February 2021

Family Law Week

# NEWS

## Message from the President of the Family Division: The Road Ahead 2021

At the beginning of the message, the President notes that the Lord Chief Justice has made it clear that the courts will continue to function during Lockdown 3, but that footfall in court buildings must be kept to a minimum. The default position will be to facilitate the remote attendance of all or some of those involved in hearings. Whilst there is a most welcome 'light at the end of the tunnel', in the form of mass vaccination, this 'light' is only likely to lead to a return to anything like normal working in the Family Court once the bulk of the population have been vaccinated, which may not be achieved for some time. Thus, the President says, we are facing not only a period of enhanced provision of remote hearings during Lockdown 3, but also a further, albeit more relaxed, period with a significant proportion of remote/hybrid hearings over the next six months before, it is hoped, getting back to normality.

For the President's message, **click here**.

10/1/21

## Domestic Abuse Bill receives second reading in Lords

On 5 January 2021 the Domestic Abuse Bill received its second reading in the House of Lords. The committee stage at which the bill will be scrutinised line-by-line is yet to be scheduled.

For the second reading debate, **click here**. For the Bill, as introduced in the Lords, **click here**. To follow progress of the Bill, **click here**.

10/1/21





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## Cafcass publishes updated organisational guidance on working with children through Covid-19

Cafcass has published updated guidance which outlines the arrangements that are currently being made for Family Court Advisers to see children and families, work in Cafcass offices and attend court. The Cafcass guidance has been updated due to the current Government national lockdown restrictions which have been put in place. This guidance will continue to be reviewed and will be updated should there be any changes to the current Government guidance.

### Seeing children and families

The guidance explains that for the expected period of restrictions (until 15 February 2021 but subject to review) a Family Court Adviser should only see children and families in-person if the meeting is considered to be the only way to assess and understand children's experiences, wishes, feelings, hopes for the future and therefore the recommendations that are in their best interest. The guidance revises earlier versions in which the default position was to see children in person at least once in the life of their proceedings.

If a Family Court Adviser judges that there must be an 'in person' engagement with a child and family, they need to assess that this can be undertaken safely for both themselves and for the child and family with whom they are working.

The professional decision as to whether to see a child in person or remotely remains that of the Family Court Adviser appointed by the court and should be written contemporaneously onto the casefile, explained clearly to the child and family and communicated to the court in all subsequent reports. The risk assessment they make will clearly show the weighing and balancing of judgement in respect of the need to see a child in-person versus the risk we present to them by in-person work and vice versa. The result is likely to be that in most cases the children and families will be seen remotely until the risks from the current new Covid-19 variant are reduced and the restrictions are lifted.

### Office work

All of the Cafcass offices are Covid-secure and, if required, remain open for in-person visits and for other work purposes, government guidance on social distancing must be followed when using this space.

### Attending court

The guidance explains that all open courts are Covid-secure and have risk assessments completed by HMCTS that Cafcass staff can access. It should be a matter of discussion between the Family Court Adviser and the court on the most effective way that their participation can take place with an agreement reached in advance of a hearing.

The courts will have the facility to arrange for evidence to be given remotely. There is significant use of hybrid hearings where the parents or other family members attend in person together with their advocates, while the Family Court Adviser, social workers and other experts attend remotely. There will be cases where it is necessary for the Family Court Adviser to be present in court. The needs of the children Cafcass represents may require that a hearing in person takes place.

For the guidance, **click here** and then on the link to the guidance.

10/1/21

## Amendments to civil legal aid eligibility criteria

The Legal Aid Agency has announced that compensation provided to claimants of specific compensation schemes will now be disregarded when assessing civil legal aid eligibility.

The LAA has implemented the changes made to the regulations to ensure that claimants of specific compensation schemes are not disadvantaged in applying for legal aid.

There will now be a mandatory disregard for the following schemes, when applying for civil legal aid:

- Relevant Infected Blood Support Schemes covering England, Wales, Northern Ireland and Scotland (and earlier support schemes)
- Payments under the Vaccine Damage Payment Act
- Compensation for person diagnosed with variant Creutzfeldt-Jakob disease (vCJD).

In addition, there will be a discretionary approach applied to the following schemes:

- Criminal Injuries Compensation Scheme (includes Northern Ireland CICS)
- National Emergencies Trust
- We Love Manchester Fund
- London Emergencies Trust Fund.

As a result of receiving a compensation payment from these compensation schemes or any connected payment (e.g. to a relative) some individuals applying for legal aid would have failed the financial eligibility criteria if the change to the means test had not been made, due to such payments being considered as income or capital.

### Mortgage cap removal

The legislation also removes the existing cap on the amount of mortgage debt that can be deducted from a property's value, so that all mortgage debt will be deducted. This means that more individuals will pass the financial eligibility criteria for civil legal aid. This change will come into effect from 28 January 2021.

10/1/21

## Amendments to Family Procedure Rules

Amendments to paragraph 1.4 and 11.1 of Practice Direction 36N, to add provision for a legal representative of a respondent to use the online system for contested financial remedy applications and remove references to Maintenance Pending Suit applications, came into force on **18 December 2020.** The remainder of the amendments come into force on **11 January 2021**.

The following new Practice Direction comes into force **1 February 2021**:

> The introduction of new Practice Direction 41C to provide for a procedure by which, in specified circumstances, appeal proceedings in Family Division of the High Court may proceed by electronic means using an online case management system.

The following Practice Direction amendments came into force on **18 December 2020**:

- Amendment to the European Union Exit Practice Direction Update to ensure that the transitional provisions in relation to the EU Protection Measures Regulation align with the Withdrawal Agreement. Amendment of the current expiry date of Practice Direction 36G from 31 January 2021 to 30 September 2021. The PD makes provision for a pilot scheme which enables applications for child arrangement orders (under section 8 Children Act 1989) to be generated online.

- Amendment of the current expiry date of Practice Direction 36H from 31 December 2020 to 31 June 2021 to extend the current interim provision in place for communicating Forced Marriage and Female Genital Mutilation Protection Orders (FMPOs and FGMPOs) to relevant police forces and regional policing leads.

- Amendment of the current expiry date of Practice Direction 36J from 31 December 2020 to 31 December 2021 to extend the pilot arrangements allowing 'legal bloggers' to attend family proceedings heard in private.

- Amendment of the current expiry date of Practice Direction 36K from 31 January 2021 to 30 September 2021. The Practice Direction makes provision for a pilot scheme for the bulk scanning of section 8 Children Act 1989 applications for child arrangements orders.

- Amendment of the current expiry date of Practice Direction 36M and 36P from 31 April 2021 to 1 August 2021. These Practice Directions enable pilot schemes testing the online submission within certain public law proceedings, emergency proceedings relating to children, and placement proceedings – as part of HMCTS's Family Public Law Reform Project.

- Amendments to Practice Directions 5B, 36G, 36M, 36N, 36O, 36P, 41A and 41B to clarify the position regarding the timing of receipt of applications or other documents submitted by email, via online schemes or via bulk scanning.

- Amendment to Practice Direction 41B to remove the reference to Maintenance Pending Suit applications from the online system for consent financial remedy applications.

For the Family Procedure Rules, **click here**.

10/1/21

## Lady Black retires from the Supreme Court

The Rt Hon Lady Black of Derwent retires as a Supreme Court Justice on 10 January 2021. The President of the Supreme Court, Lord Reed, has made a short video to pay tribute to her work and to say a fond farewell to her on behalf of everyone at the Supreme Court.

Lady Black was called to the Bar in 1976 at Inner Temple. For a period in the 1980s she taught law at Leeds Polytechnic. She later specialised in family law, became a Queen's Counsel in 1994 and was appointed a deputy High Court judge in 1996 and a Recorder in 1999.

She was appointed to the High Court in 1999, assigned to the Family Division, and served as Family Division Liaison Judge to the Northern Circuit from 2000 to 2004. On 15 June 2010, Black became a Lady Justice of Appeal, and was appointed to the Privy Council.

In 2004, she became Chairman of the Judicial Studies Board's Family Committee. She continued in that role until her appointment to the Judicial Appointments Commission as a judicial member in 2008.

Lady Black became the second female judge of the Supreme Court of the United Kingdom, after Lady Hale, on 2 October 2017.

She was a founding contributor to the ***Family Court Practice*** and continues to serve as a consulting editor.

For Lord Reed's video in tribute to Lady Black, **click here**.

10/1/21

## Continuing application of the Choice of Court Convention and Child Support Convention for the United Kingdom

After the conclusion of the transition period following the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union, the United Kingdom continues to be bound by the HCCH Convention of 30 June 2005 on Choice of Court Agreements (Choice of Court Convention) and the HCCH Convention of 23 November 2007 on the International Recovery of Child

Support and Other Forms of Family Maintenance (Child Support Convention).

The United Kingdom has been bound by the Choice of Court Convention since 1 October 2015 and the Child Support Convention since 1 August 2014. On 28 September 2020, to ensure continuity in their application following its withdrawal from the European Union, the United Kingdom deposited an instrument of accession to the Choice of Court Convention and an instrument of ratification of the Child Support Convention. These instruments took effect on 1 January 2021. For more information, see the **Status Table of the Choice of Court Convention** and the **Status Table of the Child Support Convention**.

At present, 31 States and the EU are bound by the Choice of Court Convention, while 41 States and the EU are bound by the Child Support Convention. More information on these Conventions is available on the **Choice of Court Section** and **Child Support Section** of the HCCH website.

The United Kingdom has been a Member of the HCCH since 1955 and is a Contracting Party to **13 HCCH Conventions**.

10/1/21

## Education Secretary launches review of children's social care

Education Secretary Gavin Williamson **has launched an independent review** of children's social care which aims 'to raise the bar' for vulnerable children across the country. A commitment to look at the care system was included in the Conservative Party's General Election manifesto.

In a speech to children's charities and sector organisations, the Education Secretary has also announced that he has appointed Josh MacAlister to lead the review. A former teacher, Mr MacAlister founded the social work charity Frontline in 2013. He will step down from his role as Chief Executive to lead the review.It is intended that the review will reshape how children interact with the care system, looking at the process from referral through to becoming looked after. It will address major challenges such as the increase in numbers of looked after children, the inconsistencies in children's social care practice, outcomes across the country, and the failure of the system to provide enough stable homes for children.

Running throughout the review will be the voices and experiences of children, young people or adults who have been looked-after, or who have received help or support from a social worker. Their experiences will be considered and reflected sensitively and appropriately, with their views included in full in the work.

During the virtual launch, Josh MacAlister launched a 'Call for Advice' to help shape the early work of the review and invited applications for an 'Experts by Experience' group to advise him on how to include the voices of people with a 'lived experience' of the children's social care system. The review will consult widely and bring in a broad range of expertise.

The Review will address the need for change that supports children to achieve their potential. Children who have been in care comprise 25 per cent of the homeless and 24 per cent of the prison population. Over a third of care leavers (39 per cent) are not in education, employment or training, compared to 13 per cent of all 19-21-year-olds and just 13 per cent progressed to Higher Education by age 19 compared to 43 per cent of all other pupils.

In addition, statistics published on 15 January 2021 reveal the number of serious incident notifications between April and September 2020. The data will provide important information to the care review to help address major challenges.

The Department for Education will publish terms of reference for the review, setting out the themes and questions that will be addressed and how it will respond to the changing needs of children in care or at risk of going into care, especially given the impact of the pandemic.

These will include how to improve accountability for those responsible for children's outcomes, how to ensure children have a positive experience of care, and how to support and strengthen families – helping children stay safely with their families where possible.

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

15/1/21

## Human Rights Committee to hear from those whose right to a family life has been undermined by long lockdown

On Wednesday, 13 January, at 3pm the Parliamentary Joint Committee on Human Rights will hear from witnesses about the human rights implications of long lockdown in mental health units and prisons, as well as care homes.

Following the Committee's inquiry ***The Government's response to Covid-19: human rights implications***, the Committee have launched an inquiry into ***The Government's response to Covid-19: human rights implications of long lockdown***.

During this session, the Committee will re-visit problems covered in their previous inquiry, including the detention of young people who are autistic and/or have learning disabilities and the rights of the children of mothers in prison, and will be hearing from witnesses whose right to a family life (Article 8 ECHR) has been personally affected by the long lockdown in these settings, as well as campaigners.

For more details, including the witnesses to be called, **click here**.

15/1/21

## Domestic abuse victim not supported properly by Wandsworth council when she became homeless

The Local Government and Social Care Ombudsman is highlighting the importance of councils considering the exceptional circumstances of people fleeing domestic abuse when assessing their housing needs, following a complaint about London Borough of Wandsworth.

Following an investigation, the Ombudsman found Wandsworth council did not consider relaxing its local area connection criterion when a single mother asked for help. It was not safe for the woman to remain in another London borough where her former partner had assaulted her, causing serious injuries.

The woman's former partner had pleaded guilty to aggravated bodily harm and criminal damage and was in custody awaiting sentencing. She fled to her mother's home where she and her child shared a bedroom with her sister. Her former partner knew the address. She asked Wandsworth for help, but it said she was not homeless.

The next day the woman told the council her mother wanted her to leave. The council told her about its council housing scheme, which she could apply for but not from her mother's as it was not a safe address. The council suggested she move in with her uncle for 12 months and then she would qualify for its scheme. Her uncle lived very close to her mother, and her former partner also knew his address. She moved in with her uncle and chased the council about the housing scheme for many months with several different officers.

Eventually the council gave the woman a Personalised Housing Plan (PHP) which contained no future actions for the council. The council now told the woman she did not qualify for its scheme because she did not live in the borough.

The council did not investigate the woman's homeless application, but instead encouraged her to withdraw it and apply for help to the council where she had suffered violence. She told Wandsworth council three times she would do this if the council put its advice in writing, but it refused.

The Ombudsman's investigation found the council should have considered the woman and her child as homeless when she first approached it. It would have then accepted it owed her a relief duty and issued her with a Personal Housing Plan (PHP), but the plan it ended up giving the woman included incorrect information, saying the council could not help her to be safer where she was, and that she could not register on its allocations scheme.

The Ombudsman also found the council should have offered the woman interim accommodation. After 56 days, it should have then decided whether it owed her the main housing duty. Since the woman was homeless, eligible, in priority need and not homeless through any fault of her own, the council would have accepted it had a full duty to her.

It took at least eight months too long for the council to consider offering the woman interim accommodation, and it missed numerous opportunities to tell her about her right to review the council's decisions, denying her right to appeal.

