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The Interplay between Criminal and Family Proceedings

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Circumstances may arise that lead not only to the institution of family proceedings but also to a criminal investigation and subsequent prosecution. Which proceedings ought to be heard first and what particular evidence may be disclosed from one sphere of jurisdiction to the other are all issues that can cause problems for practitioners. This article provides guidance as to the legal principles applied in England and Wales and also in Jersey.

Introduction: the overlap between family and criminal law

1 The courts now frequently encounter cases in which the parties are, or have been, engaged with both the criminal and family justice system. [1] This may arise, for example, where there are allegations of domestic violence within a family, or where allegations of physical or sexual abuse arise. There may be situations in which the children who are the subject of care proceedings are themselves the perpetrators of crime.

2 Criminal proceedings may be the precursor to public law proceedings, for example by the police making a referral to social services when they are called to an incident involving a child. Alternatively, investigations and assessments of risk within the family law context may reveal historic criminal allegations such as the criminal convictions of a parent or cohabitee; or an investigation by the police of allegations which did not result in any prosecution.

3 This paper considers the current law and procedure in respect of such parallel proceedings and aims to provide some practical guidance to the difficulties encountered when allegations are tried in concurrent jurisdictions.

Understanding the criminal and family law interface

4 It can be tempting to adopt the fallacy that family proceedings and the criminal trial process are born of fundamentally different objectives.

5 It is frequently stated, for example, that care proceedings (and the associated fact-finding exercise) are wholly inquisitorial in nature due to them having, ultimately, the best interests of the child as their paramount consideration. Conversely, it is said, criminal proceedings are wholly adversarial, being concerned solely with apprehending the guilty and bringing them to justice.

6 This analysis is, arguably, over-simplistic, *inter alia* because—

[1] See generally *Related Family and Criminal Proceedings: A Good Practice Guide*, available as a PDF from www.family-justice-council.org.uk, and as hard copy from lawsociety@prolog.uk.com.

(i) No judicial process is *wholly* adversarial or inquisitorial. In care proceedings, for example, one can differentiate between the process whereby the Minister for Health and Social Services seeks to establish the existence of the threshold criteria in order to justify state intervention (perhaps more realistically described as "adversarial") and the "disposal stage" in which the court must decide what order, if any, would best promote the welfare of the child (more properly "inquisitorial"); see *Re R (Care: Disclosure: Nature of Proceedings*) [2] where Charles J said (at 722)—

> "To my mind, some tension exists between the statements that [care] proceedings are essentially non-adversarial and the points made as to establishing the threshold criteria and the establishment of facts for the purposes of ss 31 and 1 of the Children Act 1989.
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> In accordance with the guidance given in *Re M (A Minor) (Care Orders: Threshold Conditions)* [1994] AC 424, [1994] 2 FLR 577 and *Re H (Minors: Sexual Abuse: Standard of Proof)* [1996] AC 563 ... the approach in practice at the threshold stage, where the local authority has to establish the existence of the threshold criteria on the basis of facts proved to the civil standard, and thus, on that basis, that the parents have not acted as it would be reasonable to expect a parent to act, *is largely an adversarial process. Further at that initial stage, the test that the court is applying is not one as to what would best promote the welfare of the child, rather the issue at that stage is whether the threshold or trigger exists to enable public authorities to interfere in the lives of a family and thus possibly remove children from their parents.*
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> Human nature and the respective roles of the parties at that stage of public law proceedings have the result that those proceedings are treated at that stage as being adversarial or as having *a substantial adversarial element*. In my judgment*, it is at the next stage, namely the welfare or disposal stage, when the issue is what would best promote the welfare of the child, that the non-adversarial or inquisitorial nature or element of the proceedings comes to the fore."*

(ii) Children are regularly involved in the criminal justice system, whether as perpetrators, victims or witnesses. In criminal proceedings, the Attorney General may consider the interests of the child in relation to both the decision whether to prosecute and the conduct of the trial process itself. For example, an application may be made for special measures such as a child witness to be separated from the view of the defendant when giving evidence in Court [3] or even to give evidence by way of video recording or live television link; [4]

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[2] [2002] 1 FLR 755.
[3] For relevant principles see *eg Att Gen v Myles* 2005 JLR *N* 19; *Baglin v Att Gen* 2005 JLR 180.
[4] *Att Gen v Drean* 2007 JLR *N* [69]; Criminal Justice (Evidence of Children) (Jersey) Law 2002.

