

Local authority input into private law proceedings, part III – public law proceedings arising out of private law proceedings.

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In this third instalment of our look at the intersection of private and public children law (the first article ‘Local authority input into private law proceedings’ was published in the November 2020 issue at [2020] Fam Law 1517 and the second article was published in March 2021 at [2020] Fam Law 413, we are going to focus on the

circumstances in which the local authority may become involved within private law proceedings through a S.37 report and may then decide to issue public law proceedings.

Directions under s 37 Children Act 1989

In the first article we focused upon the circumstances in which the court may become sufficiently concerned to direct a s 37 report. In summary, within private law proceedings, a court may direct that a local authority prepares a welfare report when considering any private law application, pursuant to s 8 Children Act 1989. This could be either a s 7 report, primarily in cases where there has been some historical local authority input/involvement with the family or a s 37 report.

In relation to a s 37 report, this is directed when the court is sufficiently concerned as to the welfare of a child to warrant a local authority investigation. The relevant provisions that the court considers are as follows:

37 Powers of court in certain family proceedings.

(1) Where, in any family proceedings in which a question arises with respect to the welfare of any child, it appears to the court that it may be appropriate for a care or supervision order to be made with respect to him, the court may direct the appropriate authority to undertake an investigation of the child’s circumstances.

(2) Where the court gives a direction under this section the local authority

concerned shall, when undertaking the investigation, consider whether they should—

- (a) apply for a care order or for a supervision order with respect to the child;
- (b) provide services or assistance for the child or his family; or
- (c) take any other action with respect to the child.

(3) Where a local authority undertake an investigation under this section, and decide not to apply for a care order or supervision order with respect to the child concerned, they shall inform the court of—

- (a) their reasons for so deciding;
- (b) any service or assistance which they have provided, or intend to provide, for the child and his family; and
- (c) any other action which they have taken, or propose to take, with respect to the child.

The wording under s 37(1) is clear. The power to direct a s 37 report arises in ‘any family proceedings’¹ and the power to direct such a report arises when it appears to the court that it may be appropriate for a care or supervision order to be made, thereby warranting an investigation to be undertaken by the local authority.

In terms of which local authority shall undertake the report, s 37 (5) states that the local authority named in a direction under subsection (1) must be:

- (a) the authority in whose area the child is ordinarily resident; or
- (b) where the child is not ordinarily resident in the area of a local authority, the authority within whose area any circumstances arose in consequence of which the direction is being given.

As Cobb J commented in *Re OB (Private Law Proceedings: Costs)* [2013] EWHC 1956 (Fam), [2016] 1 FLR 92 (para[97]):

‘... these obligations are of course considerably more onerous, and focused, than the obligation which falls on an authority to prepare a report under s 7 of the CA 1989 which provides that:

“A court considering any question with respect to a child under this Act may—

...

- (b) ask a local authority to arrange for—
 - (i) an officer of the authority; or
 - (ii) such other person (other than [an officer of the Service] [or a Welsh family proceedings officer]) as the authority considers appropriate,

to report to the court on such matters relating to the welfare of that child as are required to be dealt with in the report.” ’

The Family Procedure Rules also set out further considerations in respect of s 37 reports. Rule 12.17, entitled ‘investigation under s 37 of the 1989 Act’ provides as follows:

- (1) This rule applies where a direction is given to an appropriate authority by the court under section 37(1) of the 1989 Act.
- (2) On giving the direction the court may adjourn the proceedings.
- (3) As soon as practicable after the direction is given the court will record the direction.
- (4) As soon as practicable after the direction is given the court officer will –
 - (a) serve the direction on –
 - (i) the parties to the proceedings in which the direction is given; and
 - (ii) the appropriate authority where it is not a party;

¹ Under the heading ‘interpretation’ in the Family Procedure Rules 2010, it states: “‘proceedings’ means, unless the context requires otherwise, family proceedings as defined in section 75(3) of the Courts Act 2003”. Section 73(3) of the Courts Act 2003 provides that ‘family proceedings’ mean (a) proceedings in the family court and (a) proceedings in the Family Division of the High Court which are business assigned, by or under section 61 of (and Schedule 1 to) the Senior Courts Act 1981, to that division of the High Court and no other.

- (b) serve any documentary evidence directed by the court on the appropriate authority.
- (5) Where a local authority informs the court of any of the matters set out in section 37(3)(a) to (c) of the 1989 Act it will do so in writing.
- (6) Unless the court directs otherwise, the court officer will serve a copy of any report to the court under section 37 of the 1989 Act on the parties.
- (Section 37 of the 1989 Act refers to the appropriate authority and section 37(5) of that Act sets out which authority should be named in a particular case.)”

Practical considerations

If the court has made a s 37 direction it is reasonable to assume that the court is contemplating possible public law proceedings. The local authority as part of their report will often be granted access to the private law bundle to enable it to undertake a comprehensive report.

A hearing date will be fixed after the making of a s 37 and a direction in the order will provide a date by which the report must be filed.² For good practice, on the face of the order the court may insert a recital specifying exactly why the court has directed a s 37 report. Wall J in *Re M (intractable contact dispute: interim care order)*,³ set out some general considerations and commented that: ‘the court must spell out its reasons for making the s 37 order very carefully, and a transcript (or a very full note) of the judgment should be made available to the local authority at the earliest opportunity’. His Lordship further commented that:

‘In my judgment, it is vital for the local authority to know the judge’s thinking in making the order. Even if such an order is made urgently, a note of the reasons for it should, in my judgment, be prepared and made available to the

local authority. Apart from anything else, clear reasons for the order save a great deal of time, and enable the local authority to focus on the salient points. In the instant case, I reserved judgment and shortly afterwards handed down the first of the two judgments set out below in a form designed to be read by both the parties and the local authority. In its original form, the first judgment was cross-referenced to the court bundles which were also disclosed to the local authority. Such a course may not be practical in other cases, particularly where the report is urgently required. However, it is not enough, in my judgment, for the local authority simply to be told the judge has ordered a s 37 report. The local authority needs to know why the judge has done so.

