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Number 21 October 2014



## **Albion Chambers** FAMILY TEAM NEWSLETTER

# Care proceedings with a foreign element

#### Form C110a

Section 5 of the current version of Form C110a asks three questions:

Do you have any reason to believe that any child, parent or potentially significant adult in the child's life may be habitually resident in another state?

Do you have any reason to believe that there may be an issue as to jurisdiction in this case (for example under Brussels 2 revised)?

Has a request been made or should a request be made to a Central Authority or other competent authority in a foreign state or a consular authority in England and Wales?

#### **Directions on Issue**

PD12A tells us that within a day of issue "Court considers jurisdiction in a case with an international element." This is provided for in the standard Directions on Issue.

#### Section 6 of the CMO

And the much-loved draft CMO includes at Section 6:

#### Jurisdiction

- a) The Court is satisfied that it has jurisdiction in relation to the child/ren [give reasons, eg. based on habitual residence] [and/or]
- b) There is an issue as to jurisdiction in respect of the children and consideration needs to be given to this issue [and the application of Council Regulation (EC) No 2201/2003 (Brussels 2 Revised)] to these proceedings by the parties as a matter of urgency
- c) The local authority shall liaise with the [identify country] consular authority in England and Wales or other competent authority in [name of foreign state] in relation to the proceedings or make a request to

the Central Authority of *[identify country]* for such information as may be relevant to determine issues of jurisdiction.

#### What might the issues be?

Clearly, jurisdiction is a matter that needs urgent consideration in any care case where it might be an issue; there's little point setting off down a route that leads to a jurisdictional dead end, hence C110a posing the jurisdiction question before proceedings are issued. The onus is on the local authority to raise it in the C110a if it has "any reason to believe" that it might be an issue. The allocation team at the Court must be alert to the question even if it isn't raised by the local authority, and as a long-stop those representing the adult respondents and the child also need to give it consideration in time for the CMH.

In addition to jurisdiction, courts and practitioners need to be alert to the following issues:

- Even if the courts of England and Wales have jurisdiction, should a foreign court be invited to "take over" the case or, sometimes, part of the case?
- What is the appropriate line of communication with the relevant foreign jurisdiction?
- Does anything need to be done in compliance with the Vienna Convention?

## The Vienna Convention on Consular Relations, 24 April 1963

Sir James Munby P was far from wrong when he said in *Re E* [2014] EWHC 6 (Fam) "Articles 36 and 37 of the Vienna Convention on Consular Relations are probably not very familiar to most family lawyers." However, the erudite readership of this newsletter was of course familiar with

the detailed content of the Convention long before Sir James Munby P drew it to the attention of the rest of the profession (me included), so I needn't say much about it. What it boils down to is summed up by the President at [46] as follows:

"In cases involving foreign nationals there must be transparency and openness as between the English family courts and the consular and other authorities of the relevant foreign state. This is vitally important, both as a matter of principle and, not least, in order to maintain the confidence of foreign nationals and foreign states in our family justice system. To seek to shelter in this context behind our normal practice of sitting in private and treating section 12 of the Administration of Justice Act 1960 as limiting the permissible flow of information to outsiders, is not merely unprincipled; it is likely to be counterproductive and, potentially, extremely damaging. If anyone thinks this an unduly radical approach, they might pause to think how we would react if roles were reversed and the boot was on the other foot".

At [47] the President goes on to explain what should happen if a consular authority seeks information or access to the Court in proceedings concerning one of its nationals (transparency and cooperation is what's required) and he then sets out a positive duty on the Court:

"Whenever a party, whether an adult or the child, who is a foreign national

- a) is represented in the proceedings by a guardian, guardian ad litem or litigation friend; and/or
- b) is detained, the court should ascertain whether that fact has been brought to the attention of the relevant consular officials and, if it has not, the court should normally do so itself without delay".

