Child Protection Proceedings

in the

Children's Court of Victoria

Overview

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Magistrate

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OVERVIEW OF FAMILY DIVISION (CHILD PROTECTION) PROCEEDINGS IN THE CHILDREN'S COURT

INTRODUCTION

The purpose of this Paper is to provide a brief overview of the legislation governing proceedings in the Family Division of the Children's Court. (Child Protection). A more detailed analysis can be found in the research materials edited by Magistrate Peter Power on the Children's Court website.

The Cummins Report "Protecting Victoria's Vulnerable Children Inquiry" was tabled on 28 February 2012. I have referred to the Report throughout this Paper.

Commencement of Protection Proceedings

If a protective intervener is satisfied on reasonable grounds that a child is in need of protection, s/he may

(a) serve a notice under s.243 directing that the child appear or be produced before the Court or
(b) take a child into safe custody (apprehension) with or without a s.241 safe custody warrant.[1]

A Family Division proceeding is commenced by filing an application with the appropriate registrar.[2]

Grounds for a Protection Application

A child is in need of protection if any of the following grounds exist –

(a) the child has been abandoned by his or her parents and after reasonable enquiries –
(i) the parents cannot be found; and
(ii) no other suitable person can be found who is willing and able to care for the child;
(b) the child's parents are dead or incapacitated and there is no other suitable person willing and able to care for the child;

[1] Section 240(1) Children Youth and Families Act 2005. All references to legislation are references to the CYFA unless otherwise indicated.
[2] Section 214

(c) the child has suffered, or is likely to suffer, significant harm as a result of physical injury and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;

(d) the child has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;

(e) the child has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parents have not protected, or are unlikely to protect, the child from harm of that type;

(f) the child's physical development or health has been, or is likely to be, significantly harmed and the child's parents have not provided, arranged or allowed the provision of, or are unlikely to provide, arrange or allow the provision of, basic care or effective medical, surgical or other remedial care.[3]

For the purposes of subsections (1)(c) to (1)(f), the harm may be constituted by a single act, omission or circumstance or accumulate through a series of acts, omissions or circumstances.[4]

Jurisdiction

For the purposes of this Act it does not matter whether the conduct constituting a ground referred to in section 162 occurred wholly or partly outside Victoria.[5]

Child

For the purposes of Family Division proceedings, a child is defined as a person who is under 17 years, or if the child is subject to a protection order it continues in force until the eve of the child's 18th birthday.[6]

[3] Section 162(1)
[4] Section 162(2)
[5] Section 163
[6] Refer to s.3(1)

This means that if a person comes to the attention of DHS, the person has turned 17 and there is not an order in place, DHS will not be able to issue a protection application to seek a protection order in respect of that person. The Cummins Report recommended that the definition of child be amended to make it possible for protection applications in respect of any child under the age of 18 years.[7]

SERVICE

Difficulties are often encountered by the DHS in locating and identifying certain parties. It is essential that persons who are required to be served are served in accordance with the Act. Section 594 prescribes the modes of service of applications and notices under the Act and section 593(1) prescribes the service of documents when there is no other provision made.[8] In the event service cannot be effected or there are exceptional circumstances, an application must be made to dispense with service.

Protection application by notice

DHS has to serve in accordance with section 594 (see below)

(a) the child's parent and
(b) the child, if the child is of or above the age of 12 years.[9]

Section 594 provides that if the Act requires a notice of an application or hearing to be served on a child or a parent or other person in accordance with s.594, the notice may be served

> (a) the posting, not less than 14 days before the hearing date stated in the notice, a true copy of the notice addressed to the parent or the child or the person (as the case requires) at the last known place of residence or business of the parent of a child or the person; or
>
> (b) by delivering, not less than five days before the hearing date stated in the notice, a true copy of the notice to the parent or the child or the person (as the case requires); or

[7] Recommendation 43
[8] Applications to revoke vary or breach – The applicant must "as soon as possible" cause a copy of the application to be given or sent by post to any person "by or on behalf of whom such an application could have been made." (s277). Applications to extend S.O, SCO and GO – The applicant must "as soon as possible" cause a copy of the application to be given or sent by post to the child and parent of the child.(s277)
[9] Section 243(2)(c)

(c) by leaving, not less than five days before the hearing date stated in the notice, a true copy of the notice for the parent of a child or the person (as the case requires) at the last known place of residence or business of the parent or the child or the person with a person who apparently resides or works there and who apparently is not less than 16 years of age.[10]

