Lost in the Triangle

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We have all experienced cases that profoundly affect us. My first involved a ten-year-old ward of court in Bermuda who was required to give evidence in his parent's divorce. He sat in the tired witness box, dwarfed by the courtroom and the goings-on within it, and shrank further when forced to face his father and confirm that he did not want to live with him. It was clearly difficult for the boy, and bizarrely, every now and then the door to the courtroom would open with someone coming and going, and with them a dart of the sounds from the busy corridor. It was very unsettling and extremely inconsiderate.

Being the early 80s in Bermuda, there was probably nothing unusual about the proceedings, the setting or the lackadaisical approach to children giving evidence, but it was entirely unusual for me, as I was that boy.

It would be wonderful to say that the experience inspired me to become a dedicated law student hell bent on changing the world, or at least the 20.6 square miles of it that is Bermuda. But that would be very far from the truth. When I was at school in England I was a hopeless student with dyslexia, which at that time was commonly regarded as a middle class excuse for idleness. At 17 I fled academia to study art and started DJing. Despite all my best efforts to just have fun, I actually became rather successful, consulting for well-known brands, music channels and writing soundtracks for fashion shows. It was an entirely different world to 'law', although a judge did once joke that my experience of playing to intoxicated hordes at music festivals made me eminently qualified to address a jury.

When I eventually got bored of the 'in crowd', the clubs and the fashion shows, I went off to study law. My fellow students thought it was a thoroughly bad life decision and a very odd career move, but I was in good company. Chukka Unuma MP and Courtenay Griffiths QC did the same. My ultimate aim had been to go into politics, like the former. However, I was eager to get in the trenches of criminal law like the latter, and I was very fortunate to have an unconditional pupillage waiting for me with Elizabeth Christopher, a titan defence attorney in Bermuda. After four years with her firm, in 2014, along came another profound case.

As I left court with a young client in a criminal matter he asked if I could help him in 'Child Court' that same day. He was worried 'they' would try to send him away, I explained that child law was not my area and that he should keep the counsel he already had. He said he did not have a lawyer or anyone else. I thought that unlikely but felt compelled to at least take him to the court to make sure. Prior to doing so I had a quick scan of the Bermuda Children Act 1998 ('our Act') and fell upon the following section that ensured a child had a litigation guardian and counsel in 'specified proceedings':

"Representation of child and of his interests in certain proceedings
35 (1) For the purpose of any specified proceedings, the court shall appoint a litigation
guardian for the child concerned unless satisfied that it is not necessary to do so in order to safeguard his interests.

(2) The litigation guardian shall be under a duty to safeguard the interests of the child.

(3) Where—
(a) the child concerned is not represented by counsel; and
(b) any of the conditions mentioned in subsection (4) is satisfied,
the court may appoint counsel to represent him.

(4) The conditions are that—
(a) no litigation guardian has been appointed for the child;
(b) the child has sufficient understanding to instruct counsel and wishes to do so;
(c) it appears to the court that it would be in the child's best interests for him to be represented by counsel.

[...]

Bermuda is a British Overseas Territory and many of our statutes have been derived from UK laws, such as our Act, which is an adaptation of the UK Children Act 1989 (the 'UK Act'). The section above is essentially identical to S.41 in the UK Act, as originally enacted:

"Representation of child and of his interests in certain proceedings
41 (1) For the purpose of any specified proceedings, the court shall appoint a guardian ad litem for the child concerned unless satisfied that it is not necessary to do so in order to safeguard his interests.

(2) The guardian ad litem shall—
(a) be appointed in accordance with rules of court; and
(b) be under a duty to safeguard the interests of the child in the manner prescribed by such rules.

(3) Where—
(a) the child concerned is not represented by a solicitor; and
(b) any of the conditions mentioned in subsection (4) is satisfied,
the court may appoint a solicitor to represent him.

(4) The conditions are that—
(a) no guardian ad litem has been appointed for the child;
(b) the child has sufficient understanding to instruct a solicitor and wishes to do so;
(c) it appears to the court that it would be in the child’s best interests for him to be represented by a solicitor.

(5) Any solicitor appointed under or by virtue of this section shall be appointed, and shall represent the child, in accordance with rules of court.

[...]

When I arrived at ‘Child Court’ I was disappointed to find that my client was correct; he didn’t have a lawyer. There were only two social workers from the Department of Child and Family Services sitting in the reception room. It was noticeably empty of lawyers, and anyone else. The social workers were clearly wondering what I was doing there, as was I.

