(a) The criteria under Section 90(1A) and 90(2) would have to be first satisfied.

(b) A party would have to canvass the matters contained under Section 90(2A).

(c) If the Application is for variation is made by the Director General then the provisions of sub-section (5) would have to be applied even if a finding had earlier been made.

(d) A party would have the obligation before the Court reached a decision to determine the matter in satisfying the matters under sub-section (6).

18. If the sole basis for varying or rescinding an order is a strict adherence to Section 90 then the ludicrous situation can be reached that a party making that application to rescind or vary an order under Section 69 can, upon making the application, seek an Interim Order under Section 70. See *Re: Edward* ante.

19. It is therefore suggested that a party seeking to vary or rescind an Interim Order needs only confine themselves to the provisions of Sections 69, 70 and 70A and the matters relevant under the objects and principles of the Act. It would be necessary for a party to show what has changed since the Court last considered the Application. While there is nothing in the Act that requires this as a pre-condition (save and except for Section 90(2)) Courts have always found that before changing or varying an order there has to be a change in circumstances since the orders were made. See *Rice –v- Asplund 6 FAM LR 570.* Such a principle does not seek to invest the Court with an implied power but really is a proper basis of the Court's exercise of jurisdiction. After all if it has already considered and made an order, why should it allow any party to re-litigate a matter when there is nothing new or fresh before it?

Preparing and Running a Section 90 Case: a Perspective from the Bench

Legal Aid Annual Care and Protection Law Conference 23 August 2008

Children's Magistrate Paul Mulroney

Orders under the *Children and Young Persons (Care and Protection) Act 1998* ("the Act") should ordinarily be final but are not set in stone. The legislation makes provision for the recognition of a change in circumstances, which should result in the change of an order.

90 Rescission and variation of care orders

(1) An application for the rescission or variation of a care order may be made with the leave of the Children's Court.

(1A) The Children's Court may order a person who makes an application under this section to notify those persons whom the Children's Court specifies of the making of the application.

Note. *Section 256A sets out the circumstances in which the Children's Court may dispense with service.*

(2) 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.

(2A) Before granting leave to vary or rescind the care order, the Children's Court must take the following matters into consideration:

(a) the nature of the application, and
(b) the age of the child or young person, and
(c) the length of time for which the child or young person has been in the care of the present carer, and
(d) the plans for the child, and
(e) whether the applicant has an arguable case.

(3) An application may be made by:

(a) the Director General, or
(b) the Children's Guardian, or
(c) a person having parental responsibility for the child or young person, or
(d) a person from whom parental responsibility for the child or young person has been removed, or
(e) any person who considers himself or herself to have a sufficient interest in the welfare of the child or young person.

(3A) If:

(a) an application is made to the Children's Court by a person or persons (other than the Director General) for the rescission or variation of a care order (other than a contact order) in relation to a child or young person, and
(b) the application seeks to change the parental responsibility for the child or young person, or those aspects of parental responsibility involved in having care responsibility for the child or young person, and
(c) the Director General is not a party to the proceedings,

the applicant must notify the Director General and the Children's Guardian of the application, and the Director General and the Children's Guardian are entitled to be parties to the application.

(4) The Children's Court is not required to hear or determine an application made to it with respect to a child or young person by a person referred to in subsection (3) (e) unless it considers the person to have a sufficient interest in the welfare of the child or young person.

(5) If:

(a) an application for variation of a care order is made or opposed by the Director General, and
(b) a ground on which the application is made or opposed is a ground that has not previously been considered by the Children's Court,

the ground must be proved as if it were a ground of a fresh application, or of opposition to a fresh application, for a care order.

(6) Before making an order to rescind or vary a care order that places a child or young person under the parental responsibility of the Minister, or that allocates specific

aspects of parental responsibility from the Minister to another person, the Children's Court must take the following matters into consideration:

(a) the age of the child or young person,

(b) the wishes of the child or young person and the weight to be given to those wishes,

(c) the length of time the child or young person has been in the care of the present caregivers,

(d) the strength of the child's or young person's attachments to the birth parents and the present caregivers,

(e) the capacity of the birth parents to provide an adequate standard of care for the child or young person,

(f) the risk to the child or young person of psychological harm if present care arrangements are varied or rescinded.

(7) If the Children's Court is satisfied, on an application made to it with respect to a child or young person, that it is appropriate to do so:

(a) it may, by order, vary or rescind an order for the care and protection of the child or young person, and

(b) if it rescinds such an order—it may, in accordance with this Chapter, make any one of the orders that it could have made in relation to the child or young person had an application been made to it with respect to the child or young person.

