*Children's Court of New South Wales*

**District Court Annual Conference**
**Newcastle: Tuesday 2 April 2013**

**Judge Peter Johnstone**
**President of the Children's Court of NSW**

# "Child Care Appeals"

An overview of the key concepts in the Care Act focussing on practical aspects of Care Appeals, including the use of clinical evidence.

## Introduction

1. This paper has been prepared for the 2013 District Court Judges Conference, and is to be presented at Newcastle on 2 April 2013.

2. The purpose of the paper and presentation is to provide those judges who will be hearing appeals under the *Children and Young Persons (Care & Protection) Act 1998* (the *Care Act*) with an overview of the key concepts in the Act, focussing on practical aspects, including the use of clinical evidence. The paper will build on similar previous presentations; in particular the papers prepared by Judge Marien, then the President of the Children's Court, for the District Court conference in 2011 and for the Local Court Regional conferences in 2012. I also acknowledge the help and assistance provided in the preparation of the paper by the former Children's Court Research Associate, Louise Brown (now a Deputy Registrar at the Supreme Court).

3. The paper is prepared in 3 parts: the first part will deal with the key concepts of the Care and Protection jurisdiction of the Children's Court. The second part will deal with practical aspects, and the use of clinical evidence. The third part will deal with some recent cases.

## Key Concepts of the Care and Protection Jurisdiction

### The nature of Care Appeals

4. 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).

5. 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).[1]

6. 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* (sections 43 to 109X: s 91(4). 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).

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

### Practice and Procedure

8. Care proceedings are 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).

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

9. 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).

10. 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).

11. 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. 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.

12. 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.

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

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

15. 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).

16. The Court is not bound by the rules of evidence, unless it so determines: s 93(3).

17. But, In *Sudath v Health Care Complaints Commission* [2012] NSWCA 171 Meagher JA said:

> "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."

18. 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 relates to the provisions of the *Evidence Act 1995* concerning self-incrimination s (128).

19. The standard of proof 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: *Director-General of Department of Community Services; Re "Sophie"* [2008] NSWCA 250.

20. 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.

21. The circumstances in *Re Tracey* were unusual and unique.[2] Nevertheless, it is important to draw the parties 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.

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[2] See the discussion of *Re Tracey* in Judge Marien's 2011 paper at [8].

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."

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

**The guiding principles**

23. The objects of the *Care Act*, as set out in s 8, are to provide:

(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

(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.

24. The *Care Act* is to be administered under the principle that the safety, welfare, and well-being of the children are paramount (**the paramount concern**): s 9(1) of the *Care Act*.

25. This principle 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.

26. It is now well settled law that the proper test to be applied is that of "unacceptable risk to the child": *The Department of Community Services v "Rachel Grant", "Tracy Reid", "Sharon Reid and "Frank Reid"* [2010] CLN 1 per Judge Marien at [61].

27. 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 test of whether there is an "unacceptable risk" of harm to the child is the sine qua non for the application of the Act: see *M v M* [1988] HCA 68 at [25]. If ever in doubt, return to this principle for guidance.

28. 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. Included in these particular principles are 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).

- 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).

**Key concepts**

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

- The need for care and protection
- Removal of children
- Parental responsibility
- Permanency planning
  (a) involving restoration
  (b) involving out-of-home care
- Contact

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

30. The basis for making a Care order under the *Care Act* is a finding that the child is in need of care and protection. This is known as the "establishment" phase. Care and protection is the catch-all ground for the making of a Care order: s 71; and is the trigger for the main operative provisions, such as removal: s 34, allocation of parental responsibility: s 79 and permanency planning: s 83.

31. "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)

32. If the Director-General 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). Removal 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.

33. Where a child is removed, or the care responsibility of a child is assumed, by the Director-General, 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 an interim Care order: s 69. The order may be for ongoing allocation of parental responsibility pending 'establishment', or such other order as the Court considers is required.