We all waited in relative silence but for quiet old hits playing on a slightly off-tuned radio. It seemed deliberately positioned near a closed door leading to one of the two courtrooms, but we could still occasionally clearly hear the proceedings. I was a little uneasy about the door opening, as it would mean I had to enter. When it did, the parties to the other matter walked past. I surmised that two were social workers and the other a mother. Another courtroom opened to reveal the same. It was understandable that there were no children, disappointing there were no fathers, but disturbing that there were no lawyers.

Once we were before the court, I raised the issue of appointing a litigation guardian for my client. It was evident that this was the first time the court had ever been directed to S.35. The poor social

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workers did not have the faintest idea what I was talking about, what a litigation guardian was and why my client had a lawyer in the first place. The court appointed me as the child’s litigation guardian and adjourned the matter so that the Department of Child and Family Services (DCFS) could provide me with a copy of the application they had intended to make that day. My client had not been given any of the pleadings. I am certain the mothers in the earlier two matters had not either.

After court I used our greatest research tool; I called a friend, and then another. They all practised in family law, but none had ever heard of S.35 being relied upon, even though it had been enacted in 1999. There was not a single published Bermuda case even mentioning the section, despite its mandatory nature. So, to understand it I researched S.41 in the UK Act, using the second best research tool; google (I jest, somewhat). This quickly led me to CAFCASS and a plethora of materials. Then I was able to do less expensive research on Lexis.

I found that the concept of appointing protection for children is at least 2,500 years old. Under Tutorship in Ancient Rome an adult could be appointed as a child’s tutor, which was mandatory to accept. The Tutor became a guardian to the child in any suit as they “wholly represent the Pupil’s legal personality in his lawful acts”. Under Curatorship, the government could appoint an adult to act “When the minor was in litigation”. In English law, the first reference to a guardian and a ‘next friend’ for the purpose of litigation is found in the Statute of Westminster II, 1275, under the reign of Edward I of England. From then on adults became the voice for children in court, for the most part without much consideration for the child’s autonomy.

Prior to S.41, the UK Children Act 1975 had provided the court with the discretion to appoint a guardian ad litem (a ‘GAL)...if it appears that it is in [the child’s] interests to do so”.\textsuperscript{2} The case of Plymouth Juvenile Court ex parte F and F3 exposed the fact that the provision was notoriously underutilised. It was approximated that GALs were only appointed in around 10% of care cases.

In the subsequent debate of the Bill for the UK Children Act 1989, the then Minister of Health said it was envisaged that S.41 should cause the appointment of GALs in not less than 90% of public law matters.\textsuperscript{4} However, Re J (a minor) (change of name)\textsuperscript{5} is the only published case where a court was satisfied a GAL was not necessary. Yet in that case the child’s previous GAL was still involved in the case. He was receiving updated reports and remained in contact with the Local Authority and the court.

At our next court date, we had some surprise guest appearances; two counsel from the Attorney General’s Chambers and a bevy of bemused members of staff from DCFS. With an air of disdain towards the court for having utilised S.35, counsel for the AG submitted that the word ‘shall’ in S.35(1) meant ‘may’, and therefore the AG was seeking the unique reasons why the court was persuaded to appoint a litigation guardian. The court was not persuaded. Having heard my explanation of the ‘tandem model’, I was appointed as the child’s counsel, and the court directed that only an independent social worker could act as the appointed litigation guardian. I then had the difficulty of finding one.

I struggled even to find a social worker that was not attached to DCFS in some way. The few I did find were already attached to charities that were solely committed to providing family counselling. However, one name kept coming up as a possibility, Tiffanne Thomas. Ideally I would have had a choice

\textsuperscript{1} p. 2–3, 6 & 14 ‘The Guardian Ad Litem (1896), Hoyt
\textsuperscript{2} Pursuant to section 32A(1) of the Children and Young Persons Act 1969 (as amended by s. 64 of the Children Act 1975 and Rule 14A(1) of the Magistrates’ Courts (Children and Young Persons) Rules 1970 (SI 1970 No. 1792)), and pursuant to similar powers of section 4B of the Children Act 1948 (as amended by section 58 of the Children Act 1975).
\textsuperscript{3} [1987] 1 F. L. R. 166
\textsuperscript{4} HC Official Report, SC B, 23 May 1989, col. 255.
\textsuperscript{5} [1983] 1 FLR 699
but as fate would have it, she was and is amazing; more than qualified, absolutely committed and selfless. She often puts me to shame.

