

CHILDREN'S ISSUES IN THE SUPREME COURT

Address to the Children's Court of New South Wales Meeting

Friday, 8 April 2016

The Hon Justice Paul Brereton AM RFD

INTRODUCTION

Notwithstanding the assumption by the Commonwealth in the (CTH) *Family Law Act 1975* of jurisdiction in respect of children of marriages, the subsequent referral of power in respect of ex-nuptial children, and the extensive statutory jurisdiction in respect of children conferred on the Children's Court, the Supreme Court retains, in addition to its supervisory jurisdiction, and its statutory jurisdiction under the (NSW) *Adoption Act 2000*, its inherent or *parens patriae* jurisdiction, which in exceptional cases may provide the only means for dealing with unusually difficult circumstances in children's cases.

In this paper, I discuss the following aspects of the Supreme Court's jurisdiction in children's matters:

- The *parens patriae* jurisdiction generally, and its relationship with the jurisdiction of the Children's Court;
- Secure accommodation orders; and
- Out-of-home-care adoptions, including birth parent contact.

THE *PARENS PATRIAE* JURISDICTION

Origins and nature of the *parens patriae* jurisdiction of the Supreme Court

The *parens patriae* jurisdiction is derived from the direct responsibility of the Crown as "parent of the country" for those persons who from their legal disability cannot look after themselves and are in need of protection - in particular children and incapable persons.¹ It probably originated in the time of Edward III, and was

¹ For general overviews and history of the jurisdiction, see *Wellesley v Duke of Beaufort* (1827) 2 Russ 1, 20 [38 ER 236, 243] (Lord Eldon LC) (on appeal *Wellesley v Wellesley* (1828) 2 Bli N S 124; [4 ER 1078]); *Secretary, Department of Health And Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218, 258-9 (Mason CJ, Dawson, Toohey and Gaudron JJ), 279-80 (Brennan J); *In re L (An Infant)* [1968] P 119, 156 (Lord Denning MR); *Re Eve* [1986] 2 SCR 407; 31 DLR (4th) 14; *K v Minister for Youth and Community Services* [1982] 1 NSWLR 311, 323 (Helsham CJ in Eq); *Director-General, New South Wales Department of Community Services v Y* [1999] NSWSC 644, [85] (Austin J).

originally vested in the Lord Chancellor, who exercised it through the Court of Chancery² and, in due course and in this State, the Equity Court.³

By reason of the prerogative of the Crown to act as supreme parent of children, the jurisdiction requires and obliges the court to act in the manner of a wise, affectionate, and careful parent for the welfare of the child.⁴ While the original focus of the jurisdiction was more concerned with protecting the property of a minor, it expanded to be concerned with the protection and welfare of children more generally,⁵ and has become “essentially protective” in nature.⁶ In exercising the jurisdiction, the court’s concern is predominantly the welfare of the person involved.⁷

Traditionally, the Court assumed parental responsibility in such a case by making a child a ward of the Court.⁸ The effect of making a child or young person a ward of Court is that the Court’s power supersedes the rights and powers of the parents or other guardians, and the Court’s consent is required for all important steps in the child’s life.⁹

However, the jurisdiction is not limited to circumstances in which the child has been made a ward of the Court; it is now established that wardship is a matter of machinery,¹⁰ and is the result of, and not the ground for, the exercise of the Court’s inherent jurisdiction,¹¹ so that protective orders may be made either by the machinery of wardship, or by *ad hoc* orders, including injunctions, which leave the guardianship and custody of the child otherwise unaffected.¹² Nowadays, the court prefers to intervene to the minimum extent necessary for the welfare of the child, and only makes the child a ward of court where such a course is necessary.¹³

² *Fountain v Alexander* (1982) 150 CLR 615 at 633 (Mason J); see also Lowe and White, *Wards of Court*, 2nd ed (1986), pars 1-2; cited in *Marion’s Case* (1992) 175 CLR 218, 279-80 (Brennan J).

³ *In re L (An Infant)* [1968] P 119, 156 (Lord Denning MR); *Marion’s Case* (1992) 175 CLR 218, 279-80 (Brennan J); *Re Frances and Benny* [2005] NSWSC 1207, [17] (Young CJ in Eq).

⁴ *R v Gyngall* (1893) 2 QB 232, at p 241, cited in *Marion’s Case* at 280 per Brennan J.

⁵ *In re Spence* (1847) 2 Ph 247 (Lord Cottenham LC); *In re L (An Infant)* [1968] P 119, 156-7 (Lord Denning MR); *Director-General, New South Wales Department of Community Services v Y*, (Austin J)

⁶ *Marion’s Case* (1992) 175 CLR 218, 279-80 (Brennan J).

⁷ *Re Frances and Benny* [2005] NSWSC 1207, [17] (Young CJ in Eq).

⁸ *In re L (An Infant)* [1968] P 119, 156-7; *Director-General, Department of Community Services; Re Jules* [2008] NSWSC 1193 (Brereton J).

⁹ *Director-General, New South Wales Department of Community Services v Y; In re L (An Infant)* [1968] P 119, 156-7.

¹⁰ *In re L (An Infant)* [1968] P 119, 156-7.

¹¹ *Re N (Infants)* [1967] Ch 512, 531 (Stamp J); see also *L v L* [1969] P 25 (Sir Jocelyn Simon P).

¹² *Marion’s Case* at 280 per Brennan J; see also *K v Minister for Youth and Community Services* [1982] 1 NSWLR 311, 323.

¹³ For a case in which wardship was considered desirable, see *Director-General, Department of Community Services; Re Jules* [2008] NSWSC 1193 (Brereton J).

Scope

The jurisdiction is wide-ranging and far-reaching. It extends as far as necessary for the protection and education of the child.¹⁴ It is not a jurisdiction that is encumbered with technicalities.¹⁵ No jurisdictional limits have ever been described and, subject to the requisite nexus with the welfare of the child, in theory it is unlimited.¹⁶ The power is more extensive than that of parents, because the courts can exercise jurisdiction in cases where parents have no power to consent to an operation, as well as cases in which they have the power.¹⁷ Thus “the jurisdiction is of a very broad nature, and ... can be invoked in such matters as custody, protection of property, health problems, religious upbringing and protection against harmful associations”.¹⁸ It has been invoked to enable the performance of medical procedures (where consent by or on behalf of a child has not been forthcoming) including vaccination,¹⁹ involuntary admission and treatment for anorexia nervosa,²⁰ abortion (overriding the decision of the Minister who, having parental responsibility, declined to consent, and ordering that he give all requisite consents),²¹ sterilisation of an intellectually disabled child for reasons which are not therapeutic,²² parentage testing,²³ and indefinite protective detention and restraint.²⁴

¹⁴ *Wellesley v Wellesley* (1828) 2 Bli N S 124, 136; [4 ER 1078, 1083] (Lord Redesdale); cited in *Marion's Case*, 258 (Mason CJ, Dawson, Toohey and Gaudron JJ).

¹⁵ *Re Frances and Benny* [2005] NSWSC 1207, [17] (Young CJ in Eq).

¹⁶ *In re X (A Minor)* [1975] 2 WLR 335 at 339-340, 342, 345, 345-346; [1975] 1 All ER 697 at 699-700, 703, 705, 706; *In re R (A Minor)* [1991] 3 WLR 592; [1992] Fam 11; *Marion's Case*, at 258-9 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Director-General, New South Wales Department of Community Services v Y* at [90] (Austin J: “contemporary descriptions of the *parens patriae* jurisdiction over children accept that in theory there is no limitation on the jurisdiction”).

¹⁷ *Marion's Case*, at 258-9 (Mason CJ, Dawson, Toohey and Gaudron JJ).

¹⁸ *Re X* [1975] 1 All ER 697 (Latey J).

¹⁹ *Director-General, Department of Community Services; Re Jules* [2008] NSWSC 1193.

²⁰ In *Re W* [1992] 3 WLR 758; [1992] 4 All ER 627 the Court of Appeal upheld an order for treatment for a young person with anorexia nervosa, holding that her wishes, while relevant, were not conclusive. *Re C* [1997] 2 FLR 180 also involved a young woman with anorexia nervosa, who was ordered by the Court to remain at a clinic for treatment until discharged by her doctor or further order – and the court’s order provided for the use of reasonable force, if necessary, to detain her. In *DoCS v Y*, Austin J made orders to the effect that the child be returned to the Children’s Hospital without her consent, to resume a course of treatment for anorexia nervosa, and authorising the hospital staff to detain her, using reasonable force if necessary.

²¹ *K v Minister for Youth and Community Services* [1982] 1 NSWLR 311 (Helsham CJ in Eq).

²² *Marion's Case*; see also *In Re B (A Minor) (Wardship: Sterilisation)* [1988] AC 199; [1987] 2 All ER 206; cf *Re Eve* [1986] 2 SCR 388.

