

Planning for Contact Changes¹

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CROC underpinnings

The United Nations *Convention on the Rights of the Child*³ states in Article 9(3):

“States ... shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis except if it is contrary to the child’s best interests.”

In looking at this Article, and the equivalent Article 8, *European Convention on Human Rights* the points that have been emphasised by the Courts are that:

- It is a right of the child and not of the parent.⁴ This means that the child should not be forced into having contact against the child’s wishes.⁵
- The relevant factor in deciding to curtail contact is where this is in the best interests of the child⁶
- What is in the best interests should not be arbitrarily determined and should be justified by strong reasons.⁷

As a right attached to the child it would seem to follow that, consistent with the enunciation of these principles as the child grows and develops, contact should be sufficiently flexible to be able to respond to the changing requirements of the child.

The background of the NSW Care Jurisdiction

¹ Unless otherwise stated all statutory references are to the *Children and Young Persons (Care and Protection) Act 1998*. The term ‘child’ is used in this paper for simplicity purposes rather than the correct reference of ‘child or young person.’

² The comments in this paper are the comments of Roderick Best and do not necessarily represent the views of the Minister or the Secretary. All errors are solely the errors of Roderick Best.

³ The Convention was adopted by the General Assembly on 20 November 1989

⁴ *B v United Kingdom* (1987) 10 EFRR 87; *Mustaqim v Belgium* (1991) 13 ECHR 802

⁵ *C v Finland* (2006) 46 EHRR 485

⁶ *Hoppe v Germany* [2003] 1 FLR 384; *Ersholz v Germany* [2000] 2 FLR 486; *Hendriks v Netherlands* (1982) 29 DR 5

⁷ *W v United Kingdom* (1987) 10 EHRR 29; *Johansen v Norway* (1996) 23 EHRR 155; *Andersson (M and R) v Sweden* (1992) 14 EHRR 615; *Hokkanen v Finland* (1994) 19 EHRR 139; *Rieme v Sweden* (1993) 16 EHRR 155.

Between 1905 (when the Children’s Court was established) and 2000 there was no explicit power of the Children’s Court to make final contact orders. This was changed following the Parkinson Review by the inclusion in the present Act of a power of the Children’s Court (by section 86) to order a minimum level of contact. The rationale for this was set out in the report of that review as:

“[The Court’s inability to make a final care order for contact] has given rise to inconsistency in both the nature and frequency of contact between parents and their children. It has also given rise to considerable frustration, anger and resentment of parents who feel powerless to insist on contact on a basis which they consider to be reasonable, appropriate and in the best interest of the child.”⁸

The nature of contact is that it should exist as a default position and should only be excluded where it is contrary to the child’s best interests and then only totally denied by order of the Court.⁹

Unlike the situation in private law, no express presumption in favour of contact, let alone an express statement of the right of the child to contact was included in public law.¹⁰ An implied presumption as to an entitlement to contact has been held to exist, unless the safety, welfare and well-being of the child might otherwise be jeopardised, as a result of what is now sub section 9(f), *Children and Young Persons (Care and Protection) Act 1998*.¹¹ Notwithstanding this clear statutory difference between private and public law there has been comment in England and in Victoria that those who argue against a presumption for contact in public law proceedings are treated as no longer being ‘sensible’ and judicial officers make comments that are ‘condemnatory’ or ‘dismissive.’¹² The comments in Victoria have gone so far as to say that:

“a pro contact stance in the courts has often meant that issues of domestic violence, and consequent concerns about safety, have been ignored.”¹³

The current practice has been described as a means:

“to reduce the likelihood of parents resisting a permanent care order. Bargaining access to the child via contact orders is a bargain that seems predominantly to not involve the child or their needs, to find a permanent carer who will be able to comply with contact arrangements over the long haul. It appears to be a ‘fix’ to deal with the quick settlement of the caserecognition of the rights of parents or family members is also part of contact order at a level to focus on their needs rather than the child.”¹⁴

⁸ Parkinson, P *Review of the Children (Care and Protection) Act 1987* (Ashfield, 1997) p96.