Local Government and Social Care Ombudsman, Michael King said

> "Statutory guidance says councils should not adopt allocations criteria that disadvantage people fleeing an area because of domestic violence. This has also been extended to people who have recently arrived in an area because of domestic violence.
>
> "In this case, the woman had suffered a brutal assault and the council's failures meant she continued to live in an area where she was at risk of violence. The council did nothing to help her find safe, alternative accommodation, even when it knew her ex-partner would be released from prison, leaving her frightened and at ongoing risk.
>
> "I'm pleased the council has accepted the faults in my report and hope other councils can take my findings on board to ensure they also appropriately support people in a similar situation in need of their help."

In this case the Ombudsman recommended that the council should apologise to the woman and put her in Band A of its allocations scheme backdated to October 2018, as well as provide suitable temporary accommodation in Wandsworth. It should also pay her £500 for the delays in dealing with her applications and £150 a month for the 12 months she has stayed in relatives' homes since her ex-partner left prison, because the council now says neither place was safe for her.

The Ombudsman has the power to make recommendations to improve processes for the wider public. In this case the council should provide information to housing officers about its duties towards people fleeing domestic violence and tell officer the allocations local connection criteria do not apply. It should also arrange training for its housing options and homelessness officers in dealing with people who have suffered domestic abuse and review its allocations policy.

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

15/1/21

## Workplace support for victims of domestic abuse: review report

The Department for Business, Energy & Industrial Strategy has published a report on improving workplace support for domestic abuse victims, including raising awareness and sharing best practice among employers.

The report sets out the key findings from the review by BEIS into how victims of domestic abuse can be supported in the workplace and the actions which government will take as a result.

There are three main themes:

- raising awareness and understanding of the impacts that domestic abuse can have on individuals and employers
- building and sharing best practice among employers
- the role of employment rights.

The report draws upon analysis of responses to the BEIS call for evidence which ran from June to September 2020.

**Chapter 1** considers the impact of domestic abuse on individuals and employers, including the challenges brought by the coronavirus pandemic. It identifies that an effective employer response is founded on being able to spot the signs of domestic abuse and know how to signpost to specialist services. The chapter sets out the steps which the Government will take to work with employers to raise awareness of domestic abuse as a workplace issue.

**Chapter 2** focuses on best practice and the positive role that employers can play, alongside the barriers for individuals and employers in accessing and providing support. It finds that having a workplace policy can be an effective mechanism for employers and employees, but that this needs to be embedded in wider organisational frameworks and cultures. The government wants all employers to have the tools and resources they need to support their members of staff and will set up a working group to raise awareness and drive change.

**Chapter 3** discusses the role that employment rights can play in giving employers and employees the certainty they need. While individuals may be able to use annual leave or request flexible working in order to take time away from work to deal with the impacts of domestic abuse, the review has found evidence to suggest that there are unmet needs in this area. In light of this, the government will consider through a consultation the steps which can be taken for victims of domestic abuse as well as consult to take forward the manifesto commitment to 'encourage flexible working and consult on making it the default unless employers have good reasons not to'.

For the report, **click here**.

17/1/21

## New rules for legal practice: guidance for legal professionals

The Ministry of Justice has published a webpage bringing together guidance for legal professionals about what they need to do from 1 January 2021.

The page includes guidance for legal professionals about family law disputes involving the EU, published on 30 December 2020.

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

For a page bringing together guidance for people who are involved in UK-EU cross-border family law disputes and explaining what needs to be done from 1 January 2021, **click here**.

17/1/21

## Independent Human Rights Act Review issues call for evidence

The Independent Human Rights Act Review has launched a public **Call for Evidence**. The Call for Evidence closes on the 3 March 2021.

The Review is not considering the UK's membership of the Convention; the Review proceeds on the footing that the UK will remain a signatory to the Convention. It is also not considering the substantive rights set out in the Convention.

The Call for Evidence comprises two themes. The first deals with the relationship between domestic courts and the European Court of Human Rights. The second considers the impact of the HRA on the relationship between the judiciary, the executive and the legislature.

For details of the Review, including its membership and terms of reference, **click here**. For the Call for Evidence, **click here**.

17/1/21

## Politicians must come up with 'a big, bold plan' to fix child poverty: Children's Commissioner

Anne Longfield, the Children's Commissioner for England, has published a call from a cross-party collection of politicians and campaigners calling for urgent action to tackle child poverty.

The set of short essays includes contributions from Robert Halfon MP, chair of the Education Select Committee, DWP Select Committee Chair Stephen Timms MP, Legatum Institute Director Baroness Philippa Stroud, former Prime Minister Tony Blair, David Burrowes of Strengthening Families, Edward Davies of the Centre for Social Justice, Helen Barnard of the Joseph Rowntree Foundation, Oasis Charitable Trust founder Steve Chalke, Association of Directors of Children's Services Vice President Charlotte Ramsden, Emma Revie, Chief Executive of the Trussell Trust and Hannah Slaughter of the Resolution Foundation.

Introducing the contributions, the Children's Commissioner warns that child poverty in England will continue to rise during this Parliament unless the Government commits to a bold, broad response, and that the Covid crisis is creating a child poverty timebomb that could see millions more children falling into poverty without urgent help. In 2010/11, there were 3.6 million children living in relative poverty in the UK after housing costs. By the start of the Anne Longfield's term as Children's Commissioner, in 2014/15, the number had risen to 3.9 million, rising to 4.2 million or 30 per cent of children by 2018/19. By the end of this parliament, even with a strong economic recovery, one in three children will be living in relative poverty – a level not seen since the 1990s.

While growing up in poverty doesn't necessarily mean an unhappy childhood, the Children's Commissioner notes that it can make life a lot harder. In a survey carried out last year, one in five children listed "not having enough money" as one of their top three worries. Five per cent listed "not having enough food or clothes". Not only does poverty bring material hardship for children, it harms their future life chances. At every stage of education, poorer children do worse than their more affluent peers. As a result, they are more likely to enter adulthood with fewer opportunities. Previous Children's Commissioner's Office research shows that children on Free School Meals (FSM) are more than twice as likely as their peers to leave education without a Level 2 Qualification (5 GCSEs, a technical equivalent or an apprenticeship).

For the first time in decades, the disadvantage gap between children in poverty and their peers during school has increased, while the disadvantage gap at age 19 has been increasing for several years. In short, for the first time in decades there is a 'double-whammy' of rising child poverty and worsening life chances for children in poverty. Covid-19 will only have accelerated these trends.

Anne Longfield is urging the Government to end the uncertainty and worry facing families around whether the £20 a week Universal Credit uplift introduced by the Chancellor at the start of the Covid crisis will be retained. Analysis by the Resolution Foundation this week shows that over 300,000 children would be shifted into poverty if the uplift is removed in April.

To read the essays, **click here**.

22/1/21

## Independent Human Rights Act Review: Parliamentary Committee calls for evidence

The Parliamentary Joint Committee on Human Rights is seeking views to help inform its response to the Government's independent review of the Human Rights Act and its outcome.

The Committee would welcome submissions which focus on one or more of the following issues:

- Has the Human Rights Act led to individuals being more able to enforce their human rights in the UK? How easy or difficult is it for different people to enforce their Human Rights?
- How has the operation of the Human Rights Act made a difference in practice for public authorities? Has this change been for better or worse?
- What has been the impact of the Human Rights Act on the relationship between the Courts, Government and Parliament?
- Has the correct balance been struck in the Human Rights Act in the relationship between the domestic Courts and the European Court of Human Rights? Are there any advantages or disadvantages in altering that relationship?
- Are there any advantages or disadvantages in seeking to alter the extent to which the Human Rights Act applies to the actions of the UK (or its agents) overseas?

For more information, **click here**.

22/1/21

## Government publishes new strategy to protect children from sexual abuse

The Home Secretary has published a new national strategy to protect children from all forms of child sexual abuse.

The **Tackling Child Sexual Abuse Strategy** sets out how the Government will use new legislation and enhanced technology to stop offenders. This includes investing in the UK's Child Abuse Image Database to identify and catch more offenders more quickly – for example, by using new tools to speed up police investigations and protect officers' wellbeing by avoiding them being repeatedly exposed to indecent images.

The strategy is based on the following three objectives:

- objective 1: tackling all forms of child sexual abuse and bringing offenders to justice
- objective 2: preventing offending and re-offending
- objective 3: protecting and safeguarding children and young people, and supporting all victims and survivors

The strategy captures our long-term ambition to tackle this crime. It outlines the concrete steps we are taking now to step up our response and provides a robust framework for government to drive action across:

- all agencies
- all sectors
- charities
- communities
- technology companies
- society more widely

to carry on strengthening our response to all forms of child sexual abuse.

The Home Office will make it easier for parents and carers to ask the police whether someone has a criminal record for child sexual offences as the department commits to a review of Sarah's Law.

These measures are additional to civil orders to stop reoffending and introducing stronger sentencing.

The government will support local areas to improve their response to exploitation with funding for The Children's Society's Prevention Programme initiative, and will introduce the Online Safety Bill to ensure that technology companies are held to account for harmful content on their sites, and do not compromise on children's safety.

The publication comes as new Home Office research estimates that the social and economic cost of the crime over the victims' lifetimes is at least £10 billion for the victims who experienced child sexual abuse in the year ending March 2019, with the full emotional cost being immeasurable.

The strategy also aims to improve the data available on offenders following the publication of the paper on the characteristics of group-based offending which found that it was difficult to draw conclusions about the ethnicity of offenders as existing research is limited and data collection is poor.

This commitment includes working with local authorities to understand and respond to threats within their communities and collecting higher quality data on offenders so that the government can build a fuller picture on the characteristics of perpetrators and help tackle the abuse that has blighted many towns and cities in England.

To access the policy document, **click here**.

22/1/21

## Firms should check whether they need to register as doing tax advice work

**The Law Society has reminded firms**, including those practising family law, that they should have checked whether they need to register as doing tax advice work to fulfil their obligations under the money laundering regulations.

Law firms had until 10 January 2021 to check whether any tax advice work they carry out falls under a new and wider definition for anti-money laundering purposes. The Fifth Anti-Money Laundering Directive brought in amended regulations, with the definition of 'tax adviser' widened to include more activities than before.

Any firm that finds it is now in the scope of the regulations should have applied to the Solicitors Regulation Authority (SRA) or another AML supervisor, such HM Revenue and Customs, to be supervised for money laundering before 10 January. If your firm has not done so, you can still apply now.

The SRA has produced guidance for firms to help determine whether or not you fall within the scope of the regulations. The Law Society advises that even if a firm believes that it does not need to be regulated for anti-money laundering purposes it should read the guidance before being confident of this.

Family Law Week recently published an article, written by Matthew Moore of Infolegal, addressing this issue. **Click here** for the article.

22/1/21

## Special Restrictions on Adoptions from Abroad (Nigeria) Order 2021

Section 9(4) of the **Children and Adoption Act 2006** provides for the Secretary of State by order to declare that special restrictions are to apply for the time being to the bringing of children into the United Kingdom from a country or territory outside the British Islands in certain cases involving adoption.

Section 11(1) of that Act provides that those special restrictions are that the appropriate authority is not to take any step, which might otherwise have been taken, in connection with furthering the bringing of children into the United Kingdom in those cases. Section 11(2) provides that the relevant steps may be taken if the prospective adopters satisfy the appropriate authority (defined in section 11(4)) that the authority should take those steps despite the special restrictions.

By article 2 of this Order, the Secretary of State declares that special restrictions are to apply to Nigeria.

For the Order, **click here**.

22/1/21

## New private law cases received by Cafcass in December rose 9 per cent on 2019

Cafcass received a total of 3,510 new private law cases (involving 5,371 children) in December 2020 – 9.5 per cent (or 305 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.

24/1/21

## New public law cases received by Cafcass rose by nearly 5 per cent in December

Cafcass received a total of 1,383 new public law applications (involving 2,130 children) in December – 64 applications (4.9 per cent) more than in the same month last year. The number of children featured in the cases fell from 2,142 children in December 2019.

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

24/1/21

## Damage to children's mental health caused by Covid crisis demands major increase for children's mental health services

The Children's Commissioner's annual report on the state of children's mental health services in England has found that while there has been an expansion of children's mental health services over the past four years, such was the poor starting point that services are still nowhere near meeting the needs of many hundreds of thousands of children. The Children's Commissioner argues this is because of a lack of ambition in improving children's mental health services, despite numerous Government announcements on children's mental health.

However, the main positive finding of the analysis is that some individual local areas are improving above and beyond what central Government has expected of them and delivering vastly improved services for children.

The data in the report largely cover the period up to end of March 2020, showing a system without the necessary capacity or flexibility to respond to the pandemic, which has been such a seismic event in the lives of children. The major disruption to two years of education, alongside the limited opportunities to see friends and wider families, to play and enjoy activities and the worry about the impact of Covid on their families, will have taken a heavy toll on some children.

In the report, the Children's Commissioner calls for the Government to raise its ambition significantly to deliver a wholesale change in the way we provide children's mental health services. She argues the work that has been undertaken over the past five years paves the way – in particular the creation of Mental Health Support Teams which provide a model of integrated mental health care across schools and the NHS. One positive development from the Covid-19 crisis is that it has shown that some of these services can be provided digitally.

The Children's Commissioner also warns that the Government's current plan to roll out NHS-led counselling in schools to 20-25 per cent of areas by 2023 is not ambitious enough, particularly following the Covid pandemic, and repeats her call for an NHS-funded counsellor for every school as quickly as possible.

The substantive findings for this report are based on detailed examination of the data on children's mental health for 2019/2020. The main findings of the report are:

- Access to children's mental health services is still not adequate.
- Access is improving, but not as quickly as we would expect.
- Spending on children's mental health is slowly increasing but highly variable and still inadequate.
- There is a postcode lottery around what local areas spend, waiting times for treatment, access to treatment and how many children are referred to services and go on to receive support.

For the report, **click here**. For a summary of the report, **click here**.

29/1/21

## Financial Remedy Court organogram

Tne Courts and Tribunals Judiciary has published an organogram charting the national and regional structure of the Financial Remedy Court.

For the organogram, **click here**.

29/1/21

## Domestic Abuse Bill enters committee stage

On 25 January 2021 the Domestic Abuse Bill began its committee stage in the House of Lords. To follow progress of the bill, **click here**. For a briefing, prepared by the Local Government Association, listing the tabled amendments to the bill, **click here**.

For draft guidance (published on 26 January 2021) on the delivery of support to victims of domestic abuse, including children, in domestic abuse safe accommodation services, **click here** and scroll to the bottom document.

29/1/21

## Civil legal aid application forms changed to reflect new eligibility criteria

The Legal Aid Agency has made changes to the civil legal aid application forms to reflect amendments to the eligibility regulations removing the mortgage cap as part of the means test for civil legal aid.

Previous versions of the application forms will continue to be accepted until 31 March 2021.

However, the previous forms still refer to the mortgage cap and providers must ensure that the correct regulations are applied in the calculation of an individual's means and therefore the full mortgage/secured loan must be deducted.

