SUBMISSIONS

TO THE QUEENSLAND CHILD PROTECTION COMMISSION OF INQUIRY

The Writer:

I am a solicitor with M.A. Kent & Associates and work extensively in the area of child protection in opposition to the Department of Community Services (Child Protection) otherwise known as the Department or DOCS. I act as a representative for parents and as a direct representative for children predominantly in the Ipswich area though have appeared in other children's court jurisdictions. In this position, I deal with the department of communities on a near daily basis to assist parents/children deal with the department and appear in the children's court. I have experience in running many interim hearings in regards to preventing children going into the care of the chief executive (mostly performed on aid provided for a mention), and draw on much of that experience in these submissions.

I also work in Crime, family law, domestic violence, and various other area of law (general practice); with Family law being the main focus.

Introduction

Whilst I have read submissions stating the level of children removed from homes in Australia is lower than some other developed countries, this comparison/approach is highly flawed, as it does not address any issue of over use of placement in those countries, welfare restraints, reasons for removal, follow up support, or the ethics surrounding such removal. As a solicitor, it is apparent in Family Law matters that removal of children from parents is highly traumatising to a child, manifesting more so in later life. If children are removed from parents by the department, logic would dedicated the same children would also suffer trauma, and this appears to be correct from the matters I deal with.

Additionally, of high concern is the abundantly clear position that parents will not be able to progress a matter to trial. Trials are rare not because the Departments actions have been vindicated,

but because parents simply cannot compete with the department and/or are unable to fund representation (as Legal Aid for trials is extremely rare).

There are many aspects of the Child Protection Act 1999 (the Act) and its implementation by the Department which do not adequately address needs or rights of children – we seek to protect them, but will traumatise them to find out if there actually is a need for that protection. These concerns are shared among all solicitors and barristers I have regular contact with (including barristers that have represented the department), parents of children in the care of the chief executive, and even staff within the Department. The failings of the Department are a major topic for solicitors dealing with the Department which greatly concerns us. These submissions however are based on my own experiences with the Department and deal predominantly with:

a. Poor implementation of the Act by the department,
b. Trauma suffered by children in the care of the chief executive compared to actual risk of harm with parents,
c. Lack of contact with parents when children are taken into the care of the chief executive,
d. Level of "burden of proof" displayed in children's court (particularly at interim hearings),
e. Time taken to get to trial
f. Lack of ability to award costs at children's court (being my main overriding concern), and
g. The departments lack of understanding or vetting of affidavits and supportive evidence.

Other matters of concern include the department rarely following case plans and then blaming parents (i.e. stating they will provide timely support outlined in plans such as counselling, support for families, training for parents, funds for transport, etc… but not following up on these ideals), bullying of parents (including coercion to sign consent orders), a lack of transparency as to decision making, miss representation of information, breaches of privacy, who is a parent within the meaning of the Act, and misuse of a parents private and personal history.

These submissions are structured to list topics, provide anonymous examples where possible, and recommendations. I am quite open to discussing these submissions if so required.

1. Table of contents:

2. Consent

I will discuss consent latter in the submission again but it should be noted consent does not in any way mean a parent wishes or voluntarily agrees a child should be in the care of the chief executive, or even have the department enter their homes to speak with their children. In the vast majority of cases, consent is through duress of the system - lack of legal aid, feeling of hopelessness, time it takes to actually have a trial, bullying by the department, the parent being made to feel they are inadequate or a combination of the above. At a trial, parents know full well they are out gunned by the department who will have a solicitor, barrister, and no threat of providing costs if the department is unsuccessful. Parents feel the Separate representative and the department are out to get them, and have no-knowledge of how to conduct a trial or cross examine a witness. Consent is often sold to parents as a way to see an end date on an order and for things to move forward (though things should be moving forward in any case). Solicitors are equally to blame for parents consenting, however to be fair to solicitors, they are not funded to actually do anything for parents beyond explaining what is currently happening and accepting adjournments in court.

Example

A mother had 2 children. child 1 was approximately 1 year old, but had by this time suffered 2 sets of injuries. Child 2 being approximately 3 years old was in perfect condition. The first injury of child 1 was getting her arm caught in the bars of her cot. The treating GP stated that whilst not overly common, this did happen from time to time and treated the arm. The mother moved the child to a porter cot so this would not happen again. The second injury was a result of child 2 jumping from the family bed into the now lower set porter cot; Child 1 cried but did not seem physically injured and recovered fairly quickly. The mother noticed over the next couple of days child 1 was not weight bearing when trying to stand/walk, so the mother took child 1 to a local hospital. The new injury coupled with the history of the previous injury was then written down as suspicions. The department removed both children from the mother despite the child 2 having no injuries. An attempt at an interim hearing to have the children returned failed due to the “totality” of injuries and lack of evidence to support the mother not causing the injury – essentially the magistrate was playing it carful which is usually the case. There was of course no way to show the mother did not cause the injury.

Failing at an interim hearing, the client knew full well a trial was a year away, and the order being sought was only for 1 year to the chief executive. The mother consented to the orders sought because she knew the length of time to the trial was a long way off, legal aid would not be coming, and it was a waste of time resisting as she could not prove anything; whilst the department could not prove she did injure the child, expert evidence has already said "it is suspicious". At no time did the Mother agree the injuries were caused by her which unfortunately means the Department would work slowly with reunification as the Department are already of the mindset that the mother caused the injury and that the mother simply won't admit it. The mother shortly after consenting to the orders had a third child with her partner and that child was taken about a week after birth and ultimately the mother consented to the order over the baby as well stating "none of it is true, but I can't prove it and I can't fight it". Whilst it is the department that has the onus of proof, they do not have that onus until a trial (which rarely occurs).

3. Decision making

Decision making almost seems random and is not uniformly implemented; paticulary between regional departments. A set of stringent regulations for implementing conduct is desperately needed (or needs to be followed if one does exist). Such policies should also be open and transparent to solicitors, parents and the public. Case workers (otherwise known as a "CSO") change regularly and is a big complaint between parents. It is not uncommon to have 6 or 7 case workers throughout the duration of a set of consent orders. This leads to major frustration among parents and children, as each CSO or team leader seem to have their own reporting styles and make varying decisions resulting in fluctuations of cooperation from parents and lose or increase in contact with children in the Departments care. Simply put, information is lost, mishandling of information, or interpreted in a different light that what was actually explained. As a result, some decisions seem completely irrational and quite inconsistent with previous team leaders or case workers. As a new CSO is brought on board, matters can also stagnate with no progression at all for a good period of time.

Decision making does not stem from guidance from the Act, but an element of control. For example, a major grievance comes from CSO or team leaders ignoring section 5B of the Act, in particular 5B (k)(i) – "a child should have stable living arrangements including arrangements that provide – for a stable connection with the child's family and community,

to the extent that is in the child's best interest". The use of "in the child's best interest" as a term is highly subjective and poorly defined – the term will be used to justify a child having 1 hours contact with parents for months on end, or alternately removal of contact altogether. I'm aware of other matters where contact was set at 1 hour a month; usually because a parent will not engage constructively with the department (i.e. punishment). This is crushing to a child who only knows their parent, but is standard practice for all children entering care. No reasoning is given for such minimal contact except to say "we feel it is in the child's best interest to have limited contact at this time"… no reason for this "feeling" can be given. All the literature, family reports (from family law matters), and research I can find supports the idea that "increasing meaningful time is positive for the childs development". Every Federal magistrate or judge working in family law seems to say the same thing.

I do note, social assessment reports based on material supplied by the department (not the parents) and interviews with parents seem often to support the department; which is probably because the departments will make their own findings and this may very well influence an outcome. In one example, a parent said she used to drink a bit when she went out with friends (referring to alcohol consumption when she was in her late teens/early twenties), this was interpreted as a concern the mother may be a "binge drinker". The "May be" is then approached with a mindset of "is a binge drinker" and the mother was forced to attend ATODS, counselling, and have restricted time with the children when in fact she only drank moderately; or no more than other late teens who go to nightclubs.

In another quick example, a mother gave up drinking altogether just to show she had no dependence on alcohol. Most parents express the reports are not even handed, jump to conclusions, misrepresent the way answers are given, and make suppositions based on departmental material (which is often erroneous). Often parents misinterpret questions and try to give an "honest" answer to the way they interpreted the answer. The department will also use results from multiple choice tests to identify people's state of mind and use the result as if they are proven fact. This is akin to an anti-scientific approach to solving a problem, instead of trying to disprove something to be satisfied it is true, the department pick a topic and just try to prove it is correct; which is usually quite easy to do as you can ignore the evidence which does not support a given finding.

