



PRESIDENT OF THE
FAMILY DIVISION

SIR MARK POTTER, PRESIDENT OF THE FAMILY DIVISION
SEMINAR ON FORCED MARRIAGES: LAW, RELIGION AND PRACTICE

OPENING REMARKS

2 APRIL 2009

I have been asked to explain briefly to you the business of the family courts.

Perhaps the first thing that I should make clear is that decisions in these courts are made on the basis of propositions of law which are entirely free-standing in the sense that they are fully independent of any religious precepts or principles.

While this country has for centuries had an established Christian church in the Church of England, the paths of the civil courts (who deal with all family matters) and the ecclesiastical courts (who no longer have jurisdiction in that area) diverged many years ago and the civil laws and principles invoked to make decisions in the family courts now depend almost entirely on principles and procedures set out in statutes.

When considering family cases, the courts adopt a non-discriminatory approach, regarding both parents as having equal rights and responsibilities and the law provides that, in any dispute involving the residence care and upbringing of children, the welfare of the child is the paramount consideration

The main business of the family court is taken up with

(A) Private Law

- (i) Claims for financial maintenance for spouses and children and
 - (ii) Residence and contact disputes between separating or separated parents who cannot agree upon the arrangements for the care and upbringing of the children of the family.
- Although stories of disputes in the family courts are often in the press, and the activities of organisations such as Fathers for Justice are newsworthy, it is worth saying that in most cases, separating parents are able to make their own arrangements for contact without

taking the matter to court. 90% of cases never reach court following divorce or the separation of unmarried couples and of those that do, the vast majority are settled without the need for a final hearing before a court.

Independent research¹ reported in September 2008 that in only 11% of the 10% of cases taken to court was a final hearing required and that almost 1/3 of these settled in the course of the hearing.

(B) Public Law Children cases

Care Proceedings: are taken by Local Authorities when they have concerns that a child is in danger of harm and in need of protection by the state by means of a care or supervision order. Orders that a child should be taken into the care of foster parents or, in the worst cases, removed for adoption are only made where the court is satisfied that it is necessary to do so to protect the child from significant harm. Many children taken into care are returned to parents who have established during the care order that the child can safely be returned to them. Where they cannot do so, children are adopted into a new secure family approved for that purpose and, in the case of children from a particular ethnic group, every effort is made to see if they can be adopted into a family from that group.

All proceedings (private and public law) concerning the welfare of children, with the exception of adoption, are governed by the Children Act 1989 which is a comprehensive code setting out the principles on which the court and other agencies involved must act, and which provides that the child's welfare shall be the court's paramount consideration.

When deciding in any particular case what is in the best interests of a child, the court is required to have regard to a checklist of factors formulated to enable the court to consider what is best for the particular child.

In a recent case², the Court of Appeal had to consider the appeal of a Muslim father against a decision of the court to place his children in care with long-term foster parents who were white, English and non-Muslim and thus were not culturally and religiously appropriate parents. However, having heard of chilling violence within the family, including the death of another child and a so-called, "Honour Killing," The court held that the family were

¹ Outcomes of applications to court for contact orders after parental separation or Divorce. Joan Hunt and Alison Macleod. Oxford Centre for Family Law and Policy. University of Oxford. September 2008.

² B-M (Children) [2009] EWCA Civ 205

nonetheless appropriate on the basis that protection of the children from harm was the paramount concern, the foster parents were particularly committed to their care and they could not be properly protected in any other way.

During the original proceedings, the judge heard evidence from a Muslim scholar, who did not suggest that the behaviour of the family could be encompassed within Islam. At the conclusion of the case, the judge stated, "The message from this case, which must be sent out loud and clear, is that this court applies a tolerant and human rights based rule of law: one which, under the Act of 1989, regards parents as equals and the welfare of the child as paramount".

In relation to equality, it is worth referring to another passage from the judgment of the Court of Appeal in the same case, as it highlights an aspect of the justice system in this country of which we can all be proud. The father, who Lord Justice Wall described as, "a disadvantaged, non-English speaking and in many ways worthy parent," was provided through free legal aid with the opportunity to challenge the decisions of the local authority in relation to his children, and was able to call expert evidence to assist him.

Furthermore, that challenge was skilfully advanced by specialist child lawyers. The father's case was fully aired and expertly conducted. This is as it should be. In the end, the father's case failed on its merits, but the fairness of our English child care procedures permitted a full range of criticisms to be advanced and carefully considered on his behalf.

That is the background to the work of the family courts in this country. However, the focus of this seminar is "forced marriage."

Now our law recognizes, as I am sure does this audience, a clear distinction between a forced marriage and an arranged marriage. In arranged marriages, the families of both spouses take a leading role in arranging the marriage but the choice as to whether or not to accept the arrangement remains with the prospective spouses.

In forced marriage, one or both spouses do not consent to the marriage and some element of duress is involved. Duress is usually physical but it can also be emotional - the result of unremitting family pressure. In English law, it has long been recognized that, a marriage contracted under duress is voidable and can be annulled on the ground of lack of valid consent, as consent is a necessary ingredient for lawful marriage, but in relation to the problem of forced marriages, it is only recently that Parliament has passed the Forced

Marriage (Civil Protection) Act in respect of which Mr. Justice James Munby here is far more expert than I am. So, I will now hand over to him.

Please note that speeches published on this website reflect the individual judicial office-holder's personal views, unless otherwise stated. If you have any queries please contact the Judicial Communications Office.
