Lent talk
Compassion and the Law – Family Law

Good afternoon and thank you for coming to listen to this Lent Talk, within the series ‘Compassion and the Law”.

This talk is from a ‘Family Law’ perspective. Family Law is a wide ranging jurisdiction which encompasses divorce and the related financial reliefs for separating families, domestic violence and abuse, and the law relating to the care of children.

I am a Children’s Lawyer who has practiced in this area of law for over 15 years. Children’s Law can be broken down into two main areas: Private Law applications, disputes between parents or other family members; and Public Law applications in which the State applies to the Court for orders in relation to children. I propose to talk about whether compassion exists within what we call ‘Care Proceedings’.

Care Proceedings refer to applications made to the Family Court by the Social Services Departments of Local Authorities, to obtain Court Orders to allow them to intervene in the private lives of families, and specifically the care that children within those families are receiving from their parents or primary care givers. Typically, but not exclusively, these applications will be for ‘Care Orders’ or ‘Supervision Orders’.

A Care Order allows the Local Authority to share parental decision making with parents, and gives Social Services the power to remove children and place them away from their home, sometimes permanently with a plan for Adoption. A Supervision Order obliges the Local Authority, via the allocated Social Worker, to advise, assist and befriend a child who is at home or in a placement with friends or wider family members.

It can be said that since the abolition of the death penalty that the permanent removal and separation of a child from its birth parents is the most draconian power that the State now has over individuals within our Country. It is with this in mind that I wish to consider the role that compassion plays within the family jurisdiction of our legal system.

To do so I propose to look at the following

The statutory principles set out in the Children Act 1989 which frame the legal process in Care proceedings.
Two innovative developments in the Family Courts which are aiming to make the system more compassionate for those who use them, namely the Family Drug and Alcohol Court and Settlement Conferences
Refer to a new social work project ‘Pause’, which works with women who have had multiple children removed from their care.

Care Proceedings - the current system

Care Proceedings affect families from all backgrounds and walks of life. Whilst I am unable to refer to specific cases for reasons of confidentiality, to provide a context for the talk I can tell you in broad terms about some of the clients I have represented in the Family Court;
I have represented primary school aged children who have suffered neglect, witnessed domestic violence and abuse, and who have parents with mental health problems.
I have represented babies born withdrawing from heroin and cocaine and spending their first days and weeks in the Special Care Baby Unit.
I have represented a Mother of eight children struggling to cope and meet the competing needs of all of her children.
I have represented a Father suffering with depression and anxiety, who is also alcohol dependent, and supporting his wife who has learning difficulties and trying to keep their new born baby in their joint care.
I have represented a 4 year old child who received life threatening head injuries from his Mother’s partner after months of sustained physical abuse from which he was not protected.
I have represented a 14 year old Mother, with learning difficulties, who is providing care for her baby within the support of a Mother and Baby Foster care placement.
I have represented a Grandfather who was a successful businessman who applied to have his two granddaughters placed in his sole care when the Local Authority had placed them in foster care.
I have represented a teenager who had been placed with his Grandparents, who then having been targeted and shot, was moved to a placement many miles away from home.
I have represented a father and sole carer of his 8 year old daughter, who had been accused of sexual abuse of his stepdaughter and a babysitter 20 years earlier.

I have represented a teenage girl, the subject of sexual abuse and neglect, and who had a cognitive impairment due to the parenting she had received, who was placed in Secure accommodation as she repeatedly ran away from foster care and other residential placements back to the care of her parents and placing herself in danger.

In Care proceedings the Family Courts need to address and resolve some of the most difficult circumstances, faced by some of the most vulnerable members of our society.

So in what ways is legal practice in Care Proceedings compassionate?
Family law and Care Proceedings sit within our civil law system, and it remains the case the burden of proof falls upon those who apply for an Order to set out evidentially why the Court should make the Order that it is seeking. It must prove its case on the balance of probabilities.

When the Local Authority seeks a Care or Supervision Order for a child they become the 'Applicant'. The birth parents will both be entitled to be 'Respondent' parties to the proceedings. The children themselves are also 'Respondent' parties, who will have a litigation friend known as a 'Children's Guardian'. In addition there may be other family members, such as grandparents who become 'Respondent' parties to the proceedings. The number of parties in Care proceedings often mean that the adversarial dynamics of the usual 'Claimant' vs 'Defendant' system do not exist, in my experience this can often lead to a more collegiate approach between the lawyers. Whilst each lawyer must ensure that they represent their client's best interests and act on their instructions in Court, it can be argued that the lawyers often work together better in Care Proceedings. Perhaps it is the number of perspectives considering each issue which means that often there is an outcome which is agreed or many of the issues are narrowed reducing the extent of the litigation.