(iii) Both court systems rely on evidence of physical or sexual abuse or neglect by an identified perpetrator, tested through cross-examination by advocates, albeit to differing standards of proof. Whilst the fact-finding exercise is technically not concerned with apportioning "blame", it equally would be wrong to assume that the consequences for a parent of an adverse finding in a family law setting are any less severe than in the criminal arena;

(iv) Human rights implications infiltrate both jurisdictions and the conduct (or, indeed, fairness) of one set of proceedings may directly or indirectly effect the other;

(v) Children as witnesses: whilst an alleged child "victim" will almost always give evidence within criminal proceedings, the child is far less likely to do so within care proceedings, although it should be noted that the Supreme Court has recently removed the presumption that children should not be compelled to give evidence in family proceedings (considered later in this paper).

Initiation of proceedings; case management and fact-finding

7 In recent cases coming before the Jersey courts, it is interesting to see that practice appears to have altered in respect of the initiation of care proceedings. Historically, when faced with allegations of abuse that might also have amounted to criminal offences, the Children's Service might have taken its lead as to whether or not to institute care proceedings by reference to the decision on whether or not there was sufficient evidence for a prosecution. Cases such as *Minister for Health and Social Services v KG* [5] and *Re X* [6] suggest that historically this may have been the case, although more recent experience (including these cases themselves) reveal a greater awareness of the importance of avoiding delay and obtaining an appropriate adjudication from the family court.

8 However, assuming both jurisdictions of the Royal Court are engaged, which comes first: the criminal or the family proceedings? In some cases there will be arguments in favour of concluding a criminal trial before embarking on a fact-finding hearing (not least because the higher standard of proof in a criminal trial means that a conviction in criminal proceedings will, in all likelihood, render a further fact-finding exercise unnecessary). In addition, as a matter of Jersey customary law, it is important not to overlook the maxim "*le criminel tient le civil en état*" [7] ("the criminal law suspends the civil"): issues in a criminal case will generally be heard before being the subject of any determination in a civil matter, although exceptions do exist. Most importantly to the exercise of discretion, is the avoidance of any prejudice to the criminal proceedings. [8] Holding civil proceedings in

[5] [2009] JRC 076 at para 3 to the judgment as to the background to the case.
[6] *In re X Children* 2009 JLR 66 at para 1 as a background to the case.
[7] See *eg Traité du Droit Coutumier de L'Ile de Jersey,* Le Gros republished *Jersey & Guernsey Law Review* at 461. *Hickman v Hickman* 1987–88 JLR 602.
[8] *Glazebrook v Housing Cttee* 2000 JLR 301.

private, coupled with specific undertakings may be a sufficient means of avoiding such prejudice. [9]

9 In reality, however, the "no delay" principle enshrined in s 1(2) of the Children Act ("CA 1989") as interpreted by the case law and in Jersey under article 2(2) of the Children (Jersey) Law 2002, may make it difficult to convince a court that the criminal proceedings should go first.

(i) *R v Exeter Juvenile Court ex p H & HR v Waltham Forest Juvenile Court ex parte B.* [10] These were linked applications for judicial review of youth court decisions to refuse to adjourn care proceedings pending the hearings of the criminal charges on the basis that further delay would be contrary to the best interests of the children. Both applications were refused, the Divisional Court ruling that—

- there was no bar to the hearing of the care proceedings where criminal proceedings were pending;
- in both cases the justices had taken all relevant matters into account and considered the risk of possible prejudice to the applicants against the overwhelming need for the children to have their future settled with the minimum of delay.

(ii) *Re TB (Care Proceedings: Criminal Trial)*. [11] Applications for care orders on the grounds of neglect were made in respect of four children in a case in which criminal charges had also been laid. On the application of the father the fact-finding was vacated so that the criminal trial of the parents could take place before the applications for care orders were heard. The Guardian appealed. The Court of Appeal held—

- where there were parallel proceedings the welfare of the child should take precedence over the family who faced criminal proceedings;
- the fact that criminal proceedings were pending was not of itself a reason to adjourn care proceedings. It needed to be shown that some detriment would be caused to the children if the care proceedings were not adjourned;
- the issue of delay was all-important. That said, the court acknowledged that there would be cases in which the child's welfare would be best served by the care proceedings taking place after the criminal proceedings had been concluded;
- in determining what was in a child's best interests, it was relevant for the court to consider what the effect would be on the parent's trial of the care proceedings being heard first although that would not of itself be a determinative factor;
- in the present case the outcome of the care proceedings was unlikely to be greatly influenced by the outcome of the criminal proceedings.

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[9] *Haworth v Policy & Resources Cttee* 2005 JLR 1.
[10] [1988] 2 FLR 214.
[11] [1995] 2 FLR 801.