In yet a further example, a mother had 4 children, 1 child was in her care, 2 boys with one regional department, and a girl with another regional department. The 2 boys were returned to the mother through negotiations with the department, who ultimately stated the mother was “willing and able” to care for the children. The other regional department however stated the mother was not “willing and able”, and as such, would not return the girl to the mothers care.

Example

As an example of inconsistent decision making - A father was removed from the home on alleged carnal knowledge charges (latter nollied by the DPP). The mother did not believe her husband guilty of the carnal knowledge charge (for very good reasons). A FIS report was conducted over 6 home visits and numerous conciliations with the mother by telephone, with the report writer concluding the mother was protective of the children, and would be able to supervise the father with the children, particularly if the charges were dropped or he was found not guilty (which was the case). However because the mother did not believe the charges, the department set about trying to remove the children instead of supporting the family. Luckily for the mother, we appeared at an interim hearing and were able to retain the children with the mother. The department’s position would not change despite the charges being dropped, as the department held the view the father had not been tried at a civil level and thusly he was still deemed as being guilty – the abuse was substantiated on just the evidence of the child.

The department’s various affidavits were littered with comments which indicated the father being “an offender”, and a further report was commissioned by the department for a physiatrist to assess the father as a “reoffend” and the mothers’ propensity to care for the children with the chance of the father reoffending. Naturally as the mother did not believe the charges, she failed 9 out of 10 of the protective requirements – because the mother did not believe the charges. Indeed, at almost every contact, and certainly every discussion I attended between the Department and the mother, the department also ways pressed the mother on not believing the charges.

Subsequently, when the mother asked the Department if she could supervise the father to visit the children for Christmas, it was refused. When the mother wanted the father to

attend her daughter's wedding this was also refused, even when the mother asked if someone at the wedding could supervised – the answer was "no", because the person supervising would not be aware of the fathers grooming or predatory behaviours. The mother made an application to QCAT to review the decision, however QCAT did not feel they had jurisdiction to review the decision of why the mother could not supervise such contact.

It is frustrating that the department who are not qualified to assess evidence do exactly that on a daily basis at such an intrusive level, children are removed from the home because of it. If there was training put in place this would not have happened. In this example, the department could certainly remain suspicion of the father, but the conduct was to try and force the mother into believing the charges. It followed, that when the first order expired, the department applied for another order for the children to be placed into the care of the Department.

- Having read the original transcript for the complainant, it was clearly obvious that the evidence provided by the complainant child was very inconsistent and undescriptive with no particularisation of any events, or even credible descriptions. She struggled to indicate what actually happens in sex beyond high school sex education, and even missed important information whilst contradicting herself over the course of 2 separate interviews.
- By the time a prerecord was performed, the DPP were satisfied there was no case. They went as far as to say in email communication with the department that there were too many conflicting problems with the evidence of the child and as such the charges were Nollied; something the DPP rarely do, as they would usually run the trial in any case.
- Over the period of one and a half years on a PSO (only because at the original interim hearing the department were unsuccessful at retaining care of the children) there had been no complaint of any sexual harassment or domestic violence,

Yet despite all this, the department sought fit to apply for a new order placing the children into the care to the chief executive based on the concept the mother did not believe the charges (even though at this point it was known the charges had been Nolled). What the CSO commented in the application as being fact and swearing to same, was a position on evidence which she was not qualified to make which had influence each report writer that was asked to assess the family (i.e. treating the father as a "reoffender"). Whilst there were

other factors, the magistrate with regards to the second interim hearing again did not award custody to the chief executive; but had I not been there to run a mention as an interim hearing (devoting considerable time to draw up the Affidavit of the mothers in my own time), the children would certainly have been removed.

Example

In another matter, the Department became involved in a family dispute and clearly took the fathers side; the father being a professional in the medical industry and who also informed the department that the mother had a mental illness sighting a bi-polar disorder and schizophrenia which were latter shown to be incorrect.

The mother instructed that she had left the family home due to domestic violence on 3 occasions which was deemed stressful on the children by the Department; and probably was. The department listed however several concerns which included things such as the eldest child not wanting the mother to enter her bedroom (after the mother had discovered a diary there), the mother not allowing the child to enter the main bedroom, a eldest child not having much sleep (this was just prior to end of year exams), the father wanting religious counselling for his children as opposed to other forms of counselling, and a few other minor concerns which were on the whole clearly parenting issues. Domestic violence however was not listed as a concern; possibly because the father was stating the mother simply suffered from mental illness and there was no domestic violence. The majority of evidence was from the eldest daughter (16 years of age) and the father, with the mother not being consulted. After receiving a referral for the matter, I appeared at the children's court and argued the Departments application solely related to parenting issues and not child safety issued. My intention was to prevent any interim orders for the mother to have limited contact with all her children as had previously been eluded to in communications with the mother by the department. I was unclear as to the orders the Department actually wanted, as when I enquired by email as to the concerns of the department (as I could not see any genuine concerns in the material provided), I received correspondence from the team leader to not again communicate with the Department on this matter.

It turned out the department were not seeking any orders on the day when I appeared for the next mention, but still persisted with their application for a PSO only. The application

made little sense as I was told by the team leader if the mother had contact with the children at the home, the children would be removed from the parents and placed into care. If the department were making such threats, why not just put it in the application? As there was no PSO in place yet, it made little sense the departments would be interviewing the children, making such threats, and still not consulting with the mother. At the mention, I brought to the attention of the court that I had received correspondence stating I was not to have further contact with the Department, the departments threats which did not appear in the application, and the department only acting on concerns provided by the father. The Magistrate essentially told the Department the mother was entitled to representation and no orders were made that day with no progress what so ever.

At a subsequent family group meeting, the department seemed to depart from their wanting the mother to have some sort of supervised contact with the children, but persisted in wanting a PSO. Concurrently the Department did encouraged the father to apply for a DVO against the mother and to place the children on the DVO which he did. I then had the children removed from the DVO application at an interim hearing in DV court with the parents ultimately consenting to DVO's against each other on the minimum terms for 1 year.

The department then encouraged the father to apply to the federal magistrate's (FM) court for orders over the children and that they would offer their support. I informed both the father and the department that it was highly likely this would not be possible due to s69zk of the Family Law Act 1977 which prevented the FM court making orders where the Department already have orders over the care of children – including a PSO. A disagreement ensured with the team leader over this very point with the department stating that the FM court would have jurisdiction to deal with the matter. I found the team leader was quite unprofessional throughout our dealings as she did not want to talk to me at all.

Despite this, the department encouraged the application to the FM court and the father followed through with his application. At the FM court after allowing the department to be made a party to the application, we were told by the FM court they would not hear the matter whilst the department had a PSO relying on section 69zk. We (both the mothers and fathers representatives) then threatened costs against the department as they would not provide a letter supporting the court having jurisdiction, yet were responsible for the application not going any further.

The department then applied to have the PSO dismissed at children's court stating the concerns of the department were now only parenting issues. The Children's court magistrate comment "but no-body dismisses a PSO". The matter is now proceeding in the correct jurisdiction where it will be dealt with even-handedly.

The example demonstrates the department providing advice in areas they know little about, bullying, and reluctance to work with solicitors, and taking clear sides of a given parent without consultation of the other parent. Admittedly, not all regions of the Department work this poorly, noting this region was not in the Ipswich area; however it shows the inconsistency of training at the team leader level.

Recommendations

A set of regulations be implemented to guild for decision making which is also focused on the needs of the family, not just the children. Decision making need also be more universal and regulations may help provide such clarity. Training should also provide for objectivity when receiving complaint from one parent to another. Setting out concepts of parenting issues and child safety issues would help enormously.

4. Removal of children

Often children are removed with no contact with their parents, or 1 hours supervised contact once a week in a small room (or even 1 hour over a month to be in a location very remote from the parent). This level of contact is said to be reviewable every 4 to 6 weeks, but due to trauma suffered by the child and separation anxiety, contact can easily be removed altogether to remove separation anxiety and/or ongoing trauma (instead of increasing contact). This act is often viewed by children as a punishment on them. Also over a period of 4 to 6 weeks, reviews often do not occur, or a level of stagnation occurs because the department need to continue to monitor the situation, perform drug tests, or some other reason. The review more often than not will not be done in consultation with the children or the parents.

Parents are restricted from talking about any proceedings with children, reasons for removal, the children's wants, needs, or aspirations for return to the family. As counselling is often not provided for some time, the child naturally blame themselves. Often health

concerns will also be forced to wait until a health passport can be organised, and a paediatrician arranged (which can take months).

