Care proceedings and appeals to the District Court

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1. Introduction

In this paper I propose to first deal with some of the general legal principles applicable to care proceedings in the Children's Court and the District Court (with reference both to the relevant legislation and to some authorities) and then to more specifically deal with the conduct of care appeals to the District Court.

2. The objects and principles of the Care Act

Sections 8 and 9 of the *Children and Young Persons (Care and Protection) Act* 1998 (the *Care Act)* set out the objects and principles of the Act.

Section 7 provides that the objects and principles of the Act are intended,

> *"[T]o give guidance and direction in the administration of this Act. They do not create, or confer on any person, any right or entitlement enforceable at law".*

Section 9 (1) sets out the "paramountcy principle". The section provides,

> *"This Act is to be administered under the principle that, in any action or decision concerning a particular child or young person, the safety, welfare and well-being of the child or young person are paramount*".

The paramountcy principle partly reflects Article 3 of the *United Nations Convention on the Rights of the Child* ("the Convention"). (Article 3 of the Convention states that the best interests of the child "*shall be a primary consideration*"). The paramountcy principle is to be taken into account in making all decisions and determinations under the *Care Act*.

Further principles for administration of the *Care Act* are set out in section 9 (2). Of particular importance is the principle contained in section 9 (2) (c) (formerly section 9 (d)) which provides,

> *"In deciding what action is necessary to take (whether by legal or administrative process) in order to protect a child or young person from harm, the course to be followed must be **the least intrusive intervention** in the life of the child or young person and his or her family **that is consistent** with the paramount concern to protect the child or young person from harm and promote the child's or young person's development".* (Emphasis added)

The least intrusive intervention principle was considered recently by the Court of Appeal in **Re Tracey** [2011] NSWCA 43. The Court also considered the relevance of the Convention in care and protection proceedings as well as the requirements for a care plan under the *Care Act*. I shall return to this decision later in the paper.

3. Important legal principles under the Care Act

3.1 "Attachment theory" and the need for expedition in care proceedings

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.

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.*
>
> *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. Even if the loss occurs after approximately 3-5 years of age, some persistent loss of security in new relationships is to be expected.*
>
> *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. 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.*[1]

The critical importance of a child forming secure positive attachments in infancy and early childhood is partly the basis for the need for permanency planning under the *Care Act* (see sections 78A, 83 and 84) and requires that care proceedings, particularly when relating to very young children, be determined as expeditiously (and hopefully as successfully) as possible. The need for expedition in care hearings is a key feature of the *Care Act*. Principle 9 (2) (e) provides,

> *"If a child or young person is placed in out-of-home care, arrangements should be made,* ***in a timely manner****, to ensure the provision of a safe, nurturing, stable and secure environment, recognising the child's or young person's circumstances and*

[1] From the (2011) *Family Forensic Court Protocol* generated by The International Association for the Study of Attachment (IASA). Mr Allerton is a member of the IASA.

> *that,* ***the younger the age of the child, the greater the need for early decisions to be made in relation to a permanent placement****."* (Emphasis added)

Further, section 94 (1) provides,

> *"All matters before the Children's Court are to proceed* ***as expeditiously as possible*** *in order to minimise the effect of the proceedings on the child or young person and his or her family and to finalise decisions concerning the long-term placement of the child or young person."* (Emphasis added)

This need for expedition is reflected in the Children's Court's Time Standards which require that 90% of care cases are to be finalised within 9 months of commencement and that 100% be finalised within 12 months of commencement.

3.2 Need of care and protection - "establishment"

Section 71 (1) of the *Care Act* provides that the court may make a care order in relation to a child or young person "*if it is satisfied that the child or young person is in need of care and protection*". ("*Care order*" is defined in section 60). The finding that a child is in need of care and protection is sometimes referred to as "establishment". Grounds upon which a child or young person may be found to be in need of care and protection are set out in the sub-section. Those grounds are not exhaustive.

Section 72 of the *Care Act* provides,

> ***"Determination as to care and protection***
>
> *(1) A care order in relation to a child or young person may be made only if the Children's Court is satisfied that the child or young person is in need of care and protection or that even though the child or young person is not then in need of care and protection:*
>
> *(a) the child or young person was in need of care and protection when the circumstances that gave rise to the care application occurred, and*
>
> *(b) the child or young person would be in need of care and protection but for the existence of arrangements for the care and protection of the child or young person made under section 49 (Care of child or young person pending care proceedings), section 69 (Interim care orders) or section 70 (Other interim orders).*
>
> *(2) If the Children's Court is not so satisfied, it may make an order dismissing the proceedings."*

A finding that a child or young person is in need of care and protection is not a final determination as to the rights of the parties. The finding simply gives the court jurisdiction to make certain final care orders, for example, an order allocating parental responsibility under section 79 of the *Care Act*. The court does not have to make that finding before it can make an interim order: see **Re Fernando and Gabriel** [2001] NSWSC 905 per Bell J at [41] and **Re Jayden** [2007] NSWCA 35 at [74]. Nor does the court have to make that finding prior to registering a care plan under section 38 of the *Care Act* or registering a parental responsibility contract under section 38A of the *Care Act*.

3.3 "**Realistic possibility of restoration**"

Pursuant to section 83 (1) of the *Care Act*, if the Director General seeks a final order for removal of a child or young person, the Director General must assess whether there is "*a realistic possibility of the child or young person being restored to his or her parents"* having regard to:

(a) *the circumstances of the child or young person, and*
(b) *the evidence, if any, that the child or young person's parents are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care.*

Curiously, section 83 does not expressly state that the court cannot make a final order for the removal of a child or young person unless the court has determined that there is no realistic possibility of restoration. But in my view, it is a necessary implication of the section that the court must make that determination before making a final order for removal of a child from the care of his or her parents. There is, however, an express requirement in section 83 (7) (b) that, prior to approving a permanency plan involving restoration, the court must find that there is a realistic possibility of restoration.

In the vast majority of contested cases, which come before the Children's Court the central issue for determination, is whether there is a realistic possibility of restoration of the child or young person to their parents' care.

As to the meaning of "*realistic possibility of restoration*" see **Saunders and Morgan v Department of Community Services (NSW)** (District Court of NSW, Johnstone DCJ, 12 December 2008); [2008] CLN 10. In the course of his judgment, Judge Johnstone referred to the following passage from the submission of the former Senior Children's Magistrate Mr Scott Mitchell to *The Special Commission of Inquiry into Child Protection Services in NSW (the Wood Inquiry):*

> *"The Children's Court does not confuse realistic possibility of restoration with the mere hope that a parent's situation may improve. The body of decisions established by the court over the years requires that usually a realistic possibility be evidenced at the time of hearing by a coherent program already commenced and with some significant* ***'runs on the board'****. The court needs to be able to see that a parent has already commenced a process of improving his or her parenting, that there has already been significant success and that continuing success can confidently be predicted.*
>
> *What is required can be likened to a prima facie case where absent some unforeseen and unexpected circumstance a safe and appropriate restoration will be possible in the near future".* (Emphasis added)

In relation to this passage Judge Johnstone said at [12] - [15],

> *"This passage has elements that resonate. With respect, however, to liken the determination to the concept of a prima facie case is alien to the fact that these are civil proceedings. It is also at odds with the natural meaning of the words themselves, and in my view a purposive and beneficial construction of the legislation does not require such an onerous test.*

There are aspects of a 'possibility' that might be confidently stated as trite. First, a possibility is something less than a probability; that is, something that it is likely to happen. Secondly, a possibility is something that may or may not happen. That said, it must be something that is not impossible.

