The Old Chestnut - Running a strong Section 90 Application

This paper was prepared to compliment a question and answer session conducted at the Legal Aid Care and Protection Conference on 12 August 2016 at Sydney

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1. This paper has been prepared to compliment a question and answer session organised for the Care and Protection Conference on 12 August 2016. It has been prepared not as a legal analysis with the principles to be adopted and applied (although reference may be made to some of those principles) but rather a practical application and consideration of the practicalities and implementation of such an Application.

A. The Law

2. Whist I commence this by saying it would not be an exploration of the legal principles, it is trite to say that before embarking upon the preparation and presentation of a Section 90 Application a practitioner should be very familiar with the legal provisions of the Act and the Case Law that have interpreted it. In particular the relevant provisions need to be considered and understood:

   (a) Section 8.

   (b) Section 9.

   (c) Section 90 in its entirety.

3. In terms of its interpretation the following cases informing a guide to any competent practitioner in the preparation of the Application:

   (a) In the matter of *Campbell* (2011) NSWSC761

   (b) In the matter of *Troy* 14/9/2010 CLN2 2010 (Marien P)

   (c) *Susan Kessel* and *DG v FACS* 6/2/2012 (Marien P)

   (d) *SV v DOCS* (2002) NSWCA151 Court of Appeal Re: Greta (2012) NSWSC294.

4. The authorities to which I have referred are not exhaustive but indicative and of assistance. I particularly invite practitioners to consider the very helpful consideration of the legal principles and their application in Section 90 Applications considered and discussed by Marien P in *Susan Kessel* and *DG* referred to above.

B. The Application

5. To identifying the significant change since the matter was last before the Court a precursor to the consideration of the matters under Section 90(2A) is whether the applicant can demonstrate a significant change in a relevant circumstance since the matter was last considered by the Court. It is suggested that the optimum way of identifying and presenting evidence of this is to obtain and attach to any Affidavit to be filed:

   (a) A copy of the Orders.

   (b) A copy of any Care Plan that informed and gave rise to those Orders.

   (c) If in existence a copy of any judgment of the Court.

6. Once the issues have been crystallised and identified, the task in identifying change becomes that much easier. Reference to those matters that formed the basis of the opinion and the orders being made is the best way of then identifying the changes that have occurred since that time.

7. Identifying the steps taken to effect that change and address the issues should be done in two ways:

   (a) By expressing it in the body of the Affidavit.

   (b) By attaching meaningful and supportive reports or letters from services engaged that corroborate that intervention and its effectiveness. While sometimes it is difficult to obtain both on a cost or other resource basis, copies of comprehensive assessments, letters or documents that evidence and support the position contended for goes a long way to corroborating the assertion and making the case to be presented much easier.

C. Status Quo and its Relevance

8. This is often the most difficult area because the time taken to address the issues is often used as a reason based on settlement and stability of the children not to disturb it. It is important in that process to identify and acknowledging those matters to confirm if it is the case that it has been a stable placement that one supported by the parent and identifying ways in which that

have occurred. It is also important to emphasis the attendance, punctually and appropriateness in contact and the maintenance of a real attachment with the parent albeit secondary to the carer.

9. The position as to the stability and security of the children of course is a different situation if there has in fact been instability and lack of permanency. In that case highlighting and identifying those changes and any observed impact upon the children including their separation from each other would be a keen matter to identify and highlight.

10. In the former case however it is important to acknowledge the carer to confirm the carer's importance in the life of the child and when setting forth plans for the future identify the importance of the carer playing an ongoing meaningful role in the life of the children in light of that attachment.

11. As part of these considerations the question of timing is very important. If you move too soon then the court will reject it on the basis that there has been too little time past since the matter was last considered and the issues requiring addressing have not been adequately and appropriately addressed and your application filed. The countervailing position is if too greater time has passed then the argument is put that while you have done all of those things the matter should not be re-opened in the interests of the child because the child is now settled and stable. As a rule of thumb I think 6 to 12 months from the date of final orders has to be a working model. I frequently advise clients at the completion of proceedings where I believe they may have merit (and even when they do not) of what they need to do and the timeframes for that to occur. To be factored into that is the need to obtain a grant of aid which can take between 3 to 6 weeks depending upon requisitions that might be made.

