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**KEEPING IT IN THE
FAMILY:**

**A practical guide to the
crossover between Family
Law and Criminal Law**

**Wednesday
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6.30pm to 7.30pm**

FAMILY LAW GROUP



7 Lincoln's Inn Fields London WC2A 3BP

T 020 7404 7000 F 020 7381 4606

DX 90 Chancery Lane E clerks@thomasmore.co.uk

www.thomasmore.co.uk

KEEPING IT IN THE FAMILY – WHEN CRIMINAL LAW IMPACTS ON FAMILY LAW, SOME PRACTICAL POINTS

- A. Burden of proof
- B. Privilege against Self-Incrimination
- C. Special considerations for Parties who are serving prisoners
- D. Confiscation proceedings
- E. Disclosure from the police/CPS
- F. Rehabilitation of Offenders

INTRODUCTION

1. Vexed questions often occur where family proceedings and criminal proceedings overlap. This seminar is intended to answer some, not all of the issues, many of which members of the Family Team at Thomas More Chambers have experienced, as no doubt have you.

2. The standard book dealing with Crime is Archbold which comes out every year and provides an overview of evidence, offences, sentencing and procedure.

3. In addition, in 2007 the Family Justice Council published a Guide “Related Family and Criminal Proceedings” albeit that much of this guide is focussed on child abuse issues.
<http://www.family-justice-council.org.uk/docs/RelatedFamCrimPro.pdf>

A. THE BURDEN OF PROOF IN FAMILY PROCEEDINGS

Or how hard can it be?

4. It is trite law but the burden of proof in crime and civil is different, no matter how “serious” the civil allegations may be. The issue of which standard of proof to apply often arises in civil proceedings where allegations of a criminal nature are made. Civil courts have historically always rejected the adoption of a third intermediate standard of proof however following the case of **Re H (Minors)**[1996] AC 563, a case which dealt with the threshold criteria in care cases, the lines became somewhat blurred. In that case, the House of Lords held that in making findings of fact in care cases, the standard was on the balance of probabilities but:

“When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.”

5. The dictum of Lord Nicholls above has led to some confusion with some courts appearing to use it to create a third higher standard of proof (‘enhanced’ or ‘heightened’ civil standard of proof). As such, by the time the House of Lords came round to dealing with the issue again in the case of **Re B** [2008] UKHL 35 it was hoped that they would give a definitive answer on the subject. Lord Hoffman appeared to do this when he said:

“The time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.”

6. In dealing with the inherent probabilities point which appeared to have confused judges and practitioners alike, Lord Hoffman said:

“There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities”.

7. Baroness Hale, in her judgment, added:

“As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability”.

8. If there was any doubt that **Re B** had settled the matter of standard of proof in civil hearings, the case of **Re S-B** [2009] UKSC 17 which was heard on 14th December 2009, now makes it clear that **Re B** has finalised the issue;

“This issue shows quite clearly that there is no necessary connection between the seriousness of an allegation and the improbability that it has taken place. The test is the balance of probabilities, nothing more and nothing less.”

9. This contrasts sharply with the criminal standard of proof –see Archbold 2009 4-386

“Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt ...If there is a reasonable doubt, created by the evidence given ...the prisoner is entitled to an acquittal” **Woolmington v DPP** [1935] AC 462 HL

10. This has been clarified as meaning the sort of doubt that might affect the mind of a person in dealing with matters of importance in his own affairs **R v Gray** 58 Cr App R177

B. PRIVILEGE AGAINST SELF INCRIMINATION –

Do I have to answer that question?

11. The starting point in any civil case is that a party has the right not to incriminate themselves ie that they are not bound to answer any question if his answer would, in the opinion of the court, tend to expose him to any criminal charge or penalty which the court regards as reasonably likely to be preferred.

