January 2021

Family Law Week

NEWS

Addendum to Practice Guidance: Placements in unregistered children's homes in England or unregistered care home services in Wales

Guidance issued by Sir Andrew McFarlane, President of the Family Division:

> On 12 November 2019 the Office of the President of the Family Division issued on my behalf new Practice Guidance to explain the registration and regulation structure applicable in England and, separately, in Wales for residential care facilities for children and young people: ***Practice Guidance: Placements in unregistered children's homes in England or unregistered care home services in Wales***.
>
> As noted in the Practice Guidance, the number of applications made for a court in family proceedings to authorise a residential placement of a young person in circumstances where their liberty may be restricted had increased markedly in recent times. This continues to remain the case, and the Practice Guidance remains in force and should be followed by courts.
>
> This document is an addendum to the 2019 Practice Guidance.
>
> The Practice Guidance sets out steps that must be followed in circumstances where an application is made to the court for an order under the court's inherent jurisdiction to authorise the deprivation of the liberty of a child. This addendum provides an additional required step as follows: the court must include in any order approving the placement of a child in an unregistered placement, a requirement that the local authority should immediately notify OFSTED (England) – if the placement is in England – or the Care Inspectorate Wales – if the placement is in Wales – and provide them with a copy of that order and the judgment of the court.

GENERAL EDITOR
Stephen Wildblood QC

DEPUTY EDITOR
Dr Bianca Jackson
Coram Chambers

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Law Week Limited
Greengate House
87 Pickwick Road
Corsham
SN13 9BY

The email addresses for the purposes of such notification are:

Ofsted: EYRegulatoryandSocialCare@ofsted.gov.uk
Care Inspectorate Wales: CIWLocalAuthority@gov.wales

5/12/20

Stalking analysis reveals domestic abuse link

Stalking is increasingly being recognised as a form of domestic abuse within the criminal justice system, with CPS analysis finding the majority of offences are committed by ex-partners.

A record 2,288 charges were brought in 2019-20 – more than double the number five years previously. This is partly driven by better recognition among police and prosecutors of stalking as part of a wider pattern of domestic abuse.

CPS analysis of stalking prosecutions this year – the first exercise of its kind – found that most offences were committed by abusive ex-partners. Of stalking cases sampled at random from across England and Wales, 84 per cent involved complaints against ex-partners and three-quarters reported domestic abuse had previously occurred during the relationship.

The data was released to mark the UN's 16 Days of Activism Against Gender-Based Violence.

Joanna Coleman, CPS national lead for stalking prosecutions, said:

> "Stalking is an abhorrent offence which leaves victims traumatised, humiliated and often in genuine fear of their lives. I am very encouraged to see our work in this area reflected in a record number of stalking prosecutions, however we recognise there is always more to be done. My message to stalking and domestic abuse victims is this – no matter the coronavirus restrictions in place, the CPS and criminal justice system is open for business and we will treat your case as high priority."

The CPS analysed a random cross-section of 50 stalking prosecutions completed between April and June 2020 across all 14 of its regional offices. In every case involving an ex-partner, victims were bombarded with unwanted and often threatening phone contact and were physically stalked at their home or place of work. Social media was cited as a significant factor in 17 cases, with offenders usually creating multiple Facebook and Instagram accounts to get around being blocked by their victims.

Three cases involved the disclosing of private sexual images – so-called "revenge porn", with one woman's photos sent to her manager by an ex. In two cases, trackers were put on the victims' cars and one involved an attempted abduction. In eight prosecutions, the victim and perpetrator had not been in a relationship. These involved friends, colleagues or strangers developing fixated, obsessive, unwanted and repeated attention towards victims.

Recent data from the National Stalking Helpline, run by Suzy Lamplugh Trust, found that 100 per cent of reports involved some form of digital stalking, with this pattern intensifying over the lockdown periods of this year. Victims describe themselves a "sitting ducks" with perpetrators having more time on their hands.

Police are urging stalking victims "not to suffer in silence", with it taking an average of 100 incidents before they report the crime.

Suky Bhaker, chief executive of Suzy Lamplugh Trust, said:

> "The impact of stalking is devastating and can infiltrate every aspect of a victim's life, with 78% of victims reporting symptoms consistent with PTSD according to a recent pilot study. It is important that victims report this crime and seek specialist support."

6/12/20

Child Trust Fund court fees waived for parents

Parents or guardians of children who lack mental capacity can ask for court fees to be waived when seeking access to a Child Trust Fund, the government has announced.

A Child Trust Fund (CTF) is a long-term, tax-free savings account for children.? The money belongs to the young person and they can only take it out when they turn 18.

If a young person lacks mental capacity and as a result cannot handle their finances, a parent or guardian must apply to the Court of Protection to allow them to manage these funds. This safeguard exists to protect vulnerable people from fraud or abuse.

Parents and guardians who apply to the court before their child's 18th birthday already do not pay fees, unless the child has other substantial assets. The Ministry of Justice and HM Treasury are working with trust fund providers to ensure that parents are aware of this and can take necessary steps.

The announcement means that families who need to access the money in this fund to help support the young person's future can now ask for fees to be waived. Those who have already paid can request a refund under the plans. A new working group will also consider what more can be done to streamline the process and make it more accessible for parents.
This follows concerns from parents and campaigners that the system can be stressful and costly for families.

Eligibility for fee remission is based upon the capital and income of the person who is lacking capacity – in this case the child. The vast majority of those applying to the Court of Protection will not have to pay a fee if they:

- apply prior to the child's 18th birthday

- ask for a fee waiver through the Help with Fees scheme or

- ask for a fee waiver due to exceptional circumstances, which includes the CTF being the only asset of the child (regardless of the amount), and where their monthly income is below £1,085.

Updated guidance has been provided to the Court of Protection to address these circumstances and when a fee remission is applicable.? This will ensure that parents, guardians, and young people do not suffer the consequences of not being informed they need to apply prior to the young person's 18th birthday.

For more information, **click here**.

6/12/20

Resolution calls for early legal advice to soften blow of divorce

Resolution has urged the government to improve access to early legal advice for divorcing couples, as a new poll reveals the deleterious impact of divorce upon mental health.

The Resolution-commissioned YouGov survey of more than 1,000 divorcees found that 41 per cent of those who divorced within the last five years suffered mental health episodes including depression and anxiety. Of those, just over half reported having suicidal thoughts (54 per cent).

The figures represent a significant worsening of people's experience of divorce as the corresponding rates for people who divorced longer than five years ago found 29 per cent of them reported poor mental health and 32 per cent had suicidal thoughts.

The poll also found the number of 'DIY divorces' – those seeking little or no professional or legal help and representing themselves – increased from 35 per cent among those who divorced over five years ago, to 57 per cent among those who got divorced within the last 5 years. This could be attributed in part to the lack of legal aid available for the majority of family cases since 2013.

The findings have prompted calls for greater support for divorcing couples as the survey also found that 63 per cent of all divorcees surveyed felt that having early access to professional advice, where legal rights and options are made clear from the outset, would have improved their personal experience.

The survey results were released to coincide with Good Divorce Week (30 Nov – 4 Dec), an annual initiative from Resolution to raise awareness of the work of family justice professionals. During the week, Resolution members across England and Wales gave out free 30-minute advice sessions to those who needed it.

Juliet Harvey, National Chair of Resolution, said:

> "In recent years we've witnessed a toxic storm where families cannot access professional advice and where people are representing themselves in court often reaching outcomes that are far from amicable. This poll shows that as well as driving up conflict, this can be damaging to the wellbeing of everyone involved, especially children.
>
> "We know that early professional advice not only helps those facing separation make the most informed decisions for them and their families, it can also save the taxpayer money. Family breakdown costs taxpayers an estimated £51bn each year, and for every £1 spent on legal aid in family cases, £5 is saved elsewhere.
>
> "Funding for early advice will reduce pressure on taxpayers, on our overloaded family courts, and more importantly, on separating families across England and Wales. Today's findings should act as a wake-up call to Government."

The survey additionally found a widespread lack of awareness about out-of-court alternatives, with just 21 per cent of divorcees knowing about arbitration and 36 per cent for mediation. This comes at a time when pressures on the court service in England and Wales have rapidly increased as a result of the Covid-19 pandemic.

Just over half (53 per cent) of parents who responded to the survey said that they wanted to put the best interests of their children at the heart of the process but found it difficult. Almost two in five said their ex-partner had tried to use the children as bargaining chips in the divorce (37 per cent).

6/12/20

State of the Nation's Foster Care Impact Report launched

In this impact report The Fostering Network lists the positive changes that have happened in the world of fostering since the publication of the State of the Nation 2019 report (which took place in the summer of 2018 and covered key practice and workforce issues such as placement stability, training and support for carers, and status and authority of the workforce). The new impact report also highlights some aspects of fostering where vital change is still to happen.

For the Impact Report 2020, **click here**. For the State of the Nation 2019 report, **click here**.

6/12/20

Family Justice Board statement: Priorities for the family justice system

The Family Justice Board has produced **a statement** that summarises the priority actions it intends to pursue in response both to immediate pressures within the family justice system, and to bring about longer-term reform.

Accompanying the statement are two further documents, presenting more detailed discussion of the priorities pertaining to public family law and private family law matters respectively.

These documents are being cascaded to professionals and practitioners working within the family justice system across England and Wales to raise awareness of the priorities identified by the Board. Further information will be cascaded in early January 2021, including details of national, regional and local implementation arrangements.

For the statement and accompanying documents, **click here** and scroll to the foot of the page.

11/12/20

Significant risk to children's rights in new asylum system: Coram Children's Legal Centre

The Home Office has published a statement of changes to the Immigration Rules that are due to come into force at 11pm on 31 December 2020 – the end of the transition period following the UK's exit from the EU.

Coram Children's Legal Centre note that these changes will affect all children who arrive in the UK and seek protection, whether they arrive as part of a family, separated, or if they have been trafficked into the UK. The new rules allow the government to refuse to consider claims for protection where they consider that the child, young person or family 'could have made an application for protection' in a 'safe third country'. The rules also seek to allow the UK to remove such a person from the UK to any safe third country, not just countries they could have made a claim for protection in, as well as limiting where someone can claim asylum in the UK.

Coram Children's Legal Centre work with many children and young people who have arrived in the UK via other countries. The Legal Centre says that the reasons for their coming to the UK are varied and complex. For children, they arrive in the UK through circumstances often beyond their control. These changes seek to undermine the state's legal commitments and the standards by which some of the most vulnerable children in society are treated.

Coram Children's legal centre warns that with systemic issues and delay rife in the UK immigration system, these changes will add further confusion, harm and delay for those children and young people most in need of safety and protection.

13/12/20

Number of looked after children at 31 March 2020 increased by 2 per cent on a year ago

Children looked after on 31 March 2020 increased to 80,080, from 78,140 last year – up 2 per cent on the corresponding date last year. This is a rate of 67 per 10,000 children, up from 65 last year.

The figures are revealed in statistics released by the Department for Education.

Children starting to be looked after decreased to 30,970, from 31,770 last year – down 3 per cent. Children ceasing to be looked after were 29,590, very similar to 29,570 last year.

Children looked after who were adopted were 3,440, from 3,590 last year – down 4 per cent. This continues the fall seen since a peak of 5,360 adoptions in 2015.

Commenting on the figures, Jenny Coles, President of the Association of Directors of Children's Services, said:

> "These figures show the continued support that local authorities provide to children and young people in their local areas to safeguard and protect them. ADCS research shows that the number of children in care has increased significantly over the past decade, while local authorities have faced a 50 per cent reduction in budgets since 2010. Yet despite the barriers, we continue to work intensively with children and families to enable them to stay together safely. Only through long-term national investment in early help can we ensure that children are not taken into care when they could have stayed with their family and had their needs been met earlier.
>
> "These figures are largely unaffected by the Covid 19 pandemic. While the true impact of national and local lockdowns on vulnerable children and families is only starting to emerge, we anticipate that it will remain with us throughout next year and beyond, with families presenting greater complexity of need. It is essential that we have both the capacity and resources to meet these needs as quickly as possible. The government must provide the sector with a sustainable, equitable and long-term financial settlement that enables children to thrive, not just survive in the wake of the pandemic."

13/12/20

Nationwide call for views on tackling violence against women and girls

The government has launched a nationwide **Call for Evidence** to inform a new strategy to tackle Violence Against Women and Girls.

The survey will be carried out in partnership with third sector organisations so that victims and survivors are fully supported when speaking about their experiences. This will be anonymous, enabling respondents to provide as much information as they are comfortable with. During the consultation, which closes on 19 February 2021, the government will also seek the views of organisations who directly support victims and survivors, such as frontline professionals and academics.

As well as the public survey, the Home Office will set up focused discussions with a range of representatives from charities directly engaging with victims to gather their views. The survey will provide the fine detail of the lived experiences, while the focus groups will inform with more strategic or structural issues.

Statistics show that there were estimated 2.3 million victims of domestic abuse in the last year and it costs society an estimated £71 billion. Domestic homicides count for around one in five of all homicides and the government is aiming to reduce homicide overall.

The Tackling Violence Against Women and Girls Strategy will be published early next year, with the Domestic Abuse Strategy due to follow once the **Domestic Abuse Bill** receives Royal Assent.

For more information, **click here.** For the Call for Evidence itself, **click here**.

13/12/20

City council in foster carer dispute after girl's mother dies

Birmingham City Council considered allowing an 11-year-old girl to be deported during a dispute with her foster carers, the Local Government and Social Care Ombudsman has discovered.

The girl, who was born in the UK, was being looked after by a couple, who were family friends, after her mother died as she had no other relatives in the country.

The couple maintained it was not a private arrangement to foster the girl, and they needed the support of the city council as friends and family foster carers. Because of the circumstances of this case, this should have meant the council supported the couple both financially, by paying them the allowances they were due, and practically by providing the support of a supervising social worker.

Because the council held firm that it was a private arrangement, the girl was not treated as a looked after child and missed out on the additional support and protections that come with this. This should have included regular reviews of her care plan and appointing an independent reviewing officer to ensure her voice was heard. She also lost contact with her remaining relatives who lived abroad.

The council had a duty to secure legal advice and representation so the girl could make her case to stay in the country. At one point the council suggested telling the carers to go to court if they wanted to continue to care for the child or she would be deported the following month when her leave to remain expired. The council did not act, and so the foster parents had to use money set aside by the girl's mother in a trust fund to make a successful application for British citizenship.

In this case the council has agreed to apologise to the girl for not acting sooner to secure her legal status, and address the issues with contact. It should pay her £1,000 for the uncertainty and distress this caused. It will also apologise to the foster carer and her partner for failing to assess them as friends and family carers and pay them £1,000 for their frustration and stress caused by this. It will pay the couple the allowances they should have received as friends and family carers and make a payment to the girl's trust fund to cover the cost of her application for leave to remain and citizenship.

The council has also agreed to remind social workers of their responsibility to promote contact between children in private fostering arrangements and their parents; and review all open private fostering cases to ensure it has documented issues highlighted in the report. It will also review open cases of unaccompanied children to ensure it is offering the support outlined in the statutory guidance, especially regarding the child's immigration status.

For the full report, **click here** and then click on the link at the top right of the opened page.

13/12/20

Ombudsman urges councils to scrutinise services for children in care

The Local Government and Social Care Ombudsman is highlighting the experiences of children in the care system and the difficulties they face when councils get things wrong.

In a **new report**, the Ombudsman shares the cases of children who have been let down by the authorities who should be looking after their interests. The report shares case studies, learning and best practice guidance for local authorities at every stage of a child's journey through the system. It also suggests a range of questions council scrutiny committees can ask to ensure their authorities are providing the best services they can to the children in their care.

The Ombudsman notes that statistics around children in care are startling: they are more likely to have a special educational need or mental health difficulty than their friends who live with parents. And their outcomes are just as concerning: formerly looked after children are more than three times as likely to be out of education, training or employment once they leave care.

This is all set against a backdrop of increasing numbers of children being brought into the system; 28 per cent more children were in care in 2019 than 2009.

Cases shared in the report include a young man left never knowing if he was deprived of the chance to say goodbye to his dying mother when he was younger, a teenager returning to her foster home to find her bags packed as she'd turned 18, or the siblings removed without warning from the foster parents who wanted to adopt them.

Michael King, Local Government and Social Care Ombudsman, said:

> "Each case highlighted in this report is a case too many, and reflects the real life experiences of some of the most vulnerable in our society.

"While these cases reflect a time before the Covid-19 pandemic, we know the system is under even more pressure today. Although the councils' actions in these cases were disappointing, we want to drive home the importance of learning from mistakes. In doing so this can help avoid repetitions and improve the lives and opportunities for all children in care.

"I am issuing this report so councils providing children's services can use the learning and reflect on their procedures and processes. At every turn, I invite them to ask themselves, 'would this be good enough for my child?'"

Cathy Ashley, Chief Executive of Family Rights Group stated:

"The themes in this report reflect poor practice that is commonly reported by families to our advice service. Whilst some local authorities are striving to get it right for every child and are keen to learn and improve, there is huge variation in practice across the country. This can too often result in children and families not getting key advice or support to prevent problems escalating into a crisis. At times authorities are failing to comply with the law or their own internal procedures, including refusing some young people the help to which they are entitled.

"This report highlights how poor decisions can be so damaging at a critical moment in the lives of children in care or at risk of care. It is particularly concerning given that more children are now in the care system than at any times since 1985, and the pandemic is increasing the pressure and strains on families and on children's services.

"Putting the voices and experiences of children and families at the centre is key to getting this right. We particularly welcome the Ombudsman's checklist for local authorities which is designed to help each authority give every child the best life chances."

For the report, **click here** and click again on the link at the top right corner of the page opened.

13/12/20

Human Rights Act: Government launches independent review

The Ministry of Justice has launched an **independent review** by a panel of experts which will examine whether there is a need to reform the Human Rights Act. The review, led by former Court of Appeal Judge Sir Peter Gross, will consider:

- The relationship between the domestic courts and the European Court of Human Rights (ECtHR). This includes how the duty to 'take into account' ECtHR case law has been applied in practice, and whether dialogue between our domestic courts and the ECtHR works effectively and whether there is room for improvement;

- The impact of the HRA on the relationship between the judiciary, executive and Parliament, and whether domestic courts are being unduly drawn into areas of policy;

- The implications of the way in which the Human Rights Act applies outside the territory of the UK and whether there is a case for change.

The MoJ says that the UK remains committed to the European Convention on Human Rights and that the review is limited to looking at the structural framework of the Human Rights Act, rather than the rights themselves.

For more information and short profiles of the panel members, **click here**.

13/12/20

Listing of final hearings in care cases in the Central Family Court

Resolution reports:

From January 1st 2021 there will be an important change to the way care proceedings are listed before the judges at Central Family Court (CFC). At the Case Management Hearing (CMH) judges will only list to Issues Resolution Hearings (IRH); they will no longer list to final hearings. This applies to proceedings before the District and Circuit Bench only: please note that this does not apply to proceedings before the Magistrates.

The majority of Care Centres now list only to IRH and that this is proving successful in bringing about the resolution of care proceedings at IRH in many cases. It is also making better use of judicial and court time as listed final hearings are more likely to be effective than is often the case at present.

For a Care Listing Protocol for Practitioners, **click here** and for an IRH checklist, **click here**. They will be key documents under the new arrangements.

13/12/20

Civil, Criminal and Family Justice (Amendment) (EU Exit) Regulations 2020

These Regulations make amendments to a number of statutory instruments that made provision in relation to the United Kingdom's exit from the European Union. Statutory instruments amended include the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019; the Civil Legal Aid (Amendment) (EU Exit) Regulations 2019; the Family Procedure Rules 2010 and Court of Protection Rules 2017 (Amendment) (EU Exit) Regulations 2019, and the Civil Procedure Rules 1998 (Amendment) (EU Exit) Regulations 2019 in order to update references to 'exit day' to 'IP completion day'.

These Regulations also amend those instruments and others in order to ensure alignment with the United Kingdom's obligations under articles 67, 68 and 69 of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, which make

provision for the treatment of matters which are already ongoing at the end of the transition period.

For the Regulations, **click here**.

13/12/20

New private law cases received by Cafcass in November rose 3 per cent on 2019

Cafcass received a total of 4,088 new private law cases (involving 6,126 children) in November 2020 – 3.7 per cent (or 114 cases) more 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.

18/12/20

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

Cafcass received a total of 1,501 new public law applications (involving 2,319 children) in November – 32 applications (2.1 per cent) fewer than in the same month last year.

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

18/12/20

Family Court activity between July and September 2020 returns to 2019 levels

The **latest statistics issued by the Ministry of Justice** show that activity in the family courts revived between July and September 2020 following the decline in the previous quarter. Between July and September there 68,805 new cases started in the family courts which represents minimal change in the number of cases started compared with the same quarter in 2019.

There were increases in private law (up 8 per cent), financial remedy (up 5 per cent) and domestic violence remedy case starts (up 26 per cent), and decreases in adoption (down 12 per cent) and matrimonial case starts (down 10 per cent).