The section requires, however, that the possibility be 'realistic'. That word is less easy to define, but clearly it was inserted to require that the possibility of restoration is real or practical. It must not be fanciful, sentimental or idealistic, or based upon 'unlikely hopes for the future'. Amongst a myriad of synonyms in the various dictionaries I consulted, the most apt in the context of the section were the words 'sensible' and 'commonsensical'.

Furthermore, the determination must be undertaken in the context of the totality of the Care Act, in particular the objects set out in s 8 and other principles to be applied in its administration. The object import notions of safety, welfare, well-being, health, needs, a safe and nurturing environment, and the like. Section 9 and other sections set out the principles to be applied. Some that are particularly apposite to the issues in this appeal include, in summary:

- *The safety, welfare and well-being of the children must be the paramount consideration, paramount even over the rights of the parents: s 9(a).*
- *The views of the children are to be given due weight: s 9(b), and the interests of the siblings must be taken into account: s 103.*
- *Any action to be taken must be the least intrusive intervention in the life of the children and the family that is consistent with the paramount concern to protect them from harm and promote their development: s 9(d).*
- *That the children retain relationships with people of significance: s 9(g).*
- *That any out-of-home care arrangements are made in a timely manner, to ensure the provision of a safe, nurturing, stable, and secure environment, recognising the children's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made in relation to a permanent placement: s 9(f) and s 78A.*
- *The Department bears the burden of proof on the balance of probabilities."*

Later in **Re Leonard** [2009] CLN 2 Mitchell SCM said at [30],

*"It may be important to keep in mind, too, when considering "**realistic possibility of restoration,**" that section 83 is cast in the present rather than the future tense. The realistic possibility needs to be shown as existing at the time of the hearing even if the appropriate time for effecting the restoration has not yet arrived. A court is unlikely to be satisfied merely because a party is about to begin or is contemplating commencing a process from which a realistic possibility of restoration might (or might not) emerge. It is for that reason that the Children's Court generally looks for "**runs on the board**" and some success, already achieved, in addressing parenting deficits. Further, even if some successes have been achieved by the parent, the*

Children's Court will need to assess the likely time frame in which the restoration might be effected and may need to take into account the viability of such a restoration given the delay and the age, level of maturity, wishes and developing attachments of the child or young person. Further, the ability to predict a viable restoration may become less and less reliable as time passes". (Emphasis added)

3.4 Care plans and permanency planning

If the Director General applies to the court for a final order, not being an emergency protection order, for the removal of a child or young person from the care of his or her parents, the Director General must present a care plan to the court before final orders are made: section 78 (1).

The care plan must set out the allocation of parental responsibility; the kind of placement proposed and how it relates in general terms to permanency planning; proposed arrangements for contact between the child and his or her parents, relatives, friends and other relevant persons; the services that need to be provided to the child or young person and the agency designated to supervise the placement in out-of-home care: section 78 (2).

As to the form and other required contents of a care plan see clause 12 of the *Children and Young Persons (Care and Protection) Regulation* 2000.

The court cannot make a final order for the removal of a child from the care and protection of his or her parents, or, for the allocation of parental responsibility in respect of the child, unless it has considered the Director General's care plan: section 80.

The requirement for the court to have a care plan before it does not apply to interim orders: **Re Fernando and Gabriel** [2001] NSWSC 905 at [45].

In **Re Tracey** [2011] NSWCA 43 the Court of Appeal dealt with the requirements of a care plan. In that case the Department placed before the District Court on an appeal the same care plan that had been before the Children's Court. That care plan proposed that the child was to be placed in the long-term care of two carers. However, since the matter had been in the Children's Court, one of the two proposed carers had died and the care plan had not been revised so as to provide that the child was to be placed in the long-term care of the surviving carer only. Nor were the proposed orders for parental responsibility in the care plan amended. Giles JA said at [90],

> *"As a matter of common sense, for compliance with s 80 the care plan presented to the Court must be a relevant care plan, proposing rules for the carer or carers under the Court's consideration for those roles. It would be absurd if a care plan contemplating exercise of some parental responsibility by A were sufficient for an order whereby that parental responsibility was exercised by B*".

His Honour went on to say at [93]-[94],

> "*The revised care plan may not have differed greatly from the 15 May 2009 care plan, but presentation of a care plan and its consideration by the Court is not a formality. The Court then decides the removal of the child or the allocation of parental responsibility with regard to a care plan apt to the current circumstances. The Court may not be obliged to give effect to the care plan (see* ***George v Children's Court of New South Wales*** *[2003] NSWCA 389 at [58]) but that does not warrant presentation or consideration of a care plan which can not be implemented.*

> *In my opinion, there was jurisdictional error in that the judge did not consider a care plan as required by s 80 of the Care Act*".

The decision means that a care plan will need to be very carefully scrutinised by the court to ensure that it accurately reflects the Department's proposals with respect to allocation of parental responsibility, placement and contact arrangements. If the care plans fails to accurately reflect those proposals it may not be a valid care plan.

3.5 The meaning of "permanency planning" under the Care Act

Where the Director General assesses that there is no realistic possibility of restoration of the child to their parents' care, the Director General is to prepare a permanency plan for another suitable long-term placement for the child and submit it to the court for consideration: section 83 (3) of the *Care Act*.

If the Director General assesses that there is a realistic possibility of restoration, the Director General is to prepare a permanency plan involving restoration and submit it to the court for consideration: section 83 (2).

The court is then to decide whether it accepts the assessment of the Director General and if the court does not accept the assessment, it may direct the Director General to prepare a different permanency plan: section 83 (5) and (6).

Section 83 (7) (a) of the *Care Act* provides that the court must not make a final care order unless it **expressly** finds that "*permanency planning*" for the child or young person has been "*appropriately and adequately addressed*".

Sections 78A, 83 (7A) and 84 deal with the meaning and requirements of permanency planning under the *Care Act*. Sections 78A (2A) and 83 (7A) are recent amendments. These amendments mirror the applicable law concerning permanency planning as referred to in **Re Rhett** [2008] CLN 1 by Mitchell SCM, namely, that a permanency plan, whilst not needing to provide details as to the exact placement in the long-term of the child or young person concerned, must be,

> "*sufficiently clear and particularised so as to provide the Children's Court with a reasonably clear picture as to the way in which the child's or young person's needs, welfare and well-being will be met in the foreseeable future*":

See further in relation to these provisions: **The Director General of the Department of Human Services and Hamilton** [2010] CLN 2.