Example

In one example, a mother was on an IPA with the department. This was due to domestic violence in the past (some 2 years earlier) and alcohol abuse (which was a problem prior to the IPA). The mother was not overly cooperative with the department due to what she describes as abusive/threatening treatment by the department. As described by the mother, the department advised the mother to make a statement with police over an unrelated incident and organised a time for this to occur. Whilst the mother left her children in the care of her neighbour (who unfortunately chose to monitor from her own home whilst the children remained in the family home), the police turned up and removed all 3 children, and then charged the mother with leaving the children unattended/abandonment. I did not see the charge so am unaware of what it actually was – in any case, this charge was later dismissed after the facts of the matter came to light, but the children remained with the Department.

The children were removed from the mothers care for 2 years which was ultimately consented to as the mother saw no way of fighting the department – essentially giving up as opposed to actually consenting.

Whilst in care, the youngest child (a female) was subjected to predatory behaviour by a carer though this would only come to light after the children were returned to the mothers care. Due to the CSO going on maternity leave in the first year, the matter did not progress for 1 year (i.e. contact did not increase). The eldest child was almost 14 by the time the matter came to my attention, with the department commencing a fresh application to retain 2 of the children in care; with the youngest being prepared to live with her father (though an order was still sought for this child so the reunification could occur over time). Given the poor handling of the matter by the department, a settlement was negotiated were all children were returned to the mother despite the department up until this time only allowing 1 hour contact every second week with the children some 120km from where the mother resided. The children reunified with no problem at all within 7 days. Clearly the

children did not need to be in care, adjusted to being returned with no problems, and the mother was more than capable of caring for the children.

The mother was delighted when the children were placed back into her care, and the department escaped having to explain the situation at an interim hearing I was going to run that same day (after having prepared an affidavit for the mother on my own time).

Absolutely no good came from the removal of the children, and it would seem the fresh applications was completely unnecessary. Had I not intervened and been prepared to run an interim hearing, 2 or even 3 children would still be in the care of the department and be facing a long term order which would have been the next step. I would like to thank the court coordinator for having the common senses to communicate my arguments prior to the interim hearing to help resolve that matter.

Example

2 children were removed from a parent. Child 1 (4 years old) had always been with the mother and not left her side for more than 12 hours at any one time. Child 2 (7 years old) had just returned to his mother from his father after 6 months because his father could not handle him any longer due to his ADHD; which was otherwise managed well by the mother.

The children were removed from the mother after she lived with the paternal grandfather and had left the children with him for approximately 12 hours after an argument (whilst the children slept commencing at about 11pm). Instead of waking the children, the mother left the house going to a friends home. It turned out the grandfather was a child sex offender having downloaded inappropriate material from the internet (over 100 videos). The mother knew “an” inappropriate video (i.e. one video) was found on his computer as she had been told this by the Department when they came to his house to see her about this, but the department also stated she could remain at his house so-long as the children were not left with the grandfather as the supervisor. The grandfather however informed the mother the video was not his, but was on his PC so he got blamed for it. The mother had known him for 14 years and trusted what he had said.

The department were alerted to the children being left with the grandfather over night, as the grandfather told police that the children were in his care (being part of his parole

conditions). As the department were now involved and the children were to be removed from the mothers care, the grandfather took it upon himself to make-up a version of events to try to have the children placed back with his own son (being the father of both children). Much of the grandfathers story was not credible, and the grandfathers second son (and the second sons ex-girlfriend) backup the mothers version of events. The children were unfortunately removed from the mothers care. Contact was limited to 1 hour supervised contact a week for Child 1 for 6 months. Child 2 had contact eventually removed because at the end of contact sessions he would strike out at the mother and anyone else (no-doubt because he felt he was being abandoned by his mother). Phone contact was provided but also later removed as well (no-doubt because he was becoming disassociated with his mother due to lack of contact). At the same time, Child 2 who should have been medicated for a mental illness (suffering chronic ADHA) was not receiving any medication whilst with the Department and did not receive any medication for about 8 months due to difficulties in seeing a paediatrician. At the first mention of the matter which ran as an interim hearing for care of the children, the department stated child 2 was already booked in for an appointment to be diagnosed to get medication, and this was one of the reasons the Department was able to retain the children at the first interim hearing.

I had not seen a parent who had completed so many parenting courses, sought practical assistance from various agencies, and did so much for her children prior to the department becoming involved. None of this seemed to satisfy the department the mother had the best interest of the children at heart. At the interim hearing, the magistrate sided with the department when a 28 day temporary order was applied for stated she would grant the order, but would be surprised if the department applied for any further orders beyond a PSO. Naturally, the department applied for a 2 year order over both children.

Aside from the children being removed unnecessarily, the main frustration was the case worker (or the team leader) did not seem to recognise that limited contact is more likely the main problem for the second child's behaviour– noting contact with Child 1 was always very positive; despite this time not being increased for the first 6 months; with time increasing to 2 hours. This is a recurring theme that in the federal magistrate's court seems to try to avoid at all costs due to psychological damage children suffer from limited contact with parents. Again, there is no other real reason these 2 children are in the care of the department except for the children being left with the grandfather overnight. Latter because the mother

had payments removed from child support she became transient and was raised as a problem, as was her not emotionally coping well with the children's removal. These problems took a little while to solve but when solved the department still retained the children and contact was extremely limited and remained supervised. The department cannot provide a plausible reason for Child 1 remaining in care, except to say the Department still wish to monitor contact with the mother to make sure it is appropriate. There is no reason why the mother cannot manage child 2. Having ADHD does not require the child to be remain in the care of the chief executive.

There are other side issues where the mother was considered "emotionally unstable" and suffering financially difficulties losing government benefits, however this was clearly due to her children being removed. I did run an interim hearing on this matter twice, but the magistrate in each hearing agreed to leave the child in the care of the chief executive due to child 2's condition and the department saying they were in the best position to treat it. This made no sense, as child 1 at least had no problems.

There are too many tragic examples to list with regard to removal of children. I have heard many more stories than I have lived.

Recommendations

An independent body to review department decisions and files is required – such a department could also implement a tougher stance on departmental ethics. Whilst there is a complaints department for DOCS, the department seems to have little sway or effective use. The department needs to be independent of DOCS and have the ability to review internal decisions made by case workers or team leaders, including complaints.

QCAT do not provide a board service, and applications cost $550 to file (though this can be wavered). A more dedicated and proactive department for reviewing DOCS would however be much better suited to the task. Such a department can audit files, interview parents, and ascertain if facts provided in affidavits are indeed accurate; This otherwise can only happen if there is a trial, and more often than not there will not be a trial as parents become worn down by the court process and consent where they otherwise would not, and funding for trials is virtually non-existent.

Lastly, because children need to have more contact with parents where a temporary order or short term order is place over children in the care of the chief executive; with the Children's court having powers to oversee this decision. The family court has extensive powers in this regard in deciding where children shall reside, contact, etc… and this power is used to great extent. I have often heard magistrates in children's court say they wish they had the power to assist with self-litigants, but cannot.

5. Treatment of parents

A complaint parents often bring to me is of being bullied and coerced into agreeing to orders sought. Whilst I cannot verify this, I have found often promises are made regarding contact but not followed through (this happens very often). Parents feel that if they do not relent to the department, there will be no increase in time with their children. There is little option for parents, and they are forced by the system to consent to orders sought, or wait and latter consent as they are in no position to fight the orders sought. The process to get to trial is simply far too long, and aid is generally speaking never given. This creates a huge power imbalance at a trial.

Example

I have dealt with several matters where parents had unwittingly signed consent orders, however after becoming aware of the matter, I identified the document and consent was withdrawn. This problem is not overly prevalent in the Ipswich area, but I have noticed this practice and have been informed of it second hand by other solicitors. This is a national problem, not necessarily a problem for Queensland.

I have also encountered areas where the department mention matters and not make adequate provisions to ensure parents are present - though again I have not personally encountered this in Ipswich as the magistrates are quite carful to make sure service has been effected where possible.

Example

A client who was in NSW had consent orders entered into without her signing the orders for the child to be removed on a long term order. The order placed the child with the father and the child's paternal grandparents as joint guardians (I do not understand how that is

possible, but that is how the orders read). This was done at a mention where the mother was not present because she was unaware of the court date; the mother had attend the court on numerous times prior. Whilst this is a NSW matter, the propensity for this to occur exists in Queensland. I only became aware of these past events as the mother was again dealing with the Department in Queensland but can verify the orders I saw were for a long term order and the mother had not signed.

