Forced into submissions

By David Beatson
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I am not sure if it's just me, but over the last year or so I have started to notice an increasing trend taken by courts in private law cases, particularly the magistrates' court, whereby contested final hearings are being pushed through and dealt with on the basis of submissions, regardless of pleas from me and/or my opponent and regardless (in my view) of whether this is really appropriate or not. I therefore thought I'd write a few words which act in less of an instructive or educative manner, but more an exploration to see if others are noticing the same trend, perhaps not dissimilar to an agony aunt column.

Now, I should hasten to add that this is not meant to come across as me jumping on an opportunity to take a few pots shots at the Justices. That really is not my intention. I am focusing on the Bench because that is where I see this trend being perpetuated.

This is also focused on final hearings which are dealing with welfare only. I am not lumping fact finds into this, where it is pretty rare for oral evidence not to be heard.

As we know, the court has wide case management powers at its disposal and discretion which this decision, as to what format a contested final hearing will follow, usually falls within. And, within reason, that has to be right. The ever-rising number of litigants-in-person and the odd rogue lawyer means that the court has to take a robust stance at times with its listing.

As we also know, the family courts are under extreme pressure in terms of listing, swamped with huge caseloads. If I ever dare to suggest to the court at the point of looking at listing a final hearing that we might require a whole day, or even more, I am looked at in horror and reminded that the family court system is at breaking point in terms of the number of cases that it has to progress. None of that is lost on me, it really isn't.

However, there are cases where the only way for the court to properly determine the issues in dispute is to get the parents in the box and for their evidence to be properly challenged. Sometimes this is abundantly clear, where there are significant and relevant factual disputes which require the court's determination so as to properly consider the application. On other

occasions it is not as evident, but still absolutely essential that the other side's case is properly tested and challenged.

In either case, the starting point that I face regularly from the Justices, usually before I have an opportunity to give my two (or twenty) cents is something along the lines of "We've read your note, Mr Beatson, but the Bench is of the view that we do not require to hear from the parents to come to a decision. We have their statements.". I understand their point, but it is a little more nuanced than that, as we all know.

If there is a s7 report then you normally have a bit more luck, but again the default position, in my experience, will be for the court to hear from Cafcass with no need to hear from the parents. Can that really be right? Sure, we can put our client's objections (or the reasonable ones, at least) to the report writer, but in terms of actually setting out, for example, what life is like for them at home, their relationship with the child/ren, and how the report writer has got those things wrong, the best person to give that evidence is the parent themselves.

There may be cases where it won't help for your client to give evidence, but sometimes it's necessary; whether that's for the court to get a holistic view of the case and the child's lived experiences by the people that know them best, as opposed to a myopic and snapshotted view from a professional who, whilst no doubt being hardworking and with the children's best interests at the forefront of their mind, really has had just a fleeting glimpse.

I find my face growing blue as I argue with the court, the legal advisor, sometimes my opponent although they're usually on board, and I would say at least 30% of the time it's in vain. I normally have to start not so subtlety mentioning the word "appeal" in my submissions more times than an ex-partner in one of Taylor Swift's songs. And the result is infinitely less successful or sonically pleasing.

A classic example is where you have a parent seeking 50/50 shared care. They're already having, say, 4 nights in 14, and they want 7. Let's not be cynical and assume that this is about CMS payments, and we have a parent that genuinely wants to be as big a part of their child's life as is possible. There are no safeguarding concerns, the time the child spends with them is positive, and they say there's no reason why it shouldn't be 50/50. The other side says keep it the same – the status quo – and if it ain't broke why fix it. The other side may say that there are reasons why your client cannot commit to 7 nights, often work commitments or similar, and your client says that's incorrect. It's essentially an issue of quantum, and I can understand in the absence of major factual disputes why the court may want to save court time by hearing

it on submissions, together with the fact that these parents have to co-parent moving forward, and being beaten up in the witness box on instruction by your fellow co-parent can leave a bad taste in the mouth moving forward. But in actuality, aren't the reasons why the other side says the proposed arrangement can't work and why they say it is not in the child's best interests necessary to explore and challenge? Shouldn't your client be able to listen to this and respond, and be similarly challenged? There's only so much detail they can put in their witness statements, particularly when they're invariably limited to 6 pages or less, and only so much detail you can take by way of instructions for your submissions. A further, and important point, is that you can't then be seen to be giving evidence on behalf of your client in your submissions.

The result that one can see from the above example is that the court are unable to find a reason to change the current circumstances. They stumble at that stage of the welfare checklist that the status quo is working, the child is seeing their parent, and they don't know what the likely effect of a change of circumstances would be, so they're not going to risk it. Or they might extend it to 5, maybe 6 nights. And if they (correctly in my view) make a joint lives with order, what is there really left to appeal?

This has happened in a number of my cases, and I am convinced that the number is growing. That might be confirmation bias, but I don't think so. And the result, if the client gets an outcome that they're less than thrilled about, is that then you're faced with giving advice on an appeal. This is an unsatisfactory outcome for everyone; the client's wallet takes a further battering, the court's time becomes further encroached upon, and more delay for the child before the matter is finally put to bed. In other words, the opposite of what the first instance court was aiming to achieve. And so often the worst part is that you're giving advice that boils down to the fact that, whilst the outcome may have been different if you'd been able to challenge the other party and the court heard oral evidence, and the decision is one where you, the client, or a judge, may disagree with – these do not necessarily constitute valid grounds to appeal.

The client is often left devastated, having been through lengthy proceedings which have had a significant toll on their mental and financial health, and either got nothing or something that is far short of what they consider to be fair and best for their child, you can sort of see where they're coming from. But it's the court's opinion, they haven't necessarily gotten the law wrong or anything like that, but just an outcome the client and often you don't like. You are then in that position of telling the client to not waste their money on an appeal.

I also take a minute to take off my sometimes jaded spectacles, and to put myself in their shoes. As a parent, and one whom hopefully has no major red flags or safeguarding concerns about them (my almost 3 year old regularly falls in ponds on my watch, but he bears at least some responsibility for that) that would preclude me from having an equal relationship with my child, this hits differently. I can completely empathise as to why a client would feel as though the court has completely let them and their child down.

So, what are the experiences of others? Are fully contested hearings with oral evidence becoming an endangered species? Is cross-examination being routinely Benched? Or are courts just tired of hearing me talk, and want me out of there as soon as is possible? Please treat the latter as rhetorical, as if this is the majority opinion then I think I'd rather continue in ignorance, but if it's not, what is the answer? Should we or indeed legal advisors being doing more to ensure that the court does not shoehorn cases into submissions? Being at the junior end of juniors, I'd welcome views on this.

There is most definitely a time and a place for final hearings to be dealt with on submissions. In fact, it often is more appropriate and in those circumstances I welcome it. But it shouldn't be the default, nor the starting position. Each case turns on its own facts, each family is different, and I do not think we can allow the court's approach to dissolve into a tick-box exercise.

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