



Association of **Lawyers for Children**

Promoting justice for children and young people

CHILD ABDUCTION WITHIN THE UNITED KINGDOM

An analysis of the various provisions, the difficulties which are likely to be experienced by a litigant in person and, in the light of this, how the Legal Aid, Sentencing and Punishment of Offenders Bill might now best be amended.

**THIS PAPER REPRESENTS THE VIEWS, ON THIS ISSUE, OF THE
ASSOCIATION OF LAWYERS FOR CHILDREN
AS AT 27TH FEBRUARY 2012**

Introduction

Child abduction is the unauthorised removal of a child from the care of a person with whom he normally lives¹.

Hershman and McFarlane comment² that: “The remedies available with respect to child abduction are piecemeal, rather than being part of a unified scheme, and vary depending on the location of the child at any particular time.” (i.e. the location of the child when a remedy is sought).

It is convenient, accordingly to look at the remedies first ***where the child is within England and Wales*** and second, where the child is ***not within England and Wales but is within the UK***.

Within these separate parts, the scope of jurisdiction and remedies differs between courts, so it is necessary to look separately at the position in the High Court, the County Court and the Family Proceedings Court.

It is also necessary to look separately at remedies designed to ***prevent*** a feared abduction, and remedies designed to ***secure the return*** of an abducted child.

In the context of the Legal Aid, Sentencing and Punishment of Offenders Bill it is important to recognise that the effect of the proposals as they currently stand, is that legal aid will not be available for any of these steps, unless the applicant is in a position to pass one of the gateways relating to domestic violence or harm to a child.

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¹ Hershman & McFarlane : *Children Law and Practice* at G[1]

² Section G[1]

PART A :PREVENTION OF A FEARED ABDUCTION

SECTION A.1 HIGH COURT

(1) Prohibited steps order (s.8, Children Act 1989);

Problem areas if no legal aid is available:

- Fee payable on issue : £200³;
- Potential difficulties if the applicant's first language is not English – potential costs of interpreters;
- Unlikely to be granted on a “without notice” basis unless the applicant has put forward a clear case, which is going to be hard for a litigant in person in any circumstances, and likely to be extremely hard against the emotional distress here involved;
- Fee payable to enquiry agent to effect personal service on respondent of the application (assuming the order is not made “without notice”);
- Fee payable to enquiry agent to effect personal service on respondent of the prohibited steps order.

(2) Wardship (inherent jurisdiction of the High Court). Immediately an application is issued, the child may not be removed from the jurisdiction of England and Wales, without permission of the court⁴;

(3) Injunction under the inherent jurisdiction of the High Court⁵.

SECTION A.2 COUNTY COURT

(1) Prohibited steps order (s.8, Children Act 1989);

Problem areas if no legal aid is available:

- Fee payable on issue : £200⁶;

³ *The Family Proceedings Fees Order 2008* SI 2008 No.1054, Schedule 1, paragraph 2.1(c), as amended by *The Family Proceedings Fees (Amendment) Order 2010* SI 2010 No.1916.

⁴ Hershman & McFarlane : *Children Law and Practice* at G[45]

⁵ Hershman & McFarlane : *Children Law and Practice* at B[1286] and G[46]

⁶ *The Family Proceedings Fees Order 2008* SI 2008 No.1054, Schedule 1, paragraph 2.1(c), as amended by *The Family Proceedings Fees (Amendment) Order 2010* SI 2010 No.1916.

- Potential difficulties if the applicant’s first language is not English – potential costs of interpreters;
- Unlikely to be granted on a “without notice” basis unless the applicant has put forward a clear case, which is going to be hard for a litigant in person in any circumstances, and likely to be extremely hard against the emotional distress here involved;
- Fee payable to enquiry agent to effect personal service on respondent of the application (assuming the order is not made “without notice”);
- Fee payable to enquiry agent to effect personal service on respondent of the prohibited steps order.

SECTION A.3 FAMILY PROCEEDINGS COURT

(1) Prohibited steps order (s.8, Children Act 1989);

Problem areas if no legal aid is available:

- Fee payable on issue : £200⁷;
- Potential difficulties if the applicant’s first language is not English – potential costs of interpreters;
- Unlikely to be granted on a “without notice” basis unless the applicant has put forward a clear case, which is going to be hard for a litigant in person in any circumstances, and likely to be extremely hard against the emotional distress here involved;
- Fee payable to enquiry agent to effect personal service on respondent of the application (assuming the order is not made “without notice”);
- Fee payable to enquiry agent to effect personal service on respondent of the prohibited steps order.

PART B : SECURING THE RETURN OF AN ABDUCTED CHILD

CHILD CURRENTLY LOCATED WITHIN ENGLAND AND WALES

SECTION B.1 HIGH COURT

(1) ***Tracing the child*** - Investigative order : (i.e. against telephone service providers in order to provide details of numbers dialled by a person or

⁷ *The Magistrates’ Courts Fees (Amendment No.2) Order* [2010 No.1917] Schedule 1, paragraph 8.1(d)

persons suspected of having removed the child, or other information tending to pinpoint that person's whereabouts)

Problem areas if no legal aid is available:

- Fee payable on issue : £160⁸;
- Potential difficulties if the applicant's first language is not English – potential costs of interpreters;
- Fees payable to third party holders of information, e.g. telephone service providers, banks, employers, internet service providers can run into excess of one thousand pounds;
- The ability quickly to identify the bodies and persons against whom orders should usefully be sought, and then to follow those orders through, frequently requires detailed research, persistent and committed contact with those bodies and persons, and persistence in getting through to relevant senior management members of organisations and agencies. This is skilled and time-consuming work, which a litigant in person in such circumstances is most unlikely to be capable of doing.

- (2) ***Tracing the child*** - Wardship : automatic order requiring respondents to serve notice stating whereabouts of child or, as the case may be, that the respondent is unaware of his whereabouts⁹;

Problem areas if no legal aid is available:

- Fee payable on issue :£160¹⁰;
- Failure to respond adequately or at all (a common enough occurrence) will require that further steps are taken, e.g. an investigative order, with the resulting problems at B.1 (1) above.

