March 2021

Family Law Week

NEWS

New laws to protect victims added to Domestic Abuse Bill

On 1 March 2021 the Government announced that a raft of new amendments to the Domestic Abuse Bill would be presented, providing greater protections for victims. The proposals include making non-fatal strangulation a specific criminal offence, punishable by up to five years in prison. The act typically involves an abuser strangling or intentionally affecting their victim's breathing in an attempt to control or intimidate them. The announcement follows concerns that perpetrators were avoiding punishment as the practice can often leave no visible injury, making it harder to prosecute under existing offences. The Government will also strengthen legislation around controlling or coercive behaviour (CCB), no longer making it a requirement for abusers and victims to live together. For the announcement, click here.

1/3/21

President's Public Law Working Group report published

The President of the Family Division, Sir Andrew McFarlane, has welcomed and endorsed the publication of the President's Public Law Working Group (PLWG) report.

He said:

> "The report and its recommendations are the fruits of intense and extensive collaborative work by professionals from all of the sectors working on child protection cases in the Family Justice system. Whilst the group has been brought together and led by the judiciary, this has genuinely been a joint endeavour by all of the many PLWG members and others who have been involved. I am most grateful to each and every one of them.
>
> "The PLWG was formed, prior to the COVID-19 pandemic, to investigate the steep rise in public law cases coming to the Family Court and to offer recommendations for improving the system's ability to address the needs of the children and families at

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> the centre of these important cases. The additional pressures on the Child Protection and Family Justice systems arising from COVID have only gone to underline the need for the new ways of working that the PLWG's recommendations describe.
>
> "It has been a striking feature of this work that the development of the group's ideas and recommendations has been organic and has proceeded at each turn on the basis of agreement across the board, rather than controversy. That this is so, strongly suggests that the recommendations made are both sound and necessary. It gives ground for real optimism that the messages in this report will be welcomed by social workers, lawyers, judges, magistrates and court staff across England and Wales and that, after a short implementation period, they can be put into effect and begin to make a real difference on the ground. That is my earnest hope and confident expectation."

For the March 2021 report, and four supplemental reports, **click here** and scroll to the foot of the page.

7/3/21

BASW UK responds to Government Independent Review of the Human Rights Act

The British Association of Social Workers has submitted **a response** to the **Government's Independent Review of the Human Rights Act**, giving evidence on the way that the Act is used by social workers.

The review is looking at two key areas – the relationship between domestic courts and the European Court of Human Rights, and the impact of the Human Rights Act on the relationship between the judiciary, the executive and the legislature.

The BASW response focuses on how social workers use the Human Rights Act in their day to day roles, and uses the example of campaign group **Article 39** taking the Government to court over the **Adoption and Children (Coronavirus) (Amendment) Regulations 2020** to demonstrate why the courts should be able to hold the executive to account.

The response also questions the accessibility of the review, with no easy-read version available and the use of complex language in the call for evidence.

For the response, **click here**.

7/3/21

Dame Rachel de Souza begins her term as Children's Commissioner for England

Dame Rachel de Souza has begun her term as Children's Commissioner for England in succession to Anne Longfield. In a **blog piece** on the Children's Commissioner's website, she says:

> "When I hand over in six years' time, I want to look back at six years in which adults in power in this country have done even more for children than the post-war generation. I want to see not just a golden age of policy-making, but a golden age of delivery. That is how I saw my role in schools and that is how I see my role now: to deliver.
>
> "We know the challenges – the human cost of the pandemic; the bereavement; rising rates of domestic abuse; vulnerable children; estrangement; children in care or specialist units; children with SEND; a mental health epidemic; social inequality; regional inequality; rising unemployment; economic restructuring. recession; the conflicts between more austerity and a reduction in public services, and more debt which could be passed on to our children; access to further education; access to opportunity. The list is long, and in every particular, children's futures are on the line.
>
> "The question I intend to put before the adults of 2021 is: what are we going to do about these things? I have a lot to learn myself, so in the early months of my tenure, I will be listening to the whole sector on all these points. In particular, I want to hear previously unheard voices, from minority or vulnerable groups of course, but also from the child whose identity may fall between definitions which might confer a particular need or disadvantage. During my tenure, I want my work to improve the chances of every single child, whatever their early standing in life, wherever they are, from the inner city to the most remote corner of every county in England."

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

7/3/21

No case for reform of the Human Rights Act, says Joint Committee on Human Rights

The Parliamentary Joint Committee on Human Rights has published **its response** to the **Government's Independent Human Rights Act Review**, which concludes that the HRA has had an enormously positive impact on the enforcement of human rights in the UK, and finds that there is no case for reform under the terms of reference of the Government's review.

On the basis of evidence heard to date, the Committee have found that there is no compelling case for reform of the HRA under the Independent Review's Terms of Reference.

The JCHR found that the legislation:

- Respects parliamentary sovereignty;

- Does not draw the UK courts into making decisions which should be made by Parliament and Government;
- Provides an important mechanism which allows individuals to enforce their rights, which would be impossible for most people, were it to require the great expense and years of delay of going to the European Court of Human Rights (ECtHR) in Strasbourg;
- Reduces the likelihood of the UK Government being found in breach of the Convention by the ECtHR by enabling the UK courts to rule on Convention rights, which they do in a way which is respected by and helpful to the ECtHR;
- Helps the ECtHR by providing greatly valued UK judicial input into European Convention on Human Rights (ECHR) jurisprudence;
- Improves the work of the criminal justice system and other agencies by instilling a "human rights culture" in training and guidance.

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

7/3/21

Review of the controlling or coercive behaviour offence published

The Home Office has published **the results of a review of the controlling or coercive behaviour offence**, which was introduced in December 2015.

The review considered the available criminal justice system data, academic literature, and engaged with stakeholders, to understand how the controlling or coercive behaviour (CCB) offence has been used since its introduction in 2015.

The review found that volumes of recorded offences and prosecutions have increased year on year since the offence's introduction, indicating that the legislation has provided an improved legal framework to tackle this type of abuse. However, the review also concludes that there is likely still room for improvement in understanding, identifying and evidencing CCB, as it is likely that only a small proportion of all CCB comes to the attention of the police or is recorded as CCB, and charge rates remain relatively low.

On 1 March 2021, the Government announced a raft of new amendments to the **Domestic Abuse Bill** which will include measures to strengthen legislation around CCB, no longer making it a requirement for abusers and victims to live together.

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

7/3/21

Human Rights Commissions questioned on enforcement of human rights across the UK

The Parliamentary Joint Committee Human Rights has held a session questioning the chairs of the UK's three National Human Rights Institutions – the Equality and Human Rights Commission, the Scottish Human Rights Commission and the Northern Ireland Human Rights Commission – about the impact that the Human Rights Act has had on the enforcement of human rights across the UK, barriers that continue to exist to enforcement, and whether any amendment to the Human Rights Act is needed.

In the course of the session, the Committee considered:

- The impact of section 6 of the Human Rights Act, which requires public authorities to act in a way which is compatible with convention rights
- The relationship between the domestic courts and the European Court of Human Rights
- Whether the domestic courts are unduly drawn into questions of policy
- Any concerns about possible reform of the Human Rights Act
- Major human rights challenges facing the UK as we emerge from the pandemic: will this coming period will offer opportunities to increase awareness and understanding of human rights both among public authorities and individuals?

To view the session, **click here**. For more information about the Committee's inquiry concerning the Government's Independent Human Rights Act Review, **click here**.

12/3/21

Intercountry adoption: exception requests

The Department for Education has published information about exception requests to adopt children from countries with special restrictions. The guidance is aimed at prospective adopters and outlines the Department for Education's process for handling exception requests to adopt children from countries where special restrictions are in place. The information reflects and expands on the process set out in the **Adoptions with a Foreign Element (Special Restrictions on Adoptions from Abroad) Regulations 2008**.

For the guidance, **click here**.

12/3/21

Supreme Court to hand down judgment in 1980 Hague Convention / asylum case

The Supreme Court will hand down judgment in *G v G* on Friday, 19 March 2021.

The case concerns G, the only child of divorced parents. Until February 2020, G's parents lived near to each other in South Africa. However, after telling friends that she was lesbian, G's mother began to experience persecution from her family in South Africa. As a result, she fled to England with G and made an application for asylum. Upon discovering that G had been taken to England, G's father made an application for her return under the 1980 Hague Convention. At first instance, Lieven J held that the father's application for a return order should be stayed pending the determination of G's mother's asylum claim. The Court of Appeal in ***G (A Child : Child Abduction)*** **[2020] EWCA Civ 1185** considered that, in the circumstances, the High Court was not barred from determining the father's application for a return order, nor was it barred from making such an order. The mother appealed to the Supreme Court.

The Supreme Court will consider:

1. Does a child named as a dependent on a parent's asylum application have any protection from refoulement?

2. Can a return order be made under the 1980 Hague Convention even where a child has protection from refoulement?

3. Should the High Court be slow to stay an application under the 1980 Hague Convention prior to determination of an application for asylum?

For the Court of Appeal judgment, **click here**.

12/3/21

Violence Against Women and Girls Call for Evidence reopened

This **call for evidence** was reopened on 12 March to collect further views from those with lived experience of, or views on, crimes considered as violence against women and girls (VAWG). It has been reopened to reflect the recent public discussion about VAWG. It is open to all genders. It previously ran for 10 weeks from 10 December 2020 to 19 February 2021. The reopened consultation closes on 26 March 2021.

The Home Office is seeking views to help inform the development of the government's next Tackling Violence Against Women and Girls Strategy. It is particularly keen to hear from people who may feel underrepresented in previous strategies or who feel their circumstances were not supported by existing services.

In addition to those with lived experiences of these issues, the Home Office is also seeking the views of those with expertise in working with victims and survivors, those involved in preventative activity, and those involved in providing services. This includes relevant professionals, such as those working in social care, education, law enforcement, local government, public health and healthcare.

Everyone aged 16 or over is welcome to contribute to the call for evidence, participants do not have to have experienced violence or abuse.

You can participate in the call for evidence by completing **the public survey**.

For more information, **click here**.

14/3/21

CMA launches study of children's social care provision

The Competition and Markets Authority has launched **a study of children's social care provision** to establish why a lack of availability and increasing costs could be leading to the needs of children in care not being met.

The CMA will examine concerns around high prices paid by local authorities and inadequate supply of appropriate placements for children in their care. This, says the CMA, could be putting pressure on the ability of local authorities to provide the appropriate accommodation and care which children need.

Using its statutory market study powers, the CMA aims to obtain information to help build a better understanding of the children's social care sector. Depending on what it finds, it can issue guidance to businesses and the public, make recommendations to the industry or to government or, if appropriate, launch a full investigation into the market.

In England, Scotland and Wales, around 99,000 children live under the care of their local authority. The majority of children in care, approximately 65,000, live in foster care. Around 16,000 children live in residential care, including children's homes and independent or semi-independent living accommodation, with the remaining 18,000 in a range of other types of placement, including with their parents or placed for adoption.

Each local authority is responsible for contracting foster care and purchasing the required children's homes places. Children are placed with foster carers, either directly by the local authority or by independent fostering agencies, which can be run for-profit in England and Wales but not in Scotland.

Children's homes are provided either directly by local authorities, by the private sector or by charities, with 70 per cent of children in England and 78 per cent of children in Wales placed in private sector homes.

The launch of the study comes after concerns have been raised by other organisations about private sector provision of children's social care making high profit margins. A **recent Local Government Association report** found that some independent providers of children's residential and

fostering placements are achieving profits of more than 20 per cent on their income.

The study will examine whether high levels of profit have been made at the expense of investment in recruiting and retaining staff, and providing quality services.

The CMA will look at how well the current system of provision is working across England, Scotland and Wales and explore how it could be made to work better. In particular, it will look into:

- the supply of placements, including whether the current balance of local authority, private sector and third sector provision is working well for children and local authorities
- prices charged by providers and variation between prices paid for similar types of placement, with increasing prices potentially putting pressure on local authority budgets
- the way commissioning of places is carried out, and whether local authorities could be more effective in securing appropriate placements for children
- the environment for investing in the system to ensure sufficient appropriate places are available for all children who need them in the future, and whether any measures should be taken to improve this.

Comments on the issues raised can be submitted in the **Invitation to Comment** by 14 April 2021. All updates on the CMA's work in this area can be found on the **Children's social care study page**. For a recent House of Commons Library research briefing on children's social care services in England, **click here**.

14/3/21

Adoption and Children (Coronavirus) (Amendment) Regulations 2021

These regulations, which come into force on 30th March 2021, have been made "in order to continue to assist the children's social care sector during the coronavirus pandemic".

Regulation 2(2) amends **Her Majesty's Chief Inspector of Education, Children's Services and Skills (Fees and Frequency of Inspections) (Children's Homes etc) Regulations 2015** (the 2015 Regulations) to reduce certain fees payable under Parts 2, 3 and 4 of those Regulations. In particular, they decrease the fees that are payable to the Chief Inspector in respect of registration of voluntary adoption agencies, adoption support agencies, children's homes and residential family centres; and variation of registration of those establishments and of fostering agencies. They also decrease the annual fees payable by the above establishments and agencies as well as those payable by boarding schools, residential colleges and residential special schools.

Regulation 2(3) and (4) amend the approved places threshold (see regulation 2 of the 2015 Regulations for the definition of "approved place") set out in the 2015 Regulations. Once this threshold has been exceeded, the relevant institution is obliged to pay a higher annual fee.

Regulation 2(3)(a) to (c) increases the approved places threshold for residential colleges from between 4 – 10 places to 4 – 11 places.

Regulation 2(3)(d) to (f) increases the approved places threshold for residential special schools from between 4 – 15 places to 4 – 17 places.

Regulation 2(4) increases the approved places threshold for children's homes from between 4 – 25 places to 4 – 29 places.

Regulation 3 amends regulation 14 of the **Adoption and Children (Coronavirus) (Amendment) Regulations 2020** to provide that the amendment made by regulation 12 of those Regulations ceases to have effect at the end of 30th September 2021. Regulation 12 omits regulation 27 of the 2015 Regulations which sets out the minimum frequency by which premises must be inspected.

Regulation 4 extends the amendments made by the **Adoption and Children (Coronavirus) (No.2) Regulations 2020** until the end of 30th September 2021.

Regulation 5 revokes **Her Majesty's Chief Inspector of Education, Children's Services and Skills (Fees and Frequency of Inspections) (Children's Homes etc.) (Amendment) Regulations 2020**. Given the ongoing pressures faced by certain children's social care providers caused by the pandemic, all the changes made by that instrument in relation to fees payable by those providers to Her Majesty's Chief Inspector of Education, Children's Services and Skills have been reversed through regulation 2(2) to (4) of these Regulations.

The Secretary of State must still review the effectiveness of the continued limited amendment made by the Adoption and Children (Coronavirus) (Amendment) Regulations 2020 and of the continued amendments made by the Adoption and Children (Coronavirus) (Amendment) (No.2) Regulations 2020 for the period they remain in effect.

For the latest Regulations, **click here**.

14/3/21

New private law cases received by Cafcass in February rose slightly on 2020

Cafcass received a total of 3,827 new private law cases (involving 5,306 children) in February 2021 – 0.3 per cent (or 12 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.

14/3/21

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

Cafcass received a total of 1,374 new public law applications (involving 2,139 children) in February – 27 applications (1.9 per cent) fewer than in the same month last year. The number of children featured in the cases fell from 2,323 children in February 2020.

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

14/3/21

Almost all young women in the UK have been sexually harassed, YouGov poll finds

Ninety-seven per cent of women in the UK between the ages of 18 and 24 say that they have been sexually harassed, whilst 80 per cent of women of all ages say that they have experienced sexual harassment in public spaces. ***The Guardian*** has reported a survey by YouGov carried out for UN Women UK which warns that most women have lost faith that the abuse will be dealt with.

According to the survey of 1,000 women, 96 per cent of respondents did not report incidents. Latest estimates from the Crime Survey for England and Wales show that fewer than one in six (16 per cent) female victims and fewer than one in five (19 per cent) male victims aged 16 to 59 years of sexual assault by rape or penetration since the age of 16 years reported it to the police. Police recorded crimes remain well below the number of victims estimated by the survey.

For the Guardian report, **click here**. For the latest overview (for the year ending March 2020) on statistics for sexual offences in England and Wales, provided by the Office for National Statistics, **click here**.

21/3/21

Children's Commissioner launches 'Beveridge Report for children'

Dame Rachel de Souza, the new Children's Commissioner for England, has launched a **'once-in-a-generation' review of the future of childhood**.

'The Childhood Commission' will be inspired by the ambition of William Beveridge's pioneering 1940s report, which laid the foundations of the post-War social security system. 'The Childhood Commission' will identify the barriers preventing children from reaching their full potential, propose policy and services solutions and develop targets by which improvements can be monitored.

The Commission will not only focus on the problems that have been highlighted and amplified by the Covid pandemic but will also address the policy shortfalls that have held back the lives of many children for decades. At its heart will be **'The Big Ask'** – the largest consultation ever held with children in England. The Children's Commissioner will ask children how the pandemic changed their lives for better or worse, what their aspirations are and the barriers to reaching them, how things are at home, how their communities and local environment could be improved, and how they feel about the future and the challenges facing the world.

'The Big Ask' consultation will take place after the Easter break. An online survey will be distributed to all schools, posted on the Oak National Academy, and advertised via social media, child-facing charities and other communications channels. To reach children outside mainstream settings, it will be sent directly to youth custody organisations, CAMHS inpatient units and children's homes. Face-to-face interviews and focus groups will be conducted with children who are under-represented and harder to reach. This consultation will drive the subsequent phases of the Commission.

The Children's Commissioner will publish an interim report before the summer, setting out children's expectations and aspirations, and the barriers to attaining them, informed by the results of the consultation, an evidence review and data analysis. A subsequent report will propose solutions, investment, metrics, and set out the challenge to society to pay back to this generation of children and re-set their future.

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

21/3/21

Children in care homes: Education Committee launches call for written evidence

The House of Commons Education Committee has launched a call for written evidence as part of **its inquiry into children's homes**.

The inquiry is examining issues around attainment and employment outcomes for young people in children's homes, as well as the support available and regulation of the sector. It is part of the Committee's continuing work examining the issues faced by left behind groups.

The Committee is inviting written submissions addressing any or all of the following areas:

- Educational outcomes for children and young people in children's homes, including attainment and progression to education, employment and training destinations
- The quality of, and access to, support for children and young people in children's homes, including support for those with special education needs, and the support available at transition points
- The use and appropriateness of unregulated provision
- Rates of criminalisation of children in children's homes

- The sufficiency of places in children's homes, and the regional locations of homes
- The impact of the Covid-19 pandemic, including the extent to which this might increase the numbers of children's homes places needed
- The support available for kinship carers, and for children in homes to maintain relationships with their birth families.

The deadline for submissions is Friday, 23 April. For further information concerning the inquiry, **click here**.

21/3/21

Home Affairs Committee announces inquiry into Violence Against Women and Girls

The Commons Home Affairs Select Committee has announced **an inquiry** following the tragic death of Sarah Everard and the raising of safety concerns by women across the country.

The Committee will be conducting an overarching inquiry into Violence Against Women and Girls, focusing first on low rape conviction levels. Further details will follow next week.

The Committee recognises the importance and breadth of issues relating to violence against women and girls. The effects of violence against women and girls are profound, complex and traumatising. The Committee intends to undertake a wider inquiry in this area and there will be further opportunities for anyone to provide their views, reflections or experiences. Full terms of reference for this inquiry will be published in due course.

The Committee will also be conducting a separate short inquiry into the policing of vigils over the weekend of 13 and 14 March with its first evidence session on Wednesday, 24 March.

For more details of both inquiries, **click here.**

21/3/21

Ombudsman issues guide for dealing with children's statutory complaints

The Local Government and Social Care Ombudsman has launched **a new guide** to help local authorities handle complaints under the children's services statutory complaints process.

Free to download, the short guide shares the lessons from previous investigations about how councils should apply the regulations and statutory guidance. This is the area in which the Ombudsman receives the most queries from local authorities.

For complaints about many areas of children's services, there is a statutory, three-stage complaints procedure local authorities must follow. Common questions answered in the guide include basic issues around what areas come under the statutory process along with more detailed questions about young people's consent, court action, delays and deadlines, and statements of complaint.

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

> "We have published this guide to help local authorities navigate the process, and avoid some of the pitfalls we have seen in previous investigations. It is not uncommon for us to find issues with complaint handling when we investigate cases about children's services – and we receive many questions from councils about how to follow the process.
>
> "Our answer is the statutory complaints process is set out in law so we expect councils to follow the guidance and regulations as they stand, and will hold them to account should they not do so.
>
> "Where they have concerns about the effectiveness of the statutory process, councils have an opportunity to raise those in the Government's review of children's services – something which we intend to contribute to."

