



PUMP COURT

CHAMBERS

# Expecting the unexpected

Victoria Ellis & Maria Henty



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## **Decree Absolute – the unexpected way**

Victoria Ellis



# Unexpected applications for Decree Absolute

You must have Decree Nisi to make a Final Order in financial remedy proceedings, but what difference does a Decree Absolute make?

- ❖ The ability to bring a claim / assets you can claim against.
  
- ❖ Remarriage
  - Consider the loss / limitation of any claim.
  - The risk of a new spouse establishing an interest in the matrimonial assets.
  
- ❖ If a party dies
  - If a party dies intestate
  - If there is a need to bring claim under the Inheritance (Provision for Family and Dependents) Act 1975 (“the 1975 Act”)
  - If a party is not domiciled in the UK
  
- ❖ Tax implications

# Contested Decree Absolute Hearing

Any party wishing to prevent a decree absolute being granted needs to show special circumstances.

Section 9(1) of the Matrimonial Causes Act 1973 states that the court can (a) make the decree absolute (b) rescind the decree, (c) require further inquiry (d) otherwise deal with the case as it thinks fit. A discretion which is wholly that of the court.

**Thakkar [2016] EWHC 2488:** Mr Justice Moor heard the matter, in which a wife sought to prevent her husband being granted a decree absolute. H had provided limited disclosure and W feared that if a decree absolute was granted she would miss out significantly on certain assets.

Moor J held that so long as the application is made after the appropriate period had expired (6 weeks and 1 day for the petitioner and 3 months for the respondent ) then there was a strong presumption in favour of making the decree absolute. This presumption would only be overridden in special circumstances.

Moor J referred to the case of **Re G (Decree Absolute: Prejudice) [2002] EWHC 2842**, which provides a list of scenarios which were not sufficient to delay making a decree absolute:

- ❖ That the objecting spouse would be disadvantaged under the 1975 Act;
- ❖ That there had been allegations of failure to provide full and frank disclosure; and,
- ❖ That the other party would be likely to disengage.

So what we are looking for is a factor that can be used to distinguish a case from **Re G**. In **Thakkur** Moor J found such a feature in the offshore structure which held significant assets, where “*whether or not you are a wife or an ex-wife can make all the difference*”.

