Albion Chambers, Broad Street, Bristol BS1 1DR
and 29 Park Street, Taunton TA1 4DG

Telephone 0117 927 2144
Fax 0117 926 2569
DX 7822 Bristol

clerks@albionchambers.co.uk
www.albionchambers.co.uk

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Albion Chambers CHILD LAW NEWSLETTER

Separate representation of children

The tension between understanding and 'best interests'

It is not uncommon for children to disagree with the recommendations of the Children's Guardian who has been appointed to represent their interests in care proceedings.

The recent case of *Re Z (A Child: Care Proceedings; Separate Representation)* [2018] EWFC B57 addresses some of the competing factors that may arise when a child in those circumstances wants to instruct his or her own solicitor. The judgment of His Honour Judge Bellamy is not binding authority, but it is a typically thoughtful analysis of those factors. Interestingly, the reported judgment is the abbreviated version prepared for Z, a 14-year-old young man, and therefore absent the specific legal references relied on by the Judge.

Put simply, Z wanted to return to the care of his parents or remain with his grandparents. He had been assessed by a clinical psychologist and a trauma-based social worker/play therapist during the proceedings. Their conclusions were that he should be placed in long-term foster care with therapeutic support. Whilst not specifically stated, it seemed likely that Z's Children's Guardian agreed with the experts' analysis.

The experts were also invited to comment on whether Z had capacity to instruct his own solicitor. They concluded that Z was "profoundly confused about his own mind and about his best interests". They considered that his opinion, as recorded in their report, together with Z's continuing engagement with his social worker and Children's Guardian were sufficient to ensure that his views were heard and considered by the Judge.

Perhaps not surprisingly Z did not agree. He prepared a detailed ten-page letter for the experts and a shorter letter for his Children's Guardian and his solicitor. He also wrote directly to the Judge and saw the Judge in the presence of his solicitor and Children's Guardian.

The Judge described Z as an "extremely articulate and highly intelligent" young man. It was universally accepted within the proceedings that if the test to be applied was based solely on intellectual capacity then Z should be given permission to instruct his own solicitor. The concerns raised by all the other parties, including Z's parents, related to the likely harmful impact on his emotional well-being by engaging directly in the proceedings.

As Black LJ conceded in *Re W (A Child)*, the rules about the representation of children incorporate an element of paternalism which is not present in the rules governing the litigation capacity of adults.

In *Re W (A Child)*, Black LJ noted the comments of Thorpe LJ in *Mahon v Mahon*:

"In testing the sufficiency of a child's understanding, I would not say that welfare has no place. If direct participation would pose an obvious risk of harm to the child, arising out of the nature of the continuing proceedings and, if the child is incapable of comprehending that risk, then the judge is entitled to find that sufficient understanding has not been demonstrated. But judges have to be equally alive to the risk of emotional harm that might arise from denying the child knowledge of and participation in the continuing proceedings".

Black LJ observed, however, that views about the involvement of children in legal proceedings had evolved since Thorpe LJ made those comments. She relied on the summary of that "evolutionary process" provided by the former President of the Family Division, Sir James Munby, in *Re W (Children) (Family Proceedings: Evidence)*. Inter alia, he referred to developments in relation to children giving evidence in family proceedings, and the introduction of guidelines to encourage judges to enable children to feel more involved and connected to proceedings in which important decisions were made about them.

The analysis conducted by His Honour Judge Bellamy in Z's case reflected those changing views. His summary of the law started with the fact that a child is a party to care proceedings and that the court shall appoint a Children's Guardian to represent him/her unless satisfied that it is not necessary to do so to safeguard the interests of the child.

The Judge noted the duties of the Children's Guardian and of the solicitor instructed to represent the child. In doing so, he summarised Rule 16.29 FPR 2010. The Judge referred in particular to the duty to conduct proceedings according to the child's instructions where:

(a) There is a conflict with the Children's Guardian; and

(b) The solicitor is satisfied, having regard to the child's understanding, that s/he is able to instruct the solicitor direct.