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

21/3/21

New film to mark the launch of an agenda for change in Special Guardianship

A new training film on special guardianship for sector professionals was launched at an online event on Monday, 15 March, with speakers including Sir Andrew McFarlane, President of the Family Division; Josh MacAlister, Chair of the Independent Review of Children's Social Care; and Krish Kandiah, Chair of the Adoption and Special Guardianship Leadership Board.

The film, ***Special Guardianship – an agenda for change***, was made jointly by CoramBAAF, the Centre for Child and Family Justice Research at Lancaster University and Kinship (formerly Grandparents Plus).

Opening the virtual launch event, Sir Andrew McFarlane outlined key changes in best practice guidance, and the ambitious national training programme starting in April to ensure that reform is delivered consistently across England and Wales.

The 'best practice guidance' under the authority of the Sir Andrew includes recommendations to allow special guardians access to legal aid (currently discretionary) to cover costs for legal advice and support in being represented in court as well as a comprehensive individual support plan detailing what the local authority will provide to help the carer and the child as they grow up.

This is the sister film to *The First Day of Forever – becoming a special guardian*, a moving first-hand account of what it is really like to be a special guardian. Both films are funded by the Economic and Social Research Council's Impact Acceleration Account.

In addition to the films, **a series of resources have been produced** that outline the legislative, policy and practice framework in Special Guardianship.

Director of Policy, Research and Development at CoramBAAF John Simmonds, who is featured in the film, said:

> "Special Guardianship has seen a remarkable growth in its use since it was introduced in 2005. There is an urgent agenda for change. Every child subject to the order, must get the services and resources they and their carers need to ensure that they fully recover from any maltreatment they have experienced and go on to have a loving, enriched and full life of opportunity."

Professor Judith Harwin, of Lancaster University, said:

> "The research is clear – special guardianship benefits vulnerable children, their families and society at large. Yet it is an undervalued and under-supported form of care. With more children leaving care on special guardianship orders than adoption orders, there's an urgent need to focus on ensuring these children and their carers are properly supported. Now is the time to act on the evidence and to invest in special guardianship."

Dr Lucy Peake, the CEO of Kinship, said:

> "Special guardianship is a positive option for children whose parents are unable to care for them. But too many special guardians are struggling to access the support they and their children need. They need independent advice, financial allowances and tailored support services. Special guardians are being pushed to the brink. If we don't support them there's a real risk that they won't cope and more children will enter the care system."

To view the film, **click here**.

21/3/21

Supreme Court allows mother's appeal in 1980 Hague Convention / asylum case

The Supreme Court has held that a child who can objectively be understood to be an applicant for asylum cannot be returned to the country from which he or she has sought refuge before the final determination of the asylum claim.

The Supreme Court substantially allowed the mother's appeal in ***G v G* [2021] UKSC 9** and remitted the case to the High Court for reconsideration of the 1980 Hague Convention application on that basis. Lord Stephens gave the only judgment, with which the other members of the Court – Lord Lloyd-Jones, Lord Hamblen, Lord Leggatt and Lord Burrows – agreed.

The appeal concerned the relationship of the 1980 Hague Convention (the "1980 HC") to asylum law.

The parties are the parents of an eight-year-old girl ("G"). G was born in South Africa, where she has been habitually resident all her life. In March 2020, G's mother, the appellant, wrongfully removed G from South Africa to England, in breach of G's father's rights of custody. G's father, the respondent, applied for an order under the 1980 HC for G's return to South Africa. The mother opposed his application on the ground, in particular, that there is a grave risk that return would expose G to physical or psychological harm or otherwise place her in an intolerable situation.

The mother identifies as lesbian. She alleged that after separating from the respondent and coming out, her family subjected her to death threats and violence. On her arrival in England she applied for asylum on the basis of her fear of persecution by her family. She listed G as a dependant on her asylum application. G has not made an asylum application in her own right. A core principle of asylum law is that refugees are protected from being returned to the country in which they have a well-founded fear of persecution. The unlawful return of a refugee is known as "refoulement".

The central question in this appeal is whether G is protected from refoulement as a result of being listed as a dependant on her mother's asylum application, such that she cannot be returned to South Africa pursuant to the 1980 HC proceedings until the asylum application is determined. If so, this raises the further question of how the 1980 HC proceedings and the asylum claim can be coordinated. An asylum claim can take months, if not years, to resolve, and the 1980 HC requires the prompt determination of an application for the return of an abducted child (which means, in this context, within six weeks). There is therefore a real risk that by the time the asylum claim has been determined, the relationship between the child and the left-behind parent will be harmed beyond repair. There is also a real risk in cases of this type that the taking parent will seek to achieve that objective by making a sham or tactical asylum claim.

The Court of Appeal, in ***G v G* [2020] EWCA Civ 1185**, held that a child listed as a dependant on an asylum application

has no protection from refoulement, but that if G had made an application in her own right, she could not be returned prior to the determination of her application. The Court of Appeal concluded that there was no bar to ordering G's return to South Africa. The mother appealed against that decision.

UK asylum law is derived from a patchwork of international, EU and domestic law sources [77], which provide that an individual who is a refugee (because, in short, they have a well-founded fear of persecution in their country of nationality) has a right not to be refouled, subject to limited exceptions. That right does not depend on whether they have been granted status as a refugee [79]-[81]. An individual who can be understood to be seeking refugee status is therefore protected from refoulement. An asylum application which lists a child as a dependant is also an asylum claim by that child if objectively it can be understood as such. That will normally be the case: the adult's grounds for fearing persecution are likely to apply to their child, and an omission by the child to make an application in their own right cannot be determinative if it is the parent who would anyway have to make the application on the child's behalf [117]-[121].

The protection from refoulement of a child who can objectively be understood to be an applicant for asylum applies during the determination of their application by the Home Secretary. The effect of implementing a return order in 1980 HC proceedings in respect of a child asylum applicant is to return the child to the country from which they seek refuge. While the High Court can decide whether to make a return order, the return order cannot be implemented until the Home Secretary has determined the asylum claim [124]-[134]. The mother's first ground of appeal therefore succeeds. There is no bar to the High Court deciding the 1980 HC application prior to the determination of the asylum claim, however, and it should be slow to stay 1980 HC proceedings. A reasoned judgment on whether the child should be returned, on the basis of evidence which will often overlap with the asylum claim and which has been tested by an adversarial process, may assist the prompt determination of the asylum claim by the Home Secretary. The High Court has power to set aside its decision if the asylum claim is successful. The mother's second and third grounds of appeal therefore fail [154]-[162].

An asylum claim is not "determined" until the conclusion of any appeal [135]-[140]. Asylum law distinguishes between asylum seekers who have the right to appeal from within the UK, and those who must appeal from outside the UK. The implementation of a return order in 1980 HC proceedings in respect of a child with a pending in-country appeal would render the appeal process ineffective. A pending in-country appeal must therefore bar the implementation of a return order. Because the time taken by the in-country appeal process is likely to have a devastating impact on 1980 HC proceedings, urgent consideration should be given to a legislative solution [141]-[153].

All those involved in the 1980 HC proceedings, including the Home Secretary in determining any related application for asylum, must act promptly if the UK is to fulfil its obligations under the 1980 HC [68]-[72]. Various steps are proposed to coordinate related 1980 HC and asylum proceedings with a view to their prompt determination. These include requesting that the Home Secretary intervene in 1980 HC proceedings; consideration by the High Court of whether to make documents in those proceedings available to the Home Secretary, and whether to order disclosure of the documents in the asylum claim to the 1980 HC proceedings; joining the child as a party with independent representation; and assigning any asylum appeal to a High Court Family Division judge [163]-[177]. The Home Secretary has also proposed an expedited process for determining asylum claims with concurrent 1980 HC proceedings, which is a welcome initiative [6].

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

21/3/21

Judicial Review consultation launched

The Ministry of Justice has launched **a public consultation on judicial review** which will address **the recommendations** of an independent panel of experts led by Lord Faulks QC.

They investigated whether the correct balance is being struck between the rights of citizens to challenge Executive decisions and the need for effective government.

The Panel concluded that there was a growing tendency for the courts in judicial review cases to edge away from a strictly supervisory jurisdiction, becoming more willing to review the merits of the decisions themselves, instead of the way in which those decisions were made.

The Panel proposed two reforms to substantive law: to reverse the effects of so-called 'Cart judgments' to prevent appeals in the Upper Tribunal being subject to judicial review in the High Court; and to introduce suspended quashing orders as a new remedy.

On Cart judgments, the Review analysis found that 5,502 Cart judicial reviews have occurred since this route of Judicial Review was made available, but that in only 12 instances had an error of law been found.
On quashing orders, the Panel concluded that the courts should have the ability to suspend quashing orders, mandating a time by which any administrative oversight should be corrected.

On Civil Procedure Rules, the consultation will also consider whether to recommend to the Civil Procedure Rule Committee that they consider a range of procedural reforms to improve the efficiency of Judicial Review claims.

These will include:

- Removing the promptness requirement to make space for pre-trial resolutions
- Allowing parties to agree to extend the time limit for claims being brought
- Formalising procedure on replying to an Acknowledgement of Service (as suggested by the Review)

- Looking for improvements to the pre-action protocol to encourage pre-trial solutions and
- Several others which are detailed in the **consultation document**.

For the consultation document, **click here**. For the panel's report, **click here**.
21/3/21

Recovery message from the President of the Family Division

On 22 March 2021 the President of the Family Division, Sir Andrew McFarlane, published the following letter.

"Dear All

At the beginning of the Pandemic I asked Lord Justice Baker to lead a Judicial recovery group for the Family Court. That group has worked tirelessly to plan for our return to more normal working and to ensure that best practices and current challenges have been captured for consideration when we are looking at potential longer term changes.

The Lord Chief Justice has now signalled the start of a process so that, as Covid restrictions are relaxed, a move towards more face-to-face hearings will begin, whilst at all times having due regard to considerations of safety.

I have now asked Baker LJ to focus his attention on how we achieve the most efficient return to court over the coming months, including implementing the best practices learned from remote working.

The gradual return to face-to-face hearings will not be the end of remote working, indeed some form of remote working is likely to be required for the foreseeable future and we have learned that, in some cases, remote working is the most efficient way of dealing with some hearings. The aim is to get the balance right and this period of review is plainly very important.

To ensure that the process of review encompasses all of the work of the Family Court, Baker LJ has expanded his group to include a representative for the Financial Remedies Courts: HHJ Stuart Farquhar.

It is essential that family continues to collaborate with civil and other jurisdictions, and Baker LJ will be working closely with Simler LJ who is leading a similar project in the civil jurisdiction.

Over the coming weeks Baker LJ will be contacting many of you to ask for feedback, ideas and volunteers to assist with this work.

I am most grateful to him and to you, for your continued support.

Many thanks

Andrew"

26/3/21

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

Cafcass has published **a guide** to direct contact with children and families, working in the office, and attendance at court.

In recognition of the changing circumstances surrounding Covid-19, the guidance to staff on seeing children has been revised so that the organisation will return to the previously held position that, in most circumstances, an in-person meeting with the child/ren should take place at least once during the course of proceedings.

The guidance will continue to be updated whenever necessary as well as being reviewed monthly. The next planned review will take place on the 29th March 2021 as the government guidance and relevant legislation will remain in place until that date.

For the guidance, displayed on the website of the Association of Lawyers for Children, **click here**.

26/3/21

BASW England raise further concerns over the conduct of the Review of Children's Social Care

The British Association of Social Workers England has raised further deep concerns on how the **Review of Children's Social Care** will be conducted.

The concerns follow recently shared documents in the public domain of the **contract award notice** by the Department for Education published online. The concerns of BASW are:

- The contract sets out that any recommendations from the review which require additional or new government funding must be offset by savings elsewhere.
- There are provisions within the contract which are at odds with public statements previously made by the government and Josh MacAlister, who will lead the review.
- The contract does not require the review to consider the views of the social work profession, despite the wealth of experience available from practitioners who have frontline experience across the sector.
- Review timescales remain the same – very short – yet the scope is even wider than previously described. It will now include the family court, legal issues, and children's experiences of the youth justice system.

For the BASW press notice, which sets out BASW's concerns in more detail, **click here**.

26/3/21

Committee takes evidence on Government's Independent Review of the Human Rights Act

In the final session of **its inquiry into the Government's Independent Review of the Human Rights Act?**, the Parliamentary Joint Committee on Human Rights considered the impact of the Act on the enforcement of human rights in the UK and whether there is any case for reform of the Act.

During the inquiry, the Committee has received evidence from witnesses with wide-ranging experiences of the Human Rights Act and used the final session to explore this with legal experts and practitioners.

Topics for questions included:

- The balance between enabling individuals to enforce their rights and effective government
- The impact of the Human Rights Act on Parliamentary sovereignty
- Territorial limits on the application of the Human Rights Act
- The impact of any potential reforms on the right to an effective remedy
- Whether more could be done to address negative misconceptions about the Act.

To view the session, **click here**. For more details of the inquiry, **click here**.

26/3/21

£1 million voucher scheme to help families resolve disputes outside of court

Separating parents will be helped to resolve disputes through a new million-pound mediation scheme launched by the government.

Under **the scheme**, around 2,000 families will be able to apply for a £500 voucher towards the cost of mediation which is usually charged for unless one of the parties has access to legal aid.

The Ministry of Justice says that research suggests that more than 70 per cent of those using mediation services will resolve their issues outside of courtroom.

The initiative will also help to alleviate pressures on the family courts system resulting from the pandemic by diverting cases better suited for mediation away from the courts.

John Taylor, Chair of the Family Mediation Council said:

> "This government investment in mediation is much welcomed by the Family Mediation Council. It will help separated families agree solutions that are best for their children, taking into account what is going to be important for them as they grow up.
>
> "Family mediation is a proven cost-effective way to resolve differences following separation. This voucher scheme will make it even more accessible, and will help families resolve issues for themselves, without having to go to court."

The scheme is eligible for families seeking to resolve private law or financial matters relating to children.

If a case is eligible for vouchers, the mediator will automatically claim back the contributions from the government.

For the Ministry of Justice press release, **click here**.

26/3/21

New pilot Practice Direction 36V reflects the existence of the Family Mediation Voucher Scheme

New Practice Direction 36V is made under rule 36.2 FPR 2010. It modifies the Family Procedure Rules (FPR) and practice directions to reflect the existence of the **Family Mediation Voucher Scheme**, which launches on 26 March 2021.

The purpose of the Family Mediation Voucher Scheme is to offer a financial contribution of £500 towards mediation costs for eligible cases. The aims of the scheme are to:

- Aid court recovery in response to the pandemic.
- Provide an evidence base around the effectiveness of providing a financial incentive to encourage disputes to be resolved using mediation, instead of the courts, where appropriate.

The pilot Practice Direction specifies which cases it will apply to – see paragraph 1.4 of the attached document.

Its focus is on private law matters relating to children or on financial remedy matters where there is also an ongoing private law dispute relating to children.

For Practice Direction 36V, **click here**. For more information concerning the Family Mediation Voucher Scheme, **click here**.

26/3/21

Care cases now taking 41 weeks to first disposal

The average time for a care or supervision case to reach first disposal was 41 weeks in October to December 2020, up 8 weeks from the same quarter in 2019. 27 per cent of cases were disposed of within 26 weeks – down 13 percentage points compared to the same period in 2019. The figures are revealed in **latest statistics from the Ministry of Justice**.

The average time to first disposal throughout 2020 was 38 weeks, up 5 weeks from 2019. 31 per cent of cases were disposed of within 26 weeks, down 10 percentage points from 2019.

68,634 new cases started in Family courts in October to December 2020, up 6 per cent on the same quarter in 2019. This was due to increases in most case types: domestic violence (21 per cent), financial remedy (8 per cent), matrimonial (5 per cent) and private law (3 per cent) cases. However, there was a decrease in public law (3 per cent) case starts. Annually, there were 264,091 new cases started in Family courts throughout 2020, similar to 2019.

The mean average time from divorce petition to decree nisi was 30 weeks, and decree absolute was 56 weeks – up two weeks and four weeks respectively when compared to the equivalent quarter in 2019. The median time to decree nisi and decree absolute was 20 and 39 weeks respectively. Throughout 2020 the mean time from petition to decree nisi was 28 weeks and 53 weeks to decree absolute, each down 3 weeks respectively.

There were 28,672 divorce petitions filed in October to December 2020, up 5 per cent on the equivalent quarter in 2019. There were 23,810 decree absolutes granted in October to December 2020, a decrease of 24 per cent from the same period last year. Annually, there were 111,996 divorce petitions filed and 97,068 decree absolutes granted throughout 2020, down 4 per cent and 11 per cent respectively from 2019.

The number of domestic violence remedy order applications increased by 19 per cent compared to the equivalent quarter in 2019, while the number of orders made increased by 20 per cent over the same period. There were 35,984 applications and 39,427 orders made throughout 2020, up 20 per cent and up 17 per cent respectively from 2019.

In October to December 2020 there were 1,180 adoption applications, down 4 per cent on the equivalent quarter in 2019. Similarly, the number of adoption orders issued decreased by 8 per cent to 1,106. Annually, there were 4,229 applications and 3,826 orders for adoption in 2020, down 15 per cent and 24 per cent respectively from 2019.

There were 1,363 applications relating to deprivation of liberty in October to December 2020, up 16 per cent on the equivalent quarter in 2019. Orders decreased by 8 per cent in the latest quarter compared to the same period last year. There were 4,932 applications and 3,518 orders relating to deprivation of liberty throughout 2020, down 5 per cent and up 26 per cent respectively.

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

29/3/21

Mediation has increased since last year and now exceeds pre-COVID-19 levels

MIAMs increased by 14 per cent between October and December 2020 compared to the previous year and currently stand at just over one-third of pre-LASPO levels. Family mediation starts increased by 11 per cent and total outcomes increased by 16 per cent, of which 62 per cent were successful agreements, and are now sitting at almost two-thirds of pre-LASPO levels.

For the legal aid statistics published by the Ministry of Justice, which include the mediation figures, **click here**. For details of a newly announced family mediation voucher scheme, **click here**. For a new pilot Practice Direction 36V reflecting the existence of the Family Mediation Voucher Scheme, **click here**.

29/3/21

56 per cent of separated families in Great Britain have a child maintenance arrangement

In the latest financial year ending 2020 it is estimated that there were 2.4 million separated families in Great Britain including 3.6 million children in separated families. Of these separated families 56 per cent had a child maintenance arrangement.

In the latest three-year period covering financial years ending 2018 to 2020, it is estimated that:

- Parents With Care in separated families received a total of £2.3 billion annually in child maintenance payments.
- 89 per cent of Parents With Care were female and under the age of 50.
- 86 per cent of Non-Resident Parents were male and 80 per cent were under the age of 50
- Child maintenance payments reduced the number of children living in low income households annually – as a result of such payments 60,000 children were moved out of absolute low income on a Before Housing Costs (BHC) basis, and 120,000 children on an After Housing Costs (AHC) basis.
- 3 per cent of Parents With Care moved out of the lowest 20 per cent of the income distribution due to receiving child maintenance AHC, this is 2 per cent BHC.

- 4 per cent of Non-Resident Parents moved out of the highest 20 per cent of the income distribution due to paying child maintenance AHC, this is 4 per cent BHC.

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

29/3/21

Financial Remedy Update, March 2021

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

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

A. News Update

President's confirmation that the Financial Remedies Courts are formally part of the Family Court as pilot project comes to an end

On 24 February 2021, the President of the Family Division issued an announcement confirming the completion of the pilot project for the Financial Remedies Court ("FRCs") and confirmed that they are now formally part of the Family Court.

The FRCs will deal with all financial remedy applications, including those under Schedule 1 to the Children Act 1989 and Part III of the Matrimonial and Family Proceedings Act 1984, as well as all related enforcement applications. McFarlane P hopes that in due course legislation will be made that permits FRCs to hear applications under the Trusts of Land and Appointment of Trustees Act 1996 and the Inheritance (Provision for Family Dependants) Act 1975.

Mr Justice Mostyn and HHJ Hess have published a Note for all financial remedies practitioners addressing procedure and significant changes to way in which applications to the FRCs should be brought.

Family Procedure (Amendment) Rules 2021

The Family Procedure (Amendment) Rules 2021, which come into force on 6 April 2021, amend the Family Procedure Rules 2010 as follows:

- Rule 3 amends rule 6.43 of the FPR which makes provision for cases where service is to be effected on a respondent outside of the United Kingdom.

- Rule 4 inserts a new rule 36.3 into the FPR to enable provisions of the FPR to be modified or disapplied by Practice Directions to address issues for the work of the courts arising from a public emergency.

Family Division's Transparency Review expected to be published in Summer 2021

The Transparency Review which is currently being undertaken by the President of the Family Division is expected to be published later this year despite unavoidable delays to the timetable envisaged on its launch in May 2019 by the President.