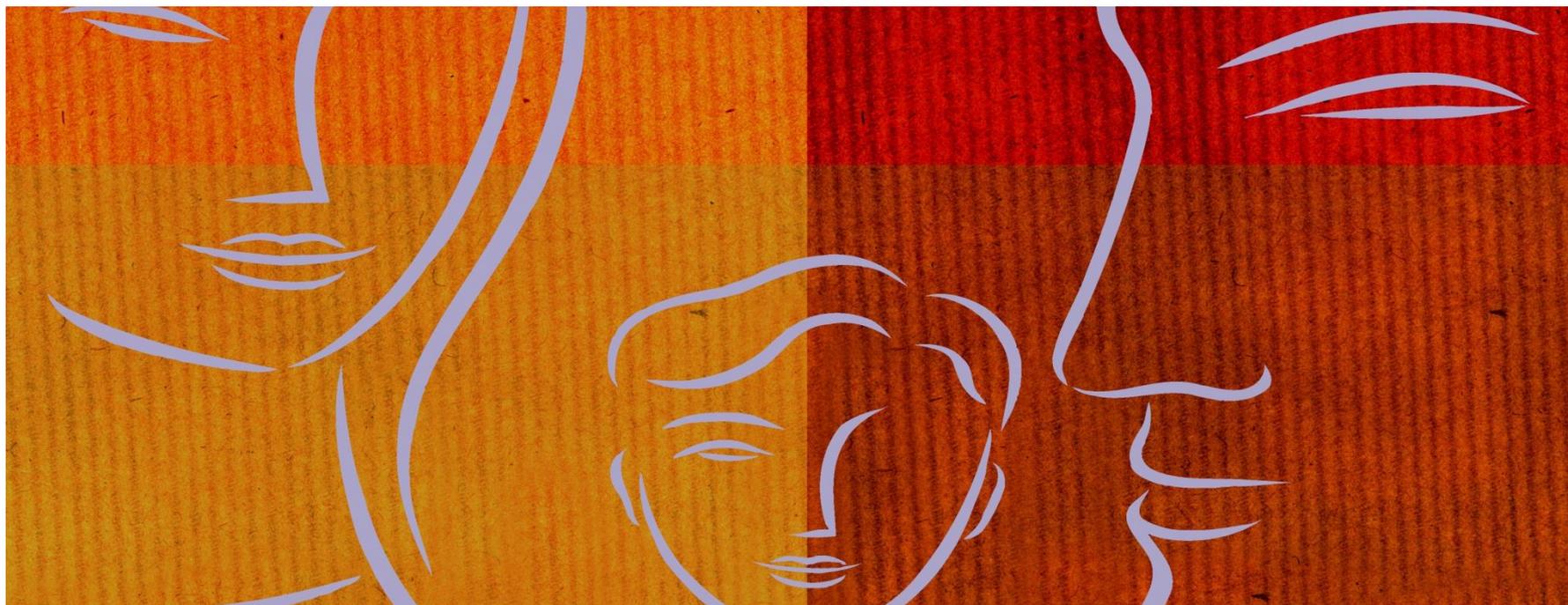


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# Where is my disclosure? – FDA & FDR

Victoria Ellis



# What to do when you have no disclosure at a First Appointment?

- ❖ Make sure you can prove the application has been served.
- ❖ Make sure you have reminded the other side of deadlines and chased missing information.
- ❖ Make sure you have given a costs warning and serve a statement of costs.
- ❖ Just because they aren't engaging make sure you are up-to-date.
- ❖ At court seek penal notices if possible.
- ❖ Ensure the order contains a recital that the court may draw adverse inferences if either party does not provide sufficient disclosure.
- ❖ Ensure you have a warning in the order that the court may proceed in the absence of another party.

- ❖ Prepare the best note and schedule you can to assist the Judge. Explain what assets your client believes have not been disclosed / standard of living of the other side to build a picture.
  
- ❖ Provide a directions order for the Judge re-timetabling the matter:
  - Include dates for the outstanding Form E;
  - Dates for you to raise a questionnaire (should the other side be able to if they have already missed their deadline?)
  - Schedule of Deficiencies
  - Valuations if necessary
  - Mortgage raising capacities
  - Property Particulars
  - Updating disclosure
  
- ❖ Adjourned First Appointment or straight to an FDR?

# What to do when you have no disclosure at an FDR?

- ❖ Make sure in the run up to the FDR you have made numerous requests for the outstanding information.
- ❖ Make sure you have given a costs warning and serve a statement of costs.
- ❖ Make sure your client has followed all the directions.
- ❖ If the other side aren't co-operating, try and obtain your own information to assist you and the court i.e. valuations, information from companies house or the Land Registry.
- ❖ Try and provide the Judge with as much information as to what your client thinks is there / should be there and why they believe that.
- ❖ If your client still wants to negotiate – make sure you advise fully as to the risk and get a written disclaimer!

# Third Party Disclosure Orders

- ❖ There are occasions when it will be sufficient to rely on recitals of adverse disclosure, when you have a good idea as to what has not been disclosed.
  
- ❖ Third Party Disclosure orders are useful when you cannot build a picture of the other side's assets without further help. They can help in all sorts of situations:
  - Against trusts or corporate structures, to force the trustees or company to provide the required information.
  - Against banks and other financial institutions to obtain bank statements, investment portfolios and other savings mechanisms.
  - Against Employers in relation to non-disclosed income.
  - Against Accountants if the court is satisfied that a party is seeking to hide assets.



- ❖ An application for disclosure against a person who is not a party to the proceedings is made under FPR 2010, r 21.2.
- ❖ Applications may be made without notice but must be supported by evidence.
- ❖ The Court may make an order under this rule only where disclosure “**is necessary in order to dispose fairly of the proceedings or to save costs**” (FPR 2010 r 21.3)
- ❖ Rule 21.4 makes it clear that an order under his rule **must**:
  - a) Specify the documents or the classes of documents which the respondent must disclose; and,
  - b) require the respondent, when making disclosure, to specify any of the documents –
    - (i) which are no longer in the respondent’s control; or
    - (ii) in respect of which the respondent claims a right or duty to withhold inspection.

