July 2021

Family Law Week

# NEWS

## Bill to raise minimum age of marriage to 18 taken over by Pauline Latham

Pauline Latham, the Member of Parliament for Mid-Derbyshire, has taken over the private members' Bill to raise the minimum legal age of marriage to 18 in England and Wales.

The **Marriage and Civil Partnership (Minimum Age) Bill** was presented to Parliament by Sajid Javid on 16 June 2021 through the ballot procedure. When Mr Javid was appointed Secretary of State for Health and Social Care, Mrs Latham agreed to sponsor the Bill. She has campaigned to end child marriage for more than three years, and brought forward a similar Bill in the last parliamentary session.

The Bill will receive its second reading on 19 November 2021. It has not yet been published.

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

4/7/21

## Gingerbread calls on the Government to scrap unfair child maintenance fees

Gingerbread, the charity for single parent families, is calling on the Department for Work and Pensions (DWP) to scrap unfair child maintenance fees. These fees are taken by the Child Maintenance Service (CMS) from money owed to children by their non-resident parent. This call came as **figures released by the DWP** showed that there is currently £408.3 million in arrears owed to children across Great Britain.

The figures also show:

- 100,900 children are not receiving the child maintenance owed to them through 'Collect and Pay'
- 28 per cent of parents (42,000) are not paying any of the child maintenance they owe under 'Collect and



**GENERAL EDITOR**
**Stephen Wildblood QC**

**DEPUTY EDITOR**
**Dr Bianca Jackson**
**Coram Chambers**

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

Pay'

- Since December 2020 overall arrears owed to chialdren have increased by £12.5 million under 'Collect and Pay'.

For the latest figures from the DWP, **click here**. For comment by Gingerbread, **click here**.

4/7/21

## Pandemic leads to 44 per cent decrease in cases handled by Forced Marriage Unit in 2020

In 2020, the Forced Marriage Unit (FMU) gave advice or support in 759 cases related to a possible forced marriage and/or possible female genital mutilation (FGM). This comprised 750 cases solely related to forced marriage, three cases related to both forced marriage and FGM, and six cases solely related to FGM. This figure includes contact that was made to the FMU through the public helpline or by email in relation to a new case. This does not include over 400 general enquires the unit received which did not relate to a specific case.

The figures were revealed in **statistics** forthcoming from the Home Office and Foreign, Commonwealth & Development Office.

The 759 cases in 2020 represents a 44 per cent decrease on the average number of cases (1,359) received annually between 2011 and 2019. This is thought to be largely attributable to reasons derived from the coronavirus pandemic, such as restrictions on weddings and overseas travel, which have been in place to varying degrees from March 2020. Following the introduction of the first lockdown in the UK, referrals to the FMU decreased from an average of 82 per month (January-March 2020) to 44 per month (April-June 2020). A procedural change regarding whether to log a new case as a referral or a general enquiry is also likely to have had a minor impact on the overall number of cases compared with previous years.

The FMU remained fully operational throughout the restrictions of the coronavirus pandemic and took steps to ensure that this was publicised extensively.

Of the cases that the FMU provided advice or support to in 2020:

- 199 cases (26 per cent) involved victims below 18 years of age
- 278 cases (37 per cent) involved victims aged 18-25
- 66 cases (9 per cent) involved victims with mental capacity concerns
- 603 cases (79 per cent) involved female victims, and 156 cases (21 per cent) involved male victims.

These proportions are broadly in line with case numbers from recent years.

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

4/7/21

## Regional and local support for LiPs underway in England and Wales

The Ministry of Justice has announced that the Legal Support for Litigants in Person (LSLIP) grant is fully underway, funding 11 projects across more than 50 organisations at local, regional and national levels to help people to identify issues as early as possible, to prevent them from getting worse, and to support people where they do need to attend court.

Eight new regional and local partnerships are working together to share knowledge, network, and build expertise. This has also allowed funded organisations greater flexibility in their response to the Covid-19 pandemic. This approach helps to build up data on people representing themselves in the courts and inform future policy.

The MOJ has funded five local partnerships in Dorset and South Somerset; Derbyshire, Coventry and Birmingham; Lancashire and Greater Manchester; North Yorkshire and Kirklees; and Suffolk, Norfolk and North Essex, alongside three regional partnerships in Devon and Cornwall; the North-East of England; and North and Mid-Wales. Just under £2 million of funding has been awarded to these eight partnerships over two years.

The North and Mid-Wales partnership, which is led by Ynys Môn Citizens Advice, is made up of eight local Citizens Advice branches plus Bangor University Law School. This partnership is delivering two projects. The first is increasing the capacity of caseworkers and expanding the support they can provide across the region for family, employment and community care issues. The second is striking a broader working relationship with the Law School.

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

4/7/21

## Marriages and Civil Partnerships (Approved Premises) (Amendment) Regulations 2021

These Regulations amend the Marriages and Civil Partnerships (Approved Premises) Regulations 2005, which make provision for the approval of premises for the solemnization of civil marriages and the formation of civil partnerships. The amendments made by these Regulations will enable proceedings to take place in outdoor areas in the grounds of premises which have been approved under the 2005 Regulations. The amendments made by these Regulations are time limited and will expire at the end of 5th April 2022 (regulation 5).

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

4/7/21

## Domestic abuse: Support for victims and survivors

The House of Commons Library has published a helpful paper explaining the varied support available for victims and survivors of domestic abuse. This includes support from housing and social security agencies, and specialist domestic abuse support services such as Independent Domestic Violence Advisers (IDVAs) and refuges.

For the paper, **click here**.

4/7/21

## 8th Family Law & Children's Rights Conference to take place from 12 to 16 July

The 8th Family Law & Children's Rights Conference: World Congress 2021, entitled Through the Eyes of a Child, will be held virtually from 12-16 July 2021. The conference is organised by the World Congress on Family Law and Children's Rights.

The conference is a major international event focusing on family law and family law processes and the rights of children and youth. It is a platform for the convergence of lawyers, judges, academics, government, non-government associations, psychologists, medical professionals and social scientists with a common interest in the active protection of children and in sharing best practices to promote the rights of children and family law issues.

The conference will take place online over five days from 12 July through to 16 July 2021. Due to the need to hold a virtual conference, the number of sessions has been significantly reduced. The conference will consist of four to five sessions per day.

For more details, **click here**.

4/7/21

## City of Wolverhampton Council to improve its adoption recruitment process

Wolverhampton council has agreed to ensure its adoption recruitment procedure adheres to statutory guidance, following an Ombudsman investigation.

The move has come following a woman's complaint about the way she was assessed and rejected for adoption by an agency acting on the council's behalf.

The Ombudsman found the agency carried out an initial assessment of the woman before she applied to become an adopter, predetermining the success of the application. This came after the woman enquired with the agency about adopting after attending one its information sessions.

Statutory guidance states assessments should be made only after people have formally applied to adopt.

During the Ombudsman's investigation, the agency claimed its method was 'routine and common practice' and that the Department for Education (DfE) was 'fully aware and supportive of the approach' it was taking.

However, the Ombudsman found this information misleading and the agency later admitted the DfE had not, in fact, sanctioned the practice.

In this case the council has agreed to review its adoption recruitment procedure to ensure it adheres to the DfE's 2013 statutory guidance on adoption.

For the Ombudsman's report, **click here**. There is a link to the report at the top right of the page opened.

9/7/21

## Appointment of the Official Solicitor in welfare proceedings: practice note

Guidance has been issued for legal professionals about appointing the Official Solicitor in healthcare and personal welfare matters in the Court of Protection.

The practice note contains information and guidance around:

- appointing the Official Solicitor as litigation friend for someone lacking capacity to conduct personal welfare proceedings
- the proceedings that the Official Solicitor is usually invited to act in, including cases that involve serious medical treatment
- the Official Solicitor's criteria for consenting to act as litigation friend
- how to invite the Official Solicitor to act in these kinds of proceedings.

The practice note also contains details of how to contact the Official Solicitor, including out of hours applications relating to urgent medical treatment issues.

For the practice note, **click here**.

9/7/21

## Appointment of the Official Solicitor in property and affairs proceedings: practice note

Guidance has been issued for legal professionals about appointing the Official Solicitor in proceedings around property and financial matters in the Court of Protection.

The practice note contains information and guidance around:

- appointing the Official Solicitor as litigation friend for the person concerned for property and financial affairs proceedings in the Court of Protection
- requests from the court for the Official Solicitor to act as, or appoint counsel to act as, an advocate to the court
- the Official Solicitor's normal criteria for accepting appointment in this type of proceedings
- how to contact and send documents to the Official Solicitor
- urgent cases.

For the practice note, **click here**.

9/7/21

## Domestic Abuse Act 2021 (Commencement No. 1 and Saving Provisions) Regulations 2021

**These Regulations** bring into force on 5th July 2021 sections 1 and 2 (for limited purposes), section 76 (in specified areas for a specified period) and section 78 of the **Domestic Abuse Act 2021**.

Regulation 2(1) brings into force the definitions of "domestic abuse" and "personally connected" in sections 1 and 2 respectively of the Act. The definitions are commenced only for the purposes of: section 76 of the Act, which is brought into force for limited purposes by these Regulations; sections 75 and 83 of the Act, which were brought into force on the day on which the Act was passed in accordance with section 90(1) of the Act; sections 177, 179, 189 and 198 of the **Housing Act 1996** ("the 1996 Act") and article 6 of the **Homelessness (Priority Need for Accommodation) (England) Order 2002** which are amended by section 78 of the Act, which is brought into force by these Regulations.

Regulation 2(2) brings into force section 78 of the Act.

Section 78 amends Part 7 of the 1996 Act (homelessness: England) by creating a new priority need category for persons who are homeless as a result of being a victim of domestic abuse.

Sections 78(2), and 78(4) to 78(7) of the Act amend sections 177, 179, 189, 198 and 218 of the Housing Act 1996.

Section 78(3) of the Act repeals section 178 of the 1996 Act (meaning of associated person), and section 78(9) of the Act makes amendments consequential on that repeal.

Section 78(8) amends article 6 of the Homelessness (Priority Need for Accommodation) (England) Order 2002.

Regulation 3 brings into force for limited purposes section 76 of the Act, which enables the Secretary of State to include polygraph conditions for certain offenders released on licence. The provision is being commenced in 13 police areas in the North of England, as specified in regulation 3(2), as part of a pilot scheme running from 5th July 2021 to 5th July 2024, as specified in regulation 3(3).

Regulation 4(1) contains a saving in relation to section 78(3) of the Act for the purposes of section 4 of the Deregulation Act 2015 and section 27 of the Housing and Planning Act 2016.

Regulation 4(2) contains a saving in relation to polygraph conditions included in a licence as part of the pilot scheme brought into force by regulation 3.

For the Commencement regulations, **click here**.

9/7/21

## Marriage venues

The House of Commons Library has published a briefing paper dealing with where couples may marry in England and Wales. It includes information about new regulations which, for a limited time (at least to begin with), enable couples to marry at some outdoor locations. It also deals with a Law Commission consultation on its provisional proposals to reform the law governing how and where couples can get married.

For the briefing paper, **click here**.

9/7/21

## Message from Mr Justice Mostyn: Standard orders

Mr Justice Mostyn has issued the following message.

> I make this announcement with the authority of the President of the Family Division.
>
> On 25 June 2021 judgment was handed down in ***A v B* [2021] EWHC 1716 (Fam)**. The High Court ruled that the Family Court had jurisdiction to make a free-standing order for a port alert. A pro forma order, named Port Alert Order was attached to the judgment. This has been added to volume 2 of the compendium of standard orders and numbered Order 13.30.
>
> Cafcass has asked that item 66(d) in Order 7.2 (Private Law Case Management Directions and Orders Precedent Library) be altered to read:
>
> > 66 – [Name] must attend the following activity programme[s] [as a condition of the child arrangements order] on dates and at times to be confirmed by the activity provider, and in any event by [date]: ……..
> >
> > d – (***England only***) an Improving Child and Family Arrangements service (ICFA) intervention: …….

The above changes take effect forthwith.

For volume 2 of the standard orders, incorporating the above changes, **click here**.

9/7/21

## Lord Chancellor questioned on Human Rights Act reforms

The Parliamentary Joint Committee on Human Rights has questioned the Secretary of State for Justice on the Government's aims for its human rights review and the impact any reforms could have on the protection of rights in the UK. They also asked questions relating to the Governments plans to reform administrative law, including changes to judicial review.

On 8 July 2021 the Committee published a report that highlighted the positive impact of the Human Rights Act and warned that Government plans to amend it could constitute a risk to the UK's constitutional settlement and to the enforcement of human rights.

To view the session, **click here**. For the Committee's report, **click here**.

17/7/21

## Children's homes inquiry: Commons Education Committee

The Commons Education Committee has held the first public evidence session in its inquiry into children's homes. It questioned former Children's Commissioner Anne Longfield, Josh MacAlister, Lead Reviewer on the Independent Review of Children's Social Care and Lord Adonis, who has lived experience of children's residential care.

The inquiry will examine a number of areas including educational outcomes and destinations, the quality of support provided by children's homes, the use of unregulated provision, out-of-area placements, rates of criminalisation, the sufficiency of children's home places, and the impacts of the Covid-19 pandemic.

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

17/7/21

## Guidance on Allocation and Gatekeeping for Care, Supervision and other Proceedings under Part IV of the Children Act 1989 (Public Law) 2014

On 5 June 2020, the President of the Family Division made two amendments to his **Guidance on Allocation and Gatekeeping for Care, Supervision and other Proceedings under Part IV of the Children Act 1989 (Public Law) 2014**.

In relation to the temporary change that was made via the addendum, please note that this addendum remains in place, and it will continue to do so until a date to be specified by the President in due course.

17/7/21

## A View from The President's Chambers: July 2021

The President of the Family Division, Sir Andrew McFarlane, has published his latest View from the President's Chambers.

The latest View covers:

- Carrying on during the pandemic
- Recovery and return to unrestricted working
- 'The Road Ahead'
- Transparency
- Public Law Working Group implementation
- Family Public Law rollout
- Domestic abuse training
- Family Justice Council
- JAC: DDJ and Recorder competitions
- Family Drug and Alcohol Court
- Mediation voucher scheme
- FRC procedural and efficiency improvements
- Experts and
- Well-being.

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

17/7/21

## Digital divorce service to replace paper D8 form from September 2021

From early September 2021, HM Courts and Tribunals Service (HMCTS) will be mandating the digital divorce process. This means that legal representatives will need to process their divorce applications using the digital online service rather than using the paper D8 form.

Divorce applications should continue to be processed via the paper route in the following instances only:

- civil partnership
- judicial separation
- nullity.

HMCTS strongly encourage signing up to MyHMCTS in good time for September by following these steps:

- check that your firm is not already signed up to MyHMCTS (firms with probate departments may already have accounts); if your firm is using

MyHMCTS, request a username and password from your administrator

- if your firm has not signed up, register for the service – your firm needs to nominate an administrator to set the organisation up and manage the account
- to register, organisations must have an active fee account (also known as Payment by Account, or PBA); registering for an account is easy and accounts are usually confirmed within three working days – if you have any questions about setting up an account, email **MyHMCTSsupport@justice.gov.uk**
- once an account has been created, the administrator will be able to manage the account, add additional users and manage permissions.

For guidance on applying for a divorce on MyHMCTS, **click here**. The opened page provides guidance on:

- Submitting a case
- Requesting a personal service
- Amending your petition
- Deemed and Dispensed Service Applications
- Alternative Service Journey and General Applications
- Completing an acknowledgement of service
- Responding to an Acknowledgment of Service for represented respondents
- Applying for a decree nisi and decree absolute
- Decree nisi clarification and amend petition for solicitors.

17/7/21

## Cafcass Prioritisation Protocol now in use in Midlands areas

A process to prioritise and manage high workloads has been implemented in the Cafcass areas covering Birmingham, the Black Country, Shropshire, Worcestershire, Staffordshire and Herefordshire family courts due to unsustainable pressures on the family justice system in the area.

Nationally, Cafcass is working with about 10,500 more children (6,500 more cases) than it was at the beginning of the pandemic because of the reduced capacity of the courts to hear cases during this period and the associated impact on the caseloads of Family Court Advisers. Cafcass says that unchecked, these pressures will impact on the quality of practice and decision-making about children's futures.

The protocol sets out the process for assessing which cases will be affected, how the permission of the family court will be sought to manage the work, and the arrangements for families and children to be made aware of and informed about the progress of their application.

For more information, **click here**.

17/7/21

## Cohabiting couples to benefit from changes to bereavement benefit rules

The Department for Work and Pensions has announced plans to extend bereavement support to cohabiting couples with children.

At present, a surviving parent can only claim the financial support if he or she was married or in a civil partnership at the time of their spouse or civil partner's death.

The government is now proposing that Widowed Parent's Allowance and Bereavement Support Payments will be extended to surviving cohabiting partners with children who were living with their partner at the time of death.

It is estimated that more than 22,000 families will now be able to claim this help, totalling an additional £320 million in support for bereaved children over the next five years.

Once approved by Parliament, the changes will apply retrospectively from 30 August 2018, with any backdated payments being made as lump sums.

For more details, **click here**.

17/7/21

## Settlement reached in Akhmedov divorce case

The *Guardian* has reported that Farkhad Akhmedov and Tatiana Akhmedova have reached a settlement in the litigation pursuant upon their divorce.