The Transparency Review is set to address the current arrangements for media/public access and reporting in the Family Court. For more details about the Transparency Review, click here.

Call on the Government to include a statutory duty on local authorities to fund community-based services in the Domestic Abuse Bill.

In a joint statement from the Children's Commissioner, the Victims' Commissioner and the Domestic Abuse Commissioner, it was stated:

> 'It is vital that the government takes this once in a generation opportunity to ensure that all victims of domestic abuse – including the children living in these abusive households – have access to local protection and support by including community-based services in the Domestic Abuse Bill's statutory duty.'

The Bill is currently in the House of Lords at report stage prior to its third reading.

Home Affairs Committee investigates domestic abuse during Covid-19 pandemic

On 3 February 2021, the Home Affairs Committee held an evidence session to examine the prevalence of domestic abuse during the Covid-19 pandemic and the adequacy of the Government's and police response. It investigated the further challenges faced by support services in providing financial and other support to victims during lockdown.

To watch the session, **click here**.

Legal Services Board data demonstrates fluctuating demand for family law services during then Covid-19 pandemic

The data reveals divorce applications received by HM Courts & Tribunals Service in November 2020 increased by 16 per cent to 11,700 compared to 10,000 in November 2019. However, there were significant fluctuations within the 12 months. Between April 2020 and July 2020 applications increased by 93 per cent but dipped in August 2020 to below 2019 levels. This summer peak may indicate a reluctance to issue proceedings during the first national lockdown with a subsequent spike showing that pent-up need. Applications increased again by 46 per cent between August and October 2020.

Referrals to the National Centre for Domestic Violence increased by 13 per cent to 7,500 in December 2020 compared to 6,700 in December 2019. However, there were significant fluctuations within the 12 months. There was a 23 per cent increase between April 2020 and July 2020, followed by a downward trend between August and November 2020.

Privy Council hears appeal concerning same-sex marriage

The Judicial Committee for the Privy Council has reserved judgment in an appeal brought by the Bermudan Government as to the validity of same-sex marriage in the British Overseas Territory.

For an article concerning the case, **click here**.

Unregulated accommodation banned for vulnerable children under 16

The Government has **announced** that children in care under 16 will no longer be allowed to be accommodated in unregulated independent or semi-independent placements, helping to ensure the most vulnerable are cared for in settings that best meet their needs. Regulations have been laid in Parliament for the ban to come into force in September, as part of the **Government's response to its consultation** last year aimed at ensuring the highest quality provision for all children and young people in care.

For comment by the Children's Commissioner for England, calling for the ban to be extended to all under-18s, **click here**.

The Law Commission consults on proposals for reform to laws around intimate image abuse proposed to better protect victims

Proposals to improve protections for victims whose intimate images are taken or shared without their consent have been published by the Law Commission of England and Wales. The proposals include:

- An expansion of the types of behaviours outlawed by existing criminal laws on taking and sharing intimate images without consent to include 'downblousing' and sharing altered intimate images, such as deepfakes
- Criminalising threats to share intimate images (including other forms of 'sextortion').
- Automatic anonymity for all victims of intimate image abuse.
- A new framework of offences better focused on this form of criminal conduct and the harm it causes.

The Law Commission is consulting on these proposals and wants to hear from a range of stakeholders including victims, experts and lawyers. The consultation period will close on 27 May 2021, following which, the Law Commission will use the responses to help develop final recommendations for reform.

To find out more about the project and to read a summary or to read the full report, **click here**.

Cases

Derhalli v Derhalli [2021] EWCA Civ 112, 2 February 2021

This was an unsuccessful second appeal of the Husband ("H") in possession proceedings which depended upon the proper interpretation of a financial remedy consent order.

The consent order provided for the former matrimonial home, where the wife ("W") and the children were living, to be sold. It was expected to sell swiftly but given the property market slowing down following the Brexit referendum in June 2016 for an asking price of around £7 million, it did not sell until March 2019 for a sum of £5.9 million.

The FMH was in H's sole name. W had claimed no beneficial interest in it. The consent order made no provision as to the basis of occupation of the property pending its sale, although W had agreed to remove the protective notices registered against the property in her favour. W refused to vacate the property, in 2017, H issued County Court possession proceedings. A declaration was made about the basis of W's continued occupation, effectively requiring her to pay rent to H until she vacated the FMH. On appeal, the judge set aside the declaration, and held that a true interpretation of the consent order was that it permitted W to live rent-free until sale, requiring her only to pay the outgoings. H appealed.

The Court of Appeal dismissed H's appeal, agreeing that a reasonable reader of the consent order, with the parties' background knowledge, would conclude that it was their intention for W to occupy the FMH rent-free pending sale. It noted that the principles of construction for a commercial contract were applicable to the financial remedy consent order to determine W's rights of occupation (***Besharova v Berezovsky* [2016] EWCA Civ 161**), albeit that a financial remedy consent order is not a contract (***MacLeod v MacLeod* [2008] UKPC 64**). The court emphasised its judgment was based on the terms the consent order, and that the case set no precedent.

However, King LJ observed that while most couples were unlikely to engage in protracted litigation about what was ultimately an "obvious proper interpretation of the Order", it may be wise for divorcing couples to set out the terms of a spouse's occupation of the FMH pending sale. Further, in King LJ's view, H's application to the County Court for possession was inappropriate. Disputes about the interpretation of a financial remedy order on divorce should be put to the Financial Remedy Court or the Family Division of the High Court. H should have applied to the Family Court for enforcement or variation of the consent order. However, Asplin and Arnold LJJ reserved opinion on whether it was appropriate for H to bring County Court possession proceedings, as the Court had not heard argument on the issue.

WX v HX (treatment of matrimonial and non-matrimonial property) [2021] EWHC 241, 10 February 2021

This case concerned an application by a wife ("W"), WX, for financial remedy against her husband ("H"), HX. The couple had been married for 33 years. H was a successful banker and W's family had made its fortune in business via previous generations. In financial remedy proceedings, Roberts J calculated the parties' assets were around £54 million. An additional $50 million was held in an offshore trust for which the parties' three adult children were the principal beneficiaries. H and W agreed these funds should be excluded from the assets to be distributed.

The £54 million included the parties' London home, which they jointly owned, and a home in Oxfordshire held by a family trust established by H, of which he was the life tenant. It also included funds inherited by W, £5 million in her sole name and £9 million in trusts established by her family. During the marriage, these funds remained separate from the matrimonial assets and were treated as W's family money. W received occasional capital distributions from the trusts and an income that she used for personal expenditure. For over 16 years, H managed the trust monies for her.

In determining the extent of the matrimonial assets to be shared between the parties, Roberts J rejected H's arguments that:

- The full value of the family's Oxfordshire home (£10.3 million) should not be attributed to him, because he occupied it as a life tenant. The reality was that H would retain the full benefit of the property into the future.

- W's trust monies had been "matrimonialised" and H's investment management had enhanced their value. Roberts J found the monies had not acquired a matrimonial character because H had managed them, and there was insufficient evidence to demonstrate his activities had produced a measurable uplift in their value.

Roberts J ordered an equal division of the matrimonial assets, giving each party around £20 million on a clean break basis. The judge found that both parties had made an equal and significant contribution to the marriage. In addition, W retained her ring-fenced non-matrimonial assets of £14 million.

AG v VD [2021] EWFC 9, 4 February 2021

In this case, the couple were from Russia and had been married for eight years. At the time of the judgment, the wife ("W") was 51 and the husband ("H") was 56. Both had children from previous marriages and the youngest child was W's daughter aged 17. H was a wealthy businessman but placed most of his assets in a foundation and held little in his own name. The parties moved to England in 2010, although H spent long periods in Russia on business. Following divorce and financial proceedings issued in Russia in 2017, W received a half share in the matrimonial home in London, worth around £2.5 million, and no maintenance. In line with Russian practice, no account was taken of assets not owned by the parties, so H's business interests and foundation assets were not considered by the court.

W made a subsequent application to the English Court under Part III of the Matrimonial and Family Proceedings Act 1984. The Court was to consider case law including *Agbaje v Agbaje* [2010] UKSC 13 and *Zimina v Zimin* [2017] EWCA 1429 which set out principles that apply to "the alleviation of the adverse consequences of no, or no adequate, financial provision being made by a foreign court in a situation where there were substantial connections with England" [48]. The Court concluded that there was a "substantial connection with England" being a greater connection with Russia and the Russian order did not provide adequately for the needs of W and her 17 year-old daughter. Despite H arguing that it was a Russian case and that the English Court should not interfere, the Court disagreed and deemed it appropriate for an order to be made by the English Court [57].

Cohen J found that H had personal assets of £3 million and foundation assets to which he had access worth between £17 - £19 million. H also held business interests, the value of which Cohen J was unable to determine. Cohen J awarded W a housing fund of £3.4 million and a Duxbury lump sum of £2.06 million, based on her needs. He commented that the parties had lost all perspective on the case, arguing every point, and together spending over £2 million in costs. For example, W had continued to pursue a sharing claim, despite Cohen J indicating early in the proceedings that the case was likely to be determined by needs.

Harrington v Harrington [2020] EWFC 99, 2 February 2021

This case deal with the wife's ("W"'s) application to publish her final judgment ([2019] EWFC 85) in financial remedy proceedings which would identify the parties and a witness. DJ Hudd granted W's application. At the time of the final hearing, the husband ("H") was an MP and had made findings about his attitude to providing disclosure and discrepancies in his disclosure. It was of public interest to know that public figures are subject to the same treatment as other citizens. While H was no longer an MP, he was at the time of the final hearing and throughout the substantive financial remedy proceedings. Given the extent to which his affairs either were already or ought to have been in the public domain, the interference with his Article 8 rights was not as substantial as it would be if he were a private individual.

DJ Hudd also declined to anonymise the identity of a solicitor witness (Mr Brook), who had given evidence voluntarily in a personal capacity as H's business partner and friend. While Mr Brook was not in public office and was not offering professional services to H in a commercial setting, he was also subject to high standards of probity being a regulated professional. In her judgment, DJ Hudd had expressed concerns about the probative value of Mr Brook's evidence. This was particularly serious given Mr Brook's professional status, such that there was a public interest in publication.

R v R [2021] EWHC 195 (Fam), 18 January 2021

In this case, the Husband ("H") sought interim provision of £21,703.50 per month, in addition to £23,500 per month for rental accommodation, to meet his living expenses. Judge Cusworth listed the raft of other applications before him and also highlighted there was an ongoing challenge to jurisdiction in the proceedings which was being litigated in "State A".

In respect of H's application for interim maintenance in relation to rental provision and for general living expenses, the Judge noted that H "has a further series of items in his budget which are of necessity extremely curtailed for the moment

by the current national lock-down in face of the pandemic. He is seeking £5,000 pcm for a combination of restaurant, theatre, cinema and concert visits, use of a gym and holidays and weekend breaks… None of this is currently required, and whilst some provision may become appropriate in due course, it is quite impossible to anticipate with precision, when that might be." [24] H also sought a full time live in nanny and domestic help which the judge stated may not be applicable in the current national circumstances.

The Wife ("W") had offered H £5,500 per month in interim provision based on her calculation that was the level of H's expenditure on the joint account before separation. Judge Cusworth eventually awarded H the sum of £9,000 per month in relation to his expenditure on the basis that money not expended during lockdown would accumulate and be available to supplement post-lockdown expenditure. In addition, Judge Cusworth ordered a rental allowance for H of £11,000 per month.

The Judge then turned his mind to the level of a legal services provision order that should be awarded to H. At the date of the hearing on and since the parties separation in September 2020, near to £1.3 million had been incurred by the parties in legal costs.

W had offered to pay H £682,000 to cover his legal fees - such offer being put forward on the basis that an extendable Legal Charge would be placed on the family home in the sum of £1.5 million to cover both parties' legal costs to date. The Judge was concerned that W's proposed approach would diminish the value of capital assets in the UK which would then be available for distribution between the parties. Judge Cusworth ordered W to pay H £200,000 which was roughly equivalent to 50% of H's current solicitor's bills, plus an ongoing amount of £150,000 per month from February until June 2021 (£750,000 in total). Judge Cusworth considered that H's costs in relation to his first solicitor was a matter for H to resolve; he did however commented that given the complexity of the issues in the case, the overall costs of both parties was reasonable.

NB v MI [2021] EWHC 224 (Fam) 8 February 2021

This case dealt with an unsuccessful application for a declaration of non-recognition of marriage and a petition for nullity. The wife ("W") sought to argue, relying on two expert reports, that she had not had capacity to consent to marry.

The High Court concluded that W had had capacity (though not wisdom) to consent and the marriage was therefore valid under English Law at its formation. Although W did not understand the full legal and financial consequences of marriage or the differences between marriage under Islamic and UK law, the relatively low standard for capacity to marry was met by W at the relevant time. Mostyn J emphasised that "the wisdom of a marriage is irrelevant".

26.03.21

Money for Nothing? Crypto-assets and their Implications in Matrimonial and Private Client Work

Helen Brander, barrister of Pump Court Chambers, considers the current treatment by the courts and taxation authorities of crypto-assets

For the matrimonial finance and private client lawyer, crypto-assets can form a major part of a client's estate and we are seeing them with increasing frequency. It is vital that we can identify, value and understand them, and advise on their implications for clients, for others interested in client assets, and to assist the court, if necessary.

Where are we now with crypto-assets?

Although crypto-assets were born as recently as 2008 with Bitcoin following the worldwide banking crash, fewer than 13 years later Bitcoin, Ethereum, Litecoin, Monero and similar crypto-currencies and tokens have generated surging interest. At the time of writing on 18th February 2021, according to XE.com, 1 Bitcoin (XBT) is worth £37,052, up from £7,802 just one year ago. On the same date, a Bitcoin exchange traded fund through Purpose Investments opened on the Toronto Stock Exchange, seeing almost seven million shares in the fund change hands before midday and almost ten million shares by close of trading. Ethereum's value grew 750 per cent from January 2020 to January 2021 and the smaller currencies are also gaining value. Tesla and Paypal entrepreneur Elon Musk has spent the last week or so promoting Dogecoin via social media and other outlets, increasing its value as a result. Crypto-assets, although being completely intangible, are currently white-hot property.

Crypto-assets: currency, property or something else?

Crypto-assets began with the person or persons named Satoshi Nakamoto publishing a paper in October 2008 entitled Bitcoin: A Peer-to-Peer Electronic Cash System setting out a vision of commerce transacted between parties with cryptographic proof of transactions, rather than requiring those transactions to take place on trust or via a trusted third party, such as a bank. This is done by the creation of a distributed ledger of transactions which is held on computers around the world and is updated simultaneously on all copies of that ledger whenever a transaction is recorded in it. The ledger is called the blockchain. A person holding Bitcoin or other crypto-assets has a public key (a string of electronic data visible in that ledger) and a private key (a string of electronic information confidential to them and which should be stored safely and away from the public key – preferably in a non-internet accessible mode (a piece of paper in a locked box is perhaps safest!)). To record a transaction on the blockchain where a person providing goods or services is happy to accept Bitcoin or similar in exchange, the purchaser combines their private key with their public key and directs the agreed share of Bitcoin (as any fraction can be transferred) to the vendor, who then also receives a fresh and randomly-generated private and public key, with the transaction being recorded on the distributed ledger / blockchain by the transferee authenticating the transfer. That transaction then becomes historic and cannot be revisited. If the purchaser of the goods retains Bitcoin, they then also receive a new private key and their public key will be modified. The identity of the person, company or entity holding crypto-assets on the blockchain are often not recorded and transactions take place by reference only to anonymous computer address identifiers. These are "on-chain" transactions. "Off-chain" transactions can also take place where, for example, someone transfers their private key to another outside of the blockchain. The new holder of the private key then has control over the asset.

It is now well-established that crypto-assets are considered in English law to meet sufficiently the relevant criteria to be defined as property, namely that a right in or affecting a thing must be:

(a) definable;

(b) identifiable by third parties;

(c) capable in its nature of assumption by third parties; and

(d) have some degree of permanence or stability (*National Provincial Bank v Ainsworth* [1965] AC 1175)

although the question of permanence or stability may remain moot, since a transfer of crypto-currency from one person to another, in fact, necessitates invalidation of the previous "holding" of it and creation of a new "holding", as the previous block on the blockchain which recorded the earlier transaction becomes historic, immutable and irreversible [1]. The **UK Jurisdiction Taskforce** noted, however, in November 2019, that the assets are as permanent as other conventional financial assets which only exist until they are cancelled, repaid, redeemed or exercised.

The effect of crypto-assets being defined as property is that an interest in them can be enforced against the whole world, as opposed to personal rights, which are enforceable only against someone who has assumed a relevant legal duty in respect of them. If one has proprietary rights, they can be protected by injunctions, can be tracked down / traced, take priority over others asserting rights over the thing, and can be recovered where they have been unlawfully taken from the owner of the proprietary right.

To date, crypto-assets have been accepted as property and have afforded their owners proprietary remedies in England and internationally [2]. The lessons learned from these cases have been considered and expanded upon by Byron James and Andrzej Bojarski in their excellent Family Law Week article, **Cryptocurrencies and Cryptoassets: Freezing Orders, Disclosure Orders and the Instruction of Experts**, which includes useful proposed precedents for orders referred to in the title of that article.

Other jurisdictions treat crypto-assets, however, as currency, rather than property. Italy, by legislative decree 90 of 2017 (amending the implementation of EU Directive 2015/849 (IV Anti-Money Laundering Directive)) imposed the same regulations on crypto-currency exchanges as apply to traditional money exchanges, thus treating those assets as a form of foreign currency, although they are defined as a "*digital representation of value not issued by a central bank or public authority*" and so are not declared by any recognisable authority as legal tender.

With their different definitions in different jurisdictions, crypto-assets are treated differently for legal and taxation purposes, and the private client and matrimonial finance lawyer is well-advised to bear this in mind and take appropriate local advice, particularly where the client has international interests.

Taxation issues

In England and Wales, HMRC has been active in assessing how crypto-assets might be chargeable to tax. **They have issued a paper** which all lawyers dealing with such assets ought to consider. In short:

(a) crypto-assets held as a personal investment for capital appreciation in value are liable to capital gains tax upon disposal (including exchange of one crypto-asset for another) of those interests. Any transaction or transfer of value will result in a chargeable disposal at the transferor's marginal rate unless a relief or an exemption applies.

(b) Crypto-assets received from employers as a form of non-cash payment or from crypto-asset mining (crypto-assets awarded for verifying additions to the blockchain ledger), transaction confirmation or airdrops (where someone receives an allocation of crypto-assets as, for example, part of a marketing campaign or advertising, but where they do not receive them as a gift) are subject to income tax and national insurance contributions.

(c) Crypto-assets held by a deceased person form part of their estate and are relevant for inheritance tax.

(d) Where crypto-assets received as income per (b) above are disposed of, then they are treated as capital and gains / losses are taxed accordingly.

(e) Taxation of crypto-assets is based on the holder's residence in the UK. This is relevant for resident individuals who are non-domiciled for tax purposes. If crypto-currency is bought with gains made off-shore by someone making use of the remittance basis of taxation, then the crypto-currency transaction is considered remitted for UK tax purposes and charges arise.

(f) HMRC considered that it would be exceptional for individuals to buy and sell crypto-assets with a frequency, level of organisation and sophistication that amounts to financial trading. In light of the creation of exchange traded funds, then that assumption may require revision. If an individual engages in that activity, then income tax takes priority over capital gains tax and will apply to profits and losses, as it would be considered a business.

(g) Losing a private key (so losing the ability to access the crypto-asset and thus losing the asset itself) does not count as a disposal for capital gains tax purposes. If there is no prospect of recovering that private key, then a negligible value claim can be made, which, if accepted, means that the individual is treated by HMRC as having disposed of and reacquired the same asset (that they cannot access) so that a loss can be crystallised.

(h) Being a victim of fraud or theft of a crypto-asset does not amount to a disposal and the individual cannot claim a loss for capital gains tax. The individual still owns the asset and has a right to recover it. If someone pays for and receives crypto-assets which turn out to be worthless, they may be able to make a negligible value claim to HMRC.

(i) Individuals are well-advised to keep separate records for each crypto-asset transaction as crypto-asset exchanges may only keep records for a short period.

(j) Crypto-asset values must be converted into pounds sterling for inclusion on tax returns and the value methodology must be recorded and kept for consideration by HMRC.

(k) Crypto-assets cannot be used to make a tax-relievable contribution to a registered pension scheme as they are not considered to be currency or money.

Our clients who decide to hold and / or invest in crypto-assets are well advised to consider their tax position carefully. In general, gifts / disposals to spouses and family members will have the same tax consequences as transfers of any other property.

