October 2020

Family Law Week

NEWS

Give couples more freedom to choose where they marry, Law Commission proposes

As the experience of couples wanting to get married during the COVID-19 pandemic has demonstrated, the laws governing how and where couples can marry are outdated and unnecessarily restrictive. So says the Law Commission which has launched a **consultation into marriage laws**.

The Law Commission is consulting on proposals to modernise those laws, giving couples greater freedom over where they hold their weddings and the form the ceremony will take. The proposals could allow couples to choose to have weddings outdoors or in private family homes, and to have simpler, less expensive weddings. The Law Commission says that the proposals will bring the process into the 21st century and allow the law to recognise the diverse ways that couples in England and Wales wish to celebrate their weddings.

In the view of the Law Commission, the laws governing weddings, originally formed in 1836, are not fit for purpose as they are no longer meeting the needs of many couples. It cites as examples:

- Couples must currently choose between a civil or a religious ceremony, with no option for a ceremony reflecting other beliefs.
- To get legally married, most couples must have their weddings in a registered building – either a place of worship or a licensed secular venue. They cannot marry outdoors, even in the garden of a licensed venue.
- The process for getting married is complicated, inefficient and does not work well for some religious groups. This can lead to couples failing to comply with the legal requirements and their marriage not being legally recognised.
- The law in England and Wales has not kept up with changes in society, and is out of kilter with the approach taken to modern weddings in many other

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places, including Scotland, Ireland and the Channel Islands.

Proposals for reform

To modernise and improve wedding law, the proposed changes would:

- Allow weddings to take place outdoors, for example on beaches, in parks, in private gardens and on the grounds of current wedding venues.
- Allow weddings to take place in a wider variety of buildings (for example in private homes) and on cruise ships.
- Offer couples greater flexibility over the form their wedding ceremonies will take, enabling them, if they desire, to use a variety of ceremonies (religious and non-religious) to mark their weddings.
- Simplify the process and remove unnecessary red tape to make it fair to couples, more efficient, and easier to follow. For example, couples will be able to complete the initial stage of giving notice of their intended wedding online or by post, rather than having to do so in person.
- Provide a framework that could allow non-religious belief organisations (such as Humanists) and/or independent celebrants to conduct legally binding weddings.
- Ensure that fewer weddings conducted according to religious rites result in a marriage that the law does not recognise at all.
- Provide a power to allow weddings to take place remotely during any future national emergency, such as another pandemic.

The Law Commission will be consulting on the proposals until 3 December 2020. Once the consultation period closes, the Law Commission will analyse the responses, and use them to help develop recommendations. We are aiming to publish the final report, with these recommendations in the second half of 2021.

For more details, **click here**.

4/9/20

Teenagers at heightened risk of some forms of abuse compared to younger children

A report published by the NSPCC – ***How safe are our children? 2020*** – has revealed the scale of abuse against teenagers and highlights their heightened risk of experiencing physical and sexual abuse offences compared to younger children.

The report also reveals that the NSPCC Helpline received an average of 1,066 contacts a month from April to July from adults with concerns that a child or young person was being physically abused – up 53 per cent on the pre-lockdown average.

The wide-ranging report explains that, compared to younger children, available data from the UK nations shows rates of police-recorded offences against teenagers across the UK are:

- Four times as high for physical abuse offences
- Nine times as high for online grooming offences
- Six times as high for sexual abuse offences.

The NSPCC notes that across the UK teenagers are twice as likely to be in care but are less likely to be the subject of a child protection plan or on a child protection register to support them compared to younger children.

Despite the extent of serious abuse against older children in crime statistics, studies have shown the ability of teenagers to look after themselves is often overestimated and there can be a tendency for professionals to focus on teenagers' behaviour rather than the causes behind it.

For the report, **click here**.

4/9/20

Adoption and Children (Coronavirus) (Amendment) (No.2) Regulations 2020

The **Adoption and Children (Coronavirus) (Amendment) (No.2) Regulations 2020** make amendments to six sets of regulations. The amendments are being made "in order to assist the children's social care sector during the coronavirus pandemic" and cease to have effect on the 31st March 2021. The regulations come into force on 25 September 2020, except for reg 7 which comes into force on 24 September 2020. They apply to England only.

Regulation 2 amends the **Residential Family Centres Regulations 2002** which make provision about the conduct and management of residential family centres. The amendments provide that, where it would be contrary to any guidance relating to the incidence or transmission of coronavirus published by Public Health England or the Secretary of State for Health and Social Care, or not reasonably practicable for a reason relating to the incidence or transmission of coronavirus, the interview required by regulation 25 of those Regulations may be carried out by telephone, video-link or other electronic means. Any use of the provision must be recorded.

Regulation 3 amends the **Adoption Agencies Regulations 2005** which set out the process for assessing the suitability of people to adopt a child and the suitability of children to be adopted. Regulation 3 amends the adopter approval process, to enable medical information that currently has to be collected during stage 1 of the approval process to be collected during stage 2 of that process. Any use of the provision must be recorded.

Regulation 4 amends the **Care Planning, Placement and Case Review (England) Regulations 2010** which set out the requirements of the care planning process. The amendments provide that, where it would be contrary to any guidance relating to the incidence or transmission of coronavirus published by Public Health England or the Secretary of State for Health and Social Care, or not reasonably practicable for a reason relating to the incidence or transmission of coronavirus, the visits required to be carried out under regulation 28 and 48 may be carried out by telephone, video-link or other electronic means. Any use of the provision must be carried out in accordance with any recommendations made by the nominated officer and recorded.

Regulation 5 amends the **Fostering Services (England) Regulations 2011** which set out the process for approvals as local authority foster parents. The amendments provide that the fostering service provider may move on to collecting the information required by regulation 26(2)(a) of those Regulations even though they have not yet received the medical information required. Any use of the provision must be recorded.

Regulation 6 amends the **Children's Homes (England) Regulations 2015** to provide that, where it would be contrary to any guidance relating to the incidence or transmission of coronavirus published by Public Health England or the Secretary of State for Health and Social Care, or not reasonably practicable for a reason relating to the incidence or transmission of coronavirus, any meeting taking place under regulation 22(1) of those Regulations may be carried out by telephone, video-link or other electronic means. Any use of the provision must be recorded.

Regulation 7 amends regulation 14 of the **Adoption and Children (Coronavirus) (Amendment) Regulations 2020** to provide that the amendment made by regulation 12 of those Regulations ceases to have effect on 31st March 2021. Regulation 12 omits regulation 27 of Her Majesty's Chief Inspector of Education, Children's Services and Skills (Fees and Frequency of Inspections) (Children's Homes etc) Regulations 2015 which sets out the frequency by which premises must be inspected.

The Secretary of State must review the effectiveness of the amendments made by these Regulations during the period in which the amendments have effect.

For the Amendment No 2 Regulations, **click here**. For a House of Commons Library briefing concerning the Adoption and Children (Coronavirus) (Amendment) Regulations 2020, **click here**.

4/9/20

Family Public Law Reform: National rollout of digital care and supervision applications resumes

The new online service to process care and supervision applications will resume its national roll out from 14 September 2020.

The service allows local authorities and legal representatives to create and manage care and supervision applications under Part 4 of the Children Act 1989, or an Emergency Protection Order under section 44 of the Children Act 1989 online. It was paused in March due to the coronavirus (COVID-19) pandemic. Since then, the project team has been working on improving performance of the service in time for national roll out, which will follow a phased approach with an initial eight court sites with others to follow.

The new service is intended to improve the progression of cases to support the best outcome for the most vulnerable children by:

- allowing local authorities to create new digital applications for care supervision and Emergency Protection Orders
- enabling cases to be progressed by the court, legal professionals, local authorities and judiciary in a timely manner
- giving legal professionals, including parents' solicitors and Cafcass the ability to access cases digitally and view tasks that need to be completed before a hearing
- allowing court users to see the status of their case and to progress it online
- enabling court users to upload and access documents and evidence digitally
- enabling documents and evidence to be added to case and court bundles which can be uploaded, annotated, presented in court and used in the hearings.

Family Public Law will transition into Court and Tribunal Service Centres as the roll out progresses. This means support for some administrative tasks relating to case management will move to a central function. Local courts will continue to carry out tasks such as listing and will also continue to support the offline process as they currently do now.

For more information about the family courts **read the latest blog by Adam Lennon – Responding to a global pandemic within the family courts**. For more information on Justice Reform and Family Public Law, **click here**.

4/9/20

Charity launches free domestic abuse advice line for businesses

A new advice line for businesses supporting employees experiencing or at risk of domestic abuse has been launched by domestic abuse charity **Hestia**.

One in four women and one in six men will experience domestic abuse at some point in their lifetime with 10 per cent of UK victims reporting abuse at work, according to a 2014 report by the TUC.

Funded by the Home Office, the **Everyone's Business Advice Line** will be a point of contact for businesses, supporting them on how to approach disclosures of domestic abuse by their employees, particularly in light of Covid-19. They will also receive advice so that they can signpost staff to specialist domestic abuse services.

Hestia says lockdown has shown that home is not always safe for everyone, and with more people working remotely due to Covid-19, cases of domestic abuse are rising. The charity saw a 47 per cent increase in victims reaching out for information and support on its free domestic abuse app, Bright Sky.

While **over 2.4 million people are affected by domestic abuse every year**, the charity says that it can be difficult for employers to recognise the signs and support those experiencing domestic abuse in their organisation. Hestia launched the Everyone's Business programme to increase awareness and support in the workplace and have worked with over 70 organisations from the Metropolitan Police to Balfour Beatty.

For more information, **click here**.

4/9/20

The Law Society launches legal action against the Legal Aid Agency

The Law Society has lodged a judicial review against the Legal Aid Agency (LAA), claiming that it failed to consult properly about a decision to move legal aid cost assessments in-house.

Law Society of England and Wales President Simon Davis said:

> "Cost assessments are vital in ensuring that when legal aid practitioners send a bill it is carefully scrutinised and they are properly paid for their work.
>
> "For years, legal aid cost assessments over the value of £2,500 have been conducted by the courts and bills under £2,500 have been assessed by the LAA – a system which has worked well for practitioners and clients alike.
>
> "Calculating cost assessments can be a complicated process which requires a level of skill and experience, and sufficient time. The LAA's predecessor – the Legal Services Commission – transferred larger cost assessments to the courts for this reason.
>
> "In June, the LAA announced they would be moving all cost assessments in-house – which they claimed would allow them to process bills more quickly and help with legal aid firms' cash flow issues during the Covid-19 pandemic. They also launched a consultation with a limited number of practitioner groups.
>
> "However, the LAA did not consult on the decision to transfer the cost assessments in-house, just on which changes were needed to transfer the assessments over from the courts."

The Law Society has raised several key concerns:

- The decision to transfer costs assessAments exceeding £2,500 to the LAA on a permanent basis was taken without any consultation with the representative bodies.
- The LAA might not have enough qualified staff and resources to handle moving all cost assessments in-house – which could create issues with processing bills and delays in legal aid firms receiving payments.
- LAA assessments of larger bills create a significant conflict of interests as the assessor is also the paying party.
- The costs appeals process is not a properly independent as it is controlled by the LAA which also appoints and remunerates the Independent Costs Assessors.

Simon Davis added:

> "In spite of these concerns about moving cost assessments in-house, the LAA has pressed ahead with this decision – without fairly consulting the profession.
>
> "We have issued proceedings on a protective basis. We invite the LAA to talk to us and engage in a full and proper discussion so that we don't have to carry on with the proceedings.
>
> "It is only right that the profession is fully and fairly consulted in how their bills will be assessed – which will have a significant impact on their business at a time when many firms are already financially stretched."

For the Legal Aid Agency's guidance concerning changes to the cost assessment system, **click here**.

6/9/20

Views sought on revised SWET

A review of the Social Work Evidence Template (or SWET), as well as the creation of a short SWET for use in urgent hearings, has recently been recommended by the President of the Family Division's Public Law Working Group.

The original SWET was designed to support a consistent, analytical approach to presenting social work evidence to the family courts whilst complementing other standardised forms required by the Public Law Outline. It was introduced in summer 2014 and subsequently updated in 2016. Its use has grown steadily and is endorsed by the President of The Family Division, as well as Cafcass and the Association of Directors of Children's Services which encourages all local authorities to use the templates and to ensure their staff can access the associated training materials.

In recent weeks a small group of representatives from local authority social work and legal teams, Cafcass and the judiciary have shared experiences and views which have then fed into an updated version of the full SWET and the first draft of the proposed interim SWET.

Wider views about the following two draft documents are now being sought:

- **Updated version of the full SWET for comment**
- **Draft interim SWET for feedback.**

The Association of Directors for Children's Services and Cafcass have produced a summary of changes made to the full SWET. **Click here** for that document.

The deadline for feedback is Friday, 18 September 2020. To contribute comments, **please click here**.

6/9/20

Financial Remedies Court Pilot extended to South West

Mrs Justice Theis, acting President of the Family Division, has announced that the Financial Remedies Pilot will be launched in the South West with effect from 1 October 2020. The lead judge in each zone will now coordinate the detailed local arrangements.

Mrs Justice Theis says:

> "The new Financial Remedies Courts scheme, featuring ticketing and allocation designed to ensure that all financial remedy cases are case managed and heard by a suitably experienced judge, is working extremely well in other parts of the country. I am sure it will be a welcome development for those practising in the South West. I am very grateful to the FRC Lead Judges who will now take on this important role in the new pilot courts."

The South West has been divided into three zones:

Bristol (operating from Bristol)
Courts covered: Bristol, Gloucester, Swindon, Salisbury, Bath and Weston-super-Mare.
Lead judge: DJ Stephanie Cope.

Devon, Cornwall and South Somerset (operating from Plymouth)
Courts covered: Plymouth, Exeter, Torquay, Barnstaple, Truro, Bodmin, Taunton and Yeovil.
Lead judge: HHJ Paul Mitchell assisted by DJ Clare Maunder.

Dorset & Hampshire zone (operating from Bournemouth)
Courts covered: Bournemouth, Weymouth, Winchester, Portsmouth, Southampton, Aldershot, Basingstoke and Isle of Wight.
Lead judge: DJ John Bridger.

8/9/20

Further consultation on remote and hybrid hearings in the family court announced

The President of the Family Division, Sir Andrew McFarlane has announced the commencement of **a further consultation on remote and hybrid hearings in the family court**.

The consultation will run for three weeks from 10 September until 30 September. A report is expected in mid-October.

This further research project will again be undertaken by the Nuffield Family Justice Observatory, an independent organisation which is committed to improving life for children and families by putting data and evidence at the heart of the family justice system. The Nuffield Family Justice Observatory carried out a rapid consultation about remote hearings in the family court in April 2020. The **subsequent report** provided many helpful and informative suggestions for good practice.

The President says that it is now clear that while some physical hearings are taking place, social distancing will continue to apply. Many hearings continue to take place over video links or by phone and will, for many more months to come. The system is still adjusting to these changes and challenges of the backlog of cases.

As a result, the President of the Family Division welcomes a second, follow-up survey of how the system is working.

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

11/9/20

Children's Commissioner calls for ban on using unregulated accommodation for under 18s in care

Anne Longfield, Children's Commissioner for England, is calling for the Government to change the law to stop councils placing under 18s in care in unregulated accommodation. The change would see all children in care who need a residential placement housed in accommodation regulated under the same standards as children's homes, and would put an end to 16 and 17 year olds being placed in bedsits, hostels and caravans.

The call comes as the Children's Commissioner publishes a report, ***Unregulated: Children in care living in semi-independent accommodation***, revealing how thousands of children in care are living in unregulated independent or semi-independent accommodation. These settings are not inspected and children living there often go without regular support from adults. This accommodation can range from a flat to a hostel or bedsit, and in the worst cases caravans, tents and in one case even a barge. The Children's Commissioner stresses that these looked after children are entitled to 'support' but not 'care', and as a result are too

often being left to fend for themselves, with minimal support, for all but a few hours a week.

The report reveals that one in eight children in care spent some time in an unregulated placements in 2018-19, and that the number is increasing due to the lack of capacity in children's homes and an outdated belief that children aged just 16 should be ready to become independent. The Children's Commissioner's report highlights the experiences of some of these children. While the Children's Commissioner's Office did hear from children about high quality settings and the support they received from staff, they also heard some shocking stories, including from children with mental health, self-harm or drug issues who became victims of exploitation and abuse while living in unregulated accommodation.

The report also shows how some providers are making extraordinary profits from unregulated accommodation. It highlights how many desperate councils are paying thousands of pounds a week to private providers who are then providing poor quality accommodation and little in the way of support to often very vulnerable children. Some of these providers are also avoiding routine procedures designed to keep children safe, including DBS checks.

