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Albion Chambers FAMILY TEAM NEWSLETTER

Injunctions

The inherent jurisdiction

Inherent Jurisdiction is one of a number of injunctions potentially available to be used in family proceedings. The Family Procedure Rules 2010, PD12D paragraphs 1.1 and 1.2 provide as follows:

1.1 It is the duty of the court under its inherent jurisdiction to ensure that a child who is the subject of proceedings is protected and properly taken care of. The court may in exercising its inherent jurisdiction make any order or determine any issue in respect of a child unless limited by case law or statue. Such proceedings should not be commenced unless it is clear that the issues concerning the child cannot be resolved under the Children Act 1989.

1.2 The court may under its inherent jurisdiction, in addition to all of the orders which can be made in family proceedings, make a wide range of injunctions for the child's protection of which the following are the most common: -

a) orders to restrain publicity;

b) orders to prevent an undesirable association;

c) orders relating to medical treatment;

d) orders to protect abducted children, or children where the case has another substantial foreign element; and

e) orders for the return of children to and from another jurisdiction.

However, a point to remember and which may seem an obvious one but nevertheless capable of being overlooked in the haste of drafting, in *Re J (A Child)* [2013] EWHC 2694 (Fam) the President observed that the courts will not make orders that cannot be enforced. The court had a duty to consider whether the terms of the proposed orders were fair, necessary and proportionate to the facts of the case.

A second point worth considering, as again it has been known to be overlooked especially when one is pleased with one's drafting efforts and forgets to scrutinise the finished article handed down from the court office, is that orders should comply with r.37.9, Family Procedure Rules; namely that, to enforce such an order, a penal notice warning of the consequences of the breach must be prominently displayed on first page of the order. Whilst para 13.2 of PD37A provides that 'The court may waive any procedural defect in the commencement or conduct of a committal application if satisfied that no injustice has been caused to the respondent by the defect', this can not and should not be relied upon as a certain fix for sloppy draftsmanship.

So what can constitute the scope of 'make any order'? The following case certainly gives some food for thought as to what the limits of one's drafting imagination can be, in *Birmingham City Council v Sarfraz and Others* [2014] EWHC 4247 (Fam), Mr Justice Keehan was concerned with a vulnerable 17-year-old woman, AB. The local authority asserted that AB had been a victim of child sexual exploitation by at least ten older men. In October 2014, the court made a secure accommodation order. The police concluded that there was insufficient evidence to secure criminal convictions against the ten men. The local authority decided to take the "bold and novel step" of applying for civil injunctions under the inherent jurisdiction to prevent the men from contacting AB or associating with any female under the age of 18 who was not already known to them, in a public place.

The final version of the substance of the injunctive orders, approved by Mr Justice Keehan, sought against each of the ten respondents included the following:

1. That the time this order is served upon X until the date specified in this order X must not:

a) contact AB by any means, in person and or through any third person whether by way of face-to-face contact, telephone (mobile/landline/facetime/skype etc.), text messages, MSM, blackberry, chatrooms, or other social media whether or not such contact is invited in the first instance by AB;

b) seek the company or be in the company of AB whether or not invited to do so in the first instance by AB;

c) approach AB in any manner, whether in public, on the street or other public areas such as parks, in private addresses open to certain members of the public such as any food outlet, retail outlet, café, public house, bar, hotel, club, nightclub etc, on public transport, in or at any premises associated with a sporting or entertainment activity or in any private residence, whether or not invited to do so in the first instance by AB;

d) follow AB in any location public or private;

f) pass on details for AB for example name, location, address, telephone numbers at which she can be reached or the names of other persons through whom she can be contacted save as directed by the police or order of the Court;

h) incite or encourage any other male to seek any form of contact with AB.

2. From the time this order is served upon X until the date specified in this order X shall immediately report any contact, or attempt at contact by AB, or any person contacting or attempting to contact them on her behalf to either (or both:

a) The West Midlands Police

b) Birmingham City Council, Social Services Emergency Duty Team

3. From the time this order is served upon X until the date specified in this order X shall immediately report any contact with him by any person seeking information about AB or passing on

information about her and to provide the name and contact details of the person to either (or both):

a) The West Midlands Police.

b) Birmingham City Council, Social Services Emergency Duty Team.

