4pb For Family

PRIVATE LAW CHILDREN UPDATE

AUTUMN

2023

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REVOKING THE PARENTAL RESPONSIBILITY OF MARRIED FATHERS

In Re A (Parental Responsibility) [2023] EWCA Civ 689[1] the Court of Appeal were concerned with issues of parental responsibility in the context of the mother's appeal against Russell J's decision to dismiss her application for a declaration of incompatibility under the Human Rights Act 1998 in relation to the statutory scheme in England & Wales which prevents the court from revoking the parental responsibility of married fathers. This is a complicated issue which has garnered much press attention, and you may have seen most recently a plan by the government to introduce "Jade's Law", which will serve to "suspend" the parental responsibility of anyone who murders the person they share parental responsibility with (see here for the government's press release on this issue, with further and better particulars awaited!)

It is a genuinely interesting decision which draws significantly (unsurprisingly) on human rights law, but ultimately concludes that the difference in treatment is justified. Per paragraph 101 of the judgment of the President of the Family Division, Sir Andrew McFarlane:

> *"Drawing matters together, it is clear that the difference in the treatment of unmarried and married fathers is justified by the long-standing principle that married fathers (and mothers) should have irrevocable parental authority/responsibility for their children. Ms Gallagher's repeated characterisation of the difference in treatment as being 'simply' because the father was married misses the point. Affording priority to the establishment, and maintenance, of stable family life by commitment through marriage or civil partnership is what it is all about. Whilst there is, therefore, a difference in treatment, and thus prima facie discrimination, as between married and unmarried fathers, the impact of that difference upon their children and the children's mothers is, in reality, minimal. Parliament has given the court power to empty a father's parental responsibility of all content and to prevent him making future applications to the court. A revocation order in the present case would make no material difference to the lives of the mother or children. Whilst the father retains the status of having parental responsibility, he also retains the status of being the children's 'father'; if the former could be removed, the latter would remain, with the consequence that the psychological or emotional benefit of revocation could only be minimal. The negative impact on a family that arises from an inability to apply to revoke parental responsibility, is, therefore, comprehensively outweighed by the overall benefit to the community of maintaining the priority that is attributed to marriage and civil partnership."*

[1] Chris Barnes was junior counsel for the appellant mother, and Mark Jarman KC represented the respondent children.

ALIENATING BEHAVIOURS

Parental alienation remains a hot topic in private children law and is likely to remain as such for some time. For a glimpse into the harm alienating behaviours can pose for children, you need look no further than the latest instalment in the long-running litigation before Keehan J in *Re A and B (Children: "Parental Alienation") (No. 5)* [2023] EWHC 1864 (Fam) where the young people at the centre of the dispute are now aged 17 and 14. At a fact-finding hearing which took place in the absence of the mother, the court made all of the findings sought by the father and made orders preventing the mother from having contact with them. Keehan J concluded as follows at paragraphs 95-98:

> *"Once more in the long history of this case the mother has pursued her own agenda and objectives without any regard whatsoever to the well-being and welfare best interests of the children. By the campaign she orchestrated of (a) tracking the children, (b) by making covert contact with them directly and through third parties and (c) of forcing them to make false allegations against their father and/or telling them to run away from the father, she has seriously abused Child A and Child B emotionally and psychologically.*
>
> *The mother has had and has a very distorted and false view of her children, her abusive role in their lives and the devoted care given to them by this father. I am in no doubt that her actions amount to coercive and controlling behaviour towards the children and towards the father and I so find.*
>
> *I am in no doubt whatsoever that if this mother were ever again to have a role in the children's lives by contact or any other means she would repeat her past abusive behaviour towards them without any regard for their well-being and their welfare. I see no prospect of the mother being able to effect any change in her distorted view of the world or in her distorted and abusive behaviour towards the children and the father.*
>
> *It is with great sadness, which I believe is shared by the children, that it is imperative in their welfare best interests that she plays no future role of any description in their lives"*

In our last update, we focussed on the decision of Sir Andrew McFarlane in *Re C ("Parental Alienation": Instruction of Expert)* [2023] EWHC 345 (Fam)[2] The aftereffects of that decision are still very much being felt, and the way in which allegations of alienation are now managed in the Family Court is markedly different to what happened pre-*Re C*. Key updates include the following:

[2] Joy Brereton KC and Chris Barnes represented the mother; Charles Hale KC and Frankie Shama represented the father; and Barbara Mills KC and Charlotte Baker represented the ACP-UK.