²³ *In re L (An Infant)* [1968] P 119.

²⁴ See the discussion below of secure accommodation orders.

Nonetheless, while the jurisdiction is “extremely broad”, it is to be exercised only in exceptional cases,²⁵ and with considerable caution; and there must be “some clear justification for a court’s intervention to set aside the primary parental responsibility for attending to the welfare of the child.”²⁶ Generally, the greater the interference with the liberty of the object of the exercise of the jurisdiction, the greater the caution required in its exercise.²⁷

Interrelationship with statutory jurisdiction

Absent the clearest statutory intention, the *parens patriae* jurisdiction is not ousted by statutory regimes. Thus the High Court held that the inherent jurisdiction of the Supreme Court of Queensland in relation to the custody of infants was not abolished by the (QLD) *Children’s Services Act* 1965-1973 in respect of a child voluntarily admitted to the care and protection of the Department by a declaration of the Director made under that Act,²⁸ nor even of one made a ward of the Department by order of the Children’s Court:²⁹ a total departure from the traditional procedure of judicial determination of the guardianship and custody of children and the substitution for it of a system of administrative discretion was not lightly to be attributed to the statute unless its language and provisions clearly compelled that result; and although the legislative scheme was far-reaching, its extensive character was not sufficient ground for concluding that the prerogative jurisdiction of the Supreme Court was entirely displaced: there might be occasions for its exercise in aid of the Director’s statutory responsibilities, or when it appeared that the Director was not discharging his responsibilities or exercising his powers in conformity with the Act.³⁰

In this State, Helsham CJ in Eq, while accepting that the court could not interfere with the terms and conditions on which the Minister had exercised custody under the Act, held that the court’s jurisdiction in respect of such children was not excluded.³¹

²⁵ *Re Victoria* (2002) 29 Fam LR 157 (Palmer J); *Frances and Benny* [2005] NSWSC 1207, [18] (Young CJ in Eq).

²⁶ *Marion’s Case* (1992) 175 CLR 218, 280 (Brennan J).

²⁷ *Director-General, Department of Community Services; Re Thomas* [2009] NSWSC 217 at [35].

²⁸ *Carseldine v The Director of Department of Children’s Services* [1974] HCA 33; (1974) 133 CLR 345, 366 (Mason J (as the later Chief Justice then was), with whom Barwick CJ and McTiernan and Stephen JJ agreed).

²⁹ *Carseldine v The Director of Department of Children’s Services* [1974] HCA 33; (1974) 133 CLR 345, 364.

³⁰ *Carseldine v The Director of Department of Children’s Services* [1974] HCA 33; (1974) 133 CLR 345, 364.

³¹ *K v The Minister of Youth and Community Services* [1982] 1 NSWLR 311, 323, 325-6; (1982) 8 Fam LR 756. See also *Re Beth* (2013) 42 VR 124; [2013] VSC 189 at [127].

...the inherent power of the court by delegation from the Crown of its prerogative right as *parens patriae* of looking after the interest of infants has not been displaced with respect to wards of the Minister in this State, except in so far as it concerns the appointment of guardians and the powers of guardians concerning custody. The power of the court goes beyond such matters. It extends to the control of the child itself, including matters relating to its welfare.

This is now confirmed by (NSW) *Children and Young Persons (Care and Protection) Act 1998* (“the Care Act”), s 247, which provides that nothing in that Act limits the jurisdiction of the Supreme Court - one aspect of which is the ‘*parens patriae*’ or welfare jurisdiction.

In *Director-General, New South Wales Department of Community Services v Y*,³² Austin J considered that not only was the whole of the *parens patriae* jurisdiction of the court with respect to the wardship, custody and care of children preserved in its application to children already in care under the Care Act, but also (*obiter*) that that jurisdiction was unaffected by Part 7 of the (CTH) *Family Law Act 1975*.³³ Whether or not that observation is correct need not be resolved because even if, in respect of children not already in care, the jurisdiction of the court was affected by the referral of powers to the Commonwealth and the Commonwealth’s exercise of those powers through the *Family Law Act*, the Supreme Court now enjoys all the jurisdiction of the Family Court of Australia, as a result of (CTH) *Jurisdiction of Courts (Cross-Vesting) Act 1987*, including its powers in relation to children.³⁴ The “welfare” power of the Family Court, which was the subject of consideration in *Marion’s Case*, is analogous to the *parens patriae* jurisdiction. Accordingly, either because its *parens patriae* jurisdiction survives unaffected by the referral of powers to the Commonwealth and Part 7 of the *Family Law Act*, or because it shares with the Family Court the statutory equivalent of the *parens patriae* jurisdiction under Part 7 of the *Family Law Act*, the Supreme Court may make orders in connection with the welfare of children in/or analogous to the *parens patriae* jurisdiction, whether or not they are children of a marriage, and whether or not they are subject to proceedings under the Care Act.

But although the Supreme Court’s *parens patriae* jurisdiction survives and can be employed to produce a result inconsistent with one reached under Care Act, the Court will exercise the jurisdiction in those circumstances only in an exceptional case.³⁵ The *parens patriae* jurisdiction, of its nature, involves the Court assuming

³² [1999] NSWSC 644.

³³ [1999] NSWSC 644 at [95]-[97].

³⁴ *Mulhall v Hartnell* (1988) 91 FLR 240; (1988) 12 Fam LR 361; (1988) FLC ¶91-947 (Young J); *Young v Lalic* [2006] NSWSC 18; (2006) 197 FLR 27, [37]-[48] (Brereton J).

³⁵ *Re Victoria* [2002] NSWSC 647; (2002) 29 Fam LR 157. See also *Re Frieda and Geoffrey* [2009] NSWSC 133; (2003) 40 Fam LR 608 (White J), in which the *parens patriae* jurisdiction was exercised at the suit of the Minister to make an interim care order different from that which had been made in the Children’s Court, and more recently *Re Baby S* [2014] NSWSC 871 (White J) and *TF v Department of Family & Community Services* [2015] NSWSC 694.

parental responsibility in part or in whole in respect of a child, where those otherwise entrusted with that responsibility are found by the Court not to be exercising it – or not to be able to exercise it – in the best interests of the child. The Court will interfere only to the minimum extent necessary, respecting the wishes of the child and the autonomy of those with parental responsibility for the child. As Helsham CJ in Eq said in *K v Minister for Youth and Community Services* (at 326F):

I am conscious of the desirability of permitting the Minister to exercise all his powers as guardian without unnecessary interference of the court. The same is true of any guardianship situation. No doubt the occasions will be rare when the necessity to supervise his actions will prompt the court to intervene. When they arise this Court must see that such steps as it considers to be in the interests of the welfare of the child must be taken, whatever may be the views of others in relation to them.

This was reiterated as recently as last Friday 1 April 2016 by Kunc J in *Re Abigail and Oliver*,³⁶ who spoke of the “well-understood reluctance on the part of the Supreme Court to exercise the *parens patriae* jurisdiction in relation to matters which are before the Children's Court”, and cited earlier decisions to like effect,³⁷ culminating with *Director-General of the Department of Community Services v Priestley*,³⁸ in which Young CJ in Eq said:³⁹

The *parens patriae* wardship jurisdiction of the Supreme Court is a very important one in the administration of justice in New South Wales. However, as Palmer J said in *Re Victoria* it is only in the most extraordinary circumstances that this Court should be asked, in the exercise of its *parens patriae* jurisdiction, to set aside or affect the decision of a magistrate in a Children's Court merely because a party is dissatisfied with that decision. It is also inappropriate in almost all cases for this court to be asked to deal with the matter in the *parens patriae* jurisdiction when the only errors alleged against the learned magistrate, who is a specialised magistrate in a specialist jurisdiction, is that he or she in the exercise of a discretion failed to give due weight to a number of factual circumstances or disproportional weight to others or where there is an error of fact that does not go to the fundamentals of the case.

Exceptional circumstances may exist if some protective order is urgently required and there are no other curial processes available to provide instant relief (reflecting the facility for approaching the duty judge in the Supreme Court for immediate urgent relief), or in aid of the Secretary's statutory responsibilities, or if it appears that the Secretary is not discharging his responsibilities or exercising his powers in conformity with the Act or in the best interests of the child.

³⁶ [2016] NSWSC 370.

³⁷ His Honour referred to *Re Barbara & Ors* [2006] NSWSC 536 at [17] - [19] (White J); *Re Victoria v Director General of the Department of Community Services and the Children's Court* [2002] NSWSC 647 at [39] (Palmer J); and *Re Frances & Benny* [2005] NSWSC 1207 at [18] (Young J).

³⁸ [2004] NSWSC 639

³⁹ [2004] NSWSC 639 at [5].