In 2017 Mr Akhmedov was ordered to pay his former wife £453 million in one of the largest divorce awards ever made by a UK court. In April this year Tatiana Akhmedova was granted substantial money judgments in pursuit of her divorce award against her ex-husband. The judgments were against the couple's son, Temur Akhmedov, Borderedge, a company owned by the couple's two sons, and Liechtenstein trustee entities, Counselor Trust Reg and Sobaldo Establishment, for their participation in schemes orchestrated by Farkhad by which they had received assets to frustrate Ms Akhmedova's ability to enforce her divorce award.

It is now being reported that Ms Akhmedova has "accepted a cash and art settlement".

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

18/7/21

## Professionals say remote hearings in the family court still need improvements to ensure fairness

Nearly two-thirds of professionals responding to a new survey felt that more needs to be done to ensure that remote hearings – now commonplace in the family court because of COVID-19 – were fair and worked smoothly.

More than 3,200 professionals (lawyers, magistrates, judges, social workers and others in the family justice system), parents and other family members from across England and Wales have shared their experiences of the family court over the last year as part of a rapid consultation by Nuffield Family Justice Observatory to inform post-pandemic recovery planning by the President of the Family Division.

The President of the Family Division, Sir Andrew McFarlane, said in response to **the report:**

> "I am extremely grateful to the Nuffield Family Justice Observatory for producing this impressive body of work. It is vital that as Covid restrictions are lifted we adapt to ensure the Family Justice System excels. This report considers our remote working practices and allows us to review what we should, and should not, maintain after the pandemic. Importantly the report gives the perspective of a range of those involved in family justice, including parents and professionals."

The majority of professionals saw a continuing role for certain types of remote hearing, though raised concerns that hearings were often remote 'by default' and that considerations such as the vulnerability of lay parties and their wishes and views, the complexity of the case, and whether there was access to suitable technology for all those taking part should be taken into account. There was support for remote 'administrative' hearings but much less for remote fact-finding hearings, hearings involving contested applications for interim care or contact orders, or final hearings. Some commented that remote hearings would always be inferior to hearings in person.

A majority of parents (73 per cent) indicated that they did not feel supported during their hearing(s). Just under half (46 per cent) did not have legal representation, and others raised concerns about not being able to be with their legal representative during the hearing and the difficulties communicating with them as a result. Two in five reported that they had wanted to attend court but had been prevented from doing so.

While many professionals reported that the technology to support remote hearings had improved over the last year, responses indicated a high proportion of hearings still taking place by telephone and ongoing issues with connectivity and access to appropriate hardware. One in three parents who responded to the consultation had joined a hearing by phone, even if the hearing was being held by video conference. There were continuing problems managing remote hearings where intermediaries or interpreters were required.

Suggestions to improve how remote hearings were run included making sure lay parties and their representatives were better prepared for the hearing, checking access to technology/links before the start of the hearing, providing better written guidance to parents and professionals and improving the technology. Many professionals suggested there should be more places where parents could go to be with their legal representative or other support to attend the hearing remotely, yet only four of the 174 parents who responded to the consultation indicated that they had been provided somewhere to attend the hearing.

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

25/7/21

## New report reveals a quarter wished for mediation or arbitration as answer to divorce

Over three-quarters of people found their divorce stressful while a quarter wished they'd chosen another way to end their marriage, a new report has found as part of **Irwin Mitchell**'s campaign to do divorce differently.

The survey by OnePoll polled 1,000 divorcees about their experience of getting divorced, and whether their relationship ending had been amicable, in a bid to discover how widely known alternative dispute resolution (ADR) was. The results were clear that divorce is often a challenging process for the people involved. Three in ten divorcees recall 'lots' of arguments during the process, while four in ten wished they had a friendlier relationship with their ex-spouse.

When it came to awareness of ADR, almost four in ten (39 per cent) didn't know what ADR was at the time of their divorce, while over a third (35 per cent) weren't offered ADR as an alternative way of resolving their dispute. A quarter (25 per cent) regretted not using mediation and arbitration services to end their relationship, highlighting the need for the family law sphere to signpost to these alternatives.

Irwin Mitchell's new report, ***Divorce – Let's do it differently***, aims to highlight to both clients and family lawyers the different types of ADR available for couples who would prefer to stay away from court.

The survey was discussed at a roundtable, hosted by Joshua Rozenberg and Irwin Mitchell including former Supreme Court judge Lord Wilson; barristers and specialist arbitrators Nicholas Allen QC and Janet Bazley QC; Family Law in Partnership's Gillian Bishop, and Director of Legal Services (Family) at Irwin Mitchell, Ros Bever.

There was a consensus among the panellists that there were three advantages of ADR: control, cost and cooperation. Their expert analysis of the ADR landscape can be found in the report.

For the report, **click here**.

25/7/21

## Bar Council responds to introduction of Judicial Review and Courts Bill

The Chair of the Bar Council, Derek Sweeting QC, has responded to the introduction of the Judicial Review and Courts Bill in the House of Commons. He said:

> "The Lord Chancellor, in introducing this Bill, says he sees himself as a 'constitutional plumber'. There's no leaking tap. Lord Faulks' independent review of judicial review found that the system was in working order.
>
> "One positive element is that Government has backed away from some of the more extensive changes to judicial review that were identified in the consultation and recognised the need to ensure that judicial review remains within the control of the courts. Caution is needed around any attempt to limit its scope.
>
> "Governments and public bodies must be effectively held to account by the public via the courts. Decisions that affect people's lives, whether they arise out of the pandemic or a local authority's planning decision should be lawful. The right to challenge them, within limits which are already strictly defined, is an important part of our constitutional checks and balances."

The Judicial Review and Courts Bill was introduced to the House of Commons and given its First Reading on 21 July 2021. For the Bill, as introduced, **click here**. For the text of a speech about judicial review given by the Lord Chancellor at Policy Exchange, **click here**.

25/7/21

## Government launches strategy for tackling violence against women and girls

The Home Office has published the government's **new strategy** to ensure women and girls are safe 'at home, online and on the streets'.

The strategy sets out an ambition to increase support for victims and survivors, increase the number of perpetrators brought to justice and to reduce the prevalence of violence against women and girls in the long-term.

The announced actions and commitments are intended to support action being taken to improve the criminal justice response to rape, toughen sentences and protection for victims through the **Police, Crime, Sentencing and Courts Bill**.

Following the death of Sarah Everard in March and the public response to it, the Home Secretary reopened the government's call for evidence on tackling crimes that, the Home Office says, disproportionately affect women. The Home Office received 160,000 further responses over two weeks, taking the total to over 180,000 responses. These, it says, have helped determine the new strategy.

While the strategy is focusing on long term change, the government is also taking immediate steps to improve safety for women and girls, focusing on practical action to bolster physical safety in public spaces. This includes:

- A new national policing lead on violence against women and girls who will report into the Home Secretary-chaired National Policing Board – they will also be the point of contact for every police force to ensure best practice is shared and that progress on improving the response to these crimes is being monitored
- A review of options to limit use of non-disclosure agreements in cases of sexual harassment in higher education
- A £5 Million 'Safety of Women at Night' Fund, in addition to the £25 million Safer Streets Fund Round 3, that focuses on the prevention of violence against women and girls in public spaces at night, including in the night-time economy
- Criminalising virginity testing, which some women and girls are being forced to undergo
- Appointing two new Violence Against Women and Girls Transport Champions, to drive forward positive change and tackle the problems faced by female passengers on public transport
- A new online tool called StreetSafe intended to provide women and girls with a means by which to pinpoint anonymously and quickly areas where they have felt unsafe and say why.

For more details of the new strategy, **click here**. For the strategy document itself, **click here**.

25/7/21

## Law Commission recommends reforms to protect victims of online abuse

The Law Commission has **recommended reforms to communications offences** to target serious harms arising from online abuse, while more effectively protecting the right to freedom of expression.

A new harm-based offence would ensure only sufficiently harmful communications – which are likely to cause serious distress – are criminalised.

The recommendations include a number of new offences, including offences to tackle cyberflashing, the encouragement or assistance of serious self-harm and sending knowingly false communications.

More than 70 per cent of UK adults have a social media profile and internet users spend over four hours online each day on average. The online world has increased the scope

for abuse and harm. A report by the Alan Turing institute estimates that approximately on- third of people in the UK been exposed to online abuse.

The recommendations, which have been laid in Parliament, would reform the "communications offences" found in section 1 of the Malicious Communications Act 1988 ("MCA 1988") and section 127 of the Communications Act 2003 ("CA 2003"). These offences do not provide consistent protection from harm and in some instances disproportionately interfere with freedom of expression.

The reforms would address the harms arising from online abuse by modernising the existing communications offences, ensuring that the law is clearer and that it effectively targets serious harm and criminality. The recommendations aim to do this in a proportionate way in order to protect freedom of expression. They also seek to "future-proof" the law in this area as much as possible by not confining the offences to any particular mode or type of communication.

For details of the Law Commission's recommendations, **click here**.

25/7/21

## Lasting Powers of Attorney: consultation launched

The Government has announced that it is **consulting about a number of proposals developed to modernise lasting powers of attorney**.

The lasting power of attorney (LPA) was introduced in 2007. It was designed to provide more flexibility and greater protections than its predecessor, the enduring power of attorney (EPA). However, the Ministry of Justice says, people increasingly want to access services digitally. Digital channels require further thinking about the safeguards put in place in such systems.

For these reasons that the Ministry of Justice and Office of the Public Guardian are working to modernise LPAs. The aims of the work are to:

- increase safeguards, especially for the donor
- improve the process of making and registering an LPA for donors, attorneys and third parties
- achieve sustainability for OPG whilst keeping LPAs as affordable as possible for all people in society.

Creating a modern LPA service will require changes to the Mental Capacity Act 2005 and the supporting secondary legislation. The Ministry of Justice has launched this consultation in order to obtain views on the potential changes to the legal framework for lasting powers of attorney.

For details of the consultation, which closes on 13 October 2021, **click here**.

25/7/21

## Robert Edwards reappointed to Family Procedure Rule Committee

The Lord Chancellor has reappointed Robert Edwards as the Welsh/Cymru Cafcass (Children and Family Court Advisory and Support Service) nominated member to the Family Procedure Rule Committee (FPRC) from 1 March 2021 to 29 February 2024.

For biographical details of Mr Edwards, **click here**.

25/7/21

## Supreme Court to give judgment in case concerning inherent jurisdiction to authorise child's placement in unregistered secure accommodation

On Friday, 30 July 2021 the Supreme Court will deliver judgment in a case concerning the exercise of the inherent jurisdiction to authorise a child's placement in unregistered secure accommodation where insufficient places are available in registered secure children's homes.

The appellant, T, was a 15-year-old child who was subject to a care order. The local authority, CBC, wished to place T in secure accommodation. Since there were no places available in registered secure children's homes, CBC applied to the High Court for orders under its inherent jurisdiction authorising T's placement in non-statutory accommodation. T had consented to the restrictions on her liberty in the placements sought and submitted that the orders restricting her liberty were, therefore, unnecessary.

The High Court did not consider that consent to be valid, and duly made the orders sought by CBC. T seeks to challenge those orders. She does not object to the placements or the restrictions on her liberty, but wishes to be recognised as capable of consenting in law. The Court of Appeal dismissed her appeal.

The Court – comprising Lady Black, Lord Lloyd-Jones, Lady Arden, Lord Hamblen and Lord Stephens – heard T's appeal in October 2020.
The judgment is expected to determine:

- In circumstances where insufficient places are available in registered secure children's homes, is the exercise of the inherent jurisdiction to authorise a child's placement in unregistered secure accommodation lawful?
- If it is, what legal test should the courts apply when determining whether to exercise the inherent jurisdiction?
- Is a child's consent to the confinement of any relevance when determining whether to exercise the inherent jurisdiction?

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

25/7/21

## Family Procedure (Amendment No. 2) Rules 2021

The **Family Procedure (Amendment No. 2) Rules 2021**, which come into force on 1st October 2021 (except for rules 3 to 6 which come into force on the day on which section 63 of the **Domestic Abuse Act 2021** comes into force), amend the **Family Procedure Rules 2010** (the FPR).

Rules 3 to 6 insert provisions into Part 3A of the FPR as required by section 63 of the Domestic Abuse Act 2021. The amendments automatically deem victims of domestic abuse as "vulnerable" for the purposes of determining whether a participation direction should be made. The court will therefore not need to make a determination as to vulnerability for parties or witnesses who state that they are, or are at risk of being, victims of domestic abuse before proceeding to consider which measures (if any) are necessary as a result of that vulnerability. The amendments also insert relevant statutory definitions from the Domestic Abuse Act 2021.

Rules 7 and 8 amend Part 10 of the FPR to clarify that the court may direct a means of service, other than personal service, of an application or order under Part 4 of the **Family Law Act 1996**.

Rule 9 amends rule 10.10 of the FPR to clarify that the court officer must notify the police of certain orders made under Part 4 of the Family Law Act 1996 where the court is to effect service of such an order in accordance with rule 10.6(2) of the FPR.

Rule 10 amends rule 27.11 of the FPR to make provision for the attendance at private hearings by duly authorised lawyers attending for specified purposes.

Rule 11 amends rule 29.6 of the FPR to refer to additional proceedings concerning gender recognition in relation to which documents, while in the custody of the court, must be kept in a place of special security.

For the Amendment No 2 Rules, **click here**.

25/7/21

## Care Planning, Placement and Case Review (Wales) (Amendment) Regulations 2021

**These regulations**, which come into force on 1 September 2021, amend the **Care Planning, Placement and Case Review (Wales) Regulations 2015** (the 2015 Regulations) in light of amendments to section 83 of the **Social Services and Well-being (Wales) Act 2014** (the 2014 Act) made by section 16 of the **Additional Learning Needs and Education Tribunal (Wales) Act 2018**.

Regulation 6 removes the requirement in the 2015 Regulations that a care and support plan include a personal education plan, because that requirement has been inserted into section 83 of the 2014 Act.

Regulation 5 prescribes the categories of looked after children for whom no personal education plan is to be prepared as part of their care and support plan. The categories prescribed are those for whom a personal education plan was not required by the 2015 Regulations. The matters that must be included in a personal education plan are unchanged.

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

25/7/21

## Government publishes strategy 'to deliver excellence' in adoption services across England

The Government has published a new National Adoption Strategy which, it says, "is set to improve adoption services in England by putting in place better recruitment across the country and removing any unnecessary delays, through more training for front line staff, improving approval process and funding for targeted recruitment campaigns".

The strategy clarifies that adopters should never be deterred from pursuing an opportunity to adopt because of their social background, ethnicity, sexuality, or age, building on advice for councils published by the Department for Education last year, which encouraged councils to prioritise adopters' ability to provide a stable, loving home and whether they would provide the best environment for a young person to grow up.

The new adoption strategy will be supported by £48 million for 2021-22, building on an investment of over £200 million to date for adoptive families. This includes £46 million to continue post-adoption help for families through the Adoption Support Fund to provide family support sessions, cognitive therapy, and activities to help children recover from earlier traumas, helping them settle into their new families and homes.

The Government is also prioritising improved support for children looked after by their family members or close relatives. A further £1 million in funding for 2020/21 is aimed at increasing the number of local kinship carers support groups, increasing funding to the Family Rights Group kinship carers helpline and including children in kinship care arrangements in the priority groups which local authorities must include in their school admissions.

For the adoption strategy, **click here**. For comment by the Children's Commissioner for England, **click here** and for that of the Local Government Association, **click here.**

29/7/21

## Legal aid needs urgent reform to secure fairness of the justice system: Commons Justice Committee

Legal aid is in urgent need of reform to protect the fairness of the justice and to ensure that the most vulnerable can have access to justice, **a report** by the House of Commons Justice Committee has found.

The report warns that a rigid system of fixed fees and low pay is leaving firms specialising in legal aid struggling. The sustainability of legal aid providers is critical to ensure that those eligible for legal aid are able to be supported through what, it finds, can be a complex and daunting system.

The Committee calls for the civil legal aid system to be overhauled. The Committee argues that early legal advice can help to make the courts operate more effectively. The legal aid system needs to be simplified to make it easier for those who are eligible to access the services they require. Providers of civil legal aid are also facing sustainability issues, resulting in 'legal aid deserts' in certain areas, where people cannot access the specialist advice in for certain issues such as housing, immigration and community care. The Committee recommends that the Government takes a more flexible approach to legal aid funding, so that the providers can be given the support to help the most vulnerable.

The Committee finds that the current legal aid means test may also be creating a barrier to justice for some of the most vulnerable in society and impacting the fairness of the justice system. The Government should consider changing the eligibility thresholds and regularly increase them in line with inflation.

With regard to family issues, the Committee welcomes the introduction of the Family Mediation Voucher Scheme. It says that it is a positive step which recognises that more needs to be done to help separating parents. The Committee believes that if early legal advice was available alongside mediation, it would result in an increase in the numbers using mediation successfully.

The Committee suggests that the civil legal aid system needs an updated version of the Green Form scheme, which was introduced in 1973, that would allow individuals to understand their rights and be directed to the services that are most appropriate for their situation. One suggestion the Committee received is that the Government could develop and pilot an ambitious and economically viable early advice scheme, that enables individuals to access timely legal and expert advice. Rather than being constrained by issues of scope, such a scheme should be strategically targeted at those who would most benefit from early advice.

The weight of evidence, according to the Committee, suggests that inaction on the rising number of litigants in person is not an option. Many of the policy responses to the issue involve increasing the resources of the courts or other agencies involved in the system. With the impact of the pandemic likely to lead to greater number of litigants in person in the family courts and in tribunals, the Committee urges the Government to consider providing more accessible and effective forms of support.

