4. THE CHILDREN'S COURT'S POWER TO LIMIT THE PRESENTATION OF EVIDENCE OR THE CROSS EXAMINATION OF DEPONENTS OF DOCUMENTS

This is a revised paper by Robert McLachlan Solicitor delivered to the Annual St James Practitioner's Conference on the 19 June 2004.

1. The Children's Court is an inferior Court of record established under the Children's Court Act. It is a specialist Court, invested with specific jurisdiction in care and protection.

2. As an inferior Court established by statute, it has no powers, jurisdictions or authorities other than those conferred by the relevant statute. See *John Fairfax and Sons Ltd –v- The Police Tribunal of New South Wales (1986) 5 NSWLR 465.* This principle, however, is affected to the extent that the Court has "an implied power". See *Grassby –v- R (1989) 168 CLR 1* at 16 to 17. The extent of those implied powers in care proceedings may now be less in light of the decision in *Re: George v Children's Court of New South Wales 31 FAMLR 218.*

3. Section 23 of the Children's Court Act empowers the Governor to make rules for the practice and procedure of the Court. It is axiomatic that such rules cannot empower the Court beyond the statute that creates it but must be complimentary to and dependent upon such statutory empowerment.

4. Pursuant to Section 15 of the Children's Court Act, the Court is empowered to "in relation to all matters in respect of which it has jurisdiction, makes such orders, including interlocutory orders, as it thinks appropriate". That power does not create an independent jurisdiction for the Court to make orders and directions to exercise power beyond its statutory powers under the Act. See *George –v- Children's Court of New South Wales 31 FAMLR 218.*

5. The Children's Court is vested with primary jurisdiction over the Children and Young Persons (Care and Protection) Act 1998 as amended. Chapter six of that legislation (Sections 92 to 109) deals with the procedure to be adopted and applied by the Children's Court (see in particular Section 92).

6. Section 93 is descriptive of the general nature of the proceedings. It is suggested that the reference to the proceedings being "not to be conducted in an adversarial manner" does not bespeak of the creation of a Court exercising powers akin to an enquiry. Whilst it is not the intent of this paper to conduct an analysis of adversarial against an inquiry, it is relevant to identify the nature of the proceedings when considering the powers that the Court might exercise on the topic at hand.

7. Whilst the word inquiry is to be found in certain provisions dealing with the orders that the Court might make, it or any like word is not used in the primary provisions dealing with the basis of the Court's jurisdiction to make Care Orders (see sections 71 and 72). The use of the word enquire is referred to in section 73 (undertakings) and supervision (Section 76) but not under Section 74 or more importantly the substantive powers allocating Parental Responsibility (section 79). This inconsistency of language under the Act is a matter that has been commented upon in other contexts by the Supreme Court. See *Re: Fernando, Re: Gabriel 53 NSWLR 494.*

8. The predecessor to this legislation, the Children (Care and Protection) Act 1987 similarly used the word inquire but in a more fulsome way as to the empowerment to make orders (see Part 5 of that Act). The question of whether that legislation created an enquiry as distinct from adversarial proceedings was considered in *Talbot –v- The Minister for Community Services (1992) 30 NSWLR 487.* The Court concluded on an analysis of that legislation that the nature of the proceedings was an action between parties resulting in a hearing and determination by the Court and not in the nature of an inquiry.

9. The use of the word inquire therefore does not of itself invest the Court with an enquiry jurisdiction. If Parliament had intended to "cure" that judicial interpretation of the Children (Care and Protection) Act then it would have done so in a clear and unequivocal way. It is suggested that the terminology used in Section 93(1) does not do so. The intermittent use of the word inquire does not do so. The provision of sections such as Section 98 which specifies the rights of parties to appear and participate are clearly indicative of the proceedings being inter-parte adversarial proceedings. If this construction is correct, then the Court's ability to restrict or

prevent the adducing of evidence or cross examination on it will, it is suggested, have to be explicit or arise from other clearly understood legal principles.

