PAPER

Pro-active Representation of Children in Care Proceedings

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In inviting me to talk at its conference on the 11 May 2006 it was suggested, as the agenda discloses, the topic I should address was "challenges for children's Lawyer". As you will see from the paper that I have published I have elected to highlight certain matters where I believe pro-active engagement by a child's representatives is called for. These represent only some of the challenges that all of us face when representing children but I highlight particular areas that, I think, are important in practice and may lead to further discussion that will enlighten all of us.

In electing to deal with the topic in the way that I have indicated above, I have been mindful of the fact that I had previously prepared an article for the Legal Aid Commission in their Newcastle Care Conference conducted in May 2003. That article represented a more comprehensive analysis of the general role of representation of children under the care legislation and could be usefully read in combination with the comments that I make hereinafter. For those that have not had access to it or wish to have access to it, it has been re-published in the very useful Children's Law News[1].

In my consideration of practical and legal issues I have been assisted by a number of publications that traverse the representation of children both in the care jurisdiction but primarily within the care, criminal and family law jurisdiction. I have identified in the Bibliography attached a number of those publications which I have found particularly useful and I commend each of them as a useful source of information and guidance in the representation of children[2].

The topics I have selected are not exhaustive of the areas where pro-activity is required but are ones, which I have found are consistently raised. My thoughts on how a representative should be pro-active are just that. A colleague, when I indicated I was preparing this paper, cautioned me about not "raising the bar too high". I am mindful that as Practitioners we must live in the real world of time and cost constraints but I hope the thoughts and opinions I have expressed are not seen as being as too work intensive and ultimately may be of utility in more effectively and appropriately advancing the interests of children and representing their interests before the Court.

A. Presenting the Views and Wishes of the Child

In the article prepared for the conference of the 3 May 2003, I traversed the various methods that may be used in eliciting evidence on the views and wishes of a child. Each of those methods can be used either in isolation or in combination with the other.

As the legal representative of the child there is a legislated obligation to ensure the views of the child are placed before the Court (see Section 99(2)(a)). It would seem to us that these views may touch upon any particular issue that the Court is then determining, which would include:-

1. Interim placement.

2. Interim contact.

3. Establishment.

4. Participation in and the terms and conditions of any assessment order.

5. Final placement and contact issues.

While the methods referred to in the attached paper remain appropriate for adducing those in evidentiary form, it would seem that sub-section (a) does not require formal evidence to be adduced on those matters but simply that the legal representative's place those views before the Court. This interpretation arises not only from the use of the words themselves in the Section but also by comparing and contrasting with the obligation of the separate representative under Section 99(6) where the obligation is to "present evidence of the child or young persons wishes". This section would seem to require the adoption of the approach set out in my earlier paper rather than simply presenting that as a piece of information from the bar table.

The distinction between the two sections is real but its basis is not apparent. While the roles are different, one would have thought that the presenting of views or wishes on the sort of topics that are referred to above in relation to a legal representative are equally apposite in respect of a separate representative. The more so where one is acting for a child who is close to attaining the age of 10 and is displaying fairly significant maturity.

It may well be that this is yet another example of the anomalies in drafting which are littered throughout the Act or perhaps it has a more profound basis in its drafting, which is not readily apparent to me. Nevertheless, it may be important in the way in which a representative can present that material to the Court. The distinction is one that should be borne in mind when one addresses that issue before a Court or deals with an objection being taken either by the Department or a parent if the view or wish is adverse to their case.

Returning to the question of presenting those views and wishes in a succinct form to the Court, each of the methods referred to in my earlier paper usually require a trial to illicit the information. The presentation of it in an affidavit form by the child or by you as the representative of the child has the problems that are highlighted in that paper and is not one that an Advocate would normally undertake. It seems to the writer because of the peculiar wording of the Section that the Court does not have to receive evidence but simply be informed by the representative of what the views are.

