

THE CORONAVIRUS AND PRIVATE CHILDREN LAW
A WEBINAR FOR CLASS LEGAL ON 2 APRIL 2020
IMPACT OF THE PRESIDENT'S GUIDANCE
AND CAFCASS ADVICE ON CHILD ARRANGEMENTS

Introduction

1. As children lawyers, we are used to uncertainty, to circumstances changing, but I think it is fair to say that none of us has ever experienced anything like this.

2. And, as children lawyers, we are used to clients looking to us for advice, to use our experience to guide them through what, for them, are uncharted waters, but we are dealing now with waters that are as uncharted for us as they are for them.

3. In this part of the webinar, I am going to look at the two significant pieces of guidance/advice that we as practitioners have so far been given – the Cafcass advice of 23 March 2020¹ and the President's Guidance of 24 March 2020.² Although only a day apart in time, they suggest, in my view, different approaches to how child arrangements should be operating in the current climate. Which is why some have described them as inconsistent. But in reality such tension as there is between the two can be far more easily explained. The Cafcass advice was produced over the course of the day on 23 March 2020 (I received it just before 5pm that day); at 8.30pm that evening the Prime Minister went on national TV to announce the lockdown that currently subsists; so the President's Guidance of the following day is able expressly and not in any hypothetical way to take into account that new reality.

¹ [https://mcusercontent.com/2750134472ba930f1bc0fddcd/files/987e77d6-0827-470c-9447-acc61404f465/CAFCASS Covid19 advice for families 20.pdf](https://mcusercontent.com/2750134472ba930f1bc0fddcd/files/987e77d6-0827-470c-9447-acc61404f465/CAFCASS_Covid19_advice_for_families_20.pdf)

² <https://www.judiciary.uk/announcements/coronavirus-crisis-guidance-on-compliance-with-family-court-child-arrangement-orders/>

Cafcass advice

4. Does that mean that the Cafcass advice, now seemingly overtaken, is of no value? No, it doesn't, because it contains helpful suggestions and will likely signal the overall approach of the Service as and when the current restrictions relax. But it is also of interest to compare it with the guidance that the President subsequently gave – in particular to see what the President could have said but did not.
5. So first to the detail of the Cafcass advice, entitled 'Co-parenting and child arrangements in a global pandemic – advice for families'.
6. It starts off with a general, uncontentious comment about routine:

“In these uncertain times, maintaining a sense of routine will help your child to feel safe and secure. Whilst your child's school may be closed, consider sticking to normal meal and bed times and any other family rituals your child takes comfort in - for example movie night or reading a book together before bed.”
7. Then follows the meat of the advice and the pretty clear steer that contact arrangements should, if at all possible, continue and child arrangements orders should, if at all possible, be complied with:

“Unless there are justified medical/self-isolation issues, (or some future nationally issued guidance or expectation associated with leaving the house in your area) children should also maintain their usual routine of spending time with each of their parents. If there is a Child Arrangements Order in place this should be complied with unless to do so would put your child, or others at risk. This will help your child to feel a sense of consistency, whilst also reassuring them that the parent they don't always live with is safe and healthy.”
8. So a pretty clear steer towards real not virtual face-to-face contact taking place subject sensibly to the caveats set out, which include future national guidance or expectation associated with leaving the home. And the advice later makes clear that “unless you or your child has an underlying health condition or other vulnerability, transporting them from one home to the other would usually be a legitimate journey (based on the current government

guidance).”

9. But, if the real face-to-face contact that had been taking place can no longer occur, then the Cafcass advice provides three pieces of advice.
10. First, it says: “If you're not able to maintain your child's routine due to illness or self-isolation, or non-availability of people who ordinarily support your child’s contact, then communicate clearly and honestly with your co-parent. If it is not safe for you to communicate directly (for example if there has been a history of domestic abuse) then consider using a trusted third party to help you.”
11. Second, it says: “Think creatively about how you can support your child to stay in touch with their other parent and family members during any period of self-isolation. Skype and Facetime can be great ways to catch up and can be used to read stories, sing and play together. With older children you could also consider a watch party – where you gather online to watch a movie or video, commenting and ‘reacting’ in real time.
12. Third it says, importantly: “If any court directed spending time arrangements are missed, think about how you and your coparent may be able to ‘make up’ your child’s time after the restrictions are lifted. Remember, any rearranged spending time arrangements should always be for your child’s benefit and should not be used as a source of tension or conflict – especially at a time when your child is likely to be feeling anxious about the effects of the pandemic”. So, I would suggest, a very clear steer towards compensatory time to make up for any contact time lost.
13. The rest of the advice is largely concerned with matters of health, hygiene and social distancing, but it does also address the obvious in a world now of remote courts, when it says: “Be extra vigilant when making sure that

children cannot hear discussions about the court case or any dispute you may have with your child's other parent. This is particularly relevant now as they are at home and there may be court hearings by skype/tele conference. Exposing children to these disputes can result in them feeling confused, having divided loyalties and may harm them emotionally.”