Recommendations

Care should be taken in awarding care to the state for long term orders where a parent has been engaged in the proceedings as a primary carer. A long term order should not be awarded at a mention, but a hearing specifically set aside for such an event, or a trial.

6. Contact

reports requested by the departments psychologists seem to suggest many children in the care of the department suffer some form of mental illness/attachment disorders … this is never blamed on the conduct of the department removing children or the current system of contact. As a family law Lawyer this is appalling and very difficult to believe. In family law, separation from a parent is seen as being virtually a cardinal sin. Meaningful contact is virtually mandatory and there had better be a darn good reason for it not occurring. It seems to be forgotten (universally) within the child safety system that if a child is removed from a parent and placed with strangers this would place enormous stress and uncertainty on the child. Contact every week, fortnight, or monthly for 1 hour (supervised) to the child is akin to teasing the child as they will be removed again and placed with the carer (like ground hog day but tantamount to psychological abuse), yet the child and parents are expected to accept this process.

The department often will offer contact once a week (if any) for an hour in a small room whilst supervising the parent and expecting the child and parent to act normally. Any sign that the child is distressed seems to result in poor conduct of the parent; correctable only by a parenting course. This is a ridiculous situation that results in children remaining in care and often removal of contact will follow until the child is “broken in”. If a child did not suffer separation anxiety, in family law proceedings we would consider the child to have a problem, but with DOCS it seems to be the opposite. The view seems to be the child needs to accept the foster carer over the parent before the child can start reunification.

Example

In one matter, a child suffering ADHD would strike at his mother wanting to hit her and others in the room upon time for contact to end (this is perhaps a common scenario). Contact was suspended for months on end.

Example

A child was removed from the mother by the father without consent and almost killed by the father who could not care for the child (the child had to be resuscitated at hospital). The mother had informed the department to try to get the child back when it was originally taken, and even called the police on 2 occasions for a welfare check (once telling the police the father was not the father and to retrieve the child). The department and police were not able to help as there were no court orders in place.

The department after the injuries were incurred deemed the mother as not willing or able to care for the child and applied for a long term order. Contact was set for 1 hour every week and was supervised. The mother did not do anything wrong, but was deemed to wilfully not protecting the child from the father. Contact provided was utterly ridiculous and clearly not in the best interest of the child – though the mother dutifully attended on the child each week for over a year. Amazingly, the department also deemed the mother as illiterate stating this was also a reason she would not be able to care for the child as she would not be able to administer any ongoing treatment for the child. After meeting with the mother, I asked her to read to me which she did – she was not illiterate. The department relied on a psychological report to say her IQ was below normal (which it probably was), but a simply test would have shown she was certainly literate. The department saw it as easier to quote a 3rd party than to actually ask the mother a simply question.

Example

One parent had morning and afternoon contact with dropping off her 2 children to school from their carers. Child 1 had some behavioural problems, and when dropping off child 1, he refused to cross the road to go to school. The mother called the carer who also could not convince the child to go to school that morning and the school also was reluctant to help when the mother sought assistance after calling the principle. The parent contacted the department who said “if he won’t go to school, you can’t make him cross the road, return

him to the carer". After following departmental advice, the department simply altered contact and took this contact away from both children. All subsequent contact with dropping off both children at school was suspended. The second child had done nothing wrong, and the mother had done all she could in the circumstances. This action demonstrates a reluctance for the department to actually deal with personal problems and assist the family. The easiest solution was to remove all morning and afternoon contact which naturally had an adverse effect on child 1 and 2. The mother wanted to appeal to QCAT but was fearful this would result in further dropping of contact.

Recommendations

QCAT is not an adequate service to assist in reviewing contact, an independent body should be established with direct access to departmental files. It should also be a default position that a carer where willing can automatically provide contact to a child and their parent – though a child should also be able to opt out of such a situation.

Children should also be at liberty to request to see their parents, and the department facilitate same. This may require a more liberal stance on children remaining with parents unsupervised, parents being able to attend the school of the children, etc… it should be accepted that parents are also innocent until proven guilty, a concept the department do not currently observe.

The department should by policy or legislation be required to have matters move forward, and any reduction in contact be reviewable to a 3rd party reviewer.

7. Abuse of lengthy times a matter may proceed to trial

The process for having a trial is excessively long. Typically one would expect the following where care to the chief executive has been made:

a. first mention apply for 28 day temporary order
b. adjourn for further 28 day order (first and only extension)
c. first mention on fresh application for short term order (adjourned for 3 weeks to seek legal advice)
d. 2nd mention to adjourn for a case plan (2 to 3 months – as we need to get a convenor)

e. 3rd mention to assign separate representative or direct representative (though a sep rep will be mandatory at some stage) (2 months)
f. 4th mention adjourn for 2 to 5 months so contact can be arranged/monitored
g. 5th mention adjourn for 4 to 5 months (for social assessment report which will take some time to book in and have prepared)
h. 6th mention adjourn for further 4 to 5 months for a psychological report (if needed);
i. 7th mention adjourn for court ordered conference (2 to 3 months as takes time to organise a convenor)
j. 8th mention trial dates (4 to 5 months for a trial date).

The above is just an example but a trial from the date children are removed is typically 12 to 18 months from the matter starting (average), this can easily stretch out to 2 years. Often we may need multiple psychological reports, updated family reports, or a mention to allow for medical examinations, drawing out of time to allow for grants of aid, or something else that can take considerable time. There may be 2 case conferences, or an additional case plans needed. Suffice to say, the system is geared to have the children in care until such time as the application would have naturally expired. Of course the risk of accepting a 1 or 2 year order is that the order will expire with nothing progressing and the department making a fresh application (which is highly likely).

This system needs to be sped up considerable. Children are taken into care with little contact which causes great harm to the child over the long term. This is evident in a cycle of abuse in children being removed from care, growing up, then having children of their own later in life that are identified by the department as parents not willing or able to care for their own children, lacking parenting skills, or entering crime. In this regard, many children that enter the system seem to engage in criminal activity by the time they are 14 or 15 years of age. Many children I have represented in youth justice matters were wards of the state; disproportionately so.

Children removed from their parents seem to display high levels of stress and dysfunction in school. It is highly likely just entering the departments care, reduced contact with siblings and parents, and the stigma of being in care leads to trauma.

Due to the amazing time it take to get a matter to trial, if the department is applying for anything under a 18 month order, it is often simply best to agree to the order and work towards reunification in that time. If you get to trial, 18 months would have past anyway, and if a parent loses at trial, there will be a further 18 month wait after the granting of the order. Sadly, many practitioners advise to simply accept the orders if the department are not seeking long term orders.

Recommendations

The process needs to be stream-lined. A parent should be able to elect a trial date from the outset of the matter. Case conferences can occur in the interim between the first mention and a trial. The only purpose a Separate representative poses is to help subpoena material and request reports. Whilst this is useful, it is not necessary if the parent is represented. A solicitor can assist in requesting various reports to assist the parent, otherwise the department should be responsible for their own case (as the department essentially represents the child). Where a parent is not represented, a Sep Rep should still be appointed, or alternatively, a direct rep if the child is over the age of 12.

This will force the department to first "Make a case" before it removes a child, and where costs can be awarded, the department will take much greater care in compiling evidence.

8. Limited resources

An excuse used to justify the limited contact between parents and children is often "limited resources". This attitude condones children suffering at the hands of the department not being able to run the system. How can this be "in the best interest" of the children? We traumatise both children and parents unnecessarily.

Recommendations

The clearest fix to this, is when children are removed from parents, carers be automatically considered as being able to supervise contact (especially if they are kinship carers). If the child is placed with them, it should be considered that they are capable of protecting the child. At no time should a directive be required for supervised contact unless a carer or child is unable/unwilling to provide such contact. There can still be supervised contact to monitor

how contact progresses, but this should be auxiliary to carer contact provided, especially if a child so requests.

9. Best interest of the child

It is often quoted by Magistrates at interim hearings that the best interests of the child must be met, which is usually code for "I have no choice but to trust the department" in regards to temporary custody orders. In actuality, by trusting the department, we are ensuring at the very least:

k. the children will be traumatised by not being at home,
l. the children will be traumatised in limited contact with family,
m. the children will be traumatised in being ripped away form family after an hours contact,
n. Social stigma will be imposed on the child,
o. The child will blame themselves for being removed as no-one is allowed to discuss their removal except for a counsellor which will not occur for many months, and
p. There is serious risk of mental health concerns later in life due to being removed from the parents.
q. The child will not be treated for mental health for a good number of months as a health passport and mental health plan need to be made first, and a paediatric doctor need to be seen which can take up to 6 months.

