]

Support persons

88. Under s 102, a participant in proceedings before the Children's Court may, with leave of the Children's Court, be accompanied by a support person. Leave must be granted unless the support person is a witness or the Court, having regard to the wishes of the child or young person, is of the view that leave should not be granted or if there is some other reason to deny the application.

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[33] The Law Society of New South Wales, 'Representation Principles for Children's Lawyers', 4th edition, 2014.
[34] Above n 33 at p. 22

89. However, the Children's Court can withdraw leave at any time if a support person does not comply with any directions given by the Court. In addition, a support person cannot give instructions on behalf of the participant.

Examination and Cross-examination

90. The *Care Act* provides that a Children's Magistrate may examine and cross-examine a witness in any proceedings to the extent that the Children's Magistrate considers appropriate in order to elicit information relevant to the exercise of the Children's Court's powers.[35]

91. The *Care Act* also provides guidance as to the nature of examination and cross-examination of witnesses.[36]

92. This guidance accords with the inquisitorial nature of Care proceedings insofar as proceedings are required to be conducted in a non-adversarial manner, with as little formality and legal technicality and form as the circumstances permit.

93. The Act prohibits the use of offensive or scandalous questions by excusing a witness from answering a question that the Court regards to be offensive, scandalous, insulting, abusive or humiliating unless the Court is satisfied that it is *essential* to the interests of justice that the question be asked or answered.[37]

94. Further, oppressive or repetitive examination of a witness is prohibited unless the Court is satisfied that it is *essential* in the interests of justice for the examination to continue or for the question to be answered.[38]

[35] Children and Young Persons (Care and Protection) Act 1998: s 107(1)
[36] Children and Young Persons (Care and Protection) Act 1998: s 107
[37] Children and Young Persons (Care and Protection) Act 1998: s 107(2)
[38] Children and Young Persons (Care and Protection) Act 1998: s 107(3)

Joinder

95. In proceedings under the *Care Act*, the parties will generally comprise the Secretary of the Department, the child or children, the parent(s), the step-parent(s), and the legal representative, being the Independent Legal Representative for children under 12, or the Direct Legal Representative for children 12 and over, up to the age of 18.

96. Other persons having a genuine concern for the safety, welfare and well-being of the child(ren) may be given leave to appear in the proceedings, or be legally represented, and examine and cross-examine witnesses.[39]

97. Others who might be significantly impacted by a decision of the Children's Court, not being parties to the proceedings, are to be given "an opportunity to be heard on the matter of significant impact".[40] Historically, such persons were generally not made parties, but could present an affidavit. They could not, however, cross-examine or call witnesses of their own.

98. There has been something of a change in approach in relation to the joinder of parties to Care proceedings in recent times, partly driven by the transfer of casework to the NGO sector, but also as a result of some recent pronouncements by superior courts. The Court is now increasingly receptive to joinder applications and more likely to make orders than in the past. In *Re June (No 2)* [2013] NSWSC 1111 ("*Re June"*) McDougall J clarified the distinction between s 87 and s 98(3) of the *Care Act*:

"The second point to note is that the opportunity to be heard is not the opportunity to participate in the proceedings either as a party as of right (s 98(1)) or as someone given leave (s 98(3)).

[39] Children and Young Persons (Care and Protection) Act 1998: s 98(3)
[40] Children and Young Persons (Care and Protection) Act 1998: s 87(3)

Thus, it does not follow that the opportunity to be heard includes the right to examine or cross-examine witnesses at least generally. However, if the question of significant impact is one that is the subject of evidence, and if there are direct conflicts in that evidence, then in a particular case, the opportunity to be heard may extend to permitting cross-examination in that particular point."[41]

99. The more recent decision in *Bell-Collins v Secretary, Department of Family and Community Services* [2015] NSWSC 701, provides further clarification.

100. During case management, the Children's Magistrate had refused the application of the grandparents to be joined as parties. At the hearing, which came before me at the Children's Court at Woy Woy[42], I gave the grandparents an extensive opportunity to be heard, under s 87(1).

101. In the *de novo* appeal to the Supreme Court, the grandparents renewed their application for joinder and the matter was considered by Justice Slattery. The significant aspect of Slattery J's decision was his distillation of the distinction between the opportunity to be heard under s 87(1) and the granting of leave to appear under s 98(3):

"In section 87(1) the threshold is one to ensure that non-parties who may suffer adverse impacts from Care Act orders will receive procedural fairness before such orders are made. The focus is on 'impact on a person."[43]

"But the threshold for s 98(3) is more child-centred.