3.6 Aboriginal and Torres Strait Islander Placement principles – s 13 of the Care Act

With respect to an Aboriginal or Torres Strait Islander child or young person who needs to be placed in statutory out-of-home care, placement principles in section 13 of the *Care Act* provide a general order for placement with extended family and kinship groups. The effect of the principles is that if an Aboriginal child is to be placed in statutory out-of-home care, then priority is to be given to a placement with family or kinship groups in preference to other placements. However, pursuant to section 13 (1), the general order for placement is "[s]*ubject to the objects in section 8 and the principles in section 9*". The Aboriginal placement principles are not to be blindly implemented without regard to those objects and principles, in particular, the paramount interests of the child: see **In the matter of Victoria and Marcus** [2010] CLN 2 at [49].

The Aboriginal placement principles **only** apply when the child "*needs to be placed in statutory out-of-home care*" as defined in sections 135 and 135A of the *Care Act*. Under section 135 (3) b), "*out-of-home care*" does not include any care provided by a "*relative*" unless,

(i) the Minister has parental responsibility by virtue of an order of the Children's Court, or
(ii) the child is in the care of the Director General, or
(iii) it is provided pursuant to a supported out-of-home care arrangement under section 153.

The Regulations may prescribe what is not to be regarded as out-of-home care: (s 135 (3) (c)) – see clause 17 of the *Children and Young Persons (Care and Protection) Regulation* 2000 (the Regulation).

Clause 5 of the Regulation defines "*related*" and "*relative*" for the purposes of the *Care Act.*

As to the meaning of "*Aboriginal*" and "*Torres Strait Islander*" see section 5 of the *Care Act*. Under the section "*Aboriginal*" has the same meaning as Aboriginal person has in the *Aboriginal Land Rights Act* 1983 and "*Aboriginal child or young person*" means a child or young person "*descended*" from an Aboriginal and includes a child or young person who is the subject of a determination under subsection (2).

Under the *Aboriginal Land Rights Act*, an "*Aboriginal person*" means a person who,

(a) is a member of the Aboriginal race of Australia, and
(b) identifies as an Aboriginal person, and
(c) is accepted by the Aboriginal community as an Aboriginal person.

Section 5 (2) of the *Care Act* provides that despite the definition of "*Aboriginal person*" in the *Aboriginal Land Rights Act 1983,* the Children's Court may determine that a child or young person is an Aboriginal for the purposes of the *Care Act* if the court is satisfied that that child is of Aboriginal descent.

As to the meaning of an "*Aboriginal descent*", see **Re Simon** [2006] NSWSC 1410 per Campbell J where it was held that "*descended*" refers to "*linear descent*". See also **Re Earl and Tahneisha** [2008] CLN 7 per Mitchell SCM where his Honour said at [13],

> "*I respectfully adopt the view expressed by the Law Reform Commission of NSW [Research Report 7 (1997) –* ***The Aboriginal Child Placement Principle****] that a "descent" definition, such as "a child of Aboriginal descent" is a broad definition which would include all Aboriginal children under the Principle. This would ensure that issues regarding a child's Aboriginality are considered regardless of the "degree" of Aboriginal blood…" Accordingly, I take the view that, if there is sufficient evidence that the great grandfather of [the children] was an Aboriginal person, they would be entitled to a finding of Aboriginal descent whatever one might say about the "degree"*".

In relation to the reliability of Aboriginal descent, Mitchell SCM referred to **Shaw v Wolf** [1989] 83 FCR 113 where Merkel J, when considering Aboriginality in the context of the *Aboriginal and Torres Strait Islander Commission Act* 1989 (Cth), noted,

> "*it may be that community recognition, given the inadequacy of written records, will be the best evidence of proof of descent*".

As to the operation of the placement principles generally see also: **RL and DJ v DoCS** [2009] CLN 3 per Garling DCJ.

3.7 Contact orders

The Wood Report found there to be significant inconsistencies across the State in the kinds of matters taken into account when making contact orders under section 86 of the *Care Act*. Accordingly, it was recommended that "*evidence based guidelines*" for contact orders be developed by the Children's Court to assist Magistrates and to achieve a greater degree of consistency in the kinds of matters taken into account when making contact orders.

The Children's Court has now developed these guidelines. The guidelines do not have the status of a Practice Note but are intended to be used purely as a guide. The guidelines seek to identify the variety of issues which may arise for consideration in making a contact order.

The guidelines are publicly available on the Children's Court website.

4. Care appeals to the District Court

Pursuant to section 91 (1) of the *Care Act* an appeal to the District Court may be brought against an order (other than an interim order) of the Children's Court. As to the meaning of "order" for the purposes of section 91 (1) see: **S v Department of Community Services** [2002] NSWCA 151 at [52] and [53].

An appeal is to be brought within 28 days after the Children's Court order is made. The time for bringing the appeal may be extended by the District Court: UCPR 50.3.

District Court *Practice Note DC (Civil) No. 5* relates to care appeals in the District Court. An information hand-out in relation to care appeals, *"Information for Parties – Appeals From the Children's Court in Care Matters"* is available on the District Court website.

The majority of appeals from the Children's Court to the District Court are appeals,

(i) against final orders allocating parental responsibility,
(ii) against refusals by the Children's Court to grant leave under section 90 (1) of the *Care Act* to bring an application for variation or rescission of a care order, or
(iii) against the Children's Court dismissal of a substantive application under section 90 to vary or rescind a care order.

4.1 Is an appeal a re-hearing or a hearing de novo?

Section 91 (2) allows for a completely new hearing in the District Court. The sub-section refers to a "*new hearing*" (not a "rehearing") and provides that not only may "*fresh evidence*" be given on the appeal but also "*additional evidence*" to the evidence led in the Children's Court. The sub-section provides that the appellant may even adduce evidence on the appeal "*in substitution for*" the evidence led in the Children's Court. There is no requirement in section 91 (2) for leave before fresh evidence or additional evidence may be adduced on the appeal.

However, when you come to section 91 (3) it is a very different picture. Under this sub-section, the District Court may determine that in conducting the appeal no fresh evidence may be adduced on the appeal and that the appeal is to be conducted only upon the transcript of the proceedings in the Children's Court together with any exhibit tendered during those proceedings.

Whether a care appeal is to be conducted as a hearing de novo or a rehearing on the transcript appears to be a matter entirely within the discretion of the District Court. How then should the discretion be exercised? The District Court may take the view in a particular case that little has allegedly changed since the case was before the Children's Court and that the appeal should properly be conducted on the transcript together with any fresh evidence. However, in a case where there appears to have been a substantial change in the situation of the parents and/or the child since the case was before the Children's Court, the District Court may take the view that the appeal should properly be conducted as a completely new hearing.