These things do not seem to be factored into a magistrate's decision making, nor does the act seem to factor this in. there ear no studies directly relating to the care of children in the departments care or its effects on those children.

What is further not factored in, or at least not to the favour of the parent, is the concept provided in s10(a) of the Act, where "a child in need of protection is a child who: has suffered harm, is suffering harm, or is at unacceptable risk of suffering harm" the idea of "unacceptable risk or suffering harm" is clearly watered down to "risk of suffering harm". I would submit, "unacceptable risk" should be a higher threshold than just "risk", but again, it's not given due consideration as any risk seems to be unacceptable despite the actual level of risk presented; as risk is simply unquantifiable. This is probably due to s9 stating "Harm, to

a child, is any detrimental effect of a significant nature on the child's physical, psychological or emotional wellbeing."

"Significant nature" is extremely broad, and can include any domestic violence. DV in turn may include for example any physical or psychological punishment. Such as a punishment to get the child to do homework. In one matter, a parent pushing the child with a foot was substantiated as being domestic violence.

Example

In one example, a child was removed from the mother for allegedly displaying sexualised behaviour and was kept by the department for 3 years (over 2 separate orders). The mothers other 3 children were also removed citing the mother having mental health concerns due to her handling of the first child and suffering a bi-polar condition which ultimately was not found to not be a problem by her doctors as it was quite manageable. 3 of the children were eventually returned, however the original child remained in care.

The affidavit of the department for his remaining in care was clearly defective as it provided "facts" that where known to be false to the writer. The child in the 3 year period with the department had only 10 sessions of counselling as a whole and his original concern of sexualised behaviour was never addressed at all. The child the began to show signs of suffering a serious mental illness "reactive attachment disorder". The department at an interim hearing relied on the defective affidavit and the magistrate had little choice but to use the "best interest of the child" argument to keep the child with the department as the department stated they were in the best position to offer counselling. The departments affidavit further stated the child wanted to remain in care (which the writer knew to be incorrect). On the balance of probability at a trial, the writer is convinced the department would not succeed as there is no evidence to support the department was in the best position to offer counselling as the mother was the one who finally organised the limited counselling in the first place (taking him when the department could not). The department even restricted the mother from taking the child to counselling resulting in missing of many of the aforementioned 10 appointments.

The least intrusive order who have been for the child to remain with the mother and a PSO be implement to monitor counselling if need be. The magistrate was able to use "best interest of the child" to keep the child in the care of the department as the department were stating they were going to organise on-going counselling and the mother was obviously stopped from doing this for a reason that would have been known to the counsellor. Despite the order for care to remain with the chief executive, the department approximately 3 weeks later placed the child back with the mother.

Recommendation

The trauma a child will suffer whilst in the departments care must be considered more carefully by Magistrates. Best interest of the child whilst important, should also consider the "risk" the department places on the child being in their care – children are abused, assaulted, and influenced by other problem children to engage in criminal activities. Where the department are making a case for the child to remain in care, the onus of proof of a statement should rest with the department. A magistrate may not guess evidence in favour of the department. For example, if a report says a child needs counselling, it cannot be taken for granted that the counselling should not include a parent unless the report specifies this. In the above example this very point was made by a magistrate in favour of the department where the department had prevented the mother taking the child to counselling. The report on the counselling did not specify the mother should not be involved, but the magistrate guess this to be the case – we argued this was not true, the department actually gave no reason for the mother not attending, stating they simply wanted the carer to do this but to no avail.

10. Least intrusive order

The department regularly apply for removal of children with parents who have littler idea about the intrusive powers of the department. Removal of children is extremely traumatic on both parents and children alike. This is not to say it should not occur at all, only that it seems to be overly utilised in comparison to this harm. If parents had access to legal assistance during an IPA or PSO for example, they may be more willing to work with the department, not against it.

I have had numerous matters where parents have been threatened simply so the parent would comply with recommendations of the department, parents resist simply because of

the threat. The department in turn will seek an incredibly intrusive order simply to push parents in a given direction.

Recommendations

The act need to recognise that removal of children is traumatic and should be an order of last resort, much like prion is an order of last resort in criminal proceeding. There should also be an onus on the department to advice of legal assistance prior to removal where possible.

It would also be of assistance if the applicant was not the case worker with whom the parents are supposed to work with. It would be more appropriate for the team leader to be the applicant, in which case the parents would be more cooperative.

11. Substantiated

Currently, "substantiated" claims do not need to be based on fact. For example, a person acquitted of a carnal knowledge charge will not have satisfied the department they did not do the offence or no-longer pose a risk. Any accusation leading to charges of an offence towards children (even if they are nollied) will result in children being removed from the home regardless of outcomes of any criminal trial.

Evidence is also often build from hearsay, poor note taking, twisting or misunderstanding of parents meanings who do not really understand questions asked, etc… Often a respondent parent may simply have to leave the home or risk having the children removed from the other parent, despite any true risk, with no real plan to reunify.

Oddly enough, it seem that children removed will enter into a cycle where their children will also be removed from them in later years (this is just the writer perception, but it would be incredibly useful to see such statistics if they exist). It is the writers understanding that a report on this has never been conducted, but would be incredibly useful. All the evidence the writer is aware of tells us that in relation to a child being removed from a parent by another parent (or other person) indicate the removed child will ultimately suffer some trauma later in life. It would seem this information would be invaluable to any research in to removal of children by the department.

Example

In one matter, the mother who had 6 children of her own and was step-mother to 2 additional children did not believe the father had committed an act of carnal knowledge and incest towards his biological daughter (the eldest step daughter). Because of the mother's belief, the department sought to remove all 6 of her children from the home despite the father already agreeing to move out in the interim; with the 2 step-children already being relocating to Victoria to be with their biological paternal grandmother. I ran an interim hearing to prevent the removal of the 6 children from the mother and it was found that it was not a requirement of the mother to actually believe the charge against the father to continue to be perceived as someone who would act protectively of the children. The mother has paid a high price for this believe, as the department despite having a report stating the mother can supervise the father, will not allow the mother to do this – as she does not believe the charge. The departments maintained the evidence of the complainant child was credible (despite charges against the father ultimately being Nollied due to major inconsistencies in the complainant child's allegations). If I had not been willing to run a non-funded interim hearing on the matter, these 6 children would still be in foster care today.

Example

There are many occasions where "substantiated" claims are simply not true.

r. In another mater, I was asked to be a support person during interviews with 2 children. I agreed, and the interviews showed the children to be very well cared for. A subsequent report initially ignored the interviews and/or their positive result. Over a year later when a new CSO was appointed to the matter and the department amended their application from a PSO to a 2 year order seeking care to the chief executive (stating the parents as being). The department's affidavit stated many things claimed to be false by the parents. One paragraph for example claimed there was cat faeces in the room during the children's interviews (seemingly forgetting I was the support person for the interviews). I know for fact the room was clean and there was no trace what so ever of any cat faeces. This is highly concerning, as it casts doubt over every affidavit that I read from the department.
s. In another affidavit it claimed a stepfather was involved in a robbery, what the affidavit neglected to inform was the step father was the one robbed whist working at a petrol station.

t. In yet another example, the department referred to the clients partner as having various DV orders against him and a criminal record. Nether fact was true. The affidavit further stated that the partner's brother was a "child sex offender" and resided with the children to be removed. The brother was not on any sex offenders list, nor did he live with the children.

Recommendations

The list of extraordinary claims with no evidence to back up the claim is immense. I do not recall reading an affidavit of the department that contained facts which were not easily disputable (to some degree). Whilst parents will also lie, the department has an onus to rely on facts as their affidavits will cause great harm if they are not accurate.

The easiest fix for this is to provide training to Staff at DOCS, and make it mandatory that all claims provide supportive evidence. Whilst there will always be concerns which cannot be shown with written evidence, where a claim is made which would have a direct impact on the outcome of a matter, that evidence should be verifiable.

12. Departmental Affidavits

Departmental staff seem to lack consistent training with regards to court proceedings. In particular, affidavits are sworn documents, however after making enquires with the department, it was revealed that departmental staff receive no training to help understand what an affidavit actual is or how much of an affect it has on parents, children, or court proceedings due to content. Many case workers I have spoken to did not realise a factually incorrect or misleading statement in an affidavit could constitute perjury.

As such, affidavits are often defective but at all stages leading up to a trial are relied upon in court. Such important documents from the department are absolutely fraught with miss information that is being sworn to and is of high concern to the writer. The applicants who are case workers in proceedings rely on notes which are often inaccurate yet swear by those notes as being true and correct. This is most concerning and misleads the courts into believing that a risk is established, and magistrate has no option but accept the content of the affidavit at an interim/hearings/mentions which often results in children being removed from parents causing great harm to the child.