10. It is clear that care proceedings even though they may be inter-parte adversarial are proceedings of a special kind focusing on the paramount welfare of a child. See *Roberts –v- Balancio 8 NSWLR 436* and *J –v- Lieschke (1986) 61 ALJR 143*. This can often lead to tension between what is thought to be the best interests of the child and the provision of natural justice and procedural fairness. An example of that tension, which is still to be fully considered, was raised by the Court of Appeal in *Minister for Community Services –v- Children's Court of NSW (2004) NSWCA 210* (24 June 2004). In that case the Court of Appeal was considering a decision of a single instance Judge to direct that there be service of a summons and related proceedings concerning an application to the Supreme Court by the Minister that a Children's Magistrate had erred in finding he had no discretion to dispense with service upon the father. Sheller JA who with Mason P was in the majority said as follows (at page 10):-

> *"Excluding the father, assuming he can be served, from taking part in the proceedings, if he wishes to do so, seems on its face, antithetical to what the Act intends...The language of the abovementioned sub-sections must be weighed against the considerations of the safe, welfare and wellbeing of the child."*

Mason P referring to the same tension said (at page 5)

> *"Procedural fairness is a fundamental legal principle, that occasionally Courts have to balance other aspects of the public interest. Several cases have recognised that some qualification of the principle of natural justice may be dictated by the need to ensure the paramount interests of the child (see eg In re: K (1965) AC 205, J –v- Lieschke (1987) 162 CLR 447 at 457, Separate Representative –v- E (1993) 114 FLR 1 at 14, also R –v- Bell; ex parte Lees (1980) 146 CLR 141)."*

11. Section 93(3) provides the Children's Court is not bound by the Rules of Evidence unless it determines otherwise. This provision replicates, albeit in a wider manner, a similar provision in the Children (Care and Protection) Act (see Section 70(3)) and indeed under the Child Welfare Act that was the preceding legislation for some 50 years. On a number of occasions the question of the receipt of evidence under that legislation has been considered by the Supreme Court. It is contended that those authorities would be persuasive in a consideration of what evidence is admissible and may be received by the Court in care proceedings. The most significant of those authorities are:-

(a) Whale –v- Tonkins & Ors 9 FAMLR 410.

(b) In the Appeal of Chantelle White Court of Appeal unreported 1987.

Those authorities establish that *"when the Court is enquiring whether a child is under incompetent or improper guardianship, though it has to find that existing at a certain date, it is in no way concerned with events close to that date; it is concerned with all evidence which is relevant, that is, evidence which can make more probable or less probable a finding as to the kind of guardianship the child is experiencing. That enquiry may cover years".* Per Hutley J A other Judges concurring. *Whale –v- Tonkins.*

12. That principle of general admissibility was further considered by the Supreme Court in *P–v- C 11 FAMLR 896.* In that case, the Supreme Court was reviewing a decision by a Magistrate who excluded evidence which the Supreme Court found he had characterised as "similar fact evidence" because he (the Magistrate) felt that it was being unfairly prejudicial to the person whom against the complaint was made. The Court found that the question of prejudice to a party in receiving material was not a basis for excluding what was other relevant and admissible evidence.

13. Historically and it is suggested currently, the width and breadth of evidence that may be received in care proceedings is extremely wide. The principle tests that the Courts have applied is the test of whether the evidence is relevant. It will be recalled that under the Evidence Act relevance is given a very wide meaning (see Section 55). It is

suggested that an equally appropriate test is whether the evidence is not only relevant but reliable. In *R –v- DOCS 2001 NSWSC 419* Hulme J found that the acceptance by the Children's Court of evidence making general assertions from unidentified sources was the type of evidence that the Court should not have received and relied upon. That approach was confirmed by the Court of Appeal in *S –v- DOCS 29 FAMLR*.

14. The question of Legal Representatives right to cross examination a witness in civil proceedings was considered in *GPI Leisure Corp Ltd –v- Herdsman Investments Pty Ltd (no. 3) (1990) 20 NSWLR 15*. After consideration of a number of authorities Young J postulated "rules" which he saw as guidelines as to how ordinarily a Trial will be conducted;

> *"(1) The only actual "right" is the right to have a fair trial.*
>
> *(2) It is the duty of the Trial Judge to ensure that all parties have a fair Trial.*
>
> *(3) In carrying out his duties the Trial Judge must so exercise his discretion in and about the examination and cross-examination of witnesses that a fair Trial is assured.*
>
> *(4) Ordinarily, a Judge in carrying out his duty will see that the Trial is conducted in the manner that is commonly used throughout the State, namely that witnesses are examined, cross-examined and re-examined.*
>
> *(5) Where there is more than one Counsel for the same party, then ordinarily the Judge will not permit any more than one Counsel to cross-examine the same witness.*
>
> *(6) Where there are parties in the same interest, the Judge will apply the same rule as stated in (5).*
>
> *(7) Where the issues are complex and there is no overlapping of cross-examination and the proposal is outlined before cross-examination begins, it may be proper for the Judge to permit cross-examination of one or more witnesses by more than one Counsel in the same interest notwithstanding prima facie rules (5) and (6).*
>
> *(8) It may be that in the interests of time or to prevent "torture" of the witness or for other good reasons, a Judge may in special circumstances limit cross-examination. Such a situation would occur*

where, for instance, there was only a fixed amount of time before an event occurred and a decision was essential before that event occurred.

