Private Law Update

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1. RE S [2020] EWHC 217 (Fam)

This case is incredibly interesting and although care proceedings things started out in private law facing an all too familiar set of facts!

The case involved two children Y (11) and X (4). Both children have different fathers and both reside with their Mother. The Mother was separated from both. DNA testing was undertaken in respect of X's Father and once paternity was confirmed contact was sought. The Mother was resistant to contact from the outset and contacted the LA to raise her fears over contact as well as her concern that contact was being pursued to "get at her". Mother made complaints to the police that the father had attended her address and also complained to her GP she had been the victim of threats to kill. Proceedings were issued and Cafcass became involved. A staged contact approach was agreed and so it began supervised by M. A further court order made provision for unsupervised contact to commence every third Saturday increasing the duration up to 7 hours incrementally. Final orders were eventually made on a "lives with / lives with" basis.

The order lasted less than 3 months and Mother refused contact complaining that X had returned with a mark on her face. F had informed her of the mark stating X had bumped her head on a coffee table when playing. There was one more contact following this, after which the Mother informed the nursery that she thought F was physically abusing X. The context of course is that M was making repeated complaints to professionals before this stating she was anxious over the contact that was taking place.

X was taken to see the GP for matters unrelated to the allegations. During the consultation X was recorded as complaining about F hitting her and was seen to slap her own face. No injuries were noted but the GP advised M to defer contact and seek legal advice. M reported her concerns to the police later that day. The allegations made to the police were widened to include reports of X touching herself and the Father shouting and his partner crying. M then

made an application to vary the final order and made further allegations of harm perpetrated by F including one that X had been putting toy scissors down her pants saying “this is what daddy does”.

M reported her allegations to nursery, to the GP for a second time and even took X to see a psychologist in London to discuss the allegations and X’s behaviour. The matter was heard by the Lay Judges and overnight contact was suspended until the matter could be properly considered by the Court.

At the same time this was unfolding for X, Y had returned from contact with his Father saying he no longer wished to go. He alleged his Father had pushed him as he had spilled juice. M stopped contact and she accepted that she stopped promoting and encouraging contact.

Cafcass considered the allegations against X’s Father and made recommendations that the final order should be reinstated. It was and it remained in place for 2.5 months. Following the order being reinstated the Mother was deeply distressed and continued to make complaint and allegations against the Father. As a result of the continued allegations the police requested further information and so the LA conducted an assessment.

The SW confirmed there were no concerns in respect of her observations of X with her Father. During one visit to see M a further complaint was made that X had a red mark on her vagina - described as a bruise. SW challenged the M and commented that X had been happy and content in F’s care just three days earlier. The Mother in response became upset and asked the SW to leave. The LA investigation concluded that the allegations were unsubstantiated. It was said to be clear that the LA were concerned M may be putting emotional pressure on X.

Contact limped on and F contacted the LA complaining that M was not including him in decisions around school and was still hostile. Around the same time this complaint was being made to the LA by F the Mother reported further allegations of physical and implied sexual abuse to the police and later to the GP. The Mother gathered evidence herself by way of videos being taken of X talking about sexual abuse, she was subjected to a physical intimate examination and the Father was interviewed by the police. The investigations lead to NFA as the allegations could not be substantiated. The LA’s concerns increased over emotional abuse of X by M. The concerns mounted and so the LA issued care proceedings.

Roberts J made the following points in her judgment about this case:

63. It is my perception that local authorities may be ill-equipped to grapple with complex private law proceedings where there are allegations of abuse made by one parent against the other. Though it is trite to observe that social workers are well aware that children can be harmed in such situations, translating that knowledge into effective social work practice is rather more difficult. There is little specific assistance to be derived from the contents of *"Working Together To Safeguard Children".* Furthermore, an organisational resistance to sustained involvement in what is seen as essentially a dispute between separated parents may also be in play in circumstances where local authorities are hard pressed to manage their child protection workload. This case demonstrates the need to develop more coherent and child focused ways of working with families such as this one.

