APPEALS IN THE SUPREME AND DISTRICT COURTS FROM CHILDREN'S COURT IN "CARE PROCEEDINGS"

A paper presented to the
Legal Aid Commission Care & Protection Conference,
Sydney, on 19 May, 2005
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Introduction

1. This paper provides an overview, and commentary on aspects of appeals from decisions of magistrates sitting in "care proceedings" conducted under the Children and Young Persons (Care and Protection) Act 1998 (the "Care & Protection Act").

2. Broadly speaking, appeals may be taken to the District Court, or to the Supreme Court. The choice will generally be determined by whether the appellant argues that an error of law has been made (and the nature of that alleged error), or whether the appellant seeks a re-hearing "on the merits".

Appeals in the Supreme Court

3. "Appeal" to the parens patriae jurisdiction.

   a) It should first be noted that an application to invoke the Supreme Court's parens patriae jurisdiction is not strictly an "appeal" at all. Rather, it is an application to have the Court exercise its own (original) jurisdiction : Re David and Ewen [2003] NSWSC 279, Campbell J at paragraph 13. Such proceedings are dealt with in the Equity Division.

   b) The parens patriae (Latin : "parent of his country") jurisdiction derives from the historical jurisdiction exercised by the English Court of Chancery, to protect persons who "cannot take care of themselves" : DoCS v Y [1999] NSWSC 644 (Austin J) at paragraph 85 (citing Lord Eldon LC in Wellesley v Duke of Beaufort (1827) 2 Russ 1, 20 [38 ER 236, 243]). The jurisdiction may be exercised so as to supersede the rights and powers of parents and guardians. It is a wide jurisdiction, the parameters of which are probably limited only by the well-known "paramountcy principle".

   c) Section 247 of the Care & Protection Act provides that – *"Nothing in this Act limits the jurisdiction of the Supreme Court"*. The Supreme Court's parens patriae jurisdiction in relation to children, and its power to make prerogative orders (see separate heading below) is therefore left intact, and may be exercised in an appropriate case (see Re Oscar [2002] NSWSC 453 21/5/02, at para 16 to 17).

   d) However, the general approach of the Supreme Court is that exceptional circumstances must be demonstrated before the parens patriae jurisdiction will be exercised to review the order of another court, especially an order made in the exercise of a discretion : T v H & Ors (1985) 3 NSWLR 270; Re Anna, Bruno, Courtney and Deepak [2001] NSWSC 79 (Hodgson CJ In Eq), at para 20 – 22; Re Victoria [2002] NSWSC 647 (Palmer J) at para 40; Re David and Ewen (above) at para 12 – 13; Re Oscar (above) at para 18.

   e) Consequently, although the parens patriae jurisdiction should always be considered as a possible avenue of appeal from a decision in care proceedings, it will be necessary to show exceptional circumstances justifying its exercise. In practical terms, this means that the Plaintiff will need to convince the Court that the usual avenue of appeal (to the District Court, under s. 91, or by way of judicial review in the Supreme Court) does not provide an adequate remedy in the circumstances.

4. Appeal by way of judicial review

a) Judicial review involves the exercise of the Supreme Court's supervisory jurisdiction over inferior courts and tribunals.

b) Probably the most fundamental principle of judicial review is that it is concerned not with the decision, but with the decision-making process. In other words, judicial review does not examine whether the challenged decision is fair or correct. It is not a review "on the merits". Rather, it is concerned with whether the decision was made within jurisdiction, and in accordance with the law. It is important also to remember that the grant of prerogative relief is discretionary, and that relief may be denied (even if error is made out) where (for example) there has been delay, or where the grant of relief would be pointless: see Director-General, Department of Community Services v District Court of NSW [2003] NSWCA 169; White v District Court of NSW (1998) 45 NSWLR 313.

c) Proceedings for judicial review of a magistrate's decision are commenced by summons filed in the Common Law Division. The relief usually sought is an order in the nature of the prerogative writs of certiorari, mandamus or prohibition (see now s. 69, Supreme Court Act 1970). As it is usual that the Children's Court simply "submits" to any order (except costs), a declaration may be sufficient in most cases (see s. 75, Supreme Court Act).

d) The scope of the jurisdiction to conduct judicial review by way of (the equivalent of) certiorari was considered by the High Court in Craig v South Australia [1994 – 95] 184 CLR 163. In its joint judgement, the Court said (at 175): --