(9) It is usually not proper to indicate at the commencement of the Hearing that cross-examination will be limited to X minutes subject to the right to make an application for an extension, although such a ruling might be justified if time was limited. It would, however, appear to be proper for the Judge to say, at any stage during the cross-examination, that he would, unless convinced that the cross-examiner was being of more assistance to the Court, curtail cross-examination in Y minutes time. This power would of necessity be used sparingly.

(10) Group cross-examination either by all Counsel cross-examining the witness at one time or a group of witnesses being cross-examined by one Counsel at the same time is not a procedure that should be permitted.

(11) In all proceedings, the Court has a duty to prevent cross-examination purely for a collateral purpose or to "torture" the witness.

(12) In interlocutory proceedings, especially proceedings for an interlocutory injunction, the collateral purpose rules must be looked at very closely because ordinarily it is not proper to permit Counsel to go on a fishing expedition and all that the Plaintiff need show is a prima facie or strongly arguable case on the merits. Cross-examination on laches, balance of convenience etc is, of course, in a different plight.

(13) Ordinarily a Judge should permit cross-examination of all witnesses by all Counsel unless one or more of the above rules apply."

15. It would appear the foregoing "rules" would be equally applicable to care proceedings. It might be observed that they may be of particular relevance in care proceedings where frequently two parents are separately legally represented even though the relief they seek is almost identical. Experience also suggests that frequently there are situations where one party may be in a very similar or identical situation to that of the Department. It would appear that the principles in relation to more than one Counsel cross examining, subject to the safeguards referred to in those

rules, may be particularly applicable to that situation to try and limit the amount of time spent in exploration of issues.

16. The legislative basis of the Children's Court exercise of jurisdiction identifies that:-

(a) care proceedings are to be conducted primarily by the use of Affidavits and reports (see Children's Court Rules 6 to 18 and 20 to 22).

(b) Practice Direction 22 and in particular clauses 16 and 17.

(c) Chapter 6 of the Children and Young Persons (Care and Protection) Act 1998 including Section 107.

None of these provisions would appear to empower the Court, except in the limited way the provisions refer to, (see particularly Section 107(2) and (3)), to prevent or limit evidence being lead or a party cross examining on such evidence.

17. The provisions of Section 107 were considered by the Supreme Court in *Director General, NSW Department of Community Services –v- Children's Court of New South Wales 56 NSWLR 555*. At page 567 when referring to that section, O'Keefe J said:

> *"Although less adversarial, technical and formal than the procedure in many other Courts, the procedure before the Children's Court is none the less recognisable to those who are conversant with the operations of Courts in our system of justice. The fact that it is a Court with a recognised procedure and which is empowered to make binding orders which affect the rights of individuals carries with it a requirement that it observe the appropriate rules of natural justice. One of these is that the right of a party to be heard is respected."*

A little later His Honour on the same page said:

> *"The powers conferred by Section 107 involved the exercise of a discretion and judgment by the Court in accordance with the terms of the statute. Whilst*

the Children's Magistrate may examine and cross examine and may permit examination and cross examination of a witness, a decision has to be made in that regard. The exercise of that function must be in accordance with the dictates of the rules of natural justice."

18. The capacity of a Children's Magistrate to limit a party's right to cross examine a witness, under the Children (Care and Protection) Act of 1987 was considered by the Supreme Court in *JD –v- Director General of the Department of Youth and Community Services and Ors* (unreported 19 March 1998) Black AJ. The Court found that the power to limit cross examination could not be arbitrarily imposed notwithstanding the compelling nature for care proceedings to be completed in a timely manner. It found that the principle test was relevance together with the other general bases for exclusion which are not dissimilar to those now encapsulated in Section 107.

