June 2021

Family Law Week

NEWS

Number of children accommodated in secure homes decreases by 23 per cent

One hundred and forty-two children were accommodated in secure children's homes in England and Wales at 31 March 2021. The figure represents a decrease of 23 per cent (that is, 42 fewer children).

The occupancy rate was 56 per cent, down from 72 per cent the year before.
Places contracted to the Ministry of Justice (MoJ) were the same as last year at 107 places – 55 children were placed by the Youth Custody Service (YCS), down from 80.

The figures appear in a release published by the Department for Education. release includes information on the number of approved places and children accommodated by:

- Gender
- age
- length of stay
- type of placement
- Ethnicity.

For the release, **click here**.

4/6/21

Report Abuse in Education helpline receives hundreds of calls since April launch

The Report Abuse in Education helpline, run by the NSPCC, has received 353 calls since opening on 1 April.

The helpline was set up after thousands of testimonies alleging child sexual abuse and harassment in schools were posted on the Everyone's Invited website. The helpline is

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available to support child and adult victims of abuse in schools to make current and non-recent disclosures of abuse or neglect. Estimates suggest around one-third of all child sexual abuse is carried out by their peers.

To access the helpline, call Report Abuse on 0800 136 663 or email **help@nspcc.org.uk** .

For more information, **click here**.

4/6/21

Care leavers could receive extra housing support

Thousands of vulnerable people, including care leavers, will get more cash to pay their rent, thanks to changes to housing benefits.

These changes came into force on 31 May 2021 – two years earlier than scheduled.

This offers £10 million of additional housing support, bringing the total projected government spend on housing support to £30 billion this year. Increases to the Shared Accommodation Rate (SAR) are expected to benefit thousands of Universal Credit and Housing Benefit claimants, and have been introduced more than two years earlier than the original implementation date of October 2023.

The SAR is applied to renters aged under 35 claiming support through Local Housing Allowance (LHA). It adjusts their benefit to the cost of renting a room in shared accommodation, but there is a higher, one-bedroom rate for people who need to rent solo housing.

There are two key changes to LHA:

- Care leavers can now claim the higher one-bedroom LHA rate for longer, as the maximum age limit has been raised to 25, from 22.
- Anyone who has lived in a homeless hostel for 3 months or more, regardless of age, will also now be able to claim the higher rate, as the age limit has been removed.

For more details, **click here**.

4/6/21

Eight in 10 councils forced to overspend on children's social care budgets

More than eight in 10 councils in England responsible for children's social care overspent in the year to 2019/20. This comes despite councils increasing their budgets by £535 million that year and by £1.1 billion in the past two years.

Increasing demand to help safeguard children and funding pressures meant councils in England had to overspend on children's social care budgets by £832 million in 2019/20, according to Local Government Association analysis.

The LGA says that councils want to work with government to prioritise a child-centred recovery plan and play a leading role in the government-commissioned independent review of the care system, alongside children, families, and partners. The association considers that this must include a long-term sustainable funding solution so councils can protect children at risk of harm. Councils are also urging government to reinstate the £1.7 billion removed from the Early Intervention Grant since 2010 to help prevent problems escalating in the first place.

The LGA, which represents councils in England and Wales, reveals that:

- More than eight in 10 councils in England responsible for children's social care overspent in the year to 2019/20. This comes despite councils increasing their budgets by £535 million that year and by £1.1 billion in the past two years.
- In the past decade, the number of Section 47 enquiries, carried out when councils have reasonable cause to suspect a child is suffering, or at risk of, significant harm has increased from 89,300 in 2010 to 201,000 in 2020 - a rise of 125 per cent.
- The number of children in care in England has increased from 64,470 in 2010 to 80,080 in 2020 – a 24 per cent rise.

This sharp rise in need for urgent child protection services in recent years has meant councils have been forced to divert limited resources from the early intervention and preventative services which help families and young people before they reach crisis point, into services to protect those at immediate risk. Despite increasing budgets, councils are still having to cut universal and early help services, such as children's centres and youth services, in order to prioritise spend on looked-after children and child protection services.

The LGA said councils fear the pandemic will further fuel demand for children's services with councils having even less money available to help young people and families in need of support.

For more details, **click here**.

6/6/21

Domestic Abuse Toolkit for Employers updated

The charity funded the original Toolkit and this update, driven by a recognition that the world of work, and awareness of domestic abuse, have changed in the three years since its publication, especially in the wake of Covid-19.

The Toolkit provides business leaders, senior managers, HR, occupational health, and anyone involved with the health and wellbeing of staff with information, resource,

examples, and confidence to tackle abuse, raise awareness and support their staff.

The charity says that with one in four women and one in six men experiencing domestic abuse in their lifetime, employers have an important role to play in society's response to this crime. Never more so than in the context of the COVID-19 pandemic, which has seen an exponential shift to working from home. According to **Refuge**, calls to helplines have increased by 61 per cent since lockdown began. For those experiencing abuse, the workplace often offers a safe space and respite from their abuser.

To download the toolkit, **click here**.

6/6/21

Narcissism in personal relationships

'Lockdown has been a narcissist's paradise,' according to divorce lawyer Vanessa Lloyd Platt, speaking to ***Metro***. 'They've had their victims at their mercy – isolated and helpless.'

She adds:

> 'In its extreme form, narcissism is a mental disorder and the impact on victims and their families is huge. Virtually all of my clients who have fallen victim to these manipulative charmers say the same thing: "I don't understand – they were so loving at the beginning. All I want to do is go back to our early days."'

In an article for Family Law Week, Karin Walker, Founder of KGW Family Law and co-author, with Dr Supriya McKenna, of Narcissism and Family Law – a practitioner's guide, provides advice to help family lawyers identify and manage narcissistic behaviour in any divorce or separation.

In her wide-ranging article, Karin describes four ways in which those with Narcissistic Personality Disorder present themselves to the outside world.

- ***The Exhibitionist Narcissist*** (also known as the "Grandiose" or "Overt" Narcissist) is the typically extroverted type.
- ***The Closet Narcissist*** (also called the "Vulnerable", "Introverted" or "Covert" Narcissist) is very much harder to spot than the exhibitionist type. The outward appearance he or she projects to the world is not immediately recognisable as arising from "NPD". They generally appear, on the surface, mild mannered and meek, a little insecure but warm.
- ***The Devaluing Narcissist*** is also called the "Toxic" or "Malignant" Narcissist. These narcissists use grandiosity as a defence but when this grandiosity is punctured and their defences are brought down, they turn on others to bring them down too.
- ***The Communal Narcissist*** (or "Altruistic" Narcissist) might, at first glance, appear to be a contradiction in terms. These are the narcissists who prop up their self-esteem and sense of specialness by giving to others.

For Karin Walker's article, **click here**. For the *Metro* article, ***click here***.

6/6/21

Launch of rapid consultation on remote, hybrid and in-person hearings in the family justice system

The President of the Family Division, Sir Andrew McFarlane, has announced the launch of a two-week rapid consultation on remote, hybrid and in-person hearings in the family justice system and the Court of Protection.

This research is the third such survey and comes 15 months after remote hearings were first put in place at the start of the COVID-19 pandemic.

The research will once again be undertaken by the Nuffield Family Justice Observatory (NFJO), an independent organisation which is committed to improving life for children and families by putting data and evidence at the heart of family justice system.

This third survey will focus specifically on recovery; identifying good practice from remote and hybrid hearings and providing an evidence base to assist with the decisions regarding future ways of working, as we return to court. More details about the survey are available online.

The President is conscious there have been a number of consultations and other demands on practitioners' time, but does urge everyone to respond to this important request.

The consultation period runs until Sunday, 27 June 2021 and the findings will be available for the President's Conference in July 2021.

The NFJO will seek to gather evidence from families with children and all professionals working in the family justice system, including judges, barristers, solicitors, Cafcass workers, court staff and social workers.

To access the consultation, please **click here**.

11/6/21

'Culture change needed to tackle "normalised" sexual harassment in schools and colleges'

Sexual harassment, including online sexual abuse, has become 'normalised' for children and young people, **a review from Ofsted** has found.

Ofsted's inspectors visited 32 state and private schools and colleges and spoke to more than 900 children and young

people about the prevalence of sexual harassment in their lives and the lives of their peers.

Around nine in ten of the girls Ofsted spoke to said that sexist name calling and being sent unwanted explicit pictures or videos happened 'a lot' or 'sometimes. Inspectors were also told that boys talk about whose 'nudes' they have and share them among themselves like a 'collection game', typically on platforms like WhatsApp or Snapchat.

The review recommends that school and college leaders act on the assumption that sexual harassment is affecting their pupils, and take a whole-school approach to addressing these issues, creating a culture where sexual harassment is not tolerated.

Ofsted's review makes a number of recommendations for schools, colleges and partner agencies, including:

- School and college leaders should develop a culture where all kinds of sexual harassment are recognised and addressed, including with sanctions when appropriate.
- The RSHE curriculum should be carefully sequenced with time allocated for topics that children and young people find difficult, such as consent and sharing explicit images.
- Schools and colleges should provide high-quality training for teachers delivering RSHE.
- Improved engagement between multi-agency safeguarding partners and schools.

The review also makes recommendations for government, including:

- The government should consider the findings of the review as it develops the Online Safety Bill, in order to strengthen online safeguarding controls for children and young people. It should also develop an online hub where schools can access the most up-to-date safeguarding guidance in one place.
- A guide should be developed for children and young people to explain what will happen after they talk to school staff about sexual harassment and abuse.
- The government should launch a communications campaign about sexual harassment and online abuse to help change attitudes, including advice for parents and carers.

The review also identifies areas where Ofsted and the Independent Schools Inspectorate can sharpen practice. Safeguarding, they say, is well covered on inspection, but a review of past inspections found that they were sometimes not robust enough on sexual harassment. For example, inspectors did not always record how they followed up with school leaders who failed to share any evidence of past incidents of sexual harassment.

Both inspectorates will be making updates to training, inspection handbooks and inspection practices where necessary, in light of the findings.

For the review, **click here**.

11/6/21

Select Committee opens inquiry into VAWG with evidence from Domestic Abuse Commissioner, Refuge and Centre for Women's Justice

The Commons Home Affairs Committee has held the opening session of its inquiry into violence against women and girls with a session taking evidence from experts working to inform Government at all levels, and domestic abuse charities.

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, the Committee says that this is an issue that can be pervasive and hidden.

The most recent Crime Survey for England and Wales showed that an estimated 1.6m women experienced domestic abuse in the last year. The Crime Survey also estimated that there were around 977,000 women who were victims of stalking in the last year.

According to a 2018 survey by Plan International UK, two-thirds of girls and young women aged 14 to 21 in the UK have experienced unwanted sexual attention or unwanted sexual or physical contact in a public place
In this opening session of the inquiry, the Home Affairs Committee sought to gain an overview of the current picture in relation to violence against women and girls, as well as the impact of current measures to address it. The Committee also investigated which forms of VAWG and which groups of women and girls affected by VAWG may be overlooked.

Evidence was given to the Committee by:

- Nicole Jacobs, Domestic Abuse Commissioner
- Yasmin Khan, National Advisor to the Welsh Government for Violence against Women, Gender-based Violence, Domestic Abuse and Sexual Violence, and founder and CEO of the Halo Project
- Sophie Linden, London's Deputy Mayor for Policing and Crime
- Claire Waxman, Victims' Commissioner for London
- Surwat Sohail, Chief Executive, Roshni Birmingham
- Cordelia Tucker-O'Sullivan, Senior Policy and Public Affairs Manager, Refuge
- Harriet Wistrich, Founding Director, Centre for Women's Justice.

To watch the session, **click here**. For more details of the Committee's inquiry into violence against women and girls, **click here**.

11/6/21

Family foster carers could be due backdated payments following Ombudsman investigation

Bournemouth, Christchurch and Poole (BCP) Council has agreed to check whether it has paid friends and family foster carers properly over the past five years, following an investigation by the Local Government and Social Care Ombudsman.

The Ombudsman has asked the council to consider backdating fostering allowances to carers after it received a complaint from the relatives of two vulnerable children who believed they had not been supported properly.

The relatives had taken in the children after the siblings' parents were unable to look after them. The children were deemed at risk, and were on Child Protection Plans, due to their parents' problems, and their unsafe living environment.

At the time, the council considered it was a private arrangement between the children's parents and the relatives. This meant the family carers were not provided with appropriate financial assistance and support from the council, and the children missed out on the support to which they were entitled as 'looked after children'.

The relatives complained to the council in their own right, and also on behalf of another relative who looked after the children. The council's own investigation found it was at fault. It offered them a significant sum as a token payment for the financial impact of caring for the children, and for the cost of the therapy the children needed. However, it still did not accept it had been responsible for placing the children in their relatives' care.

The Ombudsman found the council had been actively involved in the case, including involving the police, and so the relatives should have been entitled to the council's support.

In this case the council agreed to apologise to the relatives and calculate what they should have received in family fostering payments between March and July 2017, and also what family fostering allowances they should have received between late October and early December 2017, and between the middle of December 2017 to September 2019. It should also make a payment of £750 to one set of relatives, and £300 to the other relative for their avoidable distress. It will also provide £1,000 for each child to be used appropriately to make up for the lack of statutory support, along with legal funding for the relatives to apply for a Special Guardianship Order for the children.

The council has also agreed to produce an advice leaflet for carers. It will check whether other family carers have been similarly disadvantaged and tell the Ombudsman whether it will be willing to backdate those carers' fostering allowances. It will also exercise discretion to look at historic complaints from families which approach it within 12 months and who are complaining about events from up to five years ago.

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

11/6/21

Five members appointed to Family Procedure Rule Committee and one member reappointed

The Lord Chancellor has announced the appointment of five new members to the Family Procedure Rule Committee and the reappointment of one member.

