

Private law update

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Parental alienation

Re C ('Parental Alienation'; Instruction of Expert) [2023] EWHC 345 (Fam)

- McFarlane P
- *"Where a child's relationship with one parent is not working for no apparent good reason, signs of alienation may be found on the part of the other parent. These may include portraying the other parent in an unduly negative light to the child, suggesting that the other parent does not love the child, providing unnecessary reassurance to the child about time with the other parent, contacting the child excessively when with the other parent, and making unfounded allegations or insinuations, particularly of sexual abuse."*

Parental alienation

"Much like an allegation of domestic abuse; the decision about whether or not a parent has alienated a child is a question of fact for the Court to resolve and not a diagnosis that can or should be offered by a psychologist

...

Most Family judges have, for some time, regarded the label of 'parental alienation', and the suggestion that there may be a diagnosable syndrome of that name, as being unhelpful. What is important, as with domestic abuse, is the particular behaviour that is found to have taken place within the individual family before the court, and the impact that that behaviour may have had on the relationship of a child with either or both of his/her parents. In this regard, the identification of 'alienating behaviour' should be the court's focus, rather than any quest to determine whether the label 'parental alienation' can be applied."

Parental alienation

Warwickshire County Council v The Mother & Ors [2023] EWHC 399 (Fam)

- Lieven J
- Considering Re S (Parental Alienation: Cult) [2020] 2 FLR 263; [2020] EWCA Civ 568 –
“In summary, in a situation of parental alienation the obligation on the court is to respond with exceptional diligence and take whatever effective measures are available.”
- *“There are a number of cases concerning alleged “parental alienation”. This is a highly fact specific scenario in which labels and generalisations are not in my view helpful.”*
- *“It needs to be accepted, and carefully considered, that the “muscularity” of Court intervention suggested at [13] of Re S may be in considerable tension with the wishes and feelings of the children.”*

Parental alienation

"73. The children's relationship with their Father is undoubtedly very important. All children have, save in the most exceptional circumstances, a right to know their parents and it is important for their long-term psychological wellbeing that that they should do so. But on the facts of this case that objective has been pursued in a way that is likely to be counterproductive and ultimately destructive of the children's wellbeing and quite possibly their long-term relationship with their father.

74. The Father undoubtedly loves the children and wants to do the best for them, but I fear that he became so fixated on preserving or re-creating his relationship with them that he has lost proper insight into the impact of his decisions and actions upon them. The fact that he was at some points supported by the LA and the Guardian does not abrogate the need for him to adopt a genuinely child-centred approach."

Parental alienation

Re T [2024] EWHC 59 (Fam)

- Arbuthnot J
- Consideration of whether to extend child arrangements order beyond 16
- “As a general observation, this case is exceptional but not unique and is an example of how little the court, even the High Court, can do when a party, whether the mother or father is determined to cut the other out of their children's lives. I have no doubt this has been the mother's aim for many years and the court has been able to recognise her manipulation but has been powerless to ensure that the children have a balanced upbringing knowing both parents and both sides of the family. It is a source of frustration and regret.”

Parental alienation

Family Justice Council Consultation on Draft Guidance on Responding to allegations of alienating behaviour (August 2023)

- Consultation is now closed.
- Essential reading – focus on case management, issues of psychological manipulation and experts.

Re A and B (Children: 'Parental Alienation') (No. 5) [2023] EWHC 1864 (Fam)

- Very helpful summary of the law and example of court's approach in a difficult case.