The new forms should be used by advisers as soon as possible.

The Legal Aid Agency is in the process of implementing the necessary changes made to the regulations to make sure that claimants with a mortgage over a specific value are not disadvantaged in applying for legal aid.

For further details of the changes to eligibility criteria, **click here**.

29/1/21

## Councils urged to learn from Ombudsman investigation into child abuse complaint

The Local Government and Social Care Ombudsman is urging councils to place children at the centre of decision making in cross border child protection cases, after a suicidal teenager was left without appropriate support when she reported serious sexual abuse.

The girl, who lives in Kent, reported she had been sexually abused in Croydon when she was younger. Her mother reported this to the police and was told by the police she would be contacted by a social worker.

In June 2018 Kent received a referral from the police stating a historic allegation of serious sexual abuse had been made. Kent advised the police to refer the case to Croydon for investigation. Kent did not contact the mother or the girl to assess whether support was needed.

A second police referral was received by Kent in September 2018 relating to the same incident originally reported. Kent made contact with the family following the second referral and offered some support. The mother felt the support offered was not appropriate and would not address the issues her daughter was experiencing. The social worker did not speak to the girl directly before completing her assessment despite this being a clear requirement of the statutory guidance.

The Ombudsman's investigation found neither council took responsibility. It found both councils took no further action at the initial referral stage. There was no direct contact between either council for nearly two years. During this time the girl's mental health deteriorated: she made three suicide attempts and went missing for a period. Neither council worked together to safeguard the girl.

The Ombudsman found Croydon council at fault for failing to follow statutory guidance because it did not convene a strategy discussion following the girl's initial disclosure. This led to an uncoordinated response, lack of information sharing, failure to identify potential risk and poor victim care.

As the girl lived in Kent, that council had responsibility properly to assess and consider those needs. Kent believes appropriate support was offered. The Ombudsman found the council failed to carry out an assessment of the girl's needs in a timely way. It also failed to adopt a child centred approach when it eventually did assess the girl.

The Ombudsman also criticised the support provided to the girl's mother which she said she needed to support her daughter. Kent council failed to properly assess the mother's needs and added to her distress.

Kent council also incorrectly told the mother it might need to refer her to the Local Authority Designated Officer (LADO) because of the nature of the case. This would have threatened her employment and added to her distress.

In this case Kent County Council has agreed to pay £2,150 to the family. In addition Kent County Council will remind all staff dealing with children's services complaints when the statutory complaints process should be used, and who can make a complaint under this process.

The Ombudsman considers that both councils should share the learning points from the case across their organisations to ensure staff are aware of their responsibilities in respect of information sharing, professional curiosity and cross-border child protection referrals.

Kent County Council has also agreed to conduct an audit of 50 cases closed in similar circumstances.

For the report, **click here**. The report can be downloaded from the link at the top right corner of the page opened.

29/1/21

## Calls to NSPCC about children living in violent homes rise by over 50 per cent

The NSPCC has reported that average monthly contacts to its helpline about children and domestic violence have soared since the first lockdown began. The charity is calling upon the government to fund essential recovery services to tackle the problem.

The NSPCC helpline is receiving an average of over 30 contacts a day from adults worried about children living with domestic abuse.

Compared to pre-lockdown figures, the monthly average number of contacts between April and December 2020 was 53 per cent higher than the pre-lockdown average. 8,371 contacts were made during that period, peaking at 1,053 contacts in November alone.

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

29/1/21

## Number of open CSA cases decreased to 71,700 in September 2020

The number of CSA cases held on CMS IT systems decreased from 75,000 in June 2020 to 71,700 in September 2020. The caseload has been steadily declining since December 2014 and declining sharply since December 2018.

The reduction in caseload is due to the closure of cases as outlined in the child maintenance compliance and arrears strategy. All cases on the CSA computer system have now been closed.

The CSA historical debt balance continues to reduce. The amount of CSA debt held on CMS IT systems has decreased from £449.1 million in June 2020 to £428.7 million in September 2020. The outstanding debt balance has been steadily declining since December 2016 and declining sharply since September 2018. Debt owed to government and debt which has no reasonable chance of being collected is written off.

Between 13 December 2018, when the compliance and arrears strategy work started, and 30 September 2020:

- The CSA has written to 242,200 parents with care to ask if they want a last attempt to be made to try to collect the debt owed to them. This includes all 134,700 parents with an eligible case on the CSA system and 107,500 parents with a case on the CMS system.

- Collection of arrears is either complete or in process for 25,000 of the 26,300 case groups on which parents have requested debt collection and they have reached the debt collection stage.

- 579,400 cases with non-paying historical debt have had the debt adjusted or written off, of which 169,000 were on the CMS IT system. System records showed the cases had a total debt value of £1,935.5 million, of which £853 million was owed to government only.

For the full data, **click here**. For a House of Commons Library briefing describing the UK Government's policy to write-off arrears arising from the 1993 and 2003 child maintenance schemes (which takes account of the above data), **click here**.

29/1/21

## 'Private equity involvement in care placements needs reviewing'

The Government's review of children's social care needs to consider the impact of increasing private equity and stock market involvement in the system, the Local Government Association says as it publishes new research showing that the six largest independent providers of placements made £219 million in profit last year.

The LGA's report – ***Profit-making and Risk in Independent Children's Social Care Placement Providers*** – December 2020 update – states that some independent providers of children's residential and fostering placements are achieving profits of more than 20 per cent on their income, while four of the seven largest groups of independent providers had more debts and liabilities than tangible assets.

While councils provide some of their own fostering and children's homes places for children in care, nearly three in four children's homes and two in five fostering households are now provided by independent organisations, which includes private and charitable companies. The two largest independent fostering providers offer nearly a third of all independent fostering places.

Councils have been reporting increasing difficulty in finding suitable places for children in care, particularly for older children and those with more complex or challenging needs. They have also identified some placement costs rising far beyond inflation, putting pressure on budgets that are already at breaking point.

Rising demand means that despite increasing budgets, councils still overspent on children's social care by more than £3 billion over the past five years. Four in five councils have reported rising costs for fostering and residential placements for children in care due to coronavirus pressures last year.

The Department for Education has launched an **independent review of children's social care** which councils say is an important opportunity to consider how we can ensure that we have the right homes for all children in care, and that money spent on those placements is improving outcomes for children.

The LGA is calling for this review to lead to greater national oversight of companies providing homes for children in care, like the role the Care Quality Commission (CQC) holds for adult social care provision.

The collapse of adult care home provider Southern Cross in 2011 led to a legal duty for the CQC to monitor the financial health of the "most difficult to replace" adult social care service providers. However, no such duty exists for children's social care providers.

Additional research by the LGA – ***Barriers and Facilitators to Local Authorities and Small Providers Establishing Children's Homes*** – identifies five key barriers to diversifying ownership of children's homes: negative stigma around children's homes; financial risks; high barriers to entering the market; concerns around how to support children with complex needs; and limited coordination of commissioning around the country.

For the LGA's report *Profit-making and Risk in Independent Children's Social Care Placement Providers* – December 2020 update, **click here**. For Barriers and Facilitators to Local Authorities and Small Providers Establishing Children's Homes, **click here**.

31/1/21

## New help for divorcing couples as they are urged to consider sharing their pensions

Advicenow, working with the Pensions Advisory Group and funded by the Nuffield Foundation, has launched a ***Survival guide to pensions on divorce*** for couples sorting out how to divide their finances on divorce.

The guide seeks to address the reasons so many divorcing couples overlook their pensions when agreeing how to

divide their assets and urges readers to consider pensions when doing so. As Beth Kirkland, Advicenow's family law expert, explains:

> 'Pensions are viewed by many couples as too complicated or intimidating, and a lack of user-friendly information compounds the problem. While many of us find thinking about future finances stressful, it is dangerous to ignore them. And there is ample research that shows that not sharing pensions can lead to women who have children particularly being in unnecessarily precarious financial positions in later life.
>
> 'The survival guide addresses these issues by explaining to readers what they need to do about their pensions, how to find out what they are worth, when it is essential to get expert advice, and what they should do if they can't come to an agreement.'

The guide is the accessible version of the definitive ***Guide to the Treatment of Pensions on Divorce*** produced by the Pensions Advisory Group in 2019, and has the endorsement of the President of the Family Division and the Family Justice Council.

Hilary Woodward, Chair of the Pensions Advisory Group (PAG), says:

> 'In a survey of family lawyers by the PAG about 30 per cent reported that they had, in the last six months, been instructed to abandon, or, in their view, inappropriately settle a claim against pensions because the emotional costs were too high for their client. An even higher proportion, about 50 per cent, reported the same because the financial costs were too high. This guide will be immensely helpful to those going through a divorce with minimal or no legal advice, and to professionals for signposting to their clients. Ultimately, we hope that the Advicenow survival guide will be another important step in improving understanding of pensions on divorce and the long-term fairness of financial outcomes.'

This new guide joins Advicenow's other step-by-step help for divorcing couples which includes guides and films to assist couples to sort out arrangements for their children, reach agreement on finances on divorce, and go to court without the help of a lawyer. All of these guides are available **here**.

31/1/21

# Financial Remedy Update, January 2021

Naomi Shelton, Associate, Mills & Reeve LLP considers the important news and case law relating to financial remedies and divorce during December 2020.

As usual, the monthly update is split into two parts.

## A. News Update

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

The Regulations make amendments to a number of statutory instruments that made provision in relation to the United Kingdom's exit from the European Union. Click here to access a link to the Regulations.

The Family Procedure Rules 2010 and Court of Protection Rules 2017 (Amendment) (EU Exit) Regulations 2019 are among the statutory instruments amended by these Regulations.

### Resolution calls for early legal advice for divorcing couples

Resolution's new poll reveals the damaging impact of divorce upon parties' mental health and calls for the government to improve access to early legal advice for divorcing couples.

The Resolution-commissioned YouGov survey, in which 1,000 divorcee participants took part, released its results to coincide with Good Divorce Week (30 November – 4 December 2020), Resolution's annual initiative to raise awareness of the work of family justice professionals. The survey found that 41 per cent of those divorced in the last five years suffered mental health episodes including depression and anxiety. Fifty-four per cent of those declaring mental health episodes also reported to having suicidal thoughts.

The survey also found a widespread lack of awareness with regards to out-of-court alternatives. Only 21 per cent of those surveyed knew about arbitration and only 36 per cent were aware of mediation.

The results also showed 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 experience. This, coupled with the above, has led to Resolution calling for greater support for divorcing couples.

Click here to find out more about the survey results.

### Family Justice Board statement summarises the priorities for the family justice system

The Family Justice Board has issued a statement summarising the priority actions the Board intends to work towards in response to both the immediate pressures within the family justice system and for longer-term reform.

**Two further documents** accompanying the statement outline a more detailed discussion with regards to the priorities pertaining to public family law and private family law matters. The documents are being circulated to family law practitioners and further information will also be disseminated in early January 2021 which will include details of local, regional and national implementation arrangements.

### 3.7 per cent increase in new private law cases received by Cafcass

Cafcass received 4,088 new private law cases in November 2020 which is 3.7 per cent (114 cases) higher than in November 2019. **Click here** to view month-by-month figures.

### Increase in MIAMS between July and September 2020

Mediation Information and Assessment Meetings ("MIAMS") increased by 8 per cent between July and September 2020, compared to 2012. These volumes are comparable to pre-Covid levels showing an almost full recovery which may be partly due to sessions taking place via video link. **Click here** to view the full statistics.

### Ministry of Justice statistics show family court activity between July and September 2020 returning to 2019 levels

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

Examples of increased family court activity include the number of new domestic violence remedy order applications increasing by 26 per cent; private law cases increasing by 8 per cent and financial remedy cases increasing by 5 per cent. The mean average time from divorce petition to decree nisi was 29 weeks and to decree absolute was 53 weeks.

### Addendum to 2019 Practice Guidance regarding placements in unregistered children's homes in England and unregistered care home services in Wales

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.

The addendum guidance issues by the President can be **found here**.

## B. Case Law Update

### V v W [2020] EWFC 84, 2 December 2020

In this case, Sir James Munby dismissed the husband's ("H") application for disclosure of the transcript of the FDR hearing and various associated documents into civil proceedings involving recovery of a single joint expert's fees incurred in financial remedy proceedings.

Mr X, a single joint expert, was appointed in financial remedy proceedings to value a company owned by H. H was to pay the fees. The report was produced late and received by H two days before the FDR hearing. In April 2019, Mr X's firm issued a claim against H seeking payment of its fees. Later that month, H's company became insolvent and entered a USA "Chapter 11" bankruptcy.

H denied liability for the single joint expert's fees, alleging Mr X was negligent. H argued he was prejudiced in the financial remedy proceedings as the report was filed late, and at the FDR, Moor J indicated the trial judge was likely to make findings of fact regarding H's interest in the company, based on the report, which would affect the financial provision H would have to make to his wife ("W"). H claimed he negotiated and reached a financial settlement with W in reliance on the report, or the effect the report was likely to have on the trial judge. H subsequently applied to vary the financial order.

In June 2019, Moor J refused H's application for disclosure, but gave him liberty to apply. Moor J emphasised that non-disclosure of FDR hearings is vital and an essential prerequisite to aid fruitful discussion for the purposes of

settlement. Anything said at an FDR is not admissible in evidence, except at the trial of an individual for an offence committed at the FDR, or in the exceptional circumstances set out in *Re D (Minors)* [1993] Fam 231 regarding safeguarding.

In his judgment, Munby J highlighted the compulsory nature of the FDR and the importance of the parties' obligation to hold nothing back (r. 9.17 FPR 2010 and PD 9A).

Of the FDR hearing, Munby J said (26):

> "It is important to remember that the FDR is entirely a creature of statute, being part of the statutory process for dealing with proceedings – financial remedy proceedings brought under the Matrimonial Causes Act 1973 – which are themselves entirely a creature of statute. So far as concerns the FDR, the relevant provisions are in FPR 9.15(4), 9.17 and PD9A, para 6. For present purposes, two aspects of the FDR process are significant. The first is that the FDR is compulsory and both parties must personally attend: the parties cannot themselves contract out of it, though they can pre-empt the FDR by embarking upon a 'private' FDR: see President's Circular: Financial Remedies Court Pilot Phase 2, 27 July 2018, paras 7-11. The other is the obligation on the parties to hold nothing back at the FDR and, indeed, to put forward their best offers. Moreover, it is fundamental that the FDR is a confidential process, differing from other types of family hearings in two significant respects: first, journalists are not permitted to attend the FDR: FPR 27.11(1)(a); secondly, the judge hearing the FDR must have no further involvement with the case: FPR 9.17(2)."

