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Behind the Closed Door: A Guide and Parents' Comments on the Workings of the New South Wales Children's Court

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The New South Wales Children's Court, like other state and territory Children's Courts, is a closed court. This means that the public cannot attend court hearings when care and protection matters are before the court. The exception is Victoria where even in the Family Division of the Children's Court that deals with care and protection matters an application has to be made to a magistrate for the court to be closed. This article is designed to take the reader behind the closed door and provide information about court processes and procedures as well as present parents' comments on the way in which the court works.
In New South Wales there are seven specialist children's courts at Parramatta, Glebe (Bidura), Campbelltown, Newcastle (Broadmeadow), Wyong, Woy Woy and in the Illawarra (Port Kembla). In other places children's care matters are dealt with by local magistrates supported by specialist Children's Court magistrates from Parramatta who staff a country Children's Court circuit.
Parents' views on these processes and procedures are troubling as many see the court as unfair in the way that decisions are made. The parents' views have been obtained, through interviews with parents over a number of years, as part of the authors' professional duties, as a Guardian ad Litem and solicitor in the New South Wales Children's Court.
From this experience it is clear that many professional staff who have contact with parents involved in Children's Court matters are also unclear about the court processes, and as a result they are less able to support parents through this stressful process. This article aims to assist staff to understand the court processes so that they may in turn support parents.

■ **Keywords:** Children's Court, court process, views of parents

Introduction

There can be no more important legal decision than when a Children's Court magistrate awards the custody of a child to the New South Wales (NSW) Minister for Family and Community Services (FaCS), usually until the child is 18 years of age. Such a decision has a devastating impact on parents, even when the decision is justified because of their serious abuse and neglect of a child or children (Burgheim, 2005; Schofield, Moldestad Hojer, Ward, Skilbred, & Young, 2011). And everyone knows this decision is sometimes justified.

The *Children and Young Persons (Care and Protection) Act 1998* defines the process, which is usually lengthy, by which this legal decision is achieved. The court aims to have 90% of care cases completed within 9 months (in effect 36 weeks) and all cases within 12 months from the initiation of an application by FaCS (Children's Court, practice note no. 2). What may flow from a care application is an Interim Care Order (ICO) (*Children and Young Persons (Care and Protection) Act 1998*, section 61).

Stage 1 documents and interim care orders

Care applications by FaCS have to be made within 3 working days (72 hours) of a child being removed from parental

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care. An application has to be supported by a report that summarises the following.

- All current orders of the Children's Court and any other order being relied upon for an argument pursuant to section 106A* of the Care Act.
- Orders from the Family Court, Federal Magistrates Court and any current enforceable apprehended domestic violence orders (AVO).
- A summary of reports of significant risk of harm reports concerning the child.
- Written advice of assessment/examination from medical practitioners in relation to an injury/medical condition where the injury/medical condition has contributed to the removal/action being taken.
- Written advice from the police as to relevant incidents, consideration of which has contributed to removal/action being taken has also to be included.
- Written advice from any agency providing services to the child or the child's family where consideration of this advice has contributed to the removal/action being taken.
- Parental responsibility contract breach notices but only where the breach has prompted the Children's Court application.
- Birth alerts.
- Current case plan(s) and care plan(s).
- Relevant photographs.
- Any notes of interviews with the child or young person or parents/carer.

(Children's Court, practice note no. 2, 2010)

These are known as Stage 1 documents and have to be served on all parties i.e. the parents and their legal representative, at the time of the application or at any time before the first return court date. The care application must also specify which of nine grounds form the basis of the application (*Children and Young Persons (Care and Protection) Act 1998,* Section 71).

The grounds are as follows.

- There is no person available to care for the child or young person as a result of death or incapacity or any other reason.
- The parents acknowledge that they have serious difficulty in caring for a child or young person and, as a consequence, the child or young person is in need of care and protection.
- The child or young person has been, or is likely to be, physically or sexually abused or ill treated.
- Subject to subsection (2) the child's or young person's basic physical, psychological or educational needs are not being met, or are likely not to be met, by his or her parents or primary care-givers.
- The child or young person is suffering or is likely to suffer serious developmental impairment or serious psychological harm as a consequence of the domestic environment in which he or she is living.
- In the case of a child who is under the age of 14 years, the child has exhibited abusive behaviours and an order of the Children's Court is necessary to ensure his or her access to, or attendance at, appropriate therapeutic services.
- The child or young person is subject to a care and protection order of another State or Territory that has not been complied with.
- That section 171(1)** applies in respect of the child or young person.
- In the case where the application for the order is made by filing a contract breach – any presumption arising from the operation of section 38 E(4) that the child or young person is in need of care and protection has not been rebutted.

