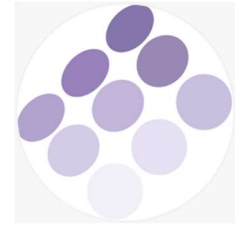


SAHCA Know How Materials

Family Section



Separate Representation of Children

Following the recent Judgment of Mr Justice Williams in *Re CS v SBH & Ors* [2019] EWHC 634 (Fam) our Deborah Piccos considers the practical impact of this Judgment for solicitors representing children.

Earlier case law

Until this recent case the most up to date guidance on this issue was given in the leading Judgment of Mrs Justice Black in *Re: W (a Child) (Public Law proceedings: child's separate representation* [2016] EWCA Civ 1051. The following paragraphs of the Judgment helpfully summarised the previous jurisprudence on this issue:

26. I think it is fair to say that views about children's involvement in legal proceedings have continued to evolve since 2005. This is not the place for a comprehensive review of developments, and nor is one necessary because, in *Re F (Children)* [2016] EWCA Civ 546, which was decided after Judge Williams made her decision about FW's separate representation, the President of the Family Division (with whom Arden LJ agreed) set out the highlights of the jurisprudence, starting at §35 of his judgment. By way of example, the evolutionary process has included developments in relation to children giving evidence in family proceedings (*Re W (Children)(Family Proceedings: Evidence)* [2010] UKSC 12, [2010] 1 FLR 1485), guidelines to encourage judges to enable children to feel more involved and connected with proceedings in which important decisions are made in their lives (*Guidelines for Judges Meeting Children who are Subject to Family Proceedings* [2010] 2 FLR 1872), the involvement of the Children and Vulnerable Witnesses Working Group (culminating in a final report dated February 2015, see [2015] Family Law 443), and recognition that the child's state of mind may have a part to play in establishing habitual residence (*Re LC (Children)* [2014] UKSC 1). Summing the position up at §41 of his judgment, the President said:

"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."

27. The question of whether a child is able, having regard to his or her understanding, to instruct a solicitor must be approached having in mind this acknowledgment of the autonomy of children and of the fact that it can at times be in their interests to play some direct part in the litigation about them. What is sufficient understanding in any given case will depend upon all the facts...."

Family Procedure Rules

Those who work in this area of law will be familiar with Rule 16.29 of the FPR which sets out the child's solicitor's obligations as follows:

(1) Subject to paragraphs (2) and (4), a solicitor appointed –

(a) under section 41(3) of the 1989 Act; or

(b) by the children's guardian in accordance with the Practice Direction 16A,

must represent the child in accordance with instructions received from the children's guardian.

(2) If a solicitor appointed as mentioned in paragraph (1) considers, having taken into account the matters referred to in paragraph (3), that the child –

(a) wishes to give instructions which conflict with those of the children's guardian; and

(b) is able, having regard to the child's understanding, to give such instructions on the child's own behalf,

the solicitor must conduct the proceedings in accordance with instructions received from the child.

(3) The matters the solicitor must take into account for the purposes of paragraph (2) are –

(a) the views of the children's guardian; and

(b) any direction given by the court to the children's guardian concerning the part to be taken by the children's guardian in the proceedings.

My experience has been that whilst the issue of whether a child is competent in a case is the child's solicitor's decision, the discussions with the children's guardian around the issue are usually extremely useful. In my case I typically find there is a consensus with the children's guardian on this issue.

Re CS

The child's solicitor's assessment of the child's competence to provide instructions directly is often said to be one of the most difficult parts of a child's solicitor's role. This part of the role requires the diligent and careful evaluation and determination of a child's capacity. This is a continuous obligation during the longevity of the proceedings and requires the child's solicitor to commit the time needed to build and maintain a rapport with the child to allow for the best possible evaluation and determination of capacity to be continually undertaken.