Orders and enforcement

Crypto-assets have appeared in lawyers' caseloads with increasing frequency, but what can one do with them? Sometimes, they form the most significant capital asset, or one party may receive employment income or incentives / bonuses in the form of a crypto-asset. How should that be treated?

As crypto-assets are property, property adjustment orders pursuant to s.24 Matrimonial Causes Act 1973 or property transfer orders pursuant to s.2(1)(c) Inheritance (Provision for Family and Dependants) Act 1975 may be made. This will be a chargeable disposal for capital gains purposes unless an exemption or relief applies.

Maintenance orders and legal services provision orders may be made where the holder of the crypto-asset is required to transfer a sum equivalent to a fiat currency sum, valued on the date of transfer, to the other party, or otherwise is required to liquidate a proportion of the crypto-asset equivalent to a fiat currency sum and to pay that fiat currency over to the other party (both of which will involve a taxable disposal). Accountancy advice should be taken as to whether for the payee this amounts to chargeable income, and / or whether for the payer the draw down or transfer to the other party should be treated on each occasion as a disposal for the purposes of capital gains tax.

In all circumstances where a person resident in the UK, but non-domiciled for tax, transfers crypto-assets to the other party of the court order, the parties and the court must be aware that the transfer itself will be taxable, even if the transaction at first glance takes place off-shore.

If a person anticipates that their registered legal partner or otherwise a trustee (constructive or express) is likely to dispose of their crypto-asset then freezing injunctions may be obtained.

If a person potentially liable to a duty to preserve the crypto-asset while litigation or negotiation continues does, in fact, dispose of it, then there are tracing firms such as Chainalysis, Elliptic and CipherTrace who can, by comparing movements in the public keys of assets and patterns, trace crypto-assets diverted by a party (or perhaps stolen by a hacker or blackmailer). Such orders can be made in conjunction with freezing orders. The reader should note that HMRC has invested and is further investing in tracing software and has requested disclosure of account holder information from crypto-asset exchange platforms, which those platforms are obliged to keep and produce to appropriate authorities.

But what if the holder of the crypto-asset refuses or fails to comply with the order made? If there are other assets held by the transgressor, then enforcement may take place against those assets. But if there are not, the aggrieved party is in an invidious position with the only apparent tools to hand being committal, appointment of a receiver where that might make a difference, or otherwise an order to obtain information from a judgment debtor. Although this may be a route to obtaining compliance with the order, it may be a fruitless exercise.

Legal policy makers and legislators urgently need to take steps to create a method of requiring a holder of crypto-assets to secure their private key in a neutral place to the satisfaction of all parties and the court, pending the outcome and satisfaction of litigation. While the holder of the private key has sole control, then the law, in its current state, is too insubstantial in its effect in the face of an unrepentant transgressor.

[1] Note well, however, that the top six transactions on the chain are vulnerable to revision for a few hours until the distributed ledgers are fully updated and consensus is achieved.

[2] See ***Vorotynseva v Money-4-Limited t/a Nebeus.Com* [2018] EWHC 2596**; *Robertson v Persons Unknown* (Unreported, 15 July 2019, Moulder J); *AA v Persons Unknown who demanded Bitcoin on 10th and 11th October 2019* [2020] 4 WLR 35 (proprietary injunction granted); *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 2; *Ruscoe v Cryptopia Ltd (in liquidation)* [2020] NZHC 728.

2 March 2021

Contact after Findings of Domestic Abuse

Teena Dhanota-Jones, Consultant at Simons Muirhead Burton, analyses a recent case involving the interplay of the law on contact and Practice Direction 12J on domestic abuse.

Introduction

R (no order for contact after findings of domestic abuse) **[2020] EWFC B57** is an important case heard at the Family Court in Oxford by HHJ Vincent. It involved the application of the law on contact and PD12J on domestic abuse. HHJ Vincent sets out the law and procedure succinctly.

Background

The parents met in 2008, whilst mother was journeying around South America. The parents were able to maintain a long-distance relationship. In September 2010 father arrived in England to study for a master's degree. He was granted a student visa for 12 months. The parties separated in June 2011, resulting in father returning to South America.

In June 2011 mother reported to the police that she had been a victim of "serious domestic abuse".

During summer 2012, the parents rekindled their relationship and conceived their daughter R. The relationship did not survive and ended in December 2013, albeit mother had spent some seven weeks in South America.

Earlier Fact Finding Hearing

At an earlier fact-finding hearing HHJ Vincent had made findings against the father in respect of his behaviour towards the mother. Some of the findings are summarised:

> 1. "By June 2011 the mother was experiencing the intensity of the father's focus upon her as demanding and oppressive. She came to feel that she was responsible for his moods, which were changeable, he could be aggressive, particularly in their sexual relations, uncaring of her feelings, and she felt increasingly intimidated and at times scared by him. I found that her experience of the relationship between January and June 2011 was that it was abusive."
>
> 2. "I do not find that the excerpts from texts of emails upon which he relied did establish the uncomplicated and purely loving picture he wanted to suggest…. The messages are raw and written with a great deal of heightened emotion and soul-searching, and are exposing of the mother's feelings at that time."
>
> 3. "There is consistency, over many years, from the mother in the way she describes the father's behaviour. Her complaint was made a couple of years before R's birth, it is hard to conceive what her motivation would be, and if seeking to exclude him from her life, why she at the same time persisted with declarations of love."
>
> 4. "I accepted her account of the change in his behaviour towards her, that he could be cold and unfeeling towards her and at times aggressive in their sexual relationship."

5. "I found that the father had caused physical harm to the mother by insisting on practising on a daily basis Aikido moves on her."

6. "…his behaviour towards her has had a profound effect upon her…"

7. "I found that during the period of the relationship when the father was in England between January and June 2011 he did seek to influence her in ways that made the mother feel increasingly isolated, and to lose self-confidence and her sense of identity."

The applications before the court

Father had applied for an order under the Children Act 1989 for him to spend time with R (his daughter who was 7 at the time of the final hearing) and a parental responsibility order. Mother had opposed the applications and only supported indirect contact; she had also made oral applications for a prohibited steps order and a non-molestation order.

The final hearing

Application for child arrangements order

HHJ Vincent applied the welfare checklist at s1(3) Children Act and guided herself to s1(2)A: the presumption that favours both parents to be involved with the child unless "proved to the contrary." She cited s1(2B) which makes it clear that the "involvement need not be equal and may be direct or indirect."

HHJ Vincent had made findings of fact of domestic abuse and therefore guided herself to PD12J. She cited the following paragraphs:

"**35**
When deciding the issue of child arrangements the court should ensure that any order for contact will not expose the child to an unmanageable risk of harm and will be in the best interests of the child.

36
In the light of any findings of fact or admissions or where domestic abuse is otherwise established, the court should apply the individual matters in the welfare checklist with reference to the domestic abuse which has occurred and any expert risk assessment obtained. In particular, the court should in every case consider any harm which the child and the parent with whom the child is living has suffered as a consequence of that domestic abuse, and any harm which the child and the parent with whom the child is living is at risk of suffering, if a child arrangements order is made. The court should make an order for contact only if it is satisfied that the physical and emotional safety of the child and the parent with whom the child is living can, as far as possible, be secured before during and after contact, and that the parent with whom the child is living will not be subjected to further domestic abuse by the other parent.

37
In every case where a finding or admission of domestic abuse is made, or where domestic abuse is otherwise established, the court should consider the conduct of both parents towards each other and towards the child and the impact of the same. In particular, the court should consider –

(a) the effect of the domestic abuse on the child and on the arrangements for where the child is living;

(b) the effect of the domestic abuse on the child and its effect on the child's relationship with the parents;

(c) whether the parent is motivated by a desire to promote the best interests of the child or is using the process to continue a form of domestic abuse against the other parent;

(d) the likely behaviour during contact of the parent against whom findings are made and its effect on the child; and

(e) the capacity of the parents to appreciate the effect of past domestic abuse and the potential for future domestic abuse."

HHJ Vincent drew her attention to the dicta in the following cases, which were all prior to PD12J (14.09.2017 and the revision 2.10.17):

1. ***Re C (Direct Contact: Suspension)*** **[2011] EWCA Civ 521**;
Re J (a minor) [1994] 1 FLR 729-34;
Re M (a minor) (contact: conditions) [1994] 1 FLR 272

Each of the cases has the same important principle: contact is fundamental, and termination can take place only "if it is detrimental to the child's welfare."

2. Re O (contact: imposition of conditions) [1995] 2 FLR 124 at 128
Sir Thomas Bingham held:

> "that in existing circumstances an order for immediate direct contact should not be ordered, because so to order would injure the welfare of the child."

Again, HHJ Vincent directed herself to how careful she must be in the consideration of this matter despite the finding made against father: a seemingly difficult balancing exercise.

3. *Re L (A child) (Contact: Domestic Violence) & Ors* [2001] FLR 260.
Lady Justice Butler-Sloss:

> "There is not, however, nor should there be, any presumption that on proof of domestic violence the offending parent has to surmount a prima facie barrier of no contact. As a matter of principle, domestic violence of itself cannot constitute a bar to contact. It is one factor in the difficult and delicate balancing exercise of discretion. The court deals with the facts of a specific case in which the degree of violence and the seriousness of the impact on the child and on the resident parent have to be taken into account. In cases of proved domestic violence, as in cases of other proved harm or risk of harm to the child, the court has the task of weighing in the balance the seriousness of the domestic violence, the risks involved and the impact on the child against the positive factors (if any), of contact between the parent found to have been violent and the child. In this context, the ability of the offending parent to recognise his past conduct, be aware of a need to change, and make genuine efforts to do so, will be likely to be an important consideration."

Application for Parental Responsibility

HHJ Vincent emphasised the component of parental responsibility: it has to be in the interests of the child. Further and importantly, the court must look at:

- "The degree of commitment the father has shown towards the child;

- The degree of attachment between him and the child; and

- The reasons why he is applying for the order."

HHJ Vincent concluded: "I am satisfied to the standard of a balance of probabilities that her anxiety is real, persistent and that it stems from the experiences of her relationship with the father."

HHJ Vincent correctly and understandably placed substantial reliance on the conclusion of the expert contained in three risk assessment reports:

> "At root of Mr Kent's analysis is the dynamics of the parental relationship. In his view essentially the parents are stuck; the mother remains traumatised and emotionally fragile as a result of her experiences in the relationship, and the father is unable or unwilling to acknowledge responsibility for the harm he caused to her, regards it as historic and not relevant to present circumstances, and instead now blames her for failing to facilitate a relationship between daughter and father."

The Honourable Judge then applied the welfare checklist and made some insightful observations. R is too young to provide any reliable information. However, the Judge considered that mother might well relay her feelings to R, which would be damaging to R. Further, mother is R's emotional support, mother suffers with anxiety which is brought to the forefront when she has to contemplate communication with the father. Such an impact on mother would impact on her ability to be the only emotional support for R. Interestingly there had been shown in court a story board prepared by R, containing photographs of the father. However, the father had refused to look at this story board, and remained entrenched in his assumption that mother had been derogatory about him to R.

HHJ Vincent then directed herself to the risk of harm to R. She set out the impact of:

a. the parent conflict; which would be inherent and ongoing particularly when the father dismisses the mother's concerns as "absurd, fabricated and malicious…..he does not accept that there is any need for him to make changes…"

b. the exposure of the intensity of father's emotions, which was described as "overwhelming".

c. the father's inability to prioritise R's needs before his own; the father suggested that a DNA test be undertaken and that the mother should be untruthful to R about this.

Overall it would seem that the above detailed analysis about the risk of harm was present and acute.

HHJ Vincent then appropriately considered whether the risk could be managed. She concluded: "I do not consider that the risks could successfully be managed with intervention from social services, supervised contact or other third party." Her poignant conclusion was: "Change starts with responsibility. The father has not demonstrated any real ability to accept the findings of the Court, to acknowledge that his behaviour towards the mother was experienced by her as abusive, and that her response to him is caused by the way that he behaved towards her."

Relevant references to PD12J

Directing herself to paragraphs 35 to 37 of PD12J she held that:

Para 35:
1. There will be unmanageable risk of harm if direct contact takes place, to both the mother and R:

"I do not consider that the physical and emotional safety of the child and the parent with whom the child is living can be secured before during and after contact."

Para 36:
2. There were findings of fact of domestic abuse and risk assessment reports had been obtained. HHJ Vincent correctly placed huge reliance on the findings in those reports in accordance with paragraph 36. The expert considered that: "…the parents were stuck." The father's inability to accept any responsibility for his behaviour sent a clear message to the Judge that father would remain entrenched in his opinion. His case that there were only two findings of fact against him were misguided and inaccurate. No doubt this cemented the Judge's view of the real and possible risk to the mother and R.

Para 37:
3. HHJ Vincent considered each of the factors and her firm conclusion was:

"With regard to the specific matters at paragraph 37 of the practice direction, I have considered the impact of the continued parental conflict upon R and the risks that would pose to her relationship with each of her parents. Her mother's ability to care for her would be impaired and her feelings that in pursuing a relationship with her father may cause her mother unhappiness or anxiety are likely to be burdensome. Because of the father's personality, the intensity of his emotions, she may be subject to feeling overwhelmed, confused, constrained to follow his lead, or responsible for his emotions. She is at risk of being exposed to the high levels of negativity with which he sees the mother and her parenting could be undermined as a result or she could feel conflicted."

The decision

1. Father was not granted direct contact.

HHJ Vincent gave a very firm and forthright reason:

"While the father is so fixed in his perspective that he is the victim in the scenario and while he holds such a relentlessly negative view of the mother, and while his interactions with her throughout these proceedings have been to seek to undermine her, accuse her, and belittle her experiences, there is no prospect of her anxiety being lessened and of feeling any reassurance that contact for her daughter will be safe. Her own emotional safety would continue to be adversely impacted, and this is likely to have an adverse effect on her capacity to parent her daughter and other children."

2. Father was not granted parental responsibility.

HHJ Vincent held:

"I do not consider it appropriate that he should exercise parental responsibility in circumstances where he does not have a relationship with her, is not going to be in a position to make informed decisions about what

is in her welfare interest and where he has a very fixed view that the child's mother is wrong and that his perspective is right.."

3. Indirect contact via skype

Albeit this was not suggested, HHJ Vincent provided an extremely helpful summary as to why this was deemed to be wholly inappropriate by the mother:

> "The mother gave reasons as to why she did not consider the previous remote contact worked. It would be a very direct intrusion into the mother's home, which would fuel her anxiety, either she or a family member would have to supervise, which she would not feel comfortable with, and it is not always an easy way for children to connect to someone with whom they do not have an established bond already. It could put pressure on R if she felt that there was information about her home and surroundings that she should not be sharing. It is harder to supervise and manage once children get to a stage where they have access to a smartphone or tablet or computer in the house."

4. Indirect contact

Mother agreed to indirect contact via exchange of cards and letters. HHJ Vincent granted indirect contact and defined this to include:

- letters;

- cards; and

- gifts on Christmas and birthdays.

5. Non molestation and prohibited steps order

HHJ Vincent was not convinced that these orders were required.

Comment

This matter has showcased the robust approach much-needed by Judges to have PD12J at the forefront of their mind whenever there have been findings of domestic abuse. The application of the law in children disputes where there are findings of domestic abuse is more intrinsic and detailed, and the welfare checklist is simply not enough.

The case highlights the balancing exercise that the Judge had to make against the backdrop of a father who had remarried and had another child and seemingly had at least apparently moved on. The implementation of PD12J has brought to the forefront that domestic abuse in contact applications requires proper and thorough investigations. The procedure of a fact-finding hearing and then risk assessments serves to support that such investigation is necessary, without which the outcome of this case may have been very different, if all the court had were statements and a CAFCASS officer's report. Perhaps father would have swayed a judge by way of a statement of a new rosy life with his new family and may have even convinced a CAFCASS officer. Fortunately, PD12J has dictated that domestic abuse is a pertinent issue in contact applications.

10/3/21

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Protecting Women Means Seriously Tracking Stalkers And Abusers

Baroness Jan Royall of Blaisdon, principal of Somerville College, Oxford and former leader of the House of Lords, explains why women will remain at risk until there is a coherent system of proactively identifying and monitoring serial stalkers and abusers.

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Thanks to vital work in the Commons and now Lords, important changes have been made to the government's **Domestic Abuse Bill** – through both advocacy and amendment. This will have a huge impact on the lives of women and children but there is more to be done to tackle gender-based violence and misogyny.

Stalking is murder in slow motion, and we must treat it as seriously as other crimes. No woman should have to live in fear of her life. That is why I have tabled an amendment to proactively identify, assess and manage serial and repeat high-risk and high-harm domestic abusers and stalkers. Formally backed by a cross-party alliance of other peers, it would also ensure a more coordinated approach to data collection on perpetrators.

A few pockets of good practice already exist, including a new pilot scheme in Sussex set up to identify and target specific stalkers for psychological therapy. It is great that the local police and crime commissioner, Katy Bourne, was awarded Home Office funding specifically for intervention and evaluation.

Perpetrators travel but information about them remains static. It is widely recognised that the current system is not working, and guidance is being issued.

But this really should be happening throughout the country and serial perpetrators should also be included on the VISOR (Violent and Sexual Offenders) database. It should be a matter of national policy, laid down in statute so that women are protected wherever they live, rather than the rather random locally-driven set up that we have now.

As a result, there is no coherent and consistent sharing of information across police services and other agencies. Perpetrators travel but information about them remains static. It is widely recognised that the current system is not working, and guidance is being issued.

Government-funded strategies are being implemented by charities, but my fundamental view is that the state has the prime responsibility for the protection of its citizens and this needs a degree of consistency across the board, as well as systems for ready exchange of data.

A failure to properly focus on perpetrators – the men who have caused the terror and violence – will mean that many women and children will continue to be unprotected.

Some have suggested my amendment would lead to confusion, should a separate group of offenders be identified. The reality, however, is that it would provide clarity and ensure that domestic abuse, coercive control, and stalking were included in risk management discussions.

Ministers, meanwhile, say the problem is a deficiency in practice not the process while acknowledging inconsistencies in the sharing of information. Given such recognition that victims and their families are being failed, why not accept an amendment that would ensure all of the necessary services had the tools and data available to minimise the gaps.

Notwithstanding the clear progress that the Bill as it stands signals, a failure to properly focus on perpetrators – the men who have caused the terror and violence – will mean that many women and children will continue to be unprotected and remain at risk.

That is why the government must go the extra mile and make this landmark legislation properly fit for purpose.

15/3/21

Capitalisation of Child Maintenance: a very rare bird

Jo Carr-West, partner with **Hunters**, considers the implications of Mr Justice Mostyn's recent judgment in AZ v FM.

Since 1998 the courts have had the power, on an application to vary spousal maintenance, to order capitalisation by terminating the periodical payments order and making a capital award to meet income needs. In his innovative judgment in ***AZ v FM* [2021] EWFC 2**, Mostyn J interpreted s31 Matrimonial Causes Act 1973 as also permitting capitalisation of child maintenance on a variation application, a power the court was not previously considered to have. However, whilst this is a significant development, it is clear that – for now at least – capitalisation of child maintenance will be ordered in only very limited circumstances.

What are the relevant provisions of the Matrimonial Causes Act 1973?

Prior to 1 November 1998 the court was expressly prohibited from capitalising maintenance on a variation application by s31(5) MCA 1973, which then provided:

> No property adjustment order shall be made on an application for the variation of a periodical payments or secured periodical payments order made (whether in favour of a party to a marriage or in favour of a child of the family) under s. 23 above, and no order for the payment of a lump sum shall be made on an application for the variation of a periodical payments or secured periodical payments order in favour of a party to a marriage (whether made under s. 23 or under s. 27 above).

This provision was a source of frustration to the judiciary, as it prevented judges from imposing a clean break if (as is often the case) it had become affordable only after the final order was made in financial remedy proceedings – for example on the sale of a business or receipt of a pension lump sum.

The Family Law Act 1996 introduced changes amending s31(5) to create an exception, set out in s31(7A)-(7H), which empowered the court, on an application to vary spousal maintenance, to capitalise the payments and direct that the party in whose favour the order was made not be able to make any further applications for maintenance.

Whilst s31(7A)-(7H) explicitly relate only to spousal maintenance, in *AZ v FM* [2021] EWFC 2 Mostyn J considered whether s31(5) empowered the court to capitalise child maintenance by way of a lump sum order.

What were the facts of the case?

The parties were both well-respected architects in their mid-50s whose financial remedy proceedings had been determined in 2011. There was one child of the marriage, now 19 and studying at university but otherwise based with the wife. The financial remedy order had provided for a clean break as between the parties, with the husband paying child maintenance of £1,700 per month until the later of the child reaching 18 or concluding tertiary education. There had been parallel proceedings in the Chancery Division in respect of the parties' architecture practice which concluded in 2014.