> *"Where available, certiorari is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an inferior court or other Tribunal. It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal or substitution of the order or decision which the superior court thinks should have been made. Where the writ runs, it merely enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and "error of law on the face of the record". Where the writ is sought on the ground of jurisdictional error, breach of procedural fairness or fraud, the superior court entertaining an application for certiorari can, subject to applicable procedural and evidentiary rules, take account of any relevant material placed before it. In contrast, where relief is sought on the ground of error of law on the face of the record, the superior court is restricted to the "record" of the inferior court or tribunal and the writ will enable the quashing of the impugned order or decision only on the ground that it is affected by some error of law which is disclosed by that record."*

e) It should be noted that the usual result of a successful appeal by way of judicial review is that the order of the Children's Court is quashed (or declared to be contrary to law), and the proceedings "remitted" to the Children's Court for re-determination "according to law". The Supreme Court will not (usually) substitute its own (care) order, but leave the determination of the substantive care proceedings to the specialist court (the Children's Court).

f) In broad (but not exhaustive) terms, a successful challenge by way of judicial review will require the plaintiff to establish one or more of the following types of error:-

- jurisdictional error;
- ultra vires;
- denial of procedural fairness; or
- error of law on the face of the record.

i. jursdicitional error and ultra vires

Traditionally, jurisdictional error and ultra vires have been regarded as separate, although similar concepts. The distinction appears in recent times to have become blurred. A magistrate will fall into jurisdictional error if he/she mistakenly asserts or denies the existence of jurisdiction or misapprehends or disregards the nature or limits of his/her functions or powers. Jurisdictional error can be made out either by a positive act, or by a refusal or failure to act. A magistrate will act ultra vires if, for example, he/she acts in excess of an express power (usually a statutory provision), or exercises a power for an improper purpose, or after taking into account irrelevant considerations.

Examples :-

- Re Oscar [2002] NSWSC 453 (21/5/02 – Hamilton J) – declaration granted where Children's Court acted beyond power (ultra vires) in ordering a psychiatric assessment without appointing the Children's Court Clinic to carry out that assessment (see Care and Protection Act, s. 58).

- George v Children's Court of NSW [2003] NSWCA 389 (dismissing an appeal against) certiorari quashing Children's Court order which required DOCS to pay rail/bus fares and reasonable accommodation expenses of parents – beyond the powers (ultra vires) granted by the Care and Protection Act.

- Re Andrew [2004] NSWSC 842 (15/9/04 – Wood CJ at CL) – jurisdictional error established by magistrate's decision that he had no discretionary power to dispense with the giving of notice of care proceedings to a parent. Decision quashed, proceedings remitted to magistrate.

ii. breach of procedural fairness

Procedural fairness is the more modern term for "natural justice". The requirement of procedural fairness is implied in the common law, and will only be excluded by a clear expression of contrary intention. The rules of procedural fairness imply a duty to "act fairly" in the making of decisions affecting rights, interests and legitimate expectations : Kioa v West (1985) 159 CLR 550. Broadly, procedural fairness involves three fundamental rules:-

- the right to a fair hearing

- the bias rule

- the "no evidence" rule – that a decision be based upon logically probative material.

Examples :-

- JD v Director-General Dept Of Youth & Community Services [1998] NSWSC 353 (19/3/98 – Black AJ) – denial of procedural fairness where magistrate in Care Proceedings restricted cross-examination to 30 minutes per witness. Declaration granted, proceedings remitted to Children's Court for further hearing.

- Re Katherine [2004] NSWSC 899 (29/9/04 – Studdert J) – denial of procedural fairness in ruling that a party was "in the same interest" as DOCS (with consequent limitation on cross-examination); apprehension of bias (perceived pre-judgment of issues).

iii. error of law on the face of the record

An error of law which appears on the face of "the record" of an inferior court or tribunal is reviewable, even if the error does not go to jurisdiction. This is a common law exception to the traditional principle that only errors going to jurisdiction are capable of review. Two important matters need be noted. First, the error must be one of law, not fact. Secondly, care needs to be taken in determining what amounts to "the record". Traditionally "the record" was held to comprise – the documents initiating the proceedings, the pleadings, and the formal order of the court. It did not include the evidence, transcript, or the reasons for the decision. However, s. 69(4) of the Supreme Court Act now provides that "the record" includes the reasons expressed by the court or tribunal for its ultimate decision.

