1GC | Family Law CELEBRATING 35 years

Private Law Children

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September 2024

- Wider context
- Measures
- Trends in case law
- Useful cases !

The Problem

"*At present the system is overloaded and inevitable delays in reaching a conclusion, which are obviously unwelcome, have the potential to make matters worse rather than better for a child. But, even if delay were not an issue, a system that pitches one parent against the other in an adversarial setting is likely to exacerbate more than it heals dysfunctional family relationships. With the rise in recent years in the number of parents acting in person, a system that is litigant-led, with the proceedings, or successive proceedings, only coming to an end when each of the parties refrains from making, or contesting, applications, has the clear potential to be harmful.*"

The President of the Family Division

The Context

14,155 new private law applications made in January-March 2024

20,935 individual children involved in these applications

On average 44 weeks for private law cases to reach a final order

Proportion of disposals where neither applicant nor respondent had representation was 40%

Proportion of cases where both parties represented went from 41% in 2013 to 19% 2024

End July 2024, Cafcass had 16,983 open private law children cases involving 26,125 children

Family Court Statistics Quarterly: January to March 2024 , Published 27 June 2024 and CAFCASS data

The Initiatives: Encouraging ADR

- https://www.gov.uk/government/news/childrens-wellbeing-at-the-heart-of-family-court-reforms
- The Family Procedure (Amendment No 2) Rules 2023 (SI 2023/1324) came into force 29.4.24.
- Tightening of exemptions for MIAMS
- Encouragement of early resolution of private law children cases
  - '*when the court requires, a party must file …and serve.. a form setting out their views on using non-court dispute resolution as a means of resolving matters raised in the proceedings',* r3.3(1A) FPR 2010
  - where *'the timetabling of proceedings allows sufficient time'*, the court should encourage the parties, as it considers appropriate, to undertake non-court dispute resolution, r3.4(1A)(b) FPR 2010. Parties' agreement to adjourn not required.

Re X (Financial Remedy: Non-Court Dispute Resolution) [2024] EWHC 538

"*This short ruling is being given today not because the parties are opposed to the course I have invited them to take but because I consider it might be helpful for those involved in family proceedings, whether concerning money or children, to understand the court's expectation that a serious effort must be made to resolve their differences before they issue court proceedings and, thereafter, at any stage of the proceedings where this might be appropriate. Furthermore, I want to signal that, at all stages of the proceedings, the court will be active in considering whether non-court dispute resolution is suitable. Changes to the Family Procedure Rules 2010 ("the FPR") which are due to come into effect on 29 April 2024 will give an added impetus to the court's duty in this regard."*

"Non-court dispute resolution is particularly apposite for the resolution of family disputes, whether involving children or finances. Litigation is so often corrosive of trust and scars those who may need to collaborate and co-operate in future to parent children. Furthermore, family resources should not be expended to the betterment of lawyers, however able they are, when, with a proper appreciation of its benefits, the parties' disputes can and should be resolved via non-court dispute resolution. Going forward, parties to financial remedy and private law children proceedings can expect—at each stage of the proceedings—the court to keep under active review whether non-court dispute resolution is suitable in order to resolve the proceedings. Where this can be done safely, the court is very likely to think this process appropriate especially where the parties and their legal representatives have not engaged meaningfully in any form of non-court dispute resolution before issuing proceedings".

The Initiatives: Encouraging ADR

"The revised MIAM regime is much more than a tweaking of some of the provisions; it should be seen as a radical tightening up of the whole process. There are now fewer, more narrowly defined, exemption, for which evidence must be provided. When a party has failed to attend a MIAM when they were not exempt from doing so, the court must *send them back. In addition, every party must file a short statement setting out their approach to options for non-court dispute resolution. Whilst the MIAM changes were introduced on their own, they should be seen as very much part of a piece with the overall direction of travel which is represented by Pathfinder and by other proposals for change (for example represented in the previous Government's policy proposals published in January 2024."*

The President of the Family Division

The Pathfinder Pilot

The Private Law Reform 'Pathfinder' pilot commenced in Dorset and North Wales, in 2022, extending to Birmingham and South Wales in May 2024.