She bravely attended court with me at the next mention date. This time opposing counsel made the submission that Ms Thomas could not be appointed as S.35(7) stated that, “The Minister may establish panels of persons from whom litigation guardians appointed under this section must be selected”, and no Minister had ever established one. I argued that as the subsection included the word ‘may’, it merely gave the Minister the discretion to limit the choice of appointees to a panel. Opposing counsel unsuccessfully argued that ‘may’ meant ‘shall’.

It was apparent that it was the first time S.35 had been used, some fifteen years since it was enacted. In spite of the presumption of the appointment of a litigation guardian we only managed to be appointed in a handful of cases. In the vast majority of cases the court continued to determine matters without any regard for S.35.

I need not have worried that I had no previous experience in child law, as neither did anyone else in court. Basic principles, such as providing us with the pleadings, were a challenge for DCFS. Concepts such as Gillick competence was unheard of, and senior staff would express outrage at the idea that a child could ever instruct a lawyer. It was common to hear such things as “But they’re a child!”, “No child is telling me what to do!” and “They’re not running the show here!”. It was a sentiment sometimes shared by magistrates.

In every case we were involved in, we found something peculiar. One involved two children who had been on supervision orders for three years due to their parents’ toxic relationship during their divorce. They had been granted a decree nisi but the decree absolute remained outstanding for three years, as DCFS had failed to complete necessary social enquiry reports. In the Children Act proceedings the parents commonly breached the orders of the court and there were related criminal convictions. The department was committed to improving the parents’ relationship for the sake of the children. It was only through the appointment of the litigation guardian that the supervision orders were eventually discharged due to us obtaining an ironclad order from our Supreme Court that ensured the parents were kept apart with very little need to communicate. Their acrimony declined significantly. They are still not divorced.

Another case involved a teenage girl who had been the victim of a sexual assault. Due to her subsequent “misbehaviour” and concerns for her mental health she was placed on a care order so that DCFS could send her to the United States for assessments. In the meantime, without the girl’s consent or prior knowledge, the department had her dropped off at our mental health facility. The hospital confirmed that she did not satisfy the criteria for admission under the Mental Health Act but the Director had instructed hospital staff to keep her on a secure ward. When I attended to assist her, staff refused to let us meet as the Director had prohibited her any contact with me. Her mother was also later refused access as a punishment for contacting a lawyer. A writ of habeas corpus secured her release. She soon became an A+ student again and is now intent on being either a child law barrister or child psychologist.

There was a case involving a ward of court, who the Director clandestinely transported back to
Bermuda from a treatment facility abroad, without court approval. It was also against medical opinion and there were no proper measures or services in place for his return. After nine months we were able to obtain an order from our Supreme Court securing his re-admission in an appropriate facility abroad.

A three-year-old boy was ‘urgently’ removed from his parents by DCFS a day after a doctor had reported a suspicious injury. It was only after the boy was made the subject of a 28-day emergency protection order was it disclosed that within hours of the initial report the hospital had confirmed with the doctor that the injury was an innocent case of Nursemaid’s Elbow, and that there were no concerns for the child’s welfare. We secured his release on initiating judicial review proceedings.

Children have been placed on care orders due to their single mothers being homeless, instead of DCFS providing housing. There is even a case where a first-time single mother had her baby taken away at birth due to unsubstantiated allegations that she had been in an abusive relationship and was promiscuous as a teenager. In another case the Director admitted that there was no risk of significant harm but that unless my client’s mother agreed to a care order, her daughter was not going to receive any treatment services.

Then there are those children with matters in both family court and criminal court. A client on a care order was granted bail but the Director refused to perfect it. Consequently, the boy was detained in a prison and kept in his cell alone for up to 21 hours a day.

An unrepresented boy on a supervision order was convicted of relatively minor offences. The senior family court magistrate, sitting in the child criminal court sentenced the boy to ‘corrective training’ in a prison for “18 months to 3 years”. This is in spite of an earlier appeal of the same magistrate ruling that indeterminate sentences are unlawful. In the later case, when AG counsel were informed of the sentence passed they wrote directly to the magistrate indicating the unlawfulness and asking for the matter to be brought back to court to be resolved. There was no reply, and no further effort was made by the Prosecution, the AG or DCFS. The boy was released on appeal, but by the time we became involved, he had already served three months of his sentence.