Munby J held that PD 9A was not wrong in law and he was bound by it: it operated as an absolute bar to H's attempt to make use of anything said or done at the FDR in support of his defence and counterclaim in the civil proceedings.

## Crowther v Crowther and Others [2020] EWHC 3555, 22 December 2020

In this case Lieven J made a costs order against the wife ("W") for discontinuing proceedings relating to a preliminary issue in which she had alleged fraud against the husband ("H") and a number of other respondents.

The couple had been engaged in "highly acrimonious and litigious" financial remedy proceedings since late 2019. In December 2019, W successfully made an urgent without notice application for a freezing injunction against H and the other respondents (called "the Castle parties"). H and W had run a successful shipping business and W alleged that they (i.e. she and H) were the beneficial owners of five ships worth £7-10million. She said there was evidence that H was conspiring to reduce his financial position by transferring assets away from himself and argued that without a freezing injunction, the assets would disappear offshore and she would be left with no redress.

In February 2020, the Castle parties issued proceedings in the Admiralty Division, asserting legal and beneficial ownership of four of the ships, and related relief. They also asserted that companies controlled by the Crowthers owed Mr Knight (one of the respondents) £5million. H immediately conceded the Castle claims in the Admiralty proceedings and entirely supported Mr Knight's version of events that he had helped the Crowthers out of some considerable financial difficulties. In those proceedings, W repeatedly (over the course of a year) pleaded fraud, sham and conspiracy against H and the Castle parties and also alleged that Mr Knight was defrauding HMRC.

The freezing injunction was temporarily discharged in respect of the ships but later reinstated by the Court of Appeal. The Admiralty proceedings were also transferred to the Family Division. A preliminary issue hearing was listed and extensive preparation for that trial was undertaken including a disclosure exercise involving thousands of documents (and also applications to release sale proceeds of the family home to pay legal fees). Days before the hearing was due to start, W reached a settlement with the Castle parties, without involving H. The settlement was set out in a consent order with the terms in a confidential Tomlin order.

A hearing took place because although W and the Castle parties had agreed that both the preliminary issue proceedings and the Admiralty proceedings were to be discontinued, it was not clear where this left W's allegations against H. At the hearing, however, she accepted that all her claims of beneficial interest against him, as well as any allegations of sham, fraud or conspiracy, would have to be discontinued.

Although the terms were in a Tomlin order, because the hearing was in open court and the parties openly referred to the terms in court, the judge felt it was "appropriate and necessary" to disclose the figures in the judgment to help understand the context of the litigation. The Castle parties agreed to pay W £750,000 in a series of instalments and release the LLP company owned by the couple from £5.6million in unpaid charter income and W of £1million in other alleged loans. There was no order as to costs and W's claims were to be discontinued on a no admissions basis. The lump sum was to be paid in tranches, the first £80,000 on 24 December 2020.

H was not a party to the agreement and it was unclear at the hearing where this left W's allegations in respect of H. Counsel for W accepted that all claims of beneficial interest against H would have to be discontinued, as would any allegations of sham, fraud or conspiracy. Counsel for the Castle parties stated that H would not be pursued for the alleged personal debts against him and the company to which the unpaid charter income was allegedly owed was now in liquidation.

Lieven J clarified that she understood that H was not going to argue at financial remedy proceedings that he had a large outstanding debt to the Castle parties which should be taken into account in any matrimonial finance award.

In light of these events, H applied for costs.

The judged noted that proceedings concerning a preliminary issue are not financial remedy proceedings and so the 'no orders as to costs' rule does not apply (r.28.3(5) FPR 2010) and therefore costs follow the event. There is also a presumption in the CPR 1998 that a party who discontinues proceedings is liable for the other party's costs (r.38.6 CPR 1998). However, r.38.6 CPR 1998 does not apply to family proceedings as it is not referred to in the FPR 2010. Lieven J's view was that nonetheless, r.38.6 was relevant.

In all High Court Divisions, the basic principle is fraud should not be alleged without sufficient evidence. Fraud has serious reputational consequences and parties should be reticent about pleading it *(Playboy Club v Banca Nazionale Dei Lavori Spa* [2018] EWCA Civ 2025). Therefore, alleging fraud and withdrawing it as compared to discontinuing other proceedings, strengthens any argument for costs. The judge noted that W's conduct had been "fairly extraordinary" and that H had faced a "grossly unfair" situation particularly as the allegations had been widely publicised.

Lieven J stated that H's poor litigation conduct was irrelevant to the principle of whether W should pay his costs of the preliminary issue (and his conduct was also probably more understandable now too). Any unreasonable costs incurred by him were said to be a matter for the costs draughtsman and judge.

Lieven J rejected W's argument that financial remedies litigation was different from other litigation because it concerned the fair distribution of family assets. It is not excepted from the basic principles of proper litigation conduct. It should not be permitted to develop into a discrete entity where the normal principles governing disclosure, pleading and discontinuance do not apply. Case law makes clear that a party who pleads fraud unsuccessfully can expect to pay costs on an indemnity basis (*Clutterbuck v HSBC* [2015] EWHC 3233 (Ch)). Family cases are not excepted from this principle.

H sought £80,000 to be paid on account. The judge considered there was no prospect of him recovering less than that amount on a detailed assessment, and it was appropriate that H should be able to recover this part of his costs at this stage. Lieven J therefore ordered W to make a payment on account in the sum of £80,000. W's legal fees were in the region of £900,000.

## **Nadeem Shahzad v Nusrat Mazher and The Queen's Proctor (intervener) [2020] EWCA Civ 1740**, 18 December 2020

This case concerned the appeal of the husband ("H") against the setting aside of a decree absolute, the rescission of a decree nisi and the setting aside of a certificate of entitlement to a decree made in the divorce proceedings between himself and his wife ("W").

H had petitioned for divorce in 2017 on the grounds that he and W had been separated for over five years (since 2006). The petition proceeded undefended. However, after decree nisi had been pronounced W applied for it to be set aside on the basis that she and H had only been separated since 2016. Unfortunately, before that application could be heard, decree absolute was made. The Queen's Proctor asked that both decrees be set aside. The trial judge had agreed to this request on the basis that (1) H had fraudulently mis-stated the date of separation and (2) contrary to r.7.32(2) FPR 2010 the decree had been made absolute whilst W's application was still pending. H appealed.

The Court of Appeal held that the court did not have the power to set aside a decree absolute where the evidence in support of the fact relied upon was false. In the absence of procedural irregularity or want of jurisdiction on the part of the court to entertain the petition, a decree absolute was unimpeachable. That conclusion was supported by s.18(1) Part III Senior Courts Act 1981 which made it clear that a party could only challenge a decree before it was made absolute, and ss.8 and 9 MCA 1973 were directed towards the Queen's Proctor intervening before the decree was made absolute.

However, the trial judge had not relied solely on H's fraud as a basis for setting aside the decree absolute. He had also relied upon procedural irregularity. That irregularity made the decree absolute voidable, and the judge was entitled to set it aside. He was also entitled to rescind the decree nisi, set aside the certificate of entitlement and dismiss the petition. Given his conclusion that H's evidence was false, there was no reason to allow the petition or the decrees to stand.

21.1.21

# Avoiding the Pitfalls of Remote / Hybrid Hearings: My Ten Top Tips

**Gabrielle Jan Posner**, Barrister and Recorder, **Trinity Chambers** Chelmsford, offers a few hard earned pointers to improve the remote hearing experience..

*This article is dedicated to Chas Tagg (Charles Adrian) 26 April 1952 – 22 December 2020*

Having waved farewell to the annus horribilis that was 2020, I have been musing about what I learned during the year. In January 2020 on my CPD record sheet for 2020 under learning objectives I put:

> "To learn to take advantage of technology. Stop relying on printed bundles and learn to work with e-bundles. Improve practice and work life balance by managing time better."

In the immortal words of Meatloaf, "*Two Out of Three Ain't Bad*" and since I never expected to achieve them in under three months, perhaps in that regard, at least, it was an annus mirabilis. Admittedly, it was thrust upon me and I can't say I am there yet, but you could say, "*You've Come a Long Way, Baby*".* I have, however, failed spectacularly to achieve the third objective – as, indeed, we all have – because the professional and personal lives that we had so carefully constructed for ourselves have been snatched away so peremptorily.

This time last year I thought Zoom was a rocket-shaped, three-flavoured ice lolly (which won't mean anything if you were born after the 1980's) and that the Cloud Video Platform was something that would not be of any interest to a respectable middle-aged lady. It is precisely because of my age that achieving the first two objectives in such a relatively short time feels so momentous. Not only can I edit and mark up a PDF and find a page reference quickly but, as somebody who had never previously Skyped or Face-timed, I am proud not just to see my grandchildren via WhatsApp video and do Zoom Pilates and quizzes, but also to be able to participate in and preside over wholly remote and partly attended hearings.

Since I see these hearings from both sides and hear a lot of great anecdotes over socially-distanced lunches with other judges, such as the one about the upside-down district judge in the first week of WFH**, I thought it would be worthwhile to share what I have learned in the hope that it may help others appearing remotely to come across rather better than is sometimes the case. You may not know this – I certainly didn't – but before you even start, the first thing you need to do, if you have a laptop or PC, is to check where your camera is. That is what you need to look into, not the middle of your screen or the eyes of the person you are talking to. You also need to adjust the height of your device not, sadly, for your own comfort if you are making notes, but so that you can still be seen if you lower your head to write.

Once you have mastered the other basics, like turning on your speakers and knowing where the mute and disable camera buttons are, it may help to bear in mind the following:

> 1. The judge will probably be in court with his or her camera disabled and on mute by the time you are let into the virtual hearing room, so be careful what you say, especially if it is about the judge and you have been wondering which planet he or she is on.
>
> 2. Unless your name is Tracey Emin, nobody wants to see your messy bed in the background or your children's or grandchildren's photos, especially not in a care case where the care plan is adoption.

3. Your barking dog who bounds in the room and licks your hand to show it is time for walkies is not adorable. You need to allow for the possibility of a hearing running over and make suitable arrangements. If, say, your own children really do need you, at a convenient point ask for a short break; everyone will understand the constraints we are all under.

4. If the courtroom has a large free-standing monitor, the image of you seen by the judge and those in attendance may be enormous. Pulling faces or gesturing during other lawyers' submissions will be seen very clearly; so remember to disable your camera before you look towards heaven, shrug your shoulders or draw your finger across your throat.

5. As the judge, it is very difficult to establish rapport at a remote hearing. A lot of techniques that are useful to diffuse tense situations when everybody is in the room together, such as making eye contact, lowering your voice and injecting a little humour, are impossible or just don't seem to work well. Humour, in particular, is not a good idea; there is too much scope for misunderstanding.

6. When it comes to submissions, the best remote advocates are the ones who say as little as they possibly can and list their best points, with bundle references, on a couple of pages emailed in advance to the judge. If you were giving a speech at a wedding, you would not do so in the same way as if you were addressing a jury. Equally, you have to adapt your approach to being on a remote platform. As you make submissions, for the judge it is like watching the news with no outside broadcasts to break it up, so that by the time you've built up to your amazing point, you may have lost him or her. Those of us who represent parents in care cases often worry that if we don't say certain things, our clients will be disappointed; better to warn them in advance that this is not going to be the same as being in a courtroom.

7. We've all heard about the person who is in business attire on their top half but when they stand up they're revealed to be in their underpants, but chunky jewellery, a coloured shirt or garish tie are quite distracting when all you see is somebody's face and torso.

8. Unmute yourself and count to five (silently, of course) before you speak. If you open your mouth and start speaking whilst you are still on mute and / or your internet connection is poor and there is a slight time lag, nobody will ever catch the beginning of what you were saying.

9. If you want to say something, raise your hand or write in the chat room. If you do use the chat room, watch out for automatic spell checking / predictive text. Unfortunate examples include ***Carcass*** for Cafcass and the ***Eat*** London Family Court. More disturbing was a message sent by one colleague to another to put in the chat room: "We seem to have had a power cut, my electricity has gone and now my ***wife*** has gone so I am going to phone in".

10. In the daytime sit facing a window rather than with your back to it so that your face can be seen properly and doesn't take on a blueish hue. Don't back light yourself with a lamp in the late afternoon in the winter especially if you are prone to moving forward when you are cross-examining: you will look faintly demonic as you lurch in and out of focus.

Well, there you are. Who knows what 2021 will bring? I hope that you all stay healthy and safe.

*Fatboy Slim
** Working From Home, I cannot believe that I know all the lingo – LOL!

5/1/21

# Breaching Legal Advice Privilege

**Henry Clayton**, barrister of **4PB**, considers the circumstances in which documents which purport to be privileged are, in fact, admissible.

What if assets have been moved to frustrate enforcement and the only person who knows where is the other party's former solicitor? Privilege protects that party, right? Not necessarily. There are many circumstances in which documents which purport to be privileged are, in fact, admissible. If such a document contains important evidence, practitioners need to ask themselves whether its apparent status can be challenged.

## First stage: does privilege even apply in the circumstances?

Legal advice privilege covers communications between lawyer and client for the purpose of furnishing legal advice, but not all communications between client and lawyer attract the privilege. The 'legal spectacles' test was formulated by the House of Lords in the leading case of ***Three Rivers DC v Bank of England (No.6)* [2004] UKHL 48**, [2005] 1 AC 610, in the speech of Lord Rodger at [60]. In that matter the issue was the extent to which communications by the Bingham Inquiry Unit about 'presentational matters' was held to be privileged:

> "Either expressly or impliedly, the BIU was asking them to put on legal spectacles when reading, considering and commenting on the drafts."

The courts have traditionally rejected calls to interpret 'legal advice' narrowly so as to restrict the operation of the privilege. In *Balabel v Air India* [1988] 1 Ch 317, Taylor LJ said at 330G:

> "legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context."

Yet this authority also makes it clear that there are limits to how broadly the privilege will be drawn. Taylor LJ continued at 331H:

> "those dicta in the decided cases which appear to extend privilege without limit …are too wide. It may be that the broad terms used in the earlier cases reflect the restricted range of solicitors' activities at the time. Their role then would have been confined for the most part to that of lawyer and would not have extended to business adviser or man of affairs."

So communications with a business adviser who just happens to be a lawyer will not be privileged if he/she is not expected to put his/her 'legal spectacles' on. Similarly, it was held by the Court of Appeal in ***USA v Philip Morris* [2004] EWCA Civ 330** (the tobacco lobby case) in the speech of Brooke LJ at [80] that:

> "advice or assistance in collecting and collating, listing, spring-cleaning, storing, transporting and warehousing documents does not amount to legal advice ….and is not the sort of assistance that requires any knowledge of the law."