In making a care application FaCS can, and do, cite more than one ground.

In the first mention of a case magistrates generally grant applications from FaCS, for an ICO, although there may be a hearing to decide whether an ICO should be made if parents object to the order. An ICO allows the child to remain in the temporary placement where the child was placed immediately following their removal from parental care. This temporary placement may be with a family member or a non-relative foster carer in the non-government sector. The court at this point will also appoint a legal representative for the child (*Children and Young Persons (Care and Protection) Act 1998,* section 99). This lawyer is usually allocated from the NSW Legal Aid (LA) Children's Panel.

When an ICO is granted, the department and the court will put in place arrangements for the parents to have regular contact with the child while the case is proceeding (*Children and Young Persons (Care and Protection) Act 1998,* section 86). A typical contact arrangement is for the parents to have supervised contact with their child twice per week for a period of 1 hour on each occasion. Supervised contact means that the contact may take place at a Community Services Centre (CSC) and will be observed by a FaCS caseworker or at a subcontracted contact centre with a contact supervisor observing the contact.

Comments by parents

When a child is removed from parental care FaCS have to inform the parents about the legal process and serve them with a copy of the report that FaCS will use to support the care application. They should also tell the parents the

date on which this application to the Court will be made. This provides the parents with the opportunity to seek legal advice.

Most parents, (unless they are ineligible because of private financial resources) make an application either directly to LA or via a private solicitor who makes an application on their behalf for a LA grant. An alternative is for the parents to seek legal advice from a duty solicitor (who may be an LA solicitor or a private practitioner who is a member of the LA care panel) who is on duty at the Children's Court on the day of the FaCS application. This solicitor may then agree, if the duty solicitor is a private practitioner, subject to a grant of aid being given, to carry the case forward. Most, but not all parents, appearing in the Children's Court are socially disadvantaged and receive Centrelink benefits by virtue of unemployment or disability, which makes them eligible for a LA grant.

For parents, the difficulty with this process is that they must find and consult with a solicitor within a short time frame and assemble information to rebut the claims made by FaCS in the report that supports the care application. This is rarely achieved and most often an ICO is granted. Most lawyers, however, advise parents to agree to the ICO. Parents more often than not accept this advice given that they are generally unfamiliar with court proceedings and think that they must accept the solicitor's advice.

A further issue for parents is that the rules of evidence do not apply in the Children's Court, unless a magistrate rules otherwise (*Children and Young Persons (Care and Protection) Act 1998* section 93 (3)–(5). This means that the NSW *Evidence Act 1995* does not normally apply. The result is that the report put forward by FaCS as the basis of an application for an ICO can contain rumour, innuendo and information that parents regard as false, misleading or inaccurate.

What follows the granting of an ICO, as has been noted, are arrangements for contact between the parents and child while the court case proceeds (Children's Court, Contact guidelines, 2011). Contact supervisors will, following parental contact, write reports about the contact which becomes part of the department's case file. The department has strict rules for parents in term of what they can do or say to their child during contact (Community Services, Practice tool, 2010).

Comments by parents

Most parents expect evidence presented to the court to be 'true' and find the fact that the rules of evidence do not apply startling. That material can be admitted that is questionable has the effect of undermining the confidence of parents in the fairness of the Court.

The issue of contact is also a contentious issue as many parents have strong views about the way contact is supervised. They object to some of the rules that the department sets and express the view that they are being 'spied upon' by contact supervisors. Children, without prompting from parents, also say the same. This is a view that is shaped by contact reports, which often focus on parental deficiencies rather than strengths, and are filed at a later date as part of FaCS affidavit material designed to support the case against the parents.

Stage 2 documents and other applications

The next step in the court process is the production by FaCS of Stage 2 documents (Children's Court practice note no. 2) that have to be served on all parties, within 14 calendar days of the granting of an ICO, in readiness for the return court date.

These documents are as follows.