I have for some time taken the course of preparing a document, which sets out those views and wishes and, perhaps has some background information to place it in context, for the purposes of the Court's information. This is normally done in situations where the writer is a legal representative but also where there is a more mature child under 10 or a child approaching the age of 10. Attached to this paper is a copy of such a document recently prepared by me. It seems to me that such a document is properly received by the Court at any stage of the proceedings and that there is an affirmative obligation by the legal representative to place those views before the Court in any event.

The benefit of adducing them in the form suggested is that it can be disseminated amongst all of the parties and the Court retains a hardcopy as a record of what those views and wishes are. Importantly, as the child is often not in attendance at Court, when those views and wishes are expressed, it is a document that can be sent to the child as material that has been placed before the Court on the child's instructions.

The writer does not normally have the document signed by the child but hands it up as an expression of the views and wishes and dates it as of the date upon which they were obtained. As a means of complying with the obligation and ensuring the Court is kept informed of the views and wishes of a child over the age of 10 the writer commends it to Practitioners. Its utility and admissibility, as a separate representative, is less clear for the reasons expressed but the writer takes the view because of the need for the child's voice to be heard on a regular basis that the better practice is to at least produce a document in similar form where the child is of sufficient age and maturity. The Court receives it, not as a piece of evidence (as sub-section 6(d) of Section 99 would require) but as an indication of the instructions received and as a matter which under the Act the Court will take into account (see Section 9(b)).

B. <u>Engaging With Your Client and Discussing the Evidence Filed.</u>

While this topic primarily deals with the role one plays as a legal representative, it is appropriate to consider it where the child in question is both close to 10 and displaying a degree of maturity.

As a party to the proceedings, which a child is (Section 98(a)) the child has a right, subject to any Court order to fully participate and attend the proceedings and to read all and any document filed by a party before it. Such principles reflect both principles of procedural fairness and natural justice that is given to a child as a party. They, however, are conditioned upon the Court's ability to intrude and limit that right in two particular ways:-

1. By exclusion of the child during the proceedings (see Section 104(2)).

2. By the non-publication to the child of certain evidence (more particularly usually contained in a Children's Court Clinic report) or a direction as to how that material is to be disseminated to the child (see Section 15 Children's Court Act and Practice Direction 22 Rule 35 and Rule 36).

In a paper that I deliver to the National Judicial College of Australia on the 5 November 2005 I was invited to consider whether a separate representative or like model could be adopted for us in the Children's Court sitting in its criminal proceedings. In the course of that article I expressed the view that a legal representative generally, but specifically acting for a child frequently makes beneficial decisions for that child based on the legal training qualifications and experience of that legal representative[3].

It seems to the writer that a similar opinion can also be expressed in relation to the role that one undertakes as a legal representative or separate representative for a child. While the right of a child to be a full participant in the proceedings is undoubted, the manner in which that is embarked upon and indeed the way in which the child wants to participate have to be issues that are weighed up in the manner in which that duty is embarked upon.

It is not unusual in the writer's experience to find children over the age of 10 who have a distinct aversion to reading affidavits and reports filed by any party in the proceedings or to engage in any detailed discussion about their contents. Often the topics traversed in those reports reflect upon the conduct of themselves and their parents and other important people in their life. There is undoubtedly a significant emotional and psychological impact upon them in reading such material and a natural aversion to doing so is entirely understandable.

Given that your duty is to ensure your client is fully informed and that you have proper instructions on the issues at hand, how do you address that dilemma?

The writer's answer is by taking each child as he or she comes. While I have expressed the view that some children have a significant distaste for reading anything or commenting upon it, other children have an avaricious desire to see and read everything. Your duty is to ensure that the child is aware of the evidence and that a copy is made available to them. Your duty is not to require them or to force them to read and to give you detailed instructions on every issue.

Largely care proceedings, as with most Court process, comes down to issues. While it is not your job to paraphrase the evidence, it is your job to identify what those issues are and to obtain instructions on them. The writer's experience is that often children are more willing to engage in and respond to questions posed on issues rather than questions posited on a detailed consideration of all the evidence filed.
As your duty is to reflect that child's position as to those views and wishes ultimately, it seems to the writer that greater utility is gained from that manner of engagement with the child rather than some potentially punitive attempt to require the child to read all of the material and give detailed instructions accordingly.