The Judge also noted the following points, established in case law, which the solicitor must have in mind when deciding whether the child has sufficient understanding under Rule 16.9 (2) FPR 2010 to instruct his/her solicitor directly:

(a) The child has the right to express his/her views freely in all matters affecting him and the right to be heard in any judicial proceedings affecting him;

(b) The child has a right to respect for his/her family life;

(c) The decision to be made refers to this child;

(d) The fact that the child's views are considered to be misguided in some way

does not necessarily mean the child does not have sufficient understanding to instruct a solicitor;

(e) The fact that the child is unwilling to accept findings already made by the court does not mean that he does not have sufficient understanding to instruct his solicitor;

(f) The fact that a child disagrees with an independent professional assessment of what is good for him/her is not sufficient of itself to lead to a conclusion that the child lacks sufficient understanding to instruct his solicitor;

(g) Whether the child has the capacity to instruct his/her solicitor will depend, in part, on the issues involved and the child's capacity to give reasonable and consistent instructions on those issues;

(h) The child's participation may pose a risk of harm to him and, if it does, the solicitor must consider whether the child is capable of understanding that risk;

(i) A child's understanding increases with time;

(j) A child's age is not the only relevant consideration;

(k) Not allowing a child to participate directly in the proceedings by instructing his/her solicitor may itself cause the child emotional harm.

As stated above, it was accepted that Z had the intellectual capacity to instruct a solicitor but the other parties raised a number of other concerns should Z instruct a solicitor direct.

The experts instructed to assess Z had expressed their concern that Z's wish to instruct a solicitor direct was 'part of his bid to regain control in a system populated by adults he does not fully trust to represent his needs'. The Judge was unimpressed stating that it was hardly surprising that Z wanted some control on decision making that would have 'a profound effect on the future course of his life'.

The local authority and Z's parents had expressed concern that Z would have access to the case papers if he were given permission to instruct his own solicitor. Once again, His Honour Judge Bellamy was unimpressed. He said that this argument was misconceived. As stated above, Z is a party to the proceedings in any event. Both the Children's Guardian and Z's solicitor were required to advise him of the contents of any document received as long as Z had 'sufficient understanding'. The Judge stated that if the solicitor was uncertain whether Z should be allowed to read a document or simply given a summary of the document's contents, the solicitor should seek guidance from the court.

In short, Z would not automatically be entitled to unfettered access to the papers if granted permission to instruct his own solicitor, and the process of determining what he should be allowed to see would be a decision based, in part at least, on his welfare.

The Judge then turned to the concerns raised on behalf of Z's mother, that his full participation in the proceedings could have a significant impact on Z's emotional and psychological welfare and the likely success of therapeutic work with him in the future. The Judge noted that the experts had not highlighted any risk on the future success of therapeutic work with Z. He also echoed the comments of Thorpe LJ in *Mahon v Mahon* back in 2005 that there was a risk of emotional harm being caused to Z by not allowing him to participate more fully in the proceedings.

The Judge concluded that Z had the 'understanding' required to instruct his own solicitor and that the welfare reasons raised by the other parties were insufficient to prevent him from doing so.

All cases where a child wants to instruct his/her own solicitor when in conflict with the Children's Guardian will be decided on the individual circumstances of the case. This judgment is not binding, nor does it raise any new points in law. It is, however, an example of the way in which the courts now approach the right of a child to be heard in proceedings involving their future which is, perhaps, less paternalistic than it has been in the past.

Jonathan Wilkinson

Editorial

Just when you think you can relax, slump down on the sofa in front of the TV and escape the stresses of the day what should appear on our screens…? Usually in the Newsletter I would welcome all our new members, and this edition is no different, so a very warm welcome to the Rachael Morton and Caroline Middleton. London's loss is our gain, we are delighted they have decided to make Albion their home and add their considerable skill to our collective expertise. In our three former pupils: Philip Smith, Lucy Taylor and Emily Heggadon, we now have three fantastically promising new tenants. Eager to demonstrate their obvious talent, they each accept instructions on any aspect of child law.