- (3) ***Tracing the child*** - Order under section 33 of the Family Law Act 1986 by which the court directs any person whom it has reason to believe may have relevant information to disclose it to the court.

Problem areas if no legal aid is available:

- Fee payable on issue : £230¹¹;

⁸ *The Family Proceedings Fees Order 2008* SI 2008 No.1054, Schedule 1, paragraph 3.3, as amended by *The Family Proceedings Fees (Amendment) Order 2010* SI 2010 No.1916.

⁹ FPR 2010, r 12.39(1)

¹⁰ *The Family Proceedings Fees Order 2008* SI 2008 No.1054, Schedule 1, paragraph 3.3, as amended by *The Family Proceedings Fees (Amendment) Order 2010* SI 2010 No.1916.

- Potential difficulties if the applicant's first language is not English – potential costs of interpreters;
 - Fees payable to enquiry agent personally to serve the person(s) so ordered to provide information to the court¹²;
 - In the event that the person disobeys the order (a common enough occurrence) an application to commit the person to prison is necessary, necessitating further paperwork (which must be precisely drawn up¹³) together with payment of a further fee of £90¹⁴
- (4) **Securing the child** - Location order: “direction to the tipstaff to take steps to locate the child and upon finding him to remove the passports of the child and any adult responsible for having removed the child.”¹⁵

Problem areas if no legal aid is available:

- Fee payable on issue : £230¹⁶;
- Potential difficulties if the applicant's first language is not English – potential costs of interpreters;
- The tipstaff can only act on information supplied to him by the applicant, so unless the applicant has full information as to who the child is with and where, the applicant will need to have gone through one or more of steps B.1 (1) to (3) to get to this point, with the accompanying difficulties there set out.
- It can be an irreparable error to send the tipstaff to an address where the occupants may tip off the person who has the child. It is important to ensure that the applicant is confident that the child is at a particular address before requesting the tipstaff to attend, and this is a skilled judgement;
- In some cases it is important to be in communication with the tipstaff when they serve the order, to advise on the best steps to take to secure the child. A litigant in person is unlikely to

¹¹ See *The Family Proceedings Fees Order 2008* SI 2008 No.1054, Schedule 1, paragraph 1.1, as amended by *The Family Proceedings Fees (Amendment) Order 2010* SI 2010 No.1916.

¹² FPR 2010, r12.16(4) and (5) : (service required within 48 hours)

¹³ The burden of proof being on the applicant, who must satisfy the court beyond reasonable doubt.

¹⁴ See *The Family Proceedings Fees Order 2008* SI 2008 No.1054, Schedule 1, paragraph 4.3, as amended by *The Family Proceedings Fees (Amendment) Order 2010* SI 2010 No.1916.

¹⁵Hershman & McFarlane : *Children Law and Practice* at G[69A]

¹⁶ See *The Family Proceedings Fees Order 2008* SI 2008 No.1054, Schedule 1, paragraph 1.1, as amended by *The Family Proceedings Fees (Amendment) Order 2010* SI 2010 No.1916.

be able to do this satisfactorily, taking into account their emotional involvement and the overwhelming nature of the situation.

- (5) ***Returning the child*** - Collection order: “empowers the tipstaff to remove the child from the person holding him and directs him to deliver the child into the care of a nominated person.”¹⁷

Problem areas if no legal aid is available:

- Fee payable on issue : £230;
- Potential difficulties if the applicant’s first language is not English – potential costs of interpreters;
- The tipstaff can only act on information supplied to him by the applicant, so unless the applicant has full information as to who the child is with and where, the applicant will need to have gone through one or more of steps B.1 (1) to (3) to get to this point, with the accompanying difficulties there set out;
- In some cases it is important to be in communication with the tipstaff when they serve the order, to advise on the best steps to take to secure the child. A litigant in person is unlikely to be able to do this satisfactorily, taking into account their emotional involvement and the overwhelming nature of the situation. The impact on the child of this stage being managed clumsily due to the tipstaff not getting full and clear instructions from the litigant in person may be substantial.

- (6) ***Returning the child*** - Order under section 34 of the Family Law Act 1986 : available in circumstances where a person is required by a “Part I order” (as defined in that statute) or an order for enforcement of a Part I order, to give up a child to another person, and the court which made the order imposing that requirement is satisfied that the child has not been given up in accordance with that order.

Problem areas if no legal aid is available:

- Fee payable on issue : £230¹⁸;
- Potential difficulties if the applicant’s first language is not English – potential costs of interpreters;

¹⁷ Hershman & McFarlane : *Children Law and Practice* at G[69A]

¹⁸ See *The Family Proceedings Fees Order 2008* SI 2008 No.1054, Schedule 1, paragraph 1.1, as amended by *The Family Proceedings Fees (Amendment) Order 2010* SI 2010 No.1916.

- Not available unless the applicant already has a Part I order (e.g. a residence order, or a special guardianship order) in their favour – if there is no such order, the applicant must use an alternative remedy e.g. wardship;
- Evidential difficulties in satisfying the requirements if what is alleged is a failure to return after a period of contact – “the terms of the requirement must be clear and there must be admissible evidence before the court to satisfy it of the situation¹⁹. This is likely to be problematic for a litigant in person.

SECTION B.2 COUNTY COURT

(1) ***Tracing the child*** - Order under section 33 of the Family Law Act 1986 by which the court directs any person whom it has reason to believe may have relevant information to disclose it to the court.

Problem areas if no legal aid is available:

- Fee payable on issue : £230²⁰;
- Potential difficulties if the applicant’s first language is not English – potential costs of interpreters;
- Fees payable to enquiry agent personally to serve the person(s) so ordered to provide information to the court²¹;
- In the event that the person disobeys the order (a common enough occurrence) an application to commit the person to prison is necessary, necessitating further paperwork (which must be precisely drawn up) and payment of a further fee of £90²². To take such a serious step without legal advice, and so the confidence that this is reasonable, would be difficult for most litigants in person and therefore unlikely to be pursued.