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[41] *Re June (No 2)* [2013] NSWSC 1111 at [186]-[187]

[42] *Department of Family and Community Services (NSW) and the Bell-Collins Children* [2014] NSWChC 5

[43] *Bell-Collins v Secretary, Department of Family and Community Services* [2015] NSWSC at [33]

The s 98(3) right is only available to a person who in the Court's opinion "has a genuine concern for the safety, welfare and well-being of the child". It is perhaps because the s 98(3) threshold is more altruistic than that under s 87 that the Care Act can afford a wider scope to participate to those who receive a grant of s 98(3) leave. Persons meeting s 98(3) leave will sometimes be, as the great grandparents are in this case, people who can by their participation fill an evidentiary gap in the proceedings that it may be in the best interests of that child to see filled in the proceedings. In my view that is the case here."[44]

102. Accordingly, Slattery J granted the grandparents leave on terms under s 98(3). The grandparents were only granted leave to cross-examine and adduce evidence about their own suitability as alternative carers for the children.

103. Finally, I wish to draw attention to a decision by Magistrate Schurr in 2003 in which an NGO, Anglicare, was joined as a party to Care proceedings: *In the matter of 'Pamela'* 2003 CLN 3.

104. In that matter, the Department of Community Services (as it was then designated) sought an order from the Court revoking the leave of Anglicare to appear as a party. The Secretary argued that the NGO had insufficient interest in the proceedings and that it was probable that the positions taken by the parties would be duplicated.

105. Magistrate Schurr outlined Anglicare's involvement in proceedings as follows:

"In late 1998 the Department of Community Services delegated to Anglicare the role of foster care agency, a role it continues to date. Anglicare does not exercise any powers of parental responsibility for this child, and these powers remain with the Minister.

[44] Ibid at [34]

Anglicare workers do, however, supervise the foster carers, coordinate access by the birth family and liaise with the Department of Community Services through case conferences."[45]

106. Anglicare had originally sought leave to be joined as a party to argue for an "independent assessment of the child and family members." Anglicare argued that once leave was granted there was no limit on their role in the proceedings.

107. The Department argued that leave should only be granted to those persons with rights, powers and duties relating to children, by reference to the objects in s 8(a) of the *Care Act*. It was argued that Anglicare had neither parental responsibility nor the day to day care of the child and could not be granted leave.

108. Magistrate Schurr concluded that Anglicare's involvement with the child was sufficient to bring it within the scope of s 98(3).

Rescission and variation of Care orders: s 90

109. Peculiar to the Care jurisdiction is the power to rescind or vary final Care orders, at a later date[46]. This statutory power enables a review of orders without the need for an appeal, where there has been a "significant change in any relevant circumstances" since the original order.

110. Applications for rescission or variation of Care orders require the Applicant to obtain leave.

111. A refusal of leave is an "order" for the purposes of section 91 (1) of the *Care Act*: *S v Department of Community Services* [2002] NSWCA 151 at [53]. Refusal to grant leave may, therefore, be the subject of an appeal de novo from the Children's Court.

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[45] *In the matter of 'Pamela'* 2003 CLN 3 at p.4
[46] Children and Young Persons (Care and Protection) Act 1998: s 90

112. The former President of the Children's Court expressed the view that if, on appeal, leave is granted, the hearing of the substantive application should then be remitted to the Children's Court for hearing[47]:

"With respect to appeals against a refusal by the Children's Court to grant leave under section 90(1), in my view if the District Court upholds the appeal and grants leave it should remit the proceedings to the Children's Court to determine the substantive section 90 application. Having granted leave the District Court would not have jurisdiction to hear the substantive application as the only "order" before the court (being the subject of an appeal under section 91 (1)) is the order refusing leave. Further, if the District Court proceeded to hear the substantive section 90 application following it granting leave, the unsuccessful party on the substantive application in the District Court would be deprived of a statutory right of appeal."

113. The *Care Act* sets out a number of additional matters that the Court *must* take into account before granting leave: s 90 (2A):

(a) the nature of the application, and

(b) the age of the child or young person, and

(c) the length of time for which the child or young person has been in the care of the present carer, and

(d) the plans for the child, and

(e) whether the applicant has an arguable case, and

(f) matters concerning the care and protection of the child or young person that are identified in:

[47] Per Judge Marien in a Paper to the 2011 District Court Judges Conference

(i) a report under section 82, or

(ii) a report that has been prepared in relation to a review directed by the Children's Guardian under section 85A or in accordance with section 150."

