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Rescission or Variation of Children's Court Orders: A Study of Section 90 Applications in New South Wales

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This article reports on a study of Children's Court files relating to completed applications for variation of care orders (section 90 applications) in three specialised Children's Courts in New South Wales. All files that could be located for completed applications were reviewed and nonidentifying data was recorded. The study attempted to examine the type of applications, the characteristics of applicants and the outcomes of the applications. One hundred and seventeen applications were reviewed: almost half of these were made by the then Department of Community Services (DoCS), and about the same proportion of applications were made by parents. After the section 90 applications were determined there was an increase in care orders allocating parental responsibility to the Minister for Community Services with 73% of the children placed under the care of the minister to age 18.

■ **Keywords:** child protection, variation of care orders, legal processes

Every state and territory child protection system has legislation that allows parents to return to the Children's Court to seek restoration of their children after final care orders allocating parental responsibility to the state have been made. In New South Wales (NSW), section 90 of the *Children and Young Persons (Care and Protection) Act 1998*, is the section under which applications to change care orders can be made (see Appendix A for other state and territory legislation to vary care orders). There has been little data available about these processes and yet many parents seek an opportunity to change care orders and carry a hope that they can one day have their children restored to their care (Holmes, 2009).

Literature Review

In Australia there is a modest range of recent literature examining the function of children's courts (Budiselik, Crawford, & Squelch, 2010; Llewellyn, McConnell, & Ferronato, 2003; McConnell, Llewellyn, & Ferronato, 2002; Sheehan, 2010; Walsh & Douglas, 2009). Each of these works focuses on specific aspects of the child protection legal process and specific populations of family members who appear in children's courts in Australia. Most of which focus on the characteristics of family members and difficulties experienced by families in the court systems (Llewellyn et al., 2003; McConnell et al., 2002; Sheehan 2010; Walsh & Douglas, 2009). All of these studies comment on policy changes and practice developments needed to improve child protection systems.

The only national study of children's courts is the current study auspiced by the Australian Research Council, which has assessed the current challenges and issues for the future in the children's court around the nation (Sheehan & Borowski, in press).

The Children and Young Person's (Care and Protection) Act heralded a new era of concerted effort towards an effective child protection system in NSW. In relation to the issue of variation of care orders the 1997 Review Committee, which preceded the legislation, suggested that leave for rescission or variation of care orders should only be granted by the Children's Court where 'the applicant can demonstrate a significant change in relevant circumstances' (Department of Community Services [DoCS], 1997, p. 6). The plan was that applications to vary care orders should be made more difficult than before to prevent unnecessary expenditure and distress caused by uncertainty arising from further litigation. It was intended that 'parents and other

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previous caregivers should have every opportunity to argue their case if there has been a significant change of circumstances which provides a basis for the rescission or variation of an order' (DoCS, 1997, p. 6).

In order to make it more difficult for parents to return to court seeking restoration of their children again and again after final care orders had been made (DoCS, 1997), section 90 requires that the Children's Court as a first step determines whether leave should be granted. In the first step the applicant must establish that there is good reason for the court to reopen the case and specific tests are applied by the court in making this preliminary decision. The decision about whether leave to reopen the case should be granted is separate from the decision about whether care orders should be changed. The court first considers whether there has been 'a significant change in any relevant circumstances since the care order was made' [s. 90(2)]. There are other specific factors that the magistrate must consider before granting leave and these are concerned with the child's age, care history, and the stability of their placement [s. 90(2A)]. The magistrate may dismiss the application if the significant change test is not met and if the information about the other factors indicate that the care orders should not be disturbed [s. 90(2A)].

At the first stage, the leave stage, the applicant must also present an arguable case [s. 90 (2A)(e)]. Senior Children's Magistrate Mitchell made a submission to the Special Commission of Inquiry into Child Protection Services in NSW (SCICPS NSW; Wood Inquiry) in which he proposed that the test of what constitutes an 'arguable case' requires that the parent provide evidence of 'runs on the board' in their program of rehabilitation (*Re Saunders and Morgan,* 2008). In a case determined in 2010 ('In the matter of Troy') the president of the Children's Court approved Magistrate Mitchell's submission and concluded that the requirement for 'an arguable case' required the parent to have 'some prospect of success' ('In the matter of Troy', para. 49; see Appendix B for other cases concerning the test for arguable case) before being given leave for the application to be considered by the court. This strengthened the test and provided a significant hurdle for parents or others in attempting to have the Children's Court review the original care orders. Since then, the Supreme Court has described the 'runs on the board' requirement to be a gloss on the statute ('In the matter of Campbell', 2011) and, therefore, not to be used as a guide in determination of whether there is a realistic possibility for children to be restored to parents, but whether this will result in any difference in actual judicial decisions is not clear at this stage.