It is long established that there is no privilege in facts, only communications. Accordingly, it was held in *Dwyer v Collins* (1852) 7 Exch 639 at [646] that:

> "the privilege does not extend to matters of fact which the attorney knows by other means than confidential communication with his client, though, if he had not been employed as attorney, he probably would not have known them."

In ***G v G* [2015] EWHC 1512 (Fam)**, heard by Roberts J, the wife applied to set aside a consent order after four years on the grounds that the husband had not disclosed he was the primary beneficiary of a family trust. An email by her leading counsel showed that she was aware of possible non-disclosure two years earlier and delayed. Her Ladyship found that there was no privilege attaching to the email which was not for purposes of legal advice (rather recommending a solicitor).

## Who is the communication between?

In ***AAZ v BBZ* [2016] EWHC 3349 (Fam)** the husband had disengaged from the litigation and 'relocated' the assets. A witness summons was directed against the solicitor who was involved in this relocation. Haddon-Cave J found that privilege did not apply because he had done so as a man of affairs (and/or because of the iniquity/fraud exception discussed below).

On appeal, reported as ***Kerman v Akhmedova* [2018] EWCA Civ 307**, [2018] 2 FLR 354, the Court of Appeal emphasised the point that the crucial communications were not between client and lawyer at all, but, in the solicitor's role as a fixer, between him and third parties.

Andrews J confirmed the following in ***Director of Serious Fraud Office v Eurasian National Resources Corporation Ltd* [2017] EWHC 1017 (QB)** –

> a. At [65]: "Interposing a lawyer in the chain of communication will not improve the client's chances of claiming legal advice privilege."
>
> b. At [75]: "Legal advice privilege does not extend to documents obtained from third parties to be shown to a solicitor for advice."

## Second stage: if privilege applies, can it be set aside by reason of inequity/fraud?

Privilege may not prevent disclosure where the document was prepared for, or in connection with, a nefarious purpose. The leading case on setting aside privilege is *Barclays Bank v Eustice* [1995] WLR 1238 (CA) in which the bank had granted a secured loan to the defendants (a mother and son) which they had taken steps to defeat by assigning the property in question to their sons/grandsons and arranging for tenancies to be granted. It was concluded at 1252C that there was a strong prima facie case that the transaction was an undervalue for the purposes of Insolvency Act 1986 s.423, and this was sufficiently iniquitous for public policy to require inspection (in *C v C*, below, Munby J commented at [42] that a set aside under MCA 1973 s.37 is an analogous situation and in neither circumstance will privilege attach to the transaction).

## Mere suspicion is not sufficient

In ***C v C (Privilege)* [2006] EWHC 336 (Fam)**, [2008] 1 FLR 115 the former matrimonial home was held by a Liechtenstein Anstalt (a form of corporate entity). A freezing order was made by Munby J (as he then was) on the grounds that the husband was about to use this entity to sell the property and potentially defeat the wife's claims. The wife then sought disclosure of the Anstalt's conveyancing file.

Munby J cited at [44] Lord Wrenbury in *O'Rourke v Derbyshire* [1920] AC 581 that the applicant must have 'a prima facie case of fraud resting on solid grounds'. It was decided that the wife had not crossed the threshold. It was fatal to the wife's case (at [55]) that there was no express allegation of the required conduct, though elaborate pleadings are not required (see [61]).

His Lordship said at [59]:

> "The wife has much reason to feel suspicious – indeed gravely suspicious….But mere surmise and conjecture, mere speculation and suspicion, even grave suspicion, are not enough."

And continued at [67]: "I *think the power the court undoubtedly has to examine the documents should be exercised very sparingly*."

It bears noting that this was a case about examination of documents, not the giving of evidence as to facts. It is also worth noting that the pressure to sell the matrimonial home in that case had, it turned out, come from the mortgagee.

## Failure to make full and frank disclosure is significant

The judgment refers at [72] to another case where privilege had been set aside by Coleridge J: *Kimber v Brookman Solicitors* [2004] 2 FLR 221. Munby J's analysis of this case was that the decision turned on the husband's very serious litigation misconduct as set out by Coleridge J in that judgment at [10]:

> "…the husband is 'cocking a snook' at the court… the husband has no intention of assisting in the process or complying with court orders or taking any part in the proceedings at all".

Continuing at [16]:

> "…there is a clear duty in this type of proceedings, as set out in the rules, on both parties to make full, complete and frank disclosure to the court of their means. In this case the husband has failed to abide by the rules and also is in breach of orders of the court. He therefore forfeits, in my judgment, any entitlement in relation to retaining the usual cloak of privilege."

In that case the husband had instructed a solicitor in the jurisdiction for a short period and thereafter only used the solicitor's services as a letterbox intervening in the proceedings when it suited him.

Similar considerations applied in *AAZ v BBZ* [2016] EWHC 3349 (Fam), discussed above.

## Limitations

In ***JSC BTA Bank v Solodchenko* [2011] EWHC 2163 (Ch)**, there was an extant freezing order which required the defendant to disclose details of his assets. Henderson J refused to set aside privilege to permit an order for disclosure of those assets' whereabouts from the defendant's solicitors. It was noted at [46] that the defendant might need to seek the solicitors' advice in relation to the asset-freezing and disclosure order.

It is worth noting that Henderson J accepted at [44] that the court had jurisdiction to make the order sought. His Lordship merely declined, on the facts, to exercise it in relation to a very broad order for disclosure of all assets. It was noted at [47] that the order sought was so broad that the solicitors could not form a view about the extent of their obligation without taking instructions from the defendant or making use of privileged information already supplied to them.

Caution was expressed at [48] that such applications should not become standard practice.

## Anti-tipping off orders

If a disclosure order had been made against the solicitors, it might have been necessary to make an anti-tipping off order, to prevent them informing their client/former client, and thereby minimise the risk of the assets being moved again before freezing or enforcement measures could be taken. This is what happened in *AAZ v BBZ* (above).

The anti-tipping off order made in *AAZ v BBZ* was upheld on appeal but the Court of Appeal said it should not have been made until further order (*Kerman v Akhmedova* [2018] EWCA Civ 307, [2018] 2 FLR 354 at [35]) – though this did not invalidate the injunction.

This form of order is more commonly used in child abduction proceedings. As explained by Hughes J in *Re H (Abduction: Whereabouts Order to Solicitors)* [2000] 1 FLR 766 (which was cited in the Court of Appeal), it exists in part to protect the solicitors against whom disclosure is sought, and is therefore a point to which practitioners involved in similar situations will wish to turn their minds.

14.1.21

# Notification of Fathers and Wider Family Members in Relinquishment Cases: A Recap

**Olivia Kirkbride**, a pupil barrister at **Coram Chambers**, considers two recent, contrasting cases in which mothers sought to relinquish newly born children without notifying the fathers and family members.

Last year, in ***A, B and C (Adoption: Notification of Fathers and Relatives)* [2020] EWCA Civ 41**, the Court of Appeal considered the issue of the approach the court and local authorities should take in cases where a mother seeks for her child to be adopted, without notifying the father and/or wider family members of the child's existence. The governing principles established by the Court of Appeal have subsequently been applied in the reported cases of ***Re L (Adoption Order: Identification of Possible Father)* [2020] EWCA Civ 577**, and ***A local authority v EL and others* [2020] EWHC 3140 (Fam)**.

Such cases often give rise to difficulties for local authorities and the courts. Given the one-sided nature of the information available, they are rarely provided with the complete picture, and a mother cannot be coerced into providing the identity of the possible or putative father if she does not wish to do so. There may be a variety of reasons why a mother would not want the father and/or wider family members to be made aware of the existence of a child born in secret. For instance, the mother may have concerns that to reveal the birth would lead to a family breakdown, or there may be cultural or religious reasons which may cause the mother to fear ostracism within her community. In other cases, the child may have been conceived within a violent relationship, or as a result of a rape, as was the case in one of the three appeals heard in *A, B and C*. Notification in such circumstances could have a severe adverse impact on the mother's mental health.

There are of course potential Article 8 implications in such cases. Where a mother seeks to relinquish her baby without the child's father and/or wider family being notified, the mother's right to respect for her private life is engaged. The existence of family life for the purposes of Article 8 is a question of fact depending on the existence of close personal ties (*Lebbink v The Netherlands* [2004] 2 FLR 463) and may exist between a child born out of wedlock and its natural father, as well as between a child and its near relatives (*Marckx v Belgium* (1980) 2 EHRR 330). Where there is a potential relationship which may develop between a child born out of wedlock and the natural father, the relevant factors in establishing Article 8 rights include the natural parents' relationship and '*the demonstrable interest in and commitment by*' the father to the child, prior to and following its birth (*Lebbink v The Netherlands* [2004] 2 FLR 463 at para 36). Thus, in Re A, B and C, the court confirmed that the existence of Article 8 rights is a weighty factor to be considered when reaching a decision as to notification; where the father and/or the wider family member have an established or potential family life with the mother or the child, the right to a fair hearing is engaged and strong grounds must exist to justify the withholding of notification.

Prior to Re A, B and C, decisions in notification cases were generally characterised by the language of 'exceptionality'. In ***M v F* [2011] EWCA Civ 273** the mother had become pregnant by her husband, who was also the father to her three adult children. The father had mental health issues and had previously been violent towards the mother and one of their other children. The mother feared that to reveal the child's existence would lead to the breakdown of the family unit and ostracism within the community, and stated that she had concerns as to the child's welfare. The Court of Appeal found that a high degree of exceptionality would be required to prevent the father being informed and that the mother had failed to demonstrate a sufficient likelihood of harm, so as to justify non-disclosure.

This language of 'exceptionality' echoed that of the then President, Baroness Butler-Sloss, in *Re H; Re G (Adoption: Consultation of Unmarried Fathers)* [2001] 1 FLR 646, where it was held that as a matter of general principle, birth fathers would be expected to be made aware of the existence of their child and of the proceedings, unless there were '*strong countervailing factors*' which meant it was inappropriate to do so. Similar language was used in ***Re H (Care and Adoption: Assessment of Wider Family)* [2019] EWFC 10**, [2019] 2 FLR 33, which cited with approval the earlier case of ***Birmingham***

***City Council v S, R and A* [2006] EWHC 3065 (Fam)**, [2007] 1 FLR 1223 that to deprive a significant wider family member of the knowledge of the child's existence 'is a fundamental step that can only be justified on cogent and compelling grounds' (para 73).

*Re A, B and C* clarified the position as to the test to be applied. Peter Jackson LJ, at para 89.7, held that although the maintenance of confidentiality is the exceptional course, particularly where a father has parental responsibility or where there is family life under Article 8, '*exceptionality is not in itself a test or a short cut*'. The decision as to notification should be made following a balancing exercise between the factors present in the individual case, and although the welfare of the child is an important consideration, the paramountcy principle does not apply. The various factors governing decisions in this area were summarised at para 89, and include, in addition to parental responsibility and the existence of Article 8 rights: the substance of the relationships between the parents and/or the relatives; the likelihood of a family placement being a realistic alternative to adoption; the physical, psychological or social impact on the mother or on others of notification (although, excessive weight should not be given to temporary difficulties or embarrassment); cultural and religious factors; the availability and durability of the confidential information; the impact of delay; and any other relevant matters.

These guiding principles were subsequently applied in *Re L (Adoption Order: Identification of Possible Father)* [2020] EWCA Civ 577. Although the mother in this case initially stated that her ex-partner, who was the father of her two elder children and had PR for the eldest, was also the father of the subject child, the mother later claimed that the child had been conceived as a result of a one-night stand with a stranger. The local authority sought a declaration that it need not take any further steps to identify the child's father or paternal family, but also sought an order for DNA testing to establish paternity. The mother sought sibling DNA testing, claiming that she feared her ex-partner's response if he were to discover the child's existence and that she was certain he was not the father. The Court of Appeal dismissed the mother's appeal against the trial judge's decision refusing sibling DNA testing and directing the mother to provide her ex-partner's contact details, concluding at para 25 that:

> a. Sibling DNA testing would have constituted a disproportionate interference with the Article 8 rights of the other children and of the father.
>
> b. The mother's argument that standard paternity testing was unnecessary therefore fell away.
>
> c. The judge took a balanced view when he refused to sanction adoption without clarification of paternity. He concluded that there was 'a substantial possibility' that the father of the elder two children was also the subject child's father and that the overriding factor was for the child to know as much about her parentage as possible.

However, a quite different decision was reached in the recent case of *A local authority v EL and others* [2020] EWHC 3140 (Fam). The court considered the local authority's Part 19 application for a declaration that it need not notify the father of the birth of twins born in secret, and that his consent was not required to their adoption.

The mother was of Polish nationality but lived in the UK at the time of the birth. She was married, and her husband lived in Poland with the couple's four existing children. Although the mother initially told health professionals that her husband was the father of the twins, she later revealed that the twins had been conceived following a one-night stand with a stranger. She claimed that if her husband were to find out about the existence of the twins, then the marriage would be over and the damage to her relationship with the four eldest children would be catastrophic. The mother had informed the local authority that there was no one else in her or her husband's family who would be able to offer care for the children and there was no realistic alternative to adoption.

First, the court considered the legal presumption of legitimacy and illegitimacy; pursuant to section 26 of the Family Law Reform Act 1969, the presumption may be rebutted '*by evidence which shows that it is more probable than not that that person is illegitimate or legitimate …*'. The judge then considered section 2(1) of the Children Act 1989, which provides that: '*Where a child's father and mother were married to … each other at the time of his birth, they shall each have parental responsibility for the child*'. Taking the term 'father' to mean the child's 'natural' or 'biological' father, the judge at para 8 concluded that if it could be proved that the husband was not the biological father of the child, then the presumption of legitimacy would be rebutted, and the husband would not hold parental responsibility for the child.

The judge accepted the mother's account, considering what possible motive she could have for lying about the paternity of the twins, and concluding that had she been able to keep the children in her family, then she surely would have done. The judge therefore found that the husband was not the biological father of the twins, and he did not hold parental responsibility for them. In granting the local authority's application, the judge concluded at para 20 that '*the exceptionality criterion is satisfied in an individual fact (lack of biological paternity) and 'holistic' sense*'.

Despite the factual similarities between the two cases, the end result in each was markedly different. This goes to emphasise Peter Jackson LJ's conclusion in *Re A, B and C*: that there is no single test to apply in cases where a mother seeks to withhold information about a child's birth from a putative or possible father, or wider family members. The judge must

instead weigh up all the factors present in the particular case, and retains a degree of discretion in determining the appropriate balance to be struck between the various interests involved.

27/1/21

# CASES

## M v H ( private law vaccination) [2020] EWFC 93

There was a background private law dispute which was being dealt with by a district judge where, following a fact-finding hearing there had been a series of hearings to re-establish the children spending time with the father. A final hearing was listed on 21 December 2020. The father's original application had included an application for a specific issue order on MMR vaccination but that was amended to encompass all the normal childhood vaccinations. The DJ (in liaison with the DFJ) and the consent of MacDonald J had that part of the case allocated to MacDonald J. The father, then sought to include vaccinations relevant to overseas travel and Covid-19.

