

Post Traumatic Stress Disorder in English family proceedings

1 TRAUMA IN THE FAMILY COURT

- 1.1 There are numerous recent reports highlighting trauma and re-traumatisation in the family court – victims of abuse and children can be retraumatised by their involvement in family proceedings. The need is now acknowledged and there is impetus for a real culture change in the family court – for practitioners on every level.
- 1.2 There is also recent and acute discussion concerning PTSD and the concept of complex trauma has been given diagnostic legitimacy by the inclusion of Complex-PTSD (**C-PTSD**) by the WHO and it appears likely that C-PTSD will be viewed by the courts as a mental disorder for the purposes of the Mental Health Act 1983¹ – it is expected to feature more and more in proceedings.
- 1.3 The Domestic Abuse Act 2021 goes some way to addressing some of the key issues concerning trauma in the family court:
- 1.3.1 children are now considered victims in their own right if they see, hear or experience the effects of abuse (between two people who are personally connected);
- 1.3.2 where a party to family proceedings is or is at risk of being a victim of domestic abuse there is an assumption of vulnerability and the quality of their evidence is likely to be diminished;
- 1.3.3 special measures for parties to proceedings are now much wider than previous and there is a prohibition on cross examination of a victim by a perpetrator (there are also specific practice directions in the FPR relevant to this).
- 1.4 Some of the main criticisms of the family court by those involved in proceedings is that the whole process – from the way evidence and information is gathered to physical attendance at court, the adversarial nature of proceedings and the attitude of some judges – is traumatic.

¹ Complex post-traumatic stress disorder, a new diagnosis: implications for practitioners and the Family Court September [2021] Fam Law; Dr Ben Laskey and George Butler.

1.5 Many victims have also said there is a very ‘pro contact’ culture and this has repercussions for children who have suffered abuse – many of whom feel their voice is not heard in proceedings.

2 **SO HOW DOES THIS RELATE TO PTSD OR MENTAL HEALTH ISSUES WITH CHILDREN?**

2.1 There are reports in the English press of a ‘mental health crisis’ – referrals for support have surged and there were 395,369 referrals to NHS Child and Adolescent Mental Health Services between April and October 2021 – a rise of 52% from 2020. There was also an increase in emergency referrals to crisis care teams which handle the most serious cases – this increased by 28% in 2021.

2.2 Whilst there is limited case law in respect of PTSD in children in proceedings, the impact of proceedings on children’s mental health is clearly demonstrated in recent case law with significant involvement of mental health professionals.

2.3 There is also the issue that there is a real difficulty in finding mental health professionals to support children and provide reports in proceedings – there are also significant delays with Cafcass which is exacerbating the backlog of cases and length of proceedings in the family court.

2.4 We are seeing more and more cases with issues of mental health in both adults and indeed children and this is only likely to increase given the sharp rise in referrals above – one of the main criticisms from the Ministry of Justice Report on Assessing risk of harm to children and parents in private law children cases² is that all too often children’s voices go unheard and crucially *“Children can be left feeling let down or suspicious of authorities, and trust in the court system can be eroded due to a child’s negative experiences”*.

3 **LEGAL FRAMEWORK WHEN DEALING WITH CASES**

3.1 **Children Act 1989** – the child’s welfare is the paramount consideration in any application made.

3.2 There is a ‘welfare checklist’ of factors the court must have regard to when making any decision in respect of a child, as below:

3.2.1 the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

² [Assessing Risk of Harm to Children and Parents in Private Law Children Cases \(justice.gov.uk\)](https://www.justice.gov.uk/assessing-risk-harm-children-parents-private-law-children-cases)

