January 2018

Family Law Week

NEWS

Millions of couples at severe financial risk due to 'common-law marriage' myth

Millions of unmarried couples living together are unaware that they are at severe financial risk as a result of the current legal system, Resolution has warned.

A poll of over 2,000 British adults, conducted by ComRes and commissioned by Resolution, to mark Cohabitation Awareness Week, has highlighted the misunderstanding of many cohabiting couples of the law in this area.

The poll found that:

- A quarter of Britons (27 per cent) wrongly believe that, after living together for more than two years, unmarried couples have similar rights to married couples if they break up
- Nearly two in five British adults (37 per cent) wrongly think it is true that unmarried couples who have lived together for more than two years benefit from what is known as a 'common law marriage'
- More than four in five Britons (84 per cent) agree that the government should take steps to ensure unmarried cohabitating couples are aware they do not have the same legal protection as married couples if they separate, or if one of them should die.

Statistics published by the Office for National Statistics in November 2017 revealed that the cohabiting couple is the second largest family type and the fastest growing, having more than doubled from 1.5 million families in 1996 to 3.3 million families in 2017. This, said the ONS, may be explained by an increasing trend to cohabit instead of marry, or to cohabit before marriage, particularly at younger ages.

Resolution chair Nigel Shepherd says the law needs to change, as the poll results show it "is falling desperately behind the times".

> "[The] poll shows that many still believe in the myth that they will get financial rights through 'common-law marriage'. This means millions of cohabiting couples are unaware that they don't have automatic claims, for example on the property they live in, if

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they split up. This makes it less likely they'll take steps to protect themselves.

"In many cases, this lack of protection affects women more than men, as they are still more likely to have taken time off work to raise children.
"The Government must listen to the public, legal professionals and a growing number of politicians who all agree that we need reform to provide basic rights to cohabiting couples should they separate.

"Society has changed – it's time for our laws to catch up."

For the poll, **click here**. For a letter calling for greater rights for cohabitants, signed on behlf of Resolution, the Bar Council , the ALC and others, **click here**.

1/12/17

Single parent surrogacy – remedial order goes to Parliament

A draft remedial order has been sent to Parliament in order to change the law on surrogacy for single parents. If passed, it will enable single mothers and fathers to apply for secure legal status for their families in just the same way as couples can currently do.

This development has been expected since May 2016 when the President of the Family Division, Sir James Munby, made a declaration in ***Z (A Child) (No 2)* [2016] EWHC 1191 (Fam)** that section 54(1) and (2) of the Human Fertilisation and Embryology Act 2008 are incompatible with Article 14 of the ECHR, taken in conjunction with Article 8.

Natalie Gamble Associates, who acted for the applicant father in Z, have welcomed the move, as has the single father client who is eagerly awaiting the final court order which will give him legal responsibility for his son.

The firm, **in its blog**, has outlined the procedure for changing the law.

"[The change] is likely to be some time in 2018. The remedial order will now be considered by Parliament over two periods of consideration (during which amendments can be proposed). The clock has now started ticking for the first 60 day consideration period, during which the Joint Committee for Human Rights will consider and scrutinise the order. Once this period has elapsed, the government will consider any proposed amendments, and the final order will then be laid for a further period of time. It is difficult to say how long this process will take (and whether a Parliamentary vote will be needed) but we would estimate between 4 to 6 months from here. We will be closely involved in this process, and will be reviewing the detail of the remedial order to raise any problems or issues."

For the blog entry by Natalie Gamble Associates, **click here**.

1/12/17

President of the Family Division Circular: Financial Remedies Courts

On 1 December 2017 the President of the Family Division, Sir James Munby, released the following circular concerning Financial Remedies Courts:

"The need for and the many benefits to be derived from the introduction of a national system of Financial Remedies Courts have been persuasively argued by HHJ Martin O'Dwyer, HHJ Edward Hess and Joanna Miles: *Hess and Miles, The recognition of money work as a speciality in the family courts by the creation of a national network of Financial Remedies Units* [2016] Fam Law 1335, and O'Dwyer, Hess and Miles, *Financial Remedies Courts* [2017] Fam Law 625. I have made clear my support for this: Note by the President [2016] Fam Law 1340, and *17th View from the President's Chambers: divorce and money – where are we and where are we going?* [2017] Fam Law 607.

Following discussions with HMCTS, I am proposing to pilot the Financial Remedies Court (FRC) concept in three places, starting, I hope, in February 2018: London, the West Midlands and South-East Wales. I envisage that further pilots will follow quite shortly on a rolling programme.

The basic concept, which builds on both the Family Court and regionalised Court of Protection models, is as follows (please note that the terminology is not yet finalised):

• A number of regional hubs, typically two per circuit (population or geography may require more), at which both the administration (HMCTS) and the judicial leadership for the relevant hub area are based.

• A lead judge for each hub area: this must be a judge (either a CJ or perhaps a DJ) with real experience / expertise in financial remedy work.

• A national lead judge with a deputy. Mostyn J and, as his deputy, HHJ Hess have agreed to fill these important positions.

• Hearings will be conducted (a) at the regional hub and (I emphasise this, because it is very important) also (b) at a number of Financial Remedies Hearing Centres (FRHCs) within the hub area.

• Initially the FRC will deal with ancillary relief cases; in due course, this will be extended to all financial remedy cases dealt with in the Family Court or Family Division.

Only 'ticketed' judges will sit in the FRC. All DJs and CJs currently in post who do this work will be 'grandfathered' in.

The FRC will function quite separately from the Regional Divorce Centres: initially in accordance with the current principles regulating

'administrative de-linking', pending full 'legal de-linking'.

Initially, the FRC will function with paper files, as at present, but HMCTS, with my support, is already working on transition by the FRC to a fully digitised model.

It follows from this that three critical issues relate to:

- The location of the proposed FRC hubs.
- The locations of the proposed FRHCs.
- The selection of the lead judge for each FRC hub.

In relation to the three pilots, local discussions on these matters are under way. Thought is also being given to where and when the next wave of pilots should begin.

I have kept the Association of District Judges aware of my thinking.

James Munby
President of the Family Division"

1/12/17

More legal aid support for victims of domestic violence, pledged by MoJ

Victims of domestic violence will get more support in taking abusive former partners to court, the Ministry of Justice has announced.

The current five year time limit on abuse evidence in the family courts will be scrapped, while the range of documents accepted as evidence of abuse will be widened to include statements from domestic violence support organisations and housing support officers. The changes will come into effect from January 2018.

The move represents the latest step to protect and support victims of domestic abuse. Earlier this year the government announced a £17 million fund to support 41 projects across the country to tackle violence against women and girls.

Justice Minister Dominic Raab said:

"We have listened to victims' groups and carefully reviewed the criteria for legal aid for victims of domestic abuse in family cases.

"These changes make sure that vulnerable women and children get legal support, so their voice is properly heard in court."

Legal aid is available to people involved in private family disputes if they are victims, or are at risk of becoming victims, of domestic violence or child abuse. To qualify, applicants must provide objective evidence of the abuse while their case is also subject to means and merits tests.

The latest changes announced follow a review of the evidence requirements set out in the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012. A statutory instrument amending the relevant regulations will be laid in Parliament in the coming days.

The government has also committed to bringing forward a landmark Domestic Violence and Abuse Bill.

5/12/17

Select Committee examines proposed HFEA order to remedy discrimination against single parents

The Joint Committee on Human Rights has called for written submissions on the Human Fertilisation and Embryology Act 2008 (Remedial Order) 2018.

This follows the Government's decision to lay a proposal for the remedial order before both Houses of Parliament. The purpose of the Government's proposal is to remove the incompatibility of section 54 of the Human Fertilisation and Embryology Act 2008 (HFEA) with Convention rights.

The Joint Committee on Human Rights is required by its terms of reference to report to Parliament on any remedial order made under the Human Rights Act.

The Committee will report on the draft proposal for a Remedial Order within 60 days of its publication.

The Joint Committee on Human Rights invites submissions of no more than 1,500 words from interested groups and individuals, including:

- Whether the remedial order removes the incompatibility with Convention rights identified by the courts
- Whether there are "compelling reasons" to use the remedial order process
- Whether the non-urgent procedure is appropriate.

A submission can be made using the **written submission form**. The deadline is Monday 8 January 2018.

For more information about the Committee's deliberations, **click here**. The remedial order is **here**.

7/12/17

14,000 new cases of FGM in two years highlights scale of the challenge: LGA

"The fact that there have been more than 14,000 new cases of FGM identified over the past two years highlights the scale of the challenge facing all agencies seeking to stop this horrific form of abuse." This was the response of Cllr Anita Lower, Deputy Chair of the Safer and Stronger Communities Board at the Local Government Association,

to **statistics produced by the NHS** covering the period from July to September 2017.

During that period there were 1,760 individual women and girls who had an attendance where FGM was identified or a procedure for FGM was undertaken. These accounted for 2,205 attendances reported at NHS trusts and GP practices where FGM was identified or a procedure for FGM was undertaken. This represents a slight fall since the previous quarter.

There were 1,060 newly recorded women and girls between July 2017 and September 2017. This was also slightly lower than the previous quarter. 'Newly recorded' means this is the first time they have appeared in the official statistics. It does not indicate how recently the FGM was undertaken, nor does it mean that this is the woman or girl's first attendance for FGM.

Cllr Anita Lower, who is also Chair of the Advisory Board for the **National FGM Centre**, run by the LGA in partnership with Barnardo's, said:

> "While it is encouraging that newly recorded cases of FGM have fallen slightly since the previous quarter, it is still concerning that there were more than 1,000 such cases, including 15 involving girls under the age of 18 and 20 cases where the procedure was undertaken in the UK.
> "It is vital that health trusts and GP practices continue to submit FGM data to help build reliable and accurate figures reflecting the prevalence of FGM across the country.
>
> "In the areas where the National FGM Centre is working, social work provision to girls and families affected by FGM has been quickly and significantly improved through the intervention of the Centre's social workers, who are embedded in council safeguarding teams. Hundreds of referrals have been received in areas that previously only recorded a handful of cases each year.
>
> "The Centre's pioneering prevention and intervention work is having an effective impact on reducing FGM by modelling good practice, sharing expert knowledge and building trusting relationships with families and communities with which they are engaged."

For the NHD Digital statistics, **click here**.

8/12/17

House of Commons to debate parental rights of prisoners

The House of Commons will debate parental rights of prisoners in Westminster Hall on Wednesday, 13 December 2017 at 9.30am. The Member leading the debate is Carolyn Harris MP. A record of the debate will be published online by Hansard.

The House of Commons Library will produce a **briefing or material** before the debate takes place.

8/12/17

Law Soc publishes behavioural research of consumers choosing divorce services

The Law Society has responded to the Solicitors Regulation Authority (SRA) consultation Looking to the Future: better information, more choice.

The consultation makes a number of proposals, including a new requirement that solicitor firms should be required to publish price and service information on their websites for certain areas of law relating to individuals and small business customers.

The Law Society's response has been informed by specially commissioned independent behavioural research, carried out by London Economics and YouGov, to better understand consumer behaviour and help solicitors to provide the best information to consumers. The research explores the consumer decision-making process when searching for legal services in three areas, one of which is divorce.

