

UPDATE ON RECENTLY REPORTED CASES CONCERNING CHILDREN

SEMINAR NOTES

1. CARE PROCEEDINGS

Assessments¹

s 38 (6) CA 89 “Where the court makes an interim care order, or interim supervision order, it may give such directions (if any) as it considers appropriate with regard to the medical or psychiatric examination or other assessment of the child”

Re G (Interim Care Order: Residential Assessment) (2006) 1 FLR 601 House of Lords

Lord Scott of Foscote, Lord Clyde, Lord Walker of Gestingthorpe, Baroness Hale of Richmond and Lord Mance

Facts: The local authority initiated care proceedings in relation to the child a few days after her birth. The child’s mother had two previous children. Her second child had died of non-accidental injuries at around 6 months. Her first child was now in his father’s care because the mother was seen as presenting too great a risk to him. The local authority initially planned to place the mother’s third child for adoption, but later agreed to a 6-8 week residential placement for the parents and child at a hospital specialising in the assessment and treatment of severely disturbed adults, young people and families. The local authority asked the hospital to obtain an account from the mother of what had happened to the child who had died, an explanation for any inconsistencies between this and previous accounts, and an assessment of the mother’s acknowledgment of and insight into the events which had led

¹ Both of the following two cases concern proposed assessment/therapy at the Cassel Hospital. An adult is firstly assessed (perhaps for a day) and then more intensive work may be recommended which is carried out on a longer term residential basis over several weeks and it is this which is expensive.

to his death. At the end of the initial period, the hospital recommended a further 6-week assessment. The local authority opposed this because little had been done to address the questions to which it sought answers. The court directed that a further 6-8 week period of assessment should be carried out. The hospital strongly recommended further treatment for the family in a residential setting but neither the local NHS Trust nor the local authority was willing to fund this. The judge held that there was no power to direct the local authority to fund a further period of inpatient treatment for the mother and child. The Court of Appeal overturned his decision, holding that the key question was whether what was sought could broadly be classified as an assessment to enable the court to obtain information. The local authority appealed to the House of Lords on the question of whether the court had power to direct the therapeutic treatment of a parent under s 38 (6) of the Children Act 1989.

Held – allowing the appeal –

(1) The court's power to direct assessment of the child under s 38 (6) must be interpreted in light of the background to the Children Act 1989 and in particular in light of the clear division of responsibility between the local authority and the court. It was the role of the court to decide, without undue delay, and having carefully scrutinised the local authority's care plan, whether or not to make a care order. It was the responsibility of the local authority to decide how the child should be cared for once an order had been made. The court should resist the temptation to postpone making its final decision until any uncertainties had been resolved, if such a course conflicted with the division of responsibilities between court and local authority, and with the general principle that delay was not in the child's best interests.

(2) The purpose of s 38 (6) was to ensure that the court was in control of the evidence to be obtained about the child and put before the court. The purposes of the subsection were to enable the court to obtain the information it needed and to control the information-gathering activities of others. The court had the power under s 38 (6) to direct an examination or assessment of

the child including, where appropriate her relationship with her parents, the risks that her parents may present to her, and the ways in which those risks may be avoided or managed. The principal focus of the assessment must be the child. Any services which were provided must be ancillary to the aim of obtaining the necessary information to make a decision. The court had not power under s 38 (6) to ensure the provision of services beyond this either for the child or her family.

Per Lord Scott of Foscote obiter: If a programme of therapy for a parent, with a view to improving his or her parenting skills, fell outside the scope of s 38 (6), the court would have no power to direct the local authority or any other potential funder to undertake the funding of the programme

See also February 2006 Family Law on Re G. While the local authority had started care proceedings on the new born third child with a care plan for adoption, they did agree to an assessment at the Cassel Hospital who recommended the family remain there for a further period (eventually agreed as 4 months) of in-patient psychotherapy for the mother. The local authority and NHS trust declined to pay for this treatment.

Johnson J declined to order it under s 38 (6) but the Court of Appeal allowed the parents' appeal (Re G (A Child: Residential Assessment) (2004) 1 FLR 876. The family remained at the Cassel and the treatment was, in fact, successful and no final care order was necessary.

The local authority appealed to the House of Lords on the question of whether the court has power to direct the therapeutic treatment of a parent under s 38 (6).

See in particular the comment by Gillian Douglas on the case in February 2006 Family Law at pages 92 – 93. "This important decision has already been the subject of extensive comment by practitioners, with some concern being expressed that this may provide an easy way for local authorities and the Legal Services Commission (the House of Lords did not have to determine

upon whom the costs might fall) to avoid having to pay for expensive placements. But the House of Lords' judgment, particularly the speech of Baroness Hale of Richmond, goes 'back to basics' in reminding us of the original intentions of the framers of the Children Act 1989 and in particular their wish, in the light of the Cleveland Inquiry, to limit the number and type of investigations of a child pending a final hearing, and the 'forlorn hope' (in the words of Baroness Hale of Richmond) that care proceedings should normally take no more than 12 weeks. To avoid the kinds of delay which remain all too common even with the Public Law Protocol in place, extended placements of the kind being sought here simply do not fit into the process as it was originally envisaged. Hence, the insistence of the House of Lords on s 38 (6) as being intended for 'assessment' for the purpose of obtaining information to enable the court to reach a conclusion on the case. Hence too, the view of the House of Lords that the sub-section cannot be used to provide services for the child and still less the family.

