WHITE PAPER CONFERENCE

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How do you encourage the Court to promote the welfare of children by developing statutory provisions purposefully and flexibly or "reading them down" in a convention complaint way?

Introduction

1. The welfare of the child is enshrined in situations where the English Court is called upon to make decisions about the upbringing of a child by virtue of s1 Children Act 1898, by which the welfare of the child is the Court's paramount consideration. In this talk I shall consider some of the ways in which the English Court pays regard to international convention in its understanding and interpretation of a child's welfare needs and best interests.

2. The introduction of the Human Rights Act 1993 (HRA) created a seachange in the approach which had previously been taken by the English courts to the provisions of European Convention for the Protection of Human Rights and Freedoms (ECHR). Whilst previously the Courts had paid some regard to the ECHR, by virtue of s3 HRA 1993 the landscape changed. It provided that:-

> "(1) So far as it is possible to do so, primary legislation and subordinate legislation **must** be read and given effect in a way which is compatible with the Convention rights.
>
> (2) This section—
>
> (a) applies to primary legislation and subordinate legislation whenever enacted;
>
> (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
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> (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the

incompatibility."

3. Articles 6 and 8 of the ECHR have, since the introduction of the 1993 Act, proved fertile ground for the development of legal thought about what constitutes the best interests of the child.

4. Article 6 places firm emphasis upon the right to a fair trial by providing that:-

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

5. Article 8 creates the right to respect for private and family life in the following terms:-

> **"**1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

6. In cases in the family courts involving children, the rights of both parents and children are engaged. In a series of cases the European Court has decided that where there is tension between Art 8 rights of child and parents, the rights of the child prevail (e.g. *Yousef v The Netherlands* [2003] 1 FLR 210). This of course has parallels with s 1 of the Children Act 1989.

7. In this talk, I shall look at aspects of the importance of articles 6 and 8 in shaping the approach taken by the English courts to issues relating to the upbringing of children and their welfare, and I shall consider two main themes. One is the value to the child of living within his/ her own family and maintaining ties with family

members. The other is the importance of fair process when the Court is considering those issues, particularly when they may involve the severing of ties to an important family member. I shall go on to consider how an understanding of the concept of the requirements of a fair trial is changing our views in our approach to vulnerable witnesses, and also look briefly at how it may have influenced what is a topic in its own right, the question of children giving evidence in family proceedings.

8. In considering the role of the ECHR, it is also important to remember one other aspect of the HRA 1998. Section 7 provides that:-

> (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
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> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
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> (b) rely on the Convention right or rights concerned in any legal proceedings,
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> but only if he is (or would be) a victim of the unlawful act.

The limits to the "reading down" of legislation

9. Although s3 of the HRA 1993 provided that primary and subordinate legislation must be read and giving effect to in a way that is compatible with Convention rights, there are limits to the extent to which legislation can be "read down". One by now classic example of this comes from the arena of children's public law. There is a long history as to the extent to the court which the Court should take into account care plans made by a local authority, and as to the extent to which the Court is able to supervise or control the care plan for a child and its implementation. In *Re S (Care Order: Implementation of Care Plan), Re W (Minors) (Care Order: Adequacy of Care Plan)* [2002] UKHL 10, [2002] 1 FLR 815 the Court of Appeal had approved a mechanism by which the care plan which a local authority made for child could be "starred" to provide for ongoing governance by the Court of the starred matters. However, the House of Lords gave that concept short shrift. The House of Lords held that although s3 of the Human Rights Act 1998 required primary legislation to be read and given effect in a way compatible with Convention rights as far as possible, the judicial innovation of starred milestones to a care plan passed well beyond the boundary of interpretation, and would constitute amendment to legislation which was

not permissible. Parliament had set out its clear intention in the Children Act 1989 that once a care order had been made, the responsibility for a child's care passed to the local authority, and was no longer with the Court. This division of responsibility was a cardinal principle of the Act.