- The relevant portions of the Community Services file.
- Any of the categories of documents produced in Stage 1 that are now held by Community Services and have not been previously produced.
- Where an argument is to be conducted pursuant to section 106A of the Care Act, copies of Children's Court judgements, orders or transcripts that Community Services retain on their files.
- Information held by Community Services from other agencies only where it is relevant to issues to be considered by the court in determining whether the child is in need of care and protection (for example, a school report where the child's educational needs are not being meet).
- A genogram of the child.
- Any temporary care arrangement (whether current or expired).
- Documents held by Community Services recording what took place at any home visit to the home of the child in the previous 12 months prior to the commencement of care proceedings.
- Any parental responsibility contacts (whether current or expired).
- Third party assessments held by Community Services where they are relevant to the issues to be determined by the court.

(Children's Court, practice note no. 2, 2010)

At either the first or return court date FaCS generally ask for the case to be 'established'. This in effect means that the parents are acknowledging that there is a care and protection case to answer. Sometimes parents consent to both an ICO and the establishment of the case, on occasions following legal advice, without admissions of any abuse or neglect on their part. Obviously, if parents have not consented to an ICO they are unlikely to agree to the establishment of the case. Under these circumstances a magistrate will set a date for a hearing.

If an ICO is in place, all Stage 1 and 2 documents have been produced and the case has been established, the magistrate will set a timetable for the conduct of the case. During the time period that elapses while waiting for the final hearing date, which can be substantial, there can be a series of mentions.

Between mentions both parties can make applications to subpoena materials that only a magistrate can order. Subpoena applications have to identify the exact materials that are being sought and can, for example, be made by FaCS for a parent's police, health, housing or education records, or by the parent's solicitor for the FaCS case files. A fee of $110 is payable for the issue of a subpoena for the FaCS file. Other organisations have different fees. If the parent's solicitor has a LA grant fees may be paid by LA. Other applications, for example a Children's Court Clinic assessment *(Children and Young Persons (Care and Protection) Act 1998,* section 54*)* of the parents, or the appointment for a Guardian ad Litem (GAL) (*Children and Young Persons (Care and Protection) Act 1998,* section 100 and 101*)*, where a solicitor is unable to obtain clear instructions from a parent, must also be heard by a magistrate.

Outside the legal process FaCS may also serve a community agency with a section 248 notice as prescribed in the *Children and Young Persons (Care and Protection) Act 1998,* section 248*)* that requires an agency to provide information about the parent's contact with, and use of, the agency's services. This information can then be made available to the court by FaCS by way of affidavit.

In some cases a family member, such as maternal and paternal grandparents, brother, sister or other relatives of the parents, from whom the child has been removed, indicate a wish to act as a kinship carer, especially long-term, for the child. If this is the case, FaCS will almost certainly undertake an assessment of the potential carer. This assessment may be undertaken internally by departmental staff or by a sub-contracted organisation such as Assessments Australia (www.assessments.com.au).

If a grandparent, or another interested person, is indicating willingness to act in this way they can formalise this interest by applying to the Children's Court to be made 'a party to the case'. This is done under section 98(3) of the *Children and Young Persons (Care and Protection) Act 1998* and a decision about a person other than a child's parents being made a party to a case can only be made by a magistrate. A grandparent, or others, if they pass a financial test and a merit test may be eligible for a grant from LA to enable them to obtain the services of a solicitor to represent them at a hearing of an application of this type.

A relatively recent innovation has been the introduction into the court process of an enhanced mediation process by way of a magistrate ordered Dispute Resolution Conference (DRC). This is under the alternative dispute resolution provision of the *Children and Young Persons (Care and Protection) Act 1998,* sections 65 and 65A (Children's Court practice note no. 6). The DRC consists of the parents and their legal representative, the FaCS casework manager, caseworker and legal representative and is convened either by an independent mediator or a court registrar that is a trained mediator. The purpose of the DRC is to try to settle the dispute between FaCS and the parents in regard to the future of the child who was removed from their care, with the mediator acting as a facilitator in this complex process.

In an independent evaluation of a sample of DRCs it is reported that these conferences resulted in 37% of the cases being resolved by consent and the narrowing of issues for resolution at a final hearing in 92% of the cases that were examined (Morgan, 2012).

