September 2018

Family Law Week

NEWS

Asking ten "critical" questions before embarking on a serious relationship can help couples thrive

Asking ten "critical" questions before embarking on a serious relationship can help couples thrive, according to a new study by **University of Exeter**.

Long-term relationships last when they are built on friendship, respect, realistic expectations, shared interests and humour, according to the research which has been backed by the prominent divorce lawyer Baroness Fiona Shackleton.

Evidence from couples, as well family lawyers, mediators and judges has helped identify the ten key aspects of a relationship which other couples can use to reflect on to see if they are likely to thrive and stand the test of time. Continuing to ask the ten critical questions can also help couples build their relationship.

The questions are:

- Are my partner and I a 'good fit'?
- Do we have a strong basis of friendship?
- Do we want the same things in our relationship and out of life?
- Are our expectations realistic?
- Do we generally see the best in each other?
- Do we both work at keeping our relationship vibrant?
- Do we both feel we can discuss things freely and raise issues with each other?
- Are we both committed to working through hard times?
- When we face stressful circumstances would we pull together to get through it?
- Do we each have supportive others around us?

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Professor **Anne Barlow**, from the University of Exeter Law School, who led the study, said:

> "Of course, every relationship is different, and it is important that couples build relationships that are meaningful to them, but we found thriving relationships share some fundamental qualities. Mostly the couple have chosen a partner with whom they are a 'good fit' and have ways of successfully navigating stressful times. These ten critical questions can help people as they decide if they are compatible with a person they are considering sharing their life with and flag the importance of dealing with issues when they arise as well as of nurturing the relationship over time."

Baroness Shackleton of Belgravia, an alumna of the University of Exeter and Partner at Payne Hicks Beach, said:

> "Wearing my 'professional hat' – as a divorce lawyer for over 40 years – more than 50 per cent of the people consulting me about divorce have said they realised either before or very soon into their marriages, that they were fundamentally incompatible with their partners.
>
> "Wearing my 'educational hat', as a former school Governor, I am acutely aware that whilst there is much school directed education on 'sex', 'drugs' and 'alcohol', there is little or none in relation to the most important decision a person makes – namely with whom you settle down and have children.
>
> "Finally, wearing my 'philanthropic hat' and seeing the untold grief children suffer when their parents separate, I felt it time to sponsor a project exploring just what makes a relationship successful and how best to maximise the chances of it succeeding, the idea being to present the resulting research in schools as an educational tool and pre-intervention measure. If as a consequence of this, fundamentally incompatible partnerships are prevented, it will have been money well spent."

The experts interviewed ten divorce lawyers/mediators and two judges to ask them the key reasons relationships fail. They also interviewed 43 couples married for 10 years, or who had separated during this period, and ten other couples in same-sex and opposite-sex relationships, who had been living together, married or in a civil partnership for at least 15 years. They also went on to discuss the findings about relationship skills and the best way to learn about relationships at workshops with a range of young people aged 14-18 who are keen to help improve relationship education in schools in innovative ways at a time when the relationship and sex education curriculum is under review.

The lawyers and judges identified four common reasons for relationships to breakdown. The first two, incompatibility and unrealistic expectations, could, and arguably should, be discovered before a couple agrees to commit to each other, The second two, failure to deal with issues and failure to nurture the relationship, exposed a lack of relationship skills which could in many cases be addressed. Obvious stress points will test any relationship and these can act as major triggers of breakdown. So how people cope with life pressures such as bereavement, an affair, financial difficulties or becoming a parent, particularly when the couple had different parenting styles, is key and requires good relationship skills. These can avoid loss of communication between a couple and help ensure the relationship is nurtured rather than lost.

The research was also conducted by **Jan Ewing**, a Research Fellow at the University of Exeter Law School, **Astrid Janssens**, a Senior Research Fellow in Child Health at the University of Exeter Medical School, who led the relationships education workshops, and **Sharon Blake**, the Shackleton Scholar at the University of Exeter Law School.

Dr Jan Ewing said:

> "Thriving relationships were built on a strong foundation of friendship. Married couples and cohabiting couples expressed their commitment differently, but all those in thriving relationships worked at maintaining a good connection by talking regularly and being pragmatic and solution-focused in approach to conflict. They loved their partner compassionately, being aware of the other's faults but viewing their partner as an intrinsically good person. They anticipated change and pulled together during stressful seasons. Most had built networks of family and friends to support them on their journey."

The critical questions were put together based on key attributes and skills that drove thriving relationships across time for the couples they surveyed:

Choosing carefully: Many of the thriving married couples were 'friends first' with intimate relationships developing slowly. They had thought carefully about formalising their relationship.

Underlying friendship: This had helped couples through harrowing life events such as bereavement or an affair. Separated couples' relationships often lacked a firm foundation of mutual friendship.

Being realistic: Couples in thriving relationships in both samples had realistic expectations of marriage and relationships, shaped by examples they had seen through the marriages of their parents or other family members. They knew it would not all be plain sailing, expected to have to work at their relationships and were open to professional help if needed. They had aligned values, hopes, dreams and expectations of the other and of the relationship.

Seeing the best: Partners in thriving relationships love compassionately and make allowances for the other's shortcomings. Compassionate love can grow over time.

Working at it: Overwhelmingly, couples in thriving relationships accepted the need to 'work at' their relationships but such work is not 'hard work' provided couples are a 'good fit'. Couples in thriving relationships were creative and intentional both about carving out time as a couple and about

ensuring that each had time apart to spend with friends and pursuing individual interests. They showed they cared in the daily rituals and small regular acts of thoughtfulness that communicated appreciation in ways that were meaningful to their partner.

Being committed: Commitment to the relationship, but not necessarily to the institution of marriage, is a prerequisite of thriving couples.

Keep talking: Thriving couples carved out time to talk about the minutiae of the day or deeper level issues as needed and this open communication fuelled intimacy.

Building the relationship that suits you both: Couples in thriving relationships built the relationship that suited them, often defying cultural or societal norms to do so. There is no one 'right' thriving relationship.

Adapting to change: An ability to adapt to change seemed to stem from a strong team mentality and was essential to thriving relationships. When couples pulled together during periods of adversity, they often report a strengthening of the relationship as a result.

Building a support network: Close, supportive networks of family and friends enriched the lives of couples across the spectrum of family forms. Women, in particular, drew substantial support from their mothers, sisters and/ or girlfriends.

3/8/18

Nominations open for the ALC's Outstanding Children Law Newcomer

The 14th Outstanding Newcomer Award in the Field of Children Law will be presented by the new President at the **Association of Lawyers for Children**'s annual conference in November and the winner will receive a copy of the Family Court Practice which is sponsored by Bloomsbury Professional Law.

The award recognises the contributions of newcomers to the field of children law and it seeks to encourage junior practitioners to continue to play an active role in shaping the future. Previous nominations included university students, barristers and solicitors. The Association encourages members to nominate junior practitioners. It is looking for someone who members think is an exceptional newcomer to this field: they may have demonstrated an ability for supporting clients, have researched points of law, have helped with training, developed new ideas and initiatives or represented parties in a particularly noteworthy case. The nomination form can be accessed from **this page**.

3/8/18

Support for children of alcohol dependent parents: guidance and application forms

The Department of Health and Social Care has published guidance as to how non-governmental organisations can apply for funding under section 64 of the Health Services and Public Health Act. The applications forms have also been published.

The package of available measures, totalling up to £6 million, includes:

- £4.5 million innovation fund for local authorities to develop plans that improve outcomes for children of alcohol-dependent parents
- £1 million to fund national capacity building by non-governmental organisations
- £500,000 to expand national helplines for children with alcoholic parents.

The programme also complements a body of work led by the Department for Work and Pensions on **Reducing Parental Conflict**, including capacity building across services nationally and a face-to-face support package delivered across several local authorities.

For the guidance and application forms, **click here**.

3/8/18

Guidance regarding legal aid for unaccompanied and separated children

Following the statement made to parliament on 12 July 2018 concerning immigration legal aid for unaccompanied and separated children, the Ministry of Justice is working on the necessary legislation and guidance.

Meanwhile, the MoJ has published a letter as interim guidance under section 4 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The letter states that those representing unaccompanied and separated children should apply for legal aid via the Exceptional Case Funding Scheme.

The letter continues:

- Caseworkers should operate on the basis that there is a strong presumption that under Article 8 of the ECHR unaccompanied or separated children require legal aid in relation to non-asylum immigration matters.
- Applications by or on behalf of unaccompanied or separated children in relation to non-asylum immigration matters need not be supported by detailed evidence in relation to issues relating to

vulnerability and ability to participate in proceedings without legal aid.

For the full text of the letter, **click here**.

3/8/18

Home Secretary promises to do more to prevent forced marriages

The Home Secretary, Sajid Javid, has promised to do more to prevent forced marriages. His intervention follows the publication by ***The Times*** of figures obtained in reply to a Freedom of Information request. They show that the Home Office had received 175 inquiries concerning the blocking of spouses' visas last year. Of those, 88 became full cases which included direct requests from victims, third parties, and officials who suspected a forced marriage. Visas were issued in 42 cases. In an additional ten a decision is pending or subject to appeal.

Mr Javid said forced marriage was a "despicable, inhumane, uncivilised practice".

For the article in *The Times* (for which there is a pay wall), **click here**. For an article on the *BBC News* website, **click here**.

For two recent articles about forced marriage and protective measures by Judith Pepper of 4 Brick Court, **click here** and **here**.

5/8/18

38,900 family-based arrangements made by parents following contact with CM Options

The Department for Work and Pensions has released **statistics** in respect of child maintenance arrangements made after speaking to CM Options. They cover the period between February 2017 and January 2018.

In total, 38,900 family-based arrangements were made by parents following contact with Options in that period. Key points are:

- 31,800 family-based arrangements were made by parents following contact with Options between February and October 2017.
- 7,100 family-based arrangements were made by parents following contact with Options between November 2017 and January 2018.

By March 2018 there were 36,900 family-based arrangements in place.

- 28,100 of the arrangements made between February and October 2017 were still in place by March 2018.
- Of the 38,900 family-based arrangements made in the year, 90% (35,200) of the arrangements were still in place.
- 1,700 have switched from other arrangements to family-based arrangements.

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

5/8/18

Nagalro publishes guide to Cafcass's professional time guidance

Cafcass and Cafcass Cymru's ***Draft Guidance on the Use of Professional Time to Benefit Children*** (which has been modified since its original publication) came to Nagalro's attention a year ago.

Cafcass was asked to withdraw the document and consult with stakeholders, but it decided not to do so. Nagalro then issued a judicial review claim, challenging both the lack of consultation and the substance of the document. The claim was recently settled because Cafcass made concessions and modified the July 2017 document following discussions with Nagalro. It also agreed to the publication of solicitors' correspondence clarifying certain aspects of it.

Nagalro has published a ***Guide to interpreting and lawfully applying Cafcass's professional time guidance***. Judith Timms OBE, Nagalro Policy Consultant, has also written **an article** explaining the action Nagalro has taken to air members' concerns, to champion the interests of the children they represent and to secure change.

Nagalro's *Guide to the professional time guidance* is intended to inform children's guardians, family court advisers and independent social workers how they can benefit from what Nagalro has learnt during the judicial review proceedings about how the document is intended to be interpreted, to identify aspects of it that remain legally problematic and to recommend other material which may be helpful should problems arise.

For Nagalro's Guide, **click here**. Judith Timms's article is **here**.

5/8/18

Williams J finds that Islamic marriage falls within Matrimonial Causes Act

Mr Justice Williams has held that a marriage between a couple who underwent an Islamic ceremony, known as a Nikah, that was not legally registered, falls within the scope of section 11 of the Matrimonial Causes Act 1973.

In ***Akhter v Khan and Another*** **[2018] EWFC 54** Williams J concluded that the marriage is a marriage entered into in disregard of certain requirements as to the formation of marriage. It is therefore a void marriage and the wife is entitled to a decree of nullity. The effect is that the wife will be able to bring proceedings for financial remedy.

Nasreen Akhter petitioned for divorce. Her husband argued that the couple were not married under English law but only under Sharia law.

After hearing evidence, Williams J concluded that:

- It was understood by both the husband and wife that they were embarking on a process which was intended to include a civil ceremony in which the marriage would be registered.
- The wife's understanding and the husband's expressed position was that this civil ceremony was to follow shortly after the Nikah ceremony.
- The failure to complete the marriage process was entirely down to the husband's refusal after the Nikah ceremony had been undertaken to take action to complete the marriage process by arranging the civil ceremony.
- The wife thereafter frequently sought to complete the marriage process by seeking to persuade the husband to undergo a civil ceremony.
- The nature of the ceremony which was in fact undertaken bore all the hallmarks of a marriage in that it was held in public, witnessed, officiated by an Imam, involved the making of promises and confirmation that both the husband and wife were eligible to marry.
- Thereafter the parties lived as a married couple for all purposes.
- The couple were treated as validly married in the UAE.

Hazel Wright, partner at **Hunters Solicitors**, commented:

> "The law on cohabitation in this country is out of date and unsatisfactory. Now those who would have been outside the scope of the law to help them can seek compensation in the courts if their spouse has deliberately refused to have a civil ceremony after a religious ceremony.
>
> "Ms Akhter and Mr Khan both knew that their Sharia marriage was not a legally registered marriage. It became vital for Ms Akhter that the English divorce court rule in her favour, that the marriage should be recognised as void, and not a non-marriage. Otherwise she would not have any rights to make any financial claims for herself.
>
> "The ruling that this marriage was just like a marriage for the couple, their families and friends, and indeed it satisfied the UAE authorities, and so was a void marriage has given heart to many who otherwise suffer discrimination.
>
> "An Independent Review into the application of Sharia law in England and Wales, published in February 2018 and commissioned by the then Home Secretary Theresa May, calls for a regime of public education about the legal status of Sharia law. Sadly, it is quite likely that, as with the defusing of the idea of 'common law marriage' (which is and can only ever be cohabitation), this won't be enough."

For the judgment, **click here**.

5/8/18

New phase of online divorce pilot launched

Beta testing of the online divorce pilot has begun. Four solicitors' firms have been selected to test the process. Initially the testing will apply only to the divorce petition itself. However, in coming months the test will be extended to the entire process from the petition through until decree absolute online via the Her Majesty's Courts and Tribunals Service (HMCTS) portal.

The online divorce beta system will allow users to issue divorces online. Tick boxes and free-text fields replace the offline equivalents. The details can be shared with clients and once approved the divorce petition is submitted online. Marriage certificates can be "posted" as PDFs and there are options for payment to follow by cheque or directly by the existing Pay by Account system (PBA).

The pilot will be rolled out to a further 16 firms in coming weeks before launching to the legal profession in the autumn. It has been available for all litigants in person since 1 May 2018 but has been held back for the legal profession until final testing has been completed.

Stuart Clark, associate at **The International Family Law Group LLP**, which is one of the firms testing the service, said:

> "This is an exciting new development as the Family Courts move steadily towards a digitised service. This could mean the end of the exclusively paper-based lawyer. Online issuing has been commonplace in the civil courts for several years but this launch of the online divorce pilot by the Courts' service is a significant step for the Family Court."

Electronic filing already occurs in family court proceedings and online issuing (of the initiating application) is the next step toward a digital Family Court.

It is hoped that soon online issuing will be the norm not only for divorces but for all applications across the Family Court, including financial applications and applications relating to children. Pilot projects on each are already underway.

Tony Roe, principal of another of the four firms selected to test the system, said:

> "From the statistics, we know that clients have been suffering from delays of months, or even a year. Now, clients who instruct our firm in the pilot will see rapid progress within their divorce, something which the paper-based system cannot deliver."

David Hodson OBE, partner at The International Family Law Group LLP, added:

"This launch is an important step forward for the family law profession and we are pleased on behalf of the profession to be leading the charge to digitalisation. We are however always mindful that this digitisation must ensure simultaneous opportunities for appropriate access to justice for those unable to adequately access these changes."

"There is no doubt that easier access will benefit our members and we welcome this sensible initiative.

"We have spoken to HMCTS officials about the delays practitioners can face in clearing security and we hope the pilot will pave the way for a permanent system of easier access."

5/8/18

Private law cases received by Cafcass in July up 4 per cent on a year ago

In July 2018, Cafcass received a total of 3,768 new private law cases. This is 4.2 per cent higher than July 2017, when there were 3,617 cases, and the highest monthly figure since October 2017.

For the month-by-month figures since April 2014, **click here**.

10/8/18

1,224 new care applications received by Cafcass in July

In July 2018, Cafcass received a total of 1,224 new care applications. This figure is 1.8 per cent lower than July 2017.

For the month-by-month figures since April 2014, **click here**. From that page, you can access data showing applications by individual local authorities.

10/8/18

Government announces easier court entrance for legal professionals

Legal professionals have been encouraged to register with their local court in advance of a government pilot designed to reduce queues and grant them easier access.

A scheme allowing practising legal professionals direct entrance to courts without the need to be searched will be piloted by HM Courts & Tribunals Service (HMCTS) in five courts, with registration beginning in August and fast-track entry from September.

The Bar Council has led the development of an app for its members to use as ID, and Law Society members will benefit from the pilot, using approved photo ID.

While tightened security procedures introduced during the last year will continue, the 'Professional Entry Scheme' intends to ease queues to get into court buildings and allow easier and swifter access for legal professionals who come to court regularly.

The scheme will recognise the trusted status of legal professionals without compromising security and is supported by the judiciary.

Law Society President, Christina Blacklaws, said:

In advance of the pilot, practising legal professions will need to register with their local court, agree to conditions of entry (which continue to include a list of prohibited items) and meet secure ID authentication requirements when they attend court. This includes identifying themselves as a legal professional and showing photographic ID, which will be checked by a court security officer against a registration list.

Random searches on a proportion of the participants in the pilot will be carried out to make sure the scheme is working as intended.

If successful, the scheme will be extended nationally and could be grown to other professional groups. It will not be implemented at courts hearing terrorist or high security cases.

For more details, **click here**.

10/8/18

Paediatricians as expert witnesses in the family courts: new guidance

The Family Justice Council and the Royal College of Paediatrics and Child Health have produced a **guide** directing the reader to discipline specific information with regards to paediatricians as expert witnesses. It is intended to be used by all stakeholders as a companion document to the generic expert witness standards set out in **Part 25 of the Family Procedure Rules**.

The guide covers: the role of paediatricians as expert witnesses in family proceedings: the role of the paediatric team when assessing the child with suspected maltreatment; the role of the professional witness; regulation and codes of conduct; issues in relation to competences; supervision/peer review; and quality of service.

For the guide, **click here**.

10/8/18

Football used as scapegoat for domestic violence

Scapegoating football as a trigger for domestic violence trivialises the issue and risks offering offenders an excuse for their behaviour, according to a UK study.

Reports linking a spike in cases with the outcome of 'Old Firm' games (Glasgow Rangers versus Celtic) and England's World Cup performance lack reliable data and fail to recognise abuse is a pattern of ongoing behaviour.

The findings are included in the f**irst in-depth study** of the perceived link between football and domestic violence and

abuse (DVA), carried out by researchers from Glasgow Caledonian University, the University of Glasgow and the University of Bristol.

They looked at it from the point-of-view of survivors, police, specialist support groups, football authorities, government organisations and policymakers, in Scotland and England.

Previous studies have over-simplified the issue and discount a range of factors, including increased policing on match days, the large number of men who watch and support the sport, and different recording practices between police forces, researchers conclude.

DVA support groups also stressed abusive behaviour is about power and control and the contributory factors are complex.

However, football as the UK's national sport has a social responsibility to highlight the issue in a similar way clubs support campaigns against racism and homophobia, according to stakeholders.

Dr Nancy Lombard, Reader in Sociology and Social Policy at **Glasgow Caledonian University**, said:

> "All stakeholders had concerns about the reliability and implications of data suggesting a causal link between football and domestic violence and abuse.
> "Participants highlighted concerns about the existing evidence and the need to view violence and abuse as a pattern of ongoing behaviour, which cannot be reduced to an incident associated with a particular event such as a football match.
>
> "Specialist DVA service providers were concerned that focusing on football masks the underlying causes and potentially offers perpetrators excuses for their abusive behaviour.
>
> "Research which suggests potential links between DVA and factors such as football or alcohol has proliferated, and links between them may be misinterpreted, misrepresented and misunderstood."

Focus groups and one-to-one interviews were conducted in Scotland and England for the study, which was co-authored by **Dr Oona Brooks-Hay**, of the University of Glasgow, and **Dr Emma Williamson**, of the **University of Bristol**, and was published in the Journal of Gender-Based Violence.

The authors conclude more could be done by governments, the media, and supporter agencies to promote anti-violence messaging through sport.

Dr Emma Williamson, from the School for Policy Studies at the University of Bristol, added:

> "This project was important because it allowed all stakeholders to express their views and despite coming from different directions, stakeholders were in general agreement about their view that blaming football for abuse was wrong and unhelpful.
>
> "All stakeholders felt that there was immense opportunity within sport, and football in particular, to help challenge abusive behaviours but that too little is understood about reporting to rely on mixed statistics which sometimes suggest a link."

The study cites Football United Against Domestic Violence, a Women's Aid campaign which provides resources and training to players and fans in England, as a positive example of community work.

For the study, **click here.**

10/8/18

LASPO changes may have disproportionately affected certain groups: LSB

The Legal Services Board (LSB) has responded to the Ministry of Justice's (MoJ) post-implementation review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

The LSB says that many of its research studies provide evidence that is relevant to assessing the impact of the changes to legal aid that were part of the LASPO reforms. It hopes that its submission (which highlights such evidence) can assist the MoJ's review to deliver outcomes that promote access to justice.

Dr Helen Phillips, Chair of the Legal Services Board, said:

> "I am pleased that we have this opportunity to contribute to the post-implementation review of LASPO. Our response contributes our evidence base to this first review of changes to the provision of legal aid in England and Wales.
>
> "What we say is evidenced by our in-depth research into the legal services market. Our research shows that, in recent years, a growing proportion of individuals are handling their legal problems alone and that a declining proportion are seeking advice.
>
> "Actual or perceived costs have come to the fore as a key factor in determining what action people take when faced with a legal problem.
> "It has become clear that individuals whose finances are stretched, but not severely enough to qualify for legal aid, are the least likely to use a lawyer. Reductions in legal aid carry the risk of increasing the number of these 'stretched consumers'.
>
> "We think it is important to look at what has happened to consumers who are no longer able to access legal aid following the reforms. Research suggests that changes in legal aid may have disproportionately affected certain groups of people such as particular ethnic groups and those from the C2DE social groups. We are also concerned about whether the reforms may have had knock-on effects elsewhere in the justice system and also more broadly in other areas of public spending such as health."

For the LSB submission, **click here**.

12/8/18

Divorcing couples admit to 'exaggerating' foul play

Thousands of divorced couples are driven to 'exaggerate' faults in their marriage to make sure the family court approve their divorce, a **new study** for the law firm **Slater and Gord**on has found.

According to the survey, three in ten 'bent the truth' about adultery, unreasonable behaviour or the length of separation to ensure their divorce petition would not be rejected under the current system.

More than a third said that being forced to assign blame added to their anguish, with 42 per cent claiming it also upset their children. More than one in four claimed the process left them with bitter feelings towards their former spouse and prevented their hopes of keeping the break-up amicable.

Of more than 1,000 British divorcees surveyed, 80 per cent said they would have opted for a 'no-fault' divorce if the law allowed.

Slater and Gordon say that it would save many couples from feeling they had to bend the truth about the breakdown of their marriage.

Family lawyer, **Joanne Green**, said:

> "Many couples feel they are stuck between a rock and a hard place, they want to split on good terms but have to find fault in order to get a divorce.
>
> "The **Tini Owens** case has highlighted how divorce law just hasn't kept up with the times. Clearly, many couples would prefer an amicable, no fault split, but far from helping that happen the current process seems to inflame the situation and incites couples to enter into a blame game.
>
> "It causes issues for the individuals involved and sadly, it also seems that it causes distress to the children stuck in the middle.
>
> "It's also important to point out that not being truthful in a court document is a serious issue and if people are found to have done so, they could be liable to serious consequences."

According to the survey, 14 percent have exaggerated about adultery and 13 percent the length of their separation. Sixty per cent of those who admitted exaggerating, blamed 'unreasonable behaviour' including nearly a quarter accusing their partner of drinking too much, picking arguments or lack of respect and controlling behaviour.

When asked the real reasons behind the breakdown of their marriage, 41 percent of the 1,011 divorcees said they had simply fallen out of love.

Joanne Green added:

> "Although there are many varied reasons for a marriage breakdown, if over 40 percent of those surveyed said they had simply fallen out of love, the law should reflect that and give the option of a no-fault divorce."

For more information about the survey, **click here**.

17/8/18

Financial order reforms set to help unfairly treated former partners and families

The Government has agreed to improve the enforcement of financial orders, in response to a Law Commission report.

In **2016 a report by the Law Commission** found that the law in this area was too complicated, sometimes ineffective, and that orders fairly awarded by the courts were not always complied with as a result.

Now in a **letter to the Commission**, Justice Minister Lucy Frazer has said the Government will bring forward non-legislative measures to improve the enforcement system, whilst considering further reform in the future.

Law Commissioner Professor Nick Hopkins said:

> "If a court decides that a former partner or children are deserving of financial support, it's not for a debtor to act or do otherwise.
>
> "These reforms will help to prevent serious hardship that some face when debtors refuse to pay, and I'm pleased Government is taking action to help those most in need."

There are four key problems with the current law:

- the complexity of the rules
- a lack of information about the debtor
- some of the debtor's assets being beyond existing enforcement powers
- a lack of means to apply pressure to debtors who can but will not pay.

Following calls for reform by the Law Commission, the Government has now agreed to explore amendments to the Family Procedure Rules 2010 and operational procedures to:

- rationalise the rules on enforcement so that the law and procedure can all be found in one place and is easier to understand and use
- make sure that the general enforcement application – which allows a creditor owed money to ask the court to enforce the order in the way it thinks best –

is fit for purpose

- introduce new guidance for litigants so they know how to go about enforcing their awards
- amend or change the court forms so that debtors and creditors understand what is required of them, the financial information necessary for enforcement is provided by debtors and to let debtors know the consequences of lying
- streamline the system to cut down on unnecessary hearings where all are in agreement and save money for all involved.

