

1KBW

**1KBW TALKS FOR
ASPIRING FAMILY LAW
BARRISTERS
CHILDREN PROCEEDINGS**

19 JANUARY 2022

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CHILDREN PROCEEDINGS

Programme:

- » Chair – Victoria Green (1KBW)
- » The scope of children proceedings: public, private and international – Kelan McHugh (1KBW)
- » Guiding principles – Section 1 of the Children Act 1989 – Tom Dance (1KBW)
- » Parental alienation and the judicial approach to transfer of residence – Katie Goldstraw (guest speaker)
- » Relocation proceedings – Ben Woolstencroft (guest speaker)
- » Dealing with domestic abuse in children proceedings – Tara Dunne (guest speaker)
- » Working as a Children's Guardian – Creanna Dodson (guest speaker)
- » Q&A with the panel

The scope of children proceedings: public, private and international

Kelan McHugh (1KBW)

- » CHILDREN ACT 1989 - Parts I and II
 - Section 8 - 'lives with', 'spends time with', 'prohibited steps order', 'specific issue order'
 - Section 13 - removal from the jurisdiction, name change
 - Section 14A - 14G - Special Guardianship
- » CHILDREN ACT 1989 - Part IV
 - Section 31 - Care and Supervision Orders
- » ADOPTION AND CHILDREN ACT 2002
 - Section 21 - Placement Orders
 - Sections 46 - 51 - Adoption Orders
- » HAGUE CONVENTION 1980
- » INHERENT JURISDICTION

Guiding principles - Section 1 of the Children Act 1989

Tom Dance (1KBW)

CHILDREN ACT 1989 - Part I

» Section 1(1)

When a court determines any question with respect to—

- (a) the upbringing of a child; or
- (b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration.

» Section 1(2)

In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

» Section 1(2A) & (2B)

A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.

In subsection (2A) "involvement" means involvement of some kind, either direct or indirect, but not any particular division of a child's time.

» Section 1(3)

In the circumstances mentioned in subsection (4), a court shall have regard in particular to—

- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- (b) his physical, emotional and educational needs;
- (c) the likely effect on him of any change in his circumstances;
- (d) his age, sex, background and any characteristics of his which the court considers relevant;
- (e) any harm which he has suffered or is at risk of suffering;
- (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
- (g) the range of powers available to the court under this Act in the proceedings in question.

» Section 1(5)

Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.

Parental alienation: The judicial approach to transfer of residence

Katie Goldstraw (Guest Speaker)

» Background

- Cafcass definition of parental alienation is 'sufficient' (Re S (Parental Alienation: Cult) [2020] EWCA Civ 568).
- Section 7 Children Act 1989 welfare report must be reasonable and proportionate (Re B-S (Children) [2013] EWCA Civ 1146).
- Rule 16.4 for those complex cases such as Re L (a child) [2019] EWHC 867 (Fam).
- The transfer of residence should be a necessary and proportionate Re H (Parental Alienation) [2019] EWHC 2723 (Fam).
- Experts and Assessors Part 25 Family Procedure Rules 2010:
- Should we focus more on the label of parental alienation or the behaviours? (Re S (A Child-Transfer of Residence) [2010] 1 FLR 1785).
- S.13 Children and Families Act 2014

» Challenges

- Section (3)(a) Children Act 1989- ascertainable compared to expressed wishes and feelings (Re D (A Child) [2006] UKHL 51).
- H (Children) [2014] EWCA Civ 733 'ascertainable' goes beyond mere expressions.
- Re E (A Child) [2011] EWHC 3521 (Fam)- why might a child express firm opposition to contact?

» Attempts to Streamline

- Section 8 Children Act 1989 and Child Arrangement Orders.
- Section 11 Children and Families Act 2014.
- Practice Direction 12J duty on the court to consider the nature of any admission or evidence of harm raised.
- Re H (Parental Alienation) [2019] EWHC 2723 (Fam) - recognises the potential short-term trauma of a transfer of residence.
- Re L (A Child) [2019] EWHC 867 (Fam)- judiciary must determine where the welfare balance points.
- Re A (Children) [2009] EWCA Civ 1141- the transfer of residence is a judicial weapon of last resort.
- Re L (A Child) [2019] EWHC 867 (Fam)- the judge wanted to distance himself from this language for risk of moving the focus away from welfare consideration.

» Future Challenges

- Re S [2020] EWHC 217 (Fam)- was 'not a classic case of parental alienation' highlights the dangers of using labels without a statutory footing.
- Re S (Minors) (Access: Religious Upbringing) [1992] 2 FLR 313 children are not packaging to be moved around.

Relocation Proceedings

Ben Woolstencroft (Guest Speaker)

1. Background

- » Sections 8 and 13 Children Act 1989.
- » Hague Convention 1980.

2. Legal Principles

- » Old Law: *Payne v Payne* [2001] EWCA Civ 166 - presumption in favour of the relocating parent and the *Payne* discipline.
- » Mostyn J in *NJ v OV* [2014] EWHC 4130 (Fam) at [4]: “It is my opinion that outside the sphere of State intervention for the purposes of child protection, the hardest decision that a judge ever has to make in the field of family law, or, for that matter, in any field, is a relocation decision.”
- » Current Law: *Re F (A Child) (International Relocation Case)* [2015] EWCA Civ 882 - no presumption, the welfare of the child is the paramount consideration.

3. Impact of the Pandemic

- » *F v G* [2021] EWFC B12 – the same principles from *Re F* continue to apply.

Dealing with domestic abuse in children proceedings

Tara Dunne (Guest Speaker)

- » F v M [2021] EWFC 4 – January 2021
In the post script, Hayden J says:
“An intense focus on particular and specified incidents [in a Scott Schedule] may be a counterproductive exercise. It carries the risk of obscuring the serious nature of harm perpetrated in a pattern of behaviour”
- » Re H-N and Others (children) (domestic abuse: finding of fact hearings) [2021] EWCA Civ 448 – March 2021
- » AA v BB [2021] EWHC 1822 (Fam) – July 2021
- » John Jackson at Parklane Plowden: ‘The tension between domestic abuse, control and coercion, Scott Schedules and the welfare of the child,’ [2020] Fam Law 218

Working as a Children's Guardian

Creanna Dodson (Guest Speaker)

- » Cafcass
- » Role of the Children's Guardian in care proceedings
- » Private law proceedings - Family Court Advisor
- » Section 7 Children Act 1989 - Welfare report
- » FPR 2010 - Part 16 and Rule 16.4