

## 8. Children in public law cases

As you approach any application under Part IV of the Children Act 1989, please keep the *Protocol for Judicial Case Management in Public Law Children Act Cases* by your right hand. This chapter will not repeat the procedural guidance set out in that protocol.

### 8.1 The 'no delay' principle

Section 1(2) of the Act applies throughout. Its importance has recently been re-emphasised in *Kent County Council v G* [2005] UKHL 68.

### 8.2 The start of the process

A local authority has a wide duty to investigate potential harm to children at (s. 47) and the court has power to direct an investigation (s. 37). Subject to limited exceptions, all public law proceedings commence in the Family Proceedings Court. Decisions as to venue are governed by the Children (Allocation of Proceedings) Order 1991.

There are a variety of routes whereby the child can be removed from parental care.

- Section 43 - the child assessment order.
- Section 46 - the police protection order (maximum 72 hours).
- Section 44 - the emergency protection order 'EPO' (maximum period eight days) - 'reasonable cause to believe that the child is likely to suffer significant harm if he is not removed to accommodation provided by the local authority.'
- Section 38 - the interim care order 'ICO', once local authority have issued an application for a care or supervision order or upon making of a section 37 direction (usual maximum 28 days) - 'satisfied there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in section 31(2), i.e. that the threshold criteria are satisfied.

The EPO is only intended to be used when there is an emergency - see *Re C and B (Care Order; Future Harm)* [2001] 1 FLR 611, per Hale J. See more recently *X Council v B (Emergency Protection Orders)* [2005] 1 FLR 341, per Munby J, where there was a welcome emphasis on the need for local authority procedures to be Human Rights Act compliant before applying to remove children from parental care, and the need for the court to address the application in the light of the HRA.

Both the EPO and ICO are drastic orders vesting parental responsibility in the local authority. Applications should only be made without notice to parents in extreme circumstances; the evidence to justify removal must be compelling and the child should be represented by a guardian. The physical removal of a child from her mother at birth requires exceptional justification, see *P, C and S v UK* [2002] 2 FLR 631(ECHR).

Practitioners and the courts should be more aware of the limits that there must be to the proper use of 'without notice' emergency applications, see *Haringey LBC, CE and another intervening* [2004] EWHC 2580 (Fam), per Ryder J.

Before making an interim care order, the court must scrutinise the local authority's care plan and particularly the proposals for contact, inviting submissions from the parents and guardian. The Family Law Act 1996 introduced powers to insert exclusion requirements in emergency protection and interim care orders. Always consider whether the risk to the child can be managed by the exclusion of an adult from the family home under a court order, rather than the removal of the child to foster care.

### 8.3 Once the case is under way

- Sections 48 to 50 give the court extensive powers to trace and recover children and create the criminal offence of abduction of a child in care (which includes interim care).
- Note the court's control over the gathering of evidence (e.g. the child cannot be assessed without leave of the court) and the fact that such evidence is not privileged, see *Re L (Police Investigation: Privilege)* [1991] FLR 731, HL. Hearsay evidence is admissible by virtue of the Children (Admissibility of Hearsay Evidence) Order 1993.
- If an interim care order is granted, note the court's power to order/prohibit assessments pursuant to section 38(6). Such assessments must be assessments of the child and must not be treatment of a parent, see *Re C (A Minor) (Interim Care Order: Residential Assessment)* [1997] AC 489, *Kent County Council v G* [2005] UKHL 68.

#### 8.3.1 Who should be joined as party to the proceedings?

- A putative father without parental responsibility, see *Re B (Care Proceedings: Notification of Father without Parental Responsibility)* [1991] 2 FLR 408.
- The other usual application comes from a family member who seeks to offer care for the child. They must seek leave and section 10(9) applies. Note the judgment of Thorpe LJ in *Re J (Leave to Issue Application for a Residence Order)* [2003] 1 FLR 114, where there was an emphasis on the positive role of grandparents and a reminder that section 10(9) of the Act does not import a test that an applicant must show a good arguable case.
- It may be desirable to 'join' a person in respect of a particular issue (e.g. a potential perpetrator of harm to the child) without granting that person full party status, see *Re H (Care Proceedings: Intervener)* [2000] 1 FLR 775.