The President's Guidance

14. And so to the President's Guidance, impressively produced, as I have already noted, within 24 hours of the Prime Minister's lock-down announcement and the Stay at Home Rules that accompanied it. I am going to go through the Guidance, as we all need to be very familiar with it, and then make some observations about it afterwards, thinking about the issues that are likely to arise in consequence of it in the short and longer term.

15. And I would suggest that the very different feel to this document is apparent from the start, with the Guidance prefaced by the following words of introduction:

“During the current Coronavirus Crisis some parents whose children are the subject of Child Arrangements Orders made by the Family Court have been understandably concerned about their ability to meet the requirements of these court orders safely in the wholly unforeseen circumstances that now apply.

This short statement is intended to offer advice but, as the circumstances of each child and family will differ, any advice can only be in the most general form.”

16. Unsurprisingly, given that our President has long promoted the importance of parental responsibility in the private law arena, his guidance starts by reminding us that “parental responsibility for a child who is the subject of a Child Arrangements Order [‘CAO’] made by the Family Court rests with the child's parents and not with the court” (paragraph 1).

17. From that starting-point, it continues:

“2. The country is in the middle of a Public Health crisis on an unprecedented scale. The expectation must be that parents will care for children by acting sensibly and safely when making decisions regarding the arrangements for their child and deciding where and with whom their child spends time. Parents must abide by the ‘Rules on Staying at Home and Away from Others’ issued by the government on 23 March [‘the Stay at Home Rules’]. In addition to these Rules, advice about staying safe and reducing the spread of infection has been issued and updated by Public Health England and Public Health Wales [‘PHE/PHW’].

3. The Stay at Home Rules have made the general position clear: it is no longer permitted for a person, and this would include a child, to be outside their home for any purpose other than essential shopping, daily exercise, medical need or attending essential work.

4. Government guidance issued alongside the Stay at Home Rules on 23rd March deals specifically with child contact arrangements. It says:

“Where parents do not live in the same household, children under 18 can be moved between their parents’ homes.”

This establishes an exception to the mandatory ‘stay at home’ requirement; it does not, however, mean that children **must** be moved between homes. The decision whether a child is to move between parental homes is for the child’s parents to make after a sensible assessment of the circumstances, including the child’s present health, the risk of infection and the presence of any recognised vulnerable individuals in one household or the other.”

18. How are parents to deal with the issue of whether real face-to-face contact should be taking place? What might be considered a reasonable parental standpoint to adopt? There are dealt with at paragraph 5:

“5. More generally, the best way to deal with these difficult times will be for parents to communicate with one another about their worries, and what they think would be a good, practical solution. Many people are very worried about Coronavirus and the health of themselves, their children and their extended family. Even if some parents think it is safe for contact to take place, it might be entirely reasonable for the other parent to be genuinely worried about this.”

19. If parents agree, what should they do? Well, we are all familiar with those clauses in child arrangements orders that provide for “such further or other arrangements as the parties may agree”. And we are all familiar with the proposition that such a clause is really for the avoidance of doubt (and is often

so described) and essentially otiose as the parental power to vary child arrangements by agreement is already recognised and implicit. And paragraph 6 of the Guidance reflects that:

“6. Where parents, acting in agreement, exercise their parental responsibility to conclude that the arrangements set out in a CAO should be temporarily varied they are free to do so. It would be sensible for each parent to record such an agreement in a note, email or text message sent to each other.”

20. Where parents do not agree – and, for me, this is the most noteworthy and potentially contentious part of the Guidance – paragraph 7 says this:

“7. Where parents do not agree to vary the arrangements set out in a CAO, but one parent is sufficiently concerned that complying with the CAO arrangements would be against current PHE/PHW advice, then that parent may exercise their parental responsibility and vary the arrangement to one that they consider to be safe. If, after the event, the actions of a parent acting on their own in this way are questioned by the other parent in the Family Court, the court is likely to look to see whether each parent acted reasonably and sensibly in the light of the official advice and the Stay at Home Rules in place at that time, together with any specific evidence relating to the child or family.”

