April 2021

Family Law Week

NEWS

New Victims' Code provides for victims of sexual violence or domestic abuse

A new Victims' Code, including specific provisions for victims of sexual violence or domestic abuse, came into force on 1 April.

Under the Code, victims of crime will be told what to expect at every stage of the justice system including, for the first time, their automatic right to be told when a perpetrator is due to leave prison. Victims of sexual violence will be able to choose the sex of their police interviewer and there will be clearer advice on when they can have their evidence pre-recorded away from the courtroom, so reducing the stress of giving evidence in court, which many find intimidating. They will also be directed towards the support of independent advisors who provide emotional and practical help, regardless of whether the crime is reported to the police.

For more details, click here.

11/4/21

Court of Appeal issues guidance on domestic abuse hearings and findings of fact

During January 2021, the Court of Appeal heard four conjoined appeals in relation to fact-finding hearings in private law cases where domestic abuse was raised as an issue. On 30 March 2021 the Court handed down its judgment, for which click here. The Court also produced a press summary which is reproduced below.

Re H-N and Others (children) (domestic abuse: finding of fact hearings) [2021] EWCA Civ 448

The court was concerned with four appeals from orders made in private law Children Act 1989 proceedings each of which involved allegations of domestic abuse. As well as deciding each of the appeals upon well-established legal principles, the court took the opportunity to give some

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guidance about a number of matters which commonly arise in the Family Court in such cases.

In view of the importance of the issues, the court permitted the intervention of a number of interested parties, namely: Cafcass (First Intervener); Rights of Women, Women's Aid Federation of England, Welsh Women's Aid and Rape Crisis England & Wales (Second Intervener); Families Need Fathers (Third Intervener); and Association of Lawyers for Children (Fourth Intervener).

At present there are a number of initiatives aimed at reviewing the approach to domestic abuse in private law proceedings dealing with applications for 'live with' or 'time spent' (contact) orders made by a parent in relation to their child or children. These initiatives include a Ministry of Justice Report of June 2020: *Assessing Risk of Harm to Children and Parents in Private Law Children Cases: ('The Harm Panel Report')* and the *President of the Family Division's 'Private Law Working Group'* report dated 2 April 2020. ("the Reports"). Recommendations from these reports are currently being implemented. [20 – 23]

In addition to the work now being carried out in the light of the recommendations made by the two reports, the Domestic Abuse Bill is currently before Parliament.

Given these developments the court limited its guidance to a number of specific issues, and had in mind that there is properly a limit on what the court should say in relation to matters which do not strictly arise in the appeals. [2]

Domestic Abuse

The court set out as background the statistics in relation to private law cases, explaining that in 2019/2020 over 50,000 private law applications were made. In approximately 40 per cent of those applications allegations of domestic abuse were made. Over 4,000 magistrates and Family judges hear cases with issues of this nature. The Family Justice system is overborne with work exacerbated as a result of the Covid 19 pandemic. [56]

The court was satisfied that the modern approach to domestic abuse discussed in the judgment at [24 – 34] is well understood and has, through experience and training, become embedded with the vast majority of judges and magistrates sitting in the Family Court. There is, however, no room for complacency and the Family Court is engaged in a continuing process aimed at developing and improving its procedures [14]. A judge who fails properly to determine the issues before him or her is likely to be held on appeal to have been in error.[54]

The Guidance

The Guidance was given against the backdrop of *Family Proceedings Rule 2010: Practice Direction 12J Child Arrangements and Contact Orders: Domestic Abuse and Harm* (PD12J) which sets out what a court is required to do in domestic abuse cases.[10]

It is accepted by the court, the parties and within the two reports, that PD12J remains fit for the purpose for which it was designed, namely to *provide the courts with a structure enabling the court first to recognise all forms of domestic abuse and thereafter on how to approach such allegations when made in private law proceedings*. The present appeals demonstrate that difficulties have, however, arisen in interpretation and implementation. [29]

The court focused upon the fact that central to the modern definition of domestic abuse is the concept of coercive and/or controlling behaviour. Such behaviour can cause harm to children living in a household [32-33]. The Family Court has to consider whether there has been a pattern of such behaviour as part of its approach to domestic abuse cases.

Specific guidance was given by the court in relation to:

i) Whether there should be a finding of fact hearing. The proper approach is set out at [38] which emphasises the need to consider the nature of the allegations, the relevance to the decision to be made in relation to the child, and the need for the court to decide if a fact-finding hearing is 'necessary and proportionate';

ii) The use of Scott Schedules [42]. The court endorsed the view of the parties and of the authors of the Harm Report, that the time has come for there to be a move away from Scott Schedules as a means of identifying issues to be tried by the Family Court. Scott Schedules, which identify specific factual incidents tied to a particular date and time, are at risk of failing to focus on the wider context and whether there has been a pattern of coercive and controlling behaviour;

iii) The approach to controlling and coercive behaviour [51]. The court emphasised the need to evaluate the existence or otherwise of a pattern of coercive and controlling behaviour without significantly increasing the scale and length of private law proceedings, in circumstances where delay is inimical to the welfare of a child and the courts;

iv) The relevance of criminal law concepts [61]. Whilst the Family courts and the parties who appear in them should not shy away from using words such as 'rape' in the manner in which they are used in ordinary speech, the law is clear that criminal law concepts should not be imported to the Family court. There is a distinction between judges needing to understand the potential psychological impact of sexual assault on a victim on the one hand and the importance of Family judges avoiding being drawn into an analysis of factual evidence based on criminal law proceedings on the other [64]. A freestanding sexual assault awareness training programme is in place for Family judges and it is a mandatory requirement for all Family judges to complete the programme.

The Appeals:

Re B-B: An appeal against the making of a consent order granting a father contact with his child was allowed. The judge made a number of wholly inappropriate comments to the mother at a hearing which was adjourned, the trial being unable to proceed as listed. The issue before the court was whether, notwithstanding the fact that the consent order was made a number of months later at a further hearing, the impact of those comments was such that the court could not

be satisfied that the mother's consent to the order had been 'genuinely and freely' given.

The court held that, notwithstanding the pressure the judge was under and the failure of the parties to comply with the court's case management orders for the preparation of the case, the impact of the judge's comments upon a young mother must not be underestimated.

Re H: An appeal against an order made in September 2019 was dismissed. The judge found an allegation of rape to be 'not proven' and declined to determine allegations of financial and emotional abuse. The judge made an order for contact. Extensive unsupervised contact has continued until the present and has recently been confirmed following a second fact-finding hearing, before a different judge, when further allegations against the father were held to be unfounded. The Local Authority wrote to the Court of Appeal to stress the importance to the child of continuing contact. The mother does not wish contact to stop and was unable to tell the court what, in those circumstances, the purpose would be in remitting the case for a retrial. The appeal was dismissed as being academic. The court emphasised that had there been a purpose to hearing the appeal, it would not have hesitated to do so.

Re T: An appeal against the making of an order for contact was allowed. At trial, the judge did not find allegations of anal rape to have been proved and held that a number of incidents of violence on the part of the father against the mother had been minor. The issue was whether the judge should: (i) have made the finding sought of anal rape; and (ii) whether she had failed properly to recognise the significance of admitted incidents of violence as evidence of a pattern of controlling and coercive behaviour. The court held that the judge had been entitled to conclude that the allegation of anal rape had not been made out, for the reasons she gave. However, having determined that the allegations of anal rape were not made out, the judge did not then step back and appreciate the significance of the matters which she did find to have been proved. As a consequence, the judge failed to appreciate the true significance and seriousness of the father's behaviour or to consider whether the findings established a pattern of coercive and/or controlling behaviour.

Re H-N: An appeal was allowed against case management orders made consequent upon the judge having declined to make a finding of rape and having indicated that certain admitted incidents of abuse against the mother should not be taken into account. The issue was whether the judge had failed to look at the pattern of control and the abuse which were demonstrated even on the basis of the father's admissions alone. It was held that the judge had discounted the father's admissions of domestic abuse perpetrated over a significant period of time and had underestimated the significance, both for the mother and for H-N, of the fact that the father had wrongfully retained H-N abroad for a period of 8 months.

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

11/4/21

Marriage and Civil Partnership (Conversion of Civil Partnership and Fees) (Amendment) Regulations 2021

The **Marriage and Civil Partnership (Conversion of Civil Partnership and Fees) (Amendment) Regulations 2021**, which come into force on 4 May 2021, amend the Marriage of Same Sex Couples (Conversion of Civil Partnership) Regulations 2014 and the Registration of Births, Deaths, Marriages and Civil Partnerships (Fees) Regulations 2016.

Of particular note, Regulation 2 amends the 2014 Regulations, which establish the procedures for converting an England and Wales same-sex civil partnership (and certain other same-sex civil partnerships) into a marriage. These procedures include the signing of a conversion declaration and the registration of details in the conversion register. Regulation 2(2) and (3)(a) to (d) and (f) makes changes to the information that must be provided by the parties and recorded by the superintendent registrar on the conversion declaration. Regulation 2(4) to (6) makes consequential amendments. Regulation 3 is a related transitional provision. Its effect is that where the parties have already complied, before 4 May 2021, with the requirements in force at that time to provide information to a superintendent registrar, they do not need to have complied with the amended information requirements before being able to convert their civil partnership to a marriage.

For the 2021 Regulations, **click here**.

11/4/21

Registration of Marriages Regulations 2021

These Regulations amend the **Marriage Act 1949** ("the 1949 Act") to provide for a new marriage registration system which will effectively come into force on 4 May 2021.

The Regulations also, in Part 2, amend section 28B of the 1949 Act to specify the evidence that must accompany a notice of marriage where a party to the marriage is a relevant national by virtue of having status, or a pending application for status (within the meaning of regulation 4 of the **Citizens' Rights (Application Deadline and Temporary Protection) (EU Exit) Regulations 2020**, under the EU Settlement Scheme ("the EUSS"). The EUSS was established by the Government in Appendix EU to the Immigration Rules.

Parts 3 and 4 (and Part 1 of Schedule 1) insert provision in the 1949 Act for a new registration system. The amendments provide that a clergyman solemnizing a marriage after the publication of banns, on the authority of a special licence or on the authority of a common licence must issue a marriage document before solemnizing the marriage. The amendments also provide that any other marriage is only to be solemnized after the superintendent registrar for the registration district in which the marriage is taking place has issued a marriage schedule.

The amendments further provide that following solemnization of the marriage, the marriage document or marriage schedule must be signed and returned to the registrar for the registration district in which the marriage took place. The registrar must then register the marriage by entering particulars into a register, accessible in electronic form. The clergyman will be responsible for returning the marriage document to the registrar and the specified person (as defined in new section 53C(8), inserted by regulation 7) will be responsible for returning the marriage schedule, except in respect of a marriage schedule where the marriage was solemnized by a registrar.

Part 4 revokes provisions in the 1949 Act which required marriages to be solemnized on the issue of two certificates of a superintendent registrar and which required marriages to be registered by a number of different persons.

Part 5 amends the **Marriage of British Subjects (Facilities) Act 1915** and the **Marriage of British Subjects (Facilities) Amendment Act 1916**, so that those Acts will no longer apply in respect of England and Wales.

Part 1 of Schedule 1 contains consequential and related amendments to the 1949 Act. These include creation of a new offence of failing to attend at the office of a registrar after having been given notice to do so for the purpose of returning a signed marriage document or marriage schedule (as the case may be). The amendments also enable the Registrar General to prescribe the form of a marriage document and marriage schedule.

Part 2 of Schedule 1 contains consequential amendments to other primary legislation, including the Marriage (Scotland) Act 1956, the **Marriage (Registrar General's Licence) Act 1970** and the **Immigration Act 2014**.

Part 3 of Schedule 1 contains consequential amendments to secondary legislation.

Schedule 2 contains transitional provisions, to enable a smooth transition to the new registration system.

For the Registration of Marriages Regulations 2021, **click here**.

11/4/21

Civil Partnership (Registration and Records) (Amendment) Regulations 2021

These Regulations, which come into force on 4 May 2021, amend the **Civil Partnership (Registration Provisions) Regulations 2005** ("the 2005 Regulations"), the **Gender Recognition Register (Marriage and Civil Partnership) Regulations 2015** ("the 2015 Regulations") and the **Civil Partnerships Records Regulations 2016** ("the 2016 Regulations").

The 2005 Regulations make provision about the registration of civil partnerships and include prescribed forms. Regulations 2 to 14 of these Regulations amend the 2005 Regulations and make related transitional provision.

The 2005 Regulations currently provide for the issuing of certified extracts and certified copies of entries on the civil partnership register. A certified extract does not include the addresses of the civil partners, but a certified copy does. Certified copies are only available to the parties themselves (when their civil partnership is formed) and to persons who are able to provide the full addresses of both civil partners. This is subject to exceptions which enable the Registrar General to authorise the issue of a certified copy where it is reasonable to do so and allow for unrestricted access to certified copies when 50 years have elapsed since the formation of the civil partnership. Regulations 3(a), 6 to 10 and 11(3)(g) of these Regulations remove the provision made by the 2005 Regulations for the issuing of certified extracts, and provide for certified copies to be issued (on payment of a fee) to anyone who provides the Registrar General or registration authority with the information about the civil partnership in question that they have obtained by searching the indexes of register entries. The amendments do not affect the parties' existing entitlement to obtain a certified copy. Regulations 12, 13 and 14 make transitional provision relating to the availability and status of certified extracts, and the availability of certified copies, on and after 4 May 2021 (the date on which the amendments made by these Regulations come into force).

Regulations 4 and 5 amend regulations 9 and 10 of the 2005 Regulations. Regulation 9 of the 2005 Regulations makes provision about the information to be included in forms 9 and 9 (w) (the forms for a civil partnership schedule issued under section 14(1) of the Civil Partnership Act 2004) and forms 10 and 10 (w) (the forms for a Registrar General's licence issued under section 25(2) of that Act). Regulation 10 of the 2005 Regulations provides for the verification and correction of information entered in these forms. Regulation 11(3)(a) to (d) of these Regulations substitutes new versions of these forms, which are set out in the Schedule.

