St Ives Chambers Family Law Group Update
Autumn 2020

Covid-19 and the Family Justice System
Mark Cooper

It seems like such a long time ago that our inboxes were being filled every day by more and more guidance. Guidance from the senior judiciary, DFJs, the FLBA, HMCTS, the Ministry of Justice and others besides. For what it's worth, you can still access just about every piece of national and local guidance for England and Wales at www.wmflba.co.uk. However, it seems that we have finally come to terms with the "new normal", at least insofar as remote hearings and hybrid hearings are concerned. The former President, Sir James Munby, used to talk about the "Digital Family Court" and, at the time, many of us made jokes about judges sitting up in bed conducting hearings over Skype wearing the top half of their suit with the Royal Crest stuck on the headboard behind them. Whilst I have not seen a judicial approach quite like that, I don't think any of us realised just how soon Sir James's vision for the digital Family Court was going to become a reality.

The speed with which everyone involved in the Family Justice System has adapted to the new way of working is nothing short of remarkable. As well as efforts being made by individuals to learn how to use software like Microsoft Teams, Zoom and (dare I mention it) CVP, there have been huge tasks undertaken behind the scenes by court user groups, LFJBs, representative associations and individual chambers and solicitors firms.

As I write this, the Prime Minister has just announced the second national lockdown for England and, within 24 hours, HMCTS has issued a supposedly reassuring missive to say that the courts will remain open. Aisha Ahmad, an associate professor at the University of Toronto has written various articles about the "six month wall" and how to power through the next phase of lockdown. She says, "*This winter you will not only be able to survive, but will also find new ways to thrive. We have learned how to live, love, and be happy under these rough conditions, so do not despair This dip is not permanent, nor will it define you through this period of adversity. If you give yourself a moment of respite, you will be across it in no time. We will innovate again, in good cheer. There is light and strength on the other side of the wall.*"

Covid-19 and the Family Justice System continued...

I'm not sure of the extent to which I share Professor Ahmad's optimism, but she is absolutely right about the six-month wall. Everyone is exhausted and, with holidays now off the agenda for a while, there is no sign of the workload getting any lighter. But what can we do about it? On a practical level, I think it is vital that we all remind ourselves of the wellbeing protocols issued by each DFJ earlier this year, before the lockdown. Those documents were written without any knowledge of Covid-19 but, as far as I am aware, they all remain in force. Indeed, Her Honour Judge Thomas (DFJ for Birmingham) is about to publish a further wellbeing document specifically addressing Covid-19 and its impact on family justice. All practitioners must feel that they can refer to the wellbeing protocols if they feel that the guidance is being overlooked by colleagues or judges. Also, senior practitioners must feel that they can stand up for more junior practitioners who may not feel they can ask a judge for more time or remind a judge that there hasn't been a lunch break or that it is now past 5 o'clock.

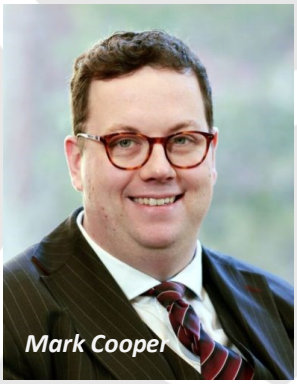
The lockdown has also taken its toll on the families we serve in the Family Court, particularly those waiting for trials to be listed. Whilst public law cases have understandably been given priority, the backlog in private law cases and financial remedy work is enormous. Many of us will have seen the articles published by the Transparency Project about the negative experience of litigants participating in remote hearings, and no doubt by now many of us will have had first-hand experience of such situations. I don't know the solutions to all of these problems, but I do think we can make life easier for ourselves, each other and our clients by being kind, measured and proportionate in the work we do. Indeed, at the time of writing, I understand that we are due to receive a further document (probably not called "guidance"…) from the President in relation to wellbeing. I just hope we will all have time to read it!

Mark Cooper

Chair of the St Ives Equality, Diversity & Wellbeing Committee

Secretary of the West Midlands FLBA

Member of the Birmingham Local Family Justice Board



To View Mark Cooper's CV click here.

R v P (Children: Similar Fact Evidence) 2020 EWCA 1088

F and M had 2 children. The 2nd born after their separation. The children remained with M in London. F applied for a CAO in respect of contact (the London proceedings). In those proceedings M alleged that F had been controlling and coercive.