The Committee encourages the Government to consider increasing the scale of projects and grants to support litigants in person. It recognises that the Government is making progress in improving legal support and information for litigants in person, but cautions the Government that such measures should not be seen as an alternative to tailored legal advice. The Committee is aware that in areas such as benefits, non-legally qualified specialist advisors can provide appropriate assistance However, as long as the justice system is characterised by complex legal frameworks and an adversarial justice system, the availability of individualised legal advice and support will remain necessary.

For the report, **click here**. For the report's conclusions and recommendations, **click here**. For a summary, **click here**.

29/7/21

## Domestic Abuse Act 2021: six more factsheets published

The Home Office has made six new additions to the series of factsheets providing more information about each of the provisions in the Domestic Abuse Act 2021.

The new factsheets cover:

- Tackling perpetrators
- Amendment to the controlling or coercive behaviour offence
- Section 91(14) barring orders
- Prohibition on charging for the provision of medical evidence of domestic abuse
- Strangulation and suffocation and
- Threats to disclose private sexual photographs and films.

For all the factsheets, **click here**.

29/7/21

## Number of old CSA cases dealt with by Child Maintenance Service below 50,000

The number of Child Support Agency cases held on Child Maintenance Service IT systems decreased from 51,600 in December 2020 to 44,900 in March 2021. The caseload has been steadily declining since December 2014 and declining sharply since December 2018. The reduction in caseload is due to the closure of cases as outlined in the child maintenance compliance and arrears strategy. All cases on the CSA computer system have now been closed.

The CSA historical debt balance continues to reduce. The amount of CSA debt held on CMS IT systems has decreased from £348.8 million in December 2020 to £310 million in March 2021. The outstanding debt balance has been steadily declining since December 2016 and declining sharply since September 2018. Debt owed to government and debt which has no reasonable chance of being collected is written off.

Between 13 December 2018, when the compliance and arrears strategy work started, and 31 March 2021:

- the CSA has written to 251,900 parents with care to ask if they want a last attempt to be made to try to collect the debt owed to them – this includes all 134,700 parents with an eligible case on the CSA system and 117,200 parents with a case on the CMS system;

- 33,400 case groups have reached the debt collection stage. They have completed representation, parents have requested debt collection and attempts to collect the arrears have commenced. For 27,200 of those case groups, collection or write off of arrears is either partially or fully completed – £51.6 million of debt has been collected to date;

- 604,600 cases with non-paying historical debt have had their debt written off-system records showed these cases had a total debt value of £2,028.5 million, of which £854.7 million was owed to government only.

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

30/7/21

## Supreme Court upholds the use of the inherent jurisdiction to authorise the deprivation of liberty of 15-year old

The Supreme Court has dismissed the appeal of a 15-year old who was accommodated in a placement in England which was not a registered children's home or approved for use as secure accommodation, in circumstances which involved her being deprived of her liberty.

In ***In the matter of T (A Child)*** **[2021] UKSC 35**, the Supreme Court held that the use of the inherent jurisdiction to authorise the deprivation of liberty in cases like the present is permissible, but expressed "grave concern" about its use to fill a gap in the child care system caused by inadequate resources.

The appeal concerns the use of the inherent jurisdiction of the High Court to authorise a local authority to deprive a child of his or her liberty. The background to the litigation is the shortage of provision for children who require special limitations on their liberty, for example by a placement in one of the small number of approved secure children's homes in England and Wales, but for whom no space is available, or who would be better served by highly specialised care albeit still with their liberty limited. This shortage has forced local authorities to seek orders from the High Court under its inherent jurisdiction authorising alternative restrictive placements of children elsewhere than in an approved secure children's home. A secure children's home is typically accommodation designed for the purpose of restricting liberty, and while the regime may vary from home to home, would commonly include extensive CCTV, high fencing or walls with limited views, and reinforced and locked doors and windows.

These proceedings were begun by Caerphilly County Borough Council ("CCBC") in July 2017 to address the care of T, who was then a 15-year-old in CCBC's care by virtue of a care order. In view of her particular needs, CCBC intended to accommodate T in a placement in England which was not a registered children's home or approved for use as secure accommodation, in circumstances which involved her being deprived of her liberty. It applied to the High Court for an order under the inherent jurisdiction authorising it to deprive T of her liberty there, and the order was granted. After that placement broke down, the court authorised CCBC to deprive T of her liberty in a registered children's home in England, which was not approved for use as secure accommodation.

The two main issues before the Supreme Court were:

> i. First, is it a permissible exercise of the High Court's inherent jurisdiction to make an order authorising a local authority to deprive a child of his or her liberty in this category of case? T argues that such a use of the inherent jurisdiction in this case is barred by the Children Act 1989 (the "CA 1989") and contrary to article 5 of the European Convention on Human Rights (the "ECHR"). This argument was not advanced before the courts below.
>
> ii. Secondly, if contrary to T's argument the High Court can have recourse to its inherent jurisdiction to make an order of the type in question, what is the relevance of the child's consent to the proposed living arrangements? T argues that consent is highly relevant, and that as she consented to the placements, it was contrary to her best interests to make the orders. These issues are no longer of relevance to T personally, whose circumstances have changed, but they continue to affect a significant number of children.

The Supreme Court unanimously dismissed the appeal. It held in particular that the use of the inherent jurisdiction to authorise the deprivation of liberty in cases like the present is permissible, but expressed grave concern about its use to fill a gap in the child care system caused by inadequate resources. Lady Black gives the main judgment, with which Lord Lloyd-Jones, Lord Hamblen and Lord Stephens agree, and Lord Stephens gives a short concurring judgment, with which Lady Black, Lord Lloyd-Jones and Lord Hamblen agree. Lady Arden gives a short judgment setting out her additional reasons for agreeing with the judgments of Lady Black and Lord Stephens.

### Reasons for the Judgment

#### *Issue 1: the use of the inherent jurisdiction to authorise a deprivation of liberty*

Local authorities have statutory duties to protect and support children, including a specific duty to provide any child in care with accommodation. Section 25 of the CA 1989 in England, and section 119 of the Social Services and Well-Being (Wales) Act 2014 in Wales, are the basis of a regime for placing, in limited circumstances, a child who is being looked after by a local authority and who is at risk of harm in accommodation provided for the purpose of restricting liberty ("secure accommodation"): [30]-[44]. Regulations provide that a children's home must only be used as secure accommodation if it has been approved for that purpose by

the Secretary of State for Education (in England) or by the Welsh Ministers (in Wales); and that children's homes must be registered with Ofsted (in England) and Care Inspectorate Wales (in Wales). Any person who carries on or manages a children's home without being registered commits an offence: [45]-[62].

The shortage of such placements has prompted local authorities to seek orders from the High Court under its inherent jurisdiction, authorising them to deprive children of their liberty in other accommodation. The inherent jurisdiction is a means of providing protection for children whose welfare requires it. It has been described as the great common law safety net which lies behind all statute law: [63]-[68]. But it is subject to limits. Section 100 of the CA 1989 prohibits the use of the inherent jurisdiction to confer, in particular, power to determine any question in connection with any aspect of parental responsibility for a child on a local authority. That, however, reflects the requirement of the CA 1989 that local authorities which need such a power must obtain a care order. It does not prevent recourse to the inherent jurisdiction in a case such as this, where the local authority already had parental responsibility by virtue of a care order: [106]-[121].

As to the contention that the use of the inherent jurisdiction cuts across section 25 of the CA 1989, there are no findings as to the precise regulatory status of T's placements. But it is in any event unthinkable that the High Court should have no means to keep children safe from extreme harm. If the local authority cannot apply for an order under section 25 because there is no secure accommodation available, the inherent jurisdiction can be used to fill that gap. Where there is absolutely no alternative and where the child, or someone else, is likely to come to grave harm if the court does not act, the inherent jurisdiction may be used to authorise a local authority to deprive a child of his or her liberty, notwithstanding that the placement will be in an unregistered children's home in relation to which a criminal offence would be being committed: [122]-[145]. Nor does the use of the inherent jurisdiction in these circumstances fall foul of article 5 ECHR, given the safeguards which the courts have devised, in particular by mirroring the procedural protections applicable in a section 25 application: [150]-[155].

Lord Stephens notes that any order made under the inherent jurisdiction to authorise a deprivation of liberty where the placement is in an unregistered children's home does not authorise the commission of a criminal offence or prevent an offence from being committed. He emphasises the matters which must be considered prior to a court authorising a placement in an unregistered children's home and the ongoing monitoring which must take place thereafter: [170]-[172], and notes that such a placement may also be justified, and required, where the positive operational duties to take steps to protect life or prevent inhuman or degrading treatment under articles 2 and 3 ECHR are engaged: [174]-[177]. This is a temporary solution developed to deal with an extremely difficult situation caused by a scandalous lack of provision. The appropriate permanent solution is the provision of appropriate accommodation: [178].

Lady Arden states that she has difficulty with the limits of the inherent jurisdiction in this case. She goes no further than to countenance its use in the exceptional circumstances described by the Secretary of State, for children 16 and above, which are likely to arise in an emergency following a placement breakdown where the consequences of the court being unable to authorise a deprivation of liberty are likely to be dire: [181]-[182].

### *Issue 2: the relevance of the child's consent to the proposed arrangements*

T argues that it would have been conducive to her welfare if the court had placed more weight on her consent to the restrictive placements, rather than making an order. But, Lady Black notes, an apparently balanced and free decision made by a child may be quickly revised. That is illustrated by the facts of this case, where T's behaviour in the first placement confirmed the judge's view that her consent was not genuinely expressed. There is therefore no basis for holding that the judge was wrong to authorise restriction of liberty in T's case, and her argument is entirely academic. Lady Black acknowledges, however, that any consent on the part of the child will form part of the circumstances that the court must evaluate in considering an application for an order authorising a local authority to restrict a child's liberty: [156]-[161].

## Supreme Court Summary

*References in square brackets are to paragraphs in the judgment.*

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

# CGT and Divorce – changes ahead?

Jo Carr-West and Lara Barton, partners at Hunters Law LLP, explain recent recommendations that would assist divorcing couples in minimising and managing the CGT implications of separating their financial affairs.

When negotiating a financial settlement on divorce (or dissolution of a civil partnership) it is crucial to factor in the tax implications, enabling the settlement to be structured tax efficiently so as to ensure that there will be funds available to pay any tax arising at the point it becomes due. Recommendations contained in the second report published by the Office of Tax Simplification (OTS) following their wide-ranging review of Capital Gains Tax (CGT) would, if implemented, assist divorcing couples in minimising and managing the CGT implications of separating their financial affairs.

## "No gain no loss" and the tax year of separation

The termination of the CGT exemption under which transfers can be made between spouses at "no gain no loss" at the end of the tax year in which separation takes place, has long frustrated practitioners.

As readers will know, assets can be transferred between spouses (or civil partners) without triggering an immediate CGT charge, and this exemption continues to apply to separated couples during the tax year of their separation. Such transfers are made on a "no gain no loss" basis, meaning that the base cost of the asset is inherited by the receiving spouse, so that the full amount of CGT will be payable when they subsequently sell or transfer the asset.

Following the tax year of permanent separation, transfers of assets between separated spouses are subject to CGT in the usual way. This would apply, for example, where a shareholding, holiday home or investment property is transferred from joint names into one party's sole name. Unsurprisingly, most separating couples do not initially realise that this process of separating out their assets on divorce will generate a tax liability if not carried out within the tax year of separation – even where no cash is being realised. Moreover, in the case of residential property, CGT now has to be paid within 30 days of the transfer (as to which see further below).

As the OTS Report highlights (paragraph 4.4), "if a couple separate on 4 April 2022 they would only have until 5 April 2022 to transfer their assets without triggering a tax charge". By contrast, a couple separating two days later, on 6 April 2022, would have not one day, but one year, to transfer their assets without triggering a tax charge.

Under the relevant legislation (s1011 Income Tax Act 2007 and s288(3) of the Taxation of Chargeable Gains Act 1992), a married couple will be treated as separated if they are separated under a court order or by a formal deed of separation executed under seal, or if "they are in fact separated in such circumstances that the separation is likely to be permanent". It is the latter category which will be relevant to the vast majority of separating couples, and it is, as the OTS notes, "nebulous", rendering it open to interpretation (paragraph 4.14).

The current rules therefore arbitrarily favour those separating earlier in the tax year. Many clients do not seek legal advice until some weeks or months after they have separated, by which time it may be too late to take advantage of the "no gain no loss" rule. Even those separating early in the tax year and taking prompt advice may struggle to conclude disclosure and negotiations, and obtain approval of a consent order within a year, particularly if their financial affairs are complex; for those needing a court decision on their financial arrangements the process is most unlikely to be concluded within twelve months, particularly given the current delays in the court system. Moreover, the current approach can put

significant pressure on separated couples to make a decision in respect of particular assets prior to an overall agreement in order to benefit from the "no gain no loss" rule, before they have had time to consider fully all the implications.

It is therefore unsurprising that "all the respondents to the OTS Call for Evidence commenting on this issue agreed that the length of time given to separating couples was inadequate" (paragraph 4.12). Acknowledging that "it is unrealistic to expect separating couples to have resolved their affairs by the end of the tax year of their separation" (page 8), the OTS Report describes the current approach as "unsatisfactory" (paragraph 4.21) and recommends (Recommendation 7) that:

> "The government should extend the 'no gain no loss' window on separation to the later of:
>
> • the end of the tax year at least two years after the separation event
>
> • any reasonable time set for the transfer of assets in accordance with a financial agreement approved by a court or equivalent processes in Scotland."

Whilst retaining the link to the tax year of separation would still result in separating couples having different time periods available to them depending on the point in the year at which they separated, all couples would have the opportunity to benefit from the "no gain no loss" rule if their settlement was approved by the court and made into a court order (as is always advisable in any event), and those couples requiring a court determination of their financial arrangements would not lose out. Such a change would bring the approach to CGT on divorce closer to that taken to **Stamp Duty Land Tax (SDLT) on divorce**, under which transactions in connection with a divorce (whether ordered by a court or as part of an agreement) are exempt from SDLT; and consideration could be given to adopting this position in respect of CGT.

In any event, and irrespective of the precise way forward, it is to be hoped that the OTS report will precipitate long-overdue change on the application of the "no gain no loss" rule to divorcing couples.

## Private Residence Relief

The OTS further suggest, though not as one of their formal recommendations, that an "extended time horizon could also apply in relation to eligibility for Private Residence Relief" (paragraph 4.29), so that (subject to the usual caveat that the relief cannot be claimed in respect of two properties at the same time) this relief too applied until the later of the end of the tax year at least two years after separation, and any reasonable time set for the transfer of assets in accordance with a court order. Such a change could make a significant difference to divorcing couples.

Under the Private Residence Relief homeowners do not pay CGT on their main home. If, on separation, one spouse leaves the family home, they will be eligible for full relief if they dispose of their interest within nine months of leaving, but once that period has expired they will be eligible only for partial relief. This "final period exemption" was 36 months prior to April 2014, and then 18 months prior to April 2020, before being cut to just nine months. As it has been reduced it has become increasingly difficult for divorcing couples to make and implement a decision as to whether the family home should be retained in joint names, transferred to one party, or sold, before the relief is lost.

Consequently, CGT may become payable in respect of the parties' main home as a result of their separation - even though it has remained the main home for some members of the family throughout the ownership period. Even if the "no gain no loss" rule is extended as recommended by the OTS, this would not assist in circumstances where it is decided to sell the family home. Even where the family home was being transferred into the name of one spouse, it seems likely that under the "no gain no loss" rule, whilst no tax would be payable at the point of transfer, the receiving spouse would inherit the other spouse's chargeable gain (between the end of the final period of exemption to the date of transfer) which would be subject to CGT on the eventual sale of the family home (if not within the annual exemption), and would result in a complex calculation to determine the tax payable.

Therefore, the extension of Private Residence Relief for divorcing couples would assist in ensuring that tax does not become payable on the family home as a result of the separation. However, as this suggestion is only discussed briefly in the report and not included as a formal recommendation, it seems unlikely that such an approach will be adopted in the near future.

## Residential Property – 30-day time limit for reporting disposals

The second recommendation with potential to assist divorcing couples addresses an issue of wider application which can cause particular difficulties in a divorce scenario.

In April 2020 HMRC drastically reduced the period for reporting and paying CGT where tax is due following the disposal of UK residential property by UK-resident individuals, trustees or personal representatives. Previously, such disposals had to be reported and any tax paid by 31st January following the end of the tax year in which the disposal took place, giving between nine and almost twenty-two months, depending on when the disposal took place. Since 6th April 2020, the

timeframe has been just thirty days from completion (not from disposal, which remains the relevant date for the tax calculation).

The authors of the OTS report consider that "for many taxpayers, 30 days is a very ambitious target… This was strongly reflected in the negative responses that this policy area received in the OTS call for evidence" (paragraph 1.81). For divorcing couples, the difficulties may be exacerbated – both in terms of cashflow and the practicalities of filing the return on time at what is already a very stressful period.

Whilst the gain on the family home will often be covered by Principal Private Residence (PPR) relief, the transfer between a divorcing couple of an investment property or holiday home is subject to an immediate charge to CGT (if outside the tax year of separation). As the property is not being sold, no liquidity is being released. When the parties had at least nine months to raise the necessary funds this could often be managed; for many it is now considerably more challenging, particularly given the significant financial demands (such as legal fees and moving costs) which often arise during a divorce.

The OTS were advised that "the timeframe presents a particular challenge for separating couples who may not receive their share of the money to pay the tax until any divorce settlement is finalised" (paragraph 1.84); reflecting that in some settlement arrangements, a residential property may be transferred between the parties (giving rise to an immediate CGT charge) with other assets being sold or transferred to enable the tax charge to be paid – meaning that the order in which these transactions take place will now need careful consideration to ensure liquidity is available at the point the tax charge crystalises.

