No shades of grey

In the conclusion to his two-part guide, Chris McIntosh sets out procedure and fact-finding issues when dealing with allegations of child abuse in a private law contact dispute

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An important consideration when dealing with child abuse allegations in private law proceedings is the directions which should be sought at an early stage, and the orders the court should be invited to make. Some of the procedural issues may be less than familiar to the family lawyer more used to private rather than public law proceedings.

Fact-finding hearings

On 9 May 2008 the president of the Family Division published a direction that where allegations of domestic violence are made the court must, at the earliest possibility, establish the factual and welfare issues raised by the allegations. It must also consider how, if proved or admitted, the allegations would be relevant to deciding whether to make a section 8 order. A revised version of the direction was published on 14 January 2009 (*Practice Direction: Residence and Contact Orders: Domestic Violence and Harm*), to take into account the House of Lords' decision in *Re B (Care Proceedings: Standard of Proof)* [2008].

The aim of the directions should be to:

> ... enable the relevant factual and welfare issues to be determined expeditiously and fairly.

The practice direction sets out directions that could be appropriate if a fact-finding hearing is considered necessary.

Disclosure

The directions that you are likely to need may include disclosure by the police and social services of all documentation and video material, or other recorded material generated by the accuser's allegations. Medical records of the child or children, and of the parents, may also be relevant.

In addition, the allegations need to be clearly established, and the best way to achieve this is likely to be for the parent making the allegations to set them out in a *Scott* schedule. A direction should therefore be sought to this effect and for your client to then be able to respond to the allegations in the same schedule.

Following the *Scott* schedule it will be necessary for each party to prepare full statements adding detail to the bare facts set out in the schedule. By this time you should have received full details of the original allegations made to the police and the social workers. It will therefore be possible to compare the original allegations to those that are currently being made. It may be that new allegations are continuing to be made. In *Re D (Intractable Contact Dispute: Publicity)* [2004] Munby J stated that:

> ... allegations which could have been made at an earlier stage should be viewed with appropriate scepticism.

Welfare report

An order for a welfare report under s7 of the Children Act (CA) 1989 should be sought from the court. This would usually be produced by Cafcass, but the court also has the ability under s7(1)(b) to request a report from the local authority. This may be considered preferable if the local authority is already involved. There is nothing to prevent the court ordering a section 7 report from both Cafcass and the local authority. *Re W (Welfare Reports)* [1995] states, in relation to the provision of a local authority social worker's welfare report, that:

> ... frequently their role will be confined to fact-finding reports, and will not involve the making of any recommendations at all.

Bear in mind that this case took place before the creation of Cafcass. A request may be made for the preparation of a Cafcass report subsequent to a local authority report.

At what stage should experts be involved?

If consideration is being given to the instruction of a psychiatrist or psychologist, then the purpose of such an instruction must be clearly defined, and its timing carefully considered. See the *Family Law Protocol* (Law Society); the practice direction which came into force on 1 April 2008, *Experts in Family Proceedings Relating to Children*; and the Public Law Outline for guidance on best practice.

Expert evidence of this nature is not routinely obtained before a fact-finding hearing. Indeed, evidence purporting to deal with the propensity of a parent to cause harm to a child is unlikely to be approved by the court, unless the circumstances of the case indicate that it is directly relevant (see *Re M and R (Child Abuse: Evidence)* [1996]).

Once the facts are established by the court at the conclusion of a fact-finding hearing (see below for a discussion on the standard of proof to be applied), then further consideration may be given to the obtaining of expert evidence. It is at this point that it may be worth seeking a direction for the accusing parent's mental state to be assessed.

An instructed expert, usually a single joint expert, will also consider any continuing risk to the child. This means that even if a finding of fact is made against your client, experts will be looking at the future risk, not just what has happened in the past.

Injunctions on discussing the allegations

Your client may well be concerned that the parent alleging that the abuse has taken place may make their concerns public. Under r11.2 of the Family Proceedings Rules (FPR) 1991, a party is prevented from communicating information about the proceedings, but this may not stop them from discussing the original allegations. If this is a concern, an undertaking on this point should be requested from the parent making the allegations, or an order sought preventing dissemination of what may be very damaging and inaccurate information.