It is worth noting that Re E concerned a 12-year-old Slovakian boy who was habitually resident in England and Wales and that there was no dispute as to jurisdiction. The Vienna Convention was of relevance because the Slovak Embassy made a request to have an observing presence in court, largely it seems because

#### Editorial

Welcome to the Autumn family team newsletter. Firstly, we are absolutely delighted to welcome back to chambers Charles Hyde QC. He has a national reputation for his heavyweight financial practice and the return of his expertise to Bristol will be warmly welcomed by all. Now, a word of caution from the editor here - I recently found myself in front of Munby P on an interesting case where a parent (quite understandably) had found it very difficult to accept the making of a final care and placement order. Now the state of the law at present is this - parents must be able to "express their views publicly about what they conceive to be failings on the part of individual judges or failings in the judicial system" and "even if the criticism is expressed in vigorous, trenchant or outspoken terms ... or even in language which is crude, insulting and vulgar" Re J (Reporting Restriction: Internet: Video) [2013] EWHC 2694 (Fam) [2014]. The case I was involved in sought to draw a distinction between legitimate opinion and harassment. I expressed myself in the skeleton as follows, "There must be a distinction between legitimate criticism (ill-informed as it may be) and outright harassment of professionals. In the present case this line has been well and truly crossed and hard working, assiduous social work professionals have been the subject of an ongoing attack by Mr X, causing them understandable anxiety and occupying their time and energy which could and should be devoted to the vital role they perform in protecting the most vulnerable children in society." It would seem that the President agreed. The word of caution is this - in getting to that very worthwhile distinction the (rightly) rigid rules governing committal proceedings (see FPR 2010 Part 37 and PD37A) must be satisfied. Further (I hesitate to use the word), any injunction must not be 'unacceptably ambiguous' (see Re HM (Vulnerable Adult: Abduction) (No 2) [2010] EWHC 1579 (Fam), [2011] 1 FLR 97). If you wish to prohibit someone from doing something make it plain that the act you are asking them not to do applies to them specifically. If you find that you have not made that absolutely clear then do not even attempt to defend it. Just sit down and shut up (he tells himself). Benjamin Jenkin

the case had attracted much press attention in Slovakia. That press attention was described at one point in the judgment as amounting to a "campaign"; the focus of the campaign is unclear from the judgment, but Munby P makes specific reference to the fact (irrelevant though it was in the particular case because of the child's age) that the UK is unusual in Europe in permitting the total severance of family ties without parental consent.

#### Jurisdiction

Whether the courts of England and Wales have jurisdiction in "matters of parental responsibility" concerning a child, wherever the child is from, is governed by Council Regulation (EC) No 2201/2003 ("the Regulation"). The basic principle under Article 8(1) of the Regulation is that the court has jurisdiction if the child is habitually resident here. If the habitual residence of the child cannot be established<sup>1</sup>, the Court has jurisdiction if the child is "present" in England and Wales.

How to establish "habitual residence" is worth an article in itself, if not an entire newsletter. It has been considered three times by the Supreme Court and more recently by the Court of Appeal. For those of you in search of bedtime reading as a cure for insomnia, may I recommend:

- Re A (Children) [2013] UKSC 60
- Re L (a child; custody; habitual residence) [2013] UKSC 75
  - Re LC (Children) [2014] UKSC 1, and
- Re H (Jurisdiction) [2014] EWCA Civ 1101.

#### Enjoy!

In the event of the Court finding that it does not have jurisdiction it must declare of its own motion that this is the case (see Article 17) but it may then put in place or continue with "provisional, including protective, measures" under Article 20 until such time as the foreign court that does have jurisdiction has taken such measures as it considers appropriate. This raises the question of communication, which is dealt with below.

#### Article 15

A small industry has developed, largely since Re E, in order to process the volume of public law cases in which jurisdiction is found to rest with the English and Welsh courts but where there might be an argument that the courts of another EU country might more appropriately (I use that phrase very loosely) deal with the matter. The position is governed by Article 15:

"1. By way of exception, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:

(a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other Member State in accordance with paragraph 4; or (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.

- 2. Paragraph 1 shall apply:
- (a) upon application from a party; or
- (b) of the court's own motion; or
- (c) upon application from a court of another Member State with which the child has a particular connection, in accordance with paragraph 3.

A transfer made of the court's own motion or by application of a court of another Member State must be accepted by at least one of the parties.

- 3. The child shall be considered to have a particular connection to a Member State as mentioned in paragraph 1, if that Member State:
- (a) has become the habitual residence of the child after the court referred to in paragraph 1 was seised; or
- (b) is the former habitual residence of the child; or
- (c) is the place of the child's nationality; or
- (d) is the habitual residence of a holder of parental responsibility...
- 4. The court of the Member State having jurisdiction as to the substance of the matter shall set a time limit by which the courts of that other Member State shall be seised in accordance with paragraph 1. If the courts are not seised by that time, the court which has been seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.
- 5. The courts of that other Member State may, where due to the specific circumstances of the case, this is in the best interests of the child, accept jurisdiction within six weeks of their seisure in accordance with paragraph 1(a) or 1(b). In this case, the court first seised shall decline jurisdiction. Otherwise, the court first seised shall continue to exercise jurisdiction in accordance with Articles 8 to 14.
- 6. The courts shall cooperate for the purposes of this Article, either directly or through the central authorities designated pursuant to Article 53."

