JOINDER AS A PARTY, IS A GENUINE CONCERN ENOUGH?

A paper by Robert James McLachlan, Solicitor

1. The only parties that have a right to appear in relation to a care application are the Director General, the parents or persons exercising Parental Responsibility and a child through a Separate Representative or Legal Representative (Section 98(1)).

2. The interests of a child clearly touch the extended members of the family or other persons. They not infrequently seek to be joined as a party to the proceedings pursuant to the Court's power under Section 98(3). When such an application is made, apart from identifying a relationship (such as a grandparent) a bold statement is simply made based either on that relationship or because of some limited evidence showing an extended involvement that the applicant be joined because she or he has in the words of the section "A genuine concern for the safety, welfare and wellbeing of the child".

3. It is thought by many applicants that by simply demonstrating a relationship and reciting the relevant provisions their application will be granted. This fails to address the balance of the section that goes on to provide "May, by leave of the Children's Court appear in the proceedings". It is suggested that these words add an additional threshold that must be crossed before a party, whatever their relationship or interests are, can succeed in being joined as a party.

4. The Court has a legal obligation to ensure that the proceedings are dealt with expeditiously (Section 94). The Court is taking seriously delays in determining matters for children whose paramount interests, clearly on the basis of permanency planning, are best met by an early determination of Care Proceedings before the Court (see the recent direction in respect of standard time provisions for the conduct of Care Proceedings).

5. It is trite to say that any exercise of discretion by the Court must be done so judicially on relevant legal principles. Section 98(3), apart from identifying the discretion does not assist further on this topic apart from the genuine concern issue which is normally satisfied. The question of leave to a party to intervene was considered by the High Court in Levy –v- Victoria (1996-1997) 189 CLR 579 Brennan CJ at page 603 stated the following principles to the exercise of the discretion to allow a party to intervene

> "The exercise of this Court's jurisdiction to determine controversies between parties is not, and could not be, conditioned on allowing intervention by all those whose interests are susceptible to affection by the Court's judgment. Such a condition would virtually paralyse the exercise of that jurisdiction. The principles of natural justice which control the exercise of curial power must take account of the nature of the jurisdiction to be exercised.
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> However, where a person having the necessary legal interests to apply for leave to intervene can show that the parties to the particular proceedings may not present fully to submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination, the Court may exercise its jurisdiction by granting leave to intervene. The grant may be limited and if appropriate, to particular issues and subject to such conditions, as to costs or otherwise, as will do justice as between all parties...of course, if the intervener's submission is merely repetitive of the submission of one of the other parties, efficiency would require the intervention be denied".

6. In GPI Leisure Corp Limited –v- Herdsman Investments Pty Limited (no.3) 1990 20 NSWLR 15 stated, as a general principle in civil proceedings, the Court could control and limit cross

examination of a witness whether parties are in the same interests such that only one Counsel would be permitted to cross examine.

7. The factors in the exercise of the discretion of allowing an intervener to become a party were considered and expressed by the Court of Appeal in National Australia Bank –v- Hokit 39 NSWLR 377 at 381. The Court of Appeal was dealing with intervention by an amicus curae identified the following as the relevant test to be applied. It is suggested it is a helpful guide as to the exercise of the discretion. What was said was:-

> "Whether leave to intervene should be granted must be decided having regard to all of the circumstances of the instant case. However, ordinarily the following at least requires consideration; whether the intervention is apt to assist the Court in deciding the instant case; whether it is in the parties interests to allow the intervention; whether the intervention will occupy time unnecessarily; and whether it will add inappropriately to the cost of the proceedings."

6. It is suggested that if a person seeks to intervene the following needs to be done:-

   (a) A formal Application and supporting Affidavit should be prepared, filed and served.

   (b) The Affidavit should identify the genuine concern as required by the section.

   (c) In addition to (b) the Application should identify what different or additional aspect the joinder of the party would bring to the consideration of the issues before the Court. This may involve an identification of a limited right to appear on issues such as contact. It should, if a relative of one of the parties, eg a grandparent identify why a separate joinder to the parent is necessary as distinct from the presentation of evidence in the parents' case. An example of why this difference might exist is because of some alienation between the grandparent and parent or a refusal, despite request, for the parent to place such material before the Court.

   (d) If a joinder is sought close to a Hearing date that has already been allocated the Affidavit might also confirm that if joined no application would be made to vacate those dates because of any inconvenience or difficulty in presenting the case on the dates allocated.

   (e) Largely the Affidavit should identify the new or additional features in the evidence in support of it that a party would bring if allowed to be joined and heard.

   While the foregoing suggestions are not exhaustive, it is felt that an Application that identifies the salient features is more likely to be successful. All too often a party makes such an Application belatedly and on an assumption that a relationship such as a grandparent, of itself, justifies joinder. These matters need to be considered fully and properly and a proper Application and Affidavit should be filed and served.