

Restoration Orders in Child Protection Matters



This fact sheet summarises the Ask LOIS webinar on this topic, presented by Carolyn Jones, Senior Solicitor, Women's Legal Services on 4 March 2014. This webinar can be downloaded for free at www.asklois.org.au/webinars/past-webinars.

This fact sheet covers:

- What are the relevant laws?
- When can your client apply for an order that her children be returned to her care?
- Practical tips for applying for a restoration order
- Managing your client's expectations and understanding when there is a realistic possibility of restoration
- The Child Protection Legislation Amendment Bill 2013 and how it might impact restoration outcomes

Children and Young Persons (Care and Protection) Act 1998

- Decisions about risk of harm and whether to remove or return children to their parents are made under this Act.
- In some cases, after children have been removed from the care of their parents it may be appropriate to apply to the Children's Court for an order to return the children to the care of their parents or for other variations.
- Applications to vary and cancel the care order are made under section 90 of the Act.
- If you work for an agency with case management responsibilities for a child who is subject to an order from the Children's Court, your responsibilities include ensuring that the care order reflects the current circumstances for the child.

When to use section 90

Section 90 applications can be made when:

- Increasing contact with a parent is assessed as being in the best interests of the child
- An agency working with a mum might assess the risk of harm issues have been appropriately addressed and that the child should be restored to her care
- A parent may have not met their responsibilities under a care plan and/or restoration plan

Who can apply under section 90?

Section 90(3) of the Act provides that applications can be made by:

- The Director General (FaCS) – this can include agencies with case management responsibilities and the Children's Guardian
- The child or young person
- A person with parental responsibility for the child
- A person from whom parental responsibility for the child has been removed
- Any person with sufficient interest in the welfare of the child as determined by the court

Leave – Significant Change

- Section 90 applications are a two-step process - getting leave granted and then the court making the decision about varying or ending the existing orders
- Before the court can make a decision about whether to change or cancel a care order they must first agree to hear the application, which is known as granting leave

Section 90(2) of the Act provides that:

The Children's Court may grant leave if it appears that there has been a significant change in any relevant circumstances since the care order was made or last varied.



- The person applying under section 90 has the responsibility for establishing there has been a significant change.
- What is a relevant circumstance varies from case to case, but requires a comparison of the facts or circumstances that were considered when the original order was made and the current situation.
- Eg, if the court originally removed a child after finding significant risk of harm because of substance abuse by the parents and domestic violence, the leave application should provide detailed information about significant changes in relation to those issues, such as ending a violent relationship and regular attendance in treatment programs. It is also useful to link the changes to positive outcomes for the child.
- Before leave can be granted the court must also consider other factors including:
 - The age of the child
 - How long the child has been living with their current carer
 - Any future plans for the child
 - Whether the person applying has an arguable case
- Even if there has been a significant change in a relevant circumstance since the original orders were made the court can refuse leave if they don't think the leave application shows that the applicant has some prospects of success.
- Timing is very important and you need to engage in reality testing with clients.

Why is there a need to seek leave?

The main purpose is to protect children, who may be very vulnerable, from being dragged through another court process unless there is a very good reason to do so. Sometimes it may also be relied on to stop people wasting the court's time.

A good leave application is essential

- It is very important that parents see a lawyer to get help preparing their court documents.
- The parent will need to file an application and an affidavit. The affidavit should:
 - Give a brief background to the making of the original care order, including a summary of the risk factors that resulted in the children being removed
 - Set out the nature and frequency of contact that the parent or parents have been having with the children since the orders were made
 - Provide detailed information about the parent's efforts to address the risk factors
 - Provide details about proposals for the future care of the children including the parent's capacity to care for the children and contact with other people who are important to the children, even if your client does not like that person e.g. relatives of the other parent
 - Refer to any restoration plans or relevant reports e.g. those made under section 82

Realistic Possibility of Restoration

Section 83 of the Act provides that:

If FaCS apply for the removal of a child from the care of his or her parents, they must assess whether there is a realistic possibility of the child being restored to their parents by considering:

- *The circumstances of the child, and*
- *The evidence that the parents are likely to be able to satisfactorily address the issues that led to removal.*

- Case decisions indicate it is not enough that there is potential for a parent to improve, rather they must have some significant *runs on the board*. Ie, significant success in addressing risk and improving parenting capacity and it appears likely they will continue to be successful.