Moreover, the *parens patriae* power does not enable the Court to make orders that require a person to act contrary to statute law or which are directly inconsistent with statute law. The prerogative powers must yield to statute, and the prerogative powers, including the *parens patriae* power, cannot not authorise a Court to dispense with, or read down, the statute law.⁴⁰

Thus, notwithstanding the detailed statutory regime provided by the Care Act, the Supreme Court's *parens patriae* jurisdiction is preserved; but its residual *parens patriae* power is exercised only in exceptional cases, and very rarely where there are proceedings before the Children's Court.

Working with children decisions

Issues of this kind arose, in the context of the (NSW) *Child Protection (Working with Children) Act 2012* (the "*Working with Children Act*"), in *Re Tilly v Minister for Family & Community Services*.⁴¹ The plaintiff foster-carer sought an order restraining the Minister, the Secretary, the "designated agency" Life Without Barriers, and the Children's Guardian, from taking steps to remove the child Tilly, aged three, who had been in her temporary care for more than a year, pending the imminent hearing of proceedings in the Children's Court only a month later, in apparent disregard of an undertaking which had previously been given to the Supreme Court that no steps would be taken by the Secretary to remove the child Tilly from her placement with the plaintiff before the resolution of the Children's Court proceedings, "except where the Secretary or his delegate reasonably considers that there is an immediate risk of harm to the child on fresh information about such risk of harm", but reserving liberty to the parties to apply in general, "and in particular, including the event that the plaintiff's authorisation as an authorised carer is cancelled or revoked."

The proposed removal arose from the circumstance that the Children's Guardian had imposed an "interim bar" under *Working with Children Act*, s 17, on the plaintiff, following an investigation into complaints made by other children who had been in her care. (NSW) *Children and Young Persons (Care and Protection) Regulation 2012*, cl 42B, provides that the authorisation of a person as an authorised carer is automatically cancelled if the person is subject to an interim bar, and that the designated agency that supervises the out-of-home care of a child in the care of a person whose authorisation is cancelled must, within 48 hours of becoming aware of the cancellation, ensure that the child no longer resides with the person. Thus LWB

⁴⁰ *P v P* [1994] HCA 20; (1994) 68 ALJR 449; (1994) 120 ALR 545; (1994) 181 CLR 583, 619-620 (Brennan J); *Re Woolley*; *Ex parte Applicants M276/2004 by their next friend GS* [2004] HCA 49; (2004) 79 ALJR 43; (2004) 210 ALR 369; (2004) 225 CLR 1, [101] (McHugh J: (in the context of the power to detain unlawful non-citizens who were children) "The *parens patriae* jurisdiction of the courts cannot be invoked to read down the legislative direction that children who are unlawful non-citizens must be detained in immigration custody").

⁴¹ [2015] NSWSC 1208.

was in the circumstances obliged by statute to ensure that Tilly no longer resided with the plaintiff.

Consistent with what has been said above, it was not open, under the guise of the *parens patriae* power, to make an order restraining the defendants from performing their statutory duties, nor an order permitting the plaintiff to commit what would be an offence under the *Working with Children Act*. However, that was not necessarily the end of the matter, because it would have been open to the Court, if satisfied that the statutory regime which required the removal of the child from the care of the plaintiff in the circumstances was contrary to the best interests of the child, to remove the child from the statutory regime by making her a ward of the Court but placing her with the plaintiff, in which case she would not be in "statutory out-of-home care" as defined (because though a ward of the Court she would not be in the care or custody of the Minister or Secretary), and the interim bar and absence of a Working with Children Clearance would apparently not pose an obstacle.

In deciding whether the circumstances were sufficiently extraordinary to justify recourse to the residual *parens patriae* jurisdiction, the touchstone was the best interests of the child, but seen in an overall context. There were two strongly competing considerations. On the one hand, it was undoubtedly in the interests of the child to have stability, and that existing and established bonds of attachment not be fractured; to remove the child from the plaintiff at that stage would do just that and fracture what appeared to be prospering bonds of attachment between them. The undesirability of this was accentuated by the circumstance that it was only a month prior to a hearing which will make a determination about the child's future and permanent placement after a much more extensive hearing and much more detailed examination of the evidence than could then be undertaken. That consideration pointed strongly in favour of the best interests of the child being to remain where she is.

On the other hand was the principle, reflected in the *Care and Protection Act*, but also in the *parens patriae* jurisdiction, that protection of children from harm or the risk of harm is at the forefront of the exercise of the protective jurisdiction. It could not be overlooked that five children who had been independently in the plaintiff's care over different periods of time, had each made litanies of complaints about the plaintiff's care of them, although many had been not sustained, some had been found to be false, and there were inconsistencies relating to those which had been found to have been sustained. Nonetheless that raft of complaints by two different groups of children over a sustained period of time with some commonalities between them gave cause to think that it was unlikely that a court making a final decision about where Tilly should be placed would leave her in an environment where there was some evidence of risk, when she could be placed elsewhere - knowing, in any event, that the placement with the plaintiff was only ever intended to be a temporary one. Even if all the allegations of the five children as made were false, the fact remained that five children appeared to have been very unhappy in the plaintiff's care. While it

was entirely possible that the dynamics might be different with a younger child and a girl, such as Tilly, and there was reason to believe that there was a very good relationship between them, the evidence painted such a picture of potential risk that a court would be hesitant to assume it, even for a month. Those reservations were fortified, first, by the circumstance that the placement was always intended to be a temporary one; secondly, by the fact that the Secretary had care responsibility for the child and favoured the removal and replacement elsewhere of the child; thirdly, that the preferred long term plan from the Secretary's perspective appeared to be to place the child with her sibling in permanent care, a very orthodox approach that might be thought would be likely to find favour in the Children's Court; fourthly, that because she was a single parent with two teenage boys, the plaintiff had no such in-built or in-house safety net as would often be available in other circumstances; and fundamentally, that by taking the alternative course, the Court would effectively be subverting a statutory scheme which was deliberately established by Parliament for the purpose of doing its utmost to ensure the safety of children, including children in care, at the accepted price that this would sometimes be harsh and unfair to persons other than those children. Essentially, Parliament had decided that the presence of risk as determined by the Children's Guardian should effectively operate as an immediate and automatic bar to a person being engaged in child-related work; while this can, and not infrequently does, operate very harshly on people who may well be entirely innocent of what is suspected, it was a price Parliament had decided to pay for maximising, to the greatest possible degree, the safety of children, particularly children in out-of-home care.

Consideration was also given to whether the decision of the Children's Guardian to impose an interim bar could be impugned for denial of procedural fairness, the plaintiff not having been afforded an opportunity to be heard on that decision before it was made. However, on a review of the *Working with Children Act* as a whole, it was considered that an intention that the rules of natural justice not apply to such a decision became apparent.⁴²

Medical treatment orders

Marion's case established that there are some decisions in respect of children which are so grave that they are beyond the scope of ordinary parental authority and can only be made with the approval of the court as *parens patriae*. In other words, there

⁴² Section 17, which deals with interim bars, contains no requirement to give notice before imposing an interim bar and is thus to be contrasted with s 19. It provides that it must give notice that the holder is subject to an interim bar, and that the bar ceases to have effect in a number of circumstances, including 12 months after the bar takes effect. In other words, an interim bar is a temporary measure for up to 12 months, and in contrast to ss 19 and 23, contains no inbuilt requirement for an opportunity to be heard, even after the decision is made. However, Pt 4 of the Act provides that an application may be made to NCAT by a person who is subject to an interim bar for an administrative review of the decision, "but only if the interim bar has been in force for more than six months." The intention appears to be that there would be a limited measure of natural justice by way of a review application, but only after the bar had been in force for more than six months.

are some decisions relating to children that are so grave that they are not within ordinary parental responsibility, but are reserved the *parens patriae*. Sterilization of a minor with intellectual disability, for reasons other than therapeutic, which was the issue in *Marion's Case*, is one example. In this way, the Court's power is more extensive than that of parents, because the courts can exercise jurisdiction in cases where parents have no power to consent to an operation, as well as in cases where they have the power.⁴³ Thus medical treatment cases fall within two classes: those where the court exercises a power that would otherwise be exercisable by a parent of the child, to request and consent to medical treatment, thus exercising parental responsibility where the parents cannot or will not appropriately do so;⁴⁴ and those where the court sanctions a procedure which is beyond the scope of ordinary parental decision-making powers, and therefore lies outside the scope of the powers, rights and duties of a parent or guardian.