12. Caselaw is clear that the consideration of whether a statement or admission might incriminate will be interpreted widely, providing the maximum protection for the potential witness – see **R v K** [2009] EWCA Crim 1640 at paragraphs 10-14 and the cases of **Rio Tinto Zinc Copn v Westinghouse Electric Corpn** [1978] AC 547, per Lord Denning:

“if there is some risk of them [proceedings] being taken – a real and appreciable risk –as distinct from a remote or insubstantial risk, then he should not be made to answer or to disclose documents”

This fundamental principle is reflected both in common law - **Blunt v Park Lane Hotel** [1942] 2KB 253 and in decisions from the ECHR including **Heaney & McGuinness v Ireland** (2001) 33 EHRR 12 ECHR

13. However, this right can be abrogated either expressly in the statute or by implication. This has major implications for the way that family proceedings are conducted if parties are forced to answer questions and provide documentation.

14. It is important also to consider the penalty for a refusal to answer a question in cases where there is no privilege against self incrimination – see **Re O (Care Proceedings: Evidence)** [2004] 1FOLR 161 Johnson J held that where a party refuses to answer questions the court should usually draw inferences that the allegations are true.

15. There would seem to no reason why this should not also be a matter of contempt although many courts would no doubt prefer not to adopt this option.

(a) Public Law Children Act

16. The Children Act 1989 at section 98(1) provides in terms that, in relation to Parts IV and V [ie public law orders - Care and Supervision, and Protection of Children], no person is excused from giving evidence on any matter, or answering any question put to him during the course of his evidence, on the ground that to do so might incriminate him or his spouse or civil partner in an offence.

17. The other side of the coin is that pursuant to section 98(2) such statements or admissions “*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*”.

18. This is a clear example of an express provision abrogating the privilege against self incrimination.

19. In addition, where a child has been abducted and a recovery order has been made requiring a person with information as to the child’s whereabouts to disclose it, the privilege against self-incrimination does not excuse compliance with the requirement – s50(1) CA

20. As to the scope of the s98(2) protection against criminal prosecution – THIS IS NOT A 100% GUARANTEE – please therefore be cautious before advising clients. No Judge can or should give a guarantee of confidentiality. Clients should be aware of s98(2) when speaking to ANYONE involved in the case

Oxfordshire County Council v P [1995] 1FLR 552 – protection extends to statements made to guardian IN ADVANCE of care proceedings

Cleveland County Council v F [1995] 1FLR 797 – protection extends to statements made to social workers investigating a child protection case at least once the proceedings have begun

RE AB (Care Proceedings: Disclosure of Medical Evidence to the Police) [2003] 1LR 161 – disclosures to expert witnesses given same protection as to guardian

Re K and others (Disclosure)[1994] 1 FLR 377 – Booth J expressed a narrower view
“provided protection to a witness who is required to give evidence in relation to a child when such evidence could incriminate his or her spouse”

Re G (Social Worker Disclosure) [1996] 1 FLR 276 – Butler Sloss LJ doubted that **Oxfordshire CC** and **Cleveland CC** cases correctly decided and considered them too wide and that social workers are not in the same position as guardians

Re EC (Disclosure of Material) [1996] 2 FLR 725 – transcripts of an admission made by father were allowed to be disclosed to the police who would free to be able to use it for questioning him ie the protection is only against the statements being admissible in evidence in criminal proceedings, not for use in a police enquiry.

21. See also Criminal Justice Act 2003 s119 which provides that a previous inconsistent statement by a witness which is put to him in criminal proceedings is now admissible as evidence of any matter stated of which oral evidence by him would be admissible – ie in cases in which police given transcripts of admissions and interview defendants using transcripts.

22. In addition, even if the prosecution could not use the statements made to prove inconsistencies (which it appears that they can), of course co-defendants might well be able to.... so s 98(2) is a very leaky sieve indeed

(b) Ancillary Relief

23. The leading case is now **R v K** [2009] EWCA Crim 1640, which despite being a criminal case was decided by a Court of Appeal including Mr Justice Holman from the Family Division. It is highly relevant to all family practitioners and changed the law dramatically from what practitioners had understood the position to be in ancillary relief claims, where difficult issues which potentially might lead to criminal charges were being examined by the court or the other side.