On average, care proceedings took longer with fewer disposals within 26 weeks. The average time for a care or supervision case to reach first disposal was 40 weeks in July to September 2020, up seven weeks from the same quarter in 2019. Twenty-nine per cent of cases were disposed of within 26 weeks, down 12 percentage points compared to the same period in 2019 and the lowest level since mid-2013.

The mean average time from petition to decree nisi was 29 weeks, and decree absolute was 53 weeks – both down one week when compared to the equivalent quarter in 2019. The median time to decree nisi and decree absolute was 22 and 38 weeks respectively.

There were 27,803 divorce petitions filed in July to September 2020, down 10 per cent on the equivalent quarter in 2019. There were 22,097 decrees absolute granted in July to September 2020, a decrease of 24 per cent from the same period last year.

The number of domestic violence remedy order applications increased by 26 per cent compared to the equivalent quarter in 2019, while the number of orders made increased by 18 per cent over the same period.

In July to September 2020 there were 1,067 adoption applications, down 9 per cent on the equivalent quarter in 2019. Similarly, the number of adoption orders issued decreased by 21 per cent to 1,009.

There were 1,744 applications relating to deprivation of liberty in July to September 2020, up 29 per cent on the equivalent quarter in 2019 and the highest level since the series began. Orders increased by 45 per cent in the latest quarter compared to the same period last year.

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

20/12/20

MIAMs between July and September 2020 up 8 per cent on a year ago

Mediation Information and Assessment Meetings (MIAMs) increased by 8 per cent between July and September 2020 compared to the previous year. Mediation starts decreased by 3 per cent and outcomes decreased by 1 per cent. These volumes are comparable to pre-pandemic levels and show almost full recovery, which may be in part due to changes in how in the service is operated; sessions can take place via video link.

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

20/12/20

Family legal help starts down by 20 per cent on a year ago

In July to September 2020 family legal help starts decreased by 20 per cent compared to the same quarter last year. Completed claims also decreased by 22 per cent and expenditure decreased by 17 per cent. However, compared to the previous quarter, there were increases across starts (8 per cent), completed claims (7 per cent) and expenditure (12 per cent) in family legal help cases.

Certificates granted for family work increased by 6 per cent in July to September 2020 compared to the previous year.

Certificates completed decreased by 20 per cent and expenditure decreased by 9 per cent compared to the same quarter the previous year. Compared to the previous quarter, certificates granted increased by 18 per cent, certificates completed decreased by 4 per cent and expenditure increased by 5 per cent.

In July to September 2020, applications for civil representation supported by evidence of domestic violence or child abuse decreased by 22 per cent compared to the same period of the previous year. The total number of these granted decreased by 23 per cent over the same period. Compared to the previous quarter, applications increased by 25 per cent and grants by 28 per cent. Applications and grants in this category had been falling since October to December 2019 having been rising since the inception of the scheme.

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 over 80 per cent. The provisional figure for the latest quarter is 85 per cent.

For the full statistics, click here.

20/12/20

Change to legal aid rule aids home owners on low incomes and domestic violence survivors

Changes to the legal aid rules have been laid in Parliament that will allow more homeowners on low incomes to access legal aid. The rule change, brought about by the **Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2020** (the Amendment Regulations), will particularly benefit survivors of domestic violence, with many more able to have legal representation in family proceedings, reducing the risk of being cross-examined by their abusers in court.

The Government agreed to change the rules on 'imaginary capital' in response to the judgment in ***R (on the application of GR) v Director of Legal Aid Casework & Anor*** **[2020] EWHC 3140 (Admin)**, a challenge brought by Public Law Project on behalf of a domestic violence survivor and working mother of two who was denied legal aid for family proceedings. 'Rebecca' [not her real name] was told she was not eligible for legal aid because she owns her own home, even though there is almost no equity in the property.

Regulation 37 of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 provides that for the purposes of calculating an individual's disposable capital, any interest in land must be taken to be the amount for which that interest could be sold after any secured debt over the land is deducted.

The amendments to regulation 37 made by regulation 2(4) of the Amendment Regulations remove the limit on the amount of mortgage or other secured charge which must be deducted when calculating an individual's financial interest in land for the purposes of capital. This deduction was previously limited to a maximum of £100,000. Regulation 2(5) inserts into Regulation 38 of the 2013 Regulations a provision enabling the Director to determine an individual's main dwelling for the purposes of regulation 38 and 39 of the 2013 Regulations. This provision was previously in regulation 37 but will no longer have any application to regulation 37 following removal of the mortgage cap but will continue to apply to regulation 38 and 39 of the 2013 Regulations.

Rebecca's solicitor Daniel Rourke, PLP, said:

> "Our justice system works best when everyone can use it on equal terms, with dignity and respect. A decision about whether someone can afford to pay for legal representation should not ignore the realities of their situation. It is plainly unfair to pretend someone has capital that simply does not exist.
>
> "For victims of domestic violence, that has not been the case. The regulations laid ... in Parliament will mean that many more vulnerable women on low incomes will be able to take part in family proceedings with the support of a lawyer, in a fairer and more equal way.
>
> "Our client is earning a low wage, looks after two children and receives Universal Credit, yet she was denied legal aid because the rules on home ownership have not been updated in decades. They are completely out of touch with reality. This irrational rule ignored the fact that my client's home was heavily mortgaged, and pretended that my client had capital which simply does not exist. The 'imaginary capital' prevented her from effectively participating in proceedings concerning her children.
>
> "We are extremely grateful to the Law Society for protecting our client against costs in this case. Without their financial support and backing, it would not have been possible to bring this challenge, which has resulted in an important change in the rules.
>
> "Our client has an upcoming hearing. We are keeping our fingers crossed that our client can obtain legal aid before the hearing takes place. If not, she may have to attend court without legal representation, where she would be expected to cross-examine her abusive ex-partner and make complicated legal arguments on her own."

Law Society president David Greene said:

> "The issue of mortgage debt is just one of many flaws in the means test that we have been highlighting to ministers. Our research has shown the means test is preventing even families living below the poverty line from accessing legal aid. This must be dealt with in the present government's review of the means test."

For the Amendment Rules, **click here**. For the judgment in ***R (on the application of GR) v Director of Legal Aid Casework & Anor*** **[2020] EWHC 3140 (Admin)**, click here. For coverage of the rule change by PLP, **click here**.

20/12/20

New Queen's Counsel appointed

Eleven family lawyers have been included among the new Queen's Counsel appointed last week. The list of family law QCs is given below. All are barristers. Across all disciplines 116 new Queen's Counsel were appointed.

The Family Law appointments were as follows:

Shiva Ancliffe of **Coram Chambers**
Kate Burnell of **St John's Chambers**
Denise Gilling of **1GC**
Nichola Gray of **1 Hare Court**
Lucy Hendry of **3PB**
Michael Horton of **Coram Chambers**
Ruth Kirby of **4PB**
Sara Lewis of **St Phillips**
Deepak Nagpal of **1KBW**
Sally Stone of **1GC**

21/12/20

Divorce in Later Life

Karin Walker, Founder of KGW Family Law, explains the issues of specific concern for family lawyers acting for 'silver splitters

As the marriage rate falls and the majority of 'millennials' choose to cohabit, the over 60s top the divorce charts. There are several reasons for this growing trend.

Couples who married in the 1970s often did so at a very young age. Cohabitation was less socially acceptable at that time and therefore marriage, particularly for those in their late teens or early 20s, was commonplace.

As the average life expectancy increases, those who are now reaching retirement age see themselves as having twenty-five to thirty years ahead of them. The sedentary lifestyle associated with retirement is no longer attractive.

Individuals change radically during adult years and often move in different directions, resulting in a level of incompatibility, which was not prevalent at the time of marriage. Life expectations and values change along with interests and social interaction. In some marriages these factors may compound and make separation likely.

Very often one party is the protagonist, the other being more content with the more traditional move towards retirement.

As a consequence of all of these factors, the 'silver separators' are fast becoming the most likely age group to consider divorce. This age group have very specific issues, which require resolution on separation, meaning that those advising them need an understanding of and ability to deal with those issues to construct, or advise on, a satisfactory outcome, taking account of future requirements.

The emotional fallout after a long marriage is inevitably more extreme and more likely to have a demonstrable and lasting effect on either or both of the couple, even if in different ways.

Pensions and future income derived from pension will have a significant impact alongside general income issues post-retirement. Division of pension on divorce is sadly a growing area of negligence claims for family practitioners and a clear understanding of the potential pitfalls and how these can be covered is essential.

Either or both of the couple are likely to have received an inheritance during the course of the marriage and there may be a need to unravel inherited wealth.

One of the couple (or even both) may have a new partner who may be younger and may have their own children. This can add to the financial complications and the uncertainty of the future.

How to deal with the emotional fallout after a long marriage /relationship

Particular emotional issues for the 'silver separators' are as follows:-

• The couple are each in a completely different place. One is looking at new horizons and a change in lifestyle whereas the other is focussing on retirement/grandchildren etc.

• The difficulties experienced by adult children when their parents separate including the potential loss of a 'home base'.

• One of the couple may have had no involvement at all in the family finances and need to re-educate or rely on professional advice.

• Expectations with regard to future standard of living and how this should be provided?

• Will one or both of the couple work beyond retirement age, and what effect does this have?

• The impact of a new partner and a new family.

• Possible health issues.

In this age group, perhaps more than any other situation, the decision to separate is driven by one of the couple. The discovery that your life partner, to whom you may have been married for in excess of 40 years, wants to bring the marriage to an end and move in an entirely different direction can be devastating and even emotionally disabling. The communication of such decision can, in itself, have a major effect. Adult children often take their parents' separation very badly as it can rock the very essence of their own security and stability even if they no longer live at home.

If you are acting for the protagonist of the relationship breakdown you need to encourage them to give the other party time to come to terms with their decision.

Sometimes the couple will be unmarried. They may have lived under the misapprehension that a 'common law' wife has rights. It is vital to explain this invidious financial situation with clarity.

It will be extremely important as a family lawyer right at the outset to understand:

• exactly what the position is on the part of your client;

• how emotionally able they are to give instructions;

• to what extent you will need to encourage them to view the position from the perspective of their spouse and work at their pace;

• what sort of additional professional advice might be beneficial to your client or indeed the couple and how might that be provided;

• whether a tactical approach to the process might be just as important as providing sound and pragmatic legal advice.

Initial meetings with new clients in this age bracket can take longer than usual. In most cases one party will not want to divorce. Whichever of the couple is your client, this is something which you will have to take on board and work with. Even if your client appears to be taking the initiative they may be doing so reluctantly.

Whatever the particular facts of the case might be, separating couples in this age group will be shrouded in an emotional situation which will require more than just legal knowledge and skill to navigate toward a successful outcome.

Below are some of the particular issues which may arise.

Pension issues

The failure to provide proper information and deal appropriately with the issues surrounding pension sharing on divorce is probably the principal growth area for negligence claims in family law. Scarily there are now organisations to whom you can take your court order and pension sharing annex(es) and they will evaluate (for a fee) whether you might have a negligence claim against the lawyer who represented you.

The report of the **Pensions Advisory Group** dated July 2019 is a 'must read', probably for all family practitioners but definitely for those acting for clients in this age bracket.

The essential stages when dealing with pensions on divorce are set out in the report as follows:-

• Gathering of information in relation to all pensions, including state pensions

- Careful review of whether any of the 'complicating factors' may be present (there are 26 listed in the report)
- Review of the valuation figures and whether they are reliable and reasonable
- Service of applications on the pension fund trustees
- Consideration of whether an expert report is needed
- Finalising the approach to, and particulars of, valuation and division of pension assets
- Completion of key court forms
- Seeking pension administrator approval
- Consideration of when to apply for Decree Absolute
- Implementation.

As the report says, 'ignoring the pensions or agreeing to ignore the pensions is not an option'. The same could be said for the report itself!

Particular issues for couples over the age of 60 are:-

- One of the couple may hold the majority (if not all) of the pension provision – and consider it to be 'theirs'. This could include a final salary scheme.
- There may have been insufficient pension contributions made during the marriage to support the couple living together during retirement, never mind living separately.
- One or both of the couple may have made pension contributions which pre-date the marriage and which they believe should be 'ring-fenced'.
- Insufficient state pension contributions may have been made by the party who did not work. This is something which should always be considered at the commencement of the case – and is often overlooked.
- Exceeding the threshold for lifetime pension contributions and the tax implications. The allowance for 2020/2021 (state pension being excluded) is £1,073,100.00.
- A desire to 'offset'.

Adult children and the extended family

When you are acting for the 'silver separators' their adult children may quickly become one of the very difficult and complicated aspects of the case.

Whereas younger children tend to be less impacted by the separation of their parents than often the parents might believe, this is often not the case when the children are already over the age of eighteen. The potential issues are numerous and can have a major impact. Things to look out for are:-

- The child who 'takes sides' and wants to support one of the couple.
- The child whose predominant concern is the loss of financial support from either or both of their parents.
- One parent is leaving the marriage to commence a relationship with a new partner who has children of their own (who may be under the age of eighteen and therefore financially dependent).
- The child who is concerned by a potential loss of inheritance.
- The 'adult' child who has not yet left home.

When parents separate in later life their own financial requirements are likely to change. Sadly human nature is such that financial changes can often bring out the worst in everyone involved. Adult children who had certain financial expectations can both suffer and behave badly.

It can be very useful, as a family lawyer, to draw a family tree and identify exactly what the relationship is between all of the extended parties involved in the case. An idea of everyone's age is also helpful. This will enable you to advise your own client on not only their own needs and entitlements, but also their obligations to others (including their children) and what impact the acquisition of future obligations might cause. Parents all too often assume that their adult children can 'cope' with their separation when, in reality, this can be very far from the truth. The lawyers involved will need to discuss carefully the potential issues with their clients in order to raise awareness.

Inheritance issues

Inheritance or inherited wealth can cause difficulties for 'silver separators' from two different perspectives:-

A) Almost certainly by their stage in life they will have inherited from their own parents or other relatives – or one of them will have done so. This inherited resource may have been 'intermingled' into the family finances, perhaps forming part of the purchase price for the family home or funding the cost of improvements; perhaps meeting the cost of school fees or expensive holidays and other luxury items. Alternatively, the inherited resource may have been 'ring-fenced' in the form of a property held in the sole name of one spouse or an investment portfolio.

B) The couple will be looking to regulate their own affairs and deal with their own inheritance planning. These arrangements may be turned upside down as a consequence of their separation.

Once again the first meeting with the client is so vitally important. The need to gather extensive information at an early stage impacts on so many areas which will be potential issues for this couple separating in later life. Essential questions relate to whether or not inheritances have already been received by either or both of the couple, and the purpose to which this resource has been put. What are the potential sources of future inheritance and for whom?

The death of either party prior to the conclusion of divorce proceedings

When acting for a couple in later life the possibility of the death of either of the couple is a situation which could arise. You will therefore need to have particular regard to the following:-

- Should Notice of Severance of Joint Tenancy be served? This may not be automatic as you may wish to consider your client's position in the event of the death of their spouse?
- Should a will be made immediately in contemplation of divorce?
- What is the position with regard to life policies/death in service benefit?

What happens if one of the couple should die prior to the conclusion of divorce proceedings? If a final decree of divorce has not been pronounced (decree absolute), the divorce proceedings stop. The couple remain married and the status of the survivor is that of widow or widower. The division of matrimonial property will cease and the widow/widower will benefit under the terms of any pension provision.

Very careful consideration needs to be given where financial arrangements have been implemented in part. A binding agreement which is clearly contractual would need to be honoured. Otherwise resources will pass under the terms of the deceased's will or the intestacy rules.

Income issues in later life

The source of income through retirement years is an important consideration in later life in any event. It was only by 2018 that all employers had to enrol their eligible workers into a workplace pension. Where only one of a couple might be working, or where reliance had been placed on downsizing the family home to provide additional income in retirement the level of income available to share on divorce may be insufficient to maintain the lifestyle expectancy.

It is important at the outset to consider the state pension provision and whether a 'top up' is possible. This is so often overlooked.

At the other end of the spectrum has the threshold for lifetime pension contributions been exceeded so that tax will be payable?

This is undoubtedly an area where the assistance of a financial advisor may be of considerable benefit.

Where income is insufficient and one party continues to work beyond retirement age, might a maintenance order be appropriate? Would this be reasonable? A clean break is not an inevitability but, nevertheless, something which the court 'must' consider.

The impact of the new partner

Either party to the marriage may have or become involved with a new partner. This will inevitably have an impact.

A new partner may be the catalyst to bring an already ailing marriage to an end. Alternatively either spouse may meet a new partner post-separation.

A new partner may have income in circumstances where the income of the couple is inadequate to meet their ongoing income needs. To what extent can this have a bearing? The new partner has no obligation either to support the spouse who is in a relationship with them nor the spouse from whom their own new partner is separating. This can cause difficulty and resentment.

The management of the family dynamic can be extremely important. The new partner may have children of their own. Those children may be dependent. If one of the couple moves in with a new partner with dependent children they may find themselves becoming financially responsible for the needs of those children which could cause a problem for their own (adult) natural children.

The imposition of a step-family brings its own problems. Loyalties inevitably become divided.

There is of course no reason to hide a new relationship. A disingenuous approach can only have an adverse effect. Whilst upfront honesty may bring about short term retribution it is without doubt the best way forwards.

In practice

When a couple of this generation separate it is usually the decision of one and the other's world may suddenly and devastatingly fall apart.

If you are acting for the protagonist they will no doubt have given their situation careful consideration. One of the first steps which you will take is to manage expectations. Your obligation may be to proceed as expeditiously as you can. Regrettably this could give rise to the need to issue Form A, if for no other reason than to set a timetable.

You will however need to have some regard to the emotional position of the other spouse.

If you are acting for the spouse who does not wish the marriage to come to an end, you need to manage their emotional needs as well as their involvement in the divorce process. You will need to encourage the other side to proceed at the pace which works for your client.

The support of a family consultant may be invaluable.

The emotional elements of the case will become an integral part of the negotiation process. On both sides it is essential to have a clear understanding of your client's objectives and what is motivating them. The need to explore the costs incurred as a consequence of the adoption of any course of action, especially where costs might arguably be expended unnecessarily, and where resources are tight, is also vitally important.

2.12.20

Children: Private Law Update December 2020

Alex Verdan QC of **4PB** analyses some recent important judgments in private children law.

This update will report on decisions dealing with the following issues:

- Challenging arbitration awards
- Orders prohibiting counsel from acting
- Unnecessary private law applications
- Relocation and the welfare analysis
- The fallibility of oral evidence
- Similar fact evidence
- Parental alienation: cult; transfer of primary care.

1. Challenging arbitration awards

Hayley v Hayley **[2020] EWCA Civ 1369** was a financial remedy case where the husband sought to challenge an arbitration award by way of appeal, or, on the basis that the court should not convert the award into an order of the court, because it was unfair. The Court of Appeal considered a number of authorities to determine what test should be applied (in both financial remedy and children proceedings).

The Court of Appeal ultimately concluded: "*the logical approach by which to determine whether the court should decline to make an order in the terms of the award, is by reference to the appeal procedure and approach found in the FPR 2010*" *[paragraph 73]. The court held that it would only substitute its own order for that of the arbitrator "if the judge decides that the arbitrator's award was wrong; not seriously or obviously wrong, or so wrong that it leaps off the page, but just wrong*" [paragraph 74].

When presented with a refusal on the part of one party to agree to the conversion of an arbitral award into a consent order, the Court of Appeal suggested it would be logical for the court to 'triage' the case, with the reluctant party having to 'show cause' why such an order should not be made [paragraph 73].

The biggest implication is that parties now have only to persuade a court that an award is "*just wrong*" in order to appeal an arbitral award with which they disagree. This is a lower threshold than previously thought, and means the same test is applied when challenging both a court-based judgment and arbitral award. It is yet to become clear whether Haley will lead to a greater number of challenges to arbitral awards in the family law sphere (and beyond); the scope to do so certainly seems wider.

2. Orders prohibiting counsel from acting

In ***Ahmed v Iqbal (Order Preventing Counsel from Acting)*** **[2020] EWHC 2666 (Fam)** MacDonald J was concerned with an order made prohibiting counsel from representing a client in the context of private law children proceedings.

The father's barrister had previously worked as a legal executive and advised the father in respect of an immigration application and at the same time communicated with the mother. After the parties separated the mother made a complaint against the legal executive on the basis of alleged misconduct. The father then instructed the barrister to represent him in contested children proceedings during which the mother made further allegations against her. The barrister in response complained to the police.

District Judge Carr made an order that the father's counsel should, in the exceptional circumstances, be prohibited from representing the father. MacDonald J, on dismissing the father's appeal, confirmed that such orders would only be made in exceptional circumstances:

> "{T}he learned Judge was justified, on the evidence before him and having exercised appropriate caution having regard to the rarity of the order sought, in concluding that this was an example of the extremely rare cases in which it is appropriate for the court to direct that counsel should not continue to act for a party to proceedings because their continued participation would lead to a reasonable lay apprehension of unfairness, creating a real risk of counsel's continued participation resulting in the order made at trial being set aside on appeal."