1. The Family Justice Council has released updated guidance on the instruction of psychologists as expert witnesses in private law proceedings. Of note is the updated Appendix 5, which provides a checklist for solicitors instructing experts, and Appendix 6, which provides the checklist of the minimum information for a proposed expert's CV, along with a template which should now become standard in such applications. Practitioners would do well to familiarise themselves carefully with these aspects of the guidance and get used to plugging proposed experts' names into the HCPC website and scrutinising their CVs.

2. Allied to a more forensic approach in the appointment of experts is an emphasis on clarity with regards to their remit and scope. Crucially – experts should not be instructed to "diagnose" alienation, following the President's endorsement of the ACP-UK's submission and having "*strongly urged*" acceptance of the principle that alienation is a question of fact to be determined by the court, and not a syndrome capable of being diagnosed (see paragraph 103 of *Re C*). That is reflected in the Family Justice Council's *Draft Guidance on Responding to Allegations of Alienation* which, places the decision in *Re C* firmly at its centre and sets out detailed proposals and structures with regards to the case management of allegations of alienation in private children proceedings. The consultation closes on 16th October 2023, so please keep your eyes peeled for the final version when published.

3. …. for an example of what might happen if, contrary to the guidance in *Re C*, an expert is sought to weigh in on factual determinations for the court, you need look no further than *Re GB (Part 25 Application: Parental Alienation)* [2023] EWFC 150. This was an appeal of a District Judge's decision to appoint a psychologist who was asked (amongst other questions) to comment on the parents' attitudes towards each other and whether the relationship between the children and the other parent is fully supported. Allowing the appeal, HHJ Middleton-Roy observed at paragraph 21:

> *"The expert was being invited expressly to provide an opinion about parental alienation. In the judgement of this Court, that is outside the expert's remit. The decision about whether or not a parent has alienated a child is a question of fact for the Court to resolve and not a diagnosis that can or should be offered by a psychologist. It is the Court's function to make factual determinations necessary to inform welfare decisions for the child, not to delegate that role to an expert. The identification of alienating behaviours should be the Court's focus, where it is necessary and demanded by the individual circumstances of the case for the Court to make such factual determinations leading to final welfare decisions for the child."*

He then remitted the expert application for a further hearing, at which he would also consider the question of determining the disputed factual issues with regards to "*alienating behaviours*".

4. In addition to those steps being taken as a direct consequence of *Re C*, practitioners will note that there remain tensions about the involvement of subject children in proceedings with allegations of that nature. Such issues featured heavily in earlier decisions of Keehan J in the *Re A and B* litigation. Most recently, in *Re C (Child: Ability to Instruct Solicitor)* [2023] EWCA Civ 889,[3] the Court of Appeal overturned a decision of HHJ McKinnell permitting a 14-year-old child to instruct his own solicitor following applications by the parents to discharge care orders that had been made to protect the children from parental conflict and from the severe alienation perpetrated by their father. Peter Jackson LJ's judgment contains a characteristically helpful summary of the relevant law and practice as it relates to children instructing solicitors and meeting with judges. The appeal was allowed, and Peter Jackson LJ concluded at paragraph 80:

> *"This is not a case where A had his own solicitor in the previous proceedings, as in Re W. Nor is it a case where a child has formed an unwise view of their own, even if it might be coloured by adult influence. Instead, these children have been the victim of severe alienation of a kind that should have led the judge to firmly reject the application for A to be allowed to instruct a solicitor directly, for all the reasons she gave when making these care orders."*

TRANSPARENCY

Emphasising once more, the direction of travel for transparency, Lieven J handed down two decisions considering this issue.

1. *KRD v PTL* [2023] EWHC 1952 Fam concerns an application made after a four-day final hearing where a 'no contact' order was made. The mother sought a reporting restrictions order and the father sought to relax the provisions of section 12 Administration of Justice Act 1960. The case considers whether it is good practice to adopt the approach taken in the Pilot scheme in those cases not presently covered by it. While the parties agreed that the approach could be adopted there were disputes about specific information and whether that could be published. Lieven J adopted the guidance and applied it to each item of information. She efficiently determined the list of issues and the judgment is a useful illustration of how decisions should be made in practice. What emerges is that the courts primary focus will continue to be the impact and effect of publication on the children concerned. Our last update linked the Pilot guidance and template orders referred to in this judgment but for ease you can find them again here.

[3] Joy Brereton KC and Frankie Shama represented the appellant mother.