As will be noted for Article 15.1, the question is not whether it is "more appropriate" for the courts of the other member state to deal with the matter.

There is, rather, a three part test:

- 1. Does the child have a particular connection with the other country, as defined by Article 15.3?
- 2. Are the courts of the other country better placed to hear the case?
- 3. Is a transfer to the courts of the other country in the best interests of the child?

These three apparently simple questions have spawned more High Court decisions than any sane person would want to write about, but the keen reader (she knows who she is) might want to look at:

- Hounslow [2014] EWHC 999 (Fam) application adjourned so enquiries could be made in Hungary Holman J swimming against the tide.
- Bristol re HA [2014] EHWC 1022 (Fam) Baker J, ably assisted by Hannah Wiltshire and yours truly, found habitual residence of Lithuanian child to be here but made Article 15 request. (By way of post script, Lithuania accepted jurisdiction but then seemingly did nothing. A "reverse request" is now in the offing, in effect asking Lithuania to consider sending the case back.)
- Coventry re A [2014] EWHC 2033 (Fam) Romanian case Hogg J refuses to make Art 15 request interesting issue re breaching confidentiality of mother who wants child adopted and doesn't want her family to be given any information.
- Leicester re S [2014] EWHC 1575 (Fam) Moylan J makes Article 15 request to Hungary (who respond very swiftly).
- Re J and S [2014] EWFC 4 Munby P rejects application for Article 15 request made too late in the day (alongside a s47(5) application).
- Southampton [2014] EWFC 16 Baker J refuses application to make Article 15 request to Latvia.
- Re F [2014] EWCA Civ 789 not really about Article 15 at all, but a reminder of the need to tackle the jurisdiction issue early on and properly, and also a reminder [para 5 of the judgment of the C of A] of the unstuffy approach taken to such matters by Sir Paul Coleridge.
- Barking and Dagenham [2014] EWHC 2472 (Fam) – Parker J going about it the right way, grasping the nettle early, making an Article 15 request (to Romania) but also timetabling the case before herself in case Romania said "No thanks."

#### Communication

There is a tendency to write to embassies. Not a good idea, except to comply with the Vienna Convention (of course!).

There's also a tendency to think that the Office for International Family Justice will

sort it all out with a magic wand. It won't. It's rushed off its feet. If there's an issue for them it will be identified by the judge – and at present all these cases are dealt with by judges of the Division, though that might change soon as some of them are finding time to do little else especially when on Circuit.

The Central Authorities are key to communication, which in England and Wales means ICACU (the International Child Abduction and Contact Unit).

The communication issue is dealt with in some detail by Moylan J in the Leicester case referred to above, in particular at paras 48 to 54. This is now required reading for anybody dealing with a care case with a foreign element.

#### Stuart Fuller

 For an example of that unusual situation see the judgment of Peter Jackson J in re F (Habitual Residence)
 [2014] EWFC 26

## The best laid plans...

very so often there are reported

cases that make essential reading for practitioners. Those decisions made by the Supreme Court and the Court of Appeal are cascaded down and very quickly find their way into our submissions to the court on a daily basis. Clearly, Re B [2013] UKSC 33 and Re B-S [2013] EWCA Civ 1146 are two such cases that have proved all pervasive and are quoted ad nauseam. They have 'changed the landscape' and play their part in this article, which is concerned with the recent decision of Baker J in Re DE (A Child) [2014] EWFC 6. Re DE, being a decision of the Family Court, may have gone unnoticed and the purpose of this article, is to suggest it too is essential reading. Besides, it has the express approval of the President and a very helpful guide as to how children may be removed from their parents' care when living at home under the auspices of a care order.

#### The facts

Care proceedings were initiated in relation to D, following his birth. Happily, D remained in his parents' care and at the conclusion of the proceedings District Judge Cronin approved a care plan of D remaining at home with his parents under a care order. The final order included an

undertaking, given by the local authority, that it would not seek to remove D from his parents without giving seven days notice, save in an emergency.

Some 18 months later, the local authority, came to the conclusion that D was not being afforded appropriate care and the parents were given notice that the local authority intended to remove him in four weeks time. The parents were not entitled to public funding but fortuitously, their lawyers acted for them *pro bono*. The father made an application pursuant to s.39 of the Children Act 1989 to discharge the care order. In response to the father's application, the local authority applied for a recovery order under s.50 of the Children Act in anticipation of removing D three days later (25 April 2014).

