SPEECH

CONTACT AND ITS PLACE IN CARE PROCEEDINGS

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by
Acting Senior Children's Magistrate Scott Mitchell

Thank you for the opportunity of addressing you today on the occasion of this seminar conducted by the legal aid commission of New South Wales on the topics of "Family Law" and "Care." I understand that emphasis is to be given this afternoon to the law and practice on *"guardians ad litem"* and practitioners, better equipped than I, intend to worry about it out loud, which I am sure will be an edifying spectacle and of great assistance to all concerned.

Instead, I want to speak to you briefly about another issue of potential significance – the matter of contact in the Children's Court. I say "potential" because, although, at present, the power to make final orders for contact is to be found in section 86 of the Act and practitioners and parties expect that, where the court makes final care orders, it will turn its mind to the question of contact, there are powerful and influential forces at work which oppose the concept of contact or, at least, oppose the court's involvement in it.

The power to make "final" orders for contact is one of the real advances to be found in the *Children and Young Persons (Care and Protection) Act, 1998*. Prior to the commencement of the new Act, the court was confined to making contact orders during the currency of proceedings but the power to make a contact order was limited to the life of the proceedings and, once a final care order was made, the court could say nothing further about contact. Contact remained in the discretion of the Department of Community Services in whose care the child had been placed.

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A more compelling argument against long-term orders for contact is that circumstances change and, over the lengthy period of a child's upbringing, are likely to change so radically that his or her need for contact may change out of all recognition. No one looks forward to an endless chain of repeated litigation as a child's changing needs for contact to mother, father or other family members is repeatedly canvassed. Perhaps, the argument goes, it is better to let the Minister decide questions of contact along with the other matters for which she will be responsible when a child is placed in long-term out of home care.

One of the difficulties with this approach is the wide range of opinion as to the value of contact. Traditionally the Department of Community Services and the agencies seem to have been very suspicious about contact in the context of orders for long-term out of home care. The view has been that, in such a context, contact is likely to have an unsettling impact on a child - that contact is likely to upset a child and to distract the child in his/her efforts to attach in his/her new placement. When a child has been placed in out of home care, few things are as important as the formation of an

attachment with the long-term carer or carers. It seems to me that a significant reason for the failure of so many long-term placements is the failure to attach and the inability of the child to see himself/herself as an integral part of the carer family. Very often the view has been that the maintenance by the child or young person of an attachment to the birth family will leave insufficient room for the new family. Hence, contact is seen as problematic.

Of course, there are very few of those who hold that view who would suggest that there should be no contact whatsoever. Almost everybody accepts that, except in extreme cases where contact is positively dangerous, a child needs to some contact with his family of origin if only so that he/she knows his origins and lest he perhaps be tempted to idealize his parents. However some within the Department of Community Services and in the agencies maintain that the bare minimum of contact will *usually* be sufficient to enable a child to develop and maintain a sense of identity. Typically and very, very frequently, two hours x 4 per year is regarded as sufficient and any more as distracting to the child and unnecessarily burdensome to the carers.

The contrary view is that, in many cases, contact with a family of origin, as well as serving the purposes of identity, has a supportive role to play in the child's formation of a positive bond with his/her new family. That view holds that, where a child has already formed an attachment with his/her family of origin and then is placed elsewhere in long-term out of home care, the attachment with the family of origin cannot simply ignored. If that original attachment is not respected, it is argued, then the child's ability to attach in other places and to other people is likely to be adversely affected and, consequently, the placement may fail.

According to that view, attachments, once formed, can rarely be extinguished. Which of us actually stops thinking about people who have been important to us? According to this theory, children, (unless removed from their family of origin as a tiny babies, before any attachment has taken place), are likely to carry their attachments into their new family where, hopefully, they will make fresh, *additional,* attachments. But they will only attach successfully in the new placement if they are allowed feel secure and comfortable in the relationships they have already formed and that security and comfort is usually to be achieved by contact.

These then are the two conflicting theories of contact in care cases that are currently in play. It is important that, as lawyers, we all think about these matters because there is soon to be a review of the Act and there will be plenty of people pushing plenty of barrows who are motivated by considerations which have less to do with the best interests of children and a good deal more to do with administrative convenience and economy.