Earlier this year the Government recognised the scale of the problem and promised **much-needed reform**. Its proposals include a ban on the use of unregulated placements for under 16s and introducing new national standards, potentially enforced by Ofsted via a new inspection regime. While the Government's commitment to reform is encouraging, the Children's Commissioner does not believe the proposals go far enough to provide every child in care up to the age of 18 with the protection they need.

As well as calling for the use of semi-independent and independent provision to be made illegal for all children in care, the report makes a number of recommendations, including:

- Increasing capacity across the care system. It is critical that the forthcoming Government Care Review promised in the Conservative manifesto addresses the challenge of sufficiency of appropriate care across the care system as a whole – especially capacity in the residential care sector.

- Clarification of what care looks like for children of different ages, including older teens. Ensuring that all children in care receive care, rather than support, does not mean refusing independence to older teens who are ready for it. For example, it may be appropriate for children of this age to have more freedom to come and go from home, and any curfew should be agreed by negotiation rather than instruction – the same as with any 16 and 17 year old living at home with their parents. The current system does not seem to allow this.

- Strengthening the role of Independent Reviewing Officers (IROs). Councils have a duty to appoint an IRO to every child in care. They are experienced social workers who oversee and scrutinise the care plan of the child and ensure that everyone who is involved in that child's life fulfils his or her responsibilities. It is important that IROs visit placements prior to children being placed, in order to assess their suitability. This would help prevent later placement breakdowns, which are highly damaging to children and can be costly to resolve.

For the report, **click here**. For the response of The Children's Society to the Children's Commissioner's call, **click here**.

11/9/20

Some amendments to Adoption and Children Regulations will be extended to 31 March 2021

The Department for Education has published **its response** to the consultation on extending certain provisions of the **Adoption and Children (Coronavirus) (Amendment) Regulations 2020** (the 2020 Regulations) until 31 March 2020.

The 2020 Regulations made temporary amendments to a set of ten children's social care regulations and came into force on 24 April 2020. They provide for extra flexibility in some circumstances which may arise as a direct result of coronavirus (Covid-19) for example high levels of staff sickness. The temporary amendments which have been made do not reduce the responsibility that local authorities have towards protecting children from significant harm and protecting their welfare. The 2020 Regulations will expire on 25 September 2020. The Department for Education sought views on those regulations that the Government proposes should lapse and those that may be extended for continued use to 31 March 2021.

A majority of responses were in favour of each of the proposals to extend individual regulations on medical reports, virtual visits, and the continued suspension of the regular cycle of Ofsted inspections of children's services providers. The majority of responses also agreed that all other temporary flexibilities introduced in April 2020 should lapse and the need to introduce additional safeguards.

Consultees offered a range of opinions and many agreed the flexibilities were required to manage the initial stages of coronavirus. Local authorities commented that the flexibilities had been rarely applied, and only with management oversight, and they should be trusted to use flexibilities in a proportionate, risk assessed way to meet the needs of children, young people and families. Some suggested all flexibilities should be extended to allow for waves of coronavirus and, in particular, were concerned about the predicted rise in cases in autumn. Others felt that services would be back to normal by September and that the flexibilities would no longer be needed.

However, many consultees also raised concerns in the way the regulations were introduced, and many felt the regulations should not be extended and should be revoked immediately.

On the basis of responses to the consultation the Government has decided to continue with plans to allow the majority of regulations to lapse on 25 September, save those specifically set out in the response document, on medical assessments, virtual visits and Ofsted inspections.

The Government has no plans to extend the regulations beyond March 2021.

For the response document, **click here**.

11/9/20

Home Affairs Committee continues inquiry into Channel Crossings and unaccompanied children

The Home Affairs Committee continues its inquiry into Channel Crossings, migration and asylum-seeking routes through the EU.

On 9 September 2020 the Committee took evidence from the Leader of Kent County Council, Roger Gough, and the President of the Association of Directors of Children's Services, Jenny Coles, on the process for handling unaccompanied asylum-seeking children arriving in the UK. It examined the ability of councils on the south-east coast to accommodate the increased number of children arriving in recent months, including the financial and resourcing implications of caring for unaccompanied children.

The session also examined the effectiveness of the voluntary National Transfer Scheme in sharing responsibility for providing care with other councils in the UK.

To watch the session, **click here**. For more information of the inquiry, **click here**.

11/9/20

Commons Justice Committee launches future of legal aid inquiry

The Commons Justice Committee has launched an **inquiry into the future of legal aid**, in light of concerns raised during the coronavirus pandemic about pressures on the system.

The inquiry aims to look ahead to the future of legal aid, to identify the major challenges facing clients and providers and how they might be tackled.
The inquiry is especially keen to hear about the sustainability of the legal aid market, the impact of Covid-19 and the increasing reliance on digital technology to deliver legal advice and court services.

Submissions should be made by 5pm on Monday 19 October via the website, including on these terms of reference:

- How LASPO has affected access to justice views on the post-implementation review and the criminal legal aid review;
- The role of the Legal Aid Agency;
- Recruitment and retention problems among legal aid professionals;
- The impact of the court reform programme and the increasing use of technology on legal aid services and clients;
- The impact of Covid-19 on legal aid services and clients; and
- What the challenges are for legal aid over the next decade, what reforms are needed and what can be learnt from elsewhere.

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

11/9/20

Update: Standard orders issued by Mr Justice Mostyn

Following the publication of the standard financial and enforcement orders by Mr Justice Mostyn in August 2019, there have been several updates.

All these orders have now been gathered together in one zip folder. To access the zip folder, **click here**.

11/9/20

Nigel Poole QC appointed High Court judge

Nigel Poole QC of Kings Chambers has been appointed a High Court judge and will be assigned to the Family Division. He is one of **six new appointments to the High Court**.

Nigel Poole QC, aged 54, will be known as The Honourable Mr Justice Poole. He was called to the Bar in 1989 and took Silk in 2012. He was appointed as a Recorder in 2009 and as a Deputy High Court Judge in 2017.

He will take up appointment on 1 October 2020 consequential to the elevation of Lord Justice Baker to the Court of Appeal.

It is anticipated that a further ten appointments will be announced in the coming months.

11/9/20

Man jailed for fake DNA test to deny parentage of two sons

A man has been jailed for faking a DNA test so that he could deny being the father of his two sons to the Child Maintenance Service.

The Crown Prosecution Service (CPS) said that Steven Dixon used a DNA mouth swab from a friend to send to the Child Maintenance Service on 6 July 2018.

In October 2015 and February 2016, the Service had received applications from two women claiming that Dixon was the father of their sons and requesting support. Steven Dixon was contacted by the Service and he sent off for a DNA testing kit that was delivered to Deerness Park Medical Group in Sunderland. He collected it himself and then asked a friend to provide a DNA mouth swab.

He submitted the swab to the Service with a form stating that the sample had been taken by Dr Jon Kisler at a surgery called The Quays on Thelwall New Road in Warrington on 6 July 2018. The form had been 'signed' by Dr Kisler. In fact, Dr Jon Kisler had not completed a DNA test with Mr Dixon at any time. In a witness statement, Dr Kisler said he had not completed the form and the signature on it was not his. He had also never worked at that surgery.

As a result of the fake test, the Child Maintenance Service contacted the two women and said Dixon was not the biological father of the two boys and could not be asked to provide financial support. But they contested this and an investigation began. A DNA test of the two boys showed them to be half-brothers which strengthened the women's claims.

Dixon wrote to the Child Maintenance Service on 16 November 2018 saying: "The pursuit of myself from both you and my ex-partners is now becoming tantamount to harassment… this pursuit is now affecting my own life, as if it wasn't traumatic enough on both occasions to find out neither of these children were mine at the time, when I believed them to be, to now having to re-live it all again and even on having it proved by yourselves by DNA that they are not mine, to then still be being pursued. It is simply not acceptable to be allowed to continue."

On 23 November 2018, a speculative search of the National DNA database by police found the submitted mouth swab to match with the DNA of a man called Kenny Jones. Jones was arrested and said that Dixon had asked him to provide the swab so that he could send it to his alcoholic father, to try and prove he wasn't his son. No money was exchanged between the men.

Dixon was arrested on 18 July 2019 and interviewed but denied the claims and said the doctor and the GP practice manager were liars. He was taken into custody and a DNA sample was taken which matched that of the two boys. He pleaded guilty to three counts of Making or Supplying Articles for Use in Frauds and today (15 September 2020) at Chester Crown Court he was jailed for 18 months.

Senior Crown Prosecutor Maqsood Khan, of CPS Mersey-Cheshire's Fraud Unit said:

> "Steven Dixon is a liar and a cheat who has gone to extensive lengths to deny the parentage of his two sons. Investigations showed that he had been at the birth of both of the boys and his signature was on their birth certificates. Indeed he seems to have played a part in their lives for a period.
>
> "But that changed and he has now turned to criminality to avoid his obligations to his children. His apparent indignation at the work of the Child Maintenance Service to get to the truth is audacious to say the least. His deception has no doubt caused distress and hurt to the women and their children and he is now behind bars. The Crown Prosecution Service hopes that this case shows that those who try and lie and cheat their way out of their responsibilities will face the consequences."

17/9/20

Children accommodated in secure children's homes

The Department for Education has released statistics on children accommodated in secure children's homes as at 29 February 2020, including:

- numbers of approved and available places
- availability and occupancy rates
- children accommodated by gender, age and length of stay.

The figures show that:

- Places approved for use decreased to 252 places, slightly down 7 places from 259 last year.
- Children accommodated in the secure children's homes were up by 7 per cent (up by 12 children) to 184.
- Approved places available for use – 90 per cent up from 88 per cent.
- Approved places that were occupied – 73 per cent – up from 66 per cent.
- Places contracted to the Ministry of Justice were similar to last year at 107 places. Eighty children were accommodated in these places by the Youth Custody Service (YCS). This represents 43 per cent of all placements, up from 38 per cent last year.

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

17/9/20

'Thousands could be paying over the odds for legal advice': Legal Services Board

Consumers urged to shop around nationally for the best deals on divorce and other legal services
New Legal Services Board (LSB) research states that there is significant regional variation in the price of legal advice, including for divorce, across England and Wales for what it says are fundamentally the same services.

The research explores the cost of common legal scenarios related to divorce; buying and selling a home; and wills, trusts, and probate and devotes a section of the report to each. It says that legal advice is generally 20 per cent

cheaper in the North of England and 17 per cent cheaper in Wales. Firms based in London are 33 per cent more expensive than firms based elsewhere. The research also shows that there is no price difference between law firms delivering services remotely and those providing them face to face.

The LSB says that the mean price of an uncontested divorce requiring a full legal service across England and Wales was: North (North West, North East, Yorkshire and Humberside) – £605; Midlands (West Midlands, East Midlands) – £760; South West (West, South West) – £667; South East (South, South East, East) – £808; London – £908; Wales – £629.

For a more complex divorce involving disagreement over assets, the mean price was: North – £2,397; Midlands – £2,993; South West – £3,156; South East – £3,040; London – £4,395; Wales – £2,032.

The LSB is encouraging everyone who experiences a legal problem to shop around as they could save hundreds of pounds.

For the research, **click here**.

17/9/20

International child abduction unit: request for co-operation form updated

The Official Solicitor and Public Trustee has published an updated form for local authority staff to ask the authorities in another country for information or assistance in a child protection case. The guidance on completing form has been updated.

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

17/9/20

New private law cases received by Cafcass in August marginally higher than 2019

Cafcass received a total of 3,748 new private law cases (involving 5,623 children) in August 2020 – 0.4 per cent (or 14 cases) higher than the same month last year.

For the month-by-month figures, **click here**. From that page, a further link shows private law case demand and number of subject children by DFJ area.

18/9/20

New public law cases received by Cafcass fell by 2 per cent in August

Cafcass received a total of 1,459 new public law applications (involving 2,384 children) in August – 40 applications (2.7 per cent) fewer than in the same month last year. Since January 2020 there has only been one month – June – in which cases have increased year-on-year.

For the month-by-month figures for public law applications, **click here**.

18/9/20

Retirement of Sir Ernest Ryder, Senior President of Tribunals

The Right Honourable Sir Ernest Ryder has retired as the Senior President of Tribunals and Lord Justice of Appeal with effect from 19 September 2020.

Sir Ernest Ryder was called to the Bar by Gray's Inn in 1981, took silk in 1997 and became a Bencher in 2004. He was appointed an Assistant Recorder in 1997, a Recorder in 2000 and a deputy High Court Judge in 2001.

He was appointed a Judge of the High Court of Justice, Family Division, on 4 May 2004 and was the Family Division Liaison Judge and then the Presiding Judge of the Northern Circuit.

Sir Ernest Ryder is a specialist in family and administrative law. Throughout his career, he has written and lectured widely on family law, the role of a modern judiciary, the leadership and governance of justice and cultural conflicts in justice.

He was appointed the Judge in Charge of the Modernisation of Family Justice in 2011, a review that led to the creation of the Family Court. His ***Judicial proposals for the modernisation of family justice*** were published in July 2012 and were subsequently accepted by both the judiciary and Government.

He was appointed a Lord Justice of Appeal and privy counsellor in 2013 and became Senior President of Tribunals in September 2015. As Senior President, Sir Ernest has been the lead judicial member of HMCTS Board, has led the tribunal system through the HMCTS modernisation programme, as well as leading the tribunals' response to the covid-19 pandemic. He has been the judicial course director of the Judicial College Leadership and Management Development Programme for the last five years.

Sir Ernest is now Master of Pembroke College, University of Oxford, as well as Senior Associate of the Centre for Socio-Legal Studies in the Department of Law.

20/9/20

167 opposite-sex civil partnerships formed on first day permitted by law

There were 167 opposite-sex civil partnerships formed in England and Wales on 31 December 2019. This was the first day it was possible to do so following the change in

legislation to extend civil partnerships rights to opposite-sex couples. The figures are revealed in **statistics on civil partnerships** published by the Office for National Statistics for 2019.

During the year, there were 994 same-sex civil partnerships formed in England and Wales. This was an increase of 4.0 per cent from 956 in 2018 and an increase of 9.5 per cent from 908 in 2017.

The majority (61 per cent) of same-sex civil partnerships in England and Wales in 2019 were between men, a lower proportion compared with the previous year (65 per cent).

Nearly in one in five (19 per cent) of those entering a same-sex civil partnership in 2019 were aged 65 years and over; this compares with just 4.0 per cent in 2013, prior to the introduction of marriages of same-sex couples.

About three-quarters (72 per cent) of same-sex civil partnerships formed in England and Wales in 2019 were to couples where both partners were single (that is, never previously entered into a marriage or civil partnership); this percentage has remained broadly consistent since the introduction of same-sex civil partnerships in 2005.

There were 916 same-sex civil partnerships dissolutions granted in England and Wales in 2019, a small decrease of 1.2 per cent from 927 in 2018; of these, 54 per cent were to female couples.

Kanak Ghosh of the ONS commented:

> "Next year, we expect to see further increases to the overall number of civil partnerships in England and Wales as more opposite-sex couples choose to become civil partners."

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

22/9/20

Proposed changes to children in need and children looked after by local authorities outcome statistics

The Department for Education has launched a consultation on proposals to change the annual children in children in need (CIN) and children looked after by local authorities (CLA) outcomes statistics.

Proposals made by the DfE include more consistency in the use of definitions and in the range of children reported on. For example, the DfE does not report outcomes on the whole CIN cohort but reports on only those children looked after for at least 12 months at 31 March – the impact on outcomes for those looked after for shorter durations is not currently reported on.

The DfE proposes producing a single publication, bringing together the CIN and CLA outcomes statistics into one place. It plans to publish a four-year time series for each outcome at national level where possible and also provide local authority level data.

For more details, **click here**.

24/9/20

Revised expert witness guidance issued by Legal Aid Agency

The Legal Aid Agency has made changes to its guidance on applying for prior authority for an expert witness in family cases. Prior authority is needed when instructing an expert who charges higher rates than the codified rates set out in the LAA's regulations.

The LAA has worked closely with representative bodies on the changes which, it says, aim to:

- improve operational processes
- give greater certainty to providers
- reduce the number of prior authority applications.

The changes provide for:

- setting out recommended additional hours where there are additional parties to be assessed by an expert for a psychological or psychiatric assessment
- all parties to be covered by a prior authority granted to the lead solicitor
- inclusion of cases of physical and domestic abuse in the risk assessment provisions
- setting out that where a court order lists all the documents required to be translated documents there is no need to apply for prior authority
- new guideline rates in annex 5 for some experts.

For the revised guidance, **click here**.