Editing the Albion Child Law Team newsletter is not only my excuse to avoid having any other responsibility in Chambers, it has become an essential part of my CPD plan for the year, and I would encourage you all to include it as part of yours (please deduct the time it takes you to read the editorial which has very little development nutritional value although I will reference one heart-warming case). *X (A child)* [2018] EWHC 1005 is hopefully the conclusion of a case spanning five previous judgments concerning a 'very disturbed teenager', the President (as he then was) having recorded the phenomenal progress X had made, concluded with the following, *'I cannot help wondering where X would be today if she had not, in the nick of time, received the appropriate clinical assistance she so desperately needed… I leave it to others to ponder the moral of this story' (see A Child (no approved secure accommodation available; deprivation of liberty)* [2017] EWHC 2458 (Fam) and *A Local Authority v SW & Ors* [2018] EWHC 576 (Fam) for context).

The Albion Chambers Child Law Conference was once again a huge success. Over one hundred child-law practitioners attended the day, expertly organised by Joanne Lucas and Fiona Farquhar, with entertaining and insightful talks delivered by HHJ Bromilow, Dr Freda Gardner, Mark Sloman and Mr Peter Richards. Not forgetting, of course, the sharp wit of James Cranfield, who kept us all going right to the end with a summary of recent case law developments.

Not long after the child law conference, I was fortunate enough to be involved in a matter heard in the Court of Appeal in *Re B* [2018] EWCA Civ 2127. Exactly a year after being chastened by the CoA for daring to attend (in *Re S-F* [2017] EWCA Civ 964) I opted for written submissions. Very fortunately the joint efforts of Becky Scammell and I were deemed 'helpful' which is probably as much as any of us can hope for. Even though Jackson LJ confirms the case raises no new point of law, it may be useful to some as a review of i) the extent of the obligation to cross-examine witnesses about accusations made against them, and ii) the correct legal approach to determining responsibility for inflicted injuries where there are only two potential perpetrators. *'Rooted in the real world of litigation in which overall fairness can be achieved in a range of ways',* was the central tenant of the test for satisfying i). For cases involving allegations of inflicted injuries where there are only two potential perpetrators, the approach is the same as where there are

several possible perpetrators. On the balance of probabilities the question is whether there is sufficient evidence to identify a perpetrator, and, if there is not the court will consider in relation to each candidate whether there is a real possibility that they might have caused the injury, excluding those of which this cannot be said. Recognising that the danger of identifying an individual simply because they are the likeliest candidate (leading to an identification on evidence that may fall short of a probability) does not arise where there are only two possible perpetrators, the correct question is the same, *'if only to avoid the risk of an incorrect identification being made by a linear process of exclusion.'*

Going forward into 2019 perhaps we will see further examples of the *Re P* case Stephen Roberts addresses below. One of the major criticisms of the 26-week statutory time limit has always been a perception from those affected that justice is at risk of being sacrificed on the altar of speed (*Re NL (A child) (Appeal: Interim Care Order: Facts and Reasons)* [2014] EWHC 270 (Fam)). To many, that language may be uncomfortable in modern, diverse Britain but *Re P* may, as is pointed out below, provide some reassurance to a sympathetic judge who is considering an adjournment to allow further time to consider a child(ren)'s return home. There was a judge, we will all know who, who certainly needed no higher reassurance to make such a decision. Enjoy the Newsletter!

Benjamin Jenkins

"Not within the child's timescale?"

A recent decision of the Court of Appeal provides some encouragement to those representing parents faced with the 'not within the child's timescale' dilemma.