(8) On the making of an order under subsection (7), the Children's Court must cause notice of the order to be served on the Director General.

Children and Young Persons (Care and Protection) Regulation 2000

6 Rescission and variation of care orders—"significant change"

For the purposes of section 90 (2) of the Act, factors which indicate a significant change in the relevant circumstances of a child or young person since a care order was made or last varied include (but are not limited to) the following:

(a) the parents of the child or young person concerned have not met their responsibilities under an applicable care plan or restoration plan,

(b) a finding by the Children's Court under section 82 (2) that proper arrangements have not been made for the care or protection of the child or young person.

Who can apply for the recision or variation of a care order?

Is the Court called to make a determination regarding someone who applies under S (3)(e) of the Act? The words "*...any person who considers himself or herself to have a sufficient interest in the welfare of the child or young person*" surprisingly seem to be a self-assessment. Otherwise it would require that the applicant was a person who *the court* considered to have a sufficient interest in the welfare of the child or young person. Compare S.90 (3) with S. 98(3) regarding leave to appear – "*....any other person who, in the opinion of the Children's Court, has a genuine concern for the safety, welfare and well-being of the child or young person...*"

The nature of the application

The application for leave should not be a protracted proceeding. It is not equivalent to re-opening the proceedings to reconsider the situation de novo. In Re Nerida [2001] NSWSC 1196, Kirby J said:

> *"41 The only issue that has troubled me is the extent to which, on a leave application, his Worship embarked upon an evaluation of the evidence in a manner appropriate to an investigation of the merits, once leave had been given.....*
>
> *44 It was appropriate that his Worship evaluate that matter and determine the extent to which, on the material before him, it could be characterised as having significantly changed as a relevant circumstance."*

Normally the application should be dealt with on the basis of the affidavits filed by the applicant and any responses. It should only be a rare case that oral evidence should be heard. This is because the findings of fact are determinative of the procedure rather than a final outcome.

Although an application for leave is a preliminary step, it should not be treated as merely procedural. Because of the nature of the proceedings being dealt with, careful consideration needs to be given to the decision to grant leave rather than seeing it as some minor procedural hurdle. In *Re - Brett v Children's Court of NSW [2006] NSWSC 984* per Sully J

> *"53 ....The making of a leave application is, no doubt, in one sense and from one point of view a procedural step taken in aid of a projected substantive application either to rescind or to vary current arrangements for the care and protection of some particular child or children. I do not see, however, why that consideration has the effect of depriving the leave application itself of any substantive character as a process, the precisely intended effect of which is an effect with respect to that current regime of care and protection.*
>
> *57 ...the first defendant was required to do significantly more than conduct a mere ex parte leave application. What was required was a discerning assessment of all of the criteria that are laid down by section 90(2) and (2A). Such an assessment could not be made except upon the basis of relevant findings of fact, clearly articulated. In so far as the first defendant was on notice that the mother, who was undoubtedly an "interested party" served as such with the leave application, wished to challenge the suggested facts put forward in support of that application; and to raise as well an issue of oppression that was relevant to the exercise of a discretionary power; then the first defendant had to resolve in the proper way those disputed issues of fact."*

What are the grounds for an application?

The applicant must establish:

- significant change
- in any relevant circumstances
- since the care order was made or last varied

The court does not first consider whether there is a good reason to change the previous order. A finding of fact needs to be made which satisfies subsection (2). In *S v Department of Community Services* [2002] NSWCA 151 Davies AJA said that:

> *"23. I should observe that a person seeking leave to apply for the rescission or variation of a care order is not required to prove on such an application that, if leave be granted, the person would be entitled to the order sought. The first step is simply to establish that there has been a change of sufficient significance to justify the consideration of an application for rescission or variation of the care order.*
>
> *27. .Section 90(2) uses the expression "a significant change in relevant circumstances". This requires a comparison between the situation at the time when the application was heard and the facts underlying the decision when the order was made or last varied."*

The evidence relied upon to establish the grounds that change must be evidence of substance. The provisions in the legislation that indicate that the court is not bound by the rules of evidence are meant to facilitate proof in matters where by their nature it may be difficult to prove a state of affairs. They are not meant to promote speculation or unfairness. In *R v Department of Community Services [2001] NSWSC 419,* Hulme J said:

> *"19 The Children and Young Persons' Care and Protection Act is not the first Act which has directed particular courts not to be bound by the rules of evidence. Nevertheless, the authorities going back to the beginning of this century, if not earlier, are clear that for material to be relied upon it must have some apparent credibility."*

Any change that occurs shortly after the making of the order that is sought to be varied needs to be very carefully considered. This will especially be the case if the party seeking leave was opposed to the making of that order.

