

# **The Children's Court & *The Children and Young Persons (Care and Protection) Act 1998*: A snapshot**

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## **• Who's Who in the Children's Court**

When children are initially removed, the Department of Communities and Justice ('DCJ') must apply to the Children's Court for Court Orders.

A Care Application has to be lodged with the Court within 3 working days of the children being removed. The *Children and Young Persons (Care and Protection) Act 1998* ('The Act') provides that children and persons with parental responsibility<sup>1</sup> have a right of appearance in Care proceedings.

When the matter is first listed before the Children's Court there will usually be the following lawyers present:

- A lawyer on behalf of the Department of Communities and Justice ('DCJ');
- An Independent Legal Representative or a Direct Legal Representative or both (this will depend on the number of children and their ages);
- A duty lawyer for the Mother;
- A duty lawyer for the Father.

Legal Aid NSW funds lawyers for both children and parents in care proceedings. Legal Aid NSW is notified by DCJ of applications for removal and has a roster of lawyers who represent children and parents. A duty lawyer is able to appear for a party on the first Court date free of charge.

After the first Court date parents need to apply for Legal Aid or instruct a private lawyer to represent them. Eligibility for Legal Aid will be discussed in more detail later in this paper.

Parents don't have to have a lawyer represent them and they can choose to represent themselves. If they make this decision, then they sit at the bar table and talk directly to the Magistrate and prepare their evidence themselves.

It is common for case workers and case work managers to attend Court as well, particularly at Final Hearings when they need to give evidence. This attendance allows them to give instructions to their lawyer and also to speak with the family at Court.

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<sup>1</sup> Normally parents, but this can be other people who for example have been allocated parental responsibility under Family Court Orders.

## • Child Representation

The Act sets out how children are to be represented in proceedings. There are two types of child representatives:

- Independent Legal Representative - For children under the age of 12. An Independent Legal Representative acts impartially and in a child's best interests;
- Direct Legal Representative- For children over the age of 12. A Direct Legal Representative acts on a child's instructions.

There are times when a child who is under 12 will be capable of giving instructions to their lawyer. There are times when a child who is over 12 will be incapable of giving instructions to their lawyer.

In both of these situations the lawyer for the child can apply to the Court and ask to change roles. The Court will make this decision but will need evidence that supports what the lawyer says should happen.

The roles of the Independent and Direct Legal Representative are very different. Legal Aid NSW has practice standards<sup>2</sup> that lawyers must follow when they represent both parents and children. The Law Society of NSW also has Representation Principles for Children's Lawyers<sup>3</sup> which lawyers must also follow.

Lawyers who represent children in Children's Court proceedings must be accepted onto the Legal Aid panel of lawyers who represent children and they need to have a certain amount of experience to be considered suitable. A lot of lawyers who represent children have completed additional training in relation to representing children but this training is not compulsory.

### *The Role of the Independent Legal Representative ('ILR')*

An ILR's job is to act in a child's best interests. An ILR obtains information and gathers evidence that is going to assist the Court to determine what is in the child's best interests. The ILR presents a case based on what they consider to be in the best interests of a child based on the evidence.

The ILR will usually establish and maintain a relationship with the child that they are representing but this will depend upon the age and circumstances of the child. There are sometimes matters where the ILR will make a decision not to meet with a child or they may choose to meet with a child at a certain time in the proceedings. For example, an ILR is unlikely to meet a child who is under the age of five or an ILR may choose to delay meeting with a child if the child has recently or is currently involved with Police, JIRT, psychologists, DCJ or all of these organisations.

The ILR will, if appropriate, explore with a child their wishes and the extent that they want to participate in the proceedings (keeping in mind that children being directly involved in Court proceedings can be detrimental). Sometimes an ILR will prepare a wishes statement and file this in Court so that the Court knows what the child would like to happen. Sometimes the child's wishes will be included in an experts report.

Usually an ILR will speak with people that are involved with the child on a regular basis – this can include teachers, doctors, psychologists and carers. An ILR will also assist the Court by gathering

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<sup>2</sup> Care and Protection Practice Standards, Legal Aid NSW

<sup>3</sup> Representation Principles for Children's Lawyers, Law Society of NSW, August 2014

evidence – this can be through issuing subpoenas, obtaining reports or filing affidavits on behalf of important witnesses.

### *The Role of the Direct Legal Representative*

A Direct Legal Representative acts on the instructions of the child. A DLR (in a similar way to a lawyer who might represent a Mother or a Father) will advise the Court whether the child agrees or disagrees with what is being put forward by DCJ during the Court proceedings.