⁹ Parkinson, p96

¹⁰ Compare *Family Law Act 1975* (Cwlth) subsection 60B(2).

¹¹ De Fina, D “Contact orders in the Children’s Court: current legal issues” a paper delivered at the Legal Aid Commission Care and Protection Conference, 29 April 2004. Ms de Fina cited in support *Re E (a minor) (Care order: contact)* [1994] 1 FLR 146; *Re L (Minors) (care proceedings: contact)* [1998] 2 FLR 156.

¹² Piper, C “Assumptions about children’s best interests” (2000) 22 *Journal of Social Welfare and Family Law* 261; Weyland, I “The blood tie: raised to the status of a presumption” (1997) 19 *Journal of Social Welfare and Family Law* 173 at 175-9

¹³ Humphreys, C & Harrison, C “Squaring the circle – contact and domestic violence” [2003] *Fam Law* 419 at 420.

¹⁴ Tregeagle, S *A summary of what is known about foster care and adoption in NSW 2014* (Sydney, 2014) p4 (unpaginated)

While noting this it must be acknowledged that contact is an important feature in a whole range of measures about the wellbeing of the child from the views of children, to maintenance of identity, to building self esteem and addressing trauma – to name but a few.

There is an alternative to a presumption of contact, tinged as it is with inappropriate overtones of parental rights. In Scotland it has been held that no presumption should apply contrary to the best interests of the child.¹⁵ In the Family Court, prior to the insertion of a right on the part of the child, Nygh J led a similar push where he said:

“The test that must apply in proceedings involving children is that of the welfare of the child being the paramount consideration, which in my view is the one and only principle to be applied. It means that in each case the Court must make an independent investigation of what the welfare of the child requires, and the Court is not very much assisted by recourse to general principles other than that principle It is not, in other words, a question of contact for contact’s sake.”¹⁶

A similar approach was adopted by Charteris J in one of the few appeal decisions on contact in NSW care proceedings.¹⁷

This questioning of a presumption towards contact, meant that within a decade of the Parkinson report, the approach to contact was instead now recognised as a ‘complex matter’ because:

“of the competing views in the literature concerning the benefits which may accrue to a child or young person from contact being maintained, and balancing the needs for stability, the likelihood of restoration, the developmental requirements of a child or young person as well as changes in the circumstances of birth families and the quality of the contact, all within the context of the best interests of the child or young person.”¹⁸

The recommendation of the Wood Special Commission of Inquiry was that:

“where permanency planning does not include restoration, it is appropriate that decisions as to contact are made by the designated agency to whom parental responsibility has been allocated. They can take account of changing circumstances as the child or young person grows older. Any dispute should be dealt with by the use of alternative dispute resolution mechanisms.”¹⁹

¹⁵ *Re X and Y (leave to remove from the jurisdiction: no order principle)* [2001] 2 FLR 118; *Porchetta v Porchetta* [1986] SLT 105; *Russell v Russell* [1991] SCLR 49; *FAG or W v JLW and KHW* [1999] ScotSC 23 unreported 2 August 1999; *S v M (access order)* [1997] 1 FLR 980.

¹⁶ *Cotton and Cotton* (1983) FLC 91-330; *Re K* [1982] FLC 91-283; *In the marriage of Newling* [1987] FLC 91-856 at 76,468; *In the marriage of N and S* [1996] FLC 92-655 at [82]; *Re M (contact: welfare test)* [1995]; *Re A* (1982) FLC 91-284 at 77,612; *In the marriage of Brown and Pedersen* (1992) FLC 92-271; *J & J* unreported 17 July 2001 per Brewster FM at [45]; *Re W (contact: parent’s delusional beliefs)* [1999] 1 FLR 1263.

¹⁷ *HX v Department of Community Services* unreported 27 August 2004

¹⁸ Wood, *The Hon J Report of the Special Commission of Inquiry into Child Protection Services in NSW*, Vol 2 (Sydney, 2008) pp 437-8.

¹⁹ Wood, p442.