Advocates and judges are often faced with the predicament of a parent in a care case who has a history of drug or alcohol abuse, or mental health challenges, but is showing the seeds of recovery or rehabilitation at the time of the final hearing in a case. All too often, the advice from the relevant expert is that there are signs of recovery but that a state of sufficient stability will not be reached within the child's timescale. There may be different reasons for the beginnings of a turn around in the client: often it is the wake up call of court proceedings, or perhaps the shaking off of a partner who is a bad influence. However, the pressing needs of the child have almost always forced the court, often with reluctance, to the conclusion that the child's needs cannot wait for the parent to progress to a sufficient state to resume care. The move to a 26 week window of course compounded the pressure on judges in such circumstances.

In the case of *Re P (A Child)* [2018] EWCA Civ 1483 the Court of Appeal was faced with a set of fairly common facts. M was an alcoholic with a history of excessive drinking, rehabilitation and sobriety, followed by relapse. L, the subject child was born in 2017. L had two older sisters. The younger of those two sisters had died of Sudden Infant Death Syndrome at the age of five months in 2014 (on a night mother had been drinking). This had prompted local-authority involvement with the family and care proceedings in respect of the surviving child; B. M was referred to an alcohol-treatment programme and made good progress. B was eventually rehabilitated to M under a supervision order. M relapsed, the local authority obtained a care order and B was placed with paternal grandmother. By this time M was pregnant with the subject child L. Following her birth in July 2017, L was placed with foster carers and the local authority pursued a care plan for adoption.

M then began her efforts to turn around her life. She did this independently of support from the local authority. She had regular contact with L, the reports of which were positive. M remained sober at the time of the final hearing in February 2018. Set against that was evidence that M had not been honest with the local authority.

The adult psychiatrist instructed in the case, Dr Hallstrom, reported that there had been a substantial change in M and that she was "a very different person", "had made all of the progress that one could hope for and expect of her to date" and that "the prognosis is looking considerably better than it was when I last saw her". Dr Hallstrom concluded that M had "made a very substantial leap forwards in addressing her alcohol use disorder" and "If she were to achieve another six months of sobriety, then I would consider there to be some grounds for optimism that she will be able to achieve long-term sobriety, possibly with occasional set backs."

In the hearing at first instance M sought a six-month adjournment to demonstrate her continued sobriety. The local authority was not confident in M's ability to remain sober and to be honest. They persisted in their care plan for placement and adoption. The Guardian, although indicating that the case was finely balanced, supported the local-authority position.

In the hearing at first instance the judge had regard to the decision of Munby P in *Re S Child* [2014] EWCC B44 (Fam) in which he set out three questions that typically needed to be addressed, namely is there some 'solid evidence based reason to believe' that:

- the parent is committed to making the necessary changes;
- the parent will be able to maintain that commitment;
- the parent will be able to make the necessary changes within the child's time scale.

The circuit judge, whilst noting M's progress, regarded the improvements as "green shoots" and concluded that there was a real risk of relapse. She also placed some emphasis on M's previous dishonesty with the social work team.

The circuit judge made the care and placement orders sought. M appealed.

In the six-month period between the final hearing and appeal hearing, the local authority reduced M's contact to once a week and reduced their involvement with her.

At the appeal stage the local authority pressed, as the key issue, the nature of alcoholism being a chronic condition and they would not be able to manage the risk to L in the event that M relapsed when L was in her care (informed in part by M's previous dishonesty with them).

The Court of Appeal allowed M's appeal. In the lead judgment King LJ concluded that the judge was wrong to conclude that there was "no purpose" by a six-month adjournment.

She did so on the following basis:

- too much emphasis had been placed on M's historic lies to the local authority,

to the extent that it seemed to have been determinative in the case;

- there was no evidence that L had suffered attachment damage;
- the judge had failed to consider that M was having good quality contact four times per week or that the foster carer gave positive reports of M's care of L;
- the court needs to consider the prognosis for sobriety before moving on to consider how any risk of relapses could be managed.

King LJ was careful, however, to emphasise that in a case where therapy has not begun and will take an indeterminate period, often 18 months to 3 years, there is no purpose to an application for 'more time'. That merely puts off the inevitable, to the detriment of the child. However, the facts in this case provided a very different situation:

- M had been abstinent for 13 months;
- She was energetically co-operating with follow up;
- There was a new and genuine acceptance by her and insight on her part into both her alcoholism and its impact on her child's welfare.