Meanwhile F had entered into a new relationship with D. Concerns were raised by her husband E when D abruptly left London and her teaching employment to go to Wales with F taking with her the 2 DE children, who were aged 11 and 9 After which the regular contact between E and the DE children ceased.

E issued proceedings in Wales (the Welsh proceedings) and the court ordered a section 37 report upon the family unit of D, F and the DE children. The report raised significant concerns about the DE children's welfare and the nature of the relationship between D and F.

The Welsh court made a residence order of the DE children to E pending a final hearing.
The final section 7 report in the Welsh proceedings, suggested that F had been coercive and controlling. The DE children reported that D had been mistreated by F.

M applied in the London proceedings to have the Welsh evidence admitted on the basis of similar fact evidence.
The Judge at 1st instance refused the application and ordered that the Welsh evidence be removed from the trial bundle.

M appealed. The grounds included:-

- The Welsh evidence was highly relevant to both the fact-finding and welfare issues
- The evidence was probative because it showed a propensity for F to act in a coercive and controlling manner

HELD

1. Hearsay evidence (which the Welsh evidence was) is admissible in children proceedings
2. Practice Direction 12J applies because the central issue for fact-finding was M's allegations of domestic abuse.
3. The CA referred to the civil case of **O'Brien v Chief Constable of South Wales 2005 UKHL 26** stating that the same test for similar fact evidence will apply in family proceedings:-

Similar Fact Evidence Continued...

- Is the evidence relevant as potentially making the matter requiring proof more or less probable
- Looking at the interests of justice – what is the significance of the evidence in the context of the case as a whole
- Will the evidence distort the trial and distract attention from the issue(s) to be decided
- There needs to be a balance between the potential probative value against its potential for causing unfair prejudice
- Other considerations may include the effect on the length and cost to the parties of the trial

Having referred to **O'Brien** the CA were unanimous in allowing the appeal.

1. The necessary analysis had not been carried out by the Judge
2. The Welsh reports were relevant to the issue in the case, namely F's behaviour in family relationships, and therefore admissible.
3. The evidence may be capable of establishing a propensity for F to behave in a certain manner and that may be of probative value in relation to the core allegations against F.

COMMENT

1. Evidencing coercive and controlling behaviour is always difficult. So the argument would be that where there is evidence of a similar course of conduct within 2 completely separate relationships that evidence must be relevant to the central allegation.
2. Once the evidence had been admitted, it would be the task of the Judge to assess what weight to attach to it, particularly given that much of it was hearsay evidence.

Holly Hilbourne - Gollop


Holly Hilbourne - Gollop

To view Holly's CV click here.

NP,JP,GP,V A Local Authority NN 2020 EWCA 1003

Children aged 6,4,and 3 had lived with their maternal grandparents (GRPs) and aunt since January 2019, after a chaotic and unsettled lifestyle in their P's care.

In March 2020, they became looked after children. Medical examination identified developmental delay in the 3 year-old. Information from school suggested that the elder two might be on the autistic spectrum. The evidence was that the children were well settled in the GRP's care.

The LA had positively assessed the GRPs, with the reservation of limited insight into the children's emotional and physical needs, the GRF's conviction for serious violence 10 years ago and a very recent report of domestic abuse against the GRM. Care proceedings were started and an ICO made with a plan of remaining in GRP's care.

F then made allegations v the GRPs including

- GRF had been a terrorist in Sri Lanka
- GRF had mental health issues
- Aunt had attempted suicide
- GRF had been physically abusive towards the 4 year old

The GRPs denied these allegations. In addition by this time it was thought (erroneously) that Aunt was no longer living with the GRPs and children. She was regarded by the LA as a protective factor for the children.

LA sought to remove the children to FC.

At the July hearing the Judge, having observed that all agreed that there is a bond between the GRPs and the children and that removal would be distressing, unsettling and emotionally harmful, approved the LA plan to remove the children to FC.

M and GRPs appealed

HELD – APPEAL ALLOWED

Re C 2019 EWCA 1998 establishes that separation under an ICO will only be justified where it is both necessary and proportionate and will only be sanctioned by the Court where the child's physical safety or psychological or emotional welfare demands it and where the length and likely consequences of the separation are a proper response to the risks that would arise if it did not occur.