The Lord Chancellor has appointed two new members to the Family Procedure Rule Committee (FPRC): Tony McGovern as solicitor member from 1 August 2020 to 31 July 2023, and Bill Turner as lay member from 4 November 2019 to 3 November 2022.

The Lord Chancellor has also appointed three practitioner members: Poonam Bhari, Graeme Fraser and Rhys Taylor for three years from 1 March 2021.

Melanie Carewhas been reappointed, as the Cafcass nominated member, for a second two-year term from 1 December 2020.

For biographies of the above-named members, **click here**.

11/6/21

Marriage by under-18s to be outlawed, pledges government

The *Guardian* and other news media have reported that the government has pledged to raise the minimum legal age of marriage to 18 in England and Wales. At present, 16 and 17-year olds can marry if they have parental consent.

In a letter to organisations campaigning against child marriage, Lord Wolfson, Parliamentary Under Secretary of State at the Ministry of Justice, wrote:

> "The government supports raising the legal age for marriage in England and Wales to protect vulnerable children living here.
>
> "[It is] committed to making sure children and young people are both protected and supported as they grow and develop in order to maximise their potential life chances. This includes having the opportunity to remain in education or training until they reach the age of 18.
>
> "Child marriage and having children too early in life can deprive them of these important life chances."

The Times reports that Sajid Javid will introduce a private member's bill making it illegal for anyone under 18 to marry.

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

14/6/21

Domestic abuse support within safe accommodation: statutory guidance and regulations consultation

In this consultation, the Ministry of Housing, Communities and Local Government seeks views on the draft statutory guidance and the following draft statutory instruments:

- The Domestic Abuse Support (Relevant Accommodation) Regulations 2021
-
- The Domestic Abuse (Local Authority Strategies) Regulations 2021.

On 29 April the **Domestic Abuse Act 2021** received Royal Assent. The Act includes within Part 4 (sections 57-61) new duties on tier 1 local authorities in England relating to the provision of support for victims and their children residing within relevant safe accommodation and a duty on tier 2 authorities to co-operate with tier 1 authorities.

The Act also places a requirement to consult on the statutory guidance and two regulations. Under section 60 of Part 4 of the Act, the Secretary of State is required to consult on and issue statutory guidance to assist local authorities in exercising their new functions. Once finalised, local authorities will need to have regard to the guidance in exercising their functions.

The consultation closes on 27 July 2021.

For the consultation documents, **click here**.

18/6/21

Child maintenance: consultation launched on modernising and improving the service

The proposals in this consultation, launched by the Department for Work and Pensions, seek to strengthen the current Child Maintenance Service (CMS), which was introduced in 2012.

The proposals would enable:

- unearned income held by HMRC to be included in CMS calculations alongside paying parents' earned income
- evidential requirements for self-employed parents to be eased where a change that has breached the income tolerance has been reported
- small volumes of low value debt to be extinguished where the value of the debt is substantially less than the cost of collecting it
- arrears to be extinguished where:

  - child maintenance has been deducted from a parent's earnings where their employer has gone into administration and

  - the CMS are unable to recover the outstanding arrears from the trustee handling the companies' insolvency

- all CMS notifications to be sent, received and accessed digitally
- the following organisations to provide information when requested to do so in a timely manner: private pension providers, academy proprietors, the Motor Insurers' Bureau and all types of companies that offer, promote or sell investment management services or facilitate share trading.

The consultation is open to voluntary and community sector organisations, as well as CMS customers and members of the general public.

The consultation, which closes on 6 August 2021, applies to England, Wales and Scotland, although comments are welcomed from across the United Kingdom.

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

18/6/21

Cafcass publishes new Domestic Abuse Learning and Improvement Plan

Cafcass has published its Domestic Abuse Learning and Improvement Plan. The plan has been developed by Cafcass' Learning and Improvement Board which was established in September 2020 to improve Cafcass' work with children and families who have experienced domestic abuse.

Responding to the **final report from the Ministry of Justice's Expert Panel on Harm in the Family Courts**, the **Domestic Abuse Learning and Improvement Plan** has drawn on the extensive knowledge of the Learning and Improvement Board which is independently chaired and includes members with lived experience alongside other agencies and professionals in the family justice system.

The new domestic abuse learning and development programme is based on the updated Cafcass Domestic Abuse Practice Pathway and guidance, which supports Family Court Advisers in working with children and families affected by domestic abuse. Both have been designed with feedback from partners including Women's Aid Federation England and SafeLives. Parents and young people with lived experience of domestic abuse have contributed to training workshops by recording their experiences and these will be shared directly with Family Court Advisers. The programme also draws on a baseline practice audit of 200 cases moderated by members of the Learning and Improvement Board.

The success and impact of the Cafcass Domestic Abuse Learning and Improvement Plan will be monitored and evaluated by Cafcass' Learning and Improvement Board to understand the improvements and difference that is being made for children and families.

Commenting on the Domestic Abuse Learning and Improvement plan, joint Independent Chairs Cathy Ashley and Angela Frazer-Wicks said:

> "Children and families who have experienced domestic abuse and are involved in private family law proceedings need to feel confident that they are understood, respected and listened to. Cafcass is instrumental in ensuring this happens, and this improvement plan will help Cafcass to better achieve this.
>
> "The Domestic Abuse Learning and Improvement Plan has been developed with our Learning and Improvement Board members, including parents and young people with lived experience. The Board will now oversee the implementation of this plan and will regularly review the progress that is being made."

For the Domestic Abuse Learning and Improvement Plan, Cafcass Domestic Abuse Practice Pathway and guidance, **click here** and follow the links in the text.

18/6/21

Getting paid – top tips on family legal aid billing

The Bar Council recently hosted a Family Legal Aid Billing Seminar which proved to be very popular with both clerks and practitioners.

The panellists were Scott Baldwin, Chief Executive of St Mary's Chambers, Robert Damiao, subject matter expert at the Legal Aid Agency and Charlotte Flanders, Managing Director and costs lawyer at Veritas Professional Legal Services. The Chair was Shiva Ancliffe QC of Coram Chambers and the Bar Council's Remuneration Committee.

Shiva Ancliffe has summarised for the Bar Council website the top tips from the seminar. To read the blog piece, **click here**.

18/6/21

Outdoor civil wedding and partnership registrations to be legalised

Outdoor civil wedding and partnership ceremonies in England and Wales are set to be legalised for the first time.

Under current laws for approved premises such as a hotel, the legal wedding or civil partnership ceremony must take place in an approved room or permanent structure. It will now be possible for a couple to have the whole ceremony outside at such a venue.

On 30 June, a statutory instrument will be laid to amend the regulations with the change taking effect on 1 July. This follows a commitment made in 2019 to legalise outdoor ceremonies.

The change will benefit almost 75 per cent of all weddings in England and Wales that are non-religious and which take place on approved premises, along with civil partnerships.

A Law Commission report later this year will present options for further reforms which will then be considered carefully by the Government. Options they are considering include offering couples greater flexibility to form their own ceremonies, allowing the ceremony to take place in a much broader range of locations, and powers to hold weddings remotely in a national emergency.

These changes are being introduced via amendments to the **Marriages and Civil Partnerships (Approved Premises) Regulations 2005** to allow legal outdoor civil weddings and civil partnership registrations to take place within the grounds of Approved Premises.

The Marriages and Civil Partnerships (Approved Premises) (Amendment) Regulations 2021 will come into force on 1st July 2021.

For further information, **click here**.

20/6/21

Court judgments to get new home

Important court and tribunal judgments will be available via The National Archives for the first time, which, the Ministry of Justice says, will increase transparency and secure free access for all.

The website will host thousands of court judgments, including judicial review rulings, European case law, commercial judgments and many more cases of legal significance from the High Court, Upper Tier Tribunal, and the Court of Appeal. The judgments will be readily available to anyone from April 2022.

At present, there are multiple sources for court judgment publications, of which BAILII is the largest. The long-term aim is for all of them to migrate onto The National Archives website which has a track record in hosting digital files safely and securely.

Following recommendations made by The Legal Education Foundation in their Digital Justice Report, the Ministry of Justice committed to standardising its approach to the publication of judgments.

As the official archive and publisher for the UK Government, The National Archives was chosen because of

its long-standing expertise in storing and publishing information securely.

BAILII will continue to provide free access to judgments, for other jurisdictions, including Scotland, Northern Ireland and the Commonwealth as well as England and Wales, continuing their service to date.

For more information, **click here**.

20/6/21

Directory of legal aid processes restarting after Covid-19 contingency published by LAA

The Legal Aid Agency has published a directory of legal aid ways of working and processes which have resumed operation following suspension during the coronavirus outbreak.

Processes returning to operation, and the dates they come back into force are listed on this page. These updates have been shared with representative bodies. The LAA says that it will continue to work with stakeholders to restart business as usual operations.

For the directory, **click here**.

20/6/21

The Independent Review of Children's Social Care publishes early thinking

The Independent Review of Children's Social Care has published ***The Case for Change***, which is the Review's early thinking about what needs to change in the children's social care system.

The report notes that "the system is under significant strain: more families are being investigated, more children are in care and costs are spiralling as money is increasingly spent on crisis intervention." Underlying this, the report says, are significant and concerning inequalities with deprivation, ethnicity and prior care experience.

In the view of the review team, families, in the majority of cases, become involved with children's social care because they are parenting in conditions of adversity, rather than because they have caused or are likely to cause significant harm to their children.

The report calls for a system that gives social workers the skills and confidence to make the complex and challenging decisions necessary to balance how to protect a child from harm, whilst keeping families together where possible. Yet, it says, process dominates over direct work with families, and decision-making and risk assessment too often underpinned by a lack of knowledge. Information sharing problems remain across agencies despite decades of reviews calling for greater sharing.

The review team considers that more needs to be done to support parents who have their children removed. It says: "Repeat care proceedings make up 20 per cent of cases in the public care system, yet intensive support for parents at risk of repeat proceedings is patchy. Better practice and alternative approaches are needed where children return home after a period of being in care to stop cycles of re-entry and trauma – nearly 30 per cent of children who left care in 2006/07 returned to care within five years."

As the review moves into its next phase, the review team will explore in more depth the issues highlighted in this document. The objective is to put forward "a bold set of recommendations that will meaningfully improve life for children and families".

To read *The Case for Change*, **click here**. To read the evidence supporting the report, **click here**. For the response of the Local Government Association, **click here**. For that of the Association of Directors for Children's Services, **click here**. For that of the British Association of Social Workers, **click here**. For that of Coram BAAF, **click here**.

20/6/21

Kinship Care (Parental Leave) Bill introduced

The Kinship Care (Parental Leave) Bill was presented to Parliament on 21 June 2021. The Bill, which is sponsored by Katherine Fletcher, would make provision about parental leave for kinship carers who take on responsibility for children whose parents are unable to care for them.

The next stage for this Bill, second reading, is scheduled to take place on 14 January 2022.

The Bill is not yet available. This can often happen in an early stage of a Bill, when it has not been fully drafted.

To follow progress of the Bill, **click here**.

25/6/21

CCLC warns of shortfall in children securing status through EU Settlement Scheme

With less than a week to go before the deadline for applications to the EU settlement scheme, Coram Children's Legal Centre is concerned that not all eligible children have applied.

Applications from children have not yet met the numbers estimated to be needed in 2018, even though the number of applications overall has significantly outstripped 2018 predictions by 20-30 per cent. This potentially leaves many thousands of children at risk of being undocumented on 1 July 2021.

CCLC says that, with clear evidence that eligible children have not yet applied to the scheme, the government must

now extend the deadline to allow time for these children to apply.

For a detailed article on the subject, **click here**.

25/6/21

Ombudsman finds London council failed to keep child safe

The Local Government and Social Care Ombudsman has said the London Borough of Lewisham exposed a former looked after child to 'significant harm' while she was in its care and failed to look into her concerns properly.

The woman complained to the Ombudsman that the council did not properly investigate when she made allegations of significant and repeated incidents of physical, sexual and emotional abuse while she was a child in foster care and council run residential units.

She told the Ombudsman she was left homeless at one point while in the council's care, was not provided with adequate support when she left care, and was never told of the outcome of the investigation into her allegations.

The council investigated, but the Investigating Officer (IO) and Independent Person (IP) who investigated at Stage Two of the complaints procedure were not provided with all the records they needed to complete the investigation. At first the council refused access, and then made it difficult for the IO and IP to view the records – often only giving them redacted versions.

The Ombudsman's investigation found a number of faults with the way the council handled the woman's case. These included not telling her the outcomes of referrals, following some of the incidents she reported, and not providing the Ombudsman with information about the outcome of the investigation into the woman's foster carers.

The council also failed to complete a standards of care review and child protection enquiries following allegations made about the foster carers. This meant there was a lack of evidence for it to address or act on to mitigate any continued risk of significant harm to the foster carers' own children or any other children placed with them.

The Ombudsman also found the council failed to act on the recommendations made in its stage two investigation, it did not offer an appropriate remedy for the significant injustice caused by its faults, and for the delay in completing the stage two process; and it failed to have sufficient regard for the woman's human rights.

In this case the council agreed to the Ombudsman's recommendations to pay the woman £7,500 for the avoidable distress and harm she was caused. It also agreed to provide her with the outcome of the investigation into her former foster carers, together with details of any other action taken following her allegations relating to the foster carers' continued approval and child protection enquiries where this relates to her.

The Ombudsman has the power to make recommendations to improve processes for the wider public. In this case the council agreed to review its approach to information sharing in the statutory children's complaints procedure and with the Ombudsman's investigations.

For the full report, **click here** and follow the link at the top right of the page opened. For the Ombudsman's recently issued guidance to practitioners on the children's statutory complaint process, **click here**.

25/6/21

Family mediation starts increased by 33 per cent in January to March 2021

Family mediation starts increased by 33 per cent and total outcomes increased by 19 per cent, of which 62 per cent were successful agreements, and are now sitting at around two thirds of pre-LASPO levels.

