

## **PRACITISE POINTS ON PATHFINDER**

*In the matter of Child A and B [2024] EWFC 284 (B)*

*The Court has recently given guidance on the operation of the Pathfinder Scheme in South East Wales.*

The case concerned two children, A and B. The children had been subject to Children Act proceedings previously and in May 2023, a “lives with Order” was made in favour of Mother and a “spend time with Order” in favour of Father, albeit that the time that the children were in each parent’s care was broadly similar and school holidays were shared equally.

The children were leaving primary school and were about to make the transition to secondary school in September 2024. Their Mother, who works in England, wished for them to attend a school closer to her place of work, so that she could also move home with the children to be within the geographical area of her employment. Father did not agree and wanted the children to attend the secondary school closer to his home in Wales. In May 2024, Mother made an application for a Specific Issue Order seeking permission for the children to attend the English school.

The matter was allocated to the Pathfinder Scheme at the Gatekeeping 1 stage and a Child Impact Report directed to be prepared by CAFCASS Cymru. This was prepared and recommended that the children attend the English school. This was in accordance with the wishes and feelings of child A. Child B preferred to attend the Welsh school. The Report was considered at the Gatekeeping 2 stage and the matter was allocated to the adjudication track and listed for a Decision Hearing. The parties were directed to file and serve witness statements in advance of that hearing. The Order also made clear that no other document should be filed without the Court's permission unless filed in accordance with the Rules or any Practice Direction. The Order also recorded that this was a case to be heard on submissions and the CAFCASS Officer would not be in attendance. The Order contained notice to the parties of an important right to apply, asking the Court to reconsider the Order within 7 days. No applications were made.

Prior to the Decision Hearing, Father's representatives wrote to the author of the Child Impact Report posing lengthy, detailed questions. The Court's permission was not sought and whilst Mother's representatives were sent a copy of the letter they were not invited to comment on its contents before it was sent. The response from CAFCASS was received two days prior to the Decision Hearing. It was sent only to Father's representatives and was not disclosed to Mother's representatives or the Court until the morning of the hearing.

The Decision Hearing took place on the basis of submissions. The Court departed from the recommendation of the Child Impact Report and ordered that the children attend the Welsh school.

From the reasons provided by the Court, it is clear that the Magistrates felt that there were deficiencies in the Child Impact Report. The reasons go on to identify several omissions from the Report including the absence of information about Child A's views about attending the school in Wales, the impact on Child B of not attending their school of choice and concerns about the relative weight given to Child A's views as opposed to Child B. Ultimately, the conclusion reached for departing from the Report's recommendation is stated to be as follows:

*"In the absence of the CAFCASS Officer in Court we have had to rely solely on the contents of the Report and an email presented to the Court this morning addressing a number of questions raised by Father. Also, during the hearing, a number of issues were raised which we feel would have benefitted from further information from CAFCASS, in particular about the considerations taken into account when assessing the impact of future arrangements on the children and their ability to maintain the current level of engagement with Father. For all of those reasons we have identified above we feel we cannot follow the recommendation of the Report and in conclusion we do not agree that an Order be made for the children to attend (the school in England) and they should attend (the school in Wales) with effect from September 2024."*

Mother appealed this decision.

The Appeal Court held that whilst it was entirely open to the Court to substitute its own analysis for that of the author of the Child Impact Report, and indeed to use evidence from the parents to fill what they considered to be evidential gaps, they did not do so. That exercise could have allowed them to set out their reasons for rejecting the recommendations, however, nowhere in the reasons is it possible to identify what the Lay Justice's own assessment of these issues were and how that fed into their welfare analysis. It is perhaps unsurprising in those circumstances that a good reason for the departure could not be identified.

Further, it was noted that the Court did not indicate to the parties during submissions that it was dissatisfied with the Report. The first indication of this was when the reasons were delivered. That meant that each party was deprived of the opportunity to consider whether oral evidence was necessary, whether the CAFCASS Officer should in fact be ordered to attend or whether a second Child Impact Report was required.

Finally, the Court held that the Lay Justices had failed to properly analyse the welfare checklist and, in particular, it was not clear what weight has been given to each child's expressed view in light of their age and understanding. Neither was it clear how they have balanced the views of one against the other and ultimately favoured child B's choice. There was no analysis of how wishes and feeling were placed into the overall analysis of the welfare checklist and the extent to which they were the deciding factor. The reasons do not contain any assessment of the impact on the children of the proposal of each of the parents nor any balancing of the strengths/weaknesses, nor any proper analysis of the effect of the changes in the children's circumstances.

The appeal was, therefore, allowed on all grounds submitted by the Mother.

The Court went on to give some practise guidance in respect of the Pathfinder Pilot in South East Wales, which can be summarised as follows:

1. The decision to allocate a case to the adjudication track is one taken at Gatekeeping 2, when it appears to the Court that the matter is capable of being settled by agreement and when the issues for determination are limited. It is a paper exercise undertaken when the Court has the Child Impact Report and any risk assessment in respect of domestic abuse that has been prepared. The parties have no input into the Gatekeeping 2 hearing. Their positions are protected by virtue of FPR 2010 4.3 which allows them to apply within seven days to vary any order or case management direction so made. Their right to do so is endorsed on the Gatekeeping 2 Order.
2. If the case is allocated to the adjudication track, then the directions made will usually prescribe whether the case is to be determined on submissions or following oral evidence. If evidence is to be called, then the Court may limit the extent of that evidence pursuant to FPR 2010 Part 22. It will also make clear whether or not the Cafcass Officer is required to attend the hearing.
3. Asking written questions of the CAFCASS Officer, particularly without consultation with the other party, is not an approach the Court can endorse. The Gatekeeping 2 Order makes clear that it is only the documents ordered by the Court than can be filed without further permission being granted. Such an approach takes no account of that Order and has the potential to undermine the process and the timetable. In the absence of a Court Order there is no obligation on the CAFCASS Officer to respond and if they chose to, there is no obligation to respond in advance of the Decision Hearing. There is also the potential for unfairness in circumstances where the other party is excluded from that process.
4. Any party seeking to ask questions of the author of the Child Impact Report should apply to vary the Gatekeeping 2 Order within the seven days allowed. The application should ask for an Order that the CAFCASS Officer attend with a clear indication as to why that is necessary and the basis of any challenge to the report. Alternatively, it should seek permission to put questions which must be set out in the application itself. This will allow the Court to consider whether the Report fails to address

important issues, which may mean a Child Impact Report 2 is necessary. Before any such application is made, the application should consider carefully whether it is a step consistent with the problem-solving approach and indeed whether it is absolutely necessary.

5. Judge-led conciliation is recorded as an essential component of the Decision Hearing. In the Gatekeeping 2 Order and is ordered to take place before submissions or evidence is heard in the anticipation that settlement is possible. If the Court does not of its own initiative take the opportunity to conciliate, then the parties should draw the Court's attention to the Order and invite them to undertake Judge-led conciliation.
6. It is of course entirely possible that when a case arrives at a Decision Hearing the Court and/or the parties come to the conclusion that Judge-led conciliation is no longer appropriate. However, that is a significant case management decision in a Pathfinder case and should be taken only after hearing submissions from the parties. It will not be enough to submit that the parties are not likely to agree. If the decision is taken, it should be clearly recorded on the face of the Order so that the case management decision can be understood.

Practitioners should, therefore, keep these principles in mind when dealing with all Pathfinder cases.

The full transcript of the Appeal Judgment can be found at:

[https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWFC/OJ/2024/284.html&query=\(pathfinder\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWFC/OJ/2024/284.html&query=(pathfinder))

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