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Making a child a party to the proceedings

Any application by a child for permission to make an application has to be heard by a High Court judge. Under s10(8) CA 1989:

> Where the person applying for leave to make an application for a section 8 order is the child concerned, the court may only grant leave if it is satisfied that he has sufficient understanding to make the proposed application for the section 8 order.

A judge may feel that it is appropriate for a child to be separately represented pursuant to r9.5 FPR 1991. If the child does not have sufficient understanding to represent themselves, a guardian *ad litem* needs to be appointed. This will be the decision of the judge where there is an issue of particular difficulty. Cafcass will be the first choice for the provision of a guardian.

The National Youth Advocacy Service can be appointed as the guardian for the children where there is an intractable contact dispute, and may be more suitable where the children are older.

Compromising before the fact-finding hearing

There may come a point, either because the relationship between the parties has thawed or because the accusing parent has accepted that nothing untoward has happened, when the possibility of compromise arises. There is nothing to prevent you suggesting that the accuser may wish to withdraw the allegations, particularly if disclosure from third parties supports your client's case. Bear in mind that it is arguably not possible to have without-prejudice negotiations in children cases. However, making this suggestion is unlikely to prejudice your client's case. If the accusing parent is prepared to withdraw the allegations, they should also put in writing that they will not seek to rely on the previous allegations in the future. The advantage of this route is that it may save your client a lot of money. The disadvantage is that your client will not have their name cleared in the same way as if they had been exonerated at a fact-finding hearing. In addition, your client would arguably be prevented from raising these allegations in the future as evidence that the accusing parent may have harmed the child emotionally.

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In *Re M (Intractable Contact Dispute: Interim Care Orders)* [2003] Wall J said:

> In an intractable contact dispute, where the residential parent is putting forward an allegedly factual basis for contact not taking place, there is no substitute... for findings by the court as to whether or not there is any substance to the allegations.

Fact-finding hearings

The purpose of a fact-finding hearing is to establish whether or not the alleged events took place, in order to consider the future welfare of the child or children. *Re B (Care Proceedings: Standard of Proof)* [2008] has made it clear that there are only two possible outcomes to a fact-finding hearing: that the allegations have been proven or that they have not been proven. It is not possible for the judge to sit on the fence. Lord Hoffman, in supporting the main judgment provided by Baroness Hale, stated:

> If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof.

If the allegations cannot be proven then it is not open to the court to 'conclude that there was a risk of a child suffering a particular kind of harm'. This means that if your client is found innocent there should be no reason for any barriers or conditions in relation to future contact arrangements. Per *Re D (Intractable Contact Dispute: Publicity)* [2004]:

> Once findings have been made, everybody must thereafter approach the case on the basis of the facts as judicially found.

Re B has also clarified the appropriate standard of proof to be used, which is the civil standard, ie the balance of probabilities, or, as Lord Hoffman puts it:

> [The court] must be satisfied that the occurrence of the fact in question was more likely than not.

The standard of proof is not the criminal standard of beyond reasonable doubt. In addition, although it is possible to consider inherent probabilities, for example that most parents do not abuse their children, an enhanced standard of proof is not required in the case of more serious allegations.

Evidence that the court will consider

It is often the nature of allegations of domestic violence, including child abuse, that there may not be much corroborating evidence. However, Baroness Hale made it clear in *Re B* that this should not allow a judge to derogate from their duty to make a finding of fact either way. To reach these conclusions the judge will consider:

- Oral evidence.
- Inherent probabilities.
- Any contemporaneous documentation or records.
- Any circumstantial evidence.
- Their overall impression of the 'characters and motivations of the witnesses'.

The fact-finding hearing is part of the main hearing and therefore it should be considered a part-heard hearing, so the same judge hears this and the final hearing.

Final hearing: potential outcomes

Once the allegations of abuse have been either proved or disproved, the final hearing will take place, to consider the issues of contact and residence.

Parental alienation syndrome or implacable hostility

If parental alienation syndrome has not already been raised by your client, it is likely to be raised where contact remains an issue. The diagnosis of this depends on one parent deliberately alienating the children from the other parent. However, in their article 'Contact and Domestic Violence – the Experts' Court Report' (*Family Law*, September 2000), Dr Claire Sturge and Dr Danya Glaser explained that:

> Parental Alienation Syndrome does not exist in the sense that it is:
>
> - not recognised in either the American classification of mental disorders (DSMIV) or the international classification of disorders (ICD10);

- not generally recognised in our or allied child mental health specialities.