The husband had moved to the US and in October 2017 applied to vary child maintenance to £800 per month on the basis that the child's needs had reduced and that the order was no longer affordable for him. His application was heard in July 2018, with judgment reserved and given in January 2019 (a delay Mostyn J regarded as "*unacceptably long*"). Following requests for clarification and supplemental judgments, the order was not perfected until October 2019.

The order was largely in accordance with the wife's open position. It provided for a small reduction in periodical payments and ordering that that the "*payments shall be made entirety in advance*" – essentially capitalisation. In recognition of the fact that future child maintenance claims cannot be dismissed, the wife agreed not to make any further applications for the child's maintenance, and gave an undertaking that were she to seek further maintenance for the child, she would immediately repay any sum awarded (though Mostyn J referred to this is a "*symbolic gesture*" given that the court could release the wife from her undertaking if a further application was made).

In making this order, the trial judge noted that it was "extremely depressing … to see that [the final order in the original proceedings] which was designed to address the financial matters between them and bring finality has given rise to such an extraordinary level of conflict". He also noted that they had spent £124,586 on costs (despite their positions being only around £50,000 apart), and that the husband seemed to "thrive on litigation". The judge considered he could not ignore this history in seeking to arrive at the correct solution.

How did Mostyn J address the question of the court's jurisdiction to capitalise child maintenance?

The husband appealed on the basis that "*the judge made a fundamental error of law by capitalising child maintenance when there is no jurisdiction under the Matrimonial Causes Act to do so*". The trial judge's order was stayed pending the husband's appeal with the original order remaining in force, but the husband had paid no child maintenance since March 2020, and informed Mostyn J that, in any event, he intended to issue a further application to vary.

The husband argued that there were three main reasons for the prohibition on capitalisation of child maintenance:

> 1. Unlike applications for spousal maintenance, applications for child maintenance cannot be statutorily dismissed, so the child cannot be prevented from making a further claim after capitalisation.
>
> 2. The child's circumstances may change; for example they may move to live with their other parent, or drop out of university.
>
> 3. Child maintenance is intended to be variable based on the paying parent's income and the child's needs. This is precluded if child maintenance is capitalised.

As Mostyn J noted, some of these points went to the question of whether it was appropriate for child maintenance to be capitalised, rather than to the question of whether the jurisdiction to capitalise existed.

In determining whether the court had the power to capitalise child maintenance, Mostyn J considered the proper interpretation of s31(5). The subsection currently reads as follows (emphasis added):

> Subject to subsections (7A) to (7G) below and without prejudice to any power exercisable by virtue of subsection (2)(d), (dd), (e) or (g) above or otherwise than by virtue of this section, **no property adjustment order or pension sharing order or pension compensation sharing order** shall be made on an application for the variation of a periodical payments or secured periodical payments order made (**whether in favour of a party to a marriage or in favour of a child of the family**) under section 23 above, and no order for the payment of a lump sum shall be made on an application for the variation of a periodical payments or secured periodical payments order **in favour of a party to a marriage** (whether made under section 23 or under section 27 above).

Mostyn J held that this sub-section means that whilst the court cannot, on an application to vary spousal or child maintenance, make a property adjustment or pension sharing order, and cannot, on an application to vary spousal maintenance, make a lump sum order, there is no equivalent prohibition on making a lump sum order on an application to vary child maintenance.

Mostyn J concluded: "*The language is completely clear. Where the application is to vary a periodical payments order in favour of a child of the family then there is power to award a lump sum*". He added that where a variation application relates to child maintenance, s31(5) "permits" the court to discharge the order and instead order a "commutation payment".

Arguably, s31(5) fails to prohibit such an order rather than actively permitting it, whereas s31(7A)-(7H) explicitly permit the court to capitalise spousal maintenance. It is however the case that s31(5) does seem to imply a difference in approach between spousal and child maintenance in respect of making lump sum orders on a variation application.

Mostyn J "*readily admit[ted]*" that an order capitalising child maintenance would be "extremely unusual", and that he had no memory of ever encountering one, but noted that this did not mean the court lacked jurisdiction to make such orders.

It was recognised that, unlike spousal maintenance claims, claims for child maintenance cannot be dismissed. Mostyn J addressed this by providing that "where the court has made a capitalisation of child maintenance it would need a change

of circumstances of exceptional magnitude before the court would augment what was intended to be a one-off commutation payment".

When should child maintenance be capitalised?

Mostyn J made clear that he did not expect the power to capitalise child maintenance to be widely used, saying "*it will remain a very rare bird indeed*".

In particular, the inability of the court or the parties to exclude the jurisdiction of the CMS for more than twelve months under the Child Support Act 1991 meant that capitalisation of child maintenance could only properly be considered where the 1991 Act "could not apply" – for example because one of the parents or the child was habitually resident abroad, or because the child was over 19.

Further, in the "overwhelming majority" of cases, the "risks and uncertainties" inherent in capitalisation would lead the court to make traditional periodical payments orders. However, capitalisation of child maintenance had been appropriate in this case due to the combination of:

- Incessant litigation on which the husband thrived;
- Repeated defaults by the husband in the payment of child maintenance; and
- The child being 19 meaning there was a relatively short period of maintenance remaining.

By the end of the hearing before Mostyn J, the parties had spent £224,000 disputing approximately £50,000 (even with the wife now acting in person); the husband was in default and had indicated his intention to issue a fresh variation application, whilst only a couple of years of child maintenance remained. These circumstances make it entirely understandable that Mostyn J was keen to uphold the solution of the trial judge which aimed to avoid further litigation between the parties or default by the husband. Whilst the interpretation of s31(5) MCA 1973 is novel, it is well-grounded in the wording of the statute.

What if the MCA 1973 does not apply because the parents were never married – can child maintenance still be capitalised?

Mostyn J's decision relies on the wording of the MCA 1973, which applies only to parties who were married.

Where a child's parents were never married, and the CMS does not have jurisdiction, child maintenance is governed by Schedule 1 to the Children Act 1989. In ***MT v OT* [2018] EWHC 868 (Fam)**, Mr Justice Cohen made a child maintenance order based on a capitalisation approach. The circumstances bore some similarities to AZ v FM: the father lived abroad meaning the CMS lacked jurisdiction, there had been incessant litigation between the parties since their separation in 2003, the father had failed to comply with previous maintenance orders, and the children (twins) were now almost 17.

Cohen J ordered that the father pay a lump sum to cover maintenance for the next five and a half years, as well as educational and other costs, to the mother's solicitors, who would make monthly payments to the mother. If there was a surplus – for example if the children did not go to university – it would be returned to the father. Thus Cohen J's order achieved the security of capitalisation for the mother, but without the risk of over-payment for the father.

When might capitalisation of child maintenance be useful?

In practice, capitalisation of child maintenance seems likely to be used as an enforcement mechanism where there has been past default, in particular where the paying parent resides outside the jurisdiction meaning the CMS lacks jurisdiction and other enforcement mechanisms suitable for maintenance claims (such as attachment of earnings orders) are unavailable. Orders are only likely to be made where the remaining period of maintenance is limited, making predicting the child's future arrangements a less uncertain task.

Mostyn J addressed only the possibility of capitalisation of child maintenance on a variation application, and it is not clear whether the court would countenance such an order within the initial financial remedy proceedings. For example, there may be cases where the parties both prefer to capitalise child maintenance, e.g. if there will otherwise be a clean break, the period of child maintenance is limited, and they are keen to have no ongoing financial nexus. Equally, there may be cases where it is apparent from the outset that compliance with a child periodical payments order is unlikely, for example where the payer is abroad and has defaulted on interim maintenance payments, making capitalisation of child maintenance desirable from the start. It would be interesting to see how the court would approach such situations.

Overall, the potential scope and extent of the power to capitalise child maintenance remains to be seen, but for now family practitioners are likely to welcome the judgment as providing a helpful new tool to enforce child maintenance obligations in certain scenarios.

16/3/21

The Unequal Power to Grant and Remove PR from Biological Parents

Stephen Williams, Barrister, **St Mary's Chambers**, calls for reconsideration of the restrictions on the acquisition of parental responsibility by fathers

There can be no doubt that in society men have historically had many advantages over women and many of these unfair and unjustifiable advantages continue to exist today. However, there can equally be no doubt that when it comes to parental responsibility ('PR') for children some men are at a distinct disadvantage for no particular, justifiable reason. As the stereotypical 'family unit' has changed, this is an area of law that (whilst niche) appears far overdue for updating.

Current legal position and the perceived problems

Parental responsibility is defined by s3(1) Children Act 1989 as '*all the rights, duties, powers responsibilities and authority which by law a parent of a child has in relation to the child and his property.*' It is notable, however, that specifically s3(4) does not exclude an individual who does not have PR from an obligation to maintain their child.

The reason why all of this is relevant is that all birth mothers acquire parental responsibility automatically, and this acquisition is not affected whether or not they are married to the father of the child. Likewise fathers who are married to the mother gain automatic parental responsibility ; however, if they are not married to the birth mother, then they have to 'acquire' parental responsibility through other provisions within the Act. The circumstances in which an unmarried father might acquire parental responsibility are set out in s4(1) CA 1989. Broadly they are:

- He is registered on the birth certificate for the child. This has to be on the first registration rather than on a later alteration;

- He and the mother enter into a 'parental responsibility agreement' providing for him to obtain PR; or

- He obtains an order from the court granting him PR.

If the number of children born out of wedlock grows, greater will be the number of fathers who need to utilise s4(1) to acquire parental responsibility for their children. In many cases they are registered on the birth certificate and there is no difficulty or hardship suffered. However, if they are not (and the mother doesn't agree to enter into a parental responsibility agreement), then they have to go to court to acquire parental responsibility.

When the government enacted the Children Act, it did not provide any form of statutory test as to how a court would judge whether a father should acquire parental responsibility through a court order, albeit the s1(3) welfare checklist applies to such a decision. Inevitably therefore caselaw has developed to fill the void. The most regular 'test' that has been sought to applied is from Re H within which the Court of Appeal (under the previous statute) provided the following guidance:

> 'the court would take a number of factors into account, including the degree of commitment which the applicant had shown towards the child, the degree of attachment which existed between them, and his reasons for applying for the order.'

This tripartite test has subsequently been said by Ward LJ in *Re C & V* to not be a comprehensive test, but simply a list of factors to be used to '*answer the more general question of whether or not a father has shown genuine concern for the child and a genuine wish to assume the responsibility in law that he already had by natural causes*'. However, crucially the court retains a discretion as to whether such a father should have parental responsibility, a discretion which is not exercisable in the case of a mother or indeed a married father.

Inevitably there are circumstances in which a discretion about whether an individual should have parental responsibility are sensible. A child born as a result of a violent rape is an obvious and vivid one. However, the child born out of a violent rape by a father married to his mother would not be so protected, and no discretion would be applicable in these circumstances. By contrast, a child born out of a loving, but non-marital, relationship may have a father who does not have PR because he was never registered, and he doesn't have the funds or ability to apply to court to acquire PR.

The situation is compounded further when considering who can have their PR terminated. The only circumstance in which a birth mother can lose her PR is where an adoption order is made for the child. This is also the case for a married father. However, an unmarried biological father who has acquired parental responsibility through any of the mechanisms in s4(1) can have that same PR removed via court order pursuant to s4(2A) CA 1989. It is however acknowledged that this is a very rare order to be made by the Family Court.

Again, there are inevitably situations where it can be accepted that there are perfectly legitimate reasons why a court might want to remove a parent's PR. However, the current statute provides for only a small subsection of PR holders to face the possibility that their parental responsibility might be removed by court order. There is no apparent justification for this distinction as to why one subset of parents who commit such wrongdoing should be liable to have their parental rights removed whilst others do not?

For both the acquisition and removal of PR there is an inevitable inequality between the sexes of parents but also between the historically recognised 'legitimate' and 'illegitimate' children. It is difficult to see why in 2021 this distinction exists or why it should continue to exist. Such a disparate position cannot be in the best interests of children.

Proposed changes

As for how the position could be changed to remedy these apparent inequities, I would suggest a few changes to the existing statute.

Firstly, the ability for a court to remove parental responsibility appears to be a legitimate and appropriate order to make in limited circumstances. Inevitably the circumstances would vary but there has been developed a considerable bulk of caselaw on the issue . To remedy the perceived inequality (as set out above) the power under s4(2A) CA 1989 should be extended to include those who acquire their parental responsibility automatically on birth. It is acknowledged that this may lead to other redrafting of the statute, but this would fulfil the legitimate aim of providing equality for the power to remove parental responsibility from parents in circumstances applicable to all.

Secondly, with respect of addressing the inequality on the granting of parental responsibility, there is clearly a public interest for parents to be assumed to have parental responsibility. For every parent to have to apply for parental responsibility would be unworkable. Inclusion on the birth certificate has enabled a large number of unmarried fathers to acquire parental responsibility, as have parental agreements. It is unclear to me precisely how many mothers (who didn't include the father on the birth certificate) subsequently enter into such agreements; whatever the number, they help in reducing the number who have to go to court.

The principal focus for any change is therefore the fathers who do not feature within these other categories. All other fathers (and indeed all mothers) acquire PR automatically without having to pass any form of discretionary test. It is my view that almost any individual (see below) who can prove that they are the biological father to a child, should also have the same automatic grant of parental responsibility.

The mechanism to achieve such a change would appear to be an addition to the statute to provide that either with the confirmation from the mother that they are the biological father to a child or DNA testing that proves this biological connection they be granted PR automatically on a paper application. All the arguments about discretion would be removed and there would be a presumption in favour of PR being granted. Of course, in the circumstances where PR was not thought appropriate, there would be the power to remove that automatically acquired PR through the pre-existing powers under s4(2A).

It is accepted that these suggestions do not cover the wide array of differing families that now exist in our modern society. Additional considerations would need to be had with respect of sperm donors, and limits would be required to prevent

such biological fathers automatically being able to obtain PR for all of their biological offspring years later. This however is a limited exception to a general rule.

Similarly, it might also be argued that for some vile offenders the presumption should be that they never should have PR and it shouldn't be victims who have to go to court to take those automatic rights away. However, these incidents are very much the exception to the standard case that comes before the Family Court and with proper judicial oversight (and the provision of legal aid through the Legal Aid Agency) such exceptions can be properly managed. There may indeed be other specific nuanced arguments that individuals may be able to come up with against these suggestions. However, it is my view (of course always willing to be persuaded) that these exceptions do not make the unequal treatment on grounds of sex or marital status any more justifiable in 2021 and the rules need to be changed.

17/3/21

Children: Public Law Update (March 2021)

John Tughan QC of 4PB considers the latest judgments that Public law child lawyers need to know about.

In this update I will consider the following recent cases and issues:

- The inter-relationship of criminal findings with facts found in care proceedings
- When to seek clarification of a judgment (and when not to do so)
- The power to control documentation within the proceedings and afterwards
- The refusal of placement orders
- The competence of a child to give instructions, the interplay with his autism, passage of time between assessments of competence and the difference between public and private law issues
- When findings of fact are open to a court
- Recusal

The inter-relationship of criminal findings with facts found in care proceedings

The case of *Re T and J* [2020] EWCA Civ 1344 raised issues relating to the inter-relationship of facts found in the care proceedings with those found in criminal proceedings. The Court of Appeal heard the Mother's appeal against facts found in the family court. She had been found to have inflicted some of the bruising, bite marks and lacerations to an 18-month-old child and was found to be in the pool of perpetrators for some of those injuries. The injuries occurred shortly after she had commenced a new relationship with K. In the care proceedings K refused to give evidence. The judge found that K had been out of the home at the relevant time and that the Mother had inflicted the injuries. At the criminal trial of K the Mother changed her account to say that K was in the home. K was convicted of causing grievous bodily harm and sexual assault while the mother was acquitted of GBH but convicted of cruelty. The mother then appealed the findings within the care proceedings.

Part of her grounds of appeal were that the care judge had failed to draw adverse inferences from K's refusal to give evidence in the care proceedings.

The Court of Appeal (Baker LJ giving the lead judgment) held that:

> "neither the fact that a jury has reached a verdict on criminal charges that is inconsistent with earlier findings in care proceedings nor the simple fact (if it be true) that the evidence heard by the jury was different from,

> or more comprehensive than, that adduced before the judge in the family proceedings is sufficient by itself to justify the conclusion that the findings in the family proceedings were wrong so as to require an appellate court to overturn the findings. It may, however, be sufficient to justify a reopening of all or part of the fact-finding hearing."

On the issue of the failure to draw an adverse inference from K's refusal to give evidence, the Court set out the law and concluded that the judge was not obliged as a matter of law to draw such an inference. He declined to infer that K was the perpetrator but did take into account the refusal to give evidence in his overall analysis. The judge could not be criticised for his approach.

The Court repeated that the Children Act 1989 Pt XII s.98(2) only gave protection against the admissibility of statements in criminal proceedings and not against their use in a police enquiry into the commission of an offence.

The case had involved two applications to re-open the fact-finding process, both refused. During the appeal the local authority indicated that it would no longer oppose a further application to re-open the facts.

When to seek clarification of a judgment (and when not to do so)

The case of ***Re O (A Child) (Judgment: Adequacy of Reasons)*** **[2021] EWCA Civ 149** was a case in which the Court of Appeal overturned findings of sexual abuse. There is an interesting analysis of the deficits of the fact-finding judgment, which included the conclusion that the judge had compartmentalised the evidence. The Court went on to consider when clarification of a judgment should be sought. Baker LJ set out the earlier relevant decisions and the current practice direction and held that:

> "...where the omissions [from the judgment] are on a scale that makes it impossible to discern the basis for the judge's decision, or where, in addition to omissions, the analysis in the judgment is perceived as being deficient in other respects, it will not be appropriate to seek clarification but instead to apply for permission to appeal."

Peter Jackson LJ held that:

> "It is of course the responsibility of the trial judge to give sufficient reasons. But all judgments are capable of improvement and where there has been what the Practice Direction refers to as 'a material omission from a judgment' the court is required to 'provide additions', either on its own initiative or on request. That will be particularly suitable where an issue has escaped attention or where a part of the reasoning is not fully clear or needs amplification. Where the line is to be drawn will depend on the circumstances, but there will come a point where what would be required would not be additions but foundations. In those circumstances, the difficulties in returning to the trial judge were explained by Wall LJ in ***Re M-W (Care Proceedings: Expert Evidence)*** **[2010] EWCA Civ 12**, when, speaking of that case, he said:
>
> > '47. The difficulties about the Emery Reimbold solution are, in my judgment, legion. I put on one side the fact that this was a reserved judgment. What strikes me with greater force – if my analysis is correct – is that the judge has made up his mind without properly considering the evidence of Dr. T, Messrs M and F and the guardian. Were we thus to invite him to reconsider, he would be bound to reject their evidence. To put the matter another way, the conclusion which he has reached would render impossible a proper judicial discussion of that evidence. Equally, were the judge to change his view and find the threshold satisfied, neither the mother nor the father would have any confidence in the judge's final conclusion.'"

The power to control documentation within the proceedings and afterwards

In ***Re R (Children: Control of Court Documents)*** **[2021] EWCA Civ 162** the Court of Appeal considered the power of the court to control documents. The issue arose when an intervenor ("R") appealed against a decision that he was not entitled to physical copies of the judgment or the written submissions.

As to the power to withhold documents, Peter Jackson LJ (giving the lead judgment) held that there was no doubt that there was such a power and went on to conclude that:

> "When faced with an application to withhold documents or information, the court is required to uphold the rights protected by Articles 6 and 8, and possibly Article 3. In family proceedings, the right to respect for private life will almost inevitably be engaged, but the transmission and preservation of private information in documents is a necessary part of any system of justice. There will however be rare cases where the possession of documents may amount to more than an interference with privacy. In this case the Judge considered that the use of descriptions of the children's abuse for the sexual gratification of the abuser and others would amount to subjecting them to degrading treatment within the meaning of Article 3. Whether

> that is so in a given case will depend on the circumstances: *Kudla v Poland* (2000) 35 EHRR 198 at 91-92. But the fact that there are cases in which a breach of Article 3 comes into question makes it self-evident that the court is entitled and may be obliged to control the possession and distribution of documentation. The existence of that power is reflected in the Rules....
>
> ....In plain language, R has everything he needs to understand the Judge's decision. He should not be allowed to prolong his abuse of these children by being given possession of graphic descriptions of what he has done to them, and he is not to be trusted not to pass the material on to others like him."

The refusal of placement orders

In ***T & R (Children) (Refusal of Placement Order)*** **[2021] EWCA Civ 71** the Court of Appeal determined an appeal by a local authority and guardian against the refusal of a placement order. The family were members of the traveller community. Following findings of fact the local authority's care plan was for long term foster care for the four older children and adoption for the two younger children. The judge made care orders and approved the care plans for the elder children. He refused to endorse the plan of adoption for the younger two children, dismissed the placement order applications, invited the local authority to reconsider the plans and made interim care orders.