A DLR is expected to regularly meet with the child, explain the Court process and Court documents and provide them with legal advice about what is likely to happen in Court. A DLR is expected to obtain the child's instructions about things like where they would like to live, contact, medical, educational and cultural decisions and issues. It is expected that a DLR will meet with children before all major Court events so that their instructions can be put to the Court.

### • **Adult Representation**

The Act provides that parents who have had their children removed have a right to appear in the proceedings in the Children's Court. DCJ must serve the parents with copies of the Court documents.

There are some situations where DCJ might ask the Court for permission to not serve a party but this only happens when the Court is satisfied that there is an 'unacceptable threat to the safety, welfare and wellbeing of a child or party to the proceedings' if any notice or document was to be served upon a particular person.

Legal Aid NSW prepares a roster of duty lawyers who can appear for parents when they require assistance. This is usually only available on the first day of Court but on other occasions duty lawyers may assist parents, grandparents, carers and other people that are significant to children to appear in Court at various stages of proceedings.

Legal Aid is available for parents, family, kin and other persons who have an interest in the care, welfare and wellbeing of child in a variety of circumstances.

- **Care Applications:** Parents must pass the 'means' test and then the 'merit' test applies only after a Care Plan is prepared;
- **Section 90 Applications:** Applicants must pass the 'means' and 'merit' test before they will be given a grant of aid to commence proceedings.
- **Joinder Applications:** Applicants must pass the 'means' and 'merit' test before they will be given a grant of aid to commence proceedings. They must also be able to show that there is a benefit to the child or young person that might be gained by the applicant being given a grant.

The Means Test looks at the applicants income and assets. It will also look at the income and assets of someone considered to be a Financially Associated Person (a FAP) like a husband or partner.

The Merit Test considers either whether the applicant has 'reasonable prospects of success' for joinder and section 90 applications and 'reasonable prospects of achieving a better outcome than that which has been proposed in the Care Plan'.

You can find more information about eligibility for grants of Legal Aid at:

<https://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/5.-family-law-matters-when-legal-aid-is-available/5.16.-care-and-protection-matters>

## • Care Applications

Care applications are heard by the Children’s Court and therefore by specialist Children’s Court Magistrates. There are some rural areas where Local Court Magistrates deal with care matters because there are no specialist magistrates in the area. Sometimes if a hearing needs to happen a specialist magistrate can be brought in to help.

There are specialist Children’s Courts in:

- Broadmeadow;
- Nowra;
- Port Kembla;
- Surry Hills;
- Parramatta;
- Campbelltown;
- Port Kembla;
- Woy Woy;

The Children’s Court also conducts circuits in a variety of regional and rural locations<sup>4</sup>.

As outlined above, when children are removed from the care of their parents, DCJ need to file an application to the Children’s Court and ask for Orders in relation to the children. This is done through the filing of a Section 61 application.

A section 61 application can only be filed by the DCJ. The application must specify the Orders sought and the grounds (the reasons) DCJ think the Orders should be made.

When an application is filed DCJ must file evidence of what steps were taken before the children were removed to support the family and whether any alternatives to a care application were considered. They also need to explain why these alternatives were unable to be used or why they didn’t work.

A section 61 application contains the following information:

- What orders DCJ wants the Court to make;
- Grounds for the Application (the concerns DCJ have about the children’s safety);
- Information about why the child/children were removed;
- Details of the child’s siblings and other significant persons in the child’s life;
- Details of the child’s culture and religion;
- Details of the child’s current educational and health needs;
- Details of the child protection history and concerns for the child;

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<sup>4</sup> Cessnock, East Maitland, Muswellbrook, Goulburn, Lismore, Coffs Harbour, Grafton, Ballina, Tweed Heads, Casino, Port Macquarie, Kempsey, Taree, Griffith, Wagga Wagga, Albury, Dubbo, Orange, Bathurst, Raymond Terrace, Singleton.

- Details of where the child will live and what contact they will have with family during the proceedings.

This document is filed and needs to be provided to the parents and the child representative and this is the document the Magistrate will have when the matter first comes to Court.

DCJ also prepare 'specified documents in support of initiating application and report' which are commonly referred to as the 'bundle of documents' or 'specified documents'. This bundle usually contains documents such as:

- Any current orders (For example from Children's Court, Family Court or ADVO's);
- Risk of Serious Harm Reports received in the last 12 months;
- Records of prior alternative action;
- Safety assessments, case plans;
- Assessments or reports received from other agencies including from health providers;
- Evidence from Police, JIRT or other mandatory reporters.