24/9/20

Latest MoJ statistics set out the impact of Covid-19 on family court activity

The **latest statistics issued by the Ministry of Justice** demonstrate the substantial impact Covid-19 and associated actions have had on family court activity.

There was a significant decrease in most types of family justice between April and June 2020 (the period covered by the statistical release). The reduction of 13 per cent (on the same quarter in 2019) to 56,867 in new cases started is linked to Covid-19 measures undertaken by the courts. This represents a 30 per cent decrease in financial remedy cases, a 24 per cent decrease in adoption, an 18 per cent decrease in matrimonial matters and a 7 per cent decrease in private law case starts.

The average time for a care or supervision case to reach first disposal was 36 weeks in April to June 2020, up three weeks from the same quarter in 2019. Thirty-four per cent of cases were disposed of within 26 weeks, down 7 percentage points compared to the same period in 2019.

There were 23,372 divorce petitions filed in April to June 2020, down 18 per cent on the equivalent quarter in 2019. There were 23,196 decree absolutes granted in April to June 2020, a decrease of 5 per cent from the same period last year. The mean average time from divorce petition to decree nisi was 23 weeks, and decree absolute was 47 weeks – down 10 and 11 weeks respectively when compared to the equivalent quarter in 2019. The median time to decree nisi was 14 weeks and 31 weeks for decree absolute respectively.

There were 7,218 financial remedy applications made in April to June 2020, down 31 per cent from the same period in 2019, while there were 7,949 financial remedy disposals events, down 22 per cent. During this period, 78 per cent of disposal events were uncontested, 15 per cent were initially contested and 7 per cent were contested throughout.

The number of domestic violence remedy order applications increased by 24 per cent compared to the same quarter in 2019, while the number of orders made increased by 17 per cent over the same period.

In April to June 2020 there were 798 adoption applications, down 35 per cent on the equivalent quarter in 2019. Similarly, the number of adoption orders issued decreased by 52 per cent to 584.

There were 1,020 applications relating to deprivation of liberty in April to June 2020, down 26 per cent on the equivalent quarter in 2019. Orders increased by 33 per cent in the latest quarter compared to the same period last year.

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

24/9/20

MIAMs between April and June 2020 down 20 per cent on a year ago

Mediation Information and Assessment Meetings (MIAMs) decreased by 20 per cent between April and June 2020 compared to the previous year and currently stand at around a third of pre-LASPO levels. Mediation starts decreased by 31 per cent and outcomes decreased by 21 per cent, and are now sitting at around a third of pre-LASPO levels.

The figures are revealed in **legal aid statistics for England and Wales** published by the Ministry of Justice. Workload and expenditure fell during the quarter, due to Covid-19, across almost all legal aid schemes.

Provisional figures for July 2020 show that there was a 21 per cent decrease in family mediation starts in July 2020 (360) compared to the monthly average between April and June 2020 (450 per month). Over the same period, assessments decreased by 22 per cent and outcomes by 32 per cent.

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

24/9/20

Family legal aid cases and expenditure fell significantly due to Covid-19

In April to June 2020 family legal help starts decreased by 26 per cent compared to the same quarter last year. Completed claims and expenditure each decreased by 27 per cent. Overall there were 25,033 family cases closed during the period (down 17 per cent on a year ago). There were 17,132 public law cases (down 21 per cent) accounting for £115.7 million expenditure; and 7,901 private law cases (down 8 per cent) accounting for £19.4 million.

The **latest legal aid statistics from the Ministry of Justice** show that workload and expenditure fell during the quarter, due to Covid-19, across almost all legal aid schemes.

Certificates granted for family work decreased by 6 per cent in April to June 2020 compared to the previous year. This decrease was seen across all family matter types apart from domestic violence, which increased by 21 per cent. Certificates completed for family work decreased by 15 per cent and associated expenditure decreased by 11 per cent compared to the same quarter the previous year.

In April to June 2020, applications for civil representation supported by evidence of domestic violence or child abuse decreased by 37 per cent compared to the same period of the previous year. The number of these granted decreased by 39 per cent over the same period. The proportion of applications granted remained steady at around 70 per cent from the inception of this type of application until the end of 2015, before increasing to around 80 per cent. The provisional figure for the latest quarter is 86 per cent.

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

24/9/20

Respect Men's Advice Line reports 60 per cent rise in domestic abuse calls during lockdown

The Respect Men's Advice Line, which offers support to men experiencing domestic abuse, says that it received 13,812 calls and emails between April and July in lockdown. This compares to 8,648 in the same period in 2019 and represents a 60 per cent increase.

The advice line told BBC News that the biggest increase in contact with abuse victims came through emails and the service saw the volume increase by 96 per cent from 372 emails in June 2019 to 728 in June 2020.

Respect's Ippo Panteloudakis was quoted as saying:

> "It was absolutely clear the lockdown period exacerbated everyone's domestic abuse experiences.
>
> "[Callers] were talking about increases in violence, increases in psychological abuse and becoming

> homeless as a result of the domestic abuse and not having anywhere to go.
>
> "We had reports from men sleeping in their cars overnight or sleeping in their friends' or parents' gardens in tents."

For the report, **click here**.

27/9/20

Financial Remedy Update, August 2020




Philip Way Partner, **Louise Lister** Trainee Solicitor, **Marc Saunderson** Partner, **Nicola Rowlings** Professional Support Lawyer all of **Mills & Reeve LLP** consider the important news and case law relating to financial remedies and divorce during August 2020.

As usual this update is provided in two parts

Cases

R (on the application of Kate Harrison and others) v Secretary of State for Justice and others [2020] WLR (D) 458

The High Court considered an application brought by six couples seeking the legal recognition of humanist marriages in England and Wales.

The Claimants sought declaratory relief; specifically, a declaration that the legislation providing for the legal recognition of marriage in England violates their rights under the HRA, and a declaration of incompatibility pursuant to section 4 of the HRA.

The Government disputed the Claimants' claim that there had been any violation of their rights, arguing that, even if there is any difference in treatment between the Claimants and their religious comparators, the measures under challenge are objectively and reasonably justified, not least given ongoing consideration of reform in this area of social policy.

The Government also argued that the couples had no right to humanist marriages, on the basis that humanist marriages are not sufficiently connected to humanism to merit legal protection. Further, the Government submitted that English law already provides for humanist marriages by way of civil marriage. Mrs Justice Eady DBE rejected these arguments, saying that there is an intimate link between couples' beliefs and their choice of a humanist ceremony.

Mrs Justice Eady DBE ruled that the failure to provide legally recognised humanist marriages means that 'the present law gives rise to… discrimination'. She also ruled that, in light of that, the Secretary of State for Justice 'cannot… simply sit on his hands' and do nothing. However, she went on to say, given that the Government is currently giving the matter consideration in the form of a review into marriage law by the Law Commission, the Government's refusal to act immediately can be justified 'at this time' and concluded, 'Although I may deprecate the delay that has occurred since 2015, I cannot ignore the fact that there is currently an on-going review of the law of marriage in this country.' As a consequence, she declined to make a formal declaration that the Government is acting unlawfully at this time.

The judge went on to say that attention must now turn to the Government's promised review of marriage law as the way that this discrimination must be addressed. The Government said that a consultation would be published in early September by the Law Commission.

OG v AG [2020] EWFC 52

OG ("H", aged 51) and AG ("W", aged 53) made cross-applications for financial remedies after a 25 year marriage, having separated in 2017.
H and W had both worked hard in a ducting business (X Ltd – "X") which H had established in 1989 and which W had been running single-handedly since September 2019.

The assets were divided into three categories:

1. Non-business, non-pension assets
These came to a total of £3.68m.

2. X
X was valued by an SJE, who gave a figure in the range of £13.78m to £13.95m (with a median of £13.865m). Of this figure, £9.992m represented surplus assets (held as cash and quoted investments). The trading element of X was valued at £3.945m.

Mostyn J agreed with W that a discount should be applied to reflect the effects of Covid-19 and Brexit, but applied a 10% discount only to the trading element of the valuation, since there was no logic in applying such a discount to the cash and investments held by X.

He also agreed with W that a discount should be applied to reflect the effects of H setting up a competitor company (AB LLP "AB"), but again only applied this to the trading element of X. The appropriate discount was held to be 30%.

These discounts reduced the net value of the parties' interests in X to £10.7m.

3. Pension assets
The parties' pension assets were worth £1.98m.

In total, the parties' assets were worth £16.37m.

Conduct

Mostyn J found that H's disclosure in relation to Dubai properties and other matters had been made in a piecemeal fashion.

AB had been loaned significant sums of money by a company incorporated in Dubai, TT Ltd ("TT"), which H asserted was a vehicle to obtain residency in Dubai. H had advanced and/or loaned monies to TT In February 2019 when AB was incorporated. Mostyn J considered that H's conduct, inter alia, in concealing a number of the Dubai transactions and loans made to TT was '*not only dishonest but futile and frankly inexplicable*'.

However, W was '*not above criticism herself*'. He found her negotiating stance to have been unreasonable and she had herself been guilty of non-disclosure.

Mostyn J categorised conduct as arising in four distinct scenarios:

1. Gross and obvious personal misconduct meted out by one party against the other (normally, but not necessarily, during the marriage).

2. 'Add-back' cases, where one party has wantonly and recklessly dissipated assets which would otherwise have formed part of the divisible matrimonial property.

3. Litigation misconduct.

4. The drawing of inferences as to the existence of assets from a party's conduct in failing to give full and frank disclosure.

Regarding H's conduct, Mostyn J firstly decided that the sums loaned by H to TT would all be added back to the matrimonial pot at full value. However, he was not satisfied that H's 'abysmal, and let there be no doubt, dishonest presentation', coupled with the remaining minor deficiencies, should lead him to infer that H had '*squirrelled away*' substantial sums stolen from X.

Although in times gone by the courts in ancillary relief cases formed 'first and foremost a moral judgment', Mostyn J pointed out that '[t]he financial remedy court is no longer a court of morals'. Conduct should be taken into account 'not only where it is inequitable to disregard but only where its impact is financially measurable', and it is 'unprincipled for the court to stick a finger in the air and arbitrarily to fine a party for what it regards as immoral conduct'.

Mostyn J therefore rejected W's submission that in addition to the competitor discount (which would fall on H alone) and a penalty in costs, there should be an additional substantial departure from equality 'to reflect the court's indignation at the way the husband has behaved in the course of the litigation'.

Costs

Mostyn J emphasised the revised para 4.4 of FPR PD28A, which requires parties to negotiate openly in a reasonable way and which is '*extremely important*'. W's attempt to take advantage of H's delinquency to justify such an unequal division of the assets as that proposed by her was not a reasonable way of conducting litigation, and so W would herself suffer a penalty in costs for adopting such an unreasonable approach. Mostyn J declared: '*It is important that I enunciate this principle loud and clear: if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs. This applies whether the case is big or small, or whether it is being decided by reference to needs or sharing*'.

Whilst a costs order was made in W's favour, the sum was adjusted to reflect her own approach. For example, £50,000 was deducted to reflect her unreasonable and untenable open negotiation stance. Mostyn J hoped that '*this decision will serve as a clear warning to all future litigants: if you do not negotiate reasonably you will be penalised in costs*'. H had to pay W £278,020, which represented 45% of W's total costs.

Overall, W received £9.055m, and H received £7.316m (44.7% of the total assets), on a clean break basis. The departure from equality was in the sum of £869,741, which was '*the price that the husband has to pay for his conduct in setting up a competitive business and conducting the litigation so abysmally*'. Mostyn J emphasised that he hoped '*it will serve as a lesson to any future litigant who is tempted to behave in the same way*'.

LP v AE [2020] EWHC 1668 (Fam)

The unmarried parents ("M" and "F") with a 6-year-old daughter were involved in private law children's proceedings for child arrangements orders to live with or spend time with F.

In June 2019, HHJ Cox ordered F to contribute to M's costs of representation through a fact-finding hearing, conditional upon M returning to the jurisdiction with the child. M applied for £117,000, based on instructing both solicitors and counsel. Instead, HHJ Cox ordered payment of £35,000, based on a quotation provided to F by a barristers' chambers on a direct access basis. The £35,000 was paid on 3 July 2019, but M's legal fees exceeded the amount, despite her representing herself after the first day of the fact-finding.

On 16 September 2019, M's newly instructed solicitors asked F's solicitors whether F would cover M's fees from August 2019. On 20 September 2019, F's solicitors replied that he would not. The High Court noted it was regrettable that the M did not make an application for a LSPO promptly then. The application was made on 20 November 2019 and sought £99,000 to take M's legal team through a hearing fixed for 16 December 2019. F offered £12,000 in response.

The hearing 16 December 2019 before HHJ Tolson QC combined child arrangements and the LSPO issue. Cohen J observed that this "should be avoided". At the 16 December 2019 hearing, HHJ Tolson QC expressed that:

(i) M's fees should have been £3,000, not £99,000;

(ii) M's solicitors did too much work;

(iii) The children's guardian's fees were a few thousand pounds, as a good indication;

(iv) F's fees were irrelevant (they were also unknown until the appeal and turned out to be some £560,000 including the related criminal case);

(v) M must still have some of the £35,000 from July left over.

Cohen J found that HHJ Tolson QC's "approach and reasoning to the issue was one which involved him taking into account matters which he should not have taken into account and ignoring matters that were plainly relevant".

Cohen J allowed M £40,000 plus VAT, through to the end of the proceedings, with £22,500 for solicitors and £17,500 to counsel, and apportioning approximately one-third to a hearing listed 31 July 2020 and two-thirds to the final hearing 14-15 September 2020.

Cohen J cited *Rubin v Rubin* [2014] 2 FLR 1018 and *BC v DE* [2017] 1 FLR 1521, Mr Justice Cohen and noted that:

(a) the costs were unpaid costs, not historic costs;

(b) an award would have been made if M's LSPO application had been issued promptly in September;

(c) an award must include both solicitor and counsel's fees (unless counsel had agreed to "happily act on a direct access basis on his own");

(d) 20 November was far too late for M to make the LSPO application;

(e) the claim could not fail simply because it was not heard before 16 December; and

(f) M's solicitors did not continue working anticipating being totally unremunerated.

Cohen J also concluded F would not pay for M's fees between August and October 2019, in part because those fees were incurred by M changing solicitors and in part because of the delay in making the LSPO application.

A useful decision for the practitioner when advising as to the merits and timing of an application for a LSPO.

AG v AD [2020] EWHC 1847 (Fam)

The couple began cohabiting in 2009 and married in 2010. In March 2017, the wife ("AG") filed a divorce petition in England which stated that she and her husband ("AD") had been separated for the past two years. In December 2017, AD petitioned for divorce in Russia, citing a separation date in 2014. A Russian decree of divorce was granted. AG withdrew her English divorce petition and sought financial orders under Part III Matrimonial and Family Proceedings Act 1984.

AG's Part III statement asserted that the marriage had ended in 2017. The issue for determination was when the marriage had ended: in 2014 or 2017. AD sought an order that AG produce the files of her previous legal advisors, AG having waived privilege in her statement, when she answered a questionnaire and in a second statement.

AG instructed Legal Case Management Ltd who had retained Sterling Lawyers Ltd to issue the petition, which AG alleged contained several errors. AG maintained that she had not informed her advisors that she had separated two years prior to 2017 and that she signed the petition in English without it being translated into Russian (her first language).

Cohen J observed that, in asserting that her instructions had been misconstrued, AG was challenging what her advisers had quoted her instructions to be, which went to the substance of her case. It would be unfair if AD could not challenge this by reference to contemporaneous notes or other communications. AG had opened up the question of what she had told her advisers, put it in issue and was relying on the same.

The decision highlights that only specific documents will be ordered to be disclosed (*Brenan v Sunderland* [2009] ICR 479). AD's request for all the files went too far. Material in the files could relate to financial affairs or the child of the family, which should not be subject to a waiver of privilege. Cohen J ordered disclosure of:

- material in which AG's instructions were given or noted about when the parties separated, together with copies of all such communications and notes to identify those to whom AG gave her instructions and the language in which those instructions were given; and

- documents identifying when the draft petition was sent to AG or any communication with her about its contents.

S v C [2020] EWHC 2127 (Fam)

The parties were married for five years and divorced in 2016. The wife ("S") applied for a financial remedy order for the parties' daughter who was by now six years old. As all matrimonial claims between the parties' had been settled, the issue the court faced was to what extent it should exercise its discretion under s.23 Matrimonial Causes Act 1973 to release to the parties a frozen fund (worth around £3.74 million). The origin of this fund was the settlement of a negligence claim the parties' had launched on behalf of their daughter. The consent order that was approved by the court in May 2016 had contained a specific recital that the parties would continue to have joint conduct of the personal injury claim and that:

- any settlement or award made for the benefit of their child could only be invested and applied as expressly agreed between the parties; and
- once such a settlement or award had been made, the parties would review the payments they had made for the benefit of their child and consider whether such payment should be met from the settlement or award going forward.