Other reforms suggested by the Law Commission are still under consideration by the government. They include:

- providing the court with wide powers to obtain information from third parties about a debtor's assets
- extending existing methods of enforcement to assets that currently cannot be enforced against, for example pension assets and joint bank accounts
- enabling the courts to apply pressure to debtors that have the means to pay but are refusing to pay – by disqualifying them from driving or preventing them from travelling out of the country.

For the 2016 Law Commission report, **click here**. For Justice Minister Lucy Frazer's letter to the Law Commission, **click here**. For the Law Commission's reply, **click here**.

17/8/18

Number of civil partnerships grew slightly in 2017

There were 908 civil partnerships formed in England and Wales in 2017, an increase of 2.0 per cent compared with 2016; this is the second annual increase since the introduction of marriages of same-sex couples was announced in 2013.

The Office for National Statistics has published **statistics relating to civil partnerships in England and Wales for 2017**.

The increase in the number of civil partnership formations between 2016 and 2017 resulted solely from an 8.0 per cent rise (23 civil partnerships) in civil partnerships between women, civil partnership formation among men decreased by 0.8 per cent (five civil partnerships).

Almost two-thirds (66 per cent) of all civil partnerships formed in 2017 were between men.

More than half (51 per cent) of those entering a civil partnership in 2017 were aged 50 years and over; this compares with 19 per cent in 2013, prior to the introduction of marriages of same-sex couples.

In 2017, the average age of men forming a civil partnership (50.3 years) was higher than for women (49.5 years).

London continued to be the most popular region for the formation of civil partnerships; 37 per cent of all formations in England and Wales in 2017 took place in London.

There were 1,217 civil partnership dissolutions granted in England and Wales in 2017, of these 57 per cent were to female couples.

Nicola Haines, Vital Statistics Outputs Branch, Office for National Statistics, commented:

> "Despite the introduction of marriages for same-sex couples in March 2014, the number of same-sex couples choosing to form civil partnerships has increased slightly for the second consecutive year. Almost two-thirds of couples entering into a civil partnership in 2017 were male and more than half of all civil partners were aged 50 years or above. However, our latest data on marriages from 2015 shows that male couples accounted for less than half of all marriages between same-sex couples while only 16% of those marrying a partner of the same-sex were aged 50 and over."

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

17/8/18

Domestic abuse victims increasingly refused right to remain in UK

The refusal rate for people applying to stay in the UK after suffering domestic violence more than doubled between 2012 and 2016.

In 2002, the Government introduced the domestic violence Rule, which allows women on spousal visas to apply for Indefinite Leave to Remain in the UK if they can prove that domestic violence is the cause of a breakdown of the relationship with their spouse. In 2012 The Destitution Domestic Violence Concession (DDVC) was introduced to support women who do not have recourse to public funds. Provided that certain criteria are satisfied, the DDVC helps such women to leave their partner safely and secure their immigration status in the UK.

However, a Freedom of Information (FOI) request by *The Guardian* has revealed that the refusal rate for applications under the domestic violence rule rose from 12 per cent in 2012 to 30 per cent in 2016, the last year for which full-year data were available. The figures show that 1,325 people were refused out of a total of 5,820 applications made between 2012 and 2016.

For the article in *The Guardian*, **click here**.

17/8/18

Man and woman charged with FGM of three-year-old girl

Two people have appeared at Thames Magistrates' Court charged with the female genital mutilation (FGM) of a three-year-old girl.

The man and woman face five charges, including FGM and failing to protect a girl from risk of genital mutilation.

The man, from Ghana, is also accused of possessing indecent videos of a child, while the woman, a Uganda national, is accused of distributing an indecent video of children.

They were remanded in custody and are due to appear at the Old Bailey on 31 August.

It is thought to be the third prosecution brought under FGM legislation. In February, a man from Bristol charged with an FGM-related child cruelty offence **was acquitted** following a ruling by the trial judge. In March, **a solicitor was cleared** of arranging female genital mutilation on his daughter when she was nine.

For a BBC News report, **click here**.

17/8/18

'Cohabiting couples need basic legal protections'

A coalition of legal organisations has written to ***The Guardian*** urging the government "to take steps to bring forward, as a minimum, basic protections for cohabiting couples".

The letter was sent by Resolution, the Association of Lawyers for Children, the Bar Council, the Chartered Institute of Legal Executives, the Family Law Bar Association, OnlyDads, OnlyMums, the Law Centres Network, the Law Society of England and Wales Family Law Committee, Legal Action Group, Legal Aid Practitioners Group, One Plus One, Relate and Rights of Women.

The organisations note that marriage numbers are declining. Currently one in eight adults in England and Wales are cohabiting, a trend steadily increasing since 2002. However, a recent survey showed as many as two in three cohabiting couples were unaware that there is no such thing as "common law marriage" in England and Wales.

The letter concludes:

> "In the interim, the government must also raise public awareness of the lack of protections in place and challenge the common law marriage myth. Only by understanding they are at risk can couples take steps to protect their family if they separate or if they are left bereaved."

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

For an article in *The Guardian* about the rise in deathbed weddings by couples who had mistakenly believed they had the same legal and financial rights and protections as married couples, **click here**.

19/8/17

Institutional neglect: 50,000 children in care where council services are failing

Almost 50,000 vulnerable children are being cared for in areas where council services are failing them, the **Social Market Foundation** (SMF) has claimed.

The think tank accused politicians of ignoring the "silent crisis" in care services that condemns tens of thousands of children to poor care followed by social and economic problems throughout their adult lives.

The SMF analysed inspection data from Ofsted, which assesses local councils' services for children in need of help and protection, looked-after children and care leavers.

According to that analysis, 63 per cent of local authorities in England are providing services for these children which either "require improvement" or are simply "inadequate."

The SMF calculations based on these figures show that this means that 47,085 children – 65% of all looked-after children – are looked after in local authorities that are deemed to be falling short of a good standard. Of those children, 13,790 are receiving care services judged as "inadequate", the worst possible grade.

The SMF said that politicians pay too little attention to the poor quality of care many looked-after children receive.

The think tank has developed an interactive dashboard to allow MPs and others to see instantly how services in their area are performing. It can be **found here**.

The SMF report, entitled ***Looked-after Children: the Silent Crisis*** was supported by the Hadley Trust. The report compared the amount of political attention given to school standards, accusing politicians of turning a blind eye to failings that affect vulnerable children.

The SMF said:

> "It is remarkable that the fact that nearly two thirds of Local Authorities being judged in need of improvement or inadequate over looked-after children is scarcely discussed at Westminster. This would not be the case if such levels of failure were found in our school system, where 78% (secondary) and 90% (primary) are judged to be either good or outstanding.
>
> "This issue clearly needs to receive more attention from politicians and policymakers, and with improvements in the data available, we now have the ability to see where we are going wrong, and how we might improve the situation of looked after children."

For SMF's report, **click here.** For its interactive dashboard, **click here**. For SMF's full press release about the report, **click here**.

19/8/18

Overall 'cost of a child' is £150,753 for a couple

Child Poverty Action Group's latest ***Cost of a Child*** report shows what it costs to raise a child to age 18, based on what the public thinks is a minimum standard of living.

CPAG estimates that the overall cost of a child (including rent and childcare) is £150,753 for a couple and £183,335 for a lone parent.

A combination of rising prices, benefits and tax credits freezes, the introduction of the benefit cap and two-child limit, the bedroom tax, cuts to housing benefits and the rolling out of universal credit have hit family budgets hard. Life has been getting progressively tougher for families on low or modest incomes over the past ten years, with families on in-work and out-of-work benefits hardest hit.

According to CPAG, even families with two parents currently working full time on the 'national living wage' are 11 per cent (£49 per week) short of the income the public defines as an acceptable, no-frills living standard.

For lone parents, CPAG reckons that even a reasonably paid job (on median earnings) will leave them 15 per cent (£56 per week) short of an adequate income because of the high cost of childcare. A lone parent working full-time on the 'national living wage' will be 20% (£74 per week) short of what they need to achieve a minimum standard of living.

To access the report, **click here**.

21/8/18

Mr Justice Hayden appointed Vice-President of the Court of Protection

Mr Justice Hayden has been appointed as Vice-President of the Court of Protection by the Lord Chief Justice, Lord Burnett of Maldon, following consultation with the Lord Chancellor. The appointment took effect on 31 July 2018.

The Hon Mr Justice Hayden was called to the Bar (Middle Temple) in 1987 and took Silk in 2002. He was appointed a Recorder in 2000 and a High Court Judge (Family Division) in 2013. He sits as a Judge of the Administrative Court and was appointed as Family Division Liaison Judge for the Northern Circuit in 2017.

23/8/18

Repatriation of victims of forced marriage: FOI release

In 2017, 27 of the Foreign & Commonwealth Office Forced Marriage Unit's cases involved the repatriation of victims from abroad. In 2016, the number had been 55.

The figures have been revealed in a recently published response, dated 18 January 2018, by the Forced Marriage Unit to a Freedom of Information request concerning the repatriation of forced marriage victims.

The response also showed the number of the FMU's cases solely based in the UK. In 2015 there were 175 and in 2016 157. At the time of the response the 2017 figures were not available. In March 2018 they were confirmed as 120.

For the FOI response, **click here**. For the statistics published in March 2018, **click here**.

26/8/18

Two Family Justice Council vacancies

Two vacancies have arisen on the Family Justice Council: one for a **Family Mediator member** and another for a **Parents' and Relatives' Interests member**.

The Family Mediator member will be an FMC accredited family mediator with at least 5 years' experience, demonstrating a record of achievement at senior level that includes a knowledge of family mediation following relationship breakdown.

The Parents' and Relatives' Interests member will have recent, significant experience of working with, or for, families and children, helping parents and relatives to maintain relationships with children either following relationship breakdown or having been taken into care.

Each member will be able to produce evidence of working, through interdisciplinary consensus, to deliver timely and improved outcomes for families and children who are involved with the family justice system. He or she will have experience as a successful team player with contribution at a strategic level and be able to prepare for and attend meetings of the Family Justice Council.

The Council meets in London four times a year and much of its work is conducted through its working groups. The post is for three years and is offered without remuneration. Reasonable travelling and other expenses are payable.

Applications to fill the Family Mediator member vacancy must be submitted by noon on 1 October 2018. Applications to fill the Parents' and Relatives' Interests member vacancy must be submitted by noon on 5 October 2018. Interviews for each position will take place in London on a date to be confirmed in late October/early November.

For further information about the Family Mediator member vacancy including an information pack, **click here**. For further information about the Parents' and Relatives'

Interests member vacancy including an information pack, **click here**.

27/8/18

Commons to hold debate on LASPO and the post-implementation review

The House of Commons will hold a Westminster Hall debate on legal aid, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the post-implementation review on Tuesday, 4 September 2018 at 6.30pm. The Member leading the debate is Karen Buck MP.

The House of Commons Library has published a research briefing setting out background to LASPO and the post-implementation review, further research sources and parliamentary material on the issue.

For the research briefing, **click here**.

27/8/18

ARTICLES

Divorce & Financial Remedy Update, August 2018

Naomi Shelton, Associate, **Mills & Reeve LLP** considers the news and case law relating to financial remedies and divorce during July 2018

As usual, this update is provided in two parts:

Part A: News in brief and

Part B: Case Law Update

A. News in brief

Sir James Munby retires

Many tributes have been paid to Sir James who retired as President of the Family Division and Head of Family Justice for England and Wales on 28 July 2018. Appointed in 2013, Sir James's legacy has been one of reform and innovation. He drove the family justice transparency agenda, established standard family orders and was not shy of publicly highlighting his concerns with the justice system.

Public Accounts Committee's concerns over court modernisation

The Public Accounts Committee has expressed little confidence in the government's ability to carry through its planned modernisation of the courts and tribunals system. HMCTS's £1.2billion programme to modernise the courts is "hugely ambitious", will be "extremely challenging to deliver" and, given HMCTS has already fallen behind in its timetable, there are concerns that the pressure to deliver quickly may mean changes are made with limited meaningful consultation with stakeholders.

Divorce (etc.) Law Review Bill introduced in House of Lords

Draft "duty to review" legislation designed to encourage the government to make major changes to divorce laws received its first reading in the House of Lords on 18 July 2018. Introduced by Baroness Butler-Sloss, the bill is the result of collaboration between legal and relationship experts, politicians and family lawyers following Professor Liz Trinder's research "*Finding Fault*".

The Bill requires the government to consider in its review, a scheme where one or both parties could register that their marriage (or civil partnership) has broken down irretrievably. The divorce or civil partnership dissolution would be granted if one or both confirmed the application after a nine-month 'cooling off' period.

To follow progress of the bill, **click here**.

Civil Partnership Act 2004 (Amendment) (Sibling Couples) Bill second reading on 20 July 2018

This short private member's bill (sponsored by Lord Lexden) seeks to amend the Civil Partnership Act 2004 to include sibling couples aged over thirty who have lived together for a continuous period of twelve years. Lord Lexden says "Brothers and sisters in such committed, platonic relationship— and indeed many other long-term cohabitants can be hit hard because they are denied all legal safeguards and fiscal protections. The rights available under the Civil Partnership Act are vital to give security to every cohabitant particularly the right to inherit a joint tenancy or a jointly owned home free of inheritance tax." To follow progress of the bill, **click here**.

Supreme Court unanimously dismiss Mrs Owens' appeal against the dismissal of her petition for divorce

The much anticipated Supreme Court's judgment was handed down on 25 July 2018 dismissing Mrs Owens' appeal against the dismissal of her petition for divorce. The result is that Mrs Owens must remain married to Mr Owens for the time being. The judgment is considered in the case law update below.

B. Case Law Update

Harris v Harris [2018] EWHC 1836 (Fam) (Mr Justice Cohen) 3 July 2018

This case concerned an appeal against an order which capitalised spousal maintenance and increased child maintenance.

The final order made in 2009 provided for the payment of various lump sums, a term order for spousal maintenance at the rate of £1,250 a month and child maintenance at the rate of £850 a month. The marriage had lasted for three years and the child, who had been a baby at the time of the order, was now aged ten.

In 2015, the husband ("H") applied to vary the spousal maintenance order. In an "unusual" consent order, it was agreed that the spousal maintenance (referred to as "representing only childcare costs") would be reduced to £500 a month until June 2017 and then it would be reduced again to £250 until June 2018. At that point, the maintenance would stop altogether with a s.28(1)(a) bar. The consent order also required the wife ("W") to provide H with copies of her employment contract, breakdowns of childcare costs and an estimate of future childcare costs. H earned in the region of £200,000 a year gross; W earned less than £2,000 a month.

When W failed to provide the documents required, H unilaterally stopped paying the maintenance (with effect from June 2016). In September 2016, he applied for an order discharging him from the obligation and sought the repayment of £3,500 in "overpaid childcare costs". In October 2016, W cross-applied to capitalise and was given permission, in November 2017, to vary the child maintenance.

Following a trial (in May 2017), judgment was delayed until November 2017 and the order was eventually made in January 2018. The judge ordered that the spousal maintenance should be capitalised in the sum of £9,500 and paid by H by December 2017 (some seven months earlier than under the consent order), with payments of £250 a month to be paid in the meantime. Interest would also be due on the capitalised sum. The effect of this was that a total of £11,693 would become payable by 30 June 2018 (assuming that H did not make the capitalised maintenance payment until then).

An issue that H and W were alive to at trial (but perhaps not the judge until afterwards) was the impact of Belgian tax on the maintenance payments received by W. As the recipient of a maintenance order, she had to pay 40.9% tax on the maintenance meaning that an order of £850 a month only gave her £509 a month income. H was also paying tax on his earnings so, effectively, each was paying tax on the same income.

The effect of the Belgian tax rules were that when the judge increased the child maintenance order to £1,600 a month, it meant that W was only receiving a little over £900. The increased child maintenance was backdated to June 2017.

H was given permission to appeal on various grounds including whether the spousal maintenance should have ended when the child maintenance increased, whether payment of the capitalised sum could fall before 30 June 2018, whether it was proper to order maintenance payments and interest in default of payment and, in respect of the child maintenance, the overall quantum.

Mr Justice Cohen allowed H's appeal in respect of the spousal maintenance to the extent that awarding W capitalised maintenance, plus continuing maintenance, plus interest was double-counting. He considered that it was open to the trial judge either to make an order for capitalised maintenance with spousal maintenance continuing at the rate of £250 a month until payment or to make an order for capitalised maintenance with interest running on that sum and child maintenance at the increased rate, backdated to June 2017.

H's appeal in respect of the quantum of the child maintenance was dismissed with Cohen J satisfied that the trial judge

had found that W needed in excess of £900 a month net although this was maintaining her at a subsistence level. Given the inequality in monthly incomes, it had been fair to place the burden of the tax on H. However, if the increased child maintenance figure was to start in June 2017, then it was only right for the spousal maintenance to stop at that point.

A substituted order provided that W will receive capitalised maintenance of £6,500 plus interest with the increased child maintenance payments. Although there was no order for the costs of the appeal, the costs of the trial were dealt with. H was ordered to pay 60% of W's costs taking into account his litigation conduct and the no order principle applicable to variation applications.

Owens v Owens [2018] UKSC 41 (Lady Hale, Lord Mance, Lord Wilson, Lord Hodge, Lady Black) 25 July 2018

The much anticipated Supreme Court judgment was handed down on 25 July 2018.

The husband ("H") and wife ("W") had married in 1978 and separated in February 2015 when W left the family home. The couple have not lived together since. In May 2015, W issued the petition at the centre of the proceedings. It was based on s.1(2)(b) MCA 1973 and alleged that the marriage had broken down irretrievably and that H had behaved in such a way that W could not reasonably be expected to live with him.

The petition was drafted in "anodyne" terms but, despite this, H defended the suit, arguing that the marriage had largely been successful.

In October 2015, a case management hearing set out directions ahead of the trial. These directions included W being given permission to amend her petition so as to expand the allegations of behaviour, a day being set aside for the trial and that there should be no witnesses other than the couple themselves.

W duly amended her petition so as to include 27 individual examples of H's moody, argumentative or disparaging behaviour. At the trial, only a handful of the allegations were focused on.

The trial judge concluded that despite the marriage having broken down, W had provided flimsy and exaggerated examples of behaviour and that those being relied upon at the hearing were isolated incidents. As such, the test under s.1(2)(b) MCA 1973 had not been met and W's petition was dismissed.

W unsuccessfully appealed to the Court of Appeal, who found no error of law or procedure to justify their interference. W appealed to the Supreme Court.

The Supreme Court unanimously dismissed W's appeal, with the result that W must remain married to H until February 2020 when she will be able to issue a petition based on five years' separation. Lord Wilson gave the majority judgment, with Lady and Lord Mance each giving a concurring but separate judgment.

Lord Wilson confirms the correct test, when applying s.1(2)(b) is:

- determine what the respondent did or did not do;
- assess the effect which the respondent's behaviour has had upon the petitioner in light of all the circumstances in which the behaviour occurred; and
- evaluate whether expecting the petitioner to continue living with the respondent would be unreasonable.

The trial judge had, Lord Wilson said, given himself the correct self-direction and had understood that he was applying an objective test with subjective elements.

Nevertheless, the majority and Lady Hale all had misgivings about other aspects of the trial judge's analysis. In particular, concerns were raised that the allegations of behaviour related to an *"authoritarian course of conduct"* and that the judge had only scrutinised very few of the examples raised by W in her amended petition. Lady Hale's misgivings meant that she considered that the proper disposal of the appeal was to allow it and send the case back for a re-trial; however, given W was not seeking this, Lady Hale was "reluctantly" persuaded that the appeal should be dismissed.

Parliament was invited to consider review and reform of the current divorce laws.

Mills v Mills [2018] UKSC 38 (Lady Hale, Lord Wilson, Lord Carnwath, Lord Hughes and Lord Hodge) 18 July 2018

This Supreme Court judgment relates to the proper approach to applications to vary periodical payments order made pursuant to s.31(1) and s.31(7) MCA 1973 after the grant of a decree of divorce.

The husband ("H") and wife ("W") divorced in 2002 after a 15 year marriage. Under the terms of a consent order, W received £230,000 and H agreed to pay spousal maintenance of £13,200 a year. It was anticipated by H that W would use the capital to buy a home for herself and their son mortgage-free. As it turned out, W was able to get a mortgage and she bought a more expensive house for £345,000.

Between 2002 and 2009, W sold and purchased a series of different properties, and with each purchase the amount which she borrowed increased. She did not necessarily reinvest all of the sale proceeds from one property into the next and seemingly spent the balance, with the result that the amount of capital she had decreased over time.

In 2009, W sold her final property and began to rent accommodation. By April 2015, when the first-instance judge heard the case, W had no capital and she had debts of around £42,000.

The April 2015 hearing was to determine two cross-applications under s.31(1) MCA 1973. H had applied for the discharge or downwards variation of W's maintenance whereas W had applied for her maintenance to be varied upwards. The trial judge noted that there was a shortfall of £4,092 a year between W's needs and her income (earnings and maintenance combined). He held that W's actions, whilst not profligate, had not been wise and she had not managed her finances sensibly. Her current needs had been increased by the choices which she had made. The trial judge declined to vary the maintenance either way which meant that H was continuing to pay about 60% of W's rental costs but W was told she would have to adjust her expenditure accordingly to accommodate the shortfall.

W successfully appealed to the Court of Appeal. The Court of Appeal concluded that the trial judge had not given sufficient reasons why all of W's basic needs should not be met by the maintenance paid by H and increased the maintenance to cover the shortfall. H appealed to the Supreme Court.

The Supreme Court unanimously allowed H's appeal, concluding that the trial judge had been entitled to decline W's application to increase the maintenance to cover the shortfall.

It important to remember that H was only given permission to appeal on one, narrow, single ground - whether, in light of the fact that provision had already been made for W's housing needs in the capital settlement, the Court of Appeal was entitled to interfere with the judge's decision not to increase the periodical payments so as to cover all of W's current rental costs.

The Supreme Court were satisfied that the Court of Appeal had erred in saying that the trial judge had given no reason for declining to increase the order for periodical payments – the judge had given a clear reason, namely that W's unwise decisions in relation to her capital had increased her basic needs by requiring her to pay rent and that it was consequently unfair to expect H to meet these increased needs in full.

The Court of Appeal should have considered the impact of the original capital payment on W's current need to pay rent, and this involved a consideration of three earlier Court of Appeal authorities: *Pearce v Pearce* [2003] EWCA Civ 1054, *North v North* [2007] EWCA Civ 760, and *Yates v Yates* [2012] EWCA Civ 532. These cases had been correctly decided and in light of this the trial judge had been entitled, although not obliged, to decline to require H to fund payment of the rent in full. This, the Supreme Court said, respected the wide discretion conferred upon the court under s.31(1) and (7) MCA 1973 in determining an application for varying maintenance. Moreover, a court would need to give very good reasons for requiring a spouse to fund payment of the other spouse's rent in the circumstances of a case like this. A spouse may well be obliged to make provision for the other spouse, but an obligation to duplicate that provision in situations such as this is likely to be improbable.

Thum v Thum [2018] EWCA Civ 624 (Lady Justice King, Lord Justice David Richards and Lord Justice Moylan) 12 July 2018

This Court of Appeal judgment concerned the construction of effective service of divorce proceedings under Article 16 of Council Regulation (EC) No 2201 / 2003 ("BIIa")

The wife's ("W") petition had been issued in England in October 2015. W did not immediately effect service of the issued petition on the husband ("H"). Then, in February 2016, W attempted to serve the husband with the petition in Germany where he was then living. However, because the address details were deficient, service failed. H was eventually served on 27 February 2016. In the meantime, H had started divorce proceedings in Germany which had commenced in January 2016.

The question before the court was had W taken all of the necessary steps for effective service? And was England or Germany seised of the divorce proceedings?

At first instance Mr Justice Mostyn dismissed H's application seeking a stay or dismissal of W's petition on the basis that the English court had been second seised. Mostyn J concluded that the English court had been first seised because W had lodged her petition first.

H appealed, arguing that service had been ineffective because he had initially been served at his business address in Germany and that a time limit should be implied into r.7.8 FPR 2010 that service be effected "as soon as possible" or "as soon as practicable".

H's appeal was dismissed. Lord Justice Moylan gave the lead judgment. With regard to a party implying a time limit, Moylan LJ said:
"Service is a critical part in the conduct of proceedings and parties need to know easily and clearly what they must do in order to comply with the rules as to service. It might be sensible or even appropriate for some additional specific obligation to be included but I can see no principled basis on which such can be implied. What period would be selected and why would that period be appropriate? In this context, what would "as soon as possible" or "as soon as practicable" mean?"
However, that is not to say that the difficulties with a party seising the jurisdiction of one court without the respondent being served promptly weren't recognised. As a result, the FPR Committee have been invited to consider whether any additional obligations in respect of service should be included in the FPR 2010.

Chaston and another v Chaston [2018] EWHC 1672 (Ch) (HHJ Paul Matthews) 5 July 2018

This was a decision of the High Court (Chancery Division) on appeal in Trusts of Land and Appointment of Trustees 1996 ("TLATA") proceedings.

Following their parents' death, four children inherited a property in equal shares. In 2014, one of the children sold and transferred her 25% share in the property to one of her siblings (the respondent). The respondent wanted to buy out the other two siblings' interests (the appellants). They were resisting; despite agreeing that the property should be sold, they wanted to put it on the open market and not sell to their brother. At first instance, the respondent successfully obtained an order under s.14 TLATA 1996 that gave him permission to the buy out the appellants at a price to be determined by a valuation report.

The appellants unsuccessfully appealed.

HHJ Matthews confirmed that the court had power to order the sale of a property to only one of the beneficiaries, that a previous agreement between the appellants and the respondent to sell to the respondent was a relevant consideration and that there had been no error of law or procedural unjustness in the decision at first instance. The trial judge's decision fell within the generous ambit of discretion afforded to him under TLATA.

8.8.18

The Divorce Trap: Life After Owens v Owens

Georgina Rushworth, Family Law Barrister at **Coram Chambers**, where she specialises in divorce and its financial consequences, considers the implications of the recent Supreme Court decision

As the dust begins to settle in the wake of the hotly anticipated decision of the Supreme Court in ***Owens v Owens*** **[2018] UKSC 41** heard on 17th May 2018 and handed down on 25th July 2018; in which the Supreme Court considered for the first time, what the law requires a petitioner for divorce to establish under section 1 of the Matrimonial Causes Act 1973 ("MCA 1973"), it is time to reflect and consider what the judgment means.

History of the Case

Mr and Mrs Owens, aged 80 and 68 respectively, were married in 1978. They have two adult children.