Only after the court finds that there has been a significant change is there consideration of whether there should be a change to the care orders. If the court believes that a change in orders is necessary for the best interests of the child then the application will be granted [s. 90 (7)].

Since the Children and Young Persons (Care and Protection) Amendment (Permanency Planning) Bill (No. 2) in June 2001, the emphasis within child protection practice has been on permanency planning and this orientation has had a marked impact on how applications to vary care orders are determined (Mulroney, 2008). The second reading speech presented by Carmel Tebbutt outlined that 'restoration is not the overwhelming goal for casework' (New South Wales Parliament, 2001, p. 18558) and stated that

> While there is no intention to remove a parent's general legal right to return to court to seek custody of their child, the Bill seeks to balance the merit of such applications with the level of distress and instability which is likely to be generated for the child ... the court should consider whether it is in the best interests of the safety, welfare and wellbeing of the child or young person before granting leave to allow an application to vary or rescind a care order. (pp. 18558–18559).

From case law it is clear that parents must have made substantial and lasting changes in order to be successful in these applications ('In the matter of J, K, and C', 2002; 'In the matter of Troy', 2010; see also Appendix C for other cases concerning the significant change in relevant circumstances). But a determined effort to reform and change one's lifestyle is not enough because of the other factors that are considered, including permanency [s. 90(6)].

The effect of the permanency planning amendment has been to make it more difficult for parents to claim that it is in the children's best interests to have care orders reviewed. There are few avenues for parents to achieve the restoration of children that they yearn for (Holmes, 2009; Klease, 2008) and if an appeal to the District Court does not take place soon after final care orders, a section 90 application is the only means available. Data about applications to vary care orders are not produced in the annual Australian Institute of Health and Welfare (AIHW) Child Protection Report (AIHW, 2011) and there has been little publicly available information about these court proceedings. The absence of data inspired this study.

The Study

A study of variation of care orders in three Sydney Children's Courts in NSW (NSW), Parramatta, Bidura and Campbelltown, was completed with analysis of court files relating to completed section 90 applications during April 2006 to May 2007. The aim of this study was to explore the nature and outcomes of section 90 applications and the characteristics of the applicants. Specifically, the intention was to obtain information about

- the number and type of applications
- the characteristics of the applicants
- the outcomes of the applications.

The research proposal was submitted to the Human Research Ethics Committee at Australian Catholic University and approval to conduct the research was granted. All text data in files were translated into numerical data and analysed

through use of the Statistical Package for the Social Sciences, Version 15 (SPSS v15) so that no data identifying any individual or family would be part of the published findings. A statistical measure of association, phi, was used to examine the relationship between the identity of the applicant and the outcome of the application (Cramer & Howitt, 2004).

There were 117 completed section 90 applications identified for the study period in the three courts. The DoCS reported that there was a total of 686 section 90 applications in NSW in the financial year 2006 to 2007 (SCICPS in NSW, 2008). This is not exactly the same period used in this research project, but the 117 completed applications examined in the study might be described as approximately 17% of the expected section 90 applications considered in NSW in that time period.

The Nature of the Applications

In the study sample DoCS was the applicant in 54 of the applications, and parents were applicants in 55 applications. These applications were decided in a short time frame with only 10% of matters taking longer than six months for completion. Nearly 50% of the applications were made within the two-year period following final orders.

The examination of the court files showed that

- 29% of applications were about contact arrangements
- 28% were applications for parents to regain parental responsibility
- 24% of applications sought a change of orders to allocate parental responsibility for the child to the Minister for Community Services
- 4% were applications to allow children to travel overseas.

An attempt was made to obtain information about the characteristics of parents who were a party to section 90 applications. The files did not always contain this information but what was found indicated that

- 48% of mothers and 24% of fathers were identified as having difficulties with substance abuse
- about 20% of mothers and 9% of fathers were identified as having a mental health issue
- almost 20% of applications noted that domestic violence was a factor in the family circumstances.