3. Unnecessary private law applications

In ***Re B (a child) (Unnecessary Private Law Applications)* [2020] EWFC B44** HHJ Wildblood QC was dealing with an appeal against a decision for a mother to produce five years' worth of medical records in private law proceedings, which was found to be disproportionately invasive. The judge took the opportunity to highlight the number of unnecessary court applications and the implications on the running of the court system. He estimated his court would have double the number of outstanding private law cases in January 2021 that it had in January 2020. He observed "*not only is unnecessary litigation wasteful. It clogs up lists that are already over-filled – in terms of the over-riding objective, it amounts to an inappropriate use of limited court resources (see Rule 1.2(e) of The Family Procedure Rules 2010)*". He highlights the possible consequences for litigants who do not take heed.

> "[9] Therefore, the message in this judgment to parties and lawyers is this, as far as I am concerned. Do not bring your private law litigation to the Family court here unless it is genuinely necessary for you to do so. You should settle your differences (or those of your clients) away from court, except where that is not possible. If you do bring unnecessary cases to this court, you will be criticised, and sanctions may be imposed upon you. There are many other ways to settle disagreements, such as mediation."

4. Relocation and the welfare analysis

In ***WS v KL* [2020] EWHC 2548 (Fam)** Knowles J was dealing with an appeal against an order allowing a mother to remove two young children permanently to Hong Kong, and found that the judge at first instance had failed to conduct a proper welfare analysis of the available options for the children or a proportionality assessment. The judge, whilst identifying various factors in the welfare checklist as to why the mother's proposal was better than the father's, had failed to undertake an holistic assessment of the options and failed to explicitly evaluate his findings and link them to the welfare checklist. This is a useful case for practitioners which emphasises the importance of undertaking a detailed and evaluated assessment of a child's welfare when dealing with applications of this sort.

5. The fallibility of oral evidence

In ***Re A (A Child)* [2020] EWCA Civ 1230** the Court of Appeal was concerned with an appeal against findings made in private law proceedings that the father had poisoned the mother and her parents, killing the maternal grandfather. The Court of Appeal in allowing the appeal provided helpful guidance about being mindful of the fallibility of memory and the pressures of giving oral evidence.

> "[33]….More recently, the courts have looked at the issue of what can, in broad terms, be identified as the fallibility of oral evidence. The issue of the extent to which a court should rely on the recollection of witnesses and the fallibility of human memory first arose in a commercial setting through observations made by Leggatt J (as he then was) in ***Gestmin SGPS SA v Credit Suisse (UK) Ltd and Another* [2013] EWHC 3560 (Comm)** ('Gestmin') at [15] – [22], and more recently in ***Blue v Ashley* [2017] EWHC 1928 (Comm)** at [68] – [69].
>
> [34]. In the *Gestmin* case, at [22], Leggatt J expressed the view that the best approach for a judge to adopt in a commercial trial was to place little, if any, reliance on a witness's recollection of what was said in meetings and conversations; rather factual findings were to be based on inferences drawn from documentary evidence and known or probable facts. This was followed in *Blue v Ashley*, where Leggatt J at [70], having

rehearsed his own earlier observations in *Gestmin*, approached evidence of a crucial conversation in a way that was '[m]indful of the weaknesses of evidence based on recollection'.

[35]. The Court of Appeal considered both of these cases in ***Kogan v Martin and Others* [2019] EWCA Civ 1645** ('Kogan'). This was a case where the judge at first instance had wrongly regarded Leggatt J's statements in Gestmin and Blue v Ashley as an "admonition" against placing any reliance at all on the recollections of witnesses.

[36]. The Court of Appeal in *Kogan* emphasised the need for a balanced approach to the significance of oral evidence regardless of jurisdiction."

In reaching the decision that the appeal should be allowed, King LJ said the following at paragraph [50]:

"Fairness required a rigorous analysis of all the evidence relevant to the 'leaning over' issue. In my judgment, the judge inappropriately favoured an aspect of the oral evidence of the mother over a significant amount of contemporaneous and written evidence, without reference to that evidence, or sufficiently explaining why she had done this. This omission, in my view, inevitably serves to undermine the findings made against the father."

6. Similar fact evidence

This decision is potentially very useful to practitioners dealing with domestic violence cases. In ***R v P (Children: Similar Fact Evidence* [2020] EWCA Civ 1088** the court was concerned with a mother's allegations of coercive and controlling behaviour against the father. The mother sought, in seeking to prove her allegation, to rely on previous allegedly coercive and controlling behaviour towards another third party as similar fact evidence. The mother appealed the court's decision to refuse to admit this evidence. Jackson LJ on hearing the appeal referred to the decision in *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26 when the House of Lords considered the issue of similar fact evidence in civil cases, where it is contended that an individual's behaviour in other circumstances makes it more likely that he will have behaved in the manner now alleged because it is evidence of a propensity to behave in that way [see paragraphs 3 – 6]:

"3. Any evidence, to be admissible, must be relevant. Contested trials last long enough as it is without spending time on evidence which is irrelevant and cannot affect the outcome. Relevance must, and can only, be judged by reference to the issue which the court (whether judge or jury) is called upon to decide. As Lord Simon of Glaisdale observed in *Director of Public Prosecutions v Kilbourne* [1973] AC 729, 756, "Evidence is relevant if it is logically probative or disprobative of some matter which requires proof ….. relevant (ie. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable".

4. That evidence of what happened on an earlier occasion may make the occurrence of what happened on the occasion in question more or less probable can scarcely be denied. … To regard evidence of such earlier events as potentially probative is a process of thought which an entirely rational, objective and fair-minded person might, depending on the facts, follow. If such a person would, or might, attach importance to evidence such as this, it would require good reasons to deny a judicial decision-maker the opportunity to consider it. For while there is a need for some special rules to protect the integrity of judicial decision-making on matters of fact, such as the burden and standard of proof, it is on the whole undesirable that the process of judicial decision-making on issues of fact should diverge more than it need from the process followed by rational, objective and fair-minded people called upon to decide questions of fact in other contexts where reaching the right answer matters. Thus in a civil case such as this the question of admissibility turns, and turns only, on whether the evidence which it is sought to adduce, assuming it (provisionally) to be true, is in Lord Simon's sense probative. If so, the evidence is legally admissible. That is the first stage of the enquiry.

5. The second stage of the enquiry requires the case management judge or the trial judge to make what will often be a very difficult and sometimes a finely balanced judgment: whether evidence or some of it (and if so which parts of it), which ex hypothesis is legally admissible, should be admitted. For the party seeking admission, the argument will always be that justice requires the evidence to be admitted; if it is excluded, a wrong result may be reached. In some cases, as in the present, the argument will be fortified by reference to wider considerations: the public interest in exposing official misfeasance and protecting the integrity of the criminal trial process; vindication of reputation; the public righting of public wrongs. These are important considerations to which weight must be given. But even without them, the importance of doing justice in the particular case is a factor the judge will always respect. The strength of the argument for admitting the evidence will always depend primarily on the judge's assessment of the potential significance of the evidence, assuming it to be true, in the context of the case as a whole.

> 6. While the argument against admitting evidence found to be legally admissible will necessarily depend on the particular case, some objections are likely to recur. First, it is likely to be said that admission of the evidence will distort the trial and distract the attention of the decision-maker by focusing attention on issues collateral to the issue to be decided. This… is often a potent argument, particularly where trial is by jury. Secondly, and again particularly when the trial is by jury, it will be necessary to weigh the potential probative value of the evidence against its potential for causing unfair prejudice: unless the former is judged to outweigh the latter by a considerable margin, the evidence is likely to be excluded. Thirdly, stress will be laid on the burden which admission would lay on the resisting party: the burden in time, cost and personnel resources, very considerable in a case such as this, of giving disclosure; the lengthening of the trial, with the increased cost and stress inevitably involved; the potential prejudice to witnesses called upon to recall matters long closed, or thought to be closed; the loss of documentation; the fading of recollections. … In deciding whether evidence in a given case should be admitted the judge's overriding purpose will be to promote the ends of justice. But the judge must always bear in mind that justice requires not only that the right answer be given but also that it be achieved by a trial process which is fair to all parties."

At paragraph [24] of the judgment Jackson LJ confirmed that this analysis also applies to family cases:

> "There are two questions that the judge must address in a case where there is a dispute about the admission of evidence of this kind. Firstly, is the evidence relevant, as potentially making the matter requiring proof more or less probable? If so, it will be admissible. Secondly, is it in the interests of justice for the evidence to be admitted? This calls for a balancing of factors of the kind that Lord Bingham identifies at paragraphs 5 and 6 of O'Brien."

Jackson LJ then goes on at paragraph [25] to deal with the extent to which the facts relating to the other occasions have to be proved for propensity to be established, and refers to paragraph [39] in the case of R v Mitchell [2016] UKSC 55.

7. Parental alienation: cult; transfer of primary care

In ***Re S (Parental Alienation: Cult: Transfer of Primary Care)*** **[2020] EWHC 1940 (Fam)** the court ordered a transfer of residence of a 9 year old to his father's care in circumstances where despite repeated warning the mother had failed to disengage from the cult of Universal Medicine. In reaching the view that a transfer of living arrangements was in the child's best interests, Williams J set out the relevant considerations on making such orders:

> "[59]. The welfare of the child is the paramount consideration. I bear in mind the welfare checklist, the presumption of parental involvement contained in section 1(2A), that an order which transfers the primary care of a child and restricts their relationship, and thus which significantly interferes with the relationship between the child and a parent, should only be made where it is necessary and proportionate. Whilst a significant order, as the Court of Appeal emphasised, a transfer of primary care is not limited to cases of last resort. Such an order will be appropriate where assessment of the paramount welfare of the child justifies such an order. In a case such as this the evaluation of paramount welfare and the necessity or proportionality of the appropriate order to give effect to that evaluation of paramount welfare are inextricably linked; and indeed, in a case such as this, the conclusions as to paramount welfare make the resulting order necessary and proportionate.
>
> [60]. Although the parameters of this hearing were set on a fairly narrow basis by the Court of Appeal, inevitably in conducting the ultimate evaluation of paramount welfare I have sought to survey the totality of the welfare landscape and have considered all of the circumstances and the welfare checklist as part of that survey. Ultimately the evaluation of welfare on the evidence as it stands before me was my function."

8/12/20

Surrogacy and HFEA Update: December 2020 (Part 1)

In the first part of his surrogacy and HFEA update, **Andrew Powell** of **4PB** analyses some important recent judgments within the England and Wales jurisdiction.

For Part 2 of this article, dealing with recent cases in the jurisdictions of Scotland and Northern Ireland, **click here**.

Re A (Surrogacy: s.54 Criteria) [2020] EWHC 1426 (Fam)

A decision in which Keehan J reads down various limbs of HFEA 2008, s.54 in order to make a parental order. The three issues in the instant case were that the application was made outside of the six-month time limit (s.54(3)); whether at the time of the application the mother and father could be found to be "two persons who were living as partners in an enduring family relationship" (s.54(2)(c)), and whether the child's "home" at the time of the application and the making of the order could be said to be with both applicants (s.54(4)(a)).

The case concerned a child (A) born in February 2017 as a result of a surrogacy arrangement in the UK. A's intended parents (M and F), who were also his biological parents, separated during the course of M's pregnancy. Shortly after A's birth, M applied for A to be made a ward of court. The judge confirmed the wardship and noted that F had indicated he had no wish to be involved in the proceedings, nor to play any part in the upbringing of A.

M made an application as a single applicant for a parental order in July 2017. The application was stayed because it pre-dated the Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018, which in October 2018 brought into force HFEA 2008, s.54A, which permitted applications for parental orders by single parent applicants.

In the meantime, however, F changed his position, indicating he wished to have contact with A and did not wish to relinquish his legal parenthood. A joint application for a parental order was made on 16 December 2019 by the parties. By the case management hearing in May 2020, F was having indirect contact with A, and directions were given for the Guardian to consider whether and, if so, how contact should progress.

The court had to consider whether a parental order could be made in circumstances where:

> i. The joint application was made some two years and four months after the prescribed six-month time limit (s.54(3));
>
> ii. The applicants were no longer in a relationship (s.54(2)(c)); and
>
> iii. The child's "home" at the time of the application and making of the order could not be said to be with both applicants, in circumstances where the applicants were separated and the child had never lived nor had any direct contact with F (s.54(4)(a)).

The court considered the leading authorities, and provided a useful summary of the principles that needed to be applied when considering whether or not the s.54 statutory criteria were met (§54):

> i) when interpreting legislative provisions, the court must have regard to the underlying purpose of the requirement and ensure the interpretation does not 'go against the grain' of the intentions of Parliament;

ii) s.3 of the HRA requires the court, where possible, to give a Convention compliant interpretation of statutory provisions;

iii) a failure to adhere to the six-month time limit to make an application for a parental order is not fatal to the making of the order;

iv) the questions whether the applicants are in an enduring family relationship and whether the child has his home with the applicants are matters of fact for the court to determine;

v) where the court finds that the Article 8 and/or Article 14 rights of the child are engaged, the biological and social reality of the child's life must prevail over legal presumption;

vi) the existence of family life is not defined nor is its existence constrained by legal, societal or religious conventions;

vii) there are no minimum requirements that must be shown if family life is to be held to exist;

viii) what is required is an unambiguous intention to create and maintain family life, and secondly, a factual matrix consistent with that intention which is clearly a question of fact and degree;

ix) the mere fact that the parents are now separated is not fatal to the application for a parental order;

x) similarly, the mere fact that the parents live in separate homes is not fatal to the application;

xi) if a parental order is not made, the child is likely to be denied the social and emotional benefits of recognition of his relationship with his parents and would not have the legal reality that matches his day to day reality;

xii) the transformative effect of a parental order cannot be overstated; and

xiii) the ultimate test for the making of a parental order is the welfare best interests of the child.

The following factors were considered of crucial significance in the instant case (§55): the mother and father had, prior to the surrogacy arrangement, been in an enduring family relationship and desperately wished for a child of their own, and each had provided their gametes to produce embryos; A had spent his entire life with his mother; at the time of the joint application, the mother and father were committed to playing key roles in A's life, and to his care and wellbeing, and had or wished to have a close and loving relationship with him, and to work together to promote his welfare throughout his minority and beyond; and finally both wished to have their biological status as A's parents recognised in law.

The court held that notwithstanding the joint application was made outside the six-month time period, this was not a bar to making a parental order; to find to the contrary would be nonsensical and deprive the child of the enormous benefit that a parental order provided (§56).

The mother and father were committed to the child's welfare and agreed both would play an active role in A's future upbringing. A, M and F were therefore in an enduring family relationship, and both A's Article 8 and 14 rights were engaged (§57).

Further, in light of the parents' intention that A would be cared for by both of them, albeit not necessarily, and not at present, on the basis of an equal shared care arrangement, a wide and purposive interpretation to the word "home" had to be applied. A had his "home" with M and F (§58).

A parental order had a transformative effect, was fundamental to his identity and status for the whole of his life, and was overwhelmingly in A's best interests. The court adopted a purposive interpretation to ensure that the statutory provisions of s.54 were applied in a ECHR compliant manner with respect to Articles 8 and 14, and granted a parental order accordingly (§60-64).

***Y v Z* [2020] EWFC 39**

Another decision before Theis J in which the court 'read down' the provisions in the HFEA 2008 s.54, to make a parental order in circumstances where the child's intended father had died after embryo transfer, but before the child's birth.

The intended parents, Mr Y and Mrs Y, were married in 2013, and entered into a surrogacy agreement with the respondents, Mrs Z (the surrogate mother) and her partner, Mr Z in 2017. The agreement outlined the parties' intentions, which included the intended parents applying for a parental order after the child's birth.

An embryo was created using the gametes from Mrs Z and Mr Y, and was transferred into Mrs Z in May 2018.

Sadly, five months into Mrs Z's pregnancy, Mr Y died unexpectedly. The child (X) was born, and had been in Mrs Y's care ever since the birth.

Mrs Y wanted to have Mr Y recognised as X's legal father, and sought a parental order (her application made jointly on behalf of herself and Mr Y). The application was made within six months of X's birth. The application was unconditionally supported by the respondents. Mrs Y's statement set out the significance both for her and X of the parental order being made.

However, the death of Mr Y meant certain requirements of HFEA 2008, s. 54 were not met. Mrs Y invited the court to "read down" the s.54 requirements under HRA 1998, s.3 so they were compatible with Convention rights. This included: the requirement for there to be two applicants (s.54(1)); the status of the applicants' relationship (s.54(2)(a)); the requirement for the child to have her "home" with the applicants at the time of the application and the making of the order (s.54(4)(a)), and for the applicants to be over the age of 18 at the time of the making of the order (s.54(5)).

Legal Framework

Theis J considered *Ghaidan v Godin-Mendoza* [2004] All ER (D) 210, a seminal decision on the effect of HRA 1998 s.3. Theis J went on to discuss a number of cases which have considered the extent to which HRA 1998, s.3 has enabled the court to "read down" the requirements in s.54, so they are compatible with Convention rights (including ***A v P*** **[2011] EWHC 1738 (Fam)**; ***Re X (A Child) (Surrogacy: Time Limit)*** **[2014] EWHC 3135 (Fam)**, and ***Re Z*** **[2015] EWFC 73**).

It had also been raised on behalf of Mrs Y the extent to which the court was required to be satisfied that Mrs Y, acting as executor of Mr Y's estate, had locus to issue an application for a parental order on his behalf. In initial written and oral submissions Mrs Y invited the court to consider whether under s.1 Law Reform (Miscellaneous Provisions) Act 1934 ("LR(MP)A"), Mrs Y is able to bring a claim on behalf of Mr Y's estate, or alternatively whether the right to apply for a parental order 'vests' before the child in question is born. If the former was the case, Mrs Y would stand in her own right as one of the applicants, and as Mr Y's executor, she would also stand in his shoes as the second applicant. Such circumstances would potentially mean the condition for two applicants is met under s.54(1)). Consideration was given to a number of cases on this issue.

Submissions

For a number of reasons (outlined at §60), the later written submissions filed on behalf of Mrs L shifted the focus on the ability of the court to read down the relevant provisions of s.54, as opposed to focusing on whether a claim could be made on behalf of Mr Y's estate pursuant to LP(MP)A, s.1. (Nonetheless, in the event the court held it needed to consider this, which it eventually did not, the summary route the court was invited to take is set out at §84.)

It was put forward on behalf of Mrs Y that a combination of the amendments to and features of the HFEA 2008 supported the submission that it would go with "the grain of the legislation" to enable X to also have her father registered on her birth certificate, which would be done if a parental order was made. Further, it would go against "the grain of the legislation" for X, uniquely among children conceived through assisted conception, to be denied that right in contravention of both her Article 8 and 14 rights. The submissions included the following points:

> 1. The history of the HFEA 2008 supports the contention that a parental order made in the terms sought would not offend public policy and would "go with the grain of" the legislation (§63-68): It was submitted that the argument for reading down in Re Z [2015] failed as it was clear Parliament had taken a deliberate policy decision to exclude single parents. The requirement for two applicants was a key feature of the "pith and substance" of the legislation; it was not here, and there was no evidence Parliament ever even considered the possibility of an intended parent dying during a surrogacy pregnancy, or that such person should be excluded from obtaining a parental order. Further, the grant of incompatibility by the court under s.4 HRA in ***Re Z (No 2)*** **[2016] EWHC 1191** was made with the government's agreement, and led to Parliament enacting the Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018. During discussion that led to the Order being made, it became clear it was no longer the "thrust of the legislation" to exclude any categories of applicants from obtaining parental orders as a result of their relationship status.
>
> 2. The provisions in HFEA 2008, ss.35-37 suggest legal parenthood status is acquired from the date the transfer of the embryo or artificial insemination takes place (§69-72): In all situations therefore, a father who dies during a pregnancy is already and remains the child's legal father for all purposes. He can also be registered as the father on his child's birth certificate.
>
> 3. The provisions in HFEA 2008, ss.39-40 provide for recording fathers on birth certificates where the embryo transfer or artificial insemination takes place posthumously (§73-76).

Discussion and conclusions

Theis J held that both ECHR Articles 8 and 14 were engaged:

> i. X was not able to establish a family life with her biological father due to his premature death; however, as Munby P has made clear in *Re X (A Child) (Parental Order: Time Limit)* [2014], Article 8 rights referred not only to family life, but also to private life. The state had a responsibility to ensure it respected X's right to a private life and that extended to ensuring recognition of her identity as the child of her deceased father. Further, Article 8 rights included "the right to adequate legal recognition of biological and social ties" (***D v ED (Parental Order: Time Limit)* [2015] EWHC 911 (Fam)**).
>
> ii. In relation to Article 14, X's Convention rights should be secured without discrimination on any ground including birth or other status. Without a parental order being made, X was not able to have a birth certificate reflecting the relationship and connection she had with Mr and Mrs Y as her parents. This was solely by virtue of the circumstances of her birth through surrogacy.