- ❖ The Court can order that the respondent must indicate what happened to documents which are no longer in his control (r.21.5)
- ❖ It is well established that there is no power to require a third party to file an affidavit or sworn statement in ancillary relief proceedings. This includes a co-respondent, who is not a party to such an application; see **Wynne v Wynne and Jeffries [1981] 1 WLR 69.**
- ❖ For guidance and a review of the case law see: **M v M (Third Party Subpoena: financial Conduct) [2006] 2 FLR 1253**

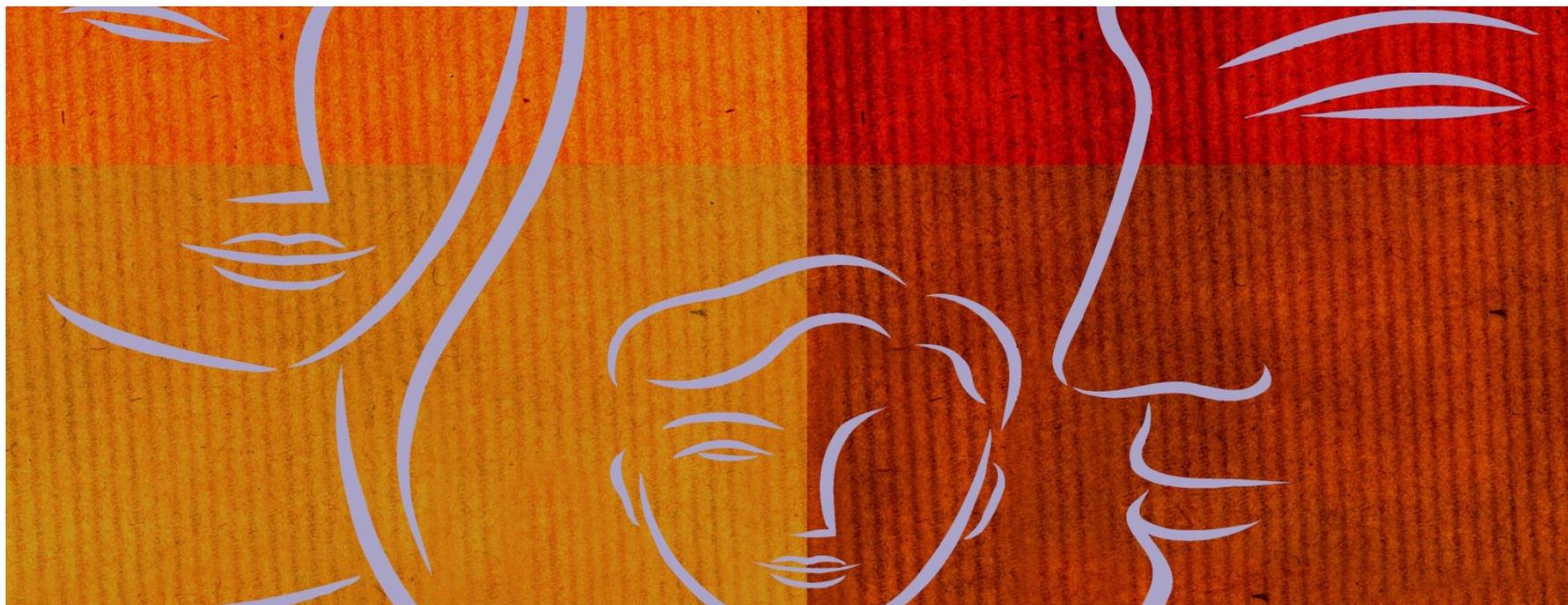


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## **What to do when your FDA turns into a Final Hearing**

**Maria Henty**



## when your FDA turns into a Final Hearing:

- **Not as bad as it seems...**

Don't panic

- **The facts:**

- 7 year marriage
- 2 young children
- Parties separated in 2014, living together but apart (court in 2017/2018)
  
- FMH - equity of £250,000 (H says he has nowhere else to live)
- W - £30k per annum (net), H - unknown
- W Pension - £90k
  
- W issued for financial remedies autumn of 2017

when your FDA turns into a Final Hearing:

What happened next?: -

- Not a lot...
  - No Form E from H
  - No disclosure from H
  - H did not attend FDA in early 2018
- Non-attendance following no engagement:
  - Warning as to treating FDA as a Final Hearing – warning as to the types of orders that may be made...

