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Albion Chambers FAMILY TEAM NEWSLETTER

Disclosure to police

the relevant principles

It is an inherent feature in proceedings relating to children that there will often be concurrent criminal proceedings. Common examples include allegations of neglect, sexual misconduct or physical assaults. Often the two court systems will be considering the same evidence.

When the family proceedings take place first and a fact-finding hearing is required, the police will often be understandably keen to know what goes on. Police material can still be disclosed into the family proceedings and used to determine factual disputes. Equally, the police may seek the disclosure of material from the family proceedings.

Para 1.2 of Practice Direction 12G to the FPR sets out when information concerning proceedings related to children may be disclosed to non-parties. It provides that a party to proceedings may disclose to a police officer the text or summary of a judgment given in proceedings, providing they do so for the purpose of a criminal investigation.

Other than this limited category of disclosure the police must make a formal application when they seek permission to see and to rely upon evidence or other documentation given in family proceedings. When such an application is made the Court has a discretion in respect of disclosure, but there are settled principles which govern the exercise of that discretion.

The leading authority on the exercise of a discretion to provide disclosure to the police remains *Re C (a minor) (care proceedings: disclosure)* [1997] Fam 76; sub nom *Re E C (disclosure of material)*[1996] 2 FLR 725, in which a police force applied successfully for disclosure of various documents, including statements made by the parents.

At paragraphs 86 to 87 of his judgment, Swinton Thomas LJ set out the factors which he had distilled from the relevant authorities, whilst being clear that they could not be put into any hierarchy of comparative importance, as the emphasis will inevitably vary depending on the facts of any given case.

i. The welfare and interests of the child or children concerned in the care proceedings and the welfare and interests of other children generally;

ii. The maintenance of confidentiality in children's cases;

iii. The importance of encouraging frankness in children's cases;

iv. The public interest in the administration of justice, the prosecution of serious crime and the punishment of offenders;

v. The gravity of the alleged offence and the relevance of the evidence to it;

vi. The desirability of cooperation between various agencies concerned with the welfare of children;

vii. In a case to which s.98(2) applies, the terms of the section itself and that any statement of admission would not be admissible against him in criminal proceedings;

viii. Any other material disclosure which has already taken place.

When seeking to resist an order for disclosure of material in family proceedings, especially items such as witness statements or transcripts of oral evidence, the principle of encouraging frankness in cases concerning children will often be a useful starting point. This is likely to be of particular relevance in a case to which s.98(2) applies. The core purpose of s.98 is to promote the giving of honest evidence with the incentive that any admission will not then be admissible in evidence in a criminal trial (except of course for perjury).

Some guidance on the application of these principles can be found in the authority of Mr Justice Munby (as he then was) in *Re: X* [2008] EWHC 242 (Fam). That case concerned a child, B, who had conceived a child at age 13 by her own father. The father was subsequently charged with incest. Care proceedings in respect of the infant were concluded, but proceedings relating to B and her siblings continued. The father sought to limit his admissions regarding his sexual contact with B. Father was compelled to give evidence, was an unimpressive witness and was found to have sought repeatedly to minimise his criminality. A transcript of his evidence was prepared.

B's mother sought leave to quote parts of the father's evidence in a victim impact statement which the Crown Court had asked the mother to complete to assist with the sentencing process.

Munby J was clear that the material should be disclosed into the criminal sphere. This was to ensure that the father, who had been a reluctant witness in the family court, was prevented from peddling a self-serving account in the criminal court, or relying upon remorse which was not reflected in his conduct in the family proceedings. The public interest in his receiving a just sentence for his actions was a substantial factor.

Further, the disclosure of such material was not contrary to s98(2). The Crown cannot use the material to build a case against the father, but only to challenge any account he might present which was inconsistent with his evidence in the family proceedings.

A more recent authority which adopts the *Re: C/Re E C* criteria can be found in London *Borough of Lewisham v D (Local Authority disclosure of DNA samples to police)* [2010] EWHC 1238 (Fam). That decision concerned an application by the police to have disclosed to them DNA material taken from various children subject to proceedings so as to allow the police to compare the material to the DNA of the First Respondent to the family proceedings, who claimed to

be their mother. The police had charged the First Respondent with offences of assault and wilful ill-treatment, but were investigating whether there might in fact be more serious issues of child trafficking to be resolved.