Also, the NSW Court of Appeal has said that in proceedings concerning the care of a child, "the record" should be regarded as having a reasonably wide ambit, and includes preceding and intervening decisions of other magistrates and courts which have considered the issue of the child's care : S v Department of Community Services [2002] NSWCA 151 (23/5/02).

Example :-

- S v Department of Community Services (above) – Court of Appeal found (at para 39) that the Children's magistrate, in dismissing a s. 90 leave application, had taken an unduly narrow approach, and not maintained a clear distinction between an application for leave (requiring only an arguable case) and an application for rescission or variation. The Court said that in cases of this type, where persons are often unrepresented, and emotionally upset, it is essential for the Children's Court to ensure that all relevant information is obtained (at para 40). The Court also found that the District Court had erred in finding that it did not have jurisdiction to hear an appeal from the magistrate's refusal of leave.

5. Costs in Supreme Court appeals

   a) The general rule in civil cases that costs "follow the event" does not necessarily apply in proceedings concerning the welfare of children. While the Supreme Court has undoubted power to award costs, the usual practice seems to be for the Court to order costs only where the requirements of justice or fairness require it. See S v Minister for Youth and Community Services (1986) 23 A Crim R 113 at 121; B v K [Butterworths Unreported - BC9805295] Hodgson CJ in Eq, 24/9/98) at p.11; Stokes v Director-General, Department of Community Services [2001] NSWSC 322 (Hidden J, 30/4/01).

   b) In determining whether costs should be ordered, the question of whether or not a party is legally aided is not relevant : Re Oscar (above) at para 8; B v K (above) at p11.

Appeals in the District Court

6. Section 91 of the Care and Protection Act confers a right of appeal to the District Court upon a party who is dissatisfied with an order (other than an interim order) made in care proceedings. The majority of appeals from care proceedings are, pursuant to this section, heard in the District Court. Part 6, Division 5 of the District Court Rules 1973 ("DCR") regulate certain aspects of appeals to the Court from care proceedings.

7. The Notice of Appeal must be filed within 21 days from the decision appealed against, although the District Court has a discretion to allow appeals outside that time: DCR s.6.36.

8. District Court appeals involve a "new hearing" in which fresh evidence, or evidence in addition to or in substitution for that admitted in the proceedings below may be given: s. 91(2) Care and Protection Act. However, the District Court has a discretion, instead of taking fresh evidence, to admit the transcript and any exhibit from the Children's Court proceedings: s. 91(3). A party who

wishes to rely upon fresh evidence, or evidence in substitution, must give notice of the nature and extent of that evidence to the other parties, as soon as practicable: DCR s. 6.43.

9. As the appeal is a "new hearing", it is not necessary for an appellant to establish any error in the decision of the magistrate. Rather, the District Court judge has all the relevant functions and discretions of the Children's Court under chapters 5 and 6 (see s. 91(4)), and may confirm, vary or set aside the decision of the Children's Court (see s. 91(5)). In other words, the judge must make up his/her own mind, based on the evidence led in the appeal. See also Director-General of Family and Community Services v Dumesny (NSW Court of Appeal, 3/5/89) – Butterworths Unreported Judgments – BC8902212; Re Oscar (above) at para 16.

10. Parties to a District Court appeal

    a) Apart from the appellant, the parties to an appeal will be :-

    - The Director-General (where he/she is not the appellant);
    - The child (where 10 years or more and not the appellant);
    - Any person (other than an officer of the appellant (sic)) who is responsible for the child and can reasonably be located; and
    - Any person who was granted leave under s. 98(3) to appear in the proceedings below (if not the appellant).

    (see DCR s. 6.37)

    (Note that although the above rule would not appear to include a child less than 10 years old, (who is not the appellant), it is the usual practice for a Separate Representative for such a child to appear and be heard in District Court appeals).

    b) It is important that the appellant (and other parties) give proper consideration to the question of who should be served with notice of the appeal. This should be considered even if the relevant person took no part in the Children's Court proceedings. Failure to give notice, or to show that reasonable efforts have been taken (eg to serve a Father) can lead to proceedings being adjourned while efforts are made to serve the person. The legal representative for an appellant should always be ready to answer the question – "Has the Father/Mother (or other relevant person) been served?" (and if not, why not).