65. Second, this case emphasises the need for social workers to challenge appropriately the views and opinions of other professionals. The initial child protection conference on 10 August 2018 highlighted the need for the mother to seek a referral from her GP in order that she might have a mental health assessment. Her GP disagreed with that plan though I note that, as is sadly often the case and probably explicable by reference to his/her own considerable workload, the GP had not attended the child protection conference and thus did not have the benefit of information from all the professionals (including the police) involved with the family. It might have been helpful if the local authority had shared with the GP more information about the welter of allegations being made by the mother in June and July 2018. That process, together with respectful and appropriate professional challenge, might have resulted in a more appropriate assessment of the mother.

69. What strikes me as beyond argument was the unhelpful nature of the piecemeal assessments conducted by the local authority in this case. Assessments were brief and conducted in response to allegations made by the mother. This case cried out for a comprehensive assessment of the family which might have led to a more informed understanding of both the mother's anxieties around X's contact with her father and her failure to promote Y's contact with his father once that broke down in November 2017. It may also have identified at a much earlier date the need for either a psychological or a mental health assessment of the mother.

70. However, and for the avoidance of doubt, my criticisms of the social work practice in this case does not mean that professionals were to blame for the repeated allegations made by the mother which disrupted the children's relationship with their respective fathers. It was the mother's erroneous beliefs which drove the making of allegations and not the responses of professionals. This mother was in search of evidence to prove that which she wrongly

believed to be true and, no matter who she spoke to, the allegations aimed at AB kept coming. Even repeated attendances at court between October 2017 and May 2019 failed to modify the mother's behaviour. The videos made of X were a truly desperate and profoundly damaging step taken by the mother in pursuit of what she believed AB to be doing to their child.

71. In summary, what might be gleaned from this case of benefit to professionals working with complex private law disputes? The following matters suggest themselves:
a) repeated section 47 investigations, which are not anchored to a comprehensive family assessment, are ultimately of little benefit;

b) greater respect needs to be given to the views of professionals who see the family more often than most social workers ever do;

c) in the interests of effective multi-disciplinary working, social workers may, on occasion, have good reason to challenge the views of other professionals. Ensuring other professionals understand the local authority's concerns and are updated as to recent events may assist that process;

d) families should be referred to sources of guidance and support or offered it as part of the local authority's intervention. This should happen sooner rather than later. The mother might well have benefitted from guidance about separated parenting and child development. Both parents would also have benefitted from advice and guidance in managing contact handovers and in communicating with each other about their child;

e) mediation services (aimed at separated parents and with appropriate expertise in dealing with complex contact cases) might have helped this family at an early stage of the proceedings;

f) delay in commissioning expert assessments is damaging. This case would have benefitted from an early specialist assessment which might have obviated the need for these proceedings;

g) such cases require a high degree of professional skill from social workers and their managers and, in my view, should not be allocated to trainee or inexperienced social workers. These can be some of the most frustrating and difficult cases to work because of the high levels of entrenched parental conflict into which children are inevitably drawn. Better

training about the complex issues these cases demonstrate, such as repeated but unsubstantiated allegations of abuse, seems to me to be urgently needed both for local authority social workers and their managers.

2. Re H (Parental Alienation) [2019] EWHC 2723 (Fam)

The parents married in 2005 and had one child (H) they separated in August 2007, following which proceedings in respect of the child were issued. At the point of this judgment being handed down these were the 6th set of private law proceedings in respect of H. The Mother had sought to rely upon allegations of domestic violence during the proceedings, none of her allegations were substantiated. Contact had continued between H and his Father but this stopped in March 2018. On 11th May 2018 H messaged his Father about seeing him and then on 23rd May 2018 sent an angry message to him containing many accusations about his conduct. The Mother claimed to know nothing about the change in H's position towards his Father. Upon investigation it became clear that the Father had sent an inappropriate and intemperate email to the Mother. The language used by the Father was repeated by H and so the Court concluded that the Mother either allowed H to read the email or told him about it.

Dr Braier was instructed in the proceedings and completed an assessment of the family. It was Dr Braier's advice that:
"Mother's opinions about the father have been transferring to H gradually over time, and are now complete, with his independent rejection of contact. Mother herself would say that this is the result of H seeing 'who his father really is', but H's presentation suggests it is more likely to reflect alienation. Mother's views of the father are entrenched, and the prognosis for any shift in that view, if H remains with his mother, does not look promising."