114. Once leave is granted, the *Care Act* goes on to prescribe another set of requirements that must be taken into account when the rescission or variation sought relates to an order that placed the child under the parental responsibility of the Minister, or that allocated specific aspects of parental responsibility from the Minister to another person: s 90(6).

115. The matters specified in s 90(6) are:

(a) the age of the child or young person,

(b) the wishes of the child or young person and the weight to be given to those wishes,

(c) the length of time the child or young person has been in the care of the present caregivers,

(d) the strength of the child's or young person's attachments to the birth parents and the present caregivers,

(e) the capacity of the birth parents to provide an adequate standard of care for the child or young person,

(f) the risk to the child or young person of psychological harm if present care arrangements are varied or rescinded.

116. In the decision by Justice Slattery *In the matter of Campbell* [2011] NSWSC 761, his Honour discussed the concepts of '*a relevant circumstance'* and '*significant*' change in a relevant circumstance in the context of an application for leave.

117. As to what constitutes a "*relevant circumstance*" Slattery J said:

"The range of relevant circumstances will depend upon the issues presented for the Court's decision. They may not necessarily be limited to a 'snapshot' of events occurring between the time of the original order and the date the leave application is heard. This broader approach reflects the existing practice of the Children's Court on s 90 applications: see for example In the matter of *OM, ZM, BM and PM* [2002] CLN 4."

118. As to what constitutes a "*significant*" change in a relevant circumstance, he referred to *S v Department of Community Services (DoCS)* [2002] NSWCA 151 where the Court of Appeal held that the change must be "*of sufficient significance to justify the consideration [by the court] of an application for rescission or variation of the order*."

Slattery J said that there are dangers in paraphrasing the s 90 (2) statutory formula for the exercise of the discretion beyond this statement of the Court of Appeal: [43]. He also made it clear that the Court's discretion to grant leave is not only limited by s 90(2), but also by the requirement to take into account the list of considerations in s 90 (2A). Therefore, establishing a significant change in a relevant circumstance under s 90 (2) is a necessary, but not a sufficient, condition for the granting of leave.

119. As to the requirement of an "*arguable case*", Slattery J held that this does not relate to the application for leave, but relates to the case for the rescission or variation sought, taking into account the matters in s 90 (6). Therefore, the matters in s 90 (6) must be taken into account in determining whether the applicant for leave has an arguable case. Slattery J agreed with Judge Marien that the interpretation of *"arguable case",* as expressed in *Dempster v National Companies and Securities Commission* (1993) 9 WAR 215, should be adopted; namely, that an arguable case is a case that is *"reasonably capable of being argued"* and has *"some prospect of success"* or *"some chance of success"*.

120. These principles were considered and applied in *Kestle v Department of Family and Community Services* [2012] NSWChC 2, in which a helpful summary of the principles to be applied in a s 90 application is set out [22]:

(i) In determining whether to grant leave the Court must first be satisfied under s 90 (2) that there has been a significant change in a relevant circumstance since the Care order was made or last varied.

(ii) The range of relevant circumstances will depend upon the issues presented for the Court's decision. They may not necessarily be limited to just a 'snapshot' of events occurring between the time of the original order and the date the leave application is heard.

(iii) The change that must appear should be of sufficient significance to justify the Court's consideration of an application for rescission or variation of the existing Care order: *S v Department of Community Services* [2002] NSWCA 151

(iv) The establishment of a significant change in a relevant circumstance is a necessary but not a sufficient condition for leave to be granted. The Court retains a general discretion whether or not to grant leave.

(v) Having been satisfied that a significant change in a relevant circumstance has been established by the applicant, the Court must take into account the mandatory considerations set out in s 90 (2A) in determining whether to grant leave.

(vi) The s 90 (2A) mandatory considerations include that the applicant has an "arguable case" for the making of an order to rescind or vary the current orders.

(vii) An arguable case means a case "which has some prospect of success" or "has some chance of success".

(viii) In determining whether an applicant has an arguable case and whether to grant leave, the Court may need to have regard to the mandatory considerations in s 90 (6).