In either case, the court's act is in the nature of an exercise of parental responsibility, to request the relevant medical practitioner to perform the procedure and to consent (as parent) to its performance. Ordinarily, the power to request and consent to medical treatment on the part of a child is a power vested in each of the parents as an aspect of parental responsibility, and that is one of the powers which pass to the Court if it assumes parental responsibility, including by making the child a ward of court. Although orders are sometimes sought and made that purport to "authorise" medical practitioners to treat a child, this does not really express what the Court does.⁴⁵ Such orders do not operate as a conferral on the medical practitioner of some power or authority that would not otherwise exist, or a delegation of parental responsibility to the medical practitioner; absent statutory provision, the Court cannot authorise third parties (whether police⁴⁶ or medical practitioners⁴⁷) to do things that they are not otherwise authorised to do in respect of a child, although it can assume, and delegate, parental responsibility or aspects of it. Rather, such orders are analogous to a parent requesting and consenting to treatment for his or her child. Another way of looking at it is that, the Court in place of a parent having consented to the treatment, it is lawful for the medical practitioner to perform the treatment, the parents' refusal of consent being beside the point once the Court has given its own

⁴³ *Marion's Case*, at 258-9 (Mason CJ, Dawson, Toohey and Gaudron JJ).

⁴⁴ Cf *Re Jules*, [15]-[19].

⁴⁵ It may be observed that this concept of "authorising" treatment appears to derive from *Marion's case* [*Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218], but that case involved a quite different issue. In *Marion's case*, the Court "authorised" the procedure (where the parents already supported it), but it did not purport to confer authority on any specific person or medical practitioner to perform the treatment. The "authorisation" in this context was an expression of the consent of the Court as *parens patriae* to the procedure.

⁴⁶ *Vaughan v Vaughan* (NSWSC, Powell J, 27 February 1979, unreported)

⁴⁷ *Director-General, Department of Community Services; Re Jules* [2008] NSWSC 1193.

consent – just as it is sufficient that one parent consents, each having parental responsibility and the ability to consent, even if the other does not.⁴⁸

The nature and operation of the power in the context of a “*Gillick*-competent” child was described in *Re R (a Minor)*,⁴⁹ which establishes that the court can consent to a procedure on such a child who refuses to consent, and can also forbid a procedure to which such a child consents. *Re R* concerned a 15-year-old girl with mental health issues who was manifesting disturbed behaviours and had threatened to kill herself, had attacked her father with a hammer and had caused considerable property damage. The local authority obtained an order to place her in an adolescent psychiatric unit. While she consented to sedation from time to time, she did not consent to the administration of anti-psychotic drugs. The local authority applied to the court for permission to administer medication, including anti-psychotic drugs, whether or not she consented. The Court of Appeal held that in exercising its wardship jurisdiction, the High Court could consent to medical treatment of a minor ward, even where the minor was competent to consent, in the sense of “*Gillick*-competent”.⁵⁰ Donaldson MR said that Lord Scarman could not in *Gillick* “have been intending to say that the parental right to consent terminates with the achievement by the child of ‘*Gillick* competence’”, and that *Gillick* was not authority for the proposition that a “*Gillick* competent” child could refuse treatment: “Such a child can consent, but if he or she declines to do so or refuses, consent can be given by someone else who has parental rights or responsibilities”.⁵¹ Donaldson MR explained:⁵²

In considering the wardship jurisdiction of the court, no assistance is to be derived from *Gillick*'s case, where this simply was not in issue. Nor, I think, is any assistance to be derived from considering whether it is theoretically limitless if the exercise of such a jurisdiction in a particular way and in particular circumstances would be contrary to established practice. It is, however, clear that the practical jurisdiction of the court is wider than that of parents. The court can, for example, forbid the publication of information about the ward or the ward's family circumstances. It is also clear that this jurisdiction is not derivative from the parents' rights and responsibilities, but derives from, or is, the delegated performance of the duties of the Crown to protect its subjects and particularly children who are the generations of the future: see *In Re C. (A Minor) (Wardship: Medical Treatment) (No. 2)* [1990] Fam. 39, 46.

Whilst it is no doubt true to say, as Lord Upjohn did say in *J. v. C.* [1970] A.C. 668, 723A, that the function of the court is to “act as the judicial reasonable parent,” all

⁴⁸ *B & B* (1997) 21 Fam LR 676, 729-730; (1997) FLC ¶92-755, 84,216-84,217; *Re Elm* [2006] NSWSC 1137; (2006) 69 NSWLR 145, [19]

⁴⁹ [1992] Fam 11; [1991] 3 WLR 592 (CA); [1991] 4 All ER 177.

⁵⁰ See *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; [1985] 3 All ER 402 and *Marion's case*, 238

⁵¹ At [1992] Fam 11, 24.

⁵² At [1992] Fam 11, 25

that, in context, he was saying was that the court should exercise its jurisdiction in the interests of the children "reflecting and adopting the changing views, as the years go by, of reasonable men and women, the parents of children, on the proper treatment and methods of bringing up children." This is very far from saying that the wardship jurisdiction is derived from, or in any way limited by, that of the parents.

Similarly, Staughton LJ said:⁵³

I conclude that the powers of a wardship judge do indeed include power to consent to medical treatment when the ward has not been asked or has declined. If that means that the wardship judge has wider powers than a natural parent (on the extent of which I have declined to express an opinion), it seems to me to be warranted by the authorities to which I have referred.

Then there is the converse case in wardship, where the ward consents but the court is minded either not to consent or positively to forbid treatment. Does the judge in such a case have an overriding power, which the natural parent of a competent child under the age of 16 does not have by reason of the *Gillick* decision? If so, there would again be a problem for doctors, who may have to ask if the child is a ward. But the trend of the cases seems to show that, if the treatment would constitute an important step in the child's life, the court does have that power.

SECURE ACCOMMODATION ORDERS

Jurisdiction

The (UK) *Children Act 1989*, s 25, provides for what are called "secure accommodation orders". Section 25 (Use of accommodation for restricting liberty), is as follows:

(1) Subject to the following provisions of this section, a child who is being looked after by a local authority may not be placed, and, if placed, may not be kept, in secure accommodation provided for the purpose of restricting liberty ("secure accommodation") unless it appears—(a) that—(i) he has a history of absconding and is likely to abscond from any other description of accommodation; and (ii) if he absconds, he is likely to suffer significant harm; or (b) that if he is kept in any other description of accommodation he is likely to injure himself or other persons ...

(3) It shall be the duty of a court hearing an application under this section to determine whether any relevant criteria for keeping a child in secure accommodation are satisfied in his case.

(4) If a court determines that any such criteria are satisfied, it shall make an order authorising the child to be kept in secure accommodation and specifying the maximum period for which he may be so kept.

⁵³ at [1992] Fam 11, 28-29. Farquharson LJ agreed with the other members of the Court.

There is no equivalent statutory provision in New South Wales that authorises, or provides for, the detention of a child as an ongoing “non-temporary” aspect of his or her treatment and protection.⁵⁴ However, in *Re Thomas*,⁵⁵ the court held that it could, in exercise of its *parens patriae* jurisdiction, make orders permitting the Secretary, as the person with parental responsibility, to detain a young person indefinitely in secure premises, and to restrain and medicate him or her as the circumstances may require.

In *Re Thomas*, it was reasoned that as with the sterilisation procedure considered in *Marion’s Case*, and notwithstanding that parents may have authority to interfere or restrict the liberty of their children to some extent, such authority did not extend to the indefinite confinement of a teenager in secure premises that he or she cannot leave of his own volition, and because such action is beyond the ordinary scope of parental responsibility, it required the sanction of the court as *parens patriae*.

Although it has been most frequently invoked in the context of medical treatment, the *parens patriae* power is not limited to therapeutic treatment; thus, for example, a court has protected a child from an unsuitable arranged marriage.⁵⁶ Orders interfering with personal integrity and liberty have frequently been made in the context of involuntary medical treatment.⁵⁷

While depriving a person of liberty other than in connection with a criminal prosecution or conviction is a very grave step, deprivation of a child’s liberty for “protective” purposes (as distinct from following conviction of an offence) may be justified, and even necessitated, by the protection and promotion of the child’s welfare. This was illustrated by the decision of the Court of Appeal of England and Wales (Butler-Sloss P, Thorpe and Judge LJ) in *Re K (A Child) (Secure Accommodation Order: Right to Liberty)*,⁵⁸ in holding that while the purpose of a “secure accommodation order” under (UK) *Children Act* 1989, s 25 was to restrict the child’s liberty, and notwithstanding that such restriction was a “deprivation of liberty” within the *Convention for the Protection of Human Rights and Fundamental*

⁵⁴ (NSW) *Children and Young Persons (Care and Protection) Act* 1998, s 158, while authorising detention for some purposes, permits it only on a temporary basis.

⁵⁵ (2009) 41 Fam LR 220; [2009] NSWSC 217. Previously, similar orders had been made in *Re Christina* (2168/07, 5 April 2007) and *Re Nellie* (5150/08, 10 October 2008).