Protection application by apprehension

DHS has to give to
(a) the child's parents, unless they cannot be found after reasonable inquiries; and
(b) the child, if the child is of or above the age of 12 years –
a written statement containing the prescribed information relating to the taking of the child into safe custody.[11]

Irreconcilable difference application

The applicant (a person who has custody of the child or a child) must cause notice of the application to be served –

- on the child's parent or child (as the case requires) in accordance with section 594 and
- on the Secretary to the DHS at least five days before the hearing of the application. [12]

With the leave of the court, the Secretary may appear or be represented at the hearing and may call and examine or cross-examine witnesses and make submissions.[13]

Proof of service

Service of a document may be proved by –
(a) evidence on oath or
(b) affidavit or
(c) declaration.[14]

[10] Section 594
[11] Section 242(1)
[12] Section 259(3)
[13] Section 259(5)
[14] Section 595(1)

The evidence of service must identify the document served, time and manner in which service is effected.[15]

In the absence of evidence to the contrary, the presumption is that service was effected if there was compliance with sections 595(1) and (2).[16]

Substituted service

Substituted service may be ordered by the court if evidence is received on oath or by affidavit that service cannot be promptly effected.[17]

Dispensation of service

If the Act requires document/s to be served on a particular individual, DHS may apply to the court and if the court is satisfied by oath or affidavit that -
(a) the individual cannot be located after the DHS has made reasonable efforts to discover his/her location or
(b) there are exceptional circumstances,
the court may make an order to dispense with service. [18]

PARTIES

- Secretary to the Department of Human Services;

- Parent –

  (a) father and mother of the child and
  (b) spouse of father and mother of child and
  (c) domestic partner[19] of father or mother of the child and
  (d) a person who has custody of the child and
  (e) a person whose name is entered as the father of the child in the register of births maintained by the Registrar of Births, Deaths and Marriages and
  (f) a person who acknowledges he is the father of the child pursuant to section 8 (2) Status of Children Act 1974 and

[15] Section 595(2)
[16] Section 595(3)
[17] Section 593(2)
[18] Section 531(2)
[19] Note – Definition of "domestic partner" - a person to whom the person is not married but with whom the person is living as a couple on a genuine domestic basis (irrespective of gender). (s.3(1))

(g) a person in respect of whom a court has made a declaration or a finding that the person is the father of the child.[20]

- Child –

Since 27 March 2013 a child aged 10 years or more must be legally represented.[21] The legal practitioner must act in accordance with any instructions given or wishes expressed by the child so far as it is practicable[22] to do so having regard to the maturity of the child.[23]

The court may determine that a child aged 10 years or more is not mature enough to give instructions to a legal practitioner considering the child's ability to communicate his/her own views, ability to give instructions in relation to the primary issues in dispute and any other matters the court considers relevant.[24] In that case, the legal practitioner must –
(a) act in accordance with what s/he believes to be in the best interests of the child; and
(b) to the extent it is practicable to do so, communicate the instructions given or wishes expressed by the child to the court.[25]

In exceptional circumstances, the court may determine that it is in the best interests of a child who is aged under 10 years, to be legally represented.[26] In that case, the legal representative will act on the best interests model referred to above.[27]

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[20] Section 3(1)
[21] Section 525. The previous child representation model was that a child who was "mature enough to give instructions" was required to be legally represented. There Act did not define an age and children generally 7 years of age were represented.
[22] Examples when it is not practicable for example to conduct a contest on the child's instructions are when a child wishes to return home and the parent refuses to have the child at home; when a child is instructing that s/he wishes that a permanent care order be made and the DHS and the proposed permanent carer seek Guardianship and not a permanent care order.
[23] Section 524(10)
[24] Section 524(1B)
[25] Section 524(11)
[26] Section 524(4). I have found exceptional circumstances for example when it was alleged the mother of 10 month old twins had munchausen by proxy; a child with disabilities had been allegedly mistreated by one or both parents and in a case in which the only parties were the DHS and an unrepresented mother and the child had special needs.
[27] Section 524(11)

- A person who is joined as a party.

Joinder applications

A person may seek to be joined as a party to the proceedings. The court must allow "as far as practicable" a person who has a "direct interest in the proceedings" to fully participate in the proceedings.[28]

Interpreter

If the court is satisfied that a child, parent or any other party to the proceeding has difficulty communicating in the English language which impacts upon their ability to understand and participate in the proceedings, the court must not hear and determine a proceeding without an interpreter.[29]

Bail Justice

The DHS is required if it takes a child into safe custody (apprehension) to take the child before the court "as soon as practicable and in any event within one working day after the child was taken into safe custody." At the Melbourne Children's Court there is a 2 pm deadline after which the child must be taken before a bail justice. The bail justice will make an interim accommodation order. That order remains in force to the next sitting day of the court. It is then necessary for the court to determine whether there will be an interim accommodation order and if so, to whom. Even if the court makes an interim accommodation order to the same person as the bail justice did, it is necessary for a new interim accommodation order to be made and for the court not to extend the order made by the bail justice.