The House of Lords accepted that it may be difficult to draw a sharp distinction between information-gathering and treatment and in so doing, accepted the view of Lord Browne-Wilkinson in *Re C (A Minor) (Interim Care Order: Residential Assessment)* (1997) AC 489 at 502 that the 'interaction between the child and his parents or other persons looking after him is an essential element in making any assessment of the child'. However, it rejected the argument put forward by, inter alia, Dr Roger Kennedy ...himself a practitioner at the Cassel Hospital, that it is 'bizarre' to maintain a distinction between 'two necessary aspects of clinical intervention so far as to make it an issue of law that the first aspect should be funded and the second aspect unfunded'...The doctor may well be right from the perspective of ethical and clinical practice but the legal question is whether s 38 (6) can be used as the vehicle for the provision of the services that the clinician identifies as being necessary to bring about change in the family. The House of Lords has given a negative answer to that question."

Funding of such s 38 (6) assessments

Lambeth London Borough Council v S, C, V and J (By His Guardian); Legal Services Commission intervening

(2005) 2 FLR 1171 Family Division Ryder J. See also Sept 2005 Fam Law at 695

There were care proceedings in which the judge found that the child had been injured by either the mother or her husband, with whom he lived and the mother had accepted that she failed to protect the child. The child went to live with his maternal grandmother. The local authority was granted a supervision order and contact conditions stipulated that he was not be alone in his mother's care. During the final hearing the child's putative father was stabbed to death by the mother's husband who was subsequently convicted of the manslaughter. A declaration had previously been made that the dead man was the child's father but recent DNA evidence proved equivocal and paternity remained an issue.

The child was then found in his mother's care. The local authority was granted a care order, the mother's application for a residence order was dismissed and both the mother and maternal grandmother agreed not to pursue applications for contact. In the meantime, the court ordered an assessment of the paternal grandmother under s 38 (6) of the Children Act 1989 as she wished to be considered as a possible carer for the child. Following a positive viability assessment she applied for a residential assessment at the Cassel Hospital for herself and the child pursuant to s 38 (6). This was opposed by the mother on the basis of doubts as to the child's paternity. The question arose as to the apportionment between the parties of the costs of such an assessment and the Legal Services Commission (LSC) argued that the local authority should pay the entire costs of £35,000.

Held – making the direction under s 38 (6) and apportioning the costs between the parties –

- 1) It was in the child's interests for the residential assessment to be undertaken despite the mother's objections. The paternal grandmother, who had always been part of the child's life, was the potential blood relative able to maintain the last surviving meaningful familial relationship with him. The two enjoyed de facto family life which the State had a positive obligation to promote.
- 2) A s 38 (6) assessment was not a placement by the local authority nor part of its case and such a direction was no more made against the local authority than against any other relevant party.
- 3) Costs of residential assessment under s 38 (6) could be apportioned between the parties – 50 % by the local authority and 25% each on the public funding certificates of the child and the grandmother – rather than being borne automatically by the local authority.
- 4) The funding of a s 38 (6) assessment was not beyond the powers of the LSC and it was neither necessary nor desirable, other than in the most exceptional case, for the Commission to intervene in children cases.

Expert Evidence

W v Oldham MBC (2006) 1 FLR 543 Court of Appeal Thorpe, Wall LJJ and Black J

Parents of a young baby appeal the court's decision to make a care order re their child. The baby had been admitted to hospital soon after his birth and was found to have suffered brain damage of a type which raised the possibility of non-accidental injury. A consultant radiologist confirmed that the child's injuries were consistent with an episode of shaking. The other medical experts, none of whom was properly capable of interpreting the critical MRI scan, deferred to the judgment of this consultant radiologist and reached a consensus that the probable cause of the brain damage was an episode of shaking. The local authority commenced care proceedings. On a number of occasions during the proceedings, the parents sought permission to instruct a second expert to report on the MRI scan. On each occasion permission was refused. The judge expressed herself to be satisfied with the medical

evidence and made a care order. On a renewed application for leave to appeal to the Court of Appeal, Thorpe LJ released the papers to a second expert. That expert expressed a clear and fundamental disagreement with the first expert, and supported the parents' case that the injuries had an innocent origin. In these circumstances, all the parties agreed that the order of the judge could not stand and that the case had to be remitted for rehearing.

Held – allowing the appeal by consent and remitting the case for rehearing –

1) In cases in which certain medical evidence became pivotal, for example, in cases involving non-accidental head injury or pathologically 'unascertained' infant death, and in which such evidence was, by its nature, difficult to challenge in the absence of further expert opinion, the court should be slow to decline an application for a second expert. It was clear in this case that there was only one medical expert capable of assessing the MRI scan and that the apparent medical consensus on which the judge relied depended upon the analysis of that expert being correct. In such circumstances, the parents were entitled to a second opinion.