(iii) Contrast the case of *Re L (A Child)*. [12] The case involved the identification of the perpetrator of injuries to a child. The father was represented by the Official Solicitor in care proceedings and did not give evidence. At a fact finding hearing the judge was unable to identify whether he or the mother was the perpetrator. In criminal proceedings which had yet to be heard, the father alone was charged with inflicting the injuries, and the mother was charged with neglect. The mother would have a chance to cross-examine the father in the criminal proceedings (if he gave evidence) which she had not had in the care proceedings. The Court of Appeal (*per* Wall LJ, as he then was) held that the outcome of the criminal proceedings was clearly relevant to the outcome of the care proceedings and that the criminal proceedings were likely to throw up material which was likely to inform the final hearing of the care proceedings.

Case management—keeping the court fully informed

10 Where there are related criminal and family proceedings the case law makes it abundantly clear that it is vital that the parties' representatives ensure that the court hearing the family proceedings is fully informed as to the state of play in the pending criminal proceedings.

11 In *Re W (Children) (Concurrent Care and Criminal Proceedings)*, [13] a father faced allegations of sexual abuse of his stepdaughter. In the care proceedings, which preceded the criminal trial, findings were made that the father had raped his stepdaughter. The child had been unwilling to give evidence at the fact-finding hearing and applications for her to be compelled to do so were refused.

12 Following the criminal trial (at which the child gave evidence and was cross-examined), the father was acquitted. Supported by the mother, he appealed against the decision against him in the fact-finding hearing. He submitted, *inter alia*, that the judge should have required the child to attend to give evidence in the care proceedings or, alternatively, that the judge should have adjourned the care proceedings until the outcome of the criminal trial so that he could be properly informed of the evidence given by the child and the information which emerged from the trial generally.

13 The Court of Appeal held—

(i) The starting point was that the existence of criminal proceedings was not of itself a reason to adjourn care proceedings (in line with *Re TB*, above);

(ii) Where there were concurrent proceedings, it was essential that each was kept fully informed of the other and that the judge conducting the care proceedings exercised his or her case management functions not only with a full knowledge of the state of play in

[12] [2009] EWCA Civ 1008.
[13] [2009] 3 FCR 1.

the criminal proceedings but also with a view to ensuring that each was heard at an appropriate time.

(iii) Lawyers are familiar with the situation where a judge applying the civil burden of proof makes findings of abuse whilst a jury, applying the criminal standard, acquits the defendant. In such circumstances judges had a particular duty to ensure that the process was seen to be fair which meant, as a minimum, having a detailed knowledge of the criminal proceedings and when they were likely to be heard;

(iv) The Court of Appeal was extremely critical of the apparent ignorance of those involved in the family proceedings of the state of the criminal proceedings and of the lack of liaison between the criminal prosecution and the care proceedings. Wall LJ stated (at para 39)—

> "There is an almost embarrassing volume of authority on the interrelationship between criminal and care proceedings. But what is clear beyond peradventure is that it is for the family court (1) to be aware at all stages of what is happening in the criminal proceedings; and (2) *to be the proactive coordinator of the proceedings, to ensure that each is heard timeously and with as little prejudice as possible to the competing interests involved*." [Our emphasis]

Linked case management hearings

14 Is it appropriate to hold linked case management hearings? In England there are now a number of local case management protocols for linked care and criminal proceedings (e.g. the Practice Statement of the South East Circuit Presiding Judges of November 2003). Currently, no such guidance exists in Jersey. Despite this, in reality there are relatively few such linked hearings in England and Wales. It is partly that the geography and limited availability of judges can cause difficulties; there is considerable regional and local variation. But, more fundamentally, in practice it is often (although not invariably) the case in England that prosecuting authorities wait for the conclusion of the fact finding part of the care proceedings before making a decision whether to charge a parent. Disclosure of the judgment to the police is now automatic under the new Rule 11 of the English Family Proceedings Rules (unless an order is made otherwise); and application by the police for disclosure of experts' reports and other material is often made. Armed with this greater information, the prosecuting authorities then come to a decision about charging a parent.

Obtaining the available evidence

15 Both criminal trials and family fact-finding hearings rely on evidence of a past/present state of affairs in order to justify intervention by the state in the lives of private individuals.

16 The disclosure of evidence is a significant bridging point between child protection proceedings and criminal proceedings precisely because the same information is often highly relevant in both sets of proceedings.

17 It is therefore vital to appreciate the evidential/disclosure considerations that have particular relevance to parallel proceedings.