SUBMISSIONS CONTESTS

When DHS has commenced proceedings by safe custody (apprehension) and agreement cannot be reached by the parties as to where the child is to be placed, the court will conduct an urgent hearing which is referred to as

[28] Section 522(1)(c)(ii). "As far as practicable" may impact upon, for example, whether both a maternal grandmother and maternal grandfather should be joined when they have an identical position.
[29] Section 526

a submissions contest. The procedure is referred to by Beach J in *Grandell v Hartrick.*[30]

In order for the matter to proceed as expeditiously as possible, it is important to make an order for the department to release the notes upon which it is relying to support the apprehension when it is requested and/or when it becomes apparent that agreement cannot be reached. The usual order is for the notes to be released to legal practitioners or if a party appears in person, to that party, no copies are to be made and the notes are to be returned to the DHS' legal practitioner at the conclusion of the proceedings.

The IAO is generally made for 21 days, during which time DHS will conduct enquiries and prepare a report.

INTERIM ACCOMMODATION ORDERS (IAO) [31]

An Interim Accommodation Order is a placement Order. It is an interim order. The protection application has not been proved. There is sometimes a dispute concerning to whom the IAO should be made for example, the mother or the grandmother with whom the mother and child will reside. In my view it should be made to the person who will have the primary care of the child. If the care is to be shared and one of those people is a parent, I would make the order to the parent as s.10(3)(b) provides for intervention into the parent/child relationship to be limited to that necessary to secure the safety and wellbeing of the child,

BEST INTEREST PRINCIPLES

Section 10 provides that the best interests of the child must always be paramount.[32] It details the matters to which the court is to have regard when determining whether a decision or action is in the best interests of the child. There is a focus upon preserving the family is the fundamental group in society and that a child is only to be removed from a parent if there is an unacceptable risk of harm to the child.

[30] Grandell v Hartrick Unreported SCV 31 January 1994 (N0. 1) and (No.2) 2 August 1994, refer also to Caroline Cooper v Secretary to the DoHS (SCV) 9 August 2013 (Ex rempore).
[31] The Cummins Report recommended creating a general "interim order" incorporating Interim Accommodation Orders and Temporary Assessment Orders. Recommendation 63.
[32] Section 10(1)

Section 10 further provides that it is necessary whenever determining whether a decision or action is in the best interests of the child, to consider the need to protect the child from harm, to protect his or her rights and to promote his or her development (taking into account his or her age and stage of development).[33]

In addition to the above, when making a decision or taking action in the best interests of the child, consideration must be given to the following (where they are relevant):-

> (a) the need to give the widest possible protection and assistance to the parent and child as the fundamental group unit of society and to ensure that intervention in that relationship is limited to that necessary to secure the safety and well-being of the child;
>
> (b) the need to strengthen, preserve and promote positive relationships between the child and the child's parent, family members and persons significant to the child;
>
> (c) the need, in relation to an Aboriginal child, to protect and promote his or her Aboriginal cultural and spiritual identity and development by, wherever possible, maintaining and building their connections to the Aboriginal family and community;
>
> (d) the child's views and wishes, if they can be reasonably ascertained, and they should be given such weight as is appropriate in the circumstances;
>
> (e) the effects of cumulative patterns of harm on a child's safety and development;
>
> (f) the desirability of continuity and stability in the child's care;
>
> **(g) that a child is only to be removed from the care of his or her parent if there is an unacceptable risk of harm to the child;**
>
> (h) if the child is to be removed from the care of his or her parent, that consideration is to be given first to the child being placed with an appropriate family member or other appropriate persons significant to the child, before any other placement option is considered;

[33] Section 10(2)

(i) the desirability, when a child is removed from the care of his or her parent, to plan the reunification of the child with his or her parent;

(j) the capacity of each parent or other adult relative or potential caregiver to provide for the child's needs and any action taken by the parents to give effect to the goals set out in the case plan relating to the child;

(k) access arrangements between the child and the child's parents, siblings, family members and other persons significant to the child