34. It was held in *Re Jayden* [2007] NSWCA 35 that s 72 of the *Care Act*, which requires a finding that a child is in need of care and protection before a Care order can be made, does not apply to interim Care orders. In his judgment, Ipp JA distinguished between interim orders and final orders: [71] - [74]. He noted that 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].

35. Parental responsibility means all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children: s 3. The primary care-giver is the person primarily responsible for the care and control of a child, including day-to-day care and responsibility.

36. 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: s 79(1).

37. 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: s 81.

38. 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: s 79(2).

39. 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: s 79(3).

40. Before the Court can make final orders in relation to the allocation of parental responsibility, it must consider a care plan presented by the Director-General: s 80.

41. After ‘establishment’ the process moves towards ‘final orders’. Prior to the making of final orders, the Director-General is required to undertake permanency planning for the child. The Court must not make a final Care order unless it expressly finds that permanency planning has been appropriately and adequately addressed.

42. 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.

43. 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: s 78A.

44. There are particular requirements as to Aboriginal and Torres Straits Islander children that reflect the principles of participation and self-determination referred to earlier in this paper: s 13.

45. As part of the permanency planning, the Director-General is required to assess whether there is a realistic possibility of restoration of a child to the parents: s 83(1). This concept is discussed further below.

46. The Court is to decide whether to accept that assessment: s 83(5). If the Court does not accept the assessment of the Director-General, it may direct the Director-General to prepare a different permanency plan: s 83(6).

47. Before the Court can make a final order approving a permanency plan involving restoration, it must expressly find that there is a realistic possibility of restoration, having regard to two matters: the circumstances of the child; and secondly, any evidence that the parents are likely to be able to satisfactorily address the issues that have led to the removal of the child. It follows that when deciding whether to accept the assessment of the Director-General, the Court must have regard to both those considerations: s 83(5).

48. There is no statutory definition of the phrase 'realistic possibility of restoration'. And, until recently, there had been no judicial consideration of what it entailed.

49. The leading superior court decision in respect of the phrase "realistic possibility of restoration" is *In the matter of Campbell* [2011] NSWSC 761, a decision by Justice Slattery.

50. I have discussed the relevant principles in a number of judgments including *Department of Family and Human Services (NSW) re Amanda & Tony* [2012] ChC 13 at [29] - [32] and *DFaCS re Oscar* [2013] ChC 1 at [29] - [34].

51. I now summarise those principles 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. It must not be fanciful, sentimental or idealistic, or based upon 'unlikely hopes for the future'. It needs to be 'sensible' and 'commonsensical'.

- 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].

52. The *Care Act*, s 83(1) makes clear at what time the "realistic possibility" of restoration should be assessed. “When the application for…a care order is before the Court, it is at that time the Court must assess ‘whether there *is* a realistic possibility’ [Emphasis added]. It must not at the time of the… application be merely a future possibility. It must at that time be a realistic possibility”: *In the matter of Campbell* [2011] NSWSC 761 at [57].

53. As noted above, there are two limbs to the requirements for assessing whether there is a realistic possibility of restoration, whether the assessment is made under s 83(1), 83(5) or s 83(7), to each of which regard must be had.

## Practical Aspects of the Care and Protection Jurisdiction

54. There are two types of final order. The first involves restoration to one or both persons (usually the parents) who enjoyed parental responsibility prior to removal. The second involves out-of-home care.

### Final orders involving restoration

55. Where the Director-General assesses that there **is** a realistic possibility of restoration, a permanency plan involving restoration is submitted to the Court: s 83(2).

56. A permanency plan involving restoration is to include:

    (a) a description of the minimum outcomes the Director-General believes must be achieved before it would be safe for the child or young person to return to his or her parents,

    (b) details of the services the Department is able to provide, or arrange the provision of, to the child or young person or his or her family in order to facilitate restoration,

    (c) details of other services that the Children's Court could request other government departments or funded non-government agencies to provide to the child or young person or his or her family in order to facilitate restoration,

    (d) a statement of the length of time during which restoration should be actively pursued: s 84(1).

