DEVON CHAMBERS

FAMILY LAW NEWSLETTER

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DELAY – A PERSISTENT PROBLEM

In his most recent annual report the Lord Chief Justice has noted that in spite of a 24% increase in the number of public law case starts during January to March 2016 (as against the same period in 2015) there has been a modest improvement in the number of cases dealt with in less than 26 weeks (60% up from 55.75%). Nevertheless delay remains an issue, and all those involved in the proceedings must comply with the prescribed timescale and directions.

Most recently a local authority was the subject of substantial criticism by Mr Justice MacDonald for non-compliance with directions in a case in which there had already been a 'more than usually chequered history' (London Borough of Redbridge v A, B and E (Failure to Comply with Directions) [2016] EWHC 2627 (Fam)). This arose even though the judge had specifically focussed the LA's attention on its obligation to comply with his directions, and reminded the parties of their duty to draw the court's attention to any issue that might affect timetabling and, if necessary to make an application to bring it back for judicial consideration.

Although specifically addressed to the LA in this case all but one of the points made by the judge are equally applicable to all parties. They are-

1. **Case management orders are to be complied with on time and to the letter. If compliance within the specified timescale is not possible then the relevant party must apply for an extension of time before the time has run out (see Re W (Children) [2015] 1 FLR 1092).**

2. **It is for the court and only the court to set and/or amend the timetable. The parties are categorically prohibited from amending the timetable by agreement (FPR 2010, r 4.5(3)). All parties have a duty to inform the court of non-compliance with the timetable set (see Re W (Children) [2015] 1 FLR 1092).**

3. The fact that the party is subject to a heavy burden of work is not an excuse for non-compliance. Resource problems will not be accepted as an excuse for failures to comply with court orders (see Bexley LBC v W and D [2014] EWHC 2187).

4. The court's rules and practice directions exist for a purpose and must be complied with. Casual non-compliance is not acceptable because further harm will likely be caused to the child (see Re H (A Child)(Analysis of Realistic Options and SGOs) [2015] EWCA Civ 406).

5. Failure by a LA to comply with court orders resulting in unnecessary and harmful delay may result in breaches of Arts 6 and 8 and an award of damages against it (see Northamptonshire County Council v AS, KS and DS [2015] EWHC 199 (Fam)).

The judge ordered the LA to show cause why it should not be ordered to pay the costs thrown away in respect of the ineffective hearings. Always a risk!

It is to be noted that the timescale does not only apply to the parties but to the court itself. In Re T Care Proceedings: Judgment Delay) [2015] EWCA Civ 606 there had been a six month delay between the hearing and the date that judgment was handed down. Care orders were made with either long-term fostering or placement for adoption. The case came before the Court of Appeal because the father argued that the judge had failed to have any regard to improvements in parenting between the conclusion of the evidence in September 2014 and judgment in March 2015. In his judgment the judge had made no reference to the six-month delay and the Court of Appeal considered it likely that he had not considered the question of whether the evidence may have become stale or require updating. The appeal was allowed and the case remitted for further consideration with the benefit of updating evidence.

The Court of Appeal made it clear that it is the court's responsibility to establish the necessary 26 week timetable in accordance with section 32 of the Children Act 1989 AND that express provision for the preparation of a judgment should be included in that timetable. It specifically stated that if the judgment cannot be completed within the 26 weeks then section 32 still applies and the judge must to go through the section 32-week exercise again and determine what is necessary (section 32(5)) and the impact on the child's welfare (section 32(6)(a)) before setting a further extension of up to eight weeks for the judgment to be finalised. The court does not have a general power, of its own motion, to grant itself an extension from the section 32 timetable. Any extension can only be determined after the formal process required by FPR r 12.26A with the court making a positive decision on the question of extension. Furthermore, if an extension (of up to eight weeks) is given to accommodate the need to prepare the final judgment FPR r 12.26C must be complied with and the court must give "(a) the reasons for that decision; and (b) … a

short explanation of the impact which the decision will have on the welfare of the child." The effect of section 32(8) is that the court does not have jurisdiction, at any one time, to grant an extension of more than eight weeks, i.e. if further time is required then the section 32 process must be complied with on each occasion.

The Court of Appeal expressed sympathy with the difficulties faced by "judges who undertake the relentless diet of high-end and burdensome care cases", but observed that the principle at the heart of section 32 dictates that the provision of judgment writing time must have enhanced priority. It appeared to conclude that the judges should focus on finishing cases rather than moving on to the next one and thereby creating additional pressures and problems.

The Court of Appeal specifically drew attention to the responsibility of the parties under FPR r 12.24 to monitor compliance with the court's directions and tell the court/court officer about failures to comply with directions and any other delays.

Unlike the position of the parties, who may be at risk as to wasted costs for example, there does not appear to be any potential for sanctions on judges whose judgments are delayed (other than the risk of appeal). It is likely that many practitioners will be apprehensive about enforcing the rules against their local judges, but the focus should be the welfare of the child or children involved. Such an approach will certainly require the practitioners themselves to ensure that they are 100% compliant!

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