Practice Direction 36Z

Early information gathering	The Child Impact Report	Review

The Pathfinder Pilot

‘child-led’

‘Judges and staff working in Pathfinder courts are supported with training to speak in a non-conflictual manner to the parties’

‘close working relationship with local domestic abuse professionals and agencies’

‘Most cases are resolved at the first hearing’

‘fewer backlogs’

‘fewer cases return to court for enforcement or other reasons’

The Pathfinder Pilot – research

https://www.gov.wales/sites/default/files/statistics-and-research/2023-12/children-and-young-peoples-experiences-of-participation-in-private-proceedings-in-the-family-courts-report.pdf

The Pathfinder Pilot- research

- FCAs felt involving children earlier could reduce stress for children and parents.
- This was backed up to some degree by children who said they felt calmer and relieved after speaking to an FCA.
- Some FCAs felt that a benefit of earlier engagement was being able to clarify the situation for children but the majority of children experienced feelings of confusion regardless.
- Some children (who the court may not have specifically ordered should be informed by an FCA of the decision) would clearly benefit from the opportunity to talk through what happened in court with a neutral, third-party.

The Pathfinder Pilot- research - recommendations

- Ensure that children actively involved in deciding whether, how, when and where to engage with Cafcass Cymru.
- Find ways for children to communicate their preferences as independently as is appropriate.
- Ask children how they would like to be informed about what happens at court.
- Signpost children to accessible information.

CAFCASS Cymru Guide 'Explaining decisions made by the Family Court to children: A guide for parents and carers.'

This guidance, published as part of the Pathfinder pilot, aims to help parents and carers when they are explaining to children the decisions the family court has made about them.

https://www.gov.wales/sites/default/files/publications/2024-04/explaining-decisions-made-by-the-family-court-to-children.pdf

Making cases smaller

X v Y [2023] EWHC 3170 (Fam) Time estimates

- Final consent order
- M applied to vary
- F convicted of controlling and coercive behaviour sentenced to 30m
- M applied for termination of PR, order for no contact, change of name and 91(14)
- FFH deemed unnecessary due to conviction but was listed for four days

X v Y [2023] EWHC 3170 (Fam) Time estimates

"Firstly, in a case where the Father is serving a custodial sentence of significant length for domestic abuse, it is unlikely to be necessary to conduct any further fact finding. In this case there were at least three written reports which were relevant to the welfare of the children and the information the court needed. Therefore, the need for oral evidence was extremely limited.

Secondly, there is no right in Family Court proceedings to cross examine a witness pursuant to Article 6. That right exists under Article 6(3)(b) in respect of criminal charges, not other proceedings. The duty under Article 6 in respect of Family Court proceedings is to ensure that all parties have a fair trial. How that is achieved is for the Judge exercising their case management powers.

Thirdly, it is essential that courts list cases with short and proportionate time estimates. The exhortation to "Make Cases Smaller" applies just as much if not more in private law cases as in public law ones. The time estimates must focus on the issues in the case and not the amount of time that the parties, and/or their advocates wish to take. There is a duty on the advocates to assist the court in focusing on the real issues in the case and setting a proportionate timetable.".

A v K (Appeal: Fact Finding: PD12J)[2024] EWHC 1981 (Fam) : No fact finding

- M's appeal from decision not to hold FFH where cross allegations made
- M already convicted of one assault vs F
- The issue before the trial judge was whether F's time with the child in term time should increase, and title of that order
- M sought to have allegations investigated. Judge said no, increased F's contact and made a shared lives with order

A v K (Appeal: Fact Finding: PD12J)[2024] EWHC 1981 (Fam) : No fact finding

- Not every case requires a fact-finding hearing even where domestic abuse is alleged (*Re H-N*);
- It is important for judges to hold firm to the notion that "[e]very fact-finding hearing must produce something of importance for the welfare decision" (*Re H-D-H* at [21]);
- There is a "need for advocates to focus on those issues which it is necessary to determine to dispose of the case, and for oral evidence and/or oral submissions to be cut down only to that which is necessary for the court to hear" (*Re B-B* at [6](iv));
- "Decisions about the scope of fact-finding are core case management decisions with particular consequences for the length and cost of proceedings, the impact of the litigation on parties and others, and the allocation of court time" (*Re H-D-H* [2021] EWCA Civ 1192 at [3]);
- The function of the family court judge in resolving issues of fact is different from that of the criminal court judge: see *Re R* [2018] EWCA Civ 198 at [62] and *Re H-N* at [66]-[74].

