IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE FAMILY COURT

B E T W E E N:

NATALIE O'TOOLE

Appellant

and

SAM DALE

Respondent

SKELETON ARGUMENT ON BEHALF OF THE APPELLANT

Ground 1: Abuse and Alienation

Submissions on Ground 1

Domestic Abuse by the Respondent Against the Appellant

1. The judge erred in finding that the domestic abuse suffered by the Appellant was either

   (a) Too mild to count; or

   (b) Irrelevant to:
      (i) Her current attitude towards contact; and
      (ii) The children's expressed wishes and feelings about seeing their father.

2. The learned judge's conclusion that there was limited evidence of domestic abuse against the Appellant by the Respondent, but that this was not relevant to the issue of the children's contact was inconsistent with the definition provided for under section 1 of the Domestic Abuse Act 2021 ("the 2021 Act"), which is adopted in the Family Procedure Rules 2010 ("FPR") Practice Direction 12J (**pages 11-16 of this Bundle**).

3. The approach of the family courts to domestic abuse should be to recognise that abuse can be far more subtle than violence and/or a series

of similar abusive events. Domestic abuse can manifest itself in a range of behaviours, including coercive and controlling behaviour.

4. The guidance of the President of the Family Division in ***Re H-N (Children) (Domestic Abuse: Finding of Fact Hearings)*** **[2021] EWCA Civ 448, [2021] 1 WLR 2681** (**pages 18-26 of this Bundle**) required the judge to be alive to the modern understanding of domestic abuse and the impact it can have on children in the household. The judge should have been alive to the pattern of behaviour perpetrated by the Respondent (paragraphs [25] and [31]).

5. The judge erred in his construction and interpretation of PD12J (finding 18(a)):

   (a) The judge was required to apply the individual matters in the welfare checklist under section 1(3) of the Children Act 1989 ("the 1989 Act") with reference to the domestic abuse suffered by the Appellant, and by extension the children (paragraphs 35-37 PD12J).

   (b) The judge was required be alive to behaviour by the Respondent which was witnessed by the children and that which created an atmosphere of fear and anxiety in the household (paragraph [31] of ***Re H-N***).

6. The judge should have made findings regarding the allegations made by the Appellant against the Respondent (finding 18(b)). This need not necessarily be via a full fact-finding hearing.

The Requirement for Expert Evidence

7. The definition of domestic abuse and its effects on those other than the immediate victim are now well recognised, and should have been recognised by the judge in the present case, with respect to the children.

8. Paragraph 33 of FPR PD12J requires that

   'the court must, if considering any form of contact or involvement of the parent in the child's life, consider –
   (a) Whether it would be assisted by any social work, psychological or other assessment…'

9. There had been a determination by the judge as to the nature and extent of the domestic abuse suffered by the Appellant. What should have followed this determination was a consideration of the benefits of expert

evidence in relation to the children, be this social, psychiatric or psychological.

10. Had expert evidence been obtained prior to the judge making his findings of fact, this would have furnished the court with relevant information including:

    (a) The extent to which the children have suffered as a result of being in a household with domestic abuse occurring (paragraph 36(2) PD12J);

    (b) How and the extent to which the children may be exposed to harm as a result of any order the court was considering making.

    (c) How the physical and emotional safety of the children and of the Appellant could be secured going forward as a result of the court's order(s) (paragraph 36(3) PD12J).

11. Expert evidence was required in the present case because it met the threshold of 'necessity' to assist in resolving the contested issue; namely, whether and how the children had been effected by the Respondent's behaviour against them and against the Appellant (***Re H-L (A Child)*** **[2013] EWCA Civ 665, [2014] 1 WLR 1160** at paragraph [3]) (**pages 27-30 of this Bundle**). In line with the overriding objective (FPR, r.1.1), a Single Joint Expert could have been instructed.

The Allegations of Alienation of the Children Against the Respondent by the Appellant

12. The judge erred in concluding that the Appellant had alienated the children against the Respondent (finding 18(k)).

13. There were multiple other explanations for the children no longer wishing to see or live with the Respondent, independent from any influence by the Appellant (***Re H (A Child) (Parental Alienation)*** **[2019] EWHC 2723 (Fam), [2019] 10 WLUK 215** distinguished) (**pages 31-32 of this Bundle**).

14. The Appellant had not attempted to use the proceedings to 'cancel' the Respondent from the children's lives. Instead, in her representations to the court she had sought compromise; even if the children did not wish to see the Respondent, she was willing to agree to this albeit under supervision.

Ground 2: Child Arrangements

The Court should have accepted the Appellant's evidence that the children did not want to see the Respondent or should have adjourned the case to independently canvass the children's wishes before deciding that they should see the Respondent. The children were invited to have their voices heard when the outcome of the case would have such a fundamental effect on their lives. They were not findings open to the court to make.

Submissions on Ground 2

1. The welfare of the children is of paramount importance (s.1(1) of the 1989 Act).

2. When making any decisions concerning the welfare of the children the ascertainable wishes and feelings of the children is to be considered. (s.1(3) of the 1989 Act and FPR PD12B paragraph 4.4).

3. Considering the wishes and feelings of the children is a fundamental principle which cannot be avoided by the court or the parties involved (***D (A Child) (International Recognition)*** **[2016] EWCA Civ 12**) (**pages 33-43 of this Bundle**).

   (a) The decision made by the court was not one available to be made given that they did not consider the ascertainable wishes and feelings of the children, which is a fundamental principle.

4. The court's decisions would have a fundamental effect on the children's lives and welfare, demonstrating the need to consider their wishes and feelings.

   (a) The Appellant sought a child arrangement order which would determine when and how the children would have contact with their non-resident parent.

   (b) The Appellant sought a specific issue order allowing the Appellant to change the surnames of the children, a critical element of their identity.

   (c) The children's views as to their continuing relationship with their father contradicts the decisions of the court, as expressed by the Appellant.

5. The age and understanding of the children are relevant when giving weight to their wishes and feelings (s.1(3) of the 1989 Act, FPR PD12B paragraph 4.4).

   (a) The children were of sufficient age and understanding for their wishes and feelings to be considered. (***Re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51**) (**pages 44-48 of this Bundle**).

6. The court should have regard to wishes and feelings which are ascertainable. The wishes and feelings of the Appellant's children were ascertainable in this case making it distinguishable from ***Re L* [2019] EWHC 867 (Fam), [2019] 4 WLUK 498** (**pages 49-53 of this Bundle**).

7. The Court should have accepted the Appellant's evidence, adjourned to prepare a Welfare Report or gathered the wishes and feelings of the children in another manner.

Lead Counsel: Mr Matthew Kingswell

Junior Counsel: Ms Tayla Dwyer

9 June 2022

List of Authorities

Case	Paragraph(s) Relied On	Bundle Page Ref.
Re H-N (Children) (Domestic Abuse: Finding of Fact Hearings) [2021] EWCA Civ 448, [2021] 1 WLR 2681	[23]-[34]	18-26
Re H-L (A Child) (Care Proceedings: Expert Evidence) [2013] EWCA Civ 665, [2014] 1 WLR 1160	[1]-[7]	27-30
Re H (A Child) (Parental Alienation) [2019] EWHC 2723 (Fam), [2019] 10 WLUK 215	[25]-[30]	31-32
D (A Child) (International Recognition) [2016] EWCA Civ 12,	[35]-[49]	33-43
Re D (A Child) (Abduction: Rights of Custody) [2006] UKHL 51	[57]-[62]	44-48
Re L [2019] EWHC 867 (Fam), [2019] 4 WLUK 498	[60]-[62], [65]-[68]	49-53

List of Statutes and Rules

Statute/Rules	Section(s)/Rule(s) Relied On	Bundle Page Ref.
Children Act 1989	s.1, s.8	7-9
Family Procedure Rules 2010	PD12B, PD12J,	10-16
Convention on the Rights of the Child	Article 12	17

Children Act 1989

1989 CHAPTER 41

PART I

INTRODUCTORY

1 Welfare of the child.

(1) When a court determines any question with respect to—

(a) the upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration.

(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

[F1(2A) A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.

(2B) In subsection (2A) "involvement" means involvement of some kind, either direct or indirect, but not any particular division of a child's time.**]**

(3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to—

(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;

(a) 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;

(b) the range of powers available to the court under this Act in the proceedings in question.

(4) The circumstances are that—

(a) the court is considering whether to make, vary or discharge a section 8 order, and the making, variation or discharge of the order is opposed by any party to the proceedings; or

(b) the court is considering whether to make, vary or discharge **[**F2a special guardianship order or**]** an order under Part IV.

(5) Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.

[F3(6) In subsection (2A) "parent" means parent of the child concerned; and, for the purposes of that subsection, a parent of the child concerned—

(a) is within this paragraph if that parent can be involved in the child's life in a way that does not put the child at risk of suffering harm; and

(b) is to be treated as being within paragraph (a) unless there is some evidence before the court in the particular proceedings to suggest that involvement of that parent in the child's life would put the child at risk of suffering harm whatever the form of the involvement.

(7) The circumstances referred to are that the court is considering whether to make an order under section 4(1)(c) or (2A) or 4ZA(1)(c) or (5) (parental responsibility of parent other than mother).]

PART II

ORDERS WITH RESPECT TO CHILDREN IN FAMILY PROCEEDINGS

General

8 [F1Child arrangements orders] and other orders with respect to children.

(1) In this Act —

"[F2child arrangements order" means an order regulating arrangements relating to any of the following—

(a) with whom a child is to live, spend time or otherwise have contact, and

(b) when a child is to live, spend time or otherwise have contact with any person;**]**

F3...

"a prohibited steps order" means an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court;

F3...

"a specific issue order" means an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.

(2) In this Act "a section 8 order" means any of the orders mentioned in subsection (1) and any order varying or discharging such an order.

