***Private children law update: cases published in January and February 2015***

***Re K and H (Children: unrepresented father: cross-examination of child)*** [**[2015] EWFC 1**](http://www.bailii.org/ew/cases/EWFC/HCJ/2015/1.html)

**Summary:** HHJ Bellamy orders HMCTS to pay for legal representation for a vulnerable witness to be cross-examined on behalf of a litigant in person accused of perpetrating abuse against the vulnerable witness.

**Facts:** A finding of fact hearing was listed to determine Y’s allegation of sexual abuse by her father. Y (17 years old) was due to give evidence at the hearing. The father was a litigant in person who wished to challenge Y’s evidence but not cross-examine Y directly. The father was not financially eligible for public funding. This hearing was listed to determine whether the court had the power to order HMCTS to pay for legal representation for the father to cross-examine Y. The Lord Chancellor was given leave to intervene.

**The decision:** HHJ Bellamy did not accept the Lord Chancellor’s submission that the father was able to pay for his own legal representation purely because he was financially ineligible for public funding. The judge went on to discuss the other options and listed the following principles of approach:

1. It is the first duty of judges sitting in the Family Court to ensure that proceedings are conducted fairly (FPR 2010 rule 1.1). Failure to do so may lead to the court itself acting unlawfully (s.6(1) of the Human Rights Act 1998).

(b) Where a party is unrepresented (whether because legal aid is not available or by choice) and is 'unable to examine or cross-examine a witness effectively' the court has a duty to assist that party (s.31G(6) of the Matrimonial and Family Proceedings Act 1984). This requires the court 'to put, or cause to be put' questions to a witness.

(c) The court will itself put questions to a witness if it is satisfied that it is 'necessary and appropriate' to do so. It will not normally be appropriate to do so when the case involves issues which are grave and/or forensically complex.

(d) Where the court is satisfied that it is not 'appropriate' for the judge to put questions to an alleged victim, the court must arrange for (cause) a legal representative to be appointed to put those questions.

(e) The court may direct that the costs of the legal representative be borne by HMCTS.

(f) The court may nominate the legal representative who is to be appointed to undertake that task.

(g) The extent of the work to be undertaken by a legal representative so appointed should be made clear at the outset and should be proportionate.

(h) In those limited cases where legal aid is still available in private law Children Act proceedings there is a detailed regulatory framework governing the calculation of costs payable to (claimable by) a solicitor for undertaking such work. The fees payable by the Legal Aid Agency are less than a solicitor might charge a privately paying client for doing the same work. That has always been so. I can see no cogent argument for suggesting that a legal representative appointed by the court should be entitled to a higher rate of remuneration than if that work were undertaken under the legal aid scheme.

In applying the principles to the current case, the judge ordered HMCTS to pay for a legally qualified advocate to cross-examine Y on the father's behalf

**Note:** This decision is currently the subject of an appeal by the Lord Chancellor.

***R (A Child)*** [**[2014] EWCA Civ 1664**](http://www.bailii.org/ew/cases/EWCA/Civ/2014/1664.html)

**Summary:** In this short judgment, the Court of Appeal allowed an appeal against a child arrangements order for no contact (including indirect contact).

**The law:** At paragraph 16,the Court of Appeal concisely sets out the applicable law:

The applicable legal principles are clear. First, the welfare of [the child] is the paramount consideration for the court. It takes precedence over any other. Second, the court has in a series of cases stressed the importance of contact between parent and child as a fundamental element of family life, which is almost always in the interests of the child, and which 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 where it would be detrimental to the child's welfare. The judge has a duty to promote such contact and to grapple with all available alternatives before abandoning hope of achieving some contact. Contact should be stopped only as a last resort and once it has become clear that the child will not benefit from continuing the attempt. The court should take a medium to long term view and not accord excessive weight to what appear likely to be short term and transient problems. The key question is whether the judge has taken all necessary steps to facilitate contact, as can reasonably be demanded in the circumstances of the particular case; Re C (a Child) [[2011] EWCA Civ 521](http://www.bailii.org/ew/cases/EWCA/Civ/2011/521.html" \o "Link to BAILII version).

**The decision:** The appeal was allowed on the basis that [para 21]:

In short, it does not seem to me that the judge has grappled with available alternatives, particularly when he did not have before him any evidence of the steps that could or might be taken to promote contact. It does not seem to me that the court was driven to conclude that the child would not benefit from continuing the attempt at contact, or that it had reached the position of last resort, or that there was no alternative other than the making of the order that was made.

***A and B (Prohibited Steps Order at Dispute Resolution Appointment*)** [**[2015] EWFC B16**](http://www.bailii.org/ew/cases/EWFC/OJ/2015/B16.html)

**Summary:** HHJ Wildblood QC comments on the procedure to be used in making prohibited steps orders at an interim hearing.

**Facts:** Father was a parliamentary candidate for UKIP and the father of A and B (both under 10 years old). At a Dispute Resolution Appointment the District Judge made a prohibited steps order that neither parent was to involve the children actively in any political activity. The father appealed on the basis of the procedure employed by the District Judge.