57. If the Court expressly finds that the plan appropriately and adequately addresses permanency planning and that there is a realistic possibility of restoration, it can proceed to make final orders in accordance with the plan.

**Final orders involving out-of-home care**

58. Where the Director-General assesses that there is **not** a realistic possibility of restoration, a permanency plan for another suitable long-term placement is submitted to the Court: s 83(3). The Director-General may consider whether adoption is the preferred option: s 83(4).

59. 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.

60. 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.

61. 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. It is now well settled law that the proper test to be applied is that of "unacceptable risk" of harm to the child: *M v M* [1988] HCA 68 at [25]. Whether there is an "unacceptable risk" is to be assessed from the accumulation of factors proved: *Johnson v Page* [2007] Fam CA 1235.

62. 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).

63. 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**

64. Importantly, the care plan involving removal must also include provision for appropriate and adequate arrangements for contact: s 78(2). 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: s 86. It is proposed, however, that this power to make contact orders will be removed from the Court.

65. As presently enacted, s 86 empowers the Court to make a range of contact orders, both as to frequency and duration, and whether or not the contact should be supervised.

66. The Director of the Children's Court Clinic has prepared a detailed document, revised as at October 2012, on factors to be considered by Clinicians in respect of contact, which I recommend to you, and to which I doubt that I can add anything useful.

67. The uncertainty at the moment is the extent to which the Children's Court will retain any jurisdiction in respect of contact arrangements in the context of final orders, having regard to the proposed legislative reforms touched on above. I would prefer to defer any discussion until the position is clarified.

**Children's Court Clinic**

68. 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.

69. 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.[4]

70. 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).

71. 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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[4] For a more detailed discussion of Assessment Orders see Judge Marien's 2011 paper at [5].

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

73. 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.[5]" 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.

74. 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.

75. 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.

76. 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.

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[5] From a paper by Jennifer Mason, then Director-General of DoCS, entitled "Courts, DoCS and Child Protection in NSW" delivered to District Court Judges in May 2009 at p 7

77. 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**

78. 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.

79. 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.

80. Judge Marien expressed the view in his 2011 paper that the ADR processes in the Children's Court are available in an appeal to the District Court. He said at [6.6]:

> "As the District Court, when conducting a care appeal, has all the functions and powers of the Children's Court, the District Court may refer an appeal at any time to a DRC under section 65 of the *Care Act* or to external mediation under section 65A."

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

82. So much so that we can probably drop the word ‘alternative’.

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

84. 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. Importantly, however, Children’s Registrars will travel to any court throughout the State and conduct DRCs.

85. Importantly, they have brought about a significant shift in culture that has impacted on cases in the Court more generally. The Australian Institute of Criminology (AIC) has recently 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.

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

87. 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.

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

**Attachment theory**[6]

89. Attachment theory is now generally accepted in the field of child psychology. Following considerable empirical and research validation, it has become a pivotal consideration in the field of child protection and in care and protection proceedings in courts. Under the theory the earliest bonds formed by children with their primary caregiver/s (particularly before 4 years of age) have a profound impact upon the child, (affecting neurological, physical, cognitive, emotional and social development), which continues throughout their life. The theory's most important tenet is that an infant needs to develop a positive relationship with at least one primary care giver for social and emotional development to occur normally, and that further relationships build on the patterns developed in these first relationships.

90. The following is a description of attachment theory provided Mr Mark Allerton, Clinical Psychologist, who is the Director of the Children's Court Clinic. Attachment behaviours are the means by which infants elicit care and even ensure their survival, and different patterns of attachment result from each individual's adaptation to the quality of care-giving he or she has received.