The application for disclosure of the DNA material was allowed. The nature of the application led to an extra emphasis being placed on considerations of the Article 8 ECHR rights of the children. However, upon being reassured that controls would be in place to ensure the safe handling and ultimate destruction of the samples, it was felt that such disclosure should be made. This case is useful reading for the careful consideration of the *Re EC* principles in order, with specific comments upon the relevance and weight of each factor in turn.

Although each of the authorities detailed above was ultimately decided in favour of disclosure, it is by no means easy to secure the disclosure of material from family proceedings into police possession. The reported cases understandably tend to be the most serious. As these matters crop up in practice they will often be less grave than matters of incest or child-trafficking and therefore less likely to weigh the scales quite so heavily in favour of the public interest in prosecution.

Edward Hetherington

When is a finding not a finding?

On 20th February 2013 the Supreme Court handed down their judgment *In the Matter of J (Children)* [2013] UKSC 9. The court had been asked to determine whether a previous finding that a person found to be in a pool of perpetrators who had caused significant harm to another child, constituted a 'finding of fact' that would support a determination under section 31 of the Children Act 1989 in relation to a new child. Could the threshold criteria be satisfied in subsequent proceedings, involving a new family, with different children, in relation to the fact that those children were 'likely to suffer' given that there was a possibility that that person was responsible for the previous harm suffered?

Lady Hale gave the lead speech and she re-iterated it was a serious matter for the state to compulsorily remove children from their family. The threshold criteria were an important measure in protecting a family from unwarranted intrusion whilst at the same time protecting children from harm. Her view remained that "the need for the local authority to prove the facts which give rise to a real possibility of significant harm in the future is a bulwark against too ready an interference with family life on the part of the state"[75]. The speech notes that the wording of section 31(2) has been the subject of six appeals to the House of Lords and the Supreme Court and that the court has consistently held that a prediction of future harm has to be founded on proven facts and that such facts have to be proved on the simple balance of probabilities. As set out in [47] Lady Hale acknowledges the anomaly that would exist if the second limb of the threshold, namely that the child is likely to suffer significant harm, did not have to be proved to the satisfaction of the court whilst the basis for the first limb, that a child is suffering harm, did.

The background to the case was that in 2004 mother's eldest child with her former partner, had died of non-accidental injuries. The judge in the proceedings relating to mother's second child (sibling of the deceased child) who was subsequently adopted, found that either mother or her former partner, the father of the two children, had caused the injuries and that the other had at the very least colluded to hide the truth. The parents subsequently separated and mother began a relationship with her current partner, who had the care of his two children. Mother had had a third child with her former partner and a fourth with the new partner. The local authority issued proceedings based upon the findings surrounding mother's eldest child. They raised no concerns about mother's care for the four children of these proceedings. HHJ Hallam considered herself bound by the previous authorities, that findings of fact that did not specifically identify the perpetrator had to be ignored in the evaluation of the likelihood of future harm and, therefore, dismissed the care proceedings. The local authority appealed on the basis that this was in conflict with the approach, as set out by Lord Nicholls in three House of Lords decisions, to be taken to the threshold criteria in section 31 of the Children Act 1989. he Court of Appeal dismissed the case. McFarlane LJ, giving the lead judgment, held that the Court of Appeal was bound by the earlier authorities. However, in light of the inconsistencies in the case law and the noticeable differences between cases in which there had been no finding of harm and those where past harm had been found but the actual identity of the perpetrator had not been proven to the civil standard, the Court of Appeal noted that there was a pressing need for the law to be clarified by the Supreme Court.

The Court of Appeal had expressed regret that the case before HHJ Hallam was limited to only one aspect of the case, namely the physical injuries sustained by mother's elder child. The circuit judge had not been asked to consider the findings of mother's failure to protect, nor evidence relating to the intervening seven year period or mother's current views on the care received by her elder child. Lady Hale acknowledged that this case had been artificially constructed by the decision of the local authority to treat the issue as a preliminary question of law, that in the real world the issue hardly ever comes packaged in this simple way and questioned what facts the court may have found relevant had the history been investigated in the usual way. "There is no substitute for a careful, individualised assessment of where those facts take one"[54] "There may, or may not, be a multitude of established facts from which such a likelihood can be established" [54].