(3) For the purposes of this Act "family proceedings" means any proceedings—

(a) under the inherent jurisdiction of the High Court in relation to children; and

(b) under the enactments mentioned in subsection (4),

but does not include proceedings on an application for leave under section 100(3)

(4) The enactments are—

(a) Parts I, II and IV of this Act;

(b) the [M1]Matrimonial Causes Act 1973;

[[F4](ba) Schedule 5 to the Civil Partnership Act 2004;]

[[F5](c) the [M2] Domestic Violence and Matrimonial Proceedings Act 1976;

(d) the Adoption and Children Act 2002;]

(e) the [M3]Domestic Proceedings and Magistrates' Courts Act 1978;

[[F6](ea) Schedule 6 to the Civil Partnership Act 2004;]

[[F5](f) sections 1 and 9 of the [M4] Matrimonial Homes Act 1983;]

(g) Part III of the [M5]Matrimonial and Family Proceedings Act 1984.

[F7][(h) the Family Law Act 1996]

[[F8](i) sections 11 and 12 of the Crime and Disorder Act 1998.]

[[F9](j) Part 1 of Schedule 2 to the Female Genital Mutilation Act 2003 (other than paragraph 3 of that Schedule).]

Family Procedure Rules 2010

Practice Direction 12B – Child Arrangements Programme

…

The child in the dispute

4.1

In making any arrangements with respect to a child, the child's welfare must be the highest priority.

4.2

Children and young people should be at the centre of all decision-making. This accords with the Family Justice Young People's Board Charter (https://www.cafcass.gov.uk/media/179714/fjypb_national_charter_1013.pdf).

4.3

The child or young person should feel that their needs, wishes and feelings have been considered in the arrangements which are made for them.

4.4

Children should be involved, to the extent which is appropriate given their age and level of understanding, in making the arrangements which affect them. This is just as relevant where:

(1) the parties are making arrangements between themselves (which may be recorded in a Parenting Plan),

as when:

(2) arrangements are made in the context of dispute resolution outside away from the court,

and/or

(3) the court is required to make a decision about the arrangements for the child.

4.5

If an application for a court order has been issued, the judge may want to know the child's view. This may be communicated to the judge in one of a number of ways –

(1) By a Cafcass officer (in Wales, a Welsh Family Proceedings Officer (WFPO)) providing a report to the court which sets out the child's wishes and feelings;

(2) By the child being encouraged (by the Cafcass officer or WFPO, or a parent or relative) to write a letter to the court;

(3) In the limited circumstances described in paragraph 18 below, by the child being a party to the proceedings;

and/or:

(4) By the judge meeting with the child, in accordance with approved Guidance (currently the FJC Guidelines for Judges Meeting Children subject to Family Proceedings (April 2010)).

…

Practice Direction 12J – Child Arrangements and Contact Orders: Domestic Abuse and Harm

Summary

1

This Practice Direction applies to any family proceedings in the Family Court or the High Court under the relevant parts of the Children Act 1989 or the relevant parts of the Adoption and Children Act 2002 in which an application is made for a child arrangements order, or in which any question arises about where a child should live, or about contact between a child and a parent or other family member, where the court considers that an order should be made.

2

The purpose of this Practice Direction is to set out what the Family Court or the High Court is required to do in any case in which it is alleged or admitted, or there is other reason to believe, that the child or a party has experienced domestic abuse perpetrated by another party or that there is a risk of such abuse.

Interpretation

2A. In this Practice Direction, "domestic abuse" has the same meaning as in the 2021 Act. Sections 1 and 2 of the 2021 Act provide that:

"Definition of "domestic abuse"

1.

(1)This section defines "domestic abuse" for the purposes of this Act.
(2) Behaviour of a person ("A") towards another person ("B") is "domestic abuse" if—
(a) A and B are each aged 16 or over and are personally connected to each other, and
(b) the behaviour is abusive.
(3) Behaviour is "abusive" if it consists of any of the following—
(a) physical or sexual abuse;

(b) violent or threatening behaviour;
(c) controlling or coercive behaviour;
(d) economic abuse (see subsection (4));
(e) psychological, emotional or other abuse;
and it does not matter whether the behaviour consists of a single incident or a course of conduct.
(4) “Economic abuse” means any behaviour that has a substantial adverse effect on B’s ability to—
(a) acquire, use or maintain money or other property, or
(b) obtain goods or services.
(5) For the purposes of this Act A’s behaviour may be behaviour “towards” B despite the fact that it consists of conduct directed at another person (for example, B’s child).
(6) References in this Act to being abusive towards another person are to be read in accordance with this section.
(7) For the meaning of “personally connected”, see section 2.

Definition of “personally connected”

2

(1) For the purposes of this Act, two people are “personally connected” to each other if any of the following applies—
(a) they are, or have been, married to each other;
(b) they are, or have been, civil partners of each other;
(c) they have agreed to marry one another (whether or not the agreement has been terminated);
(d) they have entered into a civil partnership agreement (whether or not the agreement has been terminated);
(e) they are, or have been, in an intimate personal relationship with each other;
(f) they each have, or there has been a time when they each have had, a parental relationship in relation to the same child (see subsection (2));
(g) they are relatives.
(2) For the purposes of subsection (1)(f) a person has a parental relationship in relation to a child if—
(a) the person is a parent of the child, or
(b) the person has parental responsibility for the child.
(3) In this section—
“child” means a person under the age of 18 years;
“civil partnership agreement” has the meaning given by section 73 of the Civil Partnership Act 2004;
“parental responsibility” has the same meaning as in the Children Act 1989 (see section 3 of that Act);
“relative” has the meaning given by section 63(1) of the Family Law Act 1996.

2B.

For the avoidance of doubt, it should be noted that “domestic abuse” includes, but is not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment.

3

For the purpose of this Practice Direction "the 2021 Act" means the Domestic Abuse Act 2021;
"abandonment" refers to the practice whereby a husband, in England and Wales, deliberately abandons or "strands" his foreign national wife abroad, usually without financial resources, in order to prevent her from asserting matrimonial and/or residence rights and/or rights in relation to childcare in England and Wales. It may involve children who are either abandoned with, or separated from, their mother;
"coercive behaviour" means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim;
"controlling behaviour" means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour;
"development" means physical, intellectual, emotional, social or behavioural development;
"harm" means ill-treatment or the impairment of health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of another, by domestic abuse or otherwise;
"harm" means ill-treatment or the impairment of health or development including, for example, impairment suffered from being a victim of domestic abuse or from seeing or hearing the ill-treatment of another, by domestic abuse or otherwise;
"health" means physical or mental health;
"ill-treatment" includes sexual abuse and forms of ill-treatment which are not physical;
"judge" includes salaried and fee-paid judges and lay justices sitting in the Family Court and, where the context permits, can include a justices' legal adviser in the Family Court; and
"victim of domestic abuse" includes, but is not limited to, a child who is a victim of domestic abuse by virtue of section 3 of the 2021 Act, which provides that-
"Children as victims of domestic abuse

3.

(1) This section applies where behaviour of a person ("A") towards another person ("B") is domestic abuse.
(2) Any reference in this Act to a victim of domestic abuse includes a reference to a child who—
(a) sees or hears, or experiences the effects of, the abuse, and
(b) is related to A or B.
(3) A child is related to a person for the purposes of subsection (2) if—
(a) the person is a parent of, or has parental responsibility for, the child, or
(b) the child and the person are relatives.
(4) In this section— "child" means a person under the age of 18 years; "parental responsibility" has the same meaning as in the Children Act 1989 (see section 3 of that Act); "relative" has the meaning given by section 63(1) of the Family Law Act 1996."

3A

Reference is made at various points in this Practice Direction to making findings of fact in relation to domestic abuse. It should be noted that Part 3A FPR makes provision in relation to victims of domestic abuse in the specific context of participation in proceedings and giving evidence. In that context, it is not necessary for the court to make findings of fact in relation to domestic abuse before assuming that a party or witness is, or is at risk of being, a victim of domestic abuse carried out by a party, relative of another party, or a witness in the proceedings: see rule 3A.2A FPR.
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General principles

4 Domestic abuse is harmful to children, and/or puts children at risk of harm, including where they are victims of domestic abuse for example by witnessing one of their parents being violent or abusive to the other parent, or living in a home in which domestic abuse is perpetrated (even if the child is too young to be conscious of the behaviour). Children may suffer direct physical, psychological and/or emotional harm from living with and being victims of domestic abuse, and may also suffer harm indirectly where the domestic abuse impairs the parenting capacity of either or both of their parents.

…

In all cases where domestic abuse has occurred

32

The court should take steps to obtain (or direct the parties or an Officer of Cafcass or a Welsh family proceedings officer to obtain) information about the facilities available locally (to include local domestic abuse support services) to assist any party or the child in cases where domestic abuse has occurred.

33

Following any determination of the nature and extent of domestic abuse, whether or not following a fact-finding hearing, the court must, if considering any form of contact or involvement of the parent in the child's life, consider-
(a) whether it would be assisted by any social work, psychiatric, psychological or other assessment (including an expert safety and risk assessment) of any party or the child and if so (subject to any necessary consent) make directions for such assessment to be undertaken and for the filing of any consequent report. Any such report should address the factors set out in paragraphs 36 and 37 below, unless the court directs otherwise;
(b) whether any party should seek advice, treatment or other intervention as a precondition to any child arrangements order being made, and may (with the consent of that party) give directions for such attendance.

34

Further or as an alternative to the advice, treatment or other intervention referred to in paragraph 33(b) above, the court may make an Activity Direction under section 11A and 11B Children Act 1989. Any intervention directed pursuant to this provision should be one commissioned and approved by Cafcass. It is acknowledged that acceptance on a DVPP is subject to a suitability assessment by the service provider, and that completion of a DVPP will take time in order to achieve the aim of risk-reduction for the long-term benefit of the child and the parent with whom the child is living.

Factors to be taken into account when determining whether to make child arrangements orders in all cases where domestic abuse has occurred

35

When deciding the issue of child arrangements the court should ensure that any order for contact will not expose the child to an unmanageable risk of harm and will be in the best interests of the child.