91. Under the theory, the breaking of a positive and secure attachment between a child and their primary caregiver/s during the crucial early years of the child's life can have a seriously detrimental effect on the child's future social and emotional development. To break an attachment is distressing, and can potentially place a child at risk. Transient effects are expected when the first change in placement occurs before 6-9 months of age. After 9-12 months of age, there will be distress, with longer-term effects of the change increasing with the child's age. From 1 to 3 years, separation is a traumatic loss and a developmental crisis.

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6 This section comes directly from the 2011 paper by Judge Marien

92. Even if the loss occurs after approximately 3-5 years of age, some persistent loss of security in new relationships is to be expected.

93. Children who have had secure attachments adapt to change more easily than children who have had anxious relationships. When the prior relationship included either abuse or neglect, then the change process is likely to be more difficult, ambivalent, and attenuated. Children can manage to believe that their current placement is permanent through one or two changes.

94. With additional changes, it becomes increasingly difficult for children to form a committed relationship with the new caregiver, because their prior experience prepares them to expect disruption. This means that each successive placement is more likely to fail than previous placements. The changes are likely to be accompanied by an initial ‘honeymoon’, followed by outbursts of uncontrolled anger, fear, or desire for comfort. The last of these is sometimes displayed as inappropriate sexualized behaviour. Outcomes will vary, but effects of broken attachments may include anxiety, depression, and angry rejection of others throughout the lifespan.

## Some Recent Cases

### Applications under s 90

95. Applications for rescission or variation of Care orders require the applicant to obtain leave, which will only be granted if there has been "significant change in any relevant circumstances" since the original order: s 90.

96. 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]. In Judge Marien's view, therefore, such refusal (or the granting) of leave may be the subject of a statutory appeal to the District Court.[7]

97. Judge Marien also expressed the following view:

> "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."

98. For a discussion as to whether an appeal lies in respect of an interim order of the Children's Court, see Judge Marian's 2011 paper at [4.9]

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[7] See Judge Marien's 2011 paper at [4.5]

99. 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:
>
> (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.”

100. 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).

101. 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."

102. 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.

103. 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."

104. As to what constitutes a "*significant*" change in a relevant circumstance, Slattery J 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*."

105. 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].

106. Slattery J 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 s 90 (2A) list of considerations. 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.

107. 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.

108. 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"*.

109. These principles were considered and applied by the then President of the Children's Court, Judge Marien, in *Kestle v Department of Family and Community Services* [2012] NSWChC 2. In his Reasons, his Honour sets out a helpful summary of the principles to be applied in a s 90 application [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).

110. Judge Marien went on to specifically consider whether leave could be granted on a specific basis. The mother had submitted that it was not open to the Court to grant leave on a discrete issue such as contact.

111. She submitted that once leave is granted, all issues (including restoration and contact) may be re-visited by the Court at the substantive hearing. The President did not accept this argument and held that the Court has a wide discretion under s 90 (1) to grant leave. His Honour referred 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."

112. In a careful judgment in *Re Bethany* [2012] NSWChC 4 CM Blewitt AM applied these principles at [49] - [50].

**Aboriginal & Torres Strait Islander Principles: s 13**

113. There are various cases over recent years that address the Aboriginal & Torres Strait Islander Principles set out in the *Care Act.* These include: *RL and DJ v DoCS* [2009] CLN 3, *In the matter of Victoria & Marcus* [2010] CLN 2 at [49], *Re Kerry (No 2)* [2012] NSWCA 127, *Re Simon* [2006] NSWSC 1410, *Re Earl and Tahneisha* [2008] CLN 7, and *Shaw v Wolf* [1989] FCR 113.[8]

114. The most recent decision by a superior court dealing with Aboriginality is that of *Re Kerry (No 2)* [2012] NSWCA 127, per Barrett JA. The issue that arose in the Court of Appeal, as regards the Aboriginality provisions of the *Care Act*, was a somewhat technical one.