The judge declined to consider the travel vaccinations as it was too speculative as to what vaccines might be appropriate and when to enable a welfare decision to be made. [3].

He also declined to decide on vaccination for Covid-19, because it was as yet unclear as to what recommendations would be given about the vaccination of children (ie when and which vaccine) and so any decision was premature. He nevertheless wanted it to beI wish to make it "abundantly clear" deferral "does not signal any doubt on the part of this court regarding the probity or efficacy of that vaccine". He added that

> "it is very difficult to foresee a situation in which a vaccination against COVID-19 approved for use in children would not be endorsed by the court as being in a child's best interests, absent peer-reviewed research evidence indicating significant concern for the efficacy and/or safety of one or more of the COVID-19 vaccines or a well evidenced contraindication specific to that subject child. " [4]

The judge decided that expert evidence was not necessary:

> "absent new peer-reviewed research evidence indicating significant concern for the efficacy and/or safety of one or more of the vaccines that is the subject of the application or a well evidenced contraindication specific to that subject child,to allow the instruction of an expert" [11].

The judgement deals with the mother's arguments that by reason of the children's healthy diet and lifestyle the child are unlikely to be seriously ill even if they did contract one of the diseases and that some "experts" had concerns about the risks from the ingredients of the MMR and possible links to autism and Alzheimer's. She also doubted the efficacy of the vaccines. [22-26]. She alleged that it would breach the children's Article 8 rights and the case was to be distinguished from *Re H*, on the basis that that was a public law case.

Macdonld J analysed the case law on parental responsibility and concluded that it remained necessary for the court to make decisions where parents with parental responsibility could not agree on vaccination. [37-38] [52]

Applying *Re H* he set out that absent special circumstances and peer-reviewed evidence it will be very difficult for a parent to successfully object to vaccination in accordance with the public health recommendations. [40] [44-45] [52]. The strength of an objection would not be determinative.

He indicated that if there was a case for expert evidence it should be from a jointly instructed expert drawn from the field of immunology [45]. He deprecated the use of "tendentious, partial and partisan material gathered from the Internet (what Sedley LJ in *Re C (Welfare of Child: Immunisation)* accurately characterised as "junk science") and placed before the court to support a personal belief regarding the probity and/or efficacy of vaccinations." [46]

He also held that the public good element of the vaccination programme was relevant to the decision that it was not a disproportionate interference in the children's Article 8 rights. *Re K (Forced Marriage: Passport Order)* [2020] EWCA Civ 190 applied. [49]

Case summary by **Nicholas O'Brien**, Barrister, **Coram Chambers**

## London Borough of Lambeth v L (Unlawful Placement) [2020] EWHC 3383 (Fam)

A care order had been made in relation to L in November 2016. His mother had died that year and his father (who did not have PR) disputed paternity and wanted nothing to do with him or the proceedings. L has a diagnosis of Autistic Spectrum Disorder and Post Traumatic Stress Disorder and has significant difficulties with learning, language, and the regulation of his emotions.

Following the breakdown of a number of foster-placements, L was moved to the first of a succession of residential placements in January 2019. He was subsequently subjected to regimes which included high levels of supervision and the use of physical restraint and which may have amounted to a deprivation of liberty (the details of which were due to be considered in a proposed claim for damages to be issued on behalf of L). He was moved to his current placement on 28 January 2020, with 2:1 supervision being introduced shortly afterwards.

The application before the High Court - for an order under the inherent jurisdiction authorising the deprivation of L's liberty – was not issued by the Local Authority until 28 August 2020. On 3 September 2020 the court made an initial order authorising the deprivation of liberty. McDonald J also directed a statement from the Director of Children's Services to explain how it was that L had been deprived of his liberty, without authorisation, for an extended period of time before the application had been issued. At the hearing on 16 October 2020 that statement was before the court. In it, the Local Authority made a number of concessions and confirmed that it had put in place procedures to ensure that such mistakes did not happen again. A comprehensive audit of all placement agreements and behaviour plans for every child looked after by the local authority was due to be completed by 12 February 2021.

Mr Justice McDonald gave judgment on 16 October 2020, authorising the deprivation of L's liberty, listing the matter for review in two months' time and permitting the Children's Guardian to disclose papers from the proceedings in order to obtain advice with respect to a claim for damages on behalf of L. Of interest, the Local Authority had since the order of 3 September sought an order from the Inner House of the Court of Session in Scotland for a declaration that the measures ordered by the English High Court should be recognised and were enforceable in Scotland, and the outcome of those proceedings was awaited.

The main features of the judgment are as follows:

> 1. Reiteration of the 'vital' need for all local authorities to adhere strictly to the proper procedures where a child is to be deprived of his or her liberty, as summarised by Sir James Munby in *Re A-F (Children)* [2018] EWHC 138 (Fam) paras. 46 – 55 in particular. These must be applied 'with rigor' notwithstanding the well-known current difficulties in finding appropriate placements for children with complex needs whose liberty needs to be restricted.
>
> 2. A reminder that neither the fact that a placement arises as an emergency (as it did in this case) nor the ongoing public health crisis are reasons for failing to follow the processes set out in Re A-F.
>
> 3. The application of the 'acid test.' L was subject to supervision on a 2:1 staff ratio at all times in the community and whenever he was travelling by car; was not permitted to leave the placement alone; was constantly observed from a distance within the placement, with physical restraint procedures being implemented should he seek to leave and his behaviour escalate. McDonald J found that L was unable to consent to the deprivation of his liberty, that the arrangements meant he was subject to continuous supervision and control and was not free to leave the placement, and that his circumstances amounted to a deprivation of his liberty for the purpose of Article 5 of the ECHR.
>
> 4. Consideration of L's best interests. Since the placement met his physical, emotional and educational welfare needs, kept him and others safe, promoted and facilitated his development and provided him with a stable and nurturing environment, it was in L's best interests to authorise the deprivation of his liberty at the current placement. Moreover, it was the necessary, most proportionate and least interventionist means of providing that L benefited from his current placement whilst ensuring his own safety and that of others.

Case summary by **Abigail Bond**, barrister, **St John's Chambers**

## Z v University Hospitals Plymouth NHS Trust & Ors [2020] EWCOP 69

### Background

RS is a middle-aged Polish man who, after suffering a cardiac arrest on 6 November 2020, has at best a 10-20% chance of progressing to the lowest end of a minimally conscious state (called MCS-minus). At that state, he might have been able to acknowledge the presence of a human being, but without being able to demonstrate knowing who they were. Prior to an application by the hospital responsible for RS's care – University Hospitals Plymouth NHS Trust – to the Court of Protection for permission to discontinue his life-sustaining treatment, RS was previously being kept alive by clinically-assisted nutrition and hydration (CANH) and other life-sustaining treatment.

His wife told Cohen J that from her conversations with RS, she was certain that "he would never have wanted to have been kept alive if he could not be helped and he would not have ever wanted to be a burden" (para 3(vii)). His birth family, who had been estranged and not seen RS for at least 9 years, felt that "his strong Catholic faith would mean that the sanctity of life would triumph over all other considerations" (para 3(vii)).

## Proceedings

Prior to this hearing on 30-31 December 2020, there had already been considerable court involvement. After the application by the Trust, which Cohen J granted on 15 December 2020, the birth family had unsuccessfully sought permission to appeal the decision. There were also two failed applications for interim relief to the European Court of Human Rights (ECtHR), one by the government of the Republic of Poland. At the time of this decision, there was additionally an outstanding formal substantive application to the ECtHR. RS's life sustaining treatment had been stopped and re started at least twice in the fortnight following Cohen J's first decision on 15 December 2020, because of the applications made.

At this particular hearing, Cohen J heard the birth family's applications to call evidence from a Dr Pullicino, to re-instate CANH for RS, and to transfer RS to Poland. The main issues were whether Cohen J had misplaced reliance on the medical evidence he heard on 9 December 2020 and whether his decision needed to be reconsidered in the light of the events since that time (para 10).

## Decision

On the first application, Cohen J allowed the evidence from Dr Pullicino, finding that all of the evidence should be heard in such a serious case. Dr Pullicino is an experienced neurologist and an ordained priest who had seen 10 video clips of RS, totalling about 3 minutes, taken by his birth family. Cohen J found some of Dr Pullicino's evidence "unaccountably vague" (para 13) and agreed with the criticism of his report raised by RS's treating team and counsel for the Trust and the Official Solicitor (para 21), ultimately finding Dr Pullicino an unsatisfactory witness (para 27) and not placing any weight on his evidence (para 30).

On the second application, to re-instate RS's CANH, Cohen J considered whether there had been a change in RS's state. Having discarded Dr Pullicino's evidence, he relied instead on the evidence of three experts and members of RS's treating team – a Dr Bell (the independent expert), a Dr W (a consultant intensivist and RS's treating clinician), and a Dr A (a consultant neurologist) – and concluded "I am left in no doubt that there has been no improvement in RS and no basis at all to change my decision that it is not in his best interests for life sustaining treatment to be given" (para 43).

On the third application, to move RS to Poland, Cohen J decided to "unhesitatingly reject the suggestion that RS should be moved overseas" (para 45).

The judgment concludes by noting that the ECtHR had not yet made a decision to accept the reference. Cohen J allowed a week, until 7 January 2021, for the ECtHR to respond to that application.

Summary by **Lauren Suding**, barrister, **Field Court Chambers**.

# RE AB (Court of Protection: Police Disclosure) [2019] EWCOP 66

## Brief Background

In proceedings AB's capacity to access the internet and social media was the subject of an assessment, for the purposes of which AB underwent an education programme in relation to decision-making relating to accessing the internet and social media. The report concluded that AB had capacity to access the internet and social media.

The police, who have been undertaking an investigation into offences said to have been committed by AB in 2017 and 2018 relating to category C images of children, sought disclosure of the report.

## Legal Framework

Rule 5.9 of the Court of Protection Rules 2017 provides for an application to be made by a person who is or was not a party to proceedings in the Court of Protection to inspect any other documents in the court records or to obtain a copy of such documents or extracts from such documents.

The Official Solicitor submitted, on the basis that there was no existing authority on the principle to be applied in relation to such a request for disclosure under Rule 5.9, that the court should adopt the criteria set out in *Re C (A Minor) (Care Proceedings: Disclosure)* [1997] 2 WLR 322 (approved in *Re M (Children)* [2019] EWCA Civ 1364) *mutatis mutandis* to the Court of Protection. The ten points set out by Swinton Thomas LJ in relation to family proceedings are set out in the judgment.

## Decision

Weighing the relevant factors and, in this case, giving significant weight to *'the gravity of the alleged offence and [more importantly] the relevance of the evidence to it'*, Keehan J concluded that the third report contains nothing of relevance to the police investigation other than for the police to know that (a) prior to coming to a conclusion, the expert had arranged for AB to undergo educative work; and (b) that her assessment that, in May 2019, AB had the capacity to access the internet and social media, was limited to that time and in the context of the educative work undertaken with him.

In coming to this conclusion Keehan J also took account of (i) the singular importance in cases before the Court of Protection of those who are the subject of the proceedings being frank in their discussions and their cooperation with professionals, and (ii) the need for those subject of proceedings in the Court of Protection to have confidence in the confidentiality of the proceedings and, in particular, the confidentiality of assessments undertaken of them for the purposes of determining whether or not they have capacity in the various relevant domains.

Refusing the application Keehan J concluded by stating that he would only consider disclosing the expert's report to the police if the weight to be given to the public interest was so great as to outweigh the consideration of frankness by AB in the Court of Protection proceedings.

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

## Crowther v Crowther & Ors [2020] EWHC 3555 (Fam)

Mr Crowther applied for Mrs Crowther to pay his costs of preliminary issues on an indemnity basis. There had been highly acrimonious and litigious financial remedy proceedings since late 2019.

Mr and Mrs Crowther had run a successful shipping business. Mrs Crowther obtained a freezing injunction against Mr Crowther and the second to sixth respondents ('the Castle parties). The freezing injunction was discharged but reinstated by the Court of Appeal. She alleged she and Mr Crowther were the beneficial owners of 5 ships worth approximately £7-10million.

The Castle parties issued proceedings in the Admiralty Division asserting legal and beneficial ownership of 4 of the vessels, and asserted that companies controlled by the Crowthers owed Mr Knight approximately £5million.

Mrs Crowther pleaded fraud and conspiracy against Mr Knight and Mr Crowther. She sought declarations as to sham, conspiracy and fraud against Mr Crowther and the Castle parties. She alleged the conspiracy was initially to defraud HMRC and then to defraud her in the matrimonial proceedings. The allegations were strongly denied by Mr Crowther and the Castle parties.

The Admiralty claim was transferred to the Family Division and Mrs Justice Lieven ordered a trial of preliminary issues including the beneficial ownership of the vessels, the beneficial ownership of funds held offshore by the Castle parties, who was entitled to the chartering income from the vessels, and whether the Crowthers were indebted to the Castle parties.

Mrs Crowther had spent around £900,000 in legal fees (some not attributable to the preliminary issues).

A week before the trial of the preliminary issue the court was informed that Mrs Crowther and the Castle parties had settled. Mrs Justice Lieven sought further information, including whether the Court of appeal judgment should be referred to HMRC in light of the very serious allegations of tax fraud.

Mrs Justice Lieven considered it appropriate and necessary to set out the broad terms of the agreement reached despite it being set out in a consent order with the terms in a Tomlin Order (the reasons for this decision are set out in a postscript to the judgment at [64-67]). The Castle parties were to pay Mrs Crowther £750,000 (first lump sum of £80,000 to be paid on 24.12.20) and release her from £5,632,639 unpaid charter income and over £1million of other alleged loans. She was to discontinue all claims against them on a no admissions basis and there was to be no order for costs.

Mr Crowther was not a party to the settlement agreement. Mrs Crowther accepted that all claims of beneficial interest against Mr Crowther would also have to be discontinued, as would any allegations of sham, fraud or conspiracy.

Mr Crowther applied for his costs of and occasioned by the preliminary issues advanced by Mrs Crowther on an indemnity basis, and a payment on account in the sum of the £80,000.

The Court set out the applicable procedure rules and case-law at [21]-[36].

Mrs Justice Lieven remarked that W's conduct of the litigation had been 'fairly extraordinary'. She had been arguing in the strongest possible terms that she had been a victim of a conspiracy to defraud her of millions of pounds of matrimonial assets. She had left no stone unturned in her pursuit of disclosure to support those allegations and in ensuring the disputed assets were protected through worldwide freezing orders. The allegations, made in open court, were extremely damaging to the reputations of Mr Crowther and Mr Knight. On the face of it, the situation was grossly unfair to Mr Crowther. Mrs Crowther deciding not to pursue the allegations had prevented Mr Crowther of the chance to clear his name.