To obtain a Care or Supervision Order the Local Authority must convince the Family Court that a two stage test is met. The first hurdle is the crossing the Threshold test and the second is a Welfare analysis demonstrating that the Order asked for is in the best interests of the Child.

The Threshold test is set out in section 31 of the Children Act 1989 as follows;

“The child concerned is suffering, or likely to suffer significant harm; and that the harm, or likelihood of harm is attributable to either the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him, or the child being beyond the parental control”.

This somewhat unwieldy test essentially means that the Local Authority have to establish that the parent’s care is deficient to the extent that they are causing or likely to cause the child significant harm. It requires the Court to establish blame.

There are cases in which this approach is absolutely necessary, for example where a child has suffered multiple injuries which appear to the medical professionals treating the child to be Non-accidental and for which no reasonable explanation has been given, or where allegations of sexual abuse have been made by the child which are denied by the parent. In such cases ‘fact finding’ hearings are often necessary in which the Court will hear parties cross examined and consider complex medical evidence to determine what has happened to the child. It is only fair to those who deny the allegations against them, that all the evidence is weighed and considered, and that the factual basis for the case is determined before decisions are made for the future welfare of the children. Article 6 of the Human Rights Act, a right to a fair trial, requires this process and rightly so in my view as it protects any of us that may find ourselves accused of deliberately harming our children and who face the prospect of their being removed from our care.

However there are cases where allocating blame to a parent for the difficulties that the child is experiencing due to their parent’s mental health problems, or learning difficulties, or addictions becomes a more delicate exercise, and a more compassionate approach to negotiating or determining what facts exist to meet the Threshold becomes appropriate.

Once Threshold is crossed the Court is required to undertake a Welfare analysis to determine what the future care arrangements for the child should be put in place. I would argue that this second test moves away from blame to a more compassionate approach, due to a number principles that must be considered which arise out of statue and case law. In summary these are as follows;

1. What is known as the ‘Parmountcy principle’ arising from the first provision of the Children Act 1989 which states at section 1 (1); ‘When a court determines any question with respect to the upbringing of a child … the child’s welfare shall be the

court's paramount consideration'. This requires the Court to consider above all else, the child's needs – placing the child's needs first and foremost above other considerations and the interests of other parties.

2. Section 1 (2) of the Children Act 1989 directs the Court to consider, "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". This recognises that speed is of the essence in resolving disputes regarding children – 6 months in the year of a 1 year old child is half a life time. Whilst civil litigation can often take years to conclude due to the pressures on Court time; Care proceedings must now be completed within 26 weeks unless a clear benefit to the child can be established to allow proceedings to be extended.

3. Section 1(2A) of the Children Act 1989 then directs the Court, '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… [and that] "involvement" means involvement of some kind, either direct or indirect, but not any particular division of a child's time.' This presumption is particularly pertinent in relation to disputes between parents and cases in which Adoption orders are being considered. The Court will need to establish harm is being caused to the child by the involvement of a parent in their lives if they are to be stopped from spending time with them.

4. Section 1 (3) of the Children Act 1989 requires the Judge to undertake an analysis of competing proposals for the long term care of a child according to a 'Welfare checklist' set out in statue which are as follows;

   (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.

This is balancing exercise in which no one factor outweighs another, which guides the Judge in considering what solution is in the child's best interests and again puts the child at the center of the decision making process. This approach also acknowledges that all children and families are different and that there is no one formula which can be applied in every case, but that each case will turn on its facts and nothing less than a considered welfare based analysis will do.

5. Section 1 (5) of the Children Act 1989 sets out the 'No order' principle. The Act requires the Judge to determine that making an Order would better meet the child's needs than no order at all. This principle is underpinned by the assumption that the state should be wary of intervening in the private lives of its citizens.
6. Judges at the current time must also consider the Human Rights Act, in particular article 6 a right to a fair trial; and article 8 a right to a private and family life, and apply them to each of the parties and weigh them accordingly, and ensure that any order which is made in proportionate in the circumstances of the case.
7. More recently in matters where the Court is being invited to approve a care plan for adoption, without the consent of the birth parents, case law has made it clear that this can only be considered if there is no other realistic placement available to the child.

