Judgment 25/2010 **In re V (a minor) – Magistrate's Court - 15th June, 2010**

Children (Guernsey and Alderney) Law, 2008 – applicants sought a joint residence order in respect of their grandchild – power to make a residence order when a fit person order remained in place – European Convention on Human Rights – Article 8: "Right to respect for private and family life"

IN THE GUERNSEY MAGISTRATE'S COURT

24th May 2010 and 15th June 2010

Advocate P.M. Grainge	**for the Applicants (Grandparents)**
Advocate C. M. Fooks	**for the Second Respondent (Father)**
Crown Advocate R T Sewards	**for the Third Respondent (HSSD)**
Advocate A. M. Merrien	**for the Fourth Respondent (the minor, through its guardian ad litem)**

Miss Cherry McMillen, Judge of the Magistrate's Court, set out her findings on the law in paragraphs 113 to 147 of her judgment, as follows:-

113. The paternal grandparents have made an application for a residence order under Section 17(1)(a) of The Children (Guernsey and Alderney) Law, 2008. That application is unusual to the extent that the child who is the subject of the application is the subject of a fit person order in favour of the department.

114. Under Section 5(1)(a) of The Children (Consequential Amendments etc) (Guernsey and Alderney) Ordinance, 2009:

"(1) *where a fit person order ….. has been made and remains in force in respect of a child –*

(a) in favour of the department, the department shall have parental responsibility in respect of the child as if the child were subject to a community parenting order…

(2) An application to discharge or revoke an order referred to in subparagraph (1)(a) shall be made in the same manner as an application to discharge a community parenting order under section 52(2) of the Law.

(3) The relevant court may, upon review, and as an alternative to the discharge or revocation of, an order referred to in subparagraph (1)(a) –

(a) convert the order into a community parenting order,

(b) make any other order which it may make under the Law, or

(c) refer the matter to the children's Convenor."

115. I also refer to Section 51 of The Children (Guernsey and Alderney) Law, 2008 which sets out the effect of a community parenting order on parental responsibility:

"Section 51(1) Subject to sub-section (2), where a child is subject to a community parenting order, the department may determine to what extent, if any –

(a) a parent, or

(b) any other person,

having parental responsibility in respect of the child, shall perform the duties and may exercise the right under section 5 in respect of that child.

(2) Unless it has obtained –

(a) the consent of all persons having parental responsibility in respect of the child, or

(b) leave from a relevant court

a determination of the Department under subsection (1) shall have no effect in relation to the issues referred to in subsection (3)."

(The matters in Section 51(3) and Section 51(4) have no relevance to the matter before this Court.)

116. I have already determined that the applicants should be granted an interim residence order, and as a consequence they have required parental responsibility for [the minor] – see Section 8(b) of The Children (Guernsey and Alderney) Law, 2008.

117. It is at this point relevant to note certain differences between the Guernsey and Alderney Children Law and The Children Act 1989. Under Section 9(1) The Children Act 1989 states

*"No Court shall make any section 8 order (*the equivalent of a section 17 order in Guernsey and Alderney legislation), *other than a residence order, with respect to a child who is in the care of the local authority.*

Under the provisions of section 91 (1), Children Act 1989 *"the making of a residence order with respect to a child who is the subject of a care order discharges the care order".*

There is no similar or indeed identical provision under The Children (Guernsey and Alderney) Law 2008.

118. At the commencement and at the conclusion of the case, I specifically invited/directed all of the parties' Advocates to address me in relation to the legal issues raised by the application. All four of the Applicants, either expressly or by implication appeared to agree that:

1) There was no prohibition to the Court making a residence order (whether interim or final) when a fit person order remained in place.

2) Under The Children (Guernsey and Alderney) Law, 2008, the making of a residence order does not determine or discharge the fit person order which therefore remained in place and

3) That there was no tension in making a residence order whilst a fit person order remained in place – Advocate Merrien, on behalf of the children, submitted that in terms as the residence order was made post to the making of the fit person order, it was in effect a direction as to where the child should reside, whilst the child remained subject to the fit person order.

119. I was told that the nature of the paternal grandparents' application was the subject of some detailed discussion and indeed correspondence between the parties' Advocates throughout the period leading up to the commencement of the hearing. Both at the commencement and at the conclusion of the case, the Advocates appeared to present a united front as to the interpretation of the law with particular reference to the issue of a residence order being in place simultaneously to a fit person's order, namely they agreed (without any stated equivocation) that the Court could make a residence order whilst a fit person order remained in place.