This bundle is not filed in Court but is given to the parties. If there is no agreement about the Orders that should be made on the first occasion, then the bundle is usually given to the Magistrate as it contains very important information.

## ● **Interim Orders**

Usually DCJ ask for an Order that they be allocated parental responsibility for the children on the first Court date. 'Parental responsibility' means all the duties, powers, responsibilities and authority parents have in relation to their children.

When the Court makes a decision about who should have parental responsibility, the Court looks at:

- That it is not in the best interests of the safety, welfare and wellbeing of the child to remain with his or her parents (or anyone else who might have parental responsibility);
- The Order is necessary;
- The Order is in the interests of the child;
- The Order is preferable to the making of a final order or dismissing the proceedings.

Each of the parties has the chance to tell the Magistrate whether they agree or disagree with the Orders sought by DCJ. They can also file evidence about this.

If any of the parties disagree about what orders should be made, then the Court will list the matter for a hearing. At a hearing the Court can hear evidence from case workers, case work managers, the parents and any other people who may be able to give the Court evidence that is relevant to the safety, welfare and wellbeing of the child.

## ● **Establishment**

Usually the Court will direct DCJ to file a 'Summary of the Proposed Plan' for the child or young person' which is a document which sets out the risks to the child and whether DCJ think that the child will be able to return home. It will usually also set out what steps need to be taken by the parents in order for DCJ to support the child going home.

Once the Court has determined what interim orders need to be made, the Court will then prepare the matter for the establishment phase. This is sometimes also referred to 'a finding' because the Court has to "find" or determine that the child was 'in need of care and protection' at the time they were removed.

The Act sets out the grounds that a child or young person can be in need of care and protection:

- There is no parent available (due to incapacity, death or some other reason);
- The parents acknowledge they have serious difficulties in caring for the child or young person;
- The child or young person is likely to be physically or sexually abused or ill-treated;
- The child or young person's basic physical, psychological or educational needs are not being met or likely to not be met;
- The child or young person is or is likely to suffer serious developmental impairment or serious psychological harm as a consequence of the environment in which they are living;
- The child (under 14) has exhibited sexually abusive behaviours and an order of the Court is necessary to ensure their attendance at an appropriate therapeutic service.

This list is not exhaustive and the Court can make an order based on any other reason it feels is appropriate.

The Court can determine that the child would have been in need of care and protection 'but for' the involvement of DCJ. For example, a newborn child of a parent that is homeless, using drugs and hasn't received any anti natal care may be considered to be 'in need of care and protection' because the child would have been at risk if the child was to live with the parent.

Again, each of the parties has the chance to tell the Magistrate whether they agree or disagree with this. If one of the parties doesn't agree then there will be a hearing and the Court will make the decision.

### **The Placement Phase**

Usually the next stage of the proceedings involves DCJ preparing a Care Plan. The Act says that the Court can't make final orders without considering a Care Plan and being satisfied in relation to a number of things which will be discussed below.

The Act sets out the objects and principles and the Court must turn it's mind to these whenever it makes any decision during proceedings. In summary the objects and principles are:

- Children should receive such care and protection as is necessary for their safety, welfare and wellbeing;
- The primary way that this can be achieved is by providing them with long term safe, nurturing, stable and secure environments through permanent placement;
- All institutions and services should provide an environment that is free of violence and exploitation and foster their health, developmental needs, spirituality, self respect and dignity;
- Where a child is able to form their own views then they must be given an opportunity to express these views and the views should be given weight in accordance with the developmental capacity of the child and the child's circumstances;
- The child's culture, disability, language, religion and sexuality and parents should be take into account;

- The course to be followed should be the least intrusive intervention in the life of the child;
- Children who are temporarily or permanently deprived of their family environment are entitled to special protection and assistance from the State and their identity, language, cultural and religious ties should be as far as possible preserved;
- Unless contrary to their best interests, children should be able to retain relationships with people of significance to the child including birth and adoptive parents, siblings, extended family, family friends and the community;
- The permanent placement principles guide all actions and decisions under this Act.

## ● **The Permanent Placement Principles**

The Act sets out what is often described as a hierarchy for the Court to work through when determining the final arrangements for a child. A 'permanent placement' is defined as a long term placement that provides a safe, nurturing, stable and secure environment for a child.

The hierarchy set out in the act is as follows:

1. Restoration to the care of a parent or parents;
2. Guardianship to a relative, kin or other suitable person;
3. Adoption (except in the case of an Aboriginal or Torres Strait Islander child);
4. Parental Responsibility to the Minister;
5. Adoption (if the child is Aboriginal or Torres Strait Islander).