S brought her application under three separate limbs:

- an application for a lump sum for their child under s.23 (1)(f),
- an application for child maintenance under s.23 (1)(d) due to their child's ongoing disabilities;and
- an application for secured child maintenance under s.23 (1)(e).

The husband ("C") sought the dismissal of S's application for secured funding and in the absence of the parties agreeing a way forward that the court should make no order.

The judge concluded that a formal mechanism should be put in place to ensure that the child benefited from a significant element of those funds and made an order which comprised the following:

- child maintenance of £2,000 a month;
- £150,000 of C's share that he received of the settlement monies to be set aside as a secured maintenance fund with C being entitled to draw down £24,000 a year;
- £900,000 to be preserved for C to purchase a property which would be held in his sole name and subject to a charge in the child's favour for the sum of £900,000 with S being permitted to use the funds from her share of the settlement monies to redeem her existing mortgage with the sum of £900,000 being subject to the same obligations as that of C; and
- both parties being required to put in place an acceptable form of life assurance in an agreed sum of at least £1million for their child's benefit.

Webb v Webb [2020] UKPC 22

The parties married in 2005 in New Zealand and had one child born in 2006. The Appellant Husband ("H") was subject to an investigation by the New Zealand Inland Revenue Department ("IRD") in 2011, which revealed significant tax debts. Most of the family assets held by family trusts (that were controlled by H) were located in the Cook Islands. The parties moved to the Cook Islands in 2013. The parties separated in 2016 and H returned to New Zealand.

The Respondent Wife ("W") brought an application under the Matrimonial Property Act 1991-92 in the High Court of the Cook Islands for division of matrimonial property. W asserted that the assets held in the family trusts were matrimonial property. In addition, W challenged the validity of the family trusts. H asserted that the family trusts were valid and that if any of the assets were matrimonial property, his deductible debts exceeded their value.

The High Court of the Cook Islands dismissed W's claim, finding the family trusts to be valid and that there was a real likelihood that H had to pay the IRD the debts he owed, being personal debts. In any event, if the trusts had been invalid, H's personal debts would have exhausted any matrimonial property.

W appealed to the Court of Appeal of the Cook Islands. The court held that the family trusts were invalid and that H's tax debt should not be considered as it was unlikely to be enforceable in the Cook Islands. H appealed to the Privy Council.

The Judicial Committee of the Privy Council advised that the appeal should be dismissed. Whether the family assets formedpart of matrimonial property was not as straightforward as to H's debts amounting to personal debts. Instead, it was whether the debt was enforceable in the Cook Islands. The family trusts were held invalid as H had, under each of the trust deeds, the rights in the trust assets which were indistinguishable from ownership. H had the power to secure the benefit of all of the trust property to himself at any time, regardless of any interests other beneficiaries had. It followed therefore that the trusts failed to record an effective alienation by H of any of the trust property.

In his dissenting judgment, Lord Wilson concluded that the tax debt was enforceable as there was no material to support the suggestion that the Cook Islands would decline to enforce the debt to the New Zealand IRD. Lord Wilson also turned to the construction of the word "debts" in the legislation and the importance of the wording "debts" having the same meaning in both subsections and not being referable to specified assets. As a result, Lord Wilson would have allowed H's appeal.

News

Remote hearings

HMCTS has produced online training to assist practitioners using the Cloud Video Platform (CVP) in the Civil and Family Courts. The training assists practitioners with preparing for, joining and participating in a remote hearing using the CVP.

Applications for online divorce and FR orders

- HMCTS has published guidance to assist practitioners using the online platform MyHMCTS for divorce proceedings. The guidance sets out the online steps to follow when decree nisi has been refused and clarification or an amended petition is required.

- On 13 July 2020, HMCTS published updated guidance on completing an Acknowledgement of Service online in divorce proceedings. Represented and unrepresented respondents, and co-respondents who are unable to respond online, can complete the AoS offline following receipt of an AoS invitation letter. A paper (offline) AoS can be requested and, once completed and returned to HMCTS, the information from the paper AoS is transferred onto the online system by a caseworker.

- HMCTS has updated its onboarding guidance for FR consent orders. From 24 August 2020, new pilot Practice Direction (PD) 36T came into force and temporarily modified PD 41B. PD 36T makes it mandatory to use the online application system when applying for financial remedy consent orders (except variation orders) in divorce proceedings, where the applicant is legally represented. PD 36T expires on 31 May 2021.

COVID-19 guidance

On 21 August 2020, HMCTS announced the opening of a further two "Nightingale Courts" from 24 August 2020 at the Ministry of Justice in London and the former Fleetwood Magistrates' Court building. This means that eight of the ten planned Nightingale Courts are now open.

On 23 July 2020, HMCTS circulated a letter to stakeholders from Susan Acland-Hood (Chief Executive, HMCTS), announcing that, from 27 July 2020, HMCTS will be asking all court and tribunal users in England to wear a face covering in the public areas of its court and tribunal buildings.

However, face coverings may be removed (and judges or magistrates may ask for them to be removed) when people are speaking or presenting evidence in the court room. Additionally, two metres' social distancing should be "strictly observed" for anyone speaking without a face covering.

Practitioners should note further that:

- Individuals may be asked to temporarily remove their face covering for identification purposes.

- Court and tribunal users should bring their own face coverings wherever possible, but can ask for one from a member of staff if they do not have one.

- Face coverings are not required if users "have a practical reason" not to wear one. This includes where users have a disability or health issue that makes wearing a face covering difficult, where wearing a face covering will cause the wearer severe distress, where a deaf person needs to read the individual's lips (although speech-to-text apps should also be considered), and where users are eating, drinking or taking medicine. For users who have a practical reason not to wear a face covering, they may wish to wear a lanyard with an exemption card or carry an exemption card with them.

On 1 July 2020, the Lord Chancellor and Minister for Justice, the Judiciary and HMCTS each published an update on recovery plans for courts and tribunals in response to the COVID-19 outbreak. The recovery plans followed an announcement by the Prime Minister the previous day, that HMCTS will receive £142 million of additional capital funding this year, £105 million of which is allocated to improving the court and tribunal estate.

The House of Commons Justice Committee calls for the Ministry of Justice to take action over concerns that legal services providers may collapse

COVID-19 has led to a downturn in court cases and has caused delays across the court timetables due to the safety and social distancing measures. This has resulted in reduced incomes for legal services providers, with young solicitors and

barristers being hit the hardest along with Black, Asian and Minority Ethnic lawyers. The committee's report highlights these concerns and the potential outcome that some barristers, solicitors and law centres may collapse. This will in turn lead a shortage of legal advice and representation.

Family Procedure Rule Committee meetings

The approved minutes of the Family Procedure Rule Committee meetings on 4 May 2020 and 8 June 2020 have been published.
Points of interest include:

- **Form D81:** changes to the form are planned, because the current version can be ambiguous about the net effect of draft consent orders. Other priorities mean work on the form has been delayed. An updated draft will be shared with the FPRC Forms Working Group.

- **Divorce, Dissolution and Separation Act 2020**: most of the detailed procedural changes as a result of the Act will be to Part 7 of the Family Procedure Rules 2010 (FPR). There will also be amendments to Part 6 for service and Part 9 to reflect changes in terminology. A wide range of changes beyond the remit of the FPRC, including changes to HMCTS IT systems, guidance and court forms, are also required. The changes are not expected to come into effect until later next year.

- **Opposite-sex civil partnerships**: policy agreement on the conversion of marriages to civil partnerships has been delayed because of the COVID-19 pandemic. It is hoped that regulations on conversion rights will be issued later this year. The FPRC will consider the issue again in October 2020.

- **Consultation on reintroducing Calderbank offers**: a high proportion of the 280 responses to last year's consultation were supportive of reintroducing some form of Calderbank offers. Those who were not fully supportive raised concerns about smaller money cases, needs cases, domestic abuse and the higher proportion of litigants in person. Most of the Costs Working Group support making provision in the FPR for the consideration of Calderbank offers when deciding whether to make a costs order. The aim is to incentivise parties to settle early and avoid unnecessary litigation. More understanding about how smaller money cases might be affected is required however, and the FPRC asked MoJ Policy and the Costs Working Group to obtain more information on this.

Update on Practice Directions

PD 36U (Service and notification of applications and orders under Part 4 of the Family Law Act 1996 (FLA 1996)) temporarily modifies Part 10 of the Family Procedure Rules. It will be effective from 3 August 2020 to 3 May 2021. As a result of the impact of COVID-19 and the limited availability of court bailiffs to effect personal service, courts will now be able to direct another method for service of applications and orders made under Part 4 of the FLA 1996, other than personal service.

PD 36O – Procedure for bulk scanning of certain documents: Paragraph 7.1 of PD 36O and paragraph 4.1 of PD 36P have been corrected by amending the defined term "filed" to "filing". The change is effective from 25 July 2020.

PD 36M – Procedure for using an online system to generate, file and continue applications in certain public law proceedings relating to children: The number of applications and stages in public law proceedings that can be completed using the online system has been extended to potentially include "public law proceedings" or "emergency proceedings" and to applications for secure accommodation orders (section 119, Social Services and Wellbeing (Wales) Act 2014). These changes are effective from 30 August 2020.

PD 36M – Procedure for using an online system to generate, file and continue applications in certain public law proceedings relating to children: The current pilot expiry date has been extended to 30 April 2021.

PD 36N – Procedure for online filing and progression of certain applications for a financial remedy in connection with certain proceedings for a matrimonial order. The current pilot expiry date has been extended to 30 September 2021.

PD 36H – Procedure for service of certain protection orders on the police: The current pilot expiry date has been extended to 30 October 2020.

Family Procedure (Amendment No 2) Rules 2020 (in force 1 October 2020)

These amend the Family Procedure Rules 2010 by inserting a new Part 37 that streamlines and simplifies the process for proceedings for contempt of court. The new Part mirrors the new Part 81 of Civil Procedure Rules 1998.

Practice Direction on committal for contempt of court in open court is issued

This **Practice Direction** supplements the Family Procedure Rules 2010 (and Court of Protection Rules 2007, the Criminal Procedure Rules 2014 and any related Practice Directions supplementing those various provisions) relating to contempt of court as it applies to all proceedings for committal for contempt of court. This includes contempt in the face of the court. The Practice Direction applies in all courts in England and Wales save to the extent that Part 81 of the Civil Procedure Rules 1998 applies.

The Court Fees (Miscellaneous Amendments) Order 2020 (in force 3 August 2020)

This reduces various court fees under Family Proceedings Fees Order 2008 as well as other fee orders, including various fees associated with enforcement applications. You can find the full list of changes to the Family Proceedings Fees Order 2008 **here**.

The Ministry of Justice issues a consultation on departing from retained EU case law for lower courts in the post-transition period

The Ministry of Justice has outlined the government's proposals on departing from retained EU case law for lower courts after the end of the transition period in a consultation issued on 2 July 2020. Following the transition period, retained EU law that has not been modified will be interpreted (according to retained case law, including EU retained case law). As it stands, only the Supreme Court and the High Court of Justiciary in Scotland will be able to depart from the retained EU case law. The consultation sets out the proposal to extend this power in section 6 of the European Union (Withdrawal) Act 2010 to other senior courts. You can find more information **here**.

Proposed changes to the Family Procedure Rules 2010 (FPR)

A stakeholder consultation on proposed changes to the FPR is being held by the Family Procedure Rule Committee. The aim of the consultation is to improve the procedure for general enforcement applications under Part 33, which can be used to enforce family financial orders. There are a number of proposals to address the gaps or uncertain provisions of the FPR and in doing so, making the application procedure as effective and clear as possible.

Lane Clark & Peacock LLP publishes follow-up to its report "Are tens of thousands of older being short-changed on their state pension?"

In May 2020 Lane Clark & Peacock LLP (LCP) published its report "Are tens of thousands of older women being short-changed on their state pension?" which provided an analysis of certain married women who may have been missing out on part of their state pension. After encouraging its readers to find out if they had been affected by using its calculator, more than 160,000 did. LCP have since published a follow-up report which you can **find here**. Under the old state pension, a basic state pension at 60% could be claimed by married women based on the full rate of their husband's contributions where the latter would be more than the pension they could get based on their own contributions. The uplift to 60% should have been automatically applied since 17 March 2008. The report highlights that tens of thousands of women have not had their pension automatically increased post March 2008.

The Ministry of Justice announces increased funding for litigants in person

Not for profit organisations who provide free legal support will be given £3.1 million in funding the Ministry of Justice has announced.

8.9.20

Child Support, Coronavirus and Changes in Circumstances

Jody Atkinson, barrister of St John's Chambers, Bristol, explains the options available to parents receiving or paying child support whose financial circumstances may have been badly affected by the recent turmoil.

Receiving child support becomes even more important when times are hard, as unfortunately they are for so many people. On the other side, paying for child support becomes even more of an issue, when many paying parents have been placed on furlough, or have suffered reductions in the amount of income they receive.

I should start by pointing out that there has not been any emergency legislation specifically for child support in relation to the coronavirus. Instead the usual law in relation to how the child support system deals with changes of circumstances will continue to apply.

The child support system is administered by the Child Maintenance Service ('the CMS'), who are a part of the Department for Work and Pensions ('the DWP'). The DWP are responsible for administering most welfare benefits. As has widely been reported, there have been a huge number of new benefit claimants, and the DWP have had to put into place special measures to cope with the influx. It is reasonable to suppose that some of the staff that usually work on the CMS have been temporarily assigned to other duties, and others are self-isolating. Delays in administering the CMS system are to be expected. However, as will be seen, the date on which a paying parent (paying parents are called 'non-resident parents' by the CMS) notifies the CMS about a change in their circumstances is very important under child support law. That means that it remains vital that non-resident parents take care to notify the CMS about their income dropping as soon as they can. Even if it takes a long time for the CMS to process that information, due to a backlog of work developing, it will be the date that the contact was made by the parent that matters!

Paying (non-resident) parents who forget to tell the CMS that their income has dropped may find that they end up paying a lot more child support than they should have done as a result. If they end up in arrears as a result of falling behind in payments, it may be too late to do anything about it.
I have also set out below actions that a receiving parent (called a 'person with care' by the CMS) can take if their maintenance payments stop, or if their ex-partner makes a false claim in relation to their income changing.

Child support for paying parents

One of the features of the current child support system is that the CMS are able to obtain information about non-resident parents directly from Her Majesty's Revenue and Customs ('HMRC'). This means that now, rather than asking the non-resident parent to tell them what their income is, the CMS usually rely on the information that HMRC provide.

Where a non-resident parent files a self-assessment tax return, as a self-employed person will do, then HMRC will provide the most recent tax return figure to the CMS. Where a non-resident parent is an employee, then HMRC will provide the CMS with the figures filed with them by that person's employer, under the Pay As You Earn scheme ('PAYE').

The CMS refer to the information provided by HMRC as 'historic income' and this can be a very accurate description! For self-employed people, the information provided by HMRC will inevitably be a year or so out of date, due to the fact that self-assessment tax returns are not due until the January after the end of each financial year.

The CMS conduct an automatic annual review of each case on the anniversary of the case starting. This involves the CMS contacting HMRC again to obtain the most recent tax return or PAYE information that HMRC have on their records. The CMS will then write to both parents and tell them what the child support liability will be for the next year. This is why, if

you have a child support case, you will have noticed that the CMS write to you every year at around the same time. It is important that you find this letter, as this will tell you what income the CMS have used to calculate the maintenance that should be paid.

Child support law uses the week as its basic unit. The non-resident parent's gross (pre-tax) weekly income is used to calculate maintenance, and the amount that has to be paid will be calculated as a weekly amount. The annual review will show the gross weekly income that the CMS used (ie. £500 per week for someone who earns £26,071 gross per year).

In ordinary times the fact that historic figures are used does not matter a great deal, as the non-resident parent's income usually will not fluctuate that much year to year, and any changes will work their way through the system due to the annual review. However, we do not live in ordinary times.

If no steps are taken to notify the CMS, then the rate of child support will not change in between annual reviews, and the liability to pay child support at the rate calculated at the last annual review will continue to mount up.

Furthermore, even when the next annual review takes place, that will also be based on 'historic' information provided by HMRC. If somebody has recently lost their job, suffered a dramatic drop in salary, or their self-employed business has failed, this information probably has not filtered through to HMRC yet. This means that when the CMS carry out their annual review, the information that HMRC provide them with is likely to reflect the situation prior to the salary cut, or the business failure.