## when your FDA turns into a Final Hearing:

### First FDA warnings to H: -

- *“...If the respondent fails to attend this hearing the Court will treat the appointment as a final hearing and may draw adverse inferences from any failure to disclose or non-attendance.”*
- **Recitals** – what’s been happening, what hasn’t H done, what chances has H been given. Get it all recorded.
- **Warning as to drawing an adverse inference** – get this on the face of the first order
- **Service** – shut down any later suggestions that H was not on notice.
- **Costs** – have your N260 ready for the hearing (not just a Form H)

when your FDA turns into a Final Hearing:

Drawing an Adverse Inference: -

- Failure to disclose in the context of court proceedings is serious; [36] in *Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315:

*“However ancillary relief proceedings are marked by features absent in other civil proceedings:*

*...ii) The parties owe the court a duty, a duty of full, frank and clear disclosure. The duty is absolute.*

*iii) Sadly the duty is as much breached as observed. The payer's sense of the obligation is distorted by the emotions aroused by the payee. Breaches take many forms...”*

when your FDA turns into a Final Hearing:

The court may draw appropriate inferences from silence, **[35] of AAZ v BBZ [2016] EWHC 3234 (Fam), citing Prest v Petrodel Resources Ltd [2013] 2 FLR 732 [45]:**

*“...[J]udges exercising family jurisdiction are entitled to draw on their experience and to take notice of the inherent probabilities when deciding what an uncommunicative husband is likely to be concealing.”*

when your FDA turns into a Final Hearing:

- H attends the adjourned FDA: -
  - Now eight months since W issued
  - Still no Form E
  - Not paid previous costs
  - Still no disclosure...
    - *“It’s OK, it’s all in my car, judge”*
    - No explanation as to why

when your FDA turns into a Final Hearing:

- H seeks an adjournment as he has attended FDA
- H argues, unsuccessfully, that he has not been served
- The judge is not happy

when your FDA turns into a Final Hearing:

- **What to do next...**
  - Can you have an effective FDA, FDR, Final hearing?
  - Would it be safe, in terms of disclosure, to press ahead with a Final Hearing?
  - Does your brief need to be endorsed by the client?
  - What are the risks?
  - Expense of further delay/further hearings: lack of disclosure: further non-compliance: impact on the client of more waiting: chance for a ‘slam dunk’ today
- **What I decided to do – it was risky BUT**

when your FDA turns into a Final Hearing:

• Ruling: -

- FMH 100% outright transfer to W (with vacant possession and DJ to sign TR1)
- Nominal spousal
- W keeps all pension
- W pays H lump sum of £11,000
- Clean break
  
- **Detailed recitals in the Final Order – including setting out all of H’s oral Form E given in court**
  
- H appealed without success



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## **Faux Reps**

**What to do when you opponent is not what you expected!**

**Maria Henty**



## What to do when your opponent is not what you expected

### McKenzie Friends v Paid McKenzie Friends: -

Be wary of the difference!

- Have they provided you with their CV?
- Have they provided you with a document making clear that they have no conflict of interest?
- Have they signed in at court & completed the McKenzie Friend form?

- **Do you want this person to come into court???**
  - What are the risks?
  - Are they going to hinder the hearing?
  - Are they going to keep matters confidential?
  - How have they behaved outside of court?
  - Are they so poor that they will 'torpedo' their client's case in any event?
  - Are they going to ignore all the rules and effectively be the LIP's advocate?
  - Have they been conducting the pre-hearing litigation on behalf of the other side?
  - Are they clearly charging a fee?
  - Does the LIP think that they're a solicitor?