#### 8.3.2 Should the case be listed for a 'split hearing'?

- See *Re S (Care Proceedings: Split Hearing)* [1996] 2 FLR 773, per Bracewell J. Is it desirable to consider the factual 'threshold' evidence at an early hearing, leaving 'welfare' to be assessed in the light of the factual findings? Detailed procedural guidance was given by Wall J in *Re CB and JB (Care Proceedings: Guidelines)* [1998] 2 FLR 211.

- It is essential that the same judge takes both hearings, see *Re G (Split Trials)* [2001] 1 FLR 872, CA.

### **8.3.3 Which local authority should be designated?**

It is important to resolve this at an early stage (see s 31(8)). There are a depressing number of reported cases on this issue, which could be described as a rather a sterile debate. The leading authorities are now *Northamptonshire CC v Islington LBC* [1999] 2 FLR 881 and *C (A Child) v Plymouth City Council* [2000] 1 FLR 875, per Thorpe LJ. Essentially, you should try to establish where the child's ordinary residence was at the time the proceedings commenced and, in undertaking that exercise, 'stop the clock' so as to disregard any time the child spent accommodated by the local authority, but not during periods when a child is with parents, relative or friend, or if there are 'exceptional circumstances'. If, having carried out this exercise, the conclusion is that the child has no 'ordinary residence' in any local authority area, consider where the primary circumstances arose which carried the case over the section 31 threshold.

### **8.3.4 Twin track planning.**

Twin track planning is the process by which delay is avoided because the local authority has more than one plan from the outset to cover a number of potential options, rather than planning sequentially. Often, for example, whilst we are trying to return the child to its parents we must also be in a position to issue a placement application if rehabilitation fails. Try to ensure that the local authority will be in a position to present 'well-researched options' at the final hearing. If, say, adoption is the back-up plan, then pin them down to dates for the preparation of reports by the Adoption Panel, issue of the placement application, etc.

### **8.3.5 If the local authority wishes to withdraw.**

The local authority may only withdraw with leave and the application may be opposed, see *Re N (Leave to Withdraw Care Proceedings)* [2000] 1 FLR 134.

## **8.4 The threshold criteria**

### **8.4.1 Underlying philosophy**

'Taken to its logical conclusion, a simple "best interests" test would permit the state to intervene whenever it could show that the alternative arrangements proposed would serve the children's welfare better than those proposed by their parents. But "the child is not the child of the state" and it is important in a free society to maintain the rich diversity of lifestyles which is secured by permitting families a large measure of autonomy in the way in which they bring up their children. This is so even or perhaps particularly, in those families who through force of circumstances are in need of help from social services or other agencies. Only where their children are put at unacceptable risk should it be possible compulsorily to intervene. Once such a risk of harm to the child has been shown, however, his interest must clearly predominate.'

*Review of Child Care Law*, DHSS 1985, para 2.13

### 8.4.2 Central provision

The **central provision** in public law applications is section 31:

‘A court may only make a care order or a supervision order if it is satisfied:

- (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
- (b) the harm, or likelihood of harm, is attributable to:
  - (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
  - (ii) the child’s being beyond parental control.’

### 8.4.3 Key definitions

Under section 31(9):

- **‘Harm’** means ill-treatment or the impairment of health or development. Section 120 of the Adoption and Children Act 2002 introduces a gloss: ‘including, for example impairment suffered from seeing or hearing the ill treatment of another’.
- **‘Ill-treatment’** includes sexual abuse and forms of ill-treatment which are not physical.
- **‘Health’** means physical or mental health.
- **‘Development’** means physical, intellectual, emotional, social or behavioural development. Under section 31(10), the child’s development is judged subjectively: ‘that which could reasonably be expected of a similar child’. Under section 31(2), parental care is judged objectively - ‘what it would be reasonable to expect a parent to give to him’.
- **‘Satisfied’** The burden of proof in satisfying the court lies on the party who makes the allegation - almost always the local authority.