In considering all of these options the Court must be satisfied that an Order to this effect is practicable and in the best interests of the child.

### *Restoration*

The Care Plan that is prepared by DCJ needs to tell the Court whether DCJ are of the view that there is a realistic possibility of restoration within a reasonable period. The Court and the parties are given a copy of the Care Plan and an opportunity to tell the Court whether they agree with the Care Plan or not.

When the Court makes a decision about restoration it must do so by considering:

- The circumstances of the child or young person;
- The evidence (if any) that the parents are likely to be able to satisfactorily address the issues that led to the removal of the child from their care.

A 'reasonable period' means a maximum of 24 months unless there are special circumstances that warrant it being a longer period.

When considering whether there is a realistic possibility of restoration the case law says that the Court must consider:

- Whether a parent or parents have already commenced a process of improving their parenting;
- Whether there has already been significant success;
- Whether continuing success can be confidently predicted.

If DCJ are proposing restoration then the Care Plan must contain:

- A description of the minimum outcomes that must be achieved before it would be safe for the child to return to their parents;
- Details of the services that DCJ are able to provide to facilitate restoration;
- Details of any other services (govt or otherwise) that are able to assist with restoration.

When the Court makes a decision about restoration that is different to what is set out in the Care Plan the matter will be adjourned and DCJ will be asked to prepare a new Care Plan which aligns with the Court's decision.

The Act prevents children being restored to parents when there has been a finding by the Court of 'no realistic possibility of restoration'.

## • **Permanency Planning**

The Act also requires the Court to be satisfied that permanency planning has been appropriately and adequately addressed.

Permanency Planning means a plan that:

- Provides a child or young person with a stable placement that offers long term security;
- Meets the need of the child;
- Avoids the instability and uncertainty arising through a succession of different or temporary assessments.

A permanency plan doesn't need to provide the details of the exact placement but it must be 'sufficiently clear and particularised' so the Court has a 'reasonably clear picture' as to the way the child's needs will be met in the foreseeable future.

Permanency Planning will mean different things to different children and families and must be based on their individual circumstances. It is usually expected that a Permanency Plan will contain information about:

- Whether the child will be in family placement, a group home or another location;
- Whether the child will be with siblings or other children;
- How the child's cultural and religious needs will be met;
- How the child's educational needs will be met;
- How the child's medical needs will be met;
- The contact for the child and their parents and other significant others.

## • **Expert Evidence**

Not all cases in the Children's Court have reports written by experts. This is different to the Family Court where most cases have what is called a family report or an expert's report.

However, there are some cases where a report is prepared to assist the Court. A report can be obtained in two ways:

1. By the Court making an Order for an Assessment Report through the Children's Court Clinic;

2. By the parties agreeing that an expert from outside of the Clinic will prepare a report.

The Children's Court Clinic prepares independent expert clinical assessments. These assessments can focus on:

- the children and young persons, and/ or
- the capacity of parents and others to carry out parental responsibility.

Any of the parties can apply and ask the Court to consider making an Order for an Assessment Report. In deciding whether to make an Order for a report the Court look at:

- Whether the report will provide the Court with relevant information;
- Whether the relevant information can be obtained elsewhere (for example, if the issue is drug use then the relevant information can be obtained elsewhere through testing, rehabilitation, counselling etc);
- Whether the distress likely to be caused to the child will be outweighed by the value of the information that might be obtained;
- Any duress caused to the child in any previous assessments.

Children's Court Clinicians can be qualified social workers, psychologists, clinical psychologists and psychiatrists. The parties and Court can ask that the Clinic appoint someone with particular qualifications or expertise but ultimately it is up to the clinic to decide who will prepare the report.

The Act provides that if an adult is to be assessed then they must consent to being assessed. The Act also provides that a child or young person must be informed about the reasons for the assessment in a language and manner they can understand. This is often done by the representative for the child.

Usually one party files the application which sets out what needs to be assessed and what documents the clinician should read. All of the parties then review the application and provide their input into what questions need to be answered and what documents should be read.

Once an Order for a Report is made the documents to be read by the Clinician are sent to the Clinic. The matter is usually adjourned for 6-8 weeks to allow the report to be prepared. Once completed, the report is sent to the Court who then releases the report to the parties.

If required, the Children's Court Clinician who prepared the report can be available for cross-examination. The report is considered to be a report of the Court, not evidence tendered by any party.

Occasionally there are matters which require experts with expertise that fall outside the expertise of the Children's Court Clinic. For example, matters involving non accidental injury or factitious illness disorder may be the types of matters that require an expert outside of the Clinic.