Guidance: -

**Practice Guidance: McKenzie Friends (Civil and Family Courts) (2010)**

**The Right to Reasonable Assistance**

*Litigants assisted by MFs remain litigants-in-person. MFs have no independent right to provide assistance. They have no right to act as advocates or to carry out the conduct of litigation.*

## Practice Guidance: McKenzie Friends (Civil and Family Courts) (2010)

- **What McKenzie Friends may do**

*i) provide moral support for litigants; ii) take notes; iii) help with case papers; iii) quietly give advice on any aspect of the conduct of the case.*

- **What McKenzie Friends may not do**

*i) act as the litigants' agent in relation to the proceedings; ii) manage litigants' cases outside court, for example by signing court documents; or iii) address the court, make oral submissions or examine witnesses.*

## Practice Guidance: McKenzie Friends (Civil and Family Courts) (2010)

### Rights of audience and rights to conduct litigation

*MFs do not have a right of audience or a right to conduct litigation. It is a **criminal offence** to exercise rights of audience or to conduct litigation unless properly qualified and authorised to do so by an appropriate regulatory body or, in the case of an otherwise unqualified or unauthorised individual (i.e., a lay individual including a MF), the court grants such rights on a case-by-case basis.*

## Practice Guidance: McKenzie Friends (Civil and Family Courts) (2010)

### Rights of audience and rights to conduct litigation

*Courts should be slow to grant any application from a litigant for a right of audience or a right to conduct litigation to any lay person, including a MF.*

*This is because a person exercising such rights must ordinarily be properly trained, be under professional discipline (including an obligation to insure against liability for negligence) and be subject to an overriding duty to the court. These requirements are necessary for the protection of all parties to litigation and are essential to the proper administration of justice.*



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**Where is my opponent?**

Victoria Ellis



# I'm at court but there is no sign of the other side?

- ❖ Make sure you are clear as to whether the other side are represented or not.
- ❖ Make sure we can prove that the side have been served.
- ❖ Can evidence that they knew about the hearing.
- ❖ Know your service rules.
- ❖ Alternate service – be proactive.
- ❖ Recitals and yet more recitals.
- ❖ Proceed in absence next time.
- ❖ Costs.





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# Capacity... ???

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# How to navigate proceedings when a party may or may not have capacity.

- ❖ Flag the issue at the first opportunity.
- ❖ GP capacity assessment in the first instance
- ❖ Any dispute? Further experts?
- ❖ Power of Attorney
- ❖ Deputy
- ❖ Litigation friend
- ❖ Litigation friend and evidence
- ❖ Do you need the Official Solicitor
- ❖ Office of the Public Guardian
- ❖ The Court of Protection



Official Solicitor  
and Public Trustee



Court of  
Protection



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# Children – top tips

Victoria Ellis



## Some Practical Top Tips

❖ **Determine your factual matrix – don't let an incorrect narrative take root.**

In *T (Children)* [2014] EWHC 2164 (Fam) Holman J emphasises the need for detailed investigation (fact finding) at an early stage. A mother had terminated all contact between the father and the children and allegations were then made that he had sexually abused or otherwise harmed the children. The significant majority of the allegations were not found, and those that were, were not of the level that would be a bar to contact.

❖ **Transcripts can be worth their weight in gold!**

❖ **Do you need a s.7 or s.37 Report? Which is more appropriate?**

## Some Practical Top Tips

- ❖ Be very wary of purely 'wishes and feelings' reports

### H (Children) [2014] EWCA Civ 733:

it is inappropriate to take wishes and feelings at face value. The court must scrutinise the context. A child(ren)'s stated wishes and feelings may be at odds with what is actually in the child(ren)'s best interests.

- ❖ Family Therapy
- ❖ Chances Give Choices
- ❖ ISW



Search ID: jman40  
I DON'T CARE WHICH PARENT I GET  
AS LONG AS IT'S THE SAME ONE  
THAT GETS THE PLAYSTATION.

- ❖ Cafcass Officers or Independent Social Worker (“ISW”), no matter how good they are, are not trained in psychological assessment or therapy.
  
- ❖ **If you want an assessment, ensure that a prompt Part 25 application is made. Make sure you include:**
  - CVs;
  - Cost estimates; and,
  - Time estimates.
  