As to the standard of proof:

‘Where the matters in issue are facts the standard of proof in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability. This is the accepted general principal. There are exceptions..., but I can see no reason for thinking that family proceedings are, or should be, an exception. ... When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that, on the evidence, the occurrence of the event was more likely than not. ... Built into the preponderance of probability standard is a serious degree of flexibility in respect of the seriousness of the allegation. ... this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred.

The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.'

*Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563; *Re H and R* [1996] 1 FLR 80), per Lord Nicholls of Birkenhead (all others agreeing)

- **'Is suffering'**. *Re M (A Minor) (Care Order: Threshold Conditions)* [1994] 2 FLR 577, 583, per Lord Mackay of Clashfern (all others agreeing) contains guidance on the phrase 'is suffering':

'I think there is much to be said for the view that the hearing that Parliament contemplated was one which extended from the time the jurisdiction of the court is first invoked until the case is disposed of ... There is nothing in s.31(2) which in my opinion requires that the conditions to be satisfied are dissociated from the time of the making of the application by the local authority. I would conclude that ... where, at the time the application is to be disposed of, there are in place arrangements for the protection of the child by the local authority on an interim basis which protection has been continuously in place for some time, the relevant date with respect to which the court must be satisfied is the date on which the local authority initiated the procedure for protection under the Act from which these arrangements follow.'

- **'Likely to suffer'**. As to 'likely to suffer', see *Re H*, Lord Nicholls again (all other agreeing):

'In this context, Parliament cannot have been using likely in the sense of more likely than not ... the context shows that in s. 31(2) (a) likely is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case.'

But, per Lord Nicholls again (Lords Goff and Mustill agreeing, Lords Browne-Wilkinson and Lloyd dissenting on this point):

'... the rejection of a disputed allegation as not proved on the balance of probability leaves scope for the possibility that the non-proven allegation may be true after all ... In my view these unresolved judicial doubts and suspicions can no more form the basis of a conclusion that the second threshold condition in s 31(2)(a) has been established than they can form the basis of a conclusion that the first has been established.'

- **'Keep it in perspective'**.

'It is, of course, open to a court to conclude there is a real possibility that the child will suffer harm in the future although harm in the past has not been established. There will be cases where, although the alleged maltreatment itself is not proved, the evidence does establish a combination of profoundly worrying features affecting the care of the child within the family.'

- **'Attributable'**. The harm is 'attributable' if the court is satisfied that the child was in the joint care of the parents and that at least one of them is responsible for significant harm the threshold is crossed, even if the court cannot be not satisfied which parent was responsible, see *Re CB and JB (Care Proceedings: Guidelines)* [1998] 2 FLR 211, Wall J.

In exceptional cases where care is shared, harm is attributable if the threshold is crossed but it cannot be said by whom, e.g. where childminders are involved, see *Lancashire CC v B* [2000] 1 FLR 583, 589 C-E, per Lord Nicholls.

#### **8.4.5 What if the threshold is conceded?**

The agreement of the parties does not deprive the court of its duty to satisfy itself that the criteria are made out and the court should not take the lowest common denominator as the basis for the order, see *Re G (A Minor) (Care Proceedings)* [1994] 2 FLR 69, per Wall J. But the court need not conduct a full inquiry in every case. It is a matter of judicial discretion whether on the individual facts of the case the concession offered meets the welfare needs of the child, see *Re B (Agreed Findings of Fact)* [1998] 2 FLR 968 CA; *Re M (Threshold Criteria; Parental Concessions)* [1999] 2 FLR 728 CA.

#### **8.4.6 Record of findings**

Always ensure there is either:

- A document agreed between the parties and approved by the court setting out the threshold criteria, or
- A clear record of findings you have made on the disputed evidence - there is no real substitute for a full transcript.

This document should be attached to any orders you go on to make.

#### **8.4.7 If the threshold criteria are not established**

No court may use inherent powers to require children to be looked after or supervised or confer any aspect of parental responsibility on the local authority (s. 100(2)). You may however need to consider whether any section 8 orders are necessary.