The judge summarised the views of the local authority social worker as:

> "the need for permanence was the ultimate goal and it came above the need to maintain the children's culture and heritage and with that, inevitably, the risk of contact never taking place were there to be an adoption."

The consensus of all the professionals was that T and R should be placed for adoption. The Court of Appeal (Baker LJ giving the lead judgment) decided that the Judge was entitled to conclude as he did. Following the decision in ***Re B (A Child (Post Adoption Contact)*** **[2019] EWCA Civ 29** which re-stated the law on post-adoption contact orders and confirmed that it would be an extremely unusual case in which such orders were justified, the judge was entitled to conclude that post-adoption contact might not take place and there was clearly a risk that post-adoption sibling contact might not take place. The cultural heritage and sense of belonging that these children had was a real and legitimate factor and the absence of post-adoption parental contact was also a risk. Given the evidence, it was a risk that the judge was entitled to conclude should not take place.

In refusing to make placement orders in respect of two younger children (aged three and two), the judge was entitled to depart from the professional witnesses and guardian.

The competence of a child to give instructions

Z (Interim Care Order) **[2020] EWCA Civ 1755** is an interesting case on issues surrounding the interim removal of children from the care of their parents. This was a private case involving allegations of alienation. The 15-year-old boy with autism was assessed in July as not having the capacity to instruct a solicitor. That assessment was made within the private proceedings. In November the issue before the court was the removal of the boy from his Father's care into a foster placement pending his move to his Mother's care. The interim care order was granted with a care plan of removal.

The Court of Appeal (Baker LJ in the lead) allowed the appeal for a number of different reasons including procedural irregularity and the fact that the Father's evidence was not heard at the interim hearing.

However, Baker LJ also considered the assessment of competence of a young person to give evidence, noting that the rules were "far from straightforward". Proceedings brought under s8 were distinct from those brought under s31 Children Act 1989. The latter are "specified proceedings", the former are not. Different rules apply to each, with considerable overlap.

> "Attitudes to the direct participation of children in proceedings have evolved in recent [in ***Re W (A Child)*** **[2016] EWCA Civ 1051**] Black LJ observed (paragraph 27):
>
> > 'The question of whether a child is able, having regard to his or her understanding, to instruct a solicitor must be approached having in mind this acknowledgment of the autonomy of children and of the fact that it can at times be in their interests to play some direct part in the litigation about them. What is sufficient understanding in any given case will depend upon all the facts.'
>
> It is also important to note the observation of this Court in *Re S (A Minor) (Independent Representation)* [1993] 2 FLR 437 that 'understanding is not an absolute. It has to be assessed relatively to the issues in the proceedings'."

Baker LJ emphasised the burden that was incumbent on a court when dealing with a child with disabilities. It was wrong of the court to have relied upon the earlier assessment of competence:

> "...Four months had passed since that assessment and, at Z's age, the passage of such a period of time may be significant. Secondly, the distinction in the rules between specified and non-specified proceedings obliges the court to ensure that any assessment of competence in public law proceedings focuses on the issues arising in those proceedings which involve the statutory intrusion into family life and therefore inevitably an interference with Article 8 rights. Thirdly, on the specific facts of this case, the primary issues in the two sets of proceedings were different. The primary issue in the private law proceedings was whether Z should have contact with his mother. The primary issue in the public law proceedings at the interim stage was whether he should be removed from his father. If, as this Court observed in Re S, the level of understanding has to be assessed relatively to the issue in the proceedings, Z's understanding of the issues surrounding the proposal that he be removed from the family home may be materially different to his understanding of the issues relating to contact with his mother."

When findings of fact are open to a court

The case of ***X, T, A, E and S (Children)*** **[2020] EWCA Civ 1680** involved a complicated factual background and an unusual decision for the court hearing fact-finding issues, namely whether T's injuries were inflicted by another person or self-inflicted.

Baker LJ (giving the lead judgment and allowing the appeal to a limited extent) had no difficulty in concluding that the judge was entitled to determine that some of the injuries were inflicted and that the other children were exposed to emotional harm as a result. The difficulty arose in the decision as to the reasons for T's self-harming in relation to some of the other injuries. The judge had concluded that it was as a result of emotional harm or neglect. That conclusion was to go too far. Such a conclusion was not sought, was not part of cross-examination by the local authority and was properly a question for the welfare hearing.

Recusal

Re W (Children: Reopening/Recusal) **[2020] EWCA Civ 1685** was a private law case dealing with issues of recusal, the appearance of bias and the correct procedure to be employed on such issues. In that case the judge was wrong to have recused herself.

24/03/2021

Anglo-Swiss Divorce Proceedings Post-Brexit: Part I

Roxane Reiser, Barrister of **1 Hare Court**, analyses the impact of Brexit on the recognition and enforcement of UK divorces and financial orders in Switzerland.

This is the first article of a two-part series analysing the impact of Brexit on the recognition and enforcement of UK divorces and financial orders in Switzerland. Overall, the practical impact of Brexit on recognition of UK divorces in Switzerland is likely to be limited. Part I of this article sets out the requirements for recognition of UK divorces in Switzerland, and highlights the potential dangers of relying on "weak" jurisdictional ties such as nationality or common law domicile in UK divorce proceedings.

Part II of this article will explore the changes brought about by the end of the UK membership of the Lugano Convention. This is likely to result in important efficiency losses, to the detriment of the individuals involved in such proceedings. However, rules of Swiss International Law are already filling this gap. Maintenance creditors seeking to enforce a UK maintenance order in Switzerland have nothing to fear. Those seeking to enforce orders relating to matrimonial property and Swiss pensions may face greater difficulties.

Recognition of UK divorce decrees in Switzerland

Brexit has no impact on the recognition of UK divorce decrees in Switzerland. Both the UK and Switzerland have been contracting parties to the 1970 Hague Convention on Recognition of Divorces and Legal Separations ('1970 Convention') since the mid-seventies. Reciprocal recognition of divorce decrees between Switzerland and the UK is therefore guaranteed provided that the conditions for recognition contained in the 1970 Convention are met.

Practitioners who are not already familiar with the 1970 Convention will need to pay close attention to the jurisdictional restrictions contained in Art. 2 of the 1970 Convention in particular. It provides that divorces and legal separations obtained in one Contracting State shall be recognised in all other Contracting States, subject to the remaining terms of the Convention, if, at the date of the institution of the proceedings in the State of Origin –

(1) the respondent had his habitual residence there; or

(2) the petitioner had his habitual residence there and one of the following further conditions was fulfilled –

a) such habitual residence had continued for not less than one year immediately prior to the institution of proceedings;

b) the spouses last habitually resided there together; or

(3) both spouses were nationals of that State; or

(4) the petitioner was a national of that State and one of the following further conditions was fulfilled –

a) the petitioner had his habitual residence there; or

b) he had habitually resided there for a continuous period of one year falling, at least in part, within the two years preceding the institution of the proceedings; or

(5) the petitioner for divorce was a national of that State and both the following further conditions were fulfilled -

a) the petitioner was present in that State at the date of institution of the proceedings and

b) the spouses last habitually resided together in a State whose law, at the date of institution of the proceedings, did not provide for divorce.

As the explanatory report to the 1970 Convention makes clear (Bellet/Golman), those restrictions aim to link the recognition of divorces to the existence of a sufficient claim to jurisdiction on the part of the state of origin (§24). In other words, these restrictions offer a degree of protection against the potentially exorbitant jurisdiction of some States.

Practitioners may be anxious to know whether those jurisdictional restrictions would prevent the recognition of a divorce obtained in England based on the sole domicile of one of the parties. This worry may arise from the post-Brexit amendment of section 5(2) of the Domicile and Matrimonial Proceedings Act 1973 ('DMPA 1973'), which now elevates "sole domicile" to a primary, rather than residual, basis of jurisdiction actionable only where no EU Member States has jurisdiction under Brussels IIA. This is not, in truth, a new or real issue. Switzerland was never a party to Brussels IIA and, thus, the residual jurisdiction of sole domicile has been commonly relied upon by British forum-shoppers living in Switzerland and wishing to take advantage of the wide discretionary powers of British judges.

The short answer is: It depends. The first difficulty is that domicile in the English legal sense is a fact-specific concept with no equivalent in Swiss law, generally characterised by far weaker links to a particular State than Switzerland would typically require for its courts to assume jurisdiction. The second difficulty is that there is often a dispute of fact as to whether a party was domiciled in England, rather than Switzerland, at the time of the proceedings. The Swiss court may have to determine the issue, and in doing so may come to a conclusion that is different from that of a British judge sitting in England.

There are two important provisions in this respect: First, Art. 3 of the 1970 Convention provides that where the State of origin uses the concept of domicile as a test of jurisdiction, the expression "habitual residence" in Art. 2 shall be deemed to include domicile as the term is used in that State. The explanatory report makes it clear that this provision was expressly designed to ensure recognition of divorces and legal separations obtained in the UK on the basis of domicile. See (§32), which states:

"This provision is of real significance only where the concept of domicile in the State is distinct from that of habitual residence. Such is the case, in particular, in the United Kingdom, where, on account of the importance attached to the element of intent in domicile, domicile can be retained despite a fairly prolonged stay abroad. A decree of divorce pronounced by a court in the United Kingdom which regards itself as having jurisdiction by virtue of the defendant's domicile must be recognised by the other contracting states, even if it appears that there is in fact a divergence between that domicile and the "habitual residence". Similarly, if a country bases its jurisdiction on the petitioner's domicile, a divorce acquired in that country must be recognised if one of the further conditions laid down in article 2(2) is fulfilled."

This means that Art. 2(1) and (2), when considered in the context of an English divorce, can be read as follows:

(1) the respondent had his habitual residence or domicile there; or

(2) the petitioner had his habitual residence or domicile there and one of the following further conditions was fulfilled –

a) such habitual residence had continued for not less than one year immediately prior to the institution of proceedings;

b) the spouses last habitually resided there together.

In short, the sole domicile of the defendant in England may be sufficient, but not the sole domicile of the petitioner without more.

If there is a dispute of fact as to domicile, this may not be too problematic where the defendant took part in the divorce proceedings. Art. 6 of the 1970 Hague Convention specifically provides that in such cases the authorities of the State in which recognition of a divorce or legal separation is sought shall be bound by the findings of fact on which jurisdiction was assumed. A defendant who did not challenge jurisdiction based on sole domicile in England, or whose challenge was unsuccessful, will not be able to oppose recognition in Switzerland.

However, if the defendant does not take part in the proceedings, any findings of fact made on domicile in his absence will not be binding on the Swiss court under Art. 6. A Swiss court faced with a dispute of fact as regards domicile in the English sense is likely to approach the issue in a pragmatic manner, focusing on the centre of gravity of the life of the person said to be domiciled in England. The existence of children and a main family home in Switzerland, combined with a prolonged presence in the country, is often enough for a Swiss court to consider that an individual has acquired a domicile of choice in Switzerland.

Second, Art. 17 of the 1970 Convention provides that the Contracting States can provide for rules of law, which are more favourable to the recognition of foreign divorces and legal separations than those contained in the Convention.

Rules of Swiss international private law provide additional bases of indirect jurisdiction upon which recognition depends, notably sole nationality. Art. 65 of the Swiss Private International law ('SPILA') provides that foreign divorces shall be recognised in Switzerland if obtained in the State of domicile (in the Swiss legal sense) or habitual residence or of nationality of one of the spouses, or if they are recognised in one of those States. However, where the divorce is obtained in a State of which none of the spouses or only the petitioner is a national, it shall only be recognised if in addition:

a) At least one of the spouses was domiciled or habitually resident in the state of origin, and the defendant was not domiciled in Switzerland;

b) The defendant spouse has submitted to the jurisdiction of the State of Origin or

c) The defendant spouse expressly consents to the recognition of the divorce in Switzerland.

(Note that "domicile" in this context must be understood in the Swiss legal sense. It is akin to habitual residence, but also requires an intention to settle permanently or indefinitely in a given country.)

The combined effect of Art. 2(4) of the 1970 Convention and of this provision is that a divorce obtained in England by a British petitioner whose spouse is not also British can only be recognised if:

- Either the petitioner or the defendant was habitually resident in England; or

- The petitioner had habitually resided there for a continuous period of one year falling at least in part within the 2 years preceding the institution of the proceedings;

- The defendant submitted to the jurisdiction of the State of Origin or

- The defendant expressly consents to the recognition of the divorce in Switzerland.

There are three important points to note, however. First, Art. 65 SPILA contains safeguards for a defendant domiciled (in the Swiss sense) in Switzerland, whose British spouse petitions for divorce in England where neither of them is habitually resident there. While this safeguard is absent from Art. 2(4) of the 1970 Convention, judicial attitudes in Switzerland are likely to tend towards the protection of a defendant domiciled in Switzerland whose spouse issued proceedings in England based on relatively remote links to the jurisdiction.

Second, it is nationality, rather than domicile (in the English sense), which represents the greater threat to a non-British, Swiss domiciled defendant.

Third, as will be evident from the analysis above, the interaction between Art. 65 SPILA and Art. 2 of the 1970 Convention is complex and therefore fertile ground for litigation.

Conclusion

The moral of the story, as one might expect, is that where recognition of an English divorce in Switzerland is contemplated, the ground of sole domicile contained in section 5(2) of the DMPA 1973 should be relied upon with caution.

It must also be said that recognition of the divorce itself is not, generally the heart of a divorce battle. It is the recognition and enforcement of the financial provisions flowing from the divorce, which must be kept at the forefront of the litigator's mind. There is very little value in obtaining what a party may perceive as a more generous order in England, if the provisions of that order cannot be effectively enforced in the "destination country". This may sound like a truism, but it is often overlooked.

In Part II of this series, rules for recognition and enforcement of UK financial orders concerning maintenance and other financial provisions in the post- Brexit era will be explored. It is hoped that Part II will provide some clarity to practitioners

involved in Anglo-Swiss proceedings, and perhaps dissuade a few British forum shoppers seeking to escape the jurisdiction of the Swiss courts.

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31.03.21

CASES

Project for the Registration of children as British citizens & Anor [2021]

Appeal and cross appeal of the decision of the High Court ([2019] EWHC 3536 (Admin) Mr Justice Jay). The claimants challenged the fees charged to children applying to register as British citizens (currently £1012, comprising £372 admin and processing costs, and £640 to be applied to subsidising other parts of the nationality, immigration and asylum system). Two arguments were relevant on the appeal

> 1) The fees are *ultra vires* the British Nationality Act 1981 in that they render nugatory for a significant number of children the entitlement to register because the fees are unaffordable
>
> 2) In fixing the fee for applications to register by a child, the Secretary of State failed to comply with her statutory duty imposed by s 55 to have regard to the need to safeguard and promote the welfare of children in the United Kingdom when discharging any functions in relation to immigration, asylum or nationality

In respect of 1) the High Court held it was bound by the Court of Appeal decision in *R (Williams) v SSHD* [2017] EWCA Civ 98. In respect of 2) the Judge held that the Secretary of State had failed to comply with her duties under s55.

The Claimants sought permission to appeal the decision on 1) and the Judge certified his decision under s12 of the Administration of Justice Act 1969 for the purpose of a leapfrog appeal to the Supreme Court. The Supreme Court refused permission observing that the Court of Appeal should consider Williams in the light of the Supreme Court decision in *R (UNISON) v Lord Chancellor* [2017] UKSC [2020] AC 869

The Secretary of State appealed the decision in relation to 2). An issue arising in relation to that appeal was the impact of Article 9 of the Bill of Rights 1689 which regulates the use of Parliamentary materials in legal proceedings. The secretary of State relied to some extent in the hearing below, and proposed to rely almost exclusively in the Court of Appeal on parliamentary debates to show that she had weighed the best interests of children but had concluded they were outweighed by other factors in fixing the fees at the level they were. The speaker of the House of Commons and the Clerk of the Parliaments in the House of Lords were invited to intervene. The interveners' submission was that the exceptions to Art 9 previously identified by the courts did not apply in this case, and did not allow for "the possibility of extensive use of Parliamentary material that is in dispute between the parties as here" (para 87)

The Court of Appeal refused both appeals. In relation to 1) the Court found Williams remained binding on them, but gave permission to appeal to the Supreme Court. In relation to 2) the court found that the witness evidence filed by the Secretary of State did not demonstrate that the s55 duty had been complied with, and that the secretary of state's proposed reliance on Parliamentary debates to fill the evidential gap was prohibited by Article 9 of the Bill of Rights and by the general principles of Parliamentary privilege.

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

Re O (Judgment: Adequacy of Reasons) [2021] EWCA Civ 149

Background

Public law proceedings arose from the father's application for contact. The parents separated before O's birth in January 2016. The trial judge found that the mother had never been supportive of the father's contact. In November 2018, the mother stopped contact alleging that the father had sexually abused O. A s.47 investigation found 'very little evidence' to support this and expressed concern that the mother and MGM may be projecting their anxieties on to O. This concern was later echoed by the Cafcass officer. In February 2019, at the first hearing of father's application, the court directed contact at a contact centre. Contact moved into the community in May 2019. F saw O 11 times between 11 May and 27 July 2019. On all but two occasions, he was accompanied by a family member though had taken O to the toilet alone. On 27 July, the father took O swimming alone. On the evening of 2 August 2019, the mother noticed blood on the toilet paper after wiping O's bottom. O was examined by the GP on 3 August, and by a paediatric forensic physician, Dr McLeod, on 5 August and 4 September. She concluded there were signs indicative of penetrative anal abuse. Between 5-30 August, the mother had several conversations with O and reported O made allegations about the father. O made no material statements during an ABE interview.

At an ICPC on 10 October 2019, O was made subject to a child protection plan. The conference chair recorded that no one could be ruled out as being the perpetrator and O was at risk of ongoing sexual harm. At a hearing on 15 November, the court made an interim CAO for O to live with PGM and for PGM to supervise the parents' contact. On 18 November, the court directed a s.37 report and made an ICO for O to live with PGM and for the LA to supervise contact. On 21 November,

during contact, the mother alleged she had found liquid while wiping O's bottom and suspected it to be semen. Analysis of the tissue confirmed that it was not and the liquid had come solely from O.

On 25 November, the local authority issued its application for a care order. A consultant paediatrician, Dr Crawford, was instructed. On 2 January 2020, O made an allegation which suggested MGF may have sexually abused her. He was joined as an intervenor.

The fact finding hearing was heard by HHJ Lea over 8 days, concluding in August 2020. Thereafter written submissions were directed. The LA sought findings that O had sustained the injuries observed by Dr McLeod on 5 August as a result of penetration of her anus on several occasions by her mother or father. The mother sought findings that the father had sexually abused O during or before November 2018 and again between March and July 2019. The father sought findings against the mother including that if she was not the perpetrator of the abuse of O, she had failed to protect her from it; she had encouraged O to think she had been abused by the father; had asked leading questions of O; and had sought to alienate O from her father. No party sought findings against MGF.

Judgment was handed down on 16 November 2020. The judge made findings that the injuries observed on 5 August 2019 were caused by the father and that he had behaved in a sexually inappropriate way towards her in 2018 and 2019. The court made a CAO for O to live with M and an ISO. The trial judge refused permission to appeal but stayed the orders while father applied to the Court of Appeal. Peter Jackson LJ granted permission to appeal and stayed the orders.

Appeal

Father appealed on the following grounds:

> (1) The finding that the father was responsible for the anal laceration seen on 5 August 2019 was wrong and contrary to the medical evidence and lay evidence which appeared to be accepted by the court.
>
> (2) If the court accepts this finding was erroneous the findings made in respect of any earlier assaults are fatally undermined.
>
> (3) The Judge placed too much weight without proper analysis on the father's limited opportunity to cause the injuries.
>
> (4) The Judge failed to properly analyse the evidence and make key findings about the credibility and reliability of the parents.
>
> (5) The Judge placed weight on statements allegedly made by O without first reaching a conclusion about the reliability and credibility of the mother who was reporting the same.
>
> (6) The Judge placed reliance on statements allegedly made by O without giving proper consideration to the factors in the evidence that detracted from the weight that he could attach to those statements.

The local authority and mother opposed the appeal. The LA argued that the father's complaint was to the sufficiency of the reasons and identified matters upon which further reasons could be invited, if the Court determined they were insufficient.

Baker LJ gives the lead judgment. He sets out the evidence of Dr McLeod and Dr Crawford and the arguments in some detail. He notes the pressures upon judges and that the demanding task of drafting a judgment is compounded when no time is allocated for judgment writing. The judge's findings were not necessarily wrong but could not stand due to the way he arrived at his conclusions. Baker LJ identified three overlapping problems:

> (1) The reasoning was insufficient in a number of respects;
>
> (2) The judge failed to take into account some material factors in reaching his ultimate conclusion;
>
> (3) The judge looked at evidence in compartments and did not have regard to each piece of evidence in the context of the totality of the evidence.