Hulme J again in *R v Department of Community Services* said:

> *"15 I can well understand Mr and Mrs S thinking that their separation was a significant change envisaged in section 90 as a circumstance which would justify leave being granted to make a further application for a care order. However, it would be a very, very rare case indeed where a court would, within a period of simply weeks, be likely to regard a significant change as having occurred."*

Applications by Parents

The road to hell (for a child at risk) may be paved with (his or her parent's) good intentions. Many applications by parents are made at the time that a parent is about to embark upon or has just embarked upon a programme that is intended to improve their capacity to parent their child. It may be drug rehabilitation, it may be parenting education, or it may be some course of counselling. The sad reality is that many of these efforts will falter before completion. Sometimes this will only address part of the problem that sees the child in care. Any magistrate should be

most reluctant to consider changing an order where a parent has not demonstrated significant success in addressing key issues that caused the original order to be made.

On some occasions there will be evidence that a parent has attended a parenting course. A certificate of completion will proudly be produced. In my view this carries very little weight. The real issue is whether the parent has learned anything and is capable of applying that learning to their child. I would be much more persuaded by a letter from the person responsible for the course that gave some account of the quality of involvement of the parent.

Magistrates should also be careful not to expect immediate and perfect change. Most change happens gradually, and suffers occasional setbacks. Time is critical – the longer a satisfactory situation remains the more likely it should remain. Parents are in a cleft stick – they need to show significant change without waiting too long with the result that the new situation becomes status quo. Sometimes a parent will not be able to make the necessary changes within a time frame that is in the child's interests.

Actions taken after an order has been made may be viewed sceptically on an application for variation, especially if there was resistance to change prior. This will particularly be the case after a defended hearing. A court will be interested to know why separation from a violent partner or steps at drug rehabilitation didn't occur sooner.

There will be situations, particularly with older children, in which the Director General will make a "practical" decision about placement or other matters. Actions taken contrary to the determination of the Minister will not ordinarily be regarded as grounds for an application. This was the situation *In the matters of Darren, James and Tenille* (Mitchell SCM [2006] CLN 7)

> *".....the school move is a recognition, but not an endorsement as I understand it, by the Minister of "a fact on the ground" constituted by Darren' s improper act in self placing himself with his parents and, just as I do not think he can gain or his parents can gain benefit from the fact of self placement, neither do I think they can rely on the school move which is a consequence of that improper act as constituting a ground under section 90."*

Recently there has been some research conducted of s90 applications from the Children's Court at Parramatta, Bidura and Campbelltown. Early figures suggest that 40 of the 64 applications looked at by the researchers were filed by the Director-General.[1] The message of this research may be that the Court and lawyers should not use S.90, as a device which facilitates the settlement of a case by the offer to the parents of hope of variation or rescission of the order in the future if such is unrealistic and remote.

Applications by the Director General

Usually an application by the Director General will relate to a short-term care order that anticipated restoration of a child to a parent. The basis of the application will usually be that the parent has failed to meet expectations specified in the Care Plan. (See Reg 6 (a))

There will be some circumstances where decisions are made beyond the control of the court will frustrate the determination made by a Magistrate as to the most appropriate orders to be

[1] Section 90 research by Dr Patricia Hansen, School of Social Work, Australian Catholic University

made. The risk of this will be minimised if careful attention is paid to permanency planning so that the necessary resources are in place before final orders are made. There will be other occasions where the best-laid plans go astray because of unforeseen circumstances. A situation such as this would justify the making of an application. *In the matter of Amy* (Murphy CM [2006] CLN 8) was one such case.

> *"6. The Department has on 14 June 2006 filed an Application for Leave to Vary that Order pursuant to Section 90 of the Act. In support of such Application they have filed an Affidavit by a Departmental officer which reports that Amy's contact with her father and mother has been largely positive and also recites the difficulty they have experienced in securing a long-term placement for Amy as a result of the minimum contact Orders, particularly those for the father. The Affidavit attaches copies of correspondence from the following agencies:-*
>
> - *Anglicare Child and Family Services,*
> - *Barnardo's,*
> - *Wesley Dalmar Out-of-Home Care,*
> - *Uniting Care Burnside.*
>
> *which all advise that the agency is not prepared to accept a referral for Amy's placement purely because of the contact regime. In addition, the Department advise that their own attempts to locate a permanent carer have been unsuccessful.*
>
> *7. In the circumstances, I consider that the Department has established that the grounds provided for in the legislation have been made out and I have granted leave for the Orders to be reconsidered.*
>
> *8. The concerning feature of this scenario is that each of the above agencies, without apparently considering any of the evidence and without considering the details of the Magistrate's decision and the reasons for it, appears to have taken an "in principle" decision, the effect of which is to thwart the decision of a Court which has considered all the evidence and made a decision based on the Objects and Principles enshrined in the legislation."*

