

Children Act Private Law Proceedings: A Handbook

Third Edition

John Mitchell

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FOREWORD

The Handbook is intended to serve two purposes. The first is to introduce the law and practice of the Private Law relating to children to practitioners who have little experience of the subject.

The second purpose is to provide experienced practitioners with easy access not only to summaries of the law in specific areas but also to policy reports, research and articles not always found in standard practice books.

Since the second edition of this valuable Handbook, the role of the court in relation to private disagreements relating to children has continued to be closely scrutinised. The recommendations of the Family Justice Review, which reported in November 2011, are designed to create a process which enables people, wherever possible and safe to do so to resolve these cases without court involvement. John Mitchell looks closely at the recommendations and considers them in the context of recent developments, including the revised Private Law Programme and the guidance issued by myself in relation to split hearings. In his discussion of the key issues, including that of violence within the family, he calls upon his own deep knowledge and experience as a highly respected family judge and upon the wide range of literature and research which has been commissioned in this vitally important area of the law.

The Handbook is primarily intended for legal and social work practitioners, although I am aware that previous editions have also been welcomed by and useful to litigants in person. By placing his discussion of the Children Act 1989 in the context both of policy and socio-legal research, in order to produce an holistic model of law and practice, John Mitchell ensures that this highly practical publication will also be of interest to students and to the wider 'family' community, to whom I am very glad to commend it.

Nicholas Wall
President of the Family Division
March 2012

PREFACE

In the Preface to the second edition of the Handbook, I wrote in 2006 that ‘these are exciting and challenging times for private family law’. ‘New’ family arrangements were being made and the Private Law Programme and the new contact provisions inserted into the Children Act 1989 offered a hope of making better provision for disputed contact cases. And, so it proved. Courts have been challenged to apply the principles of the Act to novel problems in same-sex families. What part, for example, should donor fathers play in the life of the child and how can family life between his father and his father’s same-sex partner be secured? Courts have tackled the issues and will continue to do so. Intractable contact disputes are a perennial challenge but Parenting Information Programmes and First Hearing Dispute Resolution appointments have helped to divert some families from litigation. The Family Procedure Rules have created a unified Family Court in all but name, completing part of the project suggested by Sir Morris Finer and the Committee on One-Parent Families in 1974. Interestingly, the Committee saw that it was of fundamental importance that the advantages to be derived from the family court should be seen primarily in terms of ‘its capacity to help [families] make the best decisions and reach the best solutions over the whole range of problems which the fact of family breakdown produces in the circumstances of each ... case.’

The next years, however, appear more daunting than exciting. The proposals of the *Family Justice Review* may assist the resolution of some family problems but research cited in the Handbook consistently points to the many difficulties including the risk of domestic violence encountered in a significant proportion of cases which come to court and the long entrenched positions of parents in ‘high conflict’ cases. These are unlikely to be resolved by the use of parenting agreements or child arrangement orders. They require experienced judges supported by child guardians and access to expert advice. Even with specialist lawyers they make great demands on all resources. And yet, in the future, courts will be expected to deal with such cases when both parents are normally litigants in person, guardians will be in short supply and possibly unrepresented, with no means of paying for hair-strand testing, psychiatric advice or specialist contact centres. The problems resulting from self-representing litigants are, of course, not confined to family courts. The recent Civil Justice Council report, *Access to Justice for Litigants in Person* warns that in many cases, ‘members of the public with good claims will be left with no option but to abandon their rights and leave problems unresolved and potentially worsening, unless they are prepared to attempt to represent themselves’. The same may come to be true of family justice.

On a happier note, I am very grateful to Sir Nicholas Wall P for writing such a generous Foreword. The editorial team at Jordans – Greg Woodgate, Kate Hather and Gillian Wright and my wife have, as always, been encouraging and supportive even when their patience has been tested and I am pleased to be able to thank them once again.

The law is stated as at 7 March 2012.

John Mitchell

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| S (A Minor) (Custody), Re [1991] 2 FLR 383, [1991] FCR 155, [1991] Fam Law 302, (1989) 153 JPN 803, (1990) 154 JPN 546 | 2.32, 2.35, 2.45, 10.85 |
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| S (Ex Parte Orders), Re [2001] 1 WLR 211, [2001] 1 All ER 362, [2001] 1 FLR 308, [2001] Fam Law 21, FD | 9.72, 10.124–10.127, 10.129 |
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| S (Uncooperative Mother), Re [2004] EWCA Civ 597, [2004] 2 FLR 710, [2004] Fam Law 637 | 11.169 |
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| SH (Care Order: Orphan), Re [1995] 1 FLR 746, [1996] 1 FCR 1, (1995) 159 JPN 757 | 12.2, 12.6 |
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| T (Abuse: Standard of Proof), Re [2004] EWCA Civ 558, [2004] 2 FLR 838, [2004] Fam Law 709 | 18.50, 20.49 |
| T (Adopted Children: Contact), Re [1996] Fam 34, [1995] 3 WLR 793, [1995] 2 FLR 792, [1996] 1 All ER 215, CA | 15.49, 15.56 |
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| T v W (Contact: Reason for Refusing Leave) [1996] 2 FLR 473, [1997] 1 FCR 118, [1996] Fam Law 666, (1996) 160 JPN 1102 | 25.57 |
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| U (Re-opening of Appeal), Re [2005] EWCA Civ 52, [2005] 2 FLR 444 | 25.69 |
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| U v U [2002] HCA 36 | 9.29 |
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| W (Adoption: Homosexual Adopter), Re [1998] Fam 58, [1997] 3 WLR 768, [1997] 3 All ER 620, [1997] 2 FLR 406, [1997] Fam Law 597, (1997) 94(24) LSG 32, (1997) 141 SJLB 137 | 10.97 |
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| W (Children) (Family Proceedings: Evidence), Re [2010] EWCA Civ 57, [2010] 2 FLR 256, [2010] 1 FCR 365, [2010] Fam Law 447, (2010) 154(7) SJLB 37 | 4.27, 17.77 |
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| W (Children) (Leave to Remove), Re [2008] EWCA Civ 538, [2008] 2 FLR 1170, [2008] 2 FCR 420, [2008] Fam Law 1004, (2008) 152(22) SJLB 29 | 4.50, 4.51, 4.53, 9.54 |
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