Per curiam

1) While not wishing to encourage interlocutory appeals against case management decisions, if a second opinion on a critical medical issue is thought to be necessary, it is essential that, if the judge has refused permission to appeal, an application for permission to appeal is made to the appeal court at the earliest opportunity. Any such application should be marked as urgent.

2) Whilst a guardian may wish to remain neutral in a finding of fact hearing, the guardian does have a proactive role to play in ensuring that a case is ready for hearing. If a guardian takes the view that a second opinion sought by parents is properly necessary, he or she should not hesitate to say so.

Emergency Protection Orders and removal of children into care

X Council v B (Emergency Protection Orders) (2005) 1 FLR 341

Munby J

A number of lacunae in the statutory scheme made it especially important that both the local authority and the justices in the family proceedings court (FPC) approached every application for an EPO with an anxious awareness of the extreme gravity of the relief being sought and a scrupulous regard for the human rights of both the child and the parents.

Re X: Emergency Protection Orders, a decision of 16.3.06 in which McFarlane J set out a 'Good Practice' guidance:

"For ease of reference I will now draw together the observations I have made with some additional guidance:

- a) The 14 key points² made by Munby J in X Council v B should be copied and made available to the justices hearing an EPO on each and every occasion such an application is made;
- b) It is the duty of the applicant for an EPO to ensure that the X Council v B is brought to the court's attention of the bench;
- c) Mere lack of information or a need for assessment can never of themselves establish the existence of a genuine emergency sufficient to justify an EPO. The proper course in such a case is to consider application for a Child Assessment Order or issuing s 31 proceedings and seeking the court's directions under s 38 (6) for assessment;
- d) Evidence given to the justices should come from the best available source. In most cases, this will be from the social worker with direct knowledge of the case;

² See appendix 1 for a copy of these 14 "most important points", per Munby J in X Council v B at (2005) 1 FLR 367 para 57 onwards.

- e) Where there has been a case conference with respect to the child, the most recent case conference minutes should be produced to the court;
- f) Where the application is made without notice, if possible the applicant should be represented by a lawyer, whose duties will include ensuring that the court understands the legal criteria required both for an EPO and for an application without notice;
- g) The applicant must ensure that as full a note as possible of the hearing is prepared and given to the child's parents at the earliest possible opportunity;
- h) Unless it is impossible to do, every without notice hearing should either be tape-recorded or be recorded in writing by a full note being taken by a dedicated note taker who has no other role (such as clerk) to play in the hearing;
- i) When the matter is before the court at the first 'on notice' hearing the court should ensure that the parents have received a copy of the clerk's notes of the EPO hearing together with a copy of any material submitted to the court and a copy of the justices' reasons;
- j) Cases of emotional abuse will rarely, if ever, warrant an EPO, let alone an application without notice;
- k) Case of sexual abuse where the allegations are inchoate and non-specific, and where there is no evidence of immediate risk of harm to the child, will rarely warrant an EPO;
- l) Cases of fabricated or induced illness, where there is no medical evidence of immediate risk of direct physical harm to the child, will rarely warrant an EPO;

- m) Justices faced with an EPO application in a case of emotional abuse, non specific allegations of sexual abuse and/or fabricated or induced illness, should actively consider refusing the EPO application on the basis that the local authority should then issue an application for an ICO. Once an application for an ICO has been issued in such a case, it is likely that justices will consider that it should immediately be transferred up for determination by a county court or the High Court;
- n) The requirement that justices give detailed findings and reasons applies as much to an EPO application as it does to any other application. In a case of urgency, the decision may be announced and the order made with detailed reasons prepared thereafter;
- o) Where an application is made without notice, there is a need for the court to determine whether or not the hearing should proceed on a without notice basis (and to give reasons for that decision) independently of any subsequent decision upon the substantive EPO application.

Amount of contact provided between a mother and a new born child received into care

Kirklees MDC v S (Contact to Newborn Babies) (2006) 1 FLR 333 Bodey J

Facts: LA obtain EPO re a newborn baby and arrange foster care on discharge from hospital. M has history of drug and alcohol abuse. LA have serious concerns re her ability to care for her three older children and her failure to access ante-natal care and to make adequate arrangements for her new baby. Three older children now in their father's care. Under the EPO M to have daily supervised contact with the baby. LA arrange this by 'buying in' supervision from an agency. On the expiry of the EPO the FPC made an ICO for 8 days. The court directed that there was to 4 hours' contact each weekday covered by this interim order, and 2 hours' on the Saturday and Sunday. The LA was opposed to the weekend contact. The child was moved

to new foster parents who were prepared to accommodate contact at weekends and the contact took place as ordered. On the expiry of this order, a further ICO was made to last for approximately 4 weeks. The contact regime remained unaltered. The local authority appealed against the weekend contact.