4. From the time this order is served upon X until the date specified in this order X must not:

a) Contact or attempt to contact, approach or attempt to approach AB's mother XY.

So in summary: there is scope to be creative, but ensure the enforceability of your drafting masterpiece not only in substance but also in clarity as to against whom you wish to injunct and remember the warning to include the warning!

Linsey Knowles

So... what have I missed?

A look at the last six months in Children Act work

I make an immediate apology for the self-serving nature of this article. Coming back to work after six months of maternity leave, I knew that I needed to get myself up to speed with recent developments in the law. Writing an article for the newsletter seemed to be the best way of firing up the sleep-deprived brain cells.

Private law update

The big news of the last six months in private law work has been the battle between the Family Court and the LAA which has resulted in HMCTS becoming the go-to place if funding can not be resolved. This issue has been brewing for a while. The Courts and the LAA clashed in a number of cases in 2014 where division of costs of instructing an expert was debated, resulting in *JG v The Lord Chancellor and Others* [2014] EWCA Civ 656 where the (then-named) Legal Services Commission's refusal to pay the entirety of the cost of instruction of an expert was unlawful. Points of advice to be drawn from that case are these:

1. Consider whether it can be argued that the instruction is a sole instruction by one party and that the other parties are simply contributing to that instruction.

2. The Court should consider whether the absence of the expert evidence might lead to a breach of any party's Convention rights.

3. Apportionment of costs is a matter for the Court. The Court must be persuaded that a party is impecunious to avoid bearing responsibility for sharing the cost of an expert. Reference to the legal aid means test is a useful starting point.

4. If a party can contribute an amount, he/she should be expected to, even if that amount is less than his/her equal share.

It should be noted that, despite this ruling, the LAA is continuing to refuse to pay for expert evidence in many cases.

We move to *Q v Q*; *Re B (A Child)*; *Re C (A Child)* [2014] EWFC 31 which came before the President in August 2014. These cases are known to many and feature a number of local representatives who will be far more familiar with them than me. The three cases all involved unrepresented fathers who were seeking contact. All three cases involved allegations against the father of rape or sexual assault. The following can be drawn from the President's judgment:

1. HMCTS should meet the reasonable costs of translation of documents, where it is appropriate and no-one else is available to pay;

2. If the attendance of an expert at Court is necessary and the expense can not be met in any other way then HMCTS has a duty to bear the costs;

3. If the Court is satisfied that an unrepresented party is "unable to examine or cross-examine a witness effectively", and where it is satisfied that there is no other way to meet the requirements of a fair trial, it can direct HMCTS to provide and pay for legal representation.

The impact of *Q v Q* is already filtering down. HHJ Bellamy, sitting as a Deputy High Court Judge faced the prospect of an unrepresented father cross-examining a child he was accused of sexually abusing in the case of *Re K and H (Children: Unrepresented Father: Cross-examination of Child)* [2015] EWFC 1. He directed that HMCTS should pay for the father's representation in those circumstances. He made the following points:

a) The first duty of a Judge is to ensure the proceedings are conducted fairly;

b) Where a party is unrepresented and is "unable to cross-examine a witness effectively" the Court has a duty to assist that party in accordance with section 31G(6) of the Matrimonial and Family Proceedings Act 1984;

c) The Court will put questions to a witness if necessary and appropriate but would not normally undertake that task where the case is grave and/or complex;

d) Where the Court is satisfied that it is not appropriate for the Judge to put questions to an alleged victim, the Court must arrange for a legal representative to be appointed;

e) The Court may direct the costs to be borne by HMCTS;

f) The Court may nominate the legal representative;

g) The extent of the work should be made clear at the outset and should be proportionate;

h) The amount paid should accord with legal aid rates.

It is unclear at this stage how far these rulings compelling payment by HMCTS will go, and to what extent there will be a change of policy at some point in the future. It seems highly unlikely that this will be a sustainable way forward, particularly with the volume of cases with unrepresented parties increasing. HMCTS is not in a position to plug the gap made by the slashing of legal aid in the long-term. I suspect that we will be wrestling these funding issues for many years to come.