120. The legal submissions made on behalf of the department, implicitly accepted that the Court could grant a residence order whilst a fit person order remained in place and in its written submissions dated the 17th May 2010, emphasis was placed on whether the Court should make a residence order, rather than whether it could make such an order and, there was no reference to any perceived tension between the making of a residence order (interim or otherwise) whilst a fit person order remained in place. Indeed, the department's final oral submissions, did not

imply or raise the issue of any perceived tension between the two orders and by implication in those submissions the department accepted the Court's jurisdiction to determine the residence of children, who are the subject of a fit person order (or indeed a community parenting order).

121. However, after I was invited by all of the parties to hand down the decision, (prior to the handing down of the judgment) in this matter, the department appeared to have taken a different view of the law than that they had expressed two days earlier. I am told that immediately after the decision was handed down in Court, the department's social work practitioner discussed in some detail with the paternal grandparents, the move of [the minor]into their home within a number of days and as a consequence, the paternal grandparents prepared their home environment, but perhaps more importantly, [the minor's sibling], for her move. However I am told that despite this the department have on reflection appeared to have determined that this Court's order should not be complied with,(at least at this time) pending the handing down of this judgment and consideration being given as to whether an appeal should be lodged.

122. I was told (at a urgent directions hearing requested by the paternal grandparents' Advocate), by the department, that they, the department, have now interpreted Section 51 of The Children (Guernsey and Alderney) Law, 2008 as giving them the ability to determine the extent to which the grandparents could perform their parental responsibility duties in relation to the child. This appeared to be in apparent contradiction to their earlier written and oral submissions. The department appear to have concluded that the making of an (interim) residence order had no practical impact as to the actuality of the child's residence, whilst a fit person order remained in place, due to their interpretation of the authority given to the department under Section 51 of the Law. If the department are correct, then it is an inevitable conclusion that the hearing of 4½ days was a nullity from the commencement because even if the Court (as it did) granted the parental grandparents' application, the department submissions are that such an order has no effect, taking into account the existence of the fit person order. This was not the only reason the department gave for not complying with the order of the Court but was their primary legal basis for so doing.

123. I remain perplexed that the department did not raise this as a legal issue at any hearing prior to the commencement of the final hearing, or at the commencement of, during, or at the conclusion of the final hearing itself.. If the department took this view, then it was obviously important that such a view should have been raised and dealt with as a preliminary legal issue prior to the commencement of the hearing. It was not, and the department's Advocate by implication accepted that the making of a residence order in favour of the grandparents, would

determine the residence of the child, despite the existence of a fit person order in favour of the department.

124. It may well be that subsequent to the hearing, the department gave the detailed consideration to the law that perhaps they should have given in advance of the hearing and it may be that they thought they had a legal argument that is relevant for the Court to determine. However, because this submission was only made by the department after the Court had handed down its decision, an inevitable conclusion could be drawn that the department were looking for a legal basis for their non compliance with the order of the Court in relation to a decision which they perceived unfavourable to the case they had presented during the Court proceedings.

125. The new law presents many complex issues for Advocates and for this Court to consider and determine. Throughout the case before me, I reminded the Advocates that I wanted to be addressed specifically on the legal issues raised by the application. Ample opportunity was given to all of the Advocates (including the department who asked for and were granted additional time to make their oral submissions), to direct me to what they considered to be the relevant legal issues on the application. At no time until after the handing down of the decision did the department raise the issue that they did not perceive themselves bound by the existence of a residence order whilst they held a fit person order in relation to the child.

126. I have already commented that there is no parallel provision in Guernsey and Alderney legislation to that in England and Wales which provides for the automatic discharge of a fit person order when a residence order is made. Section 17(1) states:

"In any family proceedings, in which a question arises with respect to the welfare of any child, a relevant court may make any of the following orders, whether or not an application for any order has been made –

(a) A residence order, being an order settling the arrangements as to the person with whom a child is to live."

127. Under Section 122:

"family proceedings" means any proceedings –

(a) under the inherent jurisdiction of any court in relation to children, and

(b) under –

(i) this Law,"

128. I am satisfied that the wording of Section 17 allows this Court to make a residence order, despite the existence of a fit person order, and that the making of a residence order is compatible with the existence of a fit person order, but the effect of it is that in making such an order the Court has "*settled the arrangements as to the person with whom a child is to live"*. If, the department consider that they do not wish to hold a fit person order as a consequence of the residence order being made, then it will be a matter for them (or others, who under the relevant legislation are either automatically entitled to do so or with leave of the court), to consider whether to apply to discharge or revoke the fit person order.

129. I am satisfied that there is no tension between the two orders. The law has provided for the making of a residence order and does not prohibit the granting of such an order, even when the child is subject to a fit person order (or community parenting order).