Held – dismissing the appeal

An order for daily contact to a child in foster care where supervision by the LA was required was exceptionally unusual. There was no ‘principle’ that very young babies should have daily contact with the mother from whom they had been removed; neither was it possible to ignore the resource implications of the contact ordered. Each case must be looked at on its particular merits, with the welfare of the child paramount, so as to determine the ‘reasonable’ or ‘appropriate’ level of contact under the relevant subsection of s 34 of the Children Act 1989

Per curiam: It would be helpful to the court if local authorities wishing to pray in aid the expense of providing the level of contact sought could furnish the court with information about the actual costs involved.

2. CHILD ABDUCTION

Re A (Abduction: Consent: Habitual Residence) (2005) EWHC 2998 (Fam)
May 2006 Family Law, (2006) FLR (forthcoming) Sumner J

Facts: American father and British mother married in USA in 1999. Come to Wales near mother’s birthplace. Daughter born in Wales. Move to USA in 2003. Daughter has dual US and UK citizenship. M has immigration visa under which she is only allowed to stay in the States for max of 90 days at a time. She therefore leaves with the daughter on several occasions to stay with her family in Wales, the last being in October 2004. F joins her in Dec 2004. Marriage breaks down. F goes back to States just before Xmas.

Communicate by email/phone but F does not ask mother or daughter to return to him.

Aug 05, F issues under Hague Convention on Civil Aspects of International Child Abduction 1980 seeking return of his daughter.

M argues daughter not 'habitually resident' in USA at the relevant time and that F has 'consented to' or 'acquiesced' in their daughter remaining in Wales and that it would expose their daughter to 'grave risk of harm' if she was returned.

Held: - refusing to order the child's return –

- 1) Both parents had a settled intention to make their home in the USA in 2003 which lasted until the mother's refusal to return there with the father in Dec 2004. The mother had spent $\frac{3}{4}$ of this time period in America and her absences were only undertaken to advance her primary intention of obtaining permanent residence in the USA. The daughter's habitual residence was the USA either because that was the habitual residence of the mother or, even more clearly, of the father. The mother could not unilaterally alter the daughter's habitual residence.
- 2) The father had consented to the child remaining with the mother in Wales. Despite attempts by members of the mother's family to persuade him not to leave Wales, he had done so and had made clear that the daughter should remain with her mother. At no time in the following months did he indicate that he did not consent to this.
- 3) The father actively encouraged the mother to believe that he accepted the situation and that he was planning a life without her and their daughter. He had thus acquiesced in the mother's retention of the daughter.
- 4) Were the mother not to be allowed to enter the USA and remain there for the duration of the court proceedings to determine the daughter's future, there would be a grave risk of psychological harm to the

daughter if she had to return without the person who had been her main and sole carer for the last 14 months.

- 5) In the exercise of the court's discretion, the court would refuse to order the child's return to the USA.

C v B (2005) EWHC 2988 (Fam) Sir Mark Potter P. May 2006 Family Law, (2006) FLR (forthcoming).

Facts: The Australian father married the English mother in England. The couple worked in various countries before returning to live in Australia. 2 children now 9 and 5. H had some drink and drugs problems. Separation in 2003. M applies unsuccessfully to Family Court of Australia for permission to relocate permanently to the UK.

Judgment of the Australian Court examines issues of F's drinking and alleged violence and the effect of geographical separation on contact and the children's relationship with their father. H moves to a home only 1 hour's drive from the mother's home in Australia. Issues about the success or otherwise of contact.

1.8.05 M takes the children to England for a holiday with the father's consent but instead of returning at the end of the month remained here with them.

The father brought proceedings under the Hague Convention on the Civil Aspects of International Child Abduction 1980 for the children's return to Australia. There was no issue as to the wrongfulness of their retention in the UK under Art 3 of the Convention. The mother argued the Art 13(b) defence ie that the children would be exposed to the grave risk of physical or psychological harm or otherwise be place in an intolerable situation if returned or that the elder child objected to return to Australia having regard to his age and maturity. Her case was based not on any harm to the children as a direct result of the father's conduct, but upon the intolerable situation in she argued the children would find themselves if she relapsed into depression on return to Australia.

Held: - ordering the children's return, subject to undertakings given by the father

- 1) The Art 13 test was stringent. The authorities established that clear and compelling evidence was required of grave risk of harm or intolerability which had to be measured as substantial, not trivial, and of a severity much more than was inherent with the inevitable disruption and anxiety following an unwelcome return to the jurisdiction of habitual residence: *Re C (Abduction: Grave Risk of Psychological Harm)* (1999) 1 FLR 1145
- 2) In absence of the Art 13 threshold having been breached, it would be improper for the English court to usurp the function of the Australian court by way of a short cut.

The Art 13 defence was not made out. The elder child was not in fear of his father. There were risks that the mother would become depressed on return to Australia but the court could not be satisfied as to a grave risk that she would do so to the extent of losing her parenting ability.