The figures are revealed in the latest legal aid statistics released by the Ministry of Justice.

MIAMs increased by 10 per cent in the last quarter compared to the previous year and currently stand at just over a third of pre-LASPO levels.

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

25/6/21

Legal aid expended on private family law increases by 21 per cent

In January to March 2021 legal aid for family matters rose 2 per cent to £159.3 million. Legal aid for public family law, which accounts for more than 80 per cent of all civil legal aid, amounted to £131.2 million (an increase of 2 per cent). Legal aid in private family matters came to £28.1 million (an increase of 21 per cent).

The figures are included in the **latest figures for legal aid** published by the Ministry of Justice.

In January to March 2021 family legal help starts increased by 1 per cent compared to the same quarter last year. Completed claims decreased by 10 per cent and expenditure decreased by 11 per cent. There was a steep decline immediately following the implementation of LASPO Act in April 2013, with a more gradual decline over the last two to three years.

Certificates granted for family work decreased by 5 per cent in January to March 2021 compared to the previous year. Certificates completed remained unchanged compared to the same quarter the previous year. The associated expenditure has increased by 5 per cent compared to the same quarter the previous year.

While civil representation for public family law remains available, the LASPO Act removed legal aid for most

private family law including issues such as contact or divorce. However, legal aid remains available for such cases where there is a risk of domestic violence or child abuse. In January to March 2021, applications for civil representation supported by evidence of domestic violence or child abuse increased by 5 per cent compared to the same period of the previous year. The total number of these granted decreased by 2 per cent over the same period. The proportion of applications granted remained steady at around 70 per cent from the inception of this type of application until the end of 2015, before increasing to around 80 per cent. The provisional figure for the latest quarter is 85 per cent.

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

25/6/21

Family court activity increases across most case types during January to March 2021

In January to March 2021 the number of cases started in the family courts rose by 7 per cent on the same quarter in 2020. 71,707 new cases started in family courts. This was due to increases in most case types: financial remedy (29 per cent), domestic violence (15 per cent), private law (5 per cent), matrimonial (2 per cent) and adoption (1 per cent) cases. However, there was a decrease in public law (7 per cent) case starts.

Quarterly data on the volume of cases dealt with by family courts during January to March 2021 were published by the Ministry of Justice on 24 June 2021.

The recovery from the impact of Covid-19 continues to be seen across family court activity data during the quarter, with increases in the number of new cases started across most case types as well as increases in the number of disposed cases across most areas compared to the same time last year, at the start of the pandemic in the UK. The impacts on timeliness measures continue to be felt, particularly for delays to care proceedings, with work continuing to address the impact to the family justice system.

On average, care proceedings took longer with fewer disposals within 26 weeks. The average time for a care or supervision case to reach first disposal was 43 weeks in January to March 2021, up 8 weeks from the same quarter in 2020. Twenty-two per cent of cases were disposed of within 26 weeks, down 14 percentage points compared to the same period in 2020.

Domestic violence remedy cases remain at high levels, with increases in both new cases starting and cases that reached a final disposal – up 15 and 36 per cent respectively from quarter 1 2020 (although down from the record levels seen in quarter 3 2020).

The mean average time from divorce petition to decree nisi was 27 weeks, and decree absolute was 51 weeks, down one week and two weeks respectively when compared to the equivalent quarter in 2020. The median time to decree nisi and decree absolute was 17 and 31 weeks respectively.

There were 30,420 divorce petitions filed in January to March 2021, up 2 per cent on the equivalent quarter in 2020. There were 30,171 decree absolutes granted in January to March 2021, similar to the same period last year.

The number of domestic violence remedy order applications increased by 12 per cent compared to the equivalent quarter in 2020, while the number of orders made increased by 13 per cent over the same period.

In January to March 2021 there were 1,178 adoption applications, up 6 per cent on the equivalent quarter in 2020. Similarly, the number of adoption orders issued increased by 6 per cent to 1,166.

There were 1,459 applications relating to deprivation of liberty in January to March 2021, up 81 per cent on the equivalent quarter in 2020. Orders decreased by 4 per cent in the latest quarter compared to the same period last year.

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

25/6/21

Child Support (Collection and Enforcement and Maintenance Calculation) (Amendment) Regulations 2021

These Regulations, which come into force on 12th July 2021, amend the **Child Support (Collection and Enforcement) Regulations 1992**. The prescribed forms for use in England and Wales by magistrates' courts when making a liability order, a warrant of commitment, disqualification from holding or obtaining a driving licence, and disqualification from holding or obtaining a United Kingdom passport are all omitted.

These Regulations also amend the **Child Support Maintenance Calculation Regulations 2012** by inserting regulations 76(1) to (4). Regulation 76(1) sets out the condition for a person who has reached the age of 16 and is under the age of 20 to fall within the definition of "child" for the purposes of the Child Support Act 1991 (the "1991 Act"). Regulation 76(1) states that such a person must be a "qualifying young person" as defined in section 142(2) of the **Social Security Contributions and Benefits Act 1992**.

The effect of inserted regulation 76(2)(a) is that a person who is in paid work, or working in expectation of payment ("remunerative work"), in any week in the "prescribed period" is not a "qualifying young person" and, therefore, is not a "child" for the purposes of the 1991 Act. The person cannot therefore be the subject of child support.

The "prescribed period" is the period of time between leaving relevant education or approved training and the applicable terminal date, or their 20th birthday, whichever is sooner. There are four terminal dates specified in regulation 7(2) of the **Child Benefit (General) Regulations 2006**. They are the last day of February, May, August and November.

The effect of inserted regulation 76(2)(b) and (4) is that a person who is in receipt of the benefits and credits mentioned in regulation 8(2) of the 2006 Regulations in their own right does not satisfy the condition of being a "qualifying young person" and therefore is not a "child" for the purposes of the 1991 Act. The person cannot be the subject of child support.

Where a person is entered for exams, inserted regulation 76(3) provides that the prescribed period ends in "the week in which" the applicable terminal date falls. After the prescribed period ends, the person is no longer a "child" and cannot be the subject of child support.

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

27/6/21

Domestic Abuse Act 2021 (Processing of Victims' Data for Immigration Purposes) (Extension of Relevant Period) Regulations 2021

These Regulations, which come into force on 29th June 2021, extend the period under the Domestic Abuse Act 2021 within which the Secretary of State must review and report to Parliament on the processing of domestic abuse data carried out by specified public authorities for immigration purposes.

27/6/21

New private law cases received by Cafcass in May rose by 6 per cent

Cafcass received a total of 3,539 new private law cases in May 2021 which is 203 cases (6.1 per cent) more than the same period in 2020. These cases involved 5,211 children, which is 80 (1.6 per cent) more children than May 2020.

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.

27/6/21

New public law cases received by Cafcass fell by 4 per cent in May

Cafcass received 1,373 new public law cases in May 2021 featuring 2,168 children; this represents a decrease of 4.3 per cent (61 public law cases) and a decrease of 9.3 per cent (222 children) on the 1,434 new public law cases received and the 2,390 children on those cases in May 2020.

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

27/6/21

Court of Appeal hears appeal concerning puberty-blocking drugs

The Court of Appeal has heard an appeal against a judgment in the Divisional Court that children under the age of 16 considering gender reassignment are unlikely to be mature enough to give informed consent to be prescribed puberty-blocking drugs.

The case of ***R (Bell and another) v. Tavistock and Portman NHS Foundation Trust* [2020] EWHC 3274 (Admin)** was brought by two claimants: Keira Bell, a young woman who underwent gender reassignment, including puberty blockers as a teenager, and has subsequently regretted this and reverted to living as a woman; and Mrs A, the mother of a 15-year-old autistic girl experiencing gender dysphoria.

The claimants challenged the provision of puberty blockers to children and young people suffering from gender dysphoria by the Tavistock NHS Trust's Gender Identity Development Service (GIDS), on the grounds that informed consent could not properly be obtained from these patients given that this use of blockers was experimental, with limited evidence of benefit, and had life-changing and life-long consequences. The claimants argued that such treatment should only be given after a court order had been obtained.

After considering a large volume of evidence about the nature of puberty blockers and the consent-taking process at GIDS, the Divisional Court found that it was "highly unlikely" children aged 13 or under could give lawful consent and "very doubtful" that a 14 or 15-year-old could do so, and so the protective role of the Court may well be appropriate. It also held that even for 16 or 17-year-olds, due to the unusual and experimental nature of the treatment, clinicians may consider it advisable to seek the Court's authorisation if there was any doubt about whether it was in the patient's best interests.

For an article in the *Guardian* about the Court of Appeal hearing, **click here**. For an article on Family Law Week by Bianca Jackson of Coram Chambers concerning the judgment in the Divisional Court, **click here**. For a subsequent article, Bianca Jackson, considering the subsequent judgment in *AB v CD and others* [2021] EWHC 741, **click here**.

27/6/21

Narcissism and Family Law – a practitioner's guide

Karin Walker, Founder of **KGW Family Law**, provides a guide to help family lawyers identify and manage narcissistic behaviour in any divorce or separation.

Use of the word 'narcissism' is becoming increasingly common, but what exactly does it mean? Almost all of us are a little narcissistic; it is the aspect of our personality that keeps us driven and focussed and encourages us to succeed. Whether or not the narcissistic personality trait gives rise to a personality disorder depends upon how prevalent that trait is.

The law is a profession which characteristically trails behind others in many regards. Lawyers did not permit themselves to advertise until 1986. Only in 2019 was it first properly recognised that lawyers, particularly family lawyers, should take some time to focus on their own well-being.

Family practitioners are empathetic by nature. Some might say that empathy is essential to properly equip the family lawyer for their professional role, helping separating couples to resolve their disputes either by agreement or adjudication.

The family lawyer is not only skilled in legal practice; they will also have some insight into psychology and patterns of behaviour, i.e. what makes someone 'tick'. They will spend much of their professional life interacting with people, most particularly their own client, but also the 'other side' and their legal representative.

Just as UK lawyers have a tendency to fall behind other professionals in terms of marketing and self-help, we also are led by the US in terms of concept recognition. Narcissistic Personality Disorder (NPD) is only now properly becoming recognised in the UK as a personality disorder. People who suffer from this personality trait are highly likely to suffer from relationship breakdown.

In order to get to grips with the confusing and abusive behaviours displayed by the narcissist, it helps to consider what led to this personality adaptation in the first place. Even though NPD can be handed down through the generations, the consensus is that narcissists are made, not born. It is not genetic.

As a result of his or her upbringing, the narcissist is deeply lacking in self-esteem and has little sense of a true identity. It is crucial to understand that this is the core wound which leads them to behave in the abusive ways that they do. Almost everything that the narcissist does is done to avoid feeling the emptiness and low self-worth within them.

There are a variety of parenting styles that can lead to NPD. Many are as a result of being brought up by narcissistic parents, but this is not always the case. These styles can also overlap. They include:

- Conditional love
- The belittling parent
- The narcissistic parent who uses their children as admirers
- The overvaluing parent

It is commonly accepted that there are four major ways that those with NPD present themselves to the outside world.

- ***The Exhibitionist Narcissist*** (also known as the "Grandiose" or "Overt" Narcissist) is the typically extroverted type. They are superficially charming in whatever way works best for them, and on the surface they have unlimited different outward appearances.

- ***The Closet Narcissist*** (also called the "Vulnerable", "Introverted" or "Covert" Narcissist) is very much harder to spot than the exhibitionist type. The outward appearance he or she projects to the world is not immediately recognisable as arising from "NPD". They generally appear, on the surface, mild mannered and meek, a little insecure but warm. Deep down, although they need to feel special, they have a sense of entitlement and are occupied with status. Unlike the Exhibitionist Narcissist they are afraid to be the centre of attention because they fear being exposed as being inadequate and false. Closet Narcissists were taught in childhood that they were not allowed to act as if they were special or seek attention and they were punished harshly for doing so.

- ***The Devaluing Narcissist*** is also called the "Toxic" or "Malignant" Narcissist. These narcissists use grandiosity as a defence but when this grandiosity is punctured and their defences are brought down they turn on others to bring them down too. They exhibit many of the other more general narcissistic behaviours but what is more prominent in this type of narcissist is that they devalue, criticise and demean others in order to inflate themselves. In reality they are jealous and envious of others but, rather than express this, they put down the other person.

- ***The Communal Narcissist*** (or "Altruistic" Narcissist) might, at first glance, appear to be a contradiction in terms. These are the narcissists who prop up their self-esteem and sense of specialness by giving to others. They obtain admiration, attention and a sense of specialness "narcissistic supply" from good words and deeds, seeing themselves as the most generous, the most caring and the most kind.

Whilst those with NPD will present predominantly in one of these ways, some overlap is possible, depending on the situation the narcissist finds themselves in, and what works well for them in that situation. There are also subtypes, which reveal themselves in the narcissist's behaviour. Some use sexuality and looks as their means of getting attention (the somatic subtype). Others use their intellect (the cerebral subtype). And some use various means at varying times and in varying proportions.

The cycle of "idealise" and "devalue" is the hallmark of those with narcissistic adaptations.

The initial stage of a relationship with a narcissist is the "idealisation" phase, also known as the "love-bombing" phase in romantic relationships.

As a lawyer representing a narcissist you will also be idealised in the early stages and, if you are unaware, you will be drawn in by the charm, charisma, likeability and pity plays. You will be the best lawyer, the most understanding, the one that they will recommend to everyone. The narcissist will be relieved to have found you, and you will be the only one they know they can fully trust, after all that they have been through.

As the lawyer representing a narcissist client, you will be idealised in whatever way works most effectively for the narcissist. This will be individualised to you. It is important to pay attention to how you feel. You may feel a strong sense of connection to the narcissist early on in the process, and may feel that this person could be your best friend were they not your client.