⁵⁶ *A Local Authority v Ma, Sa, Na* [2005] EWHC 2942 (Fam); [2007] 2 FCR 563; [2006] 1 FLR 867.

⁵⁷ In *Re W* [1992] 3 WLR 758; [1992] 4 All ER 627 (order for treatment for a young person with anorexia nervosa, holding that her wishes, while relevant, were not conclusive); *Re C* [1997] 2 FLR 180 (young woman with anorexia nervosa ordered to remain at clinic for treatment until discharged by doctor or further order, providing for use of reasonable force, if necessary, to detain her); *Marion’s Case* (authorisation of permanent procedure of hysterectomy, a serious invasion of personal integrity); *DoCS v Y* (orders to the effect that child be returned to hospital without her consent, to resume a course of treatment for anorexia nervosa, and authorising the hospital staff to detain her, using reasonable force if necessary); *Re R (a Minor)* (permission to administer medication, including anti-psychotic drugs, to a 15-year-old girl with mental health issues, whether or not she consented).

⁵⁸ [2001] 2 WLR 1141.

Freedoms, nonetheless it was not incompatible with the Convention, as it was within an exception which authorised detention of a minor by lawful order “for the purpose of educational supervision”. As the child remained a serious risk to others and at risk himself from others, the criteria for the order were fulfilled, and the order was extended. Thorpe LJ said that a secure accommodation order under the (UK) *Children Act* 1989, s 25 did not breach the child’s human rights, as *the deprivation of liberty was a necessary consequence of an exercise of parental responsibility for the protection and promotion of his welfare*. *Re Thomas* reasoned that since the protection and promotion of the child’s welfare was at the heart of the *parens patriae* jurisdiction, the jurisdiction extended to authorise secure accommodation orders in the absence of statutory provision.

The jurisdiction is now well-established, similar orders having been made in perhaps ten other cases in New South Wales.⁵⁹ *Re Thomas* has also been applied to make similar orders in Victoria.⁶⁰

The typical subject

Except in one respect, the typical subject can be described by the following extract from *Re Thomas*:

1 Thomas – not his real name – is a very troubled boy, almost sixteen years old, who, pursuant to orders made in the Children’s Court on 30 July 2007, is, until he turns 18, in the shared parental responsibility of the second defendant (his maternal grandmother) and the Minister for Community Services. The evidence describes an escalating history of self-harm, particularly in recent months; and anti-social behaviour of a very serious character, including drug use, violence towards others – particularly his carers – and serious damage to property where he has been a resident or a patient.

...

3 Thomas has a lengthy and impressive history of aggressive and disorderly behaviour, and has been diagnosed with various combinations of mild to moderate developmental delay (giving him an intellectual age of about six years), attention deficit hyperactivity disorder, oppositional defiant disorder, conduct disorder, receptive/expressive language disorder, articulation disorder, long-term marijuana abuse, complex trauma, major depression, and anxiety disorder. Since 2005, Thomas had been engaging in self-harm – inflicting pain and injury on himself, including attempts at suicide and expressing suicidal thoughts; in violence to others, including the use of weapons (such as a sharpened toothbrush); in damage to

⁵⁹ Those in which there are published judgments include *Re Sally* [2009] NSWSC 1141; *Director General, Dept of Family and Community Services Re Vernon* [2011] NSWSC 1222; *Re Helen* [2013] NSWSC 1022; *Re Bella* [2013] NSWSC 1034; *Secretary, Dept of Family and Community Services, Re Julian* [2014] NSWSC 399; *Re Madison* [2014] NSWSC 1874; *Re Sadie* [2015] NSWSC 140; and *Secretary, Dept Family and Community Services; Re Lee* [2015] NSWSC 1276.

⁶⁰ *Re Beth* (2013) 42 VR 124; [2013] VSC 189; see also *Re Beth (No 3)* [2014] VSC 121.

property; and in legal and illicit drug use (cigarettes and cannabis). He has mixed with – and at times has appeared to aspire to emulate – drug dealers. He has been detained in Cobham Detention Centre on five occasions – on 8 February 2007 (for assault), from 22 January to 31 January 2008 (assault), 28 March to 31 March 2008 (assault), 6 to 7 April 2008 (justice offences, such as absconding or failing to appear), and 12 to 13 April 2008 (justice offences).

The exception is that, save for Thomas, virtually all our clients have been girls. The typical subject is a girl in her early to mid-teens in the parental responsibility of the Minister, with a history of uncontrollable behavior including violence to others and/or self-harm, a failure of prior placements, often with an intellectual disability and/or psychiatric illness. The touchstone for making the order is that otherwise they will be a danger to themselves and/or others, and that there is no practical alternative.⁶¹

In *Re Thomas*, it was acknowledged that the orders sought were radical and involved a very serious interference with Thomas' liberty. But, in the interests of Thomas' welfare, there was no practical alternative. There was strong professional support for such a regime. Other arrangements for his care and accommodation had failed. Thomas' separate representative did not suggest otherwise. If he was not kept under close supervision in secure accommodation, he would continue to engage in self-harm, potentially with fatal effects, and would continue to associate with drug dealers and engage in further anti-social and illegal behaviour, leading to further criminal offences and prosecution, and in due course incarceration.

The Sherwood program

When an order is made, the child is ordinarily accommodated in a residential facility known as Sherwood House, located in a south-western suburb of Sydney. The premises are situated in a suburban street. The accommodation section adjoins an administration section. The bedrooms may be spartan, depending on the propensity of the occupant to extract screws and nails from furniture to inflict self-harm. There is a large recreation room, with television, Wii, and other entertainments. There is a meals area, and a large courtyard, with a shaded area, allowing ample space for physical activity. Although fenced, and secured, the premises do not have the feel or appearance of a gaol. There are multiple care staff (usually, two per child) at all times, who are shadowed by trained security guards. If restraint is required, the security guards provide it. By good behaviour, the children can earn rewards, such as outings to shopping centres, movies and the like. There are also educational activities, both within Sherwood House and, as the child progresses, where appropriate through attendance at a nearby special needs school. Sometimes a child absconds, in which case location and recovery orders have been made.⁶²

⁶¹ *Re Thomas* at [40]; *Re Bella* at [4]; cf (UK) *Children Act 1989*, s 25(1); and see *In Re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001] 2 WLR 1141 (per Thorpe LJ).

⁶² See *Secretary, Department Family and Community Services; Re "Lee"* [2014] NSWSC 417.

The proceedings are kept under review by the court, typically at quarterly intervals, when updating reports covering any incidents, medical and psychological events, diagnosis and prognosis, education, contact with family, and progress generally are required. Invariably an independent representative for the child is appointed, whose role in interviewing the child and reporting the child's views is important.⁶³ The court adopts an active supervisory role, for example requiring a second medical opinion to be required, or suggesting an alternative course to that proposed by Community Services. On the other hand, being conscious of the very difficult nature of these cases, the court has, by analogy with judicial advice to a trustee, provided advice that the Secretary would be justified in taking a course of action which might otherwise be open to criticism.⁶⁴

So far as can be told from the evidence the court receives, the children seem to respond quite well; typically, after a while, and as they adjust to the program, the frequency and severity of incidents tends to decline. It is a great credit to the staff of Sherwood House that the children develop bonds with them – often the most significant attachments these children have ever had.

Probably the greatest challenge of these cases is the transition of the arrangements for these children as they approach adulthood, and (unless they are also incapable) move outside the *parens patriae* jurisdiction. Typically this has involved transition through a “step-down” facility, known as “Sherwood Cottage”, with reduced supervision and increased independence. This does not always progress smoothly, and occasionally there has been a need to return a participant to the more structured environment of Sherwood House.

Transition often involves application for a guardianship order, to take effect once the child attains 18 years, and engagement with the Public Guardian, and with Ageing, Disability and Home Care (ADHC). Experience teaches that the circumstance that this is another agency of the same department that answers to the same Minister as Community Services is no assurance of enthusiastic engagement or a seamless transition, though the publication of a judgment that draws attention to the disconnect sometimes assists.⁶⁵

In a few cases – typically those which do not involve a mental disability or illness – very promising results have been achieved, with the participants re-entering the community as independent adults. However, many of these children need ongoing care and supervision. Their extreme nature is illustrated by one which involves the most intractable treatment-resistant psychosis I have ever encountered. In others,

⁶³ As was emphasised by the Supreme Court of Victoria in *Re Beth* at [193].

⁶⁴ *Secretary, Department Family and Community Services; Re “Lee”* [2015] NSWSC 2054

⁶⁵ See *Secretary, Department Family and Community Services; Re “Lee”* [2015] NSWSC 1276

the most that can be said is that that she is still alive, has acquired some life skills, and has some attachments to which she can turn in times of need.⁶⁶

ADOPTION

While the adoption applications that come before the Supreme Court include private adoption applications (typically, step-parent or relative adoptions), inter-country adoptions (under the Hague Convention, or from non-convention countries), and applications for declarations of validity of overseas adoptions, of most relevance in the present environment are adoptions by carers of children in out-of-home care.