In particular, the trial judge failed to address the medical evidence that: (i) the laceration observed on 5 August could have been caused by a fingernail; and (ii) pointed to that laceration having been inflicted after 27 July 2019, when O last had unsupervised contact with the father. Though the judge identified the mother's longstanding opposition to contact and noted factors undermining the reliability of the evidence about O's alleged statements, he did not consider this in his final analysis. The judge's analysis of the parents' evidence and credibility was brief. He did not refer to the father's extensive evidence, in particular as to his lack of opportunity to commit acts of sexual abuse on the number of occasions required to inflict the injuries consistent with the medical evidence. Further, while the judge stated he could see a clear basis for the findings father sought, he gave no reasons for rejecting the detailed submissions made on his behalf. Nor did he explain why he reached a conclusion contrary to aspects of the medical evidence which lead the LA to submit that it was 'highly

unlikely' that the laceration was caused by the father. The judge also did not make findings about the alleged coaching of O by the mother in August 2019 or the incident in November 2019 in which the mother alleged that liquid on the tissue was semen. Taken together, these errors and omissions undermined the reliability of the judge's conclusions that the father had inflicted the injuries identified by Dr McLeod.

Having found that the father caused the injuries observed in August 2019, the judge appeared to say that this added weight to the allegations that father had touched O sexually before or during November 2018. In reaching the finding in this way, the judge did not comply with the principle in *Re T* [2004] EWCA Civ 558 that the judge must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence. The trial judge should have considered all the evidence about the 2018 and 2019 incidents together before making any findings. He wrongly reached a finding as to the perpetrator of the 2019 injuries in isolation from the evidence about the 2018 allegations; that evidence was relevant both to the findings as to the perpetrator of 2019 and the veracity of the 2018 allegations.

Further, the judge's reasoning was again far too insubstantial. Having set out the issues around the credibility of the 2018 allegations and reminded himself of the need for caution when assessing allegations of abuse that arise in the context of private law proceedings, noting the mother's longstanding opposition to contact, the judge failed to weigh those matters when concluding that the 2018 allegations were true.

Sufficiency of Reasons

The judge's analysis was insufficient and flawed. The list of matters identified by the LA as points of analysis upon which the judge could be invited to give further reasons itself demonstrated the very extensive gaps in the judgment.

Baker LJ reviews the practice of inviting a judge to give further reasons, setting out the key points of the case law and the FPR. He notes that the practice set out in FPR PD 30A paragraph 4.6 – 4.8 is subject to two important qualifications: (1) it must never be used as an opportunity to re-argue the case; and (2) there are cases where the deficiencies in the judge's reasoning are on a scale which cannot be fairly remedied by a request for further information. Where the omissions are on a scale that makes it impossible to discern the basis for the decision or where, in addition to omissions, the analysis is perceived as being deficient in other respects, it is not appropriate to seek clarification but permission to appeal should be sought instead. This case fell into the latter category. Accordingly, the only fair course was to remit the matter for re-hearing.

Peter Jackson LJ agrees with the reasons given by Baker LJ and adds a number of observations. He noted that the judge relied on statements by O, as reported by the mother without adequately assessing the reliability of mother or O; did not weigh the relative opportunities of each parent to cause the unusual injury, or their possible motivations. Further, the judge did not address the inherent probabilities, or improbabilities, of either parent having assaulted O on the circumstances alleged, the scenario suggested by the mother being 'desperately farfetched'.

In respect of the reasons, Peter Jackson LJ notes it is the responsibility of the trial judge to give sufficient reasons but all judgments are capable of improvement. Where the line is to be drawn between seeking additions to the reasons or permission to appeal depends on the circumstances, but there comes a point where what would be required would not be additions but foundations. In those circumstances, there are difficulties in returning to the trial judge.

Case summary by **Victoria Roberts**, Barrister, **Coram Chambers**.

A (A Child) (1980 Hague Convention: Set Aside) [2021] EWCA Civ 194

The child, A, was born in England and aged 12 at the time of the appeal. A's mother ('M') was a British national and his father ('F') an Italian national. Shortly after A's birth, the family moved from England to Italy where the parents signed a declaration recognising F's paternity. A attended nursery and primary school in Italy and regularly travelled to England to visit his maternal family. In the summer of 2019, M and A travelled to England and M decided she would remain in the country with A. F travelled to England twice to try to resolve the matter and discovered M had enrolled A in an English school.

In early 2020, M applied ex-parte for an order preventing F from removing A from the jurisdiction. F then began proceedings under the Hague Convention by signing an application to the Italian Central Authority for A's return.

In due course, Ms Deidre Fottrell QC granted the application for summary return. The judge accepted evidence that F had rights of custody for the purpose of Article 3 and found that M's defence under Article 13(a) and (b) was not made out.

Under the terms of the order, F travelled to England in October 2020 to collect A. M applied to stay the return order on the basis of a change in circumstances. Mostyn J granted the stay and CAFCASS interviewed A again to establish if his alleged objection was genuine. At a hearing before Mr Leslie Samuels QC in November 2020, the judge refused M's application to join A to the proceedings and to appoint a guardian to represent him. The judge found, amongst other things, that evidence of A's wishes and feelings amounted to a fundamental change of circumstances. The return order was set aside.

In February 2020, the Court of Appeal dismissed M's application for A to be joined as a party to the appeal, largely because his views and interests had been provided to the court fully through the evidence of the CAFCASS officer and the parents' submissions.

The court considered FPR rule 12.52A, PD 12F 4.1A and the relevant case law and confirmed that "the test as to whether there has been a 'fundamental change of circumstances' requires to be set high" [48]. Mr Justice Hayden concluded, "I do not consider that the evidence in this case, as set out above, crossed the high bar, established both in the case law and fortified by the changes to the FPR. Indeed, I regard M's application as a clear example of an attempt to reargue a case which had already been comprehensively determined." [47] Asplin and Moylan LJJ were in agreement and F's appeal was successful.

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

East Lancashire Hospitals NHS Trust v GH (Out of Hours Application) [2021]EWCOP 18

The judge agreed with Keehan J in in ***An NHS Trust and Anor v FG (By Her Litigation Friend, the Official Solicitor)*** **[2014] EWCOP 30** about the duty on health trusts to plan so as to avoid out of hours applications. However, he accepted that the circumstances had arisen in such a way that this was an appropriate case for an out of hours application.

GH had suffered from depression, anxiety and agoraphobia. The effect of the agoraphobia was such that she had not left home since 2017. She had wanted to have a home birth, regarding her home as a safe space. She had however said that she would go to hospital if necessary. However, as her labour did not progress as planned she was warned by the midwives attending her at home of the serious risks to her baby's and her own health. She declined the advice to go to hospital on the basis that being in her "safe space" protected her from the risks. Her capacity was re-assessed, and the assessor concluded that GH was unable to use and weigh the information about risk of harm. The judge agreed. He concluded that it was not a case where GH acknowledged the information of the risks but preferred her own beliefs about risk, instead the anxiety and agoraphobia prevented her using and weighing up the information about risk. He concluded that she had ceased to have capacity.

In deciding on her best interests, having balanced the risks of increased anxiety and restraint when GH is already stressed with the risks of not taking the requested steps. The judge also took into account her previous expressed willingness to go to hospital and her established view that she wanted herself and the baby to remain alive and healthy. The judge noted that her partner and family wanted her to go to hospital.

He also authorised the use of restraint and reasonable force. agreed with the Official Solicitor that the use of mild sedation should be considered in effecting the removal from home and what is reasonable should take into account medical advice on her condition at the time.

He commented

> As I noted in ***Cambridge University Hospitals NHS Foundation Trust v BF*** **[2016] COPLR 411**, it is a very grave step indeed to declare lawful medical treatment that a patient has stated she does not wish to undergo. It is a graver step still compel, possibly by means of the use of sedation and reasonable force if further gentle persuasion fails, the removal of a person from their home to ensure their attendance at hospital for such medical treatment. Parliament has conferred upon the court jurisdiction to make a declaration of such gravity only where it is satisfied that the patient lacks the capacity to decide whether to undergo the treatment in question and where it is satisfied that such treatment is in that patient's best interests.
> The judge added a postscript that between announcing his decision and handing down the judgment the mother had given birth at home to a healthy child, her labour having advanced quickly before it was possible to put into effect the authorised plan.

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

BB(Children) [2021] EWFC 20

This was a judgment given by the trial judge part -way through a fact – finding hearing dealing with the court's power to dismiss an application or, alternatively, to use its case management powers to limit the findings to be considered as well as the implications of a Local Authority's decision not to pursue allegations after its case had concluded.

The Power to Dismiss at an Interim Stage

In this case allegations of inter-familial sexual abuse triggered applications by the Local Authority for various orders, including care orders, in respect of the children concerned which prompted the need for a fact-finding hearing in respect of those allegations. During the fact-finding hearing, due to it becoming apparent that there were a number of issues relating to the evidence, including the fact that ABE guidelines had either not been applied at all, or had been applied inconsistently when the children were spoken to, at the conclusion of the evidence on behalf of the Local Authority, the Respondents applied for the case to be dismissed or, if that application was refused, for the use of the court's case management powers to limit the allegations, arguing that the reliability of the evidence was so corrupted that it undermined the integrity of the trial process and could not properly be relied upon to make the findings sought.

In response, the Local Authority applied for permission to abandon some of the proposed findings and argued that although it was accepted that the court had the power to grant the application to dismiss, such a decision should not be made before all of the evidence had been heard. Failing that, the Local Authority invited the court to require them to continue with the allegations if the examination of these was deemed to be necessary when considering the 'broad canvas' of available evidence.

The judge considered the seemingly contradictory conclusions reached in the cases of ***AA v 25 others (Children) (Rev 2)*** **[2019] EWFC 64** and ***Re H-L (Children: Summary Dismissal of Care Proceedings)*** **[2019] EWCA Civ 704** as the Respondents argued that AA confirmed the court's jurisdiction to dismiss a case at an interim stage "*…in the most exceptional of circumstances…when there is "something which impinges on the integrity of the trial process*" in this instance, due to the tainted nature of the evidence, whilst the Local Authority relied upon *Re H-L* which espoused the principle that "*…with respect to children proceedings, the FPR 2010 expressly prohibits the striking out of a statement of case in such proceedings and the FPR contains no power to order summary judgment.* " At [33 & 34] he determined that AA had "survived" Re H-L and that the power to dismiss a case at an interim stage subsisted accordingly.

The question then became whether this power was applicable in this instance, and having deemed there to be a clear forensic evidential purpose to hearing the Respondents' evidence he was unable to conclude that no court could properly make the findings sought by the Local Authority without hearing all of the evidence, including the evidence of the Respondents, for the following reasons [59]:

> (a) As per Etherington LJ in ***Re I-A (Children)*** **[2012] EWCA Civ 582**, the need for a "particularly conscientious and detailed examination of all the evidence" in cases involving allegations of sexual abuse is as applicable to those aspects of the evidence that might support those facing allegations as it is to the consideration of the Local Authority's case and the allegations made by the children;
>
> (b) The court should not readily conclude that cross-examination of a witness would serve no purpose. Save in exceptional circumstances, the court's responsibility is to provide the Local Authority, and the children represented by the Guardian, with the same fair opportunity to cross-examine the Respondents as the Respondents had to challenge the Local Authority's evidence in order to reach its conclusions on the basis of the best evidence.
>
> (c) The investigation of inconsistency and dishonesty by the cross-examination of family members is an essential part of the process in public law care proceedings unless there is nothing that can be said by the witnesses that will inform the court's conclusions.
>
> (d) Asking parents questions concerning the sexual knowledge demonstrated by the children does not reverse the burden of proof as the answers to this legitimate and necessary area of enquiry are as likely to assist the parents as the Local Authority.
>
> (e) An exploration of the views of one mother as expressed in her police interviews may provide evidence of particular relevance.
>
> (f) The Court can only reach a conclusion that no court could safely make findings after having heard all the available evidence.
>
> (g) The evaluation of the evidence required was much more detailed than is appropriate to undertake at an interim stage and the need for the court to undertake a detailed evaluation of all the evidence was not reduced or removed on the basis of the alleged breaches highlighted by the Respondents.

He also concluded that he could only determine the impact of the breaches of guidance on Local Authority's ability to prove its case after careful examination of all the evidence [61].

He went on to also refuse the Respondents' application for him to exercise the court's case management functions to further limit the number of allegations as to do so at that stage would also require an evaluation of the evidence that he had already determined would be inappropriate at the half-way stage.

Having refused those applications, he went on to consider the approach to be taken regarding the allegations that the Local Authority sought permission to withdraw.

The Local Authority's argument was that where there is lacking corroborative evidence, the court should conclude that it is unlikely that an allegation can be proved but not go as far as to conclude that it is false. It was also argued that once an allegation is abandoned, the evidence relating to it can be put to one side as there is no evidential advantage or disadvantage to it being determined for any party and the allegation should be treated as 'undetermined'. The Respondents argued that the court should, instead, proceed on the basis that the abandoned matters were untrue and could, therefore, be relied on as examples of fantasy/dishonesty by the children.

The judge rejected the Local Authority's arguments and concluded that it was not open to them to seek to avoid the consequences that might follow from the court hearing evidence which undermined its allegations by seeking to withdraw them and reiterated, again, that "*the court must survey all the relevant evidence in reaching its conclusions*" [79] and reminded them that, as per *Kent County Council v A Mother* [2011], a Local Authority must present its case fairly by putting before the court the evidence that supports the conclusions it invites the court to reach as well as the contradictory evidence. He also referred to the fact that as the allegations they sought to withdraw had been responded to in sworn statements by the Respondents, their evidence, if not challenged, must be treated as accepted [84]. Having concluded that "*there is no place for 'undetermined' allegations*" [83] he decided that, although any unconnected allegations could be withdrawn, those linked to the sexual abuse allegations still being pursued, must also be pursued so that all of the linked allegations could be considered alongside each other with the weight to be attached to them being based upon the overall evidential picture. Alternatively, the Local Authority must accept that those allegations could not be proven making them unreliable and examples of false allegations having been made.

He did, however, also accept that if the Respondents sought to be 'exonerated', as per Sir Mark Hedley at paragraph 266 in AA, the approach to be taken as follows although the legal burden of proof remains on the Local Authority, seeking a positive finding that an allegation did not happen places an evidential burden on the Respondents [89].

Should a Respondent be compelled to give evidence.

Having concluded that oral evidence should be heard from all of the Respondent witnesses, the judge considered the approach to be taken if he were to be invited to compel any of them to do so and reiterated the following principles, outlined by Brooke LJ in *Wisniewski v. Central Manchester Health Authority* [1998] PIQR P324

> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

Case summary by **Lucinda Wicks**, Barrister, **Coram Chambers**

Durrell v Scaife[2021]

In the course of private law children proceedings, the husband swore at the Judge, threw a letter and a roll of blue towel at him, and then approached the Judge's dias in an aggressive manner. The Husband largely admitted the allegations at an early stage and apologised. The court noted that if his behaviour had been limited to swearing, it was unlikely that he would have been subject to committal proceedings. The Judge had not been hit, and there were no threats to hit him, but he had been put in fear. The starting point for such an offence was 12 weeks' imprisonment, which was reduced by a third to reflect the admission and apology

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

Hussain [2021] EWFC 13

The Court did not consider the reasons for the inordinate delay were satisfactory. However, the final order was based on incorrect information regarding the size of the mortgage secured on the only asset – the family home. The lump sum the husband had been ordered to pay was therefore 2-3 times the total equity in the property. The Court noted that the situation illustrated the dangers of shortcuts in that there had been no house valuation and the office copy entry for the

property had not been obtained. The court considered there was no option other than to allow the appeal, and remitted the matter to the family court.

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

Kicinski v Pardi [2021] EWHC 499 (Fam)

The hearing was the latest stage in protracted financial remedies litigation between Antje Kicinski (W) and Peter Paul Pardi (H). W appealed the decision of Recorder Allen QC (The Judge) dated 16.07.20 *(G v C* [2020] EWFC B35). Permission to appeal was granted and the appeal was listed for 2 days. The matter before the court in this hearing was an application by W for permission to stay an order for transfer of certain monies prior to the appeal. In the circumstances both parties agreed that if there was sufficient court time, the court should also deal with the appeal. Both stay and appeal were dealt with at the hearing.

A significant part of the financial dispute related to some £7 million in cash and securities in 4 Swiss bank accounts in W's name. The funds had been transferred to these accounts during the marriage by H's uncle and aunt (U&A) who executed notarised deeds of gift. A few days prior to the first appointment, W was served with a notice of claim instituted by U&A in Italy for her to return these funds. W instructed Withers in Italy in those proceedings and also instructed Withers in her divorce proceedings in this jurisdiction.

At the final financial remedies hearing in October 2019 the parties reached agreement and the court was asked to approve the heads of agreement as a Rose order. U&A were not represented in those proceedings but their solicitor instructed in the Italian proceedings was involved in the discussions about the agreement by those acting for H.

The agreement terms are set out at para 8 of the judgment, but in brief they provided for a tripartite agreement between H, W and U&A, withdrawal of the proceedings in Italy against W, deeds entered into to ensure that H and U&A would not commence, pursue or entertain any further proceedings of any nature against W, Withers or any other advisers in any jurisdiction, provision of a lump sum of £1.6 million to W and the rest to H. The agreement was intended to be in full and final settlement of all claims.

In the event, the parties were unable to agree a final order. U&A did not withdraw proceedings and these continued in Italy, although they were dismissed at final hearing. U&A also declined to enter into deeds. By the time of this hearing, the time to appeal the decision in the Italian proceedings had expired and deeds had been executed between H and W. U&A had agreed to waive any claims against W but have not agreed to rule out proceedings against Withers.

The essence of W's application before the Judge was that the Rose order should be varied to provide for an indemnity against any liability arising to Withers, in the event that U&A brought an action against Withers which they then sought to pass on to her.

The Judge determined that there was no material change in circumstances since the Rose order was made that would engage the Thwaite jurisdiction. He also (obiter) went on to consider whether it would be inequitable to hold W to the terms of the Rose order, and found it would not be, on the basis that he could not find that H was the architect of W's difficulties with the litigation in Italy.

Lieven J considered the caselaw relevant to the Thwaite jurisdiction [para 25-33] and considered the two relevant questions:

1) Has there been a significant change of circumstances, and

2) Would it be inequitable to vary the order as sought

On 1) Lieven J considered that the Judge had been wrong. (paras 48-55). W was in a materially different position to what she had bargained on. She realistically and reasonably believed that U&A had agreed to the terms incorporated into the Rose order. The Thwaite case law did not impose a requirement that the significant change had to be wholly unforeseen (para 51). While it was not possible to determine the likelihood of U&A suing Withers, the risk W perceived was not fanciful.

On 2) Lieven J considered that it would be inequitable to leave W exposed to a contingent liability when she had entered into a clean break settlement. It was appropriate to take into account the closely entwined nature of H and U&A's financial relationship when determining that it was equitable to require H to give the indemnity. It may be the very fact of H giving the indemnity would reduce the likelihood of U&A pursuing Withers. If they didn't, his liability will not arise

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

AA and BB [2021] EWFC 17

Before the Court was an application by the mother for a stay of the father's proceedings under Article 13 of the 1996 Convention on the basis of ongoing applications in Russia relating to the children's welfare.

The mother was born and raised in Russia. The father was born in Russia but moved to an EU member state as a child and was a national of that state. The parties had property in London and in Russia, where the mother's principal business interests lay. The parties had two children, both at school in London. At the time of the hearing there was litigation between the parties both in relation to the children and finances, albeit it was the issue of jurisdiction over the children that came before this Court.

As regards the mother's applications to the Russian Court, whilst the mother's initial applications had been rejected, they were ultimately accepted. It was of significance, that by the date that the father had filed his application, the mother had filed her original application. It was also significant and a fact that was established during the hearing in reply to a question "drafted over lunch", that at the time matters came before this Court, the Court in Russia had not yet determined the question of the children's habitual residence and so accepted jurisdiction in the welfare proceedings.

The father's response to the mother's application for a stay, inter alia, was that Article 13 did not apply. Instead Article 61 of Council Regulation (EC) No 2201/ 2003 ("BIIR") applied, his application being issued prior to the conclusion of the transition period, and accordingly, the court could not impose a stay, the lis pendens rules in BIIR applying only to issues between contracting states, one of which Russia was not.

Whilst the Court ultimately considered that now was not the time to take the decision to defer the determination of whether it has jurisdiction, acknowledging that "*(w)ith truly international children such as these, the position may well remain fluid for some time [paragraph 59]*, the judgment affords guidance to practitioners on the application and interpretation of Article 13 and the following paragraphs are highlighted.