121. The judgment went on to specifically consider whether leave could be granted on a specific basis.

122. The mother had submitted that it was not open to the Court to grant leave on a discrete issue such as contact.

123. She submitted that once leave is granted, all issues (including restoration and contact) may be re-visited by the Court at the substantive hearing.

124. The Court did not accept this argument and held that the Court has a wide discretion under s 90 (1) to grant leave, referring to the decision of Mitchell CM in *Re Tina* [2002] CLN 6, and said at [53]:

"In my view, the wide discretion available to the court in granting leave under s 90(1) allows the court to also exercise a wide discretion as to the terms and conditions upon which leave is granted.

Accordingly, the Court may restrict the grant of leave to a particular issue or issues. This would be appropriate, for example, where the Court determines that an applicant parent does not have an arguable case for restoration of the child to their care, but does have an arguable case on the issue of increased parental contact."

125. In a careful judgment in *Re Bethany* [2012] NSWChC 4 Children's Magistrate Blewitt AM applied these principles at [49] - [50].

Costs in Care proceedings

126. Costs in Care proceedings are not at large. The *Care Act* limits the power to make an order for an award of costs. S 88 provides:

> ”The Children’s Court cannot make an order for costs in care proceedings unless there are exceptional circumstances that justify it in doing so”

127. Under the common law a successful party has a “reasonable expectation” of being awarded costs against the unsuccessful party: *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 120; [1998] HCA 11 at [134]. Fairness dictates that the unsuccessful party typically bears the liability for costs: *Oshlack* at [67]. This means that the successful party in litigation is generally awarded costs, unless it appears to the Court that some other order is appropriate, either as to the whole or some part of the costs: *Currabubula Holdings Pty Ltd v State Bank of NSW* [2002] NSWSC 232.

128. The common law position is, however, displaced by the *Care Act*, which provides for a comprehensive statutory scheme for care proceedings in which the power of the Court to award costs is circumscribed by s 88, so that costs may only be awarded where exceptional circumstances exist.

129. The policy basis behind the restriction on the power to award costs is self-evidently based in the notion that parties involved in care proceedings should have as full an opportunity to be heard as is reasonably possible, and should not be deterred from participating in such proceedings by adverse pecuniary consequences, the safety, welfare and well-being of the child being the paramount concern[48].

[48] The Secretary, DFaCS (NSW) and the Knoll Children (Costs) [2015] NSWChC 2

130. The meaning of “exceptional circumstances” in the context of s 88 of the *Care Act*, and when they might exist, has been considered and discussed in various decisions, most notably in the judgments in *SP v Department of Community Services* [2006] NSWDC 168, *Department of Community Services v SM and MN* [2008] NSWDC 68, *XX v Nationwide News Pty Ltd* [2010] NSWDC 147 and *Director-General of the Department of Family and Community Services v Amy Robinson-Peters* [2012] NSWChC 2.

131. I will not review those decisions here, but it may be said that the situations in which “exceptional circumstances” might be found are not exhaustively defined or limited by them.

132. Some general propositions are nevertheless apt: The discretion to award costs must be exercised judicially and “according to rules of reason and justice, not according to private opinion … or even benevolence … or sympathy”: *Williams v Lewer* [1974] 2 NSWLR 91 at 95, and is not to be exercised arbitrarily or capriciously, or on no grounds at all: *Oshlack*, above, at [22].

133. The underlying idea is of fairness, having regard to what the Court considers to be the responsibility of each party for the costs incurred: *Commonwealth of Australia v Gretton* [2008] NSWCA 117 at [121].

134. The Court may have regard to the particular circumstances of the case, including the evidence adduced, the conduct of the parties and the ultimate result: *Knight v Clifton* [1971] Ch 700.

135. The purpose of an order for costs is to compensate the person in whose favour it is made and not to punish the person against whom the order is made: *Allplastics Engineering Pty Ltd v Dornoch Ltd* [2006] NSWCA 33 at [34]; *Dr Douglass v Lawton Pty Ltd (No 2)* [2007] NSWCA 90 at [22].

136. Where an order for costs is made, I suggest that the order specify whether the costs are awarded on an indemnity basis, or that the costs should be quantified on the ordinary basis, as defined in s 3 of the *Civil Procedure Act* 2005.

137. I am also of the view that the Children's Court has the power to award a fixed sum of costs. The various provisions of the *Care Act*, including s 93(2), are sufficient to give the Children's Court the power to do so[49].