36

(1) In the light of-
(a) any findings of fact,
(b) admissions; or
(c) domestic abuse having otherwise been established,
the court should apply the individual matters in the welfare checklist with reference to the domestic abuse which has occurred and any expert risk assessment obtained.
(2) In particular, the court should in every case consider any harm-
(a) which the child as a victim of domestic abuse, and the parent with whom the child is living, has suffered as a consequence of that domestic abuse; and
(b) which the child and the parent with whom the child is living is at risk of suffering, if a child arrangements order is made.
(3) The court should make an order for contact only if it is satisfied-
(a) 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 before, during and after contact; and
(b) that the parent with whom the child is living will not be subjected to further domestic abuse by the other parent.

37

In every case where a finding or admission of domestic abuse is made, or where domestic abuse is otherwise established, the court should consider the conduct of both parents towards each other and towards the child and the impact of the same. In particular, the court should consider –
(a) the effect of the domestic abuse on the child and on the arrangements for where the child is living;

(b) the effect of the domestic abuse on the child and its effect on the child's relationship with the parents;
(c) whether the parent is motivated by a desire to promote the best interests of the child or is using the process to continue a form of domestic abuse against the other parent;
(d) the likely behaviour during contact of the parent against whom findings are made and its effect on the child; and
(e) the capacity of the parents to appreciate the effect of past domestic abuse and the potential for future domestic abuse.

Convention for the Rights of the Child: Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

H-N (Children) (Domestic Abuse: Finding of Fact Hearings), Re

Court

Court of Appeal (Civil Division)

Judgment Date

30 March 2021

Where Reported

[2021] EWCA Civ 448

[2022] 1 W.L.R. 2681

Case Digest

Summary

It was important for the modern judiciary to have a proper understanding of the nature of domestic violence and abuse, in particular of controlling and coercive behaviour, and its impact on both victims and the children of the household. The Court of Appeal gave general guidance about how the Family Court should approach cases where domestic violence and abuse was alleged to be affecting the welfare of children. It considered the extent to which the Family Court might have regard to concepts applicable in criminal proceedings, how to determine the necessity for a fact-finding hearing, the requirements of FPR PD 12J, and applications for private law children orders.

Abstract

In four conjoined appeals involving allegations of domestic abuse by one parent against the other, the Court of Appeal gave general guidance about how the Family Court should approach cases where domestic violence and abuse was alleged to be affecting the welfare of children.

Held

Appeals allowed in part.

Incidence of domestic violence - At least 40% of applications under the Children Act 1989 regarding children's future care arrangements involved

allegations of domestic abuse. It was important for the modern judiciary to properly understand the nature of domestic violence and abuse, in particular of controlling and coercive behaviour, and its impact on both victims and on the children in the household (see paras 1-4, 224 of judgment).

Behaviour falling within "domestic violence" - The concept of domestic violence first introduced by the Domestic Violence and Matrimonial Proceedings Act 1976 had developed significantly. It was no longer regarded as a matter purely between the adults, but was recognised to be equally relevant to children of the family. In many cases, courts had to focus on patterns of behaviour falling short of actual bodily harm, as it was now unreservedly accepted that controlling, coercive or threatening behaviour could be as abusive, or more so, than factual incidents listed in a Scott schedule. That was reflected in the definition of "domestic abuse" in FPR PD 12J para.3. Importantly, it was also understood that specific incidents might not be free-standing matters, but part of a wider pattern of abuse. PD 12J provided the courts with a structure for recognising all forms of domestic abuse and guided the approach to such allegations when made in private law proceedings. PD 12J remained fit for purpose (paras 23-27, 31).

Coercive and/or controlling behaviour - Greater prominence was to be given to this in Family Court proceedings. *F v M [2021] EWFC 4, [2021] 1 WLUK 112* was essential reading for the Family judiciary, first because of what the facts illustrated, but also because it highlighted Home Office statutory guidance published pursuant to the Serious Crime Act 2015 Pt 5 s.77(1), which was relevant to the evaluation of evidence in the Family Court. A child could be harmed in any one or a combination of ways, for example: where the abusive behaviour was witnessed by or directed against them; where the victim of the abuse was so frightened of provoking an outburst from the perpetrator that they could not give priority to the children's needs; where there was an atmosphere of fear and anxiety in the home that was inimical to the child's welfare; or where it inculcated a set of values which involved treating women as inferior to men, *F v M* approved. It was equally important to be clear that not all directive, assertive, stubborn or selfish behaviour would be "abuse". Much turned on the perpetrator's intention and on the harmful impact of the abuse, *L (Relocation: Second Appeal), Re [2017] EWCA Civ 2121, [2018] 4 W.L.R. 141, [2017] 12 WLUK 568* followed (paras 29-32).

Court's approach to patterns of abusive behaviour - The following guidance applied to all forms of abuse, including physical and sexual violence:

- Fact-finding hearings: not every case required one. As was clear from PD 12J para.5, para.16 and para.17, the real issues in the case had to be identified at the earliest opportunity. Procedural proportionality and the appropriate allotment of resources was important; a key word in PD 12J and at the heart of the President's Guidance "The Road Ahead" (June 2020) was "necessary" (paras 6-10, 35-36). The court outlined the proper approach to deciding if a fact finding hearing was necessary (para.37). Cafcass made submissions and offered suggestions, which should be considered by those tasked with reviewing PD 12J (paras 38-40).
- Scott schedules: the value of the schedules in domestic abuse cases had declined. Sometimes they were a potential barrier to fairness and good process, rather than an aid. Courts needed to focus on the wider context of whether there had been a pattern of coercive and controlling behaviour rather than on a list of specific factual incidents. Serious thought was needed to develop a different way of summarising and organising the matters to be tried at a fact-finding hearing without limiting the number of allegations or minimising the abuse. Such work was not for the court (paras 43-49).
- Courts had to be alive to the fact that coercive or controlling incidents from the past might be relevant to a risk of future harm even though the abuse might in future manifest in a different or more subtle manner. Judges who failed to expressly consider that might be held on appeal to have erred (paras 52-53).
- Court resources: evaluating whether there was a pattern of coercive and/or controlling behaviour without significantly increasing the scale and length of private law proceedings was important. Judges and magistrates had to set a proportionate timetable and maintain control of the process. The court offered pointers in that regard (paras 55-59).

Relevance of criminal law concepts to Family Court - There was a clear distinction between judges needing to have a sound understanding of the impact of abuse and being drawn into an analysis of factual evidence based on criminal law principles. Family courts should avoid analysing evidence of behaviour by the direct application of the criminal law. What mattered was determining how the parties had behaved to each other and their children, not whether that behaviour came within the definition of a criminal act. Judges would make findings on the balance of probabilities and would not decide

whether a criminal offence had been proved to a criminal standard. Terminology used should not give an impression that the abusive parent had been convicted of a criminal offence, *R (Children) (Care Proceedings: Fact-finding Hearing), Re [2018] EWCA Civ 198, [2018] 1 W.L.R. 1821, [2018] 2 WLUK 365* followed, *JH v MF (Child Arrangements: Domestic Abuse: Appeal) [2020] EWHC 86 (Fam), [2020] 2 F.L.R. 344, [2020] 1 WLUK 595* considered (paras 61-74).

…

Domestic Violence'

23. Over the past 40 years there have been significant developments in the understanding of domestic abuse. The Domestic Violence and Matrimonial Homes Act 1976 ('DVMA 1976') introduced the concept of 'domestic violence'; although ground breaking in its time, it is now wholly outdated and hard to comprehend an approach which required evidence of actual bodily harm to a victim before a power of arrest could be attached to an injunction (s 2 DVMA 1976).

24. Obsolete too is the approach often seen in the 1980s where, although 'domestic violence' had been established and an injunction granted, judges regarded that violence as purely a matter as between the adults and not as a factor that would ordinarily be relevant to determining questions about the welfare of their children. Fortunately, there has been an ever-increasing understanding of the impact on children of living in an abusive environment. A seminal moment in the court's approach to domestic violence (as it was still called) was the Court of Appeal judgment in four appeal cases that were, like the present appeals, heard together: *Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence)* [2000] 2 FCR 404; [2000] 2 FLR 334. The central conclusion from *Re L*, which was based on the Court of Appeal's acceptance of authoritative expert child psychiatric evidence, was that there needed to be a heightened awareness of the existence of, and the consequences for children of, exposure to 'domestic violence' between parents and other partners. In CA 1989 applications, where an allegation of 'domestic violence' was made which might have an effect on the outcome, the Court of Appeal held that it was plain that it should be adjudicated upon and found to be proved or not. In its time, 20 years ago, the messages from *Re L* led to a significant change in the approach to domestic abuse allegations in the context of child welfare proceedings.

25. As the present appeals illustrate, there are many cases in which the allegations are not of violence, but of a pattern of behaviour which it is now understood is abusive. This has led to an increasing recognition of the need in many cases for the court to focus on a pattern of behaviour and this is reflected by (PD12J).

26. PD12J paragraph 3 includes the following definitions each of which it should be noted, refer to a pattern of acts or incidents:

    "'domestic abuse' includes any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass, but is not limited to, psychological, physical, sexual, financial, or emotional abuse. Domestic abuse also includes culturally specific forms of abuse including, but not limited to, forced marriage, honour-based violence, dowry-related abuse and transnational marriage abandonment;

    'coercive behaviour' means an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the victim;

    'controlling behaviour' means an act or pattern of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour."