Applications for disclosure—confidentiality and litigation privilege

18 Article 73 of the Children (Jersey) Law 2002 provides for the Court to sit in private in children proceedings and also provides criminal sanctions for any publication intended or likely to identify the child in question, including revealing the child's address or school. Similarly, the confidentiality of documents in children proceedings is protected by Rule 25 of the Children Rules 2005. However, as is the position in England and Wales, the Court can grant leave for deviation from such protective provisions in appropriate cases. [14]

19 As a further but different fetter upon disclosure is litigation privilege. Litigation privilege is an essential component of the adversarial procedure adopted in ordinary civil litigation. It prevents one party being compelled to disclose expert evidence and similar material which has been prepared for use in pending or anticipated litigation.

20 In *Causton v Mann Egerton (Johnsons) Ltd*, [15] Roskill LJ (at 170) said—

> "I am clearly of the view that this court has no power to order production of privileged documents ... so long as we have an adversarial system a party is entitled not to produce documents which are properly protected by privilege if it is not to his advantage to produce them, *and even though their production might assist his adversary."*

21 Children's cases fall into a "special category" [16] and litigation privilege does not apply in proceedings under CA 1989 and presumably also will not apply in Jersey under the 2002 Law. As a result, where the court has given leave for the relevant papers to be disclosed to an expert witness, the resulting report of the expert must be disclosed to the court and to the other parties to the proceedings.

22 In *Re L (A Minor) (Police Investigation: Privilege*) [17] a two-year old child whose parents were heroin addicts became seriously ill after ingesting methadone. The mother's case was that the child had accidentally consumed the methadone which had been left lying around carelessly in the kitchen. The mother obtained the court's permission to disclose

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[14] See for example *Health & Social Servs Min v X* 2009 JLR *N* [51].
[15] [1974] 1 WLR 162.
[16] See *Oxfordshire County Council v M* [1994] 1 FLR 175 where Sir Stephen Brown stated that children's cases "... fall into a special category where the court is bound to undertake all necessary steps to arrive at an appropriate result in the paramount interests of the child".
[17] [1997] AC 16.

the court papers to a consultant chemical pathologist in order to obtain his expert opinion as to whether or not the child's condition was consistent with her account. The order required the report to be filed and served on the other parties to the care proceedings. The report cast doubt on the mother's account of the time when the accidental ingestion of the drug had occurred.

23 At a later case conference the police dealing with the parallel criminal investigation into the mother's actions became aware of the existence of the medical report and sought an order that it be disclosed to them. A majority of the House of Lords held that—

> "An expert's report created in the 'non-adversarial' context of child protection proceedings will not be protected by litigation privilege. The report could not have been prepared without leave of the court. Once it has been disclosed in family proceedings it is therefore potentially disclosable in any other type of adversarial proceedings, notwithstanding that it would ordinarily have been so protected. Any communication between the instructing solicitor and the expert is also disclosable in future criminal proceedings."

24 There are implications in revealing even the name of an expert—there is no property in a witness and it would be open to the other side to summon the expert and ask them to give opinion evidence. This contrasts with the position as regards legal professional privilege which remains sacrosanct. Legal professional privilege attaches to all communications between solicitor and client whether related to litigation or not.

25 The position is different where an expert's report is prepared for the purpose of criminal proceedings and the local authority in the care proceedings makes an application for disclosure. In that instance, the defendant/respondent is entitled to rely on litigation privilege to refuse disclosure of direct/indirect communications with experts prepared solely for the purpose of the criminal trial (see *S County Council v B* [18]).

26 It would seem to be a likely consequence of the decision in *Re L* that a parent may well be deterred from retaining experts to advise them in family proceedings whilst a parallel criminal prosecution is ongoing because such information disclosed in the family court could become available to the prosecuting authorities for use in the later criminal proceedings. On the other hand, the benefit to the parent in being able to maintain a relationship with the child may outweigh their concerns about possible criminal sanctions.

27 What is the position as regards disclosure without an order into children proceedings? In *Re L* it was further argued that the duty of full and frank disclosure required a party to make voluntary disclosure of all matters likely to be material to the welfare of the child. The House of Lords did not reach a conclusion on the question of whether a party has an

[18] [2000] 2 FLR 161.

obligation to inform the other parties of the existence of documents that may be unfavourable to his or her case.

The privilege against self-incrimination and the interplay with art 74

28 Article 74 of the Children (Jersey) Law 2002 is in similar terms to s 98 of the Children Act 1989. It provides—

> "(1) In any proceedings in which a court is hearing an application for an order under Part 4, no person shall be excused from—
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> (a) giving evidence on any matter; or
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> (b) answering any question in the course of giving evidence,
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> on the ground that doing so might incriminate him or his spouse or civil partner of an offence.
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> (2) A statement or admission made in such proceedings shall not be admissible in evidence against the person making it or his spouse or civil partner in proceedings for an offence other than perjury."