The conflicting theories as to contact were best illustrated in a case published in [2004] Children's Law News 2. The case is called **"Re Helen"** and, in the present context, it bears some discussion because it was common ground that Helen should be placed in the parental responsibility of the Minister and live in out of home care until attaining the age of 18 years. The only issue in the case was the child's contact to her mother.

Helen was seven or eight years of age at the time of the hearing. All that was known of her father is that he was a seaman and may have hailed from Sri Lanka. Her mother and her maternal grandmother originally came from England but had arrived in Australia before Helen was born. They had no relatives in Australia. The mother was developmentally delayed and in the mild to medium range of intellectual disability. Helen was her only child and the three - Helen, her mother and her grandmother lived in a small, two-bedroom flat in the northern Sydney suburbs. Although Helen went to school every day, they lived a very isolated life surrounded by domestic squalor and extraordinary clutter, collected by the grandmother who was something of a hoarder. The mother subsequently told Departmental workers that, over recent years, her mother had become more and more moody and depressed and difficult to live with and the mother complained that she had been unable to establish her own independence and freedom.

Then, on Christmas Day, 2003, the grandmother retired for a nap after lunch and, before long, called out that she was having chest pains and she asked that an ambulance be summoned. The mother was scared and panicky but was frightened to call for help because she was unwilling to let anybody into the flat. She subsequently told police that "all I could see around me was the mess and there was no room to move... ...I didn't know how I could let anybody in." So no help was summoned and

nothing was done. Helen was present, crying and screaming for help while the grandmother made gurgling sounds and the mother just sat there. Eventually, the grandmother fell silent and the mother and Helen "felt empty and helpless," not knowing what to do. They stayed there with the body for three days until a neighbour, Doug, contacted police who eventually broke into the flat. Helen was taken into care.

Now the neighbour who had come to their aid, Doug, was an old man in his late seventies. He died before the care proceedings came on for hearing. He had sometimes been invited to the flat, being one of the few people ever granted access to it, and he and the mother had become friends and shared some degree of sexual intimacy although the mother later told Departmental workers that she did not believe that they had ever had 'a sexual relationship'.

Shortly after she was taken into care, Helen disclosed that she had been sexually abused by Doug and that, on a number of occasions, he had taken her aside, touched her breasts and her genitals and invited her to touch his genitals. The child told the JIRT team that, on a number of occasions, Doug "would pull his penis out of his pants"... while she touched it "until it became slippery." Worse still, it became clear that a good deal of this behaviour had taken place in the presence of the mother and sometimes with her participation.

Due to the mother's intellectual and developmental deficits, she was not to blame for what had happened to her daughter. She had done her best, within the limits imposed upon her by her disabilities, to be a loving and caring parent and her affection for her daughter was deep-seated and genuine. It was however clear that Helen, who had experienced a great deal in her seven or eight years of life, could not be returned to the care of the mother and would have to be placed in long-term out of home care. In the event, the mother consented to that arrangement.

The fact remained that Helen and her mother were closely bonded. They had lived together for the whole of the child's life and the mother was the child's primary attachment figure and they had shared their lives - the good and the bad, together. The Clinician's evidence was that, far from distracting her from the important business of settling down and forming affectionate and useful attachments to foster carers, Helen's continued involvement with and exposure to her mother and the success of her new placement were likely to depend upon proper and sufficient contact between mother and daughter. The Clinician predicted significant defiance, rebellion, resentment and resistance towards her foster parents should Helen's existing attachment to her mother be denied.

The Clinician's view was that, although Helen's "top priority" was to establish new and useful relationships with her new family. That did not mean that her existing attachment to her mother could be or should be ignored. Indeed, he thought that the lack of appropriate recognition of that existing attachment to her mother, just like a refusal to accept, recognise and properly allow for any innate or other deep-seated and permanent characteristic of the child, far from easing Helen's blending into a new family, would actively work against it.