Re J (Child Returned Abroad: Convention Rights) (2005) 2 FLR 803 House of Lords

Facts: Father was a Saudi citizen and the mother was a citizen of both the UK and Saudi Arabia. The couple were married in Saudi Arabia according to Shariah law. The child was born in the USA for medical reasons and was a citizen of the USA the UK and Saudi Arabia but was taken to live in Saudi Arabia shortly afterwards. The marriage encountered difficulties and the mother brought the child to England for a short time, but returned to Saudi Arabia to begin divorce proceedings in the Shariah court. A term of the agreed divorce was that the mother should not remove the child from Saudi Arabia without the father's consent. However, the parents then reconciled and remarried in accordance with Shariah law. The mother and child came to England again with the father's consent, initially for a holiday but later extended also with the father's consent to a longer stay while the mother pursued a one-year Master's degree course. The father visited the mother

and child in England but the marriage got into further difficulties. The mother resolved not to return to Saudi Arabia and presented a divorce petition in England, also applying to the Muslim Council in London to obtain a divorce according to Shariah law. The father applied to the English court seeking the child's summary return to Saudi Arabia. The judge made a residence order to the mother, with reasonable contact to the father, noting that this had been a difficult case and that but for the impact in Shariah of allegations made by the father of the mother's association with another man, he would have ordered the child's return for his future to be decided 'according to the norms of his own society'. The Court of Appeal overturned the judge's decision, on the basis that he had given too much weight to the risks associated with the allegations raised by the father against the mother. There were conflicting Court of Appeal authorities on the approach to be taken to applications for summary return to countries who were not signatories to the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention): one view being that the court could not be satisfied that return to the country of habitual residence was in the best interest of the child unless already satisfied that the welfare test would apply in that county; the other was that the approach which the court was required to take in Hague Convention cases, making no investigation and permitting no criticism of the family justice system in the country of habitual residence, was, save in exceptional circumstances, the best approach to cases concerning non-abduction countries.

Held - The mother's appeal was allowed by the House of Lords and the orders of the trial judge were restored.

1) In the exercise of a discretion in which various factors were relevant, the evaluation and balancing of those factors was a matter for the judge. Only if the judge's decision was so plainly wrong that he must have given far too much weight to a particular factor was the appellate court entitled to interfere.

2) The trial judge and the Court of Appeal had been wrong to leave out of account the absence of a jurisdiction in the home country to enable the

mother to bring the child back to England without the father's consent. There was no warrant, either in statute or authority, for the principles of the Hague Convention to be extended to countries which were not party to the Convention. In all non-Convention cases, the courts must act in accordance with the welfare of the individual child. A decision to return the child could only be reached on the basis that it was in his best interests to do so, not because the welfare principle had been superseded by some other consideration. The child's welfare was paramount and the specialist rules and concepts of the Hague Convention were not to be applied by analogy in a non-Convention case.

3) While the court had power to order immediate return to a foreign jurisdiction without conducting a full investigation of the merits, on the basis that a swift return home was in the best interest of the individual child, summary return should not be the automatic reaction to any and every unauthorised taking, or keeping of, a child from his home country. While the judge might find it convenient to start from the proposition that it was likely to be better for a child to return to his home country for any disputes about his future to be decided there, and a case against the return had to be made, there was no 'strong presumption' in favour of return. The decision had to be focused on the child in the particular circumstances of the case.

4) Factors such as connection with the countries concerned, including nationality, residence, language, race or ethnicity, religion, culture and education, were relevant, as was the child's familiarity with England and Wales. The extent to which it was relevant that the legal system of a country was different to the English system depended upon the facts of the particular case. It would be wrong to say that the future of every child within the jurisdiction should be decided according to a conception of child welfare which exactly corresponded to that current in England and Wales. However, if the foreign court had no choice but to do as one of the parties wished and were unable to consider differing views as to the individual child's best interests, then the English courts must ask whether it would be in the best interests of

the child to enable that dispute to be heard in England. The effect on the primary carer would also be relevant although again not decisive.

3. RESIDENCE AND CONTACT

G (Children) (2006) 1 FLR 771 Court of Appeal Ward, Clarke and Neuberger LJJ

Facts: The father sought parental responsibility in respect of the 2 children. The mother opposed anything other than supervised contact and was alleging domestic violence by the father. After careful negotiation, an agreement was reached between the parents, which involved the father being granted parental responsibility by consent, and a residence order being made in the mother's favour by consent. The mother withdrew the allegations of domestic violence. In relation to the outstanding issue of contact, the court ordered supervised contact. The judge was then invited to make the parental responsibility order and the residence order by consent. The judge, however, questioned the need for the residence order, taking the view that s1 (5) of the Children Act 1989 dictated that there was a presumption against making an order in cases concerning children. The judge concluded that the residence order should not be made, as there was no good reason in this case to upset the presumption given that there was no real dispute concerning residence.