FPR rule 28.3 does not apply because the trial of a preliminary issue is not 'financial remedy proceedings' for the purposes of the rules, and therefore costs would normally follow the event. Under CPR rule 38.6, the presumption is that the party who discontinues is liable for costs, but that rule does not apply because it is not referred to in FPR rule 28.2. However, the principle in CPR rule 38.6 is highly relevant to the court's determination. If a party decides to discontinue an action or part

of an action they should generally be expected to pay the costs. That proposition was strongly reinforced in this case by the fact that the withdrawn allegations were fraud and conspiracy.

Mrs Crowther relied on a very long list of Mr Crowther's alleged poor litigation conduct to support her argument that costs should be dealt with holistically at the end of the litigation. Mrs Justice Lieven had been heavily critical of Mr Crowther's conduct in a number of hearings during the proceedings. However, on the basis the allegations were now not being pursued much of that conduct may be more understandable. In any event Mr Crowther's litigation conduct was largely irrelevant to the principle of whether Mrs Costs should pay the costs of the preliminary issue.

Mrs Justice Lieven did not consider that material parts of the disclosure for the preliminary issue trial remained relevant to the financial remedy proceedings. It would be the wrong approach to defer costs to the end of the proceedings. The preliminary issues were deliberately 'hived off' to be dealt with separately, they were discrete issues about discrete assets, and it was appropriate to deal with those costs now. Mrs Justice Lieven did not accept that it would be very difficult for the costs draughtsman and costs judge to differentiate what has been spent on the preliminary issue and what was referable to the wider matrimonial dispute. A submission about a lack of detailed breakdown of costs was to confuse an in-principle costs decision, relating to a part of the litigation, from an application for summary assessment or a specific sum. The submission that financial remedies litigation was different from other litigation because the judge has to be concerned with the fair distribution of matrimonial assets was to try to create an exceptionalism for financial remedies litigation which does not and should not exist. The basic principles of proper litigation conduct should apply, and be enforced, in the financial remedies jurisdiction as in any other.

The principle that fraud should only be pleaded with considerable reticence, and if the allegation is then withdrawn the alleging party should pay costs on an indemnity basis, applies as much in financial remedies as in any other area of law. A submission that the process would delay the FDR and make settlement more difficult was not a reason not to make a costs order which properly reflects the principles.

The case-law makes it very clear that a party who pleads fraud unsuccessfully can expect to pay indemnity costs. There was no reason why that principle should not apply here. Mrs Crowther was ordered to pay Mr Crowther's costs of, and occasioned by, the preliminary issues on an indemnity basis together with a £80,000 payment on account. The court took no further action regarding referring the Court of Appeal judgment to HMRC.

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

## Rattan v Kuwad [2021] EWCA Civ 1

The wife appealed from an order allowing the husband's appeal from a maintenance pending suit ("MPS") order. The original order of Deputy District Judge Morris ("DDJ") granted the wife monthly MPS payments of £2,850. His Honour Judge Oliver ("the Judge") set aside that order largely on the basis that the DDJ had not applied the law appropriately by failing to critically analyse the wife's needs and in particular the wife's "immediate expenditure needs". Although the Judge was sure maintenance was required, he did not feel in a position to determine the sum.

The wife was granted permission to appeal since: the appeal raised an important point of principle regarding the approach of the court in determining maintenance pending suit applications; and the wife had a real prospect of success in challenging the decision that the DDJ's assessment was flawed.

The parties were married for about ten years. They had a child, and the wife had an older child by a previous marriage. Since separating the wife had remained in the former matrimonial home ("FMH") and the children lived with her.

During the financial remedy proceedings, the wife applied for MPS to cover the shortfall in her monthly income needs (which included payment of mortgage instalments and essential repairs to the FMH) and a school fees order. At a one-day hearing in October 2019, the husband's application to adjourn was refused. The DDJ ordered that the mortgage on the FMH be changed to a fixed rate product to reduce the wife's monthly income needs by about £600. The wife's claim for around £3,000 for essential repairs to the FMH was rejected due to lack of evidence. The DDJ found the husband's case that he was not employed and could not obtain employment to be unclear and confused. Further the DDJ was sceptical of the husband's case as to the transfer of funds to India.

The husband appealed on a number of grounds which were largely related to allegations of the DDJ's deficient financial analysis.

The Judge concluded, under the Matrimonial Causes Act 1973, section 22, maintenance must be "reasonable" and "should deal with immediate expenditure needs which have to be critically examined and long-term expenditure needs should be best dealt with at the final hearing". The husband's appeal was allowed due to "three fatal errors", namely the "lack of critical analysis of the wife's" needs; the inclusion of the school fees; and the assumed reduction in the mortgage instalments of £600 per month.

The Court of Appeal noted the essential requirement of reasonableness in ordering MPS and that the order must meet "immediate needs". Noting previous judicial guidance, the Court recorded that such guidance should be applied according

to the circumstances of each case and that evidence of income needs as set out in Form E may suffice. Further, critical analysis of budgets may not always be necessary.

The Court of Appeal determined that this case was not unduly complex, did not require extensive analysis and "*could be determined justly with a succinct summary and consideration of the relevant factors*."

The Court found the DDJ: had sufficiently analysed the relevant factors (including the parties' budgets and resources); had accepted the wife's listed needs were reasonable; and had been entitled to include a sum for school fees. Due to unexpected considerable delays in resolving the wife's substantial claim and as the Judge had not made an alternative maintenance order, the Court of Appeal restored the DDJ's order save for the provision regarding the mortgage which had already been agreed by the parties.

Case Summary by **Dr Sara Hunton**, Barrister, **Field Court Chambers**

# F v M [2021] EWFC 4

## Background

The need for fact-finding arose in respect of F's application for contact with two children, Y aged six and S, three, who live with their mother, M. The case was transferred to the High Court by the Court of Appeal, which had overturned a case management decision not to accept similar fact evidence. (***Re R-P (Children) (Domestic abuse: similar fact evidence)* [2020] EWCA Civ 1088**)

## The two families

In accordance with the Court of Appeal's decision, the court heard not only about the father's treatment of M, but also about his subsequent relationship with J, a woman in her 40s with two children. While M had eventually been able to extricate herself fully from F, J remained under his thrall. The parents of both women and J's former husband gave crucial evidence about the disturbing extent and impact of F's controlling behaviour.

## The court's approach

In order to understand the scope and ambit of alleged controlling and coercive behaviour it is necessary to understand that both coercion and control involve a range of acts; individual acts must be evaluated "*in the context of the wider forensic landscape*".

## Findings

There were marked similarities in the way each of the women was systematically isolated from study/work, friends, colleagues and family. The entire judgment must be read to appreciate the scale and nature of F's coercive and controlling behaviour.

From the start of his relationship with M in 2013, F ensured that she was isolated from friends and family. An early, unplanned, pregnancy was not welcomed by her and when she spent some time with her parents F involved the police, alleging that they were holding her against her will, claiming they wanted to end the relationship as they were Hindu and he Moslem; he raised a risk of honour-based violence. Each time M's parents raised what were valid concerns about her welfare, F characterised this as harassment driven by prejudice and HBV, which unfortunately was often accepted by police. Accordingly, they were not as sceptical about F as they might have been.

He persuaded her to leave university. During the course of the relationship he ensured that they moved frequently, with M's parents often unaware of their whereabouts. Sometimes he allowed minimal access to their daughter and grandchild provided they gave him money. His treatment of them is described as gratuitous emotional torture.

F controlled M physically, emotionally, psychologically and financially. He also raped her, probably on more than one occasion. For nearly four years M "*was subjected to a brutalising, dehumanising regime, by which F subjugated her and was profoundly corrosive of her autonomy.*" (§64)

She eventually broke free in September 2017, by which time she was pregnant with S. She made a complaint of rape, but the police did not pursue a prosecution. Subsequently the police interviewed her when considering a possible charge against F of controlling or coercive behaviour, but no charges were brought.

F then formed a relationship with J, who left her job, home and friends and became estranged from her parents. Her children were uprooted from all they knew, including contact with their father T, and disappeared without trace. Eventually the children were located in inadequate circumstances; a court transferred them to T's care having found that J had lost sight of their welfare interests. They currently have no contact with J.

Hayden J found F to be "*a profoundly dangerous young man, dangerous to women he perceives to be vulnerable and dangerous to children.*"

### Consideration of the available guidance

Given the lack of reported cases dealing with this issue, Hayden J goes on to consider the definitions in FPR 2010 PD12J and s76 Serious Crime Act 2015.

He comments that "*a tight, overly formulaic analysis may ultimately obfuscate rather than illuminate the behaviour*" (§108) and the overall assessment of the evidence is the same in any other case. Recognition of the "*insidious scope and manner of this particular type of domestic abuse*" is essential; the key is to recognise that "the significance of individual acts may only be understood within the context of wider behaviour." (§109)

### Scott Schedules

While declining to give guidance on the use of such schedules in family cases generally, the judge commented that such an insidious type of abuse may not be captured by this formulaic approach to marshalling the evidence and honing the allegations. He considered that where coercive and/or controlling behaviour is alleged, Scott Schedules are ineffective and frequently unsuitable.

Case Summary by **Gill Honeyman**, Barrister, **Coram Chambers**

## A Local Authority v JK & Anor [2021] EWHC 33 (Fam)

W was born on 3.02.20. Three days prior to his birth, his mother (M) notified the Local Authority indicating that she wished to place her child for adoption. W was placed with prospective adoptive parents shortly after birth. The Local Authority applications, dated 3.09.20, were made to endorse decisions, strongly supported by Mother, not to notify the father or the maternal family of W's existence. The child's guardian opposed the application. The applications were dismissed.

- The court observed that while rule 14.21 was amended by SI2020/135 with effect from 6.04.20 to provide that such applications in relation to fathers without parental responsibility should be made to the family court, non-notification applications in respect of close relatives were still required to be made under the inherent jurisdiction. The court observed that such applications should be heard together and suggested the rules committee may wish to consider whether r 14.21 could be enlarged to include other persons

- The judgment in *Cases A, B and C* [2020] EWCA Civ 41 had been delivered 3 weeks before W's birth and should have been in this Local Authority's minds. The judgment summarises the facts of A, B and C and observes how similar the cases were. The general approach to be taken is in paragraphs 45-84 of that case

- Of particular note is that

  i) Absence of notification/ maintenance of confidentiality is exceptional

  ii) The welfare of the child is important but the discretion of the court is not governed by the paramountcy principle

  iii) The procedure needs to be both urgent and thorough, this should be closely adhered to by any Local Authority in this situation

  iv) Reasons for non-notification and the facts of the case should be objectively and thoroughly assessed mindful of the often limited and one-sided nature of the information given. All information that can be discovered without compromising confidentiality should be gathered and respectfully scrutinised

  v) There is no single test, but the court gives (at para 22) a non-exhaustive list of factors to be considered, summarised from para 89 of Re A, B and C

- There was an utterly unacceptable delay in issuing the applications, which were made when W was 7 months old. In *Re A, B and C* an application made 4 months after birth was described as "belated". Applications should ordinarily be brought within a matter of weeks, rather than months after birth

Case Summary by **Martina van der Leij**, Barrister, **Field Court Chambers**

## OX44/2020 [2021] EWHC 91 (Fam)

The court was concerned with AK, a baby boy born in the UK to a Romanian national who travelled here whilst 8 months pregnant. The Mother had done that with the express purpose of giving birth here and then relinquishing AK for adoption.

During the adoption process the Mother declined to give any details of the Father but she did confirm his name and date of birth when she was admitted to the hospital to give birth. Furthermore she agreed to work with the allocated social worker and write a letter to AK as part of the life story work to be given to him when he is older. In that letter the Mother confirms details of the Father but no contact details. She was entirely consistent in her story about why she could not share details of the Father and what would happen to her if it was discovered in her native Roma Community that she had a child out of wedlock and the shame this would bring upon her. This included how her own father would treat her and she was supported in her views by her mother who had accompanied her to the UK for the birth of AK.

The social worker spoke to the Mother on two occasions and made other attempts to meet with her. The Mother was however clear that she did not wish to engage in the court proceedings and just wanted AK to be placed for adoption in the UK in a loving home. The court accepted this evidence.

The Adopters issued their application including the Part 19 applications as referred to above and the matter was transferred to the High Court for determination including whether Cafcass should prepare a welfare report and AK be joined to the proceedings; the consequence of such being that the appointment of a Guardian would trigger an obligation to notify the Romanian Central Authority of these proceedings under Article 37 of the Vienna Convention on Consular Relations 1963 ("the Vienna Convention"); thus rendering the Part 19 application academic.

The Judgment considers the obligations to notify consular authorities in certain prescribed circumstances arising from Articles 36 and 37 of the Vienna Convention when dealing with the two issues arising as set out below.

The relevance of those Articles in this case can be summarised as per Sir James Munby P at para 41 of ***Re E (A Child) (Care Proceedings: European Dimension)*** **[2014] EWHC 6 (Fam)**, [2014] 1 WLR 2670:

> 41. (i) First, Article 36 enshrines the principle that consular officers of foreign states shall be free to communicate with and have access to their nationals, just as nationals of foreign states shall be free to communicate with and have access to their consular officers.
>
> (ii) Second, the various obligations and rights referred to in paragraphs (b) and (c) of Article 36(1) apply whenever a foreign national is "detained"; and where a foreign national is detained the "competent authorities" in this country have the obligations referred to in paragraph (b).
>
> (iii) Third, Article 37(b) applies whenever a "guardian" is to be appointed for a minor or other foreign national who lacks full capacity. And Article 37(b) imposes a particular "duty" on the "competent authorities" in such a case.'

1. Notification of the consular authorities:

> • The Convention, case law and good practice supports that in any care or public law case concerning a foreign national, who is represented by a guardian ad litem and/or is detained, the court should ensure that their consular officials are made aware of the matter without delay. This also applies to pre-proceedings and child protection matters;
>
> • Citing the case of ***Re JL and AO (Babies Relinquished for Adoption)*** **[2016] EWHC 440 (Fam)**, [2016] 4 WLR 40, [2017] 1 FLR 1545, Mr Justice Baker (as he then was) held that notwithstanding the terms of the Vienna Convention, the observations of the President and the departmental guidance, a distinction should be drawn between 'a child who is taken into care by compulsion, without the consent of their parents, and a child who is taken into care with parental consent';
>
> • In this case, the local authority relied on the above and invited the court to determine that no obligation arose under Article 36 as AK was not being detained but instead was relinquished by his mother;
>
> • The court then went on to consider whether the child should be joined triggering the notification under Article 37. The child is not automatically a party to proceedings unless the court decides to join them and one of the specific circumstances in FPR r14.3(1) and (2) is met.
>
> • The court found no significant discussion or detail in case law as to why decisions were made to join the child in similar cases whereby Part 19 applications were made and therefore determined that there is no legal obligation for the child to be joined and thus to notify under Article 37.