[8] These cases are all discussed in Judge Marien's 2011 paper

115. The issue involved the interpretation of s 78A(4) of the *Care Act*. Subsections 78A(3) and (4) provide:

> "(3) A permanency plan for an Aboriginal or Torres Strait Islander child or young person must address how the plan has complied with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles in section 13.
>
> (4) If a permanency plan indicates an intention to provide permanent placement through an order for sole parental responsibility or adoption of an Aboriginal or Torres Strait Islander child or young person with a non-Aboriginal or non-Torres Strait Islander person or persons, such an order should be made only:
>
> (a) if no suitable permanent placement can be found with an Aboriginal or Torres Strait Islander person or persons in accordance with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles in section 13, and
>
> (b) in consultation with the child or young person, where appropriate, and
>
> (c) in consultation with a local, community-based and relevant Aboriginal or Torres Strait Islander organisation and the local Aboriginal or Torres Strait Islander community, and
>
> (d) if the child or young person is able to be placed with a culturally appropriate family, and
>
> (e) with the approval of the Minister for Community Services and the Minister for Aboriginal Affairs."

116. The proceedings concerned a four-year-old Aboriginal boy with certain congenital abnormalities in respect of whom sole parental responsibility was allocated to the Minister, who placed the child in out-of-home care.

117. It was submitted that s 78A(4) operated to require that the allocating order not be made unless the conditions in paragraphs (a) to (e) were satisfied.

118. Implicit in that submission was the proposition that the Minister is "a non-Aboriginal person"; and that different considerations apply to a proposal for allocation of parental responsibility for an Aboriginal child to the Minister: [74].

119. The Court rejected the proposition, and held that the concept of allocation of parental responsibility to the Minister is a concept of allocation to the State and not to a person who has racial and other characteristics possessed by human beings:

> “The Minister is not within the concept of Aboriginal or non-Aboriginal person for the purposes of the *Care Act*. It follows that where a permanency plan of the kind dealt with in s 78A(4) envisages "permanent placement through an order for sole parental responsibility" and that responsibility is to be allocated to the Minister, the circumstance on which the operation of that section is predicated (that is, parental responsibility of a non-Aboriginal person) is not satisfied and s 78A(4) does not impose any restraint upon the making of the order.” [75].

120. These sections were considered more recently by the Children’s Court in *Department of Family and Community Services (NSW) re Ingrid* [2012] ChC [2012] NSWChC 19.

121. That case involved a young Aboriginal girl whose father is Aboriginal, but whose mother is non-Aboriginal. She was assumed into care and placed in short-term fostering arrangement with non-Aboriginal short-term carers. The Director-General sought final Care orders involving allocation of sole parental responsibility for the child to the Minister and placement of the child in long-term out-of-home care till the age of 18 with a non-Aboriginal carer. The short-term carers, however, wanted to keep the child, and sought permanent placement of the child with them through an order for sole parental responsibility in their favour.

122. The matter came before the President of the Children's Court on a preliminary issue, the Director-General contending that the position of the short-term carers was untenable as a matter of law.

123. The issue was this: because the short-term carers were non-Aboriginal, the Director-General contended that they must positively establish the matters in s 78A(4), but they had not and indeed could not do so. The short-term carers contended, however, that the circumstances set out in s 78A(4) of are not obligatory. That is, the circumstances in s 78A(4), merely indicate "advisability', or a strong suggestion, and do "not go so far as to create a requirement or an obligation".

124. The President reviewed the competing arguments: [36] - [48]. He then held that the Court is expressly precluded from placing an Aboriginal child with non-Aboriginal carers, through an order for sole parental responsibility in favour of those carers, unless and until the required pre-conditions set out in s 78A(4) have been established.