**The appeal:** On appeal,HHJ Wildblood QC did not seek to give general guidance about Dispute Resolution Appointments recognising the court’s broad discretion as to how to conduct a hearing. However, in allowing the appeal, the judge listed at paragraph 28 the following difficulties with this particular case:

1. The father had no notice before the hearing that this issue would be raised as one that was argued, let alone governed by orders;

ii) The factual underlay behind the orders is disputed and there was no written or oral evidence before the court that related to the issues before it;

iii) The contentions that the mother raised in support of the order were contested and the father did not have an opportunity to answer them. If he was not to have notice of this application for an order and was not to be allowed to give evidence about it he was entitled to the opportunity to make full submissions about it. He expressed the wish to advance his side of the story on the issues that arose and did not get it.

iv) The Cafcass report did not raise this as an issue that required intervention and there was no professional evidence before the court that supported the necessity for such an order.

v) This was an important issue in the context of this case. The order made was a prohibited steps order. Such an order should only be made for good (and, I add, established) cause and for reasons that are explained as being driven by the demands of the paramount welfare of the children. I do not think that such orders can be justified in contested proceedings on the grounds of neutrality and I do think that the decision must relate to the specific children in question. In *Re C (A child)* [2013] EWCA Civ 1412 Ryder LJ said: 'A prohibited steps order is a statutory restriction on a parent's exercise of their parental responsibility for a child. It can have profound consequences. On the facts of this case, without commenting on the wisdom of any step that either parent took or intended to take when they were already in dispute, and in the absence of an order of the court, father had the same parental responsibility as mother in relation to his son. Once the order was made, he lost the ability to exercise part of his responsibility and could not regain it without the consent of the court. That is because a prohibited steps order is not a reflection of any power in one parent to restrict the other (which power does not exist) it is a court order which has to be based on objective evidence. Once made, the terms of section 8 of the Children Act 1989 do not allow the parents to relax the prohibition by agreement. It can only be relaxed by the court. There is accordingly a high responsibility not to impose such a restriction without good cause and the reason must be given. Furthermore, where a prohibition is appropriate, consideration should always be given to the duration of that prohibition. Here the without notice prohibition was without limit of time. That was an error of principle which was not corrected by an early return date because that was susceptible of being moved or vacated unless the prohibition also had a fixed end date. The finite nature of the order must be expressed on the face of the order: *R (Casey) v Restormel Borough Council* [2007] EWHC 2554 (Admin) at [38] per Munby J'.

vi) Further, the District Judge was being asked to make orders that were invasive of the Article 8 rights of the father and of the children to organise their family lives together without interference by a public authority unless that interference was necessary and proportionate. That issue was not examined.

vii) Oral evidence is not always necessary (see Rule 22.2 of The Family Procedure Rules 2010). However there must be some satisfactory basis for an order if it is to be made. Otherwise the justification of the order is absent.

HHJ Wildblood QC also questioned whether the wording of the prohibited steps order (“neither parent is to involve the two youngest children, A and B, actively in any political activity”) was sufficiently defined to be enforceable.

***Also published in January and February 2015***

***M (A Child)*** [**[2014] EWCA Civ 1755**](http://familylawhub.co.uk/default.aspx?i=ce4491)**:** The Court of Appeal set aside a shared care arrangement which provided that “from such time that the mother moves to London, the child shall live with his father and mother with the principle of equal shared time”. The order was set aside on the basis that 1) the judge had impermissibly imposed a condition as to where the mother should live and 2) that a shared care arrangement was not justified on the evidence.

***X-N (A Child)*** [**[2014] EWCA Civ 1775**](http://familylawhub.co.uk/default.aspx?i=ce4504)**:** The father appealed a decision allowing the mother to take the child on holiday to China. The appeal was allowed on the basis that: 1) the trial judge did not have relevant documents available to him from previous proceedings (which prevented either party from removing the child from the jurisdiction); 2) the trial judge failed to give sufficient weight to all three factors identified in [*Re R* [2013] EWCA (Civ) 1115](http://www.bailii.org/ew/cases/EWCA/Civ/2013/1115.html); and 3) the trial judge’s failure to deal with the lack of expert evidence as required by *Re R*. A case such as this is a “symptom of a modern world where lay parties, dealing with these complicated and important international matters, come before a judge without proper preparation and without the proper legal focus” (McFarlane LJ) and one where “one feels greatly let down by the absence of proper legal representation (McCombe).

***E (A Child: Contact)*** [**[2015] EWHC 180 (Fam)**](http://www.bailii.org/ew/cases/EWHC/Fam/2015/180.html)**:** E was conceived between a heterosexual man and a “gay lady” (her preferred label) who met online. The father wished to present their relationship as a conventional heterosexual relationship; the mother did not. The mother submitted that a previous child arrangements order (made by consent) regulating the contact between E and his father had forced her into a “heterosexual paradigm”; Hayden J found that the mother wanted to establish herself as E’s sole (not primary) carer. During the course of the hearing, the parents were able to agree a contact plan (to include unsupervised contact). The sole issue remaining for the judge to determine was whether to grant a parental responsibility order, which he did. The judge also commented upon the use of the word “donor”:

“I would express the hope that the word becomes extinct, in this context, in the lexicon of the family law reports. I cannot easily contemplate any factual circumstance where its use is anything other than belittling and disrespectful to all concerned, most importantly the child.”

***R (on the application of Rights of Women) v The Lord Chancellor And Secretary of State for Justice*** [**[2015] EWHC 35**](http://www.bailii.org/ew/cases/EWHC/Admin/2015/35.html)**:** Lang J rejected Rights of Women’s application for judicial review of the regulations specifying the type of evidence required to get through the domestic abuse gateway for public funding. The judge found that the Lord Chancellor and Secretary of State for Justice had not exceeded his powers under LASPO when making the regulations.

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