Theis J went on to consider that these rights were interfered with, and whether such interference was justified and proportionate. Theis J concluded that Parliament could not have intended "the gate should be barred forever" (adopting Munby P's words in *Re X (A Child) (Parental Order: Time Limit)* [2014]) to a parental order being made in circumstances such as this, where the intended father dies after the embryo transfer, but before the child's birth (§93):

> 1. Firstly, there was no reason to believe that Parliament either foresaw or intended the potential injustice which would result if a parental order could not be made in the circumstances of the instant case.
>
> 2. Other provisions in HFEA 2008, such as ss.35-37, provided clarity about the status of the father of children born as a result of assisted conception, at the time when the embryo is transferred, or artificial insemination takes place, provided certain safeguards are in place (in particular consent, which was not an issue in this case).
>
> 3. HFEA 2008 ss.39 and 49 provided clarity as to the status of the father in circumstances of sub-paragraph (2) where they take place after his death, again with safeguards in place relating to consent.
>
> 4. Parliament has recently, when considering the declaration of incompatibility made by the court in Re Z (No 2) [2016], signalled that it seeks to ensure that the law does not discriminate against different categories of applicants for parental orders on the grounds of relationship status.
>
> 5. A parental order was the only route by which X could have her status regarding Mr and Mrs Y recognised in a way that was intended by the surrogacy arrangement. This is what a parental order was specifically created for.

This conclusion could equally be justified having regard to the Convention rights involved (§94):

> 1. Both Articles 8 and 14 were engaged.
>
> 2. It was held that X certainly had an established 'private life' right for her own identity to be protected by legal recognition of her relationship with Mr Y.
>
> 3. Although the court concluded that Parliament cannot have intended that a child in X's position would be excluded from such recognition, without the "reading down" required by s.3 of the provisions in HFEA 2008, s.54, it could prevent a parental order being made.
>
> 4. "Reading down" did not "go against the grain of the legislation"; on the contrary, it sought to provide the order which was specifically created for a child born as a result of a surrogacy arrangement. The parental order was specifically created for a child born as a result of a surrogacy arrangement, such as in this case.
>
> 5. No alternative order could properly and accurately to reflect X's identity, including her relationship with Mr Y.
>
> 6. For X her connection with her biological father would be safeguarded in any other birth circumstances naturally or by way of assisted conception, consequently it is discriminatory for the circumstances of her birth to prevent this. A failure of the law to recognise her connection with her biological father as the result of her birth through a surrogacy arrangement amounts to a breach of her Article 14 right to enjoy her Article 8 rights without discrimination on the grounds of birth.
>
> 7. Mrs Y's Article 14 rights were also engaged. She is discriminated against based on her relationship status as a widow, rather than being married.

8. The consequences of not making a parental order in this case are that there is no legal relationship between X and her biological father; X is denied the social and emotional benefits of recognition of that relationship; X may be financially disadvantaged if there is not legal recognition as the child of her biological father; X does not have a legal reality that matches the day-to-day reality; X is further disadvantaged by the death of her biological father.

9. The only order that will confer joint and equal parenthood on Mr and Mrs Y is a parental order. Only that order will ensure X's security and identity in a lifelong way, respecting both her Article 8 and 14 rights.

Theis J concluded that making a parental order would not be incompatible with the "underlying thrust of the legislation being construed" and that the words sought to be implied into s.54 "go with the grain of the legislation." The legislation was "read down," and all of the s.54 criteria were therefore met. A parental order would meet X's lifelong welfare needs, and only that order would recognise X's reality in a transformative way, as the child of her parents, Mr and Mrs Y (§95-99).

***X (A Child : child arrangements order)* [2020] EWFC 49**

A decision by Theis J in which a father's application for a child arrangements order in respect of a child conceived through artificial insemination was refused, the court concluding the child's welfare needs required a period of stability with minimal risk of disruption.

The case concerned a 6-year-old girl (X), who had been conceived through artificial insemination. X's legal parents (Y and Z) had been in a civil partnership at the time of her birth. X had been conceived by Y using sperm from W, the applicant father, after the parties had met online. W maintained his understanding had been that Y and Z were looking for a co-parenting arrangement.

Y and Z had stopped X's contact with W in September 2014. In November 2015, W's application for direct contact was refused and an order made for indirect contact on an annual basis, which had continued to take place. Subsequently, Y and Z separated, and a child arrangements order for X to have direct and unsupervised contact with Z was made.

In August 2019, W re-applied for permission to make an application for a child arrangements order, and sought direct contact six times a year. It was these proceedings the court was concerned with. Y's position at the hearing was that it was not in X's best interests to spend time with W at this time. The Guardian agreed, recommending there be no order in respect of W's application, and that the indirect contact should continue. An order under s.91(14) for a period of five years was also recommended. W relied on X's right to know who her biological father was, and to spend time with him.

The court noted X was settled and her current situation was meeting her physical, emotional and educational needs. Any time with W would mean a change for her. She had managed considerable disruption in her short life (including three sets of proceedings), and her welfare required a period of stability with minimal disruption.

The court concluded that X's welfare needs would only be met by a refusal of the application (§32):

1. Whilst it was important for X to have information about her background and identity it was not a right that existed irrespective of her welfare.

2. Y's evidence that she had sought and taken advice about how to meet X's needs in relation to her background was accepted. This included an age appropriate book she created about the relationship between her and Z, and how they were helped to have a baby by W. Y's evidence regarding how she has read it with X and made it available to her was compelling, and supported by the Guardian. The court was confident that Y would continue to support X in a sensitive and age appropriate way, and that if X said she wanted to meet or have contact with W, then Y would take the necessary steps in accordance with X's welfare needs.

3. Given W's position regarding the co-parenting relationship he considered the parties had entered into, and belief that Y had withdrawn from that arrangement, the court expressed its concern that if W had any time with X it was likely he would seek an increase in the time and his involvement in her life. This would put her current stability at risk.

4. W's "somewhat blinkered reliance on general rights" had meant he has been unable to engage with X's reality and the steps Y had been taking to assist her. Although he said he would follow professional advice, the court considered a real risk he would only follow it if he agreed with it.

5. Y's recovery from a mental health condition had been hampered by the continuation of these proceedings, and would be further impacted by an order for X to spend time with W. This would have a direct impact on X's welfare and the stability of care Y could provide to X.

The court concluded that a s.91(14) order would be made lasting until March 2026 (i.e. 6 months after X would move to school in September 2025, ensuring she had time to settle.) Annual indirect contact would continue, including exchanges of information and photographs to enable Y and Z to discuss W with X in accordance with her wishes and welfare needs.

Re C (A Child) (Parental Order & Child Arrangements Order) **[2020] EWHC 2141**

A highly unusual decision following a fact-finding hearing in which it was found that the mother had lied about the father's consent to a second surrogacy arrangement in which two twins had been born. The court determined the parties' parental order application in respect of the child born as a result of their first surrogacy arrangement, and made a child arrangements order that the child would live with his father, and have contact with his mother.

The mother (M) and father (F) had married in 2009. They entered into a surrogacy agreement abroad in 2017, and their now 2-year-old son (C) was born in 2018 as a result of this surrogacy arrangement.

The mother asked the surrogacy agency to continue storing F's sperm for a further five months. Soon afterwards, on 24 April 2018, M entered into *another* surrogacy agreement with the same surrogacy agency. On 25 October 2018 a second surrogacy agreement was signed with the proposed surrogate mother (a different surrogate mother from C), and the agency's lawyer signed the agreement on behalf of the parents using the power of attorney used for the first surrogacy agreement. An embryo was implanted on 10 December 2018 into the second surrogate mother, and M became aware that the surrogate mother had become pregnant on 26 December. The father alleged he was unaware of the second surrogacy agreement until 5 March 2019, and that he did not sign the second surrogacy agreement.

On 6 March 2019, M reported to the police that F had allegedly assaulted her on 3 February.

A Parental Order Reporting Officer had made three visits to the family in September and October 2018. On no occasion had the mother made any reference to a second surrogacy arrangement to the Officer, nor had the mother said anything at numerous directions hearings between October and March 2019.

In 2019, twins (P and Q) were born as a result of the second surrogacy. They remained living abroad with M or alternative carers until they arrived in this jurisdiction with M in 2020. (M originally planned to divide her time between caring for C and travelling to the country of their birth to care for the twins on a two-weekly cycle, however was not able to maintain the regularity of visits.) At the time of this hearing C had been in the sole care of F since 3 April 2020, and enjoyed weekly contact with M.

During a fact finding hearing earlier in the year, formally handed down on 17 April 2020, (see ***Re C (A Child) (Parental Order: Child Arrangements Order)*** **[2020] EWHC 2474 (Fam)**), Keehan J made the following findings of fact (summarised at §8 of the instant judgment):

> i) I was not satisfied that the father had signed the second surrogacy agreement and I found he did not;
>
> ii) The mother had serially lied in her evidence. I found no innocent explanation for these lies. She was, I found, a wholly unreliable witness who would tell lies with alacrity to achieve her objectives;
>
> iii) On 5th March 2019 the mother, for the first time, told the father of the second surrogacy. The father was shocked and surprised. Plainly his adverse reaction was not one the mother wanted to hear. She alleged he had threatened her on the afternoon and evening of 5th March which led her to contact the police;
>
> iv) It was not a case of happenchance or mere coincidence that the report to the police was made the day after she had told the father of the second surrogacy. Further, she stopped all contact between the father and C for three months;
>
> v) I did not believe the mother's account of the father threatening her on 5th March. I considered it most likely, and found, that the father's adverse reaction to the news of the second surrogacy so incensed and angered the mother that she sought to punish the father and/or exact revenge by:
>
> a) making a false allegation to the police that the father had assaulted her on 3rd February 2019; and
>
> b) stopping all contact between C and his father, for no good or child focussed reason whatsoever.
>
> vi) The mother deliberately concealed the second surrogacy from the father until 5th March 2019 when it was far too late for him to do anything about it – the surrogate mother's pregnancy being so far advanced;
>
> vii) The father did not consent to the extension of the period of storage of his genetic material by the surrogacy agency in X Country;

viii) The father did not consent to the second surrogacy arrangement; and

ix) The father was a measured, reliable and credible witness. I found that he had not assaulted the mother nor subjected her to domestic abuse as she alleged or at all.

The court had a number of applications before it at this instant hearing, and each was dealt with in turn, considering the requisite law separately.

The parties' joint application for a parental order in respect of C dated 12 July 2019 (§59-66)

The sole legal issue was in respect of whether HFEA 2008, s.54(4)(a) was satisfied given that at the time of the making of the order, the parents were separated and lived in two separate households. Keehan J held that *de facto* family life was established. In the past C lived with M and/or F and they provide him with all of his care needs and make important decisions in respect of his life. Further, whilst he now lived with F, he very regularly spent time every week with M.

The court concluded it was appropriate to read down the statutory criteria in order to meet the rights of the parents and C under the ECHR therefore. Giving a wide and purposive interpretation of "home", C had his home with both F and M in that he would be cared for by both of them, albeit not necessarily, and not at present, on the basis of an equal shared care arrangement. A parental order was made accordingly.

M's application to re-open the findings of fact dated 8 June 2020 (§67-79)

M sought to re-open the findings of fact, and invited the court to consider: F's knowledge of, consent to and participation in the second surrogacy arrangement, and the finding M had deliberately concealed the arrangement from him; F's alleged assault of M on 3 February 2019, and his abusive and controlling behaviour of her in the family home; and F's reliability as a witness of fact, and by extension, M's reliability.

The court extensively considered the law on re-opening findings of fact (§53).

Ultimately, the application was deemed totally without merit and dismissed; none of the evidence put forward by M materially advanced her case. It was noted that F had accepted he had lied in respect of an aspect of his evidence when he denied taking flowers for M, entering the house, having a meal with the maternal family and spending a number of hours with them on the evening of 24 January (i.e. after the fact-finding hearing had concluded). However, his explanation that he lied because of his shame when he had failed to reconcile with M was accepted and did not negate the finding as to his credibility.

The findings of fact sought by M against F including of financial, coercive and controlling abuse during the relationship (§80-82; 110)

None of the findings of fact sought by M against F were made.

F's application for a child arrangements order dated 22 March 2019 (§83-85; 96-106)

In determining F's application for a child arrangements order, the court concluded it was in C's best interests to continue to live with the F, and have contact with M twice per week (once direct contact for four hours, and once via indirect contact).

The court held M did not exhibit any understanding of the impact upon him of her proposed arrangement for C to live with her and the twins.

Keehan J noted M said she accepted the findings of fact made by the court in the 17 April 2020 judgment. However, despite this she has still maintained F assaulted her on 3 February 2019, and that F knew about the second surrogacy and consented to it. M has continued to criticise F and talk about him in negative terms, including in her evidence. The court found she has demonstrated she has not changed or wished to move forward with F. She was lying in her allegations against F. Moreover, she has been unable to accept the harm she has caused C by the second surrogacy; it took her away from C for a prolonged period of time while she was in another country looking after the twins and has caused an immensely complex set of family relationships that will have to be explained to C and the twins in due course.

The court found that if C lived with M the prospects of him enjoying a relationship with F were very poor. However, if he lived with F, he would be encouraged to have a positive relationship with the mother.

The Guardian's application for the instruction of an expert dated 20 April 2020 (§107; 112; 114)

Permission was given for an expert, Dr Pettle, to be instructed to advise the court on whether and, if so:

i. How C should learn of the existence of his two half siblings;

ii. How he should be introduced to them; and

iii. How their relationship should be enabled to be developed.

M's level of contact with C would be reviewed in light of Dr Pettle's advice and recommendations, and the court would then consider F's request to place restrictions on the exercise of M's parental responsibility.

9/12/20

Financial Remedy Update, December 2020

Sue Brookes Principal Associate, Family Lawyer, Collaborative Lawyer and Mediator for **Mills & Reeve LLP** considers the important news and case law relating to financial remedies and divorce during November 2020.

As usual, this updated is provided in two parts:

News

High Court judgment assists domestic abuse victims' legal aid applications

Following judgment in ***R (on the application of GR) v Director of Legal Aid Casework & Anor*** **[2020] EWHC 3140 (Admin)**, victims of domestic abuse who jointly own property with their abuser must not be automatically denied legal aid on the grounds of capital that is in practice 'trapped'. The court found the Legal Aid Agency has discretion over whether legal aid should be granted in these cases. This strategic litigation was brought by Public Law Project (PLP) supported by the Law Society

Supreme Court declines to hear transgender man's appeal to be registered as father

The SC has declined to hear a case in which a transgender man who had given birth to a son sought judicial review of the decision that he had to be registered on the birth certificate of the son as his "mother". Alfred McConnell is a transgender man and holder of a gender recognition certificate, who gave birth to a son, YY. The Registrar General for England and Wales decided that Mr McConnell had to be registered on the birth certificate of his son as his "mother."

Mr McConnell applied for judicial review of that decision. His primary claim was for a declaration that as a matter of domestic law he was to be regarded, and hence entitled to be registered, as YY's "father", or otherwise "parent" or "gestational parent." His secondary and alternative claim, on the basis that domestic law requires his registration as "mother," was for a declaration of incompatibility under s. 4 Human Rights Act 1998 on the ground that the domestic regime is incompatible with his and/or YY's Convention rights under articles 8 and 14 European Convention on Human Rights.

The SC determined that permission to appeal be refused because, in its view, the applications did not raise an arguable point of law which ought to be considered bearing in mind that the cases were the subject of judicial decision and reviewed on appeal.

Divorces in 2019 rose by 18%

There were 107,599 divorces of opposite-sex couples in 2019, increasing by 18.4 per cent from 90,871 in 2018. The scale of this increase partly reflects divorce centres processing a backlog of casework in 2018, which is likely to have translated into a higher number of completed divorces in 2019.

The divorce rate among opposite-sex couples in 2019 increased to 8.9 divorces per 1,000 married men and women aged 16 years and over from 7.5 in 2018. This increase will have been impacted by the additional processing of casework in 2018.

There were 822 divorces among same-sex couples in 2019, nearly twice the number in 2018 (428 divorces). Of these, nearly three-quarters (72%) were between female couples.

Unreasonable behaviour was the most common reason for opposite-sex couples divorcing in 2019 with 49 per cent of wives and 35 per cent of husbands petitioning on these grounds. It was also the most common reason for same-sex couples divorcing, accounting for 63% of divorces among women and 70% among men.

In 2019, the average (median) duration of marriage at the time of divorce was 12.3 years for opposite-sex couples, a small decrease from 12.5 years in the previous year.

View from the President's Chambers published

The President has published his latest View from the President's Chambers. It covers:

- The pride that all persons involved in the delivery of Family Justice should feel for all that has been achieved during the past seven months
- The need to prioritise wellbeing in our individual and collective working lives amid the remorseless pressure from the increased volume of work
- Gratitude to all who assisted during the President's enforced absence from work
- The recently published report from the Nuffield Family Justice Observatory on Remote Hearings in the Family Justice System: September 2020
- Coping with increased demand in Public and Private Law children cases
- Conduct of business in the Court of Protection in recent months
- The Financial Remedies Court
- The report by the Family Solutions Group: Reframing Support for Families following Parental Separation
- Transparency
- Family Drugs and Alcohol Court
- Enhancing the provision of experts for Family cases
- The work of the Family Justice Council in recent months in support of key judicial initiatives
- Involving the Official Solicitor
- Remembering the highly valued individuals the Family Law community has lost recently, including Anne-Marie Hutchinson OBE, QC (Hon), His Honour Glenn Brasse, Dr Julian Farrand QC (Hon), Sir Robert Johnson and Ian Griffin.

Three in four family justice professionals say work-related pressures rose in lockdown

Nearly three-quarters of family justice practitioners have reported work-related pressures increasing since the first national lockdown.

The early findings come after nearly a thousand professionals responded to a major wellbeing survey run by Resolution. The large response rate means it is one of the most widespread pieces of research into wellbeing in family justice. A full report on its findings is due to be published early in 2021.

Safety from Domestic Abuse and Special Measures in Remote and Hybrid Hearings

The President has published the Safety from Domestic Abuse and Special Measures in Remote and Hybrid Hearings report. The guidance applies to all family proceedings where domestic abuse has been proved or may be an issue and it has been drafted to ensure the delivery of safe evidence and full participation of vulnerable parties. The guidance provides an important checklist that should be used to decide upon the format of the hearing, including identifying any need for appropriate personal protection or additional special measures.

Final report of the Working Group on Medical Experts in the Family Courts

This has now been published.

Cases

CB v EB [2020] EWFC 72

Mostyn J heard an application by the husband (H) to set aside two consent orders which had been made in 2010 and 2013.

H had initially applied on two grounds:

- the order remains executory and the court could therefore vary pursuant to *Thwaite v Thwaite* [1982] Fam 1 – which he eventually conceded was not applicable and he did not pursue this ground; and

- section 31F(6) of the Matrimonial and Family Proceedings Act 1984 (MFPA) and rule 9.9A FPR, which he argued gave the court unfettered power to set aside any order in exceptional circumstances.

The parties had been married for 22 years and the divorce was finalised in 2010. H had been a successful property developer. The consent order agreed in 2010 stated that the parties wanted a broadly equal division of their capital. Some of the properties were divided and others were to be sold with the wife (W) also receiving a lump sum payment.

One of H's companies was developing two properties and the expected profits were to be £2m - £6m. W was to receive a lump sum calculated with reference to H's return from these sales. If the properties had not sold by 2012, the parties would review the agreement and apply to the court if required.

W applied to enforce and implement the order in the absence of agreement. They then reached a further settlement, recorded in the 2013 order, which provided that W would receive two lump sums of £250,000 and £410,000. This order was said to be in full and final satisfaction of claims and on a clean break, conditional upon the second payment being made. The payment was made and so the clean break took effect.

The sale of one of the properties then fell through shortly afterwards and it eventually sold in 2016 for £3m less than anticipated. The other property was repossessed by the bank.

H argued that this left him in a catastrophic financial position with a net worth of £1m compared to W's £8.5m. He therefore wanted the orders to be set aside and for the court to re-start the section 25 exercise. He sought over £3.5m from W to give him half of the available resources.

Mostyn J's judgment considers in some detail the relevant law and legal commentary. Following *L v L* [2008] 1 FLR 26, he concluded that orders could only be set aside on the following "traditional grounds," which had evolved over decades to strike a fair balance between the competing public policy considerations of (a) the intention of Parliament; (b) the goal of finality and an end to litigation; (c) the need for reasonable accuracy when making findings about present and future facts; and (d) the need for scrupulous honesty by the parties:

- fraud or mistake (*de Lasala v de Lasala* [1980] AC 546);

- material non-disclosure (*Livesey (formerly Jenkins) v Jenkins* [1985] AC 424);

- *Barder v Caluori* [1988] AC 20, which requires an unforeseen change of circumstances very soon after the order was made;

- if and insofar as an order contains undertakings *Mid Suffolk District Council v Clarke* [2006] EWCA Civ 71; or

- if the terms of the order remain executory *Thwaite v Thwaite* [1982] Fam 1.