24. Prior to **R v K**, it had been assumed on the basis of **A v A** [2000] 1 FLR 701 that ancillary relief claims fell into the category of other civil proceedings, namely that there was an absolute right not to incriminate oneself and that equally therefore what was said/done in an AR could have criminal repercussions later down the line. Although strictly obiter, Mr Justice Charles in **A v A** said:

*“In my judgment correctly it was not argued before me that the privilege against self-incrimination had been removed in respect of proceedings for ancillary relief, and it follows, that, as is generally the case in relation to the disclosure of material in civil actions and notwithstanding the duty to make full and frank disclosure therein (see *Jenkins v Livesey* [1985] 1 AC 424), parties to ancillary relief proceedings can assert the privilege. If this was not the case it would be a factor in the decision-making process as to further disclosure.”*

25. The Court of Appeal has radically departed from this view, ruling in terms that given the nature of s25(1) MCA and the nature of the discretionary exercise that a court has to embark on, namely an assessment of the information to which the court must have regard under s25(1), that there can be no privilege against self-incrimination.

26. The case involved H who in his Form E, Questionnaire, open negotiations and without prejudice negotiations had made certain admissions which tended to incriminate him in relation to tax evasion. The Form E and Questionnaire were later supplied to the Inland Revenue by an informer.

27. Lord Justice Moore-Bick, having considered s25 and the wording on a Form E, stated at paragraph 31:

“The fact that a party is compelled by rules of court to disclose information and documents does not of itself abrogate the right privilege against self-incrimination. On the contrary, a party to civil proceedings who is required to give disclosure pursuant to CPR part 31 is entitled on that ground to withhold production of documents that tend to incriminate him. Moreover, the Family Proceedings Rules do not expressly exclude the privilege, so in the absence of other considerations it would be difficult to argue that they had achieved such a significant result. The argument in the present case, however, is, and must be, that the rules, which are contained in secondary legislation and have the approval of Parliament, must have been intended to have abrogated the privilege, since the court could not discharge the duty imposed on it by section 25 unless the parties were required to disclose all relevant information, even if tending to incriminate them. In our view that argument is well founded...it would be impossible for the court to discharge its duty under section 25 of the Act if it were deprived of the information on which it is required to act..For these reasons we are satisfied that parties to such proceedings are not entitled to invoke privilege against self-incrimination in order to withhold information.”

28. Further along in the judgment the CA makes clear that this abrogation of privilege in the AR does of course carry benefits as far as the criminal proceedings are concerned as any statements obtained under compulsion [which included Form Es, Questionnaires, comments made at open meetings] could not be used in criminal proceedings:

“the use of the admissions made by K in the ancillary relief proceedings would deprive K of the right to a fair trial to which he is entitled under Article 6 of the ECHR and must therefore be excluded by the judge” [para 43]

29. The CA also made clear that in relation to the admissions made in the open meeting that these could also not be used as they provided orally information which should otherwise have been in the Form E and/or Questionnaire.

30. Clients need therefore to understand that prior to embarking upon an application for AR that they will be required by the court to “come clean”

31. Importantly the CA did however accept that in relation to any statements made which were truly “without prejudice” that

“The protection which normally attaches to such communications covers whatever is said in the course of them, including admissions and that it is not possible to isolate some parts and treat them as falling outside that protection” [para 49]

32. The CA did however decide that given that such without prejudice statements were not made under compulsion but rather to advance negotiations, that there was no reason why in principle they could not be relied upon by the Inland Revenue as:

“the public interest in prosecuting crime is sufficient to outweigh the public interest in settlement of disputes” [para 72]....

