New Court News

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New Court News: Issue 5

Welcome to the fifth edition of the New Court Newsletter.

July saw our annual Summer party and we were pleased as always to welcome friends and colleagues to the English Speaking Union in Mayfair. The weather was kind to us and so for the second year in a row we were able to make use of the magnificent courtyard.

We were delighted to offer tenancies to Katherine Couper and Kathryn Blair who have made excellent progress during their time with us as pupils. We very much look forward to welcoming them as tenants upon completion of their pupillages in October.

This edition of the newsletter features two excellent articles from Philippa Jenkins on two particularly topical areas of family law - residential assessments and FGM protection orders. Matthew Richardson considers the ever-shifting landscape for solicitors and barristers appearing in the family courts, and Katherine Couper gives her final perspective of the year on her time as a pupil. I very much hope you enjoy reading.

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Further Assessments and the 26-week Timetable

by Philippa Jenkins

As care practitioners will no doubt have encountered, following the decision in *Re B-S (Children)* [2013] EWCA Civ 1146, more and more applications for residential parenting assessments are arising within proceedings. Many of these applications are made in circumstances in which parents either suffer mental health issues or have long standing issues with drug and alcohol misuse.

I have recently been involved in a number of cases in which applications have been made, at various points within the proceedings, for assessment at units such as Trevi House, St Michaels and Orchard House. I am sure that these are units which are very familiar to practitioners and units which we have all read the lengthy brochures for. Although the case of *Re S (A Child)* [2014] EWCC B44 is not a recent decision it is a case which has arisen more and more frequently in matters that I have been involved in and therefore I felt it may be helpful to set out the key arguments which the case contains.

Residential Assessments and the artificial environment argument

In two of the cases which I was recently instructed in, the mother had significant mental health issues which had stabilised but were prone to deterioration. In both of these cases the adults suffered from delusions. In two other cases within which I was recently instructed one of the parents had a long standing drug or alcohol problem. The use of substances in each case stretched back over at least 10 years and the parent at the time of the application had been compliant with services, and appeared to be abstinent for a period of time prior to the application being made.

When considering whether residential assessments are necessary in cases with such features, practitioners should take particular note of the President's judgment in *Re S*. The primary focus of this case is the extension of the timetable beyond 26 weeks and the circumstances within which such an extension is justified (as discussed below). However there is a particularly important passage from the President's judgment which I have used within each of the cases referred to above. It is the perfect point of information to add weight to the arguments that one usually runs when opposing a residential assessment. The President states at paragraph 43:

"In the first place I agree with them that the proposed assessment is not necessary, either in the sense described by Lady Hale in Re G or in the sense (the same sense) in which the word is used in FPR 25.1 and in section 38(7) of the 1989 Act. There are two aspects to this. Further assessment is not going to add significantly to what the court already knows. Moreover, the kind of assessment proposed by Orchard House, although it may tell us something about the mother's ability to parent S in a practical sense (though nothing important we do not already know) it is not going to be able to tell us very much about the mother's ability to address her many kinds of difficulties, let alone her ability to sustain in the long term in the community whatever improvements may be ☛

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noted in the short term in the supportive and controlled environment of Orchard House" [43].

When raising this case with the court and my opponents it struck me that it was a case which is under publicised, but is extremely important when looking at such applications. The arguments which it contains were taken on board by the court in each of the cases I was involved in, and the proposed residential assessment was not commissioned. The court was clear that the primary focus should be upon the ability of the parent to sustain abstinence or mental health stability within the community. This is especially so when there is no evidence that the parent's parenting skills, absent of mental health and drugs, raises concern.

What is striking from the cases I was involved in, and the matter of *Re S*, is that the parents had made positive steps, and had provided evidence in respect of their improved engagement/ motivation, yet the further assessment was not felt to be necessary.

Residential Assessments and the extension of the timetable

Arguments in respect of the appropriateness of the statutory 26 week timetable arise again and again, and are often raised in cases within which mental health and substance misuse are prevalent. I was involved in a case where the representative for the parent sought to argue that due to the mother's improved mental health, and positive reports from CMHT, the timetable for the proceedings should be extended and the parents should be placed in St Michael's Fellowship.