¹⁹ Hershman & McFarlane : *Children Law and Practice* at G[74]

²⁰ See *The Family Proceedings Fees Order 2008* SI 2008 No.1054, Schedule 1, paragraph 1.1, as amended by *The Family Proceedings Fees (Amendment) Order 2010* SI 2010 No.1916.

²¹ FPR 2010, r12.16(4) and (5) : (service required within 48 hours)

²² See *The Family Proceedings Fees Order 2008* SI 2008 No.1054, Schedule 1, paragraph 4.3, as amended by *The Family Proceedings Fees (Amendment) Order 2010* SI 2010 No.1916.

(2) **Returning the child** - Order under section 34 of the Family Law Act 1986: available in circumstances where a person is required by a “Part I order” (as defined in that statute) or an order for enforcement of a Part I order, to give up a child to another person, and the court which made the order imposing that requirement is satisfied that the child has not been given up in accordance with that order.

Problem areas if no legal aid is available:

- Fee payable on issue : £230²³;
- Potential difficulties if the applicant’s first language is not English – potential costs of interpreters;
- Not available unless the applicant already has a Part I order (e.g. a residence order, or a special guardianship order) in their favour – if there is no such order, the applicant must use an alternative remedy e.g. wardship;
- If the Part I order does not itself, on the face of it, require the child to be given up, the applicant first has to obtain, and provide proof of service on the respondent (incurring the fees of an enquiry agent for personal service) an order which does so require the child to be given up²⁴;
- Evidential difficulties in satisfying the requirements if what is alleged is a failure to return after a period of contact – “the terms of the requirement must be clear and there must be admissible evidence before the court to satisfy it of the situation²⁵. This is likely to be problematic for a litigant in person;
- The tipstaff’s office is not available in respect of such orders, nor are there any “officers of the court” who are trained to act upon them. Having obtained the order the litigant in person will have to liaise with the police to request them to take charge of the child and deliver the child to her or him. The order only *authorises* the police to act, and it cannot *require* them to do

²³ See *The Family Proceedings Fees Order 2008* SI 2008 No.1054, Schedule 1, paragraph 1.1, as amended by *The Family Proceedings Fees (Amendment) Order 2010* SI 2010 No.1916.

²⁴ Hershman & McFarlane: *Children Law and Practice* at G[75], and see also *The Family Court Practice* 2011, notes to s.34 under “procedure on application for s34 order” at page 992. (Note that this problem is confined to orders made in the County Court. It does not arise in the High Court (which can direct the tipstaff to take charge of a child even though no previous order has been disobeyed) nor in the Family Proceedings Court (s.34(3) of the FLA 1986)). A litigant in person is most unlikely to be aware of this issue.

²⁵ Hershman & McFarlane : *Children Law and Practice* at G[74]

so²⁶. Without the services of an experienced process server and legal advice, it is unlikely that most litigants in person would be able to achieve this.

SECTION B.3 FAMILY PROCEEDINGS COURT

(1) ***Tracing the child*** - Order under section 33 of the Family Law Act 1986 by which the court directs any person whom it has reason to believe may have relevant information to disclose it to the court.

Problem areas if no legal aid is available:

- Fee payable on issue : £200²⁷;
- Potential difficulties if the applicant's first language is not English – potential costs of interpreters;
- Fees payable to enquiry agent personally to serve the person(s) so ordered to provide information to the court²⁸;
- In the event that the person disobeys the order (a common enough occurrence) the enforcement provisions that exist²⁹, whilst involving no fee, are of limited use in these circumstances.

(2) ***Returning the child*** - Order under section 34 of the Family Law Act 1986 : available in circumstances where a person is required by a “Part I order” (as defined in that statute) or an order for enforcement of a Part I order, to give up a child to another person, and the court which made the order imposing that requirement is satisfied that the child has not been given up in accordance with that order.

Problem areas if no legal aid is available:

²⁶ *R v Chief Constable of Cheshire ex parte K* [1990] 1FLR 70. A 2010 publication by the National Police Improvement Agency *Parental Child Abduction :Specific Professional Practice* deals briefly, at section, with Civil Court Orders, but almost all this section is taken up with the police role in assisting the Tipstaff. It states, of a prohibited steps order : “However, police are not under an absolute duty to intervene to recover a child (under a section 8 order) unless there is a risk to the health and safety (significant harm) of the child; a breach of the peace, or a situation of violence occurs. The Court has its own powers to enforce its orders.”

²⁷ *Magistrates Courts Fees Order 2008* [2008 No.1052] as amended by the *Magistrates Courts Fees (Amendment No.2) Order 2010* [2010 No.1917]

²⁸ FPR 2010, r12.16(4) and (5) : (service required within 48 hours)

²⁹ Magistrates Courts Act 1980 s.63(3)

- Fee payable on issue : £200³⁰;
- Potential difficulties if the applicant's first language is not English – potential costs of interpreters;
- Not available unless the applicant already has a Part I order (e.g. a residence order, or a special guardianship order) in their favour – if there is no such order, the applicant must use an alternative remedy e.g. wardship;
- Evidential difficulties in satisfying the requirements if what is alleged is a failure to return after a period of contact – “the terms of the requirement must be clear and there must be admissible evidence before the court to satisfy it of the situation³¹. This is likely to be problematic for a litigant in person;
- The tipstaff's office is not available in respect of such orders, nor are there any “officers of the court” who are trained to act upon them. Having obtained the order the litigant in person will have to liaise with the police to request them to take charge of the child and deliver the child to her or him. The order only *authorises* the police to act, and it cannot *require* them to do so³². Without the services of an experienced process server and legal advice, it is unlikely that most litigants in person would be able to achieve this.

PART C : SECURING THE RETURN OF AN ABDUCTED CHILD WHERE THE CHILD IS CURRENTLY LOCATED WITHIN THE UK (BUT NOT ENGLAND & WALES)

1. If there is no Part I order in favour of the applicant, the applicant first needs to obtain such an order, or an order from the High Court, under its inherent jurisdiction³³ for care and control of the child.