27. The definition, which was expanded in 2017 and is the one currently to be used by judges in the Family Court, is plainly a far cry from the 1970s' concept of 'domestic violence' with its focus on actual bodily harm. It is now accepted without reservation that it is possible to be a victim of controlling or coercive behaviour or threatening behaviour without ever sustaining a physical injury. Importantly it is now also understood that specific incidents, rather than being seen as free-standing matters, may be part of a wider pattern of abuse or controlling or coercive behaviour. It is of note that none of the submissions to this court suggested that the current definition of 'domestic abuse' in PD12J required substantial amendment. Although the structure of the definition of 'domestic abuse' in clause 1 of the Domestic Abuse Bill ['DAB'] currently before Parliament differs from that in PD12J, the content is substantially the same. Thus, whilst PD12J will undoubtedly fall for review to ensure that it complies with the DAB once

the Bill becomes an Act, it is unlikely that the substance of the core definitions will substantially change.

28. We are therefore of the view that PD12J is and remains, fit for the purpose for which it was designed namely to provide the courts with a structure enabling the court first to recognise all forms of domestic abuse and thereafter on how to approach such allegations when made in private law proceedings. As was also recognised by The Harm Panel, we are satisfied that the structure properly reflects modern concepts and understanding of domestic abuse. The challenge relates to the proper implementation of PD12J.

Coercive and/or controlling behaviour

29. As can be seen at paragraph 27 above, central to the modern definitions of domestic abuse is the concept of coercive and/or controlling behaviour. Shortly before the hearing of these appeals, Mr Justice Hayden handed down judgment in *F v M* [2021] EWFC 4. The judgment followed a two-week fact-finding hearing of domestic abuse allegations centred on coercive and/or controlling behaviour. The arrival of Hayden J's judgment was timely. All parties commended it to the court for its comprehensive and lucid analysis, and for the plea contained within it urging greater prominence to be given to coercive and controlling behaviour in Family Court proceedings. The parties' endorsement of the judgment in *F v M* is, in our view, fully justified. It is helpful to set out one of the central paragraphs from Hayden J's judgment here:

"4. In November 2017, M [the mother] applied for and was granted a non-molestation order against F [the father]. That order has been renewed and remains effective. The nature of the allegations included in support of the application can succinctly and accurately be summarised as involving complaints of 'coercive and controlling behaviour' on F's part. In the Family Court, that expression is given no legal definition. In my judgement, it requires none. The term is unambiguous and needs no embellishment. Understanding the scope and ambit of the behaviour however, requires a recognition that 'coercion' will usually involve a pattern of acts encompassing, for example, assault, intimidation, humiliation and threats. 'Controlling behaviour' really involves a range of acts designed to render an individual subordinate and to corrode their sense of personal autonomy. Key to both behaviours is an appreciation of a 'pattern' or 'a series of acts', the impact of which must be assessed cumulatively and rarely in isolation.

There has been very little reported case law in the Family Court considering coercive and controlling behaviour. I have taken the opportunity below, to highlight the insidious reach of this facet of domestic abuse. My strong impression, having heard the disturbing evidence in this case, is that it requires greater awareness and, I strongly suspect, more focused training for the relevant professionals."

30. Whilst the facts found in *F v M* may be towards the higher end of the spectrum of coercive or controlling behaviour, their essential character is not, and will be all too familiar to those who have been the victim of this form of domestic abuse, albeit to a lesser degree or for a shorter time. The judgment of Hayden J in *F v M* (which should be essential reading for the Family judiciary) is of value both because of the illustration that its facts provide of what is meant by coercive and controlling behaviour, but also because of the valuable exercise that the judge has undertaken in highlighting at paragraph 60 the statutory guidance published by the Home Office pursuant to Section 77 (1) of the Serious Crime Act 2015 which identified paradigm behaviours of controlling and coercive behaviour. That guidance is relevant to the evaluation of evidence in the Family Court.

31. The circumstances encompassed by the definition of 'domestic abuse' in PD12J fully recognise that coercive and/or controlling behaviour by one party may cause serious emotional and psychological harm to the other members of the family unit, whether or not there has been any actual episode of violence or sexual abuse. In short, a pattern of coercive and/or controlling behaviour can be as abusive as or more abusive than any particular factual incident that might be written down and included in a schedule in court proceedings (see 'Scott Schedules' at paragraph 42 -50). It follows that the harm to a child in an abusive household is not limited to cases of actual violence to the child or to the parent. A pattern of abusive behaviour is as relevant to the child as to the adult victim. The child can be harmed in any one or a combination of ways for example where the abusive behaviour:

i) Is directed against, or witnessed by, the child;

ii) Causes the victim of the abuse to be so frightened of provoking an outburst or reaction from the perpetrator that she/he is unable to give priority to the needs of her/his child;

iii) Creates an atmosphere of fear and anxiety in the home which is inimical to the welfare of the child;

iv) Risks inculcating, particularly in boys, a set of values which involve treating women as being inferior to men.

32. It is equally important to be clear that not all directive, assertive, stubborn or selfish behaviour, will be 'abuse' in the context of proceedings concerning the welfare of a child; much will turn on the intention of the perpetrator of the alleged abuse and on the harmful impact of the behaviour. We would endorse the approach taken by Peter Jackson LJ in *Re L (Relocation: Second Appeal)* [2017] EWCA Civ 2121 (paragraph 61):

"Few relationships lack instances of bad behaviour on the part of one or both parties at some time and it is a rare family case that does not contain complaints by one party against the other, and often complaints are made by both. Yet not all such behaviour will amount to 'domestic abuse', where 'coercive behaviour' is defined as behaviour that is *'used to harm, punish, or frighten the victim…'* and 'controlling behaviour' as behaviour *'designed to make a person subordinate…'* In cases where the alleged behaviour does not have this character it is likely to be unnecessary and disproportionate for detailed findings of fact to be made about the complaints; indeed, in such cases it will not be in the interests of the child or of justice for the court to allow itself to become another battleground for adult conflict."

Patterns of behaviour

33. Having considered what is controlling and coercive behaviour and emphasised the damage which it can cause to children living in a household in which it is a feature of the adult dynamics, it is necessary to move on to consider the approach of the court where the question of whether there has been a 'pattern' of 'coercive' and/or 'controlling' behaviour by one or more of the adults in a family is raised. Although the principal focus in this judgment has been on controlling and coercive behaviour, it should be noted that the definition of domestic abuse makes reference to patterns of behaviour not only in respect of domestic abuse refers to a 'pattern of incidents' not only in relation to coercive and/or controlling behaviour but to all forms of abuse including physical and sexual violence. Our observations therefore apply equally to all forms of abuse.

34. In our judgment there are a number of important issues which arise out of the submissions made by the parties to these appeals in relation to the proper approach of the court to such cases namely:

i) Whether there should be a finding of fact hearing;

ii) The challenges presented by Scott Schedules as a means of pleading a case;

iii) If a fact-finding hearing is necessary and proportionate, how should an allegation of domestic abuse be approached?

iv) The relevance of criminal law concepts.

…

H-L (A Child) (Care Proceedings: Expert Evidence), Re

Court

Court of Appeal (Civil Division)

Judgment Date

13 June 2013

Where Reported

[2013] EWCA Civ 655

[2014] 1 W.L.R. 1160

Case Digest

Summary

The court determined the meaning of "necessary" in the Family Procedure Rules 2010 r.25.1. It was an ordinary English word and had the meaning given to it, albeit in a different context, in *P (Children) (Placement Orders: Parental Consent), Re [2008] EWCA Civ 535, [2009] P.T.S.R. 150, [2008] 5 WLUK 446* at paras 120 and 125.

Abstract

The appellant mother (E) appealed against the refusal of permission to instruct three expert medical witnesses in care proceedings concerning her two-year-old daughter (H).

H had been born in June 2010 with a rare genetic disorder, spondylocostal dysostosis. In November 2012, a significant number of bruises were noted on her face and body. Non-accidental injury was diagnosed. H was placed in foster care and care proceedings were commenced. The only medical evidence filed was from various clinicians at the local hospital. E wanted to instruct a geneticist to consider whether a child suffering from spondylocostal dysostosis might be more than usually susceptible to bruising. That issue had been addressed in a short letter from a local consultant clinical geneticist (W). In his letter, W acknowledged that he had limited experience of the condition and had therefore consulted another consultant clinical geneticist (T) who indicated that he had not come across easy bruising in children with the condition before and there was no reason to expect it. E also wanted to instruct a haematologist, and

a paediatrician to provide a general overview. The judge refused the application, noting that no unusual bruising had been noted on H before November 2012 or since she had been in foster care; there was no medical evidence to suggest that spontaneous or easy bruising was a feature of her condition; and T's view, as recorded in W's letter, did not admit to the possibility of any causal link between her condition and bruising. At the time of the instant appeal, T had indicated that he was able to answer two or three targeted questions on matters of principle, without considering the papers, in time for the start of the fact-finding hearing in six days' time. The court had to determine (i) the meaning of "necessary" in the Family Procedure Rules 2010 r.25.1; (ii) whether it was "necessary" to instruct the expert witnesses in the instant case.

Held

Appeal allowed in part.

(1) The word "necessary" meant necessary. It was an ordinary English word and was a familiar expression in family law. Its meaning in r.25.1 was that given to it, albeit in a different context, in *P (Children) (Placement Orders: Parental Consent), Re [2008] EWCA Civ 535, [2009] P.T.S.R. 150, [2008] 5 WLUK 446* at paras 120 and 125, *P (Children)* applied (see para.3 of judgment). (2) The central medical issue was whether H was more prone to manifest bruising than a child who did not suffer from the same disorder. It was unsatisfactory for the answer to that question to be provided through the channel of W, who lacked knowledge and experience of the topic and was in no position to take the matter further if E wished to challenge or seek elaboration upon that opinion. That situation potentially breached the requirements of the European Convention on Human Rights 1950 art.6 and the overriding objective in r.1.1 of the Rules. Because T was able to provide short answers on key matters of principle, without the need for full instruction and within a very tight timescale, it was plain that instruction on those terms was proportionate to the need to provide some authoritative clarity from a witness who was in a position to give such answers. It was worth reminding practitioners of the vital need to avoid blurring the important distinction between treating clinicians and experts. T's instruction was "necessary" for the purposes of r.25.1. The appeal would be allowed with respect to the instruction of T, on that limited basis. If his answers were in accordance with the opinion attributed to him by W, his involvement was likely to go no further. If, however, his answers required further elaboration, that could be dealt with by the trial judge in the ordinary way. The judge had been

entitled to conclude that neither the need for a haematologist nor a paediatrician was established. There were very limited grounds upon which any appellate court could properly interfere with case management decisions. It was important for the instant court to support first-instance judges who made robust but fair case management decisions (paras 5, 7, 22-28).