(c) TOLATA – cohabitation claims

33. One might assume that in such a case governed by the CPR the right not to incriminate oneself is retained as there is no duty on the court to enquire into the assets comparable to a s25 duty

34. CPR 31.3 provides that:

“ a party to whom a document has been disclosed has a right to inspect that document except where-

(b) the party disclosing the document has a right or a duty to withhold inspection of it”

35. One of the grounds for asserting a right to withhold inspection is that of the privilege against self-incrimination. So far, so good.

36. However, the Fraud Act 2006, brought into force on January 15th 2007, provides at section 13 that:

“(1) A person is not to be excused from –

(a) Answering any question put to him in proceedings relating to property, or

(b) Complying with any order made in proceedings relating to property

on the ground that doing so may incriminate him or his spouse or civil partner of an offence under this Act or a related Act”

(2) but in proceedings for an offence under this Act or a related offence, a statement or admission made by a person in –

(a) answering such a question, or

(b) complying with such an order

Is not admissible in evidence against him

(3) “Proceedings relating to property” means any proceedings for-

(a) the recovery or administration of any property,

(b) the execution of a trust

(c) an account of any property or dealings with property,

and property means money or other property whether real or personal (including things in action and other intangible property)

(4) "Related offence" means-

(a) conspiracy to defraud,

(b) any other offence involving any fraudulent conduct or purpose"

37. This would seem to cover any TOLATA proceedings, so again the right to assert any privilege against self-incrimination has been expressly abrogated.

38. Importantly s13 of the Fraud Act 2006 is retrospective in effect in the sense that in future proceedings it applies to events before the Act came into force as well as after – see **Kensington International v The Republic of Congo** [2007] EWHC 1632 [Comm]

(d) Children Act section 8 ie private law

39. Is there still a privilege against self-incrimination in relation to fact finding hearings? Seems to be a moot point.

Section 1 (3) CA :

" a court shall have regard in particular to

(e) any harm which he has suffered or is at risk of suffering"

Is such duty analogous to the s25MCA duty of the court to enquire into the circumstances pursuant to **R v K**?

40. See also the Domestic Violence Practice Direction 14th January 2009 para 3:

"the court must at all stages of the proceedings consider whether domestic violence is raised as an issue, either by the parties or otherwise"

And at para 5:

"In considering, on an application for a consent order for residence or contact, whether there is any risk of harm to the child, the court shall consider all the evidence and information available"

C.SPECIAL CONSIDERATION FOR SERVING PRISONERS

or the Husband with too much time on his hands

41. Anecdotal evidence would suggest that serving prisoners are particularly keen on making applications to family courts, perhaps in part to relieve the boredom Sometimes H in an AR has already been convicted and is inside, sometimes H has been convicted of DV and is applying for contact. Many practical issues arise, in particular:

Production of a prisoner at court for family proceedings

42. The **Crime (Sentences) Act 1997** Schedule 1 para 3 Transfer of Prisoners within the British Isles sets out the power to transfer a prisoner:

“If the Secretary of State is satisfied that in the case of (a) a person remanded in custody... or (b) a person serving a sentence of imprisonmentthat the attendance of that person at any place in thatis desirable in the interests of justice or for the purpose of any public inquiry, the Secretary of State may direct that person to be taken to that place”

43. The Prison Service has also produced an order no.4625 dated February 2002 which provides Guidance to when to produce prisoners “Productions in Civil Proceedings”. This Guidance emphasises that the Prison staff must consider Article 6 when considering whether to comply with a request for production “*prisons must decide whether for the proceedings as a whole to be fair, the prisoner must attend personally at court for the relevant stage of the proceedings....*” [2.2]

44. The Guidance provides that:

“Factors relevant to the Interests of Justice...

....what is the nature of the case

The nature of the case may determine how important it is that the prisoner attends, but there are certain categories where it will usually be desirable to produce the prisoner:

Cases where arrangements for children are to be made;

Cases involving the prisoner’s finances, such as bankruptcy; and

Any other domestic cases, for example divorce, restraining orders” [3.2]

45. Importantly all movements of category A prisoners outside the prison must be authorised by the Directorate of High Security Prisons – it may be possible to transfer to a more secure court hearing centre.