The amendments to regulations 9 and 10 of the 2005 Regulations reflect the changes to these forms. The amendments also provide for the manner in which information is to be entered on these forms in cases where the parties to the proposed civil partnership have most recently been married to, or in a civil partnership with, each other and a full gender recognition certificate has been issued to either or each of them since then. The amendments also make provision about entering details of the parties' parents and step-parents on the forms. Regulations 3(b) and 11(2) make further related amendments.

Regulation 11 of the 2005 Regulations prescribes the information to be recorded in the civil partnership register under section 2(4) of the Civil Partnership Act 2004 after the formation of a civil partnership. It requires the recording of the information on form 12 (where the civil partnership was formed in England) or form 12 (w) (where the civil partnership was formed in Wales). Regulation 11(3)(e) and (f) of these Regulations substitutes new versions of these forms, which are set out in the Schedule.

Regulation 15 amends the 2015 Regulations. As explained above, provision for issuing certified extracts of entries in the civil partnership register is removed by these Regulations. Regulation 15 similarly removes provision for issuing certified extracts of entries in the Gender Recognition Civil Partnership Register. It also removes a

reference to certified extracts of civil partnership register entries.

Regulation 16 amends the 2016 Regulations, which provide for information contained in an entry in the Registrar General's register of civil partnerships to be provided in portable document format to a person applying via the website **www.gov.uk**. Regulation 16 removes the requirement that such information must not include the full addresses of the civil partners unless the applicant provides those addresses to the Registrar General when applying or 50 years have elapsed since the formation of the civil partnership.

For the Civil Partnership (Registration and Records) (Amendment) Regulations 2021, **click here**.

11/4/21

Funding available for councils to support more families to resolve parental conflict

Councils can now apply to the Department for Work and Pension for funding to train frontline staff who regularly come into contact with families facing conflict, so that they can intervene at the right time to reduce friction between parents and help shield their children.

The DWP Reducing Parental Conflict programme is working with local family services, including health and social care, the courts and emergency services such as the police, to help them identify parental conflict, provide initial support and refer parents to further interventions such as therapy for a constructive resolution. This includes almost £4 million for councils in England to help resolve conflict between parents.

Research published by DWP shows that nearly nine in ten councils believe the programme's practitioner training is important to embedding support into their services and are positive about the programme's potential to improve outcomes for children in the areas.

For more details of the available funding, **click here**.

11/4/21

Domestic Abuse Bill: Progress of the Bill

The House of Commons is due to consider Lords amendments to the **Domestic Abuse Bill** on 15 April 2021. The full list of amendments is available on the **Parliament website**, together with **Explanatory Notes**.

The House of Commons Library has published a briefing providing full background to the Bill. To view the briefing, **click here**. To follow progress of the Bill, **click here**.

11/4/21

BASW England releases new Domestic Abuse Guidance for social workers

BASW England has published **new guidance** for child and family social workers supporting victim-survivors of domestic abuse.

The pandemic has seen a 61 per cent increase in calls and contacts, according to Refuge.

BASW England notes that the increased demand for support coincides with severe cuts to domestic abuse services, with 86.7 per cent having experienced one or more financial impact/s as a result of Covid-19.

The guide was developed in collaboration with stakeholders including Women's Aid, Galop, Southall Black Sisters, Sign Health, Karma Nirvana, Respect, AVA, Ann Craft Trust, Dr Michaela Rogers at the University of Sheffield, as well as people with lived experience and BASW members.

An 'intersectional approach' is adopted throughout the guide, which 'recognises the interconnecting forms of oppression on survivor's identities and lived experience of abuse and services'. Such factors include race, age, religion, culture, immigration status, deafness, disability, LGBT+ rights, mental health, multiple disadvantage (including substance use and addiction) and poverty.

The guide aims to provide social workers with a trauma-informed understanding of patterns of domestic abuse within the above groups, as well as best practice and current research.

The **Domestic Abuse Bill** went to the Commons for consideration of Lords amendments on Thursday 15 April 2021. The Commons disagreed with the Lords amendments and have therefore returned the Bill to the Lords with Reasons. As legislation changes, this guide will be routinely updated to keep it up to date.

For the guide, **click here**.

18/4/21

LAPG launches 2021 Legal Aid Census 'to show true state of social justice sector'

The Legal Aid Practitioners Group is urging lawyers throughout England and Wales to 'stand up and be counted' by taking part **in a survey** which seeks to gather extensive data about the backgrounds and lived experiences of those working on the social justice frontline.

The LAPG survey has been devised in conjunction with legal academics from Newcastle University Law School, Cardiff University and University College London who will be analysing its findings.

The census is supported by other representative groups, including Shelter, Housing Law Practitioners Association, Legal Action Group and the Black Solicitors Network, and aimed at everyone working in legal aid, those aspiring to work in legal aid and those who have left practice, at all levels (with questions tailored, accordingly). Business owners and charity managers will have the chance to share data about overheads, the cost of complying with Legal Aid Agency bureaucracy, salaries, training, recruitment and system failures. All participants will be asked about the toll of the work on their wellbeing, particularly during the pandemic.

To take part in the survey, **click here**.

18/4/21

Survey supports recommendations for a review of supervision orders in care proceedings

According to a survey carried out by Nuffield Family Justice Observatory, nine out of ten professionals think standalone supervision orders should continue to be an option in care proceedings. A key reason given for this was the need for a proportionate order between a care order and no order when children were returning home at the end of proceedings in which the threshold for a care or supervision order had been established.

Supervision orders are one of the options available to courts hearing care proceedings if they are satisfied that the grounds for a care or supervision order exist. The order places a child under the supervision of the local authority which then has a duty to 'advise, assist and befriend' the child.

Previous research by Lancaster University has raised questions about the effectiveness of standalone supervision orders, and identified varying practice across regions. Meanwhile, the Public Law Working Group – which was set up by the President of the Family Division to investigate steep rises in public law cases – recommended in its recent report that the government should review supervision orders with the aim of providing 'a more robust and effective form of a public law order'.

A total of 291 professionals and 10 parents took part in the new survey, carried out between 15 February and 8 March 2021. The majority of professional respondents (90 per cent) thought that supervision orders should be retained but half of those think some changes are needed to make them more effective, supporting the Public Law Working Group's recommendations for a review.

Overall, responses to the survey reflected previous research regarding the wide variation in practice, the management of supervision orders once proceedings are over, and the support provided under them. Concerns about the effectiveness of supervision orders were also reflected.

For the full survey findings, **click here**. For the response of the Association of Directors of Children's Services, **click here**.

18/4/21

New public law cases received by Cafcass rose by more than 13 per cent in March

Cafcass received a total of 1,612 new public law applications (involving 2,555 children) in March – 190 applications (13.4 per cent) more than in the same month last year. The number of children featured in the cases rose from 2,295 children in March 2020.

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

18/4/21

New private law cases received by Cafcass in March rose by more than a third

Cafcass received a total of 4,659 new private law cases (involving 6,627 children) in March 2021 – 38 per cent (or 1,282 cases) more than the same month last year.

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

18/4/21

Amendments to standard public law orders: message from Mr Justice Mostyn

On 19 April 2021 Mr Justice Mostyn issued the following message.

> Following the publication of the report of the Public Law Working Group (PLWG), and in particular noting the observations about the standard orders in public law cases, a small committee comprising HHJ Hess, HHJ Dancey, HHJ Moradifar and Alex Laing has recommended amendments to the standard orders.
>
> The amendments not only give effect to the recommendations of the PLWG, but also reflect the Guidance of the President on the Form of Orders in Children's Cases of 17 June 2019.
>
> With the agreement of the President, I am pleased to announce the following changes to the standard orders which implement those recommendations and Guidance.
>
> **Order 8.2, the *Public Law Case Management Directions and Orders Precedent Library* is augmented to provide for the following general provisions rubric:**
>
> > General provisions in this order, the first case management order, to apply in subsequent case management orders.

The following provisions in this first case management order shall apply throughout these proceedings unless the subsequent order expressly makes different provision:

- The declaration made under the heading of "Jurisdiction".
- The identification of an allocated judge under the heading "Allocation".
- The provisions made under the heading of "Documents/Bundles".
- The provisions made under the heading of "Variation of orders".

Order 8.3, the *Public Law Directions and Orders at Case Management Hearing* is augmented by the general provisions rubric.

Order 8.4 is replaced by a new order, the *Short Form Order for any Hearing other than the First Case Management Hearing and the Final Hearing*.

These changes take effect immediately.

Files of these orders and the complete suite of all of the Standard Children and Other Orders in their current form (including these orders) are attached below.

All of the standard orders, whether relating to children, financial remedies or otherwise, will be reviewed later this year to make the necessary changes consequent on the United Kingdom having completed on 31 December 2020 its withdrawal from the European Union.

For the amended orders, **click here** and scroll to the foot of the page.

25.4.21

Protocol for London and South East on domestic abuse applications being made outside the applicant's area

The Association of Lawyers for Children has posted the above protocol issued by the Designated Family Judges for Essex and Suffolk, Norfolk, Cambridgeshire, Buckinghamshire, Bedfordshire, Hertfordshire, Surrey, Sussex, Kent, East London and Central.

For the protocol, **click here**.

25/4/21

Biggest ever consultation with children in England launched by the Children's Commissioner

On 19 April Dame Rachel de Souza, Children's Commissioner for England, launched '**The Big Ask**', the biggest ever consultation with children undertaken in this country. The survey will run until 19 May and will ask children across England to set out their priorities for improving childhood post-Covid. The results of the survey will form the cornerstone of the Children's Commissioner's 'Childhood Commission' – an ambitious Beveridge-style report due to be published later this year.

'The Big Ask' will be made available to every school in England, with schools encouraged to use it during classes and assemblies. It will also be available via the Oak National Academy. The survey will be accompanied by an online assembly introduced by England and Manchester United footballer Marcus Rashford.

The results from 'The Big Ask' will be at the heart of the Childhood Commission which, the Children's Commissioner says, will be a once in a generation review of the future of childhood, 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 solutions and come up with targets by which improvements can be monitored.

'The Big Ask' will be online until 19 May and available to any child who can access the internet. It will also be made available to organisations and services working with children including schools, youth groups, local authorities, charities who work with children and young people, Children in Care Councils, children's homes, children's mental health services, youth justice settings, community groups and others.

The survey is completely anonymous and does not ask children to submit any directly identifiable information. Some of the survey questions are available below in the notes to editors.

To ensure that the experiences of babies and pre-school children are captured, the Children's Commissioner will be running focus groups with different communities and groups of children, which will include talking to parents and carers. There will also be focus groups for children with Special Educational Needs or Disabilities or other complex needs.

As part of 'The Big Ask', Rachel de Souza will also be visiting schools to speak with children about their experiences of the pandemic and to hear about their hopes for the future. The tour will include visits to schools in Bedfordshire, Cumbria, Yorkshire, Norfolk, the Midlands, the South West and London.

To access the Big Ask, **click here**.

25/4/21

Home Affairs Committee launches inquiries into rape and violence against women and girls

The House of Commons Home Affairs Committee has announced the terms of reference into a new inquiry into violence against women and girls. This over-arching inquiry will form the basis for the Committee's long-term work to investigate policies and strategies to combat violence against women and girls.

As part of this, the Committee has also announced the terms of reference for an inquiry into investigations and prosecutions of rape.

Launching the new inquiries, Chair of the Home Affairs Committee Rt Hon Yvette Cooper MP said:

> "Women across the country have been speaking out about their experiences of violence, abuse, stalking, and feeling unsafe - be it on our streets, in schools or at home. Everyone agrees that violence against women and girls is abhorrent, yet far too little has changed in practice to improve women's safety and in some areas things have got worse. This inquiry will examine the many forms that violence against women and girls takes in our society, what action is being taken to end the scourge of violence against women and girls, and how it is currently being addressed by Government, the police and the criminal justice system."

Violence against women and girls

The United Nations defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. While it has recently featured prominently in the media, this is an issue that can be pervasive and hidden."

The Select Committee inquiry will look at how violence against women and girls is being addressed. The Committee will use information from this call for evidence to inform its future programme of work on this issue.

The Committee invites evidence on the following points, to inform development of its future programme:

- How VAWG affects women and girls. This may include:
  - Information on different forms and experiences of VAWG – for example rape, sexual harassment and abuse, domestic abuse, coercive control, street and online harassment, stalking, forced marriage, female genital mutilation and other forms of violence and abuse – and the differences between addressing VAWG in the public and private spheres;
  - How VAWG has changed and how issues relating to VAWG are affected by modern technology, for example the use of social media and online dating sites, sexting, revenge porn and the accessibility of explicit pornography;
  - How VAWG affects young women and girls including in school and education institutions, in public places and online;
  - How VAWG affects particular groups, such as migrant women, sex workers or women with protected characteristics;
  - The prevalence and effect of honour-based violence and other practices that may affect minority groups such as female genital mutilation and forced marriage;
  - How sexual violence is being normalised within relationships, including strangulation, and the influence of extreme or violent pornography;
  - How organisations that women and girls turn to for support and help engage with issues relating to VAWG and their role in tackling and preventing it.
- How VAWG should be prevented and addressed. This may include:
  - The role information and education for both men and women play in protecting women and girls;
  - Whether there is sufficient and appropriate support available for victims;
  - What measures should be in place for perpetrators;
  - The role of organisations and institutions including the police and criminal justice system, schools, colleges and education institutions, employers and trade unions, social media companies, local community and specialist services;
  - What lessons should be learnt from the 2016-2020 Ending Violence against Women and Girls strategy when developing the Government's 2021-2024 strategy;
  - How current Bills, such as the Police, Crime, Sentencing and Courts Bill and the Domestic Abuse Bill and other recent legislation that has been introduced can address, or have addressed, the issue of VAWG; and
  - Steps towards ratification of the Istanbul Convention.

