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THE VOICE OF THE JERSEY CHILD—
RECENT CHALLENGES TO THE SEPARATE REPRESENTATION OF
CHILDREN

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*The Children (Jersey) Law 2002 was brought finally into force on 1 August 2005 and was modelled on the Children Act 1989 as applied in England and Wales. Like its counterpart, the 2002 Law represented a break with the past but did not expressly incorporate all of the protective provisions felt appropriate in the 1989 Act. This article examines certain statutory differences that have been highlighted in the recent case of *Re B* and which, controversially, may lead Jersey's Courts to limit or refuse the representation of children caught up in care cases even where they stand to be separated permanently from their parents.*

Introduction

1 There have been a number of recent articles discussing the differences between the statutory regime in Jersey relating to children's proceedings with that of England and Wales. In *The Voice of the Jersey Child*¹ it was observed that children in Jersey did not appear to have an independent voice in proceedings affecting their lives, while subsequent articles paid tribute to important developments in this area and, in particular, to the efforts of the Royal Court of Jersey in curing such previous deficiencies: *Key Issues in the Separate Representation of Children in Jersey*,² *The Voice of the Jersey Child—Beginning to be Heard*.³ From these articles, it may be recalled that in Jersey, there is no specific reference in the Children (Jersey) Law 2002 ("the 2002 Law") to a children's guardian as exists under s 41 of the Children Act 1989 ("the 1989 Act.") Nevertheless, there is vested in the Royal Court of Jersey discretion under art 75 of the 2002 Law as to how children should be represented in proceedings brought under this Law. At the time of the last two articles, there was a great deal of optimism as to emerging practice in children proceedings in Jersey. A steady stream of cases followed the routine⁴ appointment of a lawyer and guardian for children subject to care proceedings and, in certain other areas, Jersey appeared to be leading the field in recognizing children's rights.

2 More recently, however, Jersey (like many jurisdictions) has had to keep an eagle eye upon its public finances and make economies where possible. This article discusses the recent decision of the Deputy Bailiff of Jersey in the case *Re B*,⁵ a case in which the co-

¹ Corbett (2008) 12 J&GL Rev 220.

² Hanson [2009] IFL 54.

³ Corbett (2009) 13 J&GL Rev 198.

⁴ The use of the word "routine" in describing the appointment of lawyers has been contested by HM Solicitor General as suggesting that the court has not exercised its statutory discretion. He offered "invariable" as an alternative. See P.137/210 Com. Available at <http://www.statesassembly.gov.je>.

⁵ [2010] JRC 150.

author Timothy Hanson appeared on behalf of the guardian. It will be of interest to practitioners in many jurisdictions where pressures on finances may similarly lead to restrictions being placed upon a child's participation and representation in public law cases. Indeed, the Newline section of the August 2010 issue of the *Family Law Journal* warned of similar proposals in England and Wales.

The decision in *Re B*

3 In this case the Minister for Health and Social Services applied for a care order in respect of a newly born baby; the mother having had previous children permanently removed from her care during the course of the previous two years. The identity of the father was not known.

4 The application clearly envisaged the real prospect of the baby being removed from the mother permanently and a substitute family being found. The matter came before the Royal Court (the Deputy Bailiff presiding) on 30 April 2010, and whilst the Royal Court agreed to appoint a guardian for the child and made the child a party to the proceedings, it declined to sanction the agreement earlier reached by all parties that a lawyer (who had also attended Court) be appointed for the child. The Royal Court suggested that the case was "straightforward" and that, should the guardian wish to have the benefit of a lawyer, then an application could be made to that effect. The Royal Court, adopting a rather technical and inflexible approach to the issue, further declined to hear submissions from the lawyer who would have been appointed had the Court been so inclined, although submissions were entertained from the existing parties to the proceedings albeit proving unsuccessful.

5 The guardian subsequently selected was employed by the NSPCC and representations were made from managerial level to the Royal Court that it was unacceptable that a lawyer had not been appointed for the child. The representations of the NSPCC are set out in the Royal Court's judgment and will strike a chord with many—

"Firstly, I think it important to understand that a lawyer is not appointed to the guardian and therefore the guardian is not the one who benefits from legal representation, although they benefit from [sic] legal advice. The lawyer is appointed to represent the child, and work alongside the guardian in the situation where a child is, for whatever reason, unable to instruct themselves. I understand from [the guardian] that the child was made party to the proceedings and therefore I believe has to have legal representation. I understand that there is case law that supports this.