"Unfortunately, therapeutic intervention aimed at a restoring H's relationship with his father whilst in the care of his mother is ill-advised, not only in light of the research evidence, but the failure of any previous threat of change of residence to change the course of this case or mum's stance, with the consequence that H now has no relationship with his father.

Even though there may be transient distress, particularly as H is now settled in his secondary school, with friends, this needs to be weighed against the need for removal from his mum, to protect him from further harm, in the form of the consequences of complete loss of his dad."

Dr Braier also warned that if the court were to contemplate transferring residence from the mother to the father there were risks to H; he may run away and he may not settle in his father's care if it was not properly supported.

A s37 investigation was undertaken by a social worker who had no previous experience of cases involving parental alienation. The report was described as being “woefully inadequate” and largely dismissed the report of Dr Braier. NYAS also completed a report which largely dismissed the expert recommendations.

Fortunately an ISW had completed a report which considered how H may be supported in transitioning to the Father’s care and a transition plan was prepared setting out how this may best be achieved.

Keenan J in weighing up all of the evidence and options available to the Court made the following decision:
31. I am wholly satisfied that, on the totality of the evidence, the only means by which H can have a full relationship with both of his parents would be to make a Child Arrangements Order that H live with his father. Such a step is not without the risk of causing H trauma and emotional harm.

3. Re A (Children) (Parental Alienation) [2019] EWFC

HHJ Wildblood QC published a judgment in private law proceedings involving parental alienation. He did so for the following reason:

“I think it is in the public interest for the wider community to see an example of how badly wrong things can go and how complex cases are where one parent (here the mother) alienates children from the other parent. It is also an example of how sensitive the issues are when an attempt is made to transfer the living arrangements of children from a residential parent (here, the mother) to the other parent (the father); the attempts to do so in this case failed badly.”

Proceedings were issued by the Father in 2011. In 2014 they were concluded with an order for indirect contact only. In 2016 the Father resurrected the proceedings and in 2017 they

came before HHJ Wildblood. At the time the matter had come before him there had been no factual determination of the issues and so there was no “definitive judgment explaining the difficulties within this family so that future work with the family members could be based upon that judgment.”

HHJ Wildblood comments that indirect contact in cases of parental alienation has obvious limitations and serves no purpose in maintaining any form of relationship between the father and the children. As the proceedings ran on there were numerous professionals working with the family and so professional fatigue develops. In addition to this each new professional coming into the case came with a new perspective and so there was no collaborative working

There is an obvious difficulty about how to approach the expressed wishes and feelings of children who are living in an alienating environment such as this. If children who have been alienated are asked whether they wish to have a relationship with the non-resident parent there is a likelihood that the alienation they have experienced will lead them to say 'no.' Therefore, in this type of case, the approach to the wishes and feelings of children has had to be approached with considerable care and professionalism. To respond simply on the basis of what children say in this type of situation is manifestly superficial and naive. The children in this case have been expressing wishes that they should not see their father for many years now. The lack of an effective and early enquiry into what was happening within this family meant that there was no effective intervention. That, in turn, has led to the children's expressed wishes being reinforced in their minds. It has also resulted in the mother being able to say 'we should listen to the children', rather than addressing the underlying difficulties.

I directed that the children should live with their father for just over seven weeks on the basis that they would not see their mother during that period. In my opinion, the handover went badly wrong; the children were extremely distressed and resistant to the attempts to place them with the father. The schools became very concerned about the level of distress that the children were showing, and the police became involved. Within a short period of time after the children started to live with their father, they ran away from their father several times, refused to eat and exhibited extreme distress. So extreme did matters become that, after further attempts at keeping the children with the father, they returned to their mother less than a month after the hearing. They have remained there since with the father having no more contact.

Dr Berelowitz and the Family Separation Clinic were involved with this family. Dr Berelowitz is noted to have made the following comments about the matter:

'this is one of the most disconcerting situations that I have encountered in 30 years of doing such work.'