10. After the decision in the case of *Re S*, Parliament made some alteration to the status of the care plan. The Adoption and Children Act 2002 introduced new s31 (3A) to the effect that no care order could be made until the Court had considered a care plan. This was further amended with effect from 22 April 2014 by the Children and Families Act 2014 which provided that a Court deciding whether to make a care order is required to consider the permanence provisions of the care plan but not the remainder of the care plan. (Permanence provisions are those which provide for the child's long term living arrangements – with parent, family member, adoption etc.)

11. However, in addition to Parliamentary reform, and despite the limitations on "reading down", case law has gone on to put some fetters on local authority autonomy after a care order has been made.

12. In the case of *Gv N County Council* [2009] 1 FLR 774 McFarlane J (as he was) held that where a care order had been made on the basis of a detailed care plan that a child was to live with parents, a local authority was obliged to carry out some form of formal assessment involving the parents and bringing all the evidence together in a considered way if a change in the care plan to moving the children permanently away from the parents was to be seen as necessary and proportionate in ECHR terms. He also held that the procedure adopted by the mother's solicitors in that case, which was to issue a freestanding application under the HRA for an injunction, was right (although on the particular facts of the case he decided not to order an injunction for the return of the child to the mother).

13. In the case of *Re DE (Child under Care Order: Injunction under Human Rights Act 1998)* [2014] EWFC 6, [2015] 1 FLR 1001 Baker J dealt with a similar situation. The parents had differing degrees of cognitive impairment or learning disabilities. The child had been placed with the parents under a care order which included undertaking the local authority would not remove child without giving the parents 7

days notice of its intention to do so unless an emergency situation arose. Problems arose and the local authority sought to remove the child. Baker J confirmed that the Court had power to grant an injunction case under the Human Rights Act 1993 to restrain a local authority from removing a child from the parents care in an appropriate case, and also gave guidance, with the approval of Sir James Munby P as to the measures which should be taken in the future in similar cases. These included a provision that in every case where a care order was made on the basis of a care plan, providing that a child should live at home with his or her parents, it should be a term of the care plan, and a recital in the care order, that the local authority agreed to give not less than 14 days' notice of a removal of the child, save in an emergency; and that a local authority considering changing the plan and removing the child permanently from the family must have regard to the fact that permanent placement outside the family was to be preferred only as a last resort where nothing else would do and must rigorously analyse all the realistic options, considering the arguments for and against each option. Furthermore, it must involve the parents properly in the decision-making process. In addition, the guidance given was to the effect that on hearing an application for an injunction under s 8 of the HRA 1998 to restrain a local authority removing a child living at home under a care order pending determination of an application to discharge the care order, the court should normally grant the injunction unless the child's welfare required his immediate removal from the family home (see para [49]). Baker J said "For a local authority to remove a child in circumstances where its welfare did not require it would be manifestly unlawful and an unjustifiable interference with the family's Art 8 European Convention rights."

The influence of the ECHR

14. I appreciate that this course has private law as its primary focus, but it can be seen from these examples that the Court is prepared to import into our domestic children's law ideas deriving from ECHR which are not expressed overtly in either primary or secondary domestic legislation. The influence of the ECHR permeates both public and private law cases. In both, key elements emerge. One is of the importance to child of its family. Another is of the importance of the Court examining all realistic options before coming to a conclusion that a family relationship should be severed.

The importance of family connection and the need for fair process

Public law

15. We are all familiar with *Re B (A Child*) [2013] UKSC 33; [2013] 2 FLR 1075. It is a care case which reiterated that a high degree of justification is needed under Art 8 if a decision is to be made that a child should be adopted, and that a care order in such a case should be a last resort. I am sure you are also equally familiar with the case of *Re B-S* (Adoption: Application of s 47(5)) [2013] EWCA Civ 1146 [2014] 1 FLR 1035, which reminded all those involved in the process, of two key matters. The first is in relation to the importance of family connection. The second is in relation to fair process in reaching conclusions before severing family connection, and in particular the need to evaluate with care each and every realistic option before coming to a conclusion in such cases. For present purposes I shall simply draw attention to the following passages from the judgement of Sir James Munby P:-