In *Re CS v SBH & Ors* [2019] EWHC 634 (Fam) Williams J helpfully sets out at paragraph 79 the list of factors that should be considered:

“in making my own evaluation of whether this child is of sufficient understanding to conduct the appeal without a children's Guardian my conclusions are set out below and draw upon all that I have set out in this judgment as well as what I have read and heard.

i) The level of intelligence of the child: she has the intelligence of or slightly above her chronological age.

ii) The emotional maturity of the child: she lacks emotional maturity, this being evidence by an inability in particular to hold a balanced view of her father or an understanding of her position.

iii) Factors which might undermine their understanding such as issues arising from their emotional, psychological, psychiatric or emotional state: the extent of her enmeshment with her mother and the emotional harm that she had suffered from that is likely to diminish her ability to understand the true nature of the issues.

iv) Their reasons for wishing to instruct a solicitor directly or to act without a guardian and the strength of feeling accompanying the wish to play a direct role: I accept that the child has felt her voice has not been listened to or heard but that actually does not reflect the reality given that she has had a Guardian and solicitor both in the original proceedings and recently. Whilst inevitably her reasons for wanting to have a solicitor and appeal will be mixed, arising at least in part from the fact that her solicitor and Guardian did not achieve the outcome she desired I consider that it is also likely that her position has been influenced by her mother and maternal family either directly or indirectly. Although every child is of course different the fact that this child has not been in direct contact with Mr Burrows or Ms Hopkin pushing for information, seeking answers or otherwise proactively pressing her case indicates to me that her desire to have her own solicitor in Ms Hopkin and to pursue the appeal is not particularly strong. Her acceptance of the possible withdrawal of proceedings in summer 2018 is further evidence of this.

v) Their understanding of the issues in the case and their desired outcome any matter which sheds light on the extent to which those are authentically their own or are mere parroting of one parents position: the child's lack of a full appreciation of the reasons for living with her father in part at least arises from the fact that the issue has not been addressed in therapy although I note that the Guardian understood that the child had knowledge of the reasons but had not processed it. The child's wish to live with her mother was accepted by the Guardian and HHJ Meston QC as a genuine one. Inevitably it is in part a product of influence (whether direct or indirect and see HHJ Pearl's conclusion) but all our views are in part a product of influence of others views. The child's wishes in this case are closer to the authentic end of the spectrum than the parroting end although they probably fall closer to the middle.

vi) Their understanding of the process of litigation including the function of their lawyer, the role of the judge, the role they might play and the law that is applied and some of the consequences of involvement in litigation: Ms Coyle's analysis but also the contents of some of the child's expressed views whether in letters or to the Guardian do not indicate much of an understanding of the court process, the functions of a solicitor, the role and function of a judge or the consequences of having a solicitor acting directly. They emerge as very simplistic and unrealistic. Although neither Ms Hopkin or Ms Coyle specifically addressed the question of the child's understanding of the appeal process, the nature of an appeal is in many ways harder to understand than the first instance process given it is a review of the judge's decision rather than a rehearing of the application.

vii) The court's assessment of the risk of harm to the child of direct participation for the risk of harm arising from excluding the child from direct participation and the child's appreciation of the risks of harm: both the Guardian and HHJ Meston QC considered that the child would accept an outcome that was contrary to her expressed wishes. It is clear from the Guardian's report that continued litigation is contrary to the child's welfare. In particular the burden that it is considered that she carries to promote the mother's position is harmful. Further involvement in litigation in this appeal or otherwise will likely be contrary to her welfare interests. Exposure to sensitive information to a child of this age and with this history will be harmful. Although her actual involvement in this appeal might be limited the process of challenging the judgment would inevitably involve detailed discussions with the child about the evidence. On the other hand, she has expressed a desire to have Ms Hopkin act for her and to appeal. This has endured since HHJ Meston QC's adverse judgment. However it is not pressed proactively and the Guardian and Ms Coyle did not detect any real desire to appeal in any event. Thus preventing the child from engaging directly in this litigation with the effect that it would very probably bring the appeal to a juddering halt is not likely in my view to be perceived by the child as a significant insult to her autonomy as an individual."

It is important to remember that should the competence assessment be complex due to, for example, a child's competence fluctuating, a child being on the cusp of competence, or due to any special needs of the child, instructing a child psychologist or a child and adolescent psychiatrist to seek their opinion on this issue can be invaluable.

Finally, should there be a dispute about whether a child is competent to provide instructions directly, it remains within the court's jurisdiction to ultimately decide if a child can instruct his or her solicitor directly.

Deborah Piccos