46. The Prison Service also has the right to charge the prisoner for the travel costs but whether a prisoner is able or willing to pay must not be a factor in the decision as to whether to produce the prisoner. See also **R v Secretary of State for the Home Department ex parte Wynne** [1993] 1 All ER 574 HL.

47. The starting point is to write to the Prison Service requesting the production of that prisoner setting out details of the hearing etc

48. In the event that the Prison Service refuses to produce a prisoner, an application for Habeas Corpus can be used pursuant to RSC Ord 54 r9 and Supreme Court Act 1981 s9(2). There also exists a corresponding power in the County Court under the County Courts Act 1984 s57 which provides that an application must be made by affidavit by any party to order that a prisoner is brought to court to be examined as a witness. This is a power which only CJs have ie do NOT ask a DJ to make the order as they do not have the jurisdiction!

Service on a Prisoner

49. Service can be effected either by a police officer or by a prison officer.

Contact details for all police forces are held at www.police.uk/forces/htm

Whilst contact details for all prisons are held at www.hmprisonservice.gov.uk/prisoninformation/locateaprison/

Sending confidential correspondence to a prisoner

50. Rule 39 of the Prison Rules 1999 SI 1999/728 [as amended by the 2009 Prison and Young Offender Institution Amendment Rules 2009/3082 which widens the rule to cover material and not just correspondence] allows for the sending of private legal correspondence and materials.

51. The letter should be addressed to the prisoner, including their prison number and marked up clearly with "SOLICITOR'S LETTER – RULE 39 APPLIES" preferably postmarked from the firm's franking machine!

Booking legal visits

52. Each prison has an officer who books legal visits. The request should be made in writing or by email. Such legal visits are not included in the prisoner's quota of family and friends' visits [for which visiting orders are required].

D. CONFISCATION PROCEEDINGS

or the Husband already caught with his hands in the till

53. Statutes relating to confiscation proceedings have changed over the last decade. All current confiscation orders relating to offences committed after March 2003 are dealt with by the Proceeds of Crime Act 2002. It is possible that there are still confiscation orders in existence pursuant to Criminal Justice Act 1988, Drug Trafficking Act 1994 "DTA" and other statutes

54. These changes have had a major procedural impact on how W brings her AR claim when there are also confiscation proceedings on foot.

55. Essentially the procedure under POCA is as follows:

- (a) Within 2 years of the date of conviction, there must be a confiscation hearing which must follow the sentencing. This confiscation hearing is carried out by the Crown Court Trial Judge and is a two stage process where the Judge firstly has to consider the "benefit figure" ie what the proceeds of crime have been. At the second stage the Judge must consider the "available amount" ie the assets held by H. During this confiscation hearing W has no right to be represented. The order for the available amount is an order against H personally and is not directed towards any particular asset. H will have a maximum of 6 months to pay. If H does not pay, the Crown may apply for the appointment of a receiver to collect H's assets and to enforce the confiscation order;

(b) Any application to enforce the confiscation order or to lift a restraint orders [ie freezing injunctions over assets] is also heard before the same Trial Judge. At such hearing it would appear that pursuant to section 69(3) POCA that W has a right to be heard. Given that W is free to pursue her application for AR, W will therefore be able to present to the Trial Judge a concluded AR order – see for example the case of **R v Mustafa** [2009] EWCA 2506 where H’s parents applied to court and had a contested hearing listed as to whether they owned a particular asset in H’s name. Presumably at this stage it would be preferable for there to have been a contested hearing of the AR rather than a consent order. Interestingly, the Transfer and Allocation of Proceedings Practice Direction 2008 does not, however, make any suggestion that AR claims should be brought in the High Court where there are confiscation proceedings although it would seem to be a better course of action

56. The procedure under both POCA and the previous statutes is considered in the case of **Webber v Webber** [2006] EWHC 2893 where the Court held that the High Court had no jurisdiction to order that the hearings of the AR and the confiscation order be joined and heard together in front of the same Trial Judge in the criminal proceedings. Potter J made it clear that W had to take her chances in the AR and then revert to the Crown Court in relation to an application to adjust the amounts available in the light of the AR.