Public law update

The primary theme that has emerged in the last six months is one of frantic back pedalling from the very wide interpretation of *Re B* and *Re B-S* which was being applied at the start of 2014. The President has taken another look at this area in *Re R (A Child)* [2014] EWCA Civ 1625 and has told us that we have all been languishing under "myths and misconceptions". Re B-S does not, apparently, change the law. "A child's welfare", he states, "should not be compromised by keeping them within their family at all costs". One particularly interesting observation is that the judgment of the Court will inevitably be linear in structure, and that is acceptable. Whether social work statements and guardian's reports are also allowed to be linear on that basis is not clear.

The important message to take from

Re R is that what must be focused on are the "realistic options" for a child. If a possible placement can be ruled out as simply not being realistic, that should be the end of the consideration of that placement. One hopes that we will see an end to statements and reports which cover absolutely every possible placement, despite some of them clearly not being viable options.

Final observation

What has struck me most on my return to work is a downturn in the collaborative approach previously adopted between the Family Court and the representatives appearing before it. A whole raft of Judgments have been issued from the President downwards, criticising all aspects of practice. There are simply too many to go through in this article. They include criticisms of case preparation, drafting of thresholds, not properly addressing correspondence to the Court, even how many bundles get sent to Court. Many of those criticisms are, of course, entirely well-founded, but it is hoped that there is still an understanding from up high that we are all working together, as best we can, to assist families who are facing the most traumatic situations imaginable.

Charlotte Pitts

The President's progress

If it's Thursday it must be Northampton

The reaction of the local legal profession to a visit from Sir James Munby bears some comparison to that of the local middle-nobility to a visit from a Tudor monarch keen to have a sleepover: a sense of privilege (some might say), but also expense, disruption to cosy routine, and not a little apprehension (OK then, fear). Unlike a visit from a Tudor on tour, however, a visit from a President on tour often has repercussions spreading further and lasting longer than the locals being shaken out of their familiar ways for a few uncomfortable days.

Back in November last year Sir James found himself in Middlesbrough. In any event, it wasn't the location or the north-eastern November weather that upset him but, as you surely all know by now, a number of aspects of the conduct of a set of care proceedings brought by Darlington Borough Council. The President set out his thoughts in his judgment, handed down on 17 February 2015 as *Re A (A Child)* [2015] EWFC 11. By way of an amuse bouche, in paragraph 7 of his judgment he said "The present case is an object lesson in, almost a textbook example of, how not to embark upon and pursue a care case". Ouch!

Whilst being careful not to say anything disrespectful about Northampton, I can't help but wonder whether the President's mood on 17 February might have been affected by the fact that he had not long since had the pleasure of a trip to that part of the East Midlands where he had been confronted by a court bundle of 989 pages – along with a request that 591 of those pages be translated into Slovenian at a cost to the Legal Aid Agency initially estimated at £23,000 and later reduced, by some half-hearted further slimming down of the bundle, to just under £10,000. The President is, of course, immune to anything so run-of-the-mill as "bundle rage"; instead, on 26 February he handed down his judgment in *Re L (A Child)* [2015] EWFC 15. I don't know whether it's the first of his judgments to include a word in both bold and italics but there's clearly some passion in paragraph 9 when he says that failures to comply with PD27A are continuing to occur "almost fifteen years after the original Practice Direction".

Both cases are serious. Both cases have been circulated by the DFJ; we all, therefore, will be expected to be familiar with them. Forget (you already have) my feeble attempts at humour. Read the two cases. Please.

Re A [2015] EWFC 11

Re A is not, contrary to the headlines in some so-called newspapers, about a toddler being removed from his family because his dad had links with the EDL. Aside from its primary purpose of settling the future of the child concerned, it is primarily concerned with three seemingly obvious but frequently overlooked basic principles:

- There is a difference between an assertion and a fact.
- A fact is only a "threshold fact" if it demonstrates that the child is suffering or is likely to suffer significant harm attributable as set out in s31 CA 89.
- The courts are not in the business of social engineering.

The President also gave guidance (again – will people please listen this time?) about the inappropriate use of s20 "voluntary" accommodation. Stephen Roberts deals with this aspect elsewhere in this Newsletter.

Assertion/fact

Two points arise here. Put simply they are:

1. Threshold is proved by facts – whether facts of actual harm or facts that establish a likelihood of harm. It therefore goes without saying that there can be no place in a threshold document for such phrases as:
   - "It has been reported that..."
   - "X appears to have lied about..."
   - "The local authority is concerned that..."