130. However, the same would not apply if a community parenting order was made **after** a residence order had been made. I am satisfied that in those circumstances, Section 51, of The Children (Guernsey and Alderney) Law, 2008 would give the department the ability to determine where the child should reside whilst subject to a community parenting order. However, that is not the case in the matter before this court and I am satisfied that the Court has jurisdiction in this case to make an interim residence order and that the making of such an order means that the child should reside with her paternal grandparents and the decision of the Court overrides the department's ability to determine how the grandparents exercise their parental responsibility in this regard.

131. I now refer to the criteria which is relevant to the determination of the Section 17 residence order application:

Under "*Section 3(1): Subject to subsection (3), when a public authority carries out, in respect of a child, any function under this Law, that authority shall –*

(a) take into consideration such of the child welfare principles set out in subsection (2) as may be relevant to the circumstances or matter in relation to which the function is being carried out, and

(b) having taken those principles into account, carry out the function, having regard to the overriding principle that the child's welfare is the paramount consideration.

*(2) the principles (the **"child welfare principles")** for the purpose of subsection (1) are –*

(a) that a child's welfare is normally best served by being brought up within his own family and community,

(b) that, where it is not possible for a child to be brought up by his own family or community, his welfare is normally best served by maintenance of regular contact with his family and community,

(c) that no compulsory intervention shall be made in respect of a child, unless it is necessary for the effective provision to the child of care, protection, guidance or control,

(d) that any delay in determining a question about a child's upbringing is likely to be prejudicial to the child's welfare,

(e) that irrespective of age, development or ability, a child should be given an opportunity to express his wishes, feelings and views in all matters affecting him,

(f) that, except where it is shown to the contrary, it is presumed that a child is capable of forming a considered view from the age of 12 years,

(g) that a child in the care of the States is entitled to be provided with any may expect to be subject to, insofar as is practicable, similar levels of care, protection, guidance and control as would be expected to be provided or exercised in respect of a child by reasonable parents,

(h) that in any case involving criminal activity, or the risk of criminal activity by a child, the primary purpose of any compulsory intervention shall be the prevention of such activity in both the short and long terms,

(i) that it is expected that parents and any others responsible for a child's welfare will consult and co-operate with one another, and where possible resolve matters by agreement, in an atmosphere of openness and non-confrontation, with recourse to formal proceedings (whether court or tribunal) only as a last resort,

(j) that it is normally in the best interests of a child to have ongoing contact with both parents and it is the responsibility of the parents and any public authority to take reasonable steps to promote such contact, and

(k) that in determining any issue under this Law there shall be no discrimination by any public authority on the grounds of gender, marital status, ethnic or cultural origin, religion, disability, age or sexual orientation."

132. It is obvious that some of the child welfare principles are more applicable in this case than other of the principles, but I take this opportunity to set them out in their entirety. I have taken into account the paramount consideration of the child's welfare and the child welfare principles (and in particular, Section 3(2)(a)(b)).

133. I also refer to the child welfare checklist under Section 4 of the law which states:

"*4.(1) When determining any issue concerning –*

(a) the upbringing of a child under this Law, or
(b) the application of the child welfare principles,

*a public authority shall, in particular, have regard to the matters set out in subsection (2) (the "**child welfare checklist**").*"

134. I deal below with the child welfare checklist and its relevance to the decision that I had to make.

135. It is relevant at this point to refer to the application to The Human Rights (Bailiwick of Guernsey) Law, 2000 which states under Section 1(1):

"(1) In this Law, "the Convention rights" means the rights and fundamental freedoms set out in –

(a) Articles 2 to 12 and 14 of the Convention,
(b) Articles 1 to 3 of the First Protocol, and
(c) Articles 1 and 2 of the Sixth Protocol,

as read with Articles 16 to 18 of the convention.

(2) those Articles are to have effect for the purposes of this Law subject to any designated derogation or reservation……"

And :

"2.(1) A court or tribunal determining a question which has arisen in connection with a convention right must take into account any –

(a) Judgment, decision, declaration or advisory opinion of the European Court of Human Rights,"

136. In this regard I refer to Article 6 - the "*right to a fair trial"*:

*"In the determination of his civil rights and obligations …… everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…."*and

137. Article 8 – the "*right to respect for private and family life"*:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

138. "*Family life*" has been interpreted by the ECtHR in a manner which includes a wider range of relationships. Typically the question will be whether there is a "*close personal relationship*", a relationship which has *"sufficient constancy and substance to create de facto "family ties""* Lebbink v The Netherlands [2004] 2FLR 463. In Bronda v Italy [1998] HRCD 641 it was accepted that, on the facts, a grandparent had sufficient relationship with her grandchild to establish "*family life"*.