The Court of Appeal concluded that a further adjournment would have allowed M to 'capitalise on the considerable progress she had made'. The outcome at the end of those six months would not have been inevitable and there was sufficient prospect of the court being able to conclude L could be safely placed with M.

King LJ addressed the three questions posed by the President in *Re S* and concluded all three in the affirmative.

There are three further points in the judgment that are noteworthy:

- The Court of Appeal considered how the case would have been dealt with had an FDAC approach been taken, and took some comfort from the analysis that supported the prospect of a longer period of examination of progress and commitment;
- The Court of Appeal considered that had the trial judge considered the Adoption Act checklist in more detail, in the circumstances of this case she 'may well have hesitated again before concluding that L's welfare "required" the severing of her relationship with her mother without more ado";
- The Court of Appeal was critical of the stance taken by the local authority post-care and placement orders. The LA had provided no support to M in the interim period and, more particularly, had not carried out any form of updating assessment of her, on the basis that their conclusion was that M could not be trusted to be honest and open and the risk to L in the event of a relapse was too great, even now. King LJ said that she hoped that "the local authority may, on reflection, regret that approach… and conclude… the better way would have been once again to have become active in the case, and to have engaged with M …".

Conclusions

It is suggested that the following can be taken from *Re P*:

- Those representing parents should always consider and gather good evidence to answer each of the three *Re S* questions;
- The case provides some encouragement to those making applications for adjournment where the parent is able to show positive progress. The authority may provide some reassurance to a sympathetic judge who is wavering on the point;
- It is important for local authorities to continue to support and assess parents throughout the case. That principle applies, both in the period between the conclusion of the parent assessment and final hearing and in the post-final hearing period, if the matter is being appealed. If the social-work team fail to do this, those representing parents have a further piece of ammunition with which to argue for further time.

Stephen Roberts

When private law meets public law

Is that a bad thing?

It isn't often that you will find yourself in a private law case with the threat of the Local Authority becoming involved, but it can and does happen. I want to take a look at this area from an alternative perspective and argue that there are occasions when it might not be the negative outcome we think it will be.

As a brief introduction, it might be useful to consider what the purpose of section 37 was intended to be. When the law was reformed in 1989 the intention was that the court's private law and public law powers would become more aligned. By way of example, it is wholly unexceptional for public law cases to be concluded by private law orders, a child arrangements order (or residence order as it would then have been) and, as of 2002, Special Guardianship orders. It isn't equally permissible for public law orders to be made in private law cases of the court's own volition, but it is no less important that, if the circumstances warrant it, there must be a mechanism by which the court can invite the state to intervene. Take, for example, a situation where the court, having made enquiries into both parents, discovers that neither is providing "good enough" care, that the parents have reconciled into a harmful relationship, or some sort of precipitating event has occurred and either that the state needs to protect these children, or perhaps more likely, both parents need some sort of help and support from the Local Authority. It may not be likely that you will come across such cases, particularly if you only accept privately-funded clients, but it is something you need to be aware of.

Why are we often reluctant to request section 37 enquiries by the LA? First, it always feels as though it is an unnecessary heightening of concerns and consequences. We are, by definition, seeking to bring the threat of public-law proceedings, and all that entails, into something where removal from both parents is not an option. Section 37 includes a power of the court to make an interim care order pending the report and possible issuing of proceedings - who would want to promote that as a possibility to the court. Second, I suspect that a combination of force of habit, being told that is how it is and fear of forcing an already overworked LA to do more work, means we routinely plump for a CAFCASS welfare or section 7 report.