   It is wholly irrelevant to threshold that something has been reported, that somebody appears to have lied or that the local authority has concerns about something. All that matters is whether the thing that was reported actually happened (or sometimes that the report was a false report), whether X actually did lie or whether the thing about which the LA is concerned is actually a thing. No amount of reports, appearances and concerns can ever add up to a child suffering or being likely to suffer significant harm.
2. If a fact is in issue it has to be proved, and the best way to prove something is with first hand evidence. Hearsay is of course admissible, but material taken from LA records, minutes of meetings and so on is of very limited value if challenged: "A local authority which is unwilling or unable to produce the witnesses who can speak of such matters first hand may find itself in great, or indeed insuperable, difficulties if a parent not merely puts the matter in issue but goes into the witness box to deny it" [9]. It's a pain, and LA resources make it difficult, but proper statements of evidence are needed (signed ones!) and my strong view is that those statements need to be taken by the LA solicitor or a properly trained legal assistant.

Link between fact and harm to child

The father in Re A was, like many parents in care proceedings, alleged to "minimise matters of importance" and to "lack honesty with professionals" and it was asserted that he "is immature and lacks insight of (sic) matters of importance." The question then is: "So

what?" As the President put it at paragraph [12]: *"How does this feed through into a conclusion that A is at risk of neglect? The conclusion does not flow naturally from the premise".* By way of example beyond the case then before him, His Lordship referred to the judgment of Macur LJ in *Re Y (A Child)* [2013] EWCA Civ 1337, a case that had been "hijacked by the issue of the mother's dishonesty" without any real analysis of why her lies were said to create a likelihood of significant harm to the children.

Social engineering

The President gave yet another endorsement of the "wise and powerful" words of Hedley J in *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050 [50] and reinforced this with Lord Wilson's approval at paragraph 7 of Re B [reference engraved on your hearts] of a submission by counsel that "many parents are hypochondriacs, many parents are criminals or benefit cheats, many parents discriminate against ethnic or sexual minorities, many parents support vile political parties or belong to unusual or militant religions. All of these follies are visited upon their children, who may well adopt or 'model' them in their own lives but those children could not be removed for those reasons". I happen to think Lord Wilson agreed too easily with that submission and that the issues are wider, deeper and that the words "necessary and proportionate in a democratic society" are not insignificant.

Re L [2015] EWFC 15

If you're a local authority lawyer, wonder about the practicalities of different bundles for each hearing, agreeing what needs to be in the bundle (each time), getting witness bundles to court on hearing days (as opposed to sending them in advance). Having worried, just do it and stop moaning about it and bear in mind paragraph 25: "The judges of the Family Division and the Family Court have had enough. The professions have been warned". Still, not to worry – local authority legal departments will simply take on lots of extra legal assistants and those of us doing legal aid work will go on a CPD course about how to work without sleep. Nothing's impossible. Except perhaps an effective, safe and fair system of child protection without lawyers who are not just committed but who are valued and rewarded; and that's not about us, it's about the children.

Stuart Fuller

Maintenance for life

Wright or wrong?

Section 23 (1)(a) Matrimonial Causes Act 1973 gives the court power to order periodical payments. Recent decisions of the High Court and Court of Appeal have focused on such orders, considering whether spousal maintenance orders should be made, for how much, and for how long.

In *SS v NS* (Spousal Maintenance) [2014] EWHC 4183 Mostyn J considered the correct approach to periodical payments orders. He found (save in a wholly exceptional case) maintenance orders can only be made to meet needs. S25A(1) and (2) stipulate spousal maintenance should be terminated as soon as is "just and reasonable". A maintenance term should be considered unless the payee would be "unable to adjust without undue hardship" to the ending of the payments. This suggests Parliament accepts "a degree of not undue hardship" in making the adjustment. Unless undue hardship would likely be experienced the court ought to provide an end date to a maintenance order.

Assuming that there are "hard needs" which have to be met by a spousal maintenance order, he considered the questions "how much?" and "for how long?".