Investigations and prosecutions of rape

The Committee invites written evidence on the following questions:

- Whether victims have access to justice, whether witnesses are sufficiently supported, and whether there are sufficient safeguards for those who are accused of rape and sexual offences to ensure that they receive a fair trial;

- The role of the police, Crown Prosecution Service (CPS) and the courts in reporting, prosecuting and convicting in cases of rape and sexual assault, including the advice and guidance that is used to train, educate and support those involved in the disclosure, charging and prosecution of rape;

- What the barriers are to reporting, charging, prosecuting and convicting rape and sexual assaults;

- Challenges around disclosure and whether the current disclosure arrangements affect the reporting, investigation, prosecution and sentencing of rape cases;

- The success of organisational strategies and plans, for example the Joint National Disclosure Improvement Plan and the CPS' RASSO 2025 strategy.

The Committee is keen to understand from victims and survivors of rape and serious sexual assault what changes they think could help improve the experience of reporting what has happened to the police and going to court to get justice.

If you would like to submit your lived experience to the Committee, you can find questions about going through the criminal justice system following experiences of sexual violence here. You can also share why you might have chosen not to go through the criminal justice system. Responses to these lived experience questions should be received by 11 May 2021.

Before doing so and for information generally about the inquiries, **please click here**.

25/4/21

Mrs Justice Lieven appointed Family Division Liaison Judge for the Midland Circuit

The President of the Family Division, following consultation with the Lord Chancellor, has announced the appointment of a Family Division Liaison Judge.

Mrs Justice Lieven has been appointed as the Family Division Liaison Judge for the Midland Circuit, for a period of four years, with effect from 13 April 2021 where she will succeed Mrs Justice Knowles.

25/4/21

Legal aid: notice of extension to the 2018 Standard Civil Contract

The Legal Aid Agency (LAA) has sent out the formal notice of extension to the 2018 Standard Civil Contract as announced on 21 January 2021.

Letters have been sent to all holders of the contract advising that the contract will now end on 31 August 2022. There is no requirement to accept the extension and the new schedules will be uploaded in July 2021. If you have not received your letter by 30 April, please advise your contract manager.

The Standard Civil Contract 2018 is the contract between the LAA and providers for the provision of face-to-face civil legal aid in England and Wales.

The standard terms underpin the commercial relationship between the LAA and providers.

For more information, **click here**.

25/4/21

Kent teen left to live in tent during Covid crisis

A Kent teenager was left to sofa surf and live in a tent for almost two months by Medway Council during the Covid-19 pandemic after his family was left homeless, the Local Government and Social Care Ombudsman has found.

The Ombudsman found the council missed at least five opportunities to house the teenager and his mother during the summer of 2020, but instead they were left to sleep rough.

When the mother first approached the council, it decided it had no duty to house her and her 16-year-old son under its homelessness obligations. However, it did place the family in temporary accommodation because of its child protection duties.

The family became homeless in the middle of July 2020 when the children's services department asked them to leave their temporary accommodation. In making the family homeless, the council failed to consider government guidance in force during the lockdown, which asked landlords to work with renters who may experience hardship as a result of the pandemic.

When they left the temporary accommodation, the family had nowhere to go. The teenager called the council saying he and his mother were sleeping in a tent.

The mother continued to contact the council throughout July. She filled in a change of circumstances form at the beginning of August explaining she and her son had been on the streets for a few weeks. There is no record of the council taking any action upon receipt of the form.

At the beginning of September, the mother contacted the council with the help of Shelter to say she and her son had been street homeless since 13 July. The council told the

mother it would not provide her with temporary accommodation, and she should find her own private rented accommodation. The mother contacted the Ombudsman on 8 September. The investigator asked the council to make an urgent review of the case. The family were moved to bed and breakfast on 11 September. During the investigation, the council offered them a two-bedroomed property.

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

> "Our investigations into issues occurring during the pandemic have to balance the difficult circumstances and the speed at which laws were changing, against what should have reasonably happened.
>
> "Despite these challenging circumstances, the council in this case failed in its duties to a vulnerable teenager who was sleeping rough, and it missed numerous opportunities to ensure he was safe.
>
> "I do, however, welcome the swift action the council took when we alerted it to the family's situation, and hope the training it has agreed to provide to relevant staff should ensure cases such as this do not happen in future.
>
> "From what we've seen so far, the issues in this case are not indicative of how councils generally responded to public concerns during COVID-19. But we decided this case contained sufficient learning that others could take on board. Some of the problems in the case mirror issues we were seeing before the pandemic, but which have been amplified by the impact of COVID-19."

The council has agreed to apologise to the teenager and his mother, and pay them £1,500 each to reflect the distress and hardship they were caused. It will also pay the mother an additional £200 to reflect the fact she was not listened to when she reported being street homeless on a number of occasions.

The council has also agreed to decide whether the teenager is owed any duty or service under the Children Act and provide that service, and it should also consider if it owes him any duty under the Housing Act. It will also decide whether the mother is owed the full housing duty and issue her with a written decision on her homelessness application.

The Ombudsman has the power to make recommendations to improve processes for the wider public. In this case the council has agreed to provide refresher training for staff in its housing department to ensure they understand their duties under the Housing Act.

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

25/4/21

Tatiana Akhmedova granted judgments in £453 million divorce case

Tatiana Akhmedova has been granted substantial money judgments in pursuit of her £453 million divorce award against her ex-husband, Farkhad Akhmedov. The judgments, made by Mrs Justice Knowles in the High Court, are against the couple's son, Temur Akhmedov, Borderedge, a company owned by the couple's two sons, and Liechtenstein trustee entities, Counselor Trust Reg and Sobaldo Establishment, for their participation in schemes orchestrated by Farkhad by which they had received assets to frustrate Ms Akhmedova's ability to enforce her divorce award.

Temur Akhmedov was found to have worked together with his father to hide hundreds of millions of pounds of assets – including several mansions, a superyacht, a helicopter and an extensive art collection – in order to avoid paying the divorce settlement.

For the judgment, **click here**. For a report in the *Guardian*, **click here**.

25/4/21

Departing from Equality in Farming Divorces

Nichola Bright, Senior Associate at **Myerson**, explains some of the difficulties inherent in divorces involving agricultural assets.

Agricultural divorces can be "notoriously difficult to resolve" (Wilson J in *R v R* [2004] FLR 98).

There is often a departure from equality in farming cases due to the non-matrimonial nature of some farming assets. For example, a farm which has been gifted, inherited and/or in the family for generations, in the expectation that it will be handed down, is an important factor which the court will take into consideration.

Whilst a distinction can be made between matrimonial and non-matrimonial assets, the needs of one or both parties will dictate the sway of a settlement. However, needs are an elastic concept, and if needs can be satisfied without recourse to non-matrimonial farming assets, the yardstick of equality can be stretched and tested. Each case will turn on its facts and the outcome will depend on a wide variety of factors.

Sharing and equality

The landmark case of ***White v White*** **[2000] UKHL 54** was itself a farming case. Martin and Pamela White both came from farming families and were married for over 30 years. They had three children together and lived their married life as successful dairy farmers. At the outset of their relationship, they each brought into the marriage a modest £2,000 and shortly after their wedding purchased a £32,000 farm in Somerset, known as Blagroves Farm. This consisted of 160 acres of land and a farmhouse, the marital home. They purchased the farm using a mortgage and an £11,000 loan from Martin's father. Over the years, they purchased more land which increased the size of the farm substantially. The parties also farmed Rexton Farm, consisting of over 300 acres, as part of their farming partnership. Rexton Farm was part of the Willett estate, which Martin's father purchased for an advantageous price in 1971. Later, Martin's father transferred that estate into the joint names of himself and his three sons, including Martin. In 1993, Martin purchased Rexton Farm, as his part of the Willett estate, subject to a mortgage of £137,000. This was purchased in Martin's sole name and it was not treated as belonging to the couple's farming partnership. Rexton Farm was valued at £1.78 million.

At trial, the total net assets were calculated at approximately £4.6 million. At first instance, the wife was awarded £980,000 on the basis that this is what she "reasonably required". This equated to around a fifth of the overall assets. The reasoning behind this was that she required a farmhouse with stabling and 25 acres, which at the time would cost around £425,000. She also needed £40,000 in periodical payments per annum, which was capitalised at £550,000. This would leave the husband with assets that exceeded his needs.

The wife successfully appealed the first instance decision and she was awarded 43 per cent of the overall assets. The key points taken from this case:

- Home-making contributions are treated the same as the financial contributions to a marriage. The court found that both parties put a tremendous amount of effort into their marriage and family. Within the home, it was primarily the wife who brought up the children whilst also working hard on the farm. The husband was a hardworking and active farmer.

- The end of "reasonable requirements". This term had become synonymous with "needs" and used as a limiting factor on the award which was (usually) made to wives. In White, the House of Lords steered us back towards the statutory language of "needs".

- Inheritance was an important factor. The couple would not have been able to purchase Blagroves Farm without the loan from Martin's father. Also, Martin purchased Rexton Farm on advantageous terms, stemming from his father's purchase of the Willett Estate. The House of Lords approach was to recognise the inheritance and family contribution and take this into account in any settlement. However, the inheritance factor will carry little weight, if any, in a case where financial needs cannot be met without recourse to this inherited property.

The outcome of *White v White* changed how all family lawyers approach a case, with reference to the starting point of equality. The main principle derived from this case is that equality should only be departed from if there is good reason for doing so and there should be no bias in favour of the bread winner, as against the homemaker.

Soon after White v White, reasons to depart from equality crept in. I*n N v N* [2001] 2 FLR 69, another farming case, the court took the view that the theory of equality was impractical. For example, equality may have the effect of crippling the family's finances to the ultimate detriment of the children. In the case of *N v N*, the wife received around 40 per cent of the matrimonial assets, but this was done over time, on the basis that the husband's farming business needed to continue with little disruption, to retain its value.

In the same year, in the non-farming case of *S v S (Financial Provision: Departing from Equality)* [2001] 2 FLR 246, there were grounds for departing from equality on the basis of the existence of the husband's second wife and family. It was held that, having regard to all the matters in s 25, the award of £400,000 to the wife, required to achieve equality, would discriminate against the husband. On the facts, such an award would mean that the wife lived in luxury, while for the husband with a new family to support, things would be much tighter. If an agreement was harder on one party than the other, then there has to be a good reason to depart from equality. The court should aim to provide both parties with a comfortable house and sufficient money to discharge their needs and obligations. On that basis there was an order for the husband to transfer to the wife his half-share of the matrimonial home and of the joint investments, and to pay to her a lump sum of £300,000.

After S v S, the non-farming landmark case of ***Miller v Miller; McFarlane v McFarlane*** **[2006] UKHL 24** highlighted that the concept of sharing had replaced the concept of equality and confirmed that sharing was not the same as equality. The needs of the parties were the emphasis in this case and the straightjacket of "needs" may not result in an equal division of assets.

Cases of equal sharing in agricultural divorces have been rare. The reason for a departure from equality in farming cases is often justified due to the nature of farming assets. Put bluntly, the needs or reasonable requirements of the parties can perhaps be satisfied without dividing a farm in half.

Many farming cases settle on the basis of a wider family-based agreement, with the farming family agreeing to use family money to buy out one spouse in order to achieve a clean break. However, those cases that do not settle often end up in court due to thorny issues surrounding trusts, partnerships, companies, third party rights and inheritance issues.

Thorny issues in farming cases

Farms can be valued like any other asset. However, common problems that distinguish farming cases from non-farming cases are as follows:

• The farm itself may be owned by a corporate entity with third party share interests. It is not unusual for extended family to have part ownership in a farm.

• The farm or parts of the farm could be held in trust.

• Farms may be run by several members of the family: parents, children, grandchildren, all of whom may have different roles and interests in the business. Farms are typically inherited assets and have been part of one family for many years.

• The farm may be the only source of income, which has to meet the livelihoods of several members of the family and its extended relatives, not simply confined to meeting the income needs of the separating couple.

• It is not uncommon for farm income to be reduced to enable the farming family to claim tax benefits to support their income, to reduce tax, or in some circumstances reduced in an attempt to limit the claims of the other spouse in financial proceedings after separation.

• Farmland is often rented out to long term tenants, which generates an income but may prevent the land from being sold for a certain period of time.

• Compared to residential property, it is not as easy and straightforward to mortgage or otherwise charge farmland to extract cash.

• Farms that have diversified (for example, commercial offices, farm shops, holiday lets, boarding kennels) may add complex issues to the valuation process due to the nature and number of diversified elements.

• The farm owner may be party to an environmental stewardship agreement, which provides an annual income. Many famers also receive yearly financial entitlements as part of the Basic Payment Scheme. These financial incentives are a valuable feature of any farm, but there can be difficulties in transferring these entitlements from person to person.

Extracting value from a farm, whilst keeping the farm alive, is the crux of the problem in most agricultural divorces. In *R v R* [2004] 1 FLR 928, the issue for the court was ***"to contrive a raft of arrangements which enable the wife and the children to vacate the farmhouse... to move to other accommodation and to live there at a reasonable level without disabling the husband from also living at a reasonable level***".

In *R v R*, the husband's company; a farm, had no means, either by immediate payment or by borrowing, to provide a lump sum for the wife. The company offered to buy the wife a house that the company would retain, but in which she could live.

Mr Justice Wilson said it would be wrong for the wife to have to be beholden to her husband's family and leave the husband with assets, his shares in the family company, worth around £450,000. A lump sum by instalments could be paid over time and could be used as security for raising a mortgage on her own property. Therefore, the husband was required to pay £30,000 immediately and £225,000 over 20 years (charged on the husband's shares in his business).

Brexit

Leaving the EU has meant that the UK is no longer part of the EU Common Agricultural Policy, which has traditionally paid UK farmers £3.5 billion per annum. This has been a significant, if not the main, source of income for some farmers. These payments have been the difference between some farms making a profit or not, in any given financial year. In 2018, DEFRA estimated that around 42 per cent of farms would have outgoings exceeding their revenues, without the benefit of these payments.

The Agricultural Act 2020, which came into force on 11 November 2020, provides Ministerial Powers to develop new farm support approaches in England. Newly introduced Environmental Land Management (ELM) Schemes will provide farmers with financial assistance for producing 'public goods' such as environmental or animal welfare improvements and 'public benefits' such as better water and air quality or public access through farmland.