29 The rationale behind art 74 (as with s 98) is that frankness in children's proceedings is an important adjunct to the paramountcy principle. "Statement or admission" has been interpreted as including witness statements filed in the proceedings, statements or admissions made to the Guardian during the course of his or her investigation [19] and any statement made to an expert during his assessment. [20]

30 However, art 74 does not provide absolute protection for a parent. There are situations where statements made in family proceedings may be disclosed with the court's permission to a third party, including the police. Once the police have received those documents, "there is nothing in the terms of s 98 which inhibits further questioning [by the police] certainly before the suspected person is charged with the offence". [21] If the suspect accepts those statements they will form part of the admissible interview. If the suspect does not adopt, or makes no comment on, the statement then it remains inadmissible.

31 There is also nothing in theory which prevents the documents being used in cross-examination if they amount to a prior inconsistent statement, subject to the discretion of the court. [22] Putting inconsistent statements to a witness in order to challenge his or her evidence or attack his or her credibility does not amount to "using those statements

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[19] *Oxfordshire County Council v P* [1995] 1 FLR 552.
[20] *A Chief Constable v A County Council* [2003] 2 FCR 385.
[21] Swinton Thomas LJ, *Re EC (Disclosure of Material)* [1996] 2 FLR 725.
[22] *Re L (Care: Confidentiality)* [1999] 1 FLR 165. See also Part 9 Police Procedures & Criminal Evidence (Jersey) Law 2003, not yet in force.

against him" within the meaning of s.98. Whilst the Crown cannot use material that is disclosed in order to "make its case against the defendant" it can use such material in order to challenge any account the defendant seeks to put forward in the Crown Court or Royal Court which is inconsistent with it.

32 Ultimately, the decision as to what is admissible in criminal proceedings will be a matter for the court. However, it is possible for the judge in family proceedings, when granting disclosure of documents, to make a statement indicating that he or she considers the material inadmissible. [23]

33 Material may also be disclosed for the purpose of fully informing a criminal court that sentences a defendant. [24]

Social services records: public interest immunity (PII)

34 Evidence relevant to an issue in court proceedings must be excluded if, as a matter of public policy, the public interest requires that it should be so excluded, notwithstanding the competing public interest which normally requires the full disclosure of documents relevant to the facts.

35 In the case of *Re M (A Minor) (Disclosure of Material),* [25] Butler Sloss LJ considered (at 42–43) that social work records were a class of documents protected by PII, but that did not mean that there was an absolute bar against disclosure. In each case the court was required to conduct a balancing exercise as to whether the public interest in the protection of the records overrides the public interest that the party to proceedings should obtain the information he or she is seeking to obtain legal redress.

36 In the case of *Re R (Care: Disclosure: Nature of Proceedings*), [26] Charles J expressed the view that—

> "In light of the development of the law in relation to PII since 1990, [27] public interest immunity was unlikely to attach to any material simply because it belonged to a particular 'class' of document, and that each claim for public interest immunity must therefore be determined by considering the contents of the material itself."

37 A person with appropriate authority in a public body is able to decide not to advance a claim to public interest immunity in any given case. Anyone advancing a claim to public interest immunity in respect of material held by a local authority should set out with

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[23] Wall, J, *Re AB (Care Proceedings: Disclosure of Medical Evidence to Police)* [2002] EWHC (Fam) 2198.
[24] *Re X (Children)* [2008] EWHC 242.
[25] [1990] 2 FLR 36.
[26] [2002] 1 FLR 755.
[27] *R v Chief Const of W Midlands, ex p Wiley; R v Chief Const of Nottinghamshire, ex p Sunderland* [1995] 1 AC 274.

particularity the harm that it is alleged will be caused to the public interest, for example the proper conduct of the duties of the local authority to protect children, if material which passes the threshold test for disclosure is disclosed.

Social services records: disclosure into criminal proceedings

38 A party to pending criminal proceedings may apply to the criminal court for an order requiring the disclosure of material from social services files which may be relevant to the issues raised in the criminal trial. Where the documents are confidential there is a duty [28] to assert that the documents are immune from production on public interest grounds.

39 The judge must read the material in dispute [29] and require the party seeking disclosure to establish the need for the documents to be disclosed. The party seeking disclosure should set out precisely which documents are sought and the extent to which it is asserted that justice would be at risk if access to the undisclosed material were denied. Where the judge concludes that non-disclosure will lead to a miscarriage of justice, he is under a duty to admit the evidence. [30] Where a judge initially has ruled that material should not be disclosed, that decision must be kept under review by the judge throughout the trial, so that if a development occurs which alters the balance in favour of disclosure, it may take place.