Care Plans

- Care Plans are under section 78 of the Act
- When FaCS apply to the Children's Court for a child to be removed from a parent's care they must provide the court with a copy of a care plan.
- FaCS provides their opinion about the realistic possibility of restoration in a care plan, which must be provided to the court before final orders are made.
- Sometimes there might be a separate restoration plan as part of the case management for the child, which has been developed with input from the parents, FaCS and support services.

Minimum Outcomes

Care plans may include information about the minimum outcomes to be achieved before restoration can occur, for example the client must:

- Successfully complete a residential drug and alcohol rehabilitation program for a minimum of 6 consecutive months
- Secure and maintain stable accommodation in one area for at least 12 months
- Not come to the attention of police for domestic violence or drug and alcohol offences
- Engage with a Family Support Service and actively participate in parenting courses

The minimum outcomes can set a very high bar and we often hear that FaCS require 100% compliance with the minimum standards

What happens if leave is refused by the court?

If leave is refused to proceed with the section 90 application, the parent can appeal to the District Court.

The District Court has the power to run the appeal:

- As a new hearing where the parties can file fresh evidence that was not before the Children's Court, or
- Not allow fresh evidence and only look at the transcript from the Children's Court and the evidence already filed, or
- A mixture of both.

In most case the District Court appeal will be run by using the transcript and the parties have to seek leave to file fresh evidence.

If leave is granted the matter then goes back to the Children's Court for the substantive hearing, such as whether the child should be returned to their parent's care.

What happens if leave is granted by the court?

If leave is granted to proceed with the section 90 application the court will consider things like:

- The age of the child and their wishes – age can impact how much weight the court will give to their wishes
- How long the child has been with the current carer
- The strength of attachment between the child and their parents and with the current caregivers
- The capacity of the parents to care adequately for the child
- The psychological impact on the child if the current arrangements are changed.

Supporting Evidence

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It is a good idea for parents to provide the court with supporting evidence from agencies or people they have been working with, such as:

- Certificates or reports from programs they have completed like drug and alcohol treatment or parenting classes
- Letters or reports from counsellors, doctors or other services they have been attending setting out the type of service, frequency and an assessment of progress

There is also a greater chance of a successful restoration if the parent has been working closely with FaCS and/or the agency with case management responsibility.

Court Events

After court documents have been filed, in most cases parents will be given an opportunity to attend 'alternative dispute resolution' (ADR), which is a type of mediation, to see if they can reach an agreement with FaCS and any other parties concerned with the best interests of the children.

If they are unable to reach an agreement through ADR there will be a hearing before a Magistrate in the Children's Court. The Magistrate will make a decision after reading affidavits and supporting material and hearing evidence from the parties.

Key things for parents to know

- Start working towards restoration as soon as children are removed, it takes time to get kids back and it is better if FaCS support restoration from the start – and basically it is almost impossible to get your kids back if it is opposed by FaCS. Starting early will be particularly important if the new timeframes are passed into law.
- Be proactive, ask FaCS what risk factors need to be addressed and stay in regular contact with them - restoration of kids to parents is much more likely if parents are working well with FaCS and other agencies
- Don't miss contact visits or appointments – don't give FaCS any evidence to use against you
- The leave application is very important, get legal advice before you file

Further Resources

- Legal Aid *Kids in Care* booklets (set of 6)
- www.legalaid.nsw.gov.au/publications/factsheets-and-resources/kids-in-care
- WLSNSW publication *10 Things you need to know when DoCS/FaCS remove your child*
- www.womenslegalsw.asn.au/wlsnsw/resources/other-publications/
- Community Legal Centres NSW - Child protection page
- http://www.clcnsw.org.au/cb_pages/child_protection.php
- WLSNSW - Changes to child protection law
- <http://www.womenslegalsw.asn.au/wlsnsw/law-reform/child-protection-law-changes/>