Fundamentally, I believe this is an issue of the rights of this child to legal representation and we would therefore not wish to deny this child its legal right. The arguments of proportionality and costs, whilst needing consideration should not override the rights of this child for representation. It cannot also be right that lawyers and professionals can decide on this child's future without the child having full access

to representation themselves. The guardian is an experienced and expert professional, not trained in law and needs the support and advice of a legal expert to ensure this child's welfare and interest are best served. Without legal representation the guardian is in effect 'hamstrung' and unable to undertake their role.

I have also heard that this case is 'straightforward', again I cannot think this is a valid reason for denying the child representation, if this were the case then why have all other interested parties legal representation? I would therefore respectfully request the Court to appoint a legal representative for the child in this case."

6 Upon receiving these representations, the Royal Court appointed Advocate Timothy Hanson to argue the guardian's case, albeit at a hearing nearly two months later on 21 June 2010. The Minister (advised and represented by lawyers from the Law Officer's Department) agreed with the submissions on behalf of the guardian that a lawyer ought to be appointed for the child. It was common ground that the child's rights under arts 6 and 8 of the European Convention on Human Rights were engaged and that the child should be represented by a lawyer for the purpose of the proceedings, involving as they did, the spectre of permanent separation of child from mother. The Minister emphasized that the Court enjoyed a discretion and that in cases where there was agreement between the Minister and the parents, it might be unnecessary for a guardian and a lawyer to be appointed. The application was successful, and a lawyer was appointed for the child, but judgment was reserved.

7 The judgment was handed down without further hearing on 17 August 2010. It justified the grant of legal representation for the child upon the basis that the guardian felt unable to undertake her duties without the benefit of a Jersey lawyer and that there should be no further delay. The judgment, however, continued to set out principles that were stated to have been applied and which would "govern the Court's approach to these matters in the future." Inevitably, it will remain to be seen how much of the judgment is classed as *obiter dictum* or part of the *ratio decidendi* given the very particular circumstances that led to the grant of legal representation in this case. Moreover, on the basis that the application was successful, there is no practical route to challenge the reasoning of the Deputy Bailiff by way of an appeal so as to benefit other cases that will come before the court in due course.

Summary and effect of the decision in *Re B*

8 In summary, the decision in *Re B* states that—

- In public law proceedings in Jersey, the court has a discretion whether or not to join the child to the proceedings.
- The court has discretion to appoint a guardian and to appoint a lawyer for the child.
- The court may, especially where the child is very young, simply order a welfare report but in most cases it will appoint a guardian and will do so when the child is joined.

- Joinder of the child will depend upon a number of factors including whether or not there is some benefit to the child in being joined or if the child's relatively mature age and apparent understanding makes such joinder appropriate, or if a lawyer is required for the child.
- A lawyer will not be appointed merely because a guardian is appointed or the child is joined and the court may await an application from the guardian or court welfare officer that it is in the child's best interests to have a lawyer before making any such appointment.
- The Court may decline to appoint a lawyer but the guardian or court welfare officer should have access to legal advice from time to time by application to the Judicial Greffier to be arranged.

9 The decision in *Re B* demonstrates that because the legislation in Jersey is worded differently from that of England and Wales, the joinder of children as parties and the appointment of guardians and lawyers for children should not be the same as in England and Wales. The reason given for this in the judgment is that when the Children (Jersey) Law 2002 and the Children Rules 2005 were drafted, express provisions in respect of the appointment of guardians and lawyers for children comparable to those in England and Wales were omitted. The reason for that omission is stated to be in order to save the costs which would result from the separate representation of children.