The "devalue" stage then quickly follows. In a romantic situation it occurs as the narcissist realises that their target is not the perfect human that they had idealised and put on a pedestal during the initial phases of the relationship. It is usually not an abrupt change but a gradual turning up of the heat, so slowly that other person may not notice. The aim of devaluation is to gradually lower the target's self-esteem so that they accept more and more bad behaviour and eventually start jumping through hoops to try to get back the original feeling they had during the "love-bombing" phase.

The narcissist will also demonstrate triangulation by bringing a third person into the equation. That person will invariably be another unwitting victim, groomed as another source of narcissistic supply. Narcissists generally have multiple sources of supply on the go at any one time, and many of these will be romantic interests waiting in the wings to take the place of the significant other.

As a lawyer, be prepared to be triangulated with counsel, and with other lawyers and professional representatives. You may find yourself rapidly descending from "flavour of the month" to being devalued and compared unfavourably to others.

Once the narcissist has devalued the target to the point where they are thinking about leaving, the cycle will begin again. The target will experience huge relief at being back in favour and will make excuses for the narcissist's previous behaviour. When the devalue stage returns again (as it invariably will), the target will be thrown off balance once again. The cycles

repeat until the target begins to blame themselves for being unable to keep the narcissist happy and tries harder and harder to do so.

Exactly the same thing will happen to the lawyer who becomes at risk of adapting to the manipulation demonstrated by the narcissist in their aim to be professionally valued and appreciated as they were at the outset of the case.

When a narcissist is on the verge of being left by their partner/spouse, this will trigger deep abandonment issues. "Hoovering" is the term given to the narcissist's tactic to suck the target back into the relationship so that the narcissist can continue to use them as a narcissistic supply. It is another form of idealisation but specific to imminent abandonment. The narcissist will again turn back into the perfect partner becoming seductive and charming. This is however merely a temporary reprieve.

It is widely quoted that it takes seven attempts to leave a narcissist; even one who is physically abusive. If you are representing the spouse of a narcissist they may well be hoovered back into the relationship even after you have been instructed to act for them. They may seem weak or indecisive to those who do not understand the highly addictive, neurochemical nature of trauma bonding (similar to a heroin addiction). Look out for this as when your client reinstructs you it may be a clue to the nature of the person they are divorcing and be mindful of trying not to judge them for their apparent indecision.

It is important to remember that narcissist behaviour follows a very particular pattern. When meeting a new client for the first time you will spend much time listening and evaluating to gain as much information as possible about their situation and requirements. If your client is suffering from NPD be warned that they may be projecting and claiming that in fact they are the victim of narcissistic abuse. Experience will enable you to see through this because despite being very proficient at projection, their more natural behaviour traits will eventually become apparent. This is more likely to be the case if they realise that you are able to see through their projection; they will quickly turn on you by being highly critical of your approach and advice and probably refusing to pay your fees.

The narcissist may be unaware that they suffer from a personality disorder (and it is important that you do not call them out as otherwise all you will do is experience narcissistic rage) and make no reference to the personality of their husband or wife. Recognising their behaviour disorder at an early stage will help you decide whether you actually want to take them on as a client or enable you to recognise the boundaries and strategies which you will need to have in place to support them during the breakdown of their relationship.

The spouse who has suffered the toxicity of a relationship with a narcissist may not fully understand what it has been about their situation which has made them feel so wretched and confused for such a prolonged period of time. They will need you to recognise the behaviour pattern to which they have been subjected so that you can help them navigate what lies ahead. The narcissist has no wish to achieve a reasonable or family focussed outcome. Especially if they did not wish the relationship to come to an end, they will be experiencing narcissistic rage which gives rise to a desire to annihilate the other party.

Narcissists believe themselves not to need to conform to rules or regulations – they are far too special to do that. They do not adhere to deadlines nor do they conform. Financial disclosure will be provided on a piecemeal and incomplete basis. Child arrangements will be expected to reflect their express wishes. They will move the goalposts throughout the negotiations to avoid settlement. They will need to 'win'.

If acting for their spouse you need to stay two steps ahead and recognise that your client has a need to remove him or herself from the relationship as much as achieve the best possible settlement. It is about achieving a balance.

If your client is the narcissist, you need to ensure that you do not allow yourself to become their weapon or mouthpiece. You must be aware of their behaviour patterns and not become an extension of their abuse. You must also protect yourself from their 'idolise/devalue' behaviour pattern and watch out for when they may turn on you.

If you don't want to represent an individual who suffers from NPD, don't be afraid to say so at the outset and decline the instruction. If, as the case progresses, you feel that trust has broken down to the point that you can no longer represent this client, don't be afraid to call time. Make sure that you always have money on account to cover your fees as they are very unlikely to pay you if the professional relationship sours. They are also highly likely to make a complaint against you if they do not get their own way.

The requirement to attend a Mediation Information and Assessment meeting ahead of the issue of any form of court application was intended to ensure that no such application is issued without first attempting some form of out of court dispute resolution process. Where one party suffers from NPD, out of court methods of dispute resolution may not always be 'suitable'.
Classic mediation offers the narcissist the chance to play games and prolong the process. It is a perfect opportunity to attempt to charm and manipulate the mediator and for triangulation. Similarly the collaborative practice allows them to meet their spouse's solicitor face to face and to belittle and demean them to their spouse/partner, thereby undermining their confidence and, as a consequence, the process itself. If the conduct of the case breaks down to the extent that both

parties have to instruct different solicitors, this presents the perfect opportunity to undermine the whole process and create real consequences for the other side while doing so.

Narcissists do however like to feel special and are therefore attracted to new and innovative forms of process. 'Hybrid' has very much become the 'buzz' word of 2021. Hybrid mediation has risen to the fore for the following reasons:-

- separate meetings
- lawyer inclusive
- the ability of the mediator to hold confidences.

The process lends itself to help couples where one suffers from NPD or some other personality disorder or there is high conflict.
If you feel that an adjudicative environment is an inevitability, consider arbitration. The bespoke nature of the process will attract a narcissist who needs to feel unique.

If you are representing the narcissist's spouse/partner you need to be aware of all of these factors in order to stay one step ahead. You are looking for the process which might give your client their life back with as little cost (emotional and financial) as possible.

Finally, your own wellbeing needs to remain uppermost in your mind. Recognise what sort of client you are dealing with. Stay one step ahead. Don't allow your professional boundaries to be eroded. Brace yourself for inevitable devaluation. If you feel you can't act any more, don't be afraid to call time but make sure you have clear grounds to do so. Speak to the SRA if necessary – they are there to provide help and guidance.

'Narcissism and Family Law – a practitioner's guide' is by Dr Supriya McKenna and Karin Walker with their client partner book entitled: **Divorcing a Narcissist – the lure, the loss and the law**'. Both publications provide a valuable insight into the world of family law when one of the participants suffers from NPD.

04.06.21

When Two Worlds Collide – the interplay of SGOs and care orders in light of F v G [2021] EWCA Civ 622

Madeleine Whelan, barrister of **Fourteen**, analyses a recent Court of Appeal case that highlights the flexibility of the Children Act.

Can a special guardianship order and a care order co-exist when made at the same time, or a care order is made following an SGO? This previously unanswered question has found its solution in the recent case of **F v G [2021] EWCA Civ 622**.

The facts of the case are necessary in order to understand the way in which the matter came before the Court of Appeal in March 2021. The children were F and G, twin girls, now aged 10. Prior to their birth, their mother had met K, who was not their biological father but nonetheless raised them as his own from their birth to 2017 when he and their mother separated. In April 2019, the girls were made subject to care proceedings after their mother formed a relationship with a violent partner. Those proceedings concluded in April 2020 with the making of an SGO in favour of K, and a care order in favour of the local authority. No judgment was given for this decision, and it was not, it seems, challenged by any party at the time. Sadly, the placement with K broke down almost immediately and the local authority informed K they intended to terminate their placement and place the girls into foster care. K subsequently made an application for discharge of the care order. The local authority therefore sought for discharge of the SGO. It was in these circumstances that the matter came before HHJ Sharp for final determination.

Those familiar with the current jurisprudence surrounding SGOs would be well-placed to read the recent decision of ***Re M (Special Guardianship Order: Leave to Apply to Discharge)*** **[2021] EWCA Civ 442** in which Peter Jackson LJ sets out the following overview of SGOs and their use and purpose:

> "14. Special guardianship was created in 2005 as an alternative legal status that offered greater security for children than long-term fostering, but without the absolute legal severance from the birth family that stems from adoption. According to figures published by the Ministry of Justice, some 67,000 children were made subject to SGOs in the ten years since 2011, of whom three-quarters had been the subject of care proceedings. (In the same period, some 54,000 children were adopted.) Special guardianship has been much more popular than custodianship, its predecessor under the Children Act 1975, which was described by the Law Commission in 1988 (Law Com. No. 172) as little used.
>
> 15. The White Paper published in 2000, Adoption: a new approach Cm. 5017, stated that special guardianship would:
>
> • give the guardian clear responsibility for all aspects of caring for the child and for taking the decisions to do with their upbringing
>
> • provide a firm foundation on which to build a lifelong permanent relationship between the child and their guardian
>
> • be legally secure
>
> • preserve the basic link between the child and their birth family

• be accompanied by access to a full range of support services, including where appropriate, financial support.

16. The legal framework for special guardianship was created through amendments to the 1989 Act brought about by the Adoption and Children Act 2002 ('the 2002 Act'). Section 115(1) of the 2002 Act inserted new sections 14A-F into the 1989 Act. The new sections provide for:

o who may apply for an SGO

o the circumstances in which an SGO order may be made

o the nature and effect of special guardianship orders

o support services.

17. Under section 14C, the effect of an SGO is that the special guardian will have parental responsibility for the child. Subject to any later order, they may exercise parental responsibility to the exclusion of all others with parental responsibility.

18. The purpose of special guardianship is therefore to achieve permanence for the child. The term 'permanence' has a special meaning in care planning, as defined in The Children Act 1989 Guidance and Regulations Volume 2: care planning, placement and case review, June 2015, DFE-00169-2015:

"2.3 Permanence is the long-term plan for the child's upbringing and provides an underpinning framework for all social work with children and their families from family support through to adoption. The objective of planning for permanence is therefore to ensure that children have a secure, stable and loving family to support them through childhood and beyond and to give them a sense of security, continuity, commitment, identity and belonging."

The concept of permanence is also found in the requirement under s. 31 (3B) of the 1989 Act for a court deciding whether to make a care order to consider the permanence provisions of a care plan. These include provisions setting out the long-term plan for the upbringing of the child and the way in which the plan would meet the child's needs."

The Children Act 1989 does continue to operate as the fluid and forward-thinking piece of legislation that it is and provides for situations where SGOs can be curtailed and controlled. Key examples are of course s.33(3)(b)(i) CA 1989, by which the local authority has the power, when a care order is in effect, to "*determine the extent to which…a parent, guardian, or special guardian of the child…may meet his parental responsibility for him*". On the face of it then – it would appear that as a matter of logic and language, Parliament had planned for the interplay of SGOs with care orders and made allowances for such occasions. Further, per s.11(7), an SGO can contain "*conditions which must be complied with*" – thus giving the court another tool by which to retain a level of control over the SGO.

In light of the above, however, HHJ Sharp decided, at the close of the case, not to discharge K's SGO, to remove the children to foster care and to impose a condition on K that he should not seek information from third parties regarding the children unless he had previously informed the mother and the local authority in writing. The mother immediately appealed, arguing that:

1. SGOs and care orders cannot co-exist

2. Even if they could, the court was wrong to allow them to in this case

3. The imposition of the condition was wrong in principle and / or content.

The Court of Appeal granted leave to appeal, and the matter came before them, and with it, intense scrutiny of the Children Act 1989. The Court firstly examines the provisions above, namely s.33 and s.14 and make broadly similar points in relation to parliamentary intention and language, before turning to s.91 headed 'Effect and duration of orders etc.'. The Court concludes that whilst the statute provides that the making of an SGO discharges a pre-existing care order, there is no equal provision that the making of a care order discharges a pre-existing SGO, **unlike** a standard s.8 child arrangements order, which is discharged upon the making of a care order. The Court (more accurately, counsel) identifies just one reported case where a care order and an SGO are made at the same time – ***Re A and B* [2010] EWHC 3824 (Fam)**. However, it is a short judgment containing no substantive analysis of the legal principles. The Court were also referred to the Best Practice Guidance published in June 2020 by the Public Law Working Group, in particular para 34 which warned against the making of a supervision order alongside an SGO, as it would be considered a "red flag" that the SG support plan was simply not robust enough. They conclude that there are no cases available where the coexistence of SGOs and care orders had been directly considered.

The Court states, on the first issue of whether care orders and SGOs can co-exist in this format (that is, when both have been made together or the care order is made following the SGO), that yes – they can co-exist in this way. This conclusion is reached by drawing the strands of s.14, s.33 and s.91 together to conclude that Parliament's clear intention, particularly when inserting "special guardian" into s.33, was to contemplate the existence of care orders and SGOs simultaneously. The rationale for this may be that the SG is the only person with PR, or that they have an extremely close familial bond with the child which ought to be legally maintained – whatever the circumstances, it is the facts that must be considered should the court be asked to consider discharging the SGO where a care order remains. The Court is keen to highlight that the exclusivity of PR granted by an SGO under s.14C is in relation to exercise not entitlement or PR and is, critically, "*subject to any other order in force*" (unless that order is a pre-existing care order, which is dealt with by s.91). Therefore, the Court concludes that the family court does have the jurisdiction to allow care orders and SGOs to co-exist – although their likely use will, of course, be rare.