On 24 April 2014, the matter came before District Judge Goddard, who suggested at the outset that the father should have applied to injunct the local authority from removing D, under s.8(1) of the Human Rights Act 1998. The judge also urged the local authority to allow some breathing space having heard that there was no emergency situation that had precipitated the intended removal of D. An application for injunctive relief was made orally by the father's solicitor. Counsel for the local authority responded by saying that the Court would have to find the proposed actions of the local authority unlawful in order to grant relief under s.8 of the HRA. It was submitted that the parents' human rights had been considered at the time the final order was made and, that furthermore, responsibility for the child had, at that point, passed from the Court to the local authority. District Judge Goddard gave a judgment in which he reluctantly concluded that he could not go behind the care order and the application for an injunction was dismissed. He granted the application for a recovery order. Accordingly, D was removed the following day.

The father lodged an appeal and this came before Baker J on 16 May 2014.

#### The appeal

Baker J sets out the relevant law and it is not intended that this be repeated in great detail here. In short, a local authority has the power to limit a person's parental responsibility for a child whilst a care order is in force. However, it may not exercise its power to limit a parent's parental responsibility unless "they [the LA] are satisfied that it is necessary to do so in order to safeguard or promote the child's welfare." (s.33(3) and (4)). A local authority must comply with its obligations under Article 8 of the ECHR, whilst exercising its

powers under a care order. Munby J, as he then was, is quoted in the very useful case of Re G (Care: Challenge to Local Authority's Decision) [2003] EWHC 551 (Fam). In that case he [Munby J] observed that Article 8 "requires that the parents are properly involved in the decision-making not merely before the care proceedings are launched, and during the period when the care proceedings are on foot... but also... after the care proceedings have come to an end and whilst the local authority is implementing the care order..." Ergo, if a local authority acts in a way that infringes a parent's Article 8 rights, this will be unlawful and the Court may grant appropriate relief - For further exploration of this see Re S; Re W [2002] UKHL 10.

It is at this point that Re B and Re B-S come into play. As we all know severing the ties between a child and parent can only be done where nothing else will do. All the realistic options must be explored and the arguments analysed. Baker J says that the same approach must be followed when the local authority proposes changing a care plan and removing a child from its family. This is identified at paragraph 34 of the judgment, as an "essential process", not only as a matter of good practice, but it is an inevitability given there will be an application to discharge the care order and/ or an application for a placement order. Whilst this exercise is undertaken the child should remain at home under the care order unless his safety and welfare demands immediate removal - the same test as Re L-A [2009] EWCA Civ 822 applies. Referring to the argument advanced by the local authority, at the hearing before District Judge Goddard, that the removal of D was lawful by virtue of the care order, Baker J found this fundamentally flawed. It would only be lawful if necessary to safeguard or promote the child's welfare. Any other removal would be an interference with Article 8 and parents in such circumstances are entitled to seek an injunction under s.8 of the HRA. District Judge Goddard did have the power to make an injunction and in not doing so, was plainly wrong. The father's appeal was therefore allowed.

#### Further guidance

At paragraph 49, Baker J sets out measures that should be taken in future cases:

(1) In every case where a care order is made on the basis of a care plan providing that a child should live at home with his parents, it should be a term of the care plan, and a recital in the care order, that the local authority agrees to give not less than fourteen days notice of a removal of the child, save in an emergency;

- (2) Where such a care order has been granted, a local authority considering changing the plan and removing the child from the family must have regard to the fact that permanent placement outside the family is a last resort where nothing else will do and must rigorously analyse all the realistic options. Furthermore, it must involve the parents properly in the decision-making process;
- (3) In such cases the parent should consider whether to apply for an injunction under s.8 of the HRA in addition to an application to discharge the care order and if so, make the applications at the same time;
- (4) The local authority must consider whether the child's welfare requires his immediate removal. The authority must keep a written record demonstrating that it has considered this question and recording the reasons for its decision. Any removal of a child in circumstances where the child's welfare does not require immediate removal, or without proper consideration and consultation, is likely to be an unlawful interference with the Article 8 rights of the parent and child;
  - (5) On receipt of an application to

discharge a care order, where the child has been living at home, the Court should check whether it is accompanied by an application under s.8 of HRA and, if not, whether the circumstances might give rise to such an application. Any application for an injunction in these circumstances must be listed for an early hearing before a circuit judge; and

(6) On hearing an application for an injunction under s.8 HRA, the Court should normally grant the injunction unless the child's welfare requires his immediate removal from the family home.