(l) the child's social, individual and cultural identity and religious faith (if any) and the child's age, maturity, sex and sexual identity;

(m) where a child with a particular cultural identity is placed in out-of-home care with a caregiver who is not a member of that cultural community, the desirability of the child retaining a connection with their culture;

(n) the desirability of the child being supported to gain access to appropriate educational services, health services and accommodation and to participate in appropriate social opportunities;

(o) the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance;

(p) the possible harmful effect of delay in making the decision or taking the action;

(q) the desirability of siblings being placed together when they are placed in out-of-home care;

(r) any other relevant consideration.[34] (emphasis added)

Aboriginal children

In addition to s.10 whenever an Aboriginal child is before the court regard must be had to the Aboriginal Child Placement Principles.

[34] Section 10(3)

An Aboriginal person is defined as a person who :-

> (a) is descended from an Aborigine or Torres Strait Islander; and
> (b) identifies as an Aborigine or Torres Strait Islander; and
> (c) is accepted as an Aborigine or Torres Strait Islander by an Aboriginal or Torres Strait Island community.[35]

The Aboriginal Child Placement Principle provides as follows:-

For the purposes of this Act the Aboriginal Child Placement Principle is that if it is in the best interests of an Aboriginal child to be placed in out-of-home care, in making that placement, regard must be had –

> (a) to the advice of the relevant Aboriginal agency; and
> (b) to the criteria in subsection (2); and
> (c) to the principles in section 14.[36]

The criteria are –

> (a) as a priority, wherever possible, the child must be placed within the Aboriginal extended family or relatives and where this is not possible other extended family or relatives;
> (b) if, after consultation with the relevant Aboriginal agency, placement with extended family or relatives is not feasible or possible, the child may be placed with –
>
> > (i) an Aboriginal family from the local community and within close geographical proximity to the child's natural family;
> > (ii) an aboriginal family from another aboriginal community;
> > (iii) as a last resort, a non-Aboriginal family living in close proximity to the child's natural family;
> > (c) any non-Aboriginal placements must ensure the maintenance of the child's culture and identity through contact with the child's community.[37]

The requirements under subsection (1)(a) to have regard to the advice of the relevant Aboriginal agency and under subsection(2)(b) to consult with the relevant Aboriginal agency do not apply to the making of a decision or the taking of an action under Part 3.5.[38]

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[35] Section 3(1)
[36] Section 13(1)
[37] Section 13(2)
[38] Section 13(3) – Child care arrangements.

In addition the following further principles are relevant for the placement of an Aboriginal child.

In determining where a child is to be placed, account is to be taken of whether the child identifies as Aboriginal and the expressed wishes of the child.[39]

If a child has parents from different Aboriginal communities, the order of placement set out in sections 13(2)(b)(i) and 13(2)(b)(ii) applies but consideration should also be given to the child's own sense of belonging.[40]

If a child with parents from different Aboriginal communities is placed with one parents family or community, arrangements must be made to ensure that the child has the opportunity for continuing contact with his or her other parents family, community and culture.[41]

If a child has one Aboriginal parent and one non-Aboriginal parent, the child must be placed with the parent with whom it is in the best interests of the child to be placed. [42]

If an Aboriginal child is placed with a person who is not within an Aboriginal family or community, arrangements must be made to ensure that the child has the opportunity for continuing contact with his or her Aboriginal family, community and culture.[43]

[39] Section 14(1)
[40] Section 14(2)
[41] Section 14(3)
[42] Section 14(4)
[43] Section 14(5)

INTERIM ACCOMODATION ORDER PLACEMENTS

An Interim Accommodation Order may provide for a child to

(a) sign an undertaking to appear[44],
(b) reside with the parent/s;
(c) reside with a suitable person[45];
(d) reside in out-of-home care;
(e) be placed in secure welfare;
(f) be placed in a hospital;
(g) be placed in a declared parent and baby unit.[46] [47]

Secure Welfare

- The test for placing a young person in secure welfare is that there is a "substantial and immediate risk of harm to the child."[48]
- The fact that a child does not have adequate accommodation of itself is not a sufficient reason for an IAO to be made to secure welfare.[49]
- The Order remains in force for a period not exceeding 21 days.[50]
- The Order can only be extended for one further period and that period cannot exceed 21 days. [51]

IAO to a hospital or declared parent and baby unit

- There is a prescribed form to be completed confirming there is a bed available for the child.[52]

Details of IAO placement

On occasions, the DHS may request the details of the placement of the child be undisclosed to the parent/s. A parent is entitled to be given details of the child's whereabouts unless the court makes a direction that