Out of home care adoptions – statutory principles

In 2012-13, 78 of the 81 carer adoptions nationally occurred in New South Wales. This reflects policies in New South Wales which have increasingly promoted adoption as a means of achieving stability for children under the long-term care of state child protection services when restoration is not considered appropriate.⁶⁷ These policies are now reflected in the permanent placement principles: the Care Act provides that a child or young person who needs permanent placement is to be placed in accordance with the permanent placement principles, which include that, if it is not practicable or in the best interests of the child or young person to be restored to the care of his or her parent or parents, or to be placed in the guardianship of a relative, kin or other suitable person, the next preference is (except in the case of an Aboriginal or Torres Strait Islander child or young person) for the child or young person to be adopted.⁶⁸ However, the Children's Court, which is the venue in which the application of those principles typically arises, does not have jurisdiction to make an adoption order; while the Supreme Court, which alone has jurisdiction under the (NSW) *Adoption Act 2000*, is directed by s 90(3) of that Act that the court may not make an adoption order unless it considers that the making of the order would be clearly preferable in the best interests of the child than any other action that could be taken by law in relation to the care of the child.⁶⁹ A note records that other action that could be taken in relation to a child includes a parenting order under the *Family Law Act* or a care order under the Care Act.

⁶⁶ See *Secretary, Department Family and Community Services; Re "Lee"* [2016] NSWSC TBA.

⁶⁷ The New South Wales approach can be contrasted with Victoria, where since 1992 permanent care orders have provided an alternative to adoption, in overcoming the uncertainty often associated with placing children on guardianship or custody orders by allocating permanent guardianship and custody of a child to a third party. Unlike adoption orders, permanent care orders do not change the legal status of the child; they expire when the child turns 18 or marries; and there is also provision for an application to be made to revoke or amend a permanent care order. The aim of placing a child on a permanent care order is to provide an opportunity for the child to develop a stable caring relationship with nurturing caregivers, without severing the tie with the biological family. A total of 3,384 permanent care orders have been granted by the Department of Human Services (DHS) in Victoria since 1992; in 2012–13, 267 orders were granted.

⁶⁸ (NSW) *Children and Young Persons (Care and Protection) Act 1998*, s 10A(3)(c).

⁶⁹ (NSW) *Adoption Act 2000*, s 90(3).

While it is not unknown for one or even both birth parents to consent to an application for adoption by carers, where they recognise that the child is in a stable environment and receiving quality care, it is common for at least one – usually the mother – to decline to do so. Sometimes this is on the basis that, while recognising the benefits for the child and not resolutely opposing adoption, she feels unable affirmatively to consent. Other times, it manifests outright opposition to adoption. In either case, adoption can proceed only if the birth parent’s consent is dispensed with. In 2006, in order to facilitate out-of-home-care adoptions, the ground provided by s 67(1)(d) was introduced, permitting consent to be dispensed with where a child has been in the long-term care of authorised carers and has established a stable relationship with them, and the interests and welfare of the child would be promoted by adoption by those carers. This was explained, in the second reading speech,⁷⁰ as enabling consent to be dispensed with where adoption would enhance the child’s sense of belonging and permanence in the carers’ family, notwithstanding that there is no concern about the child’s current welfare (as distinct from the child’s welfare at the beginning of the placement). Essentially, this reflects a policy decision that once a child has been removed from his or parents and placed in long-term out-of-home care, the rule that the legal parental relationship is not to be severed without the consent of the parents is displaced, if the court is satisfied that the best interests of the child will be served by adoption.⁷¹ Thus the existence of an order of the Children’s Court placing the child in the long-term parental responsibility of the Minister is an important element in establishing the grounds for a consent dispense order.

Despite the apparent tension with the adoption principles - the permanent placement principles are consistent with the approach that has prevailed in adoption cases, from which some general principles can be identified.⁷²

The typical presentation

The starting point in these cases is that there is already in place an order of the Children’s Court allocating parental responsibility to the Minister until the child attains 18 years of age. Implicit in that order is a conclusion, by a specialist court, that the child cannot be satisfactorily cared for by the birth parents, and that restoration to a birth parent is improbable – although it remains possible for a birth parent to make application for restoration (by way of rescission of the care order) in the event of a

⁷⁰ New South Wales, Hansard, Legislative Council, 25 October 2006.

⁷¹ *Adoption of NG (No 2)* [2014] NSWSC 680 at [105].

⁷² These “general principles” – which are not rules of law - emerge from a series of decisions in out-of-home care adoption cases: see *Adoption of BS (No 3)* [2013] NSWSC 2033; *Adoption of SRB, CJB and RDB* [2014] NSWSC 138; *Adoption of NG (No 2)* [2014] NSWSC 680; *Adoption of KH* [2015] NSWSC 274; *Adoption of RCC and RZA* [2015] NSWSC 813; *Adoption of AT* [2015] NSWSC 1666; *Adoption of SVS* [2015] NSWSC 2043.

change of circumstances, notwithstanding that a final order allocating parental responsibility to the Minister until 18 is in place.⁷³

Typically, though not invariably, the child is one whose earliest years have been disrupted, often with multiple placements, with the consequence that the child's ability to form and establish secure attachments will be compromised. However, he or she will now have been in a stable placement with the proposed adopters for some years - often the child's longest period of stability to date – and will be doing well.

As restoration would involve a move from the residence, the family, the school, the connections and the environment in which the child is established, and would disrupt extant stable, secure and supportive arrangements, and move the child to an untried and uncertain alternative – often further jeopardising the child's already compromised ability to form and establish secure attachments – it rarely provides a realistic or attractive alternative. The other alternatives to adoption are usually maintaining the status quo – which is long-term foster care in the parental responsibility of the Minister – or making an order giving parental responsibility to the carers (in place of the Minister).

Advantages of adoption

Even though an adoption order may not effect any immediate or overt improvement relative to the status quo in respect of the extant arrangements for a child's residence, education, and care, that does not mean that it is without beneficial impact.

First, an adoption order enhances a child's sense of security and stability, which are important life foundations for children, all the more so against an early background of instability. If during his or her earliest years a child has been deprived of the opportunity to develop secure attachments, he or she is at high risk of tenuous interpersonal relationships and fragile emotional health, and this is a strong indicator for providing every possible support for stability and security to enable development of secure attachments while the opportunity remains to do so. The ages of two to seven years are the most important from that perspective. Adoption contributes to this by providing certainty and permanence for the child, both directly, and indirectly through the additional certainty it affords the adoptive parents. The possibility of further changes, disruptions and separations will be minimised. Aspirations to restoration expressed by birth parents, however improbable as an outcome, will be foreclosed. An adoption order is also likely to minimise any remaining temptation for birth parents to make comments or suggestions that the child may be returning to their care.

⁷³ (NSW) *Children and Young Persons (Care and Protection) Act 1998*, s 90.

Secondly, the child's legal status is brought into conformity with reality. Membership of the family that the child already regards as his or her own is perfected, providing a sense of security and permanent belonging in that family. That membership is not only during childhood, but for life. Psychologically and residentially, the child is already a member of the proposed adoptive family. An adoption order brings the legal position into line with this.

Thirdly, the child's legal name is brought into conformity with that of the family with which he or she lives and identifies, and the child is enabled to choose for himself or herself whom to tell of his or her status, without it being self-evident from the name. This correspondence of name is frequently referred to by children as, for them, the most significant aspect of adoption. (The child's birth surname is often retained as a second name).

Fourthly, an adopted child ceases to be a State ward in "out-of-home" care, and becomes a member of a legally recognised family, in "in-home" care. Parental responsibility passes to the adoptive parents, and the need for departmental intervention, and departmental approval for significant decisions of the caregivers, is removed, as is any stigma potentially associated with being a State ward. Devoted carers who know and love the child are almost always better positioned to make decisions about the child than departmental officers, however well-intentioned.

Risks and mitigators

While an adoption order legally severs the parental relationship between the child and the birth parents, they are often relationships which, in reality, have been practically devoid of parental responsibility. Often, it is argued that adoption is contrary to a child's need to identify with its family of origin. A clear sense of identity is an important life foundation for children, particularly against an early background of ambiguity or instability, and one important aspect of a child's identity needs is the need to know his or her origins. Children who do not live with their birth parents may well embark on a search or inquiry in respect of birth family, and lack of satisfactory answers may result in a sense of being "abandoned" or "unwanted". Such children therefore have a need for knowledge of their origins, of their birth parents, and of the reasons why they are not in their care. That said, a child's origins comprise only one aspect of the child's identity, and where the child has been placed with proposed adoptive parents for a period that represents by far the longest period of continuous stability of the child's life experience, he or she is likely to identify the proposed adoptive parents as his or her psychological parents, and given their respective roles in the child's life to date, the adoptive family is likely to provide a far greater component of the child's identity than his or her origins.