Joinder

10 As far as a child being made a party to proceedings is concerned, the judgment suggests that this should only happen where the child is competent to instruct a lawyer, but also, surprisingly, that the guardian (a social worker and not a lawyer) could act as guardian *ad litem* pursuant to art 75(2) without the need for a lawyer. The judgment further suggests that, as joinder carries with it obligations in respect of disclosure, evidence, applications and appeals, this is a reason for a child not to be made a party. The authors submit that these consequences are not a reason for there not to be joinder of the child; they are reasons for the child to be properly represented by a guardian and a lawyer.

The argument that the child should not automatically be joined

11 The judgment refers to the difference between the Rules in Jersey and England and Wales (r 10(6) of the Children Rules 2005 in Jersey and r 4.7 of, and Appendix 3 to the Family Proceedings Rules 1991 in England and Wales). The child is always automatically a party in care proceedings in England and Wales, but may only be joined as a party by the Court in Jersey. No explanation is given for the seeming *volte face* by the judge in *Re B* who, having made the child a party on 30 April 2010 resiled from that position as being appropriate in the judgment. The judgment discusses the joining of the child in the context of the ratification or otherwise of the United Nations Convention on the Rights of the Child (UNCRC) and the Human Rights (Jersey) Law 2000, indicating that as Jersey has not yet ratified the UNCRC, these provisions could safely be ignored. It goes on to suggest that

ratification of the UNCRC without reservation in this respect, may further not be appropriate for Jersey (despite it being part of the Island's Strategic Plan). Article 9 of the UNCRC places an obligation on states to give interested parties (including the child) the opportunity to participate in proceedings involving potential separation from their birth family. As the judgment observes, such an obligation would have cost implications. The authors submit that in order to be able to participate in proceedings a child needs to be a party.

12 In other areas of Jersey law the right to be made a party and be heard has been confirmed by the Court of Appeal. In *Sinel Trust v Rothfield*⁶ it was held that—

“To decide in favour of one party without having taken steps to give the other parties the opportunity to be heard was contrary to essential considerations of justice as administered in the Courts of Jersey, and contrary to the requirements of art 6 of the European Convention on Human Rights”.

Further, in *Leeds v Admatch*,⁷ access to justice for foreign plaintiffs was emphasized such that a security for costs application should not have been granted at first instance. It is clear from these cases that the Jersey courts will enable participation in proceedings if money is involved, but where the stakes are so much higher, where a child's whole life may be changed by proceedings, practitioners may draw the conclusion from the judgment in *Re B* that the Jersey courts do not support the child's opportunity to participate.

13 Even more concerning is the assertion in the judgment of *Re B* that—

“Consideration of other practice and procedure before the Royal Court also suggests that there is no requirement under the Human Rights Law to join the child as a party to the proceedings. The Court makes orders at a *Visite Royale* on the application of the parish, which is a public body, and in the absence of land owners who are not at that stage parties to the proceedings.”

The *Visite Royale* is a customary law tradition whereby the court goes out to the parishes to ensure that the roads and byways of the Island are free from obstruction.⁸ If a tree is found to be an obstruction, for example, a recently qualified lawyer is appointed to argue on behalf of the relevant landowner. Even then an aggrieved landowner can have the matter reconsidered *inter partes* at a later date. On one level, therefore, the judgment in *Re B* appears to show that the Royal Court is content for issues such as a bulging wall or an overhanging tree to merit greater access to justice than vulnerable children within care proceedings.

⁶ [2003] JCA 048.

⁷ [2009] JCA 097.

⁸ See Bailhache “*The Visite Royale and Other Humber Visits*” (1998) 2 JL Rev 124.

Appointment of guardians: incorrect reference to statutory framework and terminology

14 Guardians in Jersey have been appointed under art 75 of the Children (Jersey) Law 2002—

“75 Representation and assistance for children

“(1) Where it considers it desirable in the interests of a child to do so the court may order—

(a) that the child be separately represented in such proceedings under this Law as the court may specify; or

(b) that the child be assisted and befriended by such person, being a person independent from the Minister, as the court may specify.”

