

**Judgment 26/2010**

**In re U and U (minors) – Magistrate’s  
Court – 16<sup>th</sup> July, 2010**

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**Children (Guernsey and Alderney) Law, 2008 – application by short term foster carers (i) for residence orders under s.17(1)(a) of the 2008 Law, and (ii) to be joined in applications by HSSD for community parenting orders – provisions of the 2008 Law and the English Children Act 1989 compared – applicable criteria and principles**

**IN THE GUERNSEY MAGISTRATE’S COURT**

**2<sup>nd</sup> July 2010 and 16<sup>th</sup> July 2010**

<b>Advocate S. L. Brehaut</b>	<b>for the Applicants</b>
<b>Advocate S. Mallett</b>	<b>for the Mother</b>
<b>Mr. W. Simmonds</b>	<b>for HSSD</b>
<b>Advocate D. G. Le Marquand</b>	<b>for the children (by their Safeguarder)</b>

**Miss Cherry McMillen, Judge of the Magistrate’s Court, summarised the applicable law in paragraphs 4 to 24 of her judgment, as follows:-**

4. The applicants seek leave under section 18 (1) (a) (iii) to be allowed to apply for a residence order in respect of both children under S17 (1) (a) of The Children (Guernsey and Alderney) Law, 2008. The applicants are not amongst those classes of persons who are by operation of law, namely sections 18 to 20 inclusive, entitled as of right to apply for a residence order in respect of the children.
5. Further, if the applicants are successful on their application for leave to apply for a residence order, they seek to be joined in the substantive proceedings.
6. The substantive proceedings pending in relation to both children are applications by the department for community parenting orders in respect to them both. Those applications are based on care plans that the children be adopted and with a recommendation there be no direct contact between the children and their mother. Those substantive proceedings are listed to follow on immediately after this preliminary application.
7. Section 18 (1) (a) (iii) provides that “*with leave of the relevant court, any person .....*” is entitled to apply for a Section 17 Order in respect of a child.
8. I have had to consider what criteria to apply to such applications for leave to apply for a Section 17 Order.
9. I am satisfied that I should apply the criteria and principles set out in Section 3 and Section 4 of the law.
10. Section 3 states that 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 these principles into account, carry out the function, having regard to the overriding principle that the child's welfare is the paramount consideration.*

11. Section 4 states:

*(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) namely the child welfare checklist.*

12. I am satisfied that I must therefore apply the principles set out in sections 3 and 4 of the law to the application for leave to apply for a Section 17 order. This court is a public authority and in considering the application under Section 18 (1) (a) (iii) of the law, I am satisfied I am carrying out a function under this Law.

13. It is of note to highlight there are certain differences to this legislation to the similar legislation that applies in England and Wales, namely The Children Act 1989.

14. There is similar provision in The Children Act, 1989, for the court to consider whether to grant leave to an applicant applying for an order under Section 8 of the law, Section 8 being very similar in terms to Section 17 of the Guernsey legislation. However, in the English and Welsh legislation there are specified criteria which the court must take into account when considering whether to grant leave to apply for such an order:

Section 10 (9) The Children Act 1989, states:

*“Where the person applying for leave to make an application for a Section 8 order is not the child concerned, the court shall, in deciding whether or not to grant leave, have particular regard to –*

- (a) The nature of the proposed application for the section 8 order.*
- (b) The applicant's connection with the child.*
- (c) Any risk there might be of that proposed application disrupting the child's life to such an extent that the would be harmed by it; and*
- (d) Where the child is being looked after by the local authority*
  - (i) The authority's plans for the child's future; and*
  - (ii) The wishes and feelings of the child's parents.”*

15. There is no such provision in Guernsey legislation.

16. The importance of the criteria in Section 10 (9) of The Children Act 1989 is that the welfare checklist in Section 1 (3) of The Children Act 1989 cannot be applied to such a decision – *“in considering such an application the Court is not considering a question with respect to the upbringing of a child, as this is a matter which falls to be considered at the substantive hearing”*. The courts in England and Wales, must, therefore apply the considerations of S 10(9) Children Act, 1989:

*“The welfare of the child is not the paramount consideration, otherwise some of the considerations of section 10 (9) would be otiose”.*

(Re A and W (Minors) (Residence Order: Leave to Apply) [1992] 2FLR 154.

17. However, in Guernsey legislation I am satisfied that the overriding principle of the child's welfare, the child welfare principles and the child welfare checklist are applicable to an application for leave to apply for a residence order as a consequence of the criteria set out in Section 3 (1) and Section 4 (1)(a). This is in contrast to the position in England and Wales.
18. In the parties' skeleton arguments/legal submissions filed prior to the commencement of the application, all seemed to agree that I should apply the criteria in Section 10 (9) of The Children Act 1989 as being at the very least, persuasive in that Guernsey legislation was in their respective submissions 'silent' on the criteria to be applied.
19. The department submitted (paragraph 7 of their submission):

*“There is no legal test set out in the 2008 law, or in the ordinances ....or in the Family Proceedings (Guernsey and Alderney) Rules, 2009”*

And paragraph 8

*“In the absence of statutory guidance on the same, the department submits that the Court should look for guidance from the jurisdiction of England and Wales and in particular The Children Act, 1989, as amended.”*

The department submitted it would be logical and prudent to follow this legislation and jurisprudence *“where Guernsey law is silent.”*

20. The applicants submitted that I should pay regard to S 10(9) of The Children Act 1989, although in their submissions did make some, albeit very limited, reference to Section 3 (2) of The Children (Guernsey and Alderney) Law, 2008.
21. The mother adopted the applicant's submissions on the Law, but did accept the application of S 3 and S 4 to the decision the Court has to make.
22. The safeguarder submitted:

*“there is no statutory or otherwise guidance as to the test to be applied for an application for leave .....The Court should look to guidance from England and Wales .....it is agreed that this Court should have particular regard to the factors in Section 10 (9) of The Children Act which should be applied in this application.”*

23. The parties oral submissions were along a similar vein, although when asked by me to consider the applicability of Sections 3 and 4 to such an application, all of the Advocates presented as accepting that Section 3 and 4 did apply and must be considered albeit with reference to the criteria in Section 10 (9) of The children Act 1989.
24. I am satisfied that Guernsey legislation is not silent on the criteria that I must apply to an application for leave to apply for a Section 17 order. I am satisfied I must consider the criteria and principles set out in Sections 3 and 4 of The Children (Guernsey and Alderney), Law, 2008. I am not satisfied that I should apply the criteria set out in Section 10 (9) of The Children Act 1989, because firstly it seems to be unnecessary and secondly it would mean incorporating legislation from another jurisdiction into our own legislation when no such section was incorporated into our legislation when there was an opportunity to do so.