- 3.2.2 his physical, emotional and educational needs;
 - 3.2.3 the likely effect on him of any change in his circumstances;
 - 3.2.4 his age, sex, background and any characteristics of his which the court considers relevant;
 - 3.2.5 any harm which he has suffered or is at risk of suffering;
 - 3.2.6 how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
 - 3.2.7 the range of powers available to the court under this Act in the proceedings in question.
- 3.3 Some factors may weigh more heavily than others depending on the case, but it is clear that the wishes and feelings of the children, needs and any risk of harm will be most relevant in cases when children’s mental health or trauma is in issue.
- 3.4 **FPR PD12J** – provides detailed guidelines on the actions a court is required to take following allegations of domestic abuse in a child arrangements case including guidance on fact finding hearings, how allegations are to be dealt with and procedure at each hearing – there has been recent case law that whilst this remains fit for purpose, there are inconsistencies in how it has been applied.
- 3.5 **PD3AA “Vulnerable Persons: Participation in proceedings and giving evidence”** this practice direction is also relevant for parties to proceedings where trauma and allegations of abuse are in issue. This sets out the procedure and practice to be followed to achieve a fair hearing by providing for appropriate measures to be put in place to ensure that the participation of parties and the quality of the evidence of the parties and other witnesses is not diminished by reason of their vulnerability.

4 **RECENT CASE LAW**

Re M (a child) (private law children proceedings: case management: intimate images [2022] EWHC 986

- 4.1 In this case, which involved serious allegations of rape and in which intimate photographs and videos were admitted into evidence, the mother was found by an expert to be suffering from C-PTSD.
- 4.2 In paragraph 21 of the judgment the court referenced the expert report and stated in relation to the mother’s complex PTSD:

“The mother’s reported symptoms of Complex-PTSD were likely to impact upon her ability to provide her best evidence. Traumatic stress can influence engagement with court processes in a diversity of ways, with the impact having a positive correlation with exposure to trauma related material and exposure to increased stress (each being typical within court hearings). Research indicates that for those individuals experiencing trauma related symptoms, attempting to relay their experiences can produce memories that are fragmented, lacking in specific details, and difficult to position within a linear narrative. Those who experience trauma are more likely to produce inconsistent or incomplete accounts, and accounts may shift as an individual comes to terms with their experiences. Trauma memories are more likely to be partial, and fragmented into key moments. The impact on memory that trauma survivors experience means they are at raised risk of being susceptible to suggestive influences and vulnerable to court proceedings, most significantly within a cross-examination where there is opportunity to use suggestive, misleading questions in an attempt to find inconsistencies and inaccuracies in a witness’s testimony to imply unreliable evidence.”

- 4.3 This judgment, as recent as 29 April 2022, highlights how the court are recognising the impact trauma has on parties to proceedings and indeed the report recommended that she did not come into direct contact with the father and he should not see her giving evidence – the mother had said that the past proceedings had put her into a ‘deep depression’ in respect of how the evidence and intimate images and videos was dealt with.

Re A (nos 1,2,3 and 4) 2020 – 2021 EWHC 3366

- 4.4 This was a complex, quite harrowing, series of cases in proceedings dealing with allegations of parental alienation and child ill mental health. A child psychiatrist and psychologist were involved and there was evidence of real harm and impact of the ongoing proceedings on the mental health of the children. Both children were found to suffer depressive disorders as a consequence of their parents’ conflict. Below are some citations from the first judgment to highlight the severity of the harm:

“The report of Dr Butler was agreed and she was not called to give evidence. In the course of her report, Dr Butler said:

“In particular, I was left concerned that Child B is presenting with evidence of a depressive disorder. Both children present as highly anxious in their function as a result of being exposed to the parental conflict for most of their lives.”³

³ Re A [2021] EWHC 3366 (Fam).

13: ***“Child A has a history of being overly involved in the parents’ separation from very early on. In my opinion, that has had a significant impact on her emotional development. I think she is now presenting with evidence of (1) disordered attachment development and (2) increased risk of mental health problems. Child A is intellectually an able child and is socially able. However, she is pseudo mature. By that I mean she presents as if an adult. She talks about general day-to-day things in an adult-like manner and she acts as if she is equal with the adults that she is dealing with in her life. The difficulty for her, I think, has been that this strategy has not led to her needs being met. Rather, it reassured adults, particularly her parents, that she is doing fine. Thus, they placed expectations on her of coping with situations which were beyond her emotional age and ability. She is only 13. She is just entering adolescence, one of the most crucial and vulnerable times in a child’s lifespan. She is carrying the responsibility of managing the parental conflict as she has done for a number of years. She also has a heightened sense of responsibility for her brother which, in my opinion, has now tipped into a need to control him in order to make sure that he also rejects his father. Child A has been allowed to take up this position within the family and is not being challenged by her mother. It has been recognised by her father but he has felt helpless to effect change for her as he has also remained locked in conflict with The Mother. It is going to be extremely important for Child A that her parents now recognise that the way they have finished their separation has caused her emotional harm.”***

“Child A is at risk of developing depression and anxiety as an adolescent and an adult. These experiences risk impacting on her capacity to form safe relationships. She is at high risk of developing abusive relationships as an adult and of struggling as a parent herself. Her parents need to effect significant change soon in order to mitigate against the emotional harm that has already been done to Child A and her capacity to manage in relationships.”