D. <u>The Plans for the Child</u>

12. This is often the area where most applications fail. One can normally reach the point of establishing a significant change by identifying engagement with services and courses. It is lack of particularity and certainty in the plans for the future that causes uncertainty and doubt in the mind of the Court and perhaps ultimate refusal of the Application on discretionary grounds.

13. It is not necessary to show that you have any more than an arguable case. However, it is important to demonstrate as clearly as you can that it is a thought out considered position likely to be given effect to if the opportunity is presented. It should include:

    (a) Where the children should live.

    (b) An acknowledgment of their existing relationship and the need to transition carefully and sympathetically.

    (c) The importance of the existing carers on an ongoing basis after restoration.

    (d) Identification of the basic facilities such as housing and other services including schooling to support maintenance, security and stability.

14. If the applicant has formed a relationship with a new partner, it is imperative that that partner disclose themselves by way of an Affidavit identifying and acknowledge at the very least the matters in the applicant's Affidavit and confirm their relationship with and their commitment to the children under the plan that the applicant is progressing. Again all too often cases are run without any evidence whatsoever from that person meaning that there is a large gap in the factors to be considered in the discretion under Section 90. The Affidavit does not have to be detailed or exhaustive but it has to identify and make available the applicant to the new partner to scrutiny and confirmation the new partner is aware of and supportive of the Application. The degree and extent of material to be put in will vary in each case and may depend upon any history that that person brings presentation of the Application.

E. <u>Practical Matters</u>

15. Some basic things that assist in the Court's grasp of the Application and its merits:

    (a) Attach the orders to the Application.

    (b) Identify in the Application the significant changes.

(c) Identify the general tenure of the orders that you would seek albeit under a plan to be prepared by the Department if the Court grants leave to bring the Application.

16. Structure the Affidavit in support to deal with the issues that need to be addressed:

(a) Firstly deal with the significant changes in relevant circumstances.

(b) Go through and identify in subparagraph form or topic form each of the criteria under Section 90(2A) and 90(6) to the extent they are at play and to be considered by the Court.

17. I have read many Applications and Affidavits that are unclear on how those issues have been addressed and what the plans for the future are. In effect the Application and Affidavit should read as if they are submissions without reference to the Law so that the Court has a ready reckoner as to those matters.

18. In setting forth the material ensure your client is frank and concedes any slips or failings in the intervening period. If drug usage has been the significant problem and there has been a relapse disclose it. Ensure that the acceptance and ownership of that and discussion with any counsellor engaged has been used to strengthen the ability to deal with that and to ensure that relapse does not occur again. Fudging does not help and ultimately may undo what is otherwise a meritorious application.

19. Identify who all other relevant parties are to ensure that service of the Application and supporting Affidavit is served upon them. If other parties' whereabouts are no longer known to ask the Department to assist. If this cannot be done on the first return date seek that assistance when the matter comes before the Court, although in my view, it is preferable when serving the documents upon the Department to invite the assistance in either serving or providing information about those persons so that service can be effected.

20. Identify where the child is living and commence the proceedings at the court that is closest to that locality. The court will usually accede to any application, usually brought by the Department, to transfer proceedings to the court that is most approximate to where the child is living. While there are always

exceptions to that rule, try and avoid the matter being delayed between two to four weeks or perhaps more by such a transfer occurring by choosing the right court to commence the proceedings in.

F. Grants of Legal Aid

21. Clearly all of the suggestions above are predicated in the usual case upon a grant of aid being forthcoming under stage 2. The limitations in funding of such grants are self obvious. That being noted, effectively you have to be in a position to outline the matters that I have detailed above to ensure that an effective application for a grant of aid is likely to be forthcoming without multiple requisitions and delays. In my experience Legal Aid wants similar information to what the court requires before it will consider the merits of the Section 90 and in my view you should try, with the assistance of your client, gather that information so that there is a succinct but clear picture of the matters that I have referred to above.