[44] This undertaking is rarely made and would require the child to be an adolescent.
[45] Children Youth and Families Regulations 2007 Regulation 16
[46] Section 263(1)
[47] Section 263(1)
[48] Section 242(5)(b)
[49] Section 263(5)
[50] Section 264(2)
[51] Section 267(2)(c)
[52] Section 263(1)(f) and (g).

the placement details be undisclosed. Such a direction can only be made if the court is of the opinion that it is in the best interests of the child.[53]

UNDERTAKINGS – s.272

A summary of the features of a section 272 undertaking is as follows: –

- Protection application is not proved.
- Written undertaking may be given by :
  - (a) the child; or
  - (b) the child's parent; or
  - (c) the person with whom the child is residing.[54]
- The undertaking includes the person undertaking to do or refrain from doing the thing/s specified in the undertaking.[55]
- The undertaking must not exceed 6 months of if there are "special circumstances"[56] the undertaking may exceed 6 months but not 12 months.[57]
- The undertaking may include any conditions the court considers to be in the child's best interests.[58]
- The undertaking can only be made if the person making the undertaking consents.[59]
- There is provision for variation or revocation of an undertaking.[60]
- There is no provision for a breach.

WHAT ARE PROTECTION ORDERS?

If the court finds

(a) that the child is in need of protection; or

(b) that there is a substantial and irreconcilable difference between the person who has custody of the child and the child to such an extent that the care and control of the child are likely to be seriously disrupted, then the court may make a protection order.[61]

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[53] Section 265(1) and (2)
[54] Section 272(2)
[55] Section 272(2)
[56] "Special circumstances" are not defined.
[57] Section 272(3)
[58] Section 272(40
[59] Section 272(50
[60] Section 273

The protection orders are; –
(a) an order requiring a person to give an undertaking;
(b) a supervision order;
(c) a custody to third party order;
(d) a supervised custody order;
(e) a custody to secretary order;
(f) a guardianship to secretary order;
(g) a long-term guardianship to secretary order;
(h) an interim protection order.[62]

PROOF OF THE PROTECTION APPLICATION

The protection application must be proved on the basis of actual harm or likelihood of harm. In relation to the proving of a protection application, Magistrate Peter Power in the Children's Court website resource materials states[63]

> *The question of whether any of the grounds of section 162(1) of the CYFA are established is to be determined objectively – as opposed to deciding whether such risk or harm was intended by the parent(s)' actions – and is to be determined as at the time when the protection application was made ; see MS and BS v DOHS (County Court of Victoria unreported 18/10/2002) per Judge Cohen at p18* (*Application for Judicial Review pursuant to O.56 dismissed: Mr amd Mrs X v Secretary to DOHS [2003] VSC 140 per Gillard J.*

"Likely to suffer harm"

Magistrate Power[64] refers to Lord Nicholls of Birkenhead *In re H and Others (Minors) (Sexual Abuse : Standard of Proof)*[65] as to the meaning of the word "likely" in this context. He stated –

> *Parliament cannot have been using likely in the sense of more likely than not. If the word likely were given this meaning, it would have the effect of leaving outside the scope of care and supervision orders cases where the court is satisfied there is a real possibility of significant harm to the child in the future but that possibility*

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[61] Section 274
[62] Section 275(1)
[63] At [5.5.3]
[64] At [5.5.4]
[65] [1996] AC 563 at 585 (Lord Goff of Chiefly and Lord Mustill agreed. They were discussing a similar provision in s.31(2)(a) Childrens Act 1989(England).

> *falls short of being more likely than not ……* ***likely is being used in the sense of a real possibility; a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm any particular case****.*

He further stated-

> *Facts which are minor or even trivial if considered in isolation, when taken together may suffice to satisfy the court of the likelihood of future harm*[66].

What constitutes "significant damage" and "significant harm"?

Magistrate Power[67] refers to the decision of O'Bryan J in *Director of Community Services Victoria v Buckley and Ors*[68] when considering what constitutes "significant damage" and "significant harm."

- The word "significant" means "important, notable, of consequence."[69]

- " …it is "irrelevant that the evidence may not prove some lasting or permanent effect or that the condition could be treated."[70]

- "One might observe that before a finding could be made that a child has suffered or is likely to suffer emotional or psychological harm to the degree required by subclause (e) consideration would need to be given to the expert evidence before the court. It would be very difficult to make a finding in favour of the [Department] in the absence of credible expert evidence."[71]

PROTECTION ORDERS

I will provide a very brief overview of the features of the protection orders.