- ❖ Do not ambush



- ❖ It is difficult to overstate the importance of judicial continuity. Effective case management can make all the difference in the world to the ultimate outcome.
- ❖ It prevents each hearing being a new opportunity for more allegations / concerns to be raised (particularly if previous ones have been addressed).
- ❖ **Re D (Intractable Contact Dispute: Publicity) [2004] EWHC 727 (Fam)** – be sceptical of allegations made late in the day.

# Child Contact Intervention Orders

❖ Cafcass in co-operation with local providers (most notably Core Assets) can deliver targeted interventions, tailor made to individual families.

❖ **A Child Contact Intervention Order (“CCI”) can be made via an activity direction.**

A CCI is normally funded via an agreement that Cafcass has with a local provider and can be for up to 12 hours. As a general rule, the closer you are to the end of the financial year, the less available such orders are.

**There are many types of interventions available, such as:**

- ❖ Sessions to prepare a child for contact;
- ❖ Working with parents to prepare for contact;
- ❖ Intervention to ensure contact happens; and,
- ❖ Observation of contact / helping to sustain indirect / direct contact.



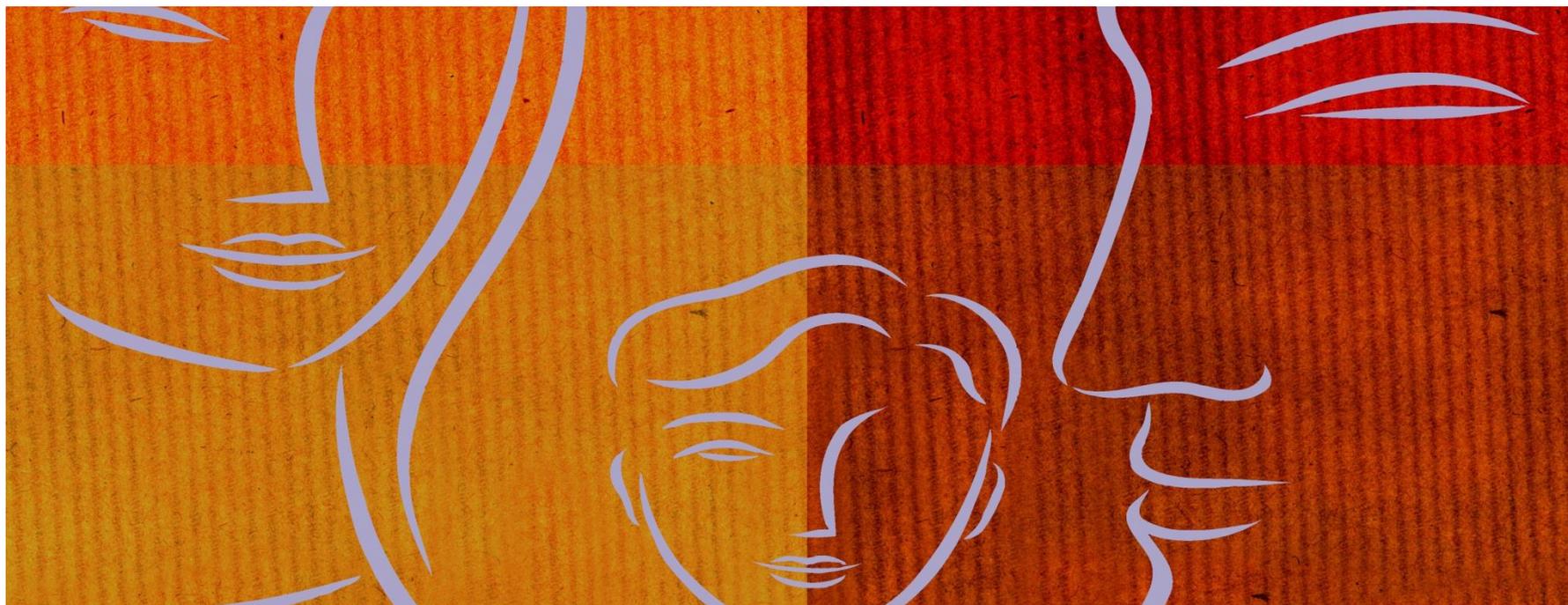
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# Guardians in Private Children