57. **Commissioners of Customs & Excise v A** [2003] 2 WLR 210 concerned the DTA 1994 and made clear that the jurisdiction of the family court was not ousted by the DTA or forced to take second place to proceedings under DTA. Under this scheme the confiscation order was made in the Crown Court but jurisdiction over the making of restraint orders, the appointment of receivers and the enforcement of confiscation orders. The enforcement process in relation to the confiscation order has to at least acknowledge the existence of the MCA and the rights of W to bring a claim.

58. **W v H & HMCE** [2004] EWHC 526 the High Court gave directions as to how to deal with cases where an AR claim was to be brought and there might be conflict with potential confiscation proceedings, albeit under CJA and DTA. It was possible under these previous regimes for the confiscation and AR proceedings to be heard together by a High Court Judge.

59. **CPS v Richards** [2006] 2 FLR 1220 CA rejected a submission that court deprived of its jurisdiction under MCA even though assets tainted and subject to confiscation. The CA held that as a matter of public policy where assets were tainted with the proceeds of crime they should not ordinarily be distributed. That did not mean that a court is deprived of the jurisdiction to make a distribution in favour of the wife.

60. The recent Court of Appeal case of **Stodgell v Stodgell** [2009] EWCA Civ 243 makes an interesting point about a “non-tainted” W whose ex H had a confiscation order of £900,000 arising from a conviction for tax evasion. H’s assets were less than £900,000. It is important to note that for reasons not given in the judgment, this W asserted NO proprietary interest in any of H’s assets including the FMH, but that the judgment proceeded on the assumption that she would be the resident parent of the parties’ child. It was accepted that W did not know of the tax evasion. The Court of Appeal however held that W was entitled to nothing as there was no difference between her having married a tax evading H and a spendthrift H.

The IRC had been entitled at any time to have bankrupted H in which case there would have been nothing for W in any event.

“This case is a good illustration of the fact that while non-complicity in the crime is a necessary condition for the wife to succeed in an ancillary relief claim as a matter of discretion where she is in competition with a confiscation order, such non-complicity is not a sufficient condition. She will also fail in a number of other circumstances, including where the husband’s assets are reduced to nil by having to pay now what he ought to have paid years ago.” [para 9]

“That is not a question of treating a state creditor as in some way stronger than a private creditor. It is a question of ascertaining what are the assets available for distribution between husband and wife” [para 10]

“the submission that there should be no difference between a wife with a proprietary interests in assets and the wife with the non-proprietary ancillary relief claim is...unarguable. The distinction is a critical one. To the extent that the wife has a proprietary interest in the property, that property is not part of the husband’s assets and his realisable assets are smaller. In either case the wife is not in competition with the confiscation order, because her interest is vested and one never gets to the Commissioners of Customs and Excise.”

E.POLICE DISCLOSURE IN FAMILY PROCEEDINGS

Or getting blood from a stone

61. It is common for practitioners in family proceedings to request disclosure of documents from the police where criminal proceedings have, or will be, involved. The only way to do this is via the Police Family Disclosure Protocol and then by way of a court direction to the police for disclosure of documents to the court.

62. Since criminal proceedings take place in open court, information and documents can be shared once it has been used in trial, subject to the general law of confidence (normally requires permission of CPS lawyer before using them in family proceedings).