However, there are circumstances where the situation may warrant or need the help of an outside body other than CAFCASS. By way of a recent example, I was involved in a private law dispute in which there was an extremely damaged 13-year-old boy living with his mother but desperately wanting to live with his father. Despite her providing, on the face of it, perfectly proper care for him, albeit making him do homework and go to school, he would attack his mother, swear at her, run away from her all in a desire to move

to his father. You might think that given his age, it would be as simple as granting his wish. However, the CAFCASS officer was of the firm view that it would be harmful for the child to move to the care of his father, as the father's parenting style was essentially to let the child do what he wanted, as and when he wanted; video games all day when he should be in school, talking negatively about the mother and so on (though the father denied this). We discussed whether the child should become a party, but it was the firm view of both parents that he should not be put in any more distress by being put any more in the middle of the proceedings. More importantly, the CAFCASS officer was not of the view that he should be separately represented as he was, by this point in proceedings, no more than a voicebox for his father, and the CAFCASS officer felt he simply was not capacitous as he was not capable of reaching a rational and informed decision about his own wellbeing. The child would, in the words of the Guardian, simply do whatever he thought his father wanted him to.

It was quite apparent that the child was suffering significant harm and needed some form of psychological assessment to see what could be done to assist him, the CAFCASS officer being out of ideas and options, and under pressure from her management to conclude her role, her welfare report having been produced. Both parents were privately paying and neither could afford to contribute the extra funds for such an instruction. There was no basis on which the court nor CAFCASS could fund such an assessment, and the parties were quite literally without option.

Enter section 37 Children Act 1989. It reads as follows:

"37. Powers of court in certain family proceedings.

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

2. Where the court gives a direction under this section the local authority concerned shall, when undertaking the investigation, consider whether they should—

(a) apply for a care order or for a supervision order with respect to the child;

(b) provide services or assistance for the child or his family; or

(c) take any other action with respect to the child.

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

(a) their reasons for so deciding;

(b) any service or assistance which they have provided, or intend to provide, for the child and his family; and

(c) any other action which they have taken, or propose to take, with respect to the child.

4. The information shall be given to the court before the end of the period of eight weeks beginning with the date of the direction, unless the court otherwise directs.

5. The local authority named in a direction under subsection (1) must be—

(a) the authority in whose area the child is ordinarily resident; or

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

6. if, on the conclusion of any investigation or review under this section, the authority decide not to apply for a care order or supervision order with respect to the child —

(a) they shall consider whether it would be appropriate to review the case at a later date; and

(b) if they decide that it would be, they shall determine the date on which that review is to begin."

A report under this section must include the following:

a) Background;

b) History of Children's Services and other agency interventions;

c) Profile of each child;

d) Profile of each adult who is party to the proceedings;

e) The response of the family members to the current circumstances;

f) A summary of the social worker's assessment;

g) The social worker's comments regarding the welfare checklist;

h) The social worker's comments regarding the no order principle and its relevance to this case;

i) The social worker's conclusions and recommendations, with reasons;

j) The social worker should discuss the contents of the report with his or her manager. The recommendations should take account of the orders available to the Court under the Children Act 1989. If there are any doubts about the recommendations that may be made to the Court, the social worker should seek advice from the Legal Department.

If the conclusion is that the provision of services to the family is required, then a detailed description of those services will need to be added to the report, a Children's Plan will need to be drawn up and appended to the report, and an indication of the timescales for the provision of services should be given.

If the conclusion is to take no further action but review the family circumstances, then the report will need to inform the court when this review will take place.

The social worker responsible for preparing the report will generally need to be present at Court when the application is heard - and should be prepared to give evidence in support of the information contained in the report.

In my case, as an option for trying to support the family, it seemed to be taking the nuclear one. Were we condemning this family and this 13-year old, for whom care proceedings were otherwise a mile away, to impending foster care and all that entailed?

The rationale for the parents and the court was as above; that we were essentially out of options.

We needed someone independent to come in and find a way out for this child. We relied upon 37(2)(b) in the hope that by asking the LA to provide a report, we would force their hand and the child would be provided with services or assistance.

There was, however, a problem. The LA weren't keen to be involved. They questioned why the court had ordered the report. They felt that they had already provided a single assessment for the family after the mother called them some months before. Their view was that the parties were in private-law proceedings, a CAFCASS officer was reporting and it was not a matter for them.