There are exceptions to this and those include where the child has been interviewed or allegedly made disclosures. It is my general approach to take the child to those specific items and to ask the child whether what is recorded there is true and whether the child in effect adheres to those matters

either in whole or part. These can often go to the heart of establishment or raise significant issues of acceptability of risk, which go to both interim and long-term placement issues.

Accordingly, while the obligation to give a voice to your client in a real sense exists, there must be acknowledgement of your individual client child's own wish to participate in the proceedings. Although you think the child should read everything, this may not be what the child wants. Listen and consult and ultimately if you are acting for a child to identify issues, take the child to salient matters contained in the reports and obtain instructions on those matters to perform your duties under the Act and arising from the Solicitor/client relationship that exists.

C. Continuing to Act for a Child After the Completion of Proceedings

The Representation of Children and Young Persons principles published by the Law Society and largely adopted by the Legal Aid Commission and indeed the Court itself, places emphasis on the importance of continuity of legal representation for children. The writer takes that obligation to mean not only in the course of the proceedings but when they are ended.

The engagement of a legal representative in the proceedings as a representative of the child is one that ultimately rests with the Children's Court (Section 99(1)). The practical implication of that process has been identified in Practice Direction 22 Rule 10.

Neither provision deal with the standing of a legal representative after the proceedings are complete. From the writer's perspective his right to be heard after the completion of the proceedings particularly in reviews of Section 82 reports (see Section 82) and consideration of reports under Section 76(4). While Section 76(5) appears to identify a continuing role for the legal representative, Section 82 is silent.

It is my view that the role of a legal representative or a separate representative continues after the completion of the proceedings. This role is not unfettered, but in my view allows an automatic right to participate and to be heard in respect of reports and to make further and other enquiries on behalf of children. Notwithstanding the neutered role of the Children's Guardian, it is my view that that right does not enable a representative to make an application under Section 90 notwithstanding the fairly wide terms of Section 90(3). It appears clear to me that the legislature intended by the specific inclusion of 90(3)(b) of the Children's Guardian to give effect to the policy under the Act that the Children's Guardian would have that role after final orders. As that is not as clear in a continuing role for review of reports under Section 76 and Section 82, I have taken the approach identified.

The Court has found that a Guardian ad Litem who has been appointed to act for a child continues in that role for the purposes of reviews under Section 82[4]. It is my contention that the position is the same in respect of Section 99.
Often a representative sees their role as complete with the order having being made and a final interview or letter, or both, having being communicated to the child. It is the writer's view that a pro-active representative for children does not end their role then.

Invariably the Court will make orders either under Section 82 or Section 76. The writer always diarises those dates for review in his office and maintains the file as an active one while such reports remain outstanding. The writer takes the view that if there is an apparent failure to file then a follow-up letter to the relevant Officer of the Department should be sent and if, as unfortunately is all to often the case, there is no response to that communication then a communication to the Court pointing out the apparent breach of its orders should be sent.

It is the writer's understanding that except for the Children's Court at Woy Woy there is no system of diarising or recording, within the Registry system, when reports are due so that the Court itself can follow those matters up. Therefore the role of a pro-active representative for the child in pursing that task is all the more important.

The writer has on a number of occasions, after communications to the Court, had matters reviewed with the Court giving appropriate directions particularly under Section 82 for review for such a report to be filed. The reports represent a powerful tool to monitor, not only on the part of the Court, but as

the representative for the child as to how the orders have been implemented and whether any issues have arisen. They should be seen as such by the representative and a system should be put in place accordingly.