In order to argue against the extension of the timetable I drew the court's attention to paragraph 44, of the judgment in *Re S*, in which the President states:

> *"Secondly, there is no adequate justification, let alone necessity which section 32(5) of the 1989 Act will shortly require, for an extension of the case so significantly beyond 26 weeks. Again, there are two aspects to this. Looking to the mother, there is sadly, at present no solid, evidence based, reason to believe that she is committed to making the necessary changes within S's timescales. Even assuming that there is some solid, evidenced based, reason to believe that she is committed to making the necessary changes, there is, sadly, not enough reason to believe that she will be able to maintain that commitment. In the light of her history, and all the evidence to hand, the assertion that she will seems to me to be founded more on hope than solid expectation, just as does any assertion that she will be able to make the necessary changes within S's timescale. Secondly, I have to have regard to the detrimental effects on S of further delay. Far from this being a case where the child's welfare demands an extension of the 26 weeks time limit, S's needs point if anything in the other direction. I accept the guardian's analysis"* [44].

The Children and Families Act 2014 amended s38 Children Act 1989 as follows:

> s38 (7B) – when deciding whether to give a direction under subsection (6) to that effect the court is to have regard in particular to: ☛

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(a) any impact which any examination or other assessment would be likely to have on the welfare of the child, and any other impact which giving the direction would be likely to have on the welfare of the child,
(b) the issues with which the examination or other assessment would assist the court,
(c) the questions which the examination or other assessment would enable the court to answer,
(d) the evidence otherwise available,
(e) the impact which the direction would be likely to have on the timetable, duration and conduct of the proceedings,
(f) the cost of the examination or other assessment, and,
(g) any matters prescribed by the Family Procedure Rules.

Within each of the cases I have recently been involved I set out the reasons I was opposing the application based on these factors. This provides a clear and concise way to submit your argument and to focus your mind on the key issues that the court will be interested in. As well as these factors the court has to also determine if such an assessment is 'necessary'.

Crucial questions to consider when seeking or opposing further assessment

There are three questions that practitioners must ask themselves when seeking to argue for or against further assessment and extension of the timetable:

Is there some solid evidence-based reason to believe that the parent is committed to making the necessary changes?

If so, is there some solid evidence-based reason to believe that the parent will be able to maintain that commitment?

If so, is there some solid evidence-based reason to believe that the parent will be able to make the necessary changes within the child's timescale?

When considering these questions practitioners should have regard to the assessments which have already taken place, whether there are any previous children who have been removed, the primary evidence of drug misuse and mental health, the ability of the parent to show progress within contact, the level of insight shown by the parent and engagement with services.

Circumstances within which extension beyond 26 weeks is justified

When mounting an argument for further assessment at the end of proceedings practitioners will also have to take into account the circumstances within which the court will extend the proceedings beyond 26 weeks. The first time that my attention was drawn to the case of *Re S* was during a final hearing by the representative for the mother. She sought to persuade the court that in the circumstances of the case the court should extend the timetable beyond 26 weeks and allow a residential assessment of her client, alongside the father.

s32(6) Children Act 1989 sets out the factors which the court will take into consideration, as follows:

"the impact which any ensuing timetable revision would have on the welfare of the child whom the application relates, and the impact which any ensuing timetable revision would have on the duration and conduct of the proceedings."

The court will also have regard to whether the extension is necessary to resolve the proceedings justly [s32(5)], and that extensions are not to be granted routinely and are to be seen as requiring specific justification [s32(7)]. ☛

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Counsel in the proceedings I was involved in sought to argue that the mother's mental health had been stable for the majority of the proceedings, that she had complied with everything that had been asked of her, was no longer using cannabis and one of the experts felt that a residential assessment was necessary in these circumstances. The court however held that, on the basis of the delusions exhibited by the mother in oral evidence, the mother's poor quality contact and the clear recommendations of the other expert, such an extension, and therefore a further assessment, was not necessary.

"...justice must not be sacrificed on the alter of speed."

The crucial factor that was highlighted by the guardian was the impact of delay on the child. This is an argument that found favour with the President in *Re S* and is a key argument to focus upon when opposing such applications.

When arguing for a residential assessment, and extension to the timetable, practitioners should also be alert to the matter of *Re NL (A Child)* [2014] EWHC 270 (Fam) in which Mrs Justice Pauffley states *"justice must never be sacrificed upon the altar of speed".*

Conclusion

I would recommend that a copy of the case of *Re S* is taken to court and re-read whenever an application for further assessment arises, whether you are making or opposing the application and regardless of the stage of the proceedings.