While adoption carries a risk that the child may feel unwanted or abandoned, this risk is incidental more to the circumstance that the child does not reside with the birth parents, than to an adoption order *per se*: whether in foster care, or under a parental

responsibility order, or adopted, there is the same potential for the question, “why do I not live with my birth parents?”. Thus, declining to make an adoption order in favour of some other solution, short of restoration, does not remove that risk. However, the risk is mitigated if the child knows the birth parents, has an understanding of their situations, and will continue to have some relationship with them. While the legal relationship with the birth parents is severed, they do not cease to be the birth parents; the relationship with them can be maintained through contact, while legal parenthood resides with those who are discharging the responsibilities of parenthood. An adoption order can provide a more secure foundation for an ongoing relationship with the birth parents through contact, with the adopters better able to support and facilitate it when relieved of the insecurity or doubt that might attend it if some prospect of restoration remains open.

Social science

There is support in the social science literature for this approach.

Children who have experienced childhood neglect or abuse are at increased risk of poor adjustment in adulthood. Former child protection clients have been found to be a high risk group for future suicidal behaviour and severe psychiatric morbidity, being four to five times more likely than peers in the general population to have been hospitalised for serious psychiatric disorders in their teens and four to six times more likely in young adulthood.⁷⁴ Adopted children generally do better than long term foster care children. Children adopted in the 1950s in Sweden were found to do better at all stages than their fostered peers.⁷⁵ Adoptees tend to have more favourable outcomes than long term foster children, suggesting that adoption offers a form of long-term substitute care that has stronger compensatory potential than long-term fostering.⁷⁶ For children who came into the child welfare system at an early age, and while the crude outcomes for both groups were substantially weaker than for majority population peers, foster children were found to fall clearly short of adoptees on all outcomes – including school performance at 15, cognitive competence at 18, educational achievement and self-support capability in young adult years, and also after adjustments for birth parent related confounders and age placement in substitute care.⁷⁷

⁷⁴ Bo Winnerljung, Anders Hjern, and Frank Lindblad, ‘Suicide Attempts and Severe Psychiatric Morbidity Among Former Child Welfare Clients – A National Cohort Study’ (2006) 47(7) *Journal of Child Psychology and Psychiatry* pp 723-33.

⁷⁵ Michael Bohman and Soren Sigvardsson, ‘Outcome in Adoption: Lessons from Longitudinal Studies’ in *The Psychology of Adoption* (eds D M Brodzinsky and M D Schechter), Oxford University Press, New York (1990).

⁷⁶ Winnerljung, Hjern and Lindblad, above n 36, 727.

⁷⁷ Bo Winnerljung and Anders Hjern, ‘Cognitive, Educational and Self-Support Outcomes of Long-Term Foster Care versus Adoption. A Swedish National Cohort Study’ (2011) 33(10) *Children and Youth Services Review* 1902.

A 2011 study in the United States of 353 children who were less than 13 months of age when investigated by child welfare services, which followed their progress over 66 months, indicated that remaining in foster care was less developmentally advantageous than having a more permanent arrangement of either adoption or return to birth family.⁷⁸

Two studies by Triseliotis in 1983⁷⁹ and 2002⁸⁰ are often referred to in this context. The first showed that adoptees generally had a more problem free life as adults and tended to have a better education, less self-support problems and better self-esteem than long term foster children. The second was a review article, which examined the research literature and contrasted six variables. The findings were that placement breakdowns amongst the adoption group were significantly lower compared with the fostered group; that even when long term fostering survived, the children felt less secure and had a weaker sense of belonging compared with those who were adopted; that adoptees perceived themselves to be doing significantly better than did those in foster care; and that the weight of evidence suggested that adoption conferred significant advantages on children who could not return to their birth families, especially in terms of emotional security and sense of belonging. Thus adoption provided higher levels of emotional security, a stronger sense of belonging, and a more enduring psycho-social base in life for those who could not live with their birth families, than did long term fostering.

A child psychologist who has given expert evidence in a number of these cases, Ms Therese Lindfield, has drawn on these studies and her own experience to express the opinions that adopting parents tend to persevere more than foster parents when difficulties arise, and that adopted children experience an increased sense of belonging and family ownership, which in turn enhances their security and self-esteem; and that in these dual ways the permanence of adoption improves the security – or, as I would put it, the commitment – of the foster parents, and the security of the child; which together contribute to the development of stronger bonds of attachment between them.

I absolutely accept that these are not conclusions to be applied willy-nilly to every case. But they provide a useful basis for supposing that, where the choice is between adoption and long term foster care, in general adoption may be regarded as offering positive advantages for a child over long term foster care. The quality of the relationship with the birth parents, and the impact on relations with birth siblings, are

⁷⁸ E Christopher Lloyd and Richard P Barth, 'Developmental Outcomes After Five Years For Foster Children Returned Home, Remaining in Care, or Adopted (2011) 33(8) *Children and Youth Services Review* 1383.

⁷⁹ John Triseliotis, 'Identity and Security in Long-Term Fostering and Adoption' (1983) 7(1) *Adoption and Fostering* 22.

⁸⁰ John Triseliotis, 'Long-Term Fostering and Adoption' (2002) 7(1) *Child and Family Social Work* 23.

important considerations, but it seems to me that how the child identifies himself or herself will be highly influential.

Birth parent contact

Until relatively recent times, it was assumed that adoption involved a complete severance of the relationship between the child and its birth parents. The rationale was that this enabled the adoptive parents to raise the child as their own, with neither interference by the birth parents, nor reminder of their existence; and commensurately enabled the child to grow up knowing just one set of parents without any risk of confusion or division of loyalties through familiarity with the birth parents. In that context, it was also seen as an interference with the parental rights of the adoptive parents to impose on them an access order against their will.⁸¹ Thus it was the rule that a birth parent would be granted an order for contact with an adopted child only in exceptional circumstances,⁸² although in 1987, the Full Family Court held that there was no rule discouraging an order for birth parent contact with an adopted child, and that as the welfare of the child was the paramount consideration, adoption was simply a factor to be taken into account when deciding what would best serve the child's welfare.⁸³

It was a fundamental tenet of the 2000 Act that birth parent contact should be encouraged. The practice of "open adoption", involving birth parent contact, is now widespread.

While it is accepted that a variety of relationships may exist between a child's adoptive and birth families, birth parent contact is strongly supported, unless it is not sought or not safe. Birth parent contact is a significant element in meeting the identity needs of a child who does not reside with his or her birth family, including

⁸¹ *Re S (a Minor)* [1976] Fam 1, 6; *Re M (a Minor)* [1986] 1 Fam LR (Eng) 51, 58-9. Barblett J said, in 1982, that it was basic to the concept of adoption that there be no access by a birth parent as the child grows up: *In the Marriage of N and H* (1982) FLC 91-267.

⁸² *Re B (MF) (an infant)* [1972] 1 WLR 102, 104; *Re El-G (Minors)* (1982) 4 Fam LR (Eng) 421, 433; *Re C (a minor)* [1989] AC 1, 17. However, courts did from time to time make orders for contact where it was considered to be of benefit to the child; *Re J* [1973] Fam 106; *Re S (a Minor)* [1976] Fam 1; *Re G (a Minor)* (1979) 1 Fam LR (Eng) 109. In *Adoption Application A83/6507* [1984] 2 NSWLR 590, Waddell J, as the later Chief Judge then was, observed that the Court may take judicial notice of the views now held by many professional people engaged in child welfare and adoption work that there are circumstances in which the interests of the child concerned may best be promoted by providing for adoption by the persons who have become the psychological parents, and also providing for continued contact with the natural parent. His Honour said that an order for adoption would be refused in the absence of any agreement between the natural parents of the child concerned as to access, because while the adoption order would have important advantages for the child, these did not justify the exclusion of the natural parent from the life of the child in the way that adoption would be likely to bring about. See also *Re Adoption Application No 6671/83* (1985) 10 Fam LR 624, 626, 629.

⁸³ *In the Marriage of Newling and Mole* (1987) 11 Fam LR 974, 978. The leading judgment was that of Nygh J, who said: "There is no rule that this court should not as a matter of principle, or perhaps only in exceptional circumstances, make any orders which in any way detract from the effect of the adoption order".

adopted children. The arrangements for birth parent contact are relevant to whether an adoption order should be made, because they bear on whether the child's identity needs will be adequately addressed, and thus whether adoption is in the child's best interests. The attitude of proposed adoptive parents to birth parent contact, and their ability to support it, is usually a very important consideration, especially in contested out-of-home care cases.