It was on this point that both Lord Wilson [78] and Lord Sumption [92], whilst agreeing with the disposal of the appeal, departed from Lady Hale. Lord Wilson noted that if a parent's consignment to the pool of perpetrators cannot on its own constitute a factual foundation for a prediction of likely significant harm, then it would be illogical if it could when weighed together with other facts. "If, for the purpose of the requisite foundation, X's consignment to a pool has a value of zero on its own, it can, for this purpose, have no greater value in company" [80].

As noted above, cases where the only matter upon which the local authority can rely is the possibility that the parent has harmed another child in the past are very rare. Therefore, whilst the proposition that a real possibility that a parent has harmed a child in the past is not, by itself, sufficient to establish the likelihood that they will cause harm to another child in the future, there may be a number of established facts from which a likelihood that this parent will harm a child in the future can be drawn.

Linsey Knowles

A new dawn?

Committal in cases of wilful and persistent non-disclosure

Young v Young [2013] EWHC 34 (Fam)

This article considers the recent authority of *Young v Young* and whether or not it may affect the way courts approach committal applications for serial non-disclosure in financial remedy proceedings. Certainly in my experience the prevailing view before *Young v Young* was that the influence of penal notices and the prospect of enforcement was extremely limited.

Debtors Act v "Non-Money" orders: Before considering the featured case, it is important to clarify the distinction between "non-money" injunctive orders, and actions for committal brought under the *Debtors Act 1869*. Put simply, the latter carries a maximum six-week custodial sentence and is used as a punitive sanction for breach of financial payment orders. The former, of which *Young v Young* is an example, carries a significantly larger two-year (maximum) custodial penalty in cases of contempt, pursuant to s.14 of the Contempt of Court Act 1981. Most readers will be aware of the distinction, but I have nevertheless highlighted it because at first instance in *Zuk v Zuk* [2012] EWCA Civ 1871 even the learned judge got the two confused, and sentenced the husband to nine months imprisonment, instead of the six weeks to which she was limited in Debtors Act cases.

Young v Young: Mrs Young believed that Mr Young had a hidden fortune in the region of £400 million. Mr Young pleaded poverty and claimed he was funding the litigation and living expenses by way of generous donations from friends. In June 2008 the wife was granted permission to serve a further questionnaire. The husband failed to respond and a penal notice was attached to the order in November 2008. Coleridge J subsequently extended the time limit to respond to 1st May 2009. The husband provided some responses but they did not appease the wife and she issued a committal summons. This was subsequently adjourned on 20th May 2009 for a further three weeks.

On 3rd June 2009 the wife served a further questionnaire seeking documentary evidence of all payments alleged to have been made for the husband's benefit by third parties - an important question (that should really have been asked before this stage!) given the wife's assertion that the husband was in fact making payments to himself from vast undisclosed financial resources. The husband failed to respond and on 29th June 2009 was committed to prison for six months for contempt of the previous orders, suspended for 92 days on the condition he provide the answers and documents by 7th September 2009. For reasons including (inter alia) the husband's ill health, this deadline was further extended to 9th November 2009. The husband served some answers and documentation by 11th November 2009, but the wife alleged further material deficiencies.

The matter then went cold due to (inter alia) the ill health of Parker J, and difficulties the wife was experiencing in funding the litigation. In November 2012 the wife's application for activation of the committal was granted, but not without the husband being given one final opportunity to comply by 10th December 2012, which he failed to do.

On 14th January 2013 the husband claimed to have finally purged his contempt, but having considered his efforts, Moor J concluded that he was satisfied beyond reasonable doubt that the husband had in fact failed to do so - primarily because he had still failed to settle the vital issue of where his funding had been coming from. Moor J found Mr Young's explanation that his friends were willing to give generous donations but not documentary proof of the same to be "absurd", and he concluded there had been, "a flagrant and deliberate contempt over a very long period". Mr Young was sentenced to six months custody.

Comment: Disappointingly it seems that far from marking a new dawn in the judiciary's approach to serial non-compliance with court orders for disclosure, *Young v Young* supports the prevailing general view that penal notices and the threat of committal tend to achieve very little – at least within a reasonable timeframe.