125. He said that the juxtaposition of the word 'only' with the word 'should' in the phrase 'such an order should be made only…' clearly indicates the mandatory nature of the requirements in s 78A(4): [49]. He said:

- The Court is not compelled to make an order providing for permanent placement of an Aboriginal child with non-Aboriginal persons through an order for sole parental responsibility merely because the circumstances specified in the sub-section are satisfied. The Court retains an overriding discretion to accept or reject any permanency plan proposed, in accordance with the various principles set out in the *Care Act*, not the least being the principle that the safety, welfare and well-being of the child is paramount, the test being whether there is an unacceptable risk of harm to the child: [50].

- What the Court cannot do, however, is provide for the permanent placement of an Aboriginal child with non-Aboriginal persons through an order for sole parental responsibility in their favour unless and until the circumstances specified in s 78A(4) are established to the Court's satisfaction. In this sense, the matters set out in s 78A(4) are obligatory pre-conditions to the making of the type of order contemplated by the sub-section. The Court does not have a discretion to dispense with any of the pre-conditions specified, and each and every one of them must first be established before an order can be made: [51].

- Such a construction is in my view the only appropriate way in which to interpret the sub-section. It is the purposive construction that is clearly consistent with the objects and principles of the *Care Act*, in particular the Aboriginal and Torres Strait Islander Principles set out in Part 2 of Chapter 2. The Court's discretion is not usurped, in that the Court retains an overriding discretion to reject a proposed placement: [52].

126. One of the interesting notions to emerge from the argument was the idea that "kinship" in the Aboriginal context, may be wider than European concept. S 13(1)(a), for example, talks about a kinship group "as recognised by the Aboriginal…community to which the child…belongs".

127. It is conceivable, therefore, as was the case in *Re Ingrid*, that the carer, though non-Aboriginal, might nevertheless be part of a kinship group recognised by the Community to which the child concerned belongs.

128. This notion has interesting evidentiary connotations.

**Costs Orders**

129. The *Care Act* gives the Children's Court a limited power to make an order for an award of costs.

130. S 88 of the *Care Act* provides:

> "The Children's Court cannot make an order for costs in care proceedings unless there are exceptional circumstances"

131. In his 2012 paper Judge Marien dealt in detail with what constitutes "special circumstances" justifying an award of costs against a party: [14].[9] (See also PN 5 at [17.1]).

132. More recently, Judge Marien has held that the costs power does not extend to the making of an order against a non-party: *Director General of the Department of Family and Community Services v Amy Robinson-Peters* [2012] NSWChC 3.

133. In that case, the Court dismissed an application for leave brought pursuant to s 90 (1) by the mother of the child Amy. The father sought an order for costs against the mother's solicitor, Mr Potkonyak. On behalf of the mother, the solicitor abandoned the bulk of her case, but insisted upon maintaining an argument based on a jurisdictional question. Judge Marien held that the jurisdictional argument had no prospect of success. He went on to find, further, that exceptional circumstances existed, as required by s 88.

> "On any view, the fact that Mr Potkonyak invited the court to dismiss the mother's application and declined the opportunity to put any argument to the court that the application should not be dismissed, must constitute exceptional circumstances for the purposes of s 88.

[9] See also Judge Marien's 2011 paper at [7].

Further, and very regrettably, I have also formed the view that exceptional circumstances exist because Mr Potkonyak's overall conduct of the matter in the Children's Court was at the very least grossly incompetent.

A competent legal practitioner would be aware that such a jurisdictional argument could not be raised, let alone succeed in the Children's Court but would have to be made in the Supreme Court by way of an application for prerogative relief."

134. Thus, Judge Marien was satisfied that exceptional circumstances existed warranting the making of an order for costs in favour of the father. The solicitor for the father then submitted that the order should be made against Mr Potkonyak personally.

135. His Honour went on to hold, however, that he could not make the order sought in the absence of an express power to do so. The Children's Court cannot make a costs order against a non-party, such as a legal representative for a party.