In light of this guidance it will be interesting to see how many residential assessments are now commissioned when parents have long term issues with mental health, alcohol and drugs, and how this will impact upon the arguments outlined in Re B-S. ■

Sam Wallace Completes Reykjavik Marathon for London Friend Charity

22 August 2015

Congratulations to Sam Wallace who completed the Reykjavik Marathon in a time of 4 hours 3 minutes and 40 seconds. Sam was running in aid of the London Friend Charity which provides counselling and support to members of the LGBT community in London. For more information on the work of London Friend, and to sponsor Sam, please visit www.justgiving.com/Reykjavik2015.

Pupils' Perspectives

by Katherine Couper

Five months on my feet and one month away from the end of pupillage, the year is flying by!

With the commencement of second six, I'm no longer a passenger in my supervisor's cases, but I am instead in the driving seat and receiving a broad range of instructions – from local authority care work, to domestic abuse, adoption and matrimonial finance applications.

The manufactured advocacy training scenario has metamorphosed into real life people with very real problems. The nerves kicked in for my first fully contested final hearing, but as soon as it got underway they dissipated and I secured the findings sought by the client. I've had some rather interesting litigant in person opponents and I'm adjusting to the fact this will increasingly be the case, certainly for the foreseeable future.

I recently had a very interesting non-molestation order case involving an issue of capacity. I became well-acquainted with case law in that area, in particular the case of *Wookey v Wookey*, which specifies that an injunction ought not to be granted against a person who is found to be incapable of understanding what he or she was doing or that what he or she was doing was wrong.

A month ago I moved to a new pupil supervisor, Elissa Da Costa-Waldman who is a public access barrister; qualified to conduct litigation. Elissa specialises in matrimonial and TOLATA proceedings so there has been a change in focus from Children Act cases. It has been really interesting to see the development of cases pre-issue and outside of the court room, something previously the reserve of solicitors. There's a clear benefit for many clients if the court advocate is able to maintain oversight of the litigation throughout proceedings.

There has been a lot to learn in the last few months. I've attended seminars on the new pension rules, which came into force at the start of April 2015 and which will have significant implications on the available capital when splitting the matrimonial pot. There has also been training in chambers on the new Court of Protection rules, which include big changes in the involvement of 'P' in proceedings.

The last eleven months have flown by, and I'm sure the next one will as well. ■

'That' Family Advocacy Letter

by Matthew Richardson

It is unlikely to have escaped the attention of anyone in family practice that on 16th July 2015 the FLBA and the Bar Council wrote to the Ministry of Justice on the subject of 'the standard of advocacy services being provided in many publicly funded family cases.'

In prefacing what I write, I want to make clear that I do not pretend to speak the opinion of others. A sore point for me, and for many to whom I have spoken at the Bar, is that nobody asked me what I thought before this letter was written. No proper opinion or evidence-gathering exercise has taken place. I am a member of the FLBA, but I am not one of the members of the FLBA to whom the letter refers. I speak for myself alone, and not for chambers or any wider whole.

"...a central reason for me being in this job is to give a voice to those who need to be heard."

This is a profoundly difficult time to be involved in family law. I use the term 'family law' in its widest sense, because of course the ridiculous cuts that have been made in recent years to legal aid have such a wide-ranging impact. It is not just those professionals in receipt of legal aid fees (or not, as the case may now be), but also most importantly members of the public and their families who are so greatly affected. It is right that a stand is taken against the government's uncaring and short-sighted policy of cutting spending, and it is right that those whose voice can be heard do indeed ☛

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speak out. As I am sure is the case for many readers, a central reason for me being in this job is to give a voice to those who need to be heard.

However, it seems plain that the way in which the Bar Council and the FLBA have chosen to speak out is misdirected and divisive. Their complaint is that the cuts in fees mean unwilling or incapable solicitors are having to go to court rather than instruct counsel, and this leads to cases being poorly presented. Of all the various ills that befall family law at present, this is a peculiar one to choose. Does this 'problem' even exist? The letter itself cites no direct evidence to support its assertions. Resolution, in their letter of response, asserted they 'had not seen any evidence' to support the concerns raised. I, too, have no such evidence in my experience.

And when there is evidence available of a wider significance, could the Bar Council and FLBA not have pointed their pen in a more relevant and useful direction? There is evidence, such as that cited in the 1st May 2015 open letter from Sir Anthony Hooper, Sir Stephen Sedley, Baroness Helena Kennedy QC, and many others, that suggests investment in legal aid in fact generates a huge *saving* to the state on other services. There is evidence such as the LAA chief executive's 2015 pay rise of over 10%. There is also, of course, the evidence that readers no doubt see every week, from case to case, of the alarming impact of legal aid cuts.