Sir James Munby, President of the Family Division:

1. In this appeal we have to decide the point left open in *Re TG (Care Proceedings: Case Management: Expert Evidence)* [2013] EWCA Civ 5, [2013] 1 FLR 1250.

2. In *Re TG*, in which judgment was handed down on 22 January 2013, I drew attention to the important change to rule 25.1 of the Family Procedure Rules 2010 due to be implemented with effect from 31 January 2013. Whereas previously the test for permitting expert evidence to be adduced was whether it was "reasonably required to resolve the proceedings", the test now is whether it is "necessary to assist the court to resolve the proceedings." I said (para [30]):

   "It is a matter for another day to determine what exactly is meant in this context by the word 'necessary', but clearly the new test is intended to be significantly more stringent than the old. The text of what is 'necessary' sets a hurdle which is, on any view, significantly higher that the old test of what is 'reasonably required'."

   We now have to decide what is meant by 'necessary.'

3. The short answer is that 'necessary' means necessary. It is, after all, an ordinary English word. It is a familiar expression nowadays in family law, not least because of the central role it plays, for example, in Article 8 of the European Convention and the wider Strasbourg jurisprudence. If elaboration is required, what precisely does it mean? That was a question considered, albeit in a rather different context, in *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625, paras [120], [125]. This court said it "has a meaning lying somewhere between 'indispensable' on the one hand and 'useful', 'reasonable' or 'desirable' on the other hand", having "the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable." In my judgment, that is the meaning, the connotation, the word 'necessary' has in rule 25.1.

4. McFarlane LJ, whose judgment I have read in draft, has set out the facts giving rise to this appeal and explained why it was that, at the end of the hearing, we concluded that the appeal should, in part, be allowed, though only to the very limited extent he has indicated. I agree entirely with his conclusions and reasoning and therefore need add nothing to what he has said.

5. There are, however, some more general points that merit brief discussion. In *Re TG* I encouraged case management judges to apply appropriately vigorous and robust case management in family cases; I emphasised the very limited grounds upon which this court – indeed, I should add, any appellate court – can properly interfere with case management decisions; and I sought to reassure judges by pointing out how this court has recently re-emphasised the importance of supporting first-instance judges who make robust but fair case management decisions. I take the opportunity to reiterate these important messages.

6. Inevitably there will be occasions when this court does nonetheless have to interfere with a case management decision. Such cases are few in number, not least when contrasted with the very large number of case management decisions being made, day in day out, by judges in family cases. This is as it ought to be. It shows the system working as it should. Recent examples include *Re B (A Child)* [2012] EWCA Civ 1742 and *Re G-C (A Child)* [2013] EWCA Civ 301. Neither of these cases lays down any new principles. Each is simply an application of well-established principles to the facts of the particular case. So too was *Re F (A Child)* [2013] EWCA Civ 656, where this court refused permission to appeal from a case management decision of a judge who had refused to direct the appointment of an expert in circumstances where all the parties were agreed that there should be an expert report. The principles to be applied are those set out in *Re TG*.

7. Returning to the facts of the present case, McFarlane LJ has referred to the fact that the only medical evidence that had been filed came from various treating clinicians and that no outside expert had been formally instructed in the proceedings. This is not a matter that featured large in argument, but it is worth reminding practitioners of the vital need to avoid blurring the important distinction between treating clinicians and experts: *Oxfordshire County Council v DP, RS & BS* [2005] EWHC 2156 (Fam), [2008] 2 FLR 1708, and *Oldham Metropolitan Borough Council v GW and PW* [2007] EWHC 136 (Fam), [2007] 2 FLR 597.

H (A Child) (Parental Alienation), Re

Court
Family Division

Judgment Date
3 October 2019

Where Reported
[2019] EWHC 2723 (Fam)
[2019] 10 WLUK 215

Mr Justice Keehan

…

Analysis
25. I have no hesitation in accepting the unchallenged opinion and recommendations of Dr Braier. She is one of the country's foremost experts in the field of parental alienation. For the reason given above, I have had no regard to the report of J. The NYAS caseworker does not now make any recommendation to the court, she asserted had had insufficient time to undertake full and proper enquiries but nevertheless acknowledged and accepted the opinions of Dr Braier.

26. I formed a very positive view of the father, he clearly loves his son very deeply and is fully committed to him. He comes from and lives with his loving and supportive family with whom H had a good and close relationship. It is clear to me, despite the difficulties over the years prior to March 2018, H had a warm, good and mutually beneficial relationship with his father. I can discern no reason for the complete breakdown and collapse of their relationship last year other than the malign influence and role of the mother.

27. I did not form a positive view of the mother. She repeatedly lied in her evidence. By way of example only, I refer to the following three matters:

- i) her denial of speaking with H about the father's email of 25th May is false. How else would H have known the contents of it? The father did not copy him in to that email;
- ii) the mother's assertion that she described her concerns about the state of the father's mental health in the past tense and not as appeared in Dr

Braier's report in the present tense. I am satisfied that Dr Braier would not have made such an error without acknowledging the same; and

- iii) her oft repeated claim that she accepted some of the blame in the breakdown of contact was undermined by the contrary accounts which dominated her evidence that the father was entirely to blame.

28. The mother verbally attacked the father's character and his role in H's life and that of his family, at every opportunity throughout the court hearing whether in cross examination of the father or other witnesses and in her own evidence and submissions. It is plain to me, as it was to Dr Braier, that in reality she sees no benefit to H having a relationship with his father. She will not or cannot accept any other person's account of past events or actions which do not accord with her own views and perceptions.

29. She had plainly alienated H against his father. There is no other cogent explanation for the breakdown in contact in March 2018. Dr Braier gave clear and compelling reasons and opinions for reaching this unassailable conclusion. I accept Dr Braier's evidence that, as a direct consequence of this, H is and will continue to suffer emotional and social harm. If this situation is permitted to continue H will suffer adverse consequences throughout the whole of his life. It will impede his ability to form meaningful and positive relationships now and in the future. It may cause him to suffer depression in later life.

30. I also accept the opinion of Dr Braier that if an attempt were to be made to restore direct contact between H and his father, whilst H remained in the care of his mother, it is likely that H would become more entrenched in his views against the father. Moreover, I am satisfied that any such attempt to re-start contact on this basis would fail.

In the Matter of D (A Child) (International Recognition)

Case No: B4/2014/2790

B4/2014/2790(B)

Court of Appeal (Civil Division)

[2016] EWCA Civ 12, 2016 WL 212915

Before: Lord Justice Moore-Bick Vice President of the Court of Appeal (Civil Division) Lord Justice Ryder and Lord Justice Briggs

Date: Wednesday 27th January 2016

On Appeal from the Family Division of the High Court

Mr. Justice Peter Jackson

[2014] EWHC 2756

Hearing date: 20 May 2015

Summary

The Children Act 1989 s.1(3)(a), concerning children's wishes, was a statement of fundamental principle, the breach of which constituted grounds for not recognising a foreign judgment relating to parental responsibility under Regulation 2201/2003 art.23(b).

Abstract

A father appealed against a decision (*[2014] EWHC 2756 (Fam), [2015] 1 F.L.R. 1272*) declining to recognise and enforce an order made in Romania regarding the custody of his son (D).

The parents were Romanian. D, aged nine, had lived with his mother in England since shortly after his birth. The father lived in Romania and brought custody proceedings there. The Romanian Court of Appeal made an order in the father's favour when D was aged seven. It did not consider whether to give D an opportunity to be heard in the proceedings, although a lower court had considered that matter. The mother successfully appealed against the recognition of the custody order in England. The judge held that the failure to give D an opportunity to be heard was a violation of fundamental principles of procedure in England within Regulation 2201/2003 art.23(b). He also held that the mother had not been served with

the proceedings in such a way as to enable her to arrange for her defence within art.23(c).

The father argued that

(1) the judge had been wrong to find that art.23(b) had been established because the lower Romanian court had had sufficient evidence on which to dispense with giving D an opportunity to be heard;

(2) a child not being heard in such a case was not a violation of fundamental principles of procedure within art.23(b);

(3) the judge had wrongly found that the mother had not been served with the proceedings in such a way as to enable her to arrange for her defence within art.23(c), and had been bound by the Romanian court's finding that she had been validly served.

Held

Appeal dismissed.

(1) The lower Romanian court had addressed the issue of whether D's voice should be heard, deciding that it had appropriate information as to welfare and that hearing his voice was inappropriate. The judge had accepted that he had to look at the process as a whole. Even when proceedings were viewed as a whole, what might be clear at the age of five or six was not necessarily so at seven or eight. Each court should be astute to consider participation in context (see paras 33-35 of judgment).

(2) The Children Act 1989 s.1(3)(a), concerning children's wishes, was a statement of fundamental principle, *D (A Child) (Abduction: Rights of Custody), Re [2006] UKHL 51, [2007] 1 A.C. 619, [2006] 11 WLUK 391* followed. The same principle was in Regulation 2201/2003 art.11(2) and expressly took priority over the principles of the Hague Convention on the Civil Aspects of International Child Abduction 1980. Summary and/or autonomously interpreted processes, whether under the Convention or the Regulation, could not avoid the application of a fundamental procedural protection. In every case, the court was required to ensure that the child was given the opportunity to be heard. That meant asking whether and if so how the child was to be heard. For reasons of comity, there was a high threshold to the identification of a fundamental principle. The enforcement court should identify the principle, not just one of the procedural options available in a particular Member State. The court's obligation to hear the child was distinct from any Convention defence that might be pleaded, *F (A Child) (Abduction: Child's Wishes), Re*

[2007] EWCA Civ 468, [2007] 2 F.L.R. 697, [2007] 3 WLUK 713 applied. The judge's decision would be upheld under art.23(b) (paras 36-46). The mother sought to uphold the judgment under art.23(a) by reference to the same facts as relied on under art.23(b). Although there was an overlap between public policy and breach of a fundamental principle, the former required something more. The order had breached a fundamental principle of procedure, but that was distinct from breach of a substantive principle such as welfare. The decision would not be upheld by reliance on art.23(a) (para.50).