Held: - allowing the appeal and making the residence order –

- (1) Section 1 (5) of the Children Act 1989 did not raise a presumption against the making of an order in cases concerning children. Section 1 (5) merely demanded of the court that it ask itself whether the making of an order would be better for the child than making no order at all.
- (2) The making of the residence order would be better for the child, as it would add to the mother's peace of mind; peace of mind being an

integral and important factor in producing stability in the lives of the children in the care of the parent. The order was also part of an agreement which was itself helping to dissipate the mutual mistrust of the parents and to encourage further agreement, and as such was advantageous to the children

- (3) The court should not be astute to go behind agreements carefully negotiated in difficult questions of this sort. These parties had not issued proceedings simply for the sake of getting the imprimatur of the court's judgment, but had litigated serious issues between them. Unless there was a very good reason to go behind the agreement they had reached, the court should have paid respect to the decision of the parents, whose views were that an order would be beneficial to the management of their children's lives, and that that management would be more beneficial with the order than without it.

Points: These were "quite bitterly contested contact proceedings" (per Ward LJ at p772, para 2) "where the mother was insistent on supervised contact and where there were allegations that the father had been guilty of domestic violence towards her. The mother was "anxious, as so many mothers are in those circumstances, that the order for parental responsibility would be used as a weapon to interfere in the day-to-day management and running of the children's lives and would be used therefore to unsettle or upset the decisions that she had to make from day-to-day when looking after the children."

The district judge "questioned the need for the residence order taking the view that s 1(5) of the Children Act 1989 in effect dictated that there was a presumption against making an order and there was no good reason to upset that presumption."

"On appeal, His Honour Judge Thompson took the view that his appellate duties demanded that he review the decision of the district judge, asking only whether it was plainly wrong and deciding that it could not be satisfied that the

district judge was plainly wrong. He, therefore, refused to allow the appeal": per Ward LJ, para 8.

Ward LJ: "I gave permission, remarking that it might be thought to be a storm in a teacup, but, nonetheless, there seemed to some point of principle here which it might be worth this court exploring."

The CA was referred to a decision of Munby J in *Re X and Y (Leave to Remove from Jurisdiction: No Order Principle)* (2001) 2 FLR 118.

Then Ward LJ goes on "There is, it seems, considerable academic learning as to the meaning to be given to s1 (5) and as to the purpose which it serves. I do not regard it necessary for the purposes of this judgment to enter those trouble waters because, in my view, this section is perfectly clear. It does not, in my judgment, create a presumption one way or another. All it demands is that before the court makes any order it must ask the question: will it be better for the child to make the order than make no order at all? The section itself gives the test to be applied and the question to be asked. If judges in each case do just that then they cannot go wrong, it being axiomatic that every case is different, and each case will depend upon its own peculiar facts."

Lord Justice Ward found that it would be better for these children to have the order as the order was important to the mother, it added to "peace of mind, and peace of mind is an integral and important factor in producing stability in the lives of the children in the care of the parent".

Accordingly LJ Ward held that the "district judge was plainly wrong to have refused to make this order" and he allowed the appeal. The appeal was by a consent order because the father who played no part in the appeal had written to the court indicating that he supported the mother's appeal and was still content that a residence order be made in her favour.

Re F (Family Proceedings: Section 37 Investigation) (2005) EWHC 2935 (Fam) Sumner J. April 2006 Family Law. (2006) FLR forthcoming.

A case in which the court was considering its options including requesting a section 37 investigation.

S 37 (2) Children Act 1989 provides: "Where the court gives a direction under this section the local authority concerned shall, when undertaking the investigation, consider whether they should –

- (a) apply for care order or for a supervision order with respect to the child;
- (b) provide services or assistance for the child or his family; or
- (c) take any other action with respect to the child."

S 37 (4) "The information shall be given to the court before the end of the period of eight weeks beginning with the date of the direction, unless the court otherwise directs."

Facts: For 5 years there had been continual proceedings re 2 boys now 9 and 7. Contact with the mother had ceased despite the efforts of the court, a child psychiatrist, a Cafcass officer, a therapist, the Tavistock Clinic and the National Youth Advocacy Service (NYAS). The children made accusations against the mother. The father, who now rejected the views of professionals which differed from his, argued that it was in the boys' best interests for the mother to give up her claim for contact and for the court to take no further action.

Held: -

1) The court should not order a s 37 investigation in the context of private law proceedings unless it appeared that the threshold criteria under s 31 were met and that it might be appropriate to make a public law order. There had to be a coherent care plan of which temporary or permanent removal was an integral part.

2) In this case, the court was not wholly satisfied that there was no alternative to a s 37 report, provided that a) the father would permit a child psychiatrist to

see the boys and assess their views and b) NYAS be invited to make all proper enquiries at the boys' school short of interviewing them.

“Sumner J did not rule out the eventual possibility of a s 37 order if the proposed strategies did not succeed”: (see comment in Family Law, page 261).