Recommendations

Training in drawing of affidavits should be mandatory as should an understanding of the court process, as it is the court process that will govern where the child will remain in the interim. Additionally, “Applicants” should be team leaders, not case workers. This has 2 desired affects.

- Firstly, a team leader should be more experienced in drawing up such documents.
- Secondly, a family will be required to work with the case worker and find it very difficult to do so when they believe an affidavit is full of inconsistencies resulting in the removal of their children.

The case worker will find parents more willing to work with them if they are not perceived as the enemy.

13. Step-parents

Step-parents are not considered parents by the Act, nor may they partake in proceedings. A step-parent will have no input into proceedings, care of the children, or be considered viable kinship carers by default. For step-fathers, this even includes if they were involved by way of cohabitation with the mother since 20 weeks prior to the birth of the child (see s69q of the Family Law Act 1975 which provides for a child to be considered a child of the “man” under such circumstances). I have attempted to have a stepfather joined as a party on this very point (by consent of the mother but not the department). At the interim hearing the magistrate disappointingly found s69q would not apply and the step-father was found to not be a father or guardian for the purpose of the Act as would be allowed by s52(c)(i) of the Act.

Recommendations

The Act should be amended, to expand on who can be considered a parent. The Act has several sections dealing with the definition of a parent for a given part of the Act. This is confusing to parents and makes little sense due to their inconsistency. A child may be severely disadvantaged due to this approach. Step-parents, grandparents, siblings of the children or of the parent, all should be given consideration as being parties to the matter; particularly for kinship applications. Even if the act allowed for “discretion” by the magistrate as to who is an interested party, this problem could be solved.

14. Kinship carers

The process to be acknowledged as a kinship carer is horrifyingly long, being estimated at 6 to 8 weeks wait (or longer) for approval, with a requirement for a blue care. I have had grandparents that have had children in their care for most of the children's lives, yet be forced to make a kinship carer application and wait months for it to be processed before the child was placed with them; causing trauma and uncertainty to the child due to the wait.

Example

A client in Cairns who was the paternal grandmother to 2 children that had been taken into the care of the chief executive. The paternal grandmother had at one point raised the children for over 1 year and naturally applied to be a kinship carer. Due to accusations made by the mother (who suffered from mild to server schizophrenia), the application in the first instance was refused. The grandmother's application was initially refused despite no evidence being provided to support the mother's claims. On a subsequent occasion when the grandmother repeated the application some 2 years later, it took 6 months for final approval.

Example

In another example, I had a matter where the department placed a child with a landlord where the mother was renting as a carer of the child, and not be placed with a relative. This simply made no sense as the grandparent had to go through the extensive process of being approved before the child could be place with her, yet was just left with a landlord that knew the child, though not overly well. The land lord only agreed to care for the child so as to assist the mother but was eager to have the child go to relatives.

Recommendations

Provisional approval should be simplified with a house inspection being performed preferably on the same day as any order is made. It should be a requirement that the department have investigated kinship carer arrangements prior to the order being made (unless absolutely necessary that this not occur, or no kinship carers can be identified).

15. Trials & costs for trials

Trials are almost never funded by legal aid; it is very hard to get funds for a Child safety trial, and near impossible to get aid for a barrister. Of all the matters that I have had progress to trial, only 1 had any funding with that funding only being for assisting with drawing up

material for the mother. The power balance is immense in that the department will have counsel along with the full recourses of the department. This is overwhelmingly the reason why consent is provided by parents. Trails are expensive and often very far into the distance from when a matter will start. The ugly truth is most parents will consent because there is no real choice not to. They will be run down due to the process and consent because they will not get funding to run a trail. Sadly, most solicitors simply advise clients to accept the order, as this will at least allow the time period for the orders to actually start so they can see a final reunification date on paper. Solicitors and barristers (and even honest staff at the Department) see the pressure and time placed over parents is tantamount to consent through duress.

At no point do the department have to pay costs if they are unsuccessful in legal action, but a great deal of time and anguish will have occurred. There may be a strong case for legal aid for a trial if costs can be recouped. This is one of the main reasons I will run Interim hearings so readily as I see it as the only chance to stop the proceedings in regards to children unnecessarily going into care to the chief executive. Despite it being very easy on the basis of hearsay to demonstrate a potential risk (which seems to satisfy there being an "unacceptable risk"), I still manage to keep 30% of children out of care. For the other 70 to 80%, trials will not happen and the department will get their orders despite evidence being hearsay.

By implementing a mechanism to claim costs at a trial, the department would be forced to both negotiate matters more conscientiously, and to think twice about running a trial (or even starting unnecessary action). This deterrent may in the long run save the department money and teach staff about boundaries within the legal structure of what they do.

Recommendations

There are 3 solutions,

u. aid is increased to assist parents at trial,
v. the department fund these trials, or
w. the department are held accountable for a failed application both at interim and final hearings.

Of the above, “c” is the most potent way for the department to be more closely monitored by way of cost for failed applications. If the department were burdened with the knowledge they may actually have to pay costs, they will be much more cautions in negotiations at Court ordered conferences and in actually running trials. I dare say affidavit material will also improve, and the department will actually be motived to implement the least intrusive order instead of simply removing children. More solicitors would also be will to take matters on a prospective basis (i.e. payment if they are successful in defeating an application by the department).

16. Too quick in taking legal action

From the matters I have deal with, the department would appear to be top heavy in taking legal action than actually implementing ground work to help families in need. Parents that have engaged with IPAs with the department have for the most part been impressed with this work and the staff – this is great work and should be encouraged. There is exceptional cost in removing children and supervising contact. It would be a far better system to implement resources into providing assistance rather than placing children into foster care. This would reduce costs substantially with requiring carers, and reduce trauma in removal of children. Simply put, the money could be better spent.

Recommendations

The department should invest more so in early prevention with parents. Ultimately this will save the department substantial funds in not having to provide full time care for children.

17. Burden of proof

The burden of proof is provided as being the balance of probabilities. This should apply at interim hearings as well but does not. I equate burden of proof for children’s matters with the following analogy:

x. Criminal matters – where there is fire there is fire
y. Civil matters – where there is smoke there is fire
z. Child services matters – where there is wood there is fire.

Anyone that understands interim hearings will accept disputed facts cannot be easily decided. The problem is, the stakes are very high where the chief executive wants care of the children transferred to them. Magistrates will more often than not play it safe, and side with the department if a “risk” can be shown (not necessarily an unacceptable risk as required by s10(a) of the Act); if flows if there is a risk, then 10(b) seems to be a given and

does not seem to be in need of proving the parents are not willing or able to care for the child. If a magistrate hears a matter which hinges on who caused an injury to a child but says on the outset “I am not going to make any findings as to who caused a given injury”, the interim is as good as over.

There is a clear reason why the threshold of evidence has fallen this low; being far below what the Act actually requires. The reason is – “best interest of the child” which does not require any evidence at all, only allegations and hearsay. Even if there may be a fraction of a percentage of risk if the child is not removed from a parent at an interim stage, the child may very well be removed as that risk is unacceptable to the “best interest of the child”. Unfortunately, I have found different magistrates approach this problem in their own way, though the threshold is substantially lower than in any other jurisdiction.

The analogy above comparing sources of fire thusly fits the current state of the courts as they will act on allegations alone (disputing them will not help), anything which is contentious needs to be decided at a trial with the courts siding with the cautious approach (i.e. if parents and the department disagree, the courts have to side with the department for safety concerns). The onus of proof is squarely on the parent who in many situations simply has no evidence because they did not do what was alleged. The burden is for the parent to show they can act protectively, not for the department to show both parents cannot act protectively with actual evidence; and the parents need to be able to refute this this beyond reasonable doubt or they will fail at the interim stage. If someone fails at an interim, they will not succeed until a trial can be heard. We thusly condemn children to be with the department for 1 to 2 years if an interim hearing is not successful in the first instance; with the cards already staked on the departments side.

For example, if the allegation is the parent got drunk whilst the child was at home or engaged in domestic violence (despite no-longer residing with the persons that caused the DV), the parent can deny it all they want but an order to protect the child will generally be awarded to the department – all based on hearsay until a trail can determine things, but of course a trial is over a year away.