Outcomes of the Section 90 Applications

Table 1 provides details of the outcomes of the section 90 applications. Over half of the applications were granted and new orders were made in just under half of the applications. For 22 of the 54 applications in which orders were changed, previous orders were rescinded. The magistrate dismissed 27 applications. There were no new orders in 40 matters.

After the section 90 applications were determined there was an increase in care orders allocating parental responsibility to the minister.

TABLE 1

Distribution of the Outcomes of the Section 90 Applications (n = 117)

	Frequency (%)		
Outcome	Yes	No	Total
Application granted	64 (54.70%)	53 (45.30%)	117 (100%)
Original care orders varied	54 (46.15%)	63 (53.85%)	117 (100%)
New orders in favour of applicant	29 (53.70%)	25 (46.30%)	54 (100%)

At completion of these proceedings:

- 73% of the children were placed under the care of the minister to age 18.
- In less than 10% of the cases was parental responsibility allocated to the parent.
- In another 2% of cases orders allocating parental responsibility to the minister were rescinded and so parents resumed parental responsibility.

The data were examined to explore whether parents or DoCS are more successful in section 90 applications. A bivariate statistical measure of association was used to examine the relationship between the identity of the applicant and the outcome of the application, that is, whether the application was granted. The chi square statistic was 58.109, $df = 1$, $p <$. 001, which is a significant result. The phi statistic of .70 indicates that there is a moderately high association between the two variables. For this sample of applications an application made by DoCS was more likely to be successful.

A similar result was obtained when the same procedure examined whether the applicant was granted the orders they were seeking. DoCS was shown to be more likely to obtain the orders they were seeking. The chi square statistic was 57.368, $df = 1$, $p <$. 001, and this is a significant result. The phi statistic was .70, $p <$. 001. This result indicates that there is a significant association between DoCS being the applicant and the outcome being orders in favour of DoCS.

Limitations

This study was a small cross-sectional study of the applications completed in one year at three Children's Courts in Sydney at a time of changes in child protection and in the Children's Court system. It is possible that this research did not identify and locate all completed section 90 applications for the period at the three courts. It is also possible that other cases that were on foot but not completed in the study period were more complex or different in nature for the files reviewed in this study. As a result of these factors the picture presented about the processes and outcomes of these applications may not be representative of section 90 applications overall.

An Update

An attempt was made to update data after the implementation of the Wood reforms commencing in 2010. There is still some difficulty in obtaining this data from the courts.

Since the Wood reforms there has been a decrease in the number of care orders in NSW from 3,827 new care orders made in 2008–2009 to 3,381 new care orders made in 2009–2010 (AIHW, 2011, p. 37). In 2006–2007 when there were 3,495 new care orders in NSW, there were 686 section 90 applications (SCICPS NSW, 2008) and section 90 applications were 16.4% of the combined new care applications and section 90 applications.

From the daily court lists provided to legal practitioners from one NSW Children's Court in the period of September to December 2010, 471 different care matters were identified. Of these 61 or 13% were identified as section 90 applications. This data is only a sample of practice data. It is not a complete set of data, and it may be unreliable, but it does indicate that section 90 applications remain a significant part of the court's workload in the post-Wood era.

Discussion

Permanency Planning

In spite of mandatory reporting and the considerable expansion of child protection proceedings there are those in the community who portray an image of Children's Court proceedings and child protection authorities as prone to returning vulnerable children to dangerous and neglectful families (Forwood & Carver as cited in AIHW, 2009; Sammut, 2009; Box & Salusinszky, 2007). This is not the picture conveyed by the analysis of these section 90 applications. The data from this study indicates that when final care orders are made it is very difficult for parents to go back to court to reclaim their parental responsibilities.

The permanency planning principle means that parents have very limited time in which to change their lives if they are to be successful as parents after their children have been removed and placed in out of home care (Mulroney, 2008). Permanency planning urges caseworkers and the Children's Court to make speedy and final decisions about where children will live and who will care for them because of the requirement for stability and safety to promote positive development for children. These are well respected aims in promoting what is best for children (Barber & Delfabbro 2009; Maluccio, Fein, & Olmstead, 1986). The problem is that children placed in foster care are not guaranteed stability in care and freedom from further trauma (Hansen & Ainsworth, 2011). Information from various sources about the continuing problem of placement breakdown for these children is evident in all jurisdictions in Australia and internationally (Barber & Delfabbro, 2004; Schofield, Thoburn, Howell, & Dickens, 2009; Wulczyn & Chen, 2010; Wulczyn, Kogan, & Harden, 2009).