There is no mention of any direct subsidies or quotas within the new Act. Payments under the current scheme, which will be phased out over the next seven years, are based on the size of the farm and how much land is farmed. There will be a multi-annual financial assistance plan for at least the next five years but there is no certainty on how payments will be made under the new scheme.

It is therefore very important that this seven-year phase out period is factored into any valuation of a farm or farming business, for current cases in particular. For future cases over the next five years, details of the new payment scheme will hopefully be clarified and therefore factored into any valuation of an agricultural business.

Diversification and valuations

Because of the Brexit-induced shift in emphasis towards environmental factors, the value of farmland may vary, as some farms will find it easier to meet the environmental requirements than others. For example, land which was previously valued at the lower end of the market, due to accessibility, may now benefit from an increase in value if it is repurposed to benefit the environment in some way, such as, for instance, restoring wildlife habitats, boosting wild species or woodland creation. Also, land with public footpath access may now actually increase in value due to the financial incentives that attach to having such access.

Some farms diversify with farm shops, workshops, holiday lets, wedding venues or even commercial office space. The focus on environmental factors may mean that those farms need to change how they operate or balance their carbon footprint by also benefiting the environment, as described above, to maximise the government subsidies they receive. That being said, some farms that have diversified are very lucrative already, so may not feel the effects of the change as much

as, say, a small crop farm. The value of the diversified business may itself outweigh any reduction in subsidies and the value of the land itself.

The diverse nature of farms highlights the importance of expert knowledge and valuations within farming divorces. As well as land and buildings, the farming business (or businesses) will need to be valued along with machinery, government subsidies and entitlements. The potential challenges brought about by Brexit may affect valuations and it will be more important than ever to instruct a trusted Agricultural Surveyor and Consultant when presented with an agricultural divorce.

Accurate and creative advice is needed at an early stage, to ensure that money can be released to satisfy the financial needs of both parties. For example, it may be possible for just part of the farm to be sold or there could be provision for capital payments over time. It is also possible for land to be transferred between spouses, in satisfaction of their financial claims. If there are other assets of a marriage which can be distributed to avoid a sale or part sale of a farm, that is also an option to be explored. Alternatively, or in addition, it may be possible to commence diversification of a business to aid a settlement.

Conclusion

Since the case of White, there are no widely reported farming cases where an equal division of assets has been ordered. The reason for this may lie in the nature of the assets themselves, but it may also be because of the emphasis on "needs" brought about by *Miller & McFarlane*. Some may say that "needs" has become a polite alternative to "reasonable requirements", which the House of Lords attempted to move away from, in *White v White*.

Whilst for non-farming divorces, an equal division of assets and wealth accumulated during marriage is considered a fair outcome, the reality is often unachievable for farming families, because of the desire and need to preserve assets that were owned long before the marriage or inherited by one party.

Fairness, however, still requires financial needs to be met.

22.04.21

Resources and Section 25 of the Matrimonial Causes Act 1973

Joseph Rainer and Thomas Haggie, barristers of Queen Elizabeth Building, consider third-party assets and their bearing on the court's assessment of resources in financial remedy cases.

The concept of 'resources' in s25 of the Matrimonial Causes Act 1973 arises at s25(2)(a) of the Act. In coming to a fair order, the court must have regard to:

> (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future…

Given 'financial resources' are distinguished from 'property' in the sentence, they have been taken as a separate class of asset.

In this article, we aim to:

- Delineate common scenarios whereby an asset owned by a third party might bear on the court's assessment of resources and consider their appropriate legal taxonomy.

- Highlight the dangers of running what we describe as 'pure Thomas cases'.

We hope that this article assists practitioners in analysing third-party resource issues in financial remedy cases, and encourages the practice of legally exact pleading when those issues arise. We believe this approach minimises the risk of the Family Court unfairly interfering with the rights of third parties (themselves frequently non-parties) to a claim, and minimises the risks that the 'look to the reality' approach poses to the interests of all parties concerned.

Common scenarios

In this article, we will discuss three subcategories of commonly occurring scenario, which we have named in shorthand:

- **Beneficial interest dispute –** An asset in which it is asserted a party has a beneficial interest, but that assertion is disputed. The most common such scenario is a dispute over a party's interest in property owned by a third party, often another family member.

- **Trust-type Thomas cases –** A resource to which a party has some beneficial nexus, but there is a dispute as to whether that asset would be made available to said party on request. This category covers a beneficiary to a discretionary trust. The right the party enjoys is to be considered for appointments under the trust. The party does not have an interest in possession/reversion in the trust property per se. The court must assess the evidence and determine whether it is fair and reasonable to make an order judiciously encouraging the trustee (or other analogous party) to make resources available to the spouse.

- **Pure Thomas cases –** A resource to which a party to the marriage has no strict legal or beneficial nexus but has nonetheless formed part of 'the picture' of the parties' financial life. A common example is voluntary

provision made to a party by a family member. These are frequently referred to as 'Thomas resources', after *Thomas v Thomas* [1995] 2 FLR 668. As above, in such cases the court must decide whether to frame an order so as to judiciously encourage the third party to make further provision.

• Cases in which a nuptial settlement might arise – These are outside the scope of this article.

Beneficial interest disputes

This describes those scenarios involving a question of whether a party has a beneficial interest in property legally owned by a third party, or vice versa. These scenarios, strictly speaking, are not really about 'resources' at all. We are reminded in ***Prest v Petrodel Resources* [2013] UKSC 34** that "property" in the context of s.24(1)(a) of the Matrimonial Causes Act 1973 delineates an entitlement to the property in question either in possession or reversion – i.e. a proprietary right, legal or equitable. In plain English, if a party has a beneficial interest in property, it is their property, not a more nebulous 'resource'.

The legal and procedural framework applicable to beneficial interest disputes can mostly be found in ***TL v ML* [2005] EWHC 2860 (Fam)** and is clear as day. In short:

• The Family Court is able to adjudicate a dispute between a spouse and a third party as to the beneficial ownership of a property. It can make a declaration of beneficial ownership but cannot make a property adjustment order over the third party's beneficial interest.

• That being said, the court can order the sale of a property in which a third party has a legal/beneficial interest, subject to the provisions of s.24A(6) of the 1973 Act which requires the court to give the third party an opportunity to make representations and have regard to them in the discretionary exercise. Obviously, the third party's share of any net sale proceeds falls outside the court's redistributive powers.

• A dispute with a third party must be approached on exactly the same legal basis as if it were being determined in the Chancery Division. The court's redistributive discretion and overarching goal of fairness is effectively suspended during adjudication of the beneficial interest dispute.

• It must be properly pleaded. Whilst there is no import of the CPR, Mostyn J is of the view that:

i. The third party should be joined to the proceedings at the earliest opportunity;

ii. Directions should be given for the issue to be fully pleaded by points of claim and points of defence;

iii. Separate witness statements should be directed in relation to the dispute; and

iv. The dispute should be directed to be heard separately as a preliminary issue, before the FDR.

• The burden of proof lies on the person seeking to assert that beneficial ownership diverges from legal ownership, as was made clear in *Fisher Meredith v JH and PH* [2012] 2 FLR 536. Insofar as the order of pleading is concerned, this party stands in the shoes of 'claimant' and must go first [1].

To show the existence of a trust of land, one must prove:

i. An express trust, which must either be signed in writing per s.53(1)(b) of the Law of Property Act 1925 subject to the rule in *Rochefoucauld v Boustead* [1987] 1 Ch 196, which blocks a party from relying on s.53(1)(b) if they know that a property was conveyed to them subject to an oral agreement to hold it on trust for another; or

ii. An implied trust, so either:

1. A resulting trust, which is implied where a property is purchased in the name of the legal owner with the money of the beneficial owner, or more commonly;

2. A constructive trust, which requires the usual ingredients of common intention (whether expressly stated or implied from conduct), detrimental reliance and the unconscionability of denial of relief.

If a party asserts that a spouse has, with dishonest intent, intentionally contrived with a third party (or parties) to mask the true ownership of an asset with a document or arrangement that purports to create different legal rights/obligations to those actually intended by the culprit spouse and third party, then a pleading of sham might be considered. More on this later in this article.

If a party claims that the other spouse has transferred their interest in an asset to a third party in order to defeat or reduce their claim (i.e. divested themselves of assets as a protection strategy), the court has the power to reverse such a disposition by way of s.37 of the 1973 Act. This is not a beneficial interest dispute per se – s.37 reversals are designed to rectify situations where a spouse's interest in an asset has actually been transferred to a third party, not those where it is asserted that the transfer was illusory and said spouse still retains an interest [2]. Section 37 applications are made by way of the part 18 procedure, and do not necessarily require points of claim and defence.

It is very important to understand the distinction between s.37 scenarios, beneficial interest disputes, and situations where sham might be alleged. We discuss the overlap between these concepts and the danger of 'stacking' them in the alternative from paragraph 23 below.

We have encountered a common practice where parties decide to put off Mostyn J's procedural steps until after the FDR, with witness statements from the parties and a third party directed beforehand, and the third party being invited to attend the court building at FDR in the hope that the wheels of settlement can be greased. This alternative to the strict approach espoused by Mostyn J is radically different from anything contemplated by civil procedure. It is often framed as being more pragmatic and cost effective. We would agree with this view if the disputed asset forms a relatively modest portion of the pot. In those circumstances it may be proportionate, and consistent with the overriding objective (which specifically enjoins the court to save expense) to hold off costly and time-consuming dispute about it until after the broad-brush indication and negotiation possible at FDR. We are more concerned by this scenario when it is driven by one or both parties' belief that an FDR judge is likely to gloss over the distinction between a proprietary interest and a resource owned by a third party which might be advanced to a spouse with a bit of judicious encouragement – what we will refer to as a 'pure Thomas case' and discuss further below. We believe the court and the parties – and particularly the one whose asserted rights/obligations to another are in dispute – should be vigilant against this sort of elision. After all, at this stage, the third party may not have been joined and, as the spouses experience the costs and stress of getting a case as far as FDR, may come under completely unwarranted pressure from one or both spouses to increase the matrimonial pot. This is all the more unsatisfactory when the FDR tribunal – as it is wholly entitled to do – decides it cannot opine on outcome without prior resolution of the third-party issue and restricts itself to commenting that it has been let down by the procedural steps taken to date. Trying to soft-soap a third-party issue can prove to be a disastrously expensive false economy.

Finally, beneficial interest disputes are free from the 'no order as to costs' rule in FPR rule 28.3. The losing party is thus at risk of being ordered to pay potentially two other parties' costs referable to the issue.

So-called Thomas cases – general principles

There are a handful of cases which set down the legal parameters for where the court will look at resources that might be provided by a third party. We have tried to summarise the principles:

a. Generally, in cases where the court is faced with the question of provision being made by third parties, the court can frame orders in a form which '*affords judicious encouragement to third parties to provide the maintaining spouse with the means to comply with the court's view of the justice in the case*', although this must not stray into 'improper pressure' (*Thomas v Thomas* [1995] 2 FLR 668).

Whilst it can 'encourage', it cannot compel provision from a third party [3]. (*A v A* [2007] EWHC 99 (Fam), paragraph 95). This is a strict line. Insofar as it hints at a novel form of pressure on a third party, the phrase '*judicious encouragement*' was specifically disapproved as being unhelpful and misleading by the Chief Justice of Hong Kong in *KEWAS v NCHC* [2010] HKCFA 10, paras 36-53 cited with approval as '*the most comprehensive and clear exposition*' of the law in this area by Mostyn J in ***Villiers v Villiers* [2021] EWFC 23**.

b. In cases where a question arises over the likelihood of capital/income being advanced to the beneficiary of a discretionary trust, the court should ask itself the so-called 'Charman question' – '*if a discretionary beneficiary were to request the trustee to advance the whole or part of the capital to him, would the trustee be likely to do so now or in the foreseeable future?*' (***Charman* [2005] EWCA 1606 (Civ)**, [2006] 1 WLR 1053.)

c. When answering the *Charman* question, the court is not tasked with making a positive finding about the future but making an assessment of likelihood (***Whaley v Whaley* [2011] EWCA Civ 617**, paragraph 113).

d. In all such cases, '*the question is not one of control of resources: it is one of access to them*' (*Whaley*, paragraph 113).

e. Whatever the nature of the trust (including whether it is dynastic or settled by a spouse), the issue is always approached by asking the Charman question. When answering that question, the court will have regard to the circumstances of the particular trust such as how it came into being, who the beneficiaries are, what duties the trustees have, what other relevant terms there are, how it has been administered in practice

and so on (*Whaley*, paragraph 54, *AF v SF*, paragraph 56, ***Charman v Charman*** **[2007] EWCA Civ 503**, paragraph 50).

f. Where the requests made of trustees are reasonable in the context of all the circumstances, it should be the exception rather than the rule to refuse such requests. Whether a request is reasonable will depend on the nature of the request, the interests of other beneficiaries and all the surrounding circumstances (*Re the Esteem Settlement* [2004] WTLR 1, paragraph 60).

g. An order framed on the assumption the trustees would have to make provision for a beneficiary who is the paying party would not amount to 'undue pressure' if the interests of the other beneficiaries would not be appreciably damaged, and the court decides it is reasonable for the paying party to seek to persuade trustees to release more capital to enable proper provision to be made for the other party (*Whaley*, paragraph 114, ***AF v SF*** **[2019] EWHC 1224 (Fam)** paragraph 56).

h. A distinction arises in such cases where a spouse is both a beneficiary and settlor of a trust. The court will generally treat a refusal by trustees of a request by a settlor with circumspection, because in the majority of cases a settlor would be acting reasonably in the interests of themselves and their family (*Re the Esteem Settlement*, paragraph 166, *Charman* paragraph 53).

i. The 'judicious encouragement' approach is not confined only to scenarios where a spouse is a beneficiary of a discretionary trust but is of wider application where a spouse 'enjoys access to wealth but no absolute entitlement to it' (Thomas).

j. However, there is a distinction between scenarios where a spouse is a beneficiary under a discretionary trust and other scenarios where such a beneficial nexus is absent (e.g. a family member providing funds through generosity). In the former case, the provider has a legal obligation to consider the beneficiary's interests ('*the very reason for the existence of the trust is to provide benefit for the beneficiary), whereas in the latter case the spouse has 'no more than a mere spes of bounty which may, at the election of the provider, reasonably or unreasonably be withheld*' (*TL v ML*, paragraph 86).

k. Unlike a trustee, a non-obliged purveyor of bounty to a spouse is not held to a standard of 'reasonableness' in their response to a request for funding. For a mere donor, it is their '*prerogative to be unreasonable, if that is their inclination*'. If the court is satisfied on the evidence that such a third party will provide money to meet or facilitate an award, then an award can be made on that footing. But '*if it is clear that the outsider, being a person who has only historically supplied bounty, will not, reasonably or unreasonably, come to the aid of the payer then there is precious little the court can do about it*' (*TL v ML*, paragraphs 88, 101).

l. In 'judicious encouragement' cases, there is a difference between those where an award is sought in the expectation that a third party will 'backfill' a paying party to compensate for a share of visible assets/income swallowed by a court order, and those where an award is sought that exceeds the visible assets/income and can only be met with recourse to 'fresh money' made available by the third party. 'Fresh money' cases are rare and unusual (***AM v SS*** **[2014] EWHC 865 (Fam)** paragraph 39, *TL v ML*).

m. Finally, whilst at least a partially semantic distinction, in some cases the court will be able to make findings that third party resources are likely to be made available to a spouse without the need for any judicious encouragement. For example, in *Browne v Browne* [1989] 1 FLR 291, the trial judge found that the wife in that case had '*effective control* of trusts in that the trustees had historically always been responsive to her wishes. Mostyn J considered that Browne was thus not a case of judicious encouragement at all, but 'rather a case of determining the true extent of the wife's resources'. We think ***AAZ v BBZ*** **[2016] EWHC 3234 (Fam)** and, ironically, *Charman* probably fall into this category. (*TL v ML*, paragraph 93).