However, the usual practice in the District Court is that a care appeal is conducted upon the transcript of the Children's Court hearing together with any additional evidence admitted with the court's leave. *Practice Note DC (Civil) No. 5* states at 2.1:

> *"For the efficient disposal of cases it is generally desirable to deal with appeals on the transcript plus any new evidence. Any objection to this course should be notified to the Court well in advance of the hearing"*.

In relation to new evidence, clause 9 of the District Court information sheet for parties states as follows:

> *"If any party to an appeal wishes to rely upon fresh evidence or evidence in addition to, or in substitution for, evidence before the Children's Court, that party will be required to inform the Court at an early stage:*
> *(a) the nature of the evidence*
> *(b) to what issue it is relevant*
> *(c) why the evidence was not relied on in the Children's Court"*.

I would suggest that when an appeal is conducted upon the transcript from the Children's Court, the District Court is required to have regard to the reasons of the Magistrate in which findings on credibility of witnesses may be found: see **Paterson v Paterson** (1953) 89 CLR 212 at 222-4 in relation to civil appeals generally.

4.2 Functions and discretions of the District Court on a care appeal

Upon the hearing of an appeal, the District Court has, in addition to its functions and discretions that it has apart from section 91 of the *Care Act* (e.g. its functions and discretions under the *Civil Procedure Act* 2005 and the *UCPR*) all the functions and discretions that the Children's Court has under Chapters 5 and 6 of the *Care Act*: section 91 (4). Accordingly, an appeal hearing in the District Court is not to be conducted in an adversarial manner (section 93 (1)); is to be conducted with as little formality and legal technicality and form as the circumstances of the case permit (section 93 (2)); is not subject to the rules of evidence, or such of those rules as are specified by the court, are to apply to the proceedings or parts (section 93 (3)). Further, the District Court may only make an order for costs under section 88 of the Act: see **Costs orders** below.

The decision of the District Court in respect of an appeal is deemed to be the decision of the Children's Court and is given effect accordingly: section 91 (6).

In relation to Care appeals to the District Court Rules 50.17 – 50.20 of the UCPR are also relevant. On the question of costs when appeal proceedings are discontinued also see Rule 42.19 (3) of the UCPR: see **Costs orders** at [7] at page 19 below.

4.3 Disposal of appeals

On an appeal, the District Court may (subject to its functions and discretions under section 91 (4)) confirm, vary or set aside the decision of the Children's Court: section 91 (5).

4.4 Appeals and permanency planning

As stated earlier, the court cannot make a final care order unless it expressly finds "*that permanency planning for the child or young person has been appropriately and adequately addressed*": section 83 (7) (a). As an appeal in the District Court is to be conducted as either a re-hearing or a hearing de novo, if the District Court makes an order either for restoration or for long-term parental responsibility to be placed with the Minister, the District Court (like the Children's Court) must **expressly** find that permanency planning for the child has been appropriately and adequately addressed by the Director General before making a final care order.

Further, the court must not make an order allocating parental responsibility unless it has given "*particular consideration*" to the principle in section 9 (2) (c) of the *Care Act* (the least intrusive intervention principle) and "*is satisfied that any other order would be insufficient to meet the needs of the child or young person*": section 79 (3).

The statutory requirement that, before making a final care order, the court needs to be satisfied that permanency planning for the child has been appropriately and adequately addressed, is an important requirement as circumstances pertaining to the child, the parents or the carers may have significantly changed since the matter was before the Children's Court. If the Court is not satisfied that permanency planning has been appropriately and adequately addressed in the care plan, it should require the Director General to prepare a revised or amended permanency plan.

4.5 Appeals in relation to applications under section 90 for variation or rescission of a care order

An application to vary or rescind an order of the Children's Court requires leave: section 90 (1). 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] and accordingly, such refusal (or the granting) of leave may be the subject of a statutory appeal to the District Court.

In relation to the question of leave under section 90 (1), the court may only grant leave "*if it appears that there has been **a significant change in any relevant circumstance** since the care order was made or last varied*": section 90 (1A).

Before granting leave, the court must take into account the matters in section 90 (2A). One of those matters is whether the applicant for leave has an "*arguable case*": section 90 (2A) (e).

For a recent decision concerning the operation of the above provisions relating to the granting of leave under section 90 (1) and the meaning of "*significant change in any relevant circumstance*" and "*arguable case*" in section 90 (2A) (e) see: **Re Troy** [2010] CLN 2.

If the court grants leave, before making an order to vary or rescind a care order that places a child under the parental responsibility of the Minister, or that allocates specific aspects of

parental responsibility from the Minister to another person, the court must take into consideration the matters set out in section 90 (6).

4.6 Section 90 remittals to the Children's Court

With respect to appeals against a refusal by the Children's Court to grant leave under section 91 (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.

4.7 Interim orders and section 90 – a source of new appeals to the District Court?

Section 91 (1) provides that a party cannot appeal to the District Court against an interim order. However, it appears that certain decisions made by the Children's Court with respect to an interim order may be the subject of an appeal.

4.8 The legislative scheme for interim orders under the Act

Section 62 of the *Care Act* provides that a care order may be made as an interim order or a final order, except as provided by Part 2 of Chapter 5 of the *Care Act*.

Section 61 (1) provides that "*[a] care order may be made only on the application of the Director-General, except as provided by [Chapter 5]*". An application for an interim order under section 69 and section 70 of the *Care Act* is an application for a care order: see section 60.

Section 70A provides that an interim care order should not be made unless the Children's Court is satisfied that "*the making of the order is necessary, in the interest of the child or young person, and is preferable to the making of a final order or an order dismissing the proceedings*".

Only the Director General may make an application for an interim order under section 69 or section 70 of the Act: see section 61 (1) and **Re Timothy** [2010] NSWSC 524 at [49], [52] and [57] per Rein J. In seeking an interim order under section 69, the Director General must establish,

> "*that it is not in the best interests of the safety, welfare and well-being of the child or young person that he or she should remain with his or her parents or other persons having parental responsibility*": section 69 (2).

Section 69 relates to the making of an interim order which has the effect of removing a child or young person from the person or persons who have parental responsibility: **Re Fernando and Gabriel** [2001] NSWSC 905 at [48] and **Re Timothy** at [45].

An interim order under section 69 can only be made "*after a care application is made and before the application is finally determined*". A "*care application*" is defined in section 60 to mean "*an application for a care order*".

In making an interim order under section 69 placing parental responsibility in the Minister the court must also consider the least intrusive intervention principle expressed in section 9 (2) (c) of the Act: **Fernando and Gabriel** at [50].

In relation to other interim orders (i.e. orders other than orders which have the effect of removing a child from the care of their parents or others having parental responsibility), the power to make such order derives from section 70 rather than section 69. Section 70 does not permit the court to make orders removing children from the care of the person or persons who have parental responsibility: **Re Timothy** at [46]. Under section 70 the court may make such ***other*** interim orders "*as it considers appropriate for the safety, welfare and well-being of a child or young person*". Interim supervision orders (under section 76) and interim undertaking orders (under section 73) are examples of interim orders, which may be made under section 70 rather than section 69.

