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The Lords have stopped courts from ordering parent assessments.

Christopher Simmonds reports on *Re G*

Aiding change

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The Children Act 1989, underpinned by the Human Rights Act 1998, is founded on the belief that parents should care for their children wherever possible. Many solicitors in care proceedings believe that part of the process is to assess parents' ability to change and assist them to do so. The Court of Appeal in *Re G* [2004] 1 FLR 876 gave the green light to treatment to help parents achieve necessary change during proceedings. The House of Lords in its judgment in *KCC v G (FC)* [2005] UKHL 68 appears to have put an end to this.

Section 38 (6)

The subsection at the centre of the case is s 38(6) Children Act 1989. It empowers the court in the interim phase of care proceedings to "give such directions (if any) as it considers appropriate with regard to the medical or psychiatric examination or other assessment of the child".

Case history

A baby known as 'Ellie' was the subject of the case. Concerns for Ellie were high, as her mother's previous child had died from non-accidental injuries caused either by the mother, or that child's father. Ellie's father, in contrast, had no previous involvement with Social Services. At the outset, the local authority planned to remove Ellie from her parents, and place her in foster care with a view to adoption in the longer term.

The parents applied for an order under s 38(6) for a residential family assessment for themselves, together with Ellie at the Cassel hospital. This unique resource offers assessment for high-risk families with problems of mental ill-health or personality disorder. The initial order for a six to eight-week assessment was made by consent, and was then extended by the court for a further six weeks. The Cassel then recommended continued placement for a further period of four months. This was opposed by the local authority on the grounds of expense and, relying on case law as it then stood, on the basis that this constituted treatment, not assessment, and was beyond the court's jurisdiction. Johnson J refused the parents' application to continue the placement, but that order was stayed by the Court of Appeal, which heard the case on 20 November 2003, giving judgment in the parents' favour on 27 January 2004.

The family therefore stayed together at the Cassel until discharged in April 2004. The care proceedings ended in July 2004, all parties agreeing that no order was necessary to protect Ellie, so much progress had been achieved at the Cassel. Ellie remains living with her parents in the community and, by all accounts, is thriving. But for the assessment ordered under s 38(6), in all probability she would have been removed from her parents and adopted.

The total cost to the local authority of the Cassel assessment was in the region of £200,000.

Legal history

The House of Lords had previously considered the subsection in *Re C (A Minor) (Interim Care Order : Residential Assessment)* [1997] AC 489, where it held that the subsection must be construed purposively and broadly. The purpose of the subsection was to enable the court to order any assessment directed to provide the court with the material it considered necessary to make a final decision for the child's future. As Lord Browne-Wilkinson stated :

“It is impossible to assess a young child divorced from his environment. The interaction between a child and his parents or other persons looking after him is an essential element in making any assessment of the child.”

The subsection was therefore interpreted to allow an assessment, “which involves the participation of the child”, including residential assessment of the family as a whole.

Re C did not involve a therapeutic placement so the distinction between assessment and treatment or therapy was not considered. This issue arose only when Holman J considered a case concerning the Cassel, *Re M (Residential Assessment Directions)* [1998] 2 FLR 371, when he concluded that the Local Authority could be ordered to pay for the first eight weeks, but then found “assessment necessarily merges into treatment, and at that point the power of the court ends”.

The Court of Appeal then considered the question in *Re B (Psychiatric Therapy for Parents)* [1999] 1 FLR 701 and endorsed the distinction between assessment and therapy, making it clear that the former fell within the scope of s 38(6); the latter did not. This was further refined in *Re D (Jurisdiction: Programme of assessment or therapy)* [1999] 2 FLR 632, where Thorpe LJ developed the principle of “primary purpose” in that if the programme was primarily to assess present capacity but the issue of “change” was ancillary to this, then this would fall within the definition of ‘assessment’.

In *Re B (Interim Care Order : Directions)* [2002] 1 FLR 545, Buxton LJ made it clear that the function of an order under s 38(6) was to inform the court in any way that it thought necessary or appropriate in the performance of its duty to decide whether or not there should be a final care order and that the court is given a very broad and generous power of determination in deciding what is and is not appropriate in respect of the assessment.