138. Judicial Officers have traditionally been reluctant to order the payment of specified sums of costs. Nevertheless the cases suggest a number of circumstances in which it might be appropriate to make such an order, such as the avoidance of the expense, delay and aggravation involved in protracted litigation which might arise out of taxation (or assessment): *Sherborne Estate (No 2); Vanvalen v Neaves* 65 NSWLR 268; [2005] NSWSC 1003 at [38]; *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* (2006) 236 ALR 665; [2008] ASAL 55-176; [2007] ATPR 42-138; [2006] FCA 1427 at [121]; *Keen v Telstra Corp (No 2)* [2006] FCA 930 at [4].

139. In my view, it will generally be appropriate to make orders for specified sums of costs in Care proceedings.

140. But, the power is to be exercised judicially: *Idoport Pty Ltd v National Australia Bank Ltd* [2007] NSWSC 23 at [8] - [10]; and there must be proper factual foundation for the order: *Roberts v Rodier* [2006] NSWSC 1084 at [40] - [44], *Ventouris Enterprises Pty Ltd v DIB Group Pty Ltd (No 4)* [2011] NSWSC 720.

141. The Court arrives at an estimate of the proper costs by examining, on the basis of particulars provided, whether the quantification is logical, fair and reasonable: *Lo Surdo v Public Trustee* [2005] NSWSC 1290 at [7]; *Roberts v Rodier* [2006] NSWSC 1084 at [40] - [44].

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[49] The Secretary, DFaCS (NSW) and the Knoll Children (Costs) [2015] NSWChC 2

142. The Courts have, however, tended to apply a discount, having regard to the "broad-brush" approach involved: *Idoport* at [13]; *Ginos Engineers Pty Ltd v Autodesk Australia Pty Ltd* (2008) 249 ALR 371; [2008] FCA 1051 at [23].

143. The power to award costs in the Children's Court, however, does not extend to awards of costs against non-parties, or legal practitioners[50].

144. There are, however, some exceptions to this principle, which arise under the general law.

145. The exceptions include persons who are not parties in the strict sense, but are closely connected with the proceedings, such as nominal parties: *Burns Philp & Co Ltd v Bhagat* [1993] 1 VR 203 at 217; or "relators": *Wentworth v Attorney-General (NSW)* (1984) 154 CLR 518; or "next friends": *Palmer v Walesby* (1868) LR 3 Ch App 732; and tutors: *Yakmor v Hamdoush (No 2)* [2009] NSWCA 284.

146. Then there are persons who appear in the proceedings for some specific limited purpose, who are in effect a party, for that limited purpose, such as someone appearing to maintain a claim for privilege: *ACP Magazines Pty Ltd v Motion* [2000] NSWSC 1169, or to obtain a costs order: *Wentworth v Wentworth* (2001) 52 NSWLR 602; [2000] NSWCA 350.

147. It might also be arguable that such orders may also be made against persons who are bound by an order or judgment of the Court and fail to comply, or who breach an undertaking given to the Court, or persons in contempt or who commit an abuse of process.

148. These are issues for determination in the future.

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[50] *Director General of the Department of Family and Community Services v Amy Robinson-Peters* [2012] NSWChC 3; *In the matter of Mr Donaghy (Costs)* [2012] NSWChC 11

Cultural planning

149. The *Care Act* is to be administered under the 'paramountcy principle', that is, that the safety, welfare and well-being of the child is paramount.[51] In addition to this paramountcy principle, the *Care Act* sets out other particular principles to be applied in the administration of the *Care Act*.[52]

150. One of these principles is that account must be taken of concepts such as culture, language, identity and community.[53] Additionally, it is a principle to be applied in the administration of the *Care Act* that Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young people with as much self-determination as is possible.[54]

151. Further, Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Secretary, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under the *Care Act* that concern their children and young persons.[55]

152. Finally, a general order for placement of an Aboriginal or Torres Strait Islander child who needs to be placed in statutory out-of-home-care is prescribed.[56] In summary, the order for placement is, with:

(a) a member of the child's or young person's extended family or kinship group, as recognised by the community to which the child or young person belongs,

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51 Children and Young Persons (Care and Protection) Act 1998: s 9(1)
52 Children and Young Persons (Care and Protection) Act 1998: s 9(2)
53 Children and Young Persons (Care and Protection) Act 1998: s 9(2)(d)
54 Children and Young Persons (Care and Protection) Act 1998: s 11
55 Children and Young Persons (Care and Protection) Act 1998: s 12
56 Children and Young Persons (Care and Protection) Act 1998: s 13(1)

(b) a member of the Aboriginal or Torres Strait Islander community to which the child or young person belongs,

(c) a member of some other Aboriginal or Torres Strait Islander family residing in the vicinity of the child or young person's usual place of residence,

(d) a suitable person approved by the Secretary after consultation with:

(i) members of the child's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, and

(ii) such Aboriginal or Torres Strait Islander organisations as are appropriate to the child or young person.

