Legislative Council Inquiry into Child Protection

Judge Johnstone, President of the Children's Court of NSW

Questions on notice

MR DAVID SHOEBRIDGE: What is the timeframe?

JUDGE JOHNSTONE: Usually the interim orders, as I say are made within the first week. Establishment will occur in about the first month. Then we try to get the care plan within the next one to two months. Sometimes in determining whether or not there is a possibility of restoration we will engage the services of the Children's Court Clinic where we will refer the children and the parents off for an assessment. That can delay the process by another six weeks. Eighty per cent of our cases are determined within about nine months. I can give you the exact statistics later if you want them.

For the 2015/2016 financial year period 81% of care and protection cases were finalised within 9 months, 10.2% were finalised between 9 and 12 months and 8.8% of cases were finalised after 12 months.

Please note that the statistics for the Children's Court care and protection jurisdiction are currently collected manually and are not audited.

MR DAVID SHOEBRIDGE: But we remove children at more than four times than they do in Italy, at well over double the rate they do in New Zealand and the United Kingdom, and close to double the rate they do in Canada and the United States of America, and as a result of that we have seen an explosion in the number of children in out-of home care. When you look at those statistics do you think that there might be a problem with the threshold that has been applied?

JUDGE JOHNSTONE: I do not think I can answer that off the top of my head because I am only responding to cases that I see where I believe the majority of them are justified. I am happy to take that on notice but pure statistics are hard to disagree with if that is the statistic in countries like-I would be surprised if that is the case in New Zealand.

I am not aware of the source of the figures quoted by Mr Shoebridge and I am not sufficiently familiar with the legal thresholds that are applied in the countries specified in the question. It would therefore be inappropriate for me to draw any conclusions as to whether there was either a direct or indirect correlation between the legal threshold and the rate of removal in NSW. In my view a more detailed analysis of the issues impacting on the rate of removal in NSW would be required.

MR DAVID SHOEBRIDGE: Could you provide us with some cases where we can see that reasoning, where the magistrate is pointing to the epidemiological evidence, pointing to the psychiatrist's opinion, pointing to that evidence, where they have said," Look, these are the risks and they are well-established and we know the damage that can occur from removal, but nevertheless, I am taking into account this"?

JUDGE JOHNSTONE: You will not see it in the reasons. I am just saying that the magistrates have that knowledge from their learning and experience, from what they read and what our training consists of and their own experience. But you do not get that sort of evidence in specific terms in individual cases.

MR DAVID SHOEBRIDGE: Why not? Could there be nothing more relevant than the fact that removal will damage the child and you are sure there is some evidence of it?

THE HON. BRONNIE TAYLOR: But if the child is at risk then that is the decision that the court makes.

MR DAVID SHOEBRIDGE: But you are balancing risks. Should that evidence not be before you?

JUDGE JOHNSTONE: I am happy to take that question on notice. I have not thought of it in those terms. What we tend to do at that early stage is look at what we see as a greater risk of harm to the children from other factors.

In response to this question I think it is important not to confuse the nature of the assessment that is undertaken by the Court at the three phases of the care and protection proceedings. At the interim stage the Court needs only to be satisfied that it is not in the best interests of the safety, welfare and well-being of the child or young person that he or she should remain with his or her parents on a temporary basis. In practice there is usually limited information presented to the Court to assess the risk and the vast majority of applications for interim orders are not contested by parents. This may be because the legal practitioner has advised their client not to present evidence to the Court that cannot be substantiated at that time or might later be contradicted. That is, the legal practitioner may have assessed that it is not in their client's best interests to contest the application for an interim order. The Court is therefore often assessing risk on the basis of the information presented by the Department and in a context where the removal has already taken place.

Notwithstanding this, when making decisions in care and protection cases, including applications for interim orders the Children's Court must apply the principles of general application under s9 of the *Children and Young Persons (Care and Protection) Act* 1998. Underpinning these principles is an acknowledgement that removal of a child from a parent may damage a child or young person. For example, Section 9(2)(c) provides that in deciding what action is necessary to protect the child or young person from harm the least intrusive intervention in the child's life and his or her family must be followed. Section 9(2)(d) also acknowledges that removal of a child or young person, whether temporarily or permanently, involves a deprivation of his or her family environment. Additionally, the paramount principle under s9(1) refers not just to the safety of the child or young person but also to their welfare and well-being. That is, the Court is required to take into consideration the impact on the child, including the detriment to the child, when making an interim or other order.

The establishment phase does not involve a risk assessment. This stage involves an assessment of the facts as to whether the child is need of care and protection.

However, at the placement stage the Court is required to assess whether an order is required and if so whether the child should be restored to the parents notwithstanding the Court has determined that the child is in need of care and protection. Section 10(3)(a) specifies that the first preference for permanent placement of a child or young person is for the child or young person to be restored

to the care of his or her parent so as to preserve the family relationship. By implication this section also acknowledges the detriment to a child in removing a child on an ongoing basis.

In many cases the Children's Court will obtain expert reports by psychologists or other professionals at the placement stage to assist the Court to weigh up the risk to the child against the benefit to the child of staying with the family. Those reports will often set out the research, what could be described as epidemiological evidence, to support the clinician's assessment of the child and the parents in the particular case. That assessment is likely to include an assessment of the impact on the child of entering or remaining in out of home care on an ongoing basis.

The majority of decisions in the Children's Court are given orally. However, a consideration of some of the written judgments in the care and protection jurisdiction may give some further insight into the reasoning of the Court on this issue. In relation to this issue I refer you to the case of *The Secretary, Department of Family and Community Services and M* [2015] NSWChC 1 particularly at paragraphs 51-52 and 88.

THE HON. PAUL GREEN: I am going to read a couple of things and let you take it on notice or reply. Is it correct that when community services seeks a care and protection order in the Children's Court that both biological parents of the child will be informed of the court's process and be involved? More specifically, if the child is living with one parent will community services staff make efforts to identify, find and contact the second parent and directly provide that parent with papers about the child and court process that is under way?

Second, if that is the case, what is it a child protection caseworker is required to undertake to ensure that the noncustodial parent has not been abusive towards the custodial parent in the past and will not use the details and often highly personal information in the court's documents against that custodial parent into the future? If there is no procedure in place to address that at present, what is the duty of care that community services hold for the safety of that custodial parent in these situations? At the heart of the matter is the court documents contain extremely personal information and can make parents vulnerable. If a form of natural justice is followed by providing documents to the noncustodial parents what checks and balances are in place to ensure the wellbeing of custodial parents? Can you take that on notice?

JUDGE JOHNSTONE: There are processes in the Act which enable us to suppress information from going to a parent that has a history of child abuse or violence in the relationship.

Further to my response I can confirm that an order to suppress information in care and protection proceedings would be made under the *Court Suppression and Non-Publication Orders Act* 2010. Ordinarily both parents would be served with documents relating to the care and protection proceedings unless service has been dispensed with. However, some documents are not released to the parties without the Court's permission, for example, an Authorised Clinician's report or a report under section 82 of the *Children and Young Persons (Care and Protection) Act* 1998. The Court may decline to release a report where the safety of another person may be at risk and it would be open to one party to raise an objection to the release of the document to the other party. I am not able to respond in so far as the question referred to the duty of care held by community services caseworkers.