Child arrangements – shared lives with orders

LKM v NPM [2023] EWFC 118

- Williams J

“It is unsurprising that the courts have emphasised that the only authentic principle guiding the making of shared lives with (residence) orders is the paramount welfare of the child. However, the courts have made observations which inform the evaluation of paramount welfare. These indicate that shared lives with orders:

- Emphasise the fact that both parents are equal in the eyes of the law and can have the advantage of conveying a message that neither parent is in control, and that the court expects parents to co-operate with each other;*
- Require circumstances positively indicating that the child’s welfare would be served by one;*
- May be appropriate where it provides legal confirmation of the factual reality of a child’s life;*

Child arrangements – shared lives with orders

- iii. May be appropriate because it is psychologically beneficial in terms of the equality of their position and responsibilities;*
- iv. Do not require exceptional or unusual circumstances;*
- v. Do not require the child to be spending their time evenly or more or less evenly in the two homes;*
- vi. The inability of parents to work in harmony was not a reason for declining to make such an order, but nor is such inability by itself a reason for making such an order;*
- vii. Might be justified by the deliberate and sustained marginalisation of one parent by the other;*
- viii. May be appropriate even where the parents live in different countries."*

Special guardianship orders

AB v XX & Anor (Special Guardianship Orders) [2023] EWFC 287

- Lieven J
- Maternal uncle had applied for an SGO to enable him to collect children from school and look after them
- Application found to be an abuse of the SGO jurisdiction

Temporary removal to non-Hague country

T v T [2023] EWFC 243

- Peel J
- Application to take the child to Pakistan for Christmas – the Hague Convention not yet being in force between them
- Helpful summary of applicable law on temporary removal to non-Hague country – Re R [2013] EWCA Civ 1115
- Directions for appointment of QLR, but no QLR appointed

Removal of parental responsibility

F v M (Rev 1) [2023] EWFC 5

- Hayden J
- Parental responsibility cannot be removed from a father who was married to the mother at the time of birth. Section 4 only permits an unmarried father to have his parental responsibility revoked.
- Whilst this anomaly is '*profoundly uncomfortable*' in modern society, protection can be afforded via prohibited steps and specific issue orders.
- See also Sir Andrew McFarlane P in Sheikh Mohammed v Princess Haya [2021] EWHC 3480 (Fam) and Russell J in MZ v FZ and others [2022] All ER (D) 130, [2022] EWHC 295 (Fam)

Removal of parental responsibility

Re A (Parental Responsibility) [2023] EWCA Civ 689

- McFarlane P, Moylan & Dingemans LJ
- Declaration of incompatibility sought arising from the difference in treatment of married and unmarried fathers.
- Declaration refused.
- *"it is clear that the difference in the treatment of unmarried and married fathers is justified by the long-standing principle that married fathers (and mothers) should have irrevocable parental authority/responsibility for their children."*
- *"Whilst there is, therefore, a difference in treatment, and thus prima facie discrimination, as between married and unmarried fathers, the impact of that difference upon their children and the children's mothers is, in reality, minimal."*

Jade's Law – proposed legislation to remove PR from a parent convicted of murdering the other parent

Removal of parental responsibility

- Declarations of non-parentage' following DNA testing
- Conflicting approaches as to the test to be applied – is a welfare analysis necessary?
- **Re C & A (Children: Acquisition and Discharge of Parental Responsibility by an Unmarried Father) [2023] EWHC 516 (Fam)** - HHJ Moradifar, 9 Mar 23
- Welfare analysis not required as the foundation for acquiring PR is lost.
- **A Local Authority v SB & Ors [2023] EWFC 58** - HHJ Case, 23 Mar 23
- Welfare analysis required following Ryder LJ in Re D (withdrawal of parental responsibility) [2014] EWCA Civ 315

Section 91(14) orders – applicable principles

A v B (No 3) (Domestic Abuse – no direct Contact – 91(14)) [2023] EWFC 192 - HHJ Vincent

- "a. If findings of domestic abuse are made, even if the victim did not apply for this relief, the court is now bound to consider whether or not to make a s.91(14) order.*
- b. While such an order is 'the exception and not the rule', it does not follow that the case or its circumstances must somehow be adjudged to be 'exceptional' before such an order could be made.*
- c. The court should bear in mind that such orders represent a protective filter - not a bar on applications - and that there is considerable scope for their use in appropriate cases.*
- d. Whether the court makes an order is a matter for the court's discretion. There are many and varied circumstances in which it may be appropriate to make such an order. These may include cases in which there have been multiple applications ('repeated and unreasonable'), but that is not a necessary prerequisite. They may also include cases in which the court considers that an application would put the child concerned, or another individual, at risk of harm (without the need to find the 'risk' to be 'serious' or the likely 'harm' to be 'significant' or 'serious')."*