The research showed that consumers may not read or understand all of the information that they are provided, and may overlook important factors if information is presented in the wrong way.

In respect of price transparency, the Law Society response states that some consumers will not be able to assess the extent of their legal needs at the time of initial enquiry. It is therefore unlikely that accurate and meaningful price information can be provided on a website. Any elements of litigation or disagreement can result in uncertainty, meaning family law disputes can present particular problems in this regard. The research shows that divorce customers are more likely to understand that unforeseen complications can cause price changes.

The Law Society says that it is important that clients can make informed decisions about the solicitors they choose, and they need to have the right information at the right time. However, it says, clients have very different legal needs, and legal services are complex. Simply requiring more information to be published on websites is unlikely to result in people making more informed choices. Solicitors are already required to provide the best possible information on cost to their clients, and the SRA should allow the market to respond to consumer demands for information in an appropriate way.

For the Law Society response and the behavioural research, **click here**. For the consultation paper, **click here**.

8/12/17

Care applications received by Cafcass 5% down on a year ago

In November 2017, Cafcass received a total of 1,228 care applications. This figure represents a 5 per cent decrease compared with those received in November 2016 (1,294) but is the second-highest monthly total for a November on record.

For the month-by-month figures, **click here**.

14/12/17

New private law cases received by Cafcass in November were 9% ahead of last year

In November 2017, Cafcass received a total of 3,811 new private law cases. This is a 9 per cent increase compared with those received in November 2016 (3,498) and is the highest demand for the month of November since 2012.

The number of received private law cases received in the current financial year is just under 7 per cent ahead of the corresponding months last year.

For a month-by-month table, **click here**.

14/12/17

Average duration of care proceedings remains at 28 weeks

The average time for a care or supervision case to reach first disposal was 28 weeks in July to September 2017, one week up from the same quarter in 2016 but remaining steady compared to the previous two quarters.

The **latest statistics released by the Ministry of Justice** reveal that 59 per cent of cases were disposed of within 26 weeks. This is down 4 percentage points over the same period for 2016.

There were 65,247 new cases started in family courts in July to September 2017, up 2 per cent on the corresponding period in 2016. This was mainly due to increases in domestic violence remedy order applications and private law cases (up 10 and 4 per cent respectively).

The removal of legal aid for many private law cases in April 2013 has resulted in a change in the pattern of legal representation over time. In July to September 2017, the proportion of disposals where neither the applicant nor respondent had legal representation was 35 per cent, an increase of 18 percentage points since April to June 2013. Correspondingly, the proportion of cases where both parties had legal representation dropped by 16 percentage points to 19 per cent over the same period.

In July to September 2017, it took on average 23 weeks for private law cases to reach a final order, i.e. case closure, up slightly on the same period in 2016. There are continued signs of a reversal in the downward trend seen since the middle of 2014.

In July to September 2017, there were 1,373 adoption order applications, down 6 per cent on the equivalent quarter in 2016. Similarly, over the same period the number of adoption orders issued decreased 11 per cent to 1,305.
There were 1,077 applications relating to deprivation of liberty in July to September 2017, up 38 per cent on the equivalent quarter in 2016.

Deprivation of liberty orders were up 57 per cent over the same period, from 362 to 569.

For the full statistics, **click here**.

14/12/17

MIAMs between July and September down 5% on a year ago

Mediation Information and Assessment Meetings (MIAMs) were down by 5 per cent in the last quarter compared to the previous year. Between July and September 2017 there were 2,752 MIAMs. That number stands at just over a third of pre-LASPO levels. The figures have been revealed by the Ministry of Justice.

There were 1,614 mediation starts between July and September 2017. This was down by 14 per cent on the corresponding period last year. Mediations are now running at around half of pre-LASPO levels.

For an article – ***MIAMs: a worthy idea, failing in delivery*** by Andrew Moore and Sue Brookes, of Mills and Reeve LLP – **please click here**.

For the full statistics, **click here**.

14/12/17

Child maintenance consultation launched

The Department for Work and Pensions is **asking for views** on options to give the Child Maintenance Service (CMS) stronger compliance, collection and enforcement methods to make sure parents are meeting their responsibilities towards their children.

The Child Maintenance Service was established in 2012 to replace the old Child Support Agency (CSA). Steps have already been taken to strengthen the action taken against parents who don't pay the child maintenance they owe, including consulting on seizing unpaid maintenance from joint bank accounts.

The current consultation proposals include:

- removing passports – parents who persistently do not pay the child maintenance they owe could face being banned from holding or obtaining a UK

passport for up to two years

- improved calculations – income from capital, foreign income, notional income from assets and unearned income could all be taken into account when the CMS works out how much maintenance a parent owes

- deductions from business accounts – the CMS could seize funds from sole trader and partnership accounts to pay off a parent's unpaid maintenance bill.

The consultation also outlines proposals to address historic unpaid child maintenance built up under the old CSA, and options for writing it off. New analysis shows that it would cost the government £1.5 billion to collect the debt, most of which is owed on CSA cases where the children are now adults.

The consultation closes on 8 February 2018.

For details of the consultation, **click here**.

15/12/17

Child maintenance arrears: proactive use of part payment

Proactive discussions with non-resident parents of part payment in full and final settlement of any arrears of child support has proved to be an ineffective tool for recovering arrears.

The Department for Work and Pensions has published a report presenting the findings of a trial to determine whether such discussions with clients is a good tool to recover arrears owed to parents with care.

This trial tested both discussing the option of part payment with non-resident parents first and parents with care first. If the first party called was open to part payment the offer was put to the other party. Offers were passed between parties by the Child Support Agency until an agreement was reached or payment refused.

The trial established that proactive discussions of part payment are not an effective tool for recovering arrears. There was no significant difference in the number of cases with arrears paid, or the average value of arrears paid, between the control group and other cases in the trial. The trial cost £307,000, and therefore proactively discussing part payment is not cost effective.

The low rate of payment was due to a large number of cases being unsuitable for proactive discussions of part payment, unsuccessful contact for many clients, as well as refusal of part payment.

However, in a third of cases where parents with care were called first, the parent with care wanted the arrears owed to them written off, rather than further action taken to attempt to collect the debt.

For the report, **click here**.

15/12/17

Law Commission to consider the law of surrogacy

The Law Commission has confirmed that, as part of its **13th Programme of Law Reform**, the Commission will consider the law of surrogacy. The Commission says that over the past 10 years the use of surrogacy has risen, but the law in the UK is outdated and unclear and requires comprehensive reform to keep up with the modern world.

The project will consider the legal parentage of children born via surrogacy, and the regulation of surrogacy more widely.

It will take account of the rights of all involved, including the question of a child's right to access information about their origin and the prevention of exploitation of children and adults.

For details of all 14 projects contained in the current programme, **click here**.

15/12/17

Family Justice Council 11th Annual Debate transcript and podcast available

The Family Justice Council held its 11th Annual Debate and panel discussion in London on Tuesday, 21 November 2017. The topic for this year's debate focused on the court's role in sanctioning medical treatment and the withdrawal of medical treatment of children. The motion read:
"Parental autonomy and a child's best interests: Should the courts have the final say?"

The event was chaired by the Right Honourable Sir James Munby, President of the Family Division of the High Court and Chairman of the Family Justice Council. The speakers were:

- Matthew Parris – Former MP, author, columnist and broadcaster.

- Jonathan Herring – Professor of Law at University of Oxford.

- Michael Freeman – Emeritus Professor of English Law at UCL.

- Victoria Butler-Cole – Barrister at 39 Essex Chambers.

To read a transcript of proceedings or to download a podcast, **click here**.

15/12/17

500 child protection investigations started every day

More than 500 child protection investigations were started every day on average last year by councils concerned about children at risk of harm, the **Local Government Association** has revealed.

The LGA, which represents 370 councils across England and Wales, said the "alarming" new figures show an increase from 200 investigations per day just a decade ago.

With so many children deemed to be potentially at risk, social workers are working around the clock to investigate concerns and if necessary put in place measures to help keep them safe from harm.

With 90 children entering the care system every day last year, the LGA is calling on the Government to use the upcoming Local Government Finance Settlement to resolve the £2billion funding gap that is facing children's services by 2020. The LGA says that failure to close this gap will leave many children and families across the country, who desperately rely on these crucial services, at risk.

Cllr Richard Watts, Chair of the LGA's Children and Young People Board, said:

> "It is alarming that councils are having to undertake around 300 more investigations every day than this time 10 years ago. By 2020, our children's services departments will be facing a funding gap of £2 billion.
>
> "It was extremely disappointing that last month's Budget provided no additional funding for children's services. The Government has been warned repeatedly that ongoing funding cuts have left councils struggling to provide the support that vulnerable children and families need.
>
> "Children will only be taken into care if it is absolutely necessary for their own protection. But if concerns are raised, it is absolutely right that the council investigates. With councils now starting 500 child protection investigations each day, along with providing the other vital services that they deliver, children's services have now reached a tipping point.
>
> "This has to be wake up call to government that unless there is an injection of funding to support crucial early intervention services, many more vulnerable children and families will need formal support from council child protection services in the years to come.
>
> "Last year, 75 per cent of councils were forced to overspend their budgets by millions to ensure children at immediate risk of harm were protected. We've reached the point where this service can no longer be ignored. It is absolutely crucial that the forthcoming Local Government Finance Settlement addresses this funding gap."

15/12/17

Court of Protection: New Practice Directions

The Practice Directions hitherto supplementing the Court of Protection Rules 2007 have been revoked. A new suite of Practice Directions supplementing the Court of Protection Rules 2017 has been made by the President of the Court of Protection under the powers delegated to him by the Lord Chief Justice, and are approved by Dr. Phillip Lee, Parliamentary Under-Secretary of State for Justice, by the authority of the Lord Chancellor.

For the new Practice Directions, effective from 1 December 2017, **click here**.

20/12/17

Jewish transgender father wins ground-breaking appeal in fight to see her children

The Court of Appeal has handed down judgment in a case that brings to the fore the tension between, what it termed, deeply discriminatory practices in isolated communities and the broadminded outlook of the modern world. Firmly rejecting any notion that discrimination should prevail and children be denied a relationship with their father, the Court of Appeal described this matter as a "stark, deeply saddening and extremely disturbing" case which potentially has "profound significance for the law in general, and family law in particular".

Background

In ***Re M (Children)*** **[2017] EWCA Civ 2164** the father, a transgender woman, brought an application for contact with her five children after being forced to leave the North Manchester Charedi Ultra-Orthodox Jewish community in 2015. She was shunned as a result of her trans status, and there was a concern that her children would be too if they remained in contact with her.

Although critical of the Charedi Community, the judge at first instance, Mr Justice Peter Jackson, decided in February 2017 – cited as ***J v B (Ultra-Orthodox Judaism: Transgender)*** **[2017] EWFC 4**, [2017] WLR(D) 142 – that the community's threat to ostracise the children posed such a risk of psychological harm to them that they should be limited to receiving letters from her, four times a year.

As the Court of Appeal mused at the outset of its judgment: "We suspect many reading this will find the outcome both surprising and disturbing, thinking to themselves, and we can understand why, how can this be so, how can this be right?"