In respect of the broader decision in this case, the Court of Appeal ultimately concludes that the appeal should succeed on the second ground because the facts did not necessarily dictate that maintaining the SGO was the only available option to preserve the bond between these children and the SG. For example, the placement had broken down very soon after the making of an SGO and therefore it might not have been necessary to preserve the SGO in order to preserve the relationship. The Court of Appeal stresses that K's wishes and feelings could have been taken into account per s.22(4)(d), or an order could have been made for contact per s.34(2), all of which would have ensured the preservation of the relationship without the need to continue parental responsibility. The Court of Appeal was (rightly) concerned that HHJ Sharp had failed to "*consider all the powers available to the court*" when he made the decision not to discharge the SGO, and thus concluded a re-hearing was necessary to consider the available options.

So where does this leave SGOs? The Court of Appeal is keen to emphasise that the Children Act, once again, is able to meet the needs of an evolving society and evolving legal practice – the answer was there, and all the Court did was idenitfy it. It is also clear that SGOs are intended to be weighty orders which do shape the nature of family ties and therefore should not be used as a tool simply to preserve contact where the local authority fails to do so in their care plan – the Children Act's multitude of interweaving provisions allow for those interested or invested in the children, who may not have biological or legal bonds, to be adequately considered for contact and, crucially, the court maintains jurisdiction over the finalising of the care plan. If contact or preservation of a particular relationship is not properly considered within the care plan, the Court of Appeal reminds judges that they can, and should, reject it. Conversely, advocates will be familiar with the jurisdiction the court retains over the SG support plan – not robust enough? Sorry, local authority, try again. In my view, this judgment serves as a key reminder that the courts, when aware of the full power of the arsenal available in the Children Act, should never be beholden to the local authority for adequate provisions to meet each child's welfare needs.

09.06.21

Parental Alienation: Where Are We All Going Wrong?

Ian McArdle, barrister of **Atlantic Chambers**, Liverpool, calls for a fact-finding approach to cases involving alleged parental alienation.

The concepts of parental alienation and parental alienation syndrome have been around for a number of years now and continue to challenge the family court and those who work within it. The Court of Appeal has acknowledged the demands placed upon the court by cases of alienation at the upper end of the spectrum [1] and there continue to be attempts to improve the way in which such cases are managed. Practitioners within the Family Justice System are keen to add their voices to the chorus of how best to manage such cases. But despite those attempts, there remains division as to what alienation actually is and how such cases should be managed.

We can trace authorities concerning Parental Alienation and Parental Alienation Syndrome back to the Court of Appeal case of *Re L & Ors (Children)* [2]. In that case, the Court of Appeal commissioned a piece of work by Sturge and Glaser within which commentary was offered as to Parental Alienation Syndrome. Considering PAS as devised by Richard Gardner, Sturge and Glaser expressed the view that PAS does not exist in the sense that it is does not feature in mental health directories and that the concept is not helpful. It would be useful at this point to consider Gardner's definition of PAS:

> "a psychological disturbance in which children are obsessed with deprecation and. Criticism of a parent – denigration that is unjustified and/or exaggerated."

In considering the concept of PAS, the Court of Appeal in ***Re L & Ors (Children)*** considered the evidence of Dr Ludwig Lowenstein – a proponent of Gardner whose evidence in that case was firmly in line with Gardner's expressed views – and concluded that the lower court was entitled to reject it and that PAS 'is a long way from a recognised syndrome requiring mental health professionals to play an expert role'.

However, despite that case now being more than 20 years old, it does not appear that we are much further forward. We need only look to the current working definition employed by CAFCASS:

> "When a child's resistance/hostility towards one parent is not justified and is the result of psychological manipulation by the other parent."

Re L & Others, supported by the work of Sturge and Glaser, could not have been clearer and yet CAFCASS define the concept of alienation as 'psychological manipulation'. The use of the term 'psychological' is unhelpful. It medicalises the concept. It arguably feeds into the narrative that it is a syndrome – a term with medical connotations. It draws practitioners into the belief that a medical expert opinion is required. Arguably, it undermines what the Court of Appeal told us 20 years ago.

Whilst the debates continue, the family court continues to manage those cases where alienation is a feature – and possibly, the most prominent feature – and make decisions regarding the welfare of the child. With ever increasing numbers of cases coming before the family court [3] , the pressures are not likely to ease, nor is the burden such cases place upon the court.

But what can be done to manage such cases? Peter Jackson LJ touched upon this in *Re S (Cult: Parental Alienation)* when he referred to the need for a process of alienation being found to exist. The Court of Appeal had already emphasised the need for prompt and effective findings of fact hearing [4].

It is well-established that in cases where domestic violence is a feature, the court should establish a factual matrix before making decisions relating to the welfare of the children and, in my view, the position to be taken in cases of alienation is no different. In the same way that the court approaches cases of domestic abuse, the court should seek to establish a factual matrix as soon as possible. The 'label' we attach to the alleged behaviour leading to difficulties with contact is, in some ways, unhelpful and seeks to either polarise positions further or medicalise an issue that may not necessarily require it, thereby adding further layers of complication for the court to unravel and which undoubtedly result in significant delay.

Taking a step back from labels, such as parental alienation and parental alienation syndrome, the court is likely to be assisted with focusing upon the real issue in the case: the behaviour of the parents. Once the court has determined the factual matrix, decisions can then be made regarding the appropriate welfare outcome for the children. It is in this consideration that the court will find the input of CAFCASS, and in appropriate cases experts, invaluable. As things stand, it seems as though there is such confusion as to the concept that the task of determining the factual matrix falls to either CAFCASS or an expert, neither of whom are arbiters of fact. In fact, given CAFCASS's continuing input with regards to welfare decisions, arguably, shouldn't they be as far removed as possible from determining the factual matrix so as to avoid subsequent complaints of bias?

Whilst this may be seen as over-simplifying what can be a complicated (and controversial) topic, it nevertheless allows the court to focus on the factual disputes and resolve them in a timely and proportionate manner. The debates as to what parental alienation/parental alienation syndrome is will continue to inform all aspects of the Family Justice System. The need for greater understanding of these concepts will not disappear but with greater understanding will come greater outcomes for the children and families the Family Justice System serves and will assist the court in leaving no stone unturned in the quest for ensuring children have full and proper relationships with both their parents.

Footnotes

[1] Per Peter Jackson LJ in ***Re S (Cult: Parental Alienation)* [2020] EWCA Civ 568**.

[2] ***Re L & Ors (Children)* [2000] EWCA Civ 194**.

[3] CAFCASS received a total of 3648 new private law cases in April 2021, which represents a 42.7 per cent increase.

[4] ***Re J* [2018] EWCA Civ 115**

14.06.2021

CASES

Re N (Children) [2021] EWCA Civ 785

Background

M (now 6) and her older brother, T (13), were made subject to care orders in June 2020. The placement order application was deferred. The mother applied to discharge the care order for M. HHJ Richards heard the applications together. He dismissed the mother's application and made a placement order on 21 December 2020.

Mother appealed. Permission was given on the ground that the judge had not demonstrated that adoption was the only option for M in the circumstances. The LA and guardian contested this ground of appeal.

Appeal

The parties agreed that the placement order should be set aside for procedural reasons. There had been a breach of the Adoption Agency Regulations 2005. When she made her decision, the ADM did not have a health report from the medical adviser as required by Regulation 15, or advice that no such report was required. In addition, the Child Permanence Report did not include a medical summary by the medical adviser as required by Regulation 17. The local authority sought to withdraw the underlying placement order application and intended to present M's case to the ADM again and issue a new application.

The Court took a pragmatic course and discharged the placement order. The outcome reflected the unique circumstances that arose. It does not have any implications for future decisions about M or other cases.

Not every breach of regulations will justify the upsetting of an order *Re B (Placement Order)* [2008] 2 FLR 1404. The Court did not enter into any discussion of the issue. It appears the breach may not be restricted to this case and it may be necessary for the High Court to rule on the consequences in other cases.

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

D (A Child) [2021] EWCA Civ 787

This was an appeal heard on 21 May 2021 in respect of O. He had been born the previous week. His mother, V, is 21 and has learning difficulties. She has her own support workers. The court commented that good plans were not made during V's pregnancy for what would happen after O was born.

The local authority (LA) had found somewhere for O and V to be together, supervised by two or three adults all the time. In the meantime, the proceedings started and there had been hearings on four consecutive days.

O's social workers did not feel that V could cope, even with support, but they tried to find somewhere for them to be assessed together. That was not successful.

There was a hearing the following week. It was set up for case planning but the night before, the Children's Guardian filed a report saying that she did not think it was safe for O to stay with V.

On the morning of the hearing more reports arrived which set out that things had not improved for O and in some ways, were worse. However, when the remote hearing began at 2pm the LA's proposal was that the court should set up a hearing in two weeks' time to decide whether O should be removed from V's care.

However, at 3.50pm, when the two-hour hearing was nearly over, the LA's position changed and they said that O should be placed in foster care that evening. The Judge made the order sought but he was unhappy about the lack of support that V had been offered before the birth and felt that the LA's position was confused.

V's lawyers urgently tried to appeal and an order was made in the Court of Appeal at 9pm that O should not be removed that night. The appeal was then heard only 2 days later.

The appeal

It was said on behalf of V that the way the decision came to be made was not fair.

The Court of Appeal recognised that the judge was in a very difficult position, because the planning for O's arrival had not been as good as it should have been. However, he should have considered whether the hearing was fair to V and, if it was not, whether O's situation was really so bad that he needed to be taken away immediately even though the hearing had not been fair.

It was decided that the hearing was not fair because:

- It was not listed to decide about O's removal
- There had been no written evidence setting out the arguments for and against removal
- V had not been given a chance to put forward her views
- The LA changed its position at the very end of the hearing, and it was not clear who took that decision or why.

The court said that these would be difficult issues for any parent, but especially V as she has learning difficulties and had only given birth last week.

The court concluded that this was not a case where the risk was so bad for O that V could not even be given a couple of days in which to prepare her case and have a fair hearing.

The Court of Appeal granted permission to appeal and allowed the appeal. There was a hearing already listed for the following week where a decision about separation could be taken and the court ordered documents to be prepared so that V would know in advance the case she has to answer at that hearing.

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

TT (Children: Discharge of Care Order) [2021] EWCA Civ 742

Peter Jackson LJ had granted the mother leave to appeal, not because of a prospect of success but because it gave an opportunity to consider the correctness of the approach to discharge set out by Mostyn J in GM to which the judge had made reference. Mostyn J in GM had held that the burden of proving that the risk of harm continued was on those seeking to oppose the discharge of care orders. He had also doubted the concept of "attachment theory" when considering the children's welfare.

In the present case the mother was seeking the return of 6 children. There were separate proceedings in relation to the 2 children who had been born subsequently to original care orders including one born after leave to appeal was granted.

The Court of Appeal rejected the argument that the trial judge in TT had incorrectly assessed risk. The Judge directed himself on the assessment of risk by reference to the decision of this court in ***Re F (Placement Order: Proportionality)*** **[2018] EWCA Civ 2761**, which states that a court assessing risk should consider the type of harm that might arise, the likelihood of it arising, the consequences if it arose and the measures that might be take in mitigation., The Judge considered the level of present risk to the children. In referring to "the risks that follow from the previous lies", he encapsulated the fact that the lies were strong evidence of the mother's continuing inability to protect the children reliably from very serious harm. He considered whether that risk was sufficiently reduced by the work that she had done, but he found that it was not [16] By using the shorthand of the children's "right to be safe", the Judge was not setting up a legal requirement for a risk-free environment before the children could be returned to their mother. Rather, he was illustrating the gravity of the risk in this case, having elsewhere referred to "the horrors" suffered by the eldest child. [17]

Having reviewed the interrelation of the Children Act 1989 and the Human Rights Act 1998 [paras 19-23], previous decisions of the Court of Appeal *In Re S (Discharge of Care Order)* [1995] 2 FLR 639 and ***Re C (Care: Discharge of Care Order)*** **[2009] EWCA Civ 955**, [2010] 1 FLR 774 [24-25]] previous case law Peter Jackson LJ summarised the approach required when a court is considering an application to discharge a care order saying that the legal principles are clear:

> (1) The decision must be made in accordance with s. 1 of the Act, by which the child's welfare is the court's paramount consideration. The welfare evaluation is at large and the relevant factors in the welfare checklist must be considered and given appropriate weight.
>
> (2) Once the welfare evaluation has been carried out, the court will cross-check the outcome to ensure that it will be exercising its powers in such a way that any interference with Convention rights is necessary and proportionate.
>
> (3) The applicant must make out a case for the discharge of the care order by bringing forward evidence to show that this would be in the interests of the child. The findings of fact that underpinned the making of the care order will be relevant to the court's assessment but the weight to be given to them will vary from case to case.
>
> (4) The welfare evaluation is made at the time of the decision. The s. 31(2) threshold, applicable to the making of a care order, is of no relevance to an application for its discharge. The local authority does not

> have to re-prove the threshold and the applicant does not have to prove that it no longer applies. Any questions of harm and risk of harm form part of the overall welfare evaluation.

The fundamental test to be applied to an application under s. 39, and to other applications under the Act, is, the welfare principle and not a test of necessity or some other test. The attempt in this and other cases to shift the focus away from welfare is neither helpful nor necessary. A proper welfare analysis and proportionality crosscheck is a dependable bulwark against any tendency towards social engineering. [37]

The Court also reiterated the point from ***Re DAM (Children)*** **[2018] EWCA Civ 386** at paragraph 42(5), the aphorism "nothing else will do" applies to cases involving a plan for adoption and not to applications for care orders and said the same applied to discharge applications. [38]

The court then overruled Mostyn J's analysis in "GC" as incompatible with the above principles. Although obiter to the decision in TT the court also rejected Mostyn's J doubts about "attachment theory" in *GM* .