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[66] At 591
[67] At [5.5.5]
[68] SCV Unreported 11/12/1992
[69] At page 4
[70] At page 5
[71] At page 6

UNDERTAKINGS – SECTION 278

- Protection application is proved.
- Written undertaking may be given by :
  (a) the child; or
  (b) the child's parent; or
  (c) the person with whom the child is residing.[72]
- The undertaking is in writing and includes the person undertaking to do or refrain from doing the thing/s specified in the undertaking.[73]
- The undertaking must not exceed 6 months of if there are "special circumstances"[74] the undertaking may exceed 6 months but not 12 months.[75]
- The undertaking may include any conditions the court considers to be in the child's best interests.[76]
- The undertaking can only be made if the person making the undertaking consents.[77]
- There is provision for variation or revocation of an undertaking.[78]
- There is no provision for a breach.

INTERIM PROTECTION ORDERS (IPO)[79]

- The court is satisfied

  (a) the child is in need of protection or that there is and irreconcilable difference between the person who has custody of the child and the child and
  (b) it is desirable, before making a protection order to test the appropriateness of a particular course of action.[80]

- An IPO may also be made upon an application to revoke a supervised custody order, a custody to third party order, a breach of a supervision order or a breach of a supervised custody order and

[72] Section 278(1)
[73] Section 278(1)
[74] "Special circumstances" are not defined.
[75] Section 278(2)
[76] Section 278(3)
[77] Section 278(4)
[78] Section 279
[79] The Cummins Report recommended renaming IPOs as either Tempoary Supervision Orders or Temporary Care Orders depending upon whether the chills was residing with a parent. Recommendation 63.
[80] Section 291(1)

the court is satisfied it is desirable before making a further protection order, to test the appropriateness of a particular course of action.[81]

- The maximum period of an IPO is three months.[82]

- The IPO states who has responsibility for the supervision of the child [83] and may include with whom the child will reside.[84]

- Upon the return of the IPO if the court is adjourning the proceeding, the court may make an IAO.[85]

- If an IAO is made, it must include the same conditions as the IPO including the child living with the same person/s as provided for in the IPO unless
    (a) the parties agree to different living arrangements for the child or
    (b) the parties agree to different conditions or
    (c) the court is satisfied circumstances have changed.[86]

- Upon the return of the IPO a protection order may be made.

SUPERVISION ORDERS

- The child is in the day to day care of one or both parents.[87]
- The order does not affect the guardianship or custody of the child.[88]
- The order must either
    (a) not exceed 12 months; or
    (b) if the court is satisfied that there are special circumstances which warrant it, the order may exceed 12 months but must not exceed two years.[89]

- If the order exceeds 12 months, the court must direct DHS to review the operation of the order before the end of 12 months and

[81] Section 291(2)
[82] Section 291(3)(e)
[83] Section 291(3)(b)
[84] Section 291(3)(f)
[85] Section 292(1)
[86] Section 292(2)
[87] Section 280(1)(c)
[88] Section 280(1)(b)
[89] Section 280(2)

to notify the court, child, child's parent and other persons the court directs before the end of that period, if DHS considers it is in the best interests of the child for the order to continue.[90] If DHS does not make the notification, the supervision order ceases at the end of 12 months.[91]

CUSTODY TO THIRD PARTY ORDERS[92]

(a) grants sole or joint custody to nominated person/s and
(b) must not be made in favour of the Secretary in his or her official capacity or a person employed by a community service in his/her official capacity or a parent of the child and
(c) does not affect the guardianship of the child and
(d) remains in force for not more than 12 months and
(e) may include any conditions in the best interests of the child including access by a parent or other person and in the case of an Aboriginal child – a condition incorporating a cultural plan and
(f) must not include any condition that gives powers or duties or otherwise involves DHS.[93]

- The court must not make a custody to third party order unless the court

  (a) has considered the effect of the order on the likelihood of reunification of the child with his/her family; and
  (b) is satisfied wishes and feelings of the child so far as practicable have been ascertained and due consideration has been given to them having regard to the age and understanding of the child.[94]

- If two persons have been granted joint custody of the child and cannot agree on a right, power or duty, either of them may apply to the court regarding the exercise of the right or power or performance of the duty.[95]

[90] Section 280(3)
[91] Section 280(4)
[92] The Cummins Report recommended removing Custody to Third Party Orders. Recommendation 63.
[93] Section 283(1)
[94] Section 283(2)
[95] Section 283(3)