21. And, if a parent does not get to spend time with their child, what then?

Paragraph 8 provides:

“Where, either as a result of parental agreement or as a result of one parent on their own varying the arrangements, a child does not get to spend time with the other parent as set down in the CAO, the courts will expect alternative arrangements to be made to establish and maintain regular contact between the child and the other parent within the Stay at Home Rules, for example remotely – by Face-Time, WhatsApp Face-Time, Skype, Zoom or other video connection or, if that is not possible, by telephone.”

22. And that paragraph leads to the President’s parting words:

“The **key message** should be that, where Coronavirus restrictions cause the **letter** of a court order to be varied, the **spirit** of the order should nevertheless be delivered by making safe alternative arrangements for the child.”

23. It is a relatively short piece of guidance, but one, I would suggest, that warrants a number of observations. And I proffer the following, mindful of

the questions likely to arise and points likely to be taken not only in the coming weeks but after restrictions relax and we return (hopefully) to some sense of normality.

24. First, the reference within it to the guidance accompanying the Stay at Home Rules of 23 March 2020 should now be read, I would suggest, as a reference to that part of The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, introduced on 26 March 2020, that deals with child arrangements.³ Regulation 6(1) provides that “during the emergency period, no person may leave the place where they are living without reasonable excuse” and regulation 6(2) provides 11 examples of what constitutes a “reasonable excuse”, of which sub-regulation (j) provides that “a reasonable excuse includes the need ... in relation to children who do not live in the same household as their parents, or one of their parents, to continue existing arrangements for access to, and contact between, parents and children, and for the purposes of this paragraph, “parent” includes a person who is not a parent of the child, but who has parental responsibility for, or who has care of, the child”.

25. Does that sub-regulation make a difference? One can that see it might. If one takes a literal interpretation of the expression “to continue existing arrangements”, then it might be argued that the exception is limited only to the continuation of those arrangements that subsisted prior to the emergency period. But, as children lawyers, we have grown up with the notion of purposive interpretation, so, if it came to it, I would anticipate that arrangements ordered subsequent to the start of the emergency period would also be seen as covered, and also arrangements agreed in substitution for the precise arrangements previously subsisting. And it will be noted that the exception is drafted sufficiently broadly to include not only contact in the

³ And in Wales to The Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, reg 8.

other parent's home but contact out of the home, though query whether that would likely to be agreed or ordered. Contact centres are now closed insofar as real face-to-face contact is concerned, and it is hard to see how supervised contact can survive the present restrictions save where taking place at the contact parent's home, supervised by a family member not falling within a vulnerable category.

26. Second, when I compare and contrast the Cafcass advice and the President's Guidance, it rather reminds me of the battle that has raged over the years and which now finds expression in the current Practice Direction 12J dealing with child arrangements and domestic abuse.⁴ The Cafcass advice, I would describe as more of a 'contact first' document. The President's Guidance, in tone and content, I would describe as more of a 'safety first' document. And nowhere is this clearer than in the paragraph 4 balance, which advises that real face-to-face contact *can* still happen; does not say that, wherever possible, it should happen; but does expressly say that the exception to the mandatory 'stay at home' requirement does not mean that it *must* happen.

27. Third, the President clearly does not want the courts clogged up with contact disputes and risk assessments in individual cases over the restricted period. He expects parents to act reasonably and to communicate sensibly and be alive to and understanding of each other's position, marking up that, in the present circumstances, there is a range of reasonable parental standpoints that a parent can adopt.

28. So, fourth, how is the President keeping these cases away from the courts? First, uncontentiously, by encouraging parents to use their parental responsibility jointly and sensibly. Second – and I would suggest that potentially this really is quite contentious, if taken at face value – by allowing

⁴ Practice Direction 12J – Child Arrangements & Contact Orders: Domestic Abuse and Harm.

the resident parent, in the event of a dispute, the unilateral power to vary court ordered child arrangements to what that parent considers safe.

29. I confess that I know of no case authority that allows for one parent unilaterally to vary court ordered child arrangements in the exercise of their parental responsibility. It is a proposition seemingly at odds with the classic, oft-quoted statement as to the exercise of parental responsibility to be found in the schedule to *A v A (Shared Residence and Contact)*,⁵ a decision of Wall J (as he then was). All our learning to date has emphasised that, if variations to child arrangements orders are not agreed, then it is for the court to determine – and in advance – whether a child arrangements order should be varied. So potentially that is a radical departure, and one that I feel rather uncomfortable with, particularly when I consider its potential long-term implications, to which I shall come.