'the mother has done very much more than simply not promoting the children's relationship with their father. Indeed, it is my impression that she has, at best, allowed the demonisation of the father and, at worst, actively encouraged this demonisation on the basis that it is right to do so… She is unable to perceive herself as being an agent or a cause.'

4. Re N (children) [2019] EWCA Civ 903 - (S91(14) Guidance)

The parties in this matter were involved in protracted litigation around contact which began in 2014. The Father had originally been granted overnight and holiday contact with the children, however, following allegations being made to the Local Authority and to the police that Mother's partner has physically abused the children the Mother applied for a variation of the final order. The s47investigation into the allegations revealed no evidence of physical abuse.

At a final hearing of Mother's application to vary, supervised contact, non molestation and prohibited steps orders were made. The Father was given permission to appeal. Hayden J heard the appeal and dismissed it but gave further direction for psychological assessment of the parties. Dr Craig was instructed and his report concluded there were no concerns over the Mother's capacity to care for the children. Concerns were raised in respect of the Father's emotional dysregulation at times of stress. CAT / DBT was recommended for the Father.

The Father did not attend the scheduled directions hearing but did submit a position statement requesting clear information from the court re the two therapies. Once this was received he would make the necessary arrangements to undergo the therapy so that unsupervised contact could take place.

The directions hearing turned into a hearing on evidence from the Guardian and from the Mother. The judge at the end of the hearing raised the issue of imposing a s91(14) order which would apply to both parents for two years. His intention was to block the court process

“because it is ratcheting up the emotional anti … Take away the court from it and let us just see if that calms things down a bit."

The Father lodges a later application to vary the order. He had also undertaken a course of psychotherapy. The matter came back before Mr Justice Hayden who did not have a bundle. The Mother was not in attendance. The Father’s application was dismissed - along with some scathing comments being made about the quality of the evidence provided by his therapist. The Father appealed.

Baker LJ reminds us of the basic principles to be considered before granting a s91(14) order in doing so he set out the following from the **Re T case**:

1. *Re T (A Child) (Suspension of Contact)* [2015] EWCA Civ 719 [2016] 1 FLR 916. Having referred to the guidance in *Re P*, he observed:
2.

"50. … Given the significant implications of this statutory intrusion into a party's ordinary ability to access justice, it is imperative that the court is satisfied that the parties affected:

(1) Are fully aware that the court is seised of an application, and is considering making such an order.

(2) Understand the meaning and effect of such an order.

(3) Have full knowledge of the evidential basis on which such an order is sought.

(4) Have a proper opportunity to make representations in relation to the making of such an order; this may of course mean adjourning the application for it to be made in writing and on notice.

51. These fundamental requirements obtain whether the parties are legally represented or not. It is, we suggest, even more critical that these requirements are observed when the party affected is unrepresented."

Baker LJ went on to say:

In this case, the possibility of the court making an order under s.91(14) was only raised at the end of the hearing on 14 March 2018 by the judge himself. It had not been mentioned by the mother's counsel in the course of argument. So far as this court is aware, it was not raised in any of the reports or preliminary documents filed for that hearing. It follows that, until the judge raised it himself, neither party was aware that the court was considering making such an order. There is no evidence that either party was aware of the meaning and effect of such an order, or the evidential basis for making it. The mother was present and represented and it could therefore be said that she had an opportunity to make representations in relation to the making of the order. But the father, who was not present, certainly did not have such an opportunity. He was, of course, aware of the hearing, and had received a hearing notice which warned that the court could make orders in his absence. But the order of 19 October 2017 had listed the case on 14 March 2018 for directions, not a substantive hearing. There was nothing to indicate to the father, a litigant in person, that the court would be making substantive orders at that hearing in respect of his future contact, let alone any order concluding the proceedings and preventing the parties from making further applications without the court's permission. In short, none of the fundamental requirements identified in *Re T* was satisfied.