(3) The underlying purpose of art.23(c) was to safeguard a defendant's right to a fair hearing and rights of defence. It guaranteed procedural fairness, *Klomps v Michel (C166/80) EU:C:1981:137, [1981] E.C.R. 1593, [1981] 6 WLUK 126*applied. The main question was whether the procedure followed by the Romanian court was sufficient to protect the mother's rights so as to allow for the recognition of the judgment. A recognising judge was not bound by the the originating court's decision on whether a judgment had been made in default of appearance. The judge had taken too expansive an approach to art.23(c); no actual service on a defendant was required as long as it was possible to arrange for a defence. However, a defendant's state of knowledge was relevant to whether she had had sufficient time to arrange her defence, *Klomps* applied. That question required a factual assessment by the recognising judge and a judgment on those facts. It could not be said that service had not enabled the mother to arrange her defence when she had had four months to make such arrangements. The judge had not been entitled to decline recognition pursuant to art.23(c) (paras 58-104).

35. In any event, even when viewed as a whole, time passes quickly for a child and what might be clear at the age of 5 or 6 is not necessarily so at the age of 7 or 8. In my judgment, each court should be astute to consider participation in context. That was the focus of Peter Jackson J's enquiry and I agree with him.

36. In the family jurisdiction of the courts of England and Wales and for all purposes relevant to the type of application that the parents were making ie cross custody or residence applications, the search for the fundamental

principles that are to be applied begins with the Children Act 1989 [CA 1989]. Section 1(3)(a) of that Act provides the starting point for the consideration of a welfare issue by any family court exercising a children's jurisdiction under the Act. It provides that:

> "(3) in the circumstances mentioned in subsection (4), a court shall have regard in particular to –
>
> (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."

37. This is the non-exclusive checklist of relevant factors that the court in England and Wales is required to consider on an application of the kind brought by the parents before the Romanian courts in relation to David. Does it evidence a fundamental principle at section 1(3)(a) ?

38. It is certainly right that the provision is mandatory and permits of no discretion in the court ie the parents cannot seek to avoid it. The discretion is in the weight to be given by the court to the child's wishes and feelings alongside any other relevant considerations in reaching a decision about the best interests of the child. On behalf of the appellant, Mr Williams QC submits that the focus of section 1(3)(a) is to ensure that the court evaluates all relevant factors in reaching a decision on paramountcy ie welfare. He submits that it is not a statement of fundamental principle that can be carried across into the exercise required of this court.

39. I cannot accept that submission. The question was authoritatively answered by their Lordship's House in *In re D (A Child) [2006] UKHL 51, [2007] 1 AC 619* . Baroness Hale of Richmond gave the leading opinion as follows:

> "[57] But there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents' views.
>
> [58] Brussels II Revised Regulation (EC) No 2201/2003 recognises this by reversing the burden in relation to hearing the child. Article 11(2) provides:
>
> "When applying articles 12 and 13 of the 1980 Hague Convention , it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity."
>
> Although strictly this only applies to cases within the European Union (over half of the applications coming before the High Court), the principle is in my view of universal application and consistent with our international obligations under article 12 of the United Nations Convention on the Rights of the Child . It applies, not only when a "defence" under article 13 has been raised, but also in any case in which the court is being asked to apply article 12 and direct the summary return of the child – in effect in every Hague Convention case. It erects a presumption that the child will be heard unless this appears inappropriate. Hearing the child is, as already stated, not to be confused with giving effect to his views.
>
> [59] It follows that children should be heard far more frequently in Hague Convention cases than has been the practice hitherto. The only question is how this should be done. It is plainly not good enough to say that the abducting parent, with whom the child is living, can present the child's views to the court. If those views coincide with the views of the abducting parent, the court will either assume that they are not authentically the child's own or give them very little

independent weight. There has to be some means of conveying them to the court independently of the abducting parent.

[60] There are three possible ways of doing this. They range from full scale legal representation of the child, through the report of an independent CAFCASS officer or other professional, to a face to face interview with the judge. In some European countries, notably Germany, it is taken for granted that the judge will see the child. In this country, this used to be the practice under the old wardship system, but fell into disuse with the advent of professional court welfare officers who are more used to communicating with children than are many judges. The most common method is therefore an interview with a CAFCASS officer, who is not only skilled and experienced in talking with children but also, if practising in the High Court, aware of the limited compass within which the child's views are relevant in Hague Convention cases. In most cases, this should be enough. In others, and especially where the child has asked to see the judge, it may also be necessary for the judge to hear the child. Only in a few cases will full scale legal representation be necessary. But whenever it seems likely that the child's views and interests may not be properly presented to the court, and in particular where there are legal arguments which the adult parties are not putting forward, then the child should be separately represented.

[61] Hitherto, our courts have only allowed separate representation in exceptional circumstances. As recently as in *In re H (Abduction) [2007] 1 FLR 242* , the view was expressed in the Court of Appeal, that if the test for party status were to be revised in any direction, it should in future be more rather than less stringently applied.
But Brussels II Revised Regulation requires us to look at the question of hearing children's views afresh. Rather than the issue coming up at a late stage in the proceedings, as has tended to take place up to now; European cases require the court to address at the outset whether and how the child is to be given the opportunity of being heard. If the options are canvassed then and there and appropriate directions given, this should not be an instrument of delay. CAFCASS officers and, in the few cases where this is appropriate, children's representatives are just as capable of moving quickly if they have to do so as anyone else. The vice has been when children's views have been raised very late in the day and seen as a "last ditch stand" on the part of the abducting parent. This is not the place they should take in the proceedings. There is no reason why the approach which

> should be adopted in European cases should not also be adopted in others. The more uniform the practice, the better.
>
> [62] That is not, of course, this case. When the proceedings began, it might well have been considered inappropriate to hear A's views. When the proceedings should have been completed, in August 2005, this may still have been the case. But once the proceedings were prolonged beyond then, A had reached an age where it could no longer be taken for granted that it was inappropriate for him to be given the opportunity of being heard. Consideration should then have been given to whether and how this might be done. It could scarcely by then have been said that seeking his views, or allowing his legal participation, would add to the already inordinate delay. It goes without saying that if, having heard from the child, an issue arises under the Convention which has not been raised by either of the parties, the court will be bound to consider it irrespective of the pleadings."

40. Far from section 1(3)(a) CA 1989 being merely a checklist factor that is designed to ensure comprehensive evaluation of a welfare question, it is plainly an example of domestic legislation giving force to a fundamental principle of procedure. The same principle is to be found in article 11.2 BIIR (using the European language for the same concept: "it shall be ensured that the child is given the opportunity to be heard during the proceedings"). That provision expressly takes priority over 1980 Hague Convention principles. It was most recently applied by this court to inherent jurisdiction proceedings concerning an application for summary return of a child allegedly unlawfully removed from another jurisdiction: *In the matter of S (A Child) (Abduction: Hearing the Child) [2014] EWCA Civ 1557, [2015] 2 FLR 588* in which we said:

"[24] […] The question of what if anything of that which a child wants to say is relevant to welfare and the weight to be given to it is an entirely separate question from the principle that a child is to be heard. The adverse welfare effect of delay may influence or even determine whether and how a child is to be heard on the facts of a particular case, but that again is a question relating to the welfare balance on a case management issue, not the question of principle.

[…]

[28] On the question of principle, therefore, I agree with the appellant's submissions i.e. for the reasons set out above, there is an obligation in principle on the High Court sitting its inherent jurisdiction in relation to an abduction application to consider whether and how to hear the child concerned."

41. A principle that is of "universal application" consistent with our international obligations under article 12 of the United Nations Convention on the Rights of the Child is on its face a fundamental principle. I regard this court as bound by their Lordship's decision In re D and in any event, it is high time that this court laid to rest the canard that summary and/or autonomously interpreted processes, whether Hague or BIIR , can in some way avoid the application of a fundamental procedural protection. In every case, the court is required to ensure that the child is given the opportunity to be heard. That means asking the questions, 'whether and if so how is the child to be heard'. There are a range of answers, many of which were foreshadowed in In re D . It is not the answer that is key to the question before this court but the fact that the question must be asked . The asking of the question does not in any way detract from other principles that are in play, for example, the convention policy under the Hague Convention for the return of the child to the jurisdiction of habitual residence or the no delay principle in domestic children legislation. Furthermore, the provisions of article 24 of the Charter of Fundamental Rights and Freedoms are directly applicable (see above) with the consequence that the court is required to ask the question I have identified.

42. I accept that for reasons of comity or mutual respect, there is a high threshold to the identification of a fundamental principle. There should be no tendency in the enforcement process under BIIR to fail to recognise and hence enforce orders made by Member States. To the extent that there are different approaches to how a child is to be heard both domestically and among Member States this court and indeed any court of enforcement should be astute to identify the principle and not just one of the procedural options that may or may not be available in any particular Member State.

43. In that regard it is the appellant who provides the answer to his own complaint. While making the submission that the concept of wishes and feelings in section 1(3)(a) CA 1989 is different from the concept of

providing an opportunity for a child to be heard (the two limbs of article 12 UNCRC 1989), the appellant submits that “the child being heard is to do with recognition of the developing autonomy of the child and that children of an age are able to formulate and express their own point of view. The formulation and expressing of a point of view is what relates to the concept giving the child ‘an opportunity to be heard’. It is primarily a child centred issue which ensures that the child is engaged in the process and is accorded due respect in that process”.