In addition to the cashflow difficulties, there are the practicalities of ensuring the tax calculation and return are completed within the a very short timeframe, at a point when divorcing couples will have many other concerns. A considerable amount of information is required to calculate the CGT and complete the return, including: the base cost of the property (i.e. the acquisition cost or the value of the asset when inherited by the taxpayer or gifted to the taxpayer); the cost of any capital improvements; third party costs of acquisition and disposal (i.e. estate agent's commission, legal fees); the extent to which PPR applies to any part of the gain; details of any capital losses or available Annual Exempt Amount to offset the gain; and an estimate of the taxpayer's income for the relevant tax year to ascertain the rate of CGT which is likely to apply. Whilst much of this information may well have been collected or estimated for the purposes of financial disclosure within the divorce negotiations, it will need to be updated and finalised for the return, creating additional pressure for those managing the implementation of a divorce settlement.

In any event, thirty days is very a tight deadline, particularly when one considers the process involved in order to use the UK Property tax return system, which involves first creating a Government Gateway user ID (if the taxpayer does not already have one), and then setting up a UK property account. For taxpayers wanting their agent to deal with HMRC, a new authorisation must be put in place, even where the agent has been authorised previously. Clients will need to be warned about this process and the need to act swiftly. A penalty of £100 will be payable if the return is not filed within 30 days of completion, with a further penalty of 5 per cent of any tax due or £300 (whichever is greater) if the deadline is missed by more than six months, and a further penalty of the greater of 5 per cent of any tax due or £300, for failure to meet the deadline by more than 12 months.

Given the challenging timeframe, the OTS suggests that the reporting and payment deadline be extended "to say 60 or 90 days [the formal recommendation refers only to 60 days], to give taxpayers more time to fulfil their tax obligations" (paragraph 1.94), and as an alternative suggests that measures are taken to raise awareness of the 30 day deadline. Awareness-raising, whilst valuable in and of itself, would do little to address the specific difficulties faced by divorcing couples in this regard; an extension of the timeframe to 60 or 90 days would be of some, limited, assistance.

Overall, it is welcome that the OTS have considered the implications of various CGT rules on divorcing couples, and their recommendations would alleviate some of the difficulties which arise. In particular, the extension of the "no gain no loss" rule would mean that CGT would rarely be payable on the transfer of a residential property between separating spouses, alleviating the difficulties caused by the current 30-day rule. It is to be hoped that the government take forward these sensible proposals.

In the meantime, pending adoption of the OTS' recommendations, family lawyers need to continue to be mindful to consider CGT implications in detail, making their clients aware of the need to gather any relevant information required to calculate CGT liabilities and to plan financial settlement proposals carefully.

10/7/21

# Applying the CMS Formula in High Income Cases

Joshua Viney, barrister, and Henry Pritchard, pupil barrister, both of 1 Hare Court, explore the circumstances in which it might be unfair to apply the CMS formula.

## Introduction

In December 2019 Mostyn J handed down judgment in *CB v KB* [2019] EWFC 78. In his judgment he suggested that the correct approach to the quantum of child maintenance in high income cases, where the *non-resident parent's income* is in excess of £156,000 gross per annum, was to use the figure provided by the CMS formula as a starting point.

In this article we explore how this may be good for certain cases but suggest that it may lead to unfairness in others.

## The statutory jurisdiction to award child maintenance

The court retains jurisdiction over child maintenance in a small number of scenarios. This article focuses on the two of these most often engaged where incomes exceed the CMS threshold: top-cases and written agreement cases.

By the operation of s.8(6) CSA 1991, a case is part of the top-up jurisdiction where:

> i. a CMS assessment is in force;
>
> ii. the payer's weekly income (as assessed by the CMS) exceeds the maximum applicable amount of £3,000 per week (£156,000 per annum); and
>
> iii. the court is satisfied that the circumstances of the case make it appropriate.

The court may also have jurisdiction over child maintenance where the parties' consent to the court having jurisdiction by virtue of s.8(5) CSA 1991 and the Child Maintenance (Written Agreements) Order 1993.

Where the courts have jurisdiction, they may order periodical payments pursuant to s.23(d) of the Matrimonial Causes Act 1973, informed by the s.25 factors or pursuant to paragraph 1(2)(b) of Sch 1 to the Children Act 1989, informed by paragraph 4 of the same schedule. The court therefore retains a broad discretion in relation to child maintenance payments, in stark contrast to the far more rigid formula applicable in cases where the CMS has jurisdiction.

## The authorities on using the CMS formula prior to CB v KB

Nicholas Mostyn QC (as he then was), in *GW v RW* [2003] 2 FLR 108, set out to qualify and clarify the broad discretion of the courts in relation to the quantum of child periodical payments in a case where the court had jurisdiction because of the habitual residence of the non-resident parent. The judge noted at [74]:

> "… I am of the view that the appropriate starting point for a child maintenance award should almost invariably be the figure thrown up by new child support rules."

The main justification for this, he argued, was that parties should negotiate "in the shadow of the CSA", following the principles outlined in the government's *White Paper: A New Contract for Welfare: Children's Rights and Parents' Responsibilities* [1999] Cm 4349. Specifically, it would undermine parties' agreements over child maintenance if the formula outcome was too divergent from the agreed level of payments, since an aggrieved party would simply have to wait a year before applying for a calculation, negating the agreement.

The approach of using the formula as a starting point had been considered by the higher courts on three major occasions prior to *CB v KB*:

> i. ***SW v RC* [2008] EWHC 73 (Fam)**, where Singer J described it as a "useful rule of thumb", albeit obiter, since the case at hand "was never a routine case …", where the jurisdiction appeared to have been based on a prior written agreement and where there had been no assessment.
>
> ii. ***Re M-M* [2014] EWCA Civ 276**, where McFarlane LJ held that the judge below had been correctly referred to GW v RW and SW v RC since, although it was a case where the court's jurisdiction was founded on the husband's residence abroad, "… it is informative to consider what the position would be were he to be resident in England and Wales."
>
> iii. In ***Re TW & TM (Minors)* [2015] EWHC 3054 (Fam)** Mostyn J again deployed the starting point of the formula and seemed to apply it specifically to top-up cases. It is slightly unclear whether this was actually the ratio of this case, taking into account the judge's exposition on the basis for the court's jurisdiction over child maintenance at [3]:
>
> > "In such circumstances it simply cannot be gainsaid that the prior orders were validly made. Indeed, in order perhaps to make assurance doubly sure, it should be recorded that in the case of TM the earlier orders recorded that the Child Support Agency had carried out a maintenance calculation in the maximum amount thereby entitling the court to make an order topping up that calculation under s.8(6). There can be no doubt at all that there were in existence valid prior orders capable of variation and the suggestion that the learned deputy district judge did not have jurisdiction to vary her order is legally devoid of any merit."

## CB v KB

This case was the final hearing in an application for financial remedies. The husband was a member of a well-known rock band. The main focus of the judgment was on the valuation of the various streams of income available to the respondent husband. A subsidiary issue was the quantum of child maintenance payable.

Mostyn J held that the appropriate approach for the court to take when quantifying child maintenance was to use the figure provided by the CMS formula as a starting point when determining the maintenance payable in top-up cases. The judge referred back to Re TW & TM at [9]:

> "My decision in *GW v RW* makes it clear that where a court is considering issues of child maintenance the formula **is not, so to speak, written in marble but supplies only a starting point. There may be in a case a very good reason why there should be departure from the starting point of the formula**. In my opinion the formula should apply even where the earnings of the father are in excess of the £3000 per week maximum provided for in the Act and the Regulations. If the earnings of the father were very much in excess of that then there would be a good reason to depart from the formula downwards, but if the income of the father is not un-adjacent to the maximum then to my mind, subject to other factors, that of itself is not a good reason to depart from the formula." (emphasis added)

Mostyn J developed this approach in his conclusions to *CB v KB*:

> "[49] I suggest that in every case where the gross annual income of the non-resident parent does not exceed £650,000, the starting point should be the result of the formula ignoring the cap on annual gross income at £156,000. For gross incomes in excess of £650,000 I suggest that the result given by an income of £650,000 should be the starting point with full discretionary freedom to depart from it having regard to the scale of the excess.
>
> [50] In this case the relevant factors are:
>
> > i) Gross income of the husband: £639,000;
> >
> > ii) Adjustment to gross income referable to three children in the husband's family: 84%; and

iii) Adjustment to computed sum referable to shared care of three subject children: 62.5%.

These factors lead to a computed sum for child support for the subject children of £50,269 per annum or £12,567 for each child.

[51] **Having considered the budget of the wife referable to the children I cannot see any good reason materially to depart from the starting point of £12,567 per child.** The figure for each child will be rounded to £12,600 and will be payable until each child completes tertiary education." (emphasis added)

The ratio of the judgment appears to be that as a starting point the court should apply the CMS formula in a high income case, with a cross-check against the stated needs of the child in question whereby the court would require a 'good reason' to materially depart from that starting point. We consider below what might constitute a good reason.

## Authorities after CB v KB

Since *CB v KB* was published it appears to have been followed without comment by Nicholas Cusworth QC in ***G v T*** **[2020] EWHC 1613 (Fam)** who stated:

"[70] As to the level of child maintenance, I have fully in mind the views of Mostyn J as recently expressed in CB v KB [2019] EWFC 78. I also bear in mind the fact that under my order the significant majority of the husband's receipt from all sources over the next 3½ years will be employed in meeting the wife's capital entitlement. However, it also seems appropriate to add to what would otherwise be the appropriate level of child maintenance an additional element for extra-curricular expenses, to avoid future dissention between the parties. Payment should be at the rate of £35,000 pa per child, and of conventional duration."

It was then followed by HHJ Hess in ***W v H (divorce: financial remedies)*** **[2020] EWFC B10** (following a maximum assessment) again without comment:

"[28](iii) Following the logic of Mostyn J's judgment in *CB v KB* [2019] EWFC 78 (paragraphs 48 and 49), which both parties have agreed, there should now be a child periodical payments top up order at the rate of £525 pcm now, reducing to £420 pcm from Summer 2020 and to £315 pcm from Summer 2021. Again, this will carry on until Summer 2027 when C leaves school."

Finally, Mostyn J applied his own approach again in his case of *OG v AG* [2020] EWFC 52:

"[101] As to the general child support, I refer to my decision of *CB v KB* [2019] EWFC 78 where I suggested at paragraphs 47-51 that a useful starting point for gross incomes up to £650,000 is the statutory child support formula. Mr Sharp QC and Mr Commins argue that the husband's gross income is at least £130,000. However, that calculation is before the husband's receipt of the substantial pay-out for which I have provided above. I anticipate that the husband will invest his pay-out in his new business. I have already stated that I am satisfied that the new business will generate a generous income for him. In my judgment, a reasonable gross income to attribute to the husband is £200,000 per annum. This gives rise to a liability under the formula of £19,248. The overall child support liability is therefore £26,748, which I round up to £27,000 per annum or £2,250 per month. This will be payable monthly in advance starting on the first day of the month after the receipt by the husband of his pay-out from X. It will be indexed annually by reference to movements in the CPI. It will continue until the conclusion of secondary education. In tertiary education it will fall to 50% of the secondary education rate."

Anecdotally, we have experienced a number of judges in different courts simply applying the CB v KB approach as a rule rather than a tool.

## The benefits of a formula in a high income case

It appears that there are broadly two benefits to a formulaic approach. The first is that it is simple. The court, litigants in person and representatives can plug numbers into a calculator and quickly ascertain a ballpark figure for a maintenance liability. In the right case this can reduce litigation and resolve this discrete issue at an early stage.

Second, it can also, in the right case, be fair. Where one party has a significant income and the other party has no income or a very modest income, then the percentage thrown out may well accurately reflect a fair outcome and meet the needs of the child in question.

## Concerns about a formula in a high income case

As set out above, whilst for the right case a formula may be appropriate, we would highlight the following interlinking concerns for the wrong case and generally:

> (i) The approach disregards the parent with care's income. Where that income is significant, this could lead to unfairness and create barriers to settlement.
>
> (ii) The approach appears to refocus a division of income on the basis of percentage sharing rather than need. Where the formula exceeds the child's needs, this provides an opportunity for a party to pursue spousal maintenance through the backdoor. Further it could lead to a significant overinflation of children's needs in budgets and/or the co-opting of a parent's needs into a child's budget.
>
> (iii) The approach ignores that Parliament specifically imposed a threshold for contributions towards children, preferring a discretionary approach beyond the threshold. Again, this would indicate a focus on need rather than sharing.
>
> (iv) The approach could lead to disputes about the amount of time a child spends with a parent. This is already a criticism of the CMS system, but given the sums in contention, this problem could be exacerbated in the top up arena.

If the *CB v KB* approach is correct, then some of the above concerns may also point to 'good reasons' to materially depart from the formulaic approach.

## (i) Disregarding of parent with care's income and resources

Where the parent with care has (i) a significant, comparable or higher income than the non-resident parent or (ii) capital savings that provide for a significant, comparable or higher income than the non-resident parent, then there is a large opportunity for unfairness where that income is ignored.

The disregarding of the parent with care's income is a feature of the CMS formula as it now stands. This is the result of a political compromise 20 years ago predicated on the need for the system to be more administratively workable. This element of the CMS formula is potentially unfair; a fact which the government of the day recognised but considered to be outweighed by the need for the system to be less complex.

The original Child Support scheme enacted following the Child Support Act 1991 had many problems. However, what it did not lack was an attempt to provide for a fair outcome. Chief among the proposals to provide a fair level of child maintenance was that the formula would take into account the incomes of both the parent-with-care and the absent parent (later to be re-named "non-resident parent"). The White Paper which introduced the scheme – *Children Come First: the Government's proposals on the maintenance of children* (1990) Cm 1264 – introduced this element of the formula thus:

> "3.14 Both parents of a child have a liability to maintain that child. Where both parents have an income, it is therefore appropriate to take both incomes into account. Most children of separated families live with one of their parents, usually, but by no means invariably, their mother. Where this is the case, there will of course be no financial transaction between the caring parent and the children, but the caring parent's capacity to contribute can, in some circumstances and at higher incomes, affect the calculation of the absent parent's contribution." (emphasis added)

This principle of both parents' incomes being taken into account for the purposes of the formula was duly enacted in the s.1(1) Child Support Act 1991:

> "For the purposes of this act, each parent of a qualifying child is responsible for maintaining him"

However, the early years of the 1993 scheme (which implemented the 1991 Act) were beset with difficulties. The New Labour government set out to reform the system and laid out its proposals in a Green Paper *Children First: a new approach to child support* (1998). The Green Paper was unsparing in its criticism:

> "We believe that the current complicated assessment formula should be scrapped. It seeks to be fair to everyone and ends up with a system that is so complex that no one can tell whether it is fair or not." [Ch.5, para 3]

The solution proposed by the government was to radically simplify the formula [at Ch.6, para 8]:

> "The current formula asks for information which should be irrelevant to calculating liability to maintain children. And often, parents object to supplying this information. We want to reduce these objections and encourage parents to comply with the scheme. Specifically:
>
> > **The new scheme will not take account of the parent with care's income**. Every child who lives with a parent shares automatically in her living standards and income. And non-resident parents still have a responsibility to their children, however much support and financial provision the resident parent provides." (emphasis added)

Accordingly, the parent with care's income was to be entirely disregarded.

These proposals were the subject of criticism themselves, most notably by Nicholas Mostyn QC (as he then was), in a submission to the Social Security Select Committee on 5 November 1998. He was scathing of the fact that the income of the parent with care was to be disregarded under the new scheme:

> "20. … The second aspect of gross unfairness is the failure of the new scheme to bringing into account the income of the parent with care … This logic is incomprehensible. Why should a non-resident parent pay the same for his children whether his former partner earns nothing or £200,000? A fundamental ingredient of the old scheme was to bring into account the income of the residential parent. It reflects elementary fairness."

It was noted that the taking into account of the parent with care's income had been one of the redeeming features of the 1993 scheme:

> "24 … the income of the parent with care has from the very start been a central feature of the formula. For all the criticism made of the present system, whether by politicians, judges, lawyers, commentators, journalists or pressure groups there has never been the slightest murmur of criticism of this fundamental axiom. Why? Because it is so obviously fair."

Nicholas Mostyn QC noted that the outcome of such a system amounted to the child in question simply sharing in the non-resident's income, rather than being supported by it according to their needs:

> "24. As to the failure to bring into the reckoning the income of parent with care the Minister's response was simply that if the parent with care had an income of significance then the child would by necessity be sharing in it. It is therefore fair for the father to pay the same proportion of his income whatever the income of the mother. The response to this is that it will be very difficult to persuade the fathers to see it like this."

He concluded his evidence to the Select Committee thus:

> "Of course, it is a fact of life that the parent with care will spend a part of her own income on the child. But that obvious truism cannot lead to the conclusion that the paying parent should therefore pay the same whatever the income of his former partner might be. Every child requires a finite amount of support. That obligation should be shared rateably between the parents in the ratios of their respective incomes. Only thus will the system reflect the legal obligation on each parent to support the child in question. The extent to which the parents should then endow largesse on the child from their residual incomes should be a matter for them. A percentage system does not fit easily with these precepts, while for all its faults the present system clearly does … **The failure to take into account the income of the non-custodial parent and the failure to impose a maximum are hideously unfair. There is no justification for them**." (emphasis added)

The new system, enacted in the Child Support, Pensions and Social Security Act 2000, was introduced as a clear compromise between fairness and administrative workability. This was set out by the Parliamentary Under-Secretary of State, Baroness Hollis of Heigham in a House of Lords debate on 17 April 2000 (*Hansard*, Vol 612):

> "I was asked why we are not taking into account the income of the parent with care … The first point is philosophical: she [the parent with care] is already contributing. The second point is practical and administrative: 96 per cent of parents with care have incomes of less than £100 a week. Only 500 on our casebook of 1.2 million have incomes over £500 a week. At that point, they might be expected to be making a realistic financial contribution … we should have to assess the income of every parent with care and … If that were to be done, instead of seeking three pieces of information, we should have to seek 30 or 40 in order to get an accurate assessment. In that case, noble Lords would be reimporting back into our simple formula some of the complexity that has made the existing agency impossible successfully to administer. Therefore, philosophically, it is not right; administratively, it would be a nightmare; and it is not worth it."