"How much": he approved of the Law Commission's view in "Matrimonial Property, Needs and Agreements" (Law Com No 343) (26 February 2014) that "… the transition to independence, if possible, may mean that one party is not entitled to live for the rest of the parties' joint lifetimes at the marital standard of living, unless he or she can afford to do so from his or her own resources", remarking that it is a mistake to regard the marital standard of living as the lodestar, because (i) as time passes how the parties lived in the marriage becomes increasingly irrelevant, and (ii) too much emphasis on it imperils the prospects of eventual independence.

"How long": he found that the Holy Grail should be "where it is just and reasonable, an eventual termination and clean break". He noted (it seems with approval) the Law Commission's conclusion "that the objective of financial orders made to meet needs should be to enable a transition to independence, to the extent that that is possible in light of the choices made within the marriage, the length of the marriage, the marital standard of living, the parties' expectation of a home, and the continued shared responsibilities (importantly, childcare) in the future. We acknowledge the fact that in a significant number of cases independence is not possible, usually because of age, but sometimes for other reasons arising from choices made during the marriage".

Mostyn J also considered the proper approach to discharge and extension applications holding the same approach to making an order for the first time should be followed. On an application to extend a term an examination would have to be made of whether the implicit premise of the original order of the ability of the payee to achieve independence had been impossible to achieve. On a discharge application an examination would have to be made of the assumption that it was just too difficult to predict eventual independence.

Mostyn J enumerated 11 factors to be applied when considering spousal maintenance;

i) A spousal maintenance award is properly made where the evidence shows that choices made during the marriage have generated hard future needs on the part of the claimant.

ii) An award should only be made by reference to needs, save in a most exceptional case where it can be said that the sharing or compensation principle applies.

iii) Where the needs in question are not causally connected to the marriage the award should generally be aimed at alleviating significant hardship.

iv) In every case the court must consider a termination of spousal maintenance with a transition to independence as soon as it is just and reasonable. A term should be considered unless the payee would be unable to adjust without undue hardship to the ending of payments. A degree of (not undue) hardship in making the transition to independence is acceptable.

v) If the choice between an extendable term and a joint lives order is finely balanced the statutory steer should militate

in favour of the former.

vi) The marital standard of living is relevant to the quantum of spousal maintenance but is not decisive. That standard should be carefully weighed against the desired objective of eventual independence.

vii) The essential task of the judge is not merely to examine the individual items in the claimant's income budget but also to stand back and to look at the global total and to ask if it represents a fair proportion of the respondent's available income that should go to the support of the claimant.

viii) Where the respondent's income comprises a base salary and a discretionary bonus the claimant's award may be equivalently partitioned, with needs of strict necessity being met from the base salary and additional, discretionary, items being met from the bonus on a capped percentage basis.

ix) There is no criterion of exceptionality on an application to extend a term order. On such an application an examination should to be made of whether the implicit premise of the original order of the ability of the payee to achieve independence had been impossible to achieve and, if so, why.

x) On an application to discharge a joint lives order an examination should be made of the original assumption that it was just too difficult to predict eventual independence.

xi) If the choice between an extendable and a non-extendable term is finely balanced the decision should normally be in favour of the economically weaker party.

Recently, the Court of Appeal in *Wright v Wright* CA 23.2.15 refused permission to appeal to the former wife of a millionaire racehorse surgeon, who was told by a family court judge that she has no right "to be supported for life" following her divorce. In that case, having divorced in 2008, following an 11-year marriage, the Husband was ordered to pay £33,200 maintenance per year in maintenance in addition school fees for the couples' two children (total £75,000), with proceeds from the sale of their £1.3M home being divided equally.

The husband objected to indefinite payments, effective even after his retirement. He applied to have them reduced. He said that the wife had made "no effort whatsoever to seek work", so he should not be expected to continue paying her so much.

The judge hearing the application agreed that the spousal maintenance should eventually stop, ordering that the amount the wife receives should be gradually reduced in the years leading up to her ex-husband's retirement. The judge said that "a working mother at this stage of [the children's] lives may well provide them with a good role model".

The application for permission to appeal was dismissed by Pitchford LJ, who told the wife it was "imperative" that she find a job, just like "vast numbers of other women with children". This case has received a lot of publicity, and will surely stimulate many applications to vary or terminate existing maintenance orders. On such applications, the approach by Mostyn J in *SS v NS* will now guide the court to its decision.

Deborah Dinan-Hayward

Section 20 Children Act 1989

Use or misuse?