4.9 Can a section 90 application be brought with respect to an interim order?

In **Re Timothy** Rein J followed **Re Elizabeth** [2007] NSWSC 729 per Palmer J and **Re Alan** (2008) 71 NSWLR 573 per Gzell J which found that an application under section 90 of the *Care Act* to vary or rescind an order may be brought with respect to an interim order. However, in **Re Edward** (2001) 51 NSWLR 502 at [55] Kirby J came to the view that a section 90 application can only be made with respect to a final order.

In relation to variation or rescission of an interim order under section 69 or 70 of the *Care Act*, in **Re Edward** Kirby J at [52] held that such an order can be varied by the bringing of a further application under section 69 or 70. His Honour said in this way interim orders can be varied by going outside the scheme in section 90. This view of Kirby J was expressly approved in **Fernando and Gabriel** by Bell J at [49]. On this issue see the paper of Robert McLachlan, *"Re Alan – Do the requirements of section 90 apply to any application seeking to vary or rescind an interim order*?" [2008] CLN 7. In referring to **Re Alan** and **Re Elizabeth**, Mr McLachlan states,

> "*It is unclear from the judgment of* ***Re Elizabeth*** *and* ***Re Alan*** *the extent to which the Court's attention was taken and their Honours minds were turned to the question of the jurisdiction for making interim care orders under the care legislation*."

While the weight of authority in the Supreme Court appears to be against Kirby J in **Re Edward** on the issue whether a section 90 application can be brought with respect to an interim order, his conclusion that a section 90 application can only be brought with respect to a final order has a great deal of force and seems sensible. His Honour's view is supported by the terms of section 90.The whole scheme of section 90 requiring the granting of leave and requiring the consideration of a number of matters including the wishes of the child (section 90 (6) (b)), the length of time the child has been in the care of the present caregivers (section 90 (6) (c)), the strength of the child's attachments to the birth parents and the present caregivers (section 90 (6) (d)) and the risk to the child of psychological harm if present care arrangements are varied or rescinded (section 90 (6) (f)) clearly suggests that the section is directed towards an application to rescind or vary a final order rather than an interim order.

The *Care Act* does not expressly require that any of the matters in sections 90 (2A) or 90 (6) be taken into account by the court when making an interim order. To obtain an interim order under section 69 the Director General must only establish that "*it is not in the best interests of the safety, welfare and well-being of the child or young person that he or she should remain with his or her parents or other persons having parental responsibility*". Why then is it necessary for the multitude of matters referred to in sections 90 (2A) (re leave) and 90 (6) (re

the substantive application) to be taken into consideration in determining whether to vary or rescind an interim order?

The conclusion of Kirby J that section 90 does not apply to an interim order is supported by the very nature of an interim order. It has been held (in the context of interim orders made under the *Family Law Act* 1975) that at an interim hearing the court needs to exercise considerable caution against being drawn into matters properly dealt with in the trial process and ordinarily, at interim hearings, the court should not be drawn into issues of fact or matters relating to the merits of the substantive cases of each of the parties: see **Cowling v Cowling** (1998) FLC 92-801 at [18] and **Goode & Goode** [2006] FamCA 1346 at [66].

The inability of a parent to bring a section 90 application to vary or rescind an interim order which places the child under the parental responsibility of the Minister, would not disadvantage the parent. An interim order is made on the basis that it has effect until a specific time or "*until further order*". The parent may therefore apply to the court at any time to seek discharge of the interim order without the necessity to proceed via the cumbersome and time-consuming procedures under section 90.

The reason I raise these issues about interim orders in a paper dealing with care appeals to the District Court is because as a result of the clear finding in **Re Timothy** that only the Director General can bring an application for an interim order, we have recently been seeing more applications in the Children's Court under section 90 brought by parents for variation or rescission of an interim order of parental responsibility to the Minister. Whilst there is no right of appeal to the District Court from an interim order, an order either refusing leave under section 90 or refusing the substantive section 90 application (after leave was granted) to vary or rescind an interim order would be an order which may be the subject of an appeal to the District Court: see **S v Department of Community Services** [2002] NSWCA 151 at [52] and [53].

It is clearly incongruous that whilst there is no statutory right of appeal to the District Court against an interim order made by the Children's Court, there should be a statutory right of appeal with respect to an order of the Children's Court refusing an application to vary or rescind an interim order (or refusing leave to bring such an application).

I expect that in the future you may be seeing more appeals against such orders.

5. Assessment applications and the Children's Court Clinic

The Children's Court Clinic (the Clinic) is established under section 15B (1) of the *Children's Court Act* 1987. Pursuant to section 15B (2) of that Act the Clinic has the following functions,

(a) making clinical assessments of children
(b) submitting reports to courts
(c) such other functions as may be prescribed by the rules.

The Clinic is provided with further powers under section 58 of the *Care Act*. In the event that the court makes an assessment order under section 53 and/or section 54 of the *Care Act*, the court is to appoint the Clinic to prepare and submit the assessment report: section 58 (1). In the event that the Clinic informs the court that it is unable to prepare the assessment report or that it is of the opinion that it is more appropriate for the assessment to be prepared by another person, the court is to appoint a person whose appointment is, so far as possible, to be agreed to by all the parties: section 58 (2).

Under section 53 (1) of the *Care Act* the court may make an order for,

(a) *the physical, psychological, psychiatric or other medical examination of a child or young person, or*
(b) *the assessment of a child or young person,*
or both.

The Clinic is not presently resourced to carry out physical examinations of children (other than by way of simple observation).

Under section 54 (1) the court may order the assessment of "*the capacity of a person with parental responsibility, or who is seeking parental responsibility, for a child or young person to carry out that responsibility*". Such an assessment can only be carried out with the consent of the person to be assessed: section 54 (2).

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. Section 58 (1) provides that in considering whether to make an assessment order, the court is to have regard to the following,

(a) *whether the proposed assessment is likely to provide relevant information that is unlikely to be obtained elsewhere,*
(b) *whether any distress the assessment is likely to cause the child or young person will be outweighed by the value of the information that might be obtained,*
(c) *any distress already caused to the child or young person by any previous assessment undertaken for the same or another purpose,*
(d) *any other matter the Children's Court considers relevant.*

Section 58 (2) provides that,

> "*in making an assessment order, the Children's Court must ensure that a child or young person is not subjected to unnecessary assessment*".

An assessment report submitted to the court under sections 53 and/or 54 is taken to be independent from the parties as it is a report to the Children's Court rather than evidence tendered by a party: section 59.

I will shortly be issuing a Children's Court Practice Note in relation to the Clinic to ensure it is used more effectively. In particular, the Practice Note will deal with the procedures for the making of an Assessment Application, the forwarding of documents to the Clinic following the making of an assessment order and the procedures for requesting the attendance of the Authorised Clinician at court.

5.1 Assessment applications

In ordering an assessment, the Clinic needs an assessment order with clear and unambiguous questions from the court. The Children's Court will soon issue a new form of Assessment Application. This will be a useful model to help the District Court frame the questions that the Clinic can most helpfully answer.