This was not the outcome we were all hoping for. Clearly, on any version of events, this child was suffering significant harm; either as a result of being forced against his wishes to live with his mother, from whom he was at risk of absconding, or as a result of living with his father who clearly wasn't going to promote certain important aspects of his welfare. The LA seemed to be of the view that this case would not have been on their radar but for this order, and they could not or would not help. The suspicion seemed to be that the LA were irritated that the court had determined they needed to become involved despite their insistence this was not an LA matter. It should not have been this way, however, as the purpose of section 37 is clear from the statute. As it transpired in this case events moved on and the report wasn't required. However, had the LA done as ordered, the report should have answered a number of critical questions:

1. Would the LA issue proceedings? In this case unlikely, as a supervision order

or care order was not likely to follow. In any event, the parties were not inviting this and nor was the court.

2. If the LA didn't issue proceedings, was the LA going to offer support to this family? It would have been very difficult for the LA in the light of the concerns of the court and CAFCASS officer to say not.

3. What support might the LA be able to offer?

If those questions had been answered properly, it is entirely possible the outcome of the case would have been very different for all parties.

When else might it be useful to order a section 37 report? Not a recent case but good law nonetheless [*Re W (Welfare Reports)* 1995 2 FLR 142], has made it clear that CAFCASS officers and social workers, though both likely to be qualified in the same areas of social work, have very different roles and experience to one another. Both can be ordered to provide reports under section 7 Children Act 1989, but unless there is ongoing or very recent Local Authority involvement with the family, they will undoubtedly declare it a matter for CAFCASS. Though the case of *Re W* above extolled the virtues of CAFCASS as being experienced court reporters, more adept at making contact recommendations in private-law disputes, there must equally be occasions when a social worker is more capable of assisting the court. For example, a CAFCASS report may have already been obtained but there may be aspects of the case which are identified by CAFCASS which would benefit from local authority involvement. Further, CAFCASS are limited in their resources to provide contact facilities and identify and refer to appropriate resources; play therapy and parenting support by way of example, though there are unquestionably more options than those. I should note at this stage, that whilst there is provision with the private law outline for CAFCASS to recommend "activity directions" unless they have a funding arrangement with the activity in question e.g. Separated Parenting Information Programme, they come at a cost to the parent which they may not be able to meet.

By way of further example, it may also be that the complexity of the issues requires a social worker who is used to providing assessments of risk and harm and assessing parenting abilities, over and above the more straightforward welfare assessments. S 37 directions can be useful tools in cases of intractable disputes, if the children are suffering harm as a result of one parent's distorted or false views of the other. It is of note, for example, that the court can dictate the ambit of any section 37 report, and indeed should, as good practice, set out the specific areas which the LA is being invited to look into. A section 7 report is by practice more generic, and whilst specific questions are often asked of the CAFCASS officers, their reports follow a defined pattern. Finally, the court can order more than one section 37 report, or for the LA to provide an addendum to a former report, whereas CAFCASS discourage the same.

The reality is that section 37 is an underused resource. Whether that is for the reasons I have set out above, or whether it is because it is a sad truism that Local Authorities are no more resourced or willing to support and assist families than CAFCASS are and we all know that, I cannot say. However, it is not something we should be afraid of using if the circumstances warrant it.

James Cranfield

A few random thoughts about fact-finding hearings

In my lecture at the recent Albion Chambers Child Law Conference I ran out of steam when I reached the "random thoughts" with which I had intended to conclude. For the benefit of anybody who (a) was intrigued by the headings in my notes and the PowerPoint slides that I seemed to ignore, and (b) hasn't got anything better to read at the moment, here's a potted summary of what I had intended to say.