Order in the chaos – subcategorising 'resource' cases

It should be obvious that these third-party resource cases are ranged across a spectrum of speculation. Insofar as it is useful to do so, we would typify them as follows:

a. Cases involving discretionary trusts or other similar resources with some beneficial nexus to a spouse, where the court is able to answer the *Charman* question in the affirmative and frame an order to judiciously encourage the trustees to provide funds to either 'backfill' a paying party, or more rarely, one that is premised and dependent on 'fresh money' being advanced by trustees. We will refer to these as '***trust-type Thomas cases***'.

b. Cases involving provision from third parties with no beneficial nexus to a spouse where the court finds it is safe to frame an order to judiciously encourage a third party to 'backfill' a paying party or (very rarely) provide 'fresh money' necessary to meet an award. We will refer to these as '***pure Thomas cases***'. We are not

> aware of any reported 'fresh money' case (it is of course possible that divorces are solved by a payout from a bounty provider, but the nature of the relationship this implies means such cases are unlikely to get to the stage of reported judgment post litigation).

These terms are our own shorthand, not approved judicial terminology.

Trust-type resource cases

Despite our shorthand, these cases don't have to involve a trust. As mentioned above, here we are talking about cases where despite legal ownership of a resource lying with a third party, there is some kind of beneficial nexus between a spouse and the resource. Discretionary trusts are just the most obvious instance of this scenario.

Thomas did not concern a trust. It involved a family business, of which Mr Thomas was a joint managing director and shareholder. The other shareholders were his mother and brother. At first instance, the judge made an order for child periodical payments and school fees that swallowed up almost the entirety of the monthly income Mr Thomas received from the family business but made a finding that this award would nonetheless be affordable and fair because Mr Thomas would, on the balance of probabilities, be able to procure changes in the dividend/management remuneration structure so as to provide a greater level of income for himself. To do this, he would need the cooperation of his mother and brother.

The Court of Appeal upheld the first instance judge's approach. Glidewell LJ said:

> 'If on the balance of probability the evidence shows that, if trustees exercised their discretion to release more capital or income to a husband, the interests of the trust or of other beneficiaries would not be appreciably damaged, the court can assume that a genuine request for the exercise of such discretion would probably be met by a favourable response… In relation to the facts of the present case, I would apply these principles to the family company as if it were a trust, and the shareholders (the husband, his mother and brother) the trustees.'

So in the factual context of *Thomas*, the phrase 'judicious encouragement' meant making an order that would be something of a financial squeeze for Mr Thomas without the assistance and cooperation of his family members, when the evidence indicated that it would be fair and reasonable for them to come to his aid. It is interesting that Glidewell LJ felt able to substitute 'trust' for 'family company' in this way, because as a matter of law, the fiduciary obligations of shareholders to each other are not akin to those of a trustee to a beneficiary. Having said that, he did make clear that this analysis was fact-specific.

Because a trustee owes a duty to consider a beneficiary, and to exercise their powers reasonably, a court is not bound by evidence from the trust of disinclination to assist tendered in proceedings. It is entitled to have regard to a wider canvas of what would be reasonable, and the historic pattern of arrangement between the trust and the beneficiary spouse. In ***SR v CR (Ancillary Relief: Family Trusts)*** **[2008] EWHC 2329 (Fam)**, [2009] 2 FLR 1083, Singer J did not consider himself bound by the *ipse dixit* of the witness, and instead had regard to the fact sensitive picture of his historic receipts from the trust, and the relationship between H, the trustees, and the settlor. This nexus of being obliged to test the position of the trustees against reasonableness (in the context of the trust, and its historic behaviour), makes life considerably easier for a claimant spouse than a 'pure Thomas' situation, to which we now turn.

Pure Thomas cases

Here we discuss those cases where there is no beneficial nexus between the spouse and the resource being relied upon. These are the cases most commonly associated with the *Thomas* label, and they are an oddity. It is very unusual for the law to sanction interference with the property and rights of persons who are not party to the litigation.

We think this notion, unique to Family Law, has emerged as a result of a difference in judicial focus between financial remedy applications and areas of civil law. As Glidewell LJ put it in *Thomas*, in financial remedy applications the court is concerned not to be '*misled by appearances*' and to '*look at the reality of the situation*'. It can be distasteful to a particular notion of justice if a munificent extended family decide to withdraw that generosity at the moment of divorce, to broker an outcome which may financially prejudice the non-related spouse.

That being said, we are of the view that 'pure *Thomas* cases' are conceptually and practically problematic and should rarely be argued. Here is why:

Availability of other more disciplined routes to the same conclusion

We think that there are other more rigorous legal analyses that might capture the outcome of a *Thomas* argument. In our experience, all too often pure *Thomas* arguments are wrongly used to suggest obliquely that an asset does, or should, belong to a spouse. If camouflaged ownership is being asserted, then that is what should be pleaded.

Consider this example: upon separation, a party discovers to their horror that what they had believed to be the ample assets of their spouse are actually all owned by members of their spouse's family. Throughout the marriage, our hypothetical applicant believed that the family home and two investment properties belonged to the respondent. The respondent's Form E asserts that the family home is actually owned by his father, and the two investment properties belong to his brother. Legal title supports this contention.

The applicant is adamant that these assets really belong to her husband. It should go without saying that before so much as thinking about *Thomas*, an applicant would first need to carefully consider other more obvious options:

- ***Section 37 of the Matrimonial Causes Act 1973***. This is the primary route to correcting the position where a party has transferred their own assets to a third party to deliberately put them beyond the reach of their spouse's claim.

- ***Beneficial interest.*** Where there has been no obvious divesting of assets to frustrate a claim, but it is nonetheless asserted that a spouse has a beneficial interest in assets apparently owned by another – this should be a beneficial interest argument. This is the territory discussed in the first part of this article, which should be resolved by the *TL v ML* procedure. In this case, the duty to plead falls on the applicant.

- ***Sham*** [4]. Sham may be considered where it is asserted that a document that appears to confer legal rights and/or obligations (such as a trust deed) was actually entered into with dishonest intent, and all parties to it intended a different outcome. The evidential hurdle to succeed on sham is high. However this may often be the correct legal descriptor for a finding often made by the Family Court: that a document (particularly a liability) is a 'fiction' and does not in reality mean what it purports to mean. This is often the real allegation lurking round the less aggressive sounding discussion of the 'softness' of a loan ('softness' is not otherwise a concept known to law) [5]. We think this is often unprincipled: a loan either carries the right to repayment, or it does not. It is not for a Family Court to assume a third-party creditor does not intend to rely on their rights in the absence of a clear finding that those rights are either fraudulently asserted, the terms need rectifying to give effect to the actual deal, or the creditor is in fact a '*pure Thomas*' third party who will not insist upon repayment. Although it is case specific, and a costs-risky option, we consider there may be tactical merit in the party asserting the liability forcing the other party to make an allegation of sham, in default of which they are deemed to accept the reality of the loan.

- ***Nuptial settlement.*** The facts might support an argument that either the family home itself, or at least a licence to occupy it, constitutes a nuptial settlement capable of direct variation by the court under s.24(c) of the 1973 Act. As flagged at the outset of this article, nuptial settlements are beyond the scope of this article.

What often happens in practice is that these different routes are argued in the alternative, in a mix and match fashion (as in *TL v ML*). Care needs to be taken in doing so. There is a high risk of running a case that is muddled at best and internally contradictory at worst. In ***A v A* [2007] EWHC 99 (Fam)**, Munby J (as he then was) described the wife's dual-pronged presentation of sham and a trust-type Thomas argument in the alternative as involving 'diametrically different assertions'. He witheringly appraised her position thus:

'[Counsel] is, of course, entitled to put his case in this way, but it must be appreciated that the two cases he seeks to make are quite inconsistent with each other. The first proceeds explicitly on the basis that the trusts are both shams. The second proceeds on the basis that trusts are not shams, in other words that they are genuine' (paragraph 27).

Whilst it is theoretically possible to run a case in this way, it is often hard to present the alternatives attractively. Advancing one point often undermines the other, which was exactly what befell the wife's case in *A v A*.

A similar approach was deployed in *ND v SD & Ors* [2017] EWHC 1507 (Fam) – there the wife argued sham, with s.37 as a fallback position. Those two propositions are happier bedfellows, not least because both are characterised by a flavour of impropriety. Nonetheless – the internal contradiction is still there – a s.37 argument assumes a disposition is genuine, sham asserts the opposite.

A v A and *TL v ML* are both illustrative of how flimsy *Thomas* arguments look when advanced as fallback positions. There is something inherently unattractive about spending the bulk of a case arguing that property *does belong* to a spouse (beneficial interest/sham), but when on the ropes, changing tack and arguing instead that it *should be given* to said spouse in future.

Those cases should be read as the warnings that they are. If you are arguing that legal ownership of a third-party asset veils true ownership/benefit by a spouse, then select the appropriate legal concept to express that assertion, as discussed above. *Thomas* is not a particularly useful 'backup' in such situations.

Central reliance on a challenging factual finding

As we have set out above, *Thomas* cases do not exist in an evidential vacuum. The court cannot frame an order in reliance that a third party will make resources available to a spouse unless it is able to find, on balance, that an award so framed would achieve that end. A lot then turns on the evidence of the third party.

The third party needs to be asked whether they will provide the resources sought to justify the court's contemplated award. A non-obliged third party stands in a totally different position from a trustee, and the difference is starkest in the attitude to reasonableness they are entitled to take. A non-obliged third party may decline to assist, and they do not have to justify that position to a standard of reasonableness. They owe no fiduciary duty to the spouse.

In the majority of contentious *Thomas* cases, that refusal to assist is probably the central forensic dispute in the case. Given the absence of a 'reasonableness' criterion, the odds at trial are stacked in favour of the non-obliged third party. When faced with a negative answer, there is '*precious little the court can do about it* [6] ', aside from find that the third party is not being truthful in their evidence. But that finding itself is tricky, because the court cannot impute an intention based on its own view of what is reasonable: that is not the standard to which the third party is held. Evidence of historic provision may not count for much in the context of separation, where the familial dynamic may have dramatically changed and the third party (frequently a family member) may genuinely baulk at the prospect of making provision for an ex-spouse.

A cautionary tale comes from ***Luckwell v Limata* [2014] EWHC 503 (Fam)**. Luckwell is best known as a pre-nup case. It was a case where the source of the matrimonial wealth was the wife's father. The father (Mike Luckwell) bought his daughter a sizeable property which became a family home, paid her an allowance and met the children's school fees. The wife's wealth (provided by Mike) was protected by a pre-nup. Mike's position at trial was that if the husband received a penny more than provided for by the pre-nup, not only would he not provide the funds to facilitate such an award, but he would effectively pull the carpet out from under his own daughter and terminate her allowance and the children's school fees.

Mike Luckwell was cross-examined at trial and stuck to his guns. His position was described by the wife's lawyers as *inherently implausible, lacking logic, irrational and holding a pistol to the head of the court*' . Holman J summarised the dilemma he was faced with:

> 'It could, of course, be tempting simply to call Mike's bluff; and in any event I could and would not yield to a mere threat or pistol to the head of the court. I must, however, make a finding whether Mike does or does not mean what he says and intend to carry it out.' (paragraph 95).

Holman J identified and avoided the temptation to impute a criterion of reasonableness and 'call the bluff' by reference to it. He correctly identified that his task his task was to make a finding on whether the third party was being truthful. He found that Mike Luckwell was. Having heard witness evidence from multiple parties about Mike's character ('*determined, hard, inflexible*'), and having reviewed the consistency of Mike's position throughout the litigation, Holman J concluded that '*he has the will power to carry his threat out… I must conclude on a balance of probability that he will do so*', before adding '*It is not for me to make any comment or moral observation upon the decision and intentions of Mike*' (paragraph 99).

Luckwell is a warning for those contemplating running pure *Thomas* cases. The stark reality is that if a third party says 'no', the court cannot frame an order that relies on their support unless persuaded that they will not really follow through. There may be the evidence to support such a conclusion. But it is a big gamble to take.