> "It is one thing to find that a particular witness may not be qualified to give specific evidence about a child's attachments, but it is another thing to question the validity of attachment theory as a whole or to state that it cannot be admissible in evidence. Nor is it correct to say that, if a child's attachment to substitute carers is so strong as to lead a court to refuse an application to discharge a care order, that would deprive s. 39 of meaning. That approach risks looking at matters from the point of view of the parent at the expense of a rounded assessment of the welfare of the child. … the court has to give appropriate weight to all the relationships that are important to a child, and that there may be a role for expert advice about attachment in cases of difficulty. Insofar as the observations in GM suggest otherwise, they cannot stand." [49]

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

H-M (Children) [2021] EWCA Civ 748

Background

This was the mother's second appeal relating to a fact-finding in a non-accidental injuries (NAI) case. The first had been an unsuccessful appeal against the findings of fact: ***T and J (Children)*** **[2020] EWCA Civ 1344**. She then applied to reopen the fact-find and when that application was refused, she appealed that decision. This appeal is therefore the second relating to this fact-finding hearing.

The relevant injuries, to her then one-year-old son, took place in June and July 2018. Judgment (following a three-week fact-finding hearing) by His Honour Judge Vavrecka was given in summary form in August 2019, then in a full judgment in November 2019. It concluded that both the mother and her then-boyfriend were in the pool of perpetrators. But in October 2019, between the fact-finding hearing and the full judgment, the criminal trial had concluded, finding only the boyfriend guilty: "the mother was completely exonerated as either a principal or secondary actor in the abuse perpetrated on the boy" (para 5).

The mother's first appeal, against the findings of fact, was heard and dismissed in October 2020: T and J above. The mother then applied to reopen the findings of fact on the basis of new evidence, and her application was heard by HHJ Vavrecka over two days and refused in March 2021. This second appeal was against HHJ Vavrecka's decision to refuse her application; it was granted permission to appeal and was heard 11 May 2021.

The law

The test for reopening is three stages (***Re E (Children: Reopening Findings of Fact)*** **[2019] EWCA Civ 1447** (CA)). At stage one, the applicant needs to show solid grounds for believing that the previous findings require revisiting. Sir James Munby had set out what constitutes solid grounds in ***Re ZZ and Others*** **[2014] EWFC 9** at para 33: "Mere speculation and hope are not enough, there must be solid grounds for challenge".

The second and third stages are not expressly set out in the current H-M judgment, because according to Re ZZ "One does not get beyond the first stage unless there is some reason to believe that the earlier findings require revisiting". For those seeking all three stages, Re E points to ***Birmingham City Council v H (No. 1)*** **[2005] EWHC 2885 (Fam)**; *Birmingham City Council v H (No. 2)* [2006] EWHC 3062 (Fam); and ***Re ZZ*** **[2014] EWFC 9**.

Importantly, it was accepted at the lower court level that an inconsistent conviction is not a ground for reopening a finding of fact and that what mattered was the evidence that lay behind the conviction (para 22).

The test for an appeal remains the same: material error of law or a conclusion that was not reasonably available. ***Re W (Children: Reopening/Recusal)*** **[2020] EWCA 1685** was cited by both HHJ Vavrecka (para 14) and by Jackson LJ (para 11), for its useful reminder that "it is rare for findings of fact to be varied".

The decisions

HHJ Vavrecka recognised "that the difference between the findings of the family court and those decisions reached by the jury do quite rightly lead to the family court needing to appraise its findings and whether there is a basis for reopening". He also noted in para 50 of his judgment (para 21 of the Court of Appeal judgment) that "the criminal and family courts have many differences, not only in relation to admissibility of evidence and to the standard of proof but also the focus and the wide canvas in particular that the family court as distinct from the criminal court has regard to". But ultimately HHJ Vavrecka concluded, citing para 43 of *Re W*, that "there is no new information of any significance that should persuade the court to review its findings".

The Court of Appeal agreed entirely. Jackson LJ noted in para 27 that "The differing outcomes of the two proceedings rightly led to the Family Court asking whether there was solid reason to believe that its findings required revisiting. The answer to that question did not depend on the existence of divergent findings, however striking at first blush, but on a careful analysis of the underlying evidence." The Court of Appeal judgment concluded "The outcome of the two proceedings is in some ways incongruent, but the underlying evidence was not" (para 27).

In relation to the appeal itself, Jackson LJ noted at para 25 that "the task for the mother has… been to demonstrate that… Judge [Vavrecka] was bound to conclude that the further evidence required him to reopen his previous findings. She has not succeeded in that task…".

Case summary by **Lauren Suding**, Barrister, **Field Court Chambers**.

J v J (non-recognition of overseas divorce) [2021] EWFC 43

The wife (W) is Polish, the Husband (H) Chinese. They married in 2017. There were no children. Although H disputed it, the court found that their primary base during the marriage was the UK, and was satisfied that H was a man of considerable wealth running into many millions of pounds. The couple had spent time in China for business purposes, and W was reasonably familiar with it. W had played a significant role as chief scientific officer in H's business which had operations around the world. The parties separated in 2019. W was dismissed from her role and successfully brought a tribunal claim in this jurisdiction (although she had not received the awarded damages). She also instructed employment lawyers in China in 2019/20.

W issued a petition for divorce in May 2019 in this jurisdiction by which time H was no longer living in the UK. H evaded service and in August 2020 the court eventually deemed service and authorised W to apply for trial as an undefended case. H accepted that he had been aware of the petition since early 2020. W issued Form A in December 2019; H again evaded service. There had been several court hearings in relation to the financial remedy proceedings and H filed a Form E that was "unacceptably bereft of detail". Unfortunately no further steps were taken by the court on W's undefended divorce application.

H filed for divorce in the Chinese court on 16 October 2019. W was made aware of those proceedings on 20.April 2020. Although W attempted to appoint a McKenzie friend to represent her in those proceedings, that was not accepted in the Chinese court. In the event the Chinese court permitted the divorce on 14 December 2020 and the judgment was publicised on 27 December 2020, allowing 3 months for appeal. W did not appeal. Peel J acknowledged that had W's suit proceeded expeditiously she would likely have obtained a decree in this jurisdiction before H's Chinese decree

The matter came before Peel J on 8 February 2021 listed to deal with a wide range of applications made by W including maintenance pending suit, a legal services order; and freezing orders, joinder applications and third party disclosure in relation to a number of overseas companies that W alleged were controlled by H. Both parties were unrepresented. Just prior to that hearing, on the court's request in response to evidence from the parties referring to "ongoing proceedings in China" H disclosed the evidence of the final decree of divorce obtained in China. W accepted that evidence. As a result, W's divorce suit fell away and consequently her application for financial remedy and associated applications under the 1973 Act fell away. At that hearing, Peel J asked W whether she wished to apply for a refusal of recognition of the Chinese divorce under s 51 FLA 1986 and she said yes. The Judge therefore dispensed with service and adjourned that application, and the other applications to this hearing

The Judge observed that at the heart of the jurisdiction issue lay money. It was common ground that W would likely receive no financial relief at all in China. The Judge observed that in the circumstances W would be able to pursue a claim for financial relief in England and Wales after an overseas divorce pursuant to MFPA 1984. There was thus little practical difference for W in terms of financial claims. However the Judge considered that given a decree of divorce was a momentous thing, it was appropriate for the court to determine the non-recognition application on its own merits.

From paragraph 28 of the judgment, Peel J therefore considered s 51 FLA 1986 and the relevant case law in relation to non-recognition in the light of the evidence.

S 51 (3) FLA 1986 provides that recognition of an overseas divorce may be refused if it was obtained without proper notice or if the respondent was not given opportunity to take part in proceedings, or if recognition was manifestly contrary to public policy

The court also noted the 2 stage test as set out in *Olafisoye v Olafisoya* [2010] EWHC 3540 (Fam). First, the court must assess whether reasonable steps were taken. If the court adjudges they were not, that opens the gateway to the second stage where the court should exercise discretion whether or not to refuse recognition, which should be done sparingly and with respect for the decisions of a properly constituted court in a foreign jurisdiction

While recognising the difficulties faced by a foreign national with no command of the language and limited resources particularly during the pandemic Peel J stressed that these problems without more were not sufficient to disentitle a petitioner from relying on a properly obtained divorce. The Judge concluded that H had taken reasonable steps to notify W and she had reasonable opportunity to take part in proceedings. In the circumstances W's application for non-recognition was dismissed. Her divorce suit and financial remedy application were also dismissed. The Judge directed that if W were to make an application for leave under s 13 MFPA 1984 it should be listed before him.

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

C v B [2021] EWHC 1369

The parties agreed that there had been wrongful removal pursuant to Article 12, but the mother sought to argue that the grave harm exception in Article 13(b) applied and that the judge should exercise his discretion and decline to make an order. The mother relied on the following:

a. exposure to the father's continuing domestic abuse and controlling/coercive behaviour;

b. a lack of meaningful financial support from the father;

c. vulnerable accommodation on a return to Lanzarote, given the arrears of rent on the family apartment, and no real prospect of being able to fund accommodation for herself and the children;

d. the risk that she will be arrested and separated from the children

The case was dealt with on submissions with statements from the parties. No oral evidence was given and therefore any findings were necessarily extremely limited.

The court found that the mother had failed to reach the high hurdle required to prove an Article 13(b) exception. The judge accepted several safeguards offered by the father, including that he pay for return flights [paragraph 43]. The judge did however indicate that he found the situation in which the mother and children would be placed upon return 'unsatisfactory', but did not find that it reached the threshold of 'intolerable' or that the mother or children would face a 'grave' risk.

Cobb J did however delay the making of the order until after a hearing fixed on 7th July 2021 where the Spanish court would consider the issue of custody. Despite acknowledging the summary nature of such proceedings, the benefits of delay in allowing the father to take some of the actions he put forward as safeguards, to allow the mother to build up a small amount more in benefits, and the fact that the Spanish court would be looking at the welfare of the children and their best interests (in a way a court does not do under Hague Convention proceedings), led the judge to conclude that a delay of a few weeks was appropriate. He listed a hearing shortly after the Spanish hearing to further consider the return order.

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

Re L (A Child: Step-Parent Adoption) [2021] EWCA Civ 801

An appeal by a father against an adoption order relating to the adoption of an 11-year-old boy 'L' by his mother's partner. The mother and child's guardian had consented to the order, but the father (with parental responsibility) had opposed.

The issue for the Court of Appeal was whether the order should be set aside as the judge had not been referred to or considered the leading domestic case on step-parent adoptions (***Re P (a Child)* [2014] EWCA Civ 1174**).

After a casual, non-exclusive relationship, the mother fell pregnant with L. The mother did not tell the father she was pregnant with his child. L was initially brought up believing the mother's then partner, Mr B, was his father. When L was about 3 years old, the father discovered from a DNA test that L was his son. The father successfully applied for a child arrangements order so that he could spend time with L. Contact did not run smoothly. The mother and Mr B separated. Due to his behaviour towards the mother, the father was made subject of a community order following criminal proceedings.

L's surname was changed from that of Mr B to that of the father, and the father was granted parental responsibility. The mother then met the step-father and they started a relationship, bought a house and had a child. They plan to marry in autumn 2021.

The contact arrangements broke down and, at the time of the appeal, L had not seen his father for four and a half months.

The evidence confirmed that L was the driving force behind the adoption application and the judge heard emphatic evidence from both the adoption social worker and the child's guardian that adoption was in L's interests.

The Court of Appeal held that, whilst it would have been helpful had the judge been referred to *Re P*, the order should not be set aside. The judge had properly applied the relevant statutory requirements, particularly as a lower test is prescribed where the application is made by a step-parent rather than a stranger. Although the judge had not specifically addressed the mandatory requirements regarding contact under section 46(6) Adoption and Children Act 2002, each of the elements of that section had been considered in the judgment and the court's obligations under that section had been satisfied.

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

Manchester University NHS Trust v Fixsler and Others [2021] EWHC 1426

Background

Alta was born prematurely and suffered a severe hypoxic ischaemic brain injury during her birth. It was not disputed that she continues to exhibit the symptoms of a catastrophic brain injury which will result in her death at some point in the next two years or so. She has no conscious awareness, no positive interaction with her environment, cannot close her eyes and shows no visual attention or response to auditory stimulus; the judge described this as a "state of perpetual darkness and silence". Alta is mechanically ventilated via a tracheostomy and fed by feeding tube.

The treating clinicians considered that Alta experienced no pleasure but did experience pain consistently in response to the care she received. The Trust sought a declaration that it was contrary to her best interests for life-sustaining treatment to continue, and that it was in her best interests for a palliative care regime to be implemented.

Alta's parents, who are Chassidic Practising Jews and Israeli citizens who had moved to the UK in 2014, had sought rabbinical advice about their religious duties and obligations in the context of their daughter's situation and contended that it was contrary to those obligations "*to be involved in bringing death closer*". They did not accept that Alta displayed any signs that she was suffering from pain or discomfort, opposed the Trust's application and sought to take Alta to Israel for continued treatment and exploration of long-term ventilation at home in Israel. If the court concluded that it was in Alta's best interests for life sustaining treatment to be withdrawn they assured the court that they would respect its decision, but wanted that step to be taken in Israel.

The children's guardian, who carried out a careful analysis of the relevant factors (see §47) supported the Trust's application and did not consider that a transfer to Israel was in Alta's interests.

Law

The legal framework is well settled and is summarised at paragraphs 57-59. MacDonald J went on (see §60-72) to consider the arguments on the behalf of the parents not only that "*in the assessment of overall best interests the law permits, and indeed requires, an appreciation on the part of the decision-maker about the cultural context of the individual about whom the decisions are being made*" (which the judge had no difficulty in accepting) and further that the assessment of Alta's best interests should "*start from the assumption that Alta would share the values of her parents, of her brother, and of her wider family and community*" and "*the best interests decision-making process can and must be framed within the Jewish belief system in this case*." The latter contentions were rejected; the parents' belief system was simply one of the factors to be weighed in the balance.