In my experience the statutory requirements that place the child's needs first and foremost in the Court's decision making means that frequently the legal representatives of all parties will frame their approach to Care proceedings with this in mind and advise their client's accordingly. This can often assist the parents to adjust their behaviour and make necessary changes to keep their children in their care. It is surprising how often the reality of Care Proceedings and facing the prospect of the removal of their children can make parents change their behavior. Alternatively it can assist parents come to terms with why their children must live elsewhere, such as in family placements and to come to support these placements, ultimately making them more successful. Of course this does not occur in every case and there have been two more recent developments in the Family Courts which seek to make Care proceedings fairer and more compassionate for the parents that find themselves as parties to Care proceedings which I will now look at in more detail.

Recent developments in the Family Court.

Firstly FDAC, the Family Drug and Alcohol Court, which has been running for about 10 years. You may have heard District Judge Nicholas Crichton speak about FDAC in the media, he helped developed the approach as a response to repeatedly removing children

from the same families due to addictions to drugs and alcohol, I have heard him say that in the worst case he removed 19 babies successively from the same Mother.

Lancaster University has recently published research entitled ‘After FDAC: outcomes 5 years later’. [http://www.lancaster.cc.uk/law/research/research-centre/centre-for-child-and-family-justice-research] The introduction to the paper explains FDAC as follows, “FDAC started in January 2008. It is an alternative problem-solving approach to care proceedings in cases where parental substance misuse is a key trigger for the local authority bringing proceedings. It aims to support parents to overcome their entrenched problems while the case is being determined in proceedings. FDAC’s main features are judicial continuity, fortnightly judge-led review hearings without lawyers present and a specialist multidisciplinary team - independent of the Local Authority - that advises the court and provides intensive treatment and support to parents as well as close monitoring of their progress. The non-lawyer review hearings are the court based forum for the problem-solving component of FDAC. Unlike FDAC, in ordinary care proceedings there is no independent multidisciplinary team or judge-led review hearings where the Judge plays a problem-solving role and seeks to motivate parents to change. Nor do parents in ordinary proceedings engage in conversation with the Judge…The problem-solving approach in court is about hearing cases in a collaborative rather than an adversarial manner, using motivational interviewing techniques with parents, providing regular scrutiny of the intervention plan approved by the court, and encouraging parents to seize every opportunity to turn their lives around for the benefit of their children”

The FDAC court recognises that Drug and Alcohol addiction by parents, to the extent that they are no longer able to prioritise their children’s welfare, is an illness and that there are treatments available to them that allow them to break this cycle. Fundamentally FDAC is offered to the parents as an alternative to Care proceedings, it is voluntary and an opportunity for the parents to access services that may not otherwise be available to them. The multi-discipline teams that work with the family will include experts in addiction treatment services and psychiatrists that are able to identify underlying causes to the addiction and help the parent address these. Throughout the proceedings the parents will meet regularly with these workers and undertake testing for drug and alcohol to monitor abstinence and help the parents put in place strategies to prevent relapse. There will also be specialist support for the children and other family members.

A key difference is the role that the Judge takes in FDAC. The Judge meets fortnightly with the parents in the absence of their lawyers, but with the other professionals present. The Judge will chair these meetings and will use the following approaches to try to solve the families' problems;

1. Talking directly with the parents
2. Invite the parents views on the information given by the professionals working with them
3. Express interest in their individual progress
4. Acknowledge strengths within the family
5. Offer praise to the parents on their success
6. Explain the aims of FDAC throughout the process
7. Urge the Parents to take responsibility for their actions, including the consequences of prioritising their own needs over those of their children
8. Use time in Court to tackle the range of problems faced by the parents

This can be seen in contrast with the traditional role of a Judge, to hear evidence and legal argument on behalf of all parties and weight the competing approaches, apply the law and make decisions for the future of the family. In FDAC the Judge has a mentoring and problem-solving role in addition to the usual decision making powers; one FDAC Judge is recorded as saying,

"We have all been part of the normal care process for years. In many cases outcomes are predictable and the process is perceived to be unfair. Parents are assessed and the prospects for change assessed but, often, inadequate support is given to parents which means that very little does change. That is why FDAC works. It is more fair. It gives parents a real chance to change with appropriate support. Importantly, it is humane. Even parents who do not succeed come away acknowledging that they have had a proper chance. That is why so few cases end in contested final hearings. More importantly, the outcome for children is, as a consequence, better".

And a Mother who went through the FDAC experience has been recorded as saying'
'I feel passionately about the role FDAC plays in family courts, and the unique support they offer to parents in a terrifying situation. The holistic and individualised approach FDAC takes is in stark contrast to standard child protection proceedings. Instead of viewing my situation in black and white, they found shades of grey and supported me to be strong and

brave enough to face my addiction. I was challenged to gain insight and to become strong both as an individual and as a mother.'