Supplemental to what has been said it is my view that if there is an apparent failure by the report to address issues that may have been nominated in the order of the Court seeking it then it is entirely proper to seek "further and better particulars". While there appears to be no obligation on the part of the Department to respond the writer's general experience is that Departmental Officers are willing to engage in some dialogue in respect of those matters to clarify any issues. Certainly it seems to the writer that a proper basis for review may be undertaken by a Court if it is shown that the report has failed to address issues that the Court has ordered. In that context active involvement in the drafting and settling of orders is important, a topic, which I shall turn to next.

D. Participation in the Drafting and Settling of Orders

It is the writer's experience that all too often the drafting of minutes of order is seen by parties and their legal representatives as an afterthought to the completion of the proceedings. That is not to mean that they have not applied their mind as to what final orders should be made but rather that no real consideration has been given as to the drafting of the orders to give effect to the same.

The Department has become more recently pro-active in drafting its minutes. Regrettably, although such a document is a legal document, the practice of the Department appears to be (with certain exceptions) to abrogate the drafting of that document to a Caseworker. The document produced is often reflective of that fact.

As a representative for the child who may be supportive of a resolution in the general terms proposed, the writer takes the view that there is a positive obligation to participate in the drafting of orders and to draft a minute and distribute it. I have already averred to the importance of specifying the issues in a Section 82 or Section 76 report. Often the areas that specific comment is required upon are obvious including but not limited to contact issues, ongoing medical or therapeutic intervention or indeed transition to a long-term care placement. In the case of Section 82 reports, which simply require the Minister to report on "the suitability of the arrangements for the care and protection of the child or young person" considerable latitude is given to the Caseworker then having responsibility of the matter (who may not have been the Caseworker at the time of the hearing) to put in what he or she may think.

Without abrogating that discretion, guidance in the form of particularisation of such a report can elicit the sort of information that is most relevant and helpful. It will also highlight, if it is not provided the deficiency of the report so that the Court can be invited to undertake a review, if a request for particulars is not appropriately responded to. I have attached an example of such an order.

This participation in drafting extends beyond final orders and the detail of a Section 82 report but includes an active participation in the settling of an assessment order. It is the writer's apprehension that again such documents are left to Caseworkers to draft. They often contain a myriad of issues based not only upon the facts in that case but what Caseworker thinks might be a good idea for example there are no issues of psychiatric illness but to remove that as an issue why don't we ask for that to be assessed.

As representative for the child, an appropriate involvement in the drafting and settling of those orders is important. The Clinic has made clear to the Children's Magistrate that it finds the wide ranging and apparent pre-judged issues that are drafted do not assist in the Clinic properly carrying out its role, which is to assist the Court on professional issues rather than deciding the case for it.

There is also all too frequently an attempt to assess the child or children on a wide-ranging number of issues, which are both intrusive but more importantly not relevant.

Unless there is an evidentiary basis in the material filed, then attempts by Departmental Officers to undertake fishing expeditions by undertaking unnecessary assessments of children are both deprecated and rejected.

Each case, of course has to be considered on its merits and on the instructions (in the case of the child over 10) that you might receive. For the writer's part, however it is invariably the case that the extent of involvement of a child or children should be by way of observation on issues related to the parent and their relationship with the parent. In the case of a more mature child or a child over 10 to elicit and place before the Court their views and wishes.

I have attached a draft of a Section 53 order that I frequently prepare that may be of some assistance.

I believe that legal and separate representatives can and should play a far more significant role in the drafting or input as to the drafting of orders and that some thought and detail should form part of that role.

BIBLIOGRAPHY

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2. (a) Children's Court Guide by the Redfern Legal Centre.

   (b) The Children's Court and Community Welfare in the New South Wales by Rod Blackmore.

   (c) Representing Children and Young People, A Lawyers Practice Guide by Lani Blackman.

   (d) Article "Communicating with Children over 10; If wishes were horses, beggers would ride" by Dr C J Lennings, Clinical Psychologist 2004 CLN 5.

3. "Is it Both Appropriate and Viable to have a beneficial representative role for children in criminal proceedings and if so, what model should be adopted?" 2005 CLN.

4. (a) Guardian ad Litem by R J McLachlan 2002 CLN 3.