5. In the matter of NY (A Child) [2019] UKSC 49 - (Hague Convention / Inherent Jurisdiction)

The parents in this matter were Israeli nationals who married in 2013 and had one child. They moved to the UK on 25 November 2018, both acknowledging that the marriage was in difficulties. It was said by both parents that they saw it as possible that in the event the marriage broke down they would return to live separately in Israel. There was no agreement that they would necessarily do so. Sadly the marriage broke down quickly and on 10 January 2019 the Father informed the Mother he intended to move back to Israel. The Father sought to insist the Mother also return with the child so that they may sort matters out. The Mother refused and informed the Father it was her intention to remain with their child in London.

The Father returned to Israel and quickly issues proceedings for divorce and custody of the child. The Father made an application under The Hague Convention on the basis that the Mother had wrongfully regained the child in England and Wales. The Mother argued that the child had become habitually resident in England and Wales, that the retention had not been wrongful as the Father had given the relevant consent on 10th January and that there was a

grave risk that a return to Israel would expose the child to physical or psychological harm or would otherwise place her in an intolerable situation.

The Mother's contentions were evaluated by the Judge in accordance with the approach set out in Re E. A reasonable assumption was made about the maximum level of risk to the child in light of all of the available evidence. The Father had offered numerous undertakings and so considering all that was available the judge ruled that the risk to the child did not reach the threshold required by article 13(b). The judge then considered whether he should exercise his discretion and return the child to Israel in the context of the policy aims of the Convention. The judge did not exercise his discretion to decline to order the child's return to Israel, he also added that if he had concluded the child was habitually resident in this country he would have reached the same decision to return under the inherent jurisdiction. The Mother appealed.

The Court of Appeal set aside the judgment. There had been no focus on the Father's assertion that there had been a wrongful retention. Once the judge had found there was no agreement between the parties to return to Israel of the marriage broke down, there was no ground for concluding that the Mother's retention had been wrongful. The Court went onto consider a return of the child under the inherent jurisdiction and although the judge at first instance had not made any decisions under the inherent jurisdiction they deemed him to have done so. The Court of Appeal on 18th June 2019 ordered the child's return under the inherent jurisdiction. There was a further appeal.

The matter came before the Supreme Court where it was noted that if the Court of Appeal, who are always invested with the powers of the judge against whose judgment an appeal is brought and so in this case invested with his inherent jurisdiction, was considering whether to make a fresh order on a different basis, it had to survey the relevant evidence for itself and be satisfied that the evidence was sufficiently up to date. The Mother sought to argue that the inherent jurisdiction was not available to the Court of Appeal and suggested that the summary order could have only been made as a specific issue order. In respect of this the Supreme Court stated the following:

"In principle the inherent jurisdiction was as fully available in relation to this child as was the jurisdiction to make a specific issue order. For, had she remained habitually resident in Israel on 18 June 2019, a summary order for the child's return there under the inherent jurisdiction, not being an order which "gives care of a child to any person", would have fallen neither within section 1(1)(d) of the 1986 Act nor otherwise within Part 1 of it; and the result would

have been the application of the bases of jurisdiction under common law, including that of the child's presence in England. If, alternatively, she had become habitually resident in England by that date, article 8(1) of Regulation B2R would, as in the case of a specific issue order, have endowed the court with jurisdiction to deploy the inherent jurisdiction in relation to her."

"44. The instruction in para 1.1 of Practice Direction 12D goes too far. There is no law which precludes the commencement of an application under the inherent jurisdiction unless the issue "cannot" be resolved under the 1989 Act. Some applications, such as for a summary order for the return of a child to a foreign state, can be commenced in the High Court as an application for the exercise of the inherent jurisdiction. But then, if the issue could have been determined under the 1989 Act as, for example, an application for a specific issue order, the policy reasons to which I have referred will need to be addressed. At the first hearing for directions the judge will need to be persuaded that, exceptionally, it was reasonable for the applicant to attempt to invoke the inherent jurisdiction. It may be that, for example, for reasons of urgency, of complexity or of the need for particular judicial expertise in the determination of a cross-border issue, the judge may be persuaded that the attempted invocation of the inherent jurisdiction was reasonable and that the application should proceed. Sometimes, however, she or he will decline to hear the application on the basis that the issue could satisfactorily be determined under the 1989 Act."