When two of the most understanding and tolerant judges of the Family Division express criticism of the misuse of a statutory power it is time to take careful note. Those judges are Hedley J and Keehan J; the statutory provision is section 20 of the Children Act 1989. To those two voices we can now add the opinions of our local DFJ and the President of the Family Division.

What are the key features of s20? Firstly, and fundamentally, it must be noted that s20 contains no compulsive powers. Part III of the Children Act in which s20 sits is the Part dealing with "Local Authority Support for Children and Families." S20 is worded in a way which provides that a parent can object to the provision of such accommodation – provided that parent is in turn willing and able to provide or arrange accommodation. As Hedley J said in *Coventry City Council v C, B, CA, CH* [2012] EWHC 2190 (Fam) "The emphasis in Part III is on partnership and it involves no compulsory curtailment of parental responsibility".

Hedley J went on to emphasise:

"... the use of Section 20 is not unrestricted and must not be compulsion in disguise. In order for such an agreement to be lawful, the parent must have the requisite capacity to make that agreement. All consents given under Section 20 must be considered in the light of Sections 1-3 of the Mental Capacity Act 2005."

The perceived cases of misuse of s20 fall into two categories:

1. S20 'consent' used inappropriately soon after the birth of a child;
2. Placements of children under s20 for protracted periods, thereby preventing the involvement of the court, a Children's Guardian and, potentially, lawyers for parents.

In *Coventry City Council v C, B, CA, CH* Hedley J was dealing with a case in which a mother had given consent under s20 on the same day she had given birth to the subject child, and whilst the mother was recovering from surgery and being treated with morphine. Hedley J goes on to set out very helpful (and subsequently approved) guidance on precautions to be taken in obtaining a s20 consent soon after a child has been born. The comprehensive nature of that guidance means little else need be said here.

It is the second category of case, the prolonged use of s20 placements, that has troubled the higher courts more recently.

In the first of these cases, In the matter of *U (a child)* [2013] EWCA Civ 1022, Lord Justice McFarlane addressed the issue of delay in a case of a s20 placement for a period of eight months following the discovery of bruising to a child. McFarlane LJ held that a fact-finding was obviously going to be required and that was unnecessarily delayed by eight months as a result of the extended use of s20.

The case of *Medway Council v Mother & Ors* [2014] EWHC 308 (Fam) involved a child who was discovered to have chronic subdural haematoma and retinal haemorrhages. In that case Theis J expressed concern about a delay of 12 weeks following the parents attending hospital with the child before the LA issued proceedings. The judge noted that:

(a) Without the LA issuing proceedings the parents did not have effective access to legal advice;

(b) There is no framework for parents to be involved in the further medical investigations being sought;

(c) If alleged shaking remains the position following those enquiries serious consideration should be given by the LA to issuing care proceedings promptly:

(d) Once proceedings are issued, the Court, together with the parties who will be legally represented, is then in a position to timetable and manage further medical investigation, analysis and disclosure.

(e) There should be great caution in using s20 agreements in cases where complex medical evidence may become involved. Parents faced with that situation may consider they have little choice but to agree to s20; they have no, or limited, access to legal advice and if they don't agree they risk being regarded by the LA as being 'uncooperative'.

We then have the recent judgment of Keehan J in *Northamptonshire County Council v AS and Ors* [2015] EWHC 199 (Fam). There were two particular features of concern in this case: the overlong use of s20, and the failure of the local authority to comply with court orders. Much of the judgment deals with the second of these concerns and is outside the scope of this article. However, the delay caused by the use of s20 was stark: a *15-day-old baby* (emphasis added) was accommodated under s20 on 30 January 2013; it was not until 23 May 2013 that the local authority decided to issue proceedings. It then took until 5 November 2013 for the authority to issue those proceedings, i.e. some 9½ months after a newborn baby had been placed in foster care under s20. Echoing the views of Theis J in the Medway case, Keehan J concluded that:

36. The use of the provisions of s20 Children Act 1989 to accommodate was, in my judgment, seriously abused by the local authority in this case. I cannot conceive of circumstances where it would be appropriate to use those provisions to remove a very young baby from the care of its mother, save in the most exceptional of circumstances and where the removal is intended to be for a matter of days at most.