Example

I had a client whose 3 month old child suffered a brain haemorrhage. There were no external injuries, with the child's two older siblings and the child's twin sister having no internal or external injuries at all. A Skeletal scan of the child and his twin sister showed no other injuries or abnormalities, however a doctor identified the child's current injury as "possibly" being from "shaken baby syndrome". As the parents could not explain the injury, the doctor stated the injury was highly suspicious. This diagnosis was provided despite the fact a child at this age would certainly have other injuries if shaken so badly. The child was removed from my clients care along with his 3 siblings. All 4 children were then placed under a kinship care arrangement with the maternal grandmother; but latter removed and placed into foster care forgoing placement with the paternal grandparents (as their kinship care application after 3 months was still pending).

In a subsequent letter from the hospital which treated the child, it stated these injuries could have been spontaneous (i.e. these injuries can happen by themselves). Doctors informed the client the child had thin membranes in his arteries in his head which may explain the injury. Despite this, the magistrate stated on the outset he would not make any findings on the injury itself – this meant the interim was impossible to win, and the magistrate subsequently found in favour of the department despite providing a letter stating the injury was spontaneous from the hospital. Of course if the matter proceeded to trial, on the balance of probabilities it could not be shown the parents acted in a manner that would have caused injury, as no evidence could be produced to support such a finding. The result is of course:

a. All 4 children remained with the chief executive despite injuries to only one child with no auxiliary injuries to explain what had happened,
b. Evidence assisting in explaining the injury was not taken into consideration – the burden of proof was placed on the parents and not the department at a level the parents simply cannot prove as they did not do it.
c. The magistrate was not interested in trying to decide where the injury came from, effectively tying the hands of the parents in any case – the department did not have to show anything, merely that the child suffered an injury and rely on previous expert evidence (which was not as fresh as the expert evidence we produced) that he injury "may" have been from "shaken baby syndrome".

It was a truly disheartening outcome that the family was torn apart and the children now suffer extra trauma in not being able to see their parents for more than 1 hour a week

(supervised). This simply should not happen. The “best interest of the child” is used to defeat the actual level of evidence required, as there is a very minor risk with the parents.

In the above example, the department told the parents, reunification cannot take place until they had consented to the orders. this infuriated me, as it punished the children and the parents for simply not consenting to the orders; despite the parents doing everything required by the department during this time.

Recommendations

In weighing up the “best interest of the child”, it must be recognised that children going into care will suffer many forms of anguish which can directly lead to various mental health disorders later in life. The above example finds a baby was removed from his parents which also damages the bonding process. A magistrate needs to be convinced on the balance of probabilities that it is in the best interest of the child, and such convincing should take the form of actual evidence which would refute the parent’s evidence if it was heard at trial. To make such intrusive orders the courts need also consider the trauma a child will suffer if it is removed.

If this does not happen, the “best interest of the child” will continue to see children traumatised and the negating of the balance of probability. If an application fails to meet the “balance of probability”, it should fail. The department can use PSO’s quite liberally to achieve a correct balance of intrusion and protection.

18. Interim hearings and legal aid

Legal aid do not fund interim hearings. Generally if a client wants to run an interim hearing and I see merit when a first mention occurs, I will do so (I run about 70% of matters at the first mention as interims hearings to determine if a child should reside with the parents or the Chief executive). Initially I would not run interim hearings due to lack of funding and/or experience in a given circumstance however in 2012 I may have run as many as 15 or so simply because the affidavits of the Department were so poor in quality or the applications were simply unnecessary. Of the 70% precent I ran to prevent children going to the chief executive, about 30% are successful in keeping children out of care (with orders being amended to a consenting PSO) despite the low level of burden of proof the department

require. This is a very frightening number, as it suggests at even the low level of proof required by the department to have care of children at the interim stage of a matter, there must be hundreds to thousands of children that have entered care in Queensland that should not have been. Of the matters I did win at Interim hearings, only 2 new applications were made to have the children again placed into the care of the Department, with 1 matter keeping the children with the mother and the other matter having the children removed (after a further interim hearing).

In running interim hearings if there is any allegation of injuries by a parent (however unsustainable), a magistrate will generally state there will be no finding of cause of injuries alleged. This instantly handicaps a parents application, as it is a given the injuries are otherwise unexplainable despite any evidence to the contrary raised (as this evidence will simply clash with evidence of the department). Despite this, I am able to win 30% of matters at the preliminary stage on submissions alone (or occasionally with an affidavit if time allowed for one to be prepared). To my knowledge, very few other solicitors (if any) run interim hearing on legal aid grants to simply appear at a mention as interim hearings are not funded at all by legal aid. More often than not parents cannot fund or run such hearings themselves – as they do not know how to approach or argue the issues correctly.

As provided above, I can only surmise there must be hundreds to thousands of children in care that simply do not need to be there if an interim was held for each matter on the outset. Even more children would not be in care if due consideration was given to evidence as would be at a trial. This one fact is staggering and scares me beyond belief. It is why I run interim hearings, and this one point clearly demonstrates the system is surely in need of repair – if I did not run interim hearings, many children would not be with their families today. Often is the case when children go into care this starts a downward spiral which can lead to a long term order being sought and later the child even entering into a life of crime. Many children I have represented in children's court on criminal matters where wards of the state.

Example

In one example, I ran an interim hearing to attempt to have a child returned to his mother after he had already been in care for 3 years. In the departments evidence (their affidavit), they stated the child who was 13 did not want to return home until the end of the year (the

matter was heard in January). Of course this was highly disputed as the mother's affidavit stating the child want to come home immediately.

At the initial interim the magistrate correctly picked this up and stated the child wanted to stay in care (this was the only area of contention for this magistrate). I disputed the department's affidavit, but to no avail. I managed to have the matter adjourned for 2 weeks for a direct representative to see the child (as the child had indicated he wanted a lawyer to directly represent him to his mother previously), hoping this may assist the child.

The child became very angry at the department for stating he wanted to stay in care, but was by this time also convinced he did not want a lawyer as he had been told by his carer he did not need one. The person I had organise to speak to the child to see if he still wanted a direct representative did see the child, but the child no longer want to be represented by any lawyers at all (even a separate representative). Fortunately, the child did tell the potential direct representative he wanted to go home immediately. The department however did not follow up our requests to confirm if he did or did not want to go home; placing a wilful blind eye to this situation.

After the 2 week adjournment, as the direct representative was unable to appear on the day (as they were not able to represent the child), we lost the interim hearing as the department maintained their original position not seeking to amend their affidavit but relying on notes on the file. Other factors were at play, but the new magistrate noted there was nothing to the contrary that the child wanted to go home – it was a contentious issue that could not be decided. If the department had followed up on this information as requested, the interim hearing could have been avoided. A new issue was also raised in regards to counselling and the department stating they were the only ones in a position to offer counselling, despite there being minimal counselling in the past 3 years. Again, contrary to evidence, the magistrate had to side with the department.

Subsequently, the child was so distraught over having to remain in care, he was deemed not manageable by his carer and returned home to his mother about a week later. The new one year order by the department's actions alone was shown to be meaningless and the child in that matter had been diagnosed with a reactive attachment disorder – being a severe mental health problem. The writer is convinced that had we run a subsequent interim, we

would have been in a much better position to win, as we were adapting to the concerns of the court at each interim.

Ultimately these things would not have come to light except at a trial. We did make it very clear in this matter that the mother was prepared to run interim hearings at each mention and go to trial if need be, and the mothers affidavit clearly demonstrated many faults with the departments own affidavit. The department finally relented but the child now has to suffer a from a major mental health issue when he should not have not been in care in the first place.

Recommendations

The above successes at interim hearings despite the high burden of proof placed on the parents clearly shows there is something wrong with the way the department applies for orders. It should be established in legislative form that the department must show on the balance of probabilities on the outset when applying for a short or long term order that they will succeed in their application; not rely on hearsay.

When evidence is presented to the department, there should also be a clear onus to update material and/or file so the same misguided facts do not continue to be present each time a new CSO takes over a file. One of the main problems is the affidavits are so large, the CSO who is not trained in drafting them will simply add items that are in note form and swear to them being true and correct. Additional training in drawing of affidavits is desperately needed.

The department should be held liable for costs in failed applications (both at interim and final hearing). This will ensure the department only run actions that are going to be successful, and increase efficiency with regards to evidence provided.

19. Legal aid cost structure

There is limited funding for all aspects of child safety. For example, when a matter first starts, we are generally only provided 3 hours funding to –

a. interview a client (1 hour)
b. review material (1 hour)

c. appear at a mention (1 hour)

The above funding is very much inadequate to actually get a handle on the matter and provide advice with a clear picture of what will happen if consent is not given to orders sought by the department. Affidavits of the department are often over 100 pages long, full of private history, and it is simply not possible to review this material in 1 hour. The courts have also complained about the length of affidavits and request they are provided on double sided paper to reduce sizes.