15 The judgment refers to appointments of guardians under art 75(1)(b). The role of the person described in art 75(1)(b) is, however, not the same as that of a children’s guardian. Clearly the differences in the provisions under s 41 of the Children Act 1989 and art 75 of the Children (Jersey) Law 2002 are part of this problem, the concept of a children’s guardian being alien to the Jersey courts prior to the passing of the 2002 Law. It was not until *In the Matter of the X Children*⁹ in July 2008 that the first guardian (as would be recognized in England) was appointed in Jersey care proceedings. In *Re B* the guardian could not have been appointed under art 75(1)(b) of the 2002 Law, as stated by the Deputy Bailiff, because the role envisaged by a guardian in care proceedings extends far beyond merely assisting and befriending the child. In fact, the terminology used in art 75(1)(b) shows that the role is analogous to that arising under a family assistance order as referred to in art 16 of the Law or a supervision order under art 28(1)(a): none of whom is a “guardian” as this role is understood. Indeed, such assistance and befriending is already a duty arising on the part of the Minister under art 21 (advice and assistance for certain children.)

16 Guardians must therefore be appointed under art 75(1)(a), as part of the tandem model of representation. The guardian and the lawyer both “represent” the child in their different ways, with the guardian instructing the lawyer on behalf of the child as a guardian *ad litem*. This also deals with the issue of the child’s disability within legal proceedings.

17 The phrase “as the court may specify”, is part of both art 75(1)(a) and 75(1)(b) so there is a wide discretion in each but it is only article 75(1)(a) which refers to “proceedings”, and it is accepted that in Jersey, as in England, the guardian’s role ends once a final care order is made.

⁹ 2009 JLR 143.

18 In any event this is clearly an unsatisfactory situation. This difficulty may have been overcome by the implementation of Practice Directions which were prepared by the Deputy Registrar early in 2009. Unfortunately there has been no authorization for the implementation of the Practice Directions. The delays in the process have not been the subject of any official comment that is in the public domain.

The exercise of discretion

19 The judgment in *Re B* confirms that the appointment of a guardian under art 75(1) is a matter of discretion but it is far from clear from the judgment how the judge envisages the way that discretion should be exercised. At some points in the judgment it is indicated that it is not necessary to appoint a guardian, that a court welfare officer's report will be sufficient, and that a court welfare officer will be able to protect the child's rights under the ECHR. In other parts of the judgment it is proposed that guardians might be appointed on a more regular basis. This ambivalence may well be due to confusion about the respective roles of guardian and court welfare officer and the work that these officials perform as a matter of practice.

The proposed use of court welfare officers as an alternative to guardians: the judge's misunderstanding

20 In England and Wales, both a court welfare officer and a guardian have a duty to safeguard and promote the welfare of children and to give advice to the court by making such investigations as may be necessary. The guardian however has additional duties over and above reporting to the court as to the outcome of such investigations. The guardian must advise the child and instruct the solicitor representing the child on all matters relevant to the interests of the child arising in the course of the proceedings. The guardian (as occurred in the *X* case referred to above) will also be involved and consulted by the Minister and his officials when important decisions are made as to the future of a child in care. Such differences have been categorised as the court welfare officer being the "eyes and ears of the court" and the guardian being the "voice of the child". The guardian's role is much more far-reaching than that of a court welfare officer and the guardian can make (with appropriate legal assistance) applications to the court on behalf of the child whereas the court welfare officer simply reports to the court.

The argument that the child need not have a guardian

21 The suggestion in the judgment that:

"In many cases the interests of the child, including the child's Convention rights, will be advanced by either the Minister or the parent(s), especially so when they offer competing views as to what is best to be done in the child's interests"

and therefore the appointment of a guardian is unnecessary, is very surprising. The child's welfare must be uppermost in the Court's consideration, even if (strictly speaking) the

paramountcy rule does not apply when dealing with the issue of representation, the latter being an issue that is yet to be definitively resolved in Jersey.¹⁰ Without independent representations on behalf of the child separate from the applications of the Minister and the views of the parents, it is at least arguable that the court will not have sufficient information to do its job properly.

22 Parents and the Minister have responsibilities for and not rights over children under the provisions of the Children (Jersey) Law. The legislation supersedes the customary law concept of “rights” over children.