This recommendation, to effectively confine the Children’s Courts powers to order contact to situations pending restoration, was one of only a few recommendations of the Special Commission that was not immediately adopted by the government. As a result of representations, the recommendation was deferred pending further consultation. That consultation resulted in the provisions contained in the *Child Protection Legislation Amendment Act 2014*.

To best include a more nuanced and responsive approach to contact that sees it as one of the considerations for the child’s safety, welfare and wellbeing and which can readily change over time, these reforms are clearly saying that contact should squarely be a matter of planning and set out in the care and permanency plan rather than instead be a major role for submissions and the drafting of care orders.

Contact in private and public law proceedings

In looking at case law on child contact in private and public law proceedings the difference between the two proceedings must be recognised.

A court in public law proceedings cannot make care orders unless it establishes that the child is in need of care and protection.²⁰ This means that the care being provided by the parents must be deficient in some way. This deficiency is not an element to be determined in private law proceedings.

This deficiency also means that it cannot be presumed²¹ that there is strong attachment to the parents or that the development of the child will be best promoted by either parent providing a safe, nurturing and loving home for the child.

The State is present in public law proceedings and, notwithstanding research and the permanent placement principles each saying that placement of the child in the parental responsibility of the Minister is the least desirable outcome for the child, it is still a possibility to be considered. In private law proceedings they proceed on the basis that primarily the options available for the child are to be found within the child’s family.

These differences should influence our understanding of research, case law and our interpretation of legislation.

Research

Before turning to the legislative amendments, the earlier comments about a presumption to seek contact through the courts, which presumption may not be held elsewhere, is nicely summed up in the 1992 comments of Lord Donaldson when he said:

“At the risk of being told by academics hereafter that my views are contrary to well-established authority, I think that there is a rebuttable presumption of fact that the best interests of a baby are served by being with its mother.”²²

²⁰ Section 71(1)

²¹ By no means am I asserting that strong attachment cannot exist between a child and a parent in public law proceedings.

²² *Re W (a minor: residence order)* [1992] 2 FLR 332.

Bold statements about the value of contact in care situations²³ are now comments of the past with research being far more nuanced in its conclusions.

Contact is seen as highly beneficial where the child will be restored.²⁴

Some level of contact is considered important for all children in out-of-home care:

“Children need to be connected to their biological and historical past if they are going to grow up with a positive self image and identity. Contact satisfies the child’s need for information and prevents the unhealthy idealisation of the birth family ... contact counters the child’s feelings of rejection and self blame through evidence of the birth family’s continued interest.”²⁵

But where there is on-going conflict or contact that is disruptive of the out-of-home care placement then this is likely to decrease child self-esteem, increase trauma for the child, increase problematic behavioural problems for the children causing difficulties between them and carers, and increase the likelihood for placement breakdown.²⁶ This body of research gives rise to caution especially when considering supervised contact.²⁷

Proposals for reform

In November 2012 a discussion paper was issued seeking to make changes to child protection legislation (i.e. not just the Care Act) in a number of areas. For the purposes of this talk that paper

²³ For example Woodman quoted in Fernandez E, *Significant harm: unravelling child protection decisions and substitute care careers of children* (Sydney, 1996) p 200; Grigsby, RK “Maintaining attachment relationships among children in foster care” (1994) 75 *Journal of Contemporary Human Services* 269; Howe, D and Fearnley, S “Disorders of Attachment and attachment theory” (1999) 23 *Adoption and Fostering* 19.