There is no free-ranging discretion to set aside a final order on the ground that it appears unfair in light of a later change of circumstances.

Section 31F(6) MFPA may appear to be more expansive that the language used in the County Court Rules 1981 but its effect is the same.

FPR rule 9.9A and FPR PD 9A para 13.5 confirm the traditional grounds remain available. Agreeing with Gwynneth Knowles J in ***Akhmedova v Akmedhov & Ors (No. 6)* [2020] EWHC 2235 (Fam)**, these provisions do not signal a relaxation or departure from the traditional grounds. Mostyn J did not agree with Gwynneth Knowles J that the categories of case in which FPR r9.9A can be exercised are not closed or limited to those in paragraph 13.5 of PD9A, but he thought this was mere semantics. There is no real difference between a party not being allowed to invoke a discretionary power and a party being allowed to invoke a discretionary where the application will be invariably dismissed.

FPR PD9A should not be read literally and its language must yield to the limitations set by law. There is no lawful scope for imaginative judges to unearth yet further set aside grounds. The available grounds are the traditional grounds, no more, no less.

Mostyn J added that, if he was wrong to dismiss H's application, the other hurdle H would face is section 28(3) of the Matrimonial Causes Act 1973, which bars a party who has remarried, as H had, from pursuing claims. Although H argue that he could still pursue claims in the circumstances of this case, Mostyn J was not persuaded.

MG v AG (Appeal out of time: Relief from sanctions) [2020] EWFC B49

Mr Recorder Salter heard an application for permission to appeal out of time against an order handed down in July 2018 and subsequently clarified.

The assets had been the equity in the FMH (£405,000) and the husband (H)'s shareholdings in two companies which had been valued at £6million and £182,000. The wife (W) was to receive £3.09m by July 2023, subject to simple interest at the rate of 4%, 75% of the equity in the FMH and maintenance of £4750 per month, 25% of H's net bonus and 50% of any dividends.

H wrote to the court and asked for permission from the trial judge to appeal. Permission was refused and no application was made to a circuit judge. Instead the parties attempted to agree the terms of the order.

In May 2019, H instructed new solicitors who applied for judicial reconsideration of the periodical payments but not the lump sum. This application was heard by the court in October 2019 and the order was varied to remove W's entitlement to a share of the dividends, enabling the dividends to be used as part satisfaction of the lump sum. Before the order was finally sealed by the court, H sought permission to appeal the decisions in July 2018 and October 2019 relating to lump sum and interest, periodical payments and costs. H's new solicitor filed a statement seeking relief from sanctions as the appeal was out of time.

H had to acknowledge that he was out of time in seeking to appeal in November 2019 and that the effect of him succeeding would be a rehearing. He was now arguing that the judge had made the order without any evidence-based indication as to how he could raise the lump sum. He argued that, without an appeal, he would not be able to meet the terms of the order and that would have an effect on both parties. W argued that the effect of reopening the litigation would be devastating in terms of costs and anxiety and the appeal was hopeless as the evidence had indicated H had been planning to sell his businesses to raise the lump sum rather than rely on dividends.

Mr Recorder Salter considers in detail the legal framework under FPR r 30 and FPR rule 4.5 and 4.6 and the recent decision of Francis J in ***Re D (A child) (Appeal out of time)* [2020] EHWC 1167 (Fam)**.

The merits of the appeal must be considered but they are not the only focus of the court's attention and the court must consider the broad canvas of the specific factors, including the availability of alternative remedies e.g. variation. There was no justification for H's delay in this case and it would not be in the administration of justice to allow permission to appeal to be brought so far out of time, against a background of intentional and unexplained delay. H's application was therefore dismissed.

MT v VA (Second Application: Legal Services Provision order) [2020] EWHC 3087 (Fam)

The husband (H) was applying for the second time for a legal services order under s22ZA Matrimonial Causes Act 1973, following an unsuccessful FDR hearing.

The parties were aged 40 and 38 respectively with two young children after a six year marriage. Prior to marriage, they had entered into a pre-nuptial agreement, each with the benefit of legal advice, which confirmed that H would not make financial claims against the wife (W)'s non-matrimonial assets. When he signed it, H was earning USD200,000 per year and had assets worth c.£2million.

The parties were supported financially throughout their relationship by one or more offshore trusts set up by W's father.

H argued that, having been welcomed into W's family, he became very closely involved with the family business dealings and his contribution was substantial. His evidence was that W's father was going to set him up with a fund of £20m as a platform for entrepreneurial activities. This was denied by W and her father.

W's father's finances deteriorated during the parties' relationship and he was made bankrupt in April 2018. Both W and her parents were living in rented properties at the time of the hearing, although H argued that they were simply presenting a case to protect the family money from his claims.

The judgment also refers to a substantial piece of offshore litigation involving W, her siblings and the family trusts who were suing a national government for USD 3 billion, claiming a breach of an international agreement between that government and the UK government which had led to damages suffered by them as a result of the breach.

This case was far from straightforward, with many thousands of pages of evidence. Both parties had previously had Leading and junior counsel and specialist matrimonial solicitors and they had incurred £525,000 in costs between them. They both represented themselves at this hearing and each owed their lawyers substantial sums.

W had previously been ordered to pay £150,000 by way of legal services, an order which she had appealed, she had lost the appeal and then only complied with the order after H had issued enforcement proceedings and applied for a *Hadkinson* order.

H was now seeking £95,000 in costs to clear his arrears and to reinstruct his solicitors for further advice and assistance in respect of the next directions hearing, a detailed questionnaire and a further statement he was due to file. A final hearing has been listed for 10 days in June 2021, but H was not yet seeking the costs for that hearing.

W had made an open offer for settlement on the basis that she would retain the first £3m net of costs and taxes from the offshore litigation and H would then receive any surplus finds up to a maximum of £3m to be used as a housing fund on trust to revert back to W after the children completed tertiary education and £1.5million to clear debts and meet living expenses until he became financially independent.

However, an arbitral award in the offshore litigation had delayed any possibility of a swift resolution of these matrimonial proceedings on the basis of that offer.

Roberts J considered S22ZA MCA and ***Rubin v Rubin*** **[2014] EWHC 611 (Fam)**.

The first LSPO order had been intended to take the parties up to the end of FDR. However, the court had ordered less than H's solicitors' estimated costs (in line with the costs estimate provided by W's lawyers) and W's appeal and initial failure to pay the sum due had increased the costs H had incurred prior to the FDR.

H did not have the means to pay for the legal advice he needed beyond the unsuccessful FDR. Although W argued she could not afford to pay his costs, the judge was satisfied that this is a case where W has had indirect access to very significant wealth from friends and family. Although her father had been made bankrupt, that bankruptcy has been discharged and he was now living in a substantial property in one of the most expensive areas in central London. W was living near to Hyde Park.

The judge was entitled to take a robust view on W's ability to pay and therefore ordered her to pay the £95,000 sought by H on the basis that this would clear his arrears and provide him with a further £37,000 to pay solicitors to help him to prepare the required statement and questionnaire and consider offers for settlement. This level of order would not expose W to undue hardship or prevent her from obtaining her own legal advice. It was also expressly without prejudice to the ability of either party to ask the court to reconsider where the overall burden of costs should lie at the end of the case.

Moutreuil v Andreewitch & Anor (Contempt: Sentence) [2020] EWHC 3085 (Fam)

Cobb J had previously concluded in *Moutreuil v Andreewitch (Contempt: No.2)* [2020] EWHC 1301 (Fam) that the court should impose sanctions on the first respondent (H) for multiple deliberate breaches of a freezing injunction which had been made in March 2019.

Subsequently, Cobb J had conducted the final hearing and considered the applicant (W)'s claim in respect of legal and beneficial ownership of the shares in the second respondent company and a claim under Schedule 1 Children Act 1989 *Moutreuil v Andreewitch & Another* [2020] EWHC 2068 (Fam).

This latest hearing was conducted in public with H present in person to consider the sanction for the earlier proven breaches.

The court has wide ranging discretionary powers under FPR rule 37.4 and 37.19(1) including up to two years imprisonment, which could be suspended, or a fine of an unlimited amount.

Pursuant to *Oliver v Shaikh* [2020] EWHC 2658 (QB) the aims of a sanction are (1) to punish the historic breach and (2) to secure future compliance with the order. The court should only impose imprisonment where the conduct is so serious that no other penalty is appropriate. It is a measure of last resort, even if it is suspended. If the contemnor demonstrates a genuine insight into the seriousness of his conduct and its unlawfulness, the court may conclude he has learned his lesson.

Cobb J noted that the proven and flagrant breaches of the order were deliberate and repeated and H used the frozen bank account as if it was his own until it was materially depleted, which had serious consequences for W and the children. He also noted that H has not admitted any wrongdoing nor accepted responsibility until this hearing, but he had now done so.

W had confirmed that she did not wish to see H imprisoned. H was caring for the parties' older son who was still of school age and had regular contact with his other minor children. Cobb J made clear that he was keen for H to engage in family therapy to address the extent to which the children had suffered due to the extreme parental conflict.

Taking all of this into account, Cobb J concluded that only a sentence of imprisonment was appropriate and sentenced H for 6 months, suspended for 12 months in the hope of bringing the disputes to an end and ensuring H complies with the extant final orders. H also had to pay W's costs on an indemnity basis, to be assessed if not agreed.

IC v RC [2020] EWHC 2997 (Fam)

The husband (H) had applied for permission to appeal orders made in September 2019 and October 2019. The application was transferred to Knowles J because of the issues raised: (a) should the court have allowed the wife (W)'s application to amend a substantive provision in the 2017 order under the slip rule and (b) should the amendment have taken place in circumstances where the order itself was no longer extant.

After a 29 year marriage, with three grown up children, the parties had agreed a consent order in 2015, which included periodical payments payable to W which were to end on the death of either party, W's remarriage or further order.

In 2016, H applied to reduce the periodical payments and W simultaneously applied to enforce the order. After a contested hearing, the district judge reduced the amount of monthly payments on H's application. W's counsel drafted the order and H was unrepresented. The order was worded on the basis that the periodical payments would end upon the death of either party, the Applicant's remarriage or further order. W had been the applicant in the original proceedings but H was the applicant on the variation application. This was therefore clearly an error in the drafting, which was not picked up and addressed when the order was approved.

H remarried and wrote to W to confirm that he would be stopping the maintenance when he did so. W took legal advice and her solicitors invited H to agree to correct the order. H refused. W therefore applied to the court to vary the order under the order under the slip rule. H wrote to the court objecting that this was not just a minor clerical error and the amendment would have far-reaching financial consequences for him and his new wife.

In September 2019, the original district judge amended the order pursuant to the slip rule on a without prejudice basis and provided that an application to set aside, vary or stay her order should be made within 7 days, if anyone objected.

H objected and wrote to the court. The judge conducted a hearing in October 2019 at which H acted in person and W was represented. At the hearing, the judge confirmed her view that she was correct to amend the drafting of the order, which was not what she had intended.

H therefore applied to vary the order in October 2019 and W emailed the court in December 2019 saying she wanted to enforce the order. There were further delays and in June 2020 the court listed an FDR to take place in September 2020 and

W formally applied to enforce the order. H then took legal advice and lodged a notice of appeal in respect of the orders dated September and October 2019.

The court noted that both parties had been disadvantaged by what had happened and neither had acted in bad faith.

Knowles J considered the legal framework and examined the merits of the appeal and concluded the following:

• The court may at any time correct an accidental slip or omission in a judgement or order under FPR rule 29.16(1). This does not just apply to extant orders and the court was right to amend the wording in September 2019.

• Court orders should be accurate and reflect the terms intended. W would have suffered a significant injustice if the correction were not made. The court had the power, authority and jurisdiction to make the change, as it did.

• An application to correct the order under the slip rule is not comparable to an application to set aside a financial remedy on the grounds of mistake, as H had argued. There are not the same requirements to act reasonably promptly, show there was no alternative relief available and that the application should not prejudice third parties who have acted in good faith.

• The error here was not one of substance. The court had not purported to alter the trigger events specified in the original order, merely the amount payable by H. It was clear what the court had intended and this error was therefore merely clerical.

• FPR rule 29.16(2) allows an application under the slip rule to be made without notice. The judge was therefore allowed to do this but then right to give H chance to apply to set aside vary or stay her order, upon receipt.

• The judge rejected H's further arguments regarding the prejudice caused to him by the delay in the amendment and that W had the remedy of a claim against her lawyers, whereas he did not. The court must exercise its discretion to correct an order in the light of the overriding objective in FPR rule 1.1 and H did have his own remedy by way of an application to vary the order.

• W was found not to have delayed unreasonably in the circumstances of this case. On the contrary, H's failure to seek legal advice until 8 months after the time limit for any appeal cannot justify the length of his delay. The fact that he had been a litigant in person was not a good excuse for his failure to comply with the rules. His belated application to appeal had delayed his variation application and put W to great inconvenience and expense.

• Applications under the slip rule should not be rendered unnecessarily complex. In the majority of cases, the interests of justice are best served by correcting an inaccurate order and there was no good reason not to do so here.

• H's application for permission to appeal was therefore dismissed.

10.12.20

Unnecessary Private Law Applications – a warning shot from the judiciary

Marie Crawford, barrister of Becket Chambers, reflects on a recent children law judgment and its implications for parties and practitioners.

In *Re B (A Child) (Unnecessary Private Law Applications)* [2020] EWFC B44 HHJ Wildblood QC, in a case with a title that gets straight to the point, has sent a message directed at family lawyers. Its stated targets are 'parties and lawyers'. However, given that litigants generally don't read law reports, it's a safe assumption that practitioners are the target audience and are to carry the message to clients.

It warns of 'criticisms' and 'sanctions' being imposed where unnecessary private law applications are brought to court. Whilst explicitly stating that he is not giving any general guidance and limiting himself to his own DFJ area (he is the DFJ for Bristol), it would not be overly presumptuous to anticipate that most DFJs and members of the judiciary would wholeheartedly agree with his comments.

The case that led to this separate judgment being published arose from a successful appeal granted by HHJ Wildblood QC by a mother against an order by a legal advisor using their delegated powers, for the disclosure of five years of medical records (despite the subject child not yet being 2 years old and disclosure having already been ordered from two local authorities and the police for a five-year period). The mother's position was that her medical records for the period of the alleged domestic abuse incident to date were sufficient.

In finding that the order was made erroneously (concluding that it was unnecessarily and disproportionately invasive of the mother's right to respect for her private life) and allowing the appeal, the judge used the opportunity to a give this warning about the number of 'unnecessary private law applications' clogging up the courts.

As family practitioners, our attention is drawn to the word 'unnecessary', how it is defined, and possibly to thoughts of how our clients may not agree that the applications they would like to make are anything other than absolutely necessary / essential / vital. This tendency of parties to see matters this way is of course well-known to practitioners and the judiciary alike. This is presumably why the warning of 'sanctions' is made so that they can be deterred from making their necessary / essential / vital applications.

What those 'sanctions' may be was not stated in the judgment, but it may be assumed that they will relate to costs. Therefore, in the future, practitioners would have a duty to warn clients of such a possibility. I doubt the threat of 'criticism' would have the same effect on some parties. If, however, that 'criticism' is aimed more at the representatives than the parties themselves, would that potentially mean that a representative might have to tell their client that they cannot make a particular application for fear of criticism? Would any such criticism be made public in a published judgment? We know not. What we do know is that in this case the names of counsel and solicitors in the published part of the judgment were omitted, so no criticisms of any of the lawyers involved in this case (if indeed there were any) were made public.

It isn't known whether when dealing with the particular case that led to this judgment being released for publication (because that judgment was delivered in private), HHJ Wildblood QC made any costs orders against the father upon the mother succeeding in her appeal. A 'sanction' may have been applied in that case; there is no way of knowing.

In the judge's view, presumably, this case was 'unnecessary litigation'. Although he explicitly does not apportion blame to the parties or lawyers in the case (in the published part of the judgment) for appealing what was an erroneous order, his message was that the issue of disclosure should never have needed to be determined by the court in the first place and

should have been sensibly agreed between the lawyers: '*If common sense had prevailed, it would not have been necessary for the legal advisor to determine the issue at all and, when faced with the erroneous order, common sense could have led to the avoidance of this appeal*'.

His comments also extend to the need for the appeal of the order made, suggesting that that too should have been resolved out of court.

The law report summarises the reasons for publishing the judgment:

> 'The Judge released this judgment to highlight the extent to which court lists are being filled with interim private law hearings that should not require court involvement. He estimated this court would have double the number of outstanding private law cases in January 2021 than it had in January 2020. He observed: 'not only is unnecessary litigation wasteful. It clogs up lists that are already over-filled – in terms of the over-riding objective, it amounts to an inappropriate use of limited court resources'.

The judge gives examples within the judgment:

> 'To further explain the problem, I give these examples of similar requests for micro-management that have arisen before me in the past month: i) At which junction of the M4 should a child be handed over for contact? ii) Which parent should hold the children's passports (in a case where there was no suggestion that either parent would detain the children outside the jurisdiction)? iii) How should contact be arranged to take place on a Sunday afternoon? Other judges have given me many other, similar examples'.

These examples, whilst they may make us wince and have family practitioners shifting uncomfortably in their seats, may remind some of us that we too have made submissions, on the insistence of clients, of an equally 'unnecessary' nature.

Could the message be any clearer? Judge for yourselves:

> 'The message in this judgment to parties and lawyers is this, as far as I am concerned. Do not bring your private law litigation to the Family court here unless it is genuinely necessary for you to do so. You should settle your differences (or those of your clients) away from court, except where that is not possible. If you do bring unnecessary cases to this court, you will be criticised, and sanctions may be imposed upon you. There are many other ways to settle disagreements, such as mediation.'

The only part which could benefit from some clarification is what 'sanctions' the court has in mind and whether they would be aimed at the parties or their representatives, or both.

In summary then, the takeaway from this perhaps is not so much there being an issue with the making of a substantive application for a child arrangements order if it is genuinely necessary and it has not been possible to reach agreement. The criticism appears to be, from the examples given, directed more towards the ancillary issues that arise within those proceedings which parties are not able to agree on, such as in the examples given by the judge, as referred to above, which, to be fair, would test anyone's patience.

The message seems to be reach agreement on such issues, apply common sense and be reasonable, do not ask the court to decide those matters, or you will be criticised and may be sanctioned.

It is not difficult to imagine the number of 'eye rolls' that message may elicit from family practitioners who may say, 'If only it were that easy!', and perhaps also that if the parties were able to agree an issue, they would have done so, with the assistance of their representatives. We may, as practitioners, have a lot of sympathy with that sentiment, particularly when we know that parties are often not reasonable for a number of complex reasons and despite huge effort on the part of the practitioner. Whether they are unable to do so is because they cannot help but respond emotionally, rather than rationally or 'reasonably' in the midst of their relationship breakdown; are going through ` difficult family breakdown and all that may entail; or suffering the aftermath of trauma from domestic abuse; mental health issues; drug and/or alcohol addiction.

However, on the other hand, we all bear some responsibility for where we are now (apart from that part caused by a global pandemic) and we have a duty to help our clients to reach an agreement in respect of child arrangements if at all possible. Sometimes it is simply not possible, despite our best efforts.

The threat of court sanctions may assist us in those efforts, to make clients behave more reasonably, sparingly used, costs sanctions may be a powerful tool in some circumstances.

In any event, we have been warned!

16.12.20

Surrogacy and HFEA Update: December 2020 (Part 2)

In the second part of his surrogacy and HFEA update, **Andrew Powell** of **4PB** analyses recent important judgments from Scotland and Northern Ireland.

For Part 1 of this article, covering judgments in the jurisdiction of England and Wales, **please click here**.

SB v University of Aberdeen [2020] CSIH 62

A Scottish decision in which the Inner House of the Court of Session granted a widow's petition to allow her to use her late husband's sperm for IVF treatment. The primary question was whether or not his will, together with forms signed consenting to the use of his sperm in inter alia intra uterine insemination (IUI), constituted the requisite consent for use in IVF under HFEA 1990, Sch. 3.

The parties (JB and SB) met and married. When JB's serious illness recurred, they agreed to commence fertility treatment, and were referred to a consultant by their GP. On medical advice JB had stored his sperm at the onset of his disease ten years previously and prior to meeting SB. Unfortunately however, JB's health deteriorated before treatment could begin.

It was discovered the day before he died, by which time he was unconscious, that the forms he had previously completed provided his consent only to the use of his sperm in *inter alia IUI*, and not IVF (which involves creation and storage of embryos).

Nonetheless, JB had discussed his wishes with his father, and a clause had been inserted into his will headed "Human Fertilisation and Embryology" and which directed his executors to ensure that "*my donation of sperm will be for as long as possible and for as long as she may wish, available to* [SB]."

SB petitioned the court asking it to exercise its powers under the *nobile officium*, and grant certain orders to allow her to use her late husband's stored sperm in IVF treatment. The issue before the court therefore was whether or not the will, either alone or in combination with the forms JB had signed giving consent to IUI, constituted consent by JB for the use of his sperm in IVF, as required in HFEA 1990, Sch. 3. Further, SB sought the storage of JB's gametes to be extended beyond the normal statutory period of ten years.