In relation to Child B, Dr Butler began with this analysis: “In terms of acute mental health, I was most concerned about Child B. Child B is a 10-year-old boy who, in my opinion, is presenting with (1) disordered attachment development and (2) depressive disorder. Like his sister, he is currently the centre of an extremely conflictual parental separation and subject to ongoing court proceedings.”

- 4.5 Residence was transferred to the father and also there was a period of ‘therapeutic intervention’ to ‘repair the emotional damage the children had suffered’.

- 4.6 Additionally, the extent of the harm to the children caused by their mother was so severe that the court held that the views expressed by the children do not reflect the true wishes and feelings of the children.
- 4.7 Positively, there was ongoing therapy for the children with the same experts and real progress was made once the children were settled with the father

5 VOICE OF THE CHILD⁴

- 5.1 One of the key issues highlighted in the Ministry of Justice report referred to above is that the evidence suggests that too often voices go unheard and particularly children who have experienced domestic abuse are not consulted on their views and experiences during the court process⁵ – this led to children feeling let down and criticisms are made that it undermined children’s welfare and the quality of the court’s decision making if the children are not consulted.
- 5.2 The pro contact culture was also cited as a reason as to why children’s voices go unheard as well as issues re resources and time (in court and with Cafcass and other third parties).
- 5.3 Issues where a parent has been abusive are incredibly complex in particular as to whether a child should spend time with the abusive parent – in paragraph 6.2 the report says that: *“The literature reveals that the priority for nearly all children, even those who do want a relationship with their fathers, is safety, for themselves, their mothers and the rest of their families”*.
- 5.4 Why is this important? The report goes on to say that: *“Submissions to the panel made powerful arguments as to why children’s direct participation is vital, both in ensuring the correct decision is made and to promote child wellbeing. These submissions also expressed the view that parents/carers will not always represent children’s interests adequately. Nagalro and NSPCC, for example, both noted that the experiences, needs and interests of children do not necessarily coincide with those of their parents and so need to be heard separately”*.

6 CONCLUSION

- 6.1 It is expected that if there is to be serious gatekeeping to the courts then both child inclusive mediation and arbitration, as a method to resolve disputes, will increase.

⁴ [Assessing Risk of Harm to Children and Parents in Private Law Children Cases \(justice.gov.uk\)](https://www.justice.gov.uk/assessing-risk-harm-children-parents-private-law-children-cases)

⁵ Paragraph 6.1 [Assessing Risk of Harm to Children and Parents in Private Law Children Cases \(justice.gov.uk\)](https://www.justice.gov.uk/assessing-risk-harm-children-parents-private-law-children-cases)

- 6.2 There is a call for better training and awareness of trauma for all practitioners who need to adopt a trauma informed practice. The guiding principles of trauma – informed practice are⁶:
- 6.2.1 acknowledging the impact and prevalence of trauma;
 - 6.2.2 attempting to create a sense of safety;
 - 6.2.3 avoiding loss of control, judgement and threat.
- 6.3 In terms of the future, the same journal article said: ***“It is expected that the new criteria of C-PTSD will result in a substantially increased identification of the, very high, prevalence of serious trauma in the Family Court. Certain structural aspects of the Family Court may be particularly problematic for traumatised individuals. However, once the extent and impact of trauma (for the population of Court users as a whole but also for individuals) is acknowledged, the court and practitioners will be better equipped to adjust their interactions with clients to support effective working, optimise the quality of evidence, and ultimately achieve best outcomes.”***



Sarah Anticoni
Partner
Charles Russell Speechlys
T: +44 (0)20 7203 5180
sarah.anticoni@crsblaw.com

⁶ Complex post-traumatic stress disorder, a new diagnosis: implications for practitioners and the Family Court September [2021] Fam Law; Dr Ben Laskey and George Butler.