Are the delays in Court Proceedings Creating a New "Status Quo" for Children?

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I had the recent pleasure of acting for a child via her FPR 16.4 guardian in a contested final hearing, following acrimonious proceedings that had been ongoing since September 2020, commenced in the height of the Covid-19 pandemic. Whilst practitioners of all areas of law are unfortunately acutely aware of the impact that delays have upon those who find themselves within court proceedings, it was a sharp reminder of the direct impact that delays can have on decisions made within the Family Court in relation to Child Arrangements.

The parties had previously engaged in hotly contested proceedings resulting in a Child Arrangements Order. The most recent proceedings were initiated by the Mother, seeking a Specific Issue Order for the return of the child, who was retained by the Father following contact.

When the Mother's application was heard urgently in February 2021, the Court ultimately determined that the child should remain with the Father in the interim whilst investigations were ongoing, suspending the previous Child Arrangements Order, although made clear by way of recital that this did not pre-determine any final order. A final hearing was listed shortly after, but this was vacated.

At the final hearing, some 18 months since the interim order was put in place, and nearly two years since the initial application was made to Court, the Mother sought for the return of the child to her care, arguing that the status quo which existed prior to the removal of the child to Father's care should be restored.

The Court had the benefit of three reports from the Guardian, who made clear that she would not have supported the removal of the child from the Mother's care, particularly in the way that it transpired.

The geographical distance between the parties rendered it impossible for a Court to consider an equal division of time between both parents, although the Guardian argued that this would have been ideal in the circumstances.

The Guardian ultimately recommended that the child remain living with the Father and have alternate weekend contact with the Mother, given that the child had resided in the care of her Father for 18 months, had fully integrated into a new school, and enjoyed a number of extra-curricular activities with a wide circle of friends, with whom she wanted to remain. The current arrangements had been her status quo for 18 months, and any further change would likely to be unnecessarily disruptive and have a negative impact upon the child, who wished to remain with the Father.

The Judge endorsed the recommendations of the FPR 16.4 guardian and made a Child Arrangements Order in the terms proposed.

The "Status Quo"

It has long since been established that the child's welfare shall be the court's paramount consideration (section 1(1) Children Act 1989) and that in making a section 8 order, the Court shall have regard to the factors within section 1(3) Children Act 1989 ("the welfare checklist"), namely:

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
(b) his physical, emotional and educational needs;
(c) the likely effect on him of any change in his circumstances;
(d) his age, sex, background and any characteristics of his which the court considers relevant;
(e) any harm which he has suffered or is at risk of suffering;
(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
(g) the range of powers available to the court under this Act in the proceedings in question.

The very essence of the "status quo argument" is that the court is to have regard to section 1(3)(c) of the Act and consider the likely effect on them of any change in his circumstances.

By definition, the status quo is "the existing state of affairs". In this case, the existing state of affairs had been in place for 18 months. It would be difficult to argue that this final order was not at least in part a by-product of delays faced by the Court system, which have only been exacerbated by Covid-19. It is also necessary to note that devastatingly many cases remain within the Court system for far longer than the 24-month life of this matter, particularly those which require the assistance of a FPR 16.4 Guardian.

If the matter had appeared before the Court for a final hearing in early 2021 as intended, (only three months after the child was retained by the Father, rather than 18 months), it is likely that the Mother's argument of reverting back to the status quo prior to the child's removal would have had

significantly more force. She would have returned to her school where she had started in reception four months before, her friendship group, and the place that she had called home with her Mother for the first seven years of her life.

The delays suffered in this case ensured that by the time of the final hearing, the child had been a pupil for far longer at her "new school" than the school she commenced in September 2020, she had fully integrated into a new friendship group, and enjoyed attending multiple other activities as organised by the Father in an entirely different geographical location to the home she enjoyed with her Mother.

The Court has a wide discretion when considering the welfare checklist and cases are often extremely finely balanced. Through reported cases, it is clear that when faced with similar facts, other Judges have made entirely different decisions.

The case of ***F (A Child)*** **[2009] EWCA Civ 313** was an appeal by a Mother against an order that her children should be returned to the Father's care, where they had grown up. The parties' relationship had ended for the final time at the end of 2007, and the Father made an application for a live with order in February 2008, but due to delays in the Court system, no final order was made until January 2009. The CAFCASS Officer gave evidence that the children should be returned to their home in Nottingham (with the Father), to be returned to the school where they were originally educated, at their usual base. The trial Judge determined that whilst a move to Nottingham would be another change for the children, children are quite adaptable, and they had only been living in Droitwich for some 12 months. He did not consider that a change of circumstances would cause them significant harm.