So we think perhaps the biggest problem with pure *Thomas* cases is that they are reliant on a factual finding (that a non-obliged third party will make provision), and self-defeatingly so because the very question being asked will probably evoke a negative answer. At that point, the case hinges on one's prospects of being able to persuade a court that a third party will not abide by their words.

Hard to advise on, hard to settle

It is hard to advise on the likelihood of a third party who does not need to be reasonable coming up to proof, or being disbelieved by a judge. This is unlike a beneficial interest dispute (see above), where strengths and weaknesses are visible in the pleadings and evidence. It follows that they are harder to settle, and harder for an FDR tribunal to opine on ahead of the evidence.

Enforcement difficulties

This is less of an issue in 'backfill' cases, but a serious impediment to 'fresh money' cases. In a 'backfill' case, an award might be made that gives a recipient spouse the vast majority of the parties' assets on the understanding that a judiciously encouraged third party will replenish the paying spouse. That order can be enforced against the parties' assets, and the

fact that the order was made on the basis of judicious encouragement does not per se add any extra layer of enforcement difficulty.

Not so for a 'fresh money' order: what happens if the fresh money spring never arrives? One cannot enforce against assets that have not been found to belong to one of the parties. As Mostyn J commented in *TL v ML*, it could '*hardly be said that the payer is in wilful default justifying a penalty under the Debtors Act 1869*', so coercion via a committal application is out of the question. As said above, we have not found a single reported 'fresh money' case , and there is probably good reason for that. Of course, enforcement is easier when the claim is suited to a pleading of a constructive trust, or a finding of sham against the documents evidencing the third parties' interest: as that party would be joined to the proceedings, they would accordingly be bound by the judgment.

For all these reasons discussed above, we think that pure *Thomas* cases should be very rare and should argued only when (1) the third party agrees that they will make provision, or (2) there is very strong evidence to support that proposition. Practitioners should be clear from the outset that if a third party says 'no', the evidence to the contrary will have to be compelling enough to persuade the court to go against the third party's word.

Conclusion

Most situations that arise in the Family Courts between a spouse and a third party are capable of being pleaded as legally recognisable claims without reliance on '*Thomas*' type arguments. The stricter legal arguments are almost always a preferable claim to make. If *Thomas* arguments need to be utilised, they should be pleaded consistently with alternative contentions (if possible), and should generally be a counsel of last resort, given the forensic and legal difficulties in procuring a satisfactory outcome from them.

Footnotes

[1]. We have encountered some confusion about the order of pleading in practice and have oft seen directions made for the alleged beneficial owner spouse 'go first'. That is wrong. The burden is always carried by the person asserting divergence between beneficial and legal ownership. Those who assert must prove, and thus 'go first'. The slight complexity discussed in *Fisher Meredith* relates to where a spouse holds legal title, and the alleged beneficial owner is a third party to the marriage: in that case the duty to bring the claim lies equally on the legal-title holding spouse, and on the third party whose interest is asserted. The obligation does not lie on the other party to the marriage (who is entitled to rely on equity following title). However, all these observations are subject to the comments of Lord Sumption in *Prest v Petrodel Resources* [2013] UKSC 34 at [45] regarding the duty on the economically dominant spouse regarding disclosure: though the burden of proof lies on the claimant, an inference to be drawn from non-disclosure against an economically dominant respondent husband is much more powerful in family proceedings than it would be in equivalent civil process.

[2]. Sometimes an 'add-back' argument will be a more appropriate and economical way of rectifying a party's divestment of assets if the assets disposed of to third parties represent a comparatively modest proportion of the matrimonial pot – see Mostyn J at paragraph 87 of ***OG v AG* [2020] EWFC 52**.

[3]. Ignoring variation of nuptial settlements and enforcement.

[4]. A detailed discussion of the law on sham documents and arrangements is beyond the scope of this article. By 'sham', we refer to the broad legal concept capturing situations when a document/arrangement is entered into but is intended by all the executing parties to give the appearance of creating legal rights and/or obligations different to those which the parties actually intended to create. For sham to be found, all parties to the document must have subjectively intended the divergence between apparent and actual rights/obligations and to give the false impression of said rights/obligations to others. See Roberts J's useful summary of the law in ***ND v SD & Ors* [2017] EWHC 1507 (Fam)** from paragraph 176 onwards.

[5]. The Family Court does come to sham-like conclusions, even if unpleaded. In **R v K [2018] EWFC 59** e.g., where no pleading of sham was made, a finding of sham was more or less exactly what Baker J held at [189] … the loans alleged to have been made to C finance are a fiction. The truth is… that he has procured the assistance of his acquaintances and offshore associates to try to create evidence to defeat the wife's claim'. Whilst the shape of the husband's case in *K v R* only became clear on the morning of the trial, meaning there was not time for formal pleadings, it would normally be proper to plead such an allegation as a sham. NB in this case there was not a written loan agreement – instead emails and oral evidence – which would have presented an additional (though probably not insuperable) complexity to a sham pleading.

[6]. *TL v ML*, paragraph 101

28/04/21

CASES

AB v CD & Ors [2021] EWHC 741

The case concerned a 15 year-old child, with Gender Dysphoria, who was born a boy, came out as transgender at age 10, and had transitioned socially in all aspects of life, including legal paper work, which included a name change by deed poll.

The court framed the questions to be answered as follows [as per Sir James Munby's formulation]:-

a. Do the parents retain the legal ability to consent to the treatment?

b. Does the administration of PBs fall into a "special category" of medical treatment by which either:

i. An application must be made to the Court before they can be prescribed?

ii. As a matter of good practice an application should be made to the Court ?

The decision followed hot on the heels of the Divisional Court's decision in ***Bell v The Tavistock and Portman NHS Foundation Trust & Ors* [2020] EWHC 3274 (Admin)** ("*Bell*"), which set out the matters that a child would have to understand, retain and weigh up in order to have the requisite competence in relation to puberty blockers. Although XY had provided consent to the treatment prior to *Bell*, an updating capacity assessment on the basis of the Bell criteria had not been carried out. The parents wished to consent on XY's behalf.

Bell is currently the subject of an appeal to the Court of Appeal due to be heard in June.

In considering whether the parents retained the legal ability to consent to treatment, the court reviewed the authorities which it found were replete with statements '*about not merely the centrality of parents in decisions about their children, but also as to why the Courts should in the vast majority of situations respect and uphold the parents' views and decision making about their children.*', which were aspects of the parental rights and duties set out in Article 5 of the UNCRC and Article 8 of the ECHR.

The court approached the problem on the following basis:-

> "It therefore cannot be established with certainty whether [XY] is, or is not, *Gillick* competent. In those circumstances, I am going to consider the matter on two alternative bases; either that [XY] is not *Gillick* competent, or that [XY] is *Gillick* competent, but it remains relevant whether [XY's] parents can also give operative consent to the treatment."

The court reviewed the decision in *Gillick* and concluded, neatly, that:-

> "In the present case, in the light of the decision in *Bell*, and the particular issues around *Gillick* competence explained in that judgment, it has not been possible to ascertain whether the child is competent. In this case, there are two options. If the child is *Gillick* competent, [XY] has not objected to her parent giving consent on her behalf. As such, a doctor can rely on the consent given by her parents. Alternatively, the child is not *Gillick* competent. In that case, her parents can consent on her behalf. It is not necessary for me or a doctor to investigate which route applies to give the parents authority to give consent. Therefore, in my view, whether or not XY is *Gillick* competent to make the decision about PBs, her parents retain the parental right to consent to that treatment."

Hence, the court concluded, the parental right to consent to treatment continues even when a child is *Gillick* competent, save where the parents are seeking to override the decision of the child.

With respect to the second issue, as to whether PBs fall into a special category of medical treatment requiring court authorisation either as a matter of good practice or a matter of law, the court considered that there were 2 sub issues:-

a) firstly, "t*he existence and/or scope of any "special category*"; and,

b) secondly, "*whether PBs should fall within such a category.*"

The court considered, in the light of case law that whether it was good practice or a legal requirement was probably in most cases a distinction without a difference. Further, the court was of the view that whether, if it existed at all, there was some limited 'special category' of medical treatment, it was very limited and PBs did not fall within it.

The only special category case in respect of which the court could identify a requirement to come to court was a case of the kind in *Re D (A Minor) (Wardship Sterilisation)* [1976] 1 All ER 326 i.e. "in a the case of a "non-therapeutic" sterilisation of an 11 year old."

The court noting that-

> "In all other contexts, including where the parental decision will lead to the child's life ending, the Court has imposed no such requirement. There are a range of cases where there does have to be Court approval, but this is where there is a clinical disagreement; possible alternative treatment of the medical condition in issue; or the decision is, in the opinion of clinicians, finely balanced. These are fact specific instances rather than examples of any special category of treatment where the Court's role is required simply because of the nature of the treatment."

The court went on to state that whilst "*the ratio of Bell is that a child is very unlikely to be in a position to understand and weigh up the[Bell] factors…*" in order to establish the relevant *Gillick* competency, the uncontested evidence in this case strongly suggested that '*XY's parents have fully considered these matters and come to a careful and informed decision.*', *and, as a matter of principle, the factors in Bell* '*do not justify removing the parental right to consent.*'

The court then addressed its concerns about 2 issues in the context of parents seeking to consent for PB's to children, given the broader backdrop of '*division of clinical and ethical views [which had] become highly polarised.*' and the possibility of parents feeling under pressure to consent from a child who has Gender Dysphoria and is convinced they should be prescribed PBs.

> 1. Firstly, the court was concerned that in the context of the structure of the Tavistock and UCL, "…it may be that clinical difference and disagreement will not necessarily be fully exposed. The taking of strong, and perhaps fixed, positions as to the appropriateness of the use of PBs may make it difficult for a parent to be given a truly independent second opinion. However, in my view this is a matter for the various regulatory bodies, NHS England and the Care Quality Commission, to address when imposing standards and good practice on the Second and Third Respondents."
>
> To address this issue the court explored whether "*It may well be that, given the particular issues involved, additional safeguards should be built into the clinical decision making, for example by a requirement for an independent second opinion. Any such requirement is a matter for the regulatory and oversight bodies and may be a matter considered by the Cass Review. My view is that this is likely to be a better safeguard for the very vulnerable children concerned rather than removing the ability in law of the parents giving consent. The clinical expert who gave the second opinion could then have a role in advising whether or not the particular case should be brought to Court.*
>
> 2. Secondly, the court was satisfied that "*The pressure on parents to give consent is something that all the clinicians concerned are likely to be fully alive to. Ms Morris submitted that GIDS was very much aware of the issue, and that considerable efforts were made to ensure that there was a family-based range of consultations and that parents saw clinicians in private as well as with their children. If the clinicians, or indeed any one of them, is concerned that the parents are being pressured to give consent, then I have no doubt such a case should be brought to Court.*"

Hence, depending on the circumstances, particular 'fact specific' cases regarding the administration of BPs may still find their way to court, but not by reason of BPs being in a special category, if such a thing exists, requiring reference to the court per se.

Case summary by **Barry McAlinden**, Barrister, **Field Court Chambers**

AB v CD (Abduction: Undertakings) [2021] EWHC 665

Background

The parents, both Kazakh citizens of Chechen heritage, had been married under Islamic law and had two children, E aged 7 and G, 3. After their separation in 2018 the children lived with their mother (M) and spent time with their father (F).

In December 2019 M brought the children to this jurisdiction, without the knowledge or permission of F, and applied for asylum on the basis that the children were in danger from F and that he had threatened to remove them from her care. The children were dependant persons for the purpose of that claim and did not make free-standing applications. Shortly before the hearing, the asylum claim was rejected but M's appeal against that decision was outstanding.

In October 2020 F applied for the children's return pursuant to the Hague Convention 1980. By the time of the hearing the children had not seen or had any communication with F for some 15 months. He had issued an application for contact in Kazakhstan but no hearing had taken place.

The defences

As a result of expert evidence on Kazakh law, M abandoned arguments on habitual residence and rights of custody.

M's 13(b) defence (grave risk of harm or otherwise intolerable situation) was founded on allegations of domestic abuse. There were some legitimate question-marks about the evidence she provided, but the court proceeded on the basis that M had suffered significant verbal and physical abuse. There was no evidence that she had done so since the parties separated, nor that the children were at risk. There was no evidence to back her assertion that she would not be protected by the Kazakh authorities, nor that the children would be required to live with F. There was no evidence at all about the alleged impact of a return on M's mental health. F offered financial support that would enable her to house the children.

In looking at protective measures, the court acknowledged that undertakings offered by F were not enforceable in Kazakhstan although it might be possible to incorporate them in an agreement within the contact proceedings. There is no requirement in law that undertakings must be enforceable in the requesting state for a return order to be made. Objectively there was found to be no real risk that the children would be removed from M's care in Kazakhstan and the court had no cause to doubt F's bona fides.

The 13(b) defence was not made out but return would be deferred to allow time for the parties to enter into an agreement, incorporating the relevant undertakings, for lodging with the Kazakhstani court as part of the contact proceedings

E's objection was not to Kazakhstan but to the thought of living with F. Even if she were objecting to return the court would still have exercised discretion in favour of return, given the circumstances and E's young age which meant that even if her views were taken into account they would be far from determinative.

Postscript

The Supreme Court decision in *G v G* [2021] UKSC 9, three days after this judgment was given, reverses the Court of Appeal's earlier decision that a child named as a dependant on a parent's asylum application did not have the same protection against refoulement as children who were asylum applicants in their own right. The SC also ruled that a pending in-country appeal acts as a bar to the implementation of the return order. It appears that, until it is determined, the mother's appeal against refusal of her asylum application will prevent implementation of this order.

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

Re W and Re Z (EU Settled Status for Looked After Children) [2021] EWHC 783

The court examined 3 separate applications made by local authorities under the inherent jurisdiction of the High Court to determine how application should be made to regulate a child's immigration status under the United Kingdom's European Union Settlement Scheme (EUSS) Given the UK's withdrawal from the European Union, the right to 'freedom of movement' within the EU came to an end, and children who were nationals of another EU country living in the UK would find their right to remain in jeopardy without an application.