63. It is more usual, however to want to obtain information or documents before a criminal trial is listed, as family cases are often listed on a shorter timetable, and may sometimes have reached the final hearing before a defendant has even been charged in criminal proceedings. The general principle is that the police will decline to share information if it would be prejudicial to their investigation, or in breach of the Data Protection Act or one of the European Convention Articles (Eg Art 8).

64. Requesting disclosure:

- initiate a request following the ACPO Police/Family Disclosure Protocol [see handouts]
- made to the investigating officer if a charge has yet to be laid, or the CPS lawyer after a charge has been laid
- ACPO applies to all police forces but each has the discretion as to implementation, so practitioners may find that their dealings with each police force varies

65. Practitioners are under an implicit undertaking that any material disclosed is to be used only for concurrent family proceedings.

66. If a protocol request is refused:

- make an application to the family court judge on notice to the police
- include a timescale for disclosure
- ensure it is on notice to the police
- apply for a witness summons to a named officer requiring the police to attend court with the documents requested
- if the police are not represented at the hearing when the order for disclosure is made, provide within the order liberty to apply to challenge or to vary the order

67. In the event of a refusal, a hearing will be convened at which the police will attend and the court will balance the public interest in maintaining confidentiality during a criminal investigation or trial, against the public interest in ensuring full access to relevant material to allow the family court to protect the interests of the relevant parties. The problem is not usually an unwillingness to disclose, but whether the timing is right with regard to any risk posed to the police's criminal investigations. Sometimes the police do not understand why material is required if it does not relate to the parties, and this should be spelt out if possible (eg partner assaulting his former partner or general convictions [dishonesty etc] which may relate to credibility issues)

68. Cafcass has produced into its own protocol with the police to allow the sharing of information relevant to the protection of children. Such information should be included in the Cafcass report. Where there has been a lack of co-operation by the Police, Cafcass can be a faster way of obtaining PCN conviction print outs.

69. There is a difference between the exchange of documents and an exchange of information. For example, a police officer can be given a judgment or text from a case, but only for the purpose of a criminal investigation. There is no bar, however, in an exchange of information. A social worker should, for example, inform the police of an admission made by a parent relevant to a joint investigation.

70. The other way around, the police/CPS can apply to the family court (usually after liaison with the LA or solicitors) for access to the LA's files in care proceedings. In theory the defendant has the protection of the Children Act 1989 s 98(2) in the criminal case [though see above]. Joint case management directions hearings can be made in cases of concurrent criminal and family proceedings and there are issues as to disclosure and timetabling.

71. An example of a precedent for a court order prior to police disclosure is as follows:

The chief constable of [] police do disclose all police records including CRIS and CAD reports, statements, AI, full PNC print outs for both parties, IRB's, ABE interviews (transcripts and videos), pertaining to the parties (full names and dates of birth) no later than [6 weeks usually required which accords with the time in the Protocol]

Liberty to the Chief Constable of [police force] to vary or discharge the above order on not less than 48 hours' notice.

Glossary:

CRIS: Crime Report Information System (computer print out regularly updated by the officer in the case as to police actions)

CAD: Computer assisted despatch (first contact made setting out details of victim and witnesses)

PNC: Police national computer print outs of convictions, cautions and reprimands

IRB: Incident report book (notes taken by officer at scene contemporaneously or as soon as practicable thereafter)

ABE interview: Achieving Best Evidence interview: A recorded interview which may stand as evidence in chief at the criminal court, always used for child witnesses under 17, and occasionally for other vulnerable or intimidated witnesses eg with learning disabilities, illness, or suffering fear or distress.

Memorandum of conviction: Held at whichever court dealt with the case, it sets out the conviction details and sentence. This may be necessary in cases where the perpetrator denies the facts of the offence or conviction, or makes partial admissions eg common assault not battery. This is only available directly from the court not from the police

PSR: Pre Sentence Report: This would only be available from the defendant in criminal proceedings (not the police or court) and sets out whether or not the defendant is at a risk of further offending, what recommendations were made for sentence etc. This will only be helpful in rare cases where you are acting for the defendant and he is not considered a high risk of re offending

AI: Advanced information: The papers disclosed to the defence by the police as primary disclosure, for use at the criminal trial.