Scott schedules – Response columns in Scott schedules need to be signed by lay clients and need to be consistent with their statements. I've recently had the squirm-inducing experience of seeing a parent cross-examined about differences between their statement and some of their responses to the allegations in the LA's schedule. Although the poor individual didn't say so, I strongly suspected the responses had been completed without reference to the client. We're all under huge time pressure, but obviously any document that purports to express a client's evidence needs to be seen by the client before it's filed and, in my view, signed by her as well.

Disclosure, transparency and privilege – careful advice required. Linked in a way with the Scott schedule point is the need to ensure that parent clients understand from day one:

- They are not in a criminal case and that privilege does not extend to non-disclosure of admissions (there is in fact a duty on counsel to make full and frank disclosure of relevant material that has an impact on the welfare of the child); and
- If in the witness box they utter the words "Well I told my solicitor this ages ago" in respect of something that does not appear in their written evidence, they run the risk of the court launching into an inquiry as to what they did and did not tell said solicitor.

A client whom I was representing not so long ago said something very similar to this (but included "my barrister" as well as "my solicitor"). I was both puzzled and horrified, until with a great sense of dramatic timing the client clarified that the reference was to previous legal representatives (not, I hasten to add, from this city or these chambers!).

There is a helpful short guide (though not formal guidance – spot the difference) published by the General Council of the Bar in July 2015 entitled "Disclosure of Unhelpful Material in Family Proceedings (Children)". It's worth a look.

Photographs – proper colour prints please! This is simply a plea. There is precisely no point whatsoever in any circumstances in distributing, let alone filing, serving and including in a court bundle, black and white photocopies of photos of bruising (or indeed of almost anything).

Experts provide opinions but are not gods. This remark was prompted by a recent tweet, by an experienced member of the Bar, who expressed the view that it was "unhelpful" of expert witnesses to say "I cannot rule out" an explanation for an injury and that this was to "misunderstand the standard of proof." In fact, the role of the expert witness is to offer an expert opinion which the judge then looks at along with the rest of the evidence, paying particular attention to the evidence of parents and carers. An expert might well say that an explanation for an injury is "unlikely" or that s/he "cannot rule it out", but it is perfectly open to the judge, having heard the rest of the evidence and surveyed the "broad canvas", to find that this is a case in which the LA has failed to discharge the burden of proof. Put more shortly, unlikely things do sometimes happen and cases are decided on the basis of evidence, not on the basis of bookmakers' odds.

The role of the advocate representing the child through the CG is, in my firm view, not merely to present the expert evidence, but is to leave no stone unturned if there might be something relevant underneath it.

Stuart Fuller

Albion Chambers
Child Law Team

Team Clerks
Michael Harding
Julie Hathway
Marcus Harding

Adam Vaitilingam QC
Call 1987 QC 2010
Recorder

Kate Brunner QC
Call 1997 QC 2015
Recorder
Upper Tribunal Judge

Louise Price
Call 1972

Gerraint Norris
Call 1980

Sorrel Dixon
Call 1987

Tanya Zabihi
Call 1988

Hayley Griffiths
Call 1990

Claire Rowsell
Call 1991

Libby Harris
Call 1992

Rachael Morton
Call 1995

Hannah Wiltshire
Call 1998

Charlotte Pitts
Call 1999

Linsey Knowles
Call 2000

James Cranfield
Call 2002

Stephen Roberts
Call 2002

Fiona Farquhar
Call 2002

Caroline Middleton
Call 2002

Benjamin Jenkins
Call 2004

Joanna Lucas
Call 2004

Gemma Borkowski
Call 2005

Monisha Khandker
Call 2005

William Heckscher
Call 2006

Sarah Pope
Call 2006

Jonathan Wilkinson
Call 2006

Alice Darian
Call 2006

Stuart Fuller
Call 2007
Team Leader

Philip Baggley
Call 2009

Emily Brazenall
Call 2009

Kevin Farquharson
Call 2011

Alexander West
Call 2011

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Albion Chambers
Child Law Team

Philip Smith
Call 2012

Alexander Small
Call 2012

Yasmine El Nazer
Call 2015

Lucy Taylor
Call 2016

Emily Heggadon
Call 2017