2. If the applicant only knows the general whereabouts of the child, s/he will need to pinpoint the child's whereabouts by using one of the methods of finding this out set out in section B above, with all the practical difficulties there set out.

3. Now, assuming the applicant has a Part I order, and knows where the child is (i.e. an address in Scotland, Northern Ireland or the Isle of Man) s/he must apply to the court which

³⁰ *Magistrates Courts Fees Order 2008* [2008 No.1052] as amended by the *Magistrates Courts Fees (Amendment No.2) Order 2010* [2010 No.1917]

³¹ Hershman & McFarlane : *Children Law and Practice* at G[74]

³² See Footnote (26) above.

³³ see Hershman & McFarlane *op cit*, section G[132].

originally made the Part I order for the order to be registered in that part of the UK³⁴. Depending on which court made the order, the applicant must follow the prescribed rules for applying for registration³⁵ and pay the prescribed fee.

4. Following registration, the applicant can now begin enforcement proceedings in the other part of the UK where the child now is.

5. Alternatively, “the applicant may seek to recover the child by instituting proceedings in the courts of the other jurisdiction.”³⁶

Problem areas if no legal aid is available:

- In respect of tracing the whereabouts of the child (if this is necessary) the applicant may think that, because the child is, say in Scotland, there is nothing the courts here can do to help locate the child, and valuable time may be lost. If the applicant does realise, for example, that the court can interrogate business associates, lawyers, accountants, relatives left behind etc, then the applicant will nevertheless face all the same difficulties as set out in the commentary to Part B above;
- It is necessary to have, or obtain a Part I order in order to register it;
- The registration procedure is not straightforward;
- The registering of the order is only the first step. Now the applicant must enforce the order. If the child is in Scotland, enforcement proceedings must be taken in Scotland. If the child is in Northern Ireland, enforcement proceedings must be taken there. Such courts do, of course, have powers to make orders themselves under s33 and s34 of the Family Law Act 1986 as part of enforcement proceedings, but the applicant will have all the difficulties discussed in the commentary to Part B above, together with the great practical difficulties and expense involved in taking proceedings at such a distance from home;
- If the child has been taken to Scotland, there are other potential difficulties. Scotland is a distinct legal jurisdiction, and not all orders are common to both jurisdictions. For example, Scotland has no “Special Guardianship Order”, so the enforcement of such an order is problematic. Also, in attempting to progress an application in the Court of Session, a litigant in person from this country

³⁴ S27 of the Family Law Act 1986, and see Hershman & McFarlane *op cit*, section G[119].

³⁵ In the High Court and County Court this will be FPR 2010 r32.25 and see Hershman & McFarlane *op cit*, section G[120]. In the Family Proceedings Court it will be the Magistrates Court (Family Law Act) Rules 1988, and see Hershman & McFarlane *op cit*, section G[121].

³⁶ Hershman & McFarlane *op cit*, section G[137].

can expect to have difficulty understanding the paperwork involved. “Scots pleading style is technical and elaborate and not readily understood by non-lawyers.”³⁷ Finally, the Court of Session’s powers to make *ex parte* orders are limited by Scottish caselaw³⁸, which would cause great confusion to a litigant in person who had managed to negotiate the High Court’s handling of investigative orders.

D. CASE STUDIES

(1) Child remains within England and Wales

Background

It is the beginning of September. Sharon has two children aged 6 and 5, and lives in Dartford. The children attend a local school, where they are about to start Year 2 and Year 1. Sharon works part-time at the checkout of her local supermarket. Her marriage to Jack broke down while she was pregnant with her younger child and, because of her fear of her husband, she went to a Women’s Refuge to begin with. She did consult solicitors some months later, who helped her obtain a divorce, and in the course of those proceedings contact arrangements were put in place, with Sharon’s mother acting as intermediary for dropping off and collection. There was no issue at that time as to the children living other than with their mother, and it was not thought necessary to make any order. These arrangements worked fairly well, with just the usual relatively minor niggles for some four years. This year, however, Jack formed a new relationship, and about six months ago he returned with his new partner to the West Country, where both of them have relatives in the Bristol area. They are understood to be living with Jack’s mother, Marie. As things had gone without incident for some time, Sharon agreed to let the children spend parts of the school holidays in the West Country. Sharon’s mother has been shown pictures of Marie’s accommodation on Jack’s mobile phone, and this all looked fine to her. Collection and return arrangements remain the same, and both Sharon and her mother had Jack’s mobile number, though not his address and a landline number for Jack’s mother, Marie. The children were due back at 6.00pm on Sunday, from their second visit to Bristol, just before the start of the new school year. They have not returned at 6.30pm and there have been no phone calls. Sharon and her mother ring Jack’s mobile telephone, but there is no response. By 7.00pm they are starting to worry – there is no report of any trouble on the M4. They ring Marie’s landline. They have a very strained conversation with her, in the course of which Marie tells them that Jack and his partner are not living with her, and never have, but that

³⁷ Comment from a dually qualified lawyer, February 2012.

³⁸ *Woodcock v Woodcock* 1990 S.C. 267

she believes that the children have been registered at a local school and are not coming back.

Sharon rings her old solicitors first thing in the morning. They no longer do legal aid family law work but give Sharon the number of the Ministry of Justice's national telephone helpline. The telephone adviser confirms details of her means with Sharon, and tells her that she is entitled to free advice and legal help, provided that her problem is within the scope of legal aid for family problems. He is doubtful whether it is, when Sharon explains that there has been no recent domestic violence and that contact has gone well for several years. He refers her to a specialist telephone adviser, Jim, who rings Sharon back a few minutes later. Jim explains that, unfortunately, she will not meet the criteria for free advice and assistance, or public funding to take court proceedings, but offers to give her the names of local firms who can deal with her problem if she pays for the service. She rings their numbers, but they all say that these sorts of problem are expensive to resolve, and could easily cost between £3,000 and £20,000, depending on how many hearings were necessary, whether High Court orders and searching orders were required, and whether there would have to be hearing to determine the facts. They would need a substantial payment up front before they could start. Neither Sharon nor her mother have savings, and no way of accessing such sums. She will need to go to court herself.