Mrs Owens had first consulted solicitors about a divorce, in June 2012. In December 2012, Mrs Owens delivered a draft petition to Mr Owens but that was not pursued. In February 2015, Mrs Owens left the family home and in May 2015, Mrs Owens filed the petition which was the subject of these proceedings, seeking a divorce under section 1(2)(b) of the MCA 1973.

The statement of case comprised five paragraphs couched in "anodyne" terms. Mrs Owens alleged as follows:

> "Mr Owens had prioritised his work over their life at home; that his treatment of her had lacked love or affection; that he had often been moody and argumentative; that he had disparaged her in front of others; and that as a result she had felt unhappy, unappreciated, upset and embarrassed and had over many years grown apart from him." [para 10]

At a case management hearing ("the CMH") in October 2015, Mrs Owens was permitted to amend her petition to expand on the allegations. The court also provided for statements from both parties and listed the matter for one day, directing that there should be no witnesses other than the parties themselves. Mrs Owens had proposed half a day; Mr Owens three days.

Mrs Owens duly amended her petition. She provided 27 examples of the third and fourth allegations detailing Mr Owens' alleged behaviour from 2013 over a 2-year period. At the hearing, a decision was made to focus on four of them. It is noted by the Supreme Court that Mr Owens entered very few denials, albeit he disputed the context.

The matter came before His Honour Judge Tolson QC. Giving what is recorded in the lead judgment of Lord Wilson, to be a short judgment of 6 pages, His Honour Judge Tolson QC declared that the petition was "hopeless". He found that the allegations were "flimsy", that Mrs Owens had "exaggerated their context and seriousness", that she was "somewhat old school", that she was "more sensitive than most wives", that the three incidents relied on were "isolated" and "not part of a persistent course of conduct", that Mrs Owens had "cherry picked" one of those examples, which illustrated her approach" and that the examples (in fact all) "scarcely merited criticism." [cf para 21]. HHJ Tolson QC concluded that whilst it was clear and he found as a fact, that the marriage had irretrievably broken down; Mrs Owen could not continue to live with Mr Owens, he found no behaviour such that she could not reasonably be expected to live with him. He stated that (t)he fact that she did not live with the husband has other causes" [cf para 59].

Mrs Owens appealed. On March 24th 2017, the Court of Appeal, comprising Sir James Munby, Lady Justice Hallet and Lady Justice Macur rejected the appeal, albeit one might glean their reticence from the judgment given by Lady Justice Hallett, who recorded that she reached that conclusion, "with no enthusiasm whatsoever" [para 99].

Mrs Owens appealed to the Supreme Court; Resolution were given permission to Intervene but by written submissions only. The Court, comprising Lady Hale, Lord Mance, Lord Wilson, Lord Hodge and Lady Black dismissed Mrs Owens' appeal, albeit Lady Hale concludes that she did so with "reluctance" [para 54] and there is a common sense of unease.

The lead judgment is given by Lord Wilson (with whom Lord Hodge and Lady Black agreed) and separate judgments by Lady Hale and Lord Mance. The lead judgment concludes with the Court's express recognition that in dismissing the appeal, the effect is that Mrs Owens must remain trapped in a marriage, which she wishes were at an end, and with a clear invitation to Parliament to consider reforming a law which is no longer fit for purpose [paras 44-45].

What Mrs Owens had to prove: The Current Law

Section 1 of the ***MCA 1973*** provides as follows:

> (1) Subject to section 3 below, a petition for divorce may be presented to the court by either party to a marriage on the ground that the marriage has broken down irretrievably.
>
> (2) The court hearing a petition shall not hold the marriage to have broken down irretrievably unless the petitioner satisfies the court of one or more of the following facts, that is to say –
>
> a. …
>
> b. That the respondent has behaved in such a way that the Petitioner cannot reasonably be expected to live with the Respondent.
>
> (3) On a petition for divorce it shall be the duty of the Court to inquire, so far as it reasonably can, into the facts alleged by the petitioner and into any facts alleged by the Respondent
>
> (4) If the court is satisfied on the evidence of any such fact as is mentioned in subsection (2) above, then unless it is satisfied on all the evidence that the marriage has not broken down irretrievably, it shall, subject to section 5 (…), grant a decree of divorce.

It was the opportunity to consider the interpretation of this subsection, specifically what the law required Mrs Owens to establish under it, which had at the permission stage, grasped the Supreme Court's attention, not having had a previous opportunity to do so and the authorities being few and far between; limited to the six historic judgments considered by the Court in reaching its decision [cf paragraphs 22-27]. As is expanded upon below, the Court was unanimous, that these decisions provide the correct interpretation of the subsection, requiring a three-stage inquiry as follows:

> "first (a) by reference to the allegations of behaviour in the petition to determine what the respondent did or did not do; second (b) to assess the effect which the behaviour had upon this particular petitioner in the light of the latter's personality and disposition and of all the circumstances in which it occurred; and third, c) to make an evaluation of whether, as a result of the respondent's behaviour and in the light of its effect on the petitioner an expectation that the petitioner should continue to live with the respondent would be unreasonable." [para 28]

The Case before the Supreme Court

One assessment of the Supreme Court decision might be that the outcome was rather a disappointment. The principle ground of appeal, so as to require reinterpretation of section 1(2)(b) MCA 1973, with focus to be placed on the effect on the Petitioner, was not pursued by Mrs Owens' legal team, Counsel for Mrs Owens conceding, and the Supreme Court assess "rightly" [para 43], that the current interpretation of the subsection, requiring a three-stage inquiry was correct.

Lord Wilson acknowledges that Resolution pursued the argument in their written submissions, however, in expressing the view of the majority, he confirms that that the construction which Resolution advanced is incorrect and held that the subsection correctly interpreted could not ignore the behaviour of the Respondent. The Court also dismisses the suggestion that there was any incompatibility with Article 8 of the European Convention on Human Rights.

There is a concession by Lord Wilson, that the application of the facts of the individual case will change with the passage of time [para 30 – 31] particularly with respect to the third line of inquiry, *whether an expectation of continued life together is unreasonable* and that leads us into what had previously been referred to, by Ormerod J in *Bannister v Bannister* (1980) 10 Fam Law 240 as "the linguistic trap." [p240]. Admitting that he is equally at fault in using the phrase, Lord Wilson confirms that the shorthand term "unreasonable behaviour" is wrong [para 37] stating:

> "The subsection requires not that the behaviour should have been unreasonable but the expectation of continued life together should be unreasonable" [para 37]

Arguably, this poses the question, what then is the behaviour? That remains at large.

Whilst confirming that His Honour Judge Tolson QC, despite using the now illicit phrase five times, gave himself the correct self-direction Lord Wilson does express " uneasy" feelings in respect of the lower court, including whether Mrs Owens had been failed by the almost summary procedure conventionally adopted for a defended divorce suit [para 42] and whether the judge had heard enough to appraise the cumulative effect of the behaviour on Mrs Owens and in respect of aspects of the judge's findings, however he stated, these were not the consequence of this Court [para 43], Lady Hale's uneasiness sounds louder.

Lady Hale's separate judgment makes her lack of relish with the approach the judge at first instance had taken clear. Agreeing with the lead judgment in respect of the law and its construction, Lady Hale refers to being "troubled" by the trial judge's repeated reference to unreasonable behaviour. She states:

> "This is a convenient but deeply misleading shorthand for a very different concept. In particular, it can lead to a search for blame, which is not required. Indeed, those of us who have made or supported proposals for reform of the law over the years may not have helped by referring to "no fault divorce" when the current law does not require fault. Worse still, referring to "unreasonable behaviour" can also lead to a search for who is the more to blame, which is also irrelevant." [para 48]

The concept of what constitutes "behaviour" becomes perhaps yet more elusive.

Lady Hale also raises concern that HHJ Tolson QC appears to have thought that the behaviour complained of had to be the cause of the breakdown, which she, in agreement with Lord Wilson confirms "is simply not the law" (paragraph 49). She expands:

> "One of the five "facts" prescribed in the section 1(2)(a) - (e) has to be proved. But the Act does not require that there be causal connection between them" [para 49]

Ultimately however, she shares the misgivings expressed in the lead judgment regarding the way in which the hearing was set up and, as a consequence, expresses that her preferred approach would be to allow the appeal and send the case back to be tried again. Having regard to the unsurprising "dread" with which Counsel for the Wife greeted this prospect on behalf of Mrs Owens, that was not pursued. Lady Hale confirms that she was "reluctantly persuaded" that the appeal should be dismissed.

Lord Mance delivered a separate judgment, concurring with the lead judgment in respect of the law, and its application. He states, contrary to Lady Hale, that there is no reason to think that the trial judge, when using the term "unreasonable behaviour" did not apply the correct test [para 56].

Notably, he does not share the misgivings of the lead judgment and Lady Hale in respect of the judge's assessment of the allegations, stating:

> "it appears fanciful to suppose it would have made any difference to the judge's assessment if he had also expressly put and answered the question whether, even if the allegations were individually insignificant, they were cumulatively significant. The judge clearly formed a view that there was nothing in the case overall" [para 57].

Lord Mance does however share the "unease" expressed in the lead judgment and Lady Hale's about what he refers to as an "apparently conventional procedure, whereby a defended divorce petition was listed for what, in common law terms, might be regarded as a relatively short period – in this case one day", in doing so though he notes that it was Mrs Owens who through Counsel submitted that even that was not required [para 58].

In concluding, however, he also departs from Lady Hale in her assessment that the trial judge had thought that the husband's conduct had to cause the breakdown [para 60].

Where do we go now?

Whilst the outcome has been met with disappointment in virtually all quarters, the decision is of value to practitioners, albeit it raises its own conundrum. James Turner QC who acted for Resolution has expressed "puzzlement" in respect of what now is the "behaviour" and if not causally related to the breakdown of the marriage, what is the need to prove it? The answer must be reform of the law.

What then does the decision mean for us in the interim, pending such reform?

Firstly, the commonplace, shorthand phrase "unreasonable behaviour" must be forgotten. So too, must the notion of "fault-based divorce" and be replaced with "conduct based".

Second, the court makes clear that the practice of drafting anodyne particulars is to be commended. Lord Wilson states:

> "The judge remarked that, like the petition which she had filed much later, this initial draft "lacked beef." That should have been a compliment, not a criticism. Family lawyers are well aware of the damage caused by the requirement under the current law that, at the very start of proceedings based on the subsection, one spouse must make allegations of behaviour against the other. Such allegations often inflame their relationship, to the prejudice of any amicable resolution of the ensuing financial issues and to the disadvantage of any children. Thus, for many years the advice of the Law Society, now contained in the second guidelines of para 9.2.1 of the fourth edition (2015) of the Family Law Protocol, has been:
>
> > "where the divorce proceedings are issued on the basis of unreasonable behaviour, petitioners should be encouraged only to include brief details in the statement of case, sufficient to satisfy the court…"
> > [para 7]

Mrs Owen's petition is said to be in appropriately anodyne terms [para 10].

Thirdly and finally, the Supreme Court has confirmed that the correct interpretation of section 1(2)(b) of the MCA 1973 requires a three-stage approach. Bearing in mind that application of that inquiry will change over time. It might be recollected, that until the mid 1950s divorcees were banned from entering the Royal Enclosure at Ascot. Times change.

On the 25 July 2018, the same date that judgment was delivered, the Ministry of Justice twitter account, tweeted as follows:

> "Responding to Owens versus Owens @UKSupremeCourt judgment: The current system of divorce creates unnecessary antagonism in an already difficult situation. We are already looking closely at possible reforms to the system."

At the same time, it is noted that the ***Divorce (etc) Law Review Bill*** introduced in House of Lords, draft legislation designed to encourage the Government to make the first major changes was published on 18 July 2018, when it received its first reading in the House of Lords. The date of its second reading is yet to be confirmed. Professor Liz Trinder has suggested that the timing was deliberate. This might suggest that the overall impact of the Supreme Court's decision may prove to be more positive than it initially appeared to be.

03.08.18

Williams v The London Borough of Hackney: Guidance for parents and local authorities on the use of s.20 Children Act 1989



Louise MacLynn, **Sharon Segal** and **Olivia Magennis**, barristers at **1GC Family Law** who all appeared in ***Williams v The London Borough of Hackney***, consider the implications of the judgment for local authorities, parents and their legal advisers.

In the case of ***Williams v The London Borough of Hackney* [2018] UKSC 37**, the Supreme Court has reviewed s.20 of the Children Act 1989 and given guidance in relation to its application. Section 20 is an incredibly far-reaching statutory provision and is used in the context of local authorities providing services to unaccompanied minors, disabled children, abandoned children as well as children who are on the edge of care proceedings.

A significant proportion of case law relating to section 20 deals with when a local authority's duty to accommodate a child applies, in circumstances where the local authority do not wish to accommodate. *Williams v The London Borough of Hackney* [2018] UKSC 37 was about the opposite scenario; where a local authority wanted to accommodate but the parents wanted the children back. The question then arose as to what powers the local authority had in those circumstances. The guidance therefore focuses on that aspect.

Background

The case concerned a claim under the Human Rights Act on the basis that the local authority had unlawfully accommodated the children of the claimants under s.20 of the Children Act 1989. The claimants were the parents of eight children, ranging from 8 months to 14 years old. During an incident when the 12-year-old child was caught shop-lifting, he made an allegation that his father had hit him with a belt. The police and social services became involved and the police went to the family home to interview the parents. The family home was found to be in a state 'unfit for habitation by children' and the police exercised their powers of protection under s.46 of the Children Act 1989 and removed all eight children from the parents' care. This power could only be exercised for a maximum of 72 hours.

The parents were arrested and interviewed on the same day and released in the early hours of the morning on police bail. The bail conditions prevented the parents from having unsupervised contact with any of their children, to prevent interference with victims of crime.

The parents attended the offices of the local authority with a view to the children returning home and were asked to sign what was called a safeguarding agreement. However, that agreement did not set out their right to object to the children's accommodation or their right to remove the children at any time. Both parents signed the agreement.

At the end of the 72-hour period, the parents asked the local authority to return their children but were told that they could not take their children home. A short time later, solicitors instructed by the parents wrote to the local authority giving formal notice of their intention to withdraw consent to the children's accommodation. They indicated that the parents wished to work with the local authority and therefore agreed to a further ten days of accommodation so that plans could be made to return the children.

By this stage, the local authority had confirmed that the parents had improved the conditions of the family home and had formed a plan for the children to return. However, the bail conditions remained in place and the local authority formed the view that it could not return the children until the bail conditions were varied. The social worker's view was that it was for the parents to apply to lift the bail conditions and the local authority refused a request to supply a letter confirming their support to the bail conditions being lifted.

Eventually, some two months after the children were initially accommodated, a senior social worker 'arranged with the police for the bail conditions to be varied' and the children were returned.

No care proceedings were ever commenced. The police initially charged the parents but later discontinued the proceedings.

After pursuing complaints internally and with the local government ombudsman, the parents made a number of claims against the local authority and in particular claimed damages for breach of their rights under article 8 of the ECHR.

At first instance, the parents' Human Rights Act claim was successful on the basis that the local authority's interference with the parents' article 8 rights was not in accordance with the law and they were awarded £10,000 damages each. The trial judge found that "the circumstances, combined with the inadequacies of the information conveyed, were such as to amount to the "compulsion in disguise" and that "such agreement or acquiescence as took place was not fairly obtained". The accommodation of the children after the initial 72-hour period was therefore unlawful.

The local authority successfully appealed, the Court of Appeal finding that there had been a lawful basis for the children's accommodation. The Court of Appeal held that there was no legal requirement for the local authority to obtain informed consent of parents to s.20 accommodation of children and that in any event, the bail conditions prevented the parents from providing suitable accommodation for the children whether or not they consented to the children being accommodated by the local authority.

The parents then appealed to the Supreme Court, the central issue being whether there was a lawful basis for the children's accommodation under s.20 of the Children Act 1989.

The Supreme Court judgment

The Supreme Court unanimously upheld the decision of the Court of Appeal, although for quite different reasons.

Giving the leading judgment, Lady Hale set out nine points of guidance in relation to the use of s.20 (at paragraph 38):

> a. The starting point is parental responsibility (PR); a person with PR may arrange for some or all of his or her PR to be met by others acting on his or her behalf, but helpless submission in the face of asserted power does not amount to a delegation of PR or its exercise.
>
> b. It may be confusing to talk about consent to removal or accommodation – doing so is simply delegating the exercise of PR for the time-being to the local authority. Any such delegation must be "real and voluntary".
>
> c. Removing a child from the care of a parent is very different from stepping into the breach where a parent is not looking after a child; in the latter circumstances the active consent or delegation of PR is not required, but powers exercised in such circumstances are subject to the parents' right to object (s.20(7)) or to remove the child (s.20(8)). As a matter of good practice, local authorities should inform parents of these rights and also of their other rights, including to know where the child is (para 15 Schedule 2 to the Children Act 1989).
>
> d. Parents may ask a local authority to accommodate their child and the local authority may have a power or even a duty to do so depending on the circumstances – this is a further example of the delegation of PR and again, good practice indicates that parents should be informed of their rights and the local authority's responsibilities.
>
> e. A local authority cannot accommodate a child where a parent is willing or able to do so (s.20(7)). Any debate about whether a parent is 'willing or able' can only be resolved in the context of court proceedings. Otherwise, if a parent says they are willing or able to accommodate the child, the local authority cannot accommodate the child against the parents' wishes.
>
> f. The power to remove the child is absolute, save where it is necessary to take steps to protect a person, including a child, from being physically harmed by another. Therefore, if a parent unequivocally requires the return of the child, the local authority must return him or her or obtain the power to retain the child either via the police or a court order.
>
> g. The right to object or to request return are qualified where court orders have been made determining where a child should live (s.20(9) and (10)) but are otherwise unrestricted.
>
> h. There are separate provisions for children who have reached the age of sixteen (see s.20(3), (4), (5) and (11)).
>
> i. There is no time limit to s.20 accommodation however local authorities have duties to children whom they are accommodating under the Children Act 1989 and various regulations as well as a duty to act reasonably in general public law terms and to respect the child's and parents' rights under the ECHR.

On the facts of this case, the Supreme Court held that given the initial period of accommodation pursuant to the police powers of protection, the key question in this case was whether the parents' actions after the expiry of the police protection amounted to 'an unequivocal request for the children to be returned'. The bail conditions themselves 'did not operate to give the council any greater powers than they had under the 1989 Act' and so were not decisive.

The Court found that in their initial discussions with the social workers, it was difficult to construe the parents as having given a 'clear objection' to the continued accommodation or an 'unequivocal request' for the immediate return. Similarly, the Court found that once solicitors on behalf of the parents became involved, their correspondence did not amount to an objection to accommodation or an unequivocal request for the children's return, and in fact, albeit with some reluctance, amounted to a delegation of the parents' PR until the council felt able to return them.

Importantly, the Supreme Court differed from the trial judge at first instance and was clear that PR could be delegated to a local authority without the parents being 'fully informed' as long as the parents' action is voluntary.

What are the implications for local authorities?

The following points are the most relevant for local authorities:

a. Where a child has been abandoned or there is no parent actively involved with a child, the position is unchanged and straight-forward – there is no need for active consent or delegation and the local authority must accommodate.

b. However, where there are active parents involved with the child, the local authority must have a real and voluntary delegation of PR in order to lawfully accommodate. Thus although the Supreme Court has endorsed the Court of Appeal's move away from a requirement for active consent, the local authority must have an active delegation of PR from the parents.

c. While there is no statutory requirement for the delegation of PR to be in writing, it remains sensible to evidence the delegation in this way.

d. While delegation can be 'real and voluntary' without being 'fully informed' (paragraph 39), the Supreme Court has identified the provision of information as good practice, including (see paragraph 40);

i. Informing parents what they, the local authority have done (if they have removed a child when the parents were missing or were unavailable for example due to ill-health)

ii. Informing parents of their rights under subsections (7) and (8)

iii. Informing parents of their other rights under the Children Act 1989 including to know the whereabouts of their child

iv. Informing the parents of the local authority's own responsibilities to the child.

e. While the requirement to provide the above information is 'good practice' rather than a statutory requirement, most courts can be expected to criticise a local authority which fails to comply with this guidance.

f. In some circumstances, the failure to provide information still runs the risk of a court finding that accommodation was not truly 'real and voluntary' and therefore not lawful. Therefore, local authorities should follow the guidance so as to avoid the risk of a claim under the Human Rights Act.

g. The fact that there may be bail conditions restricting the parents' contact with or care of the children does not give the local authority any greater powers than they would otherwise have. Delegation of PR is still required and a parent may remove a child regardless. If a parent is then arrested however, a local authority is likely to have a duty to accommodate and of course if the local authority considers that the threshold for proceedings under the Children Act 1989, it could issue proceedings. Police protection may also be a possibility.

h. In terms of returning children, local authorities are not required to do so unless a request is made in unequivocal terms and for an immediate or a timed return. Local authorities will have to decide for themselves whether parents have satisfied this standard. There is no requirement that the request for return be in writing.

i. Parents have a right to know (and should be told) where their children are placed and may simply remove them at any time – either from their foster placement or for example from contact (see paragraph 46).

What are the implications for parents?

From the perspective of parents and those advising them, the following are the most relevant implications:

a. If a parent has not delegated their parental responsibility to the local authority in a real and voluntary way, the child's accommodation may be unlawful

b. The local authority should have provided the parents with information about the accommodation, the parents rights and the local authority's obligations – if they have not done this at the time of placement they should do it as soon as possible thereafter

c. Parents seeking the return of their children to do so 'unequivocally' and must seek an 'immediate or timed return'.

d. There is no requirement that a request for the return of a child be in writing, but given the requirement for the request to be unequivocal, this would be advisable.

e. There will be times when making an unequivocal request leads to the initiation of court proceedings, however as the Supreme Court notes, this is not necessarily a bad thing; there are obvious advantages for a child and the family; the child will have a guardian and representation, as will the parents, and the court may make orders for contact (see paragraph 51).

f. If there is any debate about whether a parent is 'willing or able' to care for their child, parents are entitled to say that the local authority must either return the child or issue proceedings. Section 20 cannot be relied upon to lawfully accommodate a child in such circumstances (see paragraph 43).

g. Parents are entitled to simply remove their children in s.20 circumstances – either from foster care or contact. If a local authority refuses, the Supreme Court has said that the following are the available methods of enforcement:

i. habeas corpus proceedings

ii. relying on the Child Abduction Act 1984.

iii. the threat of action under the Human Rights Act, despite this ultimately not being successful in the particular facts of the Williams case.

Comment

The Court of Appeal were very critical of judges in the Family Division for importing a consent requirement into s.20 that does not appear in the text of the statute itself. The Supreme Court has not adopted that criticism in any real sense; while Lady Hale has said "*It may be confusing to talk of parental 'consent' to the removal (or accommodation) of her child. If a parent does agree to this, she is simply delegating the exercise of her parental responsibility for the time being to the local authority*" (paragraph 39), there was no specific criticism of the decisions of the lower courts on this issue (following an extensive review) and the word "consent" creeps back into the Supreme Court's analysis from time to time (see for example paragraph 40). The words 'real and voluntary delegation of parental responsibility' do not appear in the text of section 20 any more than the word 'consent' but the Supreme Court has held that this is what is required.

It might be argued that the requirement for real and voluntary delegation of PR protects parents in much the same way as a requirement for consent in the sense that it requires an active step on their part. However, delegating PR to a local authority could be seen to give local authorities a much broader power than simply consenting to the specific issue of accommodation. The whole point of section 20 after all is that local authorities do not acquire PR, which remains in the sole hands of the parents at all times. An unintended consequence could be that parents may be less willing to agree to their child being accommodated if that means that in doing so they also delegate parental responsibility.

It might also be said that from the perspective of social workers and parents on the ground, the concept of 'consent' to accommodation is much easier to understand than 'real and voluntary delegation of parental responsibility' which is rather more 'legal' in tone, and that this requirement may be more difficult to implement and off-putting to parents in practice.

The requirement for a request for the return of a child to be 'unequivocal' and for the child's immediate or timed return does appear to import a gloss on the wording of s.20(8), and it remains to be seen whether parents find it more difficult in practice to remove their children from s.20 accommodation. The fact that Lady Hale says that in terms of enforcement "the simplest step would be to remove the child" (paragraph 46) may be a little surprising to practitioners used to making sensible arrangements for these matters – particularly in the context of the Supreme Court also emphasising the local authority's duty to inform parents of their right to know the whereabouts of their child (paragraph 40). However, if a local

authority does have concerns about disclosing to a parent where a child is staying or is worried about a parent turning up and removing the child, this is perhaps a good indication about whether the parents' agreement to accommodation is genuinely voluntary.

Finally, it is interesting to note the other remedies the Supreme Court felt were open to parents; issuing a writ of habeas corpus or relying (somehow) on a local authority potentially committing an offence under the Child Abduction Act 1984. In practice, these may not be the easiest enforcement methods to use. Lady Hale did go on to say "*But far preferable to any of these is for the local authority promptly to honour an unequivocal request from the parents for the child's immediate (or timed) return*". Not many people are likely to disagree.

3.8.18

Depriving children of their liberty: Resources and Reform

Michael Jones, barrister, **Deans Court Chambers**, Manchester, considers the use of the court's inherent jurisdiction in some deprivation of children's liberty cases and calls for urgent reform

In early August 2017, Sir James Munby who was the President of the Family Division at the time, handed down a judgment in the case of ***Re X (no.3)* [2017] EWHC 2036**. The judgment, and two further judgments in that case which followed shortly thereafter, attracted a significant amount of media attention, because they highlighted the wholly inadequate state of care provision for the most vulnerable of society's young people.

In August 2017, my article **The Case of X: A Wake Up Call** was published in which I outlined the status of the availability of CAMHS inpatient provision and I made a number of observations in relation to the increasing use of the inherent jurisdiction to authorise the deprivation of a child's liberty within placements providing therapeutic input.

Matters have progressed over the past year and what has become increasingly clear (indeed, this had been the situation for some time) is that the inherent jurisdiction continues to be used on a very regular basis, not only in order to authorise the deprivation of children's liberty within therapeutic and clinical settings, but also to effectively 'contain' children with significant behavioural issues, due to a lack of available registered secure accommodation placements. Cases such as ***A Child (no approved secure accommodation available; deprivation of liberty)* [2017] EWHC 2458 (Fam)** and ***A Local Authority v SW & Ors* [2018] EWHC 576 (Fam)** are examples of two such cases.