It is not intended to cover the funding issues raised in the case, in this article. Baker J says that he has brought his concerns to the attention of the President and it remains to be seen if this is a catalyst for change. Hopefully the guidance set out above will be helpful to all those representing parents when a final care order is being made; but also when advising parents of their rights when that happy ending does not go quite as planned progressive illness, even if it comes at the cost of some distress."

William Heckscher

## Equitable accounting

## Ifs, buts and maybes



quitable accounting is a personal remedy which can be sought by a joint owner of property against a co-owner who has not contributed what they

should have in respect of the property. The subject is important to lawyers dealing with Trusts of Land cases. There are essentially three issues. They do overlap:

- Occupation rent,
- Mortgage payments, and
- Improvements to the house

Before moving onto these topics there are some preliminary points. Firstly there is authority for the proposition that the consideration of equitable accounting should take place after the question of whether a party has an interest in the property has been decided: *Wilcox v Tait* [2006] EWCA Civ 1867 (CA) @ [64]. There are good reasons for this:

- (a) If you don't have an interest you have no obligation to contribute to joint expenses; and,
- (b) If you do have an interest the extent of your obligation to contribute is equal to

the proportion of your interest.

As to the relevant time period, there is an argument that there is only scope for equitable accounting, post-separation: *Clarke v Harlow* [2005] EWHC 3062.

#### Occupation rent

If two people own the property, but only one is living there, the other person can in theory claim from the other "an occupation rent". In *Stack v Dowden* [2007] 1 FLR 1858, Baroness Hale said that sections 12 and 13 of The Trusts of Land and Appointment of Trustees Act 1996 ("Tolata") had replaced the old equitable principles in this area. Indeed in *Murphy v Gooch* [2007] 2 FLR 603, one of the specific criticisms of the first instance judgment was that there had been no reference to the statute. Consideration had to be given to the section 15 factors:

"The matters to which the court is to have regard in determining an application for an order under section 14 include:

- (a) the intentions of the person or persons (if any) who created the trust,
  - (b) the purposes for which the property

subject to the trust is held,

- (c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and
- (d) the interests of any secured creditor of any beneficiary."

However, it does look as though the case law prior to *Stack v Dowden* is likely to remain of relevance. In *Murphy v Gooch* Lightman J summarised the relationship between the Act and the equitable principles in the following way:

"The wider ambit of relevant considerations means that the task of the court must now be not merely to do justice between the parties, but to do justice between the parties with due regard to the relevant statutory considerations and, in particular, (where applicable) the welfare of the minor, the interests of secured creditors and the circumstances and wishes of the beneficiaries specified." [14]

If it is found that an occupation rent was payable, how should it be calculated? Duckworth "Matrimonial Property and Finance" notes that there are now tables published by the Association of Retail Letting Agents. He suggests taking the gross yield depending on the region and then deducting a figure for agent's commission and voids. He suggests this will lead to a figure in the 3% to 4% bracket. Lord Neuberger in Stack v Dowden @ [157] suggested that an analogy should be drawn with damages for trespass and that compensation should be based on either notional rent value or the cost of alternative accommodation. Two further points are:

- Account needs to be taken of the fact that the person who is supposed to pay the occupation rent already owns a part of the property: *Akhtar v Hussain* [2012] EWCA Civ 1170.
- A claim for OR is likely to be regarded unsympathetically in a situation where the home is used to house the parties' dependent children. See *Stack v Dowden* [2006] 1 FLR 254 @ [63].

#### Mortgage payments

In law joint owners are jointly and severally liable for mortgage payments. In equity however, their obligation is to contribute in the proportion of their interests.

The occupying person is able to set off their payments towards the interest payments on the mortgage against any claim for occupation rent. Sometimes the Court will hold that this exercise extinguishes any obligation on either side: Leake v Bruzzi [1974] 1 WLR 1528. It

may be thought that this "highly practical" approach is potentially rather unfair on the party not in occupation at a time of low mortgage rates. Indeed in *Re Gorman (A Bankrupt)* [1990] 2 FLR 284, Vinelott J stated that the practice was not a rule of law to be applied in all circumstances.

In a number of cases it has been accepted that a party should not be credited with payments to the mortgage which were made by the state: see e.g. Akhtar v Hussain.