What is most concerning is that despite attachment of the penal notice in November 2008, and the committal summons being issued in May 2009, it took a further three years before the court finally imposed a sanction for a serious and wilful contempt. Surely expiry of the suspended disposal in November 2009 should have been the cut-off point, subject only to the most compelling of reasons?

Penal notices in financial remedy proceedings, within the context being discussed, should ideally serve a coercive function designed to incentivise compliance by threatening punitive sanctions for continued disobedience. However, unless the judiciary adopt a more hard-line approach, avoidance and delay tactics will continue to present significant problems for some people in certain circumstances.

Consider for a moment the divorced wife who after two years continues to endure significant financial hardship and the stresses of protracted litigation despite strong evidence that the husband is simply 'playing the system', avoiding disclosure and concealing resources. I submit that allowing such a situation to continue runs contrary to the court's general case management responsibilities, its obligations under the overriding objective, and the principles of fair and natural justice. What is more, it presents as reasonable to conclude that such judicial apathy will only serve to undermine public confidence.

Committal applications and activation have and always will be an option of last resort, and clearly there are other coercive options that a party may wish to deploy before issuing such an application. For example, courts can of course be invited to draw adverse inferences with regards what appear to be material and wilful disclosure omissions, particularly in cases where there is other evidence that prima facie supports the wife's suspicions. Where such a course is taken and an order made on the basis of such inferences, the principle in *Hadkinson v Hadkinson* [1952] 2 All ER 56 (appeal may not be heard until the non-compliant party takes an essential step toward purging their contempt) could, subject as always to the particular factual matrix, help finally achieve compliance.

Conclusion: It presents as reasonable to surmise that judicial apathy has fuelled the general view that penal notices and the threat of enforcement achieve very little, thus blunting what could potentially be an effective weapon in cases of serial non-disclosure. Unfortunately *Young v Young* will not change that view, but it does remind us of an existing option that could, in appropriate cases, assist the courts in achieving justice between the parties.

Kevin Farquharson

Third parties and wasted costs

Fisher Meredith v JH and PH

Since 2006 the leading case on how to approach the question of joinder of third parties and financial remedies proceedings has been *TL v ML [2006] 1 FLR 1263*. The Wife in that case asserted that there were assets held by her Husband's brother and also in offshore companies that were in fact beneficially owned by H. Mostyn Q.C. (sitting as a deputy) cited Lord Denning M.R. in *Tebutt v Haynes [1981] 2 All ER 241*:

"It seems to me that, under s 24 of the 1973 Act, if an intervenor comes in making a claim for the property, then it is within the jurisdiction of the judge to decide on the validity of the intervenor's claim... A dispute with a third party must be approached on exactly the same legal basis as if it were being determined in the Chancery Division."

Mr Mostyn Q.C. then set out the necessary procedural steps in a case where there was a dispute about property owned by a third party:

"(i) The third party should be joined to the proceedings at the earliest opportunity;

(ii) Directions should be given for the issue to be fully pleaded by points of claim and points of defence;

(iii) Separate witness statements should be directed in relation to the dispute; and

(iv) The dispute should be directed to be heard separately as a preliminary issue, before the financial dispute resolution (FDR)."

In *Goldstone v Goldstone [2011] EWCA* Civ the Court of Appeal approved the suggestion of Munby J that the principles in *TL v ML* might not necessarily be appropriate in every case:

"Vigorous judicial case management in such cases is vital, but the appropriate directions to be given in any particular case must reflect the case managing judge's appraisal of how, given the forensic realities of the particular case, the issues can be best resolved in the most just, effective and expeditious manner."

In *Edgerton v Edgerton [2012] 2 FLR 273*, there were proceedings in both the Chancery division and the family division. H's business associate had brought proceedings in the Chancery division for a partnership dissolution. An order was made in the Chancery division that most of H's assets were beneficially owned by his business associate. Held in the family proceedings:

(a) The wife was a party to the partnership action and was bound by the regular order made by the Chancery division. She would not be permitted to maintain a different case in the financial remedies proceedings which was different to the position reflected in the Chancery division's order.