> "[17] Before proceeding any further, it is necessary for us to go back to first principles and to emphasise a number of essential considerations that judges *must* always have in mind, and we emphasise this, at *every* stage of the process. Regrettably, the continuing lack of attention to what has been said in previous judgments necessitates our use of plain, even strong, language.
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> [18] We start with Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedom 1950 (the European Convention). There is no need for us to go through the jurisprudence of the Strasbourg court. The relevant passages from three key decisions, *K and T v Finland* (Application No 25702/94) (2001) 36 EHRR 255, [2001] 2 FLR 707, *R and H v United Kingdom* (Application No 35348/06) (2011) 54 EHRR 28, [2011] 2 FLR 1236, [1] and *YC v United Kingdom* (Application No 4547/10) [2012] ECHR 433, (2012) 55 EHRR 33, [2012] 2 FLR 332, are set out by the Supreme Court in *Re B (A Child)* [2013] UKSC 33, [2013] 1 WLR 911, [2013] 2 FLR 1075. The overarching principle remains as explained by Hale LJ, as she then was, in *Re C and B (Care Order:*

Future Harm) [2001] 1 FLR 611, para [34]:

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

To this we need only add what the Strasbourg court said in *YC v United Kingdom* [2012] ECHR 433, (2012) 55 EHRR 33, [2012] 2 FLR 332, para 134:

> 'family ties may only be severed in very exceptional circumstances and … everything must be done to preserve personal relations and, where appropriate, to "rebuild" the family. It is not enough to show that a child could be placed in a more beneficial environment for his upbringing.' "

16. As to the proper evidential and procedural approach, he said:-

> "[34] First, there must be proper evidence both from the local authority and from the guardian. As Ryder LJ said in *Re R (Children) (Care and Placement Order: Paternal Grandparents)* [2013] EWCA Civ 1018, para [20], what is required is:
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> > 'evidence of the lack of alternative options for the children and an analysis of the evidence that is accepted by the court sufficient to drive it to the conclusion that nothing short of adoption is appropriate for the children.'
>
> The same judge indicated in *Re S (A Child) (Care Proceedings: Availability of Evidence)* [2013] EWCA Civ 926, para [21], that what is needed is:
>
> > 'An assessment of the benefits and detriments of each option for placement and in particular the nature and extent of the risk of harm involved in each of the options.'

McFarlane LJ made the same point in *Re G (Care Proceedings: Welfare Evaluation)* [2013] EWCA Civ 965, para [48], when he identified:

> 'the need to take into account the negatives, as well as the positives, of any plan to place a child away from her natural family.'

We agree with all of this.

[35] Too often this essential material is lacking."

Private law

17. The concepts are in my view of equal importance in private cases.

18. The importance of both parents in a child's life is a matter which the courts have considered actively in the context of the ECHR. The English Court has considered questions of the welfare of the child in the context of the obligation imposed by the ECHR and decisions of the European Court of Human Rights (ECtHR). It has held that there is a **duty on the Court** to take measures to recognise and maintain a relationship between parent and child. This is particularly apparent in cases where the Court has to consider issues of contact.

19. In the case of *Re C (Direct Contact: Suspension)* [2011] EWCA Civ 521, [2011] 2 FLR 912, Munby LJ (as he was) conducted a comprehensive review of relevant decisions of the ECtHR (paras 37-42) which I commend to anyone interested in this topic. For the sake of brevity, I shall quote only one part here:

> "38. The principles are not in doubt. The starting point (see *Gnahoré v France* (2002) 34 EHRR 967, para [50]) is that:
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> > "The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life."
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> and (see *Görgülü v Germany* [2004] 1 FLR 894, para [48]) that:
>
> > "it is in a child's interest for its family ties to be maintained, as severing such ties means cutting a child off from its roots, which can only be justified in very exceptional circumstances."

20. He went on to say:-

> "43. Unsurprisingly our domestic jurisprudence, if somewhat differently expressed, is to the same effect."