2. Most recently, *Louise Tickle v Father &Ors* [2023] EWHC 2446 (Fam)[4] highlights the hesitation which judges hearing decisions at first instance continue to feel over this issue, despite clear guidance from the President indicating a need for a shift in culture. HHJ Haigh adjourned Ms Tickle's application to be allowed to report what had happened at a particular hearing until the end of proceedings. Ms Tickle had not wanted to report the substantive evidential issues but rather "*procedural and systemic issues*" arising from the lack of legal aid available in these cases which in the instant case had let to an adjournment and further delay. Her application was opposed by the father and the guardian but supported by the mother. In her judgment, Lieven J gave a very useful nine point checklist of things a court needs to consider when faced with these applications. She accepted the arguments made on behalf of Ms Tickle and ruled that in adjourning the application to the end of proceedings, the balance of the competing rights had not been correctly struck. Whilst she accepted that the decision to adjourn was a case management decision and therefore the court should be slow to intervene, she concluded that:

> *"a decision on reporting is rather different from most case management decisions because it interferes with an article 10 right and in practice may prevent the journalist from reporting at all. It therefore appears to me that the full rigour of the principles in Re TG do not fully apply."*

The message is loud and clear: the nettle needs to be grasped. HHJ Haigh had not sufficiently engaged with the article 8 argument made by Ms Tickle in the context of her not seeking to report the underlying facts or evidence in this case so that confidentially and anonymity did not arise "*in a meaningful way on the facts of this case*". Consequently there was no real risk of her either not giving a fair view of the case or that it might be misunderstood. It is: "*not for the Court to consider the quality or fairness of the reporting. The Court is not an arbiter of the editorial content of reporting*". This is a seductive temptation for judges, so immersed as they have been in the longstanding culture of confidentiality and privacy. That reporting may upset or antagonise a parent may come too close to giving a parent a veto over reporting which would not meet the *Re S* requirement for an 'intense focus' on the competing rights. Insufficient weight had been placed upon the strong public interest under article 10 of the public being informed about the workings of the Family Justice System and the problems it faces on a daily basis.

[4] Chris Barnes represented the appellant, Louise Tickle.

CHILD ARRANGEMENTS

In cases where there are no safeguarding issues and no barriers to overnight contact, it can often feel as though there is a presumption in favour of exactly equal shared care, i.e. a 50/50 split. Lieven J in *Father v Mother* [2023] EWHC 1454 (Fam) has helpfully put that to bed, per paragraph 71 of her judgment on the mother's application to relocate internally (which was granted). Lieven J observed:

> *"I think the F, possibly led by Mr Lill, has become too fixated on "equality" of time, and on the belief that if there is not complete equality that will undermine the F's relationship. There is no principle that the starting point for the Court is equality of time between parents, each case must turn on its own facts. Many children spend different amounts of time with different parents, including when the parents are living together, the bond with the parent does not depend on such chronological equality."*

MANAGING CASES WHICH FEATURE ALLEGATIONS OF DOMESTIC ABUSE

"Focus" and "fewer hearings" continue to be the *mots de jour* in the Family Court. In his most recent View from the President's Chambers (July 2023), Sir Andrew McFarlane continues to encourage practitioners to focus carefully on the issues that it is necessary for the court to resolve to meet the overriding objective, namely to deal with cases justly having regard to the welfare issues involved.

A slew of private law cases demonstrate that his words are well in mind at all levels of the Family Court. Doing a chronological survey:

1. In July 2023, DDJ Harrison summarily dismissed a father's application for a child arrangements order in *Re MLD (Summary Dismissal of Child Arrangements Application* [2023] EWFC 129 in circumstances where the father was serving a life sentence for murder, with a minimum tariff of over 20 years. He still had a relationship with his older children, and wanted the younger three children that were the subject of this application to be brought to prison to see him too (although he was not the father of one of them). This was opposed by the mother. DDJ Harrison ultimately dismissed the application at that stage, having made limited orders for the mother to update the father about the children on an annual basis. He posed the following questions, and ultimately determined there was no solid advantage to the children in allowing the case to proceed:

"Having formed this view, what should I do? Is any further evidence necessary? Can I bring the proceedings to an end, or is there a solid advantage in continuing the proceedings to attempt to progress arrangements? … In this case, I do not consider that there is any solid advantage to the children in allowing the case to proceed. I have formed this view for the following reasons: [omitted]."