(b) However, in the unusual circumstances of the case, the wife was to be permitted to pursue her financial remedies claim provided she issued proceedings to have the Chancery orders set aside on the grounds of collusion and/or fraud as soon as possible.

In *Fisher Meredith v JH and PH [2012] 2 FLR 536* Mostyn J revisited his earlier decision in TL v ML. The facts in outline:

- Three years before the marriage H was issued one third of the shares in a property company. Just before separation he transferred his shareholding to his Aunt.
- The Aunt was joined. However, other relatives who might have been interested were not joined.
- H said he had never been beneficially entitled to the shares but had been a bare nominee on behalf of his uncle.

Two working days before the start of the five-day hearing, Aunt disclosed 123 pages of redacted material. On the Saturday before the Monday hearing, the silk for Aunt sent out a meaty skeleton argument. It contained visceral criticism of W's solicitors for failing to join "the beneficiaries". It sought an adjournment and wasted costs. Those applications were granted by the DJ. The appeal came before Mostyn J. His Lordship set out the law regarding wasted costs and in particular the definition in section 51(7) of The Senior courts Act 1981:

"wasted costs" means any costs incurred by a party –

(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative;"

His Lordship then outlined the difficulties which will be faced by those seeking to get a wasted costs order:

"(i) R2 [the aunt] and H have the burden of showing that FM failed to act with the competence reasonably expected of ordinary members of the solicitors' profession. R2 and H have to prove as much as they would have to prove in an action for negligence against FM.

(ii) The demonstration by R2 and H of a causal link between FM's conduct and the wasted costs, and only to the extent of the wasted costs, is essential.

(iii) Even if these conditions are satisfied H and R2 have to persuade the court to exercise its discretion to make a wasted costs order.

(iv) Where the respondent lawyers are precluded by legal professional privilege from advancing a full answer to the complaint made against them the court should only make an order for wasted costs exceptionally where:

(a) it is satisfied that there is nothing the lawyers could say, if unconstrained, to resist the order; and

(b) it is in all the circumstances fair to make the order

His Lordship cut the claim for wasted costs to ribbons as follows:

- Nowhere within the previous authorities had it been addressed upon whom the obligation to join should fall;
- There was a distinction to be drawn between where:

(a) a Claimant is saying property held in the name of a third party is the property of the Respondent; and

(b) where the Respondent says that the property to which he has the legal title is beneficially owned by a third party.

In the former case there was a clear obligation on the Claimant to apply to join the third party at an early stage. In the latter case it is not as clear cut. In the latter case the burden is on the Respondent to show that he has no interest.

The decision on the facts

- The criticisms of FM were wholly untenable. All of the other parties had assented either expressly or tacitly to the preliminary issue [share ownership] being determined without the joinder of other family members.
- An adjournment would have been needed anyway (the 123 pages).
- On the facts the adjournment appeared to be something of a joint decision.
- W's discussions as to whether to adjourn were covered by legal professional privilege: "For all we know W may have insisted on it in the teeth of advice to press on."

Conclusions

- If W is saying that property owned by someone else is in fact owned by H the onus may well be on her to seek joinder.
- If the legal title is in H's hands and he says it in fact belongs to someone else then there is a good argument for saying that the burden will be on him to join the other party.
- But remember, the case of Fisher-

Meredith dealt with specific facts regarding a wasted costs application when a hearing did not go ahead. At an FDA the obligation to consider whether parties should be joined is something which is likely to be assessed to fall on both parties. In the event that a third party is joined, it can be expected that an issue as to that third party's costs is likely to be resolved by the success or not of the argument in relation to that third party rather than the simple question of who had the obligation to join.

David Chidgey

ABE interviews in Family Fact-Finding Hearings

Children giving evidence live in family hearings received much press following *Re W* [2010] Civ 57 and the subsequent guidelines published by the Family Justice Council (December 2011: see the previous edition of this Newsletter from April 2012). While this deals with children giving evidence live in proceedings, what about the more common situation where the only evidence from the child is video evidence?