The underlying premise of the Labour government when enacting the new scheme was that it would not be practical to assess the incomes of parents with care, particularly when research suggested that most parents with care had very little

income. It would simply not be an efficient use of resources to assess such people. This could lead to unfairness, but it would be justified as a political compromise intended to make the scheme work.

By returning discretion to the court to award child maintenance where a non-resident parent earns more than £156,000 per annum, Parliament has mandated that the court must consider the income and resources of both parties – section 25(2)(a) of the Matrimonial Causes Act 1973 and paragraph 4(1)(a) Schedule 1 to the Children Act 1989. To simply take the CMS formula and apply it, fails to carry out this exercise.

As set out above, where the parent with care's income and resources are modest, the impact on the fairness of the case may be limited. However, consider the below scenario. This is deliberately at the higher end of the £650,000 range to express the point starkly.

## Scenario

Mr and Mrs Bloggs both earn £500,000 per annum. They have one child, Bloggs Junior. The family lived modestly during the marriage. After they separate Bloggs Junior lives with Mr Bloggs and Mrs Bloggs broadly equally. There is a slight discrepancy in that Bloggs Junior spends an additional one week a year more with Mr Bloggs than Mrs Bloggs. Mr Bloggs is deemed to be the parent with care. Mr Bloggs and Mrs Bloggs agree that neither of them has a spousal maintenance obligation towards the other and their assets are divided equally.

If we apply the CMS formula to this family, Mrs Bloggs is obliged to pay approximately £24,000 per year to Mr Bloggs. What is the purpose of this payment? Can Bloggs Junior spending 1 additional week with Mr Bloggs really justify an additional £24,000 to meet needs?

## (ii) Post-separation sharing of income

The practical consequence of raising the threshold to £650,000 and applying a formula to income below that level is that rather than applying a discretionary needs-based approach to the income above £156,000, there is effectively a 'share' of the income above that rate. Once a child's needs have been generously met, it is difficult to reconcile any additional payment with the Court of Appeal decision in ***Waggott v Waggott*** **[2018] EWCA Civ 727**, where the court held that a party's earning capacity is not susceptible to post-separation sharing as though it were a matrimonial asset (per Moylan LJ):

> "121. … is an earning capacity capable of being a matrimonial asset to which the sharing principle applies and in the product of which, as a result, an applicant spouse has an entitlement to share? …
>
> 122. In my view, there are a number of reasons why not."

Of course, Schedule 1 authorities make it clear that there are no grounds for applying any Matrimonial Causes Act notions of sharing or conduct to a child maintenance award.

Applying a formula above £156,000 can raise many problems. Where the formula exceeds the needs of the child in question, this could provide an opportunity for a party to pursue spousal maintenance through the backdoor. This applies equally to both cases brought under Schedule 1 to the Children Act 1989 and the Matrimonial Causes Act 1973. Admittedly, Mostyn J does provide a cross-check against the child's budget but suggests that there would need to be good reason to depart from the starting point of the formula.

However, this in itself could lead to parties overinflating their budgets for their children, to enable them to continue to pursue these sums and/or co-opt their own needs into a child's budget.

## (iii) Parliament determined that there was to be a threshold

Put simply, Parliament determined that there was to be a threshold and distinguished between the sum of maintenance to be paid above and below that threshold – below would be formulaic and above would be discretionary. The authors of the 1990 White Paper set out the reasons for this:

> "3.28 If the formula were applied to all levels of income, some people with very high incomes would pay large amounts in maintenance. **Such large amounts might be seen as unreasonable or inappropriate** especially if some other settlement had been made for the children, such as a family trust. The Government is therefore proposing to establish an upper income limit. The formula would apply up to that limit. **No further child maintenance would be deducted from income beyond that limit**." (emphasis added)

The Secretary of State for Social Security, Tony Newton, emphasised the issue of incomes in the top-up bracket during a debate on 4 June 1991 (*Hansard*, Vol 192):

> "The courts will also retain jurisdiction to cover some elements of maintenance not covered by the formula. The first of these is the child's right to share in higher levels of income. The operation of the formula will be limited at the upper end to prevent excessively high payments of maintenance becoming due, but the courts will be able to award maintenance over and above any formula assessment. The courts will also have a top-up power allowing them to make an order in addition to the normal formula award, for education costs, which are not covered by the formula."

This issue was so uncontroversial that it was barely debated at the time. It stood to reason, as it still does, that percentage payments tied to levels of income would become excessive at some stage when meeting the needs of the relevant child. There must be a finite cap on any child's needs.

The impact of the widespread adoption of Mostyn J's approach in *CB v KB* is such that the maximum assessment has effectively been abolished, albeit with the quasi-substitution of £650,000 as a new upper limit. It is unclear why the judge alighted on that figure. It may have been because the husband's income in CB v KB was slightly less than this at £639,000.

The result of this approach appears to shift the judicial focus away from a discretionary consideration of need.

## (iv) Child welfare

One of the problems with the CMS system is that there is a monetary advantage / disadvantage to (i) being the parent with care and (ii) the number of nights spent with each parent. To a degree this is unavoidable and part of the political / administrative compromise made in the 1990s.

However, the CMS formula was designed to apply to a range of incomes up to £156,000. By taking that cap and increasing it to £650,000, the scale by which a party can gain or lose a financial advantage is increased significantly. For example, on a gross income of £600,000, the liability for the non-resident parent of one child under the formula could range between approximately £50,000 and £29,000, depending on whether they had the child for one night a week as opposed to four nights a week.

This must raise concerns that this could encourage litigation in respect of how much time a child spends with a parent.

## Conclusion

In the right case, where the *parent with care* has a modest income and/or modest resources and there is a careful consideration of a budget to consider whether there is a good reason to depart from the CMS formula, then the approach in CB v KB may well be the fair one. However, we suggest that in the wrong case, by failing to properly consider the section 25 factors, notably the income and resources of both parties and the actual needs of the child in question, the application of the CMS formula could lead to unfairness.

14.07.21

# Children: Public Law Update (Summer 2021)

John Tughan QC of 4PB considers recent judgments that public law child lawyers need to know about.

In this public law update I will consider recent cases on the following issues:

(i) the jurisdiction to limit, withdraw or dismiss a local authority's factual case prior to the conclusion of the evidence

(ii) appeals, re-opening findings and the distinction between family and criminal proceedings

(iii) "pleadings", Scott schedules and how alleged findings of fact should be presented

(iv) the extent of the duty to assess family members

(v) procedural irregularity in adoption

(vi) the applications relating to a grandmother's attempted intervention in a case where her baby grandchild was placed in a "foster to adopt" placement.

## The jurisdiction to limit, withdraw or dismiss a local authority's factual case prior to the conclusion of the evidence

Does the Court have the jurisdiction to limit a local authority's factual case at the conclusion of the evidence called by the local authority and part-way through the hearing? That was the question under consideration by Darren Howe QC (sitting as Deputy HCJ) in ***BB (Care Proceedings) (Mid-Trial Dismissal and Withdrawal of Allegations)*** **[2021] EWFC 20**. In a useful review of recent authorities on the point, the Court determined that there is, indeed, such a jurisdiction.

Sir Mark Hedley in ***AA v 25 others (Children) (Rev 2)*** **[2019] EWFC 64** had considered the issue and come to the same conclusion. The correct modern approach was to be found in the decision of Munby P in ***Re T G (Care Proceedings: Case Management Expert Evidence)*** **[2013] EWCA Civ 5**, [2013] 1 FLR 1250:

> "In this connection, that is to say dealing with evidence, I venture to repeat what I recently said in *Re C (Children Residence Order.* Application Being Dismissed at Fact-Finding Stage) [2002] EWCA Civ 1489. These are not ordinary civil proceedings, they are family proceedings where it is fundamental that the judge has an essentially inquisitorial role, his duty being to further the welfare of the children, which is by statute his paramount consideration. It has long been recognised, and authority need not be quoted for this proposition, that for this reason a judge exercising the family jurisdiction has a much broader discretion than he would in the civil jurisdiction to determine the way in which an application should be pursued. In an appropriate case he can summarily dismiss the application as being, if not groundless, lacking enough merit to justify pursuing the matter. He may determine that the matter is one to be dealt with on the basis of written evidence and oral submissions without any need for oral evidence. He may decide to hear the evidence of the applicant and then take stock of where the matter stands at the end of that evidence….The judge in such a situation will always be concerned to ask himself: Is there some solid reason in the interests

> of the children why I should embark upon, or having embarked upon, why I should continue exploring the matters which one or other of the parents seeks to raise?..."

Sir Mark Hedley was at pains to point out that the principle of "no case to answer" has no proper place in family proceedings but that did not detract from the Family Court's case management powers to intervene. It would be a power used in the most exceptional of circumstances. Examples included medical evidence changing to a benign conclusion that required no explanation from the parents or a vendetta being pursued against the parents that was an abuse of process.

In ***A Local Authority v W and Others (Application for Summary Dismissal of Findings)*** **[2020] EWFC 40**, [2020] 2 FLR 1219 MacDonald J noted the decision in the Court of Appeal in **Re H-L (Children: Summary Dismissal of Care Proceedings) [2019] EWCA Civ 704** and decided that it remains to be seen whether *Re AA* can survive that decision.

*Re H-L* concerned the dismissal of proceedings at the case management stage, prior to the local authority calling any evidence at a fact-finding hearing. In *H-L* the case management provisions were described as a "self-contained code" with detailed provisions that "make it unlikely that recourse to the more general procedural provisions will be necessary".

Mr Howe QC decided that *H-L* had not undermined *AA v 25* others and that there was jurisdiction to dismiss care proceedings. However, the court did not go on to dismiss the remaining local authority case without hearing all of the available evidence. There was a purpose to hearing the respondent's evidence for a number of different reasons which included the need to examine the consistency and honesty of the respondents.

## Appeals, re-opening findings and the distinction between family and criminal proceedings

***Re H-M (Children)*** **[2021] EWCA Civ 748** had a lengthy litigation history. Following a three-week fact-finding hearing in 2019 the trial Judge made the findings of fact that included injuries, including cuts, bruises and bite marks. The mother was identified as the perpetrator. KF was her partner but not the father of the subject children.

The criminal trial took place in October 2019 and concluded with the jury returning verdicts convicting KF of both counts of inflicting grievous bodily harm and a count of sexual assault, acquitting the mother of those three charges and of the fourth charge, but convicting her of the charge of cruelty.

The mother applied to re-open the findings and then appealed instead. That appeal was dismissed (see ***T and J*** **[2020] EWCA Civ 1344**). The mother then renewed her application to re-open the findings. That application was dismissed. The mother appealed.

## How did the Court of Appeal deal with the difference between the "verdicts" of the criminal court and the family court?

The Court of Appeal (Peter Jackson LJ giving the lead judgment) reviewed the history, the law relating to re-opening applications and the judgment of the court below. There was no error of law and the judgment was careful and thorough. Peter Jackson LJ decided that:

> "A decision about whether to reopen findings of fact is highly case-sensitive. An appeal court will be slow to interfere with a reasoned decision one way or the other and will only do so where some error is manifest. In this complex case, the Judge had the marked advantage of having conducted a very substantial fact-finding hearing that left him with a distinctive view of the strengths and weaknesses of the evidence that he had read and heard. He was therefore particularly well placed to compare that evidence with the evidence given at the criminal trial. As such, his assessment attracts a wide margin of consideration.
>
> 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. In this case the most striking feature was, in my view, the conviction of KF for a sexual offence. However, as the Judge explained, the evidence leading to that conviction was not materially different from the evidence that was considered by the Family Court. For reasons that seemed good to the parties and the court in the family proceedings, no party pursued a finding that KF had acted with a sexual motive. On an analysis of the evidence, to which we were taken, that does not represent any shortcoming in the fact-finding process. The same can be said in relation to the other individual issues and as to the cumulative position. The outcome of the two proceedings is in some ways incongruent, but the underlying evidence was not."

The appeal was dismissed.

## "Pleadings", Scott schedules and how alleged findings of fact should be presented

In ***Re H-N and Others (children) (domestic abuse: finding of fact hearings)*** **[2021] EWCA Civ 448** involved a review by the Court of Appeal of the practice and procedure relating to domestic abuse. The appeals arose from private proceedings but are relevant to this public law update for the treatment of the issue by the Court of Appeal. Whilst his is a wide-ranging judgment covering many important areas of practice and procedure, I want to highlight one aspect of it for the purposes of this update. That aspect is the use of Scott schedules to define allegations between parties.

The President said this:

> "One striking feature of the dozen oral submissions heard during the hearing of these appeals was that there was effective unanimity that the value of Scott Schedules in domestic abuse cases had declined to the extent that, in the view of some, they were now a potential barrier to fairness and good process, rather than an aid….The principled concern arose from an asserted need for the court to focus on the wider context of whether there has been a pattern of coercive and controlling behaviour, as opposed to a list of specific factual incidents that are tied to a particular date and time. Abusive, coercive and controlling behaviour is likely to have a cumulative impact upon its victims which would not be identified simply by separate and isolated consideration of individual incidents.
>
> The second, more pragmatic, criticism is not unrelated to the first. As an example in one of these four appeals, the parties were required to 'limit' the allegations to be tried to ten and the judge at trial further reduced the focus of the hearing by directing that only three would be tried. It was submitted that that very process of directed selection, produces a false portrayal of the couple's relationship…
>
> For our part, we see the force of these criticisms and consider that serious thought is now needed to develop a different way of summarising and organising the matters that are to be tried at a fact-finding hearing so that the case that a respondent has to meet is clearly spelled out, but the process of organisation and summary does not so distort the focus of the court proceedings that the question of whether there has been a pattern of behaviour or a course of abusive conduct is not before the court when it should be."

## The extent of the duty to assess family members

In ***Re F (assessment of birth family)*** **[2021] EWFC 31** Cobb J was dealing with the duty of a local authority to assess birth family members. The question was formulated in this way:

> "Within these public law proceedings, is there any obligation on the Local Authority to assess members of the 'original family' (i.e., the biological/birth family) of the mother of the subject infant child (F), where the mother herself was adopted as a child and raised by adoptive parents?"

Cobb J decided that there was no obligation to assess the mother's birth family:

> "I am satisfied that the mother's birth family are her 'original' family (as per ACA 2002) but are not her current 'family' nor are they her 'relatives' as those terms are used in Part III of the CA 1989. In that respect, their status (if any) in relation to F is materially different from the status of the extended or wider family as discussed in the caselaw referred to above….
>
> Furthermore, the birth family's limited experience of F during a short visit in March 2020 (which culminated in a section 47 investigation as a result of the serious injury to F) falls a long way short of supporting any finding that they had acquired Article 8 rights to a family life with F. This right is not established on the basis of biological kinship alone.
>
> Even if the birth family could bring themselves within the definition of 'family' for the purposes of the statute/caselaw, this does not place upon the Local Authority any obligation under statute to inform, consult, assess, or otherwise consider them in circumstances such as these…"

Cobb J went on to conclude that on his own assessment the birth family could not be said to be "realistic options" as long-term carers of F. But quite apart from those conclusions on the facts of the case, the mother had a strong opposition to the birth family being assessed and this

> "…carries significant weight in my assessment this case. I am further satisfied that involving the birth family in assessment would be likely to have a deleterious effect on the mother's fragile mental health, at a critical time when she herself is being assessed in the community as a long-term carer for her daughter. I t would also, I am satisfied, cause unwelcome and avoidable division in the relationship between the mother and her parents."

## Procedural irregularity in adoption

In ***Re S (A Child)*** **[2021] EWCA Civ 605** the Court of Appeal were dealing with an appeal from the refusal to grant leave to oppose adoption. The appeal was allowed because of procedural unfairness. Macur LJ gave the lead judgment and held that:

> "In my view, the mother has a legitimate sense of grievance that, however sympathetically the judge approached her application, it was not determined properly. The consequences for her, and Z, are far reaching. It is trite to say that, however inevitable it may be, a disappointing result reached without procedural integrity will fuel a sense of injustice."

The procedural unfairness was rooted in the absence of a transcript of the original judge's judgment in making a placement order. The new judge could not know what the baseline was against which to assess a change in circumstances. The social worker's evidence could not rectify this as it was, inevitably, from the perspective of the local authority. Neither could counsel's skeleton argument rectify the deficit. The material from the local authority was "necessarily subjective" and this was unsurprising.

## Applications relating to a grandmother's attempted intervention in a case where her baby grandchild was placed in a "foster to adopt" placement

In ***Re H and T*** **[2021] EWFC 35** the court was dealing with young parents who had given up their baby ("H") for adoption. The maternal family were aware of the decision, the paternal family were not. The father told the social worker that his own mother did know of the decision. H had been placed with foster carers immediately after birth. At two weeks old he was placed with "foster to adopt" parents. Just before that placement the paternal grandmother contacted the social worker. She stated that she had only just become aware of H's existence, and wished to care for the baby immediately. She told the social worker that her son had told her that if she went ahead with this he would never speak to her again.