#### Repairs/improvements

As a starting point, if there are unauthorised renovations or improvements without the consent of the co-owner, then the person carrying them out is not automatically entitled to an account: *Leigh v Dickerson* [1884] 15 QBD 60.

Where however, the work has been carried out with the agreement of the co-owner, or on the basis of a mutual obligation, the person carrying it out is entitled to the *lesser* of:

One half of the increase in the value of the property; or

One half of the cost of the improvements if less.

The leading authority for these propositions is the case of *Re Pavlou* [1993] 2 FLR 751 @ 753.

#### **Practical points**

- Consider the authorities re when equitable accounting should start in the domestic context, i.e. before or after separation.
- If you are going to claim an occupation rent, consider getting an expert to value the rental yield. Of course you need to consider getting the other

side's agreement to a joint instruction. A proportionate way to do it may be to get the expert who is valuing the property to give this information as well.

- The occupier will want to set off against any claim for occupation rent any sums they have paid in respect of mortgage interest. That may not, however, be the end of the story, particularly if the mortgage is very small.
- If claiming an account in respect of mortgage payments you are going to want the client to supply a schedule of payments made by them broken down into capital and interest.
- Repairs after separation which were clearly required may found a good argument on the basis that they maintained the value of the property.
- The arguments about "improvements" are likely to be slightly different. If the party in occupation makes improvements which were not agreed then there will be an argument that they should not be taken into account.
- Even if one party makes improvements with agreement, there is an argument that they will only obtain any account if the improvements actually improve the value of the property. This is another matter for expert evidence. See the warning in *Re Pavlou* on this point.
- At the Case Management Conference, consideration should be given as to how to deal with the equitable accounting issue, i.e. should it be dealt with in evidence at the same time as issues in relation to ownership? A short-cut is to ask for a ruling of principle on particular issues, as happened in *Young v Lauretani* [2007] EWHC 1244, [59], [60].

**David Chidgey** 

## Domestic abuse in private law cases

## A new approach?

n 22 April 2014, a wealth of amendments to the 2010 FPR were introduced. The Child Arrangements Programme seeks to streamline private law cases by introducing compulsory Mediation Information and Assessment Meetings (with limited exceptions), discouraging the use of repeated review hearings, and handing responsibility for making arrangements for contact work back to the parents. These changes must surely flow from the relatively recently imposed restrictions to legal aid

meaning that in the majority of private law cases, one or both litigants will be acting in person.

There will always be some cases that cannot be shoe-horned into the streamlined model – namely those with issues of domestic violence or abuse. These cases will almost inevitably come before the courts, with at least one party represented. In recognition of the fact that these cases are the ones most likely to remain before the courts, the amendments to the 2010 rules introduced Practice Direction 12J – Child Arrangements & Contact Order:

Domestic Violence and Harm.

There is of course no substitute for reading the Practice Direction in its entirety, but this article will seek to identify the salient points for practitioners.

The PD starts by spelling out some basic principles about domestic abuse. In particular it emphasises the presumption that the involvement of a parent in a child's life will further the child's welfare, so long as the parents can be involved in a way that does not put the child or other parent at risk of suffering harm.

It further emphasises that domestic abuse is harmful to children, however they are exposed to it; be that by being subjected to it, witnessing it, or living in a home where it is happening (even if they are too young to be conscious of the behaviour). The harm suffered may be direct physical, emotional or psychological from living with the abuse, or indirect harm arising from an impairment to the parenting capacity of the parent who is/was the victim of the abuse.

The above principles may appear to be a statement of the obvious, but they do give a firm starting point for how a court should approach a case in which allegations of domestic abuse arise.

The Court must now identify whether domestic abuse is an issue in the case as soon as possible, and (usually at the FHDRA) further, whether it will be relevant to any Child Arrangements Order that may be made.

In cases where allegations of domestic abuse are live, the Court should not make a CAO by consent or allow an application for a CAO to be withdrawn unless:

- The parties are present in court;
- All initial safeguarding checks have been carried out; and
- A Cafcass officer has spoken with each party separately; unless
- The Court is satisfied that there is no risk to the child in so doing.

Further, FHDRAs should generally be adjourned if initial safeguarding information is not available. The Court should not generally make a CAO in the interim in the absence of such information.

These requirements have the potential to place a significant burden on already overstretched District Judges and Lay Justices. Imagine how much longer a Private Law Children Act court list will take, when the Court has to undertake the above analysis in every case where it is presented with a consent order?!