Then there is the deeply concerning practice of DCFS sending children to secure treatment facilities in the United States, sometimes for years. As S35 has not been enforced, those children that have already been sent have not had any representation in the prerequisite court proceedings. We appeared in one matter where the department was seeking such an order. The supporting evidence consisted of a photocopy of airline tickets, which were already purchased, and communication from the facility indicating they would happily receive the child. It is understood the facility has a section called the Bermuda wing.

Throughout our matters, AG counsel would appear for DCFS and would often refuse to tell us their position until we entered court, and would accuse me of personally lying in the presentation of my client’s case. It was all very bizarre. The litigation guardian was equally unfavoured; she was accused of not genuinely caring for children, being too concerned with following the law and being combative for not agreeing with the department’s
applications and reports. We were also advised that the Director had prohibited staff from having any contact with us.

As with S.42 of the UK Act, S.36 of our Act provides the litigation guardian with the right to access and copy the records of the Director and to admit them as evidence. This became a particular bone of contention. Rightly, the department would require all other parties to abide by an order from the moment it was made by the court, but it would refuse to allow access to the Directors files until it received a hard copy of the order. It was well known that it often took weeks and sometimes months to receive orders. The department also took the position that Ms Thomas could not access the records until she signed a confidentially agreement prohibiting her from using the files as evidence.

In accessing the records, Ms Thomas has found doctored documents, incomplete files, and allegations of abuse and negligence, which were never reported to the courts or the police. The revelations triggered the suspension of the Director and an internal investigation. Oddly, the Minister who initiated the inquiry was soon relieved of his position, the permanent secretary resigned and the entire Ministry was disbanded with the responsibility for DCFS reassigned to the Attorney General.

It has since been reported that allegations of abuse and neglect by two members of staff were substantiated, and that they were disciplined and returned to work. The review also "found weaknesses in some of the operations at [residential treatment services] and these are currently being corrected. Steps will always be taken to ensure that the care, welfare and wellbeing of the children is addressed with sensitivity and respect."

After five months the Director was returned to his post, without the investigators ever hearing any evidence from the relevant children, and before completion of a second internal inquiry into the Director's department, which is ongoing. The AG has recently confirmed that none of the findings will be made public. If this has all transpired as a result of Ms Thomas having limited access to a small minority of children's records, one must wonder what else lies hidden without a light cast by a litigation guardian.

As all of us in child law appreciate, government social workers are extremely important and are often unsung heroes. Most are very caring for children and work extremely hard. There have been, and remain, some great examples at DCFS, but one cannot help but wonder how many have left or will leave if there are further allegations of negligence and abuse that are excused.

Ms Thomas has now been appointed for 33 children in total. However, this represents a tiny minority of children in 'specified proceedings'. There are approximately 25 to 40 applicable cases per week. The Bermuda courts are failing to even achieve the 10% level of appointments made pursuant to the discretionary powers of the UK Children Act 1975, which was regarded as disappointing over thirty years ago in the case of F and F, and resulted in the enactment of the presumptive nature of S.42, and our S.35.

The courts entirely ignored S.35 for 15 years, and now mostly continue to. The reason? There is nothing in our Act clearly settling the issue of payment. Also, there have not been any lawyers in court to forcefully remind the magistrates of their duty to make appointments. The lawyers that are occasionally in court represent a parent and they gain no benefit of having the children represented. In fact, it is a danger to their client.

Unlike England, our Legal Aid Act does not provide children with an automatic right to legal
aid and children cannot apply for legal aid either. However, S.6 of our Children Act provides, “In the administration and interpretation of this Act the welfare of the child shall be the paramount consideration” and under S.8 the relevant Minister has the responsibility for the “administration” of the Act. Further, S.9(1)(a) provides that the Director shall “where necessary, arrange for the delivery of child care services for the benefit of the child.”

For the first few years our invoices were entirely ignored. We were told we had addressed them wrongly, despite it being the mail address on the government website. Then we received notice from the then Attorney General’s Chambers that we would be paid for one case. The next day we received notice that we would not be paid yet and that we would be replaced on all the cases by persons providing the services pro bono. Just as no one raced to provide the service for free in the 15 years before our first appointment, no one has come forward in the three years since that letter. It’s no surprise, given the work required for the appointments.

Fortunately, my initial firm, ‘Christopher’s’, was very supportive of my endeavours despite it taking up most of my time and my not being paid a cent for them. We all know that is not a common position for a firm to take. My wife Alma is a barrister at Marshall, Diel & Myers Ltd. in the matrimonial department, headed by another prodigious lawyer, Georgia Marshall. With her interest in my battle tales, her fierce reputation and her passion for Bermuda, I was privileged to then make that firm my home. How many firms take on a lawyer who in their interview states that they specialise in an area of law that doesn’t make any money?