The Court of Appeal's decision

Comprising of The President of the Family Division, Sir James Munby, Lady Justice Arden and Lord Justice Singh, the Court of Appeal disagreed with Mr Justice Peter Jackson's ruling in a 138-paragraph, joint judgment which serves as a stark reminder that discriminatory behaviour cannot and will not be tolerated in the Family Court, and the judges hearing these cases must persevere in their attempts to make contact happen, even when faced with such intransigence and hostility.

In overturning Mr Justice Peter Jackson's decision and remitting the matter back to the High Court for further consideration, the Court of Appeal said as follows:

- When parents cannot agree and make an application to the Family Court, the judge hearing the matter must act as a "judicially reasonable parent" judging the child's welfare by the standards of reasonable men and women of today in 2017, that is people who are "receptive to change, broadminded, tolerant, easy-going and slow to condemn." In the present case, the judge should have asked himself a number of pertinent questions before reaching his decision, including "How can the order give proper effect to the reality, whether the community likes it or not, that the father, whether transgender or not, is and always will be the children's father and, as such, inescapably part of their lives, now, tomorrow and as long as they live?"

- The judge did not address 'head on' the human rights and discrimination issues that arose, and especially, that: "Even secluded religious communities within society are not above the law of the land."

- In making a final order for letter-contact only, the judge "gave up too easily" on making direct contact work, his decision being described as "premature".

Concluding, the Court of Appeal held:

> "The best interests of these children seen in the medium to longer term is in more contact with their father if that can be achieved. So strong are the interests of the children in the eyes of the law that the courts must persevere. As the law says in other contexts "never say never". The doors should not be closed at this early stage in their lives."

Commenting on the decision, the legal team acting for the father, Alison Ball QC of 1 Garden Court Family Law Chambers, Hassan Khan of 4 Paper Buildings, instructed by Colin Rogerson and Anne-Marie Hutchinson OBE QC (Hon) of Dawson Cornwell said:

> "This decision is one that will be welcomed not just by LGBT individuals living within small religious groups, but by the LGBT community in general. It sends a clear message that no religious community can operate on their own island but must conform to the law of the land. We are grateful to Stonewall Equality Limited and Keshet Diversity UK for their interest and input in this case."

An article from the father's legal team, considering this judgment and particularly, its implications on the way human rights issues are ventilated in the Family Court and the likely impact upon decisions made in children proceedings, will be available in January 2018.

For the judgment, prefaced by a summary written by **Hassan Khan** and **Charlotte Baker** of **4 Paper Buildings**, **click here**.

21/12/17

New Family Law Silks announced

Seven new specialist family lawyers have been awarded silk. In total there were 119 new appointments of Queen's Counsel.

Family Law specialists whose applications have been successful this year are:

- **Nicholas Allen** of **29 Bedford Row Chambers**
- **Michael Glaser** of **Fourteen**
- **Sam King** of **4 Paper Buildings**
- **Vanessa Meachin** of **3PB**
- **Gemma Taylor** of **42 Bedford Row**
- **Owen Thomas** of **9 Park Place**
- **Nicholas Yates** of **1 Hare Court**

Among the successful applicants are:

- 32 women of the 50 who applied. Last year, 31 out of 56 female applicants were successful.
- 18 applicants who declared an ethnic origin other than white of the 33 who applied. Last year, 16 such applicants out of 37 were appointed.
- 21 applicants aged over 50, compared with 20 last year. The youngest successful applicant is 34 years old and the oldest is 63.
- Five solicitor advocates of the 10 who applied. In 2015-16, six solicitor advocates were appointed.

The new Queen's Counsel will formally become silks when they make their declaration before the Lord Chancellor at the ceremony on 26 February 2018.

For the complete list of appointments, **click here**.

21/12/17

House of Commons Committee calls for better support for foster carers and children in care

The House of Commons Education Committee concludes in its latest report that children in foster care must be given better information about their placements, placed with their siblings where possible and have access to advocacy services.

The Committee finds the foster care system is under pressure and that the Government needs to conduct a fundamental review of the whole care system to ensure children get the support they need. The report calls on the Government to do more to prevent unnecessary placement breakdowns, increase the number of foster carers in the system and improve working conditions by establishing a national college to support carers.

During the inquiry, the Committee heard from one young person who had been through eight placements in four years, another who had "moved six times in less than no time", while another had lived in thirteen different foster placements and two children's homes in five years. The Committee also heard directly from young people who had faced difficulties in maintaining regular and meaningful contact with siblings and family members.

The Committee is calling on the Department for Education to initiate a national recruitment and awareness campaign to improve capacity in the system. It must also support local authorities and foster care providers in piloting new ways of working, especially through more early intervention and prevention.

The Committee's report makes a range of recommendations relating to valuing young people, valuing foster carers and valuing care.

For the report, **click here**.

22/12/17

ARTICLES

Finance and Divorce Update, December 2017

Frances Bailey Principal Associate and Naomi Shelton, Associate with Mills & Reeve LLP, analyse the news and case law relating to financial remedies and divorce during November 2017.
As usual this month's update is divided into two parts:

A. News in brief and

B. Case Law Update

A. News in brief

Pilot Financial Remedies Courts to launch early next year

Six months after declaring that the time had come to 'de-link' divorce and money, the President of the Family Division, Sir James Munby is proposing to pilot a financial remedies court 'concept' in London, the West Midlands and south-east Wales. Further pilots are expected to follow.

The basic concept builds on the Family Court and Court of Protection models. Each circuit will typically have two regional hubs, headed by a lead judge expert in financial remedy work. Mr Justice Mostyn has agreed to be the national lead judge; His Honour Judge Edward Hess will be deputy lead judge. Hearings will be conducted at the regional hubs and some financial remedies hearing centres within the hub area. Ticketed judges will initially deal with financial relief cases, with the work being expanded to cover all financial remedy work in time. The FR courts will function separately from the regional divorce centres.

A poll marking Cohabitation Awareness Week underlines the extent of the "common-law marriage" myth

The poll commissioned by Resolution found that a quarter of Britons wrongly believe that, after living together for more than two years, unmarried couples have similar rights to married couples on separation, and over a third wrongly think it is true that unmarried couples who have lived together for more than two years benefit from what is known as a 'common law marriage'. More than four in five Britons (84%) agree that the government should take steps to ensure unmarried cohabitating couples are aware they do not have the same legal protection as married couples if they separate, or if one of them should die.

Statistics published by the Office for National Statistics in November 2017 revealed that the cohabiting couple is the second largest family type and the fastest growing, having more than doubled from 1.5 million families in 1996 to 3.3 million families in 2017.

Calls for legal aid for early advice to be reinstated in family cases

Research commissioned by the Law Society shows a clear statistical link between getting early legal advice and resolving problems sooner. According to the Law Society, the analysis adds weight to the argument that early legal advice – much of which was removed under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 - should be reinstated. The

research states that, on average, one in four people who receive early professional legal advice had resolved their problem within three to four months. For those who did not receive early legal advice, it was not until nine months after the issue had first occurred that one in four had resolved their issue.

Practice Guidance released

Sir James Munby, President of the Family Division, has issued Practice Guidance and a set of standard financial and enforcement order for general use. Whilst the orders do not have the strict status of forms (within Part 5 FPR 2010), their use is being strongly encouraged. The standard orders can be varied to suit the particular circumstances of a case but the President has indicated that the orders are to "represent the starting point, and, I would hope and expect, usually the finishing point, of the drafting exercise".

Child Support Agency caseload continues to fall

The case closure process has seen the CSA's caseload fall to 906,400. The bulk of these cases have no current liability and no payments are being made. Due to the way case closure is working, many of the cases left with the CSA have arrears (because they cannot be fully closed).

Resolution, FLBA and the IAFL publish paper on post-Brexit family law options

Resolution, the Family Law Bar Association and the International Academy of Family Lawyers, have published a paper, Brexit and Family Law, which sets out the options for family law following the UK's withdrawal from the EU.

The paper states that current reciprocal agreements between the UK and other EU member states, which have evolved over decades, bring vital assurances to families across the EU. It ensures orders made in one country can be enforced in another, for example, as well as harmonising the rules for where a case can be heard. The three organisations say this reciprocity must be maintained after Brexit, in order to provide safeguards and reassurance to those families and their children affected by divorce or separation, and involved in cross-border EU-UK family or child protection cases.

There are approximately 140,000 international divorces and 1,800 cases of child abduction within the EU each year. If family law remains unaddressed, the bodies warn, it would leave British citizens facing these issues in a position of significant vulnerability and confusion, and would lead to unfair outcomes.

House of Commons debates family justice reform

The House of Commons held a Westminster Hall debate on family justice reform on 15 November 2017. The debate was secured by Suella Fernandes, a Conservative MP and former lawyer. In the debate Ms Fernandes called for, and Members discussed, the introduction of:

- a rebuttable presumption of shared parenting
- no-fault divorce
- enforceability of pre-nuptial agreements
- protection of cohabitants on separation and
- greater transparency in the family courts.

For the Hansard record of the debate, click here.

First Courts and Tribunals Service Centres launched

The country's first Courts and Tribunals Service Centres will be launched in Birmingham and Stoke-on-Trent. The centres will bring together expertise in managing court and tribunal cases as cases transfer from traditional paper-processes to modern digital systems. The two centres will employ more than 300 people each, in roles that range from processing cases, and issuing court orders and hearing notices, to answering telephone and web enquiries.

The new service centres are being planned based on research into what users want and need, and in consultation with judges, magistrates and legal professionals, as well as agencies that represent the public and support people with cases going through the justice system.

New Part 3A inserted into Family Procedure Rules 2010

The Family Procedure (Amendment No 3) Rules 2017 came into force on 27 November 2017. They inserted a new Part 3A into the FPR 2010 making special provision about the participation of vulnerable persons in family proceedings and about vulnerable persons giving evidence in such proceedings.

Nearly three-quarters of divorced people did not discuss pensions during divorce proceedings

Seven in ten couples do not consider pensions during divorce proceedings, leaving women short-changed by £5billion every year, according to new Scottish Widows research. The research shows that more than half of married people (56%) would fight for a fair share of any jointly owned property, and 36% would want to split their combined savings. Yet fewer than one in ten (9 %) claim they want a fair share of pensions, despite the average married couple's retirement pot totalling £132,000 – which is more than five times the average UK salary of £26,000. In fact, according to the research, more married people would be concerned about losing a pet during a settlement than sharing a pension (13% vs 9%).

The key findings also include that women are less well-prepared for retirement, with only 52% saving adequately, compared with 59% of men, and that divorced women are even less prepared – 24% are not saving anything into a pension. Scottish Widows says that almost half of women (48%) have no idea what happens to pensions when a couple gets divorced, which may explain why so few couples consider them as part of a settlement. 22% presume that each partner keeps their own pension and 15% believe they are split 50-50, no matter what the circumstances.

B. Case Law Update

Richardson-Ruhan v Ruhan [2017] EWHC 2739 (Fam)

In Richardson-Ruhan, the court was faced with a hugely complex financial remedy matter. The judgment deals solely with findings of fact/computation of assets, leaving distribution to be dealt with at a further three day hearing.

The case was heard by Mr Justice Mostyn in public with certain reporting restrictions imposed. The case had attracted attention from the media prior to Final Hearing due to the high profile of the husband.