Discussion and findings

- The key question is whether the response to stimuli over an extended period is consistent, rather than whether it is constant.
- Alta consistently exhibits whole body spasms in response to handling, care giving and treatment.
- The court preferred the opinion of the clinicians and Children's Guardian about Alta's response to handling to that of the parents, who had little contact with Alta in hospital.
- While a more difficult question, the court was satisfied on the balance of probabilities that Alta experiences pain and that experience is a significant burden to her.

- We cannot know the exact nature of her experience of pain because of her catastrophic brain injury
- She has no prospect of recovery and will remain ventilator dependent
- It is probable that her condition will deteriorate and her symptoms worsen, increasing the burden of pain she is bearing.
- The starting point is to consider the matter from the assumed point of view of Alta.
- Given the circumstances of her brain injury the court could not accept that she would share the values of her parents.
- Her point of view is more likely than not to be that continued life sustaining treatment would not be acceptable to her.
- The presumption in favour of taking all steps to preserve life is rebuttable and Alta's consistent pain weighs heavily in the balance.
- Alta has minimal or no awareness of her family or ability to take comfort or enjoyment from those who love her.
- Refusing the declaration would confine her to a windowless room, her life sustained by machines "in a world she cannot meaningfully perceive or connect with."
- While parents' views may have particular value when they know their child well, Alta's parents have had little contact with her.
- The spiritual considerations urged on the court by her parents have to be considered alongside her consistent pain and other burdens of her condition and treatment.
- There was very little information about the treatment available in Israel.
- Even if there was a detailed proposal, the court would have to take into account the additional pain and discomfort resulting from Alta being transported
- There was no medical benefit to a transfer.
- From the perspective of the Jewish faith there are spiritual benefits in spending one's last days and being buried in Israel but these were outweighed in the court's secular analysis by the burdens, particularly as Alta's body could be taken to Israel for burial following her death in the UK.
- The parents assured the court that they would respect a decision that life sustaining treatment should not be continued, they might be placed under pressure to change their minds once Alta was in Israel.

Decision

With great sadness, the court made the declaration sought by the Trust and refused the parents' application to take Alta to Israel. The judge paid tribute to the dedication and care of the medical team who have treated Alta throughout her life.

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

Re K [2021] EWHC 1409 (Fam)

The children

The children are now approximately 4, 3, and 1 years old. There are early signs that one of the children may have a degree of learning disability. After many moves in their short lives, they are currently together in a foster placement where they have been for six months, but which is unable to provide a long-term home for them. The local authority wishes to place them together for adoption, which it acknowledged may not be possible (paras 19-20).

Background

In May 2017, the eldest child (at that time the only child), who was then only 72 days old, was taken to hospital and spent the night there due to a bruise on his eyebrow. Although the court determined that he had sustained the injury during a domestic abuse incident involving both parents (para 17), the parents question the finding and even question whether there was in fact a bruise. The President notes, however, that the injury and domestic abuse incident were not the factors that triggered a plan for adoption. He cites the "sustained and multi-layered dishonesty that each parent has demonstrated" as causing a risk of harm to the children in the future (para 113).

Both parents were born in West Africa, had lived in the UK for several years, and the father had the benefit of a Twi interpreter during proceedings. There was no evidence of either parent having any addiction or criminal history, but

according to the President, the parents had made "unrelenting efforts… to avoid engagement with the local authority and with the court, and to conceal… their subsequent children" (para 1).

Proceedings

Upon learning that care proceedings had been initiated in December 2017, the mother left the jurisdiction with their only child (at that time), so the matter was allocated to the High Court. The mother then returned without the child, and it is understood that the child remained in the care of his maternal grandmother in Africa.

Subsequently both parents left the jurisdiction. The second child was born in Florida in July 2018 and shortly after, both children were placed in care in the USA. After proceedings in Florida, both children were returned to the UK in late 2018 and placed in the same foster care under an ICO.

After a six-day fact-finding hearing in March 2019, Keehan J made a number of findings, which were not formally challenged, but many of which the parents seemingly never accepted.

In late 2019, the father presented as separated from the mother and put himself forward as sole carer, and Keehan J went against the recommendations of both the local authority and the guardian, determining that a rehabilitation plan should be implemented. The father made a number of promises to the court, including not contacting the mother, although later records showed he did so immediately after leaving court (para 10). Keehan J had told the father that if the father breached his promises, it was likely that the court would be "compelled and left with no choice but to place his children for adoption" (para 15, citing para 100).

Meanwhile, there had been further evasive behaviour from the parents, including the mother giving birth to the third child under a false name and address in a hospital in the Republic of Ireland in September 2019. The mother had stopped attending contact with her two boys in June 2019, to avoid her pregnancy being detected. She resumed contact with the older children in December 2019 but did not disclose the existence of their baby sister to them. There was an alleged domestic abuse incident involving both parents on 26 November 2019, which involved the police (para 65), but the baby girl became known to authorities only in January 2020, when the police stopped the parents in a car and the baby was with them (para 9). The baby was removed into police protection (para 14).

In September 2020, after another six-day hearing, to consider the welfare evidence, Keehan J's judgment made clear that the parents' "serial" and "egregious" lying made him conclude that he could "not trust a single word said by either of these parents" (para 15, citing paras 97, 98 and 102). He seemed particularly aggrieved that the father had lied to the court (para 15, citing para 98). Keehan J determined, among other things:

- The parents did not regret their actions during the course of these proceedings;
- They do not even "begin to understand or accept the significant harm the children have suffered in their care and the significant harm they would each be at risk of suffering if they were returned to the parents' care in the future";
- The prospects of the parents making "any positive changes for the better are remote, whether in the short, medium or long term" (para 15, citing para 103); and
- The children were at risk of future harm in part because of the risk of "the stability of their lives being disrupted and abruptly changed over the years to come" (para 15, citing para 107(vi)).

Keehan J's welfare decision was for final care orders and placement orders. At this point, there had been 30 hearings in the English family court in the 2 ¾ years between December 2017 and September 2020.

Appeal and rehearing

The appeal was allowed on the ground that Keehan J did not properly identify the risk of future harm to the children when undertaking his final welfare analysis (para 3). No findings of fact in either the fact-finding hearing or the welfare hearing were challenged (although many of them were also not accepted by the parents). The Court of Appeal set aside Keehan J's welfare determination and remitted the matter to the High Court for re-determination.

In his judgment, the President makes clear he did not rely on Keehan J's welfare analysis or any observation that the Court of Appeal made about it. He makes his own evaluation based upon:

- the findings of fact that have already been made; and
- the altered position and additional evidence that is now before the court (para 5) including a psychological assessment of both parents by Dr Banks.

The assessment of Dr Banks (paras 21-37) concluded that the parents would benefit from twenty sessions of couples counselling over six months, and that such work was within the children's timescales (para 47). The parents were willing

to undergo the therapy recommended and sought an adjournment, of at least four months, to review their progress. Nonetheless, the local authority pursued adoption, supported by the guardian.

The President heard evidence over five days in May 2021, including from Dr Banks.

Decision

The parents had conceded that, at the time of Keehan J's decision, there was "no alternative but to order that the three children should be placed for adoption" (para 106). The President therefore focused his evaluation on the changes since August 2020. He established a baseline of the harm the children would suffer if returned to their parents' care that day, without any attempt at therapeutic intervention (paras 111-113).

The President set out the risk of future harm arising from "the sustained and multi-layered dishonesty that each parent has demonstrated" (paras 113 and 116), including risks that the children would:

- be removed from this jurisdiction and/or would not be made available to the local authority;
- have "a wholly unstable home life";
- be exposed to habitual and consistent lies and be unable to rely on what their parents say;
- have haphazard and unpredictable access to health care, schooling and education; and
- be exposed to the unstable parental relationship including episodes of domestic abuse.

The President concluded that Dr Banks's recommendation for therapy and his belief that a single course would turn around the situation seemed to be "wholly at odds with, and not supported by, the body of his report" (para 91). The President focused on Dr Banks's repeated evidence, both written and oral, that "it would be very difficult to establish a cooperative agreement with the parents that would hold up, due to the high level of the parents' defensive avoidance, their denial and their huge degree of psychological defendedness" (paras 25, 35, 51, and 91).

The President found the parents' responses to Keehan J's findings of fact to be "wholly minimal and self-serving" (para 95). He also determined that the parents had told further lies in their oral evidence and noted the mother's evidence about couples counselling at the church as a "blatant lie" (paras 97-98). The President noted that the parents' apparent willingness to undergo therapy was "lip-service", but he did allow that the parents may not be deliberately doing so and may be incapable of seeing the truth (para 126).

The President directed himself to the law (paras 101-104): the court's paramount consideration being 'the child's welfare throughout his life' and having regard to the adoption welfare checklist set out in ACA 2002, s 1(4), citing the usual, unchallenged cases of ***Re G (Care Proceedings: Welfare Evaluation)*** **[2013] EWCA Civ 965**; ***Re B-S*** **[2013] EWCA Civ 1146**; ***Re R (A Child)*** **[2014] EWCA Civ 1625**]; and ***In Re B (A Child)*** **[2013] UKSC 33**. The President ultimately concluded that there is "no realistic prospect of therapy producing sufficient enduring change" and that he would stand by this conclusion "[e]ven if a positive report were received after four months" (para 128).

On a side note, there is helpful guidance about the appropriate situations to publicise children's availability for adoption and what type of evidence is required to enable the court to make such a determination (paras 19 and 133).

Case summary by **Lauren Suding**, Barrister, **Field Court Chambers**.

M v D [2021] EWHC 1351

An ex-parte application was made for a non-molestation order by the applicant under s. 42(2) of the Family Law Act 1996. The respondent to the application (who had no notice of either the original application or of the subsequent appeal heard by MacDonald J) was the applicant's step nephew (her sister's stepson).

At first instance the application was dismissed for want of jurisdiction. District Judge Colvin was not satisfied that the applicant and the respondent were 'associated persons' for the purposes of s. 62(d) or that the relationship of step-nephew falls within the definition of s. 62(3)(d) or the interpretation set out at s. 63(1)(a) or (b). It was noted that the statute does include 'stepmother', 'stepfather', niece and nephew but not stepdaughter, stepson or indeed step-nephew. The appeal against the lower court's decision was listed before Mr Justice MacDonald pursuant to the provisions of FPR PD30A para 2.1 on the grounds that the appeal raised an important point of principle or practice.

In dismissing the appeal and concluding that 'step-nephew' did not fall within the terms of the Act, the judge concluded that the inclusion of particular 'step' relatives and not others under the Act had been deliberate and not an oversight. MacDonald J also separated those relatives defined under s. 61(3)(a) as those of 'lineal' descent and those under s. 61(3)(b) as collateral relatives. Parliament had included certain step-relatives within s. 61(3)(a) but not so within s. 61(3)(b). Having

surveyed the Law Commission report that informed the 1996 Act and Hansard the court concluded that when it came to who could apply for injunctive relief under the 1996 Act, Parliament was expressly concerned with the degree of genealogical proximity that would allow a person to fall into the category of "associated persons" and the need for that category to be confined to "close" or "immediate" relatives. He noted in particular that Parliament was concerned with not creating a new tort of molestation by failing to ensure that the protection available under the Act to 'associated persons' was clearly defined. The judge also concluded that s.63(1) of the Act is, in speaking of a "nephew…whether of full blood or of half-blood or by marriage or civil partnership", not wide enough to encompass a person in the position of the respondent. The applicant would have an alternative remedy under the Protection from Harassment Act 1997.

Case summary by **Rachel Cooper**, Barrister, **Coram Chambers**

X [2021] EWFC 46

The case concerned a child just under two years old at the date of judgment, following 'glacially slow' proceedings that had taken the whole of her life so far to resolve.

The mother (M) was profoundly deaf and had a number of longstanding mental and physical health conditions. In particular, she had been led by medical professionals to believe, and had reasonably believed, that she had had Addison's disease since 2011. Only after January 2021 did it become clear that this had never been the case, with the consequence that M had presented with Addisonian symptoms over many years, including during multiple crisis admissions to A&E, despite not having the disease and there being no other organic explanation for such symptoms. The judge went on to find that such symptoms had been in part genuinely experienced, in part exaggerated [112].

Previous proceedings in relation to M's five older children between 2012 and 2014 had resulted in their separation from the parents [20-24]. A catalogue of 'damning findings' had been made against M in terms of her conduct and veracity as a witness; inter alia, one child had been exposed to significant FII and M had exaggerated her own ill health. Peel J now considered that, although the findings were made 7 years ago, he must take them fully into account and consider whether and how far M has demonstrated change since [25].

In the intervening period, M had led a chaotic and dysfunctional life characterised by extreme anxiety and stress, abusive relationships and abnormal behaviour in relation to her medical needs [26-32].

However, while pregnant with the subject child, M made genuine and concerted efforts to effect and demonstrate change [33-40]. Proceedings were issued following birth and the child was immediately accommodated under s.20. There was cautious optimism about the future and the LA, supported to some extent by early expert assessments, initially proposed residential assessment. This was opposed by the guardian and rejected by the court [41]. M's presentation then declined from early 2020 with numerous calls to the emergency services and a reversion to previous patterns of behaviour [45-46]. Expert opinion became more pessimistic over time [50-63] and the LA ultimately proposed placement for adoption.

In finding threshold to be met [108-122], the judge found that M continued and would likely continue to experience both Somatic Symptom Disorder (where an individual genuinely experiences symptoms of illness, which have no organic or medical cause, but are brought on psychosomatically by mental health illness) and Factitious Disorder (where an individual deliberately fabricates or exaggerates their own symptoms of illness). This represented a continuation of patterns of behaviour identified within previous proceedings. M's ongoing presentation and the previous findings of FII gave rise to a significant risk that this child would be subject to FII if returned to her care. Further findings were made regarding M's ability to provide basic case, the risk of further dysfunctional relationships, criminal behaviour, poor mental health, and her superficial insight into past concerns.

Applying the settled law relevant to welfare decision-making and placement for adoption [130-140], the judge concluded that 'by some distance' adoption was the required outcome for the child [141-150].