Before Judd J there were two applications. The first was by the grandmother under section 10(9) Children Act 1989 for permission to apply for either a Special Guardianship Order or a Child Arrangements Order with respect to H (now seven months old). The second was an application by the local authority under the inherent jurisdiction for permission not to carry out any assessment of her as a possible carer. All were agreed that neither application was governed by the paramountcy principle in either the ACA 2002 or the CA 1989.

The leading authority was ***Re B (Paternal Grandmother: Joinder as Party)*** **[2012] EWCA Civ 737** (Black LJ).

A major factor in the court's consideration was the firm stance of the parents. They opposed the grandmother taking over care of H. This meant that some of the obvious advantages of a natural family placement would not be present in the circumstances. H would be disrupted and harmed by the granting of the grandmother's application. The court granted the local authority's application and dismissed that of the grandmother.

20.07.21

# Internal relocation and Covid-19

**Eri Horrocks**, associate with **Hunters Law,** considers the court's approach to internal relocation cases in the light of F v G.

The pandemic has led to lifestyle changes for many, with flexible working becoming the norm, and whilst much of the data is for now anecdotal, there seems to be a trend towards moving to the countryside, given the reduced need to live close to the office.

Amongst those looking to move will be separated parents, and the recent case of ***F v G*** **[2021] EWFC B12** highlighted that this issue is now coming before the court. In that case, a mother who relocated to the countryside during the pandemic failed to persuade the judge that it was in her son's best interests to live there with her, and it was decided that he should live with his father in London. The case serves as a reminder that the courts now focus solely on the child's best interests, with no presumption in favour of a primary carer seeking to relocate.

This article will consider the circumstances in which internal relocation cases may come before the court, before reviewing the evolution of the caselaw and examining the court's approach in *F v G*.

## When is an application necessary?

Whilst legislative provisions limit the international movement of children (s13(b) Children Act 1989 and the Child Abduction Act 1984), the movement of children within the UK ("internal relocation") is not specifically regulated by statute.

Nevertheless, there are circumstances in which it would not be permissible for a parent to relocate their children within the UK without either the other parent's consent or the court's permission: where the move would entail breaching the terms of a child arrangements order (e.g. in respect of contact), or would require a change in schools – a decision requiring the agreement of all with parental responsibility. In such cases, if agreement cannot be reached the parent seeking to move can apply for a specific issue order; alternatively, the parent opposing the move could apply for a prohibited steps order.

Even where the other parent's agreement is not technically required (e.g. there is no child arrangements order, the child is below school age, or the father lacks parental responsibility), clients should generally be advised that it is unlikely to be in the child's best interests for them to make any dramatic changes in the child's life without conferring with the other parent, particularly in relation to changes which may significantly affect the child's relationship with the other parent. Plainly, such an approach will not be suitable in all cases, e.g. where a parent is escaping domestic abuse.

Where a proposed move is relatively local and would not affect the exercise of parental responsibility or contact arrangements, no application is likely to be required.

## The court's evolving approach to internal relocation

Prior to 2015, the approach generally taken by the court was that internal relocation by a primary carer should be restricted only in "exceptional" cases – a stipulation not applied in external (international) relocation cases.

For many years the leading case was the Court of Appeal decision in ***Re E*** **[1997] EWCA Civ 3084**. The mother had sought to move from London to Blackpool with the children to be nearer her family, but the trial judge had placed a condition on a residence order made in her favour, requiring her to live in London. Butler-Sloss LJ allowed the mother's appeal, noting

that whilst the Children Act 1989 limits the circumstances in which children can be relocated abroad, it does not limit relocation within the UK. She stated that "a condition of residence is in my view an unwarranted imposition upon the right of the parent to choose where he/she will live within the United Kingdom" and concluded that restricting the right of the primary carer to live where they wished within the UK would only be appropriate in "exceptional cases".

Although this "exceptionality" test was subsequently applied, the tension arising from the divergent approaches to internal and external relocations did not go unremarked upon.

In ***Re H*** **[2001] EWCA Civ 1338**, Thorpe LJ questioned why a different test should be applied for relocating to Belfast rather than Dublin, highlighting that the welfare test should be paramount in both cases. He upheld a condition preventing the father from relocating with the children to Northern Ireland due to the impact the separation from their mother would have on the children. However, in ***Re B*** **[2007] EWCA Civ 1055**, Thorpe LJ revisited his approach in Re H and held that upon reconsideration, his judgment had not sufficiently reflected how "truly exceptional" the imposition of a condition on the primary carer's ability to choose their place of residence within the UK should be.

In ***Re F*** **[2010] EWCA Civ 1428** Wilson LJ (as he then was) considered a mother's application to move the children from North East England to the Orkney Islands. The trial judge had refused the mother's application on the basis that the difficult journey that would be required for the children to have contact with their father made the case "exceptional". Wilson LJ upheld the decision, and commented that, if he had not been bound by authority, he "might have wished to suggest that a test of exceptionality was an impermissible gloss" on the welfare principle.

It was in ***Re C*** **[2015] EWCA Civ 1305** that the court faced the issue identified by Thorpe LJ in Re H head on. The mother sought to move from London to Cumbria to be closer to her family; the father opposed the move which would reduce his contact with the child. The trial judge had sanctioned the move on the basis that it was in the child's best interests and the father appealed. In rejecting the father's appeal, the court considered whether the principles applicable to internal and external relocation cases differed, and Black LJ (as she then was), giving the lead judgment, made clear that she was unable to find any satisfactory explanation for the different approaches in internal and external relocation cases and that both must be determined in accordance with the child's best interests.

Black LJ conducted a wholesale re-examination of the caselaw and concluded that Re E had not in fact established an "exceptionality" principle, and that, "when one goes back over the internal relocation cases, it is clear that one of the main influences behind the exceptionality 'test' was always the welfare of the child… the 'exceptional cases' where [the parent's freedom to choose to where to live] would be restricted were those where the welfare of the child required it".

## The current law

Black LJ confirmed that the approach of the Court of Appeal to external relocation in ***Re F*** **[2015] EWCA Civ 882**, decided a few months prior to Re C, applied equally in internal relocation cases.

In Re F, the Court of Appeal had confirmed that the child's welfare, considered in light of the welfare checklist in s1(3) CA 1989, must be the court's paramount consideration in a relocation case. This cemented a shift away from the practice, which had developed following ***Payne v Payne*** **[2001] EWCA Civ 166**, of a presumption in favour of granting genuine, well-thought out applications unless the children's welfare required otherwise. Rather, the court must consider all proposals for the child's arrangements and conduct a welfare assessment of each so that a comparative evaluation could be carried out – it was not sufficient only to consider the proposals of the parent seeking to move.

By the end of 2015 then, it was clearly established that the same test applied in both internal and external relocation cases, and that it required a comparative assessment of both parties' proposals with the court to make a decision solely determined by the child's best interests, with no presumption in either direction.

However, whilst the approaches to internal and external relocation cases are now aligned, the law on "internal abduction" remains very different from that on international abduction. This was confirmed by the Court of Appeal in ***Re R*** **[2016] EWCA Civ 1016**, which concerned a mother who had relocated a child from Kent to the North East without the father's knowledge. Whilst under the 1980 Hague Convention a child who has been abducted internationally must be summarily returned unless one of a limited number of defences apply, following an internal abduction the court must be guided by the child's welfare. If a child has become settled in their new location, return may not be in their interests.

Internal relocation cases since Re C have been limited, though in ***AH v DT*** **[2017] EWHC 36 (Fam)** the court had to determine, following an internal abduction, whether the child should live with the mother in Kent or Northern Ireland. Baker J confirmed that the trial judge had correctly followed Re C by approaching the matter by looking at which option would best promote the child's welfare.

## F v G

*F v G* is a useful example of internal relocation in the context of the Covid-19 pandemic, affirming that the courts continue to follow *Re C,* focusing solely on the welfare test with no gloss or presumptions. The case is unusual in that it was decided to separate siblings, highlighting how fact-specific the welfare test can be – here, each sibling's needs pointed in a different direction.

The court was concerned with two children, aged 3 and 9. Following the parents' separation in 2017 they shared care of the children, and at the start of lockdown in March 2020 agreed that the mother and children would temporarily move from London, where both parents lived, to the countryside, so that the children would be able to enjoy more space. However, the mother decided in summer 2020 that she wanted to remain in the countryside permanently, one factor being that her new partner lived nearby. The father opposed this on the basis that it would impact his relationship with the children; his work meant he was unable to relocate.

During the proceedings the father accepted that the younger child should remain with the mother and spend as much time as possible with him; the focus was therefore on the older child. It had been decided at an interim hearing that he should return to London in September 2020 so that he need not change school as this would be the least disruptive arrangement for him pending the final hearing; disruption was a particular concern as the child was autistic.

HHJ Lloyd-Jones recorded that:

> "Since the decision in *Re C* in 2015 it is clear that as in any other decision the decision made by a court under the Children Act for any child must be guided by the paramountcy principle in the Children Act – namely that it is the welfare of the child that is paramount. The welfare of a parent is only important in so far as it impacts on the welfare of a child."

In the circumstances the question was whether it would be in the child's best interests to live with his mother and younger sister in the countryside, or with his father in London. Having heard evidence from the parties, a Cafcass officer and a child and adolescent psychiatrist (with whom she was "not impressed"), the judge found in favour of the father.

The judge raised concerns about the mother's approach, noting that she had changed her position on whether it was a priority to keep the children together, and that whilst she had talked about her "unbearable heartache", she had not contemplated returning to London or visiting the older child there. The judge reflected that this "causes me to question how child centred her plans really are and causes me to think that she is seeking to mould the children's lives around her own plans".

By contrast the judge found that the father had a clear understanding of what would be in the child's best interests and was impressed at how the evidence he gave accorded with the evidence of others; the judge also noted the father's more effective management of the child's meltdowns.

After reflecting on the evidence, the judge carefully applied the welfare checklist, reminding herself that the child's welfare is the court's paramount consideration. She concluded that the father was more focused on what was best for the child, that the child's autism and difficulties with school meant that there was a risk in introducing change, such that the balance came down in favour of the child living with his father. Whilst the judge expressed unease about separating the siblings, her order provided for them to spend every weekend and the entirety of holidays together, alternating between their parents, meaning they would spend the majority of their time together.

The case serves as a reminder of just how fact-specific relocation cases are: the outcome was different for two children in the same family because of their distinct needs. The case should give pause for thought for separated parents considering relocation in the wake of the pandemic. It undoubtedly harmed the mother's case that the judge considered she was motivated by her own, not the children's interests. Any parent considering a move opposed by the other parent will need to reflect on whether the proposed move will genuinely benefit the children, in light of their particular needs and their relationship with their other parent, and be sure to present their case from that perspective.

27.07.2021

# Financial Remedy Update, July 2021

**Abigail Pearse** and **Stephanie Hawthorn**, associates at **Mills & Reeve LLP**, consider the important news and case law relating to financial remedies and divorce during June 2021.

## Case Law Update

### *J v J (Non-recognition of Overseas Divorce)* [2021] EWFC 43

This case concerned a Wife who made various applications before Mr Justice Peel, including ultimately for a refusal of recognition of a final decree of divorce obtained in China under Section 51 of the Family Law Act 1986.

By way of brief background, the Wife was of Polish origin and Husband was of Chinese origin. The parties began cohabiting in 2016, they married in 2017 and separated in 2019. The parties had no children.

The parties disagreed on where they lived during their marriage, with Wife alleging England (albeit agreeing that the parties often went on international business trips) and Husband alleging China.

Wife filed her divorce petition in England in May 2019, and by this point, the Husband had relocated to China and had evaded service of the petition. The Wife then issued financial remedy proceedings in December 2019, but the Husband also evaded service of these proceedings. Wife was authorised to continue with her divorce application, but there then followed a period of delay as the proceedings were transferred within the English courts and no further steps were taken, despite chasing by the Wife.

Meanwhile, whilst the Wife was still waiting for decree nisi to be granted, the Husband filed divorce proceedings in China in October 2019. On 14 December 2020, the Chinese court gave judgment granting the divorce, which was publicised on 27 December 2020.

Wife sought for this judgment not to be recognised, in order for her divorce (and associated financial remedy proceedings) to continue in England. Despite accepting that had it not been for the delay of the court, the Wife would likely have obtained a decree in England and Wales, Mr Justice Peel dismissed the Wife's application.

Further to an email in April 2020, the Wife was aware of the Chinese divorce proceedings. Emails were subsequently sent to her by the Husband's solicitors, via a long-used email address which she had previously used to communicate with them on - in circumstances where her residential address had been concealed for personal security reasons. It was held that whilst the Wife had not had notice of the first hearing in suit, and ordinarily should have been informed of it earlier, this ultimately did not cause her prejudice because she did have the opportunity to participate in further hearings. She had options open to her to allow her involvement. Whilst she had tried to instruct a McKenzie friend to attend the hearings on her behalf (with her being absent), this was not accepted by the Chinese Court. Mr Justice Peel was unaware of whether the concept of a McKenzie friend existed in that jurisdiction and in any event, even under English law, a McKenzie friend is only able to assist a party during proceedings, not represent them.

Ultimately, the Wife had reasonable opportunity to take part in the proceedings and reasonable steps were taken to notify her of the proceedings. On this basis, the Wife's application for non-recognition of the Chinese divorce was refused, and the divorce and financial remedy proceedings in England and Wales were also dismissed.

Further, Mr Justice Peel made clear that refusing recognition of a foreign decree of divorce should be done sparingly and with respect for the decisions of a properly constituted court in a foreign jurisdiction. Each case is to be assessed on its own merits.

## *M v D* [2021] EWHC 1351

This case concerned an appeal against a without notice order made in December 2020, whereby an ex parte application for a non-molestation order under s42(2) Family Law Act1996 ('the Act') was dismissed, on the grounds of want of jurisdiction. The first instance decision was ultimately upheld by Mr Justice MacDonald.

The Applicant had alleged that the Respondent had been verbally abusive and threatening towards her. The Respondent, the Applicant's 'step-nephew' (her sister's step-son), had no notice of either the original application or the subsequent appeal.

It was ultimately concluded at first instance, and upheld on appeal, that a 'step-nephew' did not fall within the term 'associated person' under the Act. The Applicant attempted to argue that she and the Respondent were relatives, as included by the s62(3)(d) of the Act, although it was accepted by all that step-nephew does not expressly fall within the wording of the Act itself (which does set out a specific list of people considered relatives - see section 63(1)(a) and (b)).

Included within this express list are step-mothers and step-fathers and it was argued on appeal that also included, with proper interpretation, were nephews 'acquired by marriage'. In any event it was argued that a purposive construction of the statute was required to acknowledge the "ever-expanding complexities of modern family dynamics in a society in which different relationships and different means of legitimised conception are recognised."

It was ultimately held that, given that certain step-relatives were expressly included within the definition of 'relatives', the omission of other step-relations was deliberate, as opposed to being a mere oversight. Macdonald J 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 s61(3)(b). Mr Justice MacDonald also considered that when it came to who could apply for injunctive relief under the 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.

The Act was not in place to create a new tort of molestation, but rather to protect family members of abuse, and as such Parliament had to draw the line somewhere. Indeed, it was acknowledged that otherwise identifying relatives could continue on forever as it was stated that families are, by genealogical reality, extended.

The judge 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. Whilst the judgment did restrict the breadth of the statute, in a world where it was acknowledged blended families are increasing, it was ultimately the case that the Applicant had an alternative remedy for protection under the Protection of Harassment Act 1997.

# News Update

## Consultation on the Child Maintenance Service

A consultation has been launched by the Department for Work and Pensions opening a discussion on various proposals designed to modernise and improve the current Child Maintenance Service (CMS), which was introduced in 2012. Some of the proposals include, as per the Government website:

- Allowing unearned income to be included in CMS calculations
- Easing the evidential requirements for the self-employed where they have self-reported a change that breaches the income tolerance level for review (currently 25%)
- Extinguishing small amounts of low value debt, where collecting this would cost more than the debt itself
- Extinguishing areas where:
    - Maintenance has been deducted from earnings where the 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
- Various organisations having to provide information upon request in a timely manner.

The consultation closes on 6 August 2021.

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

## Court Judgments moving to The National Archive

From April 2022, important court and tribunal judgments will be available to anyone via the National Archives, in a move hoped to increase transparency and secure free access.

Included in the archives will be judicial review rulings, European case law, commercial judgments and other cases of legal significance.

The long-term goal is for all sources of court judgment publications to migrate onto The National Archives website, allowing the digital files to be hosted securely. The largest source at present is BAILII which will continue to provide its service.

For more information, **click here**.

## Government pledges to raise the minimum legal age of marriage to 18

The current legal age at which you can get married is 16, providing parental consent has been provided. It has recently been reported that the government have pledged to raise this to 18, with The Times suggesting Sajid Javid intends to introduce a private members bill on the subject.

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."

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

## No fault divorce: coming 6 April 2022

It has been confirmed, by way of written answer to a Parliamentary question, that no fault divorce will not be introduced in October 2021, as originally indicated, but instead will be introduced on 6 April 2022.

Resolution have confirmed that they understand this delay is to allow time for necessary IT changes to HMCT's online divorce system. This new date is now fixed as a matter of parliamentary record, as noted by Resolution, with it being recognised by Chris Philip, Parliamentary Under Secretary of State at the Ministry of Justice, that the indicative date of October was "ambitious".

Outdoor weddings and civil partnership ceremonies to be legalised in England and Wales
Following a commitment that was made in 2019 to legalise outdoor ceremonies, new regulations will take effect from 1 July 2021 allowing couples to have their whole wedding ceremony outside at the venue of an approved premises.