Section 91(14) orders – applicable principles

- “e. Subject to any inconsistency with the above, the Re P guidelines continue to apply.*
- f. If the court decides to make an order, it must consider:*
 - i. its duration, as to which, any term imposed should be proportionate to the harm the court is seeking to avoid, and in relation to which decision the court must explain its reasons;*
 - ii. whether the order should apply to all or only certain types of application under the CA 1989;*
 - iii. whether service of any subsequent application for leave should be prohibited pending initial judicial determination of that application.*
- g. In all of this, the welfare of the child is paramount. That said, any interference with a parent’s otherwise unfettered right of access to the court, including the duration of any such prohibition pending permission, must be proportionate to the harm the court is seeking to avoid.”*

Section 91(14) orders

P v F [2023] EWHC 2730 (Fam)

- MacDonald J
- Final CAO for indirect contact and section 91(14) order made at DRA.
- Orders made without the father having the opportunity to dispute the Cafcass report.
- Hearing in breach of father's Article rights.
- Section 91(14) order made without the necessary procedural safeguards for a LIP.

Section 91(14) orders – application for leave

Re S (CA 1989, S 91(14)) [2023] EWHC 1161 (Fam)

- McFarlane P
- There was not a proper hearing or fair process (shortcomings in the technology and conduct of the remote hearing).
- The test is not that in section 10(9), rather consideration of whether there is a *"need for renewed judicial investigation based upon an arguable case"*. This *"is not a formidable hurdle to surmount."*
- In addition the court must apply section 91A(4):
- "Where a person who is named in a section 91(14) order applies for leave to make an application of a specified kind, the court must, in determining whether to grant leave, consider whether there has been a material change of circumstances since the order was made."

Extended Civil Restraint Orders

- FPR rule 4.8, PD 4B
- *"An extended civil restraint order may be made where a party has persistently made applications which are totally without merit."*
- A person subject to an extended civil restraint order:
 - *"will be restrained from making applications in any court concerning any matter involving or relating to or touching upon or leading to the proceedings in which the order is made without first obtaining the permission of a judge identified in the order"*
- Applications covered by the order will be automatically struck out or dismissed.

Extended Civil Restraint Orders

Re P (a child) (Extended Civil Restraint Order – abusive applicant) [2023] EWFC 110

- HHJ Lynn Roberts
- Litigant subject to section 91(14) order but making repeated, meritless applications to vary or discharge non-molestation orders.
- Order made preventing applications in the Family Court or County Court *"involving or relating to or touching upon the Children Act proceedings or Family Law Act proceedings with which I have been dealing, without first obtaining the permission ..."*
- Order made for two years.

Case management – fact-findings

Ms X v Mr Y [2023] EWHC 3170 (Fam)

- Lieven J
- Where a party has received a custodial sentence for domestic abuse, unlikely to be necessary to conduct a fact-finding hearing
- No right in the Family Court to cross examine a witness – FPR 22.1
- “Essential that courts list cases with short and proportionate time estimates”

Case management – fact-findings

TRC v NS [2024] EWHC 80 (Fam)

- Lieven J
- Decision taken by magistrates to vacate a fact-finding was not wrong

Non-disclosure to party

Re T (children: non-disclosure) [2024] EWCA Civ 241

- Jackson and Baker LJs
- Paragraph 22: “A court that is asked to authorise non-disclosure in the interests of a child should therefore ask itself these questions:
- (1) Is the material relevant to the issues, or can it be excluded as being irrelevant or insufficiently relevant to them?
- (2) Would disclosure of the material involve a real possibility of significant harm to the child and, if so, of what nature and degree of probability?
- (3) Can the feared harm be addressed by measures to reduce its probability or likely impact?