2. Discretion to notify the consular authorities:

> • The court confirmed that there are two main reasons why it might be considered appropriate to notify the consular authorities. The first is to seek further information about the birth father and the wider family. This could include seeking assessments of such family members to see whether they might be suitable people to care for the child. The second is to seek the views of the Romanian authorities more generally on placement and future legal process, including whether the proceedings should be transferred to Romania.

• The court set out the relevant factors as cited in *Re ABC (Adoption: Notification of Fathers and Relatives)* [2020] 3 WLR 35 by Peter Jackson LJ. When considering those as part of a holistic assessment and applying the facts of this case, the court determined that they point strongly in favour of not notifying the Romanian authorities. In particular the following were determinative:

(i) The father doesn't have parental responsibility in English law;

(ii) There is no evidence that he or the extended families would wish to care for the child;

(iii) The mother's fear of her family finding out is genuine and the consequences very real;

(iv) AK has a loving home in the UK; and
(v) Delay is not in the child's best interests.

• The court also considered notification to invite the Romanian Central Authority's view on placement and whether proceedings should be transferred to Romania in light of AK being a Romanian citizen. However when exercising the court's discretion the view was formed that in this unusual case it was in the best interests of AK or his mother not to do so.

Case Summary by **Anna Walsh**, Barrister, **Coram Chambers**

# Salford CC v W and Ors [2021] EWHC 61 (Fam)

## Background

There are five children, from age 4 to age 11 years old, and all parties agree that they should stay in the care of a maternal aunt and her partner, Mrs Z and Mr Y, with whom they have lived since June 2017. All parties also agree there should be a Special Guardianship Order.

On 20 December 2018, Norfolk issued care proceedings under Part IV of the Children Act 1989 with respect to the four elder children but requested that the court grant child arrangements orders in favour of Mrs Z and Mr Y. On 21 December 2018, all five children were made the subject of child arrangements orders in favour of Mr Y and Mrs Z.

At a hearing on 9 May 2019, the proceedings were formally transferred to the Family Court sitting at Manchester, and Salford City Council became the designated local authority for the children by consent, with Norfolk being discharged as a party to the proceedings. In September 2019, Salford applied for permission to amend the original application for care orders.

The first application before the court at this hearing was for an order prohibiting the maternal aunt and proposed special guardian of the children, Mrs Z, from giving effect to her stated intention to have each of the children take the sacraments of initiation in the Roman Catholic faith of Baptism, Confirmation and Holy Communion and the healing sacrament of Reconciliation (as included in the seven sacraments given by the Council of Florence (1439) and reaffirmed by the Council of Trent (1545–1563), the others being the healing of the sick, marriage and the taking of Holy Orders). The mother follows the protestant Pentecostal faith. The children were not baptised into that faith, but the mother contended that the children were raised in the Pentecostal faith.

The second application was by the maternal aunt/proposed special guardian of the children, Mrs Z, for a declaration under the inherent jurisdiction of the High Court regarding the children's legal status for the purposes of Part III of the Children Act 1989. This was in the context of issues the arising with respect to payment of financial support following the making of a special guardianship order.

## Religious issue

Mrs Z is a devout and practising Roman Catholic. Whilst the children have been in the care of Mr Y and Mrs Z they have attended Catholic church on a weekly basis. The children have also been taken by Mrs Z on spiritual trips to Lourdes and to Medjugorje in Bosnia Herzegovina and light a candle and pray the Rosary each evening. The children consider themselves Roman Catholics and live in close proximity to other children who are equally devoted to the Roman Catholic faith and who have already taken Holy Communion. Mrs Z contends that the children have been asking her why they cannot take their Holy Communion. This is corroborated by the children's social worker and their Children's Guardian. The children each wear a cross around their neck and these have been proudly displayed by the children to the social worker during home visits. The social worker further notes that the faiths followed by Ms Z and by the mother are both socially accepted, with no aspects of the lifestyle choices consequent upon either of those religions impacting on the welfare of the children. On the other hand, in *Re E (Education: Religious Upbringing)* [2013] 1 FLR 677, Munby LJ (as he then was), stated (para 36): "It is not for a judge to weigh one religion against another."

Mrs Z and Mr Y also contend there has been a difficulty in enrolling the 11-year-old child in a local Roman Catholic high school because it has not been possible to meet the school's admissions criteria for a Roman Catholic baptismal certificate.

Mrs Z is concerned that the same difficulty will face the other four children. Mrs Z further asserts that Roman Catholicism is the religious system the children are familiar with and participate in, and that were they not to be able to take Holy Communion this would risk them feeling left out with respect to the rest of the family and to feelings of not belonging to the community in which they live and will continue to live.

The mother pointed to Mr Y's Protestantism, and the fact that he is the children's blood relative. Also she noted the rules around Special Guardianship which (unlike an adoption order) take into account the children's religious upbringing.

There was scepticism expressed regarding the depth of the mother's own religious commitment and her objections to the children taking the Catholic sacraments in circumstances. Her objections were relatively recent and she had not raised any objection at all to the children attending Catholic church for the past three years and being taken on pilgrimages.

The court noted the need to determine the application on the basis of each child's welfare needs and not to embark lightly on the making of a PSO, which would prevent the exercise of parental responsibility, rather than on the preservation of the children's heritage and cultural and religious inheritance as being a key function of a special guardianship order.

The Special Guardianship Regulations 2005 make plain that information regarding the children's religious and cultural upbringing is important and must be included in the report that is placed before the court pursuant to s 14A(8). But the court was not satisfied that the special guardianship regime is intended to ensure the approach of the special guardian to the children's religious upbringing aligns with that taken prior to the making of the special guardianship order.

MacDonald J decided that it cannot be said to be in any of the children's best interests to grant to the mother a prohibited steps order preventing Mrs Z from permitting the children to take the sacraments of the Roman Catholic faith, relying partly on the mother's lack of objection over the previous three years.

The court was careful to note that its conclusion "is not to pronounce judgment on the relative merits of the Roman Catholic and Protestant religions".

## Declaration issue: Legal status of children

In relation to the application for a declaration, the inherent jurisdiction with which the court was concerned is not the inherent jurisdiction of the High Court in respect of children but, rather, the High Court's inherent declaratory jurisdiction (see **Egeneonu v Egeneonu [2017] 4 WLR 100** at [18]). When considering whether to grant a declaration or not, the court would take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose, and whether there are any other special reasons why or why not the court should grant the declaration (*Financial Services Authority v Rourke* [2002] C.P.Rep. 14). A declaration may be refused if it would prejudice the fairness of future proceedings (see *Amstrad Consumer Electronics Plc v The British Phonographic Industry Ltd* [1986] FSR 159).

Salford contended that the family do not meet the criteria for mandatory means tested financial support as former foster carers under Reg 7 of the Special Guardianship Regulations 2005 on the grounds that the children have not at any point been 'looked after'. In addition, Salford contended that Mrs Z and Mr Y do not meet the criteria for discretionary means tested financial support in any event by reason of a lack of bank statements and evidence of previous self-employed income provided by Mrs Z and Mr Y. As a result, the local authority has been unable to progress the DFES Standardised Financial Assessment and, accordingly, has been unable to progress a claim for financial support.

All parties agreed that the court has jurisdiction to make such a freestanding declaration under its inherent jurisdiction. The local authority submitted that the court should not exercise its jurisdiction, because the appropriate forum for the determination of this issue would be the Administrative Court. On behalf of the mother, it was submitted that dealing with the application for a declaration in these proceedings would be consistent with the overriding objective in FPR Part 1 and with the timescales for the children. On behalf of the proposed SGs, it was said that this court dealing with the question of a declaration would avoid delay caused by satellite litigation in the Administrative Court on an issue that is of direct relevance in the proceedings before this court.

The court considered the decision of the Court of Appeal in ***Re B* [2013] EWCA Civ 964**, in which the Court of Appeal was concerned with a case in which the subject child was being cared for by her paternal grandparents under an interim residence order and the financial support available to the grandparents depended upon whether or not the child was looked after.

Ultimately, the court decided it would be appropriate to determine the application for a freestanding declaration with respect to the legal status of each of the children, even though that application is made without claim for any other remedy consequent upon that declaration. It further determined that it is in the interests of justice for any dispute regarding these matters to be determined expeditiously and in a manner consistent with the overriding objective to deal with matter expeditiously and fairly whilst saving expense and allotting the matter an appropriate share of the court's resources and that this court will be in a better position to undertake such an exercise (if necessary) following the determination of the dispute as to the legal status of the children.

Nonetheless, the matter was adjourned to give Suffolk and Norfolk County Councils an opportunity to be heard in relation to it, in order to ensure that all those affected by any declaration granted upon the application of Mrs Z and Mr Y are either before the court or will have their arguments put before the court.

The court was careful to note, however, that its decision does not alter the general position, recognised in *Re B*, that the appropriate forum for challenging a decision of the local authority of the kind that gives rise in this case to an application for a declaration under the inherent jurisdiction will ordinarily be by way of judicial review.

Summary by **Lauren Suding**, barrister, **Field Court Chambers**.

## A Local Authority v TA & Others [2021] EWCOP 3

This case concerned an elderly woman, GA, who has dementia and was represented by the Official Solicitor. She was cared for at home by her adult son TA. The court was concerned about the negative impact on the proceedings by the actions and conduct of TA and examined two issues:

- If TA should be permitted to record the court hearings
- the extent to which the court had power to restrict his communications with the court office.

### Background

In March 2019 the local authority responsible for meeting GA's needs under the Care Act 2014 brought proceedings under the Mental Capacity Act 2005.

TA wanted to record the hearings, essentially for his 'own protection and benefit' as the local authority employees were 'pathological liars' and he had suffered bullying and intimidation from 'many' judges. He also objected to the costs of a transcript and pointed out the common delays in obtaining one.

TA's application was opposed on the basis that the widely recognised default position against recording should be recognised and there was a risk that TA would publish the recordings on the internet, as he had done in the past.

The Judge advised TA that it was possible to be supported in the court proceedings by a McKenzie friend or the services of 'Support Through Court'. TA could apply to the court for a transcript and in exceptional circumstances, such as wishing to correct an inaccuracy in the transcript, could listen to the official audio recording. (*Practice Direction: (Audio Recording of Proceedings: Access)* [2014] 1 WLR 632 (considered and confirmed recently in *Dring v Cape Intermediate Holdings Ltd*. [2019] UKSC 38) at [25]). The Judge indicated he would not grant permission to record, whereupon TA terminated his link to the remote hearing.

### Recording court proceedings

The Judge noted that the Court of Protection is not specifically included (see section 85D(2) Courts Act 2003) in the list of courts to which section 55 and schedule 25 of the Coronavirus Act 2020 ('the 2020 Act') applies. The 2020 Act introduced new statutory provisions (sections 85A-85D) into the Courts Act 2003 which allows the *court to direct* a recording of the proceedings and creates a criminal offence for a person to make or attempt to make an unauthorised recording

However, the guidance 'Remote Access to the Court of Protection' issued in March 2020 advised that the terms of the statutory criminal prohibitions were to be included in every standard order thereafter, and had been included in all orders in these proceedings.

Section 9 of the Contempt of Court Act 1981 in addition makes it a contempt of court to record a hearing without the permission of the Judge. There is a discretion under the civil law to permit recording (Practice Direction (Tape Recorders) [1981] 1 WLR 1526) if the applicant had a 'reasonable need'. The Judge found TA had no such need, having a very good, even 'extraordinary' grasp of the procedures, documents and issues engaged.

These proceedings were also subject to 'Transparency Order' which prohibits the reporting of any material which identifies, or is likely to identify, that GA is the subject of proceedings; any person as a member of the family of GA; that A Local Authority is a party; and where GA lives. The content of video-recordings which relates to these proceedings is controlled by s.12(1)(b) of the Administration of Justice Act 1960 and may not be published unless publication falls within the exceptions contained in Practice Direction 4A, paragraphs 33 to 37.

The court endorsed the definition of 'publication' set out by Munby J (as he then was) in *re B* [2004] EWCH 411 para 82(iii) as anything the law of defamation would treat as a publication, thus covering most forms of dissemination either oral or written.

## Order restricting communication with the court office

TA had been engaged in litigation concerning GA for approximately two years and the nature of his correspondence to the local authority was 'abusive and inflammatory' to such an extent that the local authority deemed TA a 'vexatious complainant' in March 2019 in line with the Local Government & Social Care Ombudsman's guidance on managing unreasonable complaint behaviour. The decision was reviewed but ultimately extended until 12 September 2021 as TA refused to accept limits to his behaviour.

By the latter part of 2020, TA's behaviour had extended to the Court of Protection court office. The Operations Manager noted excessive email traffic generated by TA who copied in '100s' of other recipients, along with excessive telephone calls with abusive comments, primarily directed at the judiciary. Further, TA made 39 COP9 applications over a 24 month period.

TA dismissed the evidence of the Operations Manager, describing the statement as a "badly drafted pathetic attempt at a fraudulent witness statement". He did not deny the volume of his correspondence but sought to justify it on the basis that HMCTS staff were engaged in a deliberate attempt to pervert the course of justice, in collaboration with the judiciary.

The court found no justification for the volume and nature of the correspondence from TA. It was wholly disproportionate and no doubt a significant distraction for the court staff. The court cited the obiter remarks of King LJ in *Agarwala v Agarwala* [2016] EWCA Civ 1252 which considered general judicial case management powers to regulate communications with the court to avoid 'a torrent of informal, unfocussed emails'. Support for this approach was further located in the Court of Appeal's judgment in *Attorney-General v Ebert* [2002] 2 All ER 789 where Brooke LJ observed at para 35 that by exercise of the inherent jurisdiction, the court's supervisory role extends to the regulation of the manner in which the court process may in general be exercised, including the power to restrain litigants from wasting the time of court staff and disturbing the orderly conduct of court processes in 'completely obsessive pursuit of their own litigation'.

The court therefore proposed to make the 'exceptional' order of restraining TA from communicating with the court office by email and telephone. TA could continue to send letters if necessary, but he could not expect a response if his correspondence was abusive. While Brooke LJ contemplated the exercise of the inherent jurisdiction, the court proposed to rely on section 47(1) Mental Capacity Act 2005.

A penal notice was attached to the injunction.

Case Summary by **Sarah Phillimore**, Barrister, **St John's Chambers**