Without notice applications in Children Act and Family Law Act: tips, pointers and warnings

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Here, we discuss tips and tricks for ex parte applications in both Children Act 1989 and Family Law Act 1996 applications, as well as common pitfalls and how to make an application as strong as possible.

Introduction

Without notice applications, both under the Children Act 1989 and Family Law Act 1996, are invaluable tools in the realms of domestic abuse and child protection. Particularly in relation to Family Law Act applications, such work is considered the bread and butter of the junior family barrister. However, those who would treat such applications as simple and routine, do so at their peril. Numerous pitfalls await the uninitiated and a failure to follow proper procedure can have a lasting effect.

This article will endeavour to give some tips and guidance on without notice applications under both Acts, considering the application, the statement and notice. These tips are intended to guide applicants but of course provide also a framework for issues to be taken by respondents at return dates.

The application and statement

Family Law Act

Starting with the obvious, an application form must be filled out correctly. On the FL401, there are separate boxes to tick for an Occupation Order and a Non-Molestation Order. It sounds straight-forward, but make sure you have ticked the right boxes. The FL401 also contains other tick-box sections relating to the relationship status of the parties and the property in question (if property is being dealt with). Accurately filling out these sections is crucial, particularly if seeking an Occupation Order, because there are different criteria to be borne in mind depending on the applicant's relationship to the property in question.

The application must also be supported by a statement. If the application is being made without notice, the applicant will be asking the court to make such an order purely on the basis of what is said in the statement. The statement has to cover two important topics:

1. Clear, relevant and recent examples of domestic abuse which form the factual foundation for the application;

2. Evidence as to why the application is being brought without notice.

Whilst the court will be sympathetic to an application and statement prepared in haste, the more detailed the statement the better. In particular, and this is something often neglected, consideration should be given to exhibits. The writers have seen countless applications where harassing communications are alleged; it is very simple, in the age of smartphones, to either screenshot messages or download the WhatsApp conversation transcript (easily done) and attach it to the statement. Absent allegations of tampering with the transcript/screenshots, a respondent will be stuck with the content of those messages. More importantly, a judge at a short, without notice hearing has cast iron evidence on which to base their decision. The more corroborating documents which can be attached to the statement, the better.

Supporting evidence may not be immediately available but that is no reason not to refer to it. The following are examples of third party evidence which can be obtained at a later date and the potential existence of which can significantly bolster a case:

1. Are the police involved? If so, the applicant will have the relevant crime reference number and possibly some preliminary documentation. This can be referred to.
2. If an injury was suffered, was an ambulance called, or was medical treatment sought? If so, again this should be referenced because it signposts future disclosure which will support the case. Was anything reported to the GP? Did the applicant seek the assistance of any domestic abuse charities or organisations? If so, mention it!
3. Is the local authority involved? Even the name of an allocated social worker will help provide a concrete platform. There is space for a social worker to be named in the C100 but not in the FL401, so make sure it appears in the Family Law Act 1996 statement.
4. Were there any third party witnesses? If so, these should be referred to, again for sign posting future directions. A court will not expect an urgently prepared application to be accompanied by a third party statement, but the potential existence of a direct witness will only strengthen the case.

The above is noted partly because it will bolster an application made without notice but mainly because that statement may be the only chance the applicant is given to file their evidence. All too often, applicants file a weak statement which may scrape over the line at an ex parte hearing. At the return date, they inevitably seek permission to file a further statement, but that permission is far from guaranteed. Many judges will say that they had their chance to put in their evidence and the application must be based on that alone. Judges are unlikely to sanction an un-ending chain of ping-ponging statements from the parties.

Structure to a statement is important. Where a matter is contested, the court at a return date has traditionally directed Scott schedules. The objective is to focus minds on properly pleaded allegations. A statement which amounts to a solid block of text without even paragraph numbering is going to be impenetrable to an overworked judge with a (likely) absurdly busy list. Clarity of structure and expression will significantly heighten the prospects of success. Practitioners will be familiar with the recent dicta of Hayden J on the topic of Scott schedules in *F v M* [2021] EWFC 4. The judge did not precisely rule out the utility of Scott schedules, but plainly their rigid format is not going to be suited to allegations such as controlling and coercive behaviour. It is does not change the point made here however, that whatever the allegation, a structured approach to pleading that allegation is needed, be it in a schedule or a general heading with numerous sub-allegations to establish a pattern of behaviour.

Too often, applications contain historic allegations which certainly on a without notice application are unlikely to persuade a court that an order should be made. The

inference is that the applicant has not needed the protection of an order since the last allegation, therefore weakening the initial ex parte element of the application. Even if the last event was only a few weeks ago, this will almost certainly lead to questioning from the judge as to why there has been that delay. Some delay can be accounted for by the need to see a solicitor or to prepare legal aid funding but do not expect to rely on those sorts of reasons if the delay is beyond a week or two. Ultimately, if there has been a delay, it is essential to address this in the statement.

The statement should also be clear as to on what basis the application is being brought; for example how is the proposed respondent connected to the applicant. This brings into question issues of third party notice; if an application is made for an occupation order, notice must be given to the mortgagee on the property, or if relevant the housing association or local authority. Failure to provide such notice will usually result in an application being adjourned or service being abridged until such time as notice has been provided.