The applicant wife was 49 and respondent husband was 55. The parties married in 1997 and were married for 16 years, before separating in 2013. There were two children of the marriage, aged 16 and 19 at the time of judgment.

The court was asked to determine a key fact in dispute between the parties, namely whether the husband was still very rich (his fortune had been around £200m) or, as presented by the husband, he was insolvent to the tune of £2m. The husband's case was that virtually his entire fortune had been stolen from him in 2014 by a convicted fraudster, Dr Smith, with the assistance of the husband's former "front-men". The wife argued that this was a false presentation and that the husband remained vastly rich in that very large sums, or his right to receive very large sums, were held on his behalf by a nominee, Mr Stevens, and that he had potential further wealth due to him depending on the outcome of an arbitration against BAE.

The court had regard to the related, hugely complex, commercial litigation involving the husband and Dr Smith, which informed the wife's financial remedy application.

By way of a brief background to that litigation, Mostyn J's judgment records that Dr Smith had been imprisoned in 2006 for theft and false accounting relating to a company, Orb, of which he had been chief executive. According to the husband's counsel, he chose to blame the husband for his conviction and incarceration and claimed that the husband held assets worth in excess of £41m which belonged to him.

Following his release from prison Dr Smith (through his cohorts) intimated claims against the Husband, leading to the launch of the 'Orb proceedings' in 2012. By the time of the hearing before Mostyn J, the commercial litigation had given rise to seven reported judgments, numerous other rulings and orders, a foray to the Court of Appeal, as well as proceedings in the Isle of Man, the BVI and an appeal in the Eastern Caribbean Court of Appeal. The first round of litigation was settled by consent on a drop hands basis but there had recently been a 'spring back into life' (the 'Phoenix proceedings').

The husband at pre-trial review asked the court to adjourn the wife's claims until after the conclusion of the Phoenix proceedings which the court declined to do given the long-standing of the wife's financial remedy claims, which had been ongoing since January 2014. The Judge did however order that the wife's statement of case be served on all parties to (and interested in) the Phoenix proceedings and extended permission for those parties to intervene. No third parties took up that invitation.

Mostyn J was tasked with the complex job of summarising the effect of the judgments in the Orb litigation and the impact of the Phoenix litigation on the issues to be decided by him.

The fundamental question for Mostyn J to decide was whether Mr Stevens has acted as the husband's nominee, particularly in relation to the transfer of £92m by one company to another company in which Mr Stevens had been transferred the shares, and the creation of a loan note for £73.75m in favour of Mr Stevens following the settlement of the Orb litigation.

Mostyn J determined that Mr Stevens was a nominee for the husband. He placed significance on the fact that the husband habitually used nominees for his business dealings and referenced a number of examples of this. His Lordship also confirmed that he was satisfied by the wife's truthful evidence of her knowledge of the existence of the husband's nominee and found it 'highly significant' that Mr Stevens had not intervened in the proceedings, or at the very least appeared as a witness, to defend his ownership of certain assets. He was satisfied that the test for a sham (as summarised by him in ***Bhura v Bhura*** **[2014] EWHC 727 (Fam)**) was fully met.

Mostyn J also determined that of the £92m that had been transferred to Mr Stevens, all but £12m had been spent and that the husband should therefore be treated as having the sum of £12m available for the purposes of a distributable award.

In so far as the Husband' s interest in the £73.75m loan note and 50% in a further company called Sentrum Rugby, the Judge found that no-one but the wife had any valid claim against the husband, those assets representing the consensual recovery achieved by the husband of his own money following the appropriation of Dr Smith. He further noted that Dr Smith had not taken up the opportunity to intervene in the matrimonial proceedings to argue that the monies appropriated by him were, in fact, his or to be treated as his and in his view it would be an abuse were Dr Smith, or his cohorts, to be allowed in later proceedings to assert that that was the case.

Mostyn J did note that it remained to be seen whether the husband would make any meaningful recovery of the funds owing in the Phoenix proceedings and confirmed that he did not seek to trespass on the future of that civil case.

So far as next steps were concerned, His Lordship invited the wife to formulate what distribution she sought in her favour, for the husband to respond to that claim and for the parties to agree the necessary directions for that process. Mostyn J ordered that the matter be re-fixed for a three day hearing before him to deal with the issue of distribution.

Hayes v Hayes **[2017] EWHC 2806 (Ch)**

Hayes concerned a former wife's appeal against the dismissal of her application to set aside a statutory demand served on her by her former husband.

There was a convoluted litigation history to the matter but the debt in question was £15,085.38 (plus interest), representing the total of various costs orders made against Mrs Hayes, and due to Mr Hayes, pursuant to various court orders in three different sets of proceedings spanning at least 8 years, beginning in 2007.

Mrs Hayes' application to set aside the statutory demand was heard at first instance by Deputy District Judge Wright in January 2017. Various arguments were put by Mrs Hayes but her application was dismissed. She sought was given permission to appeal, following an oral hearing (the transcript in respect of which, the appeal court noted, was incomplete), on limited grounds.

Pursuant to the grant of permission, the primary issue the court had to determine was the effect, if any, that a settlement between Mrs Hayes (and others) and Mr Hayes' trustee in bankruptcy, pursuant to which Mrs Hayes bid £66,000 for the trustee in bankruptcy's claims for financial losses incurred by Mr Hayes prior to 2 April 2006 and for potential personal injury damages, had on the costs orders forming the basis of the statutory demand.

Mr Justice Morgan, sitting in the High Court, found that the costs orders in question were outwith the terms of the agreement with the trustee in bankruptcy and that the benefit of those costs orders remained vested in Mr Hayes when he was discharged from his bankruptcy. The costs orders made against Mrs Hayes were therefore unaffected by the agreement and by anything that had happened previously.

As such, Mrs Hayes' appeal was dismissed and, indeed, Mr Justice Morgan found that there had never been any prospect of success. However, recognising that she had been given permission to appeal, he noted he had given the issues a good deal of thought.

Radseresht v Radseresht – Spain **[2017] EWHC 2932 (Fam)**

In Radseresht, Cohen J dealt with an application for recognition of a divorce granted in Dubai in 2009, a declaration of marital status under s 55 Family Law Act 1986 and, following on from that, a strike out of a petition subsequently brought by the applicant's wife in England & Wales.

The parties had married in 1992 in Tehran and, as was clear from Cohen J's judgment, lived an international life with business and property interests extending to Ireland, the US, Iran and the UAE. The Wife was an Irish Catholic, who

converted to Islam for the purposes of the marriage to the Husband, but never practised the religion and, of note, did not read or write Arabic.

The key events surrounding the Dubai divorce in 2009 were as follows: -

• In spring 2009, the Husband became suspicious that the Wife was having an affair. He subsequently instructed a private investigator and his suspicions turned out to be justified (and indeed the Wife admitted the affair);

• On 1 April 2009, the Husband alleged that in an argument in San Francisco he pronounced a talaq, overheard by people in his office in Dubai. The Dubai courts subsequently found the witnesses' evidence to be conflicting;

• In August 2009, the Husband instructed solicitors. They filed a case in the courts in Dubai and prepared a draft financial settlement and a power of attorney for the Wife to sign. The power of attorney was in Arabic and appointed someone who, Cohen J found, the Wife had had no choice or say in selecting;

• The Husband argued that the contents of the settlement agreement were discussed between the parties in a ten day period in mid-August 2009 but this was not accepted by Cohen J;

• On 27 August 2009, whilst packing to return to London with the two younger children, the Wife was presented with the settlement agreement and power of attorney to sign. She was not given the opportunity to take advice, could not read the power of attorney, which was in Arabic, no financial disclosure was provided and she was not given copies of either document to go away and take advice on. Notwithstanding that, she signed. Cohen J noted that some of the terms of the settlement agreement were draconian, particularly in relation to the children, who were to remain in the custody and guardianship of the Husband, and the Wife's conduct of her household going forward;

• The power of attorney was returned to the Husband's PA, who sent it to the Husband's lawyer, who sent it on to the Wife's attorney. Cohen J found that the Wife's attorney was selected by the Husband's advisers, the Wife did not understand the agreement she signed appointing him and the attorney never communicated with her in any way;

• The matter came before the Dubai courts on 8 September when a two-week adjournment was obtained (at, apparently, the Wife's attorney's request although Cohen J notes that no explanation of what happened that day had been given);

• At the adjourned hearing on 24 September the Dubai court ordered the witnesses to the alleged talaq to appear at court at a further hearing in October. They did and gave conflicting evidence. However, giving judgment on 3 November 2009, the Dubai court found that there had been a divorce on 24 September 2009 as (a) the Husband bringing his application was equivalent to a declaration he wanted a divorce and (b) the appearance at court on 24 September 2009 amounted to a single revocable talaq.

Cohen J therefore had to consider (a) whether the 24 September 2009 divorce should be recognised and (b) the issue of revocability.

In relation to the former, Cohen J found that the divorce should not be recognised (relying on section 51(3)(a) FLA 1986) as it was obtained (i) without proper notice and (ii) without the Wife being given the opportunity to take part in the proceedings. He found the Wife had had no notice. The power of attorney was in Arabic and no copy was provided to the Wife. Whilst the settlement agreement made reference to divorce those references did not constitute proper notice (it did not refer to the filing of a petition, commencement of proceedings or any court hearing dates).

The Husband's counsel attempted to argue that, notwithstanding those findings, the court had discretion to recognise the divorce anyway as the Wife's financial interests could be protected by other means (namely by a Part III application under the 1984 Act), relying on ***Lachaux v Lauchaux* [2017] EWHC 385 (Fam)**. Cohen J rejected that argument, noting that (i) the Wife's award under a Part III claim would not necessarily be the same as under an MCA 1973 claim, (ii) that the Husband in any Part III application would argue that there had been a valid divorce and weight should be placed on the settlement agreement, (iii) that Moylan J's (as he was then) comments in Lachaux were, in any event, taken out of context and (iv) issues could turn on whether the Wife was divorced in 2009 or 2017.

On the question of revocability, little turned on it given Cohen J's findings as to notice and participation. However, for completeness His Lordship addressed it in his judgment. Under Islamic law, a revocable divorce can be revoked if the parties, in the 90 day period following the divorce, have exhibited an intent to continue the matrimonial partnership. Having considered the facts, he found there was such an intention.

S v S (Applicant to Prevent Solicitor Acting) [2017] EWHC 2660 (Fam)

In S v S, Williams J had to deal with an application by a husband in defended divorce proceedings (the Husband defending the divorce, asserting that the parties were already divorced in Russia and disputing the Wife's habitual residence) for an order that the Wife's solicitors be debarred from acting for her in the proceedings and/or in any related or ancillary proceedings arising out of the dissolution of the marriage.

The issue arose due to a disputed meeting which the Husband claimed his representative, OE, had with Sears Tooth, on 30 November 2015. The Wife, subsequently, on 26 September 2016 issued a divorce petition in the Central Family Court, with Sears Tooth as her solicitors. The Husband had, in fact, signed a retainer letter with his representatives, Hughes Fowler Carruthers, a week before the disputed meeting in November 2015 (a fact that was disclosed at the hearing).