21. He continued:-

> "47. I do not propose to add to the jurisprudence or to attempt to state in my own words what has already been so clearly said by others. All I need do is to extract from the case-law to which I have referred the propositions upon which Mr Scott-Manderson places particular reliance:
> • Contact between parent and child is a fundamental element of family life and is almost always in the interests of the child.
> • Contact between parent and child is to be terminated only in exceptional circumstances, where there are cogent reasons for doing so and when there is no alternative. Contact is to be terminated only if it will be detrimental to the child's welfare.
> • There is a positive obligation on the State, and therefore on the judge, to take measures to maintain and to reconstitute the relationship between parent and child, in short, to maintain or restore contact. The judge has a positive duty to attempt to promote contact. The judge must grapple with all the available alternatives before abandoning hope of achieving some contact. He must be careful not to come to a premature decision, for contact is to be stopped only as a last resort and only once it has become clear that the child will not benefit from continuing the attempt.
> • The court should take a medium-term and long-term view and not accord excessive weight to what appear likely to be short-term or transient problems.
> • The key question, which requires "stricter scrutiny", is whether the judge has taken all necessary steps to facilitate contact as can reasonably be demanded in the circumstances of the particular case.
> • All that said, at the end of the day the welfare of the child is paramount; "the child's interest must have precedence over any other consideration."

22. In the case of *Gluhaković v Croatia (Application No 21188/09)*[2011] 2 FLR 294, the ECHR hd to consider a claim for damages brought by a father who claimed that the State had violated his Art 8 Rights because it has not secured effective contact between him and his child. It was held that there was a violation. Although the National Court had made orders for contact from time to time, it had not gone on to insure that he was able to exercise that right effectively. Instead the National Court

ignored the reality of the father's situation as to his work schedule. It had also directed that supervised contact should take place despite the objections of the centres required to supervise and father as to their suitability (at one contact could only take place in the corridor). In its most recent decision the Court had failed to establish where the contact should take place at all.

23. In the case of *Re Q* [2015] EWCA Civ 991, [2-16] 2 FLR 287, Munby P reiterated what he had said in *Re C* (supra) and went on to say:

> "[20] The most recent in-depth analysis of the case-law is to be found in the judgment of McFarlane LJ in *Re W (Direct Contact)* [2012] EWCA Civ 999, [2013] 1 FLR 494, to which we were referred. He drew attention to the decision of the Strasbourg court in *Gluhakovic v Croatia* (Application No 21188/09) [2011] 2 FLR 294, at para 57, to the effect that the obligation upon authorities, including the court, is not absolute and, whilst authorities must do their utmost to facilitate the co-operation and understanding of all concerned, any obligation to apply coercion in this area must be limited since the interests, as well as the rights and freedoms, of all concerned must be taken into account, and more particularly so must the best interests of the child."

24. The case of *Re W (Direct Contact)* to which Munby P refers was an example of a case where the Court decided that the Court had not grappled with all the alternatives before making an order that there should be no contact. A further very recent example of the need for the Court to look at the range of alternatives available before rejecting application for direct contact can be seen in the case of *Re K (Children)* [2016] EWCA Civ 99. In that case a father was successful in his appeal against a child arrangements order which granted him only indirect contact with his children for an unspecified period of time. The Court's unanimous decision was that the appeal should be allowed as the recorder had 'failed to grapple with all the available alternatives before abandoning hope of achieving contact'. The Court also remarked that the case was another example of the difficulties faced by unrepresented parents, exacerbated on this occasion by the guardian's failure to explore with the father any of

the various alternatives developed in such contact case. Had the recorder been directed to the relevant parts of the Practice Direction 12J (guidance to the courts in child arrangements cases concerned with domestic violence), and he been informed of the available options by way of direct work with the father and for the children, he may not have fallen into the trap of reaching what was a 'premature decision' that there could be no direct contact between these very young children and their father.

25. In the case of *Re F (Children)* [2015] EWCA Civ 1315 an appeal was brought by the mother of two children, against the decision in private law children proceedings. The mother and father had separated in January 2015. They had two children, a girl aged 13 and a boy aged 3. Following an occasion when the father failed to return the children to the mother, the mother removed the boy from the father's care, but the daughter refused to go with her. Consequently a status quo was established whereby the daughter lived with her father and the son with his mother. The mother applied for orders under section 8 of the Children Act 1989. One of the issues for consideration was the daughter's contact with her mother, whom she was steadfastly refusing to see. In the run up to the hearing, the father made a number of allegations against the mother, including that she had an affair with his 26 year old son (the mother's step-son).