Do FDAC courts work? The Lancaster University study provides data for the current success rates for FDAC in comparison with traditional care proceedings. In Standard proceedings, the families where drugs and alcohol are identified as an issue 25% will either have children returned to them or remain with them at the end of proceedings; this rises to 37% of families who engage with FDAC. More significantly after 3 years only 5.5% of families in standard proceedings will have maintained their success; whereas in FDAC 19% of families are still doing well 3 years later. ‘Doing well’ is defined as families in which there has been no relapse of the parent’s problems, AND no change of placement, AND no return to Court.

There are currently only a handful of FDAC courts in the UK, which include the founding FDAC in London serving Camden, Islington, Kensington and Chelsea, Lambeth, and Southwark Councils; and our own local FDAC serving Buckinghamshire and Milton Keynes. A National FDAC unit [http://fdac.org.uk/] has recently been formed with the hope that more FDAC courts will be established. Perhaps the reason for the slow uptake of FDAC is the expense to the Local Authorities who fund the multidisciplinary teams who work with the families, however it is anticipated that the cost of FDAC will be outweighed by the money saved by preventing repeat sets of proceedings removing future children from the care of the same families and the additional pressures on services that will need to be provided to these families and children as a result. An impact study by the Centre for Justice Innovation showed that in 2016 that public sector bodies saved £2.30 for every £1 spend on the FDAC court. In my view FDAC is not only a compassionate response to the impact of drug and alcohol addiction on children and families; it is also joined up thinking and a grown up response to a social policy issue.

Settlement Conferences

A more recent innovation in the Family Court are ‘Settlement Conferences’, which are currently being trialed at our local Family Court in Milton Keynes. These will be introduced in both Care proceedings and Private Law Children proceedings (which do not involve the Local Authority). The proposal is that once the matter is ready for a final hearing that an attempt will be made to settle the case rather than automatically proceed to a contested final hearing. Whilst there is already provision for a Pre-trial review or Issues Resolution

hearing in which parties are encouraged to narrow the issues between them, it is hoped that a Settlement Conference will take this a stage further by introducing differences to the way in which the hearing is conducted;

1. It is proposed that the lay out of the Court will be different and less formal
2. The parties will be able to speak for themselves and talk directly to the Judge
3. The Judge can make suggestions to resolving the issues and problems
4. The matter will only be concluded if all parties agree, if not there will be a final hearing before a different Judge.

It is hoped that the Settlement Conferences will give parents some ownership of the decisions that are made within the Court arena and an opportunity to raise issues and problems that they may feel have been overlooked. It is widely recognised within the Family Court that if proceedings are conclude by agreement that they are more likely to be successful in the longer term, as parties are not left feeling that a decision has been imposed upon them, but it is one that they have agreed and are likely to believe it is the best way forward. It is still very early days in the development of Settlement Conferences, and it will be interesting to see if they work, however it can be a seen as an attempt to develop a more empowering and compassionate approach to resolving issues before the Family Courts than the traditional adversarial approach of litigation.

“Pause”

Finally I wanted to mention another initiative in social work and connected to Care proceedings. Whilst not directly part of the Family Justice system or the Court process, the “Pause” project [http://www.pause.org.uk/] has been developed to work with Mothers who have been the subject of repeat Care proceedings. Typically these will be women who have had children removed and then become pregnant again shortly afterwards or during proceedings only to have their newborn children subject to further court proceedings, following their birth, with the likelihood being that these children will also be removed. Mothers who experience repeat removals are often becoming pregnant again in a misguided attempt to fill the emotional and psychological gap left in their lives by the removal of their older children. Pause aims to work with these women directly for approximately 18 months following the end of Care proceedings, on the basis that the woman involved takes contraception for the whole period time of the work being done with them. This is a social work initiative which addresses the core reasons why the women are not able to provide ‘good enough’ care to their children with a view to addressing these problems and effecting longer term change. Whilst this does not relate directly to the issue

of compassion in legal practice, it does deserve a mention as to the innovative ways that are being developed to help make our child protection system more compassionate.

It has been an interesting exercise to consider compassion and the law. The law by definition is the interpretation of rules and the implementation of justice, which should apply equally to all. Compassion is to show mercy, kindness, leniency. ‘Law and Compassion’, two words that do not at first glance seem to sit together. However in a jurisdiction such as the Family Court, I hope I have illustrated how the law and justice can be enhanced by compassion practiced within that system, and that compassion does not need to undermine the implementation of the law and justice.

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