The court concluded that there is only a small category of cases where the local authority need to get the court's permission to 'over rule' parents,, rather than simply relying on the statute and that applying to regulate a child's immigration status, or applying for an identity document in order to make that application, for did not fall within the category.

The court examined the following issues:

> 1. Where parents of an EU National child subject to a care order either oppose an application for their child for immigration status under the EUSS (or the application for a passport or national identity document that would allow this application to be made) or can't be found to give their agreement, can the local authority proceed to make the application relying on section 33 (3) of the Children Act OR does it need the court's permission?
>
> 2. If the EU national child requires a passport or other identity documents from the relevant EU Member State, and requires a court order if the parents can't be found or don't agree, does this court have the power to make an order and if so what is it?

The court determined that the local authority could proceed to make applications for a child's settled status without requiring the court's approval. If an order was required in order to get a copy of identification documents from the relevant EU Member State in order to make the application, the court did have the power to make an order under the inherent jurisdiction but the local authority should first check with the EUSS what documents were required as it may be possible to proceed without a passport. The Secretary of State for The Home Department, as intervenor, reassured the court that caseworkers at the EUSS will be looking for reasons to grant applications, not refuse and should exercise discretion in favour of applicants to minimise administrative burdens.

The issue of securing a child's immigration status was important, given the estimated 3,300 looked after children and care leavers who were eligible to apply to the EUSS. Those subject to a care order or placement order numbered 2,080 and so

far 1,520 applications had been made. The deadline for the applications is 30th June 2021 so it was necessary that all local authorities understood and discharged their duties towards children who are eligible to apply, although there was a discretion for late applications to be made.

With regard to children not subject to care and placement orders, guidance was issued by the Home Office in April 2020 highlighting that local authorities must in all circumstances seek the best possible outcomes for the looked after child and should address immigration issues as soon as possible and take legal advice as appropriate. If the local authority did not share PR for a child, this may mean an application to the court was necessary.

The court examined also the broader issue of what categories of decision were so serious that it would not be appropriate to allow the local authority to rely on section 33 of the Children Act 1989. A small open category of cases remain where it is appropriate for issues involving exercise of parental responsibility to come before the court but it was emphasised that this is only justified where:

> … the consequences of the exercise of a particular act of parental responsibility are so profound or enduring and have such an impact on either the child him or herself, and/or on the Art 8 rights of those other parties who share parental responsibility with a local authority, that it would be wrong for a local authority to use its power …'

Three Court of Appeal decisions were considered as guidance.

> In ***Re C (Children)*** **[2016] EWCA Civ 374**, a local authority could not use section 33 to stop a parent registering a child with a particular name; this issue should come to court.
>
> In ***Re H (A Child)(Parental Responsibility: Vaccination)*** **[2020] EWCA Civ 664** routine vaccination under the United Kingdom public health programme, in circumstances where there was no contra-indication in relation to the child in question and the link between the MMR vaccine and autism had been definitively disproved, could not be regarded as decision of such magnitude that it would be wrong for a local authority to use its power under s. 33(3)(b) to override the wishes or views of a parent
>
> in ***Re Y (Children in Care: Change of Nationality)*** **[2020] EWCA Civ 1038**, in circumstances where changing a child's citizenship is a momentous step with profound and enduring consequences that requires the most careful consideration, it would not appropriate for the local authority to proceed under s.33(3) of the Children Act 1989 in the face of parental opposition and where that course may lead to a loss of their existing citizenship

The Court noted the observation of King LJ at para 99 of *Re H (A Child)(Parental Responsibility: Vaccination)* that section 33 of the Children Act 1989 is not an invitation to local authorities 'to ride roughshod over the wishes of parents whose children are in care.' It was suggested that parents could make their own application to invoke the inherent jurisdiction if the local authority wished to vaccinate against their wishes. However, as was noted in In Re Y (Children in Care: Change of Nationality), it is often not a realistic remedy to expect parents to take legal action, particularly if their immigration status is insecure.

The court found that Parliament intended a local authority which has been granted parental responsibility in respect of a child by operation of law:

> to be able, following a rigorous procedural and legal process undertaken before a court prior to the granting of such orders and if necessary to safeguard and promote the child's welfare, to limit the power of a parent to make major decisions regarding a child's life and instead to take those decisions in place of the parent by exercising its parental responsibility for the child.

There are statutory limitations in s 33(6) and (7) that the local authority cannot cause the child to be brought up in a different religion, change the child's surname or remove him from the jurisdiction. However, subject to these restrictions and the requirement that exercise of parental responsibility must be 'necessary' to promote the child's welfare, the power conferred by s.33(3) on a local authority is not otherwise circumscribed.

The court was clear that an application to EUSS or for a passport did not invoke consequences so profound that the court's approval was needed. The court considered in particular that the application for passport was simply to provide evidence of a child's identity and nationality, and a grant of immigration status under the EUSS will not prevent the child from returning to their country of origin or, if he or she wishes to, from relinquishing their immigration status in the UK on reaching their majority.

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

AB v CD [2021] EWHC 819

Background

The parents are doctors who married in 2011 but separated the following year. At that time, the respondent mother was pregnant with their daughter, who has lived with her mother since birth. The child was 8 years old at the time of this appeal.

The parents were judicially separated by April 2013. In October 2013, the father was convicted of criminal charges relating to unauthorised and illegal provision of prescription drugs. He received a nine-month custodial sentence and lost his practising certificate. He unsuccessfully appealed against the removal of his licence to practice as a doctor in this jurisdiction. Thereafter, the father spent much of his time in Pakistan and Saudi Arabia.

Despite the parents having separated and the father spending significant time abroad, the parents spent time together with the child as a family. The parents had also attempted to make arrangements for the child to have a relationship with her father, but these attempts broke down.

Proceedings

Therefore, in November 2019, the father made an application for contact with the child. The mother's domestic abuse allegations against the father did not surface until he issued his application. The father claimed that the mother's allegations, which she said started in 2006, were entirely fabricated.

Following the mother's allegations, the father issued a further application for the child to live with him. The father also made counter-allegations against the mother including of sexual and physical abuse and parental alienation. There were therefore two separate Scott Schedules.

Recorder Armitage heard evidence over 2 ½ days. She found five of the mother's allegations proved, including sexual and emotional abuse and threats to remove the child to Pakistan. She did not find the mother's allegations of physical abuse proved, but in a recital on the face of her approved order, she referred to those allegations as having "strength and power". The Recorder accepted only one of the father's counter-allegations, in relation to the mother snatching a credit card and throwing some items to the floor.

Appeal

On behalf of the father, an appeal with eight grounds was lodged, arguing that the judge's reasoning process was fundamentally flawed and that her findings could not stand. The judge was criticised for compartmentalising the evidence and failing to consider the father's case that the allegations against him had been fabricated. It was said that the judge focussed on parts of the evidence; excluded some very serious matters (e.g. the allegations of threats to kill and throwing acid); and took a selective approach. The judge had decided she did not need to consider or determine some of the allegations raised by the mother. On behalf of the father, it was argued that such a decision drove the Recorder to consider the rape allegations without asking herself whether the mother was capable of fabricating very serious allegations.

It was argued on behalf of the father that the Recorder's decision not to make specific findings about certain aspects of the evidence meant that her judgment did not set out a "line of sight" into how far evidence that the Recorder found "unnecessary or unhelpful" did instead influence her deliberations.

The father's appeal argued that the Recorder's judgment did not include a summary of the oral evidence she heard; an account of her impression of the witnesses as truthful or otherwise; or an account of the weight which she had attached to any of these matters. It was said that the Recorder did not weigh the parties' evidence, in order to conclude that the mother's evidence was to be preferred. The grounds of the appeal also included a complaint that the Recorder had failed to give herself a Lucas direction.

In relation to the rape allegations, the court had prevented the father from putting some evidence and it was said that the Recorder's judgment did not address other evidence, including that the father and the mother had agreed that the father lacked a desire to have sexual relations with his wife. It was also submitted on behalf of the father that the Recorder had failed to explore all the documentary evidence which had the potential to undermine the allegations of rape.

On behalf of the mother, it was argued that the findings were reliable when considered in the context of the whole judgment and that the Recorder had the advantage of seeing and hearing the parties' oral evidence. With no procedural irregularity or error of law, the High Court was asked to find that there was no justification for disturbing those findings. It was highlighted that counsel did not seek further amplification or qualification of the judgment.

The law

Appeals are governed by Rule 30.12 of the Family Procedure Rules 2010 providing that an appeal shall be allowed when the decision of the lower court was wrong or unjust because of a serious procedural or other irregularity and an appellate court is permitted to draw inferences that are justified on the basis of the evidence.

All appellant courts must consider:

(i) has the judge in the court below made an error of law?

(ii) has the judge reached a conclusion on the facts which was not open to him or her from the foot of the evidence which was before the court?

(iii) did he or she fail to take into account, or give proper weight to, a significant piece of evidence or matter and/or given inappropriate or undue weight to another aspect of the evidence?

(iv) did the judge adopt a process which was procedurally irregular and unfair so as to infect or contaminate his/her decision to the extent where it is unjust?

(v) did the judge exercise his or her discretion in a manner which was outside the boundaries within which a reasonable disagreement is possible and permissible?

A fact-find judgment must be clear, in part because it can have far-reaching, life-changing, consequences for families. Guidance on the balance to be struck between clarity and "the exigencies of… over-burdened court lists" has been provided by Munby P (as he was then) in ***Re F (Children)*** **[2016] EWCA Civ 546**, paras 22-23.

Decision

In this case, it was not suggested that the Recorder made any error of law, but rather that she failed to properly assess the evidence and improperly weighed and balanced it.

Roberts J notes in this judgment that the Recorder's decision to ignore certain allegations was a case-management decision which she was entitled to make. Having declined to consider them, the position as a matter of law was that they were never proved and both parties were entitled to proceed on the basis that they played no part in her analysis or deliberations. But the Recorder's recital (acknowledging the "strength and power" of those allegations) suggested that the Recorder considered they might be true, and therefore engendered doubt about whether and to what level the Recorder analysed those matters when considering credibility.

The appellant court found that there had been an absence of analysis in the Recorder's judgment on the issues of the father's credibility and the father's case that he was facing a series of "escalating and false allegations manufactured by the mother in order to subvert any prospects of success" in his contact application.

Roberts J also highlighted that the Recorder's approach to a Lucas direction was not sufficiently nuanced because it suggested the Recorder was expunging from her mind the fact that the father had been found to be dishonest in the criminal proceedings. In fact, a Lucas direction is a reminder that "a person can lie for a number of different reasons including shame, humiliation, misplaced loyalty, panic, fear, distress, confusion and emotional pressure" and that a judgment must reflect on how that direction has shaped the approach to relevant issues of credibility. The Recorder was wrong to completely put from her mind the father's previous conviction for dishonesty.

Finally, Roberts J concluded that the Recorder's reasoning was "insufficient to explain how she conducted her assessment of credibility and which matters she did, or did not, weigh in the balance when reaching her conclusions". It was a mistake, determined Roberts J, to have included within her approved order the recital about the "strength and power" of the allegations which she claims to have ignored in her survey of the evidence.

For practitioners and judges, in cases when one party claims that allegations have been fabricated, it is incumbent on the fact-finder to explain carefully why that claim is rejected.

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

Re F (assessment of birth family) [2021] EWFC 31

The mother (M) had been adopted at age 6. By age 13 her adoptive placement began to break down and she successfully made contact with her birth family. She visited them and at one point stayed for a month. During one visit, aged 17 M discovered she was pregnant. By this time she was in foster care. Her view was that her birth family had been wholly negative about her pregnancy and she was not supported by them at all. She opposed them being assessed as carers for F. The LA's care plan for F was a supported rehabilitation to M's care, but contended that a parallel plan should include consideration of assessment of the birth family.

The court took account of the guidance offered in ***Re A, B, C (adoption: notification of fathers and relatives)*** **[2020] EWCA Civ 41** and ***Re H (care and adoption assessment of wider family)*** **[2019] EWFC 10**. On careful consideration of the legal principles the court was satisfied that M's birth family were not her current 'family' or her 'relatives' in the context of CA 1989 Part III. Even if the birth family could bring themselves within the definition of 'family' there was evidence that argued against them being considered as a realistic option to care for F (para 30). M's opposition to their assessment also carried significant weight (para 31). The court noted that there may be circumstances in which a birth family could

properly fall to be assessed, for example where there had been a reconnection with a birth family that had led to a wholesome and successful reunion, but that was not the case on the facts in this instance

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

NHS Trust v S [2021] EWHC 594 (Fam)

Background

S suffered a severe lack of oxygen and blood supply to his vital organs around the time of his birth, and as a result sustained extensive brain injury (severe perinatal hypoxic ischaemic encephalopathy). He had remained on the neonatal intensive care unit since then, requiring ventilation and feeding by naso-gastric tube.

The medical evidence (which included an independent report by the Head of Neonatal Services at GOSH commissioned by the parents) was that S had suffered permanent and irreversible brain damage and that there was no prospect of any improvement in his condition. He was unlikely to be able to see or hear, to ever be able to react to anyone or anything, to feed without a naso-gastric tube or a tube passing through the stomach wall, and to breathe without the support of a ventilator. When he opened his eyes or moved his limbs this was a reflex response rather than purposeful movement, and although there was some evidence that he appeared to respond to the discomfort of suctioning and turning, there was no prospect of him ever mobilising.

The medical professionals involved in his care all agreed that it was in his best interests to withdraw life supporting treatment. Accordingly, the hospital trust, supported by the Guardian, sought the declarations set out at para 1 of the judgment. The parents opposed the application. They sought to take S home on a ventilator (which could only be achieved if he had a tracheotomy, PEG feeding and 24-hour nursing care) without escalating treatment if he deteriorated any further. They believed that S responded to their touch.

Decision

The court bore in mind the strong presumption in favour of the prolongation of life (***Re NHS Trust v MB and others* [2006] EWHC 507 (Fam)**) and focused (as per A*intree University Hospital NHS Foundation Trust v James* [2013] UKSC 16) on whether it was in S's best interests to give him medical treatment rather than on whether it was in his best interests to withhold or withdraw it.