Although this case was summary in the sense it was determined at an early stage, and based on limited material (it seems just the safeguarding letter, which was described as "detailed" and then submissions from the father), the judgment itself runs to 60 plus paragraphs and is impressive in its detail and analysis. It is evidently the product of careful consideration and will have taken some time to prepare, so it is difficult to see how that could be replicated in a busy FHDRA list or similar.

2. In August 2023, HHJ Vincent decided where two girls would live – either in Oxfordshire or another location referred to only as [City A] (see *AM v AF (private law final hearing)* [2023] EWFC 153). HHJ Vincent was plainly troubled by the unresolved allegations of domestic abuse that featured in the case before her, but ultimately determined the issue on submissions (which is how the hearing had been set up by the last judge) but not without some trepidation. Her reasons for doing so, and in the absence of embarking on a fact-finding hearing, were set out as follows from paragraph 51:

"In all those circumstances, is it appropriate for me to reach a conclusion on the applications today? I have considered this carefully. On balance, I have decided that it is, for the following reasons:

- *The decision to proceed to a final hearing on submissions was made by District Judge Devlin at a directions hearing at which both parties were represented. Neither party has sought to appeal that decision, which is not therefore up for review by me;*
- *Both parties are legally represented. Neither party has sought to adjourn the hearing, but has had sight of the other's detailed statement and exhibits, and made submissions to the Court, advancing their own case and responding to the other's case;*
- *These proceedings are coming up to their first anniversary. The new school year starts next week and the parties agree that it is vitally important for decisions to be made as soon as possible, so that they know where they will live and where they will go to school. Delay in order to prepare for a fact-find, or for a section 7 report from Cafcass is not in the children's best interests;*
- *This is a private law application. The parents share parental responsibility for their children and are free and entitled to make the decisions about the arrangements for their children. They have asked for the Court's assistance in determining the question of where the children should live, but neither of them is asking the Court to explore*

the allegations of domestic abuse. The mother asserts that it is not relevant to her application, because she has no concerns about the girls' welfare in their father's care. She is legally represented and entitled to respect that she can make her own judgements about the girls' safety, to decide for herself how she puts her case, and what decisions she wishes the Court to make."

3. In decisions delivered in May[5] and June[6] 2023 in *Re P*, HHJ Roberts at the Central Family Court made orders summarily dismissing the father's applications for child arrangements orders. She also extended a pre-existing non-molestation order and made prohibited steps and section 91(14) orders against the father. She did so in circumstances where the father had behaved abusively to court staff and those representing the mother, and having concluded that the father's behaviour was so extreme that to allow the proceedings to continue would allow him to further subject the mother to abuse. His treatment of professionals also featured, with HHJ Roberts concluding that it would not be reasonable to ask any professional to play a role in contact because of the abuse they would receive; nor would it be reasonable to expect Cafcass to engage with him by way of a section 7 report. This followed more than a dozen hearings, and as HHJ Roberts observed at paragraph 38:

   "Mr B is taking up an unreasonable amount of court time and resources by his unnecessary applications and by repeated abusive messages to the court staff. I have a duty to ensure that precious court time and resources are fairly distributed and this case has already had more than a dozen hearings and this has got to stop."

   The next day, the father made an application to vary or discharge the non-molestation order, and it seems thereafter several other applications. HHJ Roberts took the view that this was for the purposes of harassing the mother and taking up court time (see paragraph 16). She considered the applications to be "totally without merit" and dismissed all of them. She thereafter made an extended civil restraint order, preventing the father from making applications relating to the Children Act 1989 and Family Law Act 1996 proceedings until 15th June 2025, without first obtaining permission to do so.

4. In August 2023 in *SB v DM* [2023] EWHC 2089 (Fam), Cohen J dismissed an appeal brought by a mother following a fact-finding hearing before Recorder Wood KC in December 2022. This case is interesting for a number of reasons (and for the costs decision, see further below), but not least because of the following:

   a. The mother was heavily pregnant when she gave evidence but wished to continue. Cohen J accepted that there would be some cases where the court has a duty to override the desire of a litigant to continue, and that the court has "*an independent inquisitorial protective duty*", but ultimately concluded that such a duty did not require the Judge in this case to override what the mother and her legal team were

[5] Re P (a child) (dismissal of application – abusive applicant) [2023] EWFC 86

[6] Re P (a child) (Extended Civil Restraint Order – abusive applicant) [2023] EWFC 110

saying to the court. This case reiterates the importance of all involved in a hearing being alert to ensuring participation directions are established and kept under constant review (see paragraphs 60-65).