A v K (Appeal: Fact Finding: PD12J)[2024] EWHC 1981 (Fam) : No fact finding

"When presented with allegations of domestic abuse in private law CA 1989 proceedings, judges need to be astute to work out (ideally as early on in the process as possible) what is, and is not, actually relevant to the precise welfare issues which require adjudication."

"Private law proceedings should not be used for one or other party to air grievances, to seek some form of validation or vindication of what they say went wrong in the relationship, to settle old scores, or pick over the coals of the breakdown of the relationship. Therefore, as appropriate, judges in the Family Court when presented with a private law case involving allegations of domestic abuse where the issue of fact-finding arises, should press the parties or their advocates… by asking them directly at a case management, or later: "why do I need to determine this issue / these issues in this particular case?"; "what difference would it make to the welfare decision/outcome in this case in respect of this child even if I were to find the allegation proved?". It is important to maintain focus on the individual circumstances of the particular case".

TRC v NS [2024] 2 FLR 248: Composite hearing

- Appeal from decision of magistrates to vacate FFH
- M said that the r'ship was characterised by F's abuse
- F accepted he was at times angry and verbally abusive, but placed much of the responsibility for this on the M's behaviour
- Number of recordings and transcripts of the conversations between the parents
- No FFH

TRC v NS [2024] 2 FLR 248: Composite hearing

"The Family Court is not there to adjudicate on why the parents' relationship failed, or past grievances. A fact find is only justified if it is necessary for determining the welfare outcomes for the children.

This case is a good example of why separate facts finds will often be neither necessary, nor indeed helpful in a private law dispute such as this. There is a very strong overlap here between the 'facts' and the welfare analysis of what is in the children's best interests. The holding of separate fact finding hearings, and the concept of findings of fact being 'binary' emerged from public law cases. In public law cases under Part IV of the Children Act 1989, it will often be necessary to make findings of fact before threshold is crossed, see (inter alia) Re H (Minors) (Sexual Abuse) [1996] AC 563. Threshold must be crossed before intervention by the public authority is lawful.

However, in private law there are no 'threshold' findings and it may well be that issues of the factual matrix and welfare interests are closely bound up, and best considered together. The jurisdictional basis for private law orders are the considerations under s 1 of the Children Act 1989, and the welfare checklist. This encompasses matters of fact, but also welfare issues. It is both difficult, and often unhelpful to try to compartmentalise these matters."

TRC v NS [2024] 2 FLR 248

" In many private law cases with allegations of domestic abuse, where the court is focusing on the relevance of such allegations to the best interests of the children, it is much less clear that separating fact finding from welfare is a helpful way to proceed. The welfare checklist focuses the court in considering the case in a holistic manner. The neat categorisation of truth and untruth and hard binary facts, often sits uneasily with the reality of failed relationships. It may be much more useful for a court to consider the evidence, including that of the FCA, in a holistic way rather than trying to separate facts from welfare."

"Here, the F's admissions were relevant to understanding the dynamic between the parents, but also the ongoing impact of the F's conduct on the M and the children. There was nothing unreasonable or wrong about the Magistrates putting weight on them in determining the usefulness of a separate fact finding hearing."

M v F [2023] 2 FLR 785: No cross examination of parties

- Appeal from decision of lay magistrates not to allow either parent to be cross-examined at final hearing
- The parents separated. The child remained living in the family home with F
- M applied for X to live with her and for her school to be changed; F made a cross application
- s7 report
- At FH court determined no xx of parents needed

M v F [2023] 2 FLR 785: No cross examination of parties

"The Court had two statements from M and one from F. They therefore knew what the parties' evidence and positions were. Further, counsel for the parents could cross-examine the Cafcass officer and, as such, put any material areas of disagreement to her. It was open to the Bench to consider that this would be a more effective and proportionate way to consider the material, rather than hearing oral evidence from the parents. It should be remembered that the Bench had the parties' written evidence."

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"It is so important in these disputes to focus on the matters that are central to the child's welfare and for Courts not to feel they have to engage with and determine every issue that the parents may wish to raise."