The Clinician's evidence in this regard was quite contrary to evidence presented by the Department and, in particular, quite contrary to the thrust of a learned paper published by Barnardo's Australia entitled "*Establishing Permanency for Children.*" That paper, which was handed up to the court, asserted that *"visits (to a parent) that are too frequent can interfere with a child's attachment to the new family..."* The evidence of the Clinician and of Ms. Spencer, another professional witness called, over objection, by the Legal Aid Commission on behalf of the mother, was that *"based on a child's ability to attach to more than one person in more than one situation, if a primary attachment is not properly and adequately recognised by sufficient contact, the newly developing attachment and the new placement is likely to fail."*

So that was the area of conflict in re Helen – where it was agreed by everybody, DoCS, the child's representative and even the mother, that Helen's first challenge was to form a good attachment to her new family, was what room, if any, that imperative left for the mother/daughter relationship and whether that relationship was likely to be benign or counter-productive.

The question is likely to arise in differing circumstances and the answer is likely to differ from case to case. The strength of the original attachment or attachments will vary from case to case and, particularly, with reference to the age at which the child was taken into care in the first place. The

selflessness and willingness of the natural parent to contribute to and not to subvert the placement will vary as will the maturity and willingness of the carers to allow the child to be himself or herself. What will suit one child may be quite unsuitable for another. Some children will have separated siblings as well as parents with whom they need to keep in touch. Geographical or financial restraints will need to be taken into account and a child will need to have some time to himself or herself – to pursue his or her own talents and interests rather than being caught up in a giddy round of contact visits.

One of the things which Helen's case points up is the need for the court, the agencies, the Department and the lawyers to look at the special circumstances of each case in order to form a view as to what contact arrangements are called for where a child is going into long-term out of home care. It can't be that contact is just a consolation prize or that "one size fits all." Those who seek contact orders and those who oppose them should spend some time ensuring that there is evidence on which a court can make decisions as to the sort of contact and the extent of contact that the individual child requires. It should not be that a matter as important as contact should be left to chance and good luck or to the vagaries of individual caseworkers. Rather, contact should be thought about carefully, it should be the subject of evidence and argument and orders should be sought and made which are tailored to the individual needs of the individual child.

Returning to Helen's case, there was a very hard fought hearing and a great deal of evidence was led as to Helen's relationship with her mother and her need to continue and enhance it. There was a great deal of spirited argument during which the Department of Community Services fought to limit Helen's contact to her mother and maintained that 'too much' contact would have a corrosive effect in the child's relationship with her foster carers.

Finally orders were made that Helen have more or less unrestricted phone contact to her mother and face to face contact for a full day on each alternate weekend. That face-to-face contact was to be supervised by the Minister or by her nominee and the court suggested that a suitable nominee might be a member or members of the congregation of the local Anglican Church where Helen and her mother used to worship. The orders also provided that the mother be entitled to copies of school reports and class photos and that she be kept *au fait* with details of her health and general welfare.

Now, every case is different and one can't always be too sure of the outcome of orders so the section 82 report to be prepared and submitted to the court twelve months after the orders were finally made was awaited with great interest and some trepidation.

In the event, the placement and the contact have been hugely successful. The placement is described in the section 82 report as *"stable"* and *"the relationship between them and the communication between Helen and her carer is very good."* Evidently, Helen is progressing well at school and receives positive school reports about both her progress and her behaviour. Arrangements were put in place for Helen's counselling should that be necessary. While the counselling will be provided if needed, to date, Helen has not indicated a need for it. Despite all that has happened to her and despite the fears which were expressed about the unsettling and corrosive effect of contact, Helen appears to be a happy, well adjusted and successful young lady with an excellent relationship with both her long-term carer and her mother.

The section 82 report described the mother/daughter contact as *"progressing well"..."very comfortable for both the mother and the child."* The report speaks of the *"mutual respect"* which has developed between them and they appear to be *"close."* Helen is neither resistant to contact nor distressed at its conclusion and nobody thinks that her loving relationship with her mother is any threat to her stability or to the stability of her long-term placement.

The reason I have taken some time this afternoon to speak to you about this case is not to congratulate the Children's Court for "getting it right" – or even to congratulate the Legal Aid Commission whose lawyers appeared for the mother and, bravely and in the face of stiff opposition, argued the child's right and need to maintain and, if possible, enhance her relationship with her mother. Rather it is because, as we approach the review of the Care Act, now some five years into its operation, it is important that lawyers participate in what I think will prove to be quite a spirited debate about contact and its proper place in care proceedings.