Parents withdrawing applications: the implications

Maria Henty



# Parents withdrawing applications: the implications

## Withdrawing applications: -

- **FPR r.29.4 –**
  - Need permission of the court
  - Should be written but can do orally if all parties present

## **But... be aware it is not that simple:**

*“The paramount consideration for the court is whether the withdrawal of the proceedings would promote or conflict with the welfare of the child concerned. The court must look at each case on its facts to see if there is some ‘solid advantage to the child to be derived from continuing the proceedings’...”*

# Parents withdrawing applications: the implications

## FPR r.16.4 - Children's Guardian: -

- **Practice Direction is most informative**

*“Making the child a party to the proceedings is a step that will be taken only in cases which involve an issue of significant difficulty and consequently will occur in only a minority of cases...”*

# Parents withdrawing applications: the implications

**The decision to make the child a party will always be exclusively that of the court, made in the light of the facts and circumstances of the particular case.**

- where the child has a standpoint or interest which is inconsistent with or incapable of being represented by any of the adult parties;
- where there is an intractable dispute over residence or contact, including where all contact has ceased, or where there is irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute;
- where the views and wishes of the child cannot be adequately met by a report to the court;
- where an older child is opposing a proposed course of action;
- where there are complex medical or mental health issues to be determined or there are other unusually complex issues that necessitate separate representation of the child;
- where there are international complications outside child abduction;
- where the proceedings concern more than one child and the welfare of the children is in conflict or one child is in a particularly disadvantaged position...

# Parents withdrawing applications: the implications

## Example scenario: -

- F has issued an application to spend time with his children...
- M is hesitant, F has been absent for some time
- Both children have elevated care needs and don't deal well with change
- **FHDRA** - stepped progression of contact agreed
- **DRA** - F wants to withdraw his application BUT children have already had a number of months of contact
- M - isn't sure what she wants
- **Court is very worried... Guardian is appointed**



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# Lucky Dip Round

Victoria Ellis – Quizmaster



# Family Law Act Proceedings: when a return dates becomes contested.

- Think about the logistics of the hearing
- The time estimate will be limited
- Undertakings
- Recitals no admissions / no finding of fact
- Orders no admissions / no finding of fact
- Legal aid implications
- Occupation Orders without consent
- Directions to final hearing
- Witnesses
- Disclosure



# An International Element: Finances



- ❖ Make sure you seize jurisdiction
- ❖ Can you enforce orders in the relevant jurisdiction?
- ❖ If there are assets in other countries, try and use known international and reputable firms for valuations.
- ❖ How do you establish ownership of property – not every country has an equivalent of the Land Registry.
- ❖ Can assets be removed from the country / held by non-citizens? What is the relevant law?
- ❖ If necessary seek advice from know international law firms. The law can say one thing, in practice it can be quite another.
- ❖ Make sure your timetable reflects the need to obtain information from a different jurisdiction .

# An International Element: Children



- ❖ Make sure you seize jurisdiction.
- ❖ If in doubt obtain expert evidence from the relevant country – especially in relation to the enforcement of orders / mirror orders
- ❖ Expect the unexpected in terms of another country's laws and procedures.
- ❖ Make sure you have a working knowledge of the Hague Convention.
- ❖ Make sure you have a working knowledge of how port alerts work.
- ❖ Don't forget common sense and the realities of geography!
- ❖ Be proactive. If a client is abroad can they conduct assessments by video link?

## Enforcement officer of the High Court and his two assistants.

- ❖ The majority of the Orders are made via the inherent jurisdiction:
  - **Location Order:** see **Re HM (Vulnerable Adult: Abduction) [2010] EWHC 870 (Fam)** for guidance.
  - **Collection order**
  - **Passport Order:** can be made in relation to the child and the wider family. The court may also make an order for the surrender of a foreign passport (**Re A-K (Foreign Passport: Jurisdiction) [1997] 2 FCR 563**).