11. Stay of Children's Court orders upon appeal to District Court

    a) The lodgement of an appeal in the District Court under s.91 does not stay the order appealed against : Care and Protection Act s.91(7).

    b) The full extent of the District Court's jurisdiction to grant interlocutory orders in care appeals seems to be unsettled. However, s.91(7) appears to assume a power in the District Court to make an interlocutory order such as a stay : see Director-General, Department of Community Services v Boehm (unrep) NSW Sup Ct, Santow J 13/8/97 (2836/97) (considering the predecessor to the current s. 91(7), which was in similar terms).

    c) Therefore, if a party wishes to stay the Children's Court's order, it will be necessary to file in the District Court a Notice of Motion and supporting affidavit. This may need to be done on an urgent basis (and an early return date sought), in order to avoid or minimise the "status quo" argument that may otherwise arise in relation to the interim placement of the child (as to the "status quo" principle, see In the Marriage of Cilento (1980) 6 Fam LR 35; Re Anna, Bruno, Courtney & Deepak (above) at para 23 to 27).

d) In practical terms, a party seeking a stay will need to convince the judge (who usually will have limited materials and limited time) why the decision of the magistrate (who assessed issues of credit and considered the evidence at length) should not remain in place pending the full hearing of the appeal. Where a stay is sought, it may be appropriate, as a "fall back position" to include in the Notice of Motion an application in relation to contact (see discussion below).

12. "Contact" orders in District Court appeals

a) As the lodgement of an appeal does not stay the orders made in the Children's Court, any contact orders made by the Children's Court will remain in force unless and until varied in the District Court. Those who practice in the care jurisdiction are aware of the importance of frequent and good quality contact in the maintenance of a child's relationship and attachment to a parent or other significant person. Maintaining (or building) this relationship and attachment can be of crucial importance in the outcome of an appeal.

b) It is important therefore, that immediately upon filing an appeal, the legal representatives for the appellant consider whether the current contact orders are "appropriate" (from the point of view of their client). As the hearing of the appeal may be weeks or months away, the level of contact between the child and the appellant (or some other party) will be of great importance when the question of "placement" (and/or final contact orders) is ultimately considered on the appeal.

c) If an appellant (or for that matter, any party) wishes to vary contact arrangements, then (in the absence of reaching some agreement which does not breach the existing orders), it will be necessary to approach the District Court, and seek new (interim) contact orders. A Notice of Motion and supporting affidavit must be filed. An early hearing date should be sought. It should be noted however (as with applications for stays) that a District Court judge hearing an interim application for variation of contact will need to be persuaded as to why he/she should vary orders that have been made (usually) by an experienced Children's Court magistrate, after a full and (often) lengthy hearing.

13. "All grounds" v "Placement" appeals in the District Court

a) Although it is not necessary, in an appeal to the District Court, to establish any error in the proceedings appealed against, the District Court Rules still require that an appellant include in the Notice of Appeal a statement of the "grounds of the appeal" : DCR s. 6.40(2). The statement of grounds should, at the very least, indicate which aspect of the Children's Court order is the subject of the appeal. In particular, the appellant should state whether the appeal concerns the question of whether the child is "in need of care and protection", or whether the appeal is restricted to the question of "placement" only.

b) As an appeal under s. 91 is a "new hearing" the usual practice (regardless of who is the appellant) is that the case for the Director-General is presented first. An exception to this general rule is in appeals concerning applications for leave – where the appellant would normally present his/her case (as to the existence or lack of a "significant change in relevant circumstances") first. The order of presentation of the cases for the remaining parties in any appeal is normally left to be agreed between the parties.

c) Where an appeal is on "all grounds" (ie as to both "finding/establishment" and "placement") it is common (although not invariable) for evidence on both issues to be heard concurrently. This is different from the usual approach in the Children's Court, where a "two stage" process is the norm. In the District Court, it is usually convenient for both issues to be heard together, because there will normally already be in existence significant evidence relating to the issue of "placement" (eg Care Plan, Permanency Plan, Clinic Reports, affidavits from parents, grandparents etc). The legal representative for a party should however, always consider whether this approach is appropriate in the circumstances, and if not, whether there is a proper basis to seek that the two issues be heard seriatim. In some circumstances, to proceed to hear both issues concurrently could amount to a denial of procedural fairness : see B v K (above) for a discussion of some of the issues.