SUPERVISED CUSTODY ORDERS

- The ultimate objective of a SCO is reunification of the child with his/her parent.[96]
- The order remains in force for the period of the order, not exceeding 12 months.[97]

(a) grants sole or joint custody to nominated person/s and

(b) must not be made in favour of the Secretary in his or her official capacity or a person employed by a community service in his/her official capacity or a parent of the child and

(c)does not affect the guardianship of the child and
(d) remains in force for the period specified in the order (not exceeding 12 months) and

(e) may include any conditions in the best interests of the child including access by a parent or other person and in the case of an Aboriginal child – a condition incorporating a cultural plan and

(f) must provide that if whilst the Order is in force, DHS is satisfied it is in the child's best interests, the DHS may in writing, direct that the child return to the sole or joint custody of a parent or parent/s of the child.[98] (The effect of this provision is that the SCO is converted into a Supervision Order for the period remaining of the Order.)[99]

- The court must not make a supervised custody order order unless the court
  (a) has considered the effect of the order on the likelihood of reunification of the child with his/her family; and
  (b) is satisfied the wishes and feelings of the child so far as practicable have been ascertained and due consideration has been given to them having regard to the age and understanding of the child.[100]

[96] Section 284(4)
[97] Section 284(3)
[98] Section 284(1)
[99] Section 286
[100] Section 284(2)

- If two persons have been granted joint custody of the child and cannot agree on a right, power or duty, either of them may apply to the court regarding the exercise of the right or power or performance of the duty.[101]

CUSTODY TO SECRETARY ORDERS

(a) grants sole custody of the child to DHS

(b) does not affect guardianship

(c) remains in force for the period of the order, not exceeding 12 months

(d) may include any conditions in the best interests of the child including access by a parent or other person and in the case of an Aboriginal child – a condition incorporating a cultural plan.[102]

GUARDIANSHIP TO SECRETARY ORDERS

(a) grants custody and guardianship of the child to DHS to the exclusion of all others and
(b) remains in force for a period not exceeding 2 years and
(c) ceases to be in force-
(i) when child attains 18 years or
(ii) when the child marries –
whichever happens first.

In *DHS v Mr and Mrs B*[103] Magistrate Power stated that it would be in the best interests of a child for a guardianship order to be made if but only if:-

- both parents were unavailable or unwilling to make guardianship decisions; or
- both parents were incapable of making such decisions; or
- in the past both parents had made one or more significantly inappropriate guardianship decisions; or

[101] Section 284(5)
[102] Section 287(1)
[103] 2007 VCHC 1 at 27

- the permanent care case plan could not be properly advanced unless the child was on a guardianship to secretary order.

The court cannot attach conditions to a Guardianship order.

LONG TERM GUARDIANSHIP TO SECRETARY ORDERS

- A long-term guardianship to secretary order –

(a) may be made in respect of the child of or over the age of 12 years; and
(b) grants custody and guardianship of the child to DHS to the exclusion of all other persons; and
(c) subject to the following provisions, remains in force until the child attains the age of 18 years or marries whichever happens first; and
(d) may be made instead of extending a guardianship to secretary order.[104]

- The court must not make a long-term guardianship order unless the court is satisfied that –

(a) there is a person/s available with whom the child will continue to live for the duration of the order; and
(b) the Secretary consents to the making of the order; and
(c) the child consents to the making of the order; and
(d) the making of the order is in the best interests of the child.[105]

- The court must direct the Secretary –

(a) to review the operation of the order before the end of each 12 month period; and
(b) to notify the court, the child, the child's parent and such other persons as the court directs before the end of that period if the secretary considers that it is in the best interests of the child for the order to continue for a further 12 months.[106] If the notification is not done the guardianship to secretary order ceases to be in force at the end of the period of 12 months to which the review applies.[107]

[104] Section 290(1)
[105] Section 290(2)
[106] Section 290(3)
[107] Section 290(4)

PERMANENT CARE ORDERS (PCO)[108]

A PCO has many of the features of an adoption order. It grants custody and guardianship to the permanent carer/s to the exclusion of all others.[109] If "special circumstances" exist and the Secretary, the child and the proposed permanent carers have agreed, guardianship may vest jointly in the proposed permanent carer/s and the child's parent.[110]

The order continues in force until the child attains 18 or when the child marries whichever happens first.[111] It must include conditions in the best interests of the child concerning access by the child's parent and may include conditions concerning access by the child's siblings and other persons significant to the child.[112]