Never mind the presence of solicitor-advocates (whose capability I have no need to defend) how about the absence of any lawyers at all? I recently represented a mother at a fact-finding hearing in a private law dispute where the father, defending himself against allegations of sexual and physical abuse of his children and their mother, did not qualify for legal aid. He was representing himself, did not speak English as a first language, and did not realise that he was supposed to have prepared questions to ask or even that he needed to bring the court bundle with him. Perhaps this is the sort of issue we should be writing to the MoJ about.

The 'we' in that last sentence is important. I am aware there was an ongoing discussion between Resolution, the Law Society, the ALC, and others, around some of the issues raised (or at least matters related to the issues raised) in the BC/FLBA letter. There was also an indication from the BC/FLBA that Resolution would be invited to co-sign the letter that was sent, and a deadline of 20th July was set out. This reflects the sort of cooperation and collaboration needed from the legal profession as a whole in the face of the challenges at hand. Yet in fact the BC/FLBA sent their letter on 16th July, without first having sent it to Resolution or the Law Society, and made it public on Twitter on 19th July. Given the content of the letter, it doesn't take much imagination to figure out why the consultation process was ignored.

Crucially, though, this sort of divided and inconsistent approach will do little to further our common cause. 'We', meaning the bar, solicitors, and legal professionals more widely, need to work together to fight for those who need help and to fight for the system of justice the government seems so intent upon destroying. ■

FGM Protection Orders

by Philippa Jenkins

With the introduction of Female Genital Mutilation Protection Orders in July 2015, practitioners will have to get accustomed to the new procedures. Following my first FGM case, in which both the court and I were finding our feet with such orders, I thought that it may be useful to set out a selection of the important matters that should be taken into account. The following matters are some of those which should be at the forefront of practitioners' minds when dealing with such applications.

Law

The relevant provisions for the purposes of applications for FGM Protection Orders is Schedule 2 Part 1 of the Female Genital Mutilation Act 2003. The act is contained within pages 1067 to 1074 of the 2015 Red Book.

Order

When drafting FGM Protection Orders the format is much the same as that used for Forced Marriage Protection Orders. Schedule 2, Part 1, section 1 (3, 4 and 5) sets out the terms that are to be used when drafting.

Seeking Permission

It is not clear whether Local Authorities are to apply for permission to seek an order or whether they are a 'relevant third party' as per section 2 (2). The act states that those who are to be treated as a relevant third party have not yet been identified.

Mr Justice Holman has recently considered this issue in the matter *Re E* [2015] EWHC 2275. This case provides a helpful analysis of the current law.

The issue of permission should be raised with the court when seeking an order and the factors that are taken into account are set out at section 2 (4).

Matters that the court will take into consideration

Section 1(2) states that:

"In deciding whether to exercise its powers under this ☛

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paragraph and, if so, in what manner, the court must have regard to all the circumstances, including the need to secure the health, safety and well-being of the girl to be protected".

The court needs to assess the risk and whether the risk of FGM within and outside of the jurisdiction is such that an order is required. In looking at risk outside of the jurisdiction it may be wise, dependent on the country in question, to provide evidence of the practices and risks of the particular country.

Ex Parte Orders

In the event that an ex-parte order is required the court will be concerned with the criteria set out in section 5(2). In particular;

(a) the risk to the girl, or to another person, of becoming a victim of a genital mutilation offence if the order is not made immediately,
(b) whether it is likely that an applicant will be deterred or prevented from pursuing an application if an order is not made immediately, and
(c) whether there is reason to believe that –
  (i) the respondent is aware of the proceedings but is deliberately evading service, and
  (ii) the delay involved in effecting substituted service will cause serious prejudice to the girl to be protected or (if different) an applicant.

As per section 5 (3 and 4) the respondent must be given an opportunity to make representations about an order as soon as just and convenient and at a hearing of which notice has been given to all of the parties in accordance with the rules of court.

Undertakings

There is no provision within the act in respect of undertakings. If undertakings are raised as an alternative in such cases practitioners should consider the level of sanction that is provided by Protection Orders, the terms of the undertaking and the fact that such undertakings can not order the passport office to prevent further passports and travel documents being issued. The circumstances of the case will dictate which further arguments should be made.

Conclusion

This is not meant to be an exhaustive list of all areas which need to be taken into consideration but should provide a good starting point when dealing with such applications. ■

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