Most solicitors get around this by meeting their client at the first mention at the court to combine all 3 activities as court mentions can last several hours. The natural danger in this is the client is put on the spot and has to consent to interim orders sought by the department as the solicitor is not funded to run an interim hearing. There is also no time to prepare material if need be.

To my knowledge, there are only 7 registered "preferred suppliers" in Ipswich for child safety matters. There is just no incentive for solicitors to train or act in this area of law which clients are desperately in need of. I do not recall any training in this area offered by the Department for practitioners.

Aside from mentions, aid is also provided for Court ordered conferences and for family group meetings, though the number of grants are limited and are often knocked back. We are also forced to make lengthy submission to support applications of aid outlining the parent's chance at success if they were not to consent to the department. This is quite time consuming for small grants of aid. If aid is not granted on first attempt, most solicitors will not appeal the refusal as there is simply no money in it.

Aid for trials is almost non-existent with a full case outline often required just to apply for aid– meaning meeting with the client and drafting submissions on the small chance aid may be granted.

Recommendations

Aid for these matters is simply inadequate and need to increase. As provided, if the department were held liable for costs, this would perhaps increase the chance of aid, and lessen the amount of matters that are brought before the courts.

20. Breaches of privacy

In providing backgrounds of a parent in affidavits, history of the parents own abuse as a child (often sexual in nature) will be included .These affidavits will be provided to other parties to the matter or stakeholders who may not otherwise know of this history. This is a breach of confidence/privacy and often an area parents will complain bitterly about.

Recommendations

Childhood and/or confidential information directly related to a parent with little to no probative value should not be included in such affidavits.

21. Acting as family court

The department though sometimes unwittingly, seems to have a habit of picking parents for a child much the way family courts do; though they seem to do this based on hearsay and findings by case worker who are not experts in the use of evidence. This goes beyond child safety, more so a preference of which parent they feel is going to do the better job of raising a child (again, based on hearsay).

Example

In one matter, the department saw fit on a 28 day temporary order to remove a new born baby from the mother and place that child with the father and his parents in NSW where the child's sibling resided. The 28 day order expired with no further orders sought. The department refused to provide a letter stating the child was place with the paternal grandparents only saying the child was there on "holidays". A letter to this effect was promised orally, but was never sent. The paternal grandparents refused to allow contact with the mother stating the child was now with her sister who had been placed with them on a long term order (Which was taken out by NSW department of child safety without the mothers consent at a mention approximately 1 year earlier whilst the mother was absent).

A family dispute resolution conference was entered into with the father. Contact was agreed to in writing, but then refused latter as the agreement was only a family plan as the father refused to enter into consent orders. The fathers solicitors then stated they were going to commence proceedings in the Federal magistrates court, but this was never followed though. Legal aid would not support the mother making an application to the Federal magistrates court citing limited public funds.

The internal policy with the department as told to me by the department is for the department to return the child to the same parent from where it was taken if no further orders are sought over the child. If a legislative requirement was put in place, the above scenario would not have occurred. If the department saw fit to keep the child in care and place with the father, a short term order could have been applied for with the consent of the father or a PSO restricting contact with the mother. Whilst the mother in this matter did have some psychological disorders, there was nothing that prevented her from caring for the baby; indeed the child was well cared for and the mother bonded well with the child. The mother has not seen the child since the department removed her, and the literature on the topic of restricted parental contact tells us the child will no-doubt suffer harm because of this latter in life.

Recommendations

A child should be returned from the parent it was taken, unless orders exist preventing this from occurring (including orders from the Family court).

22. Summary

Legal aid is very difficult to get for trails, and non-existent for interim hearings where great good can be had at preventing unnecessary removal of children on the outset of a matter. I am generally only successful at interim hearings when arguing points of law or common sense, not at trying to dispute facts or even hear say (despite evidence). Whilst I will run interim hearings because I see merit in a given case, this view is not shared by other solicitors (which is understandable given the lack of funds). Where children are placed into the care of the chief executive, more than likely a final order will be consented to as funding for trials is almost none-existent, time to get to trials it far too long, or the parents will consent under duress of the department and/or the system. If the department were held to

account by having costs awarded against them in matters they are unsuccessful, a great many aspects of the department would change.

I would not want to detract from some of the great work done by the Department, however this cannot excuse the amount of children that go into care that simply should not be removed from parents and the only family they know causing trauma and untold damage to the child. The following are my core recommendation to help streamline this problem:

1. Where the department are unsuccessful at trial, the Department needs to pay for costs of the parents (or legal aid) defending the action.
   a. This would allow legal aid to fund more trials (by recouping costs), and
   b. Would see the department limiting action to matters that actually require it; this should include interim hearings.

   The overall effect would by its very nature streamline how the department deal with all matters as a whole. It would not be proper for the department to claim costs against the parent due to imbalances in power that already favours the department, and ultimately, this would simply lead to even less matters making it to trial for fear of this imbalance.

2. The courts must provide more consideration to the trauma suffered by children in the departments care, and provide acknowledgement of that trauma as a determining factor when/if the court is making orders placing children into the care of the chief executive. Currently the only consideration is the risk of harm children may receive from the parent not what harm will be caused if a child is placed into the hands of the department.
3. Restrict the use of short and long term orders to matters of provable fact and not on allegations alone (this would not necessarily include temporary 28 day orders or an extension thereof to obtain that evidence).
4. Any order sought by the department, including PSO's be recognised as intrusive. Currently the court in an example provided above was perplexed when the mother did not want to consent to a PSO, and more perplexed when the department wanted to withdraw the PSO. Actually most parents do not want to consent to any type of order, but ultimately the courts are of the opinion that a PSO is not intrusive and should be awarded if requested by the department.

5. The department must provide much more care in drafting affidavits, not just relying on file notes, this can be solved by having a central applicant responsible for all applications or shifting the applicant from a case worker to the team leader who should have more experience within the department. The added benefit is the CSO will not be perceived as the "enemy" by the parents; allowing the parents to be more cooperative with the case worker and ultimately the department. It may be the CSO assists in writing the affidavit for the team leader, but it will be the team leader (or central applicant) responsible for the actual content. Further, information that has little probative value should not be included in affidavits of the Department, this would include things such as previous sexual abuse of the parents which a parent would often not want known by other parties included in proceedings.
6. The department needs to be more proactive in ground level intervention (such as with IPA's) for prevention rather than removal of children.
7. The department need to adhere to a higher level of ethics. In one example, an order I argued for I court was for no supervision being required by the department where the children had been placed with a kinship carer. The department then enforced that a supervision order was in existence despite knowing the order did not specify this. In another matter, the department told my client they would not start working towards reunification unless they consented to the orders.
8. Legal aid funding is appalling. Given my success at just interim hearings (running matters essentially at no cost to legal aid or my clients), hundreds to thousands of children must be in the care of the chief executive for absolutely no good reason; this alone has motivated me to run many interim hearings for legal aid clients despite the level of aid provided. Funding for trials is also woeful; I have never been successful at obtaining funding for a trial; though colleagues inform me they have on occasion received such aid. This severely disadvantages parents and children alike. Funding needs to be increased for the most vulnerable of our community.
9. Carers should be able by default to provide supervised contact between parents and children. The only exceptions should be if the carer or children are not willing to have such contact.
10. The definition of a parent needs to be widened to include step parents or guardians that have cared for a child for a considerable period of time. Discretion should lay with a magistrate as to whether or not an interested party should be allowed to be made a party.

11. The trial process needs to be sped up considerable – parents simply give in and consent so a matter can progress with some certainty as to when an order may finish (as they believe reunification will be completed within that time, though that certainly is not always the case); This is a major problem as consent is usually given under duress of the length of time it takes to have a trial. There are several ways this can be sped up:
    a. Remove the need for separate representatives if the parent is already represented as in theory, the child is already represented by the department.
    b. Case conferences be included in direction hearings for a trials, this would speed up the trail process by incorporating the conference in the time line for trails.
    c. Implement costs against the department if the department are unsuccessful, the longer a trial date is drawn out by multiple mentions, the higher the potential cost to the department if they are unsuccessful.

A key to most of the above is costs. If the department were held accountable, the rest may simply flow as a matter of course. Awarding of costs will have multiple positive spill off effects including creating a leaner more productive department better focused on the best interest of children.

Thank you for this opportunity to provide insight from a solicitor who actively practices in this area of law.

Regards,
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