26. During the hearing, the father, as a litigant in person, prosecuted his allegation of an affair between the mother and her step-son, which the mother denied. The step-son gave evidence. The judge found that there was absolutely no basis for the allegation. The Cafcass officer heard the evidence of the step-son who, as well as denying the affair also gave evidence of the father's drug-taking and obsessive behaviour. As result the Cafcass officer developed real concerns about the daughter's welfare and suggested three options: firstly that the daughter should live with her mother; secondly that the local authority should be involved in some way; and thirdly that a guardian should be appointed for the daughter in continuation of the proceedings under FPR r 16.4. The judge decided to make no contact order "other than as agreed between the parties". He did not deal with the evidence given by the Cafcass officer.

27. The mother appealed on several grounds. Firstly, that the judge failed to follow any of the established guidelines for courts approaching issues of contact where

contact is effectively being denied. Secondly, that the judge failed to address s1 of the Children Act 1989, and in particular the welfare checklist, or give reasons for departing from the Cafcass officer's recommendations. Thirdly, that the judge failed to require the father to give evidence in chief and be cross-examined. McFarlane LJ found each of those points to be "soundly made". He noted in particular that the issue of contact was "simply not canvassed in any way by the judge during the substantive hearing". Amongst other failings, he also found that the judgment failed to record the gravamen of the Cafcass officer's evidence, including her professional view that the daughter was suffering significant harm and in need of professional input. He said: -

> "Ms Stevens is right to say that if the judge had tried to analyse the case within the structure provided by section 1(3) of the Children Act, or by applying a human rights analysis under Article 8 of the ECHR, the judge might have brought in those factors to his consideration and we, as readers of his judgment, would understand how he had dealt with them in coming to his conclusion."

The Court ordered that the case be reheard by a different judge, with the daughter made party to those proceedings.

The changing approach to the vulnerable witness

28. There is another area in which what I would term a raised understanding of or sensitivity to the need for fairness has arisen and that is in relation to disability and vulnerability of witnesses. Both article 8 and article 6 rights maybe engaged in this process.

29. In the very important recent case of *Re D (A Child) (No 3)* [2016] EWFC 1, Munby P set out key principles which should be considered in cases involving parents with learning disabilities. Although this was a care case, much of what appears may be of importance in private law cases. He commended the words of Gillen J sitting in Family Division of High Court of Justice in Northern Ireland in *Re G and A (care Order: Freeing order: Parents with a Learning Disability* [2006 NIFam 8] to such an extent that he annexed them to his judgment. There are a number of important points of principle either highlighted or endorsed in the judgment, as to how to approach cases where the parents have learning difficulties. I shall here simply draw attention

to some matters which may be of particular relevance to private law cases, but that is no substitute to reading the guidance itself. Munby P himself said of Gillen J's advice (at para 28):-

> **"I commend his powerful words to every family judge, to every local authority and to every family justice professional in this jurisdiction**."

30. Munby P endorsed (at para 25) what is said in *Y v United Kingdom* [2012] 55 EHRR 33, [2012] 2 FRL 332 that:-

> "...It is not enough to show that a child could be placed in a more beneficial environment for his upbringing..."

31. He also endorsed (at para 26) the well-known passage from Hedley J in *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050 that:-

> "society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent ... it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done."