Court of Appeal: *Re G*

The Court of Appeal rejected the distinction between assessment and therapy, finding that *Re M* (above) should not be treated as a guideline case. The key question to be asked in each case, formulated by Thorpe LJ, was: “Can what is sought be broadly classified as an assessment to enable the court to obtain the information necessary for

its own decision?” By formulating the question in this way, the trial judge concentrates his/her attention on the purposive construction of s 38(6), reverting to the original House of Lords authority in *Re C*.

The Court of Appeal left it to the court in each case to decide what assessment was necessary and perhaps, one could venture, trusting the trial judge to case-manage and balance financial matters with the needs of the child.

House of Lords

The issues for the House of Lords were whether the court has jurisdiction to order an assessment that also includes elements of treatment and support and, if so, what principles should govern its exercise.

By the time the case came to the House of Lords it was only academic to this family and local authority, but of great significance to many other families and authorities.

Their Lordships unanimously and emphatically overturned the Court of Appeal decision.

The broad, purposive interpretation of the Court of Appeal was rejected in favour of a strict analysis of the wording of the subsection. Their Lordships held that the fact that information gained would be valuable to the court was not enough to open the door to s 38(6). The “laudable” and “socially important” purpose of rehabilitation of difficult parents was not within s 38(6); as Lord Scott put it “there is no Art 8 right to be made a better parent at public expense”. Further, as Lady Hale stated:

“The purpose of s 38(6) cannot be to ensure the provision of services either for the child or his family. There is nothing in the 1989 Act which empowers the court hearing care proceedings to order the provision of specific services for anyone. To imply such a power into s 38(6) would be quite contrary to the division of responsibility which was the cardinal principle of the 1989 Act.”

Her Ladyship stressed that the court’s function is not to decide whether or not a child lives with his/her family, but only whether or not there should be a care order, subject to a sufficiently firm and particularised care plan.

Their Lordships also focused on the time limited nature of interim orders, (eight weeks and then four weeks thereafter), the ‘no delay’ principle set out in s 1(2) and the Protocol for Judicial Case Management in Public Law Children Act cases [2003] 3 FLR 719, designed to ensure completion of care proceedings cases within 40 weeks. Lord Scott said that any assessment “is intended to be completed speedily” and Lady Hale took the view that it should last two or three months at the most. The timescale of a Cassel placement was, therefore, entirely beyond their Lordships’ view of the subsection.

Thus it appears that s 38(6) assessments must be of the child, not of the parent, unless directly involving the child (such as an assessment of attachment between parent and

child or the parent's behaviour towards the child). Thus, assessment of a parent's ability to change, a programme to achieve change, or treatment or therapy for the parent all fall outside the subsection and the court's jurisdiction. It seems that Cassel programmes, as undertaken by Ellie's parents, can no longer be ordered by the court.

Funding

It is impossible to discuss the issue of residential assessment without considering the funding implications. The House of Lords touched on the issue.

In *Lambeth Borough Council v S* [2005] EWHC 776, Ryder J held that the costs of an assessment under s 38(6) should be split between the parties to the litigation – see for principle *Calderdale Metropolitan Borough Council v S* [2004] EWHC 2529. The Legal Services Commission requires this to be a decision of the court, and publicly funded parties are not authorised to reach agreement as to apportionment. The House of Lords agreed the costs of a “proper” s 38(6) order could be shared.

Following the Lambeth decision, and anticipating the House of Lords decision, the LSC put out new rules stating that the costs of treatment or similar may not be covered and require an application for prior authority with a clear breakdown of the work undertaken. See Focus 49 (December 2005) for clear guidance on this point. The funding code is being further amended and practitioners therefore need to keep a close eye on guidance.

What next ?

Children Panel solicitors have all had clients who have child after child removed; the cost to the state is enormous and the cost of the individuals – parents and children – is terrible. The Court of Appeal allowed some parents the chance to “break the cycle”, but the House of Lords has closed the door... may the cycle continue!

The case poses a dilemma. Even if successful in an application for an initial assessment under s 38(6), if this identifies work to be done, the court has no power to order the programme to continue. If there is no right to expect the state to assist the parent to change, what is the purpose of the interim phase of proceedings? How does this serve the presumption in the Children Act, underpinned by Art 8, that children should remain with their families wherever possible? We will have to see.

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