The law was, in the most part, not in issue, save for three issues, namely (a) whether the risk of disclosure of confidential or privileged information can come from subconscious or unconscious influence (b) whether there can be a partial waiver of privilege and how that might be dealt with and (c) whether, if the grounds are established, the granting of an injunction is mandatory or discretionary.

Williams J helpfully summarised the law as follows:

- duties of confidentiality and legal professional privilege arise whether the information is imparted directly or by the use of an agent;

- the duty arises regardless of whether a formal legal relationship is entered into or not;

- the rules apply in family cases just as much as civil ones. However, there is no absolute rule that a solicitor cannot act in litigation against a former client;

- in the first instance it is for the solicitor to decide whether he can continue to act but the court retains the power to grant an injunction preventing them from acting;

- public policy reasons rooted in the proper administration of justice support the approach that a solicitor in receipt of information imparted in confidence by a former client should not act in a way which might appear to put that confidential information at risk of coming into the hands of someone with an adverse interest;

- the confidential or privileged information in question must be relevant or potentially relevant to the matter on which the solicitor is now instructed by the person with an adverse inference;

- the court should intervene to prevent confidential or privileged information from coming into the hands of someone with an adverse interest, unless there is no real risk of disclosure, 'real' meaning the risk is not fanciful or theoretical, but not requiring the risk to be substantial;

- the risk of disclosure may arise from a deliberate act, inadvertent disclosure, unconscious influence or subconscious influence;

- in family cases, it is hard to conceive of a situation where the risk of disclosure would not satisfy the above test, where the court has found there has been disclosure of detailed, confidential financial or privileged information to a solicitor which was, or might be, of relevance to the dispute;

- the party making the application may decline to waive privilege or confidentiality, or may elect to only partially waive privilege. If privilege is partially waived the court can order full disclosure to be able to determine the issue, whilst ensuring privilege is not waived for all purposes (later in the judgment Williams J mentions in passing the possibility of adopting a special advocate type measure to protect privilege, subject to questions as to proportionality);

- if the principles are established, an order should usually be made preventing the solicitor from acting. The exception would be where there were significant public policy reasons for not granting the application, including that the injustice to the respondent in granting it would outweigh the injustice to the applicant in not granting it. Williams J comments that, in determining that issue, the court may look at the purpose of the imparting of information (whether it was done simply to conflict out other solicitors), what other solicitors could act for the respondent and the costs and delay of changing representatives, whether the application was made promptly to debar etc.

The case largely turned on factual issues, in respect of which Williams J found, on the balance of probabilities that:

- a meeting had taken place between the Husband's representative and Mr Tooth of Sears Tooth on 30 November 2015;

• no confidential material was imparted to Mr Tooth at that meeting and no privileged information or advice arose. Williams J found that the facts suggested that the it had been a very brief meeting which, perhaps, the representative was attending to complete the job of going around the firms he had been instructed to, with the parallel intention to conflict them, and not a detailed, fact heavy, advice heavy meeting.

• as such, there was no need for Williams J to determine whether there was any risk of disclosure nor to consider whether an injunction should be granted.

Grasso v Naik [2017] EWHC 2789 (Fam)

Grasso v Naik concerned 21 applications by the Queen's Proctor in respect of 20 divorce petitions, and one civil partnership dissolution petition, issued between 2006 and 2016. The Queen's Proctor argued that in each case the court had been deceived by fraud into accepting it had jurisdiction and that accordingly, each petition and all decrees nisi and absolute were void (four having proceeded to decree nisi only and eleven having proceeded to decree absolute).

All 21 petitions used an address on West End Road, Southall, Middlesex. The Queen's Proctor argued the architect of the fraud was a former barrister, Khalik Bhatoo, whose family members owned the properties in question. The Queen's Proctor argued that Mr Bhatoo appeared to have been responsible for making all 21 applications and may have been involved in the signature process of some petitions/acknowledgements of service.

The court had before it (despite attempts to contact the parties to each petition) just (a) evidence from an expert Forensic Document Examiner (b) evidence from one petitioner in one case and (c) a statement from Mr Bhatoo himself in which he merely endorsed a 'skeleton argument' of Mr Patel. The President of the Family Division, Munby P, noted that the skeleton argument did not seek to assert that any of the petitioners or respondents in fact lived at the West End Road properties.

The President found that the Queen's Proctor had proved his case that in the case of each petition, the underlying proceedings were tainted by deception and where decrees had been granted, they were obtained by deception. As such all the petitions and any grants of decree nisi and absolute were dismissed, regardless of whether the parties had remarried or had a child. Furthermore, Mr Bhatoo was ordered to pay the Queen's Proctor's costs.

Finally, a couple of child support decisions:

ZS v Secretary of State of Work and Pensions and SN (CSM) (Child Support – tribunal practice) [2017] UKUT 402 (AAC)

In ZS, the Upper Tribunal allowed a mother's appeal against a decision of the First Tier Tribunal (FTT) determining a non-resident father's liability for child maintenance for their two children.

In February 2014, the mother had applied for a variation of a 2010 child support award on the basis of assets and income which had not been taken into account. The mother appealed the Secretary of State's decision to the FTT. The judgment does not go into detail, other than to explain that the issues included whether or not the father had an interest in (a) a property known as flat 8 and/or (b) a family trust holding further properties.

The mother's appeal to the FTT resulted in various findings, including that (a) the value of flat 8 was exempt under the Child Support (Variation) Regulations 2000 as, although it was rented to a tenant, the father retained a room (whilst also living at his mother's) and it was his 'main home' (noting that under housing law it was possible to live in two homes) and (b) the father may have handed his interest in the family trust to his sisters in 2012 in settlement of debts, but should produce evidence to the Secretary of State of this and in the absence of production of evidence, his weekly income should take into account the £38,000 asset.

The mother was given permission to appeal and the Upper Tribunal allowed her appeal.

In relation to flat 8, the mother's appeal succeeded for three reasons:

• the FTT had failed to address the statutory definition of home under the Child Support (Maintenance Calculations and Special Cases) Regulations 2000, noting in particular that that definition, where a person has more than one home, only applies to their 'principle home'. The upper tribunal did not know what the FTT had meant by the phrase 'main home' but noted no attempt had been made to decide which of the two properties was the father's principal home;

• the FTT had failed to (a) adequately address evidence before it (b) reconcile matters of dispute and (c) make adequate findings of fact to support a conclusion flat 8 was the father's home;

• the FTT had conflated the exemptions under regulations 18(3)(b) and (e) of the 2000 regulations and, in any event, the factual basis for a finding under either exemption was not made out.

In relation to the family trust, the Upper Tribunal agreed that the FTT should have determined the factual issue (or adjourned for further evidence), rather than directing that it be dealt with in the manner in which they had.

The Upper Tribunal allowed the appeal, set aside the FTT's decision and remitted the matter for a fresh hearing before a new FTT.

KW v Secretary of State for Work and Pensions and KE (CSM) (Child Support – variation – departure directions – diversion of income) [2017] UKUT 400 (AAC)

The central issue in this appeal to the Upper Tribunal was how the father's injury benefit received from the police (alongside his police pension) should be treated for the purposes of assessing child support.

The original child support calculation required the father to only pay the flat rate of child support maintenance as he was receiving disablement benefit. However, this was varied to take into account his police pension and injury benefit, resulting in a liability of £31.71 per week. The father appealed to the FTT who dismissed his appeal but gave him permission to appeal to the Upper Tribunal.

The FTT had looked at case law as to the treatment of similar injury benefits under the original 1993 scheme and had determined that those cases applied equally to the 2003 scheme (under which the father's case fell). As such the father's injury benefit was taken into account. The Upper Tribunal agreed entirely with their reasoning and dismissed the father's appeal. They further noted that there was no need for them to determine how the case might be dealt with under the 2012 regulations.

5 December 2017

Bitcoin, blockchain and smart contracts: consequences for family law in the not too distant future

Byron James barrister, Expatriate Law (United Arab Emirates) considers the possible implications of bitcoin, bitchain and other developments on financial remedy cases.

It is hard to escape the fact that despite the hard work of reformers including most notably, the President of the Family Division, Sir James Munby, much of family law remains firmly rooted in the past, with some practitioners and judges clinging on to a traditional way of doing things rather than embracing the benefits of new technology and harnessing it to the greater benefit of our clients. This is by contrast to other areas of law and some other jurisdictions, but also, and importantly, to clients. This manifests in numerous ways that stand as bizarre relics to a time gone by, from the need to apply for permission to serve by email (when pretty much every other document in the case is sent by the same method) to proceedings being manually recorded in some instances by non-expert typists, not to mention the lack of proper Wi-Fi in many courts. Clients often look on bemused as we practitioners explain to them the arcane rituals we routinely trudge through, wondering why they should be the ones to pay the additional amounts required to adhere to the same. Having collated a bundle online into PDF form is there any good reason, why thousands of pages are printed off, paginated, put into physical binders, then couriered to chambers and courts around the country, only to be disposed of a few days later?

Whilst other jurisdictions and industries stand on the frontier pushing forward in hugely innovative ways, we remain at the printer and the hole puncher, fiddling about with and constantly filling up ring binders; it as quaint or charming as a Morris dance in a village square. The way we practice and interact with each other and the court will have to change dramatically in the very near future. Those that continue to refuse to adapt will simply be left behind because in the end client service will dictate that we look forward bravely and not worriedly behind.

As part of the way in which we adapt and learn about the ways in which technology will inevitably change our daily practice, so to we must be aware of the ways in which the world is evolving in terms of asset categorisation. Cryptocurrencies are becoming increasingly popular and important. Most recent estimates indicate that there are 2.9million to 5.8million unique users. The concept of blockchain is also something of increasing utility and that beyond just the servicing of bitcoin. The decentralised transparency is attractive and is being considered and used as a long term operating model across a variety of applications, from peer to peer insurance even to online voting

Bitcoin

Currently, we rely on owning a number of assets in different ways across a variety of third parties. This requires us to confirm with each of the third parties what assets are held by them, usually by documentary confirmation such as bank statements. Sometimes assets are held within a centralised system such as Companies House or the Land Registry and can be publicly accessed, other times they are held privately, such as within a trust, and determined by reference only to an originating document. The future is likely to be very different.

Bitcoin, or 'digital gold' as it is known colloquially, has changed a great deal in the currency world. There are key aspects to what makes bitcoin unique. It is digital, a cryptocurrency, without any central bank or repository. The blockchain is the mechanism by which the bitcoin is maintained. The blockchain operates as a distributed database that self regulates the entire currency. It is a public ledger that records all bitcoin transactions, updated roughly every 10 minutes when a new block of accepted transactions is created and added to the chain. This allows for, inter alia, the prevention of double-spending and determination of currency value as against other currencies without centralised control. The record keeping process is known as 'mining', whereby a new block can only be added to the chain once the proof of work therein establishes the integrity of the transactions recorded. As the currency is digital, the blockchain ledger does not record actions in chose or promissory notes but rather it is where the currency actually exists as unspent transactions.