The facts in *A Child (no approved secure accommodation available; deprivation of liberty)* [2017] EWHC 2458 (Fam) are succinctly summarised by Holman J within the judgment and reflect circumstances with which many practitioners will unfortunately be all too familiar;

> "…the local authority would have wished by last June to place the child in an approved secure accommodation placement. Such placements are currently very scarce and they were unable to find one. So it was that they hoped to place him in a unit which is not approved secure accommodation at X. Their plan was, however, that within X he should, if necessary, be subject to considerable restraint, including physical restraint, in order to keep him safe and prevent him from absconding, as he had done on occasions in the past. According to the case summary for today at paragraph 10, 'The staff of X are appropriately trained in de-escalation and physical restraint'.
>
> Section 25 of the Children Act 1989 makes express and detailed provision for the making of what are known as secure accommodation orders. Such orders may be made and, indeed, frequently are made by courts, including courts composed of lay magistrates. It is not necessary to apply to the High Court for a secure accommodation order. However, as no approved secure accommodation was available, the local authority required the authorisation of a court for the inevitable deprivation of liberty of the child which would be involved."

Similarly, in *A Local Authority v SW & Ors* [2018] EWHC 576 (Fam) , Mostyn J made the following observations;

> "In recent times, a phenomenon has arisen, as I have said, whereby insufficient places have been made available to meet the demand for children to be placed in secure accommodation. Therefore, a mirror

> procedure has been devised by the High Court which has authorised placements in secure environments for children in places not authorised pursuant to the regulations made under section 25 of the Children Act"

Presumably, the rationale for permitting the use of the inherent jurisdiction in such instances (a lack of secure accommodation) is the fact that the absence of resources, in the form of available secure accommodation, makes it impossible to place a child within a registered secure children's home using section 25, hence local authorities seek authorisation under the inherent jurisdiction to deprive a child of their liberty within an alternative placement (for example a residential placement with a high level of restrictive care arrangements in place).

However, one has to question whether the use of the inherent jurisdiction in this context is permissible. In my view it is not.

I would argue that the 'leave hurdle' set out within section 100 of the Children Act 1989 cannot be crossed simply by reason of lack of available resources. To cross that hurdle, the Court must be satisfied that in the particular circumstances of any case, *no statutory scheme is available* [1]. If the section 25 criteria are established and the placement sought by a local authority is secure accommodation, with the primary purpose of the intended placement being the restriction of a child's liberty, then section 25 is clearly the appropriate statutory scheme available. An order pursuant to section 25 has been specifically designed to be permissive in nature and can be made in the absence of any available secure placement, with the local authority then having the authority to place a subject child immediately, upon a secure placement becoming available. The fact that there is no available placement in secure accommodation, does not therefore in itself, allow a local authority to overcome the leave hurdle set out within section 100(3) and (4) of the statute. If the section 25 criteria are met and the local authority seeks to place a child in accommodation specifically designed for the primary purpose of restricting that child's liberty, then there is an available statutory scheme under s.25 and the use of the inherent jurisdiction will be ousted accordingly.

Whilst the inherent jurisdiction can properly be invoked in order to lawfully authorise the deprivation of a child's liberty within a therapeutic or clinical placement where the deprivation of liberty is incidental to the primary purpose of the placement, it remains the case that there is no formal statutory scheme regulating a deprivation of liberty within such placements, albeit it has been made clear that in authorising the said deprivation, the Court will have regard to the scheme laid down by Parliament in the Children Act 1989, so as to ensure that the rights and safeguards provided for the child by section 25 are available [2].

Whilst it is appreciated that on this basis, the use of the inherent jurisdiction in such cases is capable of complying with the procedural requirements of Article 5 of the ECHR, one does have to question whether an alternative statutory scheme providing for the lawful deprivation of a child's liberty within placements that fall outside the remit of section 25 [3], would be preferable. This would fill the lacuna currently existing in the statutory provisions that necessitate the use of the inherent jurisdiction in circumstances which seem to be arising on an increasingly frequent basis, in Courts throughout the country.

Secure Accommodation: current resources

According to the 2018 figures published by the Department for Education there were 255 approved secure accommodation places in England and Wales as at 31st March 2018 [4]. This is an increase of one place from the previous year (254 as of 31st March 2017, with that figure having remained stable for the preceding 3 years). There are 15 Secure Children's Homes in England and Wales, with two providers having closed in 2014. Of those 254 places, 120 were contracted to the Youth Justice Board ('YJB'), an increase from 117 in 2017.

2016 was the first year on record where the percentage of children accommodated on the welfare basis surpassed those placed by YJB. Whilst there was not one hundred percent occupancy of the approved places available, giving the impression that the current level of provision is adequate in order to meet the demand [5], in practice the places reserved for the YJB can result in numerous occasions when there is no welfare bed in England and Wales available to local authorities looking to place a child under the provisions of s.25.

The figures show 255 available places with 204 of those being occupied and 51 being available as of 31st March 2018, however it is not clear what proportion of the *available* vacancies are allocated to the YJB. The statistics merely state that 120 of the approved places in secure accommodation are allocated to the YJB.

The National Secure Welfare Commissioning Unit ('NSWCU') continues to act as the internet based referral vehicle through which secure accommodations placements are sourced. The NSWCU provides a helpful 'flow-chart' that describes the referral process and the measures that can be implemented if a welfare placement is not available. In the event that a welfare bed cannot be found within secure accommodation for a child, then the possible release of YJB beds can be considered and "*if available, negotiation will be undertaken by the NSWCU and the YJB*". The process set out by the NSWCU then goes on to state that "*If (having considered YJB places) a placement is still not available, the responsibility for making appropriate accommodation arrangements for the young person remains with the LA responsible for the child*". There is, accordingly, no guarantee that a secure placement allocated to the YJB will be made available to a local authority on a welfare basis [6].

In the experience of the writer, YJB places are very often unavailable due to the demands currently placed upon the youth justice system within the criminal jurisdiction. 2016 was the first year on record in which the percentage of children accommodated on welfare placements surpassed the percentage placed by the YJB, reversing the previous trend in which YJB placements historically composed the majority of placements.

A further point of note is that of the 204 children accommodated in secure placements as of 31st March 2018, 46% had been accommodated for less than 3 months; a decrease from 55% in 2017. This is the first time the percentage of children accommodated for less than 3 months has fallen below 50% in the period between 2010 and 2018. There has therefore been a steady increase in the proportion of children accommodated for a longer period, with the 2018 figures showing 11% of children within secure placements having been accommodated for over 12 months. The average length of a child's stay within secure accommodation is increasing which has to be of great public concern.

Mental health provision for children: current resources

Mental health provision for children has an obvious and identifiable link with secure accommodation provision, in that some children who are subject to orders made pursuant to s.25 (and indeed, those who have their liberty restricted as a result of declarations made under the inherent jurisdiction), will present with underlying mental health issues. Certainly, many practitioners in this area will be only too familiar with cases where the subject child has been open to agencies such as CAMHS for lengthy periods of time. The British Medical Association publication: ***Young Lives Behind Bars: The health and Human Rights of children and young people detained in the criminal justice system*** provides an illuminating illustration of the extent to which detention itself (and in using the word 'detention' I include placements in secure children's homes), can impact upon a young person's mental health.

October 2017 saw the publication by the Children's Commissioner of ***Briefing: Children's Mental Healthcare in England a briefing on children's mental healthcare in England*** which runs to a little over 30 pages and is recommended reading.

It identifies what is termed as "*a postcode lottery of care*", highlighting the geographical disparity in mental health provision for young people and the huge disparity between spending on children's and adult mental health (an average 6 percent of the mental health care budget in local areas is spent on children).

To put this into context, a previous nationwide survey cited in the Briefing refers to the statistic of 9.6 percent of children aged between 5 and 16 having a mental health disorder; a worryingly high statistic on any interpretation. In relation to Tier 4 provision, there remain significant gaps within the information recorded and released in relation to how many children have to travel out of area to access treatment and how many children are referred for in-patient treatment but not accepted and the reasons for non-acceptance (with non-acceptance by providers having been another issue the writer has experienced in recent cases).

The available information shows that in 2016/17 there were 10,866 admissions to Tier 4 wards, whilst the recorded number of children who were admitted to adult wards in in 2016/17 was 294. The Children's Commissioner has been in the process of undertaking two projects in an attempt to increase understanding of Tier 4 provisions, the results of which are awaited with interest, particularly in light of the apparent lack of clear statistical information in this area resulting from the complexity of the system; in-patient care is commissioned nationally by NHS England from a range of NHS, charitable and private providers, whereas specialist community CAMHS services are commissioned locally by Clinical Commissioning Groups ('CCGs'), with universal services being provided by a mixture of CCGs, local authorities under their public health function, and by children's services as well as individual schools and colleges. There is then the complex regulatory framework; while most areas have an NHS Mental Health Trust, which will be overseen by NHS Improvement as well as the Care Quality Commission (who will also inspect all in-patient services) other provisions may fall under the CQC, or - if delivered in a school - Ofsted, or, in the case of talking therapies provided in non-NHS settings, such providers may not be inspected at all. The Children's Commissioner notes that "*the complexity is compounded by a lack of information and transparency*".

The Children's Commissioner's briefing note was swiftly followed by the Government Green Paper **Transforming Children and Young People's Mental Health Provision: a Green Paper** in December 2017. Following X's case and the associated media coverage, it does appear that the issue of the clearly inadequate status of children's mental health provision is being subjected to scrutiny, however there is still uncertainty in terms of the extent to which any proposed reform will result in significant changes to the state of the current system.

Legislative Provisions: the need for reform

Section 25 of the Children Act 1989 has been in existence for almost 30 years. It was drafted at a time where the approach to children displaying complex behavioural issues was very different from the approach adopted today. The term 'secure accommodation' itself has a punitive connotation, whereas the use of restrictive placements for children in a welfare context today is (quite properly) aimed more towards intervention and support than perhaps it had been in the years gone by.

We have thankfully reached a stage where the onus is becoming increasingly focussed upon addressing the underlying problems experienced by children who display harmful, destructive behaviours to both themselves and to others, rather than simply containing those behaviours by 'locking them up' (I make no excuse for using those words), hence the increasing use of what are often referred to as 'therapeutic' placements (a term which is more than slightly Delphic in nature).

The fact is that the regular use of the inherent jurisdiction points towards a lacuna in the current statutory provisions; section 25 is often unavailable as an option either due to lack of available secure placements, or simply due to a secure children's home being inappropriate for an individual child who requires focussed therapeutic intervention rather than mere 'containment'. Put in very stark terms, section 25 is, in some respects, ineffective because it is incapable of being utilised by local authorities in the way Parliament intended as there are insufficient resources to meet the current demand for placements. This has been the case for a number of years now. The time has surely come where consideration must be afforded to a formal statutory and regulatory scheme designed to allow for the lawful deprivation of liberty of children within placements which do not constitute secure accommodation or 'accommodation designed for restricting liberty', whilst the entirety of section 25 itself may be due a wholescale review [7].

The children who occupy placements, be it in secure accommodation, bespoke placements where a deprivation of their liberty has been authorised under the inherent jurisdiction, or Tier 4 provision, are undoubtedly the most vulnerable within our society. The need for urgent attention to be given to both resources and the current state of the statutory provisions has perhaps never been so stark as it is today.

6.8.18

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[1] As per Wall J in the seminal case of *Re C (Detention: Medical Treatment) (FD)* (1997) 2 FLR at 198

[2] See *Re C (ibid)* and R*e X & Y* (2016) EWHC 2271 (Fam).

[3] For example, in cases where the primary purpose of the intended placement is to provide therapeutic intervention or treatment, with the restrictive care arrangements being incidental to this.

[4] ***https://www.gov.uk/government/statistics/children-accommodated-in-secure-childrens-homes-31-march-2018***

[5] Occupancy at March 2018 was at 80%.

[6] The lack of available places in secure accommodation has been raised on a number of occasions by Courts over recent months- by way of example see *A Child (no approved secure accommodation available; deprivation of liberty)* [2017] EWHC 2458 (Fam) and *F (A Minor: secure accommodation resources)* [2017] EWHC 2189 (Fam).

[7] Further issues in relation to the current status of the law and the associated problems within the context of s.25 and deprivation of liberty under the inherent jurisdiction are discussed in detail within an excellent article *Daedalus, Ariadne and the Minotaur: Where are we now?* by Alex Laing published by Family Law Week here; ***http://www.familylawweek.co.uk/site.aspx?i=ed189940***

Children: Public Law Update (August 2018)

John Tughan QC of **4 Paper Buildings** reviews recent, important Children Public Law cases.

In this article I consider recent decisions on the following issues:

(i) section 20 accommodation

(ii) the Legal Aid Agency's statutory charge in claims for damages under the HRA

(iii) cross examination and the role of litigants in person

(iv) adjournment applications in cases of improving drug and alcohol prognoses

(v) the burden of proof and a mathematical approach to findings of fact

In ***Williams and another v London Borough of Hackney*** **[2018] UKSC 37** the Supreme Court was considering the limits of s20 accommodation. The facts of the case were that one of the children in the family was caught shop-lifting. The police visited the family's home and found it in what they considered to be an unhygienic and dangerous state unfit for habitation by children. A Police Protection Order was invoked in relation to all the children. The parents were arrested and released on bail with a condition that they could not have unsupervised contact with any of their children. The parents were asked to (and did) sign a 'Safeguarding Agreement' by the local authority by which they agreed that all the children would remain in their foster placements for the present time. Their rights under s20 were not explained to them. The local authority then decided that the children should be returned but took nearly two months to effect that return. The parents claimed damages and the High Court dismissed all their claims except that brought under the Human Rights Act 1998. The basis for allowing that claim was that the parents had not given their informed consent and therefore the continued accommodation was unlawful. The Court of Appeal overturned that decision and held that there had been a lawful basis for the accommodation.

The Supreme Court dismissed the parental appeal. Lady Hale gave the only substantive judgment. Section 20 contained no express provision requiring parental consent to accommodation, rather it envisaged circumstances in which no consent could be obtained. However, case law established that consent was required and that legal position was agreed by the parties at first instance. Those cases included ***R (G) v Nottingham City Council*** **[2008] EWHC 152 (Admin)** [2008] EWHC 400; ***Coventry City Council v C, B, CA and CH*** **[2012] EWHC 2190 (Fam)**; ***In re W (Parental Agreement with Local Authority)*** **[2014] EWCA Civ 1065**; ***In re N (Children) (Adoption: Jurisdiction)*****[2015] EWCA Civ 1112**; [2017] AC 167; ***Northamptonshire County Council v S*** **[2015] EWHC 199 (Fam)** and ***Herefordshire Council v AB and CD; Herefordshire Council v EF and GH*** **[2018] EWFC 10**.

However, the starting point must be parental responsibility. A local authority cannot interfere with a person's exercise of their parental responsibility without a Court order if such interference is against that person's will. "Consent" may be an unhelpful concept in this context and may be confusing. A person who does consent is simply delegating their parental responsibility to the local authority for the time being. A delegation can be "real and voluntary" without being fully "informed". The removal of a child from the care of a parent is very different to the local authority stepping into the breach when a parent is not caring for the child:

> "The active consent or delegation of a parent who is not in fact looking after or offering to look after the child is not required, any more than it is when there is no-one with parental responsibility or the child is abandoned or lost. But the local authority's duty and power are subject to the later provisions of the section, in particular, to subsections (7) to (11)."

If a parent unequivocally requires the return of the child, the local authority have neither the power nor the duty to continue to accommodate the child and must either return the child in accordance with that requirement or obtain the power to continue to look after the child, either by way of police protection or an emergency protection order.

On the facts of this case, the local authority were looking after the children because they had been taken into police protection. This was not a case of removal by the local authority and when the PPO expired the circumstances fell within s20 (1)(c), the parents being "prevented" from caring for their children. So although there are circumstances in which a real and voluntary delegation of PR is required it is not so in every case.

Northamptonshire County Council and Anor v The Lord Chancellor **[2018] EWHC 1628 (Fam)** involved a determination of the circumstances in which damages recovered pursuant to claims under the Human Rights Act are subject to the Legal Aid Agency's statutory charge. Practitioners will be familiar with the problem that has been canvassed in a number of different decisions, that the statutory charge effectively swallows any damages achieved.

In an earlier judgment at [2017] EWHC 997 (Fam) Mr Justice Francis had found the local authority to be in "serious breach of the rights of A, a child, as guaranteed by articles 6 and 8". The rights of the parents had also been breached. Following that hearing and judgment the Legal Aid Agency confirmed its view that the statutory charge from the care proceedings would apply to HRA claims. The HRA claims had been brought within the care proceedings but with freestanding pleadings. The costs of the care proceedings would "obliterate" any damages awards achieved. In the words of Francis J:

> "The moral injustice arising out of such a situation is palpable: claimants who have been appallingly let down by a local authority would find themselves recovering money from a public body with one hand only to give it back to another public body with the other hand."

By a claim pursuant to CPR Part 8 the claimant local authority sought a declaration that:

> "For the purposes of section 25 of the Legal Aid and Sentencing of Offenders Act 2012; whether brought under section 7(1)(a) or 7(1)(b) of the Human Rights Act 1998, a claim for damages under the Human Rights Act 1998 does not constitute 'proceedings…..in connection with which services are provided', where those services comprise civil legal services provided to a parent or child in part IV Children Act 1989 care proceedings".

The position of the LAA was that if the damages under the HRA were obtained on a freestanding basis, the operation of the statutory charge would depend on what costs were being claimed from the Lord Chancellor in respect of the HRA proceedings or dispute.

> "If the answer was nothing, there was nothing to protect by way of the statutory charge. On that basis, the Legal Aid Agency invited all three firms and counsel to provide an undertaking that they would not claim in respect of any costs incurred in connection with the HRA claim under their client's legal aid certificate for the care proceedings. On the basis of the undertakings received, and the assumption that the recovery of the damages would take place outside the care proceedings, the Legal Aid Agency confirmed that the statutory charge would not arise in respect of the care costs."

The LAA has amended its approach to the issue in cases where damages were sought outside of the care proceedings leading to the undertakings referred to above being sought.

The LAA position statement is attached to the judgment of the Court and is required reading for practitioners dealing with such issues.

This is, of course, a very welcome and long overdue development. As Francis J (and others) have noted, the sense of injustice at the earlier funding arrangements was "palpable".

In ***PS v BP*** **[2018] EWHC 1987 (Fam)** Mr Justice Hayden was dealing with private proceedings, which for reasons I hope will become obvious are relevant to a public law article. F (a serving police officer) was acting in person. M alleged strangulation and rape of her by F and a further attempted strangulation, which was said to have taken place in the presence of the child. The Judge below decided very early on that he was not going to allow direct cross-examination of M by F and cited an earlier decision of Hayden J, *Re: A (a minor) (fact finding; unrepresented party)* [2017] EWHC 1195 (Fam). His decision was that the Court would cross-examine the Father. Hayden J allowed the appeal and was critical of both that decision of the Judge and the way he executed it, while recognising the invidious position the Court was in.

The importance of this decision for the public-law sphere is in the comments of Hayden J about cross-examination, the purpose of it and the fundamental right to "challenge". Hayden J said this:

> "A true assessment of a witness's demeanour can only properly be undertaken when the witness is put to the assay by challenge (adversarial testing 'beats and bolts out the Truth much better, see Crawford v Washington (2004) 541 US 36 at 62 per Scalia J). In this case the witness's account was not satisfactorily challenged and the weight that can be placed on her presentation in the witness box is accordingly, in my view, diminished….
>
> Having allowed this appeal and in the light of my comments in *Re: A (supra)*, I consider it to be important, at least, to try to provide some wider assistance. The Youth Justice and Criminal Evidence Act 1999 (YJCEA), operating in the criminal courts, strikes the careful balance between recognising an accused's right to cross-examine a witness in person and the protection of potentially vulnerable witnesses. (see also *Carmarthenshire County Council v Y and Others* [2017] WLR (D) 534; [2017] EWFC 36. Accordingly, the court may only prevent such cross-examination where it is satisfied that the quality of evidence given by the witness on cross-examination by the accused in person would (i) be diminished if conducted by the accused and (ii), would be likely to be improved if a direction were given prohibiting it. It is important to emphasise that the two, are indivisible in these provisions. Logically, there is not an automatic bar to cross-examination by a litigant in person in such circumstances. The application of these criteria may make it the predominant outcome but that is, of course, quite different. Having been required to confront these issues again in the context of this appeal I consider that they, by parity of reasoning, provide a useful starting point for the Judge in a family case. Thus, it requires to be emphasised that the prevention of cross-examination in person by an alleged perpetrator should not be regarded as automatic. The court must consider the broad canvas of evidence when reaching its decision on this point. Into this wider picture must be factored in, the continuing reality that unlike in the criminal courts, there is no mechanism by which the court can provide for the instruction of an advocate."

In ***Re P (A Child)*** **[2018] EWCA Civ 1483** the Court of Appeal overturned a decision to make a final care and placement order and to refuse an adjournment. The Mother had problems with alcohol. By the time of the final hearing she had remained sober and had "done all that could have been asked of her" in terms of addressing her alcoholism. The Mother had been "dry" for a year and Dr Hallstrom gave evidence to the Court as to prognosis:

> "[61] Her vulnerabilities will never disappear. The question is at which point does one consider the risks to be acceptable. I cannot say what an acceptable risk is, but I would consider if she maintains her progress for another six months, that there would be some grounds for optimism that there has been a substantial improvement in her overall condition, both in relation to her personality and a vulnerability to relapse into drinking.
>
> [62] I don't think the prognosis will improve substantially by waiting a further six months after that."

King LJ held that too much emphasis had been placed on historic lies and that "no purpose" to the adjournment was not something she agreed with.

Of course, by the time the case came on for Appeal a further 6 months sobriety was in evidence. The child was 7 months old at the time of the order made at first instance. Those sort of timescales are relatively commonplace in proceedings involving substance abuse and I wonder if this decision suggests a sea-change in approach. In particular, given the age of the child and the oft-repeated imperative of reaching early final decisions.

In ***Re A Children)*** **[2018] EWCA Civ 1718** the Court of Appeal heard the appeal by the local authority against the decision of Francis J. At first instance the Judge found that the local authority had not proven their case on the totality of the evidence. King LJ, giving the judgment of the Court of Appeal, decided that reliance on the burden of proof was only open to a Judge following a full and comprehensive assessment of all the evidence within the judgment. That the burden of proof was reached for too early as the answer. The Court was also critical of the use of a "pseudo-mathematical approach to the evidence, wherein the Judge had held as follows:

> "Aggregating, as I must, the probability of suicide together with the probability of accident, I find that the aggregate of these two is more than 50 per cent. Doing the best that I can, I find that the possibility of suicide is about 10 per cent, and the possibility of accident and a perpetrated act are about 45 per cent each. It would be wrong for anyone to regard these figures as in any way accurate, for of course they are not. They persuade me, however, that the local authority has not discharged the burden of proof which is upon it. I am not satisfied, on the balance of probabilities, that this was a perpetrated act, albeit that I recognise that it is one of three possibilities."

3.8.18

Posthumous conception: a legacy in life, incapacity and death

Louisa Ghevaert, Director and Head of Fertility, Parenting & Surrogacy Law at Vardags and Michael Mylonas QC Head of the Court of Protection team, Serjeants' Inn Chambers consider the ground breaking decision in *Y v A Healthcare NHS Trust and others* [2018] EWCOP 18

The Human Fertilisation and Embryology Act 1990 ('HFE Act 1990') requires the written consent of a person before their gametes can be used in any fertility treatment. That this should be explicitly required is no surprise given the serious consequences of such treatment both for the person whose gametes are used but also for any child born as a result of that use. In that context, the case of ***Y v A Healthcare NHS Trust and others*** **[2018] EWCOP 18** is a unique and significant decision. Mrs Justice Gwynneth Knowles exercised the Court's powers under s16(1)(a) of the Mental Capacity Act 2005 ('the MCA 2005') to order that a named individual could sign a consent form for fertility treatment where the husband ("P") lacked capacity following a catastrophic brain injury. Under the terms of the Order the clinicians were authorised to retrieve, store and posthumously use P's sperm. This overcame the absence of any written consent signed by P himself.

This compassionate and forward thinking legal ruling by the COP helps honour the wishes of P and his wife for further children. Her Ladyship cautioned that the case was decided on its facts and there was strong evidence before the Court both of P's desire and wishes for a child and for the use of his sperm posthumously if anything untoward happened to him during the treatment. It will be important for any future application to ensure a proper factual foundation before the Court will exercise its powers under the MCA 2005.

This case marks a step forward in the recognition and protection of an individual's fertility and their family building wishes. However, it also brings into sharp focus the importance of fertility preservation and maximisation for both men and women in the UK.

Background

In *Y v A Healthcare NHS Trust & Ors* [2018] EWCOP 18 the couple were in the early stages of fertility treatment in the hope of having a child. They had been referred and were under the medical care of a fertility clinician when the husband was involved in an accident that caused his catastrophic brain injury. The accident occurred just days before the couple were due to attend a further clinic appointment to progress their treatment.

The husband had discussed with his wife and agreed to the storage and use of his sperm during his life and afterwards. However, his unexpected traumatic brain injury prevented him from providing the requisite written consent to the storage and use of his sperm in fertility treatment.

Legal difficulties

The case created very real legal difficulties. Under common law, in the absence of the husband's consent (oral or written) to the retrieval of his sperm, its harvesting would constitute assault. As the husband in this case lacked capacity, he was unable to provide that consent.

The HFE Act 1990 also applied in prescriptive terms in this case. Section 4(1) HFE Act 1990 states that:

> "No person shall -
>
> (a) store any gametes, or
>
> (b) in the course of providing treatment services for any woman, use -

(i) any sperm, other than partner-donated sperm which has been neither processed nor stored…

except in pursuance of a licence".

Section 4(1A) HFE Act 1990 states that:

"No person shall procure [make available], test, process or distribute any gametes intended for human application except in pursuance of a licence or a third party agreement".

Consequently, only a licensed fertility clinic could retrieve and store the husband's sperm and that required the effective consent of the husband.

Schedule 3 to the HFE Act 1990 governs consent to storage and use of gametes in the UK. Paragraph 1(1) of Schedule 3 requires such consent to be provided in writing and signed by the person giving consent (although another can sign if that individual has capacity but is unable to sign themselves under para 1(2) due to illness, injury or physical injury). Paragraph 1(3) of Schedule 3 provides that effective consent must not have been withdrawn. Paragraph 2(2) of Schedule 3 states that consent to storage of gametes must, save in specified circumstances, record what is to happen to the gametes if the consent provider becomes incapacitated or dies.