32. Key points of importance from Gillen J's guidance include the following:-

> a. People with a learning disability are individuals first and foremost and each has a right to be treated as an equal citizen...courts must take all steps possible to ensure that people with a learning disability are able to actively participate in decisions affecting their lives. [164.2]
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> b. Parents with learning difficulties can often be "*good enough*" parents when provided with the ongoing...support they need. The concept of "*parenting with support*" must underpin the way in which the courts and professionals approach wherever possible parents with learning difficulties. [164.4]
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> c. Judges must make absolutely certain that parents with learning difficulties are not at risk of having their parental responsibilities terminated on the basis of evidence that would not hold up against normal

parents. Their competences must not be judged against stricter criteria or harsher standards than other parents. [164.4]

d. Too narrow a focus must not be placed exclusively on the child's welfare with an accompanying failure to address parents' needs arising from their disability which might impact adversely on their parenting capacity. [164.5]

e. The court must also take steps to ensure there are no barriers to justice within the process itself. Judges and magistrates must recognise that parents with learning disabilities need extra time with solicitors so that everything can be carefully explained to them...The process necessarily has to be slowed down to give such parents a better chance to understand and participate. This approach should be echoed throughout the whole system including LAC reviews (emphasis added). [164.6]

f. All parts of the Family justice system should take care as to the language and vocabulary that is utilised. [164.6]

g. The courts must be careful to ensure that the supposed inability of parents to change might itself be an artefact of professionals' ineffectiveness in engaging with the parents in appropriate terms. [164.6]

h. A shift must be made from the old assumption that adults with learning difficulties could not parent to a process of questioning why appropriate levels of support are not provided to them so that they can parent successfully...The concept of "*parenting with support*" must move from the margins to the mainstream in court determinations. [164.7]

33. Munby P also commented on the importance of intermediaries to assist the parents, to the point where, in this case, the hearing would not have been fair without their input.

34. In this context I enjoy your attention to the Advocates Gateway (produced by the Inns of Court Advocacy Training Council and available online through the simple device of googling the words Advocates Gateway)

35. These toolkits provide advocates with general good practice guidance when preparing for trial in cases involving a witness or a defendant with communication needs.

36. The most recent Toolkits (which were updated in December 2015) cover the following:-

1. Ground rules hearings and the fair treatment of vulnerable people in court

Ground rules hearing checklist

1a. Case management when a witness or defendant is vulnerable

1b. Case management in young and other vulnerable witness cases - summary

2. General principles from research, policy and guidance: planning to question a vulnerable person or someone with communication needs

3. Planning to question someone with an autism spectrum disorder including Asperger syndrome

4. Planning to question someone with a learning disability

5. Planning to question someone with 'hidden' disabilities: specific language impairment, dyslexia, dyspraxia, dyscalculia and AD(H)

6. Planning to question a child or young person

7. Additional factors concerning children under 7 (or functioning at a very young age)

8. Effective participation of young defendants

9. Planning to question someone using a remote link

10. Identifying vulnerability in witnesses and defendants

11. Planning to question someone who is deaf

12. General principles when questioning witnesses and defendants with mental disorder

13. Vulnerable witnesses and parties in the family courts

14. Using communication aids in the criminal justice system

15. Witnesses and defendants with autism: memory and sensory issues

16. Intermediaries step by step

17. Vulnerable witnesses and parties in the civil courts

18. Working with traumatised witnesses, defendants and parties

Children giving evidence in family proceedings

37. This leads me finally to the topic of children giving evidence in family proceedings. It is, of course, a subject in its own right. I only draw attention to it in the context of this talk because it seems to me it is a topical and important example of the influence coming into English law from external conventions, not only the ECHR, but in this respect also the United Nations Convention on the Rights of the Child, and, where relevant, BIIA (although for how long that European convention will apply to us only time will tell).

38. In the now well known case of *In re W (Children) (Family Proceedings: Evidence)* [2010] UKSC 12, [2010] 1 WLR 701, the Supreme Court held that the starting point or presumption that a child should not give evidence in Children Act cases cannot be reconciled with the Article 6 requirements of the need for a fair trial; although regard must also be had to the article 8 rights of the child. Baroness Hale said in that case:-

> **"**22. However tempting it may be to leave the issue until it has received the expert scrutiny of a multi-disciplinary committee, we are satisfied that we cannot do so. The existing law erects a presumption against a child giving evidence which requires to be rebutted by anyone seeking to put questions to the child. That cannot be reconciled with the approach of the European Court of Human Rights, which always aims to strike a fair balance between competing Convention rights. Article 6 requires that the proceedings overall be fair and this normally entails an opportunity to challenge the evidence presented by the other side. But even in criminal proceedings account must be taken of the article 8 rights of the perceived victim: see *SN v Sweden*, App no 34209/96, 2 July 2002. Striking that balance in care proceedings may well mean that the child should not be called to give evidence in the great majority of cases, but that is a result and not a presumption or even a starting point."