The proposed new Assessment Application,

i. consolidates multiple children in a sibling group into the one application, while allowing for separate questions for individual children, if required,
ii. outlines the reasons for making an assessment order,
iii. includes a brief list of issues to be addressed by the clinician,

iv. states whether a clinician with specific expertise is required,
v. includes contact details for all children, other parties and the legal representatives, and
vi. lists all the documents upon which the assessment is to be based, including all relevant previous clinical assessments undertaken of the child, children or family.

Clinic assessments are of greatest assistance to the court when the Clinic is asked to address specific and clear questions. Usually by the time a case has gone on appeal to the District Court, the issues which the Clinic is asked to address should be quite confined.

Problems can be encountered in preparing an assessment report when the parent is,

- in gaol,
- allegedly suffering from significant alcohol or other drug problems which are not being addressed,
- in residential treatment for drug dependence or mental illness, or
- about to give birth.

In each of these situations, a Clinic assessment may not be viable. For example, for a parent serving a lengthy sentence of imprisonment an assessment of parenting capacity would probably be of no utility. Further, it is extremely difficult (if not impossible) to carry out a proper parenting capacity assessment in the setting of a prison.

Following the making of an assessment order, all relevant documents must be sent to the Clinic as soon as possible together with the assessment order. Under the proposed Practice Note all documents upon which the assessment is to be based (which will be particularised in the Assessment Application and agreed to by all the parties) must be forwarded to the Clinic within **5 working days** from the making of the assessment order.

The documents provided to the Clinic should provide the Authorised Clinician conducting the assessment with all relevant documents pertaining to the assessment being sought (including all prior assessments) and details of prior interventions. In addition to documents used to establish a case, other documents to be provided should include previous clinical assessments undertaken of the child, children or family (e.g. paediatric, psychological, psychiatric, social work assessments or reports, school reports, previous Children's Court Clinic assessments and hospital discharge summaries relevant to the terms of the Assessment Order).

Assessment reports usually take six weeks to complete from when the Clinic receives the assessment order and all the relevant documents ("the file of documents"). This may need to be extended at the request of the Clinic due to case complexity, availability of clinicians, missed appointments, etc. It is obviously undesirable for the court to have to re-list a matter due to delays in the Clinic assessments, however, these delays can be avoided if the implications of conducting an assessment are considered carefully beforehand by the parties and the court.

5.2 The Authorised Clinician attending at court

In the event that an Authorised Clinician is requested by a party or parties to attend at court for cross-examination the court should ensure, by making appropriate directions, that the Clinician is requested to appear in good time, and also that he or she is provided with any updating documents early enough (no later than **three weeks** before the hearing) to be able to properly consider them before giving evidence.

Before a care case is listed for hearing it is important that the parties ensure that the Authorised Clinician (if required for cross-examination) is available to attend on a particular

day. This may be done by either enquiring through the Clinic or directly with the Clinician. When the matter is listed for hearing, the court registry is to forward to the Clinic a *Notice to Authorised Clinician to Attend Court* (which is to be filed by a party requesting the attendance of the Clinician).

The Clinic website (www.lawlink.nsw.gov.au/ccc) has guidelines on the kind of questions that the Clinic can most usefully answer. It also has more detailed information to help develop Assessment Orders and requests for court appearance. You may contact the Clinic through its phone and fax numbers (Ph: 8688 1530, Fax: 8688 1520), and email address: childrens_court_clinic@agd.nsw.gov.au. The Clinic Director, Mr Mark Allerton, is very happy to discuss any matters relating to assessment orders and the Clinic with a judicial officer or a practitioner. He is also happy to give presentations on the Clinic to judicial officers and practitioners.

6. New Alternate Dispute Resolution procedures in the Children's Court

In accordance with a number of Wood recommendations, the Children's Court has now implemented the greater use of alternative dispute resolution (ADR) procedures in care and protection proceedings. The Court is doing this in two ways – first, through dispute resolution conferences (DRCs) conducted by a Children's Registrar under section 65 of the *Care Act*, and, secondly, by the Court referring cases to external mediation pursuant to section 65A of the *Care Act* under a pilot being conducted at the Children's Court at Bidura. Under the pilot, cases at Bidura are referred to mediation conducted by experienced mediators from the Legal Aid Panel.

6.1 Children's Court Practice Note 3 - "*Alternative Dispute Resolution Procedures in the Children's Court*"

Recently issued Practice Note No. 3 "*Alternative Dispute Resolution Procedures in the Children's Court*" establishes the model under which internal DRCs are conducted. These procedures took effect from 7 February this year. The Practice Note also refers to the Bidura pilot. The Practice Note is available on the Children's Court website.

6.2 Dispute Resolution Conferences (DRCs) under section 65

The Practice Note states that DRCs are to be conducted by Children's Registrars. DRCs are scheduled to run for a minimum of two hours, and personal attendance is required by,

- all parties (except children) and their legal representative (if the party is legally represented)
- the child's legal representative
- the Community Services Caseworker, and Casework Manager.

DRCs are conducted as a conciliation process. In this sense, a DRC is a process in which the parties, with the assistance of the Children's Registrar, identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. Under a conciliation model, the Children's Registrar has an advisory role, but not a determinative one, and might, for instance, express views on what the Court may consider relevant if the matter goes to a hearing. The Children's Registrar is also responsible for managing the DRC, including setting the ground rules, managing any apparent power imbalance between the participants and ensuring the participants conduct themselves appropriately.

The usual confidentiality arrangements apply to a DRC, pursuant to clause 11 of the *Children and Young Persons (Care and Protection) Regulation* 2000. Following the DRC, the

Children’s Registrar will report back to the Court whether agreement was reached by the parties in relation to any issues, and, if agreement has not been reached, the Children’s Registrar will, in consultation with the parties, identify the issues remaining in dispute to allow the court to allocate hearing time.

Where all the parties have reached agreement, proposed consent orders will be prepared and provided to the Court at the next mention of the matter. The Court will then determine whether it is appropriate to make the consent orders which are sought taking into account the objects and principles of the *Care Act* as well as other relevant provisions of the *Care Act*. If the court declines to make the orders sought the Court will make directions for the further conduct of the matter.

6.3 External mediation pilot at Bidura Children’s Court

The external mediation pilot commenced in the Bidura Children's Court on 9 September 2010. A number of external mediations have now been held dealing with a variety of care and protection issues.

Mediations, unlike DRCs, are scheduled for a minimum duration of three hours and are conducted at Legal Aid's Castlereagh St offices. Those required to attend an external mediation session are the same as those required to attend a DRC under section 65. Participants are also asked to sign a confidentiality agreement.

The Bidura Pilot will run for approximately 12 months. During this time, cases from Bidura that are suitable for mediation will go to the external mediation pilot, rather than a DRC.

6.4 Legal practitioners' training regarding new procedures

Information sessions have been held for care and protection legal practitioners throughout the State. A pod cast recording of this information is available on the Children’s Court website.