Comments by parents

Parents are often unaware of the extent to which FaCS can obtain information about their lives and are surprised, if not shocked, when they first hear about the Department's capacity to access this information. Once parents are involved in a Children's Court case they have no privacy and all confidentiality is lost (Ainsworth & Hansen, 2010). In addition, grandparents and other relatives rarely know about the process of becoming joined as a party to a case and only find out about their capacity to be an active party in regard to say grandchildren late in the proceedings or after the matter has been finalised.

Preparation for final hearing and filing of care plans

A further step in care proceedings, after establishment, is when a magistrate having satisfied themselves that all the preliminary issues have been dealt with sets a date by which FaCS has to file with the court a Care Plan for the child (*Children and Young Persons (Care and Protection) Act 1998,* section 78). Before this Care Plan can be filed with the court FaCS has to hold a meeting with the parents and explain to them what the department is proposing should happen to the child and the orders they will be asking the court to make. If a GAL has been appointed for one or both of the parents the GAL has to be included in the Care Plan meeting.

It may be that this is the first time that the parents are formally told that FaCS are not recommending the restoration of the child to their care, although since the introduction of the DRC process this may have been indicated at that earlier stage. After this meeting the Care Plan is filed and the parent and their solicitor will have a period of time in which to develop and file a response with the court. Once this process is completed and the case is ready for a hearing (NSW Children's Court, practice note no. 5) a final hearing date or dates are set. A final hearing may focus on the possibility of the child being restored to parental care or if FaCS are unwilling to support this a hearing may focus only on the issue of contact between the child and parents, if the parents have conceded that restoration is not possible at this point in time.

The final hearing

The final court hearing, which can go over a number of days, is where FaCS and the parent's solicitor argue the case, witnesses are cross-examined (FaCS caseworkers, parents and Children' Court Clinic clinicians) and the magistrate makes final orders. There are a number of different types of orders. These orders include restoration of the child to parental care, often with undertakings i.e. abstain from alcohol or drug use *Children and Young Persons (Care and Protection) Act 1998,* section 73*)*, restoration with a 12 month supervision order (*Children and Young Persons (Care and Protection) Act 1998,* Section 76) or parental responsibility (PR) to the Minister for FaCS often until the child is 18 years of age. Where the order is for PR to the Minister it may include an order or notation specifying the frequency of parent-child contact (*Children and Young Persons (Care and Protection) Act 1998,* Section 86).

Comments by parents

Parents say that a final hearing is the culmination of a long and extremely stressful process. It is also the point at which, if a child is made PR to the Minister, the parents' hopes for the future are shattered. It is a moment when parents often show strong emotions of anger as well as despair. At this time parents may also begin to consider filing a District Court appeal (*Children and Young Persons (Care and Protection) Act 1998,* section 91*)* or a section 90 application (*Children and Young Persons (Care and Protection) Act 1998,* section 90*)* for rescission or variation of the care order that has just been made. Both possible actions may be unrealistic, but acceptance of the permanent loss of a child is for many parents just too painful to contemplate. It is especially difficult to obtain a LA grant to support an appeal or section 90 application as LA not only applies a financial test of eligibility, but also the merit test mentioned earlier. The merit test states that LA must be 'satisfied that the legally assisted person has reasonable prospects of success (LA policy bulletin 2/12). A solicitor applying for a grant for an appeal or a section 90 application has to sign that in their opinion there is a reasonable prospect of success.

It is also not unknown for parents to come away from a hearing and express the view that the magistrate was too willing to listen to the evidence of FaCS caseworkers, not question them enough and give this evidence more weight than they give to the evidence of the parents.

Appeals and section 90 applications

Following a final hearing and the making of an order of PR to the Minister a parent has the right of appeal on the grounds of dissatisfaction with the magistrate's decision to the District Court. The first barrier to an appeal is the need for a LA grant to enable parents to obtain the services of a solicitor. The second is the District Court filing fee that is payable at the start of the action, if the appeal is not LA grant aided, that currently stands at $550.

A further avenue by which parents can seek restoration of a child to their care is by filing a section 90 application (NSW *Children and Young Persons (Care and Protection) Act 1998,* section 90). This is a two stage process. Firstly, a parent has to convince a magistrate that there have been 'significant changes in any relevant circumstance' since the final order was made that gave PR for the child to the Minister. Only if the magistrate agrees that this is the case does the section 90 application proceed to a new hearing (Hansen, 2012). As before, the barrier is the need for a LA grant to enable parents to obtain the services of a solicitor. As noted, LA reviews these applications and makes a judgement about the 'merit' of the case. It is also unlikely that an application made close to the date of final orders will be successful as a magistrate is unlikely to be of the view that sufficient time to make the 'significant changes' that are required has elapsed.