Case summary by **Iain Large**, Barrister, **St John's Chambers**

M (Children: Applications by Email) [2021] EWCA Civ 806

The facts

These are care proceedings where a mother was found to have cognitive difficulties. An application under FPR Part 25 for a full psychological assessment was granted by the allocated judge, a DJ, at a CMH. The mother did not attend the appointment, having forgotten. Further appointments were offered the mother did not respond to her solicitors. The timetable was jeopardised. The children's solicitor notified the mother that the children's guardian had instructed her to apply to "vacate" the direction on the basis that the timetable would be affected. The application was made by email and referred to the DFJ. It was then discovered that the maternal grandmother had been admitted to hospital and died. The mother finally responded she would want to be assessed. The solicitor for the child sent an email to the DFJ with a draft order saying that no objection had been received to the proposed order. The mother's solicitor emailed the court the same

afternoon explaining about the bereavement, saying that the mother's last instructions were that she wanted to be assessed and seeking a listing of the application.

The matter was not referred to the allocated judge and the DFJ approved the draft order supplied by the child's solicitors "vacating" the direction. She extended her condolences to the mother for the death of the grandmother. The process involved 3 emails in the space of under 1 ½ hours.

The mother gave instructions and a request was made to the DFJ for reasons (proferring the explanations for the missed appointment). The judge responded saying that this had been an important appointment and the fact that the mother forgot was "troubling" and the judge had no confidence that the mother would comply by attending other appointments.

The Court of Appeal's decision

The Peter Jackson LJ noted [24] that the mother's solicitors should have notified the court when the timetable was in doubt and the children's solicitor was correct to do so. However, the children's solicitor's email should have given more detail including that another appointment was being offered to the mother by the expert. The email application also proceeded on the basis of absence of dissent and not agreement. The local authority and father and other parties had expressed no view.

It would also have been appropriate to refer the case to the allocated judge who would have been aware of the reasons why the expert assessment had been considered necessary previously and balance that against the changes to the timetable as a result of the delay in obtaining the report. "*Maintenance of the statutory timetable is always an important factor, but the children are in a family placement and delay was not the driving factor. This process fell short of what is required in a case concerning the futures of four young children.*" [38]

The court acknowledged at [42] that FPR 18 allows a court to dispense with the requirement for a formal hearing and a hearing, but what may be appropriate for a consent order, was not necessarily appropriate for a significant order such as was the case here.

At 43- 44 Peter Jackson LJ stated

> "The court must distinguish applications that can appropriately be made without an application notice from applications that should, because of the importance of the issue or for some other reason, be made by formal notice…44.Similarly, the court must discriminate between those applications that require a hearing and those that do not. The default position is that there should be a hearing, as the court can only make an order without a hearing if it does not consider that a hearing would be appropriate. It should be on solid ground if it makes an order without a hearing when, as the rule contemplates, the parties agree that a hearing is not required, or where the order is agreed. It may also decide to dispense with a hearing in other circumstances, for example where the issue is not of particular importance, or where the proper order is obvious, or where the documents contain all the information and arguments and a hearing is unlikely to add much. There will be other reasons why an application can be fairly dealt with without hearing – it is all a matter of judgement"

The application could have been listed for a short remote directions appointment, when the position could have been considered, instead the result was a time-consuming appeal which was neither opposed nor conceded by the local authority or children's guardian.

The Court of Appeal gave fresh directions for a report, rather than remitting it, thereby increasing the delay.

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

Q, R and S (children) (RRO Application) [2021] EWHC 1492

The RRO was made restricting publication of the names or photographs of the children and the schools they attend. A restriction was also placed on seeking information relating to the children or their parents from a carer, the children, the father, the staff or pupils at their schools or any relatives All restrictions were until the youngest child reached the age of 18.

The LA also sought a reporting restriction that prohibited publication of information that the children were present at the family home at the time their mother was killed, that the 2 younger children may have witnessed her killing and that Q, R and S were left alone with their mother's body for some time.

The LA's position was that this information, if made public, would heighten the children's trauma and worsen their mental health. It was well known that the father had killed the mother and had pleaded guilty to her murder. All 3 children were severely traumatised by events, they were presenting with difficult behaviours and press intrusion may hinder their progress. The LA position was supported by the children's guardian.

Lee Agnew (BBC 3 counties radio) and Louise Tickle (freelance journalist) opposed that restriction on public interest grounds. They argued that the age of the children meant they would not be impacted by the reporting, and everyone in the vicinity of where they lived would know the information anyway. Reporting of these details was also supported by the maternal grandmother

The court determined that the additional reporting restriction sought by the LA and CG was disproportionate

Case summary by **Martina Van Der Leij**, Barrister, **Field Court Chambers**

P (Circumcision Child in Care) [2021] EWHC 1616

This case concerned P, a 21-month old boy, who was the subject of an interim care order in favour of the local authority and had been placed with his maternal aunt and uncle at birth. Both parents accepted that they could not care for P and it was likely that he would be made the subject of Special Guardianship Orders in favour of the maternal aunt and uncle. During the course of the interim care order, the parents had been offered contact three times per week with P, but neither of them had taken this up since late 2020.

Both parents were Muslim and sought for P to be circumcised. The mother's application was opposed by both the local authority and the Guardian. Though they were not parties themselves, the maternal aunt and uncle also felt that P should not be circumcised at present, though were committed to promoting his Muslim faith, including adhering to a broadly halal diet.

The Judge noted that there did not appear to be any High Court or Court of Appeal decision around the issue of male circumcision in public law proceedings. Having reference to the legislation and private law authorities, he distilled a number of guiding principles [27] and highlighted the need for the matter to be brought to court swiftly. In respect of the current proceedings, Mr Justice Cobb viewed the decision as "finely balanced" but ultimately refused the mother's application. His position was influenced in particular by: the parents' lack of contact with P; their failure to provide age-appropriate books about Islam to him; the fact that P's brothers were not circumcised (nor had the parents sought for them to be); and the views of P's carers. The Judge agreed that P should be brought up in the Muslim faith and was satisfied that the maternal aunt and uncle would encourage this.

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

R (Care Proceedings Joinder of Foster Carers) 2021 EWCA Civ 875

It transpired that there were two potential sets of adoptees – the foster carers, and a cousin and her partner (the latter who were identified late in the proceedings). The local authority were supporting the cousin and partner at that stage. The foster carers had made an application to adopt, which had not been validly made at the time of the initial hearing. The judge took the view that the foster carers should be joined as there was nobody else who could effectively put their case, in contrast to the cousin. The local authority appealed against this decision. At the time of this judgment, both couples had been approved as adopters.

The case also concerned the division of responsibilities between the court and local authority when it came to adoption in these very unique circumstances where a placement order application was not being made without adopters being identified, but where there were two prospective adopters. The issue arose as to whether the court should determine this as part of its final welfare decision, or if it should be left to the local authority as part of their statutory functions.

After a thorough evaluation of the law on adoption, the role of the care plan, family placements, and joinder of foster carers and prospective adopters, the Baker LJ, giving the leading judgment, concluded that the trial judge was wrong in both principle and law to join the foster carers as parties. The exceptional circumstances did not exist. The foster carer's application to adopt must be considered before any final decision was made about the child's future, but this did not necessitate them being joined as parties. The guardian was able to carry out any necessary enquiries without the foster carers being joined. The following was proposed as the more appropriate course of action:

> 66. "It seems to me that the right course for the judge would have been to list the local authority's application for a care order for a final hearing. At that point, the judge could have considered whether adoption in principle was the right option, applying the test laid down in *Re B* and *Re B-S*. In the event that the court determined that adoption was the right option, it could have made a care order and proceeded to consider Mr and Mrs A's application alongside the local authority's application for a placement order. That might have necessitated an adjournment for assessments and would undoubtedly have required careful consideration about issues of confidentiality. In my judgment, however, it would have been an unobjectionable course to take in the light of the authorities."

Baker LJ however did not agree with the local authority that the proposed application by the foster carers was irrerlevant nor that it was an impermissible attempt to circumvent the statutory scheme. There was nothing in the statutory scheme to prevent a person who is lawfully entitled to apply for a private or non-agency adoption from doing so before or after the local authority has applied for a placement order. Baker LJ further noted that where such a person has given notice of intention to apply to adopt, the local authority is absolved from its statutory obligation to apply for a placement order, provided the adoption application is issued within four months and has not been withdrawn or refuse (s.22(5) Children Act 1989). Further, when a lawful application has been made, the court must consider it and is not constrained from doing so by the statutory scheme. Any court was also required to take into account the range of powers available when making a placement order, and that would include the making of a non-agency adoption order as sought by the foster carers.

The Court concluded that the care order application should proceed to a final hearing at which the judge would have to determine the local authority plan for adoption, and that if this was so, it was anticipated that a final care order would be made but the application for a placement order adjourned to be determined in parallel with Mr and Mrs A's application to adopt (by which time it would have been validly made). The Court also set aside the order for the filing and serving of adoption assessments, on the basis that they would contain confidential information, and stating that this should be reconsidered at the next hearing.

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

Greater Manchester Police v Zuniga & Ors [2021] EWHC 1572

The Application

The applicant was the Chief Constable of Greater Manchester Police ('GMP'). GMP sought orders in respect of material already held by them relating to data manipulation at a forensic laboratory, which they sought to use for an ongoing criminal investigation [1].

The permission sought by GMP was an extension of the cooperation permitted by the *2013 Protocol*, the only practical difference being that GMP's application was made in relation to a class of data, rather than on a case by case basis [18].

None of the respondents opposed GMP's application or chose to appear at this hearing [7].

Background

The GMP investigation, which commenced in 2017, was:

> '[2]…into data manipulation by the seven respondents, who are the suspects in the case, at a forensic laboratory which, via two different companies consecutively operating at the laboratory, provided services to police forces for the purposes of identifying drug use. The forensics analysis hair, blood and urine for quantities of illegal substances, and the results provided, some of which were falsified, were used in criminal, family, coronial or employment cases'.

The GMP investigation was at a forensic laboratory across two different companies operating consecutively, which operated at the same Manchester testing centre, the Hexagon Tower [4]. The alleged activity said to have occurred between 2011 and 2017. Trimega Laboratories ('TL') operated from 2009 until they ceased trading in 2014 and were liquidated by KPMG. Randox Testing Services ('RTS') bought the equipment and methodology from TL upon its liquidation and operated from 2014 onwards [4].

The data manipulation first came to light in January 2017, when RTS contacted GMP following their discovery of data manipulation at Hexagon Tower. Both RTS and GMP began concurrent investigations, RTS having cooperated with GMP throughout [8].

The investigation uncovered 27,000 reports which appeared to have been affected. As a result therefore, potential injustices may have occurred from the data manipulation, being many and serious in nature [3].

The GMP investigation also concerned the data anomalies relating to two family court cases in particular: (i) "the Welch case"; and (ii) *Bristol City Council v. A & A & Ors* (2012) [9].

The issue before the court

HHJ Nicholas Dean QC granted an order in July 2020 under *s.59 Criminal Justice and Police Act 2001*, and a Production Order regarding material which had previously been lawfully obtained from KPMG [10]. As a result of those orders, the retention of the material at the time of this hearing was lawful regardless of the outcome of the application before McFarlane P in this case [10].

However, under *s.22 PACE 1984*, GMP could only hold the biometric material for as long as necessary in the circumstances, meaning not for a purpose other than criminal law enforcement (Per Lord Dyson ***X v X (Children) & A***

***(Local Authority)* [2015] EWCA Civ 34**, [46]). Therefore, GMP now sought permission to use and hold the information without such a limitation, including if the material was not used [10].

Some of the information in question had been used in family cases, meaning that *FPR 2010 r.12.73* and *FPR 2010 r.12.75* came into play, both of which restrict the communication of information. In particular, preventing the communication of test results beyond the parties to the proceedings [11]. Permission to share the information with the police was therefore required [12].

McFarlane P observed that:

> '[14]… the granting of these orders requires careful consideration. Following *Marper v. United Kingdom* [2008] ECHR 1581 [67] and *X v. Z & A* [31], retention, use, and disclosure of biometric data interferes with an individual's Article 8 rights. Holding data of such a personal nature is of critical sensitivity…
>
> [15]…This is a unique case. Once GMP have directed the case towards a prosecution, much of the material concerned would not then be able to be held under s.22. it is not hard to imagine the circumstances where this data would be sought by an individual concerned, given the size of the affected data, and the nature of the proceedings in which it was involved. There are likely to be criminal, family, coronial and employment cases, previously decided, which parties may wish to revisit on the basis of faulty data. The importance of this is hard to overstate. It concerns miscarriages of justice which may have occurred in reliance on what are now known to be erroneous drugs testing results. It is instructive that where material has been handed to GMP by RTS, RTS has approached the parties involved for their consent and it has not been refused in any such case'

McFarlane P records GMP's submissions that: (i) the data in question was not "primary material" such as that gathered by police at a crime scene, but rather under the control of the Family Courts. It therefore could not be considered solely by reference to the criminal investigation rules [16]; and (ii) secondly, the application is necessary for practical purposes. The alternative being for GMP to apply for permission for each case, or each circuit, which it was argued would be a disproportionate burden on court resources given the volume of data concerned [17].

The President concluded that:

> '[18]… Given the number of people affected who may require these materials at some point, it is important that it is retained. The alternative would allow for individuals concerned to access the material produced for court, but not the background material which demonstrates the data manipulation. In my judgment there is no viable alternative to allowing the data to be held by GMP which would allow the individuals concerned access to the material needed to demonstrate a miscarriage of justice.'

The court granted the orders sought by GMP, the case to be retained by the President of the Family Division for review of the data retention every 12 months [19 & 20]. An amendment was made such that the identity of individuals was only to be revealed in criminal trials if that individual had consented to it [20].

Case summary by **Bethany Scarsbrook**, Barrister, **St John's Chambers**