Re M (Contact: Long-term Best Interests) Court of Appeal Ward and Scott Baker LJJ (2006) 1 FLR 627

Facts: During a severe bout of depression, the mother mishandles the younger child, then 2 years old, on three or four occasions, and this led to the separation of the family, both children remaining with the father with regular contact with the mother, including staying contact. Following the F's remarriage, difficulties with the contact developed. In a crucial incident, known in the F's household as the 'the abduction of the younger child', the M, seeking to collect the children for staying contact pursuant to the court order, picked up the younger child in an attempt to take her to the car, but was prevented by the father's wife, who retrieved the child and took her inside the house. That was the last occasion on which either child saw the mother: thereafter the children refused further contact with the mother for fear that the mother would abduct them. Initially, a child psychiatrist recommended contact, but later, given the problems being experienced by the elder child, a moratorium of 2 years on direct contact was recommended, with indirect contact at reasonable intervals. Not only did the father fail to encourage the children to see the mother in a more positive light during that period, but the children were unaware that the mother had written to them regularly throughout. Even when the court welfare officer took presents from the mother to the children, they refused to open them and the father would not require them to do so. In view of the hostility to the mother expressed by the children, the court made an order for no direct or indirect contact, but did require F to send school report, general reports of progress and school photographs. 2 years later, M applied for a review of the contact, having not seen wither child for about 7 years. The court welfare officer reported the children remained as

implacably hostile to the mother as ever. The evidence, other than that from the children, the father and the father's wife, was entirely supportive of the mother as a loving and concerned parent. The judge ordered indirect contact by letters or cards on a quarterly basis to an accommodation address, and required the father to provide biannual reports on the children, including a recent photograph at least once a year, with a copy of their annual school reports, amended so as not to show the school address. The judge accepted that intervention should have been made sooner, and stated that if the children, now 15 and 13, had been younger he would have favoured further intervention, but that given their age, the fixed nature of their views, and their entrenched hostility to any proper resolution, the risk to their present equilibrium balance would be disproportionate to any benefit gained.

Held: - allowing the mother's appeal, directing that an expert report on the advisability of a full enquiry into the prospects of future contact, and transferring the matter to the High Court –

1) Not only the age, but also the understanding of the children had to be considered. The views of children of this age would ordinarily carry great weight, but their understanding had been corrupted by the malignancy of the views with which they had been force-fed over many years of their life.

2) The judge had acknowledged the harm that the children were suffering and would continue to suffer, and had acknowledged the failings of the court in dealing with that problem, but had failed to consider the option of a limited form of psychiatric or psychological assessment. There was an opportunity for the court to perform its duties, rather than abdicate them, by requiring that an expert view the papers and report to the court on the view of the court welfare officer, that more short-term harm would be done than long-term benefit gained by imposing contact, and report as to whether or not the same expert should see the children and conduct a full inquiry. Where, as in this case, the court had the picture that a parent was seeking without good reason, to eliminate the other parent from the child's, or children's lives, the court should not stand by and take no positive action. Justice to the children and the

deprived parent required the court to leave no stone unturned that might resolve situation and prevent long-term harm to the children.

Ward LJ: "The tragedy which begins the story is that this incident has been blown utterly out of proportion."

The abduction of H "had become known in the father's household as 'the abduction of H' which again is a flagrant mischaracterisation of what took place...As the Judge described it, this is: '...a monster misunderstanding all round, with extremely unfortunate consequences so far as these children are concerned.' The unfortunate consequences are that that was the last the children have seen of their mother. That was 8 years ago."

Re R (Residence: Shared Care: Children's Views) (2006) 1 FLR 491 Court of Appeal, Thorpe, Scott Baker and Lloyd LJ

Facts: Following the parents' separation their 2 children aged 10 and 8 spent time equally with each parent under a shared residence agreement reached following court proceedings. The mother had moved only a short distance from the family home. Each parent subsequently sought a residence order with F seeking a shared residence order as an alternative. The children strongly favoured a continuation of the shared residence arrangements.

The judge took the view that shared residence orders were not usually in the best interests of the children and that such orders were not appropriate unless there was an extremely good relationship between the parents. He made a residence order in favour of the mother with contact to the father. The children had been living with their mother under these arrangements for nearly a year by the time the father's appeal came to be dealt with.

Held – granting permission to appeal but dismissing the appeal –

- 1) The judge's approach to shared residence order was unsupportable. In particular, there was no basis for his conclusion that a harmonious relationship was a prerequisite to the views to such an order
- 2) The judge had paid insufficient regard to the views of the children. The views of the children demanded very careful judicial consideration which in this instance was lacking.
- 3) The F's right to a fair trial and to a judgment that was correctly directed on issues of law and principle had to be balanced against the harm to the children of further litigation. In light of the delay in this case and the fact that the children had been living with their mother for nearly a year, it would not be in their interests to initiate further litigation by ordering a retrial.

Thorpe LJ: "For the sake of clarity, I reiterate my opinion that the judge's approach to the issue of a shared residence order is insupportable. The judge seemingly refers to the significant shift in case-law over the course of the last 10 years, but does not seem to have understood the pace or direction of that movement. This court has recently confirmed the wisdom of the approach taken by Wall J (as he then was) in *A v A (Shared Residence)* (2004) EWHC 142 (Fam) (2004) 1 FLR 1195. As is plain from paras (121) – (126) of that judgment, a harmonious relationship between the parents is not a prerequisite of a shared care order. Indeed the presence of that sort of harmonious relationship is a contraindication of a shared residence order since such parents would fall within the no order principle emphasised by s1(5) of the Children Act 1989. For the judge simply to dismiss what was an important option on the basis that the parents had the potential for continuing emotional conflict is not good enough; and the fact that he adopted that approach at a very early stage suggests a closed mind to what was a very serious option, given that it was on foot; given that it had operated to the benefit of the children for the preceding 6 months and given the fact that it was the children's strong wish to see it continue."