#### Directions for fact finding

The Court should determine whether such a hearing is necessary as soon as

possible. In making such a determination it should consider the factors identified at para. 17, which include whether any admissions made provide a sufficient factual basis, whether the application can be determined without a fact finding, and whether it would be necessary and proportionate in all the circumstances of the case.

Where the Court considers a fact-finding hearing is necessary, it must identify the disputed facts as soon as possible (para. 19). Consideration should be given to completing a Scott Schedule at the first hearing, with the assistance of the judge. Again, pity the poor District Judge/Lay Justices, with a heavy first appointment list, expected to sit and draft a Scott Schedule, potentially with a litigant in person.

The Court must address matters of evidence to enable the fact finding hearing to take place. It must also identify what support both the alleged victim, and alleged perpetrator may require, to both give their own evidence, and challenge that of the other side. (this would presumably include special measures – screens, video link etc., and possible use of Mackenzie Friends).

#### **Interim Contact**

In determining any interim CAO, the Court must address whether any contact can take place in a way that is safe (given the allegations), and further, what steps could be taken to make contact safe. For example, could contact take place in a supported setting? Should it be supervised? If direct contact is not appropriate in the interim, would indirect contact be in the child's best interests?

#### Fact-finding hearings

Para.s 28-31 make very interesting reading – they could be said to enshrine the efforts the courts have been making, in order to conduct fact-finding hearings efficiently, for many years. They state that fact finding can be an inquisitorial, or investigative process. The parties can be asked to identify what questions they seek to ask of the other party, and the Judge or Lay Justices should be prepared to conduct the questioning of witnesses on behalf of either party (particularly cross examination of alleged victim on behalf of the alleged perpetrator).

Again, perhaps this enshrines what often already occurs in practice, but the Court should now not only make findings as to the specific allegations of domestic abuse, but also, its effect on the child, the child's parents and any other relevant person. It is worth considering this element when drafting Scott Schedules.

At the conclusion of the fact-finding hearing the Court should consider directing

a s.7 report, and whether any other expert evidence is necessary; (the author recently had a psychological report directed post fact-finding in order to assess the impact of the proven domestic abuse on the mother, and her ability to manage both direct and indirect contact).

#### After the fact-finding hearing

In considering whether an order for direct contact might be appropriate, in cases where findings of domestic abuse have been made, the Court should apply its mind to matters such as local facilities for supervision of contact, treatment options for the perpetrator, and whether an Activity Direction (such as a Domestic Violence Perpetrators Programme might be appropriate).

Para. 36 states: The court should only make an order for contact if it can be satisfied that the physical and emotional safety of the child and the parent with whom the child is living can, as far as possible, be secured during and after contact, and that the parent with whom the child is living will not be subjected to further or coercive behaviour by the other parent.

It is therefore incumbent on the Court to consider the impact of the proven domestic abuse, and the motivation of the applicant parent – is it a genuine desire to promote the best interests of the child, or is it a wish to continue to harass or control the other parent?

In considering the relevant factors, the Court must determine if and how any identified risks can be managed in a way that would enable contact to occur. There will inevitably be some cases where the risks, and potential impact on the parent with whom the child lives are so great, that only indirect contact would be appropriate. In such cases, the Court must address how indirect contact can safely be managed - should it be sent directly to the home address, or should it be managed by a third party? The author has experience of a number of cases where even managing twice yearly letters/cards was deemed to be too much for the mother to manage.

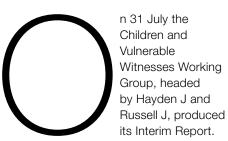
#### Conclusions

- Identify issues of domestic abuse asap.
- Draft your Scott Schedule in time for the FHDRA.
- Encourage the Court to play an active role in the fact-finding hearing.
- Give active consideration to the impact on the resident parent as well as the child when considering what if any contact is appropriate.

#### Joanna Lucas

# A summary of the Interim Report

## Children and vulnerable witnesses Working Group



The Working Group (WG) was set up in following the President's '12th View' in which the President set out three areas of the family justice system that were in need of review:

- a) the Family Justice Council's April 2010 Guidelines for Judges Meeting Children Who are Subject to Family Proceedings<sup>2</sup>, the need for such review being highlighted in particular by the Court of Appeals decision in *Re KP* <sup>3</sup>.
- b) the Family Justice Council's Working Party's December 2011 Guidelines on Children Giving Evidence in Family Proceedings<sup>4</sup>
- c) the "wider issue of vulnerable people giving evidence in family proceedings, something in which the family justice system lags woefully behind the criminal justice system".