Analysis of how the problem would be resolved by a lawyer, assuming the matter was being dealt with now, under present legal aid arrangements.

(1) **Monday** : As Sharon did not obtain a residence order at the time of her divorce, Jack (although he has clearly acted in a highly devious manner) is not in breach of any order. The way in which he has behaved makes it probable that a judge would make a summary order for the children's return provided that a proper history of the background, the children's upbringing by their mother over the past 5 years, and the telephone conversation with Marie can be put together.

(2) The solicitor interviews Sharon and her mother and puts statements together for each of them. Meanwhile he asks an enquiry agent to check the two numbers out, but the enquiry agent reports that the mobile number is no longer in service, and that although he was able to speak to Marie she was quite brusque and refused to give him any information either as to where she lived or where the children were, or how Jack might be contacted. He reports that there is no lawful way for him to pursue the matter further. By late afternoon, it is clear that this problem cannot be resolved simply. Depending on the time, and the availability of a judge it might be possible to go to court that afternoon, but it could now be the following morning.

(3) **Tuesday:** With the solicitor's assistance, proceedings are issued in the High Court that morning, and an order is obtained from the duty judge directed to the telephone service providers for both Jack's mobile number and Marie's landline number. They are to advise the solicitors forthwith of the addresses they hold. The solicitor has to give an undertaking to the court, routine in such circumstances, to pay their charges for this service. The order prohibits the service providers from telling their customers of the existence of the order, so that they will not be aware of what is happening. The judge puts the matter back for a day for this step to be achieved. Sharon's attendance is excused, provided she can be in touch with her solicitor by telephone.

(4) **Wednesday – 2.00pm.** There is a further court hearing. The solicitor has the address of the grandmother in Bristol. There are two addresses for Jack, an old one in Bristol and a new one, as from a fortnight ago, which is the grandmother's address. The High Court makes a collection order, and also, to cover the possibility that Jack is simply covering his tracks by giving his mother's address, an order requiring Marie to attend the Royal Courts of Justice on Friday morning to answer questions as to the whereabouts of the children. The tipstaff, with the assistance of the local police, establishes that the children are not at Marie's address. She is directed accordingly to attend court.

(5) **Friday – 1030.** Marie attends court. She maintains, even when closely questioned by Sharon's barrister, that she has no idea where her son is. He did take some pictures of her house, but that was after she'd had it redecorated in the spring. He hasn't been around since the start of the summer holidays when he called round with her grandchildren and they went out for the day to Weston. The only address she has for him is the address the court already have from the mobile telephone provider. The last time she heard from him was on Sunday morning, when he rang to say that the children wanted to be with him, that he wasn't returning them that evening to Sharon, and that they were fine and she wasn't to worry. Jack had asked her to tell Sharon if she rang, and Marie hadn't been very happy about being used in this way. Sharon's barrister then hands Marie a copy of the order she is going to ask the judge to make if they can't make any progress. It is another order to the telephone service providers, requiring them to provide details of all telephones in the names of Marie and her son, with a list of all numbers called during the past two weeks. If Marie is lying to the court, this will be apparent. The judge tells Marie that he is going to put the case back for half an hour while Marie thinks things over. He asks Marie to hand over her own mobile telephone, and give the telephone number to Sharon's advocate who is to test the number by ringing it. Marie is to wait immediately outside the Judges' courtroom, in the company of the court usher. The judge warns her that if the court finds, following disclosure of the telephone account details, that she has lied he can see no reason for not sending her to prison for contempt of court for a substantial period of time. Faced with this mounting pressure, Marie hands over details of her son's address, new telephone number and the

school where the children have been placed. Sharon goes straight to Bristol where she is taken by police to the school and the children returned to her. The court makes a prohibited steps order, prohibiting Jack from removing the children from Sharon's care and control, and a residence order in Sharon's favour until a fortnight later, when Jack can come to court and give an account of himself.

How would Sharon fare, given that legal aid is not available now to her, and she must do this by herself?

She would probably look at her divorce papers, see that they were dealt with by the Dartford County Court, and go down on the Monday afternoon to the court office.

The first hurdle she would have to overcome would be to persuade the court staff that this was an emergency, since the counter would probably not be open in the afternoon³⁹. Next, she would be confronted with the need to pay a fee first of £230⁴⁰, unless she had the paperwork with her to show that she was exempt⁴¹. Probably it would be Tuesday morning before she could overcome this hurdle.

Counter court staff cannot advise on the law, but assuming they could give her some limited help, or she could have got some advice overnight, she might arrive at the conclusion that she needed an order under s33 of the Family Law Act 1986, and the counter staff will give her a Form C4 to fill in. She will not be able to provide any address for Marie. Hopefully there will be a judge on duty who can see her, and who will tease out the facts. It will become apparent that she needs an investigative order, and hopefully, the judge will transfer her case to the High Court for this purpose. Sharon's account is unlikely to be backed up by appropriate evidence, i.e. from the children's school as to their enrolment, and her mother as to her involvement. The judge may put the case back for her to produce this first. So it might be Wednesday, or Thursday before she can see a judge with High Court jurisdiction. There is an immediate problem at this stage. How are the telephone service provider's charges to be met? Sharon cannot afford to pay these. Technically, in the present state of the law, there is one potential way around this difficulty. This would be for the judge to make the

³⁹ HMCTS are currently consulting on a proposal to limit counter opening hours to two hours a day, typically 1100 am to 1.00pm.

⁴⁰ See *The Family Proceedings Fees Order 2008* SI 2008 No.1054, Schedule 1, paragraph 1.1, as amended by *The Family Proceedings Fees (Amendment) Order 2010* SI 2010 No.1916.