44. That is rightly an acceptance that the rule of law in England and Wales includes the right of the child to participate in the process that is about him or her. That is the fundamental principle that is reflected in our legislation, our rules and practice directions and our jurisprudence. At its most basic level it involves asking at an early stage in family proceedings whether and how that child is going to be given the opportunity to be heard. The qualification in section 1(3)(a) CA 1989 like that in article 12(1) UNCRC 1989 relates to the weight to be put upon a child's wishes and feelings, not their participation.

45. For young children who have not developed any sufficient communication skills it may not be possible or necessary to ascertain their wishes and feelings. Furthermore, there may on the facts of a particular case be very good welfare reasons to make a decision not to do so. That is quite separate from the question whether and how they are going to participate. Again, for some children in the private law context participation may be through their parents but it must not be assumed that that will be good enough. The question must be asked.

46. It was submitted to us that no assistance can be gained from the jurisprudence of the domestic court in relation to Hague Convention 1980 proceedings on the basis that it evidences a more liberal approach developed by the court to deal with the summary nature of that jurisdiction and the issues in play. Given the House of Lords decision in In Re D (supra) and the strong judgment of this court in *Re F (Abduction: Child's Wishes [2007] EWCA Civ 468, [2007] 2 FLR 697* at [17] to [25] the submission is frankly unsustainable. In support of my conclusion I need only extract the principle from the analysis of Thorpe LJ in Re F which

emphasises the court's obligation to hear the child as being distinct from any Hague Convention defence that might be pleaded.

47. The participation of the child in our domestic proceedings has been the subject of a growing body of jurisprudence over the last decade or more. The theme of the case law is an emphasis on the 'right' of participation of those 'affected' by proceedings. This found prescient acknowledgement in 2005 when Thorpe LJ in *Mabon v Mabon [2005] EWCA Civ 634, [2005] 2 FLR 1011* at [28] commented on the right to participation of articulate teenagers in the following terms:

[…] "Unless we in this jurisdiction are to fall out of step with similar societies as they safeguard Article 12 rights, we must, in the case of articulate teenagers, accept that the right to freedom of expression and participation outweighs the paternalistic judgment of welfare."

48. The involvement in proceedings of children whose interests are affected was specifically highlighted by Baroness Hale in In Re D (supra) and in *ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4, [2011] 1 FLR 2170* . These dicta were brought together by Sir James Munby P in *Cambra v Jones [2014] EWHC 913 (Fam), [2015] 1 FLR 263* . At [18] he said, and I respectfully agree,:

[…] " *If* and to the extent that [the child's] Article 8 rights are engaged, then that will carry with it the important procedural right to be "involved in the decision-making process, seen as a whole, to a degree sufficient to provide [her] with the requisite protection of [her] interests" see *W v United Kingdom (1988) 10 EHRR 29* , para 64. However, although that may, it does not necessarily, carry with it the right to be represented or the right to party status: see ZH (Tanzania) , paras 34-37. In *CF v Secretary of State for the Home Department [2004] EWHC 111 (Fam), [2004] 2 FLR 517* , proper representation was held to be necessary; because it was lacking, the decision was quashed. But there are many contexts where effective participation requires neither party status nor even representation."

49. The appellants argue that the principle I have identified is not one that is complied with in all domestic proceedings. There is no evidential basis for that assertion which would, if correct, represent significant non-compliance with domestic practice directions. It suffices for me to re-iterate

to anyone who doubts the procedural practice that is to be followed that it can be found at para 4.2 of the Child Arrangements Programme (PD 12B to Part 12 of the Family Procedure Rules 2010) which reiterates that children and young people should be at the centre of all decision making and para 14.13 which states in terms that the court should ask ‘is the child aware of the proceedings’ and ‘how is the child to be involved in the proceedings’.

Re D (A Child) (Abduction: Rights of Custody)

2006 WL 3206217

No. [2006] UKHL 51

IN THE HOUSE OF LORDS

SESSION 2006-07

on appeal from [2006] EWCA Civ 830

Thursday 16th November, 2006

Hearing dates: 9, 10 and 11 OCTOBER 2006

B e f o r e:

LORD NICHOLLS OF BIRKENHEAD

LORD HOPE OF CRAIGHEAD

BARONESS HALE OF RICHMOND

LORD CARSWELL

LORD BROWN OF EATON-UNDER-HEYWOOD

- - - - - - -

IN RE D (A CHILD)

Summary

A right of veto, giving one parent the right to insist that the other parent did not remove the child from the home country without his or her consent or a court order, did amount to "rights of custody" within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction 1980 Art.5(a). Having sought a determination from the Romanian court under Art.15 of the Convention as to whether the removal of a child from Romania was wrongful, the English court should not have allowed a parent to challenge the Romanian court's decision as to the content of his rights under Romanian law.

Abstract

The appellant mother (M) appealed against a decision ([2006] EWCA Civ 830) that her son (B) should be returned to Romania upon certain

undertakings by the father (F). B had been born in Romania in 1998. M and F had been married in Romania in that year but were divorced two years later. Two years after that M brought B to England without F's knowledge or consent. F brought proceedings under the Child Abduction and Custody Act 1985 and the Hague Convention 1980 . A dispute arose as to the effect of the orders made about B when his parents divorced. The judge was unable to resolve the difference of opinion between the parties' experts on Romanian law and directed that a determination be obtained from a Romanian court pursuant to Art.15 of the Convention. The Romanian Court of Appeal ruled that the removal of B to England was not wrongful under Romanian law. The English court nevertheless heard evidence on Romanian law from an expert who reached different conclusions from the Romanian court. On that basis the judge ordered B's return to Romania. The Court of Appeal dismissed M's appeal. M submitted that a mere right to prevent the removal of a child from a country without consent did not amount to rights of custody within Art.5(a) of the Convention.

Held

Appeal allowed.

(1) A right of veto, giving one parent the right to insist that the other parent did not remove the child from the home country without his or her consent or a court order, did amount to "rights of custody" within the meaning of Art.5(a) of the Convention, *C v C (Abduction: Rights of Custody Abroad) [1989] 1 W.L.R. 654, [1988] 12 WLUK 167*approved. There was no good reason to distinguish the court's right of veto, which was recognised as rights of custody, from a parental right of veto, whether the latter arose by court order, agreement or operation of law, *H (A Minor) (Abduction: Rights of Custody), Re [2000] 2 A.C. 291, [2000] 2 WLUK 152* applied. A parent's potential right of veto, where for instance the parent had the right to go to court and ask for an order, would not amount to rights of custody. To hold otherwise would be to remove the distinction between rights of custody and rights of access altogether, *J (A Minor) (Abduction: Custody Rights), Re [1990] 2 A.C. 562, [1990] 7 WLUK 318* considered. (2) In a fully reasoned judgment, the final Court of Appeal in Romania had held that as Romanian law then stood, F, as the divorced non-custodial parent, did not have a right of veto of measures taken by M as the custodial parent relating to B's person. Therefore the removal of B from Romania had not been wrongful. Having sought a determination under Art.15, the English court should not have allowed F to challenge the Romanian court's decision as to the content of his rights under Romanian law. Save in exceptional

circumstances, for example where the ruling had been obtained by fraud or in breach of the rules of natural justice, such a determination had to be treated as conclusive as to the parties' rights under the law of the requesting state. Only if the foreign court's characterisation of the parent's rights was clearly out of line with the international understanding of the Convention's terms should the court in the requested state decline to follow it, *Hunter v Murrow [2005] EWCA Civ 976, [2005] 2 F.L.R. 1119, [2005] 7 WLUK 879* considered. (3) Since F did not have "rights of custody" for the purpose of the Hague Convention when B was removed to England, that removal was not wrongful under Art.3 and no obligation to return B arose under Art.12 of the Convention.

57. There is evidence, both from the CAFCASS officer who interviewed him after the Court of Appeal refused him leave to intervene, and from the solicitor who represents him, that A is adamantly opposed to returning to Romania. Yet until the case reached this House, no defence based on the child's objections was raised. This is not surprising. A was only four and a half when these proceedings were begun. At that age few courts would accept that he has "attained an age and degree of maturity at which it is appropriate to take account of its views". But he is now more than eight years old and he was more than seven and a half when these proceedings were heard by the trial judge. As any parent who has ever asked a child what he wants for tea knows, there is a large difference between taking account of a child's views and doing what he wants. Especially in Hague Convention cases, the relevance of the child's views to the issues in the case may be limited. But there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents' views.

58. Brussels II Revised Regulation (EC) No 2201/2003 recognises this by reversing the burden in relation to hearing the child. Article 11.2 provides:

"When applying articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity."

Although strictly this only applies to cases within the European Union (over half of the applications coming before the High Court), the principle is in my view of universal application and consistent with our international obligations under article 12 of the United Nations Convention on the Rights of the Child.. It applies, not only when a 'defence' under article 13 has been raised, but also in any case in which the court is being asked to apply Article 12 and direct the summary return of the child - in effect in every Hague Convention case. It erects a presumption that the child will be heard unless this appears inappropriate. Hearing the child is, as already stated, not to be confused with giving effect to his views.

59. It follows that children should be heard far more frequently in Hague Convention cases than has been the practice hitherto. The only question is how this should be done. It is plainly not good enough to say that the abducting parent, with whom the child is living, can present the child's views to the court. If those views coincide with the views of the abducting parent, the court will either assume that they are not authentically the child's own or give them very little independent weight. There has to be some means of conveying them to the court independently of the abducting parent.