Mechanisms for birth parent contact

Typically, an adoption plan, providing for the exchange of information and/or contact, is presented to the court at the time an adoption order is sought. If the parties to the adoption have agreed to an adoption plan, the Court may not make an adoption order unless it is satisfied that the arrangements proposed in the plan are in the child's best interests and are proper in the circumstances.⁸⁴

An adoption plan does not of itself create legally enforceable obligations, but the parties to an adoption who have agreed to an adoption plan may apply to the Court for registration of the plan. Before registering a plan the Court must be satisfied that it does not contravene the adoption principles, that the parties to the adoption understand its provisions and freely enter into it, and that the provisions are in the child's best interests and proper in the circumstances. An adoption plan that is registered has effect, on the making of the relevant adoption order, as if it were part of the order, and thus becomes enforceable.⁸⁵ While registration was, until recently, uncommon, I have promoted it, particularly in out-of-home care cases, as it provides additional comfort and assurance to the birth parents that their ongoing contact with the child is not solely dependent on the support of the adoptive parents, but is underpinned by a plan that has effect as an order of the Court.

A birth parent who does not consent to an adoption may now nonetheless participate in (and apply for registration and enforcement of) an adoption plan: although a non-consenting birth parent is not otherwise a party to the adoption, a non-consenting birth parent who agrees to an adoption plan is to be treated as if he or she were a party to the adoption for the purposes of the making, registration and review of the adoption plan.⁸⁶ However, this opportunity has rarely been availed, I suspect because birth parents have difficulty in accepting that there is a difference between agreeing to an adoption plan and consenting to an adoption.

In addition, there is jurisdiction under the *Family Law Act* to make a "spend time with" order in respect of an adopted child who, once an adoption order is made, is a child

⁸⁴ (NSW) *Adoption Act*, s 90(2).

⁸⁵ (NSW) *Adoption Act*, s 50; *Director-General, NSW Department of Family and Community Services Re JS* [2013] NSWSC 306.

⁸⁶ (NSW) *Adoption Act*, s 46(2B), introduced by amendment in 2015.

of the adoptive parents.⁸⁷ This jurisdiction also enables a birth parent effectively to seek a review of contact arrangements.⁸⁸ An argument that *Family Law Act* s 69ZK excludes power to make such an order has been rejected, on the basis that that section was not intended to address the situation after – as distinct from before – an adoption order is made.⁸⁹

While the view has been taken in many jurisdictions – and was accepted by the NSW Law Reform Commission when the 2000 Act was drafted – that arrangements for birth parent contact should be voluntary and unenforceable, I tend to disagree. One of the greatest fears of birth parents who oppose adoption though recognising that the child is receiving superior care is that of losing contact with their child, and the promise of voluntary cooperation by the adopters is often not a sufficient response; however, a legally enforceable obligation is usually more acceptable. Similarly, adopters will often express agreement to support whatever contact the child wants, but that does not adequately reflect the obligation of the adoptive parents to proactively support contact in the best interests of the child. The theory of voluntariness is that adopters should not have birth parent contact foisted on them against their will, but to my mind, if the long-term interests of the child are that there be birth parent contact, the adopters must be prepared to accept and support it. Insofar as there is a concern that birth parent contact may be confusing to a child, I suspect we have all seen sufficient of blended families to accept that children have little difficulty in adapting to environments in which they have more than two parents.

The nature of birth parent contact

Birth parent contact in the context of adoption is different from contact with a non-residence parent following separation, where there is an established relationship between the child and the parent, who remains a legal parent. In this context, contact may be as little as twice a year, though that is minimalist, and will rarely exceed eight times a year; there is evidence that it is difficult to sustain more than

⁸⁷ In *Adoption Application A83/6507*, Waddell J said that whereas, but for the *Family Law Act*, the Supreme Court would have had power in its inherent jurisdiction when making an adoption order to provide for access to the child concerned, that had been overtaken by the *Family Law Act*, pursuant to which access to a child of a marriage – as an adopted child became on making an adoption order – was a matrimonial cause within the then exclusive jurisdiction of the Family Court. The jurisdiction of the Family Court to make an order for contact in respect of an adopted child at the suit of one of the natural parents was confirmed by the Full Court of that Court in *Newling and Mole* (1987) 11 Fam LR 974, 978, in which the Court said that a concession made by counsel for the adoptive mother that it could not be argued that it lacked jurisdiction to deal with an application by the natural father for access to the adopted child was correctly made. Since those cases were decided, the (Cth) *Jurisdiction of Courts (Cross-Vesting) Act* 1987 has vested in the Supreme Court all the relevant jurisdiction of the Family Court, so that it is now open to the Supreme Court, in its cross-vested jurisdiction, to make such an order under the *Family Law Act* contemporaneously with making an adoption order, and thereby avoiding the necessity for two sets of proceedings in different courts.

⁸⁸ *Director-General, Department of Family & Community Services; Re TVK* [2012] NSWSC 1629.

⁸⁹ *Director-General, Department of Family & Community Services; Re TVK* [2012] NSWSC 1629.

quarterly.⁹⁰ Moreover, where a child's ability to develop secure attachments has been jeopardised by early disruption, it is vital that the bonds established with the adoptive parents be now afforded maximum protection and security. This means that an adoptive parent is usually present during contact, although this may change – as may the duration of contact - as children become more confident and secure.

While, in theory, proposals that contact be reviewed after a period seem attractive, once an adoption order is made, the adoptive parents are in control, and another occasion for independent review of the contact arrangements will not readily present itself, as it can often be foreseen that the birth parents are unlikely to have the requisite resources and support to bring the matter back to the court. For that reason, it is preferable to make orders in conjunction with the adoption order, based on the best judgment one can make as to the probable course of events, leaving to those who may wish to argue that when the time arrives an increase in contact is no longer appropriate the burden of bringing the matter back to the court.

CONCLUSION

The *parens patriae* jurisdiction remains a very live and important aspect of the jurisdiction of the Supreme Court. However, it will be exercised to affect a decision of a Children's Magistrate only in an exceptional case.

The availability of a secure accommodation order, while very much a last resort, is to be born in mind when all lesser measures fail. Presumably, while the Children's Court could not itself make such an order, the intention to apply for such an order could be incorporated in a care plan, or could be the subject of a recommendation or direction to Minister or Secretary.

Adoption law and practice, and social science, accord with the permanent placement principles in taking the view that generally adoption offers advantages over long-term fostering – in particular, higher levels of emotional security, a stronger sense of belonging, and a more enduring psycho-social base in life. However, the social science is not based in the Australian context. Further research as to the relative benefits of adoption in the Australian context would be desirable – for example, a comparison of outcomes for out-of-home-care adoptions in New South Wales with those for permanent care orders in Victoria.

Adoption proceedings sometimes revive contact with a birth parent who has had nothing to do with the child since removal. While sometimes this is in the context that despite provision for birth parent contact following removal, the parent has not exercised it, there are also cases in which the care orders and/or care plan included, without explanation, no provision for birth parent contact. There are of course some cases in which birth contact is inappropriate. However, they are relatively few;

⁹⁰ Catherine Macaskill, *Safe Contact? Children in Permanent Placement and Contact with their Birth Relatives* (Russell House Publishing, 2002).

children need to know their parents, even if they are incarcerated. Regardless of whether adoption is contemplated, a child who does not know his or her parents is at greater risk of identity issues and depressive disorders in later life. Generally speaking, I am reluctant to allow an adoptive parent to be the arbiter of whether such contact is in the interests of the child. I acknowledge that contact often involves significant emotional stresses for any or all of the child, the birth parents and the adoptive parents. I also acknowledge that stressful contact hinders development and makes it less likely that the child will want to explore his or her roots with confidence when older; and enforced participation in contact that children find stressful is usually counterproductive in the longer term. Very clear evidence that the child does not desire contact – after a trial – may persuade me that none should be ordered. But it seems to me important that consideration be given to birth parent contact in every case. Again, further research in respect of birth parent contact in the context of long term removal would be helpful.

There has been some discussion as to whether jurisdiction in adoption should be conferred on the Children's Court, at least in the context of out of home care placements. It seems to me, however, that there are good reasons for keeping the jurisdictions separate and distinct. The question of making an adoption order in favour of particular adoptive parents necessarily arises long after the care order is made, and involves amongst other things being satisfied that the arrangements for the child are not only satisfactory but stable and settled. It would not be possible to make that decision at the time of a care order. While, as the cases indicate, the decision of the Children's Court allocating parental responsibility to the Minister until 18 is a very important consideration, other matters occurring after the care order is made also inform the discretion to make an adoption order. On the other hand, the care order and plan – and in particular the arrangements for birth parent contact – often cast the die: a birth parent who has little or no contact following removal encounters great difficulties in contending for restoration in the context of an adoption application by carers.