The court concluded as follows (§20-23):

> "20. We proceed on the basis that the requirements of an effective consent to use of the deceased's gametes for IVF treatment are that:
>
> • (a) It must be in writing;
>
> • (b) It must be signed by the deceased;
>
> • (c) It must specify the purpose of use, and be clear that it encompasses consent to the creation of any embryo in vitro ;
>
> • (d) The individual must have been given a suitable opportunity to receive proper counselling about the implications of taking the proposed steps, and have been provided with such relevant information as is proper; and of the consequences in respect of the possibility of variation or withdrawal of consent as specified in schedule 4, paragraph 4 ; and

- (e) It must not have been withdrawn.

In our view, the terms of the deceased's will constitute sufficient consent to meet these requirements. It is in writing, it is signed and it has not been withdrawn. The remaining two conditions for effective consent relate to the opportunity for counselling and whether the terms of the clause are sufficiently clear to provide consent for the specific form of treatment that is involved in IVF.

21. As to the first of these, it is clear that the deceased was, at the time of his first visit to the clinic at the start of his illness, provided with suitable and appropriate opportunities for counselling in respect of the steps which he was then undertaking. What is "a suitable opportunity to receive proper counselling", or provision of "such relevant information as is proper" is, as is accepted by the HFEA, situation specific. The context in which the deceased and the petitioner consulted their GP and were referred to the consultant and thus to the fertility clinic, was one in which they were investigating the possibility of having a child in the face of JB's impending death. It seems clear to us, taking together the affidavits of the consultant and the petitioner, that the terms of paragraph 3 of schedule 6 were adequately met before the deceased signed his will about two months after being seen by the GP and consultant. In addition, during their consultation with the consultant, the couple completed and signed a fertility clinic "Welfare of the Child" consent form. Under the heading "we have considered the following issues", they ticked a box stating "Our possible need for and the availability of independent counselling". The form was signed by both of them. The referral letter from the consultant to the clinic stated "The couple seem to have considered the difficult road ahead". The Authority accepts that treatment by IVF appears to have been in the contemplation of JB, and the affidavit of SB makes this clear. We consider therefore that there was a discussion, albeit limited, about IVF which was in the circumstances sufficient to meet the statutory requirements.

22. The remaining issue relates to the construction of the clause in the will. It is axiomatic that we should start by examining the plain meaning of the words in the context in which they occur. We regard the following features as important. First, it is a testamentary document in which JB was not only making disposition of his estate but, by this clause, expressing his wish for the future use of his stored gametes. Second, he and his wife had sought and been referred for treatment to en able them to have a child. Third, although it is expressed as a direction to his executors, in reality it is an expression of his wishes. For present purposes, we are not concerned with whether the clause could be given testamentary effect. The only question is whether it can be construed as granting the necessary consent. In our view there is no doubt that it can. It is the sort of provision that would only sensibly be made by a man contemplating his death in the near future, and seeking to make his wishes clear. The heading refers not merely to fertility but to "embryology". The clause itself is expressed unconditionally and in the widest terms. It specifies that the material be "available" to SB, in other words available for her unqualified use, thus covering the prospect of her treatment, given the known context, and meeting the terms of paragraphs 6(2) and 2(1)(b) of the schedule. All these factors point unerringly toward JB having given consent to IVF treatment. Consent to use of the gametes for the purpose of IVF must impliedly include consent for the storage of any embryos thereby created, thus meeting also the terms of paragraph 8 of the schedule .

23. Where it is desired to store gametes for a period in excess of ten years for the provision of treatment services there must be written consent of the donor and a medical opinion to the effect that that person was, or may have been likely to become, prematurely infertile (Human Fertilisation and Embryology (Statutory Storage Period for Embryos and Gametes) Regulations 2009, regulation 4(3)(a) and 4(3)(b) ; and *In re Warren* [2015] Fam. 1). The clause in the deceased's will, specifying that the material be available to the petitioner for "as long as possible", together with the opinion of the treating oncologist as to the deceased's state of fertility, clearly meet these requirements."

The orders sought by SB were granted therefore, with the precise wording by consent and agreement of the parties (see §24).

Ms A and Ms R & Ors [2020] NIFam 6

A same-sex couple applied for a declaration of parentage in order to ensure that both of their names appear on the child's birth certificate. The court found itself unable to make a declaration of parentage, concluding that both s.42 and s.43 HFEA 2008 did not apply in the instant case. The court held it was also unable to make a declaration of parentage on the basis of social and psychological parentage; could not read s.42 to include couples in an "enduring relationship"; and refused to make a declaration of incompatibility with the ECHR Articles 8 and 14.

The decision involved a lesbian couple, R and A. They wished to co-parent a child, and sought a donor, P, who provided sperm with which in 2014 R conceived the child in question (C), who was born in the same year. A and R were not married or in a civil partnership at the time. R was listed on C's birth certificate as C's mother and only parent. P's name was not on the birth certificate, and crucially nor was A's.

The court had two key applications before it:

1. P's application for contact with C. The court noted that the role P was to play in C's life had not been definitively agreed between the parties. P contended he was to play some sort of part in C's life, including having at least one visit soon after C was born. R and A objected to this which in turn led to P making an application for contact. The court noted that:

> "3. Regrettably there was never a written or agreed formulation of what role Mr P would play in C's life e.g. when he would see C, how often he would see C, how he would be introduced to him, how his children would be introduced to him or how he would be known to him. It is appalling that the planning between the adults for something so important and long lasting was so inadequate. People put more care into arranging a holiday than these three adults did for C. To the extent that there were discussions the outcome was incomplete and incoherent."

R and A challenged P's right to seek contact on the basis that he is not C's father in any way which should be recognised by the court. (Note that despite seeking contact, P did not seek to have his name added to C's birth certificate.)

2. A's application for a declaration of parentage under Article 31B of the Matrimonial and Family Proceedings (NI) Order 1989 ("the 1989 Order") naming her as C's second parent, and enabling her to be added to C's birth certificate. R and A subsequently entered a civil partnership, and wished for A to be added to C's birth certificate as a second mother. They argued P was not the natural father of C, and they were C's only natural parents. A sought to argue that a refusal to add A's name to C's birth certificate would be incompatible with her rights, and those of C and R, to family life pursuant to Article 8, and Article 14 insofar as she would be a victim of discrimination based on her status of being other than married or civil partnered. A, supported by R, argued that C was born when they were in an "enduring relationship" which should be officially recognised and respected as being equivalent to a civil partnership or marriage.

Further, A argued that she was a parent to C in the social and psychological sense recognised by Lady Hale in ***Re G*** **[2006] UKHL 43**, and the court should in the alternative make a finding of its own accord that a declaration of parentage is appropriate.

A sought that s.42 of the HFEA 2008 was to be read so as to apply to A even if she was not married to R or in a civil partnership because she was in an "enduring relationship". Alternatively, A sought a finding that s.42 was incompatible with the ECHR Articles 8 and 14, and also a finding that s.43 was incompatible because it required A to have received treatment services through a licensed clinic.

A argued it was not sufficient for her to benefit from any of the orders which might be made under the Children (NI) Order 1995 ("the 1995 Order), such as an order for parental responsibility or a joint residence order with R. Whilst these orders are of some value, A argued that they do not carry the permanence of registration as a legal parent on the birth certificate and are vulnerable to challenge as circumstances change. Nor would it be sufficient for her to become an adoptive parent. A argued she could only have her position recognised adequately if she was declared to be a parent.

The Department of Finance, the UK Secretary of State for Health and the Attorney General resisted these submissions, as did P.

The Law

The court considered the HFEA 2008 in detail, including the provisions in ss.42 and 43 (§10-22), and the provisions of the 1989 Order (§4-5).

It concluded that if A fell within either s.42 or s.43 of the HFEA 2008 and was therefore "treated as a parent of the child" she would be entitled to a declaration of parentage under Article 31B of the Matrimonial and Family Proceedings (NI) Order 1989 ("the 1989 Order"), and in turn able to be registered on C's birth certificate as his second parent.

Sections 42 and 43 of HFEA 2008

As A was not R's civil partner until C was born, s.42 did not apply (§24).

Further, s. 43 did not apply either because R did not receive treatment from a licenced services provider, and the specified female parenthood conditions in s.43 had not been complied with in any way. This included the fact that A and R had not signed consent forms with a declaration acknowledging that they had received information about different options available, had been offered counselling, understood the implications of their consent, and was aware that the consent could be changed or withdrawn up to a certain point. The court noted that all of this was absent in this case and that "[t]hese consents are not incidental matters, they are fundamental to the process" (§24).

Conclusions

The court noted that:

> "29. The 2008 legislation recognises married couples, couples in civil partnerships and unmarried couples in Sections 42 and 43 subject to certain conditions. None of those conditions is one which Ms A could not have complied with. Had she and Ms R entered a civil partnership earlier they would have come within Section 42. Alternatively they could have gone through a licensed clinic and met the demands of section 43. They chose not to do so and now seek to avoid the consequences of their deliberate decisions."

The court declined to read s.42 to include people in an "enduring relationship" as to do so would "open the door wider […] only ends the certainty which the legislation has sought to achieve in this complex and difficult area." (§31)

In respect of A's submission that the court should make a declaration of legal parentage for the purpose of Article 31B of the 1989 Order on the basis of social and psychological parentage, the court followed Jackson J in *Re G (Unregulated Artificial Conception)* [2014] EWFC 1, where the court had concluded the existence or non-existence of psychological parenthood was not an apt subject for a declaration parenthood. In short, the court considered A was "asking much too much":

> "32. … Providing social or psychological parenting for a child is of enormous importance and value to a child as Lady Hale recognised. However, in my judgment, it is really quite different from what Article 31B contemplates and requires. At different times in a child's life one adult may leave the scene and another one arrive on it. That new adult might become central to the child's well-being and positive development on a long term basis. Wonderful as that is for the child it is not a basis for adding his or her name to the birth certificate."

The court ultimately concluded very strongly that:

> "33. … Ms A is not and cannot be the natural parent of C. Had she and Ms R taken one of the routes open to them they could have become the recognised legal parents. By failing to do so they have lost that opportunity, at least so far as Ms A is concerned."
>
> In respect of the arguments raised by A regarding compatibility with the ECHR, the court held that whilst Article 8 is engaged and to an extent has been interfered with, the interference is "extremely limited" and justified because:i. As noted above, A had the opportunity to become a legal parent through the routes provided for by s.42 and 43 of the HFEA 2008: "It is not the law which denies second parentage to Ms A. On the contrary it is her failure to take any of the steps open to her by law." (§34)
>
> ii. While the interference is necessary to introduce certainty into the complex area of parental relationships, it is limited by the variety and combination of alternative orders which would be able to cement A's place in C's life (i.e. orders for parental responsibility and shared residence which, in the circumstances of this case, are likely to be long lasting in their effect as P was not seeking anything more than some form of contact) (§34).

Further, in respect to the submissions that she had been discriminated against contrary to Article 14, the court found against A as the provisions in ss.42 and 43 allowed for recognition of a second parent of a woman who is in a marriage or civil partnership (s.42), or outside of a marriage or civil partnership (s.43). No comparator was found.

A declaration of parentage pursuant to Article 31B of the 1989 Order was declined. No declaration of incompatibility with Articles 8 and 14 of the ECHR were made either.

16/12/20

Bell v Tavistock and the Implications for Trans Children

Dr Bianca Jackson of **Coram Chambers** considers the recent decision of *Bell v Tavistock*

Introduction

The decision of the High Court in ***Bell & Anor v The Tavistock And Portman NHS Foundation Trust*** **[2020] EWHC 3274** ("Bell v Tavistock") has caused a great deal of concern amongst the parents of children with gender dysphoria and trans children themselves. A link to the proceedings can be found **here**, but in short, the claimants, Ms Bell and Mrs A, brought a claim for judicial review against the Tavistock and Portman NHS Foundation Trust through its Gender Identity Development Service (GIDS); University College London Hospitals NHS Foundation Trust; and Leeds Teaching Hospitals NHS Trust. Ms Bell had transitioned whilst she was a patient of GIDS and subsequently de-transitioned as an adult; Mrs A was the mother of an autistic child with gender dysphoria who was concerned about her child being referred to GIDS and prescribed puberty blockers (notwithstanding that the child would not meet GIDS' criteria and therefore this was a "theoretical" concern).

As the High Court noted early on in its judgment, the claim ultimately came down to one question: whether children and young persons can give informed consent to the administration of gonadotropin-releasing hormone agonists (GnRHa), i.e. puberty blockers. The claimants argued, *inter alia*, that a child under 18 years was not competent to give such consent; that the information provided by the defendants to their patients was insufficient to ensure informed consent; and that the absence of procedural safeguards and the inadequacy of information provided was an infringement of the children's rights under Article 8 of the European Convention on Human Rights. In contrast, the defendants submitted that whilst it was patient-specific, children were capable of giving consent, depending on their age and understanding, and they made sure that the children were given all the necessary information to make that consent valid.

The Decision

The Court did not agree with the defendants. It held that it was highly unlikely that a child aged 13 or under would ever be Gillick competent to give consent to being treated with puberty blockers. Likewise, the court expressed doubt that children aged 14 and 15 years could ever have sufficient understanding of the long-term risks and consequences of treatment to give informed consent. A distinction was drawn between children under 16 years and children over 16 years, given that there is a presumption that the latter have the ability to consent to medical treatment. However, even in children over 16, the court queried whether there should be judicial oversight where such treatment takes place.

The Appeal

Once judgment was pronounced, the defendant applied to the trial judges for permission to appeal, which was denied on the basis that the grounds of appeal put forward by the defendants had no prospect of success and there was no other compelling reason why the appeal should be heard. The Court made the following declaration: "it is declared that the relevant information that a child under the age of 16 would have to understand, retain and weigh up in order to have competence to consent to the administration of puberty blocking drugs is that set out in paragraph 138 of the judgment handed down in this case on 1 December 2020." However, the Court stayed the implementation of the order until 4pm on

22 December 2020 to allow for the defendant and/or intervenors to seek permission to appeal from the Court of Appeal, said stay to continue if permission was granted. It is understood that GIDS is seeking permission to appeal the judgment.

The Aftermath of the Decision

Subsequent to the decision of the court, the NHS made amendments to the Service Specification for Gender Identity Development Service for Children And Adolescents (E13/S(Hss)/E) [the NHS standard contract with GIDS]. The amendments include the following:

> (1) Children under the age of 16 cannot be referred by the GIDS to paediatric endocrinology clinics for puberty blockers unless a "best interests" order has been made by the court for the child in question.
>
> (2) In respect of children under the age of 16 who are already on puberty blockers as a result of a referral from GIDS, GIDS must carry out a full clinical review of each child. The timeframe for clinical reviews will be confirmed by 22 December 2020.
>
> (3) If, upon review, the lead clinician treating the child who is under 16 determines that it is in the child's best interests that either (a) the child should continue with puberty blockers and/or (b) the child should be administered cross sex hormones (either with or without puberty blockers), the lead clinician (through their NHS provider) must make a "best interests" application to the Court for final determination of the child's needs.
>
> (4) If, upon review, the lead clinician treating the child who is under 16 determines that it is not appropriate to make a "best interests" application to the court, the lead clinician must make arrangements for puberty blockers to be withdrawn within a clinically appropriate timeframe and within safe clinical arrangements.
>
> (5) GIDS must ensure that appropriate psychosocial support and psychological therapies are available to patients who are removed from puberty blockers, and to their families and carers.
>
> (6) For children aged 16 and 17, no court intervention will be necessary before treatment can take place provided that the child has mental capacity, the lead clinician considers the treatment to be in the patient's best interests, and there is no parental dispute about the intervention. However, where the 16 or 17 year old is considering the administration of cross sex hormones or is already receiving cross sex hormones, the child's lead clinician is required to review every such child's individual circumstances, and to consider an application to the Court (through their NHS provider) for final determination of the child's needs if there is doubt about the child's "best interests."

Notwithstanding the stay of the court's decision, the amendments outlined above came into effect on 1 December 2020.

The Implications for Trans Children

As highlighted above, GIDS, in conjunction with the University College London Hospitals and Leeds Teaching Hospitals teams, will conduct a clinical review of all of its current endocrinology patients, which will commence in early 2021. In the interim, it has been agreed with the NHS that those children who are already on puberty blockers and cross-sex hormones will continue with their treatment, at least until the stay concludes. However, due to the judgment and the need for GIDS to prioritise its existing endocrinology patients, GIDS is not making any new referrals to endocrinology.

Whilst the case concerned GIDS in particular, it is likely that the judgment also applies to private providers of puberty blockers. If that is correct, private clinics will need to conduct clinical reviews of any patients under 16 and apply to the court for a "best interests" order. However, like patients at GIDS, it is presumed that children who are already on puberty blockers and cross-sex hormones can continue with their private treatment until the stay concludes.

Parental Consent

Typically, the parents of children who are not considered Gillick competent and have parental responsibility can consent to treatment on their behalf, without the need for a court order. It is a general principle that the State should be slow to interfere with how parents exercise their rights and duties with regard to their children and respect their right to do so, provided that they don't put the child at risk of significant harm. However, GIDS' policy is that parents cannot consent on behalf of a child to the administration of puberty blockers; the child must be competent to do so. As such, the court in *Bell v Tavistock* did not consider it necessary to deliberate whether parents could consent to the treatment if the child could not lawfully do so themselves. It is unclear at present whether private clinics that administer puberty blockers follow the same policy, though this has been overtaken by the decision that providers must conduct clinical reviews of all patients under 16 and apply to the court for a "best interests" decision.

Inherent Jurisdiction

As set out in the judgment, it is envisioned that where GIDS, in conjunction with the University College London Hospitals and Leeds Teaching Hospitals teams (or a private provider), undertakes a clinical review of a child and determines that the child should be placed on puberty blockers, they will apply under the inherent jurisdiction of the High Court for a "best interests" decision. Pursuant to Part 12 of the Family Procedure Rules 2010, any person with a genuine interest in or relation to the child in question can make an application relating to the exercise of the court's inherent jurisdiction. As family practitioners will no doubt be aware, the court may in exercising its inherent jurisdiction make any order or determine any issue in respect of a child unless limited by case law or statute. This includes, *inter alia*, decisions about medical treatment. When making said order, the court must be satisfied that the proposed treatment is both in the child's best interests and necessary [see, for example, *Re TM (Medical Treatment)* [2013] EWHC 4103 (Fam)].

The respondents to the application for a "best interests" order would be the child's parents (or guardian), any other person who has an interest in or relationship to the child; and the child themselves, through an appointed Guardian. Though this is not addressed in the judgment, ideally the Guardian would have knowledge of gender dysphoria and the particular welfare issues that a gender dysphoric child might face. Parents may be able to access funding for legal services through the LAA for the proceedings, though this will be means and merit-tested.

Specific Issue Order

Given the burden that the court's decision will have on the NHS and the consequences of delay for children dealing with gender dysphoria, the question arises as to whether a parent of a child under 16 who wishes to take puberty blockers – or even the child themselves – could make an application for a specific issue order under s.8 of the Children Act 1989, with GIDS, the University College London Hospitals and/or Leeds Teaching Hospitals teams invited to act as intervenors. The intention of a specific issue order is to provide directions "for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child" (s.8 of the Children Act 1989). Medical treatment of a child, including the provision of puberty blockers, falls within that rubric.

Typically, specific issue orders in respect of a child's medical treatment are made in the context of parents disagreeing about said treatment. However, this is not a prerequisite; an application for a specific issue order can be brought where all parties with parental responsibility agree on the medical treatment for the child but the type of treatment necessitates the leave of the court to be sought, for example, sterilisation. As noted by the court in *Re HG (Specific Issue Order: Sterilisation)* [1993] 1 FLR 587, the decision of whether a certain medical treatment should be undertaken is "a specific question" and "the fact that the question has to be answered is what gives rise to the issue, not that there are protagonists on either side of the debate" [595]. As per any application under inherent jurisdiction, it is likely that the child would be joined as a party and represented through a guardian.

Pursuant to s.10(4) of the Children Act 1989, any parent is entitled to make an application for a specific issue order. However, there is also the possibility that the child concerned could seek leave under s.10(8) to make the application themselves. S.10(8) stipulates that the court may only grant leave if it is satisfied that the child has sufficient understanding to make the proposed application for the s.8 order. In other words, the child must be *Gillick* competent to instruct their own legal representative; it does not necessarily follow that the child must be *Gillick* competent to consent to the treatment sought.

Whilst an application for specific issue order may not be the preferred or most direct route for obtaining a "best interests" decision, it is arguably a valid one. Indeed, pursuant to Practice Direction 12D of the Family Procedure Rules 2010, proceedings under inherent jurisdiction should not be commenced unless it is clear that the issues concerning the child cannot be resolved under the Children Act 1989.

Given the indication of *Bell v Tavistock,* it is likely that any specific issue application for the administration of puberty blockers would need to be made to the High Court. In deciding whether to grant the order, the court would be guided by s.1 of the Children Act, with reference to the welfare checklist and the paramountcy of the child's welfare.