As regards the application of Article 13 and the father's contention that this case fell into a rather "unsatisfactory lacuna", Mr Nicholas Cusworth QC disagreed and said this:

> 24. …I am quite satisfied tha(t) this case does not fall into the unsatisfactory lacuna which Mr Harrison says is the inevitable consequence of his interpretation of Article 61. Rather, the situation here is not 'governed by' Article 19 of the Regulation, but by contrast is undoubtedly governed by Article 13 of the 1996 Hague Convention, involving as this case does a lis pendens issue between the UK and a 1996 Convention country that is not a signatory to BIIR.
> …
>
> 27. … Finally on this issue, I note that with effect from 2022, the recasting of BIIR will provide expressly for this situation under what will become Article 97(2), which will provide that:
>
> > (c) where proceedings relating to parental responsibility are pending before a court of a State Party to the 1996 Hague Convention in which this Regulation does not apply at the time when a court of a Member State is seised of proceedings relating to the same child and involving the same cause of action, Article 13 of that Convention shall apply.

That prospective provision serves in my view to confirm the above interpretation of the current situation, and that a purposive interpretation of the current unspecific provision is entirely justified.

As regards the interpretation of Article 13, there was a dispute regarding the time at which "measures still being under consideration" must be measured. The Court concluded thus:

> 37. ….Mr Harrison says that the natural construction of the words is that they must relate back to the phrase 'at the time of commencement of proceedings', whereas Mr Gupta suggests that it must refer to the time when the court hears the application for a stay to be imposed. The explanation of Article 13 set out in the Practical Handbook on the operation of the Hague Convention 1996 at para 4.32 would tend to support this later position, in that it makes clear that the Article applies:
>
> > '…for as long as the proceedings in respect of the "corresponding measures" in the other Contracting State are still under consideration.'
>
> 38. However, the Lagarde Explanatory Report in relation to the 1996 Convention at [79] restates the import of this paragraph thus:
>
> > The authority having jurisdiction under Articles 5-10 should abstain from deciding on the request for measures with which it has been seised if corresponding measures have been requested from the authorities of another Contracting State which then had jurisdiction under the same Articles 5-10, such measures then being still under examination.

> 39. The use of the word 'then' both in relation to the second state having jurisdiction, and the measures being still under examination, might suggest that the same temporal requirement applied to both. However, I note that the French version of the report uses 2 different words, both rendered into English as 'then' – 'alors' for the possession of jurisdiction, 'encore' for the measures being under examination – which might more naturally have been rendered as 'still' – the word in the Practical Handbook. That would tend to support Mr Gupta's position, which I prefer of the two. Ultimately, I suspect that the drafters of this clause did not expect that there would be a substantial difference between the time when the second set of proceedings were commenced, and the time when the requirement to impose a stay arose. Even if I am wrong in this, however, my overall determination of this issue would not be affected, as I will explain.
> ….
> …
> 46. … I consider that even if I am wrong about the time for application of the phrase "are still under consideration" for the purposes of the Convention, the Russian proceedings were sufficiently extant on 6 November to qualify as being under consideration for the purposes of Article 13 (1).
> ….
> 52. I consider that,…. the proceedings would only cease to exist, and matters would only cease to be under consideration for the purposes of Article 13, once the usual time for appeal of any order dismissing or rejecting the proceedings had expired. If that time had expired, then no proceedings would exist from that point, and the circumstances of a prior request still being under consideration would not be met.

Case summary by **Georgina Rushworth**, Barrister. **Coram Chambers**

Re H (Children: Findings of Fact) [2021] EWCA Civ 319

Background

The case concerned four siblings. X was the father of 3 of the children. He spent significant parts of the decade in prison.

D, born 2010, made allegations of sexual abuse against her father, X, in 2017 but retracted them soon after. At that time, the SW and police had doubts about her evidence and no proceedings were brought. In December 2019, following two incidents of non-sexual domestic abuse, all four children were removed to foster care. During supervised contact on 24 December 2019, D had a conversation with MGM in which she mentioned abuse by X. On 25 December 2019, D made new allegations of sexual abuse to the foster carer. On 1 and 7 January 2020, R, born 2013, made allegations to the foster carer of sexual abuse by X (her step-father). Both children gave ABE interviews. In her ABE, D said the 2017 allegations had been true. X denied the allegations.

Fact Finding

It had been determined pre-trial that D and R would not give evidence. A 'hybrid' fact finding hearing took place. HHJ Cove read 4927 pages of materials and watched the ABE interviews at least three times. Edis LJ observes that the judge conducted a conspicuously careful and thorough hearing: she is to be congratulated for ensuring the witnesses were fairly heard and tested.

HHJ Cove was required to determine 11 allegations: she made findings that X had sexually abused D and R in 2019; and made findings of aggressive behaviour by X in December 2019, including of physically assaulting mother and D. The sexual abuse allegations were based entirely on the evidence of D and R. D made detailed allegations about X's aggressive behaviour, which the parents initially disputed. However, D's account was true and was corroborated by independent evidence, including CCTV.

HHJ did not find D's allegations that X sexually abused her prior to 2017 to be proved. Nor did she find that the mother had been present when X abuse D and R, which both children had alleged, or that the mother had failed to protect them from sexual abuse. She found that the mother had failed to protect the children from domestic abuse and that the mother's difficulties had led her to neglect the children and to fail properly to supervise their time with X, knowing he was aggressive and violent.

Appeal

X appealed the findings of sexual abuse only. He contended that the judge had failed to give proper weight to a number of factors and had not 'addressed' certain matters. These included D's retraction in 2017, that D may have learnt about sexual behaviour from pornography, possible collaboration or influence of D upon R, D's reliability/credibility, R's credibility as she alleged her younger brother had been abused but he made no such complaint, and R's consistency.

Edis LJ gives the lead judgment. He sets out the background and the role of the appellate court in factual appeals. The court will not lightly interfere with findings of fact. He observes that a challenged based upon suggested insufficiency of reasons for reaching a factual conclusion is not an easy one to sustain. He refers to ***Re O (A Child: adequacy of reasons)***

[2021] EWCA Civ 149 in which the court recently restated the necessity for reasoned conclusions; and ***Re JB (A Child: sexual abuse allegations)* [2021] EWCA Civ 46**, in which the court reviewed the guidance on the conduct of ABE interviews.

HHJ Cove's judgment is examined in detail and significant sections are extracted. Her review of the evidence was comprehensive and mentioned almost all the matters that X contended she had failed to address or to give sufficient weight.

The judge's findings were presented as a series of conclusions rather than a reasoned process, in which arguments are addressed and accepted or rejected. Much of the thought process is not set out expressly in the findings but is implicitly there. The judgment would have been clearer if the conclusions included short passages explaining why factual observations made in the judgment lead to the results stated.

X's best point was in relation to the 2017 allegations, which had been retracted and seemed inherently implausible. HHJ Cove set out her observations that the 2017 allegations were inconsistent and she could not on the balance of probabilities find that they were true. However, she did not find that they were lies. Edis LJ notes that a few additional sentences of explanation in the judgment would have assisted greatly.

The principal issue was whether the account given by D and R in their ABE interviews were reliable. It is a pure question of fact. When the judge found herself unable to accept the parents' answers for reasons she explained, it was open to her to accept the truth of the ABE interviews if she found them persuasive.

Conclusions

The function of the reasons is to explain how the decision has been arrived at, not to list the obviously unimportant things which have not influenced the outcome. Where there is a substantial point or piece of evidence which points away from the judge's finding, the judgment should address it and explain the approach to it. There is no harm in a judge failing to mention a submission which has struck them as so obviously unsustainable that it does not deserve an answer. However, it is incumbent on a judge who has reached a particular conclusion to identify the best points which have been made in opposition to it, and to explain why they have not prevailed.

While the judge plainly had the father's case firmly in mind and the reasons for rejecting it can be found in the judgment, tackling the case more directly would have made the judgment clearer and less susceptible to challenge.

Edis LJ identifies points that the judge should have addressed specifically. However, it was not sufficient to reverse the judge's findings. Appeal dismissed.

Case summary by **Victoria Roberts**, Barrister, **Coram Chambers**

A (Child Abduction Article 13b) [2021] EWCA Civ 328

The case concerned J, a child, who was 3 years old at the time of the proceedings. J's mother was English and J's father was American. They married, and in 2016 the mother moved to live in Virginia, where J was born in 2017. The mother maintained that the relationship was characterised by significant domestic violence, causing the mother to suffer from depression and anxiety. The father denied all of the allegations.

On 31 December 2019, the mother travelled with J to England, the father having agreed to them coming here until April 2020. On 21 February 2020, the mother applied for a domestic violence injunction against the father in the Family Court. The father subsequently issued proceedings for J's summary return under the 1980 Hague Convention on the Civil Aspects of International Child Abduction ("the Convention"). The mother opposed the application on the basis of Article 13(b). It was argued on her behalf that the child would be subject to grave psychological and/or physical harm if forced to return to the USA because of the risks of (i) domestic violence and (ii) the mother's mental health deteriorating, thereby affecting her ability to care for the child.

On 9 December 2020, the Judge ordered that J should be returned to the USA within 14 days of the mother being notified by the father's solicitors that the court in Virginia had approved a "Consent Child Custody Order" under which the parents would have joint legal custody of J, with the mother having temporary primary care. The father provided an extensive series of undertakings to the English court, for inclusion in the "Consent Child Custody Order." Whilst the Judge accepted that the mother's allegations were of a gravity that was capable of engaging Article 13(b), she had not established that the exception applied. In particular, he did not accept that a return to the USA would destabilise her parenting to a point where J's situation would become intolerable.

The mother made an application to appeal the decision, arguing that having found that her allegations were of a nature to engage Article 13(b), the Judge was wrong to grant the father's application and failed to take account of: (i) The profound effect on the mother of the father's coercive and controlling behaviour; (ii) The mother's isolation in the USA compared to

England, and the effect that this would have on her mental health; and (iii) Dr Ratnam's evidence about what would be necessary to prevent a deterioration in the mother's mental health if she returned to the USA.

Further, the mother issued an application asking the court to admit further evidence in the form of (i) expert evidence from an American lawyer about the enforceability of undertakings and availability of legal aid; and (ii) updating reports from her GP and her IDVA. The former was refused as no report had been provided. In respect of the latter, since the proceedings had completed, the mother's mental health had deteriorated significantly, to such an extent that the mother and J had to move in with the maternal family because it was no safe for her to parent J alone. The Court of Appeal admitted the evidence from the mother's GP and IDVA, as it was capable of influencing the result of the appeal.

The Court of Appeal held that the first instance Judge had "meticulously" and "methodically" [31] reviewed all the evidence, and his decision to return J to the USA which one he was entitled to reach on the evidence before him. However, based on the further evidence concerning the mother's mental health and family support, the Court of Appeal did not think that the Judge's order could stand. As such, the court allowed the appeal, set aside the return order and remitted the matter to the first instance Judge.

Case summary by **Bianca Jackson**, Barrister, **Coram Chambers**

SZ v Birmingham City Council & Ors [2021] EWFC 15

The judgment concerned the father's (F) application for contact with his children B (aged 16 ¾) and K (aged 14 ¼). Both children were in the care of Birmingham City Council (LA). B was living with the mother (M) and K was living in a care home, but having regular contact with M and B.

The LA had applied to discharge the care order in respect of B.

There had been a lengthy set of care proceedings which concluded in 2013 with care orders and an order pursuant to s.34(4) of the Children Act 1989, granting the LA authority to refuse contact between the children and F. B and K had therefore not had any contact with F since 2012.

F sought to keep in contact with B and K indirectly and for them to be able to exchange photographs and drawings with his three youngest children in his care. B and K were not only half-siblings of those children, but also their aunt and uncle as F had fathered the children with B and K's half-sister.

A case management order identified that F's application for contact must be preceded by an application to discharge the s.34(4) order. The court required the LA the serve a statement in response to F's application together with a plan setting out what steps were necessary for the assessment of F in respect of his contact application, if it was determined that his application should proceed.

The statement prepared recorded how fearful of F both children were. The existence of F's applications was not revealed to the children for fear of traumatising them further. The inferential conclusion was that they would unquestionably refuse to agree to any contact.

The LA sought summary dismissal of F's applications. The court confirmed that it has a wide power in children proceedings to dismiss summarily an application where it is satisfied that it lacks enough merit to justify it being pursued (notwithstanding the complete absence of any such power in the Family Procedure Rules themselves).

F's applications were held to be "bound to fail" and therefore, summarily dismissed for the following reasons:

> 1. It was clear that the children would unambiguously refuse to engage with any form of contact and in light of their ages, their decision, if not objectively foolish or unreasonable, will almost invariably be decisive. On the evidence before the court, the children's decision was neither foolish nor unreasonable. The court accepted the LA's evidence that it would not be in the children's best interests for there to be any form of contact.
>
> 2. The effect of the s.34(4) order was to do no more than relieve the LA of its duty to allow the children actual reasonable contact with their parents. It does not relieve the LA of its wider duty to promote and maintain contact between a child and his/her family, under Schedule 2 Paragraph 15(1): "Where a child is being looked after by a local authority, the authority shall, unless it is not reasonably practicable or consistent with his welfare, endeavour to promote contact between the child and his parents."

Therefore, F's application was premature. The correct course of action was to send a letter to the LA, who would have to apply the duty set out in paragraph 15(1). The Judge commented that "*a really carefully drafted letter written in sensitive and emollient terms, which expresses regret and contrition for the nine-year silence as well as for past misdeeds, might well be difficult to*

justify rejecting." If the LA declined to pass on the letter, then F could commence an application for contact under s.34(3) at that stage.

Additionally, the court discharged the care order in respect of B.

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

FRB v DCA (no 3) [2020] EWHC 3696

In March 2020 Cohen J handed down judgment in longstanding financial remedy proceedings commenced in June 2017 and involving 2 very wealthy families (***FRB v DCA (No. 2)* [2020] EWHC 754 (Fam)**). The final order included provision for the Husband (H) to pay the wife (W) £64 million, comprising the matrimonial home mortgage free (worth £15 m and requiring H to redeem the mortgage of £12m), and a lump sum of £49 m in 2 instalments - £30 m in 6 months and £19 m in 18 months of the order, those time periods being volunteered by H. In the event of late payment interest would be payable at 4 %. Periodical payments were at the rate of £720k pa to be reduced pro-rata by the proportion of the £49m that had been paid. The Court of Appeal refused H's application for permission to appeal.

Since the order was made, H had not paid any of the £64m. He applied to vary the quantum and timing of the lump sum on the basis that the pandemic was a Barder event and his assets (including interests in hotel, airline, and care home businesses) were affected by the economic consequences of the Covid-19 pandemic such that he was unable to make payment due to "*the enormous reduction in my financial worth*"

The wife (W) applied for an increase in her periodic payments to £2.5 m, interest on all outstanding sums at an increased rate of 8% and a legal services provision order in the sum of £1.4 m
Cohen J refused H's application on the basis that there was no documentation available to evidence that his wealth had significantly reduced and it was not appropriate to consider the general financial situation of the economy. The Judge noted that a "striking feature" of H's evidence was the paucity of any specific information relating to the impact of the macro-economic situation on the assets the Court had found to be part of the marital acquest. H's application had been put on the basis that he was unable to quantify the "enormous reduction" and therefore the Court should embark on a complete revaluation of all the assets – an exercise that would cost some £300-400k and take 6 months to complete. Cohen J also stressed that H's application should be viewed in the longer term, with the stock market indices improving and a return to the pre-pandemic position expected in a matter of years. It was also noted that in his judgment in March 2020, the Judge had questioned liquidity and raised the possibility of there being a transfer of assets between the parties so that H had the option of converting some of the award he had to pay from cash into shares. H had chosen not to pursue that option.

Cohen J dealt with W's application for an increase in periodic payments, and for interest on the outstanding sums together. The Judge concluded that H should pay interest on the outstanding £30m lump sum but considered that 8 % was excessive given the current interest rates. The sum owing (at 4 %) was £1.2m. The Court noted that interest on a lump sum was only payable upon decree absolute (DA) and that would provide little incentive for H to pay. The Judge therefore increased the periodical payments by £1.2 m instead of ordering interest.

In respect of W's legal services provision application, H was ordered to pay W's outstanding legal fees (to be set against the final lump sum instalment), to provide W with litigation funding in respect of satellite litigation involving disputed ownership of family artwork, and her costs in relation to a Children Act application H had made. Costs in the financial remedy proceedings were adjourned.

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

Rezai-Namaghi v Atapour [2020] EWHC 3729 (Fam)

The case was beset with difficulties, going repeatedly part-heard, and seemingly as a result confusion arose as to whether or not decree nisi had in fact been pronounced. (see paragraphs 11 – 14)

The judge sets out the relevant legal framework at paragraphs 16 – 19 and summarises the procedural difficulties in paragraph 21.

The difficulty is, as set out at paragraph 26, that although the formalities to end a marriage can be adjusted or abridged by a judicial decision, they cannot simply be overlooked. In this case, for reasons that no one was able to explain, the decree nisi was overlooked and none of the procedural steps that should have happened had taken place at the time of the appeal.

That the parties had spent over £100,000 on financial remedy proceedings and no one had picked up on the absence of the necessary paperwork is described as "deeply unfortunate" which may be considered an understatement and the fact that four years after proceedings had commenced the parties will not have a final order could have caused much more

significant complications than it seems to have done in this case. Nevertheless a salutary warning to ensure that all relevant procedure is complied with.

Case summary by **Zoe Saunders**, Barrister, **St John's Chambers**

Parfitt v Guy's and St Thomas' Children's NHS Foundation Trust & Anor [2021] EWCA Civ 362

The NHS Trust ("the Trust") applied to the court for declarations and orders that would permit the withdrawal of life-sustaining treatment. Her mother opposed the application and proposed that Pippa should return home. In order to have any chance of being managed in a home environment, Pippa would require a tracheostomy to deliver ventilation safely and she would need to be transferred to a portable ventilator. The hospital clinicians were unanimously of the view that the mother's proposal was contrary to Pippa's best interests. But some of the independent experts took a different view.

At first instance, Poole J concluded that it was not in Pippa's best interests to continue to receive life-sustaining treatment nor to embark on a trial of portable ventilation which if successful could lead a transition process, carried out over a number of months, towards home care. The Judge therefore made the declarations sought such that the ventilation was to be withdrawn and there be clearly defined limits on the treatment provided to her after the withdrawal of ventilation with the effect that she would be allowed to die. The mother appealed this decision.

The Court of Appeal sets out the principle at the heart of such cases as summarised by Baroness Hale of Richmond in ***Aintree University Hospital NHS Foundation Trust v James*** **[2013] UKSC 67**, [2014] AC 591 (paragraph 12) and the approach to be adopted by a court conducting the necessary balancing exercise as summarised in ***An NHS Trust v MB*** **[2006] EWHC 507**, [2006] 2 FLR 319, (paragraph 13) and ***Wyatt v Portsmouth Hospital NHS Trust*** **[2005] EWCA Civ 1181**

Such a decision must be reached having considered all of the relevant factors and what is in the child's best interests. In making that decision, the welfare of the child is paramount, and the judge must look at the question from the assumed point of view of the patient. There is a strong presumption in favour of a course of action which will prolong life, but that presumption is not irrebuttable. The term 'best interests' encompasses medical, emotional, and all other welfare issues. The court must conduct a balancing exercise in which all the relevant factors are weighed.

The Court of Appeal was satisfied that the Judge's decision was rightly based on his assessment of Pippa's best interests because her welfare in the widest sense is the paramount consideration having looked at all the evidence, including importantly the views of her family, in particular her mother who has dedicated her life to Pippa and fought so hard to find a way of keeping her alive. The appeal was therefore dismissed

The Court of Appeal saw no difference in the application of the law or the approach of the learned Judge to that of MacDonald J in ***Raqeeb v Barts NHS Foundation Trust*** **[2019] EWHC 2530 (Fam)**, [2020] 3 All ER 663. The facts were different which had led to a different outcome.

The Court did note that at some points in the judgment the judge seemed to draw a distinction between "welfare" and "best interests" but having considered earlier authorities Baker LJ could find no basis for distinguishing between the two concepts and the terms are normally used interchangeably. The Judge's distinguishing between the two terms did not undermine his ultimate conclusions.

The mother had also argued that insufficient weight had been given to her views as a parent when considering the option of a trial of ventilation at home, particularly where there was expert support for her position. The Court of Appeal notes the authoritative judgment of McFarlane LJ in ***Yates v Great Ormond Hospital for Children NHS Foundation Trust*** **[2017] EWCA Civ 410**, [2018] 4 WLR 5. With regard to the weight to be given to the views of parents in cases such as this. Each case will depend on its own facts and where there is a fine balance a parent's views may be determinative but it is ultimately a matter for the Court and "the best interests of the child must prevail and that must apply even to cases where parents, for the best of motives, hold on to some alternative view".

Case summary by **Kieran Pugh**, Barrister, **Coram Chambers**