Separate training has also been provided to Community Services staff.

Promotional material (including a DVD) is being developed for participants in both programs (including children and young people).

6.5 Evaluation

An external evaluation of both the new model of DRC and the external mediation pilot will be conducted, using a sample of 100 cases from each, and a control group of 100 cases that did not undergo any form of ADR. The purpose of the evaluation is to determine the costs and benefits of each model, and how they can best complement each other. Children's Magistrates and Children's Registrars will be consulted during the evaluation.

While the DRC model has only very recently commenced, the feedback from practitioners who have participated in the Bidura pilot so far has been very positive.

6.6 ADR and appeals to the District Court

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.

If the District Court wishes to refer a case to a DRC under section 65 to a Children's Registrar in the Children's Court, arrangements can be made through the Conference Co-ordinator on telephone (02) 8688 1471 or the conference assistant on telephone (02) 8688 1469.

Should the District Court wish to refer a case to external mediation under section 65A, enquiries can be made of Legal Aid as to whether it is able to refer the case to mediators on the Legal Aid panel. Alternatively, the Department may, in some circumstances, agree to funding other external mediation.

For evaluation purposes, the Bidura external mediation pilot is restricted to cases referred from the Children's Court at Bidura.

7. Costs orders

Under section 88 of the *Care Act*, an order for costs cannot be made in care proceedings "*unless there are exceptional circumstances that justify the court in doing so*". The restriction on costs orders in care proceedings arises because proceedings relating to the welfare of a child are not to be regarded – at least not to be regarded for all purposes – as normal adversary litigation inter partes: **S v Minister for Youth and Community Services** (Supreme Court of NSW, 3 April 1986, Powell J).

What constitutes "*exceptional circumstances*" for the purposes of section 88 has been considered in a number of Children's Court and District Court decisions including **In the Matter of Jackson** [2007] CLN (Children's Law News) 2; **SP v Department of Community Services (DoCS)** [2006] NSWDC 168; **DoCS v SM and MM** [2008] NSWDC 68; **BS v DoCS & Ors** (District Court of NSW, Robison DCJ, 26 August 2009, unreported); **Joy Alleyne as Independent Legal Representative for LC v Director General Dept of Community Services** [2009] NSWDC 171 and **XX v Nationwide News Pty Ltd** [2010] NSWDC 147**.**

In **SP v Department of Community Services** Rein DCJ upheld an appeal from the Magistrate's award of costs against the Department on the basis that he did not consider it an exceptional circumstance that a solicitor would be out of pocket because of the impecuniosity of his client. After referring to a number of authorities, his Honour stated that some guidance can be gained from the cases as to the meaning of exceptional circumstances. His Honour summarised the points as follows,

1. Cases where circumstances are found or not found to be exceptional or not all turn on their own facts and circumstances (see **Murray Publishers Pty Ltd v Valuer-General** (1994) 84 LGERA 13).

2. Unusual circumstances do not make the circumstances exceptional. A council's error, for example, in its dealings with the applicant are insufficient.

3. Even circumstances out of the ordinary or even appalling breakdowns or misunderstandings in communication do not, of themselves, amount to exceptional circumstances (see **Australian Recyclers Pty Ltd v v Environment Protection Authority of NSW** (2000) 110 LGERA 171).

4. Refusal of counsel to act on recommendations of officers or advice of experts is not sufficient.

5. Acting upon a serious or fundamental error of fact, acting capriciously or deliberately attempting to frustrate or cause delay or expense to the applicant would be sufficient.

His Honour goes on at [36] to identify the following types of matters which would or at least arguably might fall within the description of exceptional circumstances for the purposes of section 88 of the *Care Act*,

1. Deliberate misleading of the court or opponents

2. Other misconduct or wrongful conduct

3. Contumelious disregard or orders of the court or the principles set out in section 93 of the *Care Act* (General nature of proceedings)

4. The raising of baseless allegations for which the party had no reasonable belief as to their existence

5. The raising of false issues that bear no relation to the facts or are contrary to clearly established case law

6. Maintenance of proceedings solely for an ulterior motive or the undue prolongation of a case by groundless contentions

7. Gross negligence in the conduct of a case at least where that has led to an extensive waste of the court's time and that of other parties

8. Where the proceedings involve a blatant abuse of process and/or are both mischievous and misconceived.

Having identified these matters as the types of matters which may constitute exceptional circumstances, his Honour said that whilst the categories of conduct are not closed, "*there is a theme or flavour about these categories that I have already outlined as falling within the ambit, in my view, of section 88*".

The *"theme or flavour"* of the categories of exceptional circumstances identified by his Honour clearly relates to the conduct of the parties and requires either deliberate improper/wrongful conduct, abuse of process or gross negligence or incompetence.

In **Department of Community Services v SM and MM** Garling DCJ expressly approved the matters which might arguably fall within the description of exceptional circumstances as identified by Rein DCJ in **SP v Department of Community Services**. Garling DCJ also referred to the decision of Campbell J in **Yacoub v Pilkington (Australia) Ltd** [2007] NSWCA 290 concerning the meaning of exceptional circumstances in Rule 31.18 of the UCP Rules.

In **Yacoub** Campbell J referred to **San v Rumble (No. 2)** [2007] NSWCA 259 and said,

> *"I shall state such of the conclusions as seem to me to be applicable in the construction of Rule 31.18 (which relates to exceptional circumstances)*
>
> *a) Exceptional circumstances are out of the ordinary course or unusual or special or uncommon. They need not be unique or unprecedented, or very rare, but they cannot be circumstances that are regularly, routinely or normally encountered (**R v Kelly (Edward)** 2000 1 QB 198).*
> *b) Exceptional circumstances can exist, not only by reference to quantitative matters concerning relative frequency of occurrence, but also by reference to qualitative factors (**R v Buckland** [2000] 1 WLR 1262).*

c) *Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional (**Ho v Professional Services Review Committee No. 295** [2007] FCA 288.*
d) *In deciding whether exceptional circumstances are exceptional within the meaning of a particular statutory provision one must keep in mind the rationale of that particular statutory provision (**R v Buckland**).*
e) *Beyond these general guidelines whether exceptional circumstances exist depends upon a careful consideration of the facts of the individual case (**AWA v Independent News Auckland** (1996) 2 NZLR 184).*

Campbell J then said,

> *"Any decision about whether there are exceptional circumstances would need to bear in mind the explicit statement of objectives of a Court in the management of litigation".*

In **DoCS v SM and MM**, in awarding costs against the Department, Garling DCJ identified the following as exceptional circumstances,

- The appeal had no merit
- The Magistrate made the only reasonable order available
- There were no grounds to seek an appeal from that order nor was there additional evidence which may have caused the District Court to reach a different decision from the Magistrate.

Judge Garling found that the position the Department took on the appeal was unreasonable being a position which was not based upon the available expert evidence. Further, his Honour found that the fact that the respondent parents were not entitled to legal aid and had to pay their own legal costs as a result of the Department's appeal, was also relevant to the consideration of exceptional circumstances.