### **8.5 Once the threshold is crossed**

The exercise of discretion must be based on facts which are properly established to the requisite standard of proof, see *Re M and R (Child Abuse; Evidence)* [1996] 2 FLR 195. Where a child has suffered significant harm, but the court has been unable to identify the perpetrator, the court should proceed at the welfare stage on the footing that each of the parents was a possible perpetrator. At the fact-finding stage, judges should express such views as they are able to in order to assist later assessors, see *Re O and N; Re B* [2003] 1 FLR 1169.

Whatever the order, the local authority have actually applied for, the court could now make:

- No order.

- A section 8 order, but:
  - not alongside a care order (s 9(1)),
  - not in the case of a residence order, if the proposed recipient doesn't want it, see *Re K (Care Order or Residence Order)* [1995]1 FLR 675,
  - not in the case of prohibited steps orders as a substitute for care orders, see *Nottinghamshire County Council v P* [1993] 2 FLR 134, CA.
  - note that Family Assistance Orders are often forgotten.
- A supervision order.
- A care order (unless the child has now reached the age of 17, 16 if married).
- In exceptional cases, consider a section 91(14) order preventing further application without leave.

**The child's welfare is now paramount** (s 1(1)) and the welfare checklist applies (s 1(3) and (4)).

The **principle of proportionality** must always be analysed alongside the welfare checklist:

'Intervention in the family must be proportionate, but the aim should be to reunite the family where the circumstances enable that, and the effort should be devoted towards that end. Cutting off all contact and the relationship between the child and their family is only justified by the overriding necessity of the interests of the child'.

*Re C and B (Care Order; Future Harm)* [2001]1 FLR 611, per Hale LJ.

Similarly, in *Re B (Care: Interference with Family Life)* [2003] 2 FLR 813, Thorpe LJ said that a judge must not sanction the removal of a child from his family under a care order 'unless he is satisfied that it is both necessary and proportionate and that no other less radical form of order would achieve the essential end of promoting the welfare of the children.'

## 8.6 Care order or supervision order?

The key distinction between a care and supervision order is that a care order conveys parental responsibility for the child to the local authority and gives the local authority power to determine the extent to which the parent may exercise parental responsibility (s 33(3)). Under a supervision order, parental responsibility remains with the parents, but the local authority has the duty to advise, assist and befriend the supervised child, supported by the powers in Schedule 3, Parts 1 and 2.

Where there is a plan for the child to be placed with a parent or perhaps a relative, a narrow dispute may arise as to whether the plan might more appropriately be implemented under a

care or supervision order. As always, the court should begin with a preference for the least interventionist option, see *Re O (Supervision Order)* [2001] 1 FLR 923, per Hale LJ.

There are many decided cases addressing this issue, many of which may no longer be good law following the Human Rights Act. The question to ask may be whether the local authority really needs to share parental responsibility to ensure the child's welfare.

### 8.7 End of court control

Once a care order has been made, the court relinquishes control to the local authority. So, do not make a care order or supervision without rigorously scrutinising the local authority's care plan. This is often the central issue in many care cases. Finding the right point at which the court should cede responsibility to the local authority can be an area of real difficulty. A useful summary is found in *Re J (Minors) (Care Plan)* [1994] 1 FLR 253.

Note also the general principle that there should be cooperation between the court and public authorities and Thorpe LJ's comments in *Re CH (Interim Care or Care Order)* [1998] 1 FLR 402: 'in my judgement the fact that a care order is the inevitable eventual outcome should not deflect the judge from using the litigation approach to its maximum effect.'

In *Re S (Minors) (Care Order; Implementation of Care Plan)* and *Re W (Minors) (Care Order; Adequacy of Care Plan)* [2002] 1 FLR 815, the House of Lords have reaffirmed that the court may not exercise control over the care plan once a care order has been made. However, the speech of Lord Nicholls recognises that the effect of Article 8 of the ECHR might involve the use of interim care orders until the final care plan is sufficiently specific: 'Whether that represented a small shift in emphasis from the present case law might be a moot point.'