Fortunately, the child support system does have a way of dealing with dramatic changes in circumstances, but as will be seen it is not perfect.

It is open to a non-resident parent to request that the CMS assess them based on their 'current' income, rather than their 'historic' income provided by HMRC. However, this can only be done where their 'current' income is at least 25 per cent less than the 'historic' gross weekly income that HMRC have provided. This means that a person who was being assessed on the basis of a historic gross weekly income figure of £500 per week provided by HMRC, would need to show that their current income had fallen to £375 or below before the CMS would be able to reduce their liability. If they were still receiving gross weekly income of £400, then the drop would not be sufficient under the CMS regulations to justify using 'current income' and the CMS would continue to assess them at the rate of £500 per week up until their next annual review.

It is also very important to note that the CMS will only change a child support liability onto the current income basis from the date on which the non-resident parent notified the CMS that their income had fallen. The CMS cannot usually backdate the change in child support liability to the date on which the change in income occurred. This can produce some very unfair results and is why it is so important to notify the CMS as soon as possible.

For example, if you lose your job in April 2020, cannot find a new job and stop paying child support, but you do not tell the CMS about your job loss until October 2020 when they write to you about the child support you now owe, your maintenance calculation will only be changed with effect from October 2020, meaning that you will still owe six months of arrears of child support for the period April to October. There is very little that can be done to get rid of those arrears, and they will have to be paid at some point in the future.

That is why it is important to notify the CMS, even if the CMS cannot process the change for many months, because notifying them should stop the accumulation of arrears of maintenance.

For employed people, if there has been a change in their income, they will need to provide their most recent payslips to the CMS, showing their new lower income. If they have been placed on the government's furlough scheme, then they will usually be in receipt of 80 per cent of their ordinary gross salary. As set out above, current income will only be used in place of the 'historic' figure provided by HMRC, where it is 75 per cent or less of the HMRC figure. That means that most people on furlough will not be entitled to an immediate reduction in the child support that they pay, because the reduction falls short of the amount required to go onto the 'current income' basis. However, many people who have been placed on furlough will have lost overtime and other elements of their usual pay cheque, meaning that they might well be actually receiving less than 75 per cent of the figure that the CMS are using. That is why it is so important to check the figure on the last annual review letter.

It is also possible for self-employed people to be assessed on their 'current' income, but it is slightly more complicated than with employed people. Unfortunately, the way that the CMS work out 'current' income for self-employed people will not help in most cases where coronavirus has caused a sudden drop in earnings (short of a cessation of trading).

As set out above, the default position is that self-employed people are assessed on their most recent tax return that they have submitted to HMRC. Accounting periods vary, but as at the date of writing (September 2020), the information that HMRC would have for most self-employed people would be in relation to their year ending 5 April 2019 tax return.

If a self-employed person wants to be assessed on the basis of their current income, then they will need to provide the CMS with their accounts for a tax year that is more recent than the tax year for which HMRC have already provided 'historic information'. If their self -mployed earnings are 25 per cent less than the historic figure, then the CMS can use that figure

instead. If they are not, then their maintenance will continue at the same rate up until their next annual review. However, there needs to be a completed tax year of accounts, it is not possible to simply state that your month by month income has gone down.

This option will be of little benefit to most self-employed parents, since their most recent completed tax year will not reflect the dire straits that they currently find themselves in. As said, for most self-employed people, the most recent information that HMRC has will be their tax return for the year ending 5 April 2019. The tax return for year ending 5 April 2020 is not due until 31 January 2021, and so most self employed people will not have had their accounts drawn up yet.

It is open to them to have the accounts for year ending 5 April 2020 drawn up now, and send them to the CMS and asked to be assessed based on these accounts, rather than the year ending 5 April 2019 accounts. However, the year ending 5 April 2020 accounts will only contain a couple of weeks of trading that were damaged by coronavirus. The earnings may even be higher than those for the years ending in 2018 or 2019 that have already been filed with HMRC, and that the CMS are using to assess child support. The downturn income will only appear in the year ending 5 April 2021 accounts, but those are not available yet, because that year has not yet finished. There are two solutions available.

If a self-employed person has ceased to carry on their trade or profession, then the CMS should assess them on the basis that their income is nil (and therefore their child maintenance calculation should be changed to nil from the date that they reported the business' trade ceasing). That means that if the non-resident parent has stopped self-employed business entirely (even if it is hoped to resume it in due course), then the CMS should reduce that parent's child support liability to nil. However, this can only happen if notification is sent to the CMS; until it is, liability under the pre-existing maintenance calculation will continue to build up. If the CMS refuse to change the maintenance calculation, then the non-resident parent will have the right to appeal to an independent tribunal (and I can foresee a number of appeals about whether self-employed businesses actually ceased trading or not).

Another route that is available to both self-employed and employed persons is to claim a welfare benefit. If the non-resident parent claims certain welfare benefits, then he or she should be moved onto the 'flat rate' of £7 per week. Unlike changes which are reported by the parents themselves, where a welfare benefit is claimed, then the change in the recipient's child support liability should be backdated to the date on which they began to receive the benefit. Although the CMS system is run by the DWP, the recipient of the benefit will still need to inform them for them to process this change. Benefits that will result in the flat rate include jobseeker's allowance, employment support allowance and state pension credit. A non-resident parent receiving universal credit should be put on the £7 flat rate of child support on if universal credit is paid on the basis that they do not have any earned income.

Universal credit rules have been changed by some emergency legislation, which means that it should be easier for self-employed people to claim universal credit. Child support is another good reason for self-employed people whose business has dried up to investigate this and make a claim if appropriate.

Child support for receiving parents (persons with care)

Receiving the correct amount of child support will be a matter of survival for many families, and, just as with paying parents, there are actions that receiving parents (whom the CMS calls 'persons with care') can and should take to make sure that they receive the child support that they are entitled to.

The first thing is to ensure is that there is actually a child support calculation in place. Many parents have used the CMS's website to calculate the amount of child support that should be paid, and then paid that amount. Some mistakenly think that this is a child support calculation that can then be enforced. It is not, and the CMS will only enforce a calculation where there is an active case with them. The person with care will know if this is their situation, as they will be receiving (at least) annual letters from the CMS as part of the annual review system that I explained above. No letters from the CMS – no case.

To have the CMS calculate child support in a way that is actually enforceable, it is necessary to contact them. There is a one-off application fee of £20 (this was put in place simply to discourage applicants and can be waived in certain circumstances, such as domestic violence). The enforceable child support liability will start only from the date on which the CMS writes to the non-resident parent. It cannot be backdated, so if voluntary child support payments have stopped, the person with care will need to act quickly.

If the person with care has a case open with the CMS and payments have stopped, there is something they can do. All CMS cases are designated as either a 'pay direct' or a 'collect and pay' case. Most cases are 'pay direct'; this is where the non-resident parent pays the person with care directly themselves (eg. by standing order). The CMS do not keep a record of how much is paid in pay direct cases; they just send out the annual letters saying what payments should be made. This means that the CMS will not know if the non-resident parent stops paying, until they are told.

If the non-resident parent has stopped paying, then the person with care needs to contact the CMS and tell them so. They should consider asking the CMS to move them onto 'collect and pay'. This is where the child support will be paid by the non-resident parent via the CMS, then onto the person with care.

The CMS charge collection fees for cases which are designated as 'collect and pay'. They will charge the non-resident parent 20 per cent of the amount collected, and the person with care 4 per cent of the amount collected. The reason why both parents are charged is to encourage parents to resolve matters between themselves, stay on 'pay direct', and most importantly from the government's perspective reduce the work that the CMS have to do.

The CMS will not enforce child support arrears until a case moves onto 'collect and pay' and can be reluctant to enforce arrears that arose before the case switched, as it is difficult for them to be sure whether the maintenance was paid, or not. That means that if a parent with care is on pay direct and their ex-partner stops paying, and it is not possible for them to resolve matters, then they will want to seriously consider asking the CMS to move you onto 'collect and pay', notwithstanding the 4 per cent collection charge.

The CMS have a wide variety of enforcement powers available to them, including deducting money directly from bank accounts, and deductions directly from pay cheques. The only cost to the receiving parent will be the 4 per cent collection charge.

I have explained above how the CMS treat requests by a paying parent for their maintenance calculation to be changed due to a drop in their income. The receiving person with care will be notified by the CMS of any decision to change the amount of maintenance payable. The person with care has 30 days from the date of the CMS's letter (note not the date it arrives) to contact the CMS if they want to dispute the CMS's decision. Like all CMS time limits it is very important to notify the CMS within the time limit, otherwise the right to appeal may be lost. After an internal CMS review (known as 'mandatory reconsideration'), an appeal lies to an independent tribunal, who will look at the whole decision again, and in much more detail than the CMS usually will. As I said above, I can foresee a lot of appeals about whether a non-resident parent really has stopped trading or not.

The CMS system is usually flexible enough to ensure that those parents who try to work the system get found out. However, it relies on the other parent to contest the issue – if the person with care does not take any action, then the CMS will usually assume that they accept whatever the non-resident parent is saying. Often contesting the issue will involve the person with care 'applying for a variation'. This enables the CMS or a tribunal to take a wider look at a case. So, for example, if a non-resident parent was running a business and decided not to pay themselves any income, due to the coronavirus, but continued to pay a salary to their new partner who was employed by the business, then the person with care could apply for a variation on the grounds of 'diversion of income'. This would enable the CMS to take the salary paid to the new partner into account when calculating the amount of maintenance that should be paid.

Another ground of variation can be used where a person is paying the flat rate due to receiving a welfare benefit, but is still receiving an income. That might be seeing some more use due to the number of self-employed people who will now be receiving welfare benefits. Finally, there is the assets ground of variation, which allows the CMS to assign a notional income to the non-resident parent's assets. That might be seeing more use in an environment where a lot more people will be living off their assets. Assets, however, are a topic deserving their own article, which I will be publishing in the near future.

18/9/20

Psychological Assessments: a brief guide to choosing a psychological expert

Sophie Crampton, barrister of **4 Brick Court**, offers guidance on when to instruct a psychologist and how to choose a suitable one for your case.

The mental health of one or more parties is a key issue that often arises in family proceedings, particularly care proceedings. However, even if all parties agree that a mental health expert is necessary, agreeing on the right expert, whether it is a question of psychiatrist vs psychologist or even one type of psychologist versus another, is often a bone of contention. This difficulty seems in part to stem from misunderstandings surrounding the roles and abilities of various experts. Thus, the aim of this article is to bring clarity to this issue and provide, albeit brief, guidance on when a psychologist can be instructed and how to determine which psychologist should be instructed when choosing from a number of unknown experts.

This article was prepared partly through my own research but also with substantial assistance from Dr Ruhina Ladha, a Clinical Psychologist, who was able to provide her guidance based on her own experiences of clinical practice. Additionally, guidance has been prepared jointly by the British Psychological Society and the Family Justice Council entitled ***Psychologists as expert witnesses in the Family Courts in England and Wales: Standards, competencies and expectation*** (referred to as 'the psychologists as expert witnesses guidance' within this article).

Though this article will focus on psychologists, general guidance on giving expert testimony has been prepared by the Royal College of Psychiatrists in 2015, entitled ***Responsibilities of psychiatrists who provide expert opinion to courts and tribunals***. This guidance provides useful information about the responsibilities and ethical considerations for psychiatrists giving expert evidence.

Psychologist vs psychiatrist

For a formal diagnosis of a mental health condition, psychiatrists are usually the most appropriate expert. However, psychologists, specifically Clinical or Educational psychologists, are able to formally diagnose learning disability and specific types of learning difficulties. In children, they can also diagnose Attention Deficit Hyperactivity Disorder (ADHD) and Autism Spectrum Disorder (ASD). In relation to ASD, whoever is undertaking the diagnosis should be ADOS (Autism Diagnostic Observation Schedule) trained, as this allows them to carry out the communication, social interaction and play observation assessment that is required for diagnosis. ADI-R (Autism Diagnostic Inventory-Revised) qualifications are also useful but not as essential.

While an individual psychologist can diagnose ASD, best practice is for this to be diagnosed by a multi-disciplinary team. A multi-disciplinary assessment may still be required before the child can access support through a particular service, though any psychologist's report obtained can be released to the service to help expedite this process. Psychologists can also say whether or not a person's symptoms are consistent with a particular mental health diagnosis, which may be sufficient depending on the facts of a particular case.

For an assessment of a parent's day to day functioning, their level of insight or their ability, from a psychological point of view, to understand and meet their children's emotional needs, a psychologist will be an appropriate expert. Clinical Psychologists in particular will be able to provide a holistic explanation of a person's current difficulties and patterns of behaviour and what factors precipitate and perpetuate them. They can then go on to explore the impact of these difficulties on parenting.

Similarly, when looking at whether a child's behaviour is a result, at least in part, of the parenting they have experienced, this can be done by a psychologist. In some cases, previous CAMHS assessments or similar mental health assessments would be required first, in order to rule out other causes of their behaviour such as neurodevelopmental disorders.

Finally, together and apart assessments can be undertaken by psychologists rather than social workers, particularly in situations where one or more siblings has a neurodevelopmental disorder or behavioural problems.

In terms of treatment, where the appropriate treatment is likely to be medication, then the most appropriate expert is a psychiatrist. However, psychiatrists will, in most cases, have limited experience of psychological treatments and therefore, the most appropriate expert to comment on these is a psychologist. Likely treatment will depend on the individual, as there are a number of mental health conditions that can be treated with either medication or psychological intervention or both. Therefore, this is not something legal professionals could or should try to predict when choosing an expert. However, it is useful to bear in mind when selecting an expert that psychologists would not, as a rule, comment on treatment with psychiatric medication and psychiatrists are often not able to comprehensively comment on psychological treatment.

Choosing an expert psychologist

Unlike the term psychiatrist, the term 'psychologist' is not a protected title and theoretically can be used by anyone regardless of their level of training and qualifications. There are certain titles (e.g. Clinical Psychologist or Forensic Psychologist) that are protected by the Health & Care Professionals Council (HCPC) and can only be used by professionals registered with them. If a psychologist is using one of these titles, this will give you an indication of their qualifications/professional status. Any psychologist using one of these terms will be registered with the HCPC (and often the British Psychological Society (BPS)) and can be checked on their **website**.

It is of note that the term Child Psychologist is not a protected term and can be used by anyone regardless of qualification and experience, so caution should be exercised in instructing anyone with this label.

Sections 3 to 5 of the psychologists as expert witnesses guidance provides further information in relation to the regulation of psychologists, their code of conduct and the competencies expected. Appendix 2 to this guidance provides a detailed description of each type of psychologist (Clinical, Forensic, Educational etc), their typically day to day activities and their career pathways.

Psychology, like law, covers a broad range of roles and disciplines and each expert psychologist will have their own particular areas of expertise which may be highly specialist or niche. Therefore, when considering the CV of an expert psychologist, their current and previous job roles or specialist areas will need careful scrutiny when deciding if they are right for a particular case.

For example, Clinical Psychologists are most often instructed in family proceedings. However, the precise Clinical Psychologist required will depend on whether they are being instructed to assess an adult or a child, what is being assessed (e.g. mental health, effect of chronic illness, attachment, risk etc) and the client's history or background (e.g. whether they have previous offending behaviour or have been a victim of sexual abuse or whether they need an assessor sensitive to their particular culture or who speaks their language). The BPS also provides guidance on working with interpreters, which is available here.

Paragraph 5.8 of the psychologists as expert witnesses guidance sets out what to look for when considering whether an expert is sufficiently competent in the specialised field required, namely;

i. Qualifications and/or degrees in the areas in question;

ii. Number of years of relevant post-doctoral/post-qualification experience;

iii. Academic, professional and scientific publications in relevant areas;

iv. Demonstrations of professional practice, competence, specialist knowledge and expertise with a bearing upon the issues in the case; and

v. Current experience in applying psychology in the area of claimed expertise, e.g. clinical, counselling, educational, forensic, health, occupational, sport and exercise.

A helpful for checklist of things to consider or to clarify with any potential experts is included at Appendix 5 to the psychologists as expert witnesses guidance.

Appendix 4 to the psychologists as expert witnesses guidance provides guidelines as to appropriate timescales for different psychological assessments. Expert psychologists, when providing a cost estimate, should provide a breakdown

of how many hours are needed to undertake each aspect of an assessment. Be cautious of experts providing unusually short time scales, particularly in relation to any interviews/observations.