In **BS v Minister for Community Services & Ors** Robison DCJ, after referring to **DoCS v SM and MM** and **SP v DoCS**, said at [4],

> *"Exceptional circumstances can and, indeed, in many cases include a broad variety of factors. There can be a difference of view as to what amounts to an exceptional circumstance. The judges of this court in those two decisions had indicated certain views about what are considered to be exceptional circumstances. At the end of the day each case needs to be determined in the context of the proceedings and the matters which were brought to the attention of the court during the course of the proceedings. Certainly a relevant matter is the conduct of the parties to proceedings of this nature*".

His Honour stated at [5] that any order for costs under section 88 could only be made with respect to the appeal proceedings before the District Court (not to the proceedings in the Children's Court). In finding that exceptional circumstances existed and ordering the Department to pay the mother's legal costs, his Honour found that the Department had an "*entrenched immovable view*" from an early stage and rejected expert opinion which supported the mother's case even though it had no expert evidence to contradict that expert opinion. His Honour noted that while section 94 of the *Care Act* requires that proceedings

should proceed as expeditiously as possible, the entrenched and immovable view of the Department resulted in the proceedings not proceeding expeditiously.

In **Joy Alleyne as Independent Legal Representative for LC v DG Dept Community Services** Goldring DCJ, in refusing to award costs against the Department, said at [11],

> *"I do not regard the matters set out by Rein J in **SP** as an exhaustive statement of what might constitute "exceptional circumstances" for the purposes of section 88, though they give a clear indication of some matters that may constitute such circumstances. **BS** also indicates matters of a different type, which may give rise to such circumstances. It may be that in some circumstances, the financial position of a party may give rise to a finding of "exceptional circumstances". It may be that the factual situation is so complex, or the Department had taken such an unreasonable position, as Robison J found in **BS v Minister for Community Services**, that either would make for exceptional circumstances. The facts of this case do not".*

In **XX v Nationwide News Pty Ltd** the defendant, The Australian newspaper, had published a number of articles concerning certain care proceedings in the Children's Court. Although the articles did not directly name the child the subject of the proceedings, there was evidence before the Children's Court that facts about the case referred to in the articles had identified the child. It was clear that the contents of the articles were likely to identify the child in breach of section 105 (1) of the *Care Act*.

In the Children's Court the plaintiff successfully obtained a non-publication order against the newspaper defendants. However, the court refused the plaintiff's application for costs with respect to their successful application. The Children's Court found that the conduct of the newspaper did not fall within the categorises of exceptional circumstances referred to by Rein DCJ in **SP v DoCs**.

The plaintiff appealed to the District Court against the order refusing costs. Gibson DCJ held at [47] that the requirement that exceptional circumstances be established placed "*a heavy burden*" upon a party seeking costs in care proceedings. Her honour re-affirmed that the list of matters set out by Rein DCJ in **SP v DoCS** is not exhaustive. In overturning the Magistrate's decision and awarding costs against the newspaper, her Honour found that its conduct did fall within the kinds of conduct referred to in **SP v DoCS** as its breach of implied undertakings as to documents obtained in the litigation process was capable of amounting to wrongful conduct, amounted to contumelious disregard to the principles of the *Care Act* and that it had been guilty of gross negligence in not removing articles from its website.

Her Honour declined to award indemnity costs although she stated at [59] that while there is no provision in the *Care Act* for awarding indemnity costs, "*that does not necessarily mean that indemnity costs cannot be awarded: see, by analogy, **Vero Insurance Scriven** [2010] FMCA 352 at [45]".*

7.1 Discontinuing proceedings – costs

In relation to costs orders where appeal proceedings are discontinued, Rule 42.19 (3) of the UCPR provides that the defendant's costs in the appeal are not payable by the plaintiff unless the court finds there are "*special circumstances to justify an order for their payment*".

8. Recent decision - Re Tracey [2011] NSWCA 43

This is an important recent decision of the Court of Appeal relating to the operation and applicability of the "least intrusive intervention" principle contained in s9 (2)(c) of the *Care Act* and the applicability of the United Nations *Convention on the Rights of the Child* (1989) (the Convention). The case also deals with the statutory requirements for a care plan under the *Care Act*.

In **Re Louise and Belinda** [2009] NSWSC 534 Forster J at [54] said the following with respect to the operation of the least intrusive intervention principle in section 9 (2)(c) of the *Care Act*,

> *"In my opinion the section is ambulatory. In the case of a care application made under s60 of the Act, it has the effect of requiring the court to be reluctant to remove a child from its natural parents unless there is a compelling reason to do so. On the other hand, where an application is made not under s60, but under s90, for the rescission or variation of a care order, the sub-section has a different effect. In that case, the least intrusive form of intervention would normally mean not interfering with existing care arrangements. Needless to say, the force of the requirement imposed by s9 (d) (now s9 (2)(c)) will vary from case to case, and a court will undoubtedly have regard, inter alia, to the strength of the respective bonds that a child may have with his or her natural parents and his or her foster carers."*

In **Re Tracey** Giles JA (with whom Spigelman CJ and Beazley JA agreed) said that this explanation by Forster J as to the operation of section 9 (2) (c) was erroneous as the least intrusive intervention principle has no application when it is not necessary to take action to protect a child from harm. Giles JA said at [79] that the principle's prescription is confined *"to when it is necessary to take action in order to protect a child from harm, and when taking action it is necessary the course to be followed must be one of least intrusive intervention…"*. Giles JA said *"there must be a prospect of harm if action is not taken, and the question is then the nature of the action."*

The case is also important as the Court of Appeal found (per Spigelman CJ and Beazley JA) that the trial Judge was in error in failing to take into account as a relevant consideration, in exercising her discretion under s90, Australia's treaty obligations under the Convention. The case involved a mother who was to be deported to Cambodia following her conviction for drug offences. If the child remained in the care of the Minister the child would therefore have no contact with her mother as the child was to remain in Australia. In finding that the Judge was in error in not having regard to the Convention, Spigelman CJ referred particularly to Article 7.1 which provides, in part, that a child has a right *"to be cared for by his or her parents"*.

Although the paramountcy principle contained in section 9 (1) of the *Care Act* partly reflects Article 3.1 of the Convention, the decision in **Re Tracey** means that the court will be required to take into account all relevant Articles of the Convention in determining what is in the best interests of the child; in particular, Article 3.1, Article 3.2, Article 5 together with Article 9.1, Article 8 (1) and Article 29.

As stated earlier in this paper, **Re Tracey** also deals with the requirements of a valid care plan for the purposes of section 80 of the *Care Act*.

9. <u>Local Court Bench Book</u>

Very useful and instructive material relating to the conduct of care proceedings may also be found in the Local Court Bench Book on the JIRS website. Go to the link “Bench Books” then “Children’s Court” and then to the link “Care and Protection Jurisdiction”.

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