It is prosaic thought, but when making a s 37 order the court should be clear about how the order is going to be communicated to the local authority and by whom. There is nothing more likely to cause delay than the absence of a speedy mechanism for conveying the order to the local authority. I have on at least one occasion written short reasons, told the bar what they were, and then sent them by facsimile to an identified officer of the local authority.⁴

Further, Wall J remarked that ‘judicial continuity is essential. Apart from saving time and resources, this means that applications can be made to the judge at short notice, and she or he can keep tight control over it’.⁵

After a s 37 report has been completed in private law proceedings, a party to the proceedings may seek to question the nature or substance of the investigation or the court may have further questions in respect of the report or even raise concerns in respect of the adequacy of the investigation. Accordingly, the court may direct that the

² The local authority must report back within 8 weeks unless the court otherwise directs: s 37(4) Children Act 1989.

³ [2003] EWHC 1024 (Fam), [2003] 2 FLR 636, at page 638 a number of general considerations were specified, to be assessed on a case by case basis.

⁴ At 639 and 640

⁵ At 639

author of the report (usually the allocated social worker) is to attend the next hearing either with or without representation. This can be particularly useful, especially in circumstances where the local authority decides not to apply for a care or supervision order but there may be other issues with which the local authority can support the child, for example, local services, housing issues, supervising contact and as indicated, where the court may want to explore certain aspects of the report. Even if public law proceedings are not issued, another consideration for the court may be whether the local authority should be joined to the private law proceedings or in some circumstances, the local authority may themselves wish to be joined as a party to the proceedings.

From the local authority's perspective, given their duty under s 37, they are liable in costs in certain circumstances. As Cobb J in *Re OB (Private Law Proceedings: Costs)*⁶ commented:

'I regard a local authority in a private law case in which a s 37 direction has been given as being sufficiently 'closely connected' with the litigation to justify the order; by such a direction the court is expressly inviting consideration of the issuing of public law proceedings. It should be noted that when a s 37 order is made, the court also has the power (if the relevant 'threshold' is established under s 38(2) of the CA 1989) to make an interim care order: see s 38(1)(b), CA 1989. Although this did not happen here, this power illustrates in my judgment the extent to which the court can, if it considers it appropriate, draw a local authority directly into private law process of this kind and underlines its 'close connection' with the subject matter of the proceedings.'

Once a report has been completed, s 37 (6) states that:

'If, on the conclusion of any investigation or review under this

section, the authority decide not to apply for a care order or supervision order with respect to the child—

- (a) they shall consider whether it would be appropriate to review the case at a later date; and
- (b) if they decide that it would be, they shall determine the date on which that review is to begin.'

Interim orders

If the local authority makes an application for a care order or supervision order, public law proceedings will commence. On issue, the child(ren) will be appointed a guardian within the public law proceedings.

Section 38 Children Act 1989 provides that:

'(1) Where—

- (a) in any proceedings on an application for a care order or supervision order, the proceedings are adjourned; or
- (b) the court gives a direction under section 37(1),

the court may make an interim care order or an interim supervision order with respect to the child concerned.'

Thus, the scope for interim orders upon the completion of the s 37 investigation is quite broad. The court can make interim care or supervision orders in respect of the subject child(ren). The court will only make such orders if it determines that the threshold is crossed to make such orders.

The decision to make the order under s 38 requires consideration of three linked factors:

1. Whether the interim threshold is made out;
2. Whether the child's welfare requires an order to be made; and
3. In cases where interim removal of the child from the parents' care is proposed, whether separation is justified.

⁶ [2013] EWHC 1956 (Fam), [2016] 1 FLR 92, paras [106] and [107]. Cobb J provided his decision in the case at para [105].

Threshold for public law proceedings

If public law proceedings are issued at the interim stage the court needs to be satisfied that the interim threshold criteria are met.

In applying for a public law order, the applicant (almost universally the local authority) must assert that ‘the child concerned is suffering, or is likely to suffer, significant harm’⁷. Furthermore, the harm or likelihood of harm is attributable to:

- (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give him; or
- (ii) the child being beyond parental control.⁸

At the interim stage, the question is whether there are “reasonable grounds for believing”⁹ that the child is suffering or is

likely to suffer significant harm and that that harm is attributable to the parents’ care.

In *Re M (Interim Care Order: Removal)* [2005] EWCA Civ 1594, [2006] 1 FLR 1043 (at [12]), Thorpe LJ observed that ‘essentially, there was insufficient evidence of risk of harm to satisfy the statutory test’. The emphasis is placed on an evidential base for the harm/risk of harm asserted. As Munby P observed in *Re A (Fact Finding: Disputed Findings)* [2015] EWFC 11, [2016] 1 FLR 1 (at [9]): ‘the local authority . . . must adduce proper evidence to establish what they seek to prove’.

It is perhaps slightly more difficult to imagine a situation in which, upon the completion of the s 37 report, the court will not have enough information to determine whether the interim threshold is made out, but it is certainly something that all parties must be alive to.

⁷ Section 31(2)(a) CA 1989

⁸ Section 31(2)(b) CA 1989

⁹ Section 38(2) CA 1989