In this case:-

1. Judge needed to have balanced the risks of leaving the children with the GRPs, which he did at great length, against the risks of removing them, which he covered only briefly
2. Judge had not given enough consideration to the emotional harm arising from separation. He had underestimated that harm, which would be substantial.
3. Removal at an interim stage was a particularly sharp interference with a child's respect for family life.
4. The children were young, had been with the GRPs for 18 months. They would not have memories of any other home.
5. The evidence that the children had been involved in family conflict was slim.
6. The deficiencies in the GRPs insight were manifestly insufficient to justify removal.

Ann Chavasse

To view Ann Chavasse's CV click here.

Re Y (Leave to Oppose Adoption) 2020 EWCA Civ 1287

Parents with disabilities

Both parents were profoundly deaf. The difficulties in this case were compounded by the court needing to hold a remote hearing due to Covid-19.

The CA re-iterated the duty of lawyers acting for parents with a disability to identify that at the earliest opportunity. Also the duty on the LA to make the issue known to the court at the time proceedings are issued, so that the court can identify what support/arrangements will be required.

Leave to Oppose

The case concerned Y now aged 2 years and 8 months. The parents had accepted that F had caused serious NAI to Y when he was a few weeks old. Other findings against F included domestic violence and abuse. There were also findings against both parents that they had lied to the court. Y's elder half sibling had been removed and placed with a maternal Aunt and Uncle. At the care hearing the parents accepted that Y could not be returned to their care. There were 2 options namely LTF or adoption.

Y was placed with FCs who then applied to adopt him.

Parents applied for leave to oppose the adoption on the basis that they had made significant changes to their lifestyle in the 12 months since the care proceedings. The changes included:-

- Ps had relocated
- There had been no further incidents of domestic abuse
- M was receiving treatment for depression
- F was receiving counselling in respect of domestic abuse, which was specifically adapted for the profoundly deaf
- F had been prescribed and was taking appropriate medication
- Ps had severed links with risky adults in M's family
- Y was having contact with his half siblings and had formed ties with them, such that it would be distressing if the link were severed.

Leave to Oppose Adoption continued...

Judge at 1st instance granted the Ps application. LA appealed.

HELD

The Judge at 1st instance:-

1. was entitled to proceed on the basis of written submissions
2. had not taken the P's assertions as to change at face value
3. had undertaken a careful and balanced analysis of Y's welfare
4. had correctly identified that he was not evaluating the prospect of Y returning to P's care, but rather the prospects of Ps successfully opposing the making of an order

The Judge, having concluded that the changes in circumstances were sufficient to open the door, it was in the interests of Y's welfare throughout his life, to have another look at the question of whether the need to preserve family relationships, in particular sibling relationships, continues to be outweighed by the greater permanency which adoption would bring.

The CA also observed that there had been continuity of Judge throughout the proceedings and therefore he was best placed to evaluate the case and Y's best interests.

Carol Binnion


Carol Binnion

To view Carol Binnion's CV click here.

Re CTD (A Child: Re-Hearing) 2020 EWCA Civ 1316

The CA took the opportunity in this local case, where there had been findings of NAI, to clarify the position concerning when it is appropriate to order a re-hearing of an issue.

1. Has the Applicant shown that there are solid grounds for believing that the previous finding(s) require revisiting
2. If so, how should the re-hearing be conducted
3. Re-hear and determine the issue(s)

Stage 1

1. Consider whether there is any reason to think that a re-hearing will result in any different finding
2. Public policy considerations eg the certainty of findings
3. The importance of the previous findings in the context of the current proceedings
4. Is the challenged finding likely to make a significant legal or practical difference to to the arrangements for these or other children
5. The Applicant at Stage 1 must establish that there are solid grounds for believing that a re-hearing will result in a different finding. Mere hope and/or speculation is not enough. **Re B 2005 EWHC 2885**

See also Re E 2019 EWCA 1447; BCC v H 2006 EWHC 3062; Re ZZ 2014 EWFC 9

Stage 2

1. The Court gives case management directions governing the arrangements for a re-hearing
2. Giving particular consideration to what evidence is required

Stage 3

1. This is a re-hearing not a review or appeal.
2. The burden of proof is upon the party who seeks to establish the facts on the civil standard
3. The facts must be determined afresh on the basis of all the evidence.


Rebecca Cross

To view Rebecca's CV click here.