The decentralisation of asset holding will make determining the wealth of individuals much harder. Bitcoin is held, as above, literally in the public ledger. Every piece of cryptocurrency has a public and private key: the public key is used to

verify to the outside world that the paired private key has given the currency instruction and the private key is used to monitor or alter that instruction. These keys, providing access to the bitcoin entitlement, are held within a 'wallet' and then depending on the provider of this wallet depends on who has access to the various keys. Without the key or the wallet, it is not possible to know what level of bitcoin is held by any given person.

Decentralising assets will make determining an individual's wealth much harder

This will have implications for things such as the payment of tax and completion of tax returns as it will become increasingly difficult to objectively confirm the information recorded within those documents; consequently, their utility in proceedings, and specifically in matters such as the calculation of child maintenance, will diminish. One might declare that no cryptocurrency is owned at all, but have a wallet with a key that accesses the equivalent of million GBP. One might be able to trace to that amount if there is a trail through centralised organisations (say if I purchased £1,000,000 worth of bitcoin from my traditional bank account) but not, for example, if the services I provide are paid to me in bitcoin via the blockchain. It will also have severe consequences for bankruptcy, where one can declare to the world that you have no assets and therefore your debts extinguished, whilst holding your decentralised wallet with one million GBP stored therein.

Just as for tax, for insolvency and other areas where the objective confirmation through third parties is an integral part of the process, so for financial remedies it will become increasingly difficult. The process will have to change, almost certainly within the blockchain. There will need to be some form of regulation, that is beyond the level of current sophistication. There is a possibility that the digitalisation of asset holding will make determining an individual's wealth easier but only if the current system is remodelled to allow matching between assets within the blockchain and individuals. Whether that happens or not depends on the level of control governments are able to exert over an otherwise decentralised system.

With no centralised system of control, how does one preserve a decentralised asset?

It is also worth noting that the preservation of assets is extremely difficult under this system. Once one has identified an asset, in the absence of a centralised authority to enforce a freezing injunction such orders are essentially worthless. An *in personam* order is still available, but without an overreaching third party to ensure compliance, coupled with the difficulty in asset tracing as above, one might think it is of limited value.

One could take active steps such as an *Anton Piller* order to physically obtain the hardware on which wallets are held but this has limitations because one still needs to access the software therein; a further order from the Court would be required to access such content within the seized hardware as well as sufficient technology/expertise to break in.

This could perhaps one day be solved by a coding issue, perhaps inherent within the block chain, but this just returns to the difficulty of achieving regulation beyond the self-regulating aspect currently enjoyed let alone determining the identity of who such a regulator should be.

Blockchain

For family lawyers, the blockchain can perhaps best be explained by use of a metaphor. If one was to have a draft order that required perfecting, the standard methodology would be to email that draft order as a Word document to the other side and invite their tracked changes. On receipt, the changes would be made by the other side and the original author would be locked out from the same. The changes made would only be capable of observation and amendment after they have been made and once permission had been given for the original author to be let back in, i.e. when the Word document is emailed back to you. This is similar to the mechanism by which banks currently manage transfers and spending: they lock the account whilst they make alterations, decrease the balance, update the other side and then reopen access.

The blockchain is entirely different. Imagine, instead of the above method, there was one online document to which both parties have access and that the single version is always accessible and available to them with changes being visible in real time. This is how the blockchain works and thereby achieves transparency. It is a shared, public ledger, always being amended and updated in real time.

In Sweden currently, they are trialling putting the country's land registry on the blockchain: "*the plan is to put real estate transactions on blockchain once the buyer and seller agree on a deal and a contract is made. From there all the parties involved in the transactions -- the banks, the government, brokers, buyers, and sellers -- are able to track the progress of the deal once it is completed*"[1] . Not only will this make the process quicker, less reliant on completion of documents and the returning of the same in a timely manner, but also more secure and more transparent. It is envisaged that this will lead in turn to fewer real estate disputes, mortgage and identity fraud.

The blockchain may well be transported into the English legal system. As well as the Land Registry, it could be used to replace the current register of births, deaths and marriages. There could then be some form of integration between the registries for land, births, deaths and marriages and perhaps also a wills blockchain as well. The three could update and interact with each other, providing a self-regulating, transparent public ledger of property ownership and the basis of the same following death, marriage, divorce or otherwise.

There is also scope for the blockchain to be used as a means of storing HMCTS data. If one moves away from the concept of retaining hard copies of information in a building, the process of storing files on a hard drive in a HMCTS server *might* be considered the next level but it is in fact just a step towards there being no centralised repository of information. The blockchain would provide an easily accessible place for case information to be stored, updated and amended as required, and there would be no need to destroy files more than 6 years old.

Smart contracts

Blockchains provide a faster, more secure means of paying a party without the need to use an intermediary. The decentralised ledger has led to the creation of 'smart contracts' which are essentially self-executing and would essentially be the conversion of contract terms into computer code which would then be stored and replicated within the blockchain. This would then lead to the automatic implementation of the terms of the contract, such as the consequential transfer of money. They operate on the "If-Then" premise of contracts/coding, which one might consider is perfect for the implementation of financial remedy orders.

Could the future involve self-implementing financial remedy orders?

Imagine where the terms of a financial remedy order are converted into code and then placed within the blockchain. This would then enable the contract to execute itself once the triggering date is reached. On the triggering date of a Mesher order the property could be placed on the open market for sale, with the potential terms of the sale contract written into the initial code, the money would then be allocated to the parties in accordance with the terms of the financial remedies order, as per the order translated into code instruction.

If there is a blockchain land registry, then the code could also be used to update this ledger at the same time providing an automatic reconciliation of property ownership. The cost of implementing non-contentious issues would be reduced to the drafting of a code and the amount of form filling, reliance on the compliance of third parties and the other side with inevitable consequential delay would all be eliminated or at the very least, reduced.

Smart contracts as a vehicle for maintenance orders: automatic payment via the blockchain

There would also be a potential use when it comes to the payment of maintenance. An automatic instruction could be provided via the written code to ensure that the payment from party A to party B in accordance with the terms of the financial remedies order.

In the event of default, either there could be inbuilt penalties, such as fines, or a notification issued to the relevant Court. The blockchain itself could then be reviewed to understand the activity in the market in the event of default, if such remedy is required following the automatic clauses available within the coding as set out above.

The future

The practice of family law will be very different in the near future. We already lag behind dramatically even as we come to grips with things being online and not on paper, whereas the level of sophistication being deployed in other fields moves on apace.

Progress and change is inevitable, and all too often the main opposition to it is based on nostalgia and lack of funding, which are poor reasons to remain fixed to the past: whilst some family lawyers are out there complaining that the iPod will never catch on, the rest of the world is out buying their iPhone X.

1 https://www.reuters.com/article/us-sweden-blockchain/sweden-tests-blockchain-technology-for-land-registry-idUSKCN0Z22KV

7.12.17

CASES

Mansour v Slovakia - 60399-15 (Judgment - Violation of Right to respect for private and family life (Positive obligations Respect...) [2017] ECHR 102

The applicant was a father who alleged that the Slovakian enforcement courts had failed to secure respect for his family life in violation of Article 8 in dealing with a return order for his children under the Brussels II bis Regulation.

The father was Irish and the mother was Slovakian. The family settled in Ireland where both children were born. The mother travelled to Slovakia in 2011 with the parties' two children. The father commenced proceedings promptly in Slovakia for the return of the children and the Slovakian District and Regional Court ordered the return of the children to Ireland, pursuant to Brussels II.

The father applied for enforcement in 2012 after non-compliance and, after various applications by the mother, the Slovakian courts in 2013 eventually found that the return order was not enforceable. This was because the mother had not been identified as the recipient of the return order and the father had not been provisionally entrusted with the care of the children. The father applied to the Constitutional Court who found a violation of the applicant's Convention rights, remitted his appeal for re-examination and awarded him 3,000 EUR in compensation for non-pecuniary damage and the legal costs he had claimed (276 EUR).

The court's assessment

The ECtHR reiterated principles on enforcement of return orders set out in *Ignaccolo-Zenide v. Romania*, no. 31679/96, § 117, ECHR 2000 I. First, that Article 8 includes a parent's right to have measures taken with a view to being reunited with a child and an obligation on national authorities to take such action. In taking action, authorities should consider the best interests of the child as to the possibility of coercive measures to enforce return.

The adequacy of measures is to be judged by the swiftness of its implementation and this requires urgent handling of enforcement of decisions as the passage of time can have irremediable consequences for relations between children and the parent who does not live with them. In this case, the ECtHR found that the main proceedings in Slovakia were completed relatively swiftly but the state's positive obligation was engaged when the mother did not comply with the order and the applicant applied for enforcement. Although the Constitutional Court had found a breach in the length of the enforcement proceedings, the enforcement proceedings had been terminated as the domestic courts concluded that the return of the children was no longer in their best interests, precisely because of the passage of time.

In other words, the issue of the return of the children was resolved by passage of time rather than by judicial decision. This passage of time was directly attributable to the respondent State. The procedure the Slovakian courts followed fell short of the requirements inherent in its positive obligation to secure the applicant his right to respect for family life under Article 8 of the convention. The enforcement procedure was incompatible with the State's positive obligations under Article 8.

The ECtHR found that the compensation granted by the Constitutional Court was not sufficient. The state should put into place a remedy which is at the same time preventative and compensatory whereas in this case the compensation was insufficient and there had not been any preventative effect.

Damages were awarded of EUR 10,000 and costs of EUR 5,400.

Summary by **Hannah Gomersall** barrister, **Coram Chambers**

HRH Prince Louis of Luxembourg v HRH Princess Tessy of Luxembourg (Publication of Offer) [2017] EWHC 3095 (Fam)

This was a dispute between the husband prince and wife princess about the ambit of a reporting restriction applied for by the husband to regulate the reporting of the financial remedy proceedings. The princess felt that she had been traduced by unfair media coverage and, although agreeing that a reporting restriction order should be made, she sought to be allowed to make public the bare terms of her open offer to her husband, and to provide certain information about the former matrimonial home. The husband argued that the order should restrict the media from publishing any information concerning the financial arrangements of the parties, including the terms of the wife's open offer or information about the former matrimonial home. It was accepted by the husband that some coverage by the press of his wife had amounted to a personal attack on her.

Financial remedy proceedings are held in private. The publication of any information about such private proceedings is governed by the ECHR and not by any inherent jurisdiction of the High Court. The fact that a hearing is in private does

not of itself prohibit the publication of information about those private proceedings, or of evidence or information given within those proceedings. See *Clibbery v Allen* [2002] Fam 261.

The immediate procedural history was an interim reporting restriction order made by the judge at the conclusion of a hearing on 13 October 2017 following a suggestion by leading counsel in submissions for the wife that she wished to put the record straight as regards some reportage. That suggestion occasioned an immediate oral application for a reporting restriction order by leading counsel for the husband.

The judge made two procedural points. First that media organisation normally has a right to be given notice of the evidence relied on in support of an application in which they are interested: see FPR PD 121 para 3.3, which records that legal advisors can differentiate between information provided for legal as opposed to editorial purposes. Secondly, that because of the general requirement for notice of such reporting restriction orders it is vital that parties should give consideration to the possibility of an application for such an order in advance of the FDA.