In her appeal, the Mother argued forcefully in favour of maintaining the status quo that had been in place since separation and throughout the life of the proceedings and that, if the children would be safe and thrive in either household, the Judge had failed to provide an adequate explanation of the reasons that justified a change from the settled position of 12 months.

As per Lord Justice Ward in paragraphs 18 and 19 of the judgment:

> *18. There is a reason for the change. It is that given by the welfare officer: that they return to the environment in which they grew up. It may not be of itself the most compelling reason but it is the explanation for the recommendation made by Mr Webb and it was the reason accepted by the judge: that their best interests were served by returning to Nottingham. My difficulty in this case is one which I have felt as a trial judge dealing with these disputes and which I have since expressed in the Court of Appeal. It is this. In the well-known case of* ***G v G*** **[1985] 1 WLR 647** *at 1385 Lord McDermott indicated that, in cases involving an exercise of discretion, the appellate court should*

not interfere unless there is some fact which the judge failed to take into account, or a fact which he wrongly took into account, or that he erred in principle. None of those errors of law appear in this judgment. The weight to be given to various factors is a matter for the trial judge not the appellate tribunal. Consequently unless, in the exercise of his discretion, the judge can be shown to have exceeded the generous ambit within which there is room for reasonable disagreement, the appellate court should not interfere [...].

19. I am far from certain that I would have made the same decision in this case, but when I ask myself if there was an error of law, I have to conclude that there was not. When I ask myself whether the judge exceeded the generous ambit within which there is that room for disagreement, I cannot say that he has. The problem with this jurisdiction is that the more finely balanced the case is, the more difficult it becomes to appeal it.

Similarly in the case I dealt with recently, the Judge found that the child would be safe and thrive with her physical, emotional and educational needs being met in the care of either of her parents. He acknowledged the child's ascertainable wishes and feelings that she wished to remain with her Father, although proceeded with some caution due to her age. He also notably determined that if the child was settled, happy, and there were no safeguarding concerns, there were no good reasons to up-root her again, to change schools, towns, and ultimately to move house again. A difficult and finely balanced case, but the child's living arrangements of 18 months had become the child's status quo, no matter how passionately the Mother argued that the true status quo was the living arrangements enjoyed before the court proceedings commenced.

Practitioners need to be alive to the impact of the delays. If a client is reluctant to agree direct contact because their approach is "return the child to live with me, or nothing", this is only going to entrench the new living arrangements and embroil the child(ren) in adult issues. Any period of no contact between a child and a parent with whom they have lived is going to have an impact and should be minimised as far as possible. Taking a balanced view about agreeing and maintaining contact arrangements early in proceedings; and seeking to either agree or persuade the Court that these should be increased over the lifespan of the case will undoubtedly lessen the degree and minimise the impact of any change to the child's living arrangements.

Equally, if allegations are made which may impact what safe contact arrangements can be agreed or ordered by the Court, the necessity of a Fact-Find hearing and the applicability of FPR Practice Direction 12J must be considered at the earliest opportunity and continuously reviewed to avoid further delay. If allegations are not pursued and contact cannot be agreed, an interim contact application will likely be appropriate to avoid losing momentum.

It is fair to say that if parents find themselves in court proceedings, their communication is often fraught with difficulties or non-existent. We regularly see section 7 reports which set out the potential impact that ongoing hostility between parents will have upon their child(ren).

The FPR 16.4 guardian above highlighted significant concerns with the parents' communication within her first report and criticised their ability to promote the other. Throughout the proceedings, the Father took significant steps to improve this, and understand the impact that his previous actions may have had upon the child. He used the delays in the court system to his advantage: to make positive changes. By the final hearing, the FPR 16.4 guardian was satisfied that the Father was actively promoting the Mother and the contact arrangements, and communicating positively. Taking on board advice and recommendations at an early stage of proceedings, rather than waiting for the final hearing was, and will always be, an extremely positive step for parties to take. This is even more important when one considers the often significant delay between hearings.

It would be wrong to imply that in this case the only reason for the child remaining with the Father was her "new" status quo of 18 months. But in finely balanced cases, such a factor can tip the scales in favour of maintaining the current arrangements simply because there is no good reason to uproot the child(ren) again. The delays suffered by parties who find themselves embroiled in court proceedings are significant, and have been exacerbated by the Covid-19 pandemic.

The stark reality for parents is that in waiting months for their "day in court" to resolve matters, a new status quo is often formed which courts can be reluctant to revert without good reason.

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Law is correct as at 22 June 2022

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