14. Procedural aspects of appeal hearings in the District Court

a) The procedure adopted in any particular appeal tends to vary, depending upon the attitude of the parties, and of the individual judge. Sometimes, an appeal is determined "on the transcript", or on "agreed facts", although it is usual that at least some oral evidence is heard. This gives the judge an opportunity to assess the credit of the parties and witnesses, and also allows the Court to be provided with up-to-date information (ie evidence which has come to notice, or come into existence since the making of the Children's Court orders).

b) Practitioners appearing in District Court appeals should be aware that the level of "care" experience in judges of the District Court is quite varied. While there are many judges who have significant experience in hearing "care appeals", it is not uncommon for an appeal to be placed before a judge who is unfamiliar with the Care and Protection Act, and with the practice, procedure and jargon that is second nature to those who practice regularly in the "care" jurisdiction. It is helpful therefore, for a legal representative to be prepared to take the judge (succinctly) to the most relevant sections of the legislation. The usual starting point will be the Court's powers on the appeal (s. 91), the general nature of proceedings (s. 93), and the various orders that can be made (ss. 73, 74, 75, 76, 79, 86 etc). It may also be helpful to bring to Court copies of any relevant case law.

c) As it is not necessary to show any error in the magistrate's decision, the judgment from the Children's Court is not necessarily relevant on the appeal. However, that judgment usually provides a succinct summary of the evidence, and the issues to be determined, and it is common therefore, for the appeal judge to be provided a copy of the judgment to read.

d) In many District Court appeals, most of the relevant evidence will already be available and (hopefully) in reasonably admissible form at the commencement of the appeal. Therefore, the parties should confer beforehand and, if possible, assemble a (paginated) "agreed bundle" of documents, separated into those tendered by the Department, the Parents, the Child etc.

e) One major practical difference between the hearing of an appeal in the District Court, and the hearing of care proceedings in the Children's Court is that usually, once the appeal commences, it will proceed on consecutive days until it is concluded (subject to the judge's availability). As is well known to those who practice in the "care" jurisdiction, this is not necessarily the case in the Children's Court, where, for a variety of reasons, hearings are conducted over a series of days, often separated by weeks or months. It is important therefore, that before an appeal is listed for hearing, the parties agree upon a realistic estimate of its likely duration.

f) In some District Court appeals (in Sydney), a daily transcript is made available, which can be either left in the "transcript box" at the front of the Downing Centre, or (sometimes) sent to the practitioner by email, or on floppy disc. An inquiry should be made at the commencement of the appeal to determine whether a transcript will be available, and if so, in what form, and the arrangements for its collection. Although transcripts are normally very expensive, it is usual that (where available) they are provided free of charge to legally-aided parties.

15. Subpoenas

a) Copies of documents subpoenaed in the Children's Court proceedings will usually be kept with the District Court file. It may be necessary therefore, to seek access (including photocopy access) to those documents prior to the hearing of the appeal (to identify documents that might be used in cross-examination, or which might be tendered).

b) Careful thought should also be given to whether fresh subpoenas are desirable (it would be a rare case where it is not desirable) for documents not subpoenaed in the Children's Court, or documents that have come into existence after the satisfaction of earlier subpoenas. Following are some examples of sources of relevant documents :-

- Hospitals

- Doctors
- Counselling services
- Schools
- Pre-schools
- Department of Community Services
- Department of Housing
- Centrelink
- Department of Corrective Services
- Police Service
- Attorney-Generals' Department (Court records)
- Ambulance Service
- Drug rehab services
- Employers
- Email service providers

c) It is important to draft any subpoena carefully, to avoid the risk of its being set aside as having no "legitimate forensic purpose" (eg that it amounts to a "fishing expedition") or on grounds that it is oppressively wide - see (for example) R v Saleam (1989) 16 NSWLR 14; Carroll v Attorney-General for NSW (1993) 70 A Crim R 162; Commissioner of Police v Tuxford & Ors [2002] NSWCA 139.

d) Any subpoenas that are issued in the District Court should be made returnable on a date well before the hearing of the appeal, to allow sufficient time for inspection and copying of documents, and (if necessary) the issuing of further subpoenas.