Rather than referring to a syndrome, Sturge and Glaser preferred to refer to 'implacable hostility':

> The term 'implacable' is used here to describe the intensity and unchanging nature of the hostility and the fact that any amount of mediation is unlikely to result in an alteration in the hostility felt by the parent.

They go on to say that in such circumstances it is not unusual for the parent to make allegations of sexual abuse against the non-resident parent.

The term 'implacable hostility' has found judicial approval. In extreme cases where this is found, the court has not shied away from removing the children from the care of the parent demonstrating implacable hostility towards the other parent. In *V v V (Contact: Implacable Hostility)* [2004] and *Re C (Residence Order)* [2007] the children were removed from the care of their mother, not because there was any doubt that she could look after the children, but for the implacable hostility that she showed towards the father.

Deliberately fabricated allegations

Where the judge at the fact-finding hearing finds that the allegations of abuse are untrue, it may be that they will also find that the allegations were deliberately fabricated by the accusing parent. This leads to the question whether it is appropriate for the children to remain in the care of the resident parent, or whether they may be inadvertently harming the children.

In *Re M (Intractable contact dispute: Interim Care Order)* [2003] the mother falsely persuaded the children that their father and his family had sexually abused them. It was held that the children were suffering significant harm in the mother's care as a result of her:

> ... false and distorted belief system about the non-residential parent, which the children had imbibed.

Therefore a section 37 investigation took place, and as a result of that the children were taken into care before residence being granted to the father.

Rights of redress

If you reach the stage where your client has been cleared of all of the allegations and contact has resumed, or at least been ordered, your client is likely to be relieved but angry about the time and money that has been spent. Inevitably you will be asked if there is any right of redress, and there are two main options.

Costs

The principle that in general there should be no order for costs in children matters is well established. However, this presumption may be overturned where one party's behaviour is unreasonable in relation to the litigation. The Court of Appeal in *Re T (Order for costs)* [2005] provided a warning to parents who feel that they can frustrate contact with impunity:

> Those who unreasonably frustrate contact need to be aware that the court has the power to make costs orders in appropriate cases, and that the consequences of such unreasonable behaviour may well be an order for costs made against the resident parent who has behaved unreasonably.

Therefore, depending on the behaviour of the parent who originally made the allegations, it may be worth seeking costs.

Defamation or slander

White v Withers & anor [2009] has reminded family practitioners that we are not bound only to operate within the family courts to pursue a claim for our clients. In some circumstances, the option of pursuing the false accuser in the civil arena for defamation is something that your client may need to consider. Specialist advice should be sought if this option is being considered.

Conclusion

When the allegations are first made against your client it is, of course, important to be as reassuring as possible. However, you need to warn the client that the process of clearing their name and reintroducing a normal contact regime is unlikely to be either quick or cheap. How the case develops will, to a large extent, depend on the motives behind the allegations and whether they express genuine concerns or are part of a deliberate plan to frustrate contact. In the latter case, it is disappointing that the characteristic judicial response to difficulties with contact is, according to *Re D (Intractable Contact Dispute: Publicity)*, to:

> ... reduce the amount of contact and replace unsupervised with supervised contact.

If the accusing parent is prepared to withdraw the allegations, they should also put in writing that they will not seek to rely on the previous allegations in the future.

Given the risk that the allegations might be true, it is difficult to see how the process itself could be improved, although more money to pay for judges and Cafcass officers would go a long way towards speeding up the process and thereby reducing the negative impact of the allegations and their ramifications on all concerned. ■

Re B (Care Proceedings: Standard of Proof) [2008] UKHL 35
Re D (Intractable Contact Dispute: Publicity) [2004] EWHC 727
In Re M (Intractable contact dispute: Interim Care Order) [2003] EWHC 1024 (Fam)
Re M (Contact: Long-term best interests) [2005] EWCA Civ 1090
Re O (Contact: Withdrawal of Application) [2003] EWHC 3031 (Fam)
Re S (Contact: Promoting Relationship with Absent Parent) [2004] EWCA Civ 18
Re T (Order for costs) [2005] EWCA Civ 311
S v S (Interim Contact) [2009] EWHC 1575 (Fam)
V v V (Contact: Implacable Hostility) [2004] EWHC 1215 (Fam)