Finally, address the issue of why the application is being brought ex parte. It is not particularly often that an application is so urgent or so dangerous that notice could not be provided. The usual reason seen is that if the respondent were aware of the proceedings, they would stop the applicant making the application. If this is the case, this must be stated within the statement. The writers have both seen applications criticised and some ultimately fail because this issue has not been addressed.

Children Act

What is said above can only be repeated; a clear, pertinent statement is going to be an important accompaniment to a C100 marked 'urgent'. However, in Children Act applications, there is the opportunity to also put in a C1A at an early juncture. This is not a pre-requisite but it is an invaluable opportunity to set out the factual matrix behind the application in a clear format (albeit with the same limitations as with Scott schedules). The applicant may be criticised for not filing a C1A if, at the FHDRA, allegations are made and they have not been particularised.

Notice

The relevant guidance on the issue remains as set out by Munby P, as he then was, in his guidance dated 18 January 2017.

Essentially, where notice can be given, it should. This can be anything from making an application fully on notice to giving short notice, even if only a matter of hours. Notice is particularly important when making an occupation order; it is a rare judge who is willing to make an occupation order without any notice whatsoever to the respondent. Be realistic when advising clients on the success of an Occupation Order made without notice.

If an application is made ex parte without clear justification, the obvious risk is that the application will not succeed on a without notice basis and will simply be adjourned for an on-notice hearing. The other risk is costs, more on which below.

In relation specifically to unjustified without notice applications in Children Act cases, the applicant risks losing credibility in the eyes of the court. A baseless application is unlikely to endear the applicant to the court or Cafcass when considering welfare.

The duty of candour

In *L v K (freezing orders: principles and safeguards)* [2013] EWHC 1735 (Fam), Mostyn J set out at para [50] the duty of candour which applies to ex parte or short notice applications. The case and the guidance therein was referred to with approval by Munby P in his 2017 guidance.

Coming to the court on a without notice basis engages certain duties above and beyond the usual duties which govern legal professionals in court proceedings. There is a duty of candour, which means that the litigant is under a duty to bring to the court's attention information that both helps and hinders their application. The applicant

must come to the court with clean hands. The reality is, if one does not comply with this duty, it will soon become abundantly clear at the return date and lead to a potential costs order.

Another duty which is often neglected is that a note must be taken of the hearing and provided along with the application. This again is guidance specified by Munby P in 2017. Whilst decisions are generally based on the statement alone, but without going to the lengths of obtaining a transcript, the respondent cannot be sure. Best practice is absolutely to take a note and serve with the application.

Service

Regardless of success (but clearly if an order is obtained, this is essential), service of the application and order is important from an enforcement perspective. Section 42A Family Law Act 1996 states that where an order is made ex parte, the respondent will only be guilty of an offence if they are aware of the existence of the order. As such, the respondent need only be made aware of the order for its power to bite. In real terms, without successful service, any breach will not be treated as a criminal offence; the applicant will not be able to use the order in the way it is designed.

Service becomes more significant if one were to seek to enforce by way of civil contempt. In the first instance, personal service is essential to then, at a later date, enforce by way of committal. The court previously had the power to retrospectively allow a different method of service. However, FPR Part 37 was updated on 1 October 2020 and that retrospective power appears to have been removed. Therefore, it is vital that personal service is undertaken at the time or failing that, an order for alternative service is obtained.

Costs

Finally, a word of warning on costs. Proceedings under both the Children Act 1989 and Family Law Act 1996 operate under the clean sheet approach for costs, i.e. that there is no starting point. However, unlike with Children Act cases, where there is the general steer towards no order as to costs (see for example *Re J (Costs of Fact-Finding Hearing)* [2009] EWCA Civ 1350, [2010] 1 FLR 1893), Family Law Act cases do not carry the same guidance. Improper conduct, such as issuing without notice unnecessarily, can come under the general heading of litigation conduct, which in itself can form the basis of a costs application.

Like with fact-finding hearings in Children Act cases, the successful party at the conclusion of a contested Family Law Act application can expect to make a strong costs application. The strength of that application will be either bolstered or undermined by past conduct, going back to the initial application.

The introduction refers to the dangers of not complying with correct procedure and the case of *MH v KF* [2020] EWFC B43 is a prime example of such dangers. Indeed, it touches on nearly every point raised above.

The judgment concerns an application for costs by the mother in the context of Children Act proceedings which had begun with an ex parte application. In dismissing the application, HHJ Middleton-Roy noted that the mother's original application was not supported by a witness statement, her without notice application was doomed to fail and steps to give informal notice to the father should have been taken (but were not). The mother's ex parte conduct was particularly damning, in that when she failed without notice, the mother made another application to a different court on the same day, without referring to the previously unsuccessful application. This of course was in breach of the duty of candour.

The end result was that what appeared to otherwise be a bona fide costs application (considering the father's conduct outlined at para [15] of the judgment) was unsuccessful, because of mistakes made at the very start of proceedings. Reader, you have been warned!

Conclusion

It is hoped this article is of assistance to practitioners, both in making applications and in opposing improperly or poorly made applications.

This article follows on from a podcast episode on the same topic, published on the Pump Court Chambers Family Law Podcast in 2020.