Testing in expert reports

Expert reports that stray beyond their expertise into the role of a social worker or the judge are open to challenge, as are reports where the conclusions drawn are not supported by a proper analysis. Difficulties arise where conclusions are supported but by psychometric testing. Many tests cannot be released into the public domain as foreknowledge of the test would affect the answers people are likely to provide (paragraph 5.16 of the psychologists as expert witnesses guidance). This can a conflict with an individual's Article 6 rights, particularly in cases where a psychologist's conclusions are heavily reliant on tests that the court and the parties are not familiar with.

In these situations, the only way to ensure fairness is for the court and the other parties to have sight of the tests used. The BPS has produced guidance entitled "Statement on the conduct of psychologists providing expert psychometric evidence to courts and lawyers", available here. This guidance recommends negotiations to minimise the degree to which the psychologist's professional standards are compromised by his / her overriding obligation to the court. They give the example of a scoring sheet being provided to counsel only but not allowing this to leave court or for copies to be made. While tests such as the WAIS for cognitive testing will be uncontroversial, it is worth requesting a blank test or scoring sheet for lesser known tests, particularly those focusing on risk or propensity.

The use of personality tests in psychological reports should be approached with particular caution. Arden LJ (as she then was), in the case of ***Re S (Care: Parenting Skills: Personality Tests)*** **[2004] EWCA Civ 1029**, stressed that "if the judge was (exceptionally) minded to rely on the results of the personality tests, he had first to assess their validity, both generally and for the purpose of this case." She went on to say "personality testing of this kind cannot be used to resolve issues such as parenting skills unless they are validated by other evidence." Personality testing, as an area of psychology, is constantly evolving and care must be taken to assess the validity and reliability of any tests used to assess someone's personality, particularly where significant conclusions have been drawn from this.

Psychological research in professional reports

Psychological theory or research often crops up in professional statements such as those of the Guardian or the social worker. Phrases such as "research shows that …" often appear and are used to justify separating a child from their parents or their siblings. These statements are worryingly vague to what research is being referred to or the reliability or validity of this research. Such statements are meaningless as the body of research in psychology is broad and often, while there may be research supporting a particular assertion, there is also likely to be research supporting the opposite. Professionals wishing to rely on such statements must be able to show precisely what research they were relying on so this can be evaluated by the other parties.

Summary

In summary, the psychologists as expert witnesses guidance provides useful information on the role and responsibilities of different psychologists as well as what to look for when choosing an expert psychologist. Testing, in particular personality testing, in psychological reports should be approached with caution and the test itself requested if necessary. Equally, references to psychological research appearing in professional reports should be scrutinised to ensure that the research referred to is valid and reliable.

23/9/20

CASES

Re ABC (Children: Overlaying Child) [2020] EWFC 57

The Background

D was born at 31 weeks gestation. He was admitted to the Neonatal Ward of the Birmingham Children's Hospital ('BCH') three days later. On 22nd February 2019, he was discharged home to the care of his parents in whose care he remained. On 12th March 2019 a health visitor visited the family home. The parents, B and D were present. The health visitor discussed safe sleeping arrangements with the mother and with the father (this had also been done in earlier times in relation to C). The parents were advised against having D in bed with them even with the use of a "sleepy head". The family home was reported to be cluttered but not unclean. Later on that day other family members came to the parents' home to watch the horse races at Cheltenham Festival. Alcohol was consumed by the family and parents. The father took some cocaine at 2pm. At 3pm father collected A and B from school; mother cooked the evening meal; more alcohol was consumed that evening. That evening the parents, B, C and D all slept in the same bed. In the early hours of 13th March 2019, the father woke up to feed C. He checked on D, he said, and found he was not breathing. He woke the mother. The father carried D downstairs and called 999. He then passed D to the mother who attempted to perform CPR. When paramedics arrived at the family home continued to perform CPR on D. The paramedics arrived with D at BCH at 3:37am on 13th March 2019. He remained in asystolic cardiac arrest. Resuscitation attempts continued until 3:47am. At 3:58am D was declared dead. Later that day the parents were each interviewed by the police; they were each further interviewed at later dates.

There was some LA involvement with the family prior to D's death, but concerns were not such that proceedings were issued. Father was sentenced on 25th June 2019 12 months imprisonment for an offence of conspiracy to commit fraud by false misrepresentation. He was released on home detention curfew on 25th September and was subject to licence conditions until 24th June 2020. Thereafter, post sentence supervision commenced and is due to expire on 24 December 2020.

In the proceedings the court had ordered the parents to undergo repeated drug testing. The mother complied. The father had inconclusive or no test results because he had insufficient lengths of facial or body hair (father maintained his regular practice of shaving his head and body hair) which would be susceptible to any meaningful testing. Keehan J gave this careful consideration, including in relation to the drawing of adverse inferences.

Legal Framework

In his judgment, Keehan J outlines the relevant law in full, including:

- The burden of proof lies with the local authority.
- In family proceedings there is only one standard of proof, namely the balance of probabilities.
- *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2008] 2 FLR 141, in which Baroness Hale expressly disapproved the formula subsequently adopted by courts to the effect that 'the more serious the allegation, the more cogent the evidence needed to be to prove it'.
- The inherent probability of an event remains a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred: common sense, not law, requires that in deciding this question regard should be had, to whatever extent appropriate, to inherent probabilities – per Lord Hoffman in *Re B* at paragraph 15.
- The burden of disproving a reasonable explanation put forward by the parents falls on the local authority (see paragraph 10 *Re S (Children)* [2014] EWCA Civ 1447).
- The inability of a parent or carer to explain an event cannot be relied upon to find an event proved, see *Re M (A Child)* [2012] EWCA Civ 1580.
- Findings of fact in these cases must be based on evidence.
- In *Re BR*, Peter Jackson J, as he then was, sets out a list of risk factors and protective factors that might assist the court in assessing the evidence it hears in cases of alleged inflicted injury.
- The judge must decide if the facts in issue have happened or not. There is no room for finding that it might have happened. The law operates a binary system in which the only values are 0 and 1, per Lord Hoffman in Re B at paragraph 2.

- When carrying out the assessment of evidence regard must be had to the observations of Butler-Sloss P, as she then was, in *Re T* [2004] EWCA (Civ) 558.

- When considering the 'wide canvas' of evidence part of the speech of Lord Nicholls i*n Re H and R (Child Sexual Abuse: Standard of Proof)* [1996] 1 FLR 80 remains relevant.

- The evidence of the parents and of any other carers is of the utmost importance. It is essential that the court forms a clear assessment of their credibility and reliability. They must have the fullest opportunity to take part in the hearing and the court is likely to place considerable weight on the evidence and the impression it forms of them (see *Re W and another (Non-accidental injury)* [2003] FCR 346.

- The process by which the facts are judicially determined is further complicated for the potent reason Leggatt J, as he then was, set out in *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor* [2013] EWHC 3560 (Comm) (15 November 2013), [paragraphs 15-21] in relation to testimony based on memory.

- The observations as to demeanour in *R (on the application of SS) (Sri Lanka) v The Secretary of State for the Home Department* [2018] EWCA Civ 1391 made by Leggatt J.

- The findings made by the judge must be based on all the available material, not just the scientific or medical evidence; and all that evidence must be considered in the wider social and emotional context: *A County Council v X, Y and Z (by their Guardian)* [2005] 2 FLR 129.

- In *A Local Authority v K, D and L* [2005] EWHC 144 (Fam), [2005] 1 FLR 851 Charles J referred to the important distinction between the role of the Judge and the role of the expert.

- In assessing the expert evidence, the court must bear in mind that in cases involving a multi-disciplinary analysis of the medical information conducted by a group of specialists, each bring their own expertise to bear on the problem, and the court must be careful to ensure that each expert keeps within the bounds of their own expertise and defers, where appropriate, to the expertise of others.

- The court is not precluded from making a finding that the cause of harm is unknown: *Re R (Care Proceedings: Causation)* [2011] EWHC 1715 (Fam).

- The court must resist the temptation identified by the Court of Appeal in *R v Henderson and Others* [2010] EWCA Crim 1219 to believe that it is always possible to identify the cause of injury to the child.

- As to the identification of perpetrators is concerned the standard of proof with respect to any such identification is the balance of probabilities. Where a perpetrator cannot be identified, the Court should seek to identify the pool of possible perpetrators on the basis of the "real possibility" test. *In B (Children: Uncertain Perpetrator)* [2019] EWCA Civ 575, Peter Jackson LJ drew the threads together.

- Where there are multiple injuries sustained at different times the court must consider separately the question of who is the perpetrator of each injury. If the court is able to identify the perpetrator of one injury, the question would then arise as to the extent to which the court is entitled to rely upon that finding in order to identify the perpetrator of other injuries. That issue was considered by the Court of Appeal in *Re M (A Child)* [2010] EWCA Civ 1467.

- The evidential basis for making a finding of a failure to protect was considered by the Court of Appeal in the case of *L-W Children* [2019] EWCA Civ 159.

- The rule of *R v Lucas* [1981] QB 720 was adopted in the family courts in A County Council v K, D and L. The court has considered the case of *Re: H-C (Children)* [2016] EWCA Civ 136, in particular paragraphs 98 to 100 of the decision of Lord Justice McFarlane, as he then was.

Expert Medical Evidence

Four medical experts were instructed in the proceedings: Dr Lockyer, a consultant forensic pathologist; Professor Al-Sarraj, a consultant neuropathologist; Professor Mangham, a consultant histopathologist; and, Dr Zeitlin, a consultant paediatrician. Hayden J also had the benefit of reports from Dr Marton, a consultant perinatal pathologist who performed the post-mortem examination with Dr Lockyer, and Professor Williams, an expert in the interpretation of micro CT scans.

The medical evidence was complex. It is set out in some detail at paragprahs 59-94 of the judgment. The evidence addressed the likely cause of D's death and the rib fractures.

Lay Evidence

Keehan J heard evidence from the maternal and paternal grandmother, mother, father, and mother's sister.

The mother and the father accepted the expert evidence that D had sustained 23 rib fractures, during at least two events, and that there was no medical or organic cause of the same. The parents could not give any explanation for the cause of any of them.

It was clear from the parents' evidence that their relationship was characterised by: (i) domestic abuse, both physical and verbal; (ii) the father's persistent use of cocaine of which the mother strongly disapproved; (iii) father's persistent gambling habit; (iv) both of which led to him demanding/borrowing considerable sums of money from the mother – some £25,000 over the course of their relationship; and, (v) according to the mother, and accepted by the father, his constant lies and her fears of his unfaithfulness which resulted in her not trusting him.

The mother accepted that she had been repeatedly told by health professionals of the risks and dangers of co-sleeping with babies and young children and of the clear advice not to do so. However, the mother told Keehan J that co-sleeping with her children had 'worked' for her and for the father. They had regularly pursued the practice with all of their children. The father accepted that he had been present with the mother when the health visitor visited them earlier this day and gave the clearest possible advice against co-sleeping with D.

In relation to the father, Keehan J concluded that he was a most unsatisfactory and unreliable witness. His Lordship was satisfied the father deliberately continued to cut his hair to prevent effective drug testing being performed.

Conclusions

Keehan J had no hesitation in accepting the expert medical opinion, which was unanimous in all material respects. Keehan J was satisfied that D died in the very late evening of 12th March or the very early hours of 13th March from asphyxia which was caused either by (i) one of his parents over laying him so as to occlude his airway; or (ii) D being in a micro climate in his parents' bed which was low in oxygen and high in carbon dioxide. As to the rib fractures, on the basis of the expert evidence, Keehan J found that there are just two possibilities either (i) the rib fractures were sustained in two or more episodes of overlaying by one or other of his parents; or, (ii) they were inflicted in two or more events by one or other of his parents compressing his chest sufficiently forcibly as to cause fracture of D's ribs. Keehan J posed the question: '*given that I have found that the parents have not given me a truthful account of the events in their home over the relevant period, should or must I leave open the possibility that the rib fractures resulting from inflicted injury?*' Several factors were considered (listed at paragraph 67) in seeking to answer this question. Considering revised Lucas, Keehan J concluded that the parents have not told the truth, not for any sinister reason but because of the guilt, shame and remorse they both now feel as a result of their roles in the death of D.

In all of these circumstances, whilst it is a possibility that one or other of them inflicted the rib fractures which D sustained on two or more occasions, Keehan J was satisfied that it is, on the balance of probabilities, far more likely that the rib fractures were sustained in, at least, two episodes of overlaying D when he was co-sleeping with his parents.

Keehan J did not find it necessary or proportionate to determine every fact pleaded by the local authority. His Lordships findings are set out in full at paragprahs 139-140.

Welfare

After circulation of a draft judgment the mother and the father filed and served witness statements in which they accepted all of the findings of fact made and apologised, in terms, for not having been entirely frank with the court in their written and oral evidence about the events of 8th to 13th March 2019. Most importantly, they accepted that co-sleeping with D had occurred on nights in addition to the admitted events of 11th and 12th March. The LA proposed a rehabilitation plan for the children, which was supported by all parties.

Keehan J concludes his judgment by stating:

> 'The death of D was entirely preventable and resulted from the parents' very ill-advised practice of co-sleeping. I accept that the parents are stricken with guilt and regret that their actions resulted in the death of their baby. I do not doubt they will each endure this guilt and regret for the rest of their lives.'

Further:

> 'I hope the publication of these judgments will highlight and underscore the dangers inherent in co-sleeping with babies and young children.'

Summary by **Emily Ward**, Barrister and Deputy Head of Family at **Broadway House Chambers**

Moutreuil v Andreewitch & Anor [2020] EWHC 2068 (Fam)

Cobb J gave judgement in a dispute between a former cohabiting couple concerning the ownership of the shares in a company which owned the family home. The Claimant had also made a claim under Schedule 1 Children Act 1989 in the alternative.

It was agreed that the entire shareholding in the company was transferred to the Claimant by the Defendant's business associates on 31 July 2000 at the request of the Defendant. The Claimant's case was that the Defendant intended her to be the owner of the company and therefore the home, rather than they be at risk from his creditors. The Defendant's case was that the arrangement was always that the Claimant was a bare trustee, with the Claimant being the true beneficial owner.

In February 2018 the Claimant signed a document which purported to declare that she was a nominee. In February 2019 the father purported to transfer the shares to the parties eldest son (aged 14).

There had been separate proceedings in relation to the welfare of the parties children.

It was agreed and Cobb J approved the concession that the burden was on the Defendant to show that the Claimant was not the true beneficial owner, that equity did not follow the law [10]

The Claimant argued that the defendant should not permit him to profit from his own deception (i.e. in transferring the shares to the Claimant so that they appear to third parties to not belong to him, while asserting privately that he owns them beneficially). *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467 *Knight v Knight* [2019] EWHC 915 (Ch). Cobb accepted the force of this point but did not find it necessary to rely on it in reaching his decision.[11]

The judge noted that the transfer of shares to the son (described as "preposterous") did not comply with the formalities required under s770-s771 Companies Act 2006 and this gave rise to criminal liability on the company and its directors [88-89]

Cobb J reviewed the case law and concluded that the principles in Stack v Dowden [2007] UKHL 15 as to declarations of trust and the search for intention applied to the ownership of the company shares in the same way as it applied to real property [111-116].

On the basis of evidence of the witness (preferring the Claimant's evidence) and Cobb J made findings of fact that the transfer in 2000 had vested the legal and beneficial interest in the shares in the Claimant and that was what the Defendant had intended at that time [144] and that the subsequent dealings were of no effect. He therefore did not need to consider arguments the secondary arguments but concluded that he would have found that the Claimant achieved the same outcome if she relied on proprietary estoppel [145]. Furthermore, there was no possibility of a constructive trust as there was no discussion at any stage that the beneficial interest was held in equal shares [146].

Summary by **Nicholas O'Brien**, barrister **Coram Chambers**

K (A Child) (Stay of Return Order: Asylum Application) (Contact to a Parent in Self-Isolation) [2020] EWHC 2394 (Fam)

Background and Applications

On 16th July Cobb J granted the mother's application under the 1980 Hague Convention for the return to Russia of K, a 9 year old boy: see ***NT v LT* [2020] EWHC 1903 (Fam)**. The father's application for permission to appeal was refused on 4th August, his application for reconsideration being refused on the 5th August and the stay in place pending determination of the appeal thus ended. On the same day the father issued an application for a stay of the return order on the basis that an application for asylum had been made by K through solicitors engaged by the father. A stay was granted by Moor J until the hearing before Mr Howe QC on 27th August, at which the court had no information about the basis for the child's asylum application. The following five issues were considered:

A: Does the commencement of an asylum application by or on behalf of a child prohibit the enforcement of a return order under the Hague Convention 1980 (paragraphs 9-24)

In accordance with the principle of non-refoulement, as expressed in article 33(1) of the Geneva Convention 1951, the state is not permitted to return an asylum seeker to the country in which he alleges persecution until the application has been determined. The determination of refugee status has been entrusted by Parliament to the Home Secretary; both Mostyn J in *E v E (Secretary of State for the Home Department intervening)* [2017] EWHC 2165, [2018] Fam 24 and Hayden J in *F v M (Joint Council for the Welfare of Immigrants intervening)* [2017] EWHC 949, [2018] Fam 1 had concluded that the High Court cannot exercise its powers to intervene on the merits in a matter entrusted in this way to another public authority.