Many practitioners have to deal with Achieving Best Evidence (ABE) interviews of children: some poorly controlled, some better than others. Because ABE interviews are conducted within the context of potential criminal proceedings, the possibility of submissions on the basis of the quality and conduct of the interview may be overlooked. While submissions on the procedure leading to the interview itself are made, e.g. initial disclosure to others, time from initial disclosure to the ABE interview, the opportunity to make further points on the basis of the conduct of the ABE interview itself is missed. It is therefore important to be reminded of the fundamental concepts governing these interviews.

Since the Criminal Justice Act 1991, a child's evidence-in-chief can be presented at trial by means of a video interview held by a police officer and an appropriate interview monitor, usually a social worker. These interviews were first guided by the Memorandum of Good Practice and now by Achieving Best Evidence (currently on its third edition). Of course, this is simply advisory guidance and not a legally enforceable code of conduct. There is no substitute for reading this guidance in full but the rest of this article will summarise the main points for ease of reference.

Before the ABE interview is conducted, the interviewer should engage in multi-disciplinary planning, including considering the need for psychological or psychiatric assessment of the child along with a wide range of factors (age, race, culture, language and linguistic abilities, religion, gender, sexuality, special needs, cognitive memory, current emotional state, relationships with family members, sexual education and sexual knowledge, routines and discipline of the child). Preparation should also include preparing the child for the interview: explaining to them the purpose and structure and ensuring that they understand and are comfortable with the situation. This is very important as the effect of questioning and the child's emotional well-being will impact on the accuracy and quantity of the information that the child provides.

The ABE interview should have four clear stages: rapport, free narrative, questioning and closure.

Rapport: the guidance suggests starting some discussion of a neutral topic to relax and settle the child. This should aim to establish a rhythm where the child is talking for the majority of the time and should certainly not resemble a cross-examination. For example, a string of questions such as "Where do you go to school? What year are you in? What do you study? What is your best subject? What is your worst subject?" is unhelpful because these questions can all be answered in one word and therefore do not assist the child in understanding that it is them who should be speaking.

An essential part of this stage is the explanation of the ground rules and the "truth and lies" test. The child must be asked what they understand as a truth and a lie. Their answer must indicate the intention to deceive: so no words like "imagine" or "pretend" that may suggest fantasy or play should be used.

Free narrative: eliciting the child's free narrative account is the main purpose of the ABE interview. The child should be encouraged to provide a free account of relevant events as far from the interviewer's influence as possible. This requires very careful, planned open questions to prompt and assist the child's recall: non-specific prompts such as "is there more that you can tell me?" are often used. The interviewer needs to secure as full and comprehensive an account as possible in the child's own words. This avoids any suggestion at a later date that the child was somewhat led into making an allegation.

Questioning: this stage seeks to clarify what the child has said in the narrative account. The questions should address evidential matters, i.e. the contextual and peripheral detail of the allegation and clarification of any confusion arising from the free narrative. It is not the opportunity to add further allegations or ask leading questions on such. Questions should also address the burden of proof and any potential defences.

Closing: the summing up of key evidential points by the child. This stage should crucially contain more neutral topics in order to allow the child recovery time.

From this brief outline of the comprehensive guidelines, there is much material for submissions on the weight to be placed on an ABE interview. The practitioner should note whether:

- the four stages are used, especially the free narrative;
- the child is not sufficiently prepared for the interview and does not know what is happening;
- rapport is used to settle the child;
- the "truth or lies" test is used and an appropriate response given by the child;
- there is a premature move from the free narrative to direct questioning;
- the child's anxieties and fears are not being acknowledged or discussed;
- the child does not understand the language used, is disturbed or is confused;
- a social worker is present with the child along with a police officer;
- the closing stage does not cover the main points but suddenly switches to a more comfortable, "happy" presentation;
- the questions asked are unsuitable: complex, using adult language, not adapted to age or experience, asking the child to explain the offender's behaviour, accusatory questions.

Practitioners should ensure that they have the opportunity to examine the video interview before any hearing and ensure that it complies with the guidance or determine what points can be made on the interview proceedings itself. The practitioner should be live to the possibility that they may have to defend the ABE interview against judicial criticism. Where an ABE interview is the main evidence given, such as the common situation where it is only the child and the alleged perpetrator who can give direct evidence on an allegation, the submissions made may determine the judge's perception of the ABE interview and dramatically alter the outcome of the fact-finding hearing.

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