Directly relevant to a) above was the recent ministerial announcement from The Minister of State for Justice and Civil Liberties (24 July 2014) which included the following observations that:

- every child of sufficient age and ability should have the opportunity to meet with the Judge allocated to their case;
- every child should have the opportunity (through Cafcass) of expressing their views directly to the Judge in writing;
- all children should be able to communicate their wishes and feelings to the Judge;
- children and young people should be kept up to date about court proceedings in an age appropriate manner to include the stage that the proceedings are at and to be contacted in advance of the first hearing and have

the opportunity to give feedback by email, text, telephone or other written form.

### Children and vulnerable people giving evidence

The WG considered that the application of principles following the Advocates Training Council report (2011) in the criminal justice systems has proved to be successful and hopes to adapt those principle for use in the family justice system. The WG is of the view that the provision of training for advocates and support for witnesses who are in need of support to give their evidence have had 'substantial benefit', in particular in optimizing the conditions in which best evidence can be achieved and the more efficient use of court time.

General guidance already exists and can be found on the 'Advocates Gateway' www.theadvocatesgateway.org, in October 2014 we can expect to see the publication of guidance specifically for advocates practicing within the family justice system.

### Initial proposals following work done so

The WG met initially in early July 2014. Following discussion and work undertaken it has made a number of proposals which include:

- 1. That any reform should apply to both private and public law cases;
- 2. There should a be a new mandatory rule in relation to Children and Vulnerable Witnesses and Parties with supplementary PDs and guidance approved by the President:
- 3. The term 'vulnerable witness' should continue to be used and should be extended to cover parties as well as witnesses:
- 4. Key rules should be embodied in the FPR 2010 (as amended) at the earliest point of the rules to emphasise the importance of the role of the child and the importance of identifying support or special measures required by vulnerable witnesses (in its wider definition);

- 5. There should be a new Part 4 to the FPR that should require:
- The Court to recognise the children and/ or needs of children at the outset either as participants in proceedings and being given the opportunity to communicate with the Judge or as witnesses and therefore there should be consideration of how to best provide for that involvement and support that they may need;
- ii. The Court to identify whether a party or witness is vulnerable at the outset of proceedings or at the earliest opportunity and make provision for the necessary support required to enable them to give their best evidence;
- iii. That all representatives/advocates
  must identify and consider how to best
  recognise the role of the child and/or
  provide for any assistance that they need
  to give best evidence;
- iv. That all representatives/advocates must identify if a party or witness is vulnerable and consider how to best support them/ assist them in giving evidence;
- v. That these requirements should also apply to litigants in person.
- 6. That there should be a PD based on the Family Justice Council guidance for judges seeing children;
- 7. There should be consideration of the status and nature of communication between the judge and child;
- 8. Procedure, practice and guidance for provision of special measures, support, assistance for vulnerable witnesses/parties, including children, should form part of existing PDs where possible:
- 9. The Rule/PD should be drafted with particular reference to established practice in the criminal court and to the Special Measures Directions In the Case of Vulnerable and Intimidated Witnesses;
- 10. Specific consideration should be given to the needs of witnesses in forced marriage and female genital mutilation cases:
- 11. Rule change should be implemented by training for judges and advocates;
- 12. Advocates should be expected to attend additional training (as did criminal advocates).

The WG will meet again in October 2014 to consider draft proposals and it is proposed by the WG that rule change will be in place by January 2015.

#### Alice Darian

- 1. [2010] 2 FLR 1872
- 2. [2014] EWCA Civ 554
- 3. [2012] Fam Law 79
- 4. 12th "View from the President's Chambers" published on 4th June 2014

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Team Clerks Michael Harding Julie Hathway Ken Duthie



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Nkumbe Ekaney QC Call 1990 QC 2011



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Daniel Leafe Call 1996



Adrian Posta Call 1996



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Charlotte Pitts Call 1999



David Chidgey Call 2000



Linsey Knowles Call 2000



James Cranfield Call 2002



Stephen Roberts Call 2002



Fiona Farquhar Call 2002



Kate Goldie Call 2004



Benjamin Jenkins Call 2004



Joanna Lucas Call 2004



Gemma Borkowski Call 2005



Monisha Khandker Call 2005



William Heckscher Call 2006



Edward Hetherington Call 2006



Alice Darian Call 2006



Stuart Fuller Call 2007



Philip Baggley
Call 2009



Emily Brazenall
Call 2009



Erinna Foley-Fisher Call 2011



Kevin Farquharson Call 2011



Alexander West Call 2011



Alexander Small Call 2012

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