

Children's Court of New South Wales

Practice Note 13

Section 38 care plans

Issued 13 December 2019

1. Commencement

- 1.1 This Practice Note commences on 16 December 2019.

2. Application

- 2.1 This Practice Note applies to care plans developed pursuant to section 38 of the *Children and Young Persons (Care and Protection) Act 1998* (the Care Act) except as provided in paragraphs 2.2.
- 2.2 This Practice Note does not apply to care plans developed under section 78 or section 38 where the care plan is developed and filed after an application for a care order is made under section 61 of the Care Act.

3. Section 38 care plans that do not require a court order to give effect to the care plan

- 3.1 A care plan developed under section 38 of the Care Act that does not require the Children's Court (the Court) to make an order to give effect to the care plan is not required to be listed and takes effect upon the filing of the care plan in the registry.

4. Section 38 care plans that require a court order to give effect to the care plan

- 4.1 Where a care plan:
- allocates parental responsibility, or aspects of parental responsibility, to any person other than the parents of the child or young person, or
 - a court order is otherwise sought for the purpose of giving effect to the care plan,

the care plan is to be listed before the Court to enable the Court to consider whether an order should be made by consent in accordance with section 38(2) or section 38(3) of the Care Act.

5. Filing of section 38 care plans that require a court order to give effect to the care plan

5.1 A care plan that requires the Court to consider making an order by consent is to be filed together with a one page summary at the beginning of the care plan detailing;

- the parties to the care plan
- the name, date of birth and age of the child/ren who are the subject of the care plan
- the names of the proposed carers/guardians for the child/ren and their relationship to the child/ren who are the subject of the care plan
- the proposed orders in full.
- whether or not a child or young person is an Aboriginal or Torres Strait Islander child or young person and subject to the Aboriginal and Torres Strait Islander principles in Part 2 of Chapter 2 of the Care Act.

5.2 Where the care plan requires the Court to make an order to give effect to the care plan it is sufficient that, at the time of filing, the care plan notes that the parties have reached agreement subject to the parties obtaining independent legal advice.

5.3 Where the care plan proposes a guardianship order to be made by consent, the care plan must comply with section 79B (9) of the Care Act and the following documents are to accompany the care plan at the time of filing;

- Suitability statement/s and guardianship assessment/s as required under clause 23C of the *Children and Young Persons (Care and Protection) Regulation 2012*.
- Written consent of the prospective guardian/s if they are not participants in the preparation of the care plan and proposed consent orders.
- Written consent of the Secretary if the consent orders are not sought by the Secretary.

- Copies of any recent reports regarding the health, educational or social well-being of the child or young person that is relevant to the care plan.
- If the child or young person is an Aboriginal or Torres Strait Islander child or young person, a statement outlining how the proposed order is consistent with the Aboriginal and Torres Strait Islander principles in Part 2 of Chapter 2 of the Care Act.

5.4 Written consent of a child over the age of 12 as referred to in section 79A(3)(d) of the Care Act should not be filed until the child's legal representative has been appointed and has had an opportunity to confer with the child.

6. Deemed appointment of legal representative for the child or young person

6.1 The appointment of a legal representative to act for a child or young person under section 99(1) of the Care Act shall be deemed to have been made to a solicitor or barrister employed or engaged by Legal Aid NSW on the filing of a section 38 care plan that is required to be listed before the Court.

7. Procedure for listing section 38 care plans

7.1 In the usual course a section 38 care plan that:

- allocates parental responsibility, or aspects of parental responsibility, to any person other than the parents of the child or young person, or
- a court order is otherwise sought for the purpose of giving effect to the care plan

is to be listed **within four weeks** of filing.

7.2 In regional areas where the Court is not sitting in four weeks' time, the matter should be listed as close as possible to the four week period as is reasonably practicable.

8. Service of section 38 care plans

8.1 A care plan that has been filed and listed before the Court is to be served on the parties to the care plan and the child's legal

representative together with the **Notice of Listing** and any other documents filed with the care plan.

- 8.2** At the time of service the Secretary must also serve a notice informing the respondent parent or primary care-giver how to obtain legal advice or legal representation in relation to the matter.
- 8.3** If directed by the Court, the Secretary must provide evidence of service by way of an affidavit.

9. The first return date

- 9.1** The parties are to advise the Court on the first return date whether the proposed orders are consented to.
- 9.2** If the Court is not satisfied that consent orders can be made on the first return date it may grant an adjournment of **not more than 4 weeks** to allow the parties to resolve the outstanding issues.

10 The second court date

- 10.1** If the Court is not satisfied that consent orders can be made following the adjournment the Court may decline to make the orders.



His Honour Judge Peter Johnstone
President, Children's Court of NSW
13 December 2019