APPLICATIONS FOR CARE ORDERS IN THE CHILDREN'S COURT
A DISCUSSION PAPER ON THE CURRENT STATE OF THE LAW

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Introduction

1. The law in relation to applications for care orders, and in particular interim care orders, has recently been subject to comment by Mr R. J. McLachlan in a paper "Re Alan: do the requirements of section 90 apply to any application seeking to vary or rescind an inter order."[2] In this paper Mr McLachlan commented on recent decisions of the Supreme Court in the matters of *Re Elizabeth [2007] NSWSC 729,* per Palmer J and *Re Alan [2008] NSWSC 379* per Gzell J (in which the author had carriage of instructing the Crown Solicitor).

   In summary, the argument of Mr McLachlan is that *Re Elizabeth* and *Re Alan* should be limited on their facts to commenting on the limited jurisdiction for the Supreme Court to exercise its powers patriae jurisdiction where the Children's Court has jurisdiction rather than stipulating that an interim care order can only be varied if section 90 is complied with.

2. The purpose of this paper is to suggest a contrary view of the current law based on these and other authorities.

The legislation

3. A starting point for anyone applying for a care order is to establish standing to apply. The court's power to make the orders sought is of no avail to a party who lacks standing to apply for them. In examining someone's standing to apply for an interim care order it is important to note that the *Children and Young Persons (Care and Protection) Act 1998* ("Care Act") makes no distinction between the requirements for making applications for final or interim care orders[3] and, that section 61 expressly says that DoCS is the only one able to apply for care orders "except as provided by this chapter" (being Chapter 5 of the Care Act). It has been confirmed that this applies to interim care orders.[4] Consistent with this view that DoCS is the sole applicant able to seek an interim care order, section 69(2) stipulates that the onus of proof for an interim order that will result in the separation of a child from his or her parents always lies with DoCS.

4. Those care orders which can be applied for by others are set out in Chapter 5 of the Care Act as assessment orders,[5] together with orders stipulating minimum contact in terms of frequency, duration, supervision and prohibition.[6] Both of these rights to apply come into effect once DoCS has commenced care proceedings. Section 90(3)

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[1] Disclaimer: The author is an employed solicitor in the Department of Community Services. However, the views expressed in this paper are those of the author and are not to be taken as necessarily, or at all, representing the views of the Director-General or Minister.

[2] Paper delivered at the Legal Aid Conference 23 August 2008

[3] *Re Alan* at [8]

[4] *Re: Fernando & Gabriel [2001] NSWSC 905*, per Bell J at [28 to 30].

[5] section 55

[6] section 86

gives a broader power to relevant parties to apply to vary or rescind care orders - including after final orders have been made.

5. While an application to rescind an interim care order may not be a care application under section 61, any application for a new interim order would be such a care application. Unless expressly stated to the contrary an interim order will continue until contrary order.[7]

6. It is respectfully suggested that due to the restrictions placed by section 61 on who can apply for any care order, that absent section 90, a party (such as a birth parent) would have no standing to seek to alter an interim care order – even one as to parental responsibility. Because the interim order is only limited by the making of a contrary order this means that the proposition that section 90 does not apply to applications for interim orders is in fact inimical to parties like parents.

Relevant Supreme Court authorities

7. To what extent are the authorities consistent with this distinction between standing to apply for a care order and the source of power for the Court to make the order. In the matter of *Re Alan* it was submitted on behalf of the Director-General that a section 90 application was required to be made by the applicant parents to vary or rescind the current interim order. The applicant parents seeking relief submitted that this was not the case. At point [8] of the decision in that matter Gzell J stated:

   > "The *Children and Young Persons (Care and Protection) Act,* s 91 does not extend to an appeal from an interim order. In this case an interim order was made. An interim order falls within the definition of a *care order* in s 60. Section 69 provides that the Children's Court may make interim care orders in relation to a child or young person after a care application is made and before the application is finally determined. Section 90(1) provides that an application for the rescission or variation of a care order may be made with the leave of the Children's Court. In my opinion that power extends to an interim care order because it is included within the definition of a *care order* in section 60 of the *Children and Young Persons (Care and Protection) Act".*

   In this passage His Honour identifies the two essential elements for the making of an application to vary or rescind an interim care order which have been discussed above. These are the standing of a party to make the application (following the granting of leave) and the children's court's power to make interim orders.

8. It is significant that this decision is consistent with the earlier decision of Palmer J In *Re Elizabeth*[8]. In that case His Honour said:

   > "Section 91 CYP Act gives a right of appeal to the District Court from an order of the Children's Court, but not in the case of an interim order. Section 90(1) CYP Act empowers the Children's Court to rescind or vary a care order. By s.60 CYP Act *"care order"* is defined in such a way as will include an Interim Care Order for the purposes of s.90.
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   > Section 90(1) CYP Act provides that an application to the Children's Court for rescission or variation of a care order – which on the basis of these cases

[7] Clause 20, Practice Direction 28: *Case Management in the Care Jurisdiction.*

[8] Para 7-9.

includes an interim care order – may be made with the leave of that Court. However, s.90(2) provides: *"The Children's Court may grant leave if it appears that there has been a significant change in any relevant circumstances since the care order was made or last varied."*

It will be seen that s.90 does not afford a right to apply to the Children's Court for rescission or variation of a care order on the ground that the order was affected by an error of fact or law made by the Magistrate in the Children's Court. Rather, the section provides a mechanism to review care orders, whether interim or final, if circumstances have changed so that the original order, even if correctly made at the time, is no longer appropriate."