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"…The procedure to be adopted in Court is a matter for the judge or tribunal, subject to the basic principles of natural justice and, to the degree it does not overlap, Art 6. The Bench had a view as to how the case should proceed and, as I have explained, the process they adopted was not in breach of such principles. Whether they chose to hear the parties on particular points or not was therefore a matter for them."

Re A and B (children: expert's reports) [2024] EWHC 948

- Findings re F
- M continued to promote children seeing F, but contact not happening
- Court ordered a psychological assessment re '*the psychological profile of each of the parents and their approach to each other and their approach to the children*'. And assessment of the children '*may assist in understanding the reluctance of those children… to continue spending time with their father*'
- an 'opportunity' to explain why the arrangements were failing
- M appealed. Appeal allowed

Re A and B (children: expert's reports) [2024] EWHC 948

"On that basis, a court could find itself instructing a psychologist to 'generally' assess both parents in very many cases where children were not seeing their absent parent, in the hope that something might turn up to unlock the problem. That is not in my judgment what is meant by the test of necessity, nor does it show any consideration of the careful balancing exercise mandated by s.13 (7) of the 2014 Act..".

"the judge ... laments the fact that other avenues attempted have proved unsuccessful, and he expresses concern that in the absence of progress an order for ongoing time to be spent between the father and the children may not be possible. He does not identify what necessary issues any psychological assessment of the mother would now address; and although authorising Dr Hardiman to see the children only if he considers it necessary, he does not explain why he has found that the balance falls in favour of such further investigation, over his earlier expressed concern about yet further professional involvement with them, other than his general expression that the children should be seeing their father, but are not".

But don't make them too small! Re O (Appeal; Duty to Consider Fact-Find) [2024] EWHC 839 (Fam)

- The Recorder should have considered whether or not a fact-find was necessary independent of any application before him.
- Nowhere within the judgment did the Recorder consider the potential nexus between the allegations about behaviour in contact and past alleged behaviours of controlling and coercive behaviour.
- Nowhere in his judgment did he consider whether determining the allegations of past behaviour was relevant to the establishment of the facts or whether they established a pattern of behaviour relevant to welfare.

P v F [2023] EWHC 2730 (Fam)

"the judge was wrong to make a final Child Arrangements Order at a Dispute Resolution Hearing when the father was clearly not consenting to a final order for no direct contact being made and that, in circumstances where the applicant did not agree to an order providing for no direct contact and challenged the CAFCASS report, the hearing was conducted in breach of his right to a fair trial under Art 6(1) of the ECHR and the procedural protections afforded by Art 8 of the ECHR.

Whilst a judge undertaking a Dispute Resolution Appointment is required to consider the extent to which the remaining issues between the parties can be resolved at that hearing, and to assist the parties to do so with a frank evaluation of the evidence, this cannot extend to making final orders where it is clear that a party continues to contest the matter and to seek a different outcome.

Where a party continues to dispute the outcome of the proceedings at the Dispute Resolution Hearing, PD12B provides a clear way forward, either in the form of hearing evidence at the Dispute Resolution Appointment in order to resolve or further narrow the issues or in the form of final case management directions towards a final hearing."

Re GM [2024] EWHC 288 (Fam)

- F serving sentence of imprisonment for murder. Order made re contact. Application to enforce
- Separately PGPs applied for permission to apply for contact. Permission and s7report ordered, recommended contact as between PGPs and child
- DRA - documents not provided to PGPs
- No direction for statements
- FH- further documents not provided, limited time to review

Re GM [2024] EWHC 288 (Fam)

"The Judge was presented with the now ubiquitous difficulty created by litigants who are without the benefit of legal advice and representation sending documents to the court without regard to the requirements of the FPR 2010 or the case management orders made by the court. This situation means, however, that in seeking to achieve fairness it is all the more important that the rules of evidence set out in FPR 2010, including those concerning the filing and serving of witness statements set out in FPR 2010 Part 22, are applied by the court to represented and unrepresented litigants alike."