39. It is now some six years since that guidance was given, that it remains rare for a child to give evidence in family proceedings. In the recent case of *Re E A Child)* [2016] EWCA Civ 473 McFarlane LJ said:-

> "56. It is of note that, despite the passage of some six years since the Supreme Court decision in *Re W*, this court has been told that the previous culture and practice of the family courts remains largely unchanged with the previous presumption against children giving evidence remaining intact. That state of affairs is plainly contrary to the binding decision of the Supreme Court which was that such a presumption is contrary to Article 6 of the European Convention on Human Rights.
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> 57. In any case where the issue of children giving oral evidence is raised it is necessary for the court to engage with the factors identified by Baroness Hale in *Re W*, together with any other factors that are relevant to the particular child or the individual case, before coming to a reasoned and considered conclusion on the issue.
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> 58. It is crucial that any issue as to a child giving evidence is raised and determined at the earliest stage, and in any event well before the planned trial date. The court will not, however, be in a position to come to a conclusion on that issue unless it has undertaken an evaluation of the evidence which is otherwise available. Where there has been an ABE interview, and the quality and/or content of that interview are to be challenged, it is likely that the judge will have to view the DVD before being in a position to decide the *Re W* issue."

40. This was a public law case, but it was a theme continued by Munby P in the recent case of *F (children)* [2016] EWCA Civ 546 dealing with issues which rose under the Hague Convention. In that case he said in relation to the opportunity of a child to participate in those proceedings:-

> "36. The starting point is, of course, Article 12(2) of the United Nations Convention on the Rights of the Child and Article 11(2) of Council Regulation (EC) No 2201/2003, commonly referred to as BIIA, both of which identify the obligation on the court to ensure that the child is given

the opportunity to be "heard". Next I refer to the well-known passage in the characteristically prescient judgment of Thorpe LJ in *Mabon v Mabon* [2005] EWCA Civ 634, [2005] 2 FLR 1011, paras 28-29, culminating in his observation that "judges have to be … alive to the risk of emotional harm that might arise from denying the child knowledge of and participation in the continuing proceedings." Thorpe LJ returned to the same theme in *Re G (Abduction: Children's Objections)* [2010] EWCA Civ 1232, [2011] 1 FLR 1645, para 15, a case where (see paras 20-21) Thorpe and Smith LJJ themselves met the child, a 13-year old girl, and again in *Re J (Abduction: Children's Objections)* [2011] EWCA Civ 1448, [2012] 1 FLR 457, paras 33, 42.

37. Well before then, in *In re D (A Child) (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619, paras 57-61, the House of Lords had indicated that merely enabling the child to meet the judge might not be sufficient. Having observed (para 59) that "children should be heard far more frequently in Hague Convention cases than has been the practice hitherto. The only question is how this should be done", Baroness Hale of Richmond continued (para 60):

> "There are three possible ways of doing this. They range from full scale legal representation of the child, through the report of an independent CAFCASS officer or other professional, to a face-to-face interview with the judge."

I add another possibility, the child giving evidence but without being joined as a party: see *Cambra v Jones (Contempt Proceedings: Child joined as party)* [2014] EWHC 913 (Fam), [2015] 1 FLR 263, paras 10, 14.

38. The Supreme Court returned to the topic, this time in the context of care proceedings, in *In re W (Children) (Family Proceedings: Evidence)* [2010] UKSC 12, [2010] 1 WLR 701, holding that there is no longer a presumption, or even a starting point, against children giving evidence in family proceedings. In *In re LC (Children) (Reunite International Child Abduction Centre intervening)* [2014] UKSC 1, [2014] AC 1038, the Supreme Court considered whether a 13-year old girl, T, should be joined as a party to Hague proceedings. Reversing this court, it held that she

should.