136. I respectfully concur with the view of Judge Marien. The general rule is that an order for costs should only be made against a party to the proceedings: That principle, however, may be displaced by an express statutory power: *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, such as a section in the terms of s 98(1) of the *Civil Procedure Act 2005*, which states:

"(1) Subject to rules of court and to this or any other Act:

(a) costs are in the discretion of the court, and

(b) the court has full power to determine by whom, to whom and to what extent costs are to be paid…"

137. S 88 of the *Care Act*, however, is a restricted, limited power, insufficiently express to empower the Children's Court to make costs orders against non-parties.

138. There are some exceptions to the principle under the general law. 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.

139. 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.

140. 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.

141. The Supreme Court, as a superior court, also has inherent jurisdiction to order costs against officers of the Court, that is barristers or solicitors. But not the Children's Court.

142. Thus in a recent decision by Magistrate Heilpern, his Honour declined to make a costs order against the solicitor for a party: *In the matter of Mr Donaghy (Costs)* [2012] NSWChC 11.

143. In that case a legal practitioner failed to turn up at court, and advised his client not to do so either.

144. His Honour said at [22]:

> ”The duty of a legal practitioner in these circumstances is very clear - it is to appear. Not attending in the first place, and not attending when directed, and directing your client not to attend in some sort of unilateral decision to negotiate recently served material is a breach of that duty. Where the matters are set down part heard as a special fixture in care proceedings, the breach becomes a serious breach. When the practitioner evidences a complete lack of understanding of that duty in seeking to justify the non-appearance, that is a matter that falls well within the ambit of serious incompetence or serious misconduct of a legal practitioner without reasonable cause to borrow the terminology of s 99 of the *Civil Procedure Act 2005*.

145. Magistrate Heilpern referred to the Judge Marien’s decision in *DFaCS v Robinson-Peters* and concluded that he had no power to make an order for costs against the solicitor:

> ”In my view it is unfortunate that there are no clear powers to make an order for costs against a practitioner who behaves as Mr Donaghy has. Whether parliament intended by the broad brush of s 15 of the *Childrens Court Act*, or s 88 of the *Care Act* to enable costs against a practitioner is not apparent in the second reading speech or any other extrinsic material that I have researched”: [29].

146. The Court has asked DFaCS to give consideration to amending the Act to give it an express power to make personal costs orders against legal practioners, consistent with the power in the Local Court, derived from s 98 of the *Civil Procedure Act 2005*.

**Protection of Confidentiality in ADR (DRC’s)**

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

148. In that case the father said something during the DRC that was described by the Director-General 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 Director-General 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.

149. In rejecting the application to file the affidavit, Judge Marien, 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."

150. His Honour went on to say, however, that the 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*.

151. 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.

152. 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.

153. 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).

154. Judge Marien went on to discuss the clause. In that discussion he 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]

155. The more contentious exception enabling disclosure by the Children's Registrar now appears in Clause 19(5)(c).

156. 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.”

157. 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**

158. I want to conclude by returning to the central theme of unacceptable risk of harm because it seems to me that most decisions in the Care jurisdiction ultimately involve a risk assessment, and more often than not an assessment of comparative risks.

159. It is now well settled law that in all decisions under the *Care Act* involving the paramount concern of safety, welfare and well-being of a child, including issues of removal, restoration, contact, custody and placement, the proper test to be applied is that of "unacceptable risk to the child": *The Department of Community Services v "Rachel Grant", "Tracy Reid", "Sharon Reid and "Frank Reid"* [2010] CLN 1 per Judge Marien at [61]. The appropriate test is whether there is an "unacceptable risk" of harm: see *M v M* [1988] HCA 68 at [25].

160. Whether there is an "unacceptable risk" of harm to the child is to be assessed from the accumulation of factors proved according to the relevant civil standard, as discussed above: see *Johnson v Page* [2007] Fam CA 1235.

161. I have sought to examine this test in several recent decisions, which may now be found on CaseLaw, including *DFaCS re Amanda and Tony* [2012] NSWChC 13; *DFaCS re Day* [2012] NSWChC 14; and *DFaCS re Oscar* [2013] NSWChC 1.