Conclusion

The judgment in *Bell v Tavistock* has raised more questions than it has answered. At present, if the decision stands, it is unclear how quickly GIDS will be able to undertake their clinical reviews of patients; what the timeline for making any "best interests" applications will be; what criteria the "best interests" application will be made under; how quickly the court proceedings can be listed and how long they will take; the financial impact these applications will have on both the NHS and the families involved; and so on. What is clear, however, is that for those children who do experience gender dysphoria and seek to transition, the decision – whether legally right or wrong – will have devastating effects.

22/12/21

CASES

Lancashire CC v G (No3) (Continuing Unavailability of Secure Accommodation) [2020] EWHC 3280 (Fam)

This was the third judgment in a month on the issue of placement of G, a 16 year old with highly complex needs. At two previous hearings, the judge had sanctioned the deprivation of G's liberty in an unregulated placement. The local authority position was that G was in urgent need of a secure placement; the guardian was opposed to this and favoured a regulated non-secure placement with therapeutic input. In a situation which will be familiar with practitioners in this area, no placement of the latter type was available. Since the second judgment, G's behaviour had deteriorated and she had self-harmed. This resulted in a real risk that the placement would need to be terminated and there would be yet a further unplanned move which would likely again be to a placement not designed to meet G's needs.

The judge commented on the amount that had been spent without appropriate result for G, and further commented that "this is the cost of placing the High Court in what is, essentially, a regulatory role by reason of the acute shortage of clinical provision for placement of children and adolescents requiring assessment and treatment for mental health issues within a restrictive clinical environment, of secure placements and of regulated non-secure placements." [6] He further noted that there was not only a acute shortage of secure and regulated non-secure placements *per se*, but also an even greater shortage of the subset of such placements equipped to cope with children with the multifaceted and highly complex needs demonstrated by G. [8]

Building on what could be said to be criticism of the lack of funding and resources in this area, the judge also commented that: "As I observed in my first judgment, whilst the local authority contends that this is an appropriate case for a secure accommodation order pursuant to s 25 of the Children Act 1989 and the Children's Guardian contends that a non-secure regulated placement would best meet G's needs, there is also a cogent argument that what is in fact missing for G is a restrictive *clinical* environment short of detention and treatment under the Mental Health Act 1983. The brutal reality however continues to be that none of these resources are available for G." [14]

He also drew attention to the 'triple bind' such children find themselves in: "Thus, G is placed in a *triple* bind by the acute shortage of secure and regulated non-secure placements per se, by the fact that her multifaceted and highly complex behavioural and welfare needs exclude her from consideration by those small number of such placements that are available and by the fact that those multifaceted and complex needs to do not bring her within the ambit of the Mental Health Act 1983. To repeat, this is the genesis of the gap through which highly vulnerable children like G continue to fall." [15]

The judge summed up his stark decision as follows: "Once again therefore, the choice forced upon the court is to refuse the continued authorisation of the deprivation of G's liberty in an unregulated placement, which will result in her discharge into the community where, I continue to be satisfied, she will almost certainly cause herself possibly fatal harm, or to authorise the continued deprivation of G's liberty in an unregulated placement that all parties agree is sub-optimal, from the perspective of her welfare, that the evidence suggests is increasingly struggling to contain G and in which the therapeutic input required so urgently by G cannot begin." [16]

The judge concluded that, "on an increasingly narrow balance", that it was in G's best interests to continue to authorise deprivation of her liberty. The judge noted the ad hoc safeguards that were in place, but further stated they were not substitute for the statutory regime under s.25. The judge was highly critical of the effect of shortages on the legal test: "To put it another way, the acute shortage of secure and regulated non-secure placements risks moving the test applied by the court further from welfare and closer to necessity, bleeding from the best interests principle all but the starkest considerations of safety, rendering it barren of the other factors that ordinarily comprise the considered welfare analysis that is so essential to maintaining the integrity of the best interests principle." [21]

The court listed a further hearing in 14 days in the hope that a placement would be found or, in the absence of this, to further review the deprivation of liberty.

The judge referenced a report by the Children's Commissioner which addressed the difficulties faced by children in G's position. He also directed that a copy of the report be sent to several important charities, bodies, and political figures.

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

Bell v Tavistock [2020] EWHC 3274 (Admin)

Dame Victoria Sharp P., Lord Justice Lewis, Lieven J handed down judgment on 1st December 2020.

The case involved a claim for judicial review of the practice of the defendant, through its Gender Identity Development Service (GIDS), of prescribing puberty suppressing drugs to persons under the age of 18 who experience gender dysphoria; a condition where persons experience distress because of a mismatch between their perceived identity and their sex at birth. Such drugs have been prescribed for children as young as 10 years old.

The court did not engage with the wider social or cultural aspects of transition. All accepted that gender dysphoria existed and it could cause extreme distress. The sole legal issue in the case was the circumstances in which a child or young person may be competent to give valid consent to treatment in law, and the process by which consent to the treatment is obtained.

The court did not need to consider if a parent could offer consent in place of the child as the defendant was clear that treatment would never be considered in such circumstances.

The court decided that, given the experimental nature of the treatment provided, and its possible and serious life-long consequences:

> 1. A child under 16 may only consent to the use of medication intended to suppress puberty where he or she is competent to understand the nature of the treatment.
>
> 2. It is highly unlikely that a child aged 13 or under would be competent to give consent to the administration of puberty blockers.
>
> 3. It is doubtful that a child aged 14 or 15 could understand and weigh the long-term risks and consequences of the administration of puberty blockers.
>
> 4. For a child aged 16 and over, the legal position is that there is a presumption that they have the ability to consent. However, given the significance of the treatment proposed, the court recognised that clinicians may also regard these as cases where the authorisation of the court should be sought prior to commencing the clinical treatment.

Background and arguments made

The claimants' raised three arguments:

> 1. Children are not competent to give consent to the administration of puberty blocking drugs.
>
> 2. The information provided by the defendant is misleading and insufficient to allow children to give informed consent.
>
> 3. The absence of procedural safeguards and the inadequacy of information provided, is an infringement of the children's rights under Article 8 ECHR

The court first asked if children were able in theory to give consent to the treatment. It was necessary to divide children into two groups by age – those aged under 16 and those aged 16-17, given the pre-existing statutory presumption that 16 year olds can consent to medical treatment. Having examined the issue of theoretical consent, the court considered whether the information the children received about the treatment was adequate to achieve informed consent.

The defendant argued that children were capable of giving consent, depending on their age and understanding, and that the defendants made sure they were given all the necessary information to make their consent valid. The process at GIDS involved a broad range of specialist professionals, who took care to discuss fully the children's expression of their gender identity. The process met the requirements for informed consent identified by the Supreme Court in *Montgomery v Lanarkshire Health Board* [2015] AC 1430, having regard to the frequent consultations, discussions and the provision of detailed, but age appropriate, information. Where the assessment is that the individual is not initially Gillick competent, time was taken to see if their understanding develops and competency can be achieved.

However, the defendant's arguments failed to convince the court. The defendant offered sparse data to support its contention that puberty blockers represented a safe and reversible treatment for children. Nor did the defendant provide data about the ages of children being provided the treatment from 2011 to date, the numbers of such children found to be on the autistic spectrum, or the numbers of children who were given puberty blockers who then went on to take cross sex hormones. The court noted that this lack of data was 'surprising' given the young age of the patient group, the experimental nature of the treatment and the profound impact that it has.

The defendant was also unable to assist the court about the number, if any, of young people who had been assessed to be suitable for puberty blockers, but who were not prescribed them because the young person was considered not to be Gillick competent to make the decision.

The court agreed that it was not its role to attempt to determine clinical disagreements between experts about the efficacy of a treatment. However, the degree to which the treatment is experimental and has, as yet, an unknown impact, did go to the critical issue of whether a child can have sufficient understanding of the risks and benefits to be able lawfully to consent to that treatment. The court further noted with concern that while it could not adjudicate on the reasons why gender dysphoria persisted for certain children, the 'highly complex and unusual nature of this treatment' and difficulty in fully understanding its implications, may mean that the treatment itself supported the persistence of gender dysphoria.

The court gave detailed consideration to the decision of the House of Lords in *Gillick v West Norfolk and Wisbech Health Authority* [1986] AC 112 where a majority held that a doctor could lawfully give contraceptive advice and treatment to a girl aged under 16 if she had sufficient maturity and intelligence to understand that nature and implications of the proposed treatment and provided that certain conditions were satisfied. Subsequent authorities examined further how 'Gillick competence' could best be determined. *Re S (A Child) (Child Parent: Adoption Consent)* [2019] 2 Fam 177 considered that the child needed to understand the essential "nature and quality of the transaction" (per Munby J in *Sheffield City Council v E* [2005] Fam 326, para 19) and should not need to be concerned with peripheral matters. This was particularly important when the consequences of the decision were serious.

The court derived five principles from its examination of the case law.

1. A child's Gillick competence depends on the nature of the treatment proposed as well as the child's individual characteristics.

2. The assessment is necessarily an individual one but the court may still draw lines – for example a 7 year old could not give consent.

3. Efforts should be made to allow the child to achieve Gillick competency where possible.

4. But this does not mean every child under 16 could achieve it.

5. To achieve competence, the bar must not be set too high as this would be contrary to the child's Article 8 rights and the importance of supporting individual autonomy.

The court identified 8 elements of information that a child would need to understand, retain and weigh up in order to have the requisite competence in relation to puberty blockers:

1. the immediate consequences of the treatment in physical and psychological terms;

2. the fact that the vast majority of patients taking puberty blockers go on to cross sex hormones and therefore that s/he is on a pathway to much greater medical interventions;

3. the relationship between taking cross sex hormones and subsequent surgery, with the implications of such surgery;

4. the fact that cross sex hormones may well lead to a loss of fertility;

5. the impact of cross sex hormones on sexual function;

6. the impact that taking this step on this treatment pathway may have on future and life-long relationships;

7. the unknown physical consequences of taking puberty blockers; and

8. the fact that the evidence base for this treatment is as yet highly uncertain.

The court therefore did not agree with the defendant's approach in providing 'more and more' information on the assumption that this will allow a child to achieve Gillick competency. The issue to examine is not the amount of information given, but the ability of the children and young people, to understand and most importantly, weigh up that information.

Case summary by **Sarah Phillimore**, barrister, **St Johns Chambers**

Warrington Borough Council v TN (Care Proceedings: Comity) [2020] EWFC 79

Background

JN, aged 8, was born in the UK to Lithuanian parents. She came to the attention of the local authority when it was notified that her mother had been convicted of "people trafficking" and was at risk of a custodial sentence. There were concerns about JN's exposure to domestic abuse as well as gaps in her education and multiple school moves. She was accommodated under s20 shortly before her mother was sentenced to over two years' imprisonment, with care proceedings commencing thereafter.

After serving her sentence, the mother was subject to a deportation order. The Home Office agreed that she would not be deported until the Family Court has determined whether or not it is in JN's interests to be returned to Lithuania. If so she could return with her mother.

There was a positive parenting assessment of the mother.

The issue

There had been a dispute between the parties about the extent to which the court needed to have confirmation of the safeguarding measures that would be taken by the Lithuanian authorities before it could ratify JN's rehabilitation to her mother.

There was an apparent impasse because the Lithuanian authorities had made it clear on numerous occasions, over several months, that it would determine what steps were necessary once the child arrived and would then put in place appropriate support, while the Children's Guardian felt unable to agree to JN's return to her mother's care without knowing details of the monitoring and support that would be available.

Outcome

The court indicated that:

- it considered that the Lithuanian authorities had provided sufficient information;
- the English court had no jurisdiction to compel the Lithuanian authorities to take a particular course of action ahead of JN and her mother's arrival;
- the court would give appropriate weight to the principle of comity when considering the position that would pertain in respect of JN in Lithuania.

The guardian reconsidered her position and the parties agreed:

- JN should be returned to her mother's care as soon as possible;
- The reunification plan would be finalised once the date for mother's deportation was fixed;
- The interim care order would remain in place until that date;
- The proceedings would end with the making of no order once mother was deported;
- The Lithuanian authorities would be provided with the assessments carried out in these proceedings;
- The judgment should record the support recommended within those assessments.

The court approved this approach and reiterated the importance, in cases involving children and families concerning more than one jurisdiction, of having regard to the principle of comity as it relates to judicial and social care arrangements in different jurisdictions. While the guardian's position was understandable, care must be taken not to assume that child protection systems in other countries operate in the same way as they do here, or that if they operate differently it is necessary to impose the expectations and approach taken in this jurisdiction.

Case summary by **Gill Honeyman**, barrister, **Coram Chambers**

Emoni v Atabo [2020] EWHC 3322 (Fam)

This matter concerns an application by the father ('F') against the mother ('M') for a finding that M is in contempt of court in relation to four court orders. The parties are the parents of NE, a girl, aged 11.

Firstly, Mrs Justice Lieven DBE had to decide whether to proceed in M's absence despite this being a committal application. The judge considered *Sanchez v Pawell Obaz and Jolant Obaz* [2015] EWHC 235 (Fam) finding that M had been properly served all documents via email (M is in Lagos) including the notice of hearing. M had sufficient time to prepare, she was aware of the proceedings and initially engaged in them. No reason was given for her non-attendance at this hearing, nor the last. The judge thought M had simply chosen not to engage and that an adjournment would not be likely to secure her attendance. The judge accepted that there was a major disadvantage to M not being present to give oral evidence but the court did have a number of witness statements from M from when she had previously engaged.

The case concerns F's efforts to have his daughter returned to the UK where she was habitually resident prior to removal, the judge found any further delay would be prejudicial to the child and F. The proceedings had been going on for a year. Finally, considering the overriding objective, the judge found it just to proceed in M's absence.

Procedural Rules

Part 37 of the FPR deals with the procedure for contempt, it has been recently amended by Family Procedure (Amendment No 2) Rules 202 [SI 758/2020]. The new rules aim to simplify and the clarify the process for contempt applications and to bring it closely into conformity with the CPR.

The relevant definitions are in r.37.2;

> 'contempt application' means an application to the court for an order determining contempt proceedings;
>
> 'order of committal' means the imposition of a sentence of imprisonment (whether immediate or suspended) for contempt of court;
>
> 'penal notice' means a prominent notice on the front of an order warning that if the person against whom the order is made (and, in the case of a corporate body, a director or officer of that body) disobeys the court's order, the person (or director or officer) may be held in contempt of court and punished by a fine, imprisonment, confiscation of assets or other punishment under the law.

Rule 37.4(1) provides that unless the court directs otherwise, every application must be supported by written evidence given by affidavit or affirmation.

Rule 37.4(2) sets out matters to be included in the contempt application. The FPR does not specify a form for use in family proceedings, but F's use of the N600 was appropriate.

FPR r.37.8(1) states all hearings should be listed and heard in public unless the court directs otherwise, this hearing was in public.

Rule 37.8(7) states judge and advocates must be robed. The judge was robed but gave F's counsel dispensation from wearing robes given that this is a remote hearing.

Case Law

The judge noted the 'helpful and sensible' guidance of Mrs Justice Theis in Re L (a Child) [2016] EWCA Civ 173 at para.78:

> "Before any court embarks on hearing a committal application, whether for a contempt in the face of the court or for breach of an order, it should ensure that the following matters are at the forefront of its mind:
>
> (1) There is complete clarity at the start of the proceedings as to precisely what the foundation of the alleged contempt is: contempt in the face of the court, or breach of an order.
>
> (2) Prior to the hearing the alleged contempt should be set out clearly in a document or application that complies with FPR rule 37 and which the person accused of contempt has been served with.
>
> (3) If the alleged contempt is founded on breach of a previous court order, the person accused had been served with that order, and that it contained a penal notice in the required form and place in the order.
>
> (4) Whether the person accused of contempt has been given the opportunity to secure legal representation, as they are entitled to.
>
> (5) Whether the judge hearing the committal application should do so, or whether it should be heard by another judge.
>
> (6) Whether the person accused of contempt has been advised of the right to remain silent.

> (7) If the person accused of contempt chooses to give evidence, whether they have been warned about self-incrimination.
>
> (8) The need to ensure that in order to find the breach proved the evidence must meet the criminal standard of proof, of being sure that the breach is established.
>
> (9) Any committal order made needs to set out what the findings are that establish the contempt of court, which are the foundation of the court's decision regarding any committal order.
>
> 79. Counsel and solicitors are reminded of their duty to assist the court. This is particularly important when considering procedural matters where a person's liberty is at stake."

M is a qualified lawyer who has practised in this country and Nigeria. The judge had no reason to doubt she was not aware of her opportunity to secure legal representation and legal aid. M in earlier documents had complained about the judge. In three previous orders M was told she should make an application for the judge to recuse herself, no such application was made. M was also advised that she did not have to give evidence and has a right not to incriminate herself.

The burden of proof rests on the person making the allegation of contempt and the standard of proof is the criminal standard (*Cambra v Jones* [2014] EWHC 2264 (Fam), Munby P)).

In *Egeneonu v Engeneonu* [2017] EWHC 2336 (Fam), in particular at para. 21(b):

> "To have penal consequences, an order needs to be clear on its face as to precisely what it means and precisely what it prohibits or requires to be done. Contempt will not be established where the breach is of an order which is ambiguous, or which does not require or forbid the performance of a particular act within a specified timeframe. The person or persons affected must know with complete precision what it is that they are required to do or abstain from doing. It is not possible to imply terms into an injunction. The first task for the judge hearing an application for committal for alleged breach of a mandatory (positive) order is to identify, by reference to the express language of the order, precisely what it is that the order required the defendant to do. That is a question of construction and, thus, a question of law."

And at para 21(e):

> "Contempt of court involves a contumelious that is to say a deliberate, disobedience to the order. If it be the case that the accused cannot comply with order then he is not in contempt of court. It is not enough to suspect recalcitrance. It is for the applicant to establish that it was within the power of the defendant to do what the order required. It is not for the defendant to establish that it was not within his power to do it. That burden remains on the applicant throughout but it does not require the applicant to adduce evidence of a particular means of compliance which was available to the accused provided the applicant can satisfy the judge so that he is sure that compliance was possible."

Factual Background

The parties are divorced and a CAO was made in June 2016 detailing that the child shall live with the mother and have extensive contact with the father. Under the heading 'Agreements' in the order, the parties agreed that neither would take the child from England and Wales without the other parent's agreement or an order of the court. The standard Child arrangements order warning was also included.

On 22 October 2019 M took the child to Nigeria where she remains. There is a dispute as to whether F agreed to NE going on this trip.

Upon application by F on 12 December 2019 without notice to M, Mr Justice Cobb made the child a ward and a FGM Order to last until 12 May 2020. At the return date, the judge ordered the child to remain a ward of the court and for M to return the child forthwith. This is the first order of which the judge is asked to make a finding of breach.

In around February 2020, M returned to the UK without the child. Her passports (Nigerian and British) were seized by the police in accordance with the Passport Order on a date in May 2020.

On 13 May 2020, without notice to M, Mr Justice MacDonald made an Order requesting that the High Commission of Nigeria decline to issue a passport to M, should she apply for one, the Order prohibited M from applying for a UK passport until further order.

At the return date, the judge declined M's request for return of her passports and ordered her to take all necessary steps to secure the child's return.

The matter was heard again in June 2020 where the judge ordered M to instruct her lawyers in Nigeria to hand over the

child's passports to F's lawyers and to instruct the MGM in Nigeria to hand over the child to F. On 29 June 2020 F applied for an Order for committal seeking to enforce the June order.

On 21 July the judge made a further order requiring M's lawyers to hand over the passports to F's lawyers and a penal notice was attached to the order. There was also provision for F to apply for Emergency Travel Documents for the child. The committal application was listed for September 2020.

On 28 September the committal application was adjourned with F ordered to serve an updated statement and an invitation to resubmit the committal application on the correct form.

M had filed five witness statements but had not attended the last three hearing. The evidence in her written documents caused the judge to place considerable doubt on her credibility. By means unknown, M left the UK in July 2020 to return to Nigeria.

The judge found, by the evidence contained in M's own statement, that she was aware of the order requiring her to return the child to the UK before she herself returned in February 2020. It was beyond reasonable doubt that M breached the order deliberately.

The judge also found on the evidence that M was in breach of the orders to hand over the child's passports to her Nigerian lawyers, and to arrange their transfer to F's lawyers. F was unable to return to the UK from Nigera with the child in August 2020 as he was told by the MGM that M had taken the child from the house. F did not know where she had been taken and did not know where the child's passports were.

The judge concluded that the evidence showed beyond reasonable doubt that the order had not been complied with by M and that they have deliberately not been complied with in order to prevent F from bringing the child back to the UK.

Case summary by **Harriet Dudbridge**, barrister, **St John's Chambers**

In the matter of H (Step-Parent Adoption) [2020] EWFC 86

H was born in Thailand. Her parents never married and although he was named on the birth certificate the father did not acquire parental responsibility.

H and her mother have lived in the UK with the father since 2011. The mother and step-father have married and have 2 younger children together. H and the mother have indefinite leave to remain in the UK.