37. The accommodation of DS under a s20 agreement deprived him of the benefit of having an independent children's guardian to represent and safeguard his interests. Further, it deprived the court of the ability to control the planning for the child and to prevent or reduce unnecessary and avoidable delay in securing a permanent placement for the child at the earliest possible time.

Significantly, in the Northampton case, the local authority conceded that:

The delays and general mismanagement of the case by the local authority has been seriously prejudicial to the child's welfare and the child's and mother's ability to enjoy a family life with a member of his extended family prior to November 2014, which may have irredeemable consequences for the child's future welfare and development. Such failures were in breach of the child's article 8 rights.

In parallel proceedings the local authority agreed to pay damages to the family totalling £17,000.

Finally the misuse of s20 has featured in the recent judgment of the President in *Darlington Borough Council v M, F,GM and GF and A* [2015] EWFC 11. This widely reported judgment sets out multiple criticisms by the President of a local authority's conduct of care proceedings. One of those criticisms related to the use of s20. In that case, the child was born on 11 January 2014 but care proceedings were not issued until 16 September 2014. Whilst noting that there had, appropriately and commendably, been much pre-birth planning, the President stated that "The gap was covered by the local authority's use of s20 in a way which was a misuse, indeed, in my judgment, an abuse, of the provision". The President then went on to repeat and endorse Keehan J's paragraphs 36 and 37 quoted earlier in this article.

Conclusion

Pre-birth planning and pre-proceedings work have an important function in child care cases, indeed an increasing role. However, local authorities, and parents' representatives, must keep firmly in mind that a court is likely to disapprove of:

(a) what it perceives as an inappropriate use of s20 in the period shortly after the birth of a child; and

(b) a placement of a child under s20 for a period which causes unnecessary delay and which has the consequence of excluding the court, guardians and legal representatives from the vital decision making process about the future welfare of a child.

Stephen Roberts

Subdural haemorrhages

A way out?

Cases involving subdural haemorrhages are notoriously difficult to defend and, quite frankly, to understand, but as the proud recipient of a "C" at A-level Biology, I can't think of anyone more qualified to write about such a thing.

The anatomy bit

The brain is covered by three membranes. The first is a thin film called the pia mater, which is impervious to fluid. Above that is the subarachnoid space topped by the arachnoid mater, with the final thicker dura mater just below the skull. Passing between these layers are blood vessels. Recently, in an effort at trying to explain to me in words of as few syllables as possible, a neurosurgeon, Peter Richards, used a pictorial analogy. A bemused Judge and equally bemused lawyers were invited to consider the brain as a sausage, the pia as the sausage skin, the arachnoid as the cling film around the sausage and the dura as the sandwich bag around that. He didn't go so far, but I suppose the skull would be the lunchbox and presumably the rucksack it is put in would be the hat?

The injury bit

In ordinary life there is no reason for there to be fluid in the subdural space. The subarachnoid space contains clear cerebrospinal fluid, and again, in ordinary life, no blood. The existence of fluid i.e. blood in the subdural space is almost always due to some form of infection or trauma. We, as lawyers, will only become involved where the suggestion is that a child has suffered some inflicted trauma. This will have shown up on an MRI or CT scan as fluid in the subdural or subarachnoid space. This has happened because the blood vessels which cross the layers have been torn as a result of the application of force in what is often described as a "to and fro" fashion. This causes blood to leak into the subdural or subarachnoid layers and will almost always have had an impact on the health of the child which could include the most serious of consequences. In the absence of any other explanation, the existence of such

a bleed will inevitably result in the parents finding themselves in the pool of potential perpetrators.

The way out bit?

Those who have dealt with these sorts of cases before will know how difficult they are to deal with. We are lawyers, not radiologists nor brain surgeons. My grade C doesn't exactly qualify me!

How do we create a useful line of questioning for experts? It is important to remember that the reality is you probably won't have that "Columbo" moment where "just one last thing" unravels the case and causes the previously certain witness to change their mind. It may be that the best we can do is mitigate the level of inflicted injury to the extent that the relevant parent/intervener remains a viable carer within the proceedings.