It is a matter for the parties to discuss this and agree on the appropriate expert, what documents they should consider and who should pay the costs of the expert. Once an experts report is prepared it is released to the parties and the expert can be cross examined about the contents of their report.

## • Applications for Variation/Rescission

An application for variation or rescission of a care order is commonly referred to as a 'Section 90' as this is the section of the Act that applies to these applications.

A section 90 application can only be brought with the leave of the Court. Unlike section 61 applications, section 90 applications can be brought by:

- DCJ;
- The child;
- A person with parental responsibility;
- A person who had parental responsibility;
- Any person who considers themselves to have a sufficient interest in the welfare of the child.

When the Court is determining whether to grant 'leave' the Court must consider whether there has been a 'significant change in any relevant circumstances' since the Order was made. The Court also has to consider the following:

### *Primary Considerations*

- The views of the child & the weight to be given to those views (taking into consideration the child's maturity and capacity to express their views)
- The length of time the child has been in the care of the present carer;
- The stability of the present care arrangements;
- If the Court considers the current arrangements to be stable and secure, then the Court must consider the course that would result in the least intrusive intervention in the life of the child and consider whether this course is in the child's best interests.

### *Additional Considerations*

- The age of the child;
- The nature of the application (what the person is asking for);
- The plans for the child or young person (the proposed living arrangements for the child);
- Whether the applicant has an arguable case (this means that the applicant has a reasonable case which has some prospect of success);
- Matters about the child that are raised in a section 82 report.

If all of the parties agree that leave should be granted then this usually means there is no Court hearing. If the parties do not all agree that leave should be granted, then the Court will list the matter for a hearing and either hear from all of the parties (a hearing by submissions) or hear evidence from witnesses before making a decision.

Once leave is granted the next steps depend on the issues in the case. It is often the case that one of the major issues when the Court is considering whether to restore children to their parents is the impact on the child of any change to their arrangements.

When the Court considers whether to rescind (get rid of) or vary (change) Final Orders the Court must consider:

- The age of the child or young person;
- The view of the child and the weight to be given to those views;
- The length of time the child or young person has been in care of the current carers;
- The strength of the child or young persons attachment to the birth parents AND the current carers;
- The capacity of the birth parents to provide an adequate standard of care for the child or young person;
- The risk to the child or young person of psychological harm if the current arrangements were to be varied or changed.

As can be seen from these considerations, the focus of section 90 applications is usually on attachment and the consequences of changing arrangements on children. This means that often the most helpful evidence comes from a expert who is able to assess the bonding and attachments of the child and consider the impact of the potential change on the child.

A Care Plan is also prepared in section 90 proceedings and contains the same information as a Care Plan in section 61 proceedings. The parties all have an opportunity to tell the Court whether they agree or disagree with the Care Plan.

It is also usually the case that matters are referred to a DRC when the parties can't agree.

If the parties don't agree then the matter can be listed for a Hearing for the Court to determine what the arrangements for the child or children should be.

## • Joinder Applications

There are often family members who want to directly and actively participate in Court proceedings relating to children.

There are two ways that family members, kin or other people who are significant to the child can seek to participate in proceedings:

1. A Joinder Application;
2. Being given an opportunity to be heard.

When a person makes a joinder application and becomes a party to the proceedings they are provided with copies of all documents filed in the proceedings, are able to participate in the Court proceedings in the same way as the other parties (filing documents, cross examining etc) and are able to seek Orders in their favour or in any other form (for example supporting the Father's position).

When the Court determines whether someone should become a party or not, the act requires that the Court to consider whether the person has a genuine concern for the safety, welfare and wellbeing of the child or you person.

The Court also looks at things like:

- What the applicant is asking the Court to do;
- Whether the applicant has a good case;

- Whether joining the applicant will delay the proceedings being finalised (usually once a person is joined they need to be given time to read all the documents, file their own documents and prepare for Court);
- Whether they have a unique perspective for the Court to consider (for example if a grandparent wishes to be joined but is going to ask for the Court to make Orders that the child live with the Father then joining her may not be helpful).

Ultimately the decision to join someone to proceedings is at the discretion of the Court taking into account the above factors.

Secondly, the act allows the Court to give persons who are going to be significantly impacted by Orders made by the Court, to ask to be heard before the Order is made. This can mean different things depending upon what the Court thinks is appropriate in the circumstances. However, unlike becoming a party to the proceedings, being heard does not automatically give the person the right to cross examine or any of the other benefits of becoming a party.

Again, whether a party is given the opportunity to be heard or not will depend upon the Court, the individual circumstances of the matter taking into account the objects and principles of the Act.