9. Both of the above decisions emphasise the status of interim orders as being interlocutory in nature to protect the child(ren) pending the final resolution of the matter. Palmer J asserts that: "It would be entirely destructive f the orderly, efficient and expeditious conduct of care proceedings in the Children's Court if appeals from interim care orders were to be made routinely to this Court in its parens patriæ jurisdiction."[9] The principle that interim orders ought not be readily disturbed is entirely consistent with the application of section 90 to interim care applications which acts as a safeguard against such a practice commonly occurring. Section 90 places the emphasis on obtaining a final resolution to proceedings as quickly as is practicable. There will, of course, be cases where developments require a re-visiting of interim orders but section 90 acts as a filter to prevent unwarranted applications - as well giving parties to proceedings the standing they need to apply in the first place.

10. It has been suggested that *Fernando & Gabriel*, and *Re Edward*, are inconsistent with *Re Alan* and *Re Elizabeth* on the issue of applications for interim orders, and that these earlier authorities ought to be applied because they are considered judgements on the nature of interim judgements whereas the later cases were, as noted earlier, only considered judgements on the nature of the Supreme Courts parens patriae jurisdiction. I would respectfully disagree with that proposition for a number of reasons.

11. Firstly, neither *Fernardo & Gabriel* nor *Re Edward* considered the issue of the standing of parties seek care orders. This is a crucial element of the later cases. I suggest that it is neither surprising nor significant that cases dealing with the court's power to make interim orders were not raised in *Re Alan* and *Re Elizabeth*. In those cases it does not appear that any party took issue with the court's power to make such orders. It is accepted that, as Mr McLachlan has put it, "Sections 69 and 70 are an independent basis for making such orders." But if this power is not in question, and instead issue was taken (as was certainly the case in *Re Alan*) with the proper means whereby court's jurisdiction to exercise the power can be activated, then the judgements are, on this aspect, consistent.

    Secondly, it is questioned whether *Re Edward* remains good law. Mr McLachlan alluded to this in his para 13. The comment in *Re Edward* by Kirby J at [52] to the effect that care orders can be varied using the interim order powers "outside the scheme of section 90" was predicated upon a view that a section 90 leave application was an ex parte application. Such a view would preclude using section 90 as a means of applying to change interim orders as it would not allow for the involvement of other parties. However, that view was impliedly overruled in the Court of Appeal decision of *S v DoCS [2002] NSWCA 151* where at [39] the court held that "in some

[9] *Re Elizabeth* at para 18 adopted in *Re Alan* at para 13.

cases, it would not be inappropriate for the Children's Court to consider both the leave application and the substantive application together..." This would not have

been a possible course of action if the granting of leave was itself an ex parte matter as held by Kirby J. In *Re: Brett [2006] NSWSC 984*, Sully J held that the application for leave was itself a type of care application (see [51-53]). Once this is accepted then the rights of appearance at section 98 are applicable. It is suggested that these latter two cases on section 90 remain good law while *Re Edward*, at least to some extent, does not.

Therefore it cannot be said that the passage in *Re Edward* at [52] in should in anyway be taken to discount the explicit findings of Palmer J and Gzell J on the need to invoke section 90 to vary or rescind an interim order. It is suggested that these latter authorities are binding on the Children's Court.

12. Mr McLachlan further suggested that the application of section 90 to an application to change interim orders may be a cumbersome and time consuming process. These processes will only apply where interim orders are either not time limited or open to be re made the next time they are before the court – but rely upon clause 20, *Practice Direction 28: Case Management in the Care Jurisdiction*, to define their duration.

    I suggest that the potential requirement of notifying interested parties (section 90(1A)) would apply in any event. And that the significant change test at subsection (2) is an appropriate one, so that an interim order will not be revisited if nothing has changed. Other requirements of section 90 such as the consideration of the sub sections (2A) and (6) need not be onerous on an interim application. The courts recognise that interim orders are made to implement a satisfactory temporary environment for the child(ren) pending the final outcome of proceedings. By their very nature, they are made on a somewhat superficial assessment of facts, and made bearing in mind that further evidence is likely to be provided (and tested) by the parties. They are often made on the papers. In *Goode v Goode [2006] FamCA 1346* at [68] the full court held 68:

    "In our view some of the comments of the Full Court in paragraph 18 (of Cowling's case) are still apposite. For example, the procedure for making interim parenting orders will continue to be an abridged process where the scope of the enquiry is "significantly curtailed". Where the Court cannot make findings of fact it should not be drawn into issues of fact or matters relating to the merits of the substantive case where findings are not possible. The Court also looks to the less contentious matters, such as the agreed facts and issues not in dispute and would have regard to the care arrangements prior to separation, the current circumstances of the parties and their children, and the parties' respective proposals for the future."

    Similarly, the Children's Court will make interim orders on a more limited basis than final orders.[10] Subsequent amendments to the Care Act regarding the burden of proof do not detract from the distinctions between how a court deals with final orders (and it is suggested, a section 90 after final orders), as opposed to a section 90 for interim orders.

[10] *Re Jayden* [2007] NSWCA 35 at [75-79])

Conclusions

13. The issue under discussion only arises where the interim order is not limited in duration.

14. To vary or rescind any care order, whether interim or final, the applicant is required by binding authorities to apply to the court pursuant to section 90.

15. Section 90 provides the required standing (which in many cases would be otherwise lacking) for eligible parties to make an application to vary or rescind any type of care order.

16. An interim application under section 90 would be dealt with on a more limited and less scrutinised matter than would a section 90 application made following final orders.