²⁴ Barber, J G & Gilbertson, R *Foster care: the state of the art* (Australian Centre for Community Services Research (Adelaide, 2001); Neil E & Howe, D (eds) *Contact in adoption and permanent foster care* (London, 2004); Leathers SJ “Parental visiting and family reunification: could inclusive practice make a difference” (2002) 81 *Child Welfare* 595; Browne, D & Moloney, A “Contact irregular: a qualitative analysis of the impact of visiting patterns of natural parents on foster placement” (2002) 7 *Child and Family Social Work* 35; Haight, WL Kagle, JD & Black JE “Understanding and supporting parent-child relationships during foster care visits: attachment theory and research” (2003) 48 *Social Work* 195; Sen, R & Broadhurst, K “Contact between children in out of home care placements and their family and friends networks: a research overview” (2011) 16 *Child and Family Social Work* 298; Humphreys, C & Kiraly, M “High frequency family contact: a road to nowhere for infants” (2011) 16 *Child and Family Social Work* 1; Mennen, FE & O’Keefe, M “Informed decisions in child welfare” (2005) 27 *Child & Youth Services Review* 577

²⁵ Macaskill, C *Safe contact? Children in permanent placement and contact with their birth relatives* (Lyme Regis, 2012); McWey, LM & Mullis, AK “Improving the lives of children in foster care: the impact of supervised visitation” (2004) 53 *Family Relations* 292

²⁶ Johnston, JR & Strauss, RB “Traumatised children in supervised visitation: what do they need?” (1998) 37 *Family and Conciliation Court Review* 135; Furstenburg, FF, Morgan, SP & Allison, PD “Paternal participation and children’s well-being after marital dissolution” (1987) 52 *American Sociological Review* 695; Solomon, J & George, C “The development of attachment in separated and divorced families: effects of overnight visitation, parent and couple variables” (1999) 1 *Attachment and Human Development* 2; Poussin, G & Martin-Lebrun, E “A French study of children’s self esteem and parental separation” (2002) 16 *International Journal of Law Policy and Family* 313; Birnbaum, R & Chipeur, S “Supervised visitation in custody and access disputes: finding legal solutions for complex family problems” (2010) 29 *Canadian Family Law Quarterly* 79; Moyers, S Farmer, E & Lipscombe, J “Contact with family members and its impact on adolescents and their foster carers” (2006) 36 *British Journal of Social Work* 541

²⁷ Saini, M Van Wert, M & Gofman, J “Parent-child supervised visitation within child welfare and custody dispute contexts: an exploratory comparison of two distinct models of practice” (2012) 34 *Child and Youth Services Review* 163

said that “contact arrangements are best agreed by way of the case planning process rather than through court orders.”²⁸ This was not put forward as a new idea but instead as reflecting the already existing Contact Guidelines that had been issued by the Children’s Court in 2011. What was sought was a way to develop safe and effective contact arrangements that were responsive to the needs of the child.²⁹

What underpins the drive for planned contact is the view that

“contact arrangements through case planning are particularly beneficial when a parent has disengaged, when there is little or no certainty about a parent’s circumstances and their ability to attend contact, or when a child or young person is ambivalent about having contact. In these circumstances contact arrangements made through case planning can more readily respond to the particular needs of the child or young person.”³⁰

In addition, related work on ADR was undertaken by both the Australian Institute of Criminology and an ADR Expert Working Party. Through the use of ADR the discussion paper promoted a greater involvement of the family in decisions around the child and the creation of a more child focussed system rather than one concentrating upon due process.

Where ADR was unsuccessful to resolve contact disputes, the discussion paper canvassed whether resolution of those disputes might be best obtained in the Children’s Court, through a Family Law process or by application to the Civil and Administrative Tribunal.

Finally, discussion was sought on the possibility of enforcing contact orders – recognising that only limited options to enforce contact orders currently existed through applications to the Supreme Court, under the Family Law Act or in some cases in the Local Court in conjunction with apprehended violence orders.³¹

Legislative Changes

Legislative change has not just taken place to section 86. The amending legislation recognises that there is a suite of proposals that now need to be considered. NSW now has open adoption. This recognises that contact does have a place for children who are adopted. The process that the *Adoption Act 2000* includes in its scheme is one in which contact is included not by way of court orders but rather by way of provision in the adoption plan.³² Likewise in the new scheme for guardianship orders, supervised contact is included by provision in the related care plan,³³ applications for contact orders will include alternate dispute resolution and variation by way of agreement. The ability to make a supervised contact order is expressly precluded.³⁴

²⁸ p46

²⁹ p46

³⁰ Department of Family and Community Services, *Information Sheet 12: Contact arrangements through case planning* (Sydney, 2014)

³¹ p50

³² *Adoption Act 2000*, section 46(1)(a) (iii)

³³ Section 79B(9)(b). Likewise section 86(1) has been amended to no longer permit a contact order wherever a child “is the subject of proceedings before the Children’s Court.”