Mr Howe QC rejected the argument that the return of a child under the Hague Convention is not a refoulement but a determination of rights between parents, concluding (§22) that

> "the 'rights' of a parent to decide where their children reside do not override the right of the child to be protected from persecution under the Geneva Convention."

Accordingly the commencement of the child's asylum application prohibits the enforcement of the return order.

B: Is the prohibition removed if the court concludes that the asylum application is a sham? (paragraphs 25-32)

The judge was not in a position to determine whether the asylum application is legitimate, albeit it "*has all the hallmarks of a father seeking to ambush the mother with a last-hope application*". (§29) Even if he could make such a finding, it is for the Home Secretary to decide on the legitimacy of the asylum claim; all the court can do if it has doubts is to communicate its judgment to the Secretary of State. (§30)

The return order could not be enforced even if the court concluded that the asylum application was just a vehicle to avoid the return order; the judge accepted that this allowed "*the issue of a dishonest and illegitimate asylum claim 'drives a coach and horses' through the intentions of the Hague Convention*." (§31)

Accordingly a stay was granted until 15 days after the promulgation of a decision by the tribunal deciding the asylum application.

C: Can the court require the father to file a statement detailing the grounds of K's asylum application, and if so should it do so? (Paragraphs 33-57)

The issue of confidentiality in asylum claims was addressed by Hayden J in *F v M* (supra) and by MacDonald J in *R v G and the Secretary of State for the Home Department (Intervenor)* [2019] EWHC 3147 (Fam): the court had to conduct a careful balancing exercise, taking account of competing rights. There is no presumption that disclosure of information provided in such claims would be ordered only in exceptional circumstances.

Mr Howe QC noted that in the current case the application is not for disclosure of documents in the asylum claim but for a statement disclosing the basis for that claim. The court did not know whether or not it is alleged that the mother is connected with the persecution which K claims to be at risk of if returned to Russia and therefore did not have the necessary information to decide whether directing such a statement would offend against art 22 of the Procedures Directive [Council Directive 2005/85/EC] which prohibits disclosure to "*the alleged actor(s) of persecution*".

He considered that the information requested by the mother was potentially relevant to the issue of contact. Submissions from SSHD were necessary; he invited the SSHD to intervene, listing a hearing to hear further argument on this point thereafter.

D Should any contact order require contact while mother is required to self-isolate under the Health Protection (Coronavirus, International Travel) (England) Regulations 2020? (Paragraphs 58-71)

The regulations do not require a person to quarantine from a member of their own household; under shared care arrangements a child can be part of the households of both parents. K lives with his father and has not had contact with his mother for some time so cannot be considered a member of her household. No other exemption applied, except just possibly that which allows a person to break his/her quarantine "to fulfil a legal obligation". Whether complying with a contact order could be considered as an obligation on the mother would depend on its specific wording as generally the obligation is that of the parent making the child available.

The exemption under the national lockdown guidance which permitted child contact visits is not repeated in the quarantine regulations. The court noted that permitting contact while the mother was quarantined would put the child at risk of infection, a risk which should be considered as part of a welfare checklist evaluation. The court would be extremely reluctant to make an order that exposes a child to risk of contracting Covid-19 in these circumstances.

The court's provisional view was that usually visits should not be ordered to take place during the quarantine period although no final decision was made as the issue of contact would be adjourned: see below.

E: What should be the arrangements for K to spend time with his mother while the stay is in place? (paragraphs 72-75)

K is alienated from his mother and indirect contact has not worked. While robust action is often needed to force the reintroduction of a direct relationship, this will require expert from a skilled, experienced practitioner; the mother is deemed to have applied for contact and welfare directions pursuant to s5 Child Custody and Abduction Act 1985 and case management is adjourned to allow an expert to be identified.

Summary by **Gill Honeyman**, barrister **Coram Chambers**

F v G [2020] EWHC 2396 (Fam)

There had been previous extensive custody proceedings in the USA which had only formally ended less than two months before the mother's application for a child arrangements order in the UK. There were no findings made of domestic abuse, although some mention of 'harmful conflict' a psychological report prepared in that case. A shared custody arrangement was ordered in that matter.

The mother's application was prompted by an incident in a hospital where the mother took the child for a pre-admission appointment and the father allegedly acted in an overbearing and abusive manner and slammed the door into the mother whilst she was carrying the youngest child.

At the first hearing the mother withdrew her application for a fact-finding, stating that she wasn't saying that the children couldn't see their father and was happy for them to go on holiday with him.

There was then a CAFCASS report whereby the CAFCASS officer spoke to both children but did not see them with either parent. The oldest child reported he wanted to see his dad more and was happy to go visit his father. The oldest child had previously reported to the GP that his father was mean and shouted at him. The youngest child said that his father made good food but that he shouted at them, telling them off, for example when he and his brother were fighting. He also said he felt bad when his father said bad things about his mum. When doing 'feeling safe' work he said he felt safe with his mother and not at his dad's house.

The CAFCASS officer stated that he found mother's account plausible, and that the descriptions of father's presentation were similar to that he himself experienced. He recommended a psychiatric report, and concluded that the children and their mother needed a break from direct arrangements whilst the father took responsibility for addressing his behaviour. He said he had considered recommending that direct contact be reduced but took the view that the father's response to that would intensify the difficulties for the children. The psychiatric report concluded that he did not suffer from any mental illness or personality disorder, but did not go further. The CAFCASS officer then produced an addendum report which concluded the following: 'I acknowledge that domestic abuse allegations are disputed, but in the event that clarity is provided either by admissions being made or via fact finding hearing, risks to [the children] would be reduced by their father's attendance on a Domestic Abuse Perpetrator's programme'. Despite this, a fact-finding was not further considered at a DRA, probably because of the focus on the need for a psychiatric assessment.

At the final hearing, the mother adopted the CAFCASS officer's recommendation of indirect contact and significant limitations on the father's parental responsibility. The mother made an application for the social worker from the hospital to give evidence this was granted. The father was not represented after Day 1 of the hearing. The trial judge made findings of fact against the father regarding domestic violence and accepted the CAFCASS officer's recommendations.

Mrs Justice Judd DBE allowed the appeal for a number of reasons:

> - The father was disadvantaged by a CAFCASS recommendation made on the basis of findings not formally sought. The father was able to challenge the mother, CAFCASS officer, and social worker, but the court also relied on brief letters from the GP who was not called to give evidence and to whom no explanatory questions were asked.
>
> - The finding that the children were suffering harm was very much dependent on findings regarding the father's behaviour.
>
> - The CAFCASS officer had not observed the children with the father, despite making such a significant recommendation. The more detailed assessment of father's relationship with the children was contained in the psychological report from the American proceedings – although of course the court was not bound by this, the magnitude of the decision to end all direct contact and the very different conclusion reached meant that the evidence underpinning it have should been given more weight.
>
> - The trial judge did not weigh in the balance the harm that could be caused to the children by the immediate loss of their relationship with their father, which had to be set against the risk of father's behaviour to the mother continuing. No consideration was given to some other arrangement for direct contact, rather than it ceasing altogether.

The matter was remitted for a fresh FHDRA. Mrs Justice Judd DBE declined to reinstate the previous order made in the USA due to the difficulty of issues to be determined and the need to properly examine them before the court.

Summary by **Rebecca Davies**, barrister **Field Court Chambers**

B (A Child) (Abduction: Habitual Residence) [2020] EWC Civ 1187

The parties had met in Australia and lived there throughout their marriage. B (now 2 years old) was born in Australia to the parties. M was born in the UK but now an Australian citizen. F was born in France.

B lived in Australia with her parents until December 2019. At this time, the parties moved to live in France, in the area where F was originally from. The parties found a rented property and F had a job with a 6 month probationary period. M's job in Australia had been left open until January 2021.

On 20 December 2019, the parties and B travelled to the UK to spend Christmas with M's family. M and B were due to stay in the UK longer than F due to his work commitments in France. After F had returned alone from the UK to France, M informed F in January 2020 that she believed the relationship between them was at an end, and she did not intend to return to France with B.

F sought a return order pursuant to the 1980 Convention for B to be returned to France.

Decision at First Instance

The matter came before Judd J at first instance. No oral evidence was heard before an ex tempore judgment was given.

F argued that B was habitually resident in France. The parties had moved all their possessions, including their pet dog, to France. They had given up their home in Australia, B was registered for day care in France.

M argued that B was still habitually resident in Australia, and the door to return to Australia had been left open. She argued that she had not settled in France, B had not yet started nursery, and M's job in Australia remained open.

During the hearing, F accepted (although it was unclear how the acceptance came about), that his application was dependent upon Judd J finding that B was habitually residence in France on the relevant date.

Judd J found that B was not habitually resident in France on the relevant date. She held that B had not achieved a sufficient degree of integration in a social and family life in France by 03 January as was required by the authorities [24]. Judd J therefore dismissed F's application.

The Appeal

F appealed. The International Centre for Family Law, Policy and Practice ('ICFLPP') were joined as intervenors due to the importance of the issues raised on appeal.

Arguments raised on behalf of F were:

(1)(a).
The judge was wrong not to find that there had been a wrongful retention within the scope of the 1980 Convention on the basis of her determination that B was still habitually resident in Australia [26]. This was because the 1980 Convention was engaged by the child, at the date of the wrongful removal or retention, being habitually resident in a convention state [27].

M accepted that, in respect of this issue, the 1980 Convention does apply if the child is habitually resident on the relevant date in a contracting state other than the requested state [40].

(1)(b).
F argued that under the 1980 Convention, the court has the power to order a child's return to a state *other than* that of his or her habitual residence at the date of the wrongful removal or retention [28]. F argued that:

- The Explanatory Report on the 1980 Convention by Professor Perez-Vera, discussed the Convention having been framed deliberately so as to leave such an option open to the courts [29];

- The words in the 1980 Convention Preamble, which state that it is designed to '*ensure the prompt return [of children] to the state of their habitual residence*' should not be given undue weight [30];

- The 1980 Convention should be construed widely in order to ensure maximum protection for children who have been abducted, this is consistent with the objectives of the Convention and also prevents the creation of a lacuna which would not be in the interests of children who had been removed or retained [31];

- Article 12 should be interpreted, in addition to enabling a return of a child to the habitual residence state, but also to return a child to the state from which it has been removed, and/or to return to a child's primary carer in another state [32].

M argued primarily that there was no power under the 1980 Convention to return a child to a state other than their state of habitual residence. i.e. the word return means return, and not relocation to a third state [41]. M argued the Preamble

was more significant than the Explanatory Report, which is now 40 years old. M relied on *Hanbury-Brown v. Hanbury-Brown* [1996] Fam CA 23 and Lady Hale's observations in *Re J* [2016] AC 1291 (a 1996 Convention case) where she warned *'it would be unfortunate if words in the Explanatory report were treated as if they were words in the convention itself'* [43].

M further warned that the question whether the court could order return to a third state should be considered within the broader jurisdictional framework of the 1996 Convention and BIIa. Under these provisions, the courts with substantive jurisdiction are those in which a child is habitually resident. M argued that sending a child to another state could mean a state which does not have substantive jurisdiction to make welfare decisions [45].

In the alternative to the court having no such power, M argued that if there was such a power to return to a third state, one possibility may be that this power of the court was limited to achieve a return between child and primary carer [42].

The ICFLPP submitted that Article 12 should be interpreted as permitting a return order to a third state [52]. It was argued that this approach would be consistent with a purposive construction of the 1980 Convention because it would promote the protection of children from the harmful effects of international child abduction [53]. *'This approach would ensure that the remedy of summary return would be available to a greater number of children. It would also promote the operation of the 1980 Convention as a deterrent to parental abduction'* [53].

(2)

F argued that Judd J's decision that B remained habitually resident in Australia was clearly wrong, and B had become habitually resident in France [34]. F argued that the focus of the court at first instance was too centred upon whether life in France replicated that B had previously had in Australia, and placed undue weight on the doubts and feelings M had in relation to the move [37-38].

M opposed F's submissions. She argued Judd J had reached a decision which was open to her on habitual residence, and there was therefore no basis upon which the appellate court could interfere [48]. When asked by Phillips LJ, it was submitted on behalf of M that the question was not what continuing connections B had with Australia, but whether the deep roots she had had in Australia had been pulled up, which M said they had not [51].

CoA Determination

Moylan LJ sets out the relevant law in detail in paragraphs [56]-[99].

(1)(a)

The 1980 Convention applies whenever the child is habitually resident in a contracting state, other than the requested state at the date of the alleged wrongful removal or retention [101].

The 1980 Convention would therefore apply to M's retention in this case, even with the first instance court's finding that B was habitually resident in Australia, and not in France [102].

(1)(b)

Moylan LJ concluded that there is a power under the 1980 Convention to order that a child be returned to a third state [104]:

> - The proper construction of 1980 Convention is a purposive one (see *Re F (A Minor) (Abduction: Custody Rights Abroad*) [1995] Fam 224, Butler-Sloss LJ said *'it is the duty of the court to construe the convention in a purposive way and to make the convention work')* [105];
>
> - The purposes of Article 12 include: protecting children from the harmful impact of abduction; providing a prompt remedy; and discouraging abduction generally [106];
>
> - The Preamble is setting out the general objective of the Convention in the interests of children generally rather than seeking to define the scope of orders which can be made in respect of specific children under its provisions [107];
>
> - The Explanatory Report could not be clearer that this issue was expressly considered at the time of drafting the 1980 Convention and *'a proposal to the effect that the return of the child should always be to the State of its habitual residence was not accepted'* [108];
>
> - Although obiter, Lord Hughes would not have referred to the Explanatory Report and O v. O (Child Abduction: Return to Third Country) [2014] Fam 87 in *Re C and another (Children) (International Centre for Family Law, Policy and Practice Intervening)* [2019] AC 1 in the way he did if he did not agree with their effect [109];
>
> - Confining Article 12 to only permit return to the state of habitual residence at the relevant date would not promote the 1980 Convention objections [110].
>
> - *'Clearly, any such power must be used with consideration care so that it does not procure an effective relocation without any concomitant welfare enquiry. It is to be used only when it is, in effect, procuring the children's return. The most obvious example when it might be used is when the child is being returned to his or her primary carer.*

> *Another example might be when, as in this case on the judge's determination of habitual residence, the family has moved to a new state but has not yet become habitually resident there*' [117].

Moylan LJ does not go on to consider whether, on the facts of this case, an order to return to a state other than the one of habitual residence should be made [121], because under issue (2), he goes on to find that B was in fact habitually resident in France, not Australia, at the time of M's retention of B in January 2020 [122-130].

Moylan LJ that matter would now have to be listed for a further hearing in the Family Division, to determine the exceptions relied on by M [131].

Summary by **Bethany Scarsbrook**, barrister **St Johns Chambers**

In the matter of child J [2020] EWHC 2395 (Fam)

The LA applied under the inherent jurisdiction for leave to apply for an order depriving a 16 year old boy of his liberty because it was not able to apply under s 25 of the Children Act 1989 – the relevant criteria not being satisfied. The boy was beyond parental control and due to his involvement with criminal activity and gang violence was at high risk of significant harm or even death. The placement identified and proposed was an unregistered children's home

The application was granted. The court considered the relevant statute and case law, as well as the Guidance from the President of the Family Division Sir Andrew McFarlane in relation to placements under the inherent jurisdiction when reaching its decision

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

OG v AG [2020] EWFC 52

This case concerned cross-applications by a husband (OG) and a wife (AG) for financial remedies following divorce. This was a long marriage (25 years) producing two children, aged 25 and 10. During the marriage, the parties set up a successful ducting business, 'X'. The husband worked predominantly on the production / selling and R&D side of the business and the wife predominantly on the finance / administration side. At the time of the final hearing X was valued at c. £13.8m. The trading element was valued at just under £4m. The parties had also amassed a domestic and international property portfolio in both their sole and joint names as well as in the name of X which produced rental income.