TABLE 2

Distribution of Number of Placements for Children in Out-of-Home Care in New South Wales as at 30 June 2010[a] (*n* = 17,382)

Time in care	No. of placements	Frequency	Percentage
Less than 1 year	3/3+	430	14.1%
1–2 years	3/3+	909	29.5%
2–5 years	3/3+	1,882	33.1%
5 or more years	1	1,833	32.9%
	2	1,288	23.1%
	3/3+	2,446	43.9%

Note: [a]This data is extracted from the Community Services New South Wales Annual Statistical Report 2009–2010, p. 67. The full table has not been replicated here.

By 2010 there were 17,382 children and young people in out-of-home care. Over the past few years there has been no improvement in placement stability for children and young people in out-of-home care. The intention to provide these vulnerable children with permanent and stable homes does not occur in at least 40% of instances over the past few years. And these figures do not include children who had short-term placements of less than seven days (Department of Human Services, 2011). Table 2 shows the distribution of the number of placements for these children.

Given these figures, the major issues in permanency may not be only about an alleged tendency to return children to birth families inappropriately. Another possible factor is the inherent difficulty in the out-of-home care system of preventing multiple placements. There are too many children who have more than three placements in their five or more years of being in care. But this data from DoCS does not provide sufficient detail about how large or small the problem of multiple placements may be. For example, do most of this 40% of children and young people experience only three moves in their five years in care? What proportion of this 40% experience more than eight placements?

The problem of placement instability does not necessarily mean that children should be returned to abusive and neglectful parents. Everyone working in child protection is aware of family situations where it is not conceivable that children could ever be returned to some families because the risks of harm are too great. But the argument for maintaining children with carers, even after parents have reformed and rehabilitated, rests on the notion that children need the permanency of long-term care with foster carers (Mulroney, 2008). This argument fails when it is clear that there is lack of placement stability for more than 40% of children who are in long-term out-of-home care. Placement instability is found in many countries especially in foster care or residential care rather than in kinship care (Barth & Lloyd, 2010; Strijker, 2010; Ward & Munro, 2010). There are some research studies that raise the question of whether being in foster care produces better outcomes than being adopted or living at home with parents (Barth & Lloyd, 2010; Winokur, Crawford, Longobardi, & Valentine, 2008). The data on placement instability and research on the outcomes of

foster care alert us to analyse the presumption that foster care provides a better option for these children than living with parents or other family members. Instead of assuming that foster care always produces positive results it is important to examine critically the nature of the risk posed by families and the nature of risks posed by the unstable foster care system. The argument here is for children's courts to embark on a more critical appraisal of the extent to which foster care provides the desired permanency in placement in each situation.

DoCS Use of Section 90 Applications

One of the surprises to come from the data was that DoCS is so often an applicant in section 90 proceedings. It seems that DoCS uses this process to bring a matter back to court when parents or other family members do not meet expectations after care orders have been made. In some situations the final care orders allocate parental responsibility to one family member or another. If that plan does not succeed then section 90 provides a way to make changes to ensure the child's safety and wellbeing.

There may be some who would claim that the fact that, in this sample, DoCS was more successful as an applicant than parents demonstrates this is how the world should be. Those who hold this view would see DoCS as the champion of children's rights with an undisputed priority in determining what constitutes the best interests of the child. But the right to examine the processes and outcomes of legal and administrative decision-making is a hallmark of a democratic society in which the rule of law applies (Gleeson, 2000). In the terrible situations that exist when children have to be removed from families, it is important to remember that everyone involved sees their view and intentions as promoting the best interests of children. The question that arises from the data is whether parents are naive in assuming that their change of lifestyle will allow them to reclaim their role as parents. Is it the case that once final care orders are made parents are unlikely to be able to have children restored because of the permanency planning imperative?

The Future

Whatever the limitations of this study, the information that has been obtained provides a glimpse of the processes and outcomes of a sample of section 90 applications to the NSW Children's Courts. The findings show that both parents and DoCS make these applications to vary the final care orders, that DoCS is the most successful applicant and that the end result in this sample of applications was an increase in the number of children under the parental responsibility of the minister.

The people involved in these applications are often vulnerable families who are dealing with the serious issues of poverty, domestic violence, drug use and mental health issues. This picture is consistent with what is already known about families involved in the child protection system as a whole (Walsh & Douglas, 2009). The concern for the future has to be how policy makers and service delivery providers find ways to reduce the disadvantage and increase the level of support that many disadvantaged families need.