Whilst the benefits of ongoing treatment would mean that S would be alive and would continue to receive love and care from his parents, these were outweighed by the burdens and likely suffering that would ensue: he required deep suctioning every 2-3 hours per day and the medical evidence was that the movements of his jaw in response to this suggested that he could experience pain and discomfort; regular replacement of his nasogastric and NETT tubes needed to be followed by X- rays to ensure that they were properly sited; he faced a variety of longer term problems as he got older (spasms in the muscles causing dislocations or fractures, epilepsy, chest infections, uncontrollable fits, apnoea, sudden cardiac arrest) some of which could lead to his sudden death. In summary, the court found that it was not in S's best interests to put him through all of this simply to keep him alive. The court made the declarations sought.

The court considered, as it must, the views and opinions of the parents as well as those of the doctors. However, although the mother believed S's limb movements when touched or tickled were more than reflex responses, the court found that her longing to see a reaction in her son had coloured her observations. In considering the arguments put forward by the parents, Judd J highlights at para. 21 the anomaly that whilst those who face an application to take their children into care receive full non-means and non-merits tested public funding, those who face an application to withdraw medical treatment from their child do not. Fortunately, the parents in this case, who were not eligible for public funding yet could not afford to pay for lawyers themselves, were represented by counsel for free.

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

P (a Child) (Interim Separation) [2021] EWCA Civ 499

Within a week of his birth in August 2020, P was made the subject of an interim care order and placed in a mother and baby foster placement with his mother. The placement broke down and the court approved P's placement in foster care. In October 2020, P and his mother were reunited in a residential assessment unit. The mother's initial progress was not consistently sustained and the conclusion of the PAMS assessment was that P could not move into the community with his mother.

In March 2021, the mother's partner (who she had met after P's birth) was allowed to join her in the unit to assess whether he could compensate for deficits identified in the mother's care and whether they could prioritise P's needs over their own.

Matters deteriorated such that P had to be removed from his mother's care overnight on two occasions. The unit gave notice to terminate the placement after the mother assaulted her partner and attempted self-harm. The local authority's

subsequent urgent application for permission to remove P to foster care was supported by the Independent Review Officer and the Children's Guardian.

His Honour Judge Greensmith refused the application and listed the case for the next day when the local authority was to provide a position statement setting out the support that could be offered to prevent separation of P and his mother. The following day, after hearing submissions, HHJ Greensmith gave an oral judgment in which he did not approve the removal plan as the court did not have the evidence to inform a decision as to whether separation was necessary. The case was listed to be heard eight days later before another judge.

In the meantime, the local authority applied for permission to appeal HHJ Greensmith's order. Permission to appeal was granted and, in the interim, the court determined P should be placed in foster care. By the time of the appeal hearing, the mother had spent supervised time with P on all but one day.

The mother, after careful reflection, did not oppose the appeal. Edis LJ said there was no proper basis for the court to doubt the conclusions of the five-month professional assessment at the residential unit, and there should be no pressure for that placement to continue. Other theoretical placements were either impossible, inappropriate or could not be put in place immediately. Therefore, the local authority's plan for separation should continue until a full hearing could take place. P would remain in foster care and have frequent contact with his mother.

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

Re C (A Child) [2021] EWFC 32

A decision of Sir James Munby, sitting as a Judge of the High Court, considering whether the English Court had jurisdiction to hear M's application, applying the relevant provisions of the Maintenance Regulation (EC) No 4/2009.

Background

M, the mother of the child ('C'), was born in Russia, a resident of Finland and had lived in England for extended periods prior to 2014. F, C's father, was born in Sweden and resident in Monaco. C was born in France, in August 2014, and lives with M. M and C lived in France from 2014 until August 2019, when they moved to England.

M's Schedule 1 application was issued on 26 November 2019 and F had issued an earlier application in the Monegasque courts, on 21 November 2019. F's application was principally in respect of maintenance and paternity. DNA testing took place within these foreign proceedings establishing in September 2020 that C was F's child and so dispensing with the issue of paternity. The court in Monaco, on 18 March 2021, gave judgment holding that it had jurisdiction in matters relating to C's parentage and child maintenance, giving directions to resolve the dispute regarding where M was domiciled so to determine the law applicable to the claim.

The question for the English court was whether it had jurisdiction to hear M's Schedule 1 application, which was issued later in time. Despite the United Kingdom's subsequent departure from the EU, the issue of jurisdiction was governed by the Maintenance Regulation (EC) No 4/2009 (the 'Regulation'). The material provisions being Recital (15) and Articles 2, 3, 5 12 and 13.

The Issue

F sought to stay the English proceedings. Monaco is not a member of the EU, but F contended that the Regulation has reflexive effect and so should be applied as if Monaco were a Member State, providing the terms of the Regulation do not prohibit such treatment. The argument being that, had F's proceedings been issued in a Member State, the English court would have been bound to decline jurisdiction.

M argued that the fundamental principles underpinning the Regulation (in particular, as developed by the Supreme Court in ***Villiers v Villers (Sec State for Justice intervening)*** **[2020] UKSC 30**) were fatal to F's case; namely, that these fundamental principles prevented precisely what F was inviting the court to do.

The meaning and effect of the Regulation

The court rejected F's approach to the Regulation, agreeing with the position advanced by M. In rejecting the underlying premise of F's approach, the court set out nine propositions derived from various EU jurisprudence and *Villiers*' treatment of the Regulation [para 19]; these propositions placed particular emphasis on the protection afforded to the maintenance creditor in such disputes, being the weaker party in the context of the dispute, and the unfettered right of a maintenance creditor to choose the jurisdiction in which to bring his or her claim.

The judgment proceeds to a more detailed analysis of *Villiers* and two further decisions of the CJEU before summarising why F's argument could not succeed. The Judge considered the approach to be in stark conflict with the fundamental principles applicable to the Regulation, as per the propositions summarised above, and as misinterpreting the Regulation itself; the Regulation does not entitle a maintenance debtor (in this case, F) to pick a jurisdiction seeking declaratory relief regarding the extent of any maintenance obligation he may have [para 47].

Reflexive effect

Notwithstanding the view taken on the premise of F's approach, the court continued to deal briefly with F's reflexive effect argument. This was rejected by the court in reliance upon the following: (i) Recital 15 of the Regulation expressly forbids 'any referral to national law' on the question of jurisdiction and reflexive effect is a principle of national law, rather than EU law, and (ii) one of the nine propositions of the Regulation identified by the Judge and summarised at paragraph 19 of the judgment illustrates that the doctrine of forum non conveniens has no place in the context of maintenance cases under the Regulation [para 57].

As a consequence, the Judge concluded that, despite the ongoing proceedings in Monaco, the English court did have jurisdiction to hear M's claim for maintenance subject to her being able to found such jurisdiction on the grounds of habitual residence. Conversely, the Judge concluded that the court had no jurisdiction to stay the proceedings in the manner sought by F [para 59].

Habitual residence

Art 3(b) of the Regulation provides that "in matters relating to maintenance obligations in Members States jurisdiction shall lie with the court for the place where the creditor is habitually resident."

The question as to whether the 'maintenance creditor' is the recipient parent or the child had not previously been resolved by the English courts, with prior jurisprudence adopting conflicting approaches, without any analysis of the issue or consideration of CJEU case law (see [para 60]). The Judge concluded that the recipient parent was the maintenance creditor in the context of the Regulation, which was an approach advocated for by both M and F. That the maintenance creditor is the parent informs the approach to testing for habitual residence; for an adult the test is "the centre of interests" as compared with "some degree of integration by the child in a social and family environment" for a child [para 63]. The Judge then summarised the principles and jurisprudence applicable to determining the question of habitual residence [paras 64-71].

The Judge then proceeded to consider the evidence to determine the question of M's habitual residence on 26 November 2019, the date her application was issued. The Judge accepted that F had mounted a significantly successful attack on M's reliability and honesty as a witness, identifying a number of exaggerations and falsehoods that he accepted had been demonstrated against her [para 85]. However, the Judge was not satisfied that this affected, in any meaningful way, the fundamentals of M's case in respect of habitual residence; M's return to England was carefully planned, with arrangements having been made for accommodation and C's schooling, and M was returning to a country with which she had a significant connection prior to 2014. M and C were registered with a GP and Dentist, and by September 2019 C was attending ballet and music lessons. Consequently, the Judge was satisfied that, by 26 November 2019, M had established her centre of interest in London with the necessary degree of permanence and stability. The Judge was also satisfied that C had acquired a sufficient degree of integration in a social and family environment by the same date, so finding habitual residence established irrespective of whether M or C is the 'maintenance creditor' pursuant to the Regulation.

Case summary by **Oliver Riley**, Barrister, **St John's Chambers**

YY (Children: Conduct of the Local Authority) [2021] EWHC 749 (Fam)

The children had been in care since 2012. In 2013 there had been a fac-finding which rejected allegations made by the children that they had been directly sexually abused. Work had been recommended on the need for life-story work and therapy to address their belief in what was a false narrative. The children were rejecting contact and it was not taking place. The need for this work was reconsidered and re-iterated in 2014 and 2016. Although some work was done, the recommended work was not done. The children sought to use their foster carers' surname. The DFJ who heard the case in 2016 was very concerned about the foster carers refusal to take on board the findings made about the parents and suggested that the children might need to move. Nothing was done by the local authority in response.

In 2019 C became extremely ill and Director of Children's Services exercised powers under s33 Children Act 1989 to authorise the withdrawal of life-support and C died before the mother attended the hospital.

The judgement sets out a series of failings by the local authority in the discharge of its functions towards the children and their family and litigation failures.

The judge considered and applied *Re C (Children)* [2016] EWCA 374, *Re E (A Child)* [2018] EWCA Civ 550, [2019] 1 WLR 594; and ***Re H (A Child) (Parents Responsibility: Vaccination)*** **[2020] EWCA Civ 664** and concluded that

> In Child C's case, therefore, the profound life and death decision to consent to the withdrawal of life support ought to have been the subject of an application to the High Court either by BCH or by the local authority. It was wrong and an inappropriate use of its powers under s.33 of the 1989 Act for the local authority to have exercised its powers to consent to the withdrawal of Child C's life support. [133]

There was no dispute about the appropriateness of the withdrawal of life support. This issue was the process. The local authority had at the time no policy in place on the issue as recommended by the Court of Appeal in *Re C* (above).

The judge also found that senior managers expected the social worker (who had previously advised against an SGO) to write an assessment recommending an SGO be made to the foster carers despite the fact that it was not what she professionally recommended, and the report was then approved and filed in support the making of an order by the court. [178-180], in furtherance of its "LAC reduction policy".

The significance of the finding arose from the judge's observation [92-93] that

> 92. The essential features of an application for a special guardianship order and which the court must scrutinise with care before making the order are:
>
> i) a thorough, comprehensive and evidence-based assessment of the children and of the prospective special guardians; and
>
> ii) a comprehensive Special Guardianship Support Plan which sets out the services and support to be provided to the children and the prospective special guardians: see the Public Law Working Group's Best Practice Guidance in respect of Special Guardianship Orders.
>
> 93. A key element of the support plan is the arrangements for contact between the children and their mother, father and family and the support the local authority will provide to arrange and support contact: see also s.14B of the 1989 Act.

The judge was critical of the way that the local authority ignored the advice of an expert appointed within the proceedings and the recommendations and concerns of the DFJ who accepted the views of the expert. He describes the local authority approach as "disgraceful" and "very shocking". He makes it clear that in its care planning and discharge of its duties towards children and families that there is an expectation that an authority should respond positively to such advice from an expert and a senior circuit judge. Keehan J says the approach of the local authority revealed "*a mindset which has ultimately caused them considerable, possibly irreparable, emotional and psychological harm*" [189].

The judge criticised the fact that the local authority failed to provide proper disclosure of relevant records before the hearing began. 2000 pages were disclosed once the hearing started. He said that the authority was wrong:

> (a) to have no policy in place on disclosure of documents,
>
> (b) to leave disclosure decisions to social workers; and
>
> (c) to have not allowed (until a late stage) the legal services team access to the electronic social work records,

He concluded that "The children have been utterly failed by this local authority" and that the local authority wrongly excluded the mother from decision making, in particular in relation to Child C.

It was agreed that the SGO would not be made and that the application for a care order would be withdrawn, that consideration of direct contact would be adjourned while a psychologist would be instructed to assess and work with the children, mother and the foster carers (who had acknowledged their own failings). The mother consented to the change of surnames for the children to that of the foster carer, and the court made the order thereby remedying a breach of the duty under s33(7) Children Act 1989.

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

Teaching Hospitals NHS Trust v DV (A Child) [2021] EWHC 1037

DL was required to undergo surgery for cancer and had a long history of medical intervention. Three years ago he had been baptised as a Jehovah's Witness, and in adherence to his faith did not wish to receive blood transfusions or treatment involving blood products. Prior to his baptism but whilst expressing interest in his faith, he had received a transfusion which had led him to suffer PTSD. The Trust sought a declaration that not providing transfusions should they become necessary in his latest surgery was not unlawful. DL, the Trust, and his parents (who were also Jehovah's Witnesses) had a good relationship and all agreed the surgery should take place – the only issue was treatment in the event of rare but possible complications. The surgery had once been postponed due to the strength of DL's views, but could not wait until he was 18. The clinicians agreed regarding the detrminetal impact on DL if his views were not adhered to, and so sought an order from the court.

The judge approved the plan not to provide blood product treatment. The relevant factors are outlined in paragraphs 22 and 23. The case demonstrates the importance of a minor's wishes and feelings when making such decisions, but also of weighing these against the consequences of not adhering to them. What was also key in this case was the understanding of DL and his parents regarding the potential risks and consequences.

A further point raised by DL was the necessity of an order. The court concluded that an order was necessary where clinicians accepted it was a finely balanced case, albeit that they were supporting DL's wishes. Despite the agreement between the Trust, parents, and DL, it was appropriate in the circumstances to seek an order.

Case summary by **Rebecca Davies**, Barrister, **Field Court Chambers**