## Immediate Decisions

- ❖ It is a Thursday afternoon court hearing. The parties both wish for their children to live with them. To date they have continue to live in the same house since separation. However the house has been sold and everyone is moving out on Saturday – where do the children go?
- ❖ Holding position
- ❖ Evidence supporting your position
- ❖ Acknowledge the Court needs to return the matter to court asap
- ❖ Get Cafcass on board and involved
- ❖ Focus on the best interests of the children
- ❖ Highlight what will happen if the court refuses to make a decision
- ❖ Same Christmas / Holidays/ specific issues – have a practical solution
- ❖ Court deal with matters on submissions



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# Problem Question 1

Maria Henty





### You are instructed on a FDR for H: -

#### **Background facts -**

- 20 year marriage
- Two adult children, both live with W.
- Son cannot work (ill health). W says son should remain with her. H says he can live independently.
- H living with his parents. W living in the FMH
- Your instructions are that the client is desperate to settle. H wants to sell the FMH. W wants to remain living there, she says that she has paid the mortgage for the last three years and is therefore entitled to (£11,000 in payments)
- H has no mortgage raising capacity. W has not filed hers.
- H seeks a clean break. W's position is unknown.

## FDR Problem Question

### Modest assets: –

- FMH equity - £200,000
- H bank account - £14,000
- Joint toy car collection - £30,000 (some dispute over where the cars are, W accuses H of having stolen them)
- Liabilities - £50,000 (H - £40,000 & W - £10,000)

## FDR Problem Question

- You prepare your note and schedule... Upon arrival at court your opponent saunters over...
- You are provided with:
  - A short note
  - But no schedule of assets

## FDR Problem Question

- It becomes apparent upon reading W's note that there are assets in the sum of £200,000 asserted by W and unaccounted for...
- W claims that H has £200,000 of classic cars
- No mention of this on H's Form E
- No mention on W's Form E or Questionnaire
- Shortly after counsel for W provides you with
  - Photographs of the classic cars
  - Schedule of cars with W's suggested value & car location & when H purchased the car

## FDR Problem Question

- What submissions would you make on behalf of H upon being called into court?
- What would you seek by way of directions?



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**Problem Question 2**

Victoria Ellis





# PARENTAL ALIENATION: HOW TO BREAK THE DEADLOCK?

- Adam & Emma have 3 children, Rose (12), Harry (9) & Lily (7). Adam left Emma 4 years ago.
- The children remained living with Emma and saw Adam most weekends (including overnight) and during the holidays. However 3 years ago Emma met Chris and started to cancel and reduce Adam's contact with the children.
- 2 years ago Emma cancelled all contact with the children saying they didn't want to see him.
- In correspondence Emma's solicitor states that Adam has let the children down, never sees them and they prefer to spend time with Chris now have two children of their own Fred (3) and George (18 months). Emma doesn't want Adam interfering in her new life. Her view is the children are better off without him.
- Adam is devastated and is desperate to see the children.
- You are representing Adam at the FHDRA and are handed a C1A Allegations of Harm from Emma's solicitor. Emma made various allegations that Adam has been violent and that the children were scared of him and didn't want to see him ever again. Emma raised issues about Adam's mental health and potential drug use.
- Cafcass have been spooked by the Allegations of harm and are recommending no contact.
- WHAT DO YOU DO?



# PARENTAL ALIENATION: HOW TO BREAK THE DEADLOCK?

A fact finding hearing is held and the Judge dismissed all of Emma's allegations and made a finding of parental alienation.

## The Cafcass report confirms:

- **Rose:** is very angry & upset and believes that her father abandoned her mother and that he is the reason that they have no money. She believes that Adam does not love her.
- **Harry:** insists that he is scared of his father and won't see him, but can give no examples of why he is scared. Harry believes that his mother and Chris are keeping them safe by not letting them see Adam. Harry genuinely believes what his mother has told him about Adam being dangerous. He is however very sad that he doesn't see his father. At times during contact Harry seems to forget that he is supposed to be scared of Adam and they have a nice time.
- **Lily:** says she does not want to see her father but has been observed to have a very close relationship with him. Lily is however dominated by Rose.

Despite being ordered to take the children to a contact centre, Emma regularly fails to take them, stating that they are refusing to attend. When they do attend the children arrive in a distressed state.

**YOU ARE REPRESENTING ADAM AT THE DRA AFTER CAFCASS HAVE REPORTED. WHAT DO YOU DO?**