Comments by parents

Parents are often shocked to hear from their solicitor after a final hearing that LA may be unwilling to provide a grant to support a District Court appeal or a section 90 application. For parents this feels as if they have nowhere to go and that they are being denied access to justice.

Parents can of course self represent in any NSW court but to do so is an immensely difficult task not least of all because FaCS will always be legally represented. In the District Court FaCS will be represented by Crown Law who is likely to have hired the services of a barrister. For parents this does not feel like a level playing field.

De-contextualising the lives of parents

One of the noticeable omissions from a report supporting a care application by FaCS is information about the parents social circumstances. Instead of a family social history, what is presented is a report that exclusively focuses on 'risk of significant' harm to a child of abuse or neglect, as if everything that might happen to a child occurs in a vacuum. In fact the lives of parents are de-contextualised and it is made to look as if social circumstances have no impact on their ability to be a satisfactory parent. Yet, even the most basic observation and contact with parents in the Children's Court tells you that this is not so.

Parents in the Children's Court are, more often than not, socially disadvantaged. Most live in poverty, poorly supported by Centrelink benefits, by virtue of illness, disability and unemployment. Intellectual disability and mental health issues are not uncommon. Added to this list is evidence that these parents are often poorly educated (some cannot read) and lack a range of life skills including relationship skills. Most live in low quality public housing on housing estates where social decay and tensions are all too

evident. Among this group of parents there are also an increasing number of refugees, from a range of cultures, who are the survivors of years of trauma and torture before they reached Australia.

Without a comprehensive family history that details all of the above and places any abuse or neglect of children in the context of the parents' life experiences, the Children's Court is deprived of vital information that is needed for fair and competent decision making.

There is ample evidence of the correlation between poverty and living in a poor environment (Ghate & Hazel, 2002) and parenting practices that may lead to child abuse and neglect. Poverty also is clearly correlated with child deaths to the extent that a measureable increase in poverty leads to an increase in the rate of child deaths (Douglas & McCarthy, 2011).

This brings into focus the reason why a comprehensive family social history is so important for both FaCS and the Children's Court. Without such a history it is impossible to judge whether the parents are capable, with support and education, of changing their child rearing practices in order for the parents to be good enough parents and for their child to be safe. This decision is at the core of any decision about restoration or removing a child permanently from parental care. Unfortunately, this information is not routinely collected and as a result it can be argued that the Children's Court all too often makes decisions on the basis of incomplete evidence.

Comments by parents

For parents these decisions are seen as evidence of a lack of understanding or unfairness by the court because the FaCS investigative process has for them been too narrow, by only focusing on significant risk to a child, and has failed to provide to the court a full picture of family functioning.

Conclusion

Because of the harshness of a decision to remove a child from parental care, it is inevitable that some parents will never accept the court's decision as fair or necessary. Some parents become vexatious litigants who seek constantly to return the matter to court. When this happens the court has the power to bar them from further action and this happens on rare occasions. These parents, and others in a similar situations, grieve for years about the loss of their child regardless of how correct the court decision was.

It is because of this reason that we quote the Vice-Chancellor of the High Court of England and Wales, Sir Robert Megarry who in 1978 in an address on the 'Workings of the judicial mind' said

> 'one of the important duties of the court is to send away defeated litigants who feel no justifiable sense of injustice in the judicial process'.
>
> (Megarry, 1978. page unknown)

Our question is how many parents who are litigants in the NSW Children's Court go away from a final hearing feeling 'a justifiable sense of injustice in the judicial process?'

We are also moved to finalise this article by quoting Professor Marie Connolly, Professor of Social Work at Melbourne University for her heartening and humane view of parents who have harmed a child. We quote,

> If parents who have hurt their children are nevertheless valued as humans who deserve the opportunity to work with dignity towards positive solutions to keep their children safe there is no reasons not to involve them in decision making.
>
> (Connolly, 2010, p. 212)

Notes:

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* Section 106A of the Act refers to a case where a child has previously been removed from the parents who are the subject of the current case and where that child was not restored to their care.

** Refers to the removal of a child or young person from unauthorised out of home care.

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