The mother had consented. The local authority had produced an Annexe A report supporting the application and the children's guardian concurred. The Thai authorities had been unable to trace the father.

Cobb J sets out at para 9-14 key points from the advice about Thai law as to parental responsibility which is similar to s4 Children Act 1989, except that naming the father on the birth certificate does not of itself grant PR to a father who was not married to the mother. It also notes that under Thai law the step-father could adopt H as there was at least a 25 year age gap, the mother consented and so did H. In Thailand children over the age of 15 must consent to being adopted.

Cobb J was satisfied that adoption was proportionate interference with the father's Article 8 rights – applying the principles in relation to step-parent adoptions set out in Söderbäck v Sweden [1999] 1 FLR 250 at [31]: and the judgment of McFarlane LJ in Re P [2014] EWCA Civ 1174 at [48].

He concluded that the father's consent was not required but he would have dispensed with it either on the basis that he could not be found or that H's welfare required it.

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

In the matter of Re A (A Child: Adoption Time Limits s44(3)) [2020] EWHC 3296 (Fam)

The application to adopt was made and issued before A reached her majority. A was the child of the applicant's (Z's) cousin and was born in St Lucia to parents did not feel able to care for her. In 2002, Z agreed to bring A to England and bring her up alongside her four children. A's parents signed a deed akin to a document delegating parental responsibility under section 2(9), Children Act

A remained in Z's care since that time and never returned to St Lucia. A's father visited A in 2007 and 2010. During his last visit, A's father suggested that he wished to take A back to St Lucia. Z obtained a residence order and A's father did not engage in those proceedings.

To formalise the relationship, Z spoke to the local authority about adoption in June 2018. Z applied to adopt A in May 2020. The application was incomplete, error strewn and was returned by the court. Z's second application was issued in August 2020 and supported by the adoption social worker. This was not an intercounty adoption [15] but was a non-agency adoption [17].

Keehan J determined:

> a) it was manifestly in A's best interests for the adoption order to be made in favour of Z;
>
> b) failure to comply with s 44(3) of the 2002 Act was purely a technical matter and had not caused any disadvantage or prejudice;
>
> c) Z had acted in good faith throughout; and
>
> d) the local authority had been involved with A and Z since 2018 and supported the making of an adoption order, despite the non-compliance with s 44(3).

The judge allowed the adoption application to proceed, given a purposive reading of s 44(3). In the alternative, Keehan J found that A's Article 8 rights required the provisions of s 44(3) to be read down, as to deny A the significant benefits of an adoption order 'would be nonsensical and an affront to public policy.'

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

KK v Leeds CC & DK [2020] EWCOP 64

This was a decision of Mr Justice Cobb in Court of Protection proceedings concerning DK, a 19-year-old highly vulnerable woman with global learning disabilities, an autistic spectrum disorder, and associated profound needs. Leeds City Council ("the LA") asserted that DK lacked capacity to make decisions about her residence, contact with others, and use of social media and sought declarations and welfare orders in these respects.

DK's maternal aunt, KK, had been DK's main carer during her childhood. DK had made allegations of sexual abuse against KK's husband and son. At the time of the decision, DK had not lived with KK for three years. DK wanted to return to KK's home for Christmas 2019. At an urgent hearing, District Judge Gardner determined on an interim basis that DK lacked capacity in respect of this decision.

KK wished to be joined to the proceedings. Her application for party status came before HHJ Hayes QC and was opposed by the LA and the Official Solicitor ("OS") on DK's behalf. The relevant legal test in respect joinder is in rule 9.15(1) and 9.13(2) of the Court of Protection Rules 2017 ("COPR 2017") which in short set out that anyone with a "sufficient interest" may apply to be joined as a party, but it does not automatically follow that they must be joined. The Court may order a person to be joined as a party if it considers that it is desirable to do so for the purpose of dealing with the application. The court has a broad discretion when determining if a person should be joined to the proceedings and there is no "entitlement" or "right" to be joined or any "presumption" that joinder should happen because the applicant can show a close relationship with P.

HHJ Hayes QC found that KK had "sufficient interest" in DK and in the process to make the application.

On the application of rule 9.13(2) COPR 2017, HHJ Hayes QC cited the decision of Bodey J in *Re SK (by his litigation friend the Official Solicitor)* [2012] EWHC 1990 (COP) ('Re SK') and quoted from Bodey J's judgment thus:

> "The word "desirable" necessarily imports a judicial decision as regards balancing the pros and cons of the particular joinder sought in the particular circumstances of the case." (para [43]).

The LA and the OS presented, and sought to rely upon information which, although acknowledged to be relevant to the issue before the court, they wished to keep confidential from KK ("the confidential material"). HHJ Hayes QC received the confidential material and read it. Neither KK nor her lawyers were given access to it because disclosing it to KK would, of itself, be contrary to DK's best interests. HHJ Hayes QC gave a separate judgment ('the supplementary judgment') in which he expressed his view about the confidential material, and its significance to the decision. This judgment was also not disclosed to KK and her legal representatives.

HHJ Hayes QC commented that "if ever there was a case which illustrates the need to balance competing factors when deciding this issue, this is it" and that this was made even more complicated by the fact that in opposing the joinder application, the LA and OS had relied on written evidence which had not been disclosed to KK but was material to the balancing exercise which informed the court's decision.

In a reserved judgment, HHJ Hayes QC refused KK's application and then also refused permission to KK to appeal. KK renewed her application for permission to appeal and it was directed that it should be considered at an oral hearing, with appeal to follow if permission was granted (pursuant to rule 20.4(2)(b) & 20.6(2)(b)/(5) COPR 2017).

These applications came before Cobb J. The main dispute in the appeal focussed on HHJ Hayes QC's management and deployment of the confidential material and its impact on his decision. It was also suggested that the appeal would in any event raise an important issue of procedure and practice as there is no reported case law on how the court ought to exercise its discretion under rule 9.13 COPR 2017 in circumstances such as this (where the existing parties resist joinder of an applicant, but for reasons which are not openly stated). In other contexts, the courts have held that the kind of 'closed material' procedure such as that adopted by HHJ Hayes QC can only be imposed where permitted specifically by statutory provision. This case therefore provided a means for the Court of Protection to review whether that principle applies in the context of proceedings before it.

Decision of Cobb J

Cobb J granted permission to appeal but dismissed the appeal. He was satisfied that the appeal raised an important issue of procedure and practice (rule 20.8(1)(b) COPR 2017) but nonetheless concluded that HHJ Hayes QC was not wrong to proceed to determine KK's application as he did, nor did he consider that his conclusion could be faulted.

Cobb J held [paras 38-40]:

> "It seems to me that a judge may well find, indeed would be *highly likely* to find, that it is necessary to withhold sensitive evidence/information from a third party applicant for party status in Court of Protection proceedings where disclosure would be likely directly to harm P, or otherwise indirectly harm or adversely affect P, such as by inhibiting P in his/her active participation in proceedings. It must be remembered that the whole purpose of the welfare jurisdiction under the MCA 2005 is to protect and promote the best interests of P (see by analogy with the child, *Re A* at 18); the proceedings must not become an instrument of harm to P (again see Re A at 21).
>
> The Judge's rationale for non-disclosure appears to have been firmly and appropriately rooted in his objective of protecting and promoting the best interests of DK. In my view, his approach is unimpeachable. What, after all, is the *purpose* of the proceedings if it is not to protect DK and enhance her welfare interests? Mr O'Brien made the compelling point that DK did not choose to bring these proceedings; this is all the more reason why she should not now be put in a position whereby her rights and her privacy are challenged/compromised by the process which is designed to protect her. The protection of DK and the advancement of her best interests rendered as a necessity the withholding of the confidential material from KK; had the Judge disclosed the material, and/or acceded to KK's application for joinder, he would have defeated the object of the exercise.
>
> If there was one crucial judicial finding at the centre of the decision in the case it was that "[t]he effect of joinder, in itself, will bring about these adverse consequences for DK" (43(f)). It seems to me that this finding strikes at the very heart of the exercise of the MCA 2005 jurisdiction, where the court is obligated to act in ways which promote DK's best interests and her "position".

Cobb J set out the following points for judges faced with the situation faced by HHJ Hayes QC to consider at the hearing of the application for party status [para 41]:

> i) The general obligation of *open justice* applies in the Court of Protection as in other jurisdictions (see [32] above);
>
> ii) A judge faced with a request to withhold relevant but sensitive information/evidence from an aspirant for party status, must satisfy him/herself that the request is *validly* made (see [35] above);
>
> iii) The *best interests* of P, alternatively the "interests and position" of P, should occupy a central place in any decision to provide or withhold sensitive information/evidence to an applicant (section 4 MCA 2005 when read with rule 1.1(3)(b) COPR 2017); the greater the risk of harm or adverse consequences to P (and/or the legal process, and specifically P's participation in that process) by disclosure of the sensitive information, the stronger the imperative for withholding the same (see [39] / [40] above);
>
> iv) The expectation of an "equal footing" (rule 1.1(3)(d) COPR 2017) for the parties should be considered as one of the factors (see [11] above);
>
> v) While the principles of natural justice are always engaged, the obligation to give full disclosure of all information (including sensitive information) to someone who is not a party is unlikely to be as great as it would be to an existing party (see [28(iv) and [37] above);
>
> vi) Any decision to withhold information from an aspirant for party status can only be justified on the grounds of necessity (see [36] and [37] above);
>
> vii) In such a situation the Article 6 and Article 8 rights of P and the aspirant for party status are engaged; where they conflict, the rights of P must prevail (see [37] above);

> viii) The judge should always consider whether a step can be taken (one of the 'procedural mitigations' referred to at [26] above) to acquaint the aspirant with the essence of sensitive/withheld material; by providing a 'gist' of the material or disclosing it to the applicant's lawyers; I suggest that a closed material hearing would rarely be appropriate in these circumstances.

Cobb J made two final points before he finished his judgment [para 48]:

> i) It will, I suspect, be relatively uncommon for someone in the position of KK – a former primary carer of P (particularly where P is still a young adult) who wishes party status in proceedings under the MCA 2005 – to be denied joinder to the proceedings, and be denied the chance to contribute to the decision-making in this welfare-based jurisdiction. That said, and adopting Bodey J's comments from *Re SK* ([12] above) for this case, it will always be necessary to balance "the pros and cons of the particular joinder sought in the particular circumstances of the case"; and
>
> ii) The Judge's decision, and the dismissal of this appeal, does not detract from the obligation on the Local Authority to consult with KK (section 4(7) MCA 2005) as practicable and appropriate on welfare-based issues concerning DK.

Case summary by **Sophie Smith-Holland**, barrister, **St John's Chambers**

W (Children: Reopening/Recusal) [2020] EWCA Civ 1685

This case concerned the mother's application to appeal the decision of HHJ Duggan to set aside findings of fact because of the appearance of judicial bias. In February 2020, DJ Wylie undertook a three-day fact-finding exercise into the mother's allegations that the father had perpetrated domestic abuse against her and two other women (HH and LM). The Judge made six of the findings sought (one of which had already resulted in a guilty verdict in the criminal courts), and on 16 April 2020, gave directions for further evidence and listed a final welfare hearing. The date of final hearing was subsequently adjourned twice, because of the unavailability of the CAFCASS officer, and in the interim, the father applied for contact and to reopen the findings of fact.

The matter then came before Recorder Searle. He sought to relist it before DJ Wylie, as the judge who presided over the fact-finding, but, having made inquiries during the lunch break, discovered that she had recused herself for personal reasons. The father's applications were therefore listed before HHJ Duggan for adjudication.

HHJ Duggan was concerned by DJ Wylie's recusal, of which little detail was known save that the Judge had a "family connection" to one of the parties. HHJ Duggan concluded that the appearance of bias drove him to the conclusion that the "test of fairness" was "infringed" [16] and he set aside the findings that had been made previously. Thereafter, the mother sought further information from the court as to the reasons for DJ Wylie's recusal. The parties were informed that the Judge's son and the mother were on the same hockey team and were connected on social media; however, the Judge had not been aware of this until June 2020, after the fact-finding hearing had been completed, and promptly sought to recuse herself.

The mother sought permission to appeal, which was granted, and advanced her appeal of HHJ Duggan's decision on the following bases: (i) the Judge was wrong to conclude that there was any apparent bias operating upon DJ Wylie's decision in February 2020; (ii) the Judge failed to give any or any proper reasons for his decision; (iii) the procedure adopted by the Judge was flawed and unfair to the mother in that she was not given a proper explanation as to why the District Judge had recused herself; (iv) she was thereby prevented from advancing an argument that there was no apparent bias operating upon DJ Wylie's decision in February 2020; (v) the Judge misdirected himself as to the correct legal test for apparent bias; and (vi) the Judge failed to consider or to apply the legal test for the reopening of findings.

The Court of Appeal held that HHJ Duggan's decision to set aside the findings on the basis of apparent bias was both "wrong and unfair" [40]. Firstly, the decision of apparent bias requires an "informed observer" who has knowledge of the basic facts, which the parties did not, thereby preventing them from putting their respective cases. Secondly, the Judge dd not apply the test correctly: the question to be addressed is whether the observer would conclude that there was a real possibility that the judge was biased, not whether the observer would be concerned that justice had not been seen to be done. Thirdly, the Court of Appeal held that HHJ Duggan's conclusion that the findings were infected by apparent bias was not supported by any sound reasoning. For all of the aforementioned reasons, the Court re-instated DJ Wylie's findings.

Having dealt with the issue of apparent bias, the Court then went on to consider the father's application to reopen the findings. The Court noted that the father had not sought to appeal the original findings and there was no new evidence of note. In short, his application was merely an attempt to relitigate findings of fact that had already been decided. His application was dismissed and the case was remitted to a circuit judge for the final welfare decisions to be made.

Summary by **Dr Bianca Jackson,** Barrister **Coram Chambers**

Griffith v P [2020] EWCA Civ 1675

This is an appeal from an order committing Dahlia Griffith ('the Appellant') to prison for 12 months for contempt of court.

The background is set out in the judgment of MacDonald J ("the Judge") [2020] EWCOP 46. The Appellant is a relative of P, who is in a specialist hospital with a permanent disorder of consciousness. There were proceedings in the Court of Protection concerning P's best interests. In those proceedings P was represented by the Official Solicitor. During those proceedings, an issue arose regarding disclosure of P's medical records. The court made 3rd party orders for disclosure of P's medical records to the OS. The Appellant also made 2 applications for disclosure to her of P's "full medical file" which were refused.

The Appellant subsequently sent an email to Barts Health NHS Trust ('Barts') attaching what was purported to be a court order providing for disclosure of P's medical records directly to the Appellant. Barts sent P's medical records to the Appellant's solicitors, who did not read them or forward them to the Appellant. The OS became aware of this on approaching Barts for disclosure of P's medical records and being told that they had already been provided at the Appellant's request.

The Judge granted permission for an application for committal to be issued by the Official Solicitor under Rule 21.15 of the Court of Protection Rules 2017. That was the last hearing attended by the Appellant. The position subsequently put on her behalf was that the circumstances did not prove beyond reasonable doubt that she had falsified a court order and that the circumstances of the case suggested that the Appellant believed in all innocence that she was entitled to the disclosure sought.

The Judge considered the factors in mitigation balanced against the seriousness of the interference with the administration of justice, the deliberate nature of the contempt and the absence of remorse or even any indication that the Appellant appreciated the gravity of her conduct. He was satisfied that the custody threshold was crossed and the appropriate and proportionate penalty was an immediate term of imprisonment of 12 months. The Appellant, acting in person, appealed.

The appeal was dismissed. The Judge had dealt with the committal proceedings in a way that was beyond criticism. His approach was a model of careful and balanced assessment. His finding that the Appellant was in contempt was supported by compelling reasoning, the conclusion inevitable. His approach to the sentencing exercise could not be faulted. The sentence was long but was unfortunately necessary in circumstances where the Appellant had shown no acceptance, remorse or apology for the deliberate forgery of a court order.

In conclusion the court drew attention to the opportunity available to the Appellant to seek to purge her contempt, stressing that in circumstances of this kind, the sentence of a contemnor who accepts their contempt and makes a genuine apology for their behaviour will always be carefully reviewed.

Case summary by **Martina van der Leij**, barrister, **Field Court Chambers**

X, T, A, E and S, Re [2020] EWCA Civ 1680

The two appellants, a man DB and a woman SS, started a relationship in August 2018 in circumstances where they were each caring for children from previous relationships.

SS has 2 daughters: E aged 10 and S aged 7. DB has 2 children: T a girl aged 9 and A a boy aged 7. The mother of T and A had tragically taken her own life and DB also cared for her elder child X aged 12.

On 4 November 2019 T presented at school with widespread bruising to her face, spreading down her neck and both on and inside her ears. DB was advised to take her to hospital but did not do so until the following day. At hospital a paediatric registrar recorded DB's explanation that T had harmed herself and expressed the view it was developmentally possible. A consultant paediatrician at the hospital subsequently took a different view and concluded the injuries were beyond doubt inflicted representing a significant sustained serious assault. DB and SS were arrested and the children placed in foster care where they remained, save for X who moved to live with his father.

There were no reports of T self-harming since placement in foster care. In ABE interview T said her injuries had been self-inflicted. A said T's injuries were inflicted by B. Both adults denied responsibility for the injuries. In February 2020 T told her foster care she had been physically abused by SS, and when ABE interviewed again repeated that allegation.

A hybrid fact finding hearing commenced in July 2020, but ran into a number of difficulties including technical problems and disclosure issues. After 7 days the case was adjourned part-heard. At that point the judge discharged the ICO's with regards to SS's children but the LA's appeal against that decision was allowed. Further difficulties continued at hearings in August and September and the case finally concluded after 15 days with a reserved judgment in October 2020.

The judge concluded his judgment setting out his findings as per paragraph 30, which included that as a result of the conduct of the parents T self-harmed in August, September, October and early November, and that various injuries were caused by T to herself as a result of the emotional harm suffered by her in the care of the parents and lack of adequate supervision. The judge concluded that various other injuries were inflicted on T, there was a real possibility either SS or DB was the perpetrator and the court was unable to identify which. The judgment included consideration of the expert evidence of Dr Cleghorn, consultant paediatrician. She concluded that some of the injuries observed on T were likely to be accidental, some likely to have been inflicted but not by T, and others possibly caused by T herself.

Both SS and DB appealed to the Court of Appeal and permission to appeal was granted.

DB advanced several grounds of appeal including that the judgment was fundamentally flawed by failing to explain the judge's reasoning, and that the judge was wrong to find some of T's injuries inflicted by DB or SS rather than by T herself. DB contended the judge was not in a position to make any findings about why T self-harmed, and that the judge was wrong to find that T self-harmed as a result of the conduct of the parents.

SS did not appeal against the finding that some of the injuries were inflicted or that there was a real possibility that both she and DB inflicted the injuries. The focus of her appeal was on the findings as to the cause of T's self-inflicted injuries.

The Court of Appeal (Baker and Elisabeth Laing LJJ) concluded that this was a particularly demanding hearing for the judge. The principal issue – whether T's injuries were inflicted or self-inflicted was unusual and difficult. The judgment was carefully structured. Whilst it would have been better if the judgment had contained a section where the judge expressly set out the reasons for his findings, that was not a fundamental flaw. Save in one respect the Court of Appeal was satisfied it was possible to discern the reasons for his findings. The evidence was plainly sufficient to support many of the judge's findings. The basis of the judge's findings as to whether the injuries were accidental, self-inflicted or inflicted by others was manifestly based on Dr Cleghorn's evidence which the judge obviously accepted. The judge was clearly entitled to accept her evidence and prefer it for reasons clearly explained. The judge was entitled to conclude there was a real possibility that both DB and SS were responsible for inflicting the injuries so that both of them were in the pool of perpetrators.

The difficulties in the appeal arose with the grounds of appeal relating to the reasons for T's self-harming behaviour. It was never asserted by the LA in their threshold document that T's behaviour was attributable to the adults' conduct. As a result neither DB nor SS adduced any evidence on the issue. Neither of them was cross-examined on that basis. It was never suggested to them in evidence that their conduct or neglect was the cause of T's self-harming. It was assumed by all parties that the reason for T's self-harming behaviour was not something to be determined at the fact-finding hearing, but that in the light of findings psychological and other assessments would be obtained to address the reasons for T's behaviour for consideration at the final welfare hearing. The Court of Appeal concluded it was not open to the trial judge to find that T self-harmed as a result of the conduct of the parents, or that the self-inflicted injuries were caused as a result of the emotional harm suffered by her or a lack of adequate supervision. The appeal was allowed against those findings and they were set aside.

As to what should happen to the proceedings, there was no reason to doubt the trial judge would be able to re-evaluate the issue as to the reasons for T's self-harming behaviour in the light of all the evidence ultimately available at the welfare stage. Given the very limited basis on which the appeal was allowed it would be wholly disproportionate to transfer the case to another judge and such a course could lead to further delays.

Case summary by **Victoria Flowers**, barrister, **Harcourt Chambers**