139. In The Queen on the application of L v Secretary of State for Health [2001] 1FLR 406, Scott Baker J held that "*family life"* is an elastic concept that depends on the facts of the individual case. It was accepted in that case that in some cases, the existence of family life will be immediately obvious; in others, the reverse will be true.

140. In this regard, the department referred me Haringey Borough Council v C & E [2005] 2 FLR 47, in which Ryder J held that a husband and wife who had been deceived into believing that a child who was in their care was a "*miracle baby*" had established sufficient de facto family life to engage Article 8 rights. In that case, the parents had care of children whom they believed were their own as a consequence of an apparent fraud carried out on them which led them to believe that they were indeed the parents of. On the exceptional facts of that case, Ryder J held:

"*I agree that it is not just the child C but also Mr and Mrs E whose rights are engaged. Those rights are the right to a fair trial under Article 6, the right to respect for family life under Article 8 together with the enjoyment of those rights without discrimination inter alia on the grounds of their religion".*

141. The department rely upon this case for giving credence to their submission that not only are [the minor's] rights engaged under Article 8, as well as those of the grandparents, I must also consider as to whether [its] right to respect for family life with Mr and Mrs X [foster carers of the minor] are also engaged. In paragraph 14 of their submissions, the department states: "*The relationship between foster child and foster parent has been held to engage the Article 8 right (X v Switzerland (1978) 13 DR 248)"* and the department submitted that the law must be interpreted in the light of the well established body of jurisprudence.

142. In paragraph 15 they stated "*the position must be viewed from where we are with [the minor] in that she has established a significant family life with Mr and Mrs X".*

143. This was a submission developed by Crown Advocate Sewards on behalf of the department in his oral closing submissions.

144. In fact, X v Switzerland did not find there had been a breach of the right to respect for family life but stated: "*bearing in mind that the applicant has cared for the child for many years and is deeply attached to him, the separation ordered by the court undoubtedly affects her "private life" the respect for which is also guaranteed by Article 8".* In this connection, the Commission referred to its previous decisions that the concept of private life also included "*to a certain extent the right to establish and develop relationships with other human beings"*. The Commission held *"The decision of the Cantonal Court of Canton Vaud conferring the custody of their son on Mr and Mrs Y was a measure "in accordance with the law""*:

"An examination of the decisions of the District Court in A and the Cantonal Court of Canton Vaud shows that these courts, whilst not overlooking the interests conflicting desires of the applicant and the parents, both gave predominant attention to the interests of the child L, and examined his position and future prospects with great care after taking into account all the evidence as well as expert opinions."

145. In their oral submissions, the department urged me to conclude that Mr and Mrs X's Article 8 rights, namely the right to respect for family (or private) life had been engaged and that I must consider [the minor's] position in relation to those rights vis-á-vis Mr and Mrs X.

146. [The minor] was placed with Mr and Mrs X at the beginning of December 2009 as a concurrent foster care/with a view to adoption placement. She was placed there with no guarantees or promises to Mr and Mrs X that she was to be placed permanently with them. It was explained to them that the question of her final placement had yet to be finally determined by the Court and Mr and Mrs X accepted the placement of [the minor] in their home in that full knowledge. I am not satisfied that Mr and Mrs X's Article 8 rights are engaged, or that [the minor's] rights are engaged in relation to Mr and Mrs X on the facts of this case. When the department decided that the paternal grandparents' application was to be refused, [the minor]had resided with Mr and Mrs X for a period at the most of some 9/10 weeks. This is in contrast to the case of X v Switzerland in which the child had been fostered and cared for by the applicant for a period of "*many years"*.

147. I am not satisfied that the act of placing a child with foster carers (albeit with a view to an adoption placement) per se, engages Article 8 rights for either the child placed in that placement, or for the carers. On the facts of the case before me I am not satisfied that those rights were fully engaged. Even if I am wrong in that regard, it seems obvious to me that the right for respect for family life in relation to [the minor's] birth family must take precedence or priority in relation to those rights of carers who had cared for her for such a short period of time and whilst that time had been extended by the date of the final hearing, the child had not been with them, as at the date of the final hearing, for any longer than a period of six months. In KA v Finland [2003] 1 FLR 696 it was held:

"*As the court has reiterated time and time again, the taking of a child into public care should normally be regarded as a temporary measure, to be discontinued as soon as circumstances permit, and any measures implementing such care should be consistent with the ultimate aim of reuniting the natural parent and the child. The positive duty to take measures to facilitate family unification as soon as reasonably feasible will begin to weigh on the responsible authorities with progressively increasing force as from the commencement of the period of care subject always to it being balanced against the duty to consider the best interests of the child……. The minimum to be expected of the authorities is to examine the situation anew from time to time to see whether there has been any improvement in the family's situation…."*