In the case of an Aboriginal child, it may include a condition incorporating a cultural plan for the child.[113] The court cannot make a PCO to place an Aboriginal child solely with a non-Aboriginal person/s unless the disposition report states that no suitable placement can be found with an Aboriginal person/s and the decision to seek the order has been made in consultation with the child, where appropriate and the Secretary is satisfied that the order sought will accord with the Aboriginal child placement principle. In addition, the court must have received a report from an Aboriginal agency that recommends the making of the order and if the court so requires, a cultural plan has been prepared for the child.[114]

When a PCO is made, any protection order then in force ceases to be in force.[115]

The Secretary makes the application[116] and with the leave of the court, the proposed permanent carers may appear and be legally represented at the hearing of the application and may call and examine or cross examine

[108] The Secretary to DHS must cause notice of the application for PCO to be served on the child, the subject of the application, the parent of the child and person/s named in the application as suitable to have custody or guardianship of the child and such other persons as the court directs. The modes of service are detailed in s.320(5) and are the same as s. 549.
[109] Section 321(a)
[110] Section 321(1)(b)
[111] Section 321(1)(c)
[112] Section 321(1)(d) and (e).
[113] Section 321(1)(f).
[114] Section 323
[115] Section 321(2)
[116] Section 320(1)

witnesses and make submissions.[117] They are taken to be a party to the proceeding.[118]

The criteria for a court making a PCO are :-

(a) the child's parent or, if the child's parent has died, the child's surviving parent has not had care of the child for a period of at least six months or for periods that total at least six months of the last 12 months[119]; and

(b) it is satisfied –

(i) the parent is unable or unwilling to resume custody and guardianship of the child; or

(ii) it would not be in the best interests of the child for the parent to resume custody and guardianship of the child; and

(c) it is satisfied that the person/s named in the application as suitable to have custody and guardianship of the child is or are suitable having regard to –

(i) any prescribed matters[120]; and

(ii) any wishes expressed by the parent in relation to those prescribed matters; and

(d) it is satisfied that the person/s named in the application is or are willing and able to assume responsibility for the permanent care of the child by having custody and guardianship of the child; and

(e) it is satisfied that so far as is practicable the wishes and feelings of the child have been ascertained and due consideration given to them having regard to the age and understanding of the child;

(e) it is satisfied that the best interests of the child will be promoted by the making of the order.[121]

The court cannot make a PCO unless it has received and considered a disposition report, and a stability plan has been prepared.[122] The court

[117] Section 320(2)
[118] Section 320(3)
[119] Any period the child has been in the care of a person or body under a child care agreement must be disregarded when calculating time. (section 319(2))
[120] Regulation 18 Children Youth and Families Regulations 2007 prescribes the relevant matters which include the health of the person/s, the skills and experience of the person/s and the capacity of the person/s to provide stability for a child for the duration of the permanent care order.
[121] Section 319(1)
[122] Section 322(1) and (2).

must not make a PCO if a protection order is in force.[123] Nor can a PCO be made if there are current FLA proceedings commenced by a person who is not a parent regarding the custody and guardianship of the child.[124]

APPLICATIONS TO VARY, BREACH, EXTEND AND REVOKE

The Act provides for applications to be made to vary, breach, extend and revoke protection orders.

THERAPEUTIC TREATMENT AND THERAPEUTIC TREATMENT PLACEMENT ORDERS[125]

I have attached a summary I have prepared of the provisions which relate to Therapeutic Treatment Orders and Therapeutic Treatment Placement Orders together with a decision of Judge Grant in respect of an application to extend a TTO.[126]

CHILDREN'S COURT CLINIC

The Clinic is an independent body within the Department of Justice.[127] It provides reports to both the Family and Criminal Divisions of the Court. The Court may request reports from the CCC. It is necessary for Terms of Reference to be completed by the parties, agreed upon by the magistrate and forwarded to the Clinic together with any DHS and other relevant reports. In the Family Division, the most common referrals are in respect of the attachment and bonding of children, prospects for reunification and access arrangements.

Jennifer Bowles
Magistrate
Children's Court
31 August 2013

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[123] Section 322(3)
[124] Section 322(4)
[125] The Secretary to DHS must serve the notice for a TTO/TTPO on the child and the child's parents in accordance with s.594. (s.246(2)(c),252(3)(c). Note however that in relation to TTPOs s. 252(2) also provides for service on the child and the child's parent "a reasonable time before the hearing of the application."
[126] Victoria Police v HW [2001] VChC1
[127] The Cummins Report has recommended that the Clinic be abolished and re established within the Department of Health. Recommendation 74.