Refusal of leave even if grounds are established

Even if the court is satisfied that the grounds exist, this does not mean that permission will be given to rescind or vary the order. The requirement for leave gives the court discretion to refuse the application even if the preconditions exist. Subsection (2A) prescribes matters that must be considered before leave is granted. *In The Matter Of Jasper [2006] CLN 2,* Mitchell SCM stated that:

> *"The point of the section, I think, is to protect a child from contested care proceedings by ensuring that proceedings come to an end unless there really is a good cause to reopen them."*

Specific considerations under S.90 (2A)

One of the key considerations in care proceedings is the issue of permanency. Permanency is important because it includes consideration of whether the child will be in a safe, nurturing, stable and secure environment. It is in the child's best interests to have this experience. One of the tragedies of some children in need of care is that they experience something other than permanency, and this has a serious adverse effect on them. There will be situations where a parent or other interested party has achieved a situation in life where they would be a suitable carer for the child in question but that that achievement will be too late. That is why consideration needs to be given to :

> (b) the age of the child or young person, and
> (c) the length of time for which the child or young person has been in the care of the present carer, and
> (d) the plans for the child

It may be that there has been a significant change in the relevant circumstances but consideration of the above factors will mean that a change of care arrangements is not appropriate. In some situations it may be appropriate to vary the order in a limited fashion eg by providing greater contact, but careful consideration of any adverse impact will still need to be made. Even given those considerations it may be appropriate to make an order that results in a significant change. I have made an order allocating parental responsibility of a teenager to her father, with whom she had not had contact since she was an infant, at a time when a placement was breaking down due to no fault of the child in question.

What is an arguable case under subsection (e)?

The applicant bears the onus of establishing a significant change to relevant circumstances. The applicant must also have an "arguable case", as section 90(2A)(e) requires the court, before granting leave to vary a care order, to take into consideration whether the applicant has an arguable case. The Macquarie Concise Dictionary defines "arguable" as *"1. Capable of being maintained; plausible. 2. Open to dispute or argument. 3. Capable of being argued."* An "arguable case" is clearly a far lesser test than a prima facie case test or a "more probable than not" test. In my view an "arguable case" test indicates a requirement for the applicant to put material before the court, which shows that there is a plausible case, which requires or deserves further consideration in a substantive hearing. See *Re Nerida* [2002] CLN 7 per Dive SCM.

Can the leave granted be limited?

An application for leave need not be "all or nothing". A party may succeed in persuading the court that varying some parts of an order should be considered but fail in satisfying the court that other parts of an order should be changed.

> *".....it seems to me that the provisions of section 90(2A) where the Court is required, on the hearing of an application for leave, to consider matters including "the plans for the child" support the view that leave to vary can be*

focused on particular aspects of existing orders and need not be a license to re-open and re-litigate the whole of the arrangements for a child. .....I conclude that there is power in a proper case to grant leave to seek rescission/variation and, in the grant of leave, to limited the areas in relation to which rescission/variation may be sought." Re Tina NSW Ch C 2002 per Mitchell CM

After leave has been granted

Sometimes leave will be sought to vary orders made pursuant to S.38 which provides for the registration of care plan to which there is consent. If there has been no finding that the child is a child in need of care pursuant to S.71, then there will have to be a hearing on this issue unless this is admitted by the child's parents.

"If a care plan, developed by agreement in the course of alternative dispute resolution, is registered with the Children's Court pursuant to S.38, the next step after a grant of leave is for the Court to consider whether the child is in need of care." In the matter of Ailsa (Mitchell SCM, 18 July 2006), In the matter of Cassandra (Mitchell SCM, 15 May 2006)

Minor matters

It was not until I began to prepare this paper that took notice of S.90 (3A), which requires notice to be given to the Children's Guardian of an application to vary parental responsibility by a party other than the Director General. Suffice to say that, as far as I am aware, the Children's Guardian has never sought to take part in any proceedings.

S.90 is not a "slip rule" or an alternative to an appeal against final orders.

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. *Re Elizabeth [2007] NSWSC 729* per Gzell J

"The court has an implied power to correct errors that could not have had an impact on the determination of the court eg the use of an incorrect birth name."