30. Fifth, you will have noticed that, whereas the Cafcass advice makes express reference to the concept of compensatory real face-to-face contact to make up for any such contact lost over the restricted period, the President's Guidance is silent as to that. It is an issue that is inevitably going to arise for those cases where a substantial amount of real face-to-face contact will have been missed out.

31. My sixth observation is this, and it will doubtless not surprise anyone with long experience of private children law cases. The President calls for separated parents to behave reasonably, and experience tells that, by and large, reasonable parents do behave reasonably. But, if all parents behaved reasonably, most of us would be out of jobs.

32. Perhaps reflective of my own case-load, I have the concern that this guidance

⁵ [2004] EWHC 142 (Fam), [2014] 1 FLR 1195.

potentially gives too much leeway to the unreasonable parent and in particular to the resident parent who really does not want contact to occur: they have the power to stop real face-to-face contact unilaterally; they do not have to obtain the prior sanction of the court to do so; there is no explicit expectation of compensatory contact once the restrictions end (and it is one thing dealing with an initial 3 week lockdown period, quite another if, as many expect, the restricted period ends up being 3 months or more); and, if the resident parent's unilateral decision to stop real face-to-face contact is subsequently challenged, it seems to me that it will likely be very hard to substantiate the contention that they have acted unreasonably, given what the President says, at paragraph 5, about the many people who "are very worried about coronavirus and the health of themselves, their children and their extended family", about how "even if some parents think it is safe for contact to take place, it might be entirely reasonable for the other parent to be genuinely worried about this". For all those cases where the maintenance of contact has been an issue, where there is little trust between parents, where there is even instead downright hostility, one can readily see the problems ahead.

33. And that prefaces my last observation, which is my concern about the potential longer term impact of this Guidance, which may well have significant ongoing influence – not least because, when it comes to allocation, private children law is the poor relation, meaning that appellate guidance (certainly from the Court of Appeal or above) tends to be very thin on the ground. I do worry about the concept of the parental unilateral power to vary child arrangements orders entering the lexicon of litigation life and being used in other, future situations of alleged risk; I worry about the inroad that would entail into the purity of the principle that court orders are there to be obeyed, and that, if you want to avoid your obligation under a child arrangements order, then, unless agreed, you should be applying to vary or discharge that order; and I worry because, looking back over my own

caseload, I can think of plenty of parents who would abuse that unilateral power given the chance.

34. In circumstances where there was plainly a need for guidance on an urgent basis, it seems churlish in any way to suggest that a better method may have been adopted. But might I humbly, respectfully suggest that, rather than introduce the potentially contentious concept of the unilateral parental power to vary, the understandable objective of this guidance could less contentiously have been achieved by a different route.

35. As we will be aware, section 11J Children Act 1989 introduces the enforcement order. Section 11J(2) stipulates that, “if the court is satisfied beyond reasonable doubt that a person has failed to comply with a provision of the child arrangements order, it may make an order (an “enforcement order”) imposing on the person an unpaid work requirement”. And section 11J(3) and (4) then qualify that provision by providing that “the court may not make an enforcement order if it is satisfied that the person had a reasonable excuse for failing to comply with the provision” (section 11J(3)), with the person claiming reasonable excuse carrying the burden of proving it on the balance of probabilities (section 11J(4)).

36. It seems to me that all the guidance really needed to say is that, where a parent does not comply with the terms of a child arrangements order out of genuine, grounded concern for themselves, their child or their other family members, having regard to the public health guidance, then such would be likely to constitute a “reasonable excuse” for non-compliance. That, it seems to me, would be sufficient to deter unmerited contact or enforcement applications without setting up (even if unintentionally) the potentially dangerous precedent of the unilateral parental power to vary.

37. Whether, of course, the President’s Guidance will come to be refined over

the coming weeks, time will tell. But I think that we are all now having to get used to our professional landscape changing by the hour, let alone by the day.

38. And, in that context, it is worth bearing in mind that this webinar is being given at the very start of the pandemic. In a period of such uncertainty, who knows where we will be in a few months' time? If, for example, the (so-described) 'game-changer' antibody test does arrive and come into common usage, allowing contact parents who have survived the coronavirus to demonstrate their immunity (if that is what the test can do), then one can foresee that, for many cases, that might indeed be a 'game-changer' because it will inevitably impact the balance of contact and risk.

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