When section 124 of the Children Act comes into force current practice will be given statutory force: 'no care order may be made with respect to a child until the court has considered a plan for the future care of the child prepared under section 31A.' The court also has a responsibility to consider proposed arrangements for contact before making care order (s 34(11)).

### 8.8 After the care order

Unless revoked, a care order lasts until the child's 18th birthday.

The court cannot impose conditions in a care order, see *Re T (A Minor) (Care Order: Conditions)* [1994] 2 FLR 423, CA.

But the court continues to control contact between a child and his family. The statutory framework is found at section 34 of the Act and section 34(1) emphasises the presumption of continuing contact. The welfare of the child is paramount in reaching section 34 decisions.

- The court may authorise the local authority to refuse contact between the child and parents or other family members (s 34(4)).

- A section 34 (4) order is not justified if it is made merely against the possibility that contact may need to be terminated at some stage in future if circumstances change, a principle most recently re-stated in *Re S (Care: Parental Contact)* [2005] 1 FLR 469.
- Section 34 should not be used, in effect, to control the local authority's implementation of its care plan, see *Re S (A Minor) (Care: Contact Order)* [1994] 2 FLR 222.
- For a useful summary of the potential advantages to a child of continuing contact to parents, even where the section 31 threshold criteria are satisfied and the child is in a permanent placement outside the family, see *Re E (A Minor) (Care Order: Contact)* [1994] 1 FLR 146.
- For a summary of the balancing exercise, see *Berkshire CC v B* [1997] 1 FLR 171, per Hale J.

A local authority is not entitled to make significant changes in the care plan without properly consulting and involving the parents - and presumably the child if of sufficient age and understanding, see *Re G (Care: Challenge to Local Authority's decision)* [2003] 2 FLR 42. Note the new powers of Independent Reviewing Officers created by Adoption and Children Act 2002 - is it appropriate for a court to identify issues for the IRO to address?

## 8.9 Subsidiary issues

- Recordings on orders can be very useful for future reference.
- *Publicity/openness.* The current approach is to hear these cases in private. But there is an interesting debate as to the extent to which this should continue. If an application is made, the court needs to balance Article 8 rights of parties with Article 10 rights of the press. See *Haringey LBC, CE and another intervening* [2004] EWHC 2580 (Fam), *Re S (Identification: Restriction on Publication)* [2005] 1 FLR 591; *Blunkett v Quinn* [2005] 1 FLR 648.
- *Transcripts.* Do consider directing a full transcript in appropriate cases.
- Pursuant to section 91(14), the court may order that no further application in relation to the child be made without leave. This is an order reserved for exceptional cases, see guidelines in *Re P (Section 91(14) Guidelines)* [1999] 2 FLR 573.
- *Disclosure.* The new framework is found in the Family Proceedings (Amendment No 4) Rules 2005. The court still retains a discretionary power to prohibit or direct disclosure where appropriate.

- *Injunctions*. Non-molestation orders can be made against parties or connected persons of the court's own motion in any family proceedings (s. 42(2)(b) Family Law Act). An exclusion order would require the usual application under the FLA. If protection is sought against a third party, the inherent jurisdiction of the High Court is likely to be required. Normally, reserve any further application in relation to these children to yourself.
- *Secure accommodation orders*. Governed by section 25 of the Act: 'accommodation provided for the purposes of restricting liberty'. The local authority may not keep a child in secure accommodation unless either:
  - The child has a history of absconding and is likely to abscond from any other description of accommodation, and if he absconds he is likely to suffer significant harm.
  - If he is kept in any other description of accommodation he is likely to injure himself or other persons.

Such an order is not incompatible with Article 5, see *Re K (A Child) (Secure Accommodation Order: Right to Liberty)* [2001] 1 FLR 562. Welfare is a relevant, but not the paramount, consideration when the court is considering whether to authorise the use of secure accommodation.

### 8.10 Discharge applications (s. 39)

Application may be made by local Authority, parent or child himself. It is determined in accordance with the section 1(1) welfare principles and should be dealt with by the judge who made the care order, if possible. No application to discharge can be made without leave within six months following the disposal of an earlier application.