39. Next, I should refer to *In re M and others (Children) (Abduction: Child's Objections)* [2015] EWCA Civ 26, [2016] Fam 1, para 155, and, more particularly, to *In re D (A Child) (International Recognition)* [2016] EWCA Civ 12, paras 41, 44, 47, 48, where the obligation of the court to ensure that the child is given the opportunity to be heard and "the right of the child to participate in the process that is about him or her" were said to be fundamental principles of universal application, "reflected in our legislation, our rules and practice directions and our jurisprudence" and where it was said that "the theme of the case law is an emphasis on the 'right' of participation of those 'affected' by proceedings."

40. **Finally, I refer to the very recent decision of this court in *Re E A Child)* [2016] EWCA Civ 473, paras 46-48, 56-63, and, in particular, McFarlane LJ's acid observation (paras 48, 56) that Baroness Hale's judgment in *In re W* "would seem to have gone unheeded in the five or more years since it was given" and that "the previous culture and practice of the family courts remains largely unchanged with the previous presumption against children giving evidence remaining intact."**

41. It is apparent that in relation to all these matters there has been a sea-change in attitudes over the last decade and more, even if on occasion practitioners and the courts have been and still are too slow to recognise the need for change or to acknowledge the pace of change. Moreover, and I wish to emphasise this, the process of change continues apace.

42. In April 2010, "Guidelines for Judges Meeting Children who are Subject to Family Proceedings" were issued by the Family Justice Council with the approval of Sir Nicholas Wall P: [2010] 2 FLR 1872. In December 2011, and following the decision of the Supreme Court in *In re W*, the Family Justice Council issued Guidelines, endorsed by Sir Nicholas Wall P, on "Children Giving Evidence in Family Proceedings:" [2012] Fam Law 79. More recently, the whole topic, with other related matters, has been considered by the Children and Vulnerable Witnesses Working Group which I established under the Chairmanship of Russell

> and Hayden JJ in May 2014. Their interim report was published in July 2014 (see [2014] Family Law 1217) and the final report in February 2015 (see [2015] Family Law 443). The Family Procedure Rules Committee is currently considering the extent to which, given limited resources, the recommendations of the Working Group can be fully implemented. Whatever the outcome of that discussion, it is plain that the further changes in our approach to these matters which are now widely acknowledged require to be implemented, and sooner rather than later.
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> 43. One thing is quite clear: that proper adherence to the principles laid down in *In re W* will see ever increasing numbers of children giving evidence in family proceedings.
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> 44. One of the drivers for this is the point which this court emphasised in *In re KP (A Child) (Abduction: Rights of Custody)* [2014] EWCA Civ 554, [2014] 1 WLR 4326, paras 53, 56, namely, that a meeting between the child and the judge is "an opportunity: (i) for the judge to hear what the child may wish to say; and (ii) for the child to hear the judge explain the nature of the process;" that the "purpose of the meeting is not to obtain evidence and the judge should not, therefore, probe or seek to test whatever it is that the child wishes to say;" and that if "the child volunteers evidence that would or might be relevant to the outcome of the proceedings, the judge should report back to the parties and determine whether, and if so how, that evidence should be adduced." The corollary of this is that, quite apart from all the other drivers for change, there are likely for this reason alone to be more cases in future than hitherto where the child either gives evidence, without being joined as a party, or is joined as a party."

41. Permission to appeal to the Supreme Court was recently refused in this case (and also in another case, *Re S (Children)* [2016] EWCA Civ 83, a public law case where allegations of sexual abuse had been made by 13 year-old who was not called to give evidence, in which the Court of Appeal (Black and Vos LJJ) held that the judge had exercised her discretion correctly, although there was a trenchant dissenting judgement by Gloster LJ).

42. So, be warned! The question of whether a child should give evidence in situations where child is alleged to have been the victim of abuse, or indeed is alleged to have witnessed abuse, or may have other evidence which is of relevance to the outcome of proceedings, is one we can expect to see more of in the private law as well as the public law arena.

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[Note: the passages in this paper which appear in bold have been emphasised by the writer of this paper]