"55. I respectfully suggest, however, that, before making a summary order under the inherent jurisdiction for this child to be returned to Israel, the Court of Appeal should have given (but did not give) at least some consideration to eight further, linked, questions.

56. First, the court, which was sitting on 18 June 2019, should have considered whether the evidence before it was sufficiently up to date to enable it then to make the summary order. The mother's statement in answer to the claim under the Convention was dated 29 March 2019. In it she had devoted seven out of 67 paragraphs to assertions of the child's habitual residence in England and of particular circumstances said to demonstrate how happy and settled she had become. In his statement in reply dated 11 April the father had joined issue with the mother's assertions. The oral evidence given by the parties to the judge on 15 April had been limited to the issue of consent to the child's removal from Israel and so had not addressed these matters.

57. Second, the court should have considered whether the judge had made, or whether it could make, findings sufficient to justify the summary order. The only relevant finding made by the judge had been that on 10 January 2019, only seven weeks after her arrival in England, the child had retained habitual residence in Israel. Was that sufficient to justify the making of a summary order five months later? In the light of the policy in favour of the making of substantive welfare determinations by the courts of habitual residence, did there need to be inquiry into the child's habitual residence at the relevant date, which, in the absence of an application, was in this case the date of the proposed order?

58. Third, the court should have considered whether, in order sufficiently to identify what the child's welfare required for the purposes of a summary order, an inquiry should be conducted into any or all of the aspects of welfare specified in section 1(3) of the 1989 Act and, if so, how extensive that inquiry should be: see para 49 above. It might in particular have considered that the third of those aspects, namely "the likely effect on [the child] of any change in [her] circumstances", merited inquiry.

59. Fourth, the court should have considered whether in the light of Practice Direction 12J, an inquiry should be conducted into the disputed allegations made by the mother of domestic abuse and, if so, how extensive that inquiry should be: see para 50 above. The judge had made no findings about them. Instead, in accordance with the E case cited in para 12 above, he had, for the purposes of the claim under the Convention, made a reasonable assumption in relation to the maximum level of risk to the child arising out of any domestic abuse to be perpetrated by the father and had considered that such risk would be contained within acceptable limits by undertakings offered by the father, the enforceability of which in Israel the judge had not explored. Consideration should therefore have been given to whether, in a determination to be governed by the child's welfare, the judge's approach to the mother's allegations remained sufficient.

60. Fifth, the court should have considered whether, without identification in evidence of any arrangements for the child in Israel, in particular of where she and the mother would live, it would be appropriate to conclude that her welfare required her to return there.

61. Sixth, the court should have considered whether, in the light of its consideration of the five matters identified above, any oral evidence should be given by the parties and, if so, upon what aspects and to what extent.

62. Seventh, the court should have considered whether, in the light of its consideration of the same matters, a CAFCASS officer should be directed to prepare a report and, if so, upon what aspects and to what extent. It is noteworthy that in the L case discussed in para 43 above, a CAFCASS report had been prepared. It had been designed to ascertain the boy's wishes and feelings and so was apparently made as if pursuant to section 1(3)(a) of the 1989 Act: see para 14 of Baroness Hale's judgment. In her careful weighing, in paras 34 to 37 of her judgment, of the welfare considerations which militated both in favour of, and against, the boy's return to Texas, Baroness Hale relied to a significant extent upon the content of the CAFCASS report.

63. Eighth, the court should have considered whether it needed to compare the relative abilities of the Rabbinical Court in Jerusalem and the Family Court in London to reach a swift resolution of the substantive issues between the parents in relation to the child and to satisfy itself that the Rabbinical Court had power to authorise the mother to relocate with the child back to England: see para 34 above.

64. The effect of the above is not to submerge efficient exercise of the inherent jurisdiction to make a summary order within an ocean of onerous judicial obligations. The linked obligations are obligations only to consider the eight specified matters. There is no need for us to contemplate what the proper outcome of the Court of Appeal's consideration of them might have been. It is the fact that it failed even to consider them which yields the conclusion that it conducted no defensible analysis of the child's welfare prior to its determination to make the summary order and which led this court to uphold the mother's appeal."

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