Legal representation

23 In respect of legal representation the judge suggests that there is a spectrum upon which care cases lie, some where it will be obvious that a child needs legal representation, some where it is obvious that a child does not require legal representation and a range of cases in between. Such an analysis might appear a little antiquated and seemingly flows from the view that children might properly be the passive objects of care proceedings. In contrast, as Thorpe LJ has observed¹¹—

“... in the 21st century, there is a keener appreciation of the autonomy of the child and the child’s consequential right to participate in decision making processes that fundamentally affect his family life.”

Thorpe LJ further added that the case he was dealing with provided—

“... a timely opportunity to recognise the growing acknowledgement of the autonomy and consequential rights of children, both nationally and internationally.”

In exercising discretion to appoint a lawyer for a child however, as opposed to a guardian, the judgment in *Re B* indicates that such appointments should only be made after a balancing exercise is conducted, taking all the circumstances into account. Tellingly, the only circumstance listed in the judgment is the financial consideration of the appointment of a lawyer.

The argument that there need be no appointment of a lawyer for the child

24 It may be naïve to suggest, as the judgment in *Re B* does, that guardians would have some knowledge of the law, surmising that such legal knowledge would be sufficient to run a case on behalf of a child. The judgment does go on to propose (thankfully) that where there is a need to argue a point of law, adduce evidence or cross examine witnesses a guardian may consider that a lawyer is required. It is difficult to contemplate any care

¹⁰ In *Re W (Secure Accommodation Order: Attendance at Court)* [1994] 2 FLR 1092 at 1096 Ewbank J stated that in the context of a secure accommodation order, the paramountcy rule did apply to the legal representation of the child.

¹¹ *Mabon v Mabon* [2005] 2 FLR 1011.

proceedings where such tasks are not required to be undertaken by a lawyer. Apart from guardians having different skills and expertise from those of lawyers, they do not carry professional indemnity insurance in respect of legal advice and practically cannot make applications or conduct proceedings, particularly as most guardians so far appointed in Jersey are English based, and have little knowledge of the Jersey legal system in any event.¹²

25 The judgment also states that “It does not follow that because the child is a party to the proceedings, a lawyer for the child is necessary.” This contention appears to the authors to be quite unreasonable. Every other party to legal proceedings is entitled to legal representation. Why are vulnerable children denied it? Children are no less entitled to recognition of their rights under the ECHR than any other person.¹³

26 Reference is made to a person appointed under art 75 as perhaps needing legal advice “from time to time”. A child needs access to proper legal advice and representation throughout public law proceedings if her independent position is to be recognized. The judgment does not specify how, when independent people are appointed to “stand up for the child’s rights” they are to have access to legal advice but that the child is not to have a lawyer appointed to represent her in the exercise of those rights in court.

Factors relevant to the Court’s exercise of discretion

27 Article 6 of the European Convention on Human Rights (ECHR) is discussed and the judgment concludes surprisingly, and contrary to the authorities cited, that denying a child access to legal representation is *not* contrary to art 6.

28 The judge’s view is that care proceedings are not dispositive of any civil rights of the child and therefore legal representation is not necessary. He seeks to distinguish *Airey v Ireland*¹⁴ in a less than convincing way. This position is contrary to ECHR case law, in particular in *P v UK*¹⁵ where the European Court (considering *Airey v Ireland*) held that legal representation is necessary in public law care proceedings for all parties, on the basis of equality of arms. Moreover, the Jersey Court of Appeal decision in *In re X Children* recognised that children enjoyed arts 6 and 8 rights and corresponding procedural protection such that they and their guardian are entitled to participate in decisions affecting their welfare. It is very concerning that the Royal Court in *Re B* appears to have misunderstood the concept of “civil rights” in art 6(1), especially in relation to the equality of arms arguments. The argument that a child will be represented by a guardian who is “an adult with considerable experience of court proceedings” is not a sound one.

¹² A new locally based system has recently been announced but at present would not have sufficient guardians to meet demand. Experience of working with local guardians further demonstrates a reluctance to be without legal representation in any event.

¹³ *CF v Secy of State for the Home Department* [2004] EWHC 111, a judgment that was distinguished in *Re B* and unfortunately not followed.

¹⁴ (1979) 2 EHRR 305.

¹⁵ [2002] 3 FCR 1.