The judge was primarily concerned to weigh the considerations arising from Art 8 – right to respect for private and family life – against those arising from Art 10 – freedom of expression. Ultimately, after consideration of the specific factors peculiar to this case, and bearing in mind that these were private proceedings, the judge decided that the release of terms of an open offer from one party to the other and the release of information concerning the family home would undermine the proper administration of justice; as otherwise the ability of parties to negotiate in conditions of confidentiality would be compromised. In those circumstances the interference with Art 10 was lawful and proportionate by reference to Art 10 (2).

Summary by **Martina van der Leij**, barrister, **Field Court Chambers**

Re D (A Child) [2017] EWHC 3075 (Fam)

Background

In April 2016 the child, then aged four months, had a catastrophic collapse at the family home. At the time she was in the sole care of the father, F, in her bedroom. The mother, M, was downstairs. The child stopped breathing for six minutes (F gave her cardiopulmonary resuscitation on the kitchen table) and was subsequently found to have extensive retinal haemorrhaging (retinal and intercranial), encephalopathy and a number of petechial bruises. She, somewhat miraculously, made a complete recovery [§1 – 2].

At a fact-finding hearing over two weeks in September 2016, F had been totally exonerated of any involvement in causing the injuries. The judge concluded that the local authority had failed to prove its case on the balance of probabilities [§4]. The local authority appealed. In March 2017, the Court of Appeal handed down a judgment reported as *In re D (A Child)* [2017] EWCA Civ. 196. It granted the appeal on the grounds that the trial judge had failed to carry out an overall analysis of the medical evidence, which undermined the ultimate balancing act of expert vs lay evidence [§6].

The matter was allocated to Roberts J. By this time, the child was living with M alone, but had contact with F, supervised by the maternal grandmother. They had developed an attachment. F denied doing anything to cause the injuries. M had "closed her mind to the possibility that F could have harmed their child in any way" [§143] and had resurrected a relationship with F, albeit they lived separately [§3]. The judge recognised, of course, that F had 12 months previously been exonerated by the court.

Roberts J granted applications for further expert evidence, in particular investigating the parents' updated case that the child might have a gene deficiency or abnormality (Ehlers Danlos Syndrome) [§7-8]. She did not [§9]. A new fact-finding hearing was held before Roberts J over ten days, with seven bundles of documents.

The judgment

The long judgment (55 pages and over 140 paragraphs) is almost entirely fact-specific. The background is set out in the judgment from [§15] to [§33]. The parents' evidence about the incident is at [§34] to [§55].

The judge summarised the contemporaneous medical evidence and the subsequent expert evidence at [§70] to [§93]. Of general importance is the judge's approach to the previous fact-finding hearing, which had been overturned by the Court of Appeal, and the need (or not) for a further round of oral evidence from the expert witnesses [§13]:

> 1. She was not conducting a review of the original decision, as the Court of Appeal had done that. She started with a "completely clean sheet."
>
> 2. She had not heard oral evidence from the medical experts involved in the first hearing. However, she had read the transcripts of their evidence in circumstances where: each expert had confirmed they had nothing further to add; no advocate wished to ask additional questions, save some put in writing already; and each was recognised as a pre-eminent expert in their respective field.

3. Thus, their evidence was unimpeachable.

The judge summarised the law applicable to findings of fact at [§94] onwards, adopting the summary of Baker J in *Re JS* [2012] EWHC 1370 (Fam). In this case, it was accepted that there could only be one possible perpetrator of the injuries; M had been ruled out (she was downstairs at the time). The only possible person was F [§96]. The judge reminded herself of the authorities dealing with this situation, whereby the only possible perpetrator had made no admissions of any kind (whether or an accidental injury or otherwise), and the question as to whether there might have been an entirely unknown cause hitherto undiscovered by medical science [§97] to [§102].

Having undertaken a detailed analysis of the evidence and submissions made on behalf of each party ([§103] to [138]), the judge made the findings set out in [§139]. In short: the child's injuries were sustained as a result of one or more episodes of trauma; the origin of the trauma was an incident(s) of shaking/shaking impact; the injuries were non-accidental and likely as a result of a momentary loss of self-control; and F was the perpetrator, although there was no evidence he intended to cause the injuries.

The judgment concludes with an analysis of the welfare and disposal of the case: [§140] onwards. The findings being made, all parties agreed with the local authority's final care plan: a final care order, therapeutic work with F and the parents; a further risk assessment in the future as to a possible rehabilitation of F into the household and a discharge of the care order. The judge offered comments directed to M as to her acceptance of the findings now made and the impact on her decision to wish to continue a relationship with F in light of them [§142] to [§143].

Summary by **Thomas Dance**, barrister, **1 King's Bench Walk**

HC v FW [2017] EWHC 3162 (Fam)

The parties were married for eight years of their twelve year relationship. They enjoyed a very high standard of living, described by the Court as "extraordinarily luxurious". There was no matrimonial home; the parties had lived in a series of suites in deluxe hotels around the world. Towards the end of the marriage, the Wife was diagnosed with a large benign brain tumour. Medical complications which followed treatment of the meningioma caused the Wife neurological and neuropsychological impairments.

As a result of the Wife's health, she was held to lack capacity to conduct litigation. The Court relied on the report of a clinical psychologist who had concluded that the Wife was unable to fulfil three components of the functionality test in s.3(1) MCA 2005.

The Husband had initially engaged in the proceedings, being represented at the First Appointment and attending the FDR. However, following the FDR, the Husband had completely disengaged to the extent that when the final hearing came before Cobb J the Husband's precise location was a mystery. Following the FDR, the Husband had failed to attend hearings and provided no explanation for his non-attendance. He no longer had solicitors on the record and did not comply with directions, nor respond to correspondence from the Wife's solicitors.

Cobb J proceeded to hear the final hearing in his absence. Cobb J had some evidence from the Husband in the form of a Form E, initial disclosure, and replies to questionnaire. The Court computed the assets at £40 million.

The Wife accepted that the majority of the Husband's wealth was pre-acquired by virtue of an inheritance. She based her case on need and divided her needs into two categories: general need to be assessed in light of the exceptionally high standard of living during the marriage and the significant financial resources, and specific needs to cater for her medical treatment and ongoing care.

Cobb J assessed the Wife's general needs at £298,648 pa having considered her budget, the Husband's comparative needs, the standard of living and the financial resources. On the specific care needs, Cobb J heard evidence from two care consultants: one was a single joint expert, the second was an expert instructed by the Wife. The two experts had agreed a care budget for the Wife of £250,745 pa and the Court accepted that figure.

Overall, Cobb J awarded the Wife £15,251,098 of the total assets. Given the continued non-engagement of the Husband, the Court also acceded to the Wife's application and made a s.37 MCA 1973 freezing injunction to ensure that assets could be secured and that the Wife's award was not frustrated.

Summary by **Patrick Paisley**, barrister, **1 Garden Court Family Law Chambers**

W-C (Children) [2017] EWCA Civ 250

This case concerned two children, C (aged 8) and D (aged 2), who lived with their mother under an interim supervision order. The mother had been diagnosed with an emotionally unstable personality disorder and there were concerns that the children's welfare was being neglected to a degree that caused them significant harm. The local authority initially sought to place C under a Special Guardianship Order with the maternal aunt; however, after all of the evidence had been heard and the final hearing was adjourned for judgment, the local authority changed its care plan and sought for both children to be adopted together. The first instance Judge, Recorder Digney, opened the hearing again, but ultimately decided that C should be placed with the maternal aunt under a Special Guardianship Order.

The appeal concerned D only. The local authority applied for a placement order in respect of D, with a view to her being adopted and having direct contact with her siblings. The mother sought for D to remain in her care and the Guardian argued that D should be placed in long-term fostering under a care order to allow her to continue to have regular contact with her siblings and so that she would not be confused by being "*grafted into an entirely new family*" [9] whilst her siblings were not adopted. At the end of the proceedings, the Recorder granted the local authority's applications for care and placement orders, dispensing with parental consent and authorising the local authority to place D for adoption. D was moved to an interim foster care placement and the Guardian made an application to appeal the Recorder's decision on the basis that he had not conducted an adequate analysis of the issues before the court.

The Court of Appeal's criticisms of the Recorder's decision were manifold. Though not raised on behalf of the Guardian, the court noted that the Recorder's approach to the concept of "realistic options" was not in line with the authorities. The question of whether or not an option is "realistic" should be dealt with at the beginning of proceedings, not at the end. As placement with the mother remained an option at the final hearing, the Recorder erred by not undertaking a full welfare evaluation of placement with the mother; whether she was a "*realistic*" option was "*irrelevant*" at this point [16].

With specific reference to the proceedings in respect of D, the Court of Appeal criticised the first instance judgment for lack of reference to the case law; failure to complete a holistic analysis weighing up the pros and cons of long-term fostering versus adoption; reference to welfare "checklists" and reliance on the welfare checklist in the Children Act 1989 (instead of the Adoption and Children Act 2002); lack of a proper evaluation of the welfare checklist; and failure to apply the appropriate test for dispensing with a parent's consent to be placed for adoption. For all of the aforementioned issues, the Court of Appeal allowed the appeal and directed the matter to be re-heard by a fresh tribunal.

Summary by **Bianca Jackson**, barrister, **Coram Chambers**

AB v CD (Jurisdiction Global Maintenance Orders) [2017] EWHC 3164 (Fam)

After a four-day financial remedies final hearing, the husband appealed His Honour Judge Everall QC's order. The judge had made an award of a global, annual, index-linked sum of £39,000 for the wife and children, to be paid by way of periodical payments. A further set of periodical payments was to be made to pay the children's school fees.

The parties were qualified lawyers in their 40s with three children. The wife had not worked since the children were born.

There were three issues on appeal: whether the judge had jurisdiction to make that order in respect to the children; whether the quantum of periodical payments was fair; and whether the judge had been fair in departing from equality in dividing the parties' capital.

Mrs Justice Roberts DBE determined the appeal, having considered whether the decision of the lower court was "wrong" (FPR 2010 r 30.12(3)).

The first ground of appeal was rejected. The judge had stated that he lacked the jurisdiction to make an order benefitting exclusively one or more of the children. The order did not contest nor seek to replace the jurisdiction of the statutory agency, the Child Maintenance Service, which performs the role of assessing the level of child support and the liability of the payer. As the order provided for significant spousal support, the jurisdiction of section 23 of the Matrimonial Causes Act 1973 ('the 1973 Act') was engaged. The appeal court found that His Honour Judge Everall had set out clearly his assessment of the wife's own needs.

As to the second ground of appeal, Roberts J found the judge in the lower court was greatly experienced and had exercised his wide discretion, having considered extensive evidence of the family's circumstances. He had found that the wife's employment position was weaker than that of the husband and this opinion was adopted by the appeal court.

Finally, the decision of the lower court to depart from equality was described as 'unimpeachable' and well within the discretion afforded under section 25 of the 1973 Act.

Summary by **Sara Hunton**, barrister, **Field Court Chambers**

B and C (Change of Names - Parental Responsibility - Evidence) [2017] EWHC 3250 (Fam)

Background [§1 to 17]

The case concerned two children aged 13 and 8. They lived with the mother ("M") in England. The father ("F") was believed to be in Iran. M applied for a change of forename and surname for the children, and a prohibited steps order restricting the extent to which the father could exercise PR for the children.