⁴¹ The relevant HMCTS guide (*Court fees – Do I have to pay them?*) [EX160A to accompany the remission application form EX 160] runs to 15 pages. Unless the correct proofs are produced, a fee will be payable before any application is issued.

children parties to the proceedings. This enables the judge to appoint an officer of CAFCASS as their children's Guardian. It is by no means certain the judge would be willing to do this, however⁴². As and when CAFCASS was in a position to nominate an officer to be so appointed, the Guardian would then appoint a solicitor to act for the children⁴³. Alternatively the judge could appoint a solicitor to act as the Children's Guardian. Assuming there is a solicitor willing and able to accept this appointment⁴⁴, it might appear to the court that progress can now be made along the lines discussed in the section above, but further time would be lost in reaching this point. Nor would the practical difficulties be over. There would still be difficulties in funding expenses incurred in the case, due to policy decisions by those who administer the legal aid scheme⁴⁵. In any event, legal aid will have had to be granted, and Sharon will have been left confused and bewildered by the legal minefield she has had to walk into. And this is just the first step.

(2) Child is taken to Scotland

Background

Lisa lives in Coventry, with her three children, aged 10, 8 and 2, and works part-time as an occupational therapist. The older children are the children of her marriage to Dave, who sadly died of leukaemia 7 years ago. The youngest child, Stacey, is the child of a

⁴² Section 1 of the Part 4 of Practice Direction 16 to the FPR 2010 sets out the sort of difficult case where a child might be made a party to proceedings. Making Sharon's children parties in these circumstances does not sit easily with the Practice Direction - it would clearly be being used simply as a device to get around the practical problem thrown up by the unavailability of legal aid.

⁴³ FPR 2010 Practice Direction 16A provides that an officer of CAFCASS who is appointed as a children's guardian under rule 16.4 has the additional duties set out in Part 3 of the Practice Direction which duties include, at paragraph 6.2(a), the duty to appoint a solicitor for the child.

⁴⁴ For a number of reasons it is considered undesirable for a solicitor to accept such an appointment.

⁴⁵ If Sharon was in receipt of legal aid, there would be no difficulty in her solicitor giving an undertaking to pay the telephone service providers. This is a usual expense in such circumstances, and Sharon is the only party who can be asked (at this stage of the proceedings, certainly) to pay for it. However, there are now three parties before the court, Sharon and the two children. The legal aid authorities expect expenses to be shared between parties equally, whether they are getting legal aid or not. So the solicitor for the children would have to explain to the court that they must first get permission from the legal aid authorities for the whole expense to be paid under the children's public funding certificates. This can take several days to come through. If permission is refused, it can take some time for an appeal to be heard.

relationship she subsequently formed with Hamish, a store manager working with a national chain of shoe shops. Lisa and Hamish never lived together, and they stopped going out when Lisa, pregnant at the time, discovered that Hamish was having an affair with a colleague Angie. She did not want to shut Hamish out of his daughter's life, though, and pretty much since birth Stacey has seen her father every Saturday. Lisa has recently been quite upset by the fact that Hamish and Angie have recently married, and the news that Angie is pregnant. On Friday afternoon she goes to nursery as usual after work to collect Stacey, to find that Stacey was collected an hour previously by her father, who explained to nursery staff that Lisa was unwell. Lisa goes straight round to Hamish's house, but it is obviously empty – she can see that the furniture has gone. She has Hamish's mobile, but it is switched off. She rings the shop where Hamish works, but is told he has been moved elsewhere, and sorry, they can't say where that is because that would be a breach of his privacy. She rings Head Office (she is quite agitated by now) but they are equally unhelpful. She would like to think that Stacey is still in Coventry, or somewhere else in the Midlands, but at the back of her mind is a worry that, as Hamish is originally from Dundee, and Angie moved to Coventry from Glasgow a few years back, Stacey might have been taken to Scotland. Lisa has to get home to look after the two older children, but is completely distraught and at a loss where to begin. Later she rings the police, but when she explains that there is no court order in force, and Hamish has been seeing his daughter regularly since birth, they explain that it is a civil matter and she needs to get an order from the family court. Like Sharon, in example 1, she rings the solicitors she previously consulted, and goes through the same procedure with the Ministry of Justice's national helpline, with the same fruitless results.

Analysis of how the problem would be resolved by a lawyer, assuming the matter was being dealt with now, under present legal aid arrangements.

(1) The first problem is to find where Stacey has been taken by her father. Lisa's solicitor obtains an order from the High Court judge on Monday, directed to Hamish's employers, to provide the court with information as to where he has been re-employed, and prohibiting them from disclosing the court order to Hamish.

(2) By Wednesday the court has been provided by the personnel department with Hamish's current mobile telephone number, and the address where he is now employed. It is indeed in one of the Glasgow stores. However, they do not have a home address for him, or landline number. The investigation of where the child lives now becomes a more complicated issue. The High Court has no jurisdiction to make orders against persons in

Scotland⁴⁶. An order could usefully be made directed to the mobile telephone service provider, however, (assuming that it is registered in England), since they will probably have Hamish's address in Scotland, and this is very important information. This order is made, and the application put back to Friday.

(3) On Friday, the court has an address in Glasgow, which is probably where Hamish, Angie and Stacey now are. The English court can now do no more by way of investigation, and the matter must be passed over to the Scottish courts. The final step in England is to make orders which will enable Lisa to pursue matters in Scotland. The court is satisfied from the evidence that Lisa's solicitors have filed that Stacey has been in her care since birth, and that Hamish removed Stacey from nursery by means of deception. The court makes a residence order in Lisa's favour, and at the same time makes an order⁴⁷ sending it on to the Court of Session in Edinburgh for registration.

(4) Lisa's solicitors now liaise with specialist family solicitors in Edinburgh. They will check that she satisfied the Scottish Legal Aid Board's financial eligibility criteria, and organise the signature of the necessary forms. Although procedures are different (see below), Lisa will have solicitors to guide her through the second phase in having Stacey returned to her care - enforcement by the Scottish courts.

How would Lisa fare, given that legal aid is not available now to her, and she must do this by herself?

She will face all the difficulties, delays and confusion that Sharon faced in the first case study, together with the additional difficulties that, once an order for registration has been made, she must begin all over again with an application in Edinburgh to the Court of Session.