Paragraph 3 of Schedule 3 requires the consent to be informed. Paragraph 3(1) and (2) state:

(1) "Before a person gives consent under this Schedule –

(a) He must be given a suitable opportunity to receive proper counselling about the implications of taking the proposed steps, and

(b) He must be provided with such relevant information as is proper.

(2) Before a person gives consent under this Schedule he must be informed of the effect of paragraph 4 [dealing with varying and withdrawing consent].

Paragraph 5(1) of Schedule 3 provides that a person's gametes must not be used for the purposes of treatment or non-medical fertility services unless there is effective consent by the individual to their being so used and they are used in accordance with the terms of the consent. Section 5(2) of Schedule 3 prohibits the gametes being received for those purposes unless there is an effective consent by that person to their being so used.

Paragraph 8(1) of Schedule 3 states that an individual's gametes must not be kept in storage unless there is effective consent to their storage and they are stored in accordance with that consent. The provisions in paragraphs 9 and 10 which enable an individual's gametes to be stored without their consent did not apply in this case.

Whilst the Human Fertilisation and Embryology Authority ('HFEA') could grant a special direction permitting export of sperm and modify the provisions of the HFE Act 1990 governing licence conditions and consent for export purposes, it had no power to modify licence provisions for the purposes of storage and use of sperm in the UK prior to any transfer abroad. Furthermore, no clinician would remove P's gametes in the knowledge that they could not be lawfully stored in the UK before transfer abroad.

The Human Tissue Act is of no assistance because section 53(1) provides that gametes are outside the Human Tissue Authority's regulatory remit.

There was also no case law which directly helped. In the Diane Blood case, her husband's sperm had already been retrieved, whilst he was in a coma after contracting meningitis, as a holding measure in what was recognised at the time to be a legally unexplored situation. The Court of Appeal in *R v Human Fertilisation and Embryology Authority, ex parte Blood* [1997] 2 All ER 687 held that the sperm should not have been retrieved and stored on an interim basis in the absence of effective consent by the husband. It also held that both Mrs Blood's proposed treatment and the continued storage of her husband's sperm was prohibited by the HFE Act 1990 and the HFEA had no power to authorise treatment in the UK. However, recognising the reality that the sperm had already been retrieved and stored (albeit unlawfully) the HFEA's refusal to authorise the export of her husband's sperm abroad infringed her right to receive medical treatment in another EEA state and the Court allowed the appeal on the basis that the HFEA could make a special direction enabling export of the sperm to another member state.

In ***L v Human Fertilisation and Embryology Authority and Secretary of State for Health*** **[2008] EWHC 2149 (Fam)** it was held a previous interim order for sperm retrieval had been incorrectly made following incorrect arguments about the application of the Human Tissue Act. Charles J stated at paragraph 77 "*In my judgment the 1990 Act sets an absolute, clear and bright line which prevents storage for use in the UK, and use in the UK, without effective consent. This is because there is no power given to the HFEA, or anyone else, to alter or mitigate the force of the provisions relating to the terms of licences relating to the need for such effective consent before gametes (and embryos) can be stored and used*".

Charles J went on to state at paragraph 91: "More generally, in my view the nature of gametes and the purpose of their storage and use (i.e. to produce a child) means that in respect of issues relating to their retrieval, storage and use both (a) the autonomy of the donor, and (b) the potential knock on effects of their use without express and informed consent, are engaged after the death of the provider."

Court of Protection

When it became clear that P had not signed the requisite forms before his injury, the COP represented the only hope of lawfully arranging the retrieval, storage and posthumous use of his sperm.

The COP has jurisdiction over the property, financial affairs and personal welfare of individuals who lack the mental capacity to make decisions themselves. A large proportion of applications dealt with by the COP relate to property and financial matters, along with applications for Lasting Powers of Attorney (LPAs). However, there was no precedent for seeking the assistance of the COP in a posthumous conception context. Notwithstanding this, in a sensitive and groundbreaking legal judgment, the Court stepped in to authorise the retrieval, storage and posthumous use of P's sperm.

In granting declaratory relief, the Judge determined that it was in the husband's best interests for his sperm to be retrieved, stored and used in fertility treatment because (1) he had had a settled intention to have a child with his wife, (2) he had sought a referral for fertility treatment, (3) he had discussed the issue of posthumous use of his sperm with his wife and had agreed to posthumous use and (4) he and his wife were under the care of a consultant obstetrician and gynaecologist and had undergone and arranged a further appointment for the purposes of undergoing treatment.

The Judge was satisfied that by reason of his traumatic brain injury, the husband lacked capacity to provide his written consent for fertility treatment for the purposes of the HFE Act 1990. She ordered that notwithstanding his lack of capacity, it was lawful (1) for the Head of Reproductive Medicine at the clinic to retrieve his sperm (2) for the sperm to be stored before and after his death upon the signing of the relevant consents by The Official Solicitor and (3) for his sperm and any embryos comprising his sperm to be used after his death.

Critically, the Judge further directed that a named individual (being a relative of P) had authority to sign the relevant consents for storage and use of P's sperm, and any embryos created with his sperm in accordance with paragraph 1(2) of Schedule 3 to the HFE Act 1990, pursuant to section 16(2)(A) of the MCA 2005.

Uniquely in this case, all parties worked together to find a way to save and store P's sperm for posthumous use by the wife in fertility treatment. The application was supported by the husband's medical team, the husband and wife's fertility clinician and The Official Solicitor. The HFEA formally adopted a position of neutrality at the hearing but their team had been instrumental in the discussions that resulted in the agreed outcome.

The remit of the COP, to protect an individual's health and welfare, meant that it was uniquely placed to assess where P's best interests lay. The MCA 2005 provided the jurisdiction and authority to substitute P's signature with that of an identified individual. The COP's enlightened stance and the proactive approach of the HFEA and the parties preserved the husband's sperm for future use in his wife's treatment. In so doing, the Court also provided a ray of hope that P's wife might conceive a much wanted child in future and in doing so fulfil both her and her husband's wishes.

Conclusion

Human fertility has far wider significance than what was at issue in this case. Fertility influences human behaviour, it creates and shapes populations and societies around the world, it drives science and reproductive technology and influences economics and law and policy. Medical advances will inevitably bring new challenges for society and the law in considering assisted conception and parenthood.

Individual fertility is precious. More work is needed to help people understand and secure ownership over their fertility and future family building arrangements. Decisions about whether to pass on one's biological heritage and preserve the means to do so in life, incapacity and death have long lasting implications for individuals, their spouses, partners and families.

Louisa Ghevaert was part of the wife's legal team in Y v A Healthcare NHS Trust & Ors [2018] EWCOP 18 and Head of Fertility and Surrogacy – Director -Family Law at Vardags. Michael Mylonas QC was instructed by Vardags on behalf of the wife.

20.8.18

Brexit and international family law: a pragmatic approach to divorce and maintenance



Gavin Smith, barrister, One Hare Court, David Hodson, Partner, International Family Law Group LLP and Valentine Le Grice QC, 36 Family put the case for how the need for the recognition and enforcement of judgments and orders in divorce and maintenance post-Brexit may be met by existing international agreements.

Introduction

1. Following the outline, partial agreement in March between the United Kingdom and the 27 other EU Member States (EU27) [1], the focus of the Brexit negotiations has now, at last, switched from the 'withdrawal arrangements' to the 'future relationship'. On 12 July the Government published its post-Chequers White Paper *The future relationship between the United Kingdom and the European Union* [2] which sets out the Government's broad proposals for the future partnership over a wide range of policy areas.

2. The publication of the White Paper is thus an opportune moment to revisit the pressing issue of what the Government should aim to achieve in the area of international family law as we leave the EU [3].

3. The Government's approach to future cooperation in the fields of civil and family law is couched in the most general of terms in the White Paper:

> ### 1.7.7 Civil judicial cooperation
> 145. Civil judicial cooperation is mutually beneficial to both the UK and the EU. Businesses benefit from legal certainty in the event of disputes and are more confident trading across borders. Consumers and employees benefit from protections for weaker parties. Cross-border families benefit from clear rules to resolve disputes in sensitive matters quickly and efficiently. The future relationship between the UK and the EU should protect these advantages.
>
> 146. The EU has already shown that a deeper level of civil judicial cooperation with third countries is both legally viable and operationally achievable, including through the Lugano Convention, which provides for cooperation between EU and European Free Trade Association (EFTA) countries. Under this Convention, EU Member States and third countries apply the same rules on civil and commercial judicial cooperation, and commit to pay due regard to how each other's courts interpret those rules. This architecture provides a clear precedent for close cooperation between the EU and a third country.
>
> 147. To ensure cooperation can continue in these areas at least, the UK will therefore seek to participate in the Lugano Convention after exit. However, while the UK values the Lugano Convention, some of its provisions have been overtaken, and it is limited in scope. In addition, the European Council's Guidelines have suggested the possibility of going beyond existing precedent.
>
> 148. The UK is therefore keen to explore a new bilateral agreement with the EU, which would cover a coherent package of rules on jurisdiction, choice of jurisdiction, applicable law, and recognition and enforcement of judgments in civil, commercial, insolvency and family matters. This would seek to build on the principles established in the Lugano Convention and subsequent developments at EU level in civil judicial cooperation between the UK and Member States. This would also reflect the long history of cooperation in this field based on mutual trust in each other's legal systems. The Government will also continue to work closely with the devolved administrations to ensure that the future arrangements for

> cooperation with the EU take into account the separate and distinct legal systems in Scotland and Northern Ireland.

4. Parliamentary Committees of both Houses have examined this subject [4]. They recommend the retention of the existing EU legal framework as far as possible. We believe that this reflects a largely unchallenged and uncritical assumption among many Parliamentarians (shared by some practitioners) that EU family law is preferable to any other system. Moreover, there has been no formal consultation of their memberships on these issues by the main professional bodies, Resolution and the FLBA [5]. This is obviously regrettable.

5. We are concerned that there has been insufficiently detailed consideration of the merits of the existing non-EU international instruments, which in our view provide pragmatic and workable alternatives to the two main pieces of EU family legislation [6], while not suffering from their defects.

6. In an ideal world, as the White Paper contemplates, the UK and EU would reach a comprehensive agreement covering all areas of family law [7]. Realistically, that is unlikely to happen, certainly without a very long transition period which is unlikely to be politically acceptable. Notwithstanding its fundamental importance, family law seems to be low on the Government's list of Brexit priorities. Moreover, even if this were not so, the EU27 are unlikely to make concessions of the kind that we (and, we believe, many other practitioners) consider to be desirable, notably, the abolition of *lis pendens* in divorce and maintenance disputes, and amendments to the Maintenance Regulation in the field of jurisdiction [8].

7. This paper therefore argues that, accepting these and other realities, the Government should acknowledge that the key objective must be to achieve, to the fullest extent possible, continuation of the mutual recognition and enforcement of judgments and orders, in the area of divorce and maintenance. Anything else should be subsidiary to that overarching aim, although some of the existing non-EU international instruments go well beyond the issues of recognition and enforcement.

8. We argue that these core aims for the post-Brexit era can be met by existing international agreements, namely, two Hague Conventions [9] which provide for recognition and enforcement in the areas of divorce and maintenance. These Hague Conventions have demonstrated their fitness for purpose over time, are in daily use, and do not suffer from the drawbacks of the EU laws which they would replace. Using these Conventions instead of a complex and politically problematical bespoke UK/EU arrangement will have the added advantage of reducing the number of different legal instruments that apply. As any practitioner who practises in this field is aware, the law is already unduly complex and unwieldy and there is an urgent need for simplification [10].

9. The Government acknowledges the availability of the Hague Conventions in its response to the House of Lords Europe Select Committee's 17th Report *Brexit: justice for families individuals and businesses* [11], in which it states, at para 26:

> In family law, the Hague Conventions cover much, although not all, of the same ground as the EU family law Regulations, including rules for jurisdiction and recognition and enforcement in children matters, and cooperation between Central Authorities. During negotiations, the Government will consider the coverage of the alternative international agreements when deciding how best to ensure ongoing reciprocity and mutual recognition.

10. A note about terminology. Some contributors to this debate have characterised EU legislation as "procedural" rather than "substantive" [12]. This is a serious misconception. Unquestionably, these laws, as rules of private international law, create and remove substantive rights: they create and remove grounds of jurisdiction; they impose *lis pendens* rules and abolish *forum conveniens*; and they (although not in the UK) determine which country's law should be applied to a particular dispute.

11. This paper assumes that judgments of the CJEU will cease to have binding authority at some point (save transitionally), either at the end of the 'transition' period or shortly afterwards. The Government has stated this to be a political red line. Plainly, it would be legally unacceptable for future judgments of a CJEU on which the United Kingdom is no longer represented to have binding force (as opposed to being simply persuasive) once the United Kingdom leaves the EU, other than for the minimum period necessary in the interests of legal certainty.

Lugano Convention

12. It is unclear from the White Paper whether the Government envisages that the Lugano Convention will continue to apply in maintenance cases. We consider that the Lugano Convention suffers from the same drawbacks as the Maintenance Regulation, considered below, and that if the UK becomes a party to the Convention in its own right [13] this would add an unnecessary layer of complexity in the area of maintenance. The 2007 Hague Convention framework is all that is needed. We have existing reciprocal enforcement arrangements with two of the three non-EU Lugano States, Norway [14] and Switzerland [15]. In cases involving Iceland, which are not numerous, we would fall back on national law. If the Government decides to sign up to the Lugano Convention it should so on the basis that maintenance is excluded from its scope.

The European Union (Withdrawal) Act

13. Having completed its tortuous course through Parliament, the Act received Royal Assent on 26 June. Its aims are laudable. By incorporating EU law into domestic law, it seeks to prevent a legal "cliff edge" on our departure from the EU. However, the authors of this paper agree with other commentators [16] that the current EU regime, which depends on reciprocity, cannot be maintained through the mechanism of the Act. Even if we apply the existing regime by transposing it into domestic law, there will be no legal obligation on EU27 to reciprocate. However, this problem would fall away if on Brexit day the Hague Conventions take effect immediately, subject of course to transitional provisions of the kind contained in article 63 of the March 2018 Draft Withdrawal Agreement.

An opportunity to return to *forum conveniens*

14. We consider that Brexit offers a welcome opportunity to jettison the *lis pendens* provisions of the Brussels IIA and Maintenance Regulations and revert to long-established and settled principles of *forum conveniens*. Our family courts are well used to deciding questions of discretion such as those which arise in forum disputes, namely, with which country a family has the closest connection and which court is best placed for trying their case. And of course our courts continue to apply *forum conveniens* principles in cases not involving the EU [17].

15. We accept that neither *forum conveniens* nor *lis pendens* is perfect [18]. *Forum conveniens* is said to be unpredictable in terms of outcome, compared to the certainty of *lis pendens*, and can lead to a race to judgment, as opposed to the race to court which *lis pendens* promotes. But we believe that *lis pendens* is the greater of the two evils and that the benefits of *forum conveniens* clearly outweigh the drawbacks.

16. We start from the premise that forum shopping (the purpose of which is invariably to achieve a more favourable financial outcome) is to be deprecated. Yet forum shopping is inherent in - if not in fact encouraged by - the Brussels legislation, as was pointed out in *Villiers v Villiers* [2018] EWCA Civ 1120 at [87]:

> … if, within the terms of the Regulation, a party is able to choose between two jurisdictions, then he or she is perfectly entitled to choose that which is more beneficial to him or her. [19]

17. And in *L-K v K (No 3)* [2006] EWHC 3281 (Fam), Singer J observed at [44] that 'the "first past the post regime" imposed by BIIR has the potential to be inherently unfair to one or the other, and it is arbitrary'.

18. *Lis pendens* directly encourages the race to court. It thereby discourages negotiation, mediation [20] and pre-litigation settlement. It is also discriminatory in that it favours the richer party (usually the husband), who can afford the specialist legal advice that is crucial in these cases.

19. By contrast, the *forum conveniens* principle discourages forum shopping. Take the example of a French couple who have lived all their long married life in England. Their children go to school here and all the assets are located here. Under *forum conveniens*, the English court would have little hesitation in finding that England is the proper forum. But the inflexibility of the lis pendens rules under the BIIA regime means that the French court, if first seised, will deal with the divorce and ancillary financial issues, very probably to the financial detriment of the other party, even though the connection with England is overwhelming.

20. It is ironic that, far from achieving legal certainty, BIIA and the Maintenance Regulation have spawned their very own litigation industry. Argument about obscure legal technicality has proliferated [21]. Moreover, the *lis pendens* rules have led to costly arguments about residence / habitual residence: the very kind of factual issue that 'first past the post' was designed to avoid. *Lis pendens* appears to be certain, but is less certain than appearances suggest. *Forum conveniens* appears to turn on a wide discretion, but in most cases the convenient jurisdiction is immediately apparent, especially to experienced judges and lawyers.

21. Of course, the reality is that, while English divorce courts remain a financially attractive forum, some applicant spouses, especially the wealthy, will, whether under the *lis pendens* or *forum conveniens* regimes, argue that their case be heard here, and respondent spouses will argue the contrary. But we contend that forum conveniens is the fairer system, being one that will enable our judges once more to filter out, on a discretionary basis, those cases which should be tried here from those that should not, rather than leaving the determination to be made according to rigid and arbitrary *lis pendens* rules.

Recognition of divorce and legal separation under the 1970 Hague Convention

22. To avoid conflicting divorce and legal separation judgments in the courts of different states, leading to 'limping

marriages', it is obviously of crucial importance that judgments granted by a United Kingdom court be recognised in EU27, and vice versa [22].

23. We consider that the Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations (the 1970 Convention) [23], which the UK already applies, provides an acceptable alternative to the relevant provisions of BIIA, Chapter II, which apply between all Member States save Denmark. The 1970 Convention rules are given effect in the UK by Part II of the Family Law Act 1986, which currently regulates the recognition of divorces and legal separations granted in non-EU Member States.

24. There are no direct jurisdictional rules for divorce in the 1970 Convention. Thus each Contracting State is free to establish its own jurisdictional rules. In our view such rules are not necessary. Nor are there *lis pendens* rules. Decisions based on *forum conveniens* are permitted . There are clear and proportionate rules of indirect jurisdiction, which require a minimum level of connection between the parties and the state where the divorce is granted (various combinations of habitual residence / domicile / nationality), as a pre-requisite to recognition in another state [25].

25. The bases on which recognition may be refused are very similar under both BIIA and the 1970 Convention (being, essentially: procedural unfairness; incompatibility with a previous judgment; public policy) [26]. Indeed, the similarity between the non-recognition rules in the BIIA and 1970 Convention regimes enabled Mostyn J to opine in a recent case that the court's approach to the FLA 1986, s 51 [viz. recognition in a non-EU case] should be informed by the judicial interpretation of BIIA, art 22 [27].

26. The BIIA rules governing recognition of divorce have proved uncontroversial, as is evidenced by the very small number of reported cases in the 17 years since the first BII Regulation ((EC) No 1347/2000) came into force on 1 March 2001 [28]. The pre-BIIA case law does not suggest any difficulty in the recognition of European divorce under the law in force at that time. Nor does the general case law involving the 1970 Convention cause any concern as to its continuing fitness for purpose.

27. Twelve EU States (in addition to the UK) are already bound by the 1970 Convention. They are: Cyprus, the Czech Republic, Denmark, Estonia, Finland, Italy, Luxembourg, Netherlands, Poland, Portugal, Slovakia and Sweden. Seven other countries (Albania, Australia, Egypt, Moldova, Norway, Switzerland and China (in respect of Hong Kong) are also bound.

28. It is true that, by contrast with the position under the BIIA, nullity judgments do not come within the scope of the 1970 Hague Convention. However, the number of nullity decrees with a cross-border element must be very small [29].

29. We do not consider that the retention of the existing BIIA jurisdictional grounds is a reason for remaining within a BIIA-type framework after Brexit. It is questionable whether there was ever any justification for harmonisation of grounds of jurisdiction. But once we cease to be part of the EU legal order any such justification will cease.

30. That said, the BIIA grounds of jurisdiction have, with two exceptions, been uncontroversial and we see no reason not to reproduce most of them. The exception is the poorly drafted and ambiguous fifth indent of art 3(1)(a), which states that jurisdiction shall lie with the courts of a Member State in whose territory "- *the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made*", a provision that Aikens LJ in *Tan v Choy* [2015] 1 FLR 492 observed, *obiter*, was capable of (at least) three possible constructions. This has given rise to unnecessary debate in a number of reported cases [30]. The sixth indent [31] suffers from the same ambiguity. It should therefore be made clear that habitual (and not mere) residence is required during the entire period stipulated. Nor we do need the fourth indent [32], as English law does not provide for a joint divorce petition. We also suggest that the domicile of one party should once more be a primary, rather than as at present merely a residual, ground of jurisdiction [33].

31. We therefore urge the Government to seek to persuade the EU27 to accede to the 1970 Convention, en bloc. If that is unsuccessful, then the fall-back position will be that recognition of divorce and other such 'status' judgments will be governed by the law of the individual state. Given the sophistication of the legal systems of EU27 it is not envisaged that the mutual recognition of UK and EU 27 judgments will present difficulties in practice.

The making, variation, recognition and enforcement of maintenance decisions under the 2007 Hague Maintenance Convention

32. It is clearly of fundamental importance that UK maintenance decisions continue to be recognised and enforced in EU27, and vice versa. At present this is achieved via the EU Maintenance Regulation, which, in a welcome innovation, introduced for the first time a Central Authority for the enforcement of maintenance decisions between EU States.

33. However, the Maintenance Regulation suffers from a number of defects [34]. First, it is poorly drafted and lacks clarity, as demonstrated by the lengthy but finally concluded debate as to whether a maintenance creditor may apply direct to the court of country B for enforcement of an order made in country A, or is obliged to apply through the Central Authority.

This required a reference for a preliminary ruling to be made to be CJEU for clarification [35]. The position in relation to variation applications, however, remains unclear [36].

34. Secondly, in the area of enforcement of maintenance decisions there is currently a twin-track regime [37]. Maintenance orders originating in other EU states (apart from Denmark, whose orders must be registered here) are enforceable directly in the UK, without the need for a declaration of enforceability (i.e. registration). The respondent is unable to rely on public policy as a ground of challenge [38]. This lack of substantive filter can result in injustice. On the other hand, UK orders are subject to a declaration of enforceability in the country of enforcement as a prerequisite to enforcement. There is thus a two-level playing field [39].

35. Thirdly, a provision not found in the Regulation's predecessor, the Brussels I Regulation, applies the Regulation's jurisdictional rules even where the other state involved is not a EU Member State. The need for this global extension of the reach of EU law is baldly stated, without explanation or justification, in recital 15. As a result, the jurisdictional and *lis pendens* rules apply even where a non-EU state is first seised: "*The circumstance that the defendant is habitually resident in a third State should no longer entail the non-application of Community rules on jurisdiction, and there should no longer be any referral to national law. This Regulation should therefore determine the cases in which a court in a Member State may exercise subsidiary jurisdiction.*".

36. Fourthly, the 'sole domicile' rule [40] denies jurisdiction where a maintenance claim is ancillary to proceedings concerning status (e.g., divorce) "*based solely on the nationality [in the UK and Ireland, domicile] of one of the parties*" [41]. This prevents an application to the English court for maintenance by parties resident in non-EU countries, even where no other EU State is involved.

37. Fifthly, the Maintenance Regulation currently determines jurisdiction as between the three territorial units within the United Kingdom (England and Wales, Northern Ireland and Scotland) resulting in what can only be described as the absurd situation of divorce being dealt with in one part of the UK and maintenance claims in another [42].

38. This not the occasion for a detailed comparative analysis of the 2007 Hague Convention and the Maintenance Regulation. We maintain however that an overview of the scheme of the Convention demonstrates that it will meet the needs of international maintenance applicants and respondents post-Brexit.

39. The 2007 Convention was negotiated at the same time as the Maintenance Regulation and its broad scheme is similar. The UK is already bound by the Convention as it has been approved by EU (controversially [43]) on behalf of all Member States, apart from Denmark [44]. The UK will have to sign the Convention in its own right on Brexit, but that is a minor technicality.

40. Currently, the other Contracting States are Norway, Albania, Bosnia and Herzegovina, Ukraine, Montenegro, the United States of America, Turkey, Kazakhstan, Brazil and Belarus, thus 37 states in all. As at 31 July 2018 the other signatories are, Burkina Faso, Canada and Honduras. Other countries are expected to follow suit now that the Convention applies to the United States.

41. The core scope of the Convention is child maintenance, and recognition and / or enforcement of a spousal maintenance decision where accompanied by a claim for spousal support [45].

42. A claimant for free standing spousal support is not entitled as of right to invoke the Central Authority process [46]. Very importantly, however, the EU has declared [47] that it will extend the Central Authority process [48] provisions to all applications for spousal support (even where no child maintenance obligation is also involved).

43. It is important to note that, like the Maintenance Regulation, the Central Authority scheme applies equally to initial applications for maintenance claims and to variation applications [49].

44. Under the Convention, there are no direct rules of jurisdiction, save a 'negative' rule in relation to modification (i.e. variation) cases [50], in terms similar to article 8 of the Maintenance Regulation. We believe harmonisation of direct rules of jurisdiction to be unnecessary. Under the Convention, indirect rules of jurisdiction ensure that there is a sufficiently close connection between the country where the maintenance order was made and the country where recognition and/or enforcement is sought [51]. That connection will in most cases be habitual residence [52].

45. There is a discretion – not a mandatory requirement - to refuse recognition and enforcement if the State of enforcement is already seised of proceedings between the parties [53]. The other grounds for refusal are similar to those under the Maintenance Regulation [54].

46. Like the Maintenance Regulation, the Hague Convention creates a Central Authority regime, for the registration and enforcement of decisions [55] (which include court settlements and agreements) and authentic instruments. The mechanics of the application for recognition and enforcement are very similar to the procedure under the Maintenance Regulation where a declaration of enforceability of a maintenance decision is required [56], that is, a registration process.

47. Moreover, in common with the EU, the Hague Conference on Private International Law operates an innovative iSupport scheme, whereby details of maintenance orders, payments and arrears are digitally transmitted between signatory countries, thereby speeding up proceedings, enforcement and thus, it is to be expected, recovery and payment [57].