Re GM [2024] EWHC 288 (Fam)

"*fairness demands that a party knows the case being made against them, including the evidence that is to be adduced, and has the ability to answer that case effectively, including time to prepare, the opportunity to adduce their own evidence and the opportunity to challenge the evidence of the other party, in a way that does not place them at a substantial disadvantage compared to that other party. In this regard, in addition to fairness per se, the appearance of fairness will also be important. In considering fairness, the seriousness of what is at stake is a relevant consideration'".*

"at no point prior to the final hearing ... were directions given pursuant to FPR 2010 r.22.5(1) for witness statements of the oral evidence on which the parties intended to rely in relation to any issues of fact to be decided at the final hearing from either the appellants, who were each applicants in these proceedings, or the ... primary respondent to the application. Although the appellants sent a statement to the court ahead of the final hearing, that statement was not directed by the court, ...and was not signed. The document provided to the court by the mother ... was likewise not directed by the court, ... and contained no statement of truth".

Re GM [2024] EWHC 288 (Fam)

Position statements?

"FPR r.22.5(1) makes clear that a witness statement is a statement of the oral evidence on which a party intends to rely in relation to any issues of fact to be decided at the final hearing, signed by a person. A witness statement must comply with the requirements of PD22A and FPR 2010 r.17.2(1) stipulates that a witness statement must be verified by a statement of truth. The document ... sent to the court by the mother, apparently in response to the direction for Position Statements .. was not directed as a statement of the oral evidence on which the mother intended to rely in relation to any issues of fact to be decided at the final hearing and contained no statement of truth."

Shared lives with order: AZ v BX (Child Arrangements Order: Appeal) [2024] EWHC 1528 (Fam)

- There were no safeguarding issues.
- The parents had been incapable of working together.
- The parents' inability to work together was not due to abuse but their mutual distrust.
- The parents each failed to appreciate the importance of the other in the lives of the children, which was to the detriment of the children.
- The Respondent had controlled contact. It was not "positive" given the "negative family dynamic" that either party should seek to control contact.

AZ v BX (Child Arrangements Order: Appeal) [2024] EWHC 1528 (Fam)

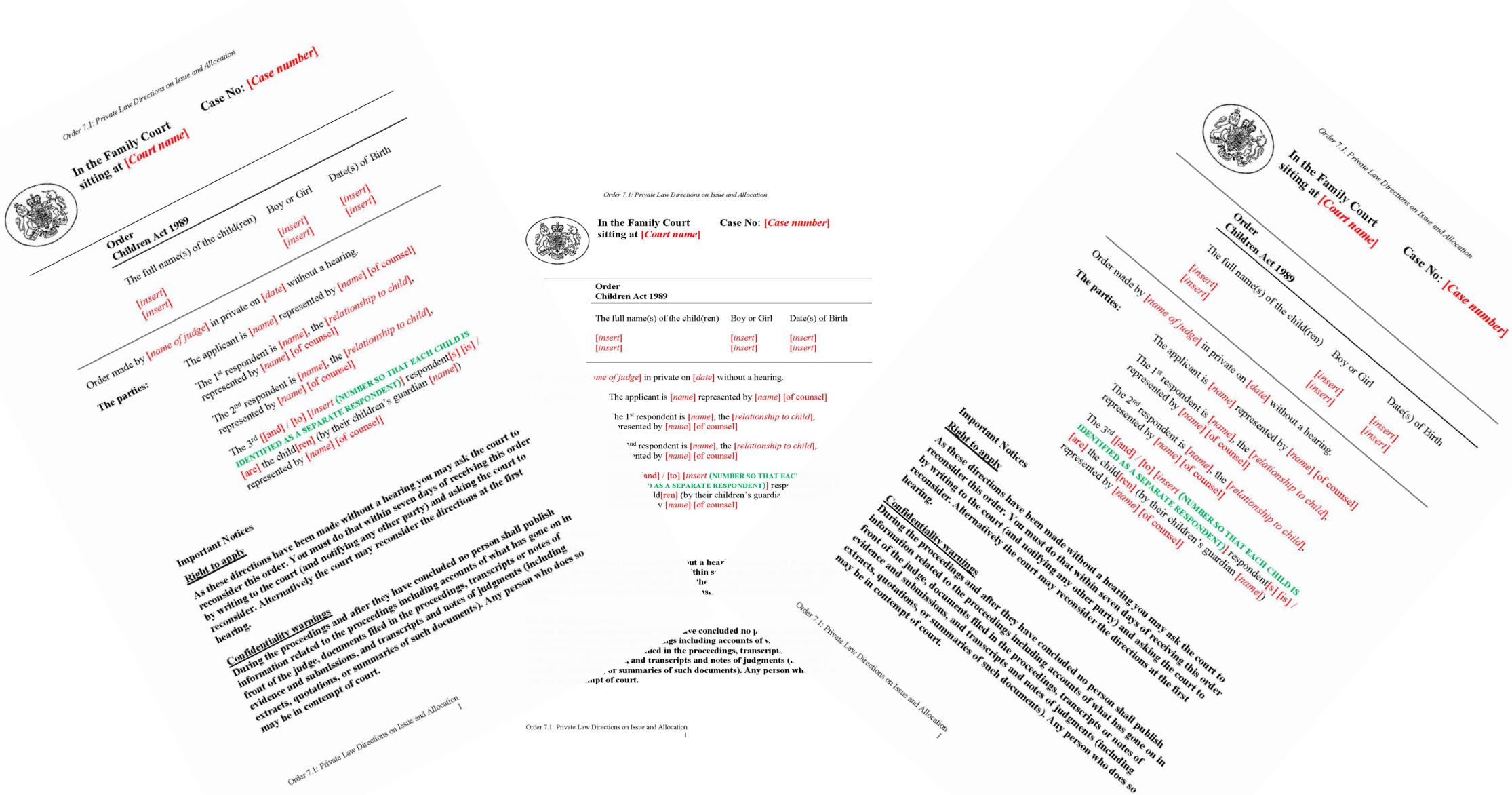
- The choice of whether to make a shared lives with order or a lives with/spend time with order is not merely a question of labelling – it is likely to be relevant to the welfare of the subject children and must be made by applying the principles of CA 1989 s1.
- The choice of the form of any lives with order should be considered alongside the division of time and any other parts of the proposed child arrangements order.
- A shared lives with order may be suitable not only when there is to be an equal division of time with each parent but also when there is to be an unequal division of time.
- It does not necessarily follow from the fact that the parents are antagonistic or unsupportive of each other that a shared lives with order will be unsuitable.
- It does not follow that because the children's experience is of spending more time with one parent than the other or even because they regard one parent's house as their "home", that a shared lives with order is necessarily unsuitable or that at lives with/spend time with order must be made.