40 The principles identified in the case of *R v Reading Justices ex p Berkshire County Council* [31] apply to the Crown Court and appear equally applicable in Jersey, although there has been no reported case yet upon the point:

(i) To be material evidence, documents must not only be relevant to the issues arising in criminal proceedings but also be documents admissible in evidence.

(ii) Documents desired merely for the purpose of cross-examination are not admissible in evidence.

(iii) Those seeking production must satisfy the court that the documents are likely to be material, this to include a real possibility though not probability.

(iv) The procedure should not be used as a disguise to attempt discovery.

Social services records: disclosure into family proceedings

41 In England and Wales, helpful guidelines were given by Cazalet J in *Re C (Expert Evidence: Disclosure: Practice)* [32] which still hold good today:

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[28] *Makanjuola v Police Commr* [1992] 3 All ER 617 at 623F.
[29] *R v K (Trevor Douglas)* 97 Cr App R 342.
[30] *R v Hallett* [1986] Crim LR 462.
[31] [1996] 1 FLR 149.
[32] [1995] 1 FLR 204.

- It is the responsibility of the local authority actively to consider what documents it has in its possession which are or may be relevant to the issues as they affect the child, its family and any other person who is relevant in regard to an allegation of significant harm, and to the care and upbringing of the child in the context of the welfare checklist issues.
- The local authority should not content itself with disclosing the documents which support its case, but must consider itself under a duty to disclose in the interests of the child and of justice documents which may modify or cast doubt on its case.
- If there is any doubt about whether the information is relevant, consideration should be given to notifying the affected parties of the existence of the material.
- There should be a presumption in favour of disclosure of potentially helpful information. If documents are obviously relevant and not protected from disclosure by public interest immunity, then the local authority should initiate disclosure.
- If documents are apparently relevant but appear to be protected by public interest immunity from disclosure, a letter should be written by the local authority to the parties' legal advisers and to the guardian drawing general attention to the existence of the documents and inviting an application to the court if disclosure of the relevant documents is required.
- The local authority should identify and flag the documents which they believe are or may be relevant. A short precis of the information should be prepared in order to assist the court which is to make the decision. If the court orders disclosure of the documents and if the nature of the precis satisfies the party affected that the material identified and disclosed is sufficient, then the directions hearing can proceed upon a short basis. However, if the precis does not achieve agreement and the other party wishes to see more of the files, then some further guide to the file should be provided so that the court can carry out the balancing exercise envisaged in *Re M (A Minor) (Disclosure of Material).*
- It is for the court to make the decision as to disclosure of documents covered by public interest immunity. If the view is taken that the witness statement served by the local authority identifies the matters of concern, then this can generally be taken to satisfy the disclosure requirements.
- In all cases it is particularly important that the local authority should draw the guardian's attention to any matters of concern within the documents. Whilst it is the court's task to decide any contested disclosure matter, the guardian's full knowledge of the material may enable him to assist the court as to its relevance.

42 Recent Jersey decisions have also emphasized the need for the Minister for Health and Social Services to disclose all matters relevant to his decisions that have a significant impact upon the welfare of a child in his care. Such an approach applies once court

proceedings are on foot and also to decisions outside the court arena. *In the Matter of the X Children* the Court of Appeal stated the position as follows: [33]

> "… there is no doubt that there has been a change in the attitude of the courts to the degree to which, as a matter not merely of good practice but of law, public authorities making decisions which vitally affect children and their parents have procedural obligations towards them … This phenomenon is particularly notable when the authority proposes to sever temporarily or permanently the family link but it is *not*, in our judgment, applicable only to that special class of decision."

43 In emphasizing that parents and children involved in care proceedings not only have substantive protection against any inappropriate interference with their private and family life but also significant procedural safeguards, the Jersey Court of Appeal went on to endorse English authority that such safeguards included—

> "… positive obligations of disclosure of all key documents in its possession or available to it…, and fairness in the decision-making process at all stages of child protection …"

44 In ensuring that all relevant evidence is available, the Royal Court has also (adopting English authority) ordered that relevant documentation from one set of care proceedings should be disclosed into other care proceedings. [34]

The role of the Children's Guardian in relation to the disclosure to other parties of the contents of social services files

45 If a Children's Guardian examines and takes copies of social services records which the Guardian believes are relevant, but which the Minister does not intend to disclose to the other parties, the Guardian should bring the nature of the documents to the court's attention with a view to seeking directions *(Re C (Expert Evidence: Disclosure: Practice)).* [35] The Guardian should not disclose the documents without an order from the court: he is not entitled to disclose documents in breach of public interest immunity.