Previously the legal wedding or civil partnership ceremony had to take place in 'an approved room or permanent structure'. According to the government, this change will benefit nearly 75% of all weddings and civil partnerships in England and Wales that are non-religious and which take place on approved premises. To find out more, click here

## Warning issued by the Court of Appeal against making applications and court orders hastily via email

The Court of Appeal has discussed the issues and risks that can arise when applications and court orders are made hastily via email, in light of a children case where Lord Justice Peter Jackson held that an order was 'wrong and unjust for serious procedural irregularity'.

In his judgment, Lord Justice Peter Jackson emphasized that no matter what form an application takes, and whether or not there is a hearing, the same standards of procedural fairness are to be applied.

He went on to say

> "the fact that an application is made by email or decided without a hearing does not mean that it should receive less careful scrutiny. On the contrary, a judge considering an application on the papers must be alert to ensure that the rules and orders of the court have been followed and that the process is as procedurally fair as if the parties were present in person".

The judgment can be **found here**

## Further consultation on hearings in the family justice system

The President of the Family Division has conducted the third consultation since remote hearings were introduced at the start of the pandemic to see how the family courts should operate as Covid restrictions begin to ease.

The survey, which was shorter than the previous two, asked questions about what aspects of remote working should be retained, what problems continue to be encountered and the experiences of attending court in person. Evidence was sought from families with children and all professionals working in the family justice system.

This consultation closed on 27 June 2021 and the findings are expected to be published this month.

27.07.2021

# CASES

## Re A (Children) (Abduction Article 13(b) [2021] EWCA Civ 939

### Factual background

A and B, aged 4 and nearly 3, are the children of both parents. The father was born and lived in the USA until moving here for work in 2014. The mother had always lived in England before she moved to the USA with the children in November 2019. She has a 14-year-old daughter, C, who is not the subject of proceedings. C has always lived with her mother and formed part of the family unit after the parents met and married. The parents agreed to move to the USA because of the father's work; he moved in February 2018 and there was a lengthy period when the mother was the children's sole carer in this jurisdiction. B was born during this time.

Very soon after the family was reunited there were escalating tensions in the parents' relationship and between the father and C, whose position in the household had become untenable. The mother clandestinely removed the children on 4th May 2020, returning to England.

The father then came to England himself, with some hopes of a reconciliation with the mother. He applied in September 2020 for the children's return to the USA pursuant to the 1980 Hague Convention.

The mother asserted that the children were not habitually resident in the US at the date of their removal and that the father had acquiesced in their remaining in England (Art 13(a)) She also made serious allegations against the father of domestic violence towards her and physical and emotional abuse of C and A, claiming that there was a grave risk that returning A and B to the US would expose them to physical or psychological harm or otherwise place them in an intolerable position (Art 13(b)). A complicating factor was that she was clear that if the court ordered the children's return to the US, she would not accompany them; she was unwilling once again to uproot C, who had "been through a traumatic time" in the US.

### The appeal

There was no appeal against the judge's finding that the children were habitually resident in the USA at the date of removal.

The mother's grounds were that the judge had taken the wrong approach to the issues of grave risk and acquiescence and that C's voice was inadequately reflected in the proceedings. The last ground was not considered to add anything of substance to the appeal.

### Law

Moylan LJ sets out the relevant law at paragraphs 81-99. At §85-86 he stresses that the focus of Article 13(b) is on the risk to the child in the event of a return. At §88-90 he confirms the that the effect of the separation of a child from the "taking parent" can, in itself, establish grave risk; this defence cannot be excluded just because that parent's own conduct in removing the child created the situation.

At §91-99 Moylan LJ discusses the proper approach to the evaluation of a 13(b) defence given the summary nature of Hague proceedings, with reference to of *Re E* (supra). The court is not wholly precluded from an evaluative assessment of the allegations but must be careful when conducting a paper evaluation and "*should not*"…"*discount allegations of physical and emotional abuse merely because he or she has doubts as their validity or cogency*". (§92-95)

If the judge concludes that the allegations would potentially establish the existence of a grave risk the court must ask how the child can be protected against that risk. The "*clearer the need for protection, the more effective the measures will have to be*." (*Re E* §52) Moylan LJ warned that if the *Re E* approach is not taken there is a risk that the allegations will be treated less seriously than they deserve, if true, and that the court will not properly consider the available protective measures. (§97-98)

### Determination

The judge had taken the correct approach to the acquiescence defence and had carefully analysed the evidence in that respect.

It was clear however that she had not approached the 13(b) defence as endorsed by the Supreme Court in *Re E.* The judge had not decided that she could "*confidently discount the possibility*" that they gave rise to a 13(b) risk. The allegations were "*of a nature and of sufficient detail and substance to warrant a careful analysis*" using the *Re E* approach. (§109)

The judge had wrongly discounted the mother's allegations, referring to evidence that in her view undermined them without having regard to the other evidence on which the mother relied. Further, she should not have discounted allegations of physical and emotional abuse on the basis that the family was under considerable stress.

Having discounted the allegations in this way she did not go on to analyse whether, if true, they would potentially create a grave risk, nor how any such risk could be mitigated. Her judgment did not properly recognise the effect on these young children of being placed in the care of a father against whom serious allegations of abuse had been made.

As all the evidence was before the Court of Appeal, it was able to determine the proper outcome without the need for a rehearing. (§116-124) There was no doubt that if the mother's allegations were true there would be a grave risk of physical or psychological harm if A and B were abruptly placed in their father's sole care. No protective measures could address that risk and the mother had a valid reason for not returning. While it was not necessary to decide whether separation from their primary carer would in itself (absent the abuse allegations) establish the necessary grave risk, it was a reinforcing factor and relevant to the exercise of discretion. The application for a return order was dismissed.

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

# A v B (Port Alert) [2021] EWHC 1716 (Fam)

## Proceedings

The case concerned Z, a 4 year old boy. His father (A), the applicant, is a British national; his mother (B) is a Slovakian national. Z was subject to ongoing private law proceedings in the Family Court. Z was living with the father and had supervised contact with the mother. The father held his passport. A 2019 prohibited steps order (PSO) prohibiting each parent from removing Z from the jurisdiction without the written consent of the other or an order remained in force. On 3 June 2021, the father applied to the High Court without notice for an order making Z a ward of court, a PSO preventing the mother withdrawing funds held in an account earmarked to pay Z's school fees, and a port alert.

The matter came before Mostyn J for an inter partes hearing. The father, a litigant in person, applied for wardship to prevent any steps being taken unilaterally by the mother in respect of Z's education or medical treatment. These matters are within the power of the Family Court to regulate by the making of a PSO. Wardship adds nothing to the statutory jurisdiction. The application was dismissed.

Pursuant to FPR 5.4, where the wardship application had to be issued and heard in the High Court, it was permissible for the father to tack on the application for a PSO. As the wardship application had been dismissed, it was not appropriate to deal with the PSO application. There were no exceptional circumstances to justify the case being heard in the High Court and it could easily be heard alongside the existing CA 1989 proceedings in the Family Court. Application dismissed.

Father also sought a port alert. The application was dismissed for two reasons: (i) it should have been made to the Family Court and not to the High Court; and (ii) because Mostyn J was not satisfied that there was a real and imminent risk that the mother was going to remove Z from the jurisdiction.

## Freestanding Port Alert Orders and the Family Court

Mostyn J explored whether the Family Court has the power to issue a freestanding port alert order and analysed the relevant law and guidance. He makes the distinction between a freestanding port alert order and a Tipstaff Order. While a port alert order is made pursuant to the inherent power of the High Court, it is not an independent substantive form of relief. It is an incidental/supplemental measure to give effect to a substantive order by the court or to protect a substantive claim made to the court. It is of the same character as an interlocutory injunction or a bench warrant, which are made frequently in the Family and County Court.

S.31(E)(1)(a) of the Matrimonial and Family Proceedings Act 1984, headed 'Family Court has High Court and County Court powers', provides that '*in any proceedings in the Family Court, the court may make any order… which could be made by the High Court if the proceedings were in the High Court*'. This is in the same terms as s.38(1) of the County Courts Act 1984. This provision supplies remedies and orders that the court can make in proceedings properly before it.

Mostyn J determined that the Family Court does have the power to issue a freestanding port alert order, where such an order is justified on the facts and is an incidental and supplemental order to give effect to a decision of the Family Court, e.g. where the court has made a PSO preventing a parent taking a child out of the jurisdiction. A port alert in these circumstances is acting ensure the efficacy of the PSO. It should only be made where the applicant demonstrates that there is a real and imminent risk that the child will be removed. The applicant does not have to prove that it is more likely than not that the child will be removed. However, the court will expect proof of a degree of probability not far short of that standard. Applications should not be made in reliance on evidence which is flimsy or amounts to mere assertion.

The default position should be that a freestanding port alert order lasts for only 28 days in the first instance. Any extension should only be ordered on a subsequent inter partes hearing. Mostyn J observed that this key provision needs to be adhered to strictly.

The initial application is likely to be made *ex parte*. There should be a transparent and accessible facility to make an urgent ex parte application in each DFJ area. Where possible, applications should be made to a hearing centre in the applicant's local DFJ area. Mostyn J expects that local agreements would be reached so that adjacent DFJ areas combine to provide an urgent business rota. Each DFJ may consider how to allocate such applications. Mostyn J expressed the view that such applications should be allocated to the circuit judge level, or, in a complex case, to a judge of High Court judge level.

The heading of the existing pro forma template order is misleading as it refers to proceedings in the High Court. A pro forma order for use in the Family Court is appended to the judgment.

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

## Abbasi & Anor v Newcastle upon Tyne Hospitals NHS Foundation Trust [2021] EWHC 1699( Admin)

Each child had been the subject of end of life proceedings under the inherent jurisdiction where the issue was whether end of life support should be withdrawn. Sadly, both children are deceased and widely drawn RRO's were made at the time those proceedings concluded, each RRO was unlimited in duration and open ended, and covered all those who were employed by the relevant NHS hospital trust, and who played any part in the provision of care or treatment of the child. Now each of the 2 sets of parents sought to be released from the RRO so that they may speak publicly about their experiences, and in doing so be free to identify NHS staff involved in the care of each child, of whom they were critical. The central issue for determination was the jurisdiction of the High Court to maintain, or to re-impose a RRO protecting the anonymity of those NHS staff involved in the care of the child where the RRO was to remain in force for a significant time following the childs death. Further, the issues before the Court also related to the exercise and balancing of rights under Article 8 and Article 10 ECHR.

The Court reviewing the authorities on RRO"s concluded that it did have jurisdiction to consider the continuance of the RRO because the Court had made the orders, they were currently in force and they were now subject to applications for revocation or renewal. If the Court took the view it did not have jurisdiction to consider the applications, then the effect would be, absent any appeal out of time, that the orders would remain in force for all time, an parents would always continue to be bound by them. As a matter of first principle where an order is in force, the Court has jurisdiction to renew it.

The approach to the balancing exercise of competing rights under articles 8 and 10 ECHR remains as stated by Lord Steyn in the House of Lords decision in *Re S (a child)(identification: Restrictions on publication)* [2004] UKHL 47 [2005] 1 AC 593, in which neither Art 8 or Art 10 right has precedence. In carrying out the ultimate balancing test of those rights, on the facts, it concluded that the continuation of the RRO's was justified and proportionate. The time had come to draw a line under ***A v Ward*** **[2010] EWHC 16 (Fam)** in so far as it required compelling reasons to be established before anonymity could be afforded to a class of professionals, this dicta was found to be per incuriam and should no longer be followed. In considering treating clinicians article 8 rights the Court found substantial weight should be given to the strong and coherent body of evidence on the potential for such individuals to become vulnerable to physical and personal attacks and to suffer adversely in terms of mental health and wellbeing required to be taken seriously. The Court also recognised the parents were not on solid ground with their assertions against the clinicians due to lack of a finding of fact hearing. The Court observed there was a lack of detail about the factuality of the claims. The applications to discharge the RRO's were refused

Case summary by **Judi Evans, Barrister**, **St John's Chambers**

## AA v BB [2021] EWFC 55

### Background

The British mother (M) and Jordanian father (F) met in Jordan and lived for most of their married life in the UAE. Their children, O and Y were born in 2013 and 2015. M formally converted to Islam in 2018. Y had considerable health difficulties and O became increasingly unhappy after a change of school in 2018; later that year the parents agreed that M should move to England with the children. F saw the children on regular visits to England and when M brought them to Dubai in October 2019. Plans for further contact were stymied by Covid. In May 2020 M told F that she would not return to Dubai and the marriage was at an end. She has renounced Islam.

### Proceedings

M applied in September 2020 for a prohibited steps order to prevent F from removing the children from the jurisdiction and a live with order. The live with order was agreed. F sought an order for the children to spend time with him, including in Dubai, Jordan (where his parents and wider family lives) and other jurisdictions outside England and Wales.

### The findings

The court found F to be lacking in empathy and insight; he was "*selfish, moody, insensitive, at times demanding*" *and* "*oblivious and insensitive*" to M's isolation in Dubai before her move. Although M's contention that F's attitude to his faith had fundamentally altered after they married was not accepted, the judge did find that faith became a more prominent theme after the children's birth and that he was likely to have become more critical of aspects of M's behaviour which he saw has immodest or un-Islamic. Coercive control was not established.

M was genuinely anxious and fearful that F would remove the children permanently and her anxiety had transmitted itself to the children. Her anxiety that he might abduct the children were he to have unsupervised contact in England was understandable but the court found the risk to be low.

## Evaluation of risk

In accordance with the principles with regard to temporary removal to a non-Convention country set out in *Re K (Removal for Jurisdiction: Practice)* [1999] 2 FLR 1084 and ***Re M (Removal from Jurisdiction: Adjournment)*** **[2010] EWCA Civ 888**, [2011] 1 FLR 1943 the court was required to consider:

> i) The magnitude of the risk of breach of the order if permission is given;
>
> ii) The magnitude of the consequence of such breach;
>
> iii) The level of security that may be achieved by building in all available safeguards.

F had never threatened to abduct the children and had agreed to them living in England; the court accepted that he had no current intention to abduct or retain them abroad. On the other hand it is very important to him that the children are brought up in the Muslim faith and he may be concerned about M's stance on this and consider that she is not acting in their best interests. He may also be influenced by his wider family to take steps to prevent the children being raised by their "apostate" mother. There is a significant risk that he may in future seek to retain O and Y in Dubai or Jordan.

If the children are retained the consequences would be devastating for them. The effects would be profound and long-lasting.

Unfortunately there are no safeguards available in this case because M would be considered an apostate in both Jordan and UAE so the normal presumption that young children should live with their mother would not apply; the chance of her being granted custodianship in either country is "*practically zero*". Any written agreement or consensual judgment would almost certainly be rejected by the courts. A bond could theoretically give M a fighting fund but her apostacy renders her ability to litigate in Dubai or Jordan an empty remedy.

## Outcome

The court made a detailed order providing for indirect and direct contact in England. Direct contact should be supervised initially but not indefinitely. The low risk of abduction could be managed by the making of a port alert and the father's passport being surrendered during contact.

The parents were urged to attend mediation to discuss future arrangements and exercise of shared PR, in particular the children's religious upbringing.

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

# Child And Family Agency of Ireland v AB [2021] EWHC 1774 (Fam)

After Brexit applications to transfer care proceedings between EU states to or from the UK cannot be made under Art 15 BIIR. The CFA therefore sought to rely on Article 8 of the Convention of 19th October 1996 on Jurisdiction Applicable Law Recognition Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children ('the 1996 Convention') which provides:

> ARTICLE 8
> (1) By way of exception, the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either – request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction to take such measures of protection as it considers to be necessary, or – suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.
>
> (2) The Contracting States whose authorities may be addressed as provided in the preceding paragraph are a) a State of which the child is a national, b) a State in which property of the child is located, c) a State whose authorities are seised of an application for divorce or legal separation of the child's parents, or for annulment of their marriage, d) a State with which the child has a substantial connection.
>
> (3) The authorities concerned may proceed to an exchange of views.
>
> (4) The authority addressed as provided in paragraph 1 may assume jurisdiction, in place of the authority having jurisdiction under Article 5 or 6, if it considers that this is in the child's best interests

AB was subject to a pre-birth child protection plan to English local authority No 1. AB's full sibling was in foster care under an interim care order to that local Authority. The parents went to Ireland for the birth of AB, to avoid the local authority seeking to remove him too.

CFA were notified by the local authority and they issued care proceedings in Ireland and AB was placed under an interim care order. The parents moved back to England to live in Local Authority No 2. A judge in Ireland decided that the proceedings were better heard in England and therefore CFA applied to the Family Court in England that the proceedings should be heard here.

Keehan J decided that the issue of inter jurisdictional transfer under Article 8 should be decided on the same principles as cases under Art 15 BIIR. He therefore applied the reasoning of Cobb J in ***Re LM* [2013] EWHC 646 (Fam)** and Munby P in ***In the Matter of HJ (A Child)* [2013] EWHC 1867 (Fam)** and ordered the acceptance of the transfer requested . He designated local authority 2 as the authority to bring the necessary proceedings under s31 Children Act 1989.

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

## Hasan v Ul-Hasan (Deceased) Anor [2021] EWHC 1791 (Fam)

The argument put forward on behalf of the wife was that the authorities under Part II of the Matrimonial Causes Act 1973 ("Part II"), as well as those under the Inheritance (Provision for Family and Dependants) Act 1975, on this subject were not binding as the question has never before been considered under Part III.

Mostyn J held that the current jurisprudence unambiguously states that a financial claim made during marriage or following divorce expires with the death of the respondent and that this principle applies equally whether the claim proceeds under Part II following a domestic divorce or under Part III following an overseas divorce.