Non-disclosure to party (cont.)

- (4) Taking account of the importance of the material to the issues in the case, what are the overall welfare advantages and disadvantages to the child from disclosure or non-disclosure?
- (5) Where the child's interests point towards non-disclosure, do those interests so compellingly outweigh the rights of the party deprived of disclosure that any non-disclosure is strictly necessary, giving proper weight to the consequences for that party in the particular circumstances?
- (6) Finally, if non-disclosure is appropriate, can it be limited in scope or duration so that the interference with the rights of others and the effect on the administration of justice is not disproportionate to the feared harm?

Privilege against self-incrimination

F v M [2021] EWHC 3133 (Fam)

P (Children)(Disclosure) [2022] EWCA Civ 495

F v M (Rev1) [2023] EWFC 5

- A father's unsuccessful attempts to seek an order that any statement or admission made by him in relations to the court's findings should not be disclosed to the police or CPS.
- Refused at first instance by Hayden J. Appeal to Court of Appeal unsuccessful. Permission to appeal to Supreme Court refused by CoA and SC.

"the father is not seeking a privilege not to incriminate himself but a privilege to self-incriminate with absolute protection as to the consequences. That would be contrary to the sound administration of justice" per Lord Burnett of Maldon CJ

- Findings of rape and coercive control disclosed by the Judge to the Home Secretary to provide full information for immigration decision (as sought by the mother).

Privilege against self-incrimination

Re O (Children) (Privilege against Self-Incrimination) [2023] EWFC 14

- Recorder Samuels KC
- The father sought an adjournment on the basis that he could not give assurances that he accepted findings against him without risking incriminating himself and his admissions being made available in the ongoing criminal prosecution.
- Application refused – *“His privilege against self-incrimination does not prevent him from advancing his case in the normal way, including giving evidence himself and / or by challenging the evidence of others. He cannot, however, be compelled to give evidence which marks the distinction between private and public law children proceedings and also marks the importance of the provisions of s.98 Children Act 1989.”*
- Adjournment not in children’s best interests.

Disclosure to the police

EBK v DLO [2023] EWHC 1074 (Fam)

- Mostyn J
- Detailed consideration of the law on contempt relating to disclosure of documents from private law proceedings police.
- FPR 12.73, 12.75 and PD 12G
- Information relating to the proceedings may be communicated to a professional acting in furtherance of child protection (this includes a specialist police officer – i.e. working in a CPU).
- A judgment or order may be communicated to a non-specialist officer for the purpose of a criminal investigation.

Disclosure to other public bodies

Re G (Disclosure of Fact-Finding Judgment to Secretary of State for the Home Department) [2023] EWHC 450 (Fam)

- Knowles J
- Disclosure to Home Office of judgment in which the mother's claims, integral to part of her asylum claim, were rejected.

Re Z (Disclosure to Social Work England: Findings of Domestic Abuse) [2023] EWHC 447 (Fam)

- Knowles J
- Disclosure to Social Work England of judgment in which findings of domestic abuse were made against the father (a social worker).
- Very helpful guidance in which the duty to consider disclosure is placed on the court to avoid the need for a victim of abuse to draw the matter to the court's attention.

Participation directions – no QLR

Re Z (prohibition on cross-examination: no QLR) [2024] EWFC 22

- MacFarlane P
- Despite PD3AB para 3.5, court is not prevented from asking questions on behalf of a party where it considers it must do so.
- In all cases the prohibited party should be required to file a list of questions they seek to have asked. This should be provided to the QLR or the court if there is none, but not the witness or other parties.

Transparency

Tickle v Father & Ors [2023] EWHC 2446 (Fam)

- Lieven J
- Principles applicable to an application by a member of the Press to report.
- Emphasising the right of members of the Press to attend hearings held in private (FPR 27.11(2)(f)), subject to the court's ability to excluded where necessary in the interests of the child, safety or protection of the parties or orderly conduct of the proceedings.

Any questions?