



A party's ability to appeal against any Children Act order believed to be unfair, is limited by a number of legal principles laid down in *G –v- G*

In a nutshell, it matters not to the court hearing the appeal, that another court on the same day hearing the same facts would have given a substantially different decision. Before an Appeal can succeed, it has to be shown that the decision was so manifestly wrong as to be wholly unjustifiable even within a broad range of discretion, or to be procedurally wrong.

- a) An Appeal should not be seen as an automatic further stage in a case
- b) Appeals should be dealt with in ways which are proportionate to the ground of complaint and the subject matter in dispute. More than one level of Appeal cannot be justified except in restricted circumstances.

**An appeal should not be seen as an automatic further stage in a case**

All Appeals, whether from the District Judge or from the Circuit Judge, will be dealt with on “Appellate Principles”

What this means, is that although a party may be free to make an Appeal, that Appeal will succeed only where it can be clearly demonstrated:

- There has been some error of law
- In conducting the necessary balancing exercise, the original Judge has taken into account matters which were irrelevant, or ignored matters that were relevant, with the result that the Judge had arrived at a conclusion that was plainly wrong

The Appeal is limited to a review, not a re-hearing, of the decision of the lower Court. Only exceptionally will the appellate court allow fresh evidence.

The principle laid down in *G –v- G* recognises that in cases involving the upbringing of children, there are often no “right answers”, and the court at first instance is faced with choosing the best of two or more imperfect solutions.

Judicial discretion means that two different legal minds may reach widely different decisions on the same facts, without either being appealable.

The result in practice, is that even if the appellate court would have made a different decision, had it carried out the original balancing exercise of weighing the various factors for and against each party, that appellate court is not free to substitute its own view unless the court below has exceeded the generous ambit within which reasonable disagreement is possible and come to a decision that is plainly wrong.

In all cases where the court is called upon to determine any question concerning the upbringing of a child, there are a number of guiding principles -

- a) the child's welfare is the Court's first and paramount concern. That is known as the Paramountcy Principle.
- b) the Court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

In cases where the court is called on to make, vary or discharge a S8 Order (residence / contact / prohibited steps / specific issues), the court must additionally have regard to the Welfare Checklist S1 Children Act 1989:

- a) the ascertainable wishes and feelings of the child concerned (considered in the light of his / her age and understanding)
- b) his / her physical, emotional and educational needs
- c) the likely effect on him / her of any changes of circumstances
- d) his / her age, sex, background and any other characteristics the court considers relevant
- e) any harm which s/he has suffered, or is at risk of suffering
- f) how capable each of his / her parents, or any other person in relation to whom the court considers to be relevant, is of meeting his / her needs
- g) the range of powers available to the court

Which elements in that checklist should be given priority, is a value judgement, on which reasonable people can differ. As Judges are also people, this means that some degree of diversity in their application of values is inevitable and, within limits, held to be an acceptable price to pay for the flexibility of the discretion conferred by the Children Act 1989.

The fact that two different courts might give two different outcomes from the same facts, simply reflects the fact that the exercise of discretion in applying the welfare checklist is not an exercise of precise science. Provided the courts clearly demonstrate that they:

- bore in mind the paramountcy principle and
- applied the welfare checklist and
- were appropriately guided by the CAFCASS officer / Children's Guardian

The decision will not be appealable unless it is manifestly perverse in the face of the evidence before the court, (and thus arguably potentially harmful to the welfare of the child).

If an order directs that a child be transferred from one person to another, but there is no urgency to do so, the court should order a stay pending appeal if so requested by the appellant, for a short period of time to enable the notice of appeal to be filed, since it is not in the interest of a child to be bandied from one person to another. The appellant can then ask for an extension of that stay when the appeal is lodged. Such a measure is essential where there is a likelihood of a child being removed from England and Wales.

The Appellant however starts at a disadvantage

- a) the court could well be unhappy that any appeal represents delay achieving a definite and final outcome for the child, and a child's welfare may be jeopardised by uncertainty
- b) The court rightly believes that hopeless appeals in children cases are likely to have adverse effects upon the children, and to worsen feelings between the parents
- c) The appellant and lawyer might both risk an order for costs if the appeal is unjustifiable

If circumstances do exist for the appellate court to exercise its power, it can substitute its own order or remit the case back to the court of first instance to reconsider the decision in the light of subsequent events (whether by the original judge or a new judge)

- if it believes that the original judge was plainly wrong or misdirected himself / herself
- if it feels that subsequent events showed that the beliefs on which the original order was made were not well-founded

### **Appeals should be proportionate**

There is the principle of proportionality between the importance of the issue at stake, and the legal resources of the parties and the community money which it is appropriate to spend on resolving the dispute.

### **More than one level of Appeal can seldom be justified**

Second Appeals are comparatively rare, and will be allowed only

- where there is a compelling reason (including a good prospect of success)
- where some important point of principle of practice arises

### **Appeals from the Family Proceedings Court (to the High Court)**

Notice of Appeal must be filed and served within 14 days of the determination, by a party to the hearing OR any person prejudicially affected by the order. No permission of the Court is required.

### **Appeals from the District Judge (to the Circuit Judge)**

Notice of Appeal must be lodged within 14 days of the decision under appeal, and ideally should give brief grounds for appeal. Permission of the circuit judge is required if the Notice is lodged later than 14 days.

### **Appeals from the Circuit Judge (to the Court of Appeal)**

An Appeal can be made only with permission of the Circuit Judge, or if refused with permission of the Court of Appeal. Notice of Appeal must be served within 4 weeks of the date of the order or one week of the grant of permission to appeal.

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