Not only does it undermine the whole basis for the current gruelling examination process to qualify as a Jersey lawyer but it runs counter to the views of guardians who (as we have seen with regard to the NSPCC) disavow any wish to add to their existing burdens the role of a pseudo-lawyer. In reality, the overriding consideration appears to be one of cost—

“The English system has been described as a Rolls Royce system. In my judgment, as long as we remain able to deliver justice in Jersey, it may be appropriate to do so by driving a less expensive motor vehicle.”

Effect of the judgment if followed

29 If followed in future cases, the effect of this judgment will be an erosion of a child’s rights and a limit on her participation in proceedings. The guardian (when appointed at all) will be left to make a case for the appointment of a lawyer if s/he disagrees with the court’s decision not to appoint a lawyer at the start of the case. As most children’s guardians will not be able to make the child’s voice heard properly in proceedings without legal representation, it is likely that there will be an increase in satellite litigation as applications are made by guardians for lawyers to be appointed, causing delay and increasing costs. Alternatively guardians may only be able to access legal advice on an *ad hoc* basis. In another judgment of the court in the *Re B* case (reported as *In re Child H*¹⁶), but in respect of an application by the mother for a residential assessment, the judge on that occasion commented that the delay by the Court in appointing a lawyer for the child had in fact caused a delay to the work of the guardian which may well have prejudiced (but in the event did not) the child’s care. Interestingly, in *Re B* the case turned rapidly from being categorised by the Court as “straightforward” such that a lawyer was said not to be required for the child, to one involving contested expert evidence involving cross-examination and detailed reference to case law. The reality is (as the *Re B* case demonstrates) that one cannot foresee exactly what will happen in a care case such that it could ever be safe to dispense with a lawyer for the child.

Costs and expenses

30 As if to reinforce further the importance of the issue of costs in the mind of the judge, the judgment then details the court’s expectation as to how much lawyers for children should be paid. The judgment sets out the funding arrangements in respect of lawyers (but it must be noted, not the funding of guardians) pursuant to art 75. Interestingly, there is no mention of the cost of lawyers for the Minister within care proceedings, just the cost of lawyers for children and parents. The judgment concludes that art 75 requires the Court to take into account the cost of legal fees when considering whether or not the child should have legal representation. Undue weight has been given to the issue of costs, which is a political and administrative matter, rather than an issue in which the court should interfere. As described in *Key Issues in the Separate Representation of Children* (at p 57), the legal aid system in Jersey runs on a rota of lawyers under 15 years’ call and only limited state

¹⁶ [2010] JRC 130A.

funding is made available in a narrow category of “onerous” cases. By virtue of the decision in *B v J*,¹⁷ however, and a particular provision in art 75 (that permits payment to those representing children from public funds) agreement had formerly been reached that lawyers from a children’s panel act for children at hourly, albeit reduced, rates and the issue of a legal aid certificate was not necessary. This therefore avoided the “hit and miss” of allocating a lawyer, irrespective as to expertise, from the general legal aid pool.

31 This judgment seeks to set out a different template for the appointment and payment of lawyers for children generally; it states—

“In those cases in the future—which I expect will henceforth be less frequent—where the court appoints a lawyer to represent the child, the Acting Batonnier may well consider it appropriate to issue a legal aid certificate to such lawyer.”

The decision of the Deputy Bailiff therefore seeks to alter current practice by bringing children’s lawyers back within the Jersey legal aid system but appears to overlook the point that specialist lawyers will no longer seek actively to be involved in cases which are now essentially *pro bono*. In the event that a legal aid certificate is not granted (an area in which the Court has no established jurisdiction) the Deputy Bailiff then sets out the system that should be applied and, in effect, has halved the fees of lawyers who act for children by pegging their rates back to five-sixths of a scale known as the “Factor A rate.” (This rate is set by the Court and represents a lawyer’s costs just to meet overheads.) There is some unease and consternation at the Deputy Bailiff including this matter in his judgment, not merely because it was not directly ventilated at the hearing but because as Attorney General, the Deputy Bailiff had issued proceedings during 2009 in respect of such issues but which have yet to be determined.