After experiencing the approach of the High Court to investigate orders, she will be baffled to discover that the approach of the Court of Session is rather different. She may eventually persuade the court to make a port alert (which will prevent Hamish from going anywhere other than back to England) and an injunction⁴⁸ prohibiting further removal from the Scottish jurisdiction, but these will be the only orders that the court will make *ex parte*. Any step such as a recovery order⁴⁹ will have to be made on a minimum of 48 hours notice to Hamish, and

⁴⁶ *O v Orkney Island Council* [2009] EWCH 3173 (Fam)

⁴⁷ Under Family Law Act 1986, s27

⁴⁸ Called an *interdict* in Scotland

⁴⁹ Under section 34 of the Family Law Act 1986, see paragraph B.1(6) above.

at the enforcement hearing Lisa will need to produce all the evidence to satisfy the court as to the background and circumstances of the abduction she alleges, and will (despite the intentions as to reciprocal enforcement of orders) also consider the child's welfare⁵⁰. Hamish will have notice of the steps that are being taken, and may choose to be obstructive. However, there is one light at the end of the tunnel for Lisa - she will not have to do this alone, if and when she discovers that, unlike in England, legal aid is still available to her in Scotland for this sort of emergency. Her problem will be getting in touch with a solicitor who practises in this specialist field, and can accordingly assist promptly and effectively.

E. HOW THE ISSUE HAS BEEN DEALT WITH TO DATE, IN COMMITTEE STAGES OF THE TWO HOUSES OF PARLIAMENT

- (1) The exchanges on this issue have been relatively brief, and superficial in terms of analysis of the difficulties involved.
- (2) The issue was considered by the House of Commons Bill Committee, at its 8th sitting on 6th September 2011. Yvonne Fovargue MP raised the issue in moving amendment 217 (last line of column 340 of Hansard) where she states (at columns 342/343):

“The amendment addresses an important omission. Under the terms of the Bill, only cases of international abduction will be covered by legal aid. Domestic abduction—abduction within the UK—will not be so covered. Domestic child abduction is considerably more prevalent than international abduction and the child welfare issues are exactly the same. The child is usually taken by a non-resident parent who has been denied all contact with the child. They have been taken by somebody whom they may not know that well to somewhere they may not know that well, whether it is inside or outside the UK. Expecting a bereft parent, regardless of whether or not the child remains in the UK, to navigate the court system without advice and representation is not just untenable but cruel. I do not wish to go through the law in detail because there are people here who know the law much better than I do. Nonetheless, it is a complex area of law that involves both civil and criminal law. It is different if it happens in the UK or abroad or if it happens in Northern Ireland. Imagine a parent who has had their child taken from them and who may believe that they are still in the UK. How a parent who is in the middle of such a traumatic experience can be expected to cope without advice, support and representation beggars belief. To distinguish between children abducted abroad and children abducted in the UK is perverse in the extreme. No one should be placed in that position without access to support, advice and representation, and I urge the Minister to accept the amendment.”

In responding, the Minister stated (column 348):

“We do not consider purely domestic cases to raise the same difficulties as international abduction cases, because a resident parent would not be dealing with a foreign jurisdiction. Seek and locate orders, which are commonly employed in cases of children being removed within the jurisdiction without the other parent's consent, are relatively straightforward to obtain. Many domestic agencies, including the police, can be engaged

⁵⁰ *Woodcock v Woodcock* 1990 S.C. 267

in trying to retrieve a child without the need for proceedings in court. If domestic violence or child abuse, and so an additional risk factor, is involved, legal aid would be available.”

The Minister’s reference to engagement of the police prompted the following exchange:

Helen Goodman (Bishop Auckland) (Lab): I am puzzled by what the Minister has said. I have only ever dealt with one such case, but in that instance I found that the police were unwilling to act until there was a court order. Is the Minister saying that that should not generally be the case? If so, how will he ensure that it is implemented fully and properly across the land?

Mr Djanogly: I cannot talk about specific circumstances, but the domestic position is clearly different from the international one.

Column number: 349

Jessica Lee (Erewash) (Con): If a child goes missing in this country, the police, who have far-reaching powers, can go and find them, but does the Minister agree that the concern is that if a child is moved outside of that jurisdiction, there are the added complexities of other jurisdictions, international organisations, and so on, being involved? That is when legal expertise is required to seek and find that child.

Mr Djanogly: I thank my hon. Friend for making the position clearer.

(3) In the House of Lords, the issue was considered in Committee on 16th January 2012 (3rd day) when dealing with amendment 41, moved by Baroness Butler-Sloss. She stated (at column 432/433 of Hansard):

“I will move on to Amendments 39, 40 and 41, to speak about child abduction both internationally and in England-or in the United Kingdom. I am sure that the Minister will know that children who are abducted from one part of the United Kingdom to another country outside the United Kingdom will almost always come under the international Hague convention, because some 90 countries support it. However, internal child abduction also arises on a regular basis and is an equally important risk in parental disputes. To my dismay, there appears to be no provision to support the children and the parent who has lost the child through child abduction. Ninety-one per cent of the members of Resolution, the family law solicitors, say that abduction is a real risk in the cases which they and their clients are dealing with.

I shall cite a case which was referred to earlier this evening by the noble Baroness, Lady O’Loan-she dealt with Belfast and Barnstaple, while I have Cornwall and Cumbria, but it is all exactly the same story. If a child is taken from Basildon to Belfast-which is in fact under a different legal system, but within the United Kingdom-or indeed from Cornwall to Cumbria, where it is the same legal system, there is a very real danger that that child may never see the left-behind parent again, and the left-behind parent will not have the chance to look after and take an interest in that child.

It is absolutely crucial that the left-behind parent gets to the court quickly, to get the relevant orders to know where the child and the parent-usually the mother-are living, and to get orders for the child to be returned to its home. It is necessary to make immediate and urgent applications to a judge. However, there is no provision for this, although there is provision, as there has to be, under the Hague convention. Amendment 41 deals with the various orders that are required to be made for the left-behind parent to get to the court. I hope that this is inadvertent on the part of the Government. I hope that they have simply overlooked this particular specialist form of family law, where the child is seriously

at risk in most cases if she or he does not have a chance to retain a relationship with the father.”