AZ v BX (Child Arrangements Order: Appeal) [2024] EWHC 1528 (Fam)

- It would make it more difficult for either parent to regard themselves as being in control of contact or to seek to control contact – a problem that the Judge had specifically identified.
- It would mitigate the effects of the Respondent's attempts to control contact.
- It would put the parents on an equal footing when seeking to make arrangements for the children.
- It would also put the parents on an equal footing with regard to holidays abroad including during school holidays when the children are going to spend equal time with each parent.
- A shared lives with order would signal to each parent that each was of value in the lives of the children.
- It would also signal to the children that each parent has, in their capacity as parent, the same inherent importance in the children's lives.
- It would promote a sense of stability within the family: whatever the disagreements between the parents, the court had ordered that the children shall live with both of them.

AZ v BX (Child Arrangements Order: Appeal) [2024] EWHC 1528 (Fam)

"Until the parties' separation the children had lived with and had been brought up by both parents, albeit the parents had different roles. The parties were now separated but the children would be spending extensive periods of time through the year with both parents. A joint lives with order is not reserved for cases where the children's time is divided equally between the two parents. It can be the right order to make even if the children will spend more time with one parent than with the other. It might well not be suitable if the children would spend only a very small proportion of their time with one parent, but even in such a case, a joint live with order is not automatically excluded."



Order 7.1: Private Law Directions on Issue and Allocation

In the Family Court
sitting at *[Court name]*

Case No: *[Case number]*

Order
Children Act 1989

The full name(s) of the child(ren)	Boy or Girl	Date(s) of Birth
[insert] [insert]	[insert] [insert]	[insert] [insert]

Order made by *[name of judge]* in private on *[date]* without a hearing.

The parties:

The applicant is *[name]* represented by *[name]* *[of counsel]*

The 1st respondent is *[name]*, the *[relationship to child]*, represented by *[name]* *[of counsel]*

The 2nd respondent is *[name]*, the *[relationship to child]*, represented by *[name]* *[of counsel]*

The 3rd *[[and] / [to]* *[insert* **(NUMBER SO THAT EACH CHILD IS IDENTIFIED AS A SEPARATE RESPONDENT)]** respondent*[s]* *[is]* / *[are]* the child*[ren]* (by their children's guardian *[name]*) represented by *[name]* *[of counsel]*

Important Notices

Right to apply

As these directions have been made without a hearing you may ask the court to reconsider this order. You must do that within seven days of receiving this order by writing to the court (and notifying any other party) and asking the court to reconsider. Alternatively the court may reconsider the directions at the first hearing.