Disclosure by the prosecution to social services/into care proceedings

46 Where the police are not agreeable to disclosing a document in their possession to a local authority or into the care proceedings, the local authority or any other party may apply to the court which is seized of the family proceedings for an order against the police (or Crown Prosecution Service (CPS)) seeking disclosure of the document on the ground that information contained within it may assist the local authority in discharging its statutory duty with respect to a child who is the subject of care proceedings.

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[33] *In re X Children* 2009 JLR 66 (Royal Court) and 2009 JLR 143 (Court of Appeal.)
[34] *In re C & D* [2010] JRC 090
[35] [1995] 1 FLR 204.

47 In deciding whether to order disclosure, the court will have to balance the public interest in maintaining the confidentiality of documents, the disclosure of which might prejudice or inhibit a pending prosecution or investigation, against the public interest in ensuring that a local authority has all material that may assist it in making the best proposals for the future of the child whose case is before the court. [36]

48 The issue of disclosure often falls into two stages: first, that of disclosure by the police to the local authority; and, secondly, whether there should be further disclosure by the police or local authority to others who are parties to the care proceedings.

49 At the second stage, if a party, for example a parent, makes an application to the court for disclosure by the local authority of documents which it has received from the police, whether voluntarily or by court order, it would be wrong for the court to determine the application in the absence of representations from the police.

50 In this context, there have been a number of cases in Jersey but few appear to have been contested and resulted in any formal published judgment. *In re W* [37]disclosure was sought from criminal proceedings into care proceedings by the lawyer for the Guardian, such documents having been obtained in the course of the successful criminal prosecution of the child's maternal grandfather "C". Whilst the application was not determined on this occasion, the Court reminded itself that it retained all of its inherent powers to make such an order, subject only to the restrictions imposed under Article 76 of the Children (Jersey) Law 2002. The court also noted that the victim of C's abuse needed to be given the opportunity to be heard and for adequate safeguards to be imposed given the "serious risk" of confidential and highly sensitive information being disseminated by the parents.

Disclosure from family proceedings to the police

51 In the case of *In re C (A Minor)* [38]a case where a child had suffered injuries leading to death and the police sought disclosure of evidence given in care proceedings, Swinton Thomas LJ said (at 330–331)—

> "In the light of the authorities, the following are among the matters which a judge will consider when deciding whether to order disclosure. It is impossible to place them in any order of importance, because the importance of each of the various factors will inevitably vary very much from case to case.
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> (1) The welfare and interests of the child or children concerned in the care proceedings. If the child is likely to be adversely affected by the order in any serious way, this will be a very important factor.

[36] *Nottinghamshire County Council v H* [1995] 1 FLR 115; *Re M (Child Abuse: Video Evidence)* [1995] 2 FLR 571.
[37] [2010] JRC 149A.
[38] [1997] 2 WLR 322; *sub nom Re EC (Disclosure of Material)* [1996] 2 FLR 725.

(2) The welfare and interests of other children generally.

(3) The maintenance of confidentiality in children cases.

(4) The importance of encouraging frankness in children's cases. All parties to this appeal agree that this is a very important factor and is likely to be of particular importance in a case to which s 98(2) applies. The underlying purpose of s 98 is to encourage people to tell the truth in cases concerning children, and the incentive is that any admission will not be admissible in evidence in a criminal trial. Consequently, it is important in this case. However, the added incentive of guaranteed confidentiality is not given by the words of the section and cannot be given.

(5) The public interest in the administration of justice. Barriers should not be erected between one branch of the judicature and another because this may be inimical to the overall interests of justice.

(6) The public interest in the prosecution of serious crime and the punishment of offenders, including the public interest in convicting those who have been guilty of violent or sexual offences against children. There is a strong public interest in making available material to the police which is relevant to a criminal trial. In many cases, this is likely to be a very important factor.

(7) The gravity of the alleged offence and the relevance of the evidence to it. If the evidence has little or no bearing on the investigation or the trial, this will militate against a disclosure order.

(8) The desirability of co-operation between various agencies concerned with the welfare of children, including the social services departments, the police service, medical practitioners, health visitors, schools, etc. This is particularly important in cases concerning children.

(9) In a case to which s 98(2) applies, the terms of the section itself, namely, that the witness was not excused from answering incriminating questions, and that any statement of admission would not be admissible against him in criminal proceedings Fairness to the person who has incriminated himself and any others affected by the incriminating statement and any danger of oppression would also be relevant considerations.

(10) Any other material disclosure which has already taken place.

I have, then, to apply those general considerations to the present case."

This formulation has come to be regarded in subsequent English cases as the starting point for any judge conducting the balancing act as to whether or not to order disclosure, and is a corner stone decision.