32 Notwithstanding the questionable approach of the Royal Court in interfering with the payment of lawyers in this manner (although there is some precedent for it),¹⁸ it will undoubtedly act as a catalyst and also reignite the wider feeling of unfairness felt by Jersey lawyers that they are largely either unpaid for their legal aid work or struggle with any payment that is made to meet their own overheads.

The position in the Bailiwick of Guernsey

33 In contrast, in Guernsey, a ‘paid’ legal aid system has been created and the system continues to give proper recognition to the rights of children in cases comparable to care proceedings. Children’s welfare cases in Guernsey and Alderney requiring compulsory intervention are dealt with under The Children (Guernsey and Alderney) Law 2008. Such cases are either dealt with by referral to the Children’s Convenor (where short term

¹⁷ 2008 JLR N [28].

¹⁸ See the now repealed *Loi (1939) sur les Honoraires des Avocats et des Ecrivains* which was passed to regulate the fees of lawyers but maintained in its preamble that such right existed as a matter of inherent jurisdiction of the Royal Court.

welfare issues normally arise) and if appropriate then onto the Child, Youth and Community Tribunal.¹⁹ Applications for Community Parenting Orders (CPOs) (where the States is looking for permanency for the child away from its family), emergency protection orders (EPOs) and secure accommodation orders (SAOs), however, are dealt with in the Juvenile Court.

34 In respect of applications for a CPO, the child is automatically made a party and the “tandem model” of representation applies with a child being represented by a Safeguarder (equivalent to a children’s guardian) and an advocate. (There is the conventional exception where the child is competent to instruct an advocate directly and there is a conflict with the Safeguarder, in which case the advocate represents the child and the Safeguarder may also instruct an advocate.) With EPOs and SAOs, the child is not automatically a party but the practice of the Court is routinely to join all such children as parties and to use the tandem model of representation as for CPOs. This is because the Court in Guernsey recognizes that all such orders are potentially such a fundamental interference with a child and/or the family’s rights that such protections have to be applied.

Questions raised in the States of Jersey

35 On 4 November 2010 a proposition was brought before the States Assembly²⁰ that sought to reverse the effect of the decision in *Re B*. The proposition requested a change to the existing law—

“so that where children may be—(i) separated from their parents by virtue of a care order; or (ii) confined by virtue of a secure accommodation order, a children’s guardian and an advocate for the child [would] be appointed by the Court in all cases.”

As part of the proposition, the words of Munby J (now Lord Justice Munby) in *Re L (Care: Assessment: Fair Trial)* were quoted²¹—

“But it must never be forgotten that with the state’s abandonment of the right to impose capital sentences, orders of the kind which judges of this Division are typically invited to make in public law proceedings are amongst the most drastic that any judge in any jurisdiction is ever empowered to make. It is a terrible thing to say to any parent—particularly, perhaps, to a mother—that he or she is to lose their child for ever.”

The proposition was defeated by a narrow margin of 25 to 21²² with the Council of Ministers and the majority of the Connétables voting against it. Interestingly, whilst the proposition was opposed by the Minister for Health and Social Services who advocated

¹⁹ Legal representation and the appointment of a Safeguarder occur rarely in these cases.

²⁰ Children (Jersey) Law 2002: Appointment of children’s guardians and advocates in certain proceedings (P.137/2010).

²¹ [2002] 2 FLR 730 at 770.

²² See <http://www.statesassembly.gov.je/StatesMinutes>, for a record of the vote.

that the court should be trusted to protect the rights of the child, the Assistant Minister for Health did support the proposition.

36 What may have been pivotal to the debate was the speech by the Solicitor General as legal adviser to the States. He correctly advised members that the existing legislation, in allowing discretion to the court to appoint a representative in care proceedings, was in accordance with both the Human Rights (Jersey) Law 2000²³ and the United Nations Convention on the Rights of the Child. However, the Solicitor General disagreed with the view of independent English counsel who had advised that the approach articulated in *Re B* was contrary to the ECHR and therefore the 2000 Law.²⁴ The opinion of the Solicitor General naturally carried weight with Members but is one that the current authors consider to have been an over generous and optimistic interpretation of the judgment in *Re B*.