Finding of fact hearings in contact involving allegations of domestic violence

Re A (Contact: Risk of Violence) (2006) 1 FLR 283 Black J

The contact hearing, listed for 3 days, occupied 7 days of court time and judgment had to be reserved for lack of time. Black J made findings of fact and gave guidance as to good practice.

- 1) It was vital that time estimates for cases were sufficient.
- 2) When a finding of fact was sought, the court expected and required the best possible evidence on which to make its decision; this was a particular problem in cases involving allegations of domestic violence, which had to be proved rigorously. Responsibility for preparation of the case remained with the parties' legal representatives, whose obligation it was to gather together and present the evidence, seeking specific directions when problems were encountered. A party applying for such directions should present the judge with a precise draft of the order sought by way of a solution to the particular problem, not simply with the problem and an invitation to solve it. It might be necessary for the judge to refuse to hear a matter until there had been proper preparation.
- 3) Full statements by the parties would identify which facts were in issue between them, and therefore needed proof, and which were accepted. Schedules of the allegations made and the responses to them, almost akin to a pleading and most useful in tabular form, would assist in achieving clarity
- 4) Where first hand evidence was available, either from a witness or in documentary form, it should be presented
- 5) Attention always had to be given to the issue of evidence that might be corroborative or, alternatively, gave rise to doubt about important allegations. It was normally sensible to give some thought to whether the police had records of reports of domestic incidents and whether there might be material police witnesses, just as consideration should be given to whether there might be medical evidence to corroborate an assertion that a particular assault had taken place and caused injuries.

4. REMOVAL FROM JURISDICTION

S 13 (1) (b) Children Act: "Where a residence order is in force with respect to a child, no person may ...remove him from the UKJ without either the written

consent of every person who has parental responsibility for the child or the leave of the court”

H v F (Refusal of Leave to remove a child from the jurisdiction) (2006) 1 FLR 776 Jeremy Richardson QC sitting as a deputy High Court Judge

Facts: The mother applied under s 13 (1) (b) of the CA89 for permission to remove her son, A, aged 9 $\frac{3}{4}$ from the UK to live with her permanently in Jamaica.³ The mother was of Jamaican origin and the F, who opposed the application, was also from the Caribbean. A resided with the mother but had regular with the father. M was unemployed and the F received incapacity benefit.

M wanted to return to Jamaica with her father to start up a bed and breakfast business in a property owned by her father.

Held: - refusing the application –

1) S1 CA89 applied so that A’s welfare was paramount. No presumption in favour of the applicant mother. Although the reasonable proposals of an applicant wishing to move abroad carried great weight, and the court was required to consider whether her motivation to move to Jamaica was genuine and not based upon a desire to reduce A’s contact with his father, the court was also required to consider whether her proposals were realistic, practical and well founded. It was also necessary to consider the father’s motivation and what the effect on A’s welfare would be of both granting and refusing the application. The test was no different simply because neither parent was affluent.

2) Although there was considerable hostility towards the father from the mother, it could not be said that her proposals were a malicious attempt to deny the father contact with A or were some sort of revenge following his remarriage. However, the M was capable of acting irrationally and there was a risk that she might place obstacles to contact with the father if she did relocate

to Jamaica with A. Moreover, her business proposals were speculative and unrealistic and the income that the proposed business might generate was insufficient to warrant the upheaval that the move would cause in A's life. The mother's proposals were ill conceived and, therefore, unreasonable. That was sufficient to defeat her application.

3) The evidence showed that F was committed to playing a meaningful role in A's life and that his reasons for opposing the application were based on a genuine concern for A's best interests. A was, at best, ambivalent about moving to Jamaica. The consequences of A being denied contact with his father would be considerable while there would only be limited advantages, if any from the move.

Footnote to this case – see para 46 of J Richardson QC's judgment at p 791 "It is also important to note that Jamaica is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Hague Convention). Consequently, if the mother, having taken A to Jamaica, refused to comply with an order of this court for his return upon contact, the father would have to take action in the Jamaican court himself. That would be very difficult and perhaps expensive, given his level of income and his remove from Jamaica."

This little boy was seeing his father every fortnight and each Wednesday. The Judge met the child and spoke to him about matters in accordance with the guidance given by the Court of Appeal in *B v B (Interviews and Listing) Arrangements* (1994) 2 FLR 489. The Judge found that the child had little 'practical insight' to what was involved in going to Jamaica. "What was important to him is that he should see his father. The impression I gleaned was that he saw Jamaica in terms of a rather grand holiday adventure, rather than as a place to live." para 53 of judgment.

"While the internet, emails and webcams are a useful means of long distance immediate communication, they would, in this case, not provide an adequate substitute for direct contact between A and his father": para 68.