16. Rules of evidence in District Court appeals

a) Section 91(8) of the Care and Protection Act provides that the provisions of Chapter 6 of that Act apply in the hearing of an appeal in the same way as they apply to the hearing of care proceedings in the Children's Court.

b) Consequently, an appeal should not be conducted in an adversarial manner : s.93(1), and should be conducted with as little formality and legal technicality and form as the circumstances permit : s. 93(2). The District Court is not bound by the rules of evidence (unless it applies them to particular proceedings, or parts of proceedings) : s.93(3).

c) The traditional view is that care proceedings (and thus appeals) are not an "inquiry", but proceedings involving an action between parties, resulting in a determination by the Court. It has been said that the Court is not entitled to "inform itself in any manner it considers appropriate" : Talbot v Minister for Community Services (1993) 30 NSWLR 487; Hartingdon v Director-General, Department of Community Services (1993) 17 Fam LR 126;

d) In practice, the level of formality in appeals (eg whether Judge and Counsel robe), and the application of evidentiary rules varies with the individual practice of the judge. As a general rule, most judges will admit evidence (subject to "weight") which is not strictly in admissible form, provided it derives from some rationally probative source.

e) Notwithstanding that the Court is not bound by the rules of evidence, legal practitioners should consider whether it is desirable to give notice (eg under ss. 63 or 64 of the Evidence Act 1995) of the intention to rely upon hearsay. The giving of such notice may improve the prospects of having that evidence admitted. Conversely, it is desirable to consider giving notice to the opponent/s of the intention to object to evidence (eg on hearsay grounds), and to give notice that relevant witnesses will be required for cross-examination. The giving of notice of these matters will improve the prospects of having objectionable material excluded (or at least provide the opportunity to cross-examine). For examples of cases which have considered the application of rules of evidence in care proceedings, see – Whale v Tonkins (1983) 12 A Crim R 103; P v C (1987) 11 Fam LR 896; Roberts v Balancio (1987) 8 NSWLR 436; Talbot v Minister for Community Services (1992) 30 NSWLR 487 at 498; R v Department of Community Services [2001] NSWSC 419; Re Katherine (above) at para 29 – 30; see also (contra) A & B v Director of Family Services (1996) 20 Fam LR 549.

f) Practitioners appearing in District Court appeals need to be mindful of s. 29 of the Care and Protection Act, which regulates the admissibility of reports to the Director-General that a child is at risk of harm. Note particularly that s.29(1)(d) does not prohibit the admission of the report or its contents (except as to the identity of the reporter) in care proceedings, or in an appeal arising from care proceedings. There may be cases in which it is appropriate to seek the Court's leave under s.29(1)(f)(ii) to disclose the identity of the reporter (eg where a malicious complaint is alleged) – see also s.29(2).

17. Costs in District Court appeals

a) The general rule in civil proceedings is that costs "follow the event" (ie are awarded to the successful party). However, it is open to argument as to whether this rule applies in appeals under the Care and Protection Act.

b) Costs in "normal" civil proceedings in the District Court are dealt with in s. 148B, District Court Act, & Part 39, District Court Rules. However, s.91(4) of the Care and Protection Act provides that, in hearing an appeal, the District Court has (in addition to its usual functions and discretions) all the functions and discretions of the Children's Court under Chapters 5 and 6. Section 88 of the Care and Protection Act (located in Chapter 5), provides that the Children's Court cannot make a costs order in care proceedings unless there are "exceptional circumstances". It is arguable therefore, that the District Court (which when hearing a care appeal, effectively "stands in the shoes" of the Children's Court), is similarly constrained.

c) However, s.91(4) of the Care and Protection Act preserves "any functions and discretions that the District Court has apart from this section". It may be therefore, that the District Court retains a wider discretion to grant costs than that contemplated by s.88.

d) The question of whether or not a party is legally aided is not relevant to whether costs should be ordered : B v K (above) at p11; Re Oscar (above) at para 8.

e) In practice, it is rare for costs in an appeal to be ordered against a parent, absent exceptional circumstances. It is unlikely that a costs order would ever be made against a child. While costs orders can be made (at least where there are "exceptional circumstances") against the Department of Community Services, these are not the norm, and most judges seem to adopt the principle contained in s. 88. For further guidance on costs in child care and custody proceedings, see – S v Minister for Youth and Community Services (above) at 121; B v K (above) at p.11; Stokes v Director-General, Department of Community Services (above); Director-General, Department of Community Services v Houdek [1999] NSWSC 1031 (Bell J, 13/10/99). (Note however, that none of these cases have considered the application of s.88).