72. By way of background, in particular in domestic violence cases, below is a summary of levels of assaults:

Common assault:

Assault can be either the mere threat of violence, or battery, the actual use of violence. The violence may be direct or indirect, and includes, for example, a slap, spitting, or accidentally driving a car onto someone's foot, but then holding it there deliberately. Common assault is nearly always dealt with in a magistrates' court, and the maximum sentence is 6 months custody. A first offence will only rarely incur a prison sentence, and is more likely to incur a fine, conditional discharge or community penalty.

ABH: Actual Bodily Harm:

This is a more serious assault than a common assault. Actual bodily harm means any injury calculated to interfere with the health or comfort of the victim, and need not be permanent, but more than merely transient or trifling. This will generally include a punch, kick, pulling or cutting of hair. There is usually some independent evidence of injury, either medical evidence, photographs or witness statements from police who saw the injury at the time.

The maximum sentence is a 5 year prison sentence. The likely sentence will depend on the facts of the case and injury caused, any relevant previous convictions and the plea. It would be common for a first offence to have a community penalty imposed unless the facts were serious enough to warrant prison.

GBH: section 18 Offences Against the Person Act 1861 Causing grievous bodily harm with intent/ Wounding with intent/Wounding without intent section 20:

Wounding (without intent) under section 20 : For wounding the continuity of the skin must be broken eg incised wound, puncture, laceration, gun shot wound. The maximum sentence is 5 years. Recklessness rather than intent is sufficient.

Grievous bodily harm: This means really serious bodily harm but not necessarily requiring treatment or lasting consequences, intentionally caused. Commonly this would include punches, kicks, strangulation, head butting etc. The maximum sentence is life imprisonment, but this is very rare. An immediate custodial sentence should be expected, the term of which will depend on the injury caused, facts, previous convictions and plea. It is not uncommon to receive a 3 or 4 year sentence even on a guilty plea.

Attempted murder:

Intention to kill has to be proved. Life imprisonment maximum sentence. Sentence would be a tariff

Defences: Self defence: The use of reasonable force to defend yourself or another; Mistaken belief in self defence (the belief has to be reasonable).

Reasonable correction of a child (case law suggests that if any harm is of the nature of ABH or above this will not be reasonable).

NB Some defendants plead guilty to public law offences instead of assault, for example threatening words and behaviour, as the sentences are lower.

F.REHABILITATION OF OFFENDERS

Or it's not over till its over

73. Just as a final point to note, in family proceedings there is essentially no "rehabilitation" inasmuch as the family courts when dealing with issues in respect of children have a right to know everything.

74. The Rehabilitation of Offenders Act 1974 provides in terms that in relation to the following types of proceedings that no conviction is ever "spent":

- (i) Adoption;
- (ii) Marriage of any minor;
- (iii) Exercise of the inherent jurisdiction of the High Court with respect to minors;
- (iv) The provision by any person of accommodation, care or schooling for minors and

(v) Any proceedings under CA 1989

75. Proof of conviction may be provided by the production of a certificate of conviction – see above, only obtainable from the court. Alternatively, providing the convictions are admitted, a Police National Computer print out can be obtained either via the Police directly or via Cafcass [see above]. Further details of the offence can be obtained in like manner.

76. In any family proceedings, the fact that a person has been convicted of a certain offence is of course admissible to prove he did indeed commit the offence – s11(1) Civil Evidence Act 1968.

77. Where a party seeks to go behind the conviction, the burden of proof is on him to prove on the balance of probabilities that the conviction was erroneous – see **Re B (Children Act Proceedings)(Issue Estoppel)** [1997] 1FLR 285.

Sarah Lucy Cooper

Freya Rowe

Inderjit Gill

Thomas More Chambers Family Team

14th April 2010