Conclusion

37 Despite the gaps in the provision in the Children (Jersey) Law 2002, great strides were made between July 2008 and April 2010 by the Royal Court and practitioners in Jersey to ensure that the voice of the Jersey child was heard, through proper representation using the tandem model. Unfortunately, the judgment in *Re B* has diluted heavily the advances made; the practice prior to 2008 being that children did not participate at all in care proceedings before the court. It is emerging from other recent cases (before different Royal Court judges), that the judgment in *Re B* has already altered current judicial practice such that representation of children in public law matters is to be governed by similar principles to those that would be applied in the private law arena. The Deputy Bailiff appears to have the support of his brother judges for the approach that has been articulated. However, it is inevitable that this approach will be challenged on appeal should the opportunity arise.

Postscript

38 In a further judgment handed down by Bailhache, Commr in *Re KK* on 9 December 2010 (and after submission of the main text to this article) the approach set out in *Re B* was followed, albeit noting that it had “attracted a certain amount of controversy.” In *Re KK* the Royal Court acceded to the request of the guardian for legal advice to be made available to him given that he had felt at a “disadvantage” when dealing with professionals and the lawyers acting for the other parties. Despite the apparent confidence expressed in *Re B* that guardians have knowledge and experience to act without a lawyer, the guardian in this case stated that his lack of legal knowledge was a handicap to the proper performance of part of his duties. While acceding to the application, the Court emphasized its intention that the lawyer should only have “a limited and reactive function.” Whilst ultimately acknowledging that the guardian had the final say as to what the lawyer should

²³ And, consequently, the ECHR.

²⁴ English counsel’s advice on the point was circulated by Deputy Hill prior to the debate with the guardian’s consent.

be instructed to do (including appearing in Court) the Royal Court made clear that a lawyer would (the Commissioner hoped) only “rarely” take on a full and active role. In particular, the Court made it clear that it would not regard it as appropriate for the lawyer “routinely” to be instructed to appear in Court or receive communications from the other parties’ lawyers, at least not without express instruction to this effect.

39 *Re KK* demonstrates the practical difficulties faced by guardians when appointed without the benefit of a lawyer and the Royal Court had little alternative but to make provision for legal assistance to be made available. As in *Re B*, however, it is unfortunate that the guardian and child were so clearly disadvantaged in the process. The need to make legal assistance available only after the guardian found himself in difficulty further demonstrates the error made in the Royal Court’s decision not to appoint a lawyer in the first place. Implicit in the attempt made by the Court to restrict the role of the lawyer, however, remains the desire to reduce any costs falling on the public purse and *Re KK* develops the policy set out in *Re B* in this respect. It remains to be seen, however, whether there will be practical difficulties faced by the parties and the Court in not knowing whether or not the lawyer advising the guardian is the appropriate point of contact at any particular juncture. Lawyers normally are either on the Court record or they are not once proceedings are underway but after *Re KK* there will also be a “hybrid” group of lawyers acting or appearing at particular hearings on an *ad hoc* basis and at the whim of the guardian. The judgment in *Re KK* also appears to categorize such lawyers as the guardian’s lawyers as opposed to those of the child, a feature that is further not recognized in rule 11 of the Children Rules 2005 which makes provision as to service of documents on (a) the lawyer “acting for the child” or (b) any person appointed under art. 75.

40 The judgment in *Re KK* is of further interest in expanding upon *Re B* and stating unequivocally that the Jersey guardian is not “in the same position” as a guardian appointed under s 41 of the Children Act 1989 in England:

“The phraseology employed by the draftsman of Article 75(1) may not be ideal, but the assisting and befriending of the child was intended to enable the Court to hear an independent view as to what was in the best interests of the child. That is the function of the guardian.”

Such a restrictive view is most unfortunate and flows from the misconception that a guardian is appointed under art 75(1)(b) rather than under art 75(1)(a) of the 2002 Law. In limiting the function of the guardian, the Court in *Re KK* has (as in *Re B*) effectively relegated the guardian to that of a Court Welfare Officer. For those that have experience of the tandem model of representation of children by a lawyer and guardian in other jurisdictions, Jersey child protection will be all the poorer for these recent developments.

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