Lord McNally responded (at column 449-450):

Amendments 39 and 40 concern legal aid for the measures to prevent the unlawful removal of a child within the United Kingdom and Amendment 41 to prevent removal from the child's normal place of residence within the United Kingdom, and to take steps to remedy such removal.

We initially proposed that legal aid would remain to secure the return of a child who had been abducted overseas. We listened to consultation responses and extended this to cover prevention of abduction in such cases. This made sense on the basis of the complexity and cost and the consequential practical disadvantages involved in dealing with a foreign jurisdiction. We do not, however, consider that domestic cases raise the

same difficulties as international abduction cases because the resident parent would not be dealing with a complex foreign jurisdiction.

The seek and locate orders, which are commonly employed in cases of removal of children within the jurisdiction without the other parent's consent, are relatively straightforward to obtain and, of course, many domestic agencies, including the police, can be engaged in trying to retrieve the child without the need for proceedings in court. Furthermore, if domestic violence or child abuse is involved and becomes an additional risk factor, legal aid would then be available.

Baroness Scotland of Asthal: I understand that the Minister is trying to give a full response, but in his valiant reply he said that the international child abduction cases were difficult and complex and that domestic abduction cases were not. Will he think again on that issue, not least because the complexity of the issues relating to abduction are similar in both domestic and international cases? Quite often the parents are greatly distressed, very confused and in need of the quick, experienced lawyer who is able to navigate the system. Many lawyers find abduction cases difficult and international cases are not very dissimilar. Will the Minister take back to the department that the belief that domestic cases may be easier than international cases is not quite as it may think it is.

Lord McNally: That is always the problem. If you say that one thing is more difficult it is implied that the others are easier. No, I was not implying that. I take the noble and learned Baroness's point. One of the more difficult areas is where there is a break-up of a family and a loss of contact. I shall read what has been said and take it back.

Baroness Butler-Sloss: Perhaps I may add to what the noble and learned Baroness, Lady Scotland, has said. I have listened with interest to what the Minister is saying to us, but he suggested that the police would intervene even without going to court. Will he check as to whether the police are prepared to act in the absence of a court order? My experience, which is now six years out of date, was that the police were not prepared to act unless there was a court order. It would be very helpful if the Minister could find out about that very practical and basic point because it adds a great deal of force to what the noble and learned Baroness, Lady Scotland, has said.

Lord McNally: I promise the noble and learned Baroness that I shall go into the Lord Chancellor's room tomorrow and say, "Baroness Butler-Sloss has asked me to ask you to clarify what you told me". It is a very serious point. My briefing states that the police would help. She has made a relevant point about whether they would do so without a court order. I have never pretended that my knowledge on these matters was only six years out of date. In fact, my expertise is right up to date because I am learning all the time. I take on board what both noble and learned Baronesses have said, and I will try to explain to the Lord Chancellor that when I stand at the Dispatch Box I am facing a considerable amendment of experience and expertise which, dare I say it, he does not always face in

the other place.

Amendment 41 is also open to the argument that it would extend to applications to prevent the child being moved by the parent with whom he or she resides and so put back into the scope of legal aid a very common type of family dispute. It is hard to estimate what effect this would have on our savings, but it would inevitably run into many millions of pounds.

(4) Lord McNally duly wrote to Baroness Butler-Sloss on 29th January 2012 enclosing a copy of the National Police Improvement Agency's 2010 publication *Parental Child Abduction: specific professional practice*. See footnote (26) above as to the limitations on the ability of an applicant to rely on police assistance.

F. SUGGESTED ADDITIONS TO LORDS AMENDMENTS 39-41 :

(1) Hopefully the government will accept what is an overwhelming case, in our view, for the retention of legal aid for abduction within the United Kingdom.

(2) The government will be concerned that the scope of legal aid remains limited to dealing with the emergency situation only, and not any subsequent stages in the proceedings e.g. variation of residence order made as part of the emergency stage, and contact orders. We think this can be controlled perfectly well by the current system of limitations as to the work which can be done under a public funding certificate.

(3) There is no mention at present of registration of orders under s27 of the Family Law Act 1986 currently provided for, and this should be added. No mention is made in amendment 41 of use of the inherent jurisdiction of the High Court, but this is retained in the Bill at paragraph 7(1) of Schedule 1 : "Civil legal services provided in relation to the inherent jurisdiction of the High Court in relation to children ...".

(4) Accordingly we suggest that amendments 39 and 41 should stand as they are presently drafted, together with the addition proposed at paragraph (3) above, i.e. (by reference to the Bill as ordered to be printed on 15th February 2012):

"Schedule 1

Page 129, line 13, after "from" insert "or within"

Page 129, line 22, at end insert –

"() Civil legal services provided to an individual in relation to the following orders and requirements where the individual is seeking to prevent the removal of a child from that child's usual place of residence, or to obtain the return of a child who has been so removed

–

- (a) a prohibited steps order or specific issue order (as defined in section 8(1) of the Children Act 1989);
- (b) an order under section 33 of the Family Law Act 1986 (“the 1986 Act”) for disclosure of the child’s whereabouts;
- (c) an order under section 34 of that Act for the recovery of the child;
- (d) a requirement under section 37 of that Act to surrender a passport issued to, or containing particulars of, the child.
- (e) registration under section 27 of the 1986 Act of a Part I order (as defined in that Act)”.

Purpose

To make legal aid available to obtain an emergency order to prevent the removal of a child from their usual place of residence, or to take steps to ensure the return of the child further to such a removal, in order to deal with the domestic abduction/unlawful removal of children within the United Kingdom as well as abductions/removals from the jurisdiction.

This amendment would limit the provision of legal aid to doing what is necessary to deal with the emergency situation. For example, legal aid would not be available in relation to any subsequent residence or contact application under the Children Act 1989.