19. Section 94 of the Act is described as being a section dealing with "expedition and adjournments". The section provides, inter alia, as follows:

> *"(1) All matters before the Children's Court are to proceed as expeditiously as possible in order to minimise the effect of the proceedings on the child or young person and his or her family and to finalise decisions concerning the long term placement of the child or young person.*
>
> *(2) For this purpose, the Children's Court is to set a timetable for each matter taking into account the age and developmental needs of the child or young person.*
>
> *(3) The Children's Court may give such directions as it considers appropriate to ensure that the timetable is kept."*

The provision appears to provide significant empowerment to the Children's Court in the conduct of the proceedings before it. Does it, however, allow intervention in itself to prevent evidence being adduced or parties cross examining on that evidence? It is

suggested it does not. Under the Children (Care and Protection) Act 1987 the dictates of the Court finalising the matters in an expeditious way were even more explicitly contained in the legislation. See Section 76 and the so called "Forty Two Day Rule".

Those provisions formed part of the legislative context that the Supreme Court considered in *JD –v- Director General of Department of Youth and Community Services & Ors*. It is suggested given the more specific empowerment under the preceding legislation and the decision of the Court in JD's Case, that Section 94 does not empower the Court to prevent or restrict the adducing of evidence whether in chief or cross examination. It clearly, however, is a strong indicator as to the need for the Court to control proceedings and ensure only relevant and reliable evidence is adduced.

20. It is the contention of this paper that the Children's Court must apply natural justice and procedural fairness. It may not exclude evidence or prevent cross examination subject to:-

(a) The provisions of Section 107.
(b) The rules propounded by Young J in the *GPI Leisure* case.
(c) The evidence being relevant and reliable.

The extent to which the "special nature" of the proceedings will empower the Court on this topic remains unclear. The tension between the principles of procedural fairness and natural justice and the interests of the child in this context remain clear but unresolved. See *Minister for Community Services –v- Children's Court of NSW.* Georges' case is suggestive of the principles of law having greater sway than that of the paramount interests of the child.

21. There has been undoubtedly an explosion in the length of care hearings. The delays in the primary Courts dealing with care proceedings (particularly St James) are concerning to all those who participate in the proceedings. Those delays, whatever legislative provisions might exist, are clearly inimical to the interests and welfare of children who are the subject of those proceedings.

22. Section 94(2) and clause 22 of Practice Direction no. 22 clearly envisage that the Court will seek to identify issues and seek to contain the adducing of evidence to relevant issues. These procedures, it is suggested, simply replicate a course that all Courts exercising civil jurisdiction (and indeed criminal jurisdiction) are now embarking upon. Care proceedings are primarily conducted on documents. Those documents in themselves should identify what the primary issues are and what evidence is in contention. Whilst it would be hoped that the conduct of the proceedings would not turn to a careful analysis of what parties have pleaded in their documents, it is clearly necessary for parties to identify in the material that they have filed what is in contest. A failure to plead to an issue as a matter of general construction can properly lead a Court to conclude that that matter is not an issue in fact. It would therefore be proper for the Court to prevent or constrain a party from seeking to cross examine on that topic.

23. Whilst it is suggested there is a capacity to introduce significant evidence ranging over many years, there is clearly a need for care to be taken in adducing that evidence. The Director General usually has access to a wide range of material stretching back many years. It is suggested there is an obligation on the Director General to prevent delays by the lengthening of the proceedings to critically look at the significance of that evidence in the case which the Director General seeks to bring. Given the principles referred to earlier, it will be difficult for the Court to prevent the Director General from adducing that evidence. However, it would be within power, it is suggested, for the Court to require the Director General and the other parties to critically look at that evidence and to see if an agreement can be reached on an agreed set of facts arising from it.

24. The Court, with care, may consider adopting the course undertaken by Magistrate Mulroney *In the matter of Tanya (no.1).* In that case the Court found that whilst the principles of Issue Estoppel did not apply in care proceedings, the Court by analogy had a discretion as to whether to allow parties to traverse previous findings and decisions made unless there was new and cogent evidence which put in doubt or in issue that finding or some of the bases for it. In that case the Court found that such evidence did not exist and that it would therefore accept the written decisions arising from earlier care proceedings and in particular the findings that arose from those

decisions. In doing so, it prevented the mother from seeking to go behind those findings but also prevented the Director General from adducing in chief the primary evidence upon which those findings had been made. The effect was to limit a complex case to the more recent events and therefore constrain the length of the hearing.

25. It is suggested that all participants in care proceedings need to bring more rigour to identify issues and avoid the examination of limited or only vaguely relevant evidence. If we do not, Parliament might. The consequences may not be to anyone's liking.