b. The criticism of the way in which the appeal was pursued. Cohen J commented as follows at paragraphs 4-5 of his costs judgment:

> *"I made it clear that I regarded Mostyn J as having been deprived of important information in respect of ground 2 as he was not shown the full order made at the pre-trial review which made it clear that the ground rules had been considered at that hearing and would be further considered at trial.*
>
> *This appeal was not a finely balanced matter. A proper examination of the transcript of what happened at the hearing demonstrated that there was no ground of complaint properly to be made by the mother. I was of the clear view that there was nothing of substance in the grounds which Mostyn J felt were unlikely to succeed."*

Drawing all of these threads together then, there is scope for creative case management in private law children proceedings, even when there are allegations of domestic abuse. Practitioners would do well to think carefully about whether applications to deal with proceedings outside the confines of Practice Direction 12B ought to be made, and when. Equally, regardless of who you are representing, you must constantly keep a careful eye on participation directions (considering Practice Direction 3AA) and ensure the court is encouraged to do so too. Failure to do so will not only give rise to appeals, but also might have implications for complaints and / or negligence claims.

COSTS

In the costs judgment following his dismissal of the mother's appeal in *SP v DM*[7] (for which, see above)[7] Cohen J reiterated some important principles including the distinction between costs at first instance and on appeal. He concluded that because:

a. It was not a finely balanced appeal;
b. He did not accept that the fact of grant of permission to appeal was in any way conducive to the issue of costs;
c. The mother continued to advance her appeal despite the warning from Mostyn J as to its success;
d. There were no important issues of public interest; and
e. Although the arguments that a grant of costs may sour the parental relationship or impact the child's resources were important they were outweighed by the sense of injustice the father would feel of having to bear all his costs of defending an unmeritorious appeal by the mother.

[7] SP v DM [2023] EWHC 282 (Fam)

He therefore made an order that the mother should contribute 62.5% towards the father's costs, (which were not assessed down on a summary assessment).

In *Re D (Costs of Appeal: Variation or revocation)* [2023] EWHC 1244 Fam Cobb J determined the mother's application to vary or revoke a costs order pursuant to FPR r. 4.1(6) as opposed to an appeal out of time. After the order was made the mother had emailed the Judge to say that she did not know how she would pay the order for half the father's costs at £76,000 as well as having spent £200,000 herself. She had been given 24 months to pay and at the time this application was heard the time for payment had not passed. The mother had advanced a position that she was not relitigating the costs arguments per se but asking the court to reconsider the costs order in light of "changed factors". Those factors were the decline in her financial resources, the intervening costs of living crisis but more importantly that the stress and anxiety of the order was "*imperilling the mothers and the maternal family's equilibrium prior to and during engagement in the therapy*" that had been ordered at the welfare stage of proceedings.

As one might expect, the father argued this was an appeal of the costs order by the back door, the mother had made submissions as to her financial circumstances at the time and he had been as affected by the costs of living crisis as she was. Further, he argued that the application was premature as the mother did not to pay the costs order until January 2024.

Cobb J had to determine first whether this jurisdiction existed and if so what test should be applied. Whilst applications to vary/revoke or appeal orders out of time have occupied well-trodden ground in the financial sphere it appeared that the advocates in this case had not appreciated the "*contentious jurisdictional platform*" upon which the mother's application rested in the context of this private law costs order.

Ultimately after embarking upon a learned exposition of the jurisdictional basis for the mother's application Cobb J concluded that he had power to vary or revoke a final order under the rule in limited circumstances but would not exercise his discretion to do so in this case. He set out useful guidance to apply to these applications at paragraph 39 and in the instant case concluded that none of the bases put forward by the mother amounted to a material change in circumstances. While he accepted that the mother's stress may have been aggravated by the order he did not accept that they had been so materially increased so as to have an impact, or one that was unforeseen on the child at the time the order was made.

UPCOMING EVENTS

WEDNESDAY 8 NOVEMBER 2023

Agency of older children: the law, psychology and practice

THURSDAY 16 NOVEMBER 2023

4PB Financial Remedies Seminar

WEDNESDAY 22 NOVEMBER 2023

4PB Key Developments In Public Law Seminar

MONDAY 4 DECEMBER 2023

Webinar with Family Law Week:

'Fact-findings in private law proceedings – where are we now'? - with Mani Singh Basi

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