48. As under the Maintenance Regulation, generous legal aid provision is available to applications made through Central Authorities [58]. In relation to applications for recognition and enforcement of child maintenance (i.e. persons under 21), the 'requested' Convention State is required to provide free legal assistance, save to the extent that the procedures of that State enable the applicant to make the case without the need for such assistance and its Central Authority provides the necessary services free of charge [59]. In non-child cases an applicant who in the State of origin has benefited from free legal assistance is entitled in any proceedings for recognition or enforcement to benefit, at least to the same extent, from free legal assistance as provided for by the law of the requested State under the same circumstances [60].

49. By signing the 2007 Convention the EU has itself signalled to the world that the provisions of the Convention are fit for its international relations in the field of maintenance. We agree entirely. Overall, on Brexit, we believe that claimants and respondents under the Convention will enjoy rights that are as extensive as those under the Maintenance Regulation. The Government should therefore abandon any attempt to extend the provisions of the Maintenance Regulation post Brexit, save transitionally.

Conclusion

50. There need be no 'cliff edge' in the event that we leave the EU without a bespoke deal. We have a ready-made set of laws on which to fall back, laws which are already in operation and work well for the benefit of international families, well beyond the EU. In some areas of family law there will be very little noticeable difference if we apply Hague law instead of EU law. In some areas there will be distinct improvements, by leaving behind EU laws which are directly prejudicial to mediation, negotiation, reconciliation and to the weaker financial party.

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3 August 2018

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[1] Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community highlighting the progress made (coloured version) in the negotiation round with the UK of 16-19 March 2018 (*https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf*), as updated by the 19 June 2018 Joint statement from the negotiators of the European Union and the United Kingdom Government (*https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/717697/Joint_Statement_-_19_June_2018.pdf*).

[2] Cm 9593, July 2018.

[3] We do not in this paper consider the competing merits of, on the one hand, the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, and, on the other, the Brussels IIA Regulation. We note, however, from the analysis carried out by one of the leading academics in this field, Professor Paul Beaumont, that there are good arguments for concluding that there are no material drawbacks (and indeed some advantages) in falling back on these Conventions in lieu of Brussels IIA: see *http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11348* and *https://www.abdn.ac.uk/law/documents/CPIL%20Working%20Paper%20No%202017_2.pdf*

[4] House of Lords EU Committee, 17th Report of Session 2016-2017 (HL Paper 134, 20 March 2017) at *https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/134/134.pdf*; House of Commons Justice Committee Implications of Brexit for the justice system, Ninth Report of Session 2016–17 (HC 750, 22 March 2017) at *https://publications.parliament.uk/pa/cm201617/cmselect/cmjust/750/750.pdf*. The House of Lords Committee has recently revisited the issue.

[5] For this reason the Law Society Family Law Committee has deliberately not adopted a position.

[6] I.e., Brussels IIA and the Maintenance Regulation.

[7] Which would go beyond current law and include reciprocal arrangements for the recognition and enforcement of non-maintenance financial orders, a serious lacuna at present. Such orders are excluded from the scope of the Maintenance Regulation (as they are not maintenance orders) and from the scope of the Recast Brussels I Regulation (Regulation (EU) No 1215/2012) and the Lugano Convention, as they are deemed by the CJEU to be 'rights in property arising out a matrimonial relationship': see *Van den Boogaard v Laumen* [1997] 2 FLR 399.

[8] Despite intensive lobbying, the UK legal profession failed to secure any divorce-related amendments to the Commission's proposal for a Brussels IIA Recast Regulation (COM (2016) 411 final, 30.6.16). The amendments proposed were the creation of the right to elect a jurisdiction for divorce; reduction of the impact of the *lis pendens* rule by establishing a jurisdictional hierarchy; and the introduction of a "transfer to a better placed court" provision for divorce cases, mirroring the existing article 15.

[9] Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations; Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance.

[10] Curiously, it has been argued that applying the Hague Conventions and reverting to *forum conveniens* will require extensive training of lawyers and judges. This is patently not so. The Hague instruments are already in use. The *forum conveniens* regime remains in force for non-EU cases (see e.g. the recently reported *Mantegazza v Mantegazza* [2017] EWHC 3811 (Fam) (Moor J, 5 May 2017)) and does not in any event involve difficult concepts of law or practice. It is, rather, any new bespoke agreement with EU27 that is likely to necessitate significant professional education.

[11] Letter dated 1 December 2017 from the then Lord Chancellor David Lidington at ***https://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/JusticeforFamilies/justice-for-families-government-response.pdf*.**

[12] See the debate in the House of Lords on 5 March 2018 (***https://hansard.parliament.uk/Lords/2018-03-05/debates/6031119A-F447-4BED-ABB2-1112621DD65F/EuropeanUnion(Withdrawal)Bill#contribution-B53539E6-BA64-4FDD-A030-4E38A7A17DB8***), and the paper entitled Brexit and Family Law (October 2017) published by the FLBA, Resolution and IAFL at ***http://www.resolution.org.uk/site_content_files/files/brexit_and_family_law.pdf*.**

[13] It is currently a party via its membership of the EU (Council Decision 2009/430/EC).

[14] Via the 2007 Hague Convention.

[15] Via the 1958 and 1973 Hague Conventions, given effect in the UK by Part 1 of the Maintenance Orders (Reciprocal Enforcement) Act 1972.

[16] See e.g. the House of Lords EU Committee 17th Report at paras 97 and 98.

[17] See *Mittal* [2013] EWCA Civ 1255, [2014] 1 FLR 1514; and *Mantegazza*, above.

[18] As Thorpe LJ observed memorably in *Wermuth* [2003] 1 FLR at [34]: "A divorcing couple that has to litigate the consequences of the marital breakdown is not blessed. The couple that first litigates where to litigate might be said to be cursed."

19 See observations in similar vein by Mostyn J in *CC v NC* [2014] EWHC 703 (Fam) at [14].

[20] The MIAM requirement does not apply where there is a 'significant risk that in the period necessary to schedule and attend a MIAM, proceedings relating to the dispute will be brought in another state in which a valid claim to jurisdiction may exist, such that a court in that other State would be seised of the dispute before a court in England and Wales': FPR 3.8(1)(c)(iii).

[21] By way of example only, and most recently, *E v E* [2015] EWHC 3742 (Fam); *S v S (Brussels II Revised: Art 19(1) and (3): reference to CJEU)* [2015] 2 FLR 364 (in which, moreover, a request had to be made to the CJEU for a preliminary ruling (*A v B (Case C-489/14)* [2016] 1 FLR 31); Ville de *Bauge v China* [2015] 2 FLR 873; *Villiers* (above).

[22] Recognition of same sex marriages and of civil partnerships is not currently regulated by EU legislation, nor is this likely given the position of a number of Eastern European EU Member States on same-sex issues. In the UK the applicable rules are contained in, respectively, the Marriage (Same Sex Couples) (Jurisdiction and Recognition of Judgments) Regulations 2014 and Civil Partnership (Jurisdiction and Recognition of Judgments) Regulations 2005.

23 ***https://www.hcch.net/en/instruments/conventions/full-text/?cid=80***

[24] Article 12.

[25] Article 2.

[26] There is a further Convention ground, not mirrored in BIIA: namely, that Contracting States may refuse to recognise a divorce when, at the time it was obtained, both the parties were nationals of States which did not provide for divorce and of no other State (article 20(1)(e)).

[27] *Liaw v Lee* [2015] EWHC 1462 (Fam), [2016] 1 FLR 533 at para 8.

[28] *Liaw v Lee* (above); *Yordanova v Iordanov* [2013] EWCA Civ 464; *Lachaux v Lachaux* [2017] EWHC 385, [2017] 2 FCR 678.

[29] In 2017 in England and Wales there were only 332 decrees absolute of nullity compared with 102, 883 decrees absolute of divorce (***https://www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2017***).

[30] *Marinos v Marinos* [2007] EWHC 2047 (Fam); *Munro v Munro* [2007] EWHC 3315 (Fam); *V v V (Divorce)* EWHC 1190 (Fam).

[31] "the applicant is habitually resident if he or she resided there for at least six months immediately before the application was made and is either a national of the Member State in question or, in the case of the United Kingdom and Ireland, has his or her "domicile" there;". It should be noted that in early 2017, a group of specialist family lawyers agreed upon proposals for a new set of jurisdictional criteria borrowing from but improving on the current EU bases (see ***https://www.familylaw.co.uk/news_and_comment/divorce-jurisdiction-after-brexit#.W2QKb8GG_gB***). These proposals were well received within the profession and would also be suitable for adoption.

[32] Either party's habitual residence, in the event of a joint application.

[33] Domicile and Matrimonial Proceedings Act 1973, s5(2)(b).

[34] "*… some four years after the Regulation came into operation, it may be apt to contemplate whether the Regulation has done other than introduce technicality, complexity and uncertainty for individuals, legal practitioners and judges*" ([2015] IFL 252, R Bailey-Harris). We agree.

[35] *MS v PS (Case C-283/16)* [2017] 4 WLR 72, [2017] 1 FLR 1163, CJEU.

[36] *AB v JJB (EU Maintenance Regulation: modification application procedure)* [2015] EWHC 192 (Fam), a decision that has given

rise to considerable debate (see, notably, [2015] International Family Law 252 and 258 and Family Law Week, 17 March 2015).

[37] As an unwelcome by-product of our decision not to opt in to the Hague Protocol which introduced "applicable law" rules (see Council Decision 2009/941/EC).

[38] See article 21 compared with article 24.

[39] This two-stage process for the enforcement of UK maintenance orders within the EU was the price that the UK had to pay for opting out of the Hague Protocol: see above.

[40] Article 3(c).

[41] As in *Baldwin v Baldwin* [2014] EWHC 4857 (Fam), where, however, the court was able to find that other bases of jurisdiction existed.

[42] See *Villiers v Villiers* [2018] EWCA Civ 1120.

[43] For a critique of the EU's controversial doctrine of exclusive competence see ***http://www.abdn.ac.uk/law/documents/Opinion_on_Child_Abduction_-_Judicial_Activism_by_the_CJEU_-_By_Beaumont.pdf***

[44] Council Decision 2011/432/EU.

[45] Article 2(1)(a) and (b).

[46] Article 2(1)(c).

[47] See Council Decision EU 432/2011, Article 4 and Annex I.B (as permitted by article 2(3) of the Convention).

[48] Ie Chapters II and III.

[49] Article 10.

[50] Article 18.

[51] Article 20.

[52] A State may enter a reservation with regard to the creditor's habitual residence. Neither the EU nor the UK have done so.

[53] Article 22(c).

[54] Article 21 (with the addition of fraud and the situation where a decision is made in violation of article 18 (restriction of jurisdiction for variation applications).

[55] In England and Wales, this is the Lord Chancellor, acting through the REMO Unit of the Official Solicitor and Public Trustee's Department.

[56] Maintenance Regulation, Chapter IV sections 2 and 3.

[57] ***https://www.hcch.net/en/instruments/conventions/isupport1.***

[58] Articles 14 to 17.

[59] Articles 15(1) and 14(3).

[60] Article 17(b).

CASES

X (A Child FGMPO) [2018] EWCA Civ 1825

The court was concerned with X, a young girl rising two years of age. The background circumstances are set out extensively in Russell J's judgment: *Re X (A Child) (Female Genital Mutilation Protection Order) (Restrictions on Travel)* [2017] EWHC 2898 (Fam). In summary they are that the mother is British; the father Egyptian. They met and subsequently married in Egypt in 2014 and lived together until January 2016 when the mother travelled to England and, whilst here, discovered that she was pregnant and sought to remain to give birth to her child.

Following the birth of X, the mother raised the issue of FGM with the health visitor which in turn led to the involvement of the social services and the police whereby an application was made under the Female Genital Mutilation Act 2003 ("the 2003 Act") preventing the mother from leaving England with the child.

The matter came before Russell J for determination who having heard the oral evidence of the parties concluded that the risk to X of FGM would remain at very substantial should she travel to Egypt with her mother. The Judge was concerned that the mother would be vulnerable and isolated, unable to understand what was being said or discussed around her and largely, if not wholly, unequipped to prevent FGM taking place if the family decided that it should. The Judge was further concerned that in the event that the child were to be in Egypt there is no legal mechanism that can be out in place to ensure she would be free to return. The FGMPO was therefore made until 2032.

In respect of the absolute travel ban, the Judge made an order forbidding the child from travelling anywhere outside the UK to prevent onward travel to Egypt. This order was made for the same duration as the FGMPO. Furthermore, the mother was forbidden from applying for a passport or any travel documents on behalf of X and her current passport would continue to be held by the court until it expired and would then be destroyed.

Whilst neither parent challenged the FGMPO prohibiting X from being subjected to any form of FGM, the mother opposed the travel ban and made an application to appeal which was granted. She subsequently changed her mind and the court permitted the father to become the appellant in her place. He then sought to significantly extend the scope of the appeal by seeking to challenge the findings of Russell J and this was refused. He was however granted permission on the following grounds:

> i. The judgment contains no evidential basis for the decision to impose the travel ban;
>
> ii. (The judge was wrong to conclude that X's family life with her father could be promoted, or sufficiently promoted, by the father travelling to the UK;
>
> iii. The judge failed to give any sufficient reasons for imposing the travel ban;
>
> iv. The travel ban was not necessary or proportionate to the risk to X of FGM and unnecessarily and unreasonably interferes with the family's Article 8 rights;
>
> v. The travel ban was wrong.

The court considered the relevant legal framework at section 5 and schedule 2 to the 2003 Act and formed the view that it is very broad and provides no real guidance as to the approach the court should take when determining whether and, if so, in what manner to exercise its powers.

When permission to appeal was granted it was done in part on the basis that the proposed appeal raised an important point of principle in that this appeared to be the first time 2003 Act was to be considered by the Court of Appeal; it thus provided an opportunity to consider the approach the
court should take to any such application. That said the broader issues raised were not addressed by the advocates as they were not in a position to do so for wholly understandable reasons.

That said, the court made the following observations about these types of applications:

> • The rights engaged by both Article 3 and Article 8 of the European Convention on Human Rights will clearly be relevant to the exercise by the court of its powers to make an FGMPO;
>
> • When deciding how to exercise its powers, the court must balance a number of factors. The court will have to consider the degree of the risk of FGM (which needs to be at least a real risk); the quality of available protective factors (which could include a broad range of matters including the court's assessment of the parents); and the nature and extent of the interference with family life which any proposed order would cause.

• The need for specific analysis balancing these and other relevant factors extends to any additional prohibitions or other terms the judge may be considering including in the FGMPO. This is because each term included within the FGMPO must be separately justified. In this exercise, although the nature of the harm would, self-evidently, be a breach of Article 3, it is the court's assessment of the degree or level of the risk which is central to the issue of proportionality and to the question of whether a less intrusive measure, which nevertheless does not unacceptably compromise the objective of protecting the child, might be the proportionate answer;

• The order being made by the court will be intended and should be designed to protect and promote the child's welfare.

The father's case was that whilst he accepted that the court's power to impose prohibitions and restrictions on travel is extremely wide and thus it had the power to make the travel ban, there was no evidential basis upon which to support such a ban until 2032 and that the Judge had not explained sufficiently why she decided to do so for that length of time. He further submitted that when the judge determined he and his family could obtain visitor visas to enter the UK and thus continue a meaningful relationship with X, he has been recently refused such a visa and therefore the ban creates significant obstacles to his family life and these were not properly considered by the Judge.

It was further argued that the ban goes beyond that which is a reasonable and the order amounts to a disproportionate interference with the family life of X and her parents.

The mother was neutral on the issue of appeal. It was opposed by both the local authority and the children's guardian.

Lord Justice Moylan allowed the appeal. He noted that the judgement contains no separate consideration of the nature of the travel ban that the judge decided to impose either in terms of findings or of analysis. Furthermore, no findings or conclusions were reached as to the prospects of the father being able to travel to England nor does it deal with the consequences for the family if he's unable to do so.

The Court found that there was no sufficient explanation for the absolute travel ban to prevent onward travel to Egypt and that the imposition of such a ban in particular was of concern when this is unsupported by any prior findings about the mother. Accordingly, the Court of Appeal accepted that grounds (i) and (iii) are made out and that a more extensive analysis than that undertaken by Russell J is required on these parts.

The case is to be remitted for a full rehearing as the trial judge will need to consider the case as a whole and cannot sever this part of the order from the rest of the case.

Summary by **Anna Walsh**, barrister, **Coram Chambers**

M v F [2018] EWHC 1949 (Fam)

This application concerned two girls, 11 and 6. The family are of Eritrean origin. The mother's initial application for relocation to Ethiopia was was overtaken by the passage of time, such that, by the time of the hearing the mother sought to relocate to Uganda. On the first day of the hearing, the Court was informed that the father agreed to the children relocating to live in Uganda. Williams J noted that notwithstanding the agreement, as the Court was seized of the issue, it was not absolved of the task of considering whether such a move was in the children's best interests. He found that, having regard to the totality of the evidence, he was quite satisfied that it was in the children's best interests to relocate.

The parties agreed, and the Court held, that it could and should exercise jurisdiction to make child arrangements orders dealing with the time that the children were to have with their father once they had moved to Uganda.

The substantive issues that remained to be determined were as follows:

i) Should it be a precondition to the relocation that it could not take place until a mirror order was in place in Uganda?

The court received evidence from a Ugandan lawyer that an English order could be registered and executed in Uganda, but that the timeframe in which that could be done could not be guaranteed due to the Summer recess. Having conducted a thorough welfare analysis, the Court was satisfied that the mother would ensure the contact with the father takes place whether or not an order was registered, however, in order to ensure that a regime was in place, Williams J held that the order should be registered in Uganda, but that this did not need to take place prior to the move. The Court agreed with the mother's position that it was in the children's best interests to be in Uganda for the start of the new term.

ii) Should the father cover all of the children's costs of travel for the contract, including ancillary costs?

The Court rejected the father's objection to paying the ancillary costs of travel (e.g. transport to/from the airport). It held that as the father pays nothing in maintenance of the children, he should be responsible for all of the costs of the children's travel.

iii) Should the father have permission to take the children to Eritrea for one week during his time with the children?

Applying the three factors set forth in *Re R (A Child)* [2013] EWCA Civ 1115), Williams J held, having conducted a thorough welfare analysis on the evidence (which included evidence from an expert in Eritrean law), that the existence of a risk of the children not returning from Eritrea, albeit low, combined with the magnitude of the consequences in terms of emotional harm to the children if they were not returned and the complete absence of security, meant that the welfare balance fell clearly against granting the father permission. Williams J held that although welfare benefits of visiting Eritrea existed (e.g. exposure to Eritrean life and culture, being able to visit the father's old house and visiting grandparents), they were limited in extent given that the extended paternal family, like the father, lived primarily in Holland (or elsewhere). Williams J further held that he did not consider it appropriate to make a conditional order (on the basis of father obtaining a mirror order and providing security) or to make an order that they could visit at some point in the future.
iv) Should the children's passports be provided to the father when he spends time with them?

The father argued that he required the children's passports as he may require them to fly to Euro-Disney or to Germany, for ID purposes and for checking into hotels and suchlike. The mother argued that if the father had the passports, the possibility of him travelling with the children to Eritrea could not be dismissed. The Court did not accept the father's reasons for wishing to have the passports and considered that the reality was that the father wanted them in order to achieve some sort of parity with the mother. Williams J noted that the father could travel freely with the children from Holland within the Schengen area; i.e. in reality, it was not a practicalities issue, rather a rights issue. Further, he held that providing the father with the passports opened a window to possible action that was not child-centred; there were not sufficient advantages to father having the passports in order to take that risk.

Summary by **Oliver Woolley**, barrister, **1GC Family Law**

Re A (Relinquished baby Risk of domestic abuse) [2018] EWHC 1981 (Fam)

In this case, the mother gave birth to a child, ("A"), and immediately agreed to him being placed in foster care citing, initially, her lack of preparedness for his arrival (as she had not realised that she was pregnant until very shortly before the birth), but latterly acknowledging that her primary concern was, in fact, that she feared abuse and harassment from the putative father ("the father"). As the proceedings progressed she confirmed that she would support A being adopted.

On exploring the reasons for the mother's concerns about the father, it transpired that she had been subjected to abusive behaviour by him during their short-lived relationship and was, thereafter, subjected to ongoing harassment and abuse by him on social media. In addition, the social worker's enquiries revealed that the father has "unstable" mental health with a history of threatening self-harm and suicide and also that he is known to the police as having an extensive history of abusive and threatening behaviour towards his former partners, including stalking and harassment, culminating in "multiple" convictions for assault and harassment, a non-molestation order, a breach of that order and two conditional discharges and a restraining order.

In a section of his judgment entitled Putative Father's history: assessment of risk [at 16-18)] Cobb J sets out further details.

Such was the father's reported history that he was described by the Judge as someone about whom reports of abusive conduct are held by different police forces nationally and who has contempt for court orders and is unable / unwilling to work with child protection agencies.

Alongside this, A's wider maternal and paternal family members were, collectively, noted to have a history of poor parenting with a high level of input from social services, including the mother who had social services' input during her own childhood and relinquished her two oldest children for adoption at birth.

In the circumstances, the Local Authority applied for a declaration that it would be permissible and lawful for them to make arrangements for the adoption of A without seeking to notify the putative father, paternal or maternal extended family members, or assess them as carers for A.

The Law

Cobb J clarifies that the procedure to be followed, invoked under Part 19 (rule 19.1(2)(b)) FPR 2010, is that set out in rule 14.21 of the FPR 2010, as per *Re RA (Baby relinquished for adoption)* [2016] EWFC 25, [2017] at [50].

At [19] he says the following: "The law in this area is now well-rehearsed in a growing number of authorities, specifically *Re JL & AO* [2016] EWHC 440 (Fam), *Re RA* [2016] (see above), *Re TJ* [2017] EWFC 6, *Re M & N (Twins: relinquished babies:*

Parentage) [2018] 1 FLR 293, and *A Local Authority v the mother and another* [2017] EWHC 1515 (Fam). I summarise the cardinal principles as they apply in this case as follows:

i) Each case is fact-sensitive (*Re RA* at [31]);

ii) The outcome contended for here is "exceptional" (*A Local Authority v the mother* at [1]-[7])

iii) The paramount consideration is the welfare of A; section 1(2) Adoption and Children Act 2002 ('ACA 2002')

iv) The court must have regard to the welfare checklist in section 1(4) ACA 2002;

v) It is a further requirement of statute (section 1(4)(f)(iii) ACA 2002) that the court has regard to the wishes and feelings of the child's relatives;

vi) Respect can and indeed must be afforded to the mother's wish for a confidential and discreet arrangement for the adoption of her child, although the mother's wishes must be critically examined and not just accepted at face value; overall the mother's wishes carry "significant weight" albeit that they are not decisive (*Re JL and AO* at [47], [48] and [50], and see also *Re RA* at [43(vi)]);

vii) Article 8 rights are engaged in this decision; however, in a case where a natural parent wishes to relinquish a baby, the degree of interference with the Article 8 rights is likely to be less than where the parent/child relationship is to be severed against the will of the parent (*Re TJ* at [26]];

viii) Adoption of any kind still represents a significant interference with family life, and can only be ordered by the court if it is necessary and proportionate (*Re RA* at [32]);

ix) A high level of justification is still required before the court can sanction adoption as the outcome, and a thorough 'analysis' of the options is necessary (*Re JL & AO* at [32]); 'analysis' is different from 'assessment' – a sufficient 'analysis' may be performed even though the natural family are unaware of the process (*Re RA* at [34]). As I said in *Re RA* at [38]:

> "in order to weigh up all of the relevant considerations in determining a relinquished baby case it may be possible (it may in some cases be necessary) and/or proportionate to perform the analysis without full assessment of third parties, or even their knowledge of the existence of the baby. The court will consider the available information in relation to the individual child and make a judgment about whether, and if so what, further information is needed".

The Decision

At [22] His Lordship considers the "weighty" statutory factors engaged, being the likely effect on A (throughout his life) of ceasing to be a member of the original family and becoming an adopted person (section 1(4)(c) ACA 2002), and the denial of A's family of the chance to claim him". He goes on to acknowledge that he must also have regard to "what in reality and on these facts is likely to be forfeited by A's lost membership of his natural family" before concluding that the "reality" was that "there is no realistic prospect of A being placed safely and securely in the care of any member of the maternal or paternal family (section 1(4)(f)(ii) ACA 2002)." [23]. He also found, on the evidence before him, "a very real risk of harm to A (section 1(4)(e) ACA 2002) from domestic abuse by F" and an equivalent risk of harm to M from F (and significant interference with her and her children's Article 8 rights) if F were advised of A's existence [24]. Having done so he concluded that he was "amply satisfied that on these facts the Local Authority has made good its case for the declaration sought".

Summary by **Lucinda Wicks**, barrister, **Coram Chambers**

West Sussex County Council & The Chief Constable of Sussex Police v F, M, N, P and T [2018] EWHC 1702 (Fam)

Case concerning N aged 15 (female), P aged 14 (male) and T aged 9 (female). In December 2017 Sussex Police applied without notice to the High Court for a forced marriage protection order ('FMPO') in respect of all three children which was granted including a direction that the respondents (the parents and an aunt) immediately make travel arrangements for N and T to return to the jurisdiction within 48 hours of service of the order. N and T had been taken to Pakistan in August 2016. P was taken into police protection. The girls were returned, albeit 5 days after the order required, and were placed in foster care pursuant to s. 20 Children Act 1989. Care proceedings began, and ICOs were made in respect of each child.

The FMPO and care application came before Williams J for a fact finding. Various special measures were taken in respect of witnesses, including N and P, giving evidence.

The findings sought by the Local Authority are summarised at paragraph 10 of the judgment and included (inter alia) domestic abuse; physical abuse; P moving to the care of his uncle and aunt because the parents were unable to provide appropriate guidance and boundaries for him; N and T being placed by the parents in Pakistan spending a lengthy period separated from their family in the UK and not being returned to the UK until required by the Court; the parents causing N to be engaged to a cousin without her consent whilst in Pakistan and making arrangements for her to marry without her consent, attempting to force her into marriage or failing to protect her from a forced marriage; and the parents and/or family members placing pressure on N and P to not tell the truth and withdraw their allegations.

N gave a retraction interview and said that she wanted to come home from Pakistan and made the allegation that she was engaged in order to get back to England. P also no longer held by allegations he had made, saying he was desperate to secure the return of his sisters from Pakistan.

The Court noted that the language of s.63A Family Law Act 1996 gives a very broad discretion, and that there is no evidential threshold other than that contained within s.63A, still less does it appear that the Court must conclude on the balance of probabilities that the protected person has or will be subjected to a forced marriage. It was clear that the making of an interim ex parte order was a very serious step with potentially very significant consequences for the respondents.