After consideration of the relevant authorities he concluded that he must dismiss the wife's application where her former husband died before her claim for financial provision following the overseas divorce could be adjudicated.

However, he also concluded that although he and the Court of Appeal were bound by the decision in Sugden he considered that decision to be incorrect such that it would be appropriate for there to be a leapfrog application for leave to appeal to the Supreme Court, so watch this space!

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

## K & Ors v K [2021] EWHC 1846 (Fam)

In July 2020 a Deputy District Judge registered a Polish custody order made in December 2016 which vested the custody and care of the three children (now aged 15, 11 and 9) with the mother in Poland, when they were living with their father in England. The appeal was brought by the father and separately the children. The mother had previously issued proceedings under the *Child Abduction and Custody Act 1985* (incorporating the 1980 *Hague Convention on the Civil Aspects of International Child Abduction*) and sought a summary return. This application was dismissed by Mr Alex Verdan sitting as a Deputy High Court Judge.

In December 2016, the Family Court in Poland made an order that the children live with their mother and provided for contact between the children and the father (who was living in England).

After summer holiday contact in 2019, the father did not return the children to Poland. He applied in Poland for variation of the December 2016 order. His application failed, and his appeal was refused. The mother issued proceedings for summary return under the *1980 Hague Convention in England* and in July 2020 applied for registration of the December 2016 order under Article 28(2) of BIIR. This was granted by the Deputy District Judge. The father issued a notice of appeal pursuant to *r 31 FPR 2010*.

Mr A Verdan QC Judge heard the combined applications, determining the 1980 Hague Convention application should be determined first, deciding against summary return.

The father sought permission to amend his Notice of Appeal in the BIIR appeal process to rely upon *Article 23(e) BIIR*. Meanwhile in May 2021 the Polish Court reconsidered the circumstances, and heard directly from the children. The Court varied the December 2016 order on an interim basis so the children remained with the father in England. The father sought further permission to amend his Notice of Appeal again to rely on *Article 23(f) BIIR*.

Mr Justice Cobb sets out the law from paragraph 22, highlighting at paragraph 23 the provisions of *Article 23 of BIIR* by which judgments relating to parental responsibility shall not be recognised including: Article 23(e) "*if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought*" and *Article 23(f)*: "*if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought*."

The court concluded at paragraph 33 that the December 2016 order was 'irreconcilable' with 'the later judgment relating to parental responsibility' given in Poland in May 2021, accepting that *Article 23(f)* 'another Member State' refers to a Member State 'other' than that in which recognition is sought. The Court concluded there were no grounds in Article 23 for not recognising the May 2021 decision, notwithstanding it was an interim order because it explicitly varied the December 2016 order. Secondly, the Court found the decision of Mr Verdan QC would have been a later judgement that was 'irreconcilable' with the December 2016 order. The Court did not hear detailed argument on a third point, but accepted that the judgment of Mr Verdan QC in the *1980 Hague Convention* proceedings was given in respect of matters 'relating to parental responsibility' [§36].

Finally the Court found it would be contrary to public policy (*Article 23 (a) BIIR*) to recognise and enforce an order made in a Member State that was contrary to both (a) a finding of the 1980 Hague Convention court that the Article 13(b) defence was made out in respect of the 15 year old; and (b) a subsequent order of the same Member State, contradictory to the order that is sought to be enforced.

Case summary by **Sarah Tyler**, Barrister, **Coram Chambers**

## Tameside Metropolitan Borough Council v C & Ors [2021] EWHC 1814 (Fam)

1. L was adopted by the parents when he was four years old. L was removed from his birth mother's care following a history of maternal alcohol abuse, neglect, inconsistent parenting and concerns around sexual abuse. It was also recorded that, prior to his removal, L was noted to have multiple fingerprint bruising on his body.

2. The adopters (parents) struggled to meet his needs and therein followed numerous psychological/psychiatric assessments of L as his behaviour steadily declined and he was demonstrating increasingly difficult behaviours, including making threats with a knife, smearing faeces, food hoarding, arson, aggression towards the family pet, sexualised behaviour and sexually harmful behaviours towards fellow pupils and teachers. As time moved on L was also noted to make threats to kill himself and others.

3. Numerous recommendations were made as to therapeutic packages and multiagency care planning.

4. On 18 December 2017 L was accommodated by the local authority but his behaviours escalated and in March 2017 the local authority issued care proceedings (s31 CA 1989) and L was subsequently placed in residential accommodation.

5. Care proceedings concluded later that year with final care orders being made in respect of L.

6. Since that date, L had thirteen placement moves and seven separate substantive residential placements in the course of less than five years. There remained no placement identified that could meet his assessed needs, Each placement broke down consequent upon the behaviour exhibited by L, which continued to be violent, threatening, and sexually inappropriate.

7. As L was moved to an unregistered unit, the local authority made an application for permission to invoke the inherent jurisdiction and for an order authorising the deprivation of L's liberty 2020. The initial hearing took place on 18 February 2020 before HHJ Allweis. An order authorising the deprivation of L was made; this interim order made was subsequently extended on eleven occasions between 6 February 2020 and 6 January 2021 in circumstances where L's placement remained unregistered despite the efforts of the local authority to move the registration process forward.

8. In making the application the local authority conceded that the current placement was not meeting L's needs but in the absence of any other option being available it was in L's best interests for the court to deprive L of his liberty to keep him safe.

9. The parents sought the staged return of L to their care but however submitted that pending this course of action, it remained in L's best interests for the deprivation of his liberty to be authorised by the court. The parents supported certain elements of the order depriving L of his Liberty ie at times requiring restraint to prevent him harming others, however, contended that other elements authorising the deprivation of L's liberty should be dispensed with, including the prohibition on L having a mobile phone.

10. On behalf of the child it was argued that the best interests principles must be applied and the court must have the child's welfare as the paramount consideration thereby undertaking a rigorous analysis as to whether the arrangements were necessary, proportionate and, crucially, in the child's best interests. It was submitted that the function of the court cannot be reduced to an administrative, transactional one in which the court acts as a rubber stamp to a fait accompli. In addition it was submitted that a lack of another suitable placement should not be determinative as to the success or otherwise of the application.

11. In determining the application, McDonald, considered all the authorities regarding the issue of deprivation of liberty, the relevant principles to be applied and also the Articles 5and 8 of the ECHR.

12. McDonald J said that whilst not determinative, the lack of availability of any alternative course of action with respect to welfare is one factor to be taken into account in evaluating properly the extent to which in it is in L's best interests for the court to authorise the current restrictions.

13. McDonald J also accepted where the merit of the sole placement available was limited to keeping the child safe in the broadest sense, taking into account the unavailability of alternatives risks the welfare outcome arrived at was one that will be based on an undesirably narrow welfare formulation that can come closer to a test of necessity than a test of best interest.

Case summary by **Tanya Zabihi**, Barrister, **Albion Chambers**

# K v H [2021] EWHC 1918 (Fam)

## Background

The full background to this matter is set out in the court's judgement at paragraphs.4-14. In summary, the parties married in Sudan on 3 June 2012. On 18 January 2014 the mother was given entry clearance to the United Kingdom on a spousal visa. The mother resided with the father at his home in London. In November 2014, B was born in the United Kingdom and E was born in March 2016 in the United Kingdom. Both children hold dual British-Sudanese citizenship.

On 25 April 2017 the mother and the children travelled to Sudan. In May 2017, the mother moved to live with her parents in Sudan. A dispute followed between the parties has to who was in possession of the children's passports. On the 30 May 2018, the father stated he was divorcing the mother. The mother sought confirmation of her divorce from the father on 9 September 2018, when she applied to the Sudanese court for an order evidencing the fact that she was divorced from the father. On 29 November 2018 the father applied in the jurisdiction of Sudan for a custody order, but was granted an order for weekly contact by the Al-Fasher Sharia Court. The dispute regarding the children's passports remained a live issue during throughout this time.

On the 29th January 2020, the mother returned to the UK, leaving the children in the care of her parents so as to report the father to the UK police with respect to alleged historic domestic abuse and withholding the children's passports. The father returned to Sudan in February 2020, returning to the United Kingdom in October 2020. The father made a further application in Sudan for a custody order with respect to the children on the grounds that they had been left by the mother in the care of the maternal grandparents. This was the father's second application that was again refused by the Sudanese court.

The mother remarried and had a baby daughter with her second husband. Her second husband is in Sudan and is awaiting entry clearance into the United Kingdom.

On 10 February 2021, nearly four years after the children went to Sudan, the mother issued a without notice wardship application in respect of the children in this court. The application form issued by the mother made no mention of the fact that the matters on which she relied in support of a without notice application had taken place as long ago as 2017. On 23 February 2021, Arbuthnot J made a passport order requiring the father to deliver up the passports of the children, and his passport, to the Tipstaff. The order was served on the father on 25 February 2021. The father denied that he was holding the children's passports. He was subsequently arrested with respect to allegations made by the mother of domestic abuse and currently holds the status of being released pending investigation.

## Issues before the court

The matter came before Mr Damian Garrido QC sitting as a Deputy High Court Judge. It was accepted by the parties that the court retained a residual *parens patriae* jurisdiction based on the long standing acknowledgement that in this jurisdiction there remains a residual *parens patriae* jurisdiction of the High Court over a child who is a British citizen but who is outside the jurisdiction of England and Wales. The issues before the court therefore were:

> i) Is this an appropriate case for the court to exercise its residual *parens patriae* jurisdiction based on the British nationality of the subject children?
>
> ii) If so, should the children be made wards of court and a return order granted under the inherent jurisdiction in respect of the children?
>
> iii) Should the passport order continue or be discharged?

## The Law

The precise nature and extent of the residual *parens patriae* jurisdiction of the High Court over a child who is a British citizen, and the question of whether that jurisdiction should be exercised (which is the issue in this case) has been the subject of much detailed examination by the higher courts.

In considering the following authorities: *Hope v Hope* (1854) 4 De GM & G 328, ***Re A* [2013] UKSC 60**, ***Re B (A Child)* [2016] UKSC 4** & *Re M (A Child)(Exercise of Inherent Jurisdiction)* [2021] 1 FLR 415, Mr Justice MacDonald considered that the following cardinal points of principle applied in determining whether the court should exercise its residual *parens patriae* jurisdiction based on the children's British Citizenship:

> i) Subject to the terms of the Family Law Act 1986, the court retains a residual *parens patriae* jurisdiction in respect of a child who is a British Citizen, which is exercisable notwithstanding that the subject child is outside the jurisdiction of England and Wales.
>
> ii) The residual *parens patriae* jurisdiction of the court is protective in nature.
>
> iii) The threshold for exercising the residual protective jurisdiction of the court is substantive and requires more than simply whatever the court considers to be in the subject child's best interests.
>
> iv) In order for the court to exercise its residual *parens patriae* jurisdiction there must exist circumstances which are sufficiently compelling to require or make it necessary that the court should exercise its protective jurisdiction with respect to the subject child.
>
> v) The need for caution when exercising the residual *parens patriae* jurisdiction of the High Court in respect of a child outside the jurisdiction of England and Wales is grounded in the well-recognised adverse consequences of the domestic court overreaching the jurisdiction of another State that has jurisdiction in respect of the child based on the primary connecting factors of habitual residence or physical presence.

Mr Justice Macdonald highlighted that the court did not have the benefit of a jointly instructed expert report on Sudanese law. However, Mr Macdonald gleaned in considering both parents letters from their Sudanese lawyers, that the following common propositions in respect to Sudanese law applied:

> i) The Islamic Family Law of 1991 (also referred to as the Sudanese Personal Status Act 1991) accords the courts responsibility for looking after the benefit of the children.
>
> ii) The custody of children does not automatically transfer to a Muslim father when the children reach the legal age prescribed by law. A father must file a suit and the court must be issued by the court before custody can be transferred upon the children reaching legal age.
>
> iii) The Islamic Family Law of 1991 (also referred to as the Sudanese Personal Status Act 1991) provides that a court may accord the custody of the male child after the age of seven and the female child after the age of nine to the mother or to a woman if the court deems it to be in the best interests of the child.
>
> iv) If the father were to be awarded custody this does not permit the father to leave the child in the care of another. If the father left the child with another person, or the residence of the father was different from the residence of the child, the court allows the mother or the maternal grandmother to seek the judgment of the court awarding custody.
>
> v) Where the children are in the custody of the mother, the Islamic Family Law 1991 accords the father a right to see the children and the court may make an order to that effect stipulating the time he can spend with the children.
>
> vi) Were the English court to determine that the children should return to their country of birth the Sudanese court would not seek to interfere as the court will not deny the child the ability to move with his or her custodian, the custodian mother being permitted to travel without permission.

## Outcome

The court having regard to the evidence, considered that it was not appropriate for this court to exercise its residual parens patriae jurisdiction in respect of the children in circumstances where B and E were habitually resident in Sudan, where the convenient forum for determination of welfare issues is Sudan and where, in that context, the evidence demonstrates no sufficiently compelling reason that the children require the protection of this court. The Sudanese courts were already seised in respect of issues concerning the children's welfare and the convenient forum for the parents to litigate with respect to the children's welfare was the forum in which the children are now habitually resident and in which they have been litigating for nearly four years. The court could not identify any sufficiently compelling reason having regard to the evidence before the court that would justify this court assuming a protective jurisdiction in respect of the children based on their nationality.

53. The court also discharged the passport order in respect of the father as it considered there was no basis for that order to subsist in light of the dismissal of the mother's application.

Case summary by **Yasmine El-Nazer**, Barrister, **Albion Chambers**

## A v A (Arbitration: Guidance) [2021] EWHC 1889 (Fam)

The parties had been married for 39 years. They were both aged 63. Proceedings were not issued in the Financial Remedies Court. They had agreed to arbitrate the financial provision matters arising from the breakdown of the marriage. They signed form ARB1 in February 2019. They issued petitions in July 2019. By agreement the decree nisi was granted on the husband's petition in March 2020. The decree was made absolute in November 2020.

The arbitration was to be heard in May 2020, but was adjourned to December 2020. The parties agreed many of the issues between them on 1 September 2020, which was incorporated into a working draft order. The arbitration therefore considered the remaining matters. The arbitrator handed down his 32 page decision ending with a summary of the award and declaration of what had been decided. The wife's advisers incorporated the award into the draft order and invited the husband to agree to submitting the order for approval by the FRC. The husband declined. He applied under s57 Arbitration Act 1996 for clarification and correction of the award. The arbitrator dismissed the application.

The wife applied in January 2021 to the Family Court (filing Form A and D11) for the husband to show cause why the draft order incorporating the award should not be made an order of the court.

The husband applied to the Business and Property Court under the 1996 Act. This was transferred to the Family Division.

The wife's application was transferred to the High Court so the application could be heard together as the Family Court had no jurisdiction under the 1996 Act.

Mostyn J described this as procedural chaos which prompted his Guidance. He held that the effect of ***Haley v Haley*** **[2020] EWCA Civ 1369** was that challenges to such an arbitration award should be treated as if an appeal from a DJ to a Circuit Judge in the Family Court. The test to be applied was was the award wrong. He identified that

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

## Re R (A Child) [2021] EWCA Civ 1019

These were care proceedings concerning the mother's youngest child, A. Proceedings in relation to seven older siblings had concluded in November 2019, with a District Judge approving plans for long-term foster-care (the oldest five), and making care and placement orders (the youngest two). The background was of domestic abuse and chronic extensive neglect. Proceedings in relation to A began in December 2019. The evidence included a PAMS assessment which recommended a bespoke teaching programme, and an assessment by an ISW who had subsequently carried out that work. The latter concluded that the mother had little insight into the role her parenting played in the removal of her older children, that she would need intensive input from services if A were to be placed in her care, and that she would be unlikely to work constructively with professionals. The Guardian considered that there were gaps in the evidence and proposed an adjournment to enable the Local Authority to set out the support that could be put in place to enable A to be cared for by her mother. For the Guardian, this was a 'finely balanced' case.

The Recorder gave an *ex tempore* judgment, concluding that the mother would be able to parent A with appropriate support, and that a support package along the lines of the one outlined by the Guardian in the witness box would best meet A's needs.

The Court of Appeal remitted the case for a re-hearing for the following reasons:

- The Recorder had set out his conclusion rejecting adoption before considering the welfare checklist and without having balanced the two competing options (namely, the return to the mother's care or the making of care and placement orders). Having rejected the plan for adoption, his welfare analysis was limited to merely considering whether A could be placed with her mother. Moreover, that welfare analysis did not include an analysis of the risk that the proposed rehabilitation to the mother might break down and the potential consequences of that for A.

- It was not simply a case where the Judge had informed the parties of his decision (ie rejecting adoption) and then proceeded to set out his reasons. He had failed to undertake a comprehensive welfare analysis of the pros and cons of the competing options. Particular care needs to be taken to carry out a comprehensive evaluation in cases such as this one which are described by the Guardian as 'finely balanced.'

- The test 'nothing else will do' was misapplied as a short-cut test in the way identified by McFarlane LJ in *Re W* [2017] 2 FLR 31.

- In any event, having found that a package of support was necessary to enable the mother to safely care for A, the Recorder was unable to undertake the required balancing exercise in circumstances where there was a lack of clarity as to what would be available.

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

## AE & JE v M [2021] EWHC 1957 (Fam)

This judgment is the final instalment in long running litigation, preceded by Baker J (as he then was) reported as ***FE v MR & Ors* [2017] EWHC 2298 (Fam)** in September 2017, **[2020] EWHC 162 (Fam)** in February 2020 and **[2020] EWCA