³⁴ Section 86(2)

What this demonstrates is a clear legislative policy of including contact arrangements by way of the accompanying plan rather than as set out in a court order.

This policy is also reflected in general care proceedings where contact provisions are a specific matter to be addressed within the care and permanency plan. Inclusion within the planning process also allows for participation of the designated agency that is supervising the placement. This designated agency and the department will each be approaching the question of the level and nature of contact under a commonly held contract framework that is currently in the course of development. The contact arrangement that results from this process and then set out in that care and permanency plan will then be enforceable to the extent to which its provisions are embodied in, or approved by, orders of the Children's Court.³⁵ Whereas a care application will specify the particular care orders sought by the Secretary,³⁶ for contact orders the Court can proceed on the application of any of the parties to the care proceedings and without the necessity of having the proposals for contact specified at the commencement of proceedings.³⁷ This allows the Court to deal with contact either as part of the care plan or as flowing from the discussions (including dispute resolution conferences³⁸) that arise as part of this care planning.

Where there is an application for the Court to make a contact order and the plan is for restoration then there is no limitation on the duration of the contact order³⁹ however once the Court determines that there is no realistic possibility of restoration⁴⁰ the maximum duration of an initial final contact order is 12 months.⁴¹ By way of contrast, contact arrangements in a care and permanency plan unsupported by an order under section 86 could be for any duration notwithstanding an absence of any plan for restoration. Again, there is greater flexibility and encouragement to proceed to put in place contact arrangements if parties proceed by way of case planning than by application for court orders. If parties are proceeding by way of plans then that shifts the emphasis away from hearings and places the emphasis on the dispute resolution processes where the plans will be buffeted and refined.

In connection with any application for a contact order my reading of section 86(1A) is that the new scheme provided by the legislation is:

- While a care application is current – sub-section (a)
- Where care proceedings have concluded then parties to those proceedings can subsequently apply for a contact order – sub-section (b)
- Where the application is made by someone not a party to current or concluded care proceedings – sub-section (c).

Where final care orders have been made, and these do not include contact orders or the contact order has expired,⁴² then an application for a contact order can only be brought with the leave of the

³⁵ Section 78(4) and 83(8)

³⁶ Section 61(1A)

³⁷ Section 86(1A)(a)

³⁸ Whether under section 65 or otherwise

³⁹ Section 85(5)

⁴⁰ Section 83

⁴¹ Section 86(1A)

⁴² Section 86(1F)

Court – whether under section 86(1A) if the application is limited to considering contact orders or section 90(1) whether the application seeks to rescind or vary other care orders. The wording in sub sections 86 (1A)(b), (1B), (1C) and (1E) mirrors that of sub sections 90 (1A), (2), (3) and (4). You will note that section 86(1A) (b) refers to parties “who were parties to care proceedings” rather than someone who is a party to care proceedings, which is the wording in sub-section (1A)(a). Prior to leave being granted for a contact order the matter may again be referred to alternative dispute resolution.⁴³ The referral to dispute resolution will again permit participation of the relevant designated agency supervising the placement and they, and the department, will be approaching the matter consistently with the common contact framework – once it has been developed. Again, the emphasis is on seeing whether it is possible to proceed by way of alternative dispute resolution and plans.

Where the initial contact order has expired then a care application for a new contact order can be made after the date of expiration (and, presumably from the drafting, not in anticipation of that expiration) for new contact orders under section (1A)(b) and (1F). The application will require prior alternative dispute resolution⁴⁴ and the leave of the court.⁴⁵ Any resulting contact order will not be limited in duration to 12 months.⁴⁶

Where it is proposed to vary a contact arrangement then, as with any agreement, this can be varied by the parties at any time, and on any terms, that they decide.