153. Before it can make a final Care order, the Children's Court must be expressly satisfied that the permanency planning for the child has been appropriately and adequately addressed.[57]

154. Permanency planning means the making of a plan that aims to provide a child or young person with a stable placement that offers long-term security.[58] The plan must:

(a) have regard, in particular, to the principle that if a child is placed in out-of-home care, arrangements should be made, in a timely manner, to ensure the provision of a safe, nurturing, stable and secure environment, recognising the child's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made in relation to permanent placement,[59] and

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57 Children and Young Persons (Care and Protection) Act 1998: s 83(7)
58 Children and Young Persons (Care and Protection) Act 1998: s 78A
59 Children and Young Persons (Care and Protection) Act 1998: s 9(2)(e)

(b) meet the needs of the child,[60] and

(c) avoid the instability and uncertainty arising through a succession of different placements or temporary care arrangements.[61]

155. Culture is a critical element in the assessment of what is in a child's best interests and a critical consideration in assuring the safety, welfare and well-being of a child. It is vital that decision makers in child protection matters are provided with sufficient information to be able to appreciate the distinct role culture plays in the identity formation and socialisation of each child.

156. The legislative requirement to address the Aboriginal and Torres Strait Islander Placement Principles and to adequately and appropriately address cultural planning are reminders of the significance of Aboriginal cultural identity in the socialisation of a child.

157. There are various cases over recent years that address the Aboriginal and Torres Strait Islander Principles set out in the *Care Act*. These include: *Re Kerry (No 2)* [2012] NSWCA 127; *Department of Family and Community Services (NSW) re Ingrid* [2012] NSWChC 19; *RL and DJ v DoCS* [2009] CLN 3, *In the matter of Victoria & Marcus* [2010] CLN 2 at [49]; *Re Simon* [2006] NSWSC 1410; *Re Earl and Tahneisha* [2008] CLN 7 and *Shaw v Wolf* [1989] FCR 113

158. I have made numerous comments in past cases in relation to the inadequacy of cultural planning, particularly with respect to Aboriginal children. As I stated in *DFaCS v Gail and Grace* [2013] NSWChC 4:

"The Aboriginal and Torres Strait Islander Principles are in the *Care Act* 1998 for good and well-documented reasons that do not need to be traversed anew in these reasons.

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60 Children and Young Persons (Care and Protection) Act 1998: s 78A(1)(b)

61 Children and Young Persons (Care and Protection) Act 1998: s 78A(1)(c)

They are to be properly and adequately addressed in all permanency planning and other decisions to be made under the Act and in matters before the Children's Court."

159. I am happy to report that in the past year a template for a cultural action planning section in the Care Plan has been developed. The idea behind this template is to ensure that adequate casework is undertaken to appropriately identify a child's cultural origins, and to put in place fully developed plans for the child to be educated, and to fully immerse the child in their culture; including family, wider kinship connections, totems, language and the like.

CARE APPEALS

Procedure

160. A party dissatisfied with a decision of the Children's Court may appeal to the District Court: s 91(1). The decision of the District Court in respect of an appeal is taken to be a decision of the Children's Court and has effect accordingly: s 91(6).

161. The appeal is by way of a new hearing and fresh evidence, or evidence in addition to or in substitution for the evidence on which the order was made by the Children's Court may be given on the appeal: s 91(2). The District Court may decide to admit the transcript or any exhibit from the Children's Court hearing: s 91(3).[62]

162. Judges of the District Court hearing such appeals have, in addition to any functions and discretions that the District court has, all the functions and discretions that the Children's Court has under Chapters 5 and 6 of the *Care Act* i.e. sections 43 to 109X: s 91(4).

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62 Marien J discusses the nature of the appeal in his 2011 paper at [4.1].

163. The provisions of the *Care Act* (Chapter 6) relating to procedure apply to the hearing of an appeal in the same way as they apply in the Children's Court: s 91(8).