This was a case involving mandatory orders requiring a person to do an act, in this case, requiring the return of children from Pakistan in circumstances where they had been there for 16 months, which was clearly a far more significant matter than protective and prohibitory orders which could not be seriously objected to, purely requiring respondents to refrain from doing things. It clearly involves a positive interference with the family life of the respondents and therefore has article 6 ECHR implications which were not engaged when the Court was simply making prohibitory orders.

Where mandatory orders were sought, whilst the section 63A criteria still apply, the Court must be satisfied on appropriate evidence that the making of such an order was a necessary and proportionate response. Where the order was to bite almost immediately and in circumstances where the respondents would be placed under an obligation carrying potentially penal consequences before they would in practical terms be able to seek legal advice or return the matter to Court, the approach of those applying for the injunction and the Court considering it would necessarily need to be that much more robust.

A very considerable difficulty in this case was the Court's view that all of those who have been able to give a direct account of events which form the foundation of threshold and the forced marriage allegations had not given accounts on which Williams J felt confident in relying. A detailed chronology was appended to the judgment. The findings are set out from paragraph 48 to 57.

As to the allegation of attempted forced marriage and failure to protect N from a forced marriage, the Court considered this aspect of the case had been the most troubling. Williams J concluded that there was a loose commitment for N to perhaps marry in the future, not a formal engagement, which was transmuted by P into an imminent marriage supplemented by risks to himself and sexual abuse added in for extra impact. The central allegation of the forced marriage application did not amount to a forced marriage or any imminent risk of that at all in November/December 2017. In terms of Sir Nicholas Wall's observations about the distinction between consensual arranged marriages and forced marriages involving serious human rights abuses this was far closer to the arranged marriage end of the spectrum but taking the form of a loose commitment not undertaken with N's consent but not with the intention subsequently of her being forced to marry whether she wanted to or not. The nature of the arrangement was such that had it endured to an age when she might legally have married Williams J was satisfied she would have had a say and had she not wished it, it would not have proceeded.

As a result of the constellation of findings that the Court had made on the other matters the Court was satisfied that the threshold was crossed at the relevant time. The combination of all the matters, but in particular the suppression of N's desire to return home, the enforced separation of the siblings and the consequences for them and the parents' complete disregard for the emotional impact upon them against a backdrop where the children's earlier exposure to a toxic domestic atmosphere made them particularly reliant on each other and vulnerable had caused significant harm to the children. That the parents allowed a situation to be created where their children were so desperate that they were prepared to make such serious allegations against their parents illustrated the point of how profoundly the parents were ignoring their children's emotional needs.

Summary by **Victoria Flowers**, barrister, **Field Court Chambers**

For the full text of the judgment **click here**

A & B v C [2018] EWHC 2048

In this case, Cohen J considered whether Article 21 of the Hague Convention on the Civil Aspects of International Child Abduction 1980 ('The 1980 Convention') is engaged in respect of a non-parent without rights granted by a court or parental rights holder.

The child (P) had been living with his mother and the maternal family in Poland until the mother's death in late 2016. In January 2017, P's father returned to Poland from living in the UK and P moved to live with him and his paternal grandparents. In June 2017, the father returned to the UK with P and the maternal family had not had contact with him since.

The maternal aunt and maternal grandmother made applications for disclosure orders as to the whereabouts of P in this country and for rights of access pursuant to Article 21 of the 1980 Convention.

Prior to her death the mother signed a declaration and executed a will to the effect that P's custody would be granted to the grandmother in the event of her death. The aunt had been granted no such custody rights but had been living intermittently with P and his grandmother in Poland and had some significant role in his care before the mother's death.

Article 21 enables applications: 'to make arrangements for organising or securing the effective exercise of rights of access.' The Article was clearly engaged in respect of the grandmother but the key issue in this case was whether the aunt also had 'rights of access' within the meaning of the Convention.

Cohen J sets out the relevant definitions of 'rights of access' at [14]:

" 'Rights of access under the 1980 Convention are defined at Article 5 (B) as follows:

'Rights of Access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

This is the almost identical wording to the Brussels IIA definition which at Article 2.10 describes:

'Rights of Access' shall include in particular the right to take a child to a place other than his or her habitual residence for a limited period of time."

When the learned judge initially considered the present case, he was concerned that:
'if the aunt was entitled to bring an application under Article 21 then so might anyone of a myriad of family members.' [15]

There was also a concern that a family friend, schoolteacher or any other person who had played a part in the child's life may be able to use Article 21.

However, recent European case law was 'significantly influential' in the judge's thinking (see [10]), namely the recent opinion of Advocate General Szpunar in the case of V*alcheva v Babanarakis* in the Court of Justice of the European Union (Case C-335/17) (published at [2018] 1FLR 1571) followed by the judgment of the CJEU on 31 May 2018 under the number Case C-335/17.

The *Vavelcha* case considered a grandmother's wish to exercise rights of access to her grandson. The question on referral to the Court of Justice was whether such a claim fell within the scope of Brussels IIA 2201/2003. In that case, the grandmother was in a similar position to the aunt in the present case in that no specific right had been granted to her. The court considered in detail the jurisprudence of EU legislature and the travaux preparatoires in concluding at paragraphs 33-34 and 37 that rights of access must be understood:

> "as referring not only to the rights of access of parents to their child, but also to the rights of access of other persons with whom it is important for the child to maintain a personal relationship, among others, that child's grandparents, whether or not they are holders of parental responsibility."

In the present case, Cohen J adopted this reasoning and concluded:

> "...my initial reaction that the application by the aunt fell without the terms of Article 21 was incorrect and that both grandmother and aunt, as people to whom it is important that the child maintains a personal relationship fall within the Article."

Summary by **Asha Pearce-Groves**, barrister, **St John's Chambers**, Bristol.

PS v BP [2018] EWHC 1987 (Fam) (27 July 2018)

This appeal concerns L, a three year old girl. The Father sought contact with L on 6th February 2017. On 29th November 2017, District Judge Green listed the matter for a fact-finding hearing in January 2018 in front of His Honour Judge Scarratt to avoid further delay. By the time of the hearing, the Father was acting in person. The Father was informed at the start of the hearing that he would not be permitted to cross-examine the Mother directly, relying on *Re: A (a minor) (fact finding; unrepresented party)* [2017] EWHC 1195 (Fam).

On appeal, the 'invidious' position facing judges in cases of alleged domestic violence where one party is unrepresented was highlighted. *Re: J (children) (contact orders; procedure)* [2018] EWCA Civ 115 was referenced as highlighting the 'very substantial difficulties engendered by a litigant in person whose case needs to be 'put' to a key factual witness where the allegations are of the most intimate and serious nature and where the litigant and the witness are themselves the accused and accuser'. McFarlane LJ observed in that matter that two options were realistically left to the court: the alleged abuser conducting the cross-examination himself (possibly with the assistance of a McKenzie friend) or questions are put to the witness on that party's behalf by the judge. Hayden J viewed the possibility of granting rights of audience to a McKenzie friend as firmly inconsistent with the 2015 Litigant in Person Guidelines. He also reminded himself that the Courts do not have the power to direct funding from HM Courts and Tribunal Service (as per *Re K and H* [2015] EWCA Civ 543).

In the current case, although Hayden J felt that the Father's cross-examination mirrored an approach frequently taken in the criminal courts, his points were 'essentially proper questions' when dealing with allegations of this significance. Although the Judge had intended for the Father to identify the questions and for the Judge to refine them, the role was 'plainly unfamiliar' to the Judge and did not achieve the identified objective. As a consequence, the Father's questions, when put, were 'rendered superficial, overly simplified and repeatedly phrased in a way as to minimise their impact'. The approach 'hindered the effectiveness' of the cross-examination put on behalf of the Father.

Hayden J noted that the 'cross examination of a complainant alleging rape, requires particularly careful preparation, great sensitivity and rigorous forensic discipline. Ultimately, the complainant's evidence must be challenged effectively and the alleged perpetrator's case put fairly'. Although the Family Court strives to be non-adversarial, the party bringing the allegation has the burden of proving it to the civil standard of proof (*Re B* [2008] UKHL 35).

Although Hayden J was 'extremely sympathetic' to the Judge's predicament, the Judge was deemed to have formed an adverse impression of the Father and the hearing 'fell short of what fairness demands'. Hayden J noted that the conclusions reached in the short ex tempore judgment were not rooted in the substance of the factual allegations but on the Judge's observations of the Father's demeanour. Although important, the impression that a witness makes on the first instance Judge is not a substitute for a detailed analysis of the evidence, and a true assessment of a witness's demeanour can only properly be undertaken when the witness is 'put to the assay by challenge'. The weight placed on the Mother's presentation in the witness box was therefore diminished. The process of the hearing was 'so fundamentally flawed that it inevitably corroded the reasoning of the Judgment'.

Hayden J drew particular attention to the Youth Justice and Criminal Evidence Act 1999 (YJCEA) as a useful starting point for a family judge, as well as PD 12J, FPR 3A, PD 3AA and Matrimonial and Family Proceedings Act 1984, s 31G(6). As per *K v H*, the possibility of other case management options were considered, as well as their compliance with Convention rights, including:

> (i) any direction that a party should give oral evidence being subject to the condition that they are questioned through a legal representative;
>
> (ii) a party to be questioned 'sensitively and fairly' by the judge himself (including the potential for identification of the questions in advance);
>
> (iii) a party to be questioned by a justices' clerk;
>
> (iv) a guardian to be appointed to conduct proceedings on behalf of the children.

Observations were offered to provide a 'forensic life belt until a rescue craft' – by way of Parliamentary action – arrives:

> (i) Once it becomes clear to the court that a case including serious and intimate allegations must be put where the witnesses are accused and accuser, a Ground Rules Hearing ('GRH') will always be necessary;
>
> (ii) The GRH should usually be conducted prior to the hearing of the factual dispute;
>
> (iii) Judicial continuity between the GRH and the substantive hearing is essential;
>
> (iv) The accuser bears the burden of establishing the truth of the allegations. This burden may not be compromised in response to a witnesses' distress, and fairness to both sides must be ensured;

(v) There is no presumption that the accused may not cross-examine the accuser in every case. The Judge must consider whether the evidence would be likely to be diminished if conducted by the accused or improved if a prohibition on direct cross-examination was directed. In a Family Court fact-finding hearing, these two factors may be divisible;

(vi) If cross-examination of the alleged victim runs a 'real risk' of being abusive (if allegations are established, it should bear in mind that the impact of the court process is likely to adversely affect the welfare of the subject children;

(vii) Where the factual conclusions are likely to have an impact on the arrangements for, and welfare of, a child, the court should consider joining the child as a party and securing representation. In that instance, the child's advocate may be best placed to undertake the cross-examination;

(viii) If cross-examination is not permitted by the accused in person and there is no advocate available, questions should be reduced to writing under specific headings. The Judge is not constrained to put every question sought but will have to evaluate relevance and proportionality. Cross-examination is dynamic and the process cannot become formulaic;

(ix) Although fact-finding hearings have a 'highly adversarial complexion', the central philosophy of Children Act proceedings is investigative. A judge may therefore conduct questioning in an open and less adversarial style without compromising fairness to either side.

Hayden J noted that a complainant in family proceedings not being offered the same protection as a complainant in a criminal trial is 'manifestly irrational and unfair'. Hayden J reiterated the need for a regime which replicates that operating in the Criminal Courts and expressed his hope for urgent legislation to address this 'lamentable situation'. With the observation that the system has failed both parents, a rehearing was directed and the case remitted to the High Court.

Summary by **Lindsey Sambrooks-Wright**, barrister, **Garden Court Chambers**

LCC v AB & Ors [2018] EWHC 1960 (Fam)

This case concerns a mother (AB), who was suffering from terminal cancer which led to her suffering a number of health difficulties including in respect of her mental health, as a result of the combined effects of her condition and the treatments she endured in order to combat her illness. Shortly after learning of her diagnosis, having readily acknowledged that she would be unable to care for her children whilst undergoing treatment, she asked the local authority to accommodate them under a s.20 agreement as she was their sole carer and unable to make alternative care arrangements for them herself.

Thereafter, and throughout the proceedings which ensued, the mother did not waiver in her support for the children continuing to be looked after by their foster carers and is described as having been cooperative with the local authority and accepting of any advice given regarding how her contact should be managed to enable this to be enjoyable and safe for the children.

At no point was there any dispute about the fact that the mother's primary concern had always been to ensure that the children received good care and that she had prioritised their needs by virtue of her having asked the local authority to accommodate them when she realised that her health would make it impossible for her to guarantee their safety in her care.

Furthermore, as the mother was in agreement to the children remaining in care under as.20 agreement and being made wards of court throughout their minority (if necessary), there was no dispute with respect to the proposed interim arrangements for the children while an alternative care plan for them in the longer term was identified.

The only matter that was in dispute related to the particulars within the proposed final threshold relied upon by the local and specifically their assertion that the threshold was crossed on the basis of the following [22 &23]:

"…at paragraph six, the following, 'First Respondent Mother was diagnosed with a terminal brain tumour on 17 March 2017 and on 31 March 2017 request the children be accommodated as she was unable to meet their basic care needs as a result of her health difficulties'.

There are then set out a number of what are called particulars, over the 17 days prior to the request for them to come into care, which relate to the mother AB having difficulties standing, of reporting that the father CD was being aggressive, that she had reduced mobility, the children were not reliably clean or in appropriate clothing, the mother AB does not feel safe, and the mother AB was not able to provide for her children. The further particulars are said to be (a) the fact that she has terminal cancer and (b) the capacity assessment undertaken in August of last year."

In response, on behalf of the mother it was submitted that the threshold was not, in fact, crossed as, in taking the steps that she did when she contacted the local authority she [24]:

> "…did what any reasonable parent would do who found themselves to be a lone parent with a terminal diagnosis of cancer, she sought alternate care for her children so that they would be safe and well looked after."

Mr Justice Keehan delivered his Judgment in the High Court on 23rd May 2018 in which, having summarised the applicable law [10-20] he concluded, without any criticism of any of the parties for their respective positions concerning the disputed point, that [26]:

> "she acted as a perfectly reasonable, loving, caring mother and requested that the children be cared for by the local authority"

Accordingly, His Lordship found that the threshold was not crossed on "the attributability criteria" and that "in any event…the fact that this mother AB is terminally ill does not, in my judgement, deprive her of the right as their parent to make decisions about where they live and to make decisions about with whom they will live in the future, not least when she has died." [27]

Having done so he dismissed the care proceedings and made the children wards of court.

Summary by **Lucinda Wicks**, barrister, **Coram Chambers**

Sparkasse Koln Bonn v Cutts & Anor [2018] EWHC 1879 (Ch)

In 2015, the claimant ("C") had obtained a final charging order against the first defendant, Mr. Cutts ("H"). H's wife, Mrs. Cutts-Lipkin ("W") is the second defendant [1]. In 2017, C applied for an order for sale of a property in London registered in H's name ("the Property") [3].

W issued a standalone application under ToLATA, claiming that H held the Property on trust for them both as tenants in common in equal shares. However, Chief Master Marsh considered this to have been an unnecessary application since the issue, if raised, was to be determined within the extant proceedings concerning the order for sale; her ToLATA application was therefore stayed [5].

W's claim had three limbs, each of which was expressed in the alternative:

> i. W relied on a declaration of trust dated 26 March 2003 which, she claimed, evidenced an intention to hold the beneficial interest in the Property in equal shares ("the Declaration of Trust").
>
> ii. W claimed that the Property was held by W and H in equal shares under a common intention constructive trust.
>
> iii. W asserted that her contributions either gave rise to a resulting trust, or that in making such contributions she relied to her detriment on promises made by H such that it would be unconscionable for her to have been denied an interest in the Property [9].

The registered title to the Property revealed that: i) the Property was made up of three flats comprised in one (new) lease dated 30 September 2002; ii) H became the registered proprietor on 19 November 2002; iii) Bank of Scotland plc registered a charge against the title on 8 September 2004, and; iv) there was no indication that anyone other than H held an interest in the Property [12].

Notwithstanding the charging order proceedings, which concluded in 2015, W asserted an interest in the Property for the first time in 2017. The Declaration of Trust described the Property incorrectly by referring only to two flats as opposed to three flats [13].

H's position mirrored that of W's. Chief Master Marsh considered that the Defendants had "put forward a case that, in terms of chronology, can fairly be described as muddled" [16]. By way of example, H had re-mortgaged the Property in 2004. W claimed that the mortgagee had declined to add W's name to the mortgage (in 2004), which triggered W and H to enter into the Declaration of Trust (dated 2003) [16]. Further, W claimed that the Declaration of Trust was signed in Germany, rather than in London, as stated on the face of the document [30].

C claimed, inter alia, that the Declaration of Trust was a sham in the restricted sense, namely that it was created more recently than 2003, as stated [19].

The judge concluded that neither W nor H was a satisfactory witness [34] and that W had put forward almost no documentary evidence in support of her contributions arguments (limbs (ii) and (iii) above) [33]. The judge noted that, since the new lease was granted in 2002, it was open to H at that stage to register the Property in joint names with W; H's evidence was that this option had not occurred to him at the time [37].

The judge was satisfied that the Declaration of Trust "bears all the hallmarks of a document created long after 2003". The judge found that the document was "created recently with a view to using it to minimise the harm created by the judgement obtained by the claimant [C] when the point was reached at which [C] ceased to be willing to defer enforcement" [40]. As a result, the Declaration of Trust did not evidence the joint intention of W and H as at 26 March 2003.

Even if the opposite had been true, the judge found that the Declaration of Trust itself was incapable of evidencing a trust relating to the Property since it refers to only two (out of three) flats [41]. At no point in her formal pleadings did W seek rectification in this regard [42].

The judge concluded that W's wider argument as to a common intention constructive trust, relating to all three flats, was inconsistent with the express Declaration of Trust, which referred to only two flats [43].

W's claim was dismissed and directions were provided for the order of sale of the Property to be implemented [46].

Summary by **James Webb**, barrister, **1 Hare Court**

Akhter v Khan [2018] EWFC 54

The petitioner ("W") issued a divorce petition in November 2016. The respondent ("H") defended the position on the basis that there was no valid marriage (otherwise known as a 'non-marriage'). W argued:

> a. That the presumption of marriage operated so as to create a valid marriage under English law; or
>
> b. That the marriage was a void marriage under section 11 of the MCA 1973 so as to entitle her to a decree of nullity.

On either (a) or (b) W would be entitled to pursue an application for financial relief. If not, she would not be entitled to such a remedy [§7-10].

Background

The judgment contains a detailed chronology of the facts [§20]. In brief, the parties undertook an Islamic marriage ceremony in 1998. It was accepted that this did not create a valid English marriage and that both parties knew this at the time. W said that she had anticipated a civil ceremony after the Nikah. The parties had 4 children.

In 2005 they moved to live in Dubai. They had to obtain a marriage certificate for a spousal visa, which they obtained but without a ceremony or blessing. The judge found, 'I suspect [W] kidded herself allowed herself to ignore the fact that she had not undertaken a civil ceremony (sic).'

There was an issue, determined in W's favour, as to whether H had asked W to live in a polygamous marriage. W essentially ended up 'apologising for being a poor Muslim because she could not accept him taking a second wife…'

At this point, W returned to live in England with the children in 2011. H travelled to see them regularly and W said she again raised the issues of a civil ceremony then and throughout 2011/2012. H denied this and denied the parties continued with their marriage and cohabitation.

H returned from Dubai in 2014. W drafted an Islamic Will for H, which H refused to sign. The contents of the Will referred to 'my wife Nazarene Akhtar... (whom I have married in Sharia law only)…'

W's case was that she continued to raise the issue of a civil ceremony thereafter and would be rebuked by H. H's case continued to be that the parties had separated from 2011 and that there was no talk of a civil ceremony.

There were issues concerning domestic violence and W applied for a non-molestation order in June 2016, September 2016 and in 2017. The children were made subject to a Child In Need plan in August 2016. W issued a divorce petition in November 2016.

The judge preferred W's evidence generally [§23-24]. He found that:

> 'At the point when the Nikah ceremony was undertaken it was the parties' intention and the expectation of the close family that it was the first stage in a process that would have included the civil ceremony and the Walima. I'm also satisfied that the question of the civil ceremony was returned to at various stages over the 18 years that passed subsequently…' [§28]

Legal framework: presumption of marriage

The judge set out the framework of the competing arguments at the start of his judgment [§14-17] before moving onto the law.

The cases on presumption of marriage were summarised first [§31-39]. The judge said [at §40]:

> 'The cases all establish that if the known ceremony is shown on the evidence not to create a valid English marriage that the presumption cannot apply.'

Seeing as neither party sought to argue in this case that the Nikah ceremony created a valid English marriage and neither of them had thought at any time that it did so qualify, the presumption of marriage could not apply so as to presume a valid marriage under English law [§40-41].

Legal framework: marriage and nullity

Whether the marriage in this case was a void marriage susceptible to a decree of nullity came down to the ultimate question of whether the requirements of section 11(a)(iii) of the MCA 1973 were satisfied:

> (11) Grounds on which a marriage is void.
> A marriage…shall be void on the following grounds only, that is to say –
>
> (a) That it is not a valid marriage under the provisions of the Marriage Acts 1949 to 1986 (that is to say where –
>
> (i) …
>
> (ii) …
>
> (iii) the parties have intermarried in disregard of certain requirements as to the formation of marriage.)

The judge analysed a number of authorities on the interpretation of section 11 [listed at §46, then §47-57]. These had been considered by Moylan J in *MA v JA and the Attorney Genera*l [2012] EWHC 2219 (Fam), [2013] Fam 51, at paragraphs 67-281. The judge summarised the key aspects of that judgment [§53]. Later on in the judgment, in his 'conclusions on the law', Williams J described *MA v JA* as the 'starting point in relation to the interpretation and application of section 11' [§92], namely:

> c. 'Unless a marriage purports to be of the kind contemplated by the marriage acts it will not be within section 11;
>
> d. What brings a ceremony within the scope of the Act or at what stage the cumulative effect of the failures is to take the ceremony wholly outside the scope of the 1949 Act has to be approached on a case by case basis (see for instance, *K v K* [2016] EWHC 3380, [2017] 2 FLR 1055);
>
> e. The court should take account of the various factors and features mentioned above including particularly, but not exhaustively: (a) whether the ceremony or event set out or purported to be a lawful marriage; (b) whether it bore all or enough of the hallmarks of marriage; (c) whether the three key participants (most especially the officiating official) believed, intended and understood the ceremony as giving rise to the status of lawful marriage.'

However, this was simply the 'starting point' the judge said. He considered arguments that the interpretation of section 11 was affected by provisions relating to fundamental human rights [§57-:

First, Article 6 ECHR, namely the right to a fair trial. H argued that the existence in law of a non-marriage and inability to make a financial claim was indirectly discriminatory in respect of women and in particular Muslim women [§75]. The AG rejected this argument insofar as the essence of article 6 was to guarantee a procedural right (i.e. access to a court) as opposed to substantive right [§76]. The judge agreed with the AG, albeit 'not without some reservation' [§77].

Secondly, Article 8 ECHR, namely the right to respect for private and family life. H argued that this incorporated a right to respect for the parties' status as a married couple and describing their status as 'non-marriage' was an infringement of that right [§78]. The AG disagreed, arguing that there was no difference in 'status' between a void marriage and a non-marriage (i.e. the parties were never married in law) [§79]. The judge agreed with the AG all but one respect:

> 'It does not seem to me that there is a distinction in Article 8 terms between those who cohabit choosing not to marry and those who knowingly undertake a religious only ceremony and opt not to undertake the additional formalities necessary to affect (sic) a valid legal marriage. However I do consider that in respect of those who sought to effect or intended to effect a legal marriage that article 8 supports an approach to interpretation and application which the finding of a decree of a void marriage rather than a wholly invalid marriage…' [§80]

Thirdly, at the judge's own request [§67-68] the parties were asked to make submissions as to whether Article 3 of the United Nations Convention on the Rights of the Child (best interests of the child a primary consideration in all actions concerning children) was of relevance. The judge considered that it must affect his interpretation of section 11 [§82].

Fourthly, Article 12 ECHR, namely the right of individuals to marry without appearance from the state. This was not expressly relied on by H. However, the judge felt there:

> 'may be circumstances where Article 12 also has relevance in terms of its horizontal effect. In this case where the husband led the wife to believe that they would undertake a civil ceremony as part of the process of marrying and has thus left her in the situation where she does not have a marriage which is valid under English law the husband himself has infringed her right to marry….' [§83]

Finally, the judge rejected an argument by H that Article 1 Protocol 1 affected his role in interpreting section 11 MCA 1973 [§84-89].

Pulling this together in his conclusions on the law, the judge 'supplemented' the starting point of Moylan J in *MA v JA* and the previous authorities with his conclusions on the human rights arguments [§93]. This led to a 'somewhat more flexible' approach to the interpretation of section 11, 'in particular to reflect the article 8 rights of the parties and the children' [§94].

Conclusion

Applying this new flexible approach to the facts, the judge concluded that, even though there was no civil ceremony and the Nikah did not qualify as an English marriage: the failure to complete the marriage process was as a result of H's refusal to undertake the process; W had sought to complete the process by asking H to do so; the Nikah ceremony bore the hallmarks of a marriage even though it was not one; the parties lived as a married couple for all purposes; and they were treated as validly married in Dubai (UAE). Thus, the marriage fell within the scope of section 11 MCA 1973, and was void and susceptible to a decree of nullity [§95-97].

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

A-F (Children) (No 2) [2018] EWHC 2129 (Fam)

In this judgment Sir James Munby, sitting as a Judge of the High Court, dealt with four matters following his decision in *Re A-F (Children) (Restrictions on Liberty*) [2018] EWHC 138 (Fam)

> i) A review of any relevant developments since the previous hearing;
>
> ii) The making of final orders;
>
> iii) Consideration of the implications of the fact that two of the children either have had or will, during the currency of the final order, if granted, have their sixteenth birthday; and
>
> iv) The formulation, if possible, of standard forms of order for use in such cases.

With respect to points (i) and (ii), the children continued to be in placements which they were not free to leave and the Judge followed the children's respective guardians' recommendation that the court make orders authorising the continued deprivation of their liberty for a further twelve months [5].