In November 2018, the husband resigned as a director of X. He stopped working for X in 2019. In February 2019, another ducting company 'AB' was incorporated. Its shareholders were the husband's father and two of his two close friends. AB was loaned significant funds by a company 'TT' incorporated in Dubai which at the same time the husband had loaned equivalent amounts to, those funds coming from sales of matrimonial property in Dubai. The husband was found to be the real owner of AB [**45**] – [**51**]. The funds loaned to TT by the husband as a result of sales of matrimonial property were added back (c. £900,000).

Covid-19 / Brexit discount

A novel issue for the court was how to deal with the asserted impact of Covid-19 and a no-deal Brexit on X. In respect of Covid-19, X was providing ducting to a range of companies impacted by the global crisis. In respect of Brexit, a significant part of the the business of X is with customers sited in the EU and is presently transacted on a tariff-free basis. As a result, if no trade agreement is reached between the UK and the EU by 31 December 2020 then there will undoubtedly be adverse consequences for X.

The wife argued that a 10% discount should be applied to both the trading and surplus assets value of X because of the economic downturn caused by the Covid-19 pandemic and the likely future disruption to be experienced on account of Brexit. The SJE who valued X agreed that a discount should be applied on due to these risks but declined to provide a figure. Mr Justice Mostyn applied a 10% discount to the value of X on the basis of Covid-19 and Brexit but only in respect of the trading value and not the value of the surplus assets.

Competitor business discount

The wife argued that the value of X (including surplus assets) be discounted by 40% because the husband had set up competitor business AB. The SJE's was that where a seller of a business refused to enter into a non-compete clause and was on the production / selling side of the business, he would likely advise them to seek a 20-40% discount in the asking price. Mr Justice Mostyn applied a 30% discount to the value due to the husband having set up AB. This discount was again only to the trading aspect of the value and not to the surplus assets.

Conduct

The wife argued that the total matrimonial assets, after the discounts relating to Covid / Brexit and AB were applied to X, should be divided two-thirds to her and one-third to the husband. The wife argued that such a departure from equality was justified on the basis of the husband's conduct: his extensive non-disclosure; setting up competitor AB; and fraudulently altering emails.

Mr Justice Mostyn considered the four scenarios in which conduct can rear its head within financial remedy proceedings:

> i. Personal misconduct during the marriage or after which will only be taken into account in rare circumstances (***Miller v Miller*** **[2006] UKHL 24**, [2006] 2 AC 618) and where there is a financial impact of such conduct;
>
> ii. Add-back jurisprudence where in the rare case dissipation is clear and obvious;
>
> iii. Litigation misconduct which may result in a litigant being severely penalised in costs but will only very rarely affect the substantive disposition;
>
> iv. Failure to provide full and frank disclosure where the court is able to draw inferences with respect to the process of computation rather than distribution;

Mostyn J considered that the departure from equality sought by the wife was disproportionate and untenable. The 30% discount applied to the trading element of X as a result of AB would fall solely on the husband due to his conduct (£1,183,500). The husband would also be sanctioned by way of a costs order. However, Mostyn J declined to order the departure from equality sought by the wife to reflect the court's indignation at the husband's conduct during the proceedings. This would amount to a discount based on morality where the court should only apply sanction for conduct where it is financially measurable.

Costs

The parties ran up around £1 million in costs. This, Mr Justice Mostyn found, was mostly referable to the husband's litigation conduct. However, the wife had also failed to negotiate openly and in a reasonable way after the financial picture had become largely clear post PTR (ref: para 4.4 of FPR PD28A). Mr Justice Mostyn said in respect of the wife's failure:

> "It is important that I enunciate this principle loud and clear: if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs. This applies whether the case is big or small, or whether it is being decided by reference to needs or sharing."

Mostyn J divided the wife's costs into two periods: (i) the shortly after the PTR; (ii) the costs between PTR and final hearing. The wife's costs in period (i) were c. £412,000. The judge had formed the view during the parties' evidence that both were difficult and confrontational characters. As a result, he did not accept that but for the husband's litigation conduct that this case would have settled. He considered in any event it would have gone to final hearing. He reduced the wife's costs in period (i) as follows:

> a. Reduction of £100,000 representing the estimated "normal" costs that would accrue to such a case and to which the normal rule at FPR r.28.3(5) would apply;
>
> b. Reduction of £40,000 as estimated costs in a s. 37 MCA application made by the wife with respect to the Dubai assets during the proceedings which was not ultimately pursued.
>
> c. Reduction of £10,000 to represent a sanction for the wife's own non-disclosure.

The husband was ordered to pay 90% of the wife's costs (reduced per a – c above) in period (i) on an indemnity basis (£235,626).

In respect of period (ii), Mr Justice Mostyn agreed with the wife that rule at FPR r.28.3(5) should not apply and that the husband's misconduct in the first period had contaminated the second period and also that the husband had continued to be dishonest about the ownership of AB to avoid the competitor discount being applied. For this period, the husband was ordered to pay 90% of half of the wife's costs on an indemnity basis. However, from this sum Mostyn J went on to discount £50,000 in light of the wife's unreasonable and untenable open negotiation stance in this second period (PD 28A paragraph 4.4 applied).

Conclusion

Mr Justice Mostyn considered that all other things apart, this was a paradigm case for the equal sharing principle to apply to. The marriage was long, and all the property was matrimonial. With reference to the contributions that the parties had each played within the family business, he considered these to be incommensurable: Miller v Miller at [150]; Bendix Autolite Corp v Midwesco Enterprises Inc (1988) 486 US 888 at 897.

Mostyn J divided the non-business non-pension assets 50/50. The judge deducted from the value attributable to the husband's 50% share in X (£5,353,821) the 30% discount in the trading value of X due to AB a costs sanction of £278,020 (45% of the wife's costs). The husband received in total £7,316,094 (including pension assets) or 44.7% of the total assets.

The departure from equality was £869,741. This sum, Mr Justice Mostyn explained, was the price that the husband had to pay for his conduct in setting up a competitive business and conducting the litigation so abysmally. He stated that he hoped it will serve as a lesson to any future litigant who is tempted to behave in the same way.

Summary by **Rachel Cooper**, barrister **Coram Chambers**

J v A South Wales Local Authority [2020] EWHC 2362

Brief Facts

J, born on 28 August 2000, commenced proceedings by his litigation friend against the local authority alleging breach of duty for failure of the local authority to remove him from the care of his mother and his mother's foster parents in the first months of his life and place him for adoption.

The local authority's defence admitted breach of duty in not ensuring he was removed from the care of his birth mother in the first month of life in place for adoption. In it's defence the local authority, having made those admissions, found it not necessary nor proportionate to plead specifically to the other matters set out in a further 46 paragraphs of J's particulars of claim. It did however admit paragraphs 52 to 54 of the particulars of claim confirming that had it not acted in breach of duty it should have allocated social worker prior to J's birth, and that social workers should have undertaken a full assessment of the mother's needs and made plans based on that assessment. The local authority accepted that had it done so, it is likely that J would've been removed from his mother and the foster parents of the mother and placed for adoption.

In its defence, at paragraph 55 to 57, the local authority made plain that it has a duty to act in J's best interests given that he is in their care pursuant to a care order. The local authority did not believe it was in J's best interests to have an examination of his claim at that stage, as it may have an adverse effect upon his welfare. The importance of this paragraph is because of the conflict of interest that it clearly articulates: on the one hand the local authority was the defendant to a claim brought by J and therefore entitled to resist the claim, and on the other hand it was the entity having care of J under a care order with an obligation to act in his best interests.

The proceedings were stayed by successive orders of the court from March 2013 to J's 18th birthday. The appeal court accepted that these delays were imposed for J's benefit and for the reasons articulated in the local authority's defence, noting that there can have been no other proper reason for putting off the final resolution of the dispute.

The appeal court addressed the decision of CN and GC v Poole BC ('CN'), which went to the Supreme Court and was made at about the time J turned 18 when the local authority ceased to be his carer. The effect of that decision is that when the Court of Appeal in 2017 handed down its decision it held that the local authority did not owe a common law duty of care to the child when exercising statutory child protection powers and duties.

First instance

At a hearing on 4 October 2019 HHJ Howells permitted to the local authority to withdraw its admissions made in the letters and defence and permitted an amended defence. The judge directed herself to the Overriding Objective and CPR 14 and PD 14, which she addressed one by one. Her considerations are articulated at paragraph 21 of the appeal judgment. The admissions that had been made were made with the express purpose to react to a change in the law caused by the decision in CN. However, the amendments went beyond beyond that putting a significant change in the ambit of the factual dispute between the parties.

Grounds of Appeal

J appealed on three bases:

> (1) The Judge failed properly to consider and apply the overriding objective and/or to consider the interests of the administration of justice as required by CPR PD 14 paragraph 7.2(g).
>
> (2) The Judge failed properly to consider the prejudice that would be caused to J by allowing the admission to be withdrawn as required by CPR PD 14 paragraph 7.2(c).
>
> (3) The Judge failed properly to consider the stage in the proceedings at which the application to withdraw was made as required by CPR PD 14 paragraph 7.2(e).

Decision

The Appeal Court made three preliminary points before addressing the grounds of appeal in turn and in reverse order:

(1) The appeal is in relation to a discretionary case management decision which an appellate court should be slow to interfere with;

(2) The judge directed herself entirely correctly on the law that informed her discretion; and

(3) The judgment at least reference and, on the face of it, took into account all of the points articulated by J in opposition of the application to withdraw the admission.

In relation to Ground 1 the Appeal Court found that the judge entirely failed to consider the importance of the other factors going to the interests of the administration of justice. Although the judge made abstract reference to the important of finality and the interest of the parties not to have matters reopened at late stages, the judge failed to consider the importance of this factor in the context of this case. Four points are stated in support of this conclusion - see paragraphs 30(4)(a)-(d) of the judgment.

In relation to Ground 2, whilst finding that parts of the lower court's conclusion were not open to challenge, the Appeal Court found that the judge's conclusion that '*any direct evidence here of any specifics whereby the passage of time has directly affected the evidential cogency of [J's] case if they need to investigate the matter afresh*' was not sustainable. Whilst the material before the judge did not show any specific evidence of prejudice, the court should have asked herself why that was the case. The judge failed to appreciate that she was in no position to assess the prejudice to J of the admissions being withdrawn because the very withdrawal of those admissions transformed the ambit of the factual dispute between J and the local authority. Whilst appreciating that the judge might have said that the change wrought by the decision of the Supreme Court in CN rendered any factual inquiry by J redundant. The Judge was clearly of the view that, as the law now stands, no relevant duty was owed by the Local Authority to J, and it may be that this absence of a duty could not be made good by any investigation of the facts. However, the Judge did not approach the balancing exercise which informed her discretion in this way. Instead, she considered that she was able to conclude that there would be no prejudice to J because the facts could, if necessary, be investigated even at this late date.

The appeal was allowed and the order set aside. Permission to withdraw the admissions and amend the defence were refused. Judgment was entered with damages to be assessed against the local authority and in favour of J.

Summary by **Emily Ward**, Barrister and Deputy Head of Family at **Broadway House**

G (A Child: Child Abduction) [2020] EWCA 1185

The appeal court considered the state's obligations in respect to child abduction under the 1980 Hague Convention and immigration law under the 1951 Geneva Convention and related European Directives. Specifically, the matter concerned the tension in attempting to promptly return a child (who has been wrongfully removed or retained) to their home jurisdiction whilst avoiding expelling or returning a refugee to a country where they may face persecution.

The mother had removed the child, G, to the United Kingdom from South Africa. The father applied under the Hague Convention for G's immediate return. The mother claimed asylum on the basis that, as a lesbian, she had received threats from her family. The Secretary of State for the Home Department (SoS) erroneously believed G had also applied for asylum. Lieven J then stayed the father's application pending a determination by the SoS of asylum claims by the mother and, as understood by the court at the time, G.

The father appealed the order staying his application. The SoS then confirmed that the mother had applied for asylum with G as her dependent, but G had not made such an application on her own behalf. The Court of Appeal addressed five main issues [**24**]:

"Issue 1: In the context of an application for a return order under the 1980 Hague Convention and 1985 Act, does the fact that the child and/or the taking parent have refugee status or a pending asylum claim or appeal act as any form of bar to the determination of the application or the making or implementation of any return order?

Issue 2: If so, does it act as a bar (i) to the determination of the application or (ii) to the making of a return order or (iii) only to the implementation of any return order?

Issue 3: If there is no bar to the determination of the application, how should the court go about its task of deciding whether to determine or to stay the application?

Issue 4: What part, if any, should the child play in the application?

Issue 5: What steps should the court take to apprise the Secretary of State of the application under the 1980 Hague Convention and any material used in that application?"

As to the first issue, the court defined and analysed four categories of case based upon the status/position of the child to

determine whether a bar to return the child existed. On issue 2, the court concluded that any bar applied only to implementation and not to determining or making a return order. In respect to issue 3, the court set out guidelines on determining or staying an application [**161**]. Regarding issue 4, the court held that the child should be joined as a party to the Hague Convention proceedings. Finally, the court provided guidelines in respect to issue 5 and the steps to be taken by the court in informing the SoS of the Hague Convention application [**166**].

The father's appeal was allowed as, "the judge was wrong to proceed on the basis that there was a bar to determining the 1980 Hague Convention application, because (i) contrary to the facts as she had been given them, no independent application for asylum had been made by or on behalf of G, and (ii) in any event, there was no bar to determining the application or even to making a return order, as opposed to implementing any such order." [**184**]

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

Re A (A Child) [2020] EWCA Civ 1230

The father ('F'), a doctor, appealed against an order of HHJ Jacklin QC following a fact-finding hearing in private law proceedings. F sought contact with his 9 year old child. The mother ('M') opposed all forms of contact.

The judge found that F had poisoned the maternal grandfather, the maternal grandmother and M with thallium. This resulted in the death of the maternal grandfather, and M and the maternal grandmother becoming very seriously ill.

The Court of Appeal allowed the appeal and remitted the matter for rehearing before a High Court Judge.

The judgment details the authorities about the fallibility of oral evidence and witness recollection. The Court of Appeal did not seek in any way to undermine the importance of oral evidence in family cases, or the long-held view that judges at first instance have a significant advantage over judges on appeal in having seen and heard witnesses give evidence, but the court must be mindful of the fallibility of memory and the pressures of giving evidence. The relative significance of oral and contemporaneous evidence will vary from case to case. What is important is that the court assess all the evidence in a manner suited to the case before it and does not inappropriately elevate one kind of evidence over another.

It was the habit of the grandparents to make coffee and drink it on the veranda. On the relevant day, M came on to the veranda and drank about half of the grandmother's mug of coffee. During the morning, the grandmother drank the other half of her coffee and the grandfather finished his.

M's case was that when she came on to the veranda the morning in question, F had his back to her and she could see he was 'leaning over' the table where 2 cups of coffee were placed. Her case was that F did not turn to greet her but remained where he was for some moments before turning around.

The judge made the following findings as to this evidence: '*I do not accept that the mother concocted this evidence. She was thoroughly cross-examined on this evidence and it was clear to me that she was recounting an event that she recalled. She was a truthful witness and I accept her account.*'

By early evening the same day the grandfather was becoming ill and he died 2 days later.

The Court of Appeal set out that M was giving evidence about an incident which lasted only a few seconds 7 years before, in circumstances where her recollection was taking place in the aftermath of unimaginably traumatic events. Those features alone would highlight the need for that critical evidence to be assessed in its proper place, alongside contemporaneous evidence and any evidence upon which undoubted or probable reliance could be placed.

The Court of Appeal agreed with F's submission that such an important finding of fact required an analysis of all the relevant evidence found in the statements and contemporaneous evidence, as well as caution on the part of the judge when considering the reliability of the detail within an account of events which had taken place 7 years ago. The judge clearly regarded the 'leaning over' finding to be, if not the lynch pin, certainly central to her conclusions that F had killed the grandfather and tried to kill the grandmother. These are findings of the utmost seriousness, but particularly shocking when made in relation to a doctor. The judge inappropriately favoured an aspect of M's oral evidence over a significant amount of contemporaneous and written evidence without reference to that evidence or sufficiently explaining why she had done this. That omission inevitably served to undermine the findings made against F.

Moreover, the judge was in error in reaching the conclusion she did in respect of motive in circumstances where that alleged motive had not been put to F in cross-examination. The judge had found that F was motivated to remove the grandparents as they were an obstacle to a continuing relationship with M and close involvement in the life of his son. Without careful forensic scrutiny of all the relevant evidence, the finding that F's motive was to kill the grandparents as a means to get them out of his and M's life, whilst at the same time he sat by and watched M drink poisoned coffee, amounted to speculation.

Summary by **Victoria Flowers**, barrister **Harcourt Chambers**