   (b) The Role of Guardians ad Litem in the Children's Court by Dr Bao-er NSW Law Society Journal May 2006 volume 44 page 60.

   (c) In the matter of Jason - CLN 6 2004.

CHILDREN & YOUNG PERSONS (CARE AND PROTECTION) ACT 1998

CHILDREN'S COURT RULE

IN ST JAMES CHILDREN'S COURT
AT 111 ELIZABETH STREET, SYDNEY NO.

IN THE MATTER OF AN APPLICATION TO MAKE AN ORDER UNDER S 71 OF CHILDREN AND YOUNG PERSONS (CARE AND PROTECTION) ACT 1998

IN THE MATTER OF:

Child

VIEWS AND WISHES OF – 3/5/06

1. ( ) was born on the 20 September 1996 and is currently aged 9 years 7 months.

2. She lives with her aunt and older sister ( ). She gets on pretty well with her sister but they have the occasional disagreement. She is glad that she is living with her.

3. Her brother ( ) resides with her paternal grandparents in the City. She saw ( ) in the last school holidays and tends to see him at those times but occasionally on weekends when her aunt and the grandparents get together. She also has access to telephone.

4. While she would like to see ( ) a bit more often, she generally feels happy and content that he is well looked after. If anything he is spoilt by the grandparents.

5. ( ) is aware that the Court is deciding where she should live. Her first preference would be to live with her dad. She is aware that her dad and the Department are saying that that cannot take place at the moment and a decision has to be made until she is 18. She therefore accepts that decision with some sadness.

6. If she cannot live with her dad there is no doubt in her mind that she wants to live with her aunt. She says that her aunt looks after her, keeps her safe and she is a good lady. She just wants to see a lot of her dad if she cannot live with him.

7. Her preference would be to see her dad every weekend and to have regular telephone contact. Currently she does see him fairly often and has some telephone contact with him but that is affected by his work commitments which sometimes mean he is not available. She would like at some stage in the future to go back and live with her dad but certainly if she cannot, she wants to see him a lot.

8. She knows her mum is unwell. She does not want to see her mum. She knows in the future she may change her mind and wishes the door to be left open for her to approach her mum if that is her wish. She does not want a contact order because she believes those arrangements can be made in due course when she wants to make them with the help of her aunt and the Department.

9. ( ) is in year 4 at School. Her favourite activity is sport although school generally is fun and she has a number of friends there. She is happy living where she is and with the friends that she has.

Dated: 3 May 2006

DRAFT SECTION 82 ORDER

1. Pursuant to Section 82 the Court orders the Minister to prepare and file a report on or by 1 October 2006, detailing inter alia the following:-

   (a) Particulars of any change in placement of the child or children including reasons for that change and particulars of the new carer, excluding any identifying feature.

   (b) If a long-term carer has been identified, a profile of that carer, excluding any identifying features.

   (c) If restoration to a long-term carer has not been effected what is the likely time frame for that to be attended to and when is it expected to be completed.

   (d) Have the children been referred to counselling in accordance with the care plan and if so, what is their progress and the estimation of their likely length of engagement.

   (e) Particulars of the general developmental, health and educational progress of the children including copies of any relevant reports touching upon the same.

   (f) The level and frequency of contact enjoyed by the children with each of their parents and any proposals for variation or change thereto including the reasons therefore.

   (g) The general suitability of the care arrangements for the children.

DRAFT SECTION 53 ORDER

1. Pursuant to Section 53 the Court orders that be assessed as to the following issues:-

   (a) By observation only of the bonding and attachment with each of his parents.

   (b) By observation only for the purposes of assessing the parenting capacity of each of his parents.

   (c) By interview to assess and identify the views and wishes of ( ) in respect of:-

      (i) Placement.

      (ii) Contact with parents and other important family members.

   (d) An assessment arising from (c) of the maturity and understanding of ( ) in respect of the views and wishes and the weight the Clinician believes should be attributed to the views and wishes expressed.