With respect to (iii) Sir James considered whether the matters should be transferred to the Court of Protection and concluded that they should not be transferred because [12]:

> i) There can be no sensible basis for discharging any of the care orders which are already in place. The children require the continuing protection of such aspects of the care regime as LAC reviews and the support of an IRO.
>
> ii) While the care orders remain in place, the Family Court has a continuing, if much reduced, potential role in the lives of the children – for instance, if issues in relation to contact require to be determined in accordance with section 34 of the 1989 Act.
>
> iii) For the time being, at least until they are approaching their eighteenth birthdays, the children are the responsibility of the local authority's Children's Social Care (LAC) Teams, who are…much more familiar with practice and procedure in the Family Court and the Family Division than with practice and procedure in the Court of Protection.
>
> iv) The children's guardians will be able to continue exercising that role so long as the cases remain within the Family Court and the Family Division; it is, at the least, doubtful whether they would be able to act as litigation friends in the Court of Protection.
>
> v) It may be easier to ensure judicial continuity if there is no transfer.
>
> vi) …the benefits weigh heavily in favour of maintaining the forensic status quo. There are…so far as I can see, no reasons for thinking that…the children's welfare will be better safeguarded within the Court of Protection.

Having determined the above, the Judge went on to deal with the suggestion made by counsel that he prepare proposed draft orders for future use in cases of this kind and attached to his judgment three forms of order providing for: (i) directions on issue [16]; (ii) the order following first hearing [17]; and (iii) the order following final hearing [18]. In doing so, he acknowledged that the question of whether these are to be "formally promulgated as additions to the Compendium" was a matter for Sir Andrew McFarlane, as President of the Family Division.

In similar fashion, the Judge also:

> i) Annexed a suggested form of social work statement template for use in such cases [15]
>
> ii) Recommended that in such cases CAFCASS use position statements in the form filed by counsel on behalf of the guardians as they were "appropriately short and focused" (not annexed to the Judgment) [14]; and
>
> iii) Agreed with counsels' suggestion that: "an additional box should be included in the C110A form with the wording "Does the proposed care plan, or likely long-term care plan, for the child(ren) involve a possible deprivation of the child(ren)'s liberty within the meaning of Article 5 (on the basis that the child is or would be confined to a greater extent than a child of comparable age)?" and invited the Family Procedure Rule Committee to consider making this amendment [14].

Summary by **Lucinda Wicks**, barrister, **Coram Chambers**

F v M [2018] EWHC 2106 (Fam)

This was an appeal by a father to the High Court against the decision of District Judge Gibson to refuse to recognise an order of the Zamoskvoretsky District Court in Moscow. The District Judge had primarily refused to recognise the order on the basis that the child's voice had not been heard. The case is noted to be unusual in that, typically, foreign orders are recognised at first instance and the registration is then challenged on appeal. In this case, recognition had been refused from the outset.

The father's appeal against that refusal was dismissed and the mother's objections to recognition under Article 23 (b) and (d) were expressly upheld by Mr Justice Cohen.

Background

The proceedings concerned a child, A, who was born in 2007. The parties had been married, but had separated some time ago, in 2009. The mother had since formed a relationship with C, a prominent critic of the Russian government. Both the mother and C are under investigation and have been charged with criminal offences in Russia.

In April 2014, the mother had travelled with A to England, to meet with C. In August 2014, the Father applied for the summary return of A to Russia. It was the father's case (found by the English court) that the mother had obtained his approval for a visit to England but that she had thereafter wrongfully retained A in England.

Originally, Mrs Justice Hogg made an order for A to be returned to Russia under the court's inherent jurisdiction. The mother appealed and the Court of Appeal allowed her appeal. The matter was remitted to the high court for a further hearing with the benefit of a CAFCASS report. The mother's appeal is reported as in *re S (A Child) (abduction; hearing the child)* [2014] EWCA Civ 1557.

At the re-hearing Mr Justice Moor determined that on an interim basis it would be wrong for A to be returned to Russia. He found that if she returned to Russia the mother would be likely to be put under pressure to influence C who was very unpopular with the government of the Russian Federation. He accepted that the mother had genuine fears of arrest if she returned to Russia.

Difficulties arose between the parents as to the arrangements for A, and the father applied in Russia for an order in relation to A. The lower court first ruled that A should live with the mother, taking into account a 2013 report and the English CAFCASS report. The father appealed this decision, ultimately to the Russian Supreme Court, and this decision was overturned and remitted. On 27th September 2017, the District Court in Moscow appears to have held that A should not continue to live with the mother. It was this order (upheld on yet another appeal) that the Father sought to register in England.

Appeal

The mother had successfully argued and continued to say that registration should be refused pursuant to Article 23 of The Hague 1996 Convention pursuant to paragraph (2) (b) and (d), namely that: the decision was made without the child having been provided the opportunity to be heard, and that the decision was manifestly contrary to public policy in England and Wales. The latter argument related to her asylum status.

The parties had agreed that the High Court should both determine the appeal and consider the Article 23 objections. As Mr Justice Cohen explained:

> "After discussion both parties agreed to ask me to treat this hearing as a unitary hearing and to consider all the relevant matters under Article 23 as if this was the mother's appeal against registration. I considered that this was a wise decision as otherwise there would have been scope for me to remit the matter back to the district judge and for then there to be a further round of appeal which would be wasteful of both time and resources."

The Hugh Court dismissed the appeal and did not accept criticisms of the District Judge's approach or judgment. Nonetheless and in addition to this, each of the Article 23 objections was upheld by Mr Justice Cohen, following a detailed assessment. Even with these objections made out, the Court still retains a discretion as to whether or not to register an order; Mr Justice Cohen again considered this but concluded that, because A's return to Russia would necessarily involve separation from her mother, this was "so contrary to her interests and so devastating that the court should not be contemplating recognition in the circumstances".

Summary by **Millie Benson**, barrister, **1 King's Bench Walk**

W (A Child) [2018] EWCA Civ 1904

The parties had one child and lived in Spain. In 2016, the mother wrongfully removed the child to England. The father applied under the Hague Convention 1980 for the return of the child. The mother raised Article 13(b) defences. In particular, the mother relied on her mental health and the effect returning to Spain would have on her and the child. At the final hearing, His Honour Judge Bromilow did not find that there was a grave risk of harm nor that the child objected and subsequently ordered that mother and child return to Spain.

Following that judgment however, the mother suffered a marked deterioration in her mental health. She applied to set aside HHJ Bromilow's return order and sought a further psychiatric assessment and a re-hearing. HHJ Bromilow acceded to that application stating that the mother's psychiatric health had "fundamentally changed" and that she was "psychologically overwhelmed by the circumstances".

The father appealed. He made five submissions, [at paragraph 21], as to why the High Court did not have power to set aside a final order made under the Hague Convention 1980.

Given the new evidence concerning the mother's mental health however, the father accepted that the 1980 Convention application would have to be reheard. In practical terms then, the appeal was academic. The Court of Appeal technically dismissed the father's appeal but still proceeded to comment on the important point of whether the High Court had power to set aside a final order.

Lord Justice Moylan, giving the lead judgment, commented that the hurdles to the existence of such a set aside power centre on the effect of Section 17 of the Senior Courts Act 1981, the decision in *Re M (Abduction: Undertakings)* [1995] 1 FLR 1021 and the meaning of rule 4.1(6) FPR 2010.

Moylan LJ stated that there would be considerable advantages to a judge who made the final order being asked to determine whether any asserted change of circumstances justifies any reconsideration of the order and, if so, whether it is of sufficient impact to justify a rehearing. This would avoid the need for the parties to come to the Court of Appeal. Moylan LJ expressed that the test for such an application could be: "whether there has been a fundamental change of circumstances which sufficiently undermines the basis of the court's decision and order to require the application to be reheard".

The Court of Appeal did not consider the set aside power could be found in rule 4.1(6) of the FPR 2010. As to the conflict posed by s.17 SCA 1981, the Court of Appeal stated that given the development of the legislative history there are arguments for concluding that s.17 SCA 1981 does not apply to orders made by the High Court in particular in respect of children.

The Court of Appeal's provisional view then was that the High Court does has power under the inherent jurisdiction to review and set aside a final order under the 1980 Hague Convention. This power can be exercised when there has been a fundamental change of circumstances which undermines the basis on which the original order was made.

Summary by **Patrick Paisley**, barrister, **1GC Family Law**

Y v A Healthcare NHS Trust (2) The Human Fertilisation And Embryology Authority (3) Z (By His Litigation Friend,The Official Solicitor) [2018] EWCOP 18

Y and Z had one child and had both wanted a brother or sister for their son. They were unable to conceive naturally a second time and embarked on IVF treatment. Unfortunately, a few months later, Z was involved in a motorcycle accident in which he suffered a catastrophic brain injury and massive internal injuries.

Medical opinion was that he would never recover any function or awareness or regain consciousness. The clinical team recommended that brainstem testing should be undertaken and if no brain activity was identified he would be pronounced dead and taken off life support.

Y wished to retrieve Z's sperm (gametes) before he died in order to continue the IVF treatment they had both agreed on. The consents sought needed to be executed and witnessed in Z's presence before he died or was declared dead in order to comply with the strict requirements of sub-paragraph 1(2) of schedule 3 to the Human Fertilization and Embryology Act 1990.

The Court granted the application, and additionally authorised consent to be executed for use of the gametes stored and any embryos formed from the material.

Mrs Justice Knowles noted that the decision was fact specific and observed that if other such cases were to arise, that the court should consider from the outset the execution of consents to both storage and use of gametes, rather than storage alone to avoid further proceedings and delay.

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

A v A [2018] EWHC 2194 (Fam)

At the conclusion of an appeal hearing before Mr Justice Cohen in February 2018, Cohen J held that it was right for the wife ('W') to be released from her undertakings to repay the husband ('H') in respect of mortgage interest repayments and a loan, which had formed part of a Consent Order made in 2011 ('the Consent Order'). However, he decided that such an outcome would only be fair if replacement undertakings were put into place.

(For the full summary of the appeal judgment, **click here**).

Cohen J considered that he did not have adequate information about W's finances to proceed immediately to a determination of the appropriate replacement undertakings. The parties agreed that the matter should be retained by him, rather than be remitted. It returned before Cohen J in June 2018.

W's Financial Position

Cohen J summarised W's capital position as of June 2018 in a Schedule, which is attached to his Judgment.

In summary, W held:

a) £2.8m in her home ('BL'), once the mortgage is redeemed;

b) £2.314m in capital assets outside BL;

c) Her share in the Spanish Property and her entitlement to £700,000 on its sale in accordance with the Consent Order. On the basis of a sale price of £1.75m (which was not certain), W's entitlement in the Spanish Property had a value of £1.454m; and

d) Her liability to H under the undertakings in the sum of £1.625m (and increasing).
[5]- [9]

This meant that her capital position, net of her liability to H (as it was in June 2018), was in the sum of £4.95m, of which £2.8m was held in BL, with the balance of c.£2.14m held in cash, investments and pensions.

W did not have an income independent of H [10].

Parties' Agreement as to Timing

During the hearing, the parties agreed that, under any replacement undertaking, W would not be obliged to meet her liability to H until the sale of the Spanish Property, rather than on the sale of the Former Matrimonial Home as envisaged in the Consent Order [12].

Quantum of W's liability to H

The issue which remained to be determined by Cohen J was: what was the appropriate quantum of W's liability under the replacement undertaking. The Judge at first instance had already determined that W should not be released from her obligation to pay £260,000 of the total liability of £1.625m. Thus, it was for Cohen J to decide the extent to which, if at all, W should be excused from the obligation to repay H £1.365m [13].

H's Position [14] – [17]

H argued that, under the replacement undertaking, W should be required repay the full £1.365m, but with the variation of timing referred to above. He justified this by reference to:

a) Needs: W could meet her income needs with the c.£2.14m that she held outside of BL. This would provide her with an annual income of c.£110,000pa. She also has the ability to release more capital by downsizing her home.

b) The parties' agreement: In circumstances where W is not left in a position of "real need", it would be unfair to depart from the terms of the agreement.

W's Position [18] – [24]

W sought to reduce her liability to H under the replacement undertaking as much as possible. In so doing, she raised the following arguments:

a) **Anticipated effect of agreement**: In considering the parties' agreement, the Court should focus on what the parties had anticipated its effect would be. W emphasized that, had the properties sold at the level anticipated by the parties at the time of their agreement, W would have received c.£5.5m on top of the value of BL; under H's proposal should would receive a little over £2.1m.

b) **Uncertainty**: Under H's proposal, if the Spanish Property sold for less than 1.75m, the amount that W would have to pay from the capital currently in her name (above the proceeds of sale of the Spanish Property due to her) would increase. It would be unfair for W to bear this uncertainty.

c) **Amortisation**: It would be unfair for W to amortise all of her assets save for her home. In particular, it would be unfair for W to amortise her capital outside her pension funds.
H's Revised Position [23]

To meet W's argument about uncertainty, at the conclusion of the hearing, H proposed that W would be released from her liability to him on the transfer by her to him of the Spanish Property. On the basis of the current value (although this was considered to be optimistic) W would transfer £1.45m to H in full and final satisfaction of her liability to him, thereby saving her £170,000. She would be left with capital outside BL in the sum of £2.31m. W rejected this offer.

Decision

Cohen J decided that W should be required under the replacement undertaking to pay to H £1.066m on the sale of the Spanish Property, which represents a reduction of £559,000 from her liability under the original undertaking.

In coming to this determination, the Judge considered the parties' arguments in respect of the parties' agreement and amortisation:

a) **The parties' agreement:**

i. He confirmed that the same principles apply to a consent order as those which apply to ante-nuptial agreements [32] – [34].

ii. He rejected H's submission that there had been no unanticipated change following the Consent Order [35]. He considered that the significant reduction in the monies accruing to W, due to the difficulties that the parties faced in selling their properties, was "beyond their anticipation" [36].

iii. He acknowledged that, to the extent that W's liability to H is reduced, H suffers financially, but pointed out that H had not argued that this would have any significant impact on him [37].

iv. He considered that the length of the parties' marriage and the marital standard of living were relevant factors, but had to be set against the fact of the parties' agreement [38].

v. He rejected H's emphasis on "real needs" and concluded that he would consider W's needs, although they would be rigorously assessed to reflect the fact of the parties' agreement [40].

b) **Amortisation**:

i. He accepted that, in spite of H's significant wealth, because this was a case which involved an agreement between the parties, it was proper for him to consider the reasonable use by W of her capital resources to produce an income [41] – [42].

ii. However, he concluded that it would not be fair to expect W to amortise all of her award because he considered that she needed to retain some capital for security [43].

Quantification

Cohen J based his determination of the appropriate quantum of W's liability under the replacement undertaking on his assessment of W's needs. W needed:

a) BL free of mortgage (this was agreed between the parties);

b) Some free capital; and

c) Her income fund.

To ensure that W retained some free capital, Cohen J held that it was appropriate for 100% of W's pension assets, but only 50% of her other capital assets (outside BL), to be amortised [46]. This left W with £562,000 of free capital.

Cohen J calculated that by utilising 100% of her pension assets and 50% of her other capital assets (outside BL) as a Duxbury Fund, plus income derived from her capital and her state pension, W nevertheless suffered an income shortfall, which would be repaired by an income fund of £389,000 [45] - [46]. That £389,000 represents the first part of the reduction of W's liability to H.

The balance of the reduction in the sum of £170,000 reflected Cohen J's view that it would be highly unattractive for W to have to pay a balancing lump sum to H to meet the shortfall between what she was due to receive from the sale of the Spanish Property, and her liability to H [48]-[49]. The Judge was explicit that W was discharged from any further liability to H [50].

Conclusion

Cohen J concluded that, "The effect of what I have done is to share the pain between the parties, albeit relieving the wife substantially less than did Judge Hughes" [53]. This was partially due to W's financial position being healthier than he had anticipated, and partly because by the time of the hearing in June 2018, the Former Matrimonial Home had sold for more than anticipated.

Cohen J indicated that the fact that H made the "crucial" concession as to the timing of payment by W during the hearing, would be a factor which he would take into account when determining any application for costs by H [54].

Summary by **Georgina Howitt**, barrister, **1 Hare Court**

AW v KJ [2018] EWHC 2229 (Fam)

This was the father's application under the inherent jurisdiction for the return of his daughter ('E'), aged two and a half from Russia.

E had lived in Russia since February 2016 when she moved there aged 4 months with her mother, a Latvian national.

On the parties' separation in early 2016, the father suspected that the mother may remove the child from the jurisdiction and on 9.2.16 an order was granted prohibiting her from removing the child.

The mother asserted that at this time she was suffering domestic violence at the hands of the father and in an act of desperation she breached the order and removed the child to Russia. Keehan J did not conduct a fact finding exercise in respect of the mother's allegations but observed that the mother clearly viewed herself as a victim of domestic abuse and spoke about the same in her evidence 'with very real emotion.'

It was common ground that, since February 2016 E had been in the full time care of her mother and that, save for one Skype call in October 2017, E had not had contact with her father.

The court considered R*e J (A Child), Re (Child returned abroad: Convention Rights)* UKHL 40 and *Re G DHR* [2017] EWCA (Civ) 1675. Keehan J reminded himself that E's welfare and best interests were his paramount consideration (s.1(1) Children Act 1989) and that, insofar as it was relevant, he should have regard to the various provisions of the welfare checklist: s.1(3) Children Act 1989.

The judge found that the mother had more than adequately cared for E for over the last two years and that the father's approach in these proceedings was not focused on E's welfare but rather on the rights of those involved and particularly his right of parental responsibility.

The mother had been clear in her evidence that she would not return to this jurisdiction even if E's return were ordered. The father when pressed on what his position would be in these circumstances was of the view that it would not be in E's best interests to live with him but rather to be in social services' care. The judge commented at [25]:

> "I cannot conceive in any circumstances how that would be in the interests, let alone the welfare best interests of this little girl."

The learned judge entirely accepted that E's relationship and eventually contact with the father was to be encouraged and facilitated but found:

> "That is achieved not by ordering the return of E to this country but by there being a proper welfare investigation into how the needs of this little girl might best be met, how her living arrangements as between her parents can be arranged and as to how it could be the case the father is enabled to enjoy spending time with his daughter and, more importantly, E is allowed to enjoy spending time with her father."

Keehan J dismissed the application and the matter was listed for consideration of substantive welfare matters.

Summary by **Asha Pearce-Groves**, barrister, **St John's Chambers**, Bristol.

B (A Child: Immunisation) [2018] EWFC 56

The case concerned a 5-year-old girl, B, whose parents were separated and unable to agree as to her immunisation. Before the parents separated, B had received all the recommended vaccinations. Under the recommendations of Public Health England, she was now due (or overdue) 3 further vaccinations.
The case was determined by His Honour Judge Clifford Bellamy, sitting as a Deputy Judge of the High Court.

The court heard evidence from Dr Elliman, a jointly instructed medical expert witness. B's guardian supported the mother's position. The parents filed written statements but did not give oral evidence. The father, though lacking relevant medical expertise, had carried out extensive research and exhibited over 300 pages of material in support of his position. The judge extrapolated the father's 7 key points and Dr Elliman addressed the medical issues. The court dismissed the father's proposition that where parents disagree on a child being vaccinated, then the status quo should be preserved as wrong in law (*Re Z* [1996] 1 FLR 191; *Re B (A Child)* [2003] EWCA Civ 1148).

Dr Elliman acknowledged that no vaccination is 100% risk free, but that vaccination has greatly reduced the burden of infectious disease.

The judge noted the paramountcy principle and the principle that delay in determining the matter may be prejudicial to B's welfare. In respect to the no order principle, the judge recorded that the court should decide the matter as the parents' views were polarised. With regard to Article 8 of the European Convention, His Honour Judge Bellamy stated that any order made by the court must be proportionate and in B's best welfare interests.

Having considered the case law, the judge then determined that Dr Elliman's opinions were 'mainstream' whilst the father's views were biased and unreliable. In conclusion, the judge granted the specific issue order and made a declaration that it was in B's best welfare interests to receive the vaccinations.

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

YZ v Leicester City Council & Ors [2018] EWHC 2262 (Fam)

The case concerned four children – MHS (aged 12), KS (aged 11), AS (aged 9), and HS (aged 7) – who were made the subject of care orders on 9 December 2016 and placed in long-term foster care. The judgment in respect of those proceedings may be found at [2016] EWHC 3177 (Fam) and indicates that one of the principal bases for the court approving the "extremely unusual" care plan of long-term foster care was the parental antipathy and the conflict between them post-separation [6].

Subsequent to those proceedings, the father obtained employment and his own accommodation, undertook the recommended counselling, and attended various parenting courses. The current proceedings concerned his application to discharge the care orders in respect of all four children, which was opposed by the local authority (Leicester City Council), the mother, and the Children's Guardian.

Having reviewed the evidence of the father, the social worker and the Children's Guardian, the court held that the father had not made sufficient changes in his views from those that he held in 2016 to warrant the discharge of the care orders. Keehan J cites ten reasons why he came to that conclusion, which can be summarised broadly as the father's continued antipathy towards the mother (and her partner) and his failure to work effectively with professionals [14]. Further, the court found that discharging the care orders and/or placing the children in their father's care would not be in their best interests; the children needed better than "good enough" parenting [15], and the court held that the father would not be able to provide this. The Judge dismissed the father's application on the basis that it had no merit, and did not regard a further assessment of the father to be necessary.

In addition to the father's substantive application, the Guardian queried in her report whether the court should, of its own motion, make an order pursuant to s.91(14) of the Children Act 1989 preventing either parent from making further applications to the court in respect of the children save with the permission of the court. After reminding himself that a s.91(14) order is "a draconian order only to be made on rare circumstances and for very cogent reasons" [18], Keehan J did not think that it was appropriate for such an order to be made in these proceedings; however, he warned all of the parties that if an "unmeritorious application" was made in the case subsequently, it was "very likely" that the application would be summarily dismissed and a s.91(14) order made.

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

Tattersall v Tattersall [2018] EWCA Civ 1978

The case had a long procedural history – the original financial remedy order having been made on 10 December 2012; the husband had previously sought to appeal the order itself but that appeal was dismissed by the Court of Appeal on 9 July 2013 – and with various orders for enforcement having been made between 2013 and 2016. The husband also applied in 2014 to vary the original order, which was before the court hearing the enforcement claims but has (as yet) not been determined.

It was primarily the concurrence of (the wife's) enforcement applications and (the husband's) variation application that led the husband to be given leave to appeal. Notwithstanding this, his substantive appeal was dismissed at the full hearing, save that credit was given to him (per the original order) for £6,000 of CSA payments against the capitalised sum. In all other respects the husband's appeal was dismissed.

Brief procedural background

The order of 10 December 2012 ("the financial order") provided, inter alia, for the husband to pay to the wife periodical payments at the rate of £1,070 pcm, less any child support payments, until the first of various trigger events, one of which was 1 September 2020. From September 2020 until September 2027, the rate of periodical payments was to become nominal, with a dismissal and section 28(1A) bar to be imposed at that stage.

The husband failed to pay the periodical payments owing under the financial order. It was recorded in the Judgment (§10) that "for some time the husband paid what he calculated his CSA liability would be and he then stopped paying anything." By the time of this appeal, the wife informed the court that she had received c. £3,500 in CSA payments from the husband. The wife issued enforcement applications, first in July 2013 and secondly in September 2013. Those came to be heard (together) at trial on 3 June 2014, with judgment being given on 30 July 2014 and addendum judgment on 23 September 2014.

Meanwhile, the husband had lodged an application to vary the financial order on 9 October 2013. He did not pay the court fee until 27 January 2014, so it was not issued until then. Case management directions were made on 31 January 2014 that listed his variation application to be heard with the wife's enforcement claims.

Following the trial of the enforcement and variation applications in June 2014:

> a. the husband provided no documents in support of his variation application to the court, not even the application itself. His variation application therefore could not be progressed and was put over to a future hearing.
>
> b. the wife was given permission to enforce all of the arrears of periodical payments (determined to be c.£16,340);
>
> > i. part of the arrears (£6,000) was ordered to be paid from the husband's share of the proceeds of a property sold pursuant to the financial order;
> >
> > ii. payment of the balance was to be stayed pending the husband providing a copy of his variation application and supporting evidence to the court by 24 November 2014, and held by the conveyancing solicitors in the meantime. In default of such evidence being provided by 24 November, the stay would lapse.

Subsequently, the husband produced his variation application and supporting evidence. That application came before the court for directions at various junctures in 2015, and at the time of the appeal was still yet to be determined finally.

At a further hearing (on 1 June 2015) on the wife's enforcement application, another judge made an order capitalising the order for periodical payments, in the sum of £74,500 for future liability, and £9,000 in respect of arrears.

At a further hearing (on 11 January 2016) on the wife's enforcement application, the court ordered the balance of arrears held by the conveyancing solicitors to be released to the wife.

The husband was given leave on limited grounds by King LJ:

> (1) Against the order on 23 September 2014 giving permission to the wife to enforce arrears after more than 12 months.
>
> (2) Against the order on 1 June 2015 capitalising the maintenance.
>
> (3) Against the order on 11 January 2016 releasing to the wife the balance of funds held by the conveyancing solicitors.

The husband's appeal was dismissed on all grounds, save for a deduction being made from the capitalised sum to give credit (as the original financial order had) for CSA payments. The wife consented to this approach, leading the Court to make a 'broad assessment' that she was likely to receive a total of c. £6,000 in CSA payments (including the £3,500 already paid) before 2027, and on that basis the Court made a proportionate deduction from the capitalised global figure.

Of the various issues raised in the appeal, the following points arising from the judgment are of particular interest:

> - no formal application need be made for leave of the court in respect of arrears that are more than 12 months old to be enforced, if the court is prepared to proceed in that way. Such applications are "frequently made informally" (§31).
>
> - there is no need in general to adjourn enforcement proceedings for the determination of outstanding variation applications. If that were to become a general requirement, enforcement proceedings would be "too easily manipulated" (§32).
>
> - when capitalisation is live in enforcement (or other) proceedings, there may be some merit in first determining any extant variation application, but the court is entitled to expect the party seeking variation to bear some responsibility for progressing his/ her application and, if failing to do so, will not delay the other party's application longer than is necessary (§39).
>
> - while it is usual (following *Pearce v Pearce* [2003] 2 FLR 1144 and *Vaughan v Vaughan* [2010] 2 FLR 242) for a court capitalising a maintenance order to apply a Duxbury calculation rather than Ogden tables, it is not wrong for the judge to use an alternative method of calculation. There is no error of law in using, as this judge did, Ogden tables to quantify the capital fund.

Summary by **Charlotte Hartley**, barrister, **1 King's Bench Walk**