The most effective questioning may be the most simple, such as inviting the experts to consider what evidence isn't present in any given case, such as:

- Often subdural haemorrhages go hand-in-hand with retinal haemorrhages,
- Associated fractures and swellings can be seen, particularly in respect of ribs,
- Encephalopathy (an interruption of the brain function or damage to the brain) is often seen,
- Hypoxia (lack of oxygen) causing damage to the brain is thought to be a direct result of such inflicted injury,
- Bleeding down the spinal cord can occur.

The alternative course is to determine what the experts don't know:

- There has never been clinical trial to determine what happens to children who are shaken. All assertions are based on a limited test pool of those that present for medical attention.
- Similarly, medical examination of children only occurs if there is some reason to do so i.e. there is no controlled variable to compare against.
- There is no known association between the extent of the injury and the extent of force. Indeed, the reality is that the same force inflicted on two identical children could have vastly differing consequences ranging from nothing to death.

The third course is the internet

With carefully chosen search terms (particularly carefully chosen if it's a work computer...) there is no excuse nowadays for not being able to find medical journals or research papers. Medical science is always changing. As part of his "Ten Commandments", Mr Justice Baker has made it clear (most notably in *Re L and M* [2013] EWHC 1569, quoting Dame Butler-Sloss) that, "The judge in care proceedings must never forget that today's medical certainty may be discarded by the next generation of experts or that scientific research would throw into light corners that are currently dark." Again, the reality is that experts may well be more up to speed with such developments than us, but we must remember all we are doing is seeking to put doubt in the mind of the court.

The changing medical evidence bit, an example

This article came about as a result of a case in which I and another member of chambers were involved. It seemed as good an example as any to try to pull together all the points above. In this case, a ten-month-old girl had been rushed into hospital with a subdural bleed over the left side of the brain, which ultimately caused a seizure and collapse. (Fortunately, within two weeks she had been discharged with a good prognosis). The case was "straightforward" in so far as the mother and partner were the only carers of the child in the preceding 24 hours and the medical evidence seemed to be clear about NAI. However, tucked away in only one of the seven reports which had been commissioned, was that the child in question had what were described as "Prominent subarachnoid spaces". Medical interpretation of ever advancing scanning technology has developed so much over the last 15-20 years that the prominence of these spaces would most likely not have been noted by either the radiologist or any of the experts who rely on those scans. In relatively recent years the existence of "Benign Enlarged Subarachnoid Spaces" or "BESS" has become more and more of a feature of supposed shaken baby cases. In simple terms, it occurs where the space between the "sausage skin" and the "cling film" is abnormally large causing the blood vessels that bridge that gap to be stretched. The thinking is that this makes the child more vulnerable to the tearing of these blood vessels at a lower force, or perhaps even spontaneously. This could either rule out the mechanism of any subdural bleed being a deliberate shake or at least mitigate it to some perfectly acceptable level of force.

It is difficult for medical experts to say what percentage of children have such enlarged spaces because many children will never be diagnosed with it, or even know about it. One article I have read considers at least 17% of children under the age of two may have them. As stated in generalities above, predominantly only those children who have had the clinical need for radiology will have been tested and therefore seen to have the condition. There appears to be no accepted thinking as to how large a space constitutes BESS, though 5mm from brain to skull seems to be the minimum. It is not clear whether a space marginally less than that could at least be a contributory factor sufficient to bring at least the level of force into question.

There is a wealth of articles on the subject, some of which consider the relevance of retinal haemorrhages and at least one of which considers that retinal haemorrhages "could" come about as a result of raised intracranial pressure associated with the enlarged spaces. All of this gives at least a line of questioning which could lead to sufficient doubt as to mechanism of injury from a judicial standpoint. "Commandment" number 8 (Baker J) tells us that: "It is important to remember that the roles of the court and the expert are distinct and it is the court that is in the position to weigh up the expert evidence against its findings on the other evidence. It is the judge who makes the final decision". To put it another way, even if the expert has little doubt, the court might.

In this case, ultimately, the experts were as confident as they could be that there was no contributory factor borne by the prominent spaces and indeed that is what the Judge found. However, if the 17% is right, it is something that is going to appear in any number of allegations of shaken baby. The conclusions drawn in that case may well be different.

Sadly, one conclusion to be drawn from this is that, there may well have been cases 15 or so years ago, in which experts confidently stated that a subdural bleed could only have been inflicted when in fact, it could well have been caused by BESS.

I wonder what my old Biology teacher would make of this.

James Cranfield

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