Where it is proposed to vary a contact order during its currency then this can still be done, as any care order can be, by a care application under section 90.⁴⁷ Consistent with what I have said about the emphasis on dispute resolution and planning, you will not be surprised to learn that there is also a new procedure to build these things into the variation process. Unusually the new procedure allows for a contact order to be varied not by the Court but by agreement of the parties.

Where an agreement is reached to vary a contact order, the agreement must be signed by each of the parties to the care proceedings as at the time the relevant contact order was made.⁴⁸ The written variation agreement will then be lodged with the Court registry and the registry will stamp it in some fashion to record registration and keep a copy to be placed on the Court file and it will, provided that it is registered within 28 days of final signature by all parties to the variation agreement, automatically vary the Court’s contact order.⁴⁹ The variation is expressly said to occur without any further action by the Court.⁵⁰

In deciding who is to sign the variation agreement, there is reference to its signature by the legal representative of the child.⁵¹ While this may need clarification it would seem to me that this provision is saying that the agreement can be signed either by the child or young person if that person has developmental capacity or by a legal representative on behalf of the child or young

⁴³ Section 86 (1D)

⁴⁴ Section 86 (1D)

⁴⁵ Section 86(1A)(b) and (1B)

⁴⁶ Section 86(7)

⁴⁷ Section 86A(6)

⁴⁸ Section 86A (2)(b)

⁴⁹ Section 86A(2)

⁵⁰ Section 86A(3)

⁵¹ Section 86A(2)(b)

person. That legal representative need not be the same legal representative as appeared for the child at the time of the initial contact orders but a legal representative for the child is to sign the document where the document is signed within 12 months of the order. If the contact orders being varied took place more than 12 months previously then a lawyer can again sign the agreement as legal representative of the child or young person but this time it is no longer an essential requirement.

A further question concerning the parties to the variation agreement will be where the Minister or Secretary is represented at a dispute resolution conference by a designated agency other than the Department. If case management is transferred between designated agencies between the making of the contact order and its variation who is to be the signatory of the variation agreement? This is resolved by recognising that the designated agency is not present in its own right,⁵² but is representing the Minister and as such it is the Minister via her delegate or representative who is the signatory rather than the individual designated agency.

A template variation agreement is presently being developed jointly by Legal Aid and the Department.

A practical tip (the implications of which will need to be resolved over time) is that the section establishes an agreement, the effect of which is to vary the former contact orders rather than a new application whereby the Court varies its own orders. Under this section the variation (of the contract order) is only to have effect if it is set out in the agreement. Compare this process with a decision by the Court to vary its former order. For the Court to vary its contact orders, this can still only be done by the Court in response to an application under section 90. In this section, the essential elements of what comprises the agreement are set out in section 86A(2). This means that if registration has not happened within the 28 day time frame then the contact orders will stand unaltered. If a registry does proceed to register an agreement outside of the 28 day period then, again, the contact orders stand unaltered as the terms of the section have not been strictly met. The process is therefore time critical for registration but not for when it has to be signed. As noted above, the Court will need to develop a procedure to link, in the Court file, the original court orders and the subsequent variation agreement of the parties.

The new legislative provisions create no new judicial pathways for contact orders outside of the Children's Court nor do they give any new powers specifically designed to permit the Children's Court to enforce contact orders.

Conclusion

The intent behind these changes was to create a more responsive system that was demonstrably more child focussed. The catch cry in the discussion paper was "planning, rather than ordering, contact." It is an approach rolled across the child protection system from parental responsibility to guardianship and then onto adoption. The submissions in response to the discussion paper did not significantly challenge the research base underpinning it. Our challenge is to see how we, as lawyers, can support a design that moves away from the familiar response of passing decision-making to a

⁵² Assuming that leave has not been granted under the Courts powers concerning a person having sufficient interest in the welfare of the child – sections 86(1A)(b)(v) and 98(3)

judicial officer. Instead, decision-making is devolved to those involved in carrying out what is put in place, allowing them to participate in the planning for what the child's safety, welfare and well-being requires.

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