52 As far as specific Jersey authority is concerned, *In The Matter of D (Disclosure: Private Law),* [39] the Deputy Registrar of the Royal Court of Jersey's Family Division granted leave to a husband to disclose to police legal advisers certain documents that had been considered in family law proceedings following an allegation of assault made against him by the wife. Despite the wife's objection to such disclosure, the Deputy Registrar was persuaded by arguments made on the husband's behalf that the documents produced within the family proceedings were directly relevant to his defence. In making her decision and applying *Re D (Minors) (Wardship: Disclosure)*, [40] *Re C (A Minor) (Care proceedings: Disclosure)*, [41] and *Re Z (Children) (Disclosure: Criminal proceedings)* [42] the Deputy Registrar considered the following matters to be of particular relevance to the exercise of discretion:

(a) The welfare and interests of any children;

(b) The importance of confidentiality;

(c) The desirability of encouraging frankness in family law cases;

(d) the public interest in the administration of justice;

(e) the interests of justice that a defendant in a criminal trial should have all relevant and necessary material for the proper conduct of his defence; and

(f) the gravity of the alleged offence and the relevance of the evidence to it.

53 The Court further noted that expert evidence, such as medical reports, would be more readily disclosed than affidavits or transcripts of evidence, because it was not subject to the same provisions concerning the right not to incriminate oneself. (See further above.) It was further held that, when granting leave to disclose documents, the Family Division could impose "any appropriate conditions" such as in the instant case, for the court to retain control over any further dissemination of the documents. [43]

Child witnesses: oral evidence in family proceedings

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[39] 2009 JLR *N* [18].
[40] [1994] 1 FLR 346.
[41] [1997] Fam. 76.
[42] [2003] 1 FLR 1194.
[43] *Re X Children* [2008] 1 FLR 589, applied.

54 Until recently the presumption in family proceedings was that it was undesirable for a child to give evidence and that instances in which children would be compelled to do so would be rare (*Re M (a child) (care proceedings: witness summons)* [44]).

55 This position arguably stood in stark contrast to other trial models, in which it is trite law that a defendant be permitted to cross-examine a complainant and directly challenge the allegations made against him or her. As Lady Hale SCJ points out in *Re W (children) (care proceedings: evidence)* [45] (at para 5)—

> "The starting point of English criminal and civil procedure has historically been that facts must be proved by oral evidence given on oath before the court which can then be tested by cross-examination ..."

56 The development of the presumption against children giving evidence in family proceedings was linked to the premise, stemming in part from the *Pigot* report, that the process of giving evidence is harmful to children. More recently in Jersey, the Royal Court appears to have echoed such sentiment in *In the Matter of C*. [46]

57 However, the Supreme Court in *Re W* has now removed this presumption, giving judges broader discretion in deciding whether or not a child should be compelled to give evidence. Lady Hale stated (at para 22)—

> "[the presumption against children giving evidence in care proceedings] cannot be reconciled with the approach of the European Court of Human Rights, which always aims to strike a fair balance between competing convention rights. Article 6 requires that the proceedings overall be fair and this normally entails an opportunity to challenge the evidence presented by the other side. But even in criminal proceedings account must be taken of the article 8 rights of the perceived victim … *striking that balance in care proceedings may mean that the child should not be called to give evidence in the great majority of cases, but that is a result and not a presumption or even a starting point*."

58 The Supreme Court in Re W outlined the following (non-exhaustive) factors as relevant to the balancing exercise:

- What are the issues for the judge to decide? Is it possible to determine the case without making findings on particular allegations?
- What is the quality of the evidence the court already has (in particular the ABE interview)? Is it sufficient to rely on this evidence without needing to call a child to give evidence?
- The age and maturity of the child;

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[44].[2007] 1 FCR 253.
[45] [2010] 2 All ER 418.
[46] 2009 JLR 353 at para.68.

- The length of time since the alleged events took place;
- What family support (or lack thereof) the child has;
- The child's own wishes and feelings as regards giving evidence;
- The views of the Guardian;
- The views of those with PR (if appropriate);
- The risk of delay;
- Risk of harm specific to the particular child; and
- Risk of harm where there are parallel criminal proceedings.

59 Will children now more routinely be compelled to give evidence in care proceedings? Lady Hale stated (at para 26)—

> "We indorse the view that an unwilling child should rarely, if ever, be obliged to give evidence."

This suggests that not much may have changed.

Vulnerable/intimidated witnesses

60 As discussed earlier, some witnesses will require special protective measures, for example giving evidence behind screens and/or with the support of a victim support worker to be present in court.

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