There was an extraordinary history to this case. In brief, the parents had been born in Iran and married in 2002. They moved to the UK in 2003 and were granted asylum in 2009. The children were born in England during the marriage. The marriage was volatile and there was extensive police involvement. M sought a divorce in 2013, but in 2014 the parties and children travelled to Iran (for a purpose not agreed) which resulted in F removing the children from her care and trying to prevent M and the children leaving the country. M's case was that she left Iran covertly, children in tow.

F followed. When interviewed by the police in this jurisdiction, F said, "in Iran it is easy for a man to get custody. All is needed is for them to go to a court and then confirm it with the police." M got a non-molestation order under the FLA 1996, which was resolved by way of F giving undertakings at the return date. M obtained a prohibited steps order to prevent F removing the children from her care. F then applied for a child arrangements order in which he denied that he posed an abduction risk. A final child arrangements order was made in 2015 for the children to spend two nights per week with F. The parties divorced.

M said that the harassment continued from F. In February 2016 one of the children reported to M that F had been talking about a passport on the phone. M reported this to the police, who took no action. F then failed to take the children to school. In breach of the prohibited steps order, F had removed the children to Southern Iran, taking a convoluted route to avoid detection in transit.

M made an application for a location order. Moylan J granted it, but it was too late. The children remained in Iran without contact with M for seven months. The children's British passports were still with M's solicitors.

M located the children in Iran, with assistance. In November 2016 she travelled there, surreptitiously collected them from school and returned them to the UK. She made part of the journey on foot. She was assisted by the British Embassy in Turkey.

On her return she received increasingly frightening telephone calls and messages from F threatening to kill her, trace her, have acid thrown in her face and snatch the children (himself or through agents). F contacted the school. F instigated proceedings in Iran alleging that M had kidnapped the children. The Iranian court in December 2016 made a "custody" order in favour of F. M has been summoned and threatened with arrest in Iran.

The local authority had been assisting M to safeguard the children and keep their whereabouts secret. The children were spoken to by police under ABE Guidelines. They reported physical abuse in Iran to their GP.

English proceedings [§18-23]

The children were warded in November 2016. In May 2017 M issued the applications before Cobb J. In June 2017 the children were added as parties to the litigation and a range of orders were made to protect the children. M moved from one city to another. Having been there for some weeks, the eldest child was approached by someone in the street whom he knew and associated with F. He was traumatised by this. M and the children moved again.

The evidence from the children's representatives was that they were severely traumatised by their experiences in the care of F. They had been referred to CAMHS, who reported hyper-vigilance and a number of trauma symptoms.

The judgment

The judgment of Cobb J dealt with four issues: two procedural and two substantive.

Procedural (i): proceeding in F's absence [§24-29]

The judge dealt with the service requirements set out in Part 6 FPR. F had been served by email to an address which he used as recently as April 2017. There had been no bounce-backs. M's solicitors had used all identified forms of communication for service.

Rule 27.4(2) enabled the judge to proceed in F's absence provided he was satisfied that F had reasonable notice of the application and the specific hearing.

Procedural (ii): withholding M's witness statement [§30-32]

M's witness statement included detailed information about her current situation. The judge discussed the limited circumstances in which relevant evidence can be withheld from a party: *Re D (Minors) (Adoption Reports: Confidentiality)* [1996] AC 593 at 615D, and Re B (Disclosure to the Other Parties) [2001] 2 FLR 1017 at [67].

Cobb J held F had no immediate and obvious need to have the information in the statement in order to participate fully in the proceedings should he have chosen to do so. This was a compelling case.

Change of forename and surname [§33-37] and [§42-52]

The judge set out a very useful summary of the applicable legal principles at [§33 to 37] of the judgment, drawing from: *Dawson v Wearmouth* [1999] UKHL 18; [1999] 2 AC 309, *Re W, Re A, Re B (Change of Name)* [1999] 3 FCR 337, and Re C [2016] EWCA 374 at [40].

The judge accepted from the authorities that the orders sought by M were draconian and rare. She sought to "disenfranchise the father in practice as a holder of responsibility for the children" (see below) and to "create for them wholly new identities which are deliberately to be secret from the father. Orders of this gravity should plainly only be made by a court if there is a solid and secure evidential and factual basis for doing so." [§42] In this case, there was; the children were at very real risk of further abduction if F were to locate them.

Similarly, the change of names would be "a significant and total severance with their past: 'the blood of the name' will cease to flow in their veins;… it will deliberately expunge traces of their father's familial line." [§49]. However, the remedies were proportionate and necessary to ensure M and the children's safety and emotional and physical well-being. The children agreed, but even if they did not, the judge would have been minded to make the order anyway [§51].

Restrictions on the exercise of PR [§38-41] and [42-52]

Again, at [§38-41] the judge set out a concise and helpful summary of the applicable law as to the restriction of a married father's PR, recognising that it is not permissible to withdraw or revoke a father's PR where the parties were married at the time of the children's birth. The crucial case was *Re D (Withdrawal of Parental Responsibility)* [2014] EWCA Civ 315, [2015] 1 FLR 166, and the judge drew 12 principles from that judgment at [§40].

This was a significant infringement on F's rights and the children's rights. As with the change of names it was a draconian and rare order. However, one which was proportionate and necessary.

The raft of orders made by the judge are listed at [§52].

Summary by **Thomas Dance**, barrister, **1 King's Bench Walk**

M (Children), Re [2017] EWCA Civ 2164

Background

The father, a transgender woman previously a member of the North Manchester Charedi community, brought an application for direct contact with her five children in 2015. Although critical of the community and their attitudes, Mr Justice Peter Jackson (as he then was) ultimately determined that the risk of psychological harm posed to the children by having direct contact with their father was too great, on the basis that they, as well as their mother, would be ostracised by the Ultra-Orthodox Charedi community. Despite setting out fifteen formidable reasons in favour of direct contact, he ultimately concluded that the likelihood of the children being marginalised or excluded by a community the parents agreed they should remain a part of, was such that only indirect contact was in their best interests.

The Court of Appeal disagreed in a 138-paragraph judgment which includes a thorough analysis of the Family Court's duties under the Human Rights Act 1998, and the best interests of children in the face of discrimination and intransigence from a parent or third party. The matter has now been remitted to the High Court for further consideration.

The judgment

The father's appeal succeeded on all three grounds of appeal, as set out at [§40]:

> i) In his careful survey of the wide constellation of cultural and religious concerns, the judge ultimately lost sight of the paramountcy principle.
>
> ii) The judge failed to evaluate why indirect contact and the giving of narratives to the children about their father's transgender status was in the children's best interests and direct contact was not.
>
> iii) The judge failed to exhaust the court's powers to attempt to make direct contact work.

The Court set out the two principles it considered central to the issues in hand: first, that the function of a judge sitting in the Family Court is to act as the "judicial reasonable parent", emphasising at [§60]:

> "the judge in a case like this is to act as the "judicial reasonable parent," judging the child's welfare by the standards of reasonable men and women today, 2017, having regard to the ever changing nature of our world including, crucially for present purposes, changes in social attitudes, and always remembering that the reasonable man or woman is receptive to change, broadminded, tolerant, easy-going and slow to condemn. We live, or strive to live, in a tolerant society. We live in a democratic society subject to the rule of law. We live in a society whose law requires people to be treated equally and their human rights are respected. We live in a plural society, in which the family takes many forms, some of which would have been thought inconceivable well within living memory."

And second, that judges have a positive duty to attempt to promote contact, and in line with *Re C (Direct Contact: Suspension)* [2011] 2 FLR 912, that requires grappling with all the available alternatives before abandoning all hope of achieving contact, prematurely. The Court of Appeal reiterated that contact is to be stopped only as a last resort and only once it has become clear that the child will not benefit from continuing the attempt.

The Court of Appeal's four "Reasons for disagreeing with the analysis of the judge" are set out at §76-81. They are as follows:

> 1. First, that the judge had not asked himself "a number of highly pertinent questions", including how his conclusion could follow from his role as a judicial responsible parent applying the standards of reasonable men and women in 2017, in circumstances where the community's focus was as much on itself and the adults as it was on concern for the children [§77]. Furthermore, the Court of Appeal considered whether Peter Jackson J's judgment could be acting as the "judicial reasonable parent" adopting the reasonable parent's broadminded and tolerant approach, but was nonetheless driven to a conclusion dictated by the practices of a community which he characterised as involving discrimination and victimisation.
> Interestingly the Court of Appeal drew parallels with cases involving parental alienation and the robust approach of judges when dealing with such issues. When faced with such intransigence, the Family Court may change the child's residence, make them a ward of court, or even consider instigating public law proceedings. Outlining those options, the Court of Appeal noted: "Is the approach, should the approach, be any different merely because religious belief, practice or observance is in play? The answer in essence must be: No." [§64-6]
>
> 2. Second, that the judge did not address, head on, the human rights issues and issues of discrimination that arose. [§78]
>
> 3. Third, that the judge did not sufficiently explain why indirect contact was feasible while direct contact was not, in circumstances where the concern of the community was to shield its children from knowledge and exposure to such matters as transgender and to restrict its children from coming into contact with children who have such knowledge or have been so exposed. In essence, the Court of Appeal could not discern the difference between these children having indirect or direct contact where the risk being guarded against was 'knowledge' of transgender. [§79]
>
> 4. Fourth, that the judge "gave up too easily" and decided the issue of direct contact without a single attempt to make it work [§80]

Finally, at [§84-135], the Court of Appeal set out, in full, the legal position under the Equality Act 2010 and Articles 14 and 9 of the ECHR, making the Family Court's duties (sitting as a public body within the meaning of the Human Rights Act 1998) very clear.

In particular, the Court of Appeal provided guidance for the High Court when the matter is considered in due course, including:

> 1. The Court should consider whether there would be unlawful conduct in the face of an order for direct contact, and if so, to what extent that unlawful conduct should be given weight in any welfare analysis. The Family Court cannot be absolved of its duty under the Convention even if the parents agree (as they did in the present case) that the children should remain within the community which represents the source of the discrimination [§98].
>
> 2. Following the series of well-established principles in relation Article 14, the High Court must now "scrutinise with care the suggested justification for the apparent discrimination which the father faces on the ground of her transgender status, not least to ensure that the court itself does not breach its duty under section 6 of the HRA." [§115].
>
> 3. Even if Article 9 is engaged, pursuant to Article 9(2) the State can impose a restriction on a religious belief, observance or practice where the restriction is necessary in a democratic society. The court may still order some form of direct contact with the children, even if the implementation of that order does not fully respect

> the religious beliefs, practices and observances of the community, if those beliefs etc are not compatible with the values of a democratic society. Importantly, the Court of Appeal doubted that the actions of the community to exclude the children from the rest of the community could be considered to be a manifestation of those beliefs for the purposes of Article 9, taking account of Strasbourg jurisprudence. [§122, §130-134]

Concluding, the Court of Appeal commented at [§138]:

> "In our judgment, the best interests of these children seen in the medium to longer term is in more contact with their father if that can be achieved. So strong are the interests of the children in the eyes of the law that the courts must, with respect to the learned judge, persevere. As the law says in other contexts, "never say never". To repeat, the doors should not be closed at this early stage in their lives."

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