Last year, on behalf of some older children, the Human Rights Commission and Bermuda’s child concerned charities, we sought a declaratory judgment to settle the issue of payment and the presumption of appointments under S.35.6. We argued that the obligation of the Minister to “administer” the Act required him to provide funding for the enforcement of S.35, or in the alternative that the Director’s obligation to provide “child care services for the benefit of the child” must be interpreted as services “for the care of the child”, so as to avoid the ‘absurdity’ of denying children the protection of a provision expressly provided in an Act which was expressly provided to have the welfare of children as its paramount consideration. We also argued that if there was a lacuna, the inherent jurisdiction may fill it in order to fulfil the child’s right to a fair trial, as provided by S.6(8) of the Bermuda constitution:

> “Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time”

In June of last year our Supreme Court ruled that the courts could not construe a statute as authorising public expenditure merely by implication or use its inherent jurisdiction to authorise statutory expenditure where the Legislature has not expressly done so. Hellman J declared at para. 10:

1. For the purpose of any specified proceedings, the court shall:
   (i) Consider whether to appoint a litigation guardian for the child concerned;
   (ii) Appoint a litigation guardian for the child concerned unless satisfied that it is not necessary to do so in order to safeguard his interests;
   (iii) Give reasons for its decision.

2. Where, in the case of any specified proceedings, the child concerned is not represented by counsel, the court shall:
   (i) Consider whether any of the conditions mentioned in section 35(4) is satisfied;
   (ii) If it finds that any of the said conditions is

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6 HRc et al v AG et al [2018] SC (Bda) 54 Civ (28 June 2018)
satisfied, consider whether to appoint counsel to represent the child concerned;
(iii) Give reasons for its decision.

(3) An order appointing a litigation guardian or counsel to represent the child concerned is made subject to sufficient funds being available to fund such appointment.

It ultimately reinforced the courts' lack of enforcement; since the judgment, the magistrates' court has only made one appointment, after a lengthy argument. At para. 31, the constitutional consequences are recognised but no remedy was provided:

“The Plaintiffs application for declarations regarding the funding of representation under section 35 is therefore dismissed. This leaves a deeply unsatisfactory situation where, pursuant to its statutory duty, the Family Court will make orders for the appointment of litigation guardians and counsel which will in many cases not be complied with for want of public funding. For the present at least, the legislative intent in enacting section 35 will continue to be frustrated and children’s constitutional right to meaningful participation in decisions which may be of vital importance to their lives and wellbeing will often remain unrealized.”

We are now before the Bermuda Court of Appeal in March 2019. An interesting question to ask is, why is it that British children in the British territory of England have the ‘Rolls Royce’ of child representation, yet British children in the British territory of Bermuda do not. Could it be that all British children are equal, but some British children are more equal than others?

Last year I submitted my concerns for children to the House of Commons Foreign Affairs Committee for consideration in the completion of its most recent study of British Overseas Territories. In its report ‘Global Britain and the British Overseas Territories: Resetting the relationship’,7 there is not a single recommendation regarding the welfare of children. In fact there is not a single mention of the welfare of children. However, at para. 67, the committee did recommend that all legally-resident English citizens should have the right to vote and to hold elected office in Bermuda, otherwise it “elevates one group of British people over another”.

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He has been on the defence team for serious criminal trials and appeals led by the illustrious criminal defence attorneys Elizabeth Christopher and John Perry QC. Such experience has aided his thorough approach to a gamut of legal matters, which often enables him to provide a lateral solution to a client’s ‘impossible’ legal problem.

Saul has been responsible for establishing new areas of law in Bermuda. He is a founding member of the Mental Health Treatment Court. The DUJ court in Bermuda was established through his case of Somner & Tucker [2016] SC (Bda) 81 App. He also the first lawyer to represent a patient before the Mental Health Review Tribunal, the first lawyer to be appointed by the magistrates’ court to represent a child in Children Act proceedings and the first to be appointed by the Supreme Court to represent a child in a matrimonial matter.

Saul frequently represents the Bermuda Human Rights Committee and a number of charities concerned with child welfare, civil rights and human rights. He has also been a member of a number of Boards and Committees.]

In April 2019 Cyrus Larizadeh QC is travelling to Bermuda to provide them with some much needed training in Child Law and he will be writing a follow up article for the Summer edition of Family Affairs.