Confidentiality warnings

During the proceedings and after they have concluded no person shall publish information related to the proceedings including accounts of what has gone on in front of the judge, documents filed in the proceedings, transcripts or notes of evidence and submissions, and transcripts and notes of judgments (including extracts, quotations, or summaries of such documents). Any person who does so may be in contempt of court.

Detailed orders

JUDGE CLARKE: The longer the order the more parties come back to court arguing it and the more it underlines the ongoing problems between the parties.

JUDGE CLARKE: So I am not a fan of trying to cover every single eventuality and every single circumstance; I am also not a great fan of enormous recitals because along with everything else recitals turn into something to try and beat each other up about, so I am on final orders a fairly big fan of keeping it simple.

The Judge found that the parties could not put their disputes aside and were unable to communicate or work together for the benefit of the children but he made an order for an equal division of time during school holidays to be agreed by the parties without any default position nor any defined mechanism for making such arrangements.

Detailed orders

"CA 1989 s8 provides the court with flexibility to make child arrangements to suit the best interests of the child in each case depending on the particular circumstances of that case. In some cases the court might consider that the best interests of the child are served by a tightly drawn, detailed order setting out defined arrangements, day by day, sometimes hour by hour. Such orders may dictate where the parents hand over the children, who should be present at handovers, who should take the children to school or pick them up, where a child will spend their birthday, or their parents' birthdays, and so on. In other cases, a much looser order might be suitable. When making a child arrangements order that is intended to be in place for several years ahead, a degree of flexibility might be preferable and a detailed, precisely defined order less suitable. Children grow up. Parents change. Circumstances change."

"…Whatever form of order is made, it is generally in the best interests of a child to make an order designed to avoid further or repeat court applications. It is generally not in the best interests of children for the family to be engaged in protracted or repeated litigation".

" There is merit in simplicity and the court cannot, and should not try to, address every minute of the children's lives or every practical arrangement. However, a defined order does not have to fall into that trap. The court can formulate orders that provide sufficient certainty and clarity without necessarily covering every possible eventuality. … The balance has to be struck in each case according to the court's evaluation of the family dynamics and circumstances, always seeking to promote the best interests of the children".

Detailed orders

"In the present case the provision of a default, defined arrangement in the event that the parties failed to agree arrangements for an equal division of time in the school holidays would have been possible without making the order overly complex or lengthy. For example, adopting the approach that the Appellant had proposed at the final hearing, the Judge could have ordered that during school holidays the children shall together spend equal time with each parent on such dates and times as agreed by the parents in writing no later than six weeks before the commencement of the respective school holiday, and that in default of agreement by that time, the children shall spend alternate weeks during Winter and Easter holidays with each parent, and alternate fortnights during the Summer holidays. It is true that such an order would not meet every eventuality or issue that might arising during school holidays but the best interests of the children do not necessarily require an order to descend into minute detail. The family would have to come to agreements as to these additional details and issues as they arose. But they would know the essential arrangements in advance of the school holidays arriving".

"Where possible, and where, as here, there are no significant safeguarding concerns, the court should use its orders as a means of encouraging hostile parents to work together. To that extent, an over-defined order might be counter productive. If the order sets out every detail of the arrangements for them, then the parents have nothing to discuss. How will they then ever learn to work together in the best interests of their children? However, where the evidence establishes that it is unlikely that the parents will be able to agree the fundamental arrangements themselves, then an order that says little more than that they must do so is likely to result in further litigation".

Re T-D (Children: Specific Issue Order)[2024] EWCA Civ 793

Specific Issue Order.

The court directs that the following questions insofar as they may in future arise in connection with parental responsibility for either or both children are to be determined by the father in the event of disagreement with the mother.

a.All questions relating to schooling, this is to include which schools the children are to attend; who shall attend parents' evenings, sports events etc;

b. All questions relating to future therapy including whether and if so on what basis therapy is to be provided; by whom, etc.;

call questions relating to interactions with social workers and medical professionals, including what is to be said to them concerning the children and the extent to which they may be involved in the children's lives.