Flowing from the Wood Report (SCICPS NSW, 2008) there have been substantial changes in the child protection system and in the NSW Children's Courts. The changes include

- raising the threshold for reporting abuse from 'risk or harm' to 'risk of significant harm'
- establishing wellbeing units to review cases and decide whether the threshold of 'significant harm' has been reached before a mandatory report to DoCS is made
- increasing the use of alternate dispute resolution procedures.

The decrease in the number of child protection notifications in NSW by 27% (AIHW, 2011) suggests that the changes will have a large impact and may achieve the desired result of reducing the number of children in care (The Wood Report; SCICPS NSW, 2008). But this is uncertain given that the number of children admitted to care orders decreased by only 11.6% between 2008 and 2009, and 2009 and 2010 (AIHW, 2011).

The amendment that removes the Children's Court's jurisdiction to make contact orders in situations where there are long-term care orders has not yet commenced. Almost a third of applications in this study involved applications for changes to contact arrangements; it might be thought that if the Children's Court loses jurisdiction over contact the number of section 90 applications may decrease, but with the number of changes being implemented at this time, it is difficult to predict what will happen.

For practitioners and consumers, the results suggest that parents should be warned about the difficulties in attempting to have their children returned to their care. They have a limited window of time to change lifestyle and parenting capacity, and they need to work cooperatively with DoCS in seeking restoration. The fact that DoCS was the most successful applicant in these matters is a telling factor, and parents who are locked into the need to do battle with DoCS are probably less likely to succeed.

It is hoped that this small study encourages further research into child protection and court decision-making processes and outcomes. At this time, when there is so much change in the child protection system, it is essential that we take the opportunity to use the data that is available to learn more about what is happening so that we can work towards improvements that will protect children, provide support for vulnerable families and communities, as well as meeting the goals expected by the community.

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Appendix A

Legislation to Vary Care Orders

Children and Young Persons (Care and Protection) Act 1998 (NSW), s. 90
Children, Youth and Families Act 2005 (Vic), s. 300; Child Protection Act 1999 (Qld), s. 65
Children's Protection Act 1993 (SA), s. 40
Children and Community Services Act 2004 (WA), ss. 67–69
Children, Young Persons and their Families Act 1997 (Tas), s. 48
Children and Young People Act 2008 (ACT), s. 467
Care and Protection Act 2007 (NT), s. 137

Appendix B

Cases Concerning the Test for Arguable Case

'In the matter of Campbell'. [2011] NSWSC 761 (Slattery J, 10 March 2011). *Children's Law News, 2*, 1.
'In the matter of OM, ZM, BM and PM'. [28 May 2002] St James Children's Court. *Children's Law News, 4*, 2.
'In the matter of Nerida'. [6 September 2002] 68/2001 St James Children's Court. *Children's Law News, 7*, 2.
'In the matter of Jack'. [26 September 2002] St James Children's Court. *Children's Law News, 8*, 6.
'In the matter of Ingrid'. [4 May 2006] Broadmeadow Children's Court. *Children's Law News, 4*, 8.
'In the matter of Troy'. [14 September 2010] Parramatta Children's Court. *Children's Law News, 2*, 2.
'Re Saunders & Morgan v. Department of Community Services' [2008] NSWDC (Johnstone DCJ, 12 December 2008). *Children's Law News, 10*, 1.

Appendix C

Cases Concerning the Significant Change in Relevant Circumstances

'In the matter of J, K, and C'. [14 December 2001] St James Children's Court (2002). *Children's Law News, 2(1)*, 2.
'In the matter of OM, ZM, BM and PM'. [28 May 2002] St James Children's Court. *Children's Law News, 4*, 2.
S v. Department of Community Services [2002] NSWCA 151. *Children's Law News, 4*, 10.
'In the matter of Jack'. [26 September 2002] St James Children's Court. *Children's Law News, 8*, 6.
'In the matter of Jordan, Joshua and Michelle (No 2)'. [27 March 2003] Bidura Children's Court. *Children's Law News, 4*, 1.
'In the matter of Jasper'. [30 January 2006] St James Children's Court. *Children's Law News* 2, 1.
'In the matter of Troy' [14 September 2010] Parramatta Children's Court. *Children's Law News, 2*, 2.