60. There are three possible ways of doing this. They range from full scale legal representation of the child, through the report of an independent CAFCASS officer or other professional, to a face to face interview with the judge. In some European countries, notably Germany, it is taken for granted that the judge will see the child. In this country, this used to be the practice under the old wardship system, but fell into disuse with the advent of professional court welfare officers who are more used to communicating with children than are many judges. The most common method is therefore an interview with a CAFCASS officer, who is not only skilled and experienced in talking with children but also, if practising in the High Court, aware of the limited compass within which the child's views are relevant in Hague Convention cases. In most cases, this should be enough. In others, and especially where the child has asked to see the judge, it may also be necessary for the judge to hear the child. Only in a few cases will full scale

legal representation be necessary. But whenever it seems likely that the child's views and interests may not be properly presented to the court, and in particular where there are legal arguments which the adult parties are not putting forward, then the child should be separately represented.

61. Hitherto, our courts have only allowed separate representation in exceptional circumstances. And recently in In re H (A Child) [2006] EWCA Civ 1247, the view was expressed in the Court of Appeal, that if the test for party status were to be revised in any direction, it should in future be more rather than less stringently applied. But Brussels II Revised Regulation requires us to look at the question of hearing children's views afresh. Rather than the issue coming up at a late stage in the proceedings, as has tended to take place up to now, European cases require the court to address at the outset whether and how the child is to be given the opportunity of being heard. If the options are canvassed then and there and appropriate directions given, this should not be an instrument of delay. CAFCASS officers and, in the few cases where this is appropriate, children's representatives are just as capable of moving quickly if they have to do so as anyone else. The vice has been when children's views have been raised very late in the day and seen as a 'last ditch stand' on the part of the abducting parent. This is not the place they should take in the proceedings. There is no reason why the approach which should be adopted in European cases should not also be adopted in others. The more uniform the practice, the better.

62. That is not, of course, this case. When the proceedings began, it might well have been considered inappropriate to hear A's views. When the proceedings should have been completed, in August 2005, this may still have been the case. But once the proceedings were prolonged beyond then, A had reached an age where it could no longer be taken for granted that it was inappropriate for him to be given the opportunity of being heard. Consideration should then have been given to whether and how this might be done. It could scarcely by then have been said that seeking his views, or allowing his legal participation, would add to the already inordinate delay. It goes without saying that, if having heard from the child, an issue arises under the Convention which has not been raised by either of the parties, the court will be bound to consider it irrespective of the pleadings.

Re L (A Child) [2019] EWHC 867 (Fam)

Case No: 2018/0206

High Court of Justice Family Division

[2019] EWHC 867 (Fam), 2019 WL 02026899

Before: Sir Andrew McFarlane President of the Family Division

Date: 08/04/2019

Hearing date: 28 March 2019

Summary

The court ordered the transfer of residence of an eight-year-old child from his mother's to his father's care after finding that although the child had a good relationship with both parents and the case did not involve "intractable hostility" or "parental alienation", the child was not allowed the emotional space to express positive feelings about his father when in his mother's care, and received emotional reward for expressing negative views. Although the judgment in *A (Children) (Residence Order), Re [2009] EWCA Civ 1141, [2010] 1 F.L.R. 1083, [2009] 10 WLUK 176* referred to the transfer of a child's residence as a "last resort", there was a danger in placing too much emphasis on that phrase, which did not indicate a different or enhanced welfare test.

Abstract

A mother appealed against an order transferring an eight-year-old child's residence from his mother's home to that of his father.

Following his parents' separation when he was two, the child had lived with his mother and maternal grandmother. The father lived in Northern Ireland and the child had contact with him every third weekend and during school holidays. In May 2018, the mother applied to suspend contact with the father, and the father applied for a change of residence. The judge dismissed the mother's application, but found that the father's central submission, namely that his relationship with the child was being undermined by the mother and grandmother, might be made out. He directed that the child should be made a party to the proceedings with a children's guardian appointed by CAFCASS acting for him. The guardian's

report recommended that the child should remain with his mother, but after hearing the parents and grandmother giving evidence during a hearing in October 2018, she changed her view and recommended that the child should move to live with his father. The judge accepted the guardian's description of the child as being unable to speak positively about his father when in the maternal home, holding that the child was not allowed the emotional space to express positive feelings about his father and received emotional reward for expressing negative views. The judge found that the case fell short of attracting the labels "intractable hostility" or "parental alienation". However, he concluded that by living with his father, the child would be able to maintain a relationship with both parents, whereas maintaining the placement with his mother and grandmother would not meet his emotional needs and would cause him emotional harm in the future.

Held

Appeal dismissed.

Should change of residence be a last resort? Although the wording of *A (Children) (Residence Order), Re [2009] EWCA Civ 1141, [2010] 1 F.L.R. 1083, [2009] 10 WLUK 176*was that the transfer of a child's residence, from the obdurate primary carer to the parent frustrated in pursuit of contact, was 'a judicial weapon of last resort', there was a danger in placing too much emphasis on the phrase 'last resort'. It was important to note that the welfare provisions of the Children Act 1989 s.1 were precisely the same provisions as those applying in public law children cases where a local authority sought the court's authorisation to remove a child from parental care. Where, in private law proceedings, the choice, as in the present case, was between care by one parent and care by another parent against whom there were no significant findings, one might anticipate that the threshold triggering a change of residence would, if anything, be lower than that justifying the permanent removal of a child from a family into foster care. Use of phrases such as 'last resort' could not and should not therefore indicate a different or enhanced welfare test. What was required was for the judge to consider all the circumstances in the case that were relevant to the issue of welfare, consider those elements in the s.1(3) welfare checklist which applied on the facts of the case and then, taking all those matters into account, determine which of the various options best met the child's welfare needs, *A (Children)* explained (see para. 59 of judgment).

The child's wishes and feelings - The duty of the guardian to report on the child's wishes had to be tempered by the overarching requirement to

afford paramount consideration to the child's welfare. She had seen first-hand that he was torn between a wholly negative presentation of his father in the maternal home and the reality of his relationship with his father when they were seen together, which was happy. The guardian considered that any expression of his wishes was thus bound to favour the mother. More importantly, she considered that to ask the child to express a choice would itself be emotionally harmful and that any expression of wishes was unlikely to represent his true wishes and feelings. She had therefore made the positive decision not to do so. There had been no error in the approach to the issue of the child's wishes and feelings. The guardian's observation of a heavily conflicted young boy, who had a good relationship with both of his parents, yet could only speak negatively of his father had been heard loud and clear (paras 65-66, 68).

Was the decision to transfer residence premature? Concern about the impact on the child of being at the centre of parental conflict had been identified as long ago as 2013. It had been the theme of the CAFCASS reports in the case at every stage over the years. Further, the judge could not have been more explicit in delivering a wake-up call to the mother and the grandmother in his May judgment. He had made it plain to the mother and grandmother that he expected to see a change in the following months. He had been entitled to find that nothing had changed or would change in emotional terms for the child if he remained living in the maternal household (paras 69-72).

Welfare balance - In circumstances where the two households were broadly similar, with each meeting the child's needs, the case turned on the issue of emotional harm. The judge concluded that the level of emotional harm and the potential for future harm were such that, in the absence of any clear indicator of change, a move of home was justified. The decision might have been finely balanced, but it was not possible to say that the judge was wrong (para.73).

60. CA 1989 s 1(4)(a) requires the court to have regard to "the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)".

61. Whilst it is a fundamental principle, applicable to every case, that the child who is the subject of the proceedings shall be heard, the manner and

the degree to which the child is heard will vary from case to case. Further, it is important to bear in mind that each element in the welfare checklist is subject to the overarching requirement in CA 1989, s 1(1) that the welfare of the child must be the court's paramount consideration.

62. In the present case, L is represented by a professional CAFCASS guardian, a solicitor and experienced counsel. To that extent the voice of those acting on L's behalf is certainly "heard" within the proceedings.

...

65. There is, therefore, an express duty placed upon a guardian in a case such as this to report on the child's wishes. However, in my view, that duty must be tempered by the overarching requirement to afford paramount consideration to the child's welfare. In the present case, the Guardian began direct work with L which would normally lead to explicit discussion of the central issue before the court. However, during the course of that work she saw first-hand that which her predecessors had also apprehended, namely that this young boy was exquisitely torn between a wholly negative presentation of his father in the maternal home which was in total contradiction to the reality of his relationship with his father when they were seen together. The Guardian considered that any expression of wishes in the current circumstances would be bound to favour the mother. More importantly, she considered that to ask the question and to put this eight year old boy on the spot of expressing a choice would itself be emotionally harmful. She therefore made the positive decision not to ask him the question. Her decision was, certainly by implication, supported by the solicitors and counsel instructed on L's behalf, who now defend that decision before this court, and her decision was accepted by the very experienced family judge. In those circumstances, it is difficult, indeed it is not possible, for the mother to argue on appeal that the exercise conducted by the Guardian was fatally flawed and that, as a result, the process before the judge should be set aside and a fresh exercise undertaken to canvass L's wishes and feelings.

66. Further, I accept the submission of Mr Veitch and Ms Musgrave which focusses on the word "ascertainable". In the professional opinion of the Guardian, it was not possible to ascertain L's wishes and feelings on the

central issue without causing him emotional harm. It was also the view of the Guardian that L's position was such that any expression of wishes would be unlikely to represent his true wishes and feelings, and, to that extent it would not be possible to ascertain the child's genuine view.

67. In any event, by the close of submissions, Mr Wilkinson had trimmed back the mother's case by accepting that the CAFCASS officer was not required to put the direct question to L: "Where do you want to live?". There was, he argued, however, a need for a more subtle process to identify how the child felt about a move to Northern Ireland.

68. For the reasons that I have given, I do not consider that there was an error, whether fundamental or not, in the approach of the Guardian and the court to the issue of L's wishes and feelings. Actions speak louder than words. In that regard the Guardian's observation of this heavily conflicted young boy, who has a good relationship with both of his parents, yet can only speak negatively of his father when in the care of his mother and maternal grandmother, speaks volumes and, as the judgment demonstrates, his voice, in that regard, was heard loud and clear by the Judge.