For the avoidance of doubt the father must still consult the mother in relation to decision making for all significant events in which he exercises overriding parental responsibility."

The Order, which would last until the children are 16, does not prevent either parent from making applications to the court, including in relation to any of these matters.

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The Order, which would last until the children are 16, does not prevent either parent from making applications to the court, including in relation to any of these matters.

Re T-D (Children: Specific Issue Order)[2024] EWCA Civ 793

"The court has a broad discretion as to whether orders should be made or not. There will be some disagreements that are too insignificant to warrant an order, and some questions may fall too far into the future to allow a welfare decision to be made".

"The great majority of private law cases arise from immediate parental disagreements that can (subject to the no order principle) readily be addressed by one or more of the Section 8 orders. There will be other situations where orders can be made to resolve an issue that is likely to require a series of future parental decisions, although the details may not yet be known, or where an order may be needed to prevent an issue from arising in the first place. The court's powers are equal to all these situations and more".

Re T-D (Children: Specific Issue Order)[2024] EWCA Civ 793

"In a few cases, conventional, issue-specific Section 8 orders may be inadequate to the scale of the problem, and the court has been driven to go further. Sometimes, using its statutory power, it has removed the parental responsibility of an unmarried father. In other cases, notwithstanding the view expressed by the Law Commission, it has used Section 8 orders to deprive one parent of the right to exercise parental responsibility in one or more broad domains, or altogether. Such a power undoubtedly exists. However, as seen above, these orders have only been made in extreme cases. It is one thing to interfere with a parent's ability to make an individual decision, and another to deprive them of decision-making power more generally. Where a conventional order can be made, it may be disproportionate to go further. In other cases, nothing less will be adequate to protect the welfare of the child".

"*The choice of schools was ripe for a conventional specific issue order. Attendance at school events, therapy and access to professionals could easily be achieved by a combination of ordinary specific issue and prohibited steps orders. For the reasons given above, orders of that kind would give the father and children greater protection than the current order, and might thereby enhance the uncertain chances of shared care working".*

When worlds collide

Re D (Children: Interim Care Order: Hair Strand Testing) [2024] EWCA Civ 498

"The science of hair-strand and nail testing for prescribed and non-prescribed drugs and alcohol has contributed to family court decision-making for many years. In the Family Drug and Alcohol Courts ('FDAC'), this type of evidence is central to its processes, and its outcomes. It is still an evolving field, and, as previous case law has cautioned, hair strand testing has its limitations.'

'The variability of findings from hair strand testing does not call into question the underlying science but emphasises the need to treat data with proper caution. The science was considered in two High Court decisions (delivered close in time in 2017), namely London Borough of Islington v M and another [2017] EWHC 364 (Fam) ..('Islington v M'), and Re H (A Child: Hair Strand Testing) [2017] EWFC 64, [2018] 1 FLR 762 ('Re H') ....".

Re D (Children: Interim Care Order: Hair Strand Testing)

- Hair strand test drug results cannot be viewed in isolation.

- Experts must fully and faithfully explain their findings: the true significance of the data should be explained in a way that reduces the risk of it becoming lost in translation. The reader must take care to understand what is being read, and not jump to a conclusion about drug or alcohol use without understanding the significance of the data and its place in the overall evidence.

Re D (Children: Interim Care Order: Hair Strand Testing)

- Draw the Judge's attention to what the science can and cannot tell you, as explained in Islington v M and Re H;

- Carefully examine the hair strand test reports in full; as far as it is thought helpful or appropriate to do so, they should distil their contents accurately so as to provide with Judge with a reliable summary, not just a rehearsal or précis of the general 'Summary' or 'Opinion' section;

- Assist the Judge to consider the hair strand test results in the context of the whole of the evidence, including:
  a) The statements of those who are alleged to have exposed the children to the drugs identified;
  b) Other evidence (i.e., from observation) which may suggest drug use within the home;
  c) Other evidence which may suggest that drugs are not used within the home;
  d) The presentation of the children and the adults;
  e) The history of the family generally.

- This is all the more important in cases where the test results are in the lower range.

Watch this space!

Family Justice Council- Responding to allegations of alienating behaviour: Autumn 2024

Thank you for listening!

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