164. It is important, therefore, for District Court Judges hearing such appeals to understand the Act, its guiding principles, and its procedural idiosyncrasies.

The Children's Court Clinic

165. The Children's Court Clinic (which I will refer to in short form as the Clinic) is established under the *Children's Court Act* 1987, and is given various functions designed to provide the Court with independent, expert, objective, and specialist advice and guidance.

166. The Court may make an assessment order, which may include a physical, psychological, psychiatric, or other medical examination, or an assessment, of a child: s 53. The Court may also make an order for the assessment of a person's capacity to carry out parental responsibility (parenting capacity): s 54.[63]

167. In addition, the Court may make an order for the provision of other information involving specialist expertise as may be considered appropriate: s 58(3).

168. The Court is required to appoint the Clinic for the purpose of preparing assessment reports and information reports, unless it is more appropriate for some other person to be appointed. The reports are made to the Court, and are not evidence tendered by a party.

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[63] For a more detailed discussion of Assessment Orders see Judge Marien's 2011 paper at [5].

169. It is absolutely critical, therefore, that the Clinician be, and be seen to be, completely impartial and independent of the parties.

170. The Clinic has limited resources. Great care should be exercised in the making of assessment orders and, if made, the purpose should be clearly identified and spelled out for the Clinician. It is important to remember that the Court has a discretion as to whether it will make an assessment order. An assessment order should not be made as a matter of course. In particular, the Court must ensure that a child is not subjected to unnecessary assessment: s 56(2). In considering whether to make an assessment order, the Court should have regard to whether the proposed assessment is likely to provide relevant information that is unlikely to be obtained elsewhere.

171. Having said that, the Court can derive considerable assistance from an Assessment Report. In addition to providing independent expert opinion, the Clinician can provide a hybrid factual form of evidence not otherwise available. Because they observe the protagonists over a period of time, interview parents, children and others in detail and on different occasions, in neutral or non-threatening environments, away from courts and lawyers, untrammelled by court formalities and processes, clinicians can provide the Court with insights and nuances that might not otherwise come to its attention.

172. Thus, a Clinician can provide impartial, independent, objective information not contained in other documents, give context and detail to issues that others may not have picked up on, and which the Court, trammelled by the adversarial process and the 'snapshot' nature of a court hearing, would not otherwise have the benefit of.

173. The Children's Court expects Clinicians to be aware of, apply and adhere to the provisions of the **Expert Witness Code of Conduct** set out at Schedule 7 of the *Uniform Civil Procedure Rules* 2005 (UCPR).

Alternative Dispute Resolution in Care matters

174. Where intervention by Community Services is necessary, it is preferable that the intervention occurs early and at a time that allows for genuine engagement with the whole family, with a view to avoiding, wherever possible, escalation of problems into the Court system. Once cases do need to come to court it remains important that the Court also has processes available that will facilitate bringing the parties together with a view to them coming to a mutually acceptable resolution, that is in the best interest of the child, thereby avoiding lengthy, emotionally draining and often irrevocably divisive formal hearings.

175. Over the past few years, the Children's Court has initiated and entrenched alternative dispute resolution processes, which has involved an expansion and development of the involvement of Children's Registrars in Care matters. Prior to the introduction of these new initiatives the use of ADR in the Children's Court was restricted not only by the resources available, but also by an adversarial culture within the jurisdiction that favoured traditional court processes.

176. The ADR processes in the Children's Court are available in an appeal to the District Court.

177. The Dispute Resolution Conference (DRC) model has now become an integral aspect of Children's Court proceedings

178. The conferences involve the use of a conciliation model. This means Children's Registrars have an advisory, as well as a facilitation role.

179. Conferences are now regularly conducted at the Court by Children's Registrars who have legal qualifications and are also trained mediators: see s 65 of the *Care Act* and are based at Parramatta, Broadmeadow, Campbelltown and Port Kembla Children's Courts, and Lismore and Albury Local Courts.

180. Importantly, however, Children's Registrars will travel to any court throughout the State and conduct DRC's.

181. The DRC process has brought about a significant shift in culture that has impacted on cases in the Children's Court more generally. The Australian Institute of Criminology (AIC) has evaluated the use of ADR in the area of care and protection, and found high levels of participation and satisfaction. Family members involved found the process to be useful, and felt they were listened to and were treated fairly. The AIC evaluation found that approximately 80% of mediations conducted have resulted in the child protection issues in dispute being narrowed or resolved.

182. The timing of a referral of disputed proceedings to a DRC can sometimes be important.

183. Like all referrals for mediation, it is a matter of judgment when to do so. Sometimes it is necessary for the issues to be sufficiently defined to make the mediation viable.

184. On other occasions, it is better to refer as soon as possible, even if all the relevant documentation and information is not necessarily available.

185. The importance of confidentiality in the DRC model was reaffirmed in *Re Anna* [2012] NSWChC 1.

186. In that case the father said something during the DRC that was described by the Secretary as an admission that may have been relevant to the father's capacity to be responsible for the safety, welfare and well-being of his daughter. The Secretary sought leave to file an affidavit by a caseworker who was present at the DRC in which he refers to the alleged admission made by the father.

187. In rejecting the application to file the affidavit, the Court said:

> "A pivotal feature of alternative dispute resolution (ADR) is that, except in defined circumstances, what is said and done in the course of ADR is confidential in the sense that it cannot be admitted into evidence in court proceedings.
>
> This important protection of confidentiality encourages frank and open discussions between the parties outside the formal court process…
>
> The encouragement of frank and open discussion between the parties is particularly important in ADR in child protection cases. ADR provides parents with the opportunity to freely discuss with the Department, in a safe and confidential setting, the parenting issues of concern to the Department and, most importantly, it provides the Department with the opportunity to discuss with the parents in that setting what needs to be done by the parents to address the Department's concerns."

188. The Court went on to say, however, that the protection is not absolute. He referred to a clause in the *Children and Young Persons (Care and Protection) Regulation* 2000. That Regulation has been superseded and the relevant clause is now Clause 19 of the *Children and Young Persons (Care and Protection) Regulation* 2012.

189. Clause 19 of the new *Care Regulation* defines "alternative dispute resolution", which includes a DRC. It goes on to provide that evidence of anything said or of any admission made, during alternative dispute resolution is not admissible in any proceedings.

190. Similarly, a document prepared for the purposes of, or in the course of, or as a result of, alternative dispute resolution is not admissible in evidence in any proceedings before any court, tribunal or body.

191. Clause 19(5) enables the disclosure of information obtained in connection with the alternative dispute resolution, but only in very limited circumstances, and only by the Children's Registrar conducting the DRC. The permissible circumstances include where the relevant persons consent, or in accordance with a requirement imposed by or under a law (other than a requirement imposed by a subpoena or other compulsory process).

192. In discussion of the Clause, the Court made various important observations, including:

> ”However, the clause does not impose a general prohibition against disclosure of information obtained in connection with ADR. The clause does not, therefore, prohibit a person attending a DRC disclosing information obtained in connection with the DRC to a third party. For example, the clause does not prohibit a parent disclosing to their treating professional what was said at a DRC nor does it prohibit a lawyer who appears at a DRC as an agent disclosing to their principal what transpired at a DRC.” [17]

> ”Nor does the clause prohibit a party attending a DRC using information disclosed by another party at the DRC to make independent inquiries and tender in evidence in the proceedings the result of those independent inquiries”: see *Field v Commissioner for Railways for New South Wales* [1957] HCA *92*. [18]

193. The more contentious exception enabling disclosure by the Children's Registrar now appears in Clause 19(5)(c). Clause 19(5)(c) provides as follows:

> ”(c) if there are reasonable grounds to suspect that a child or young person is at risk of significant harm within the meaning of section 23 of the Act.”

194. I do not propose here to consider in detail today the circumstances under which a disclosure made at a DRC might be admissible pursuant to Clause 19(5)(c). That is a discussion for another day. For the moment, be aware that the power exists, but it is limited to disclosure by the person conducting the alternative dispute resolution, that is the Children's Registrar, and not the parties or others in attendance, or the caseworkers or legal practitioners involved.

CONCLUSION

195. I hope the contents of this paper have been helpful in guiding judges hearing Care appeals.

196. Additional resources may be found at the following sites:

(a) The Website of the Children's Court contains numerous resources including the Practice Notes, the Contact Guidelines and various protocols. Most important, however, is the Children's Law News site (CLN), which contains various cases and articles collected over the last decade relating to Children's Law. It contains a helpful index.

(b) There is a chapter in the Civil Trials Bench Book on Care Appeals.

(c) The Judicial Commission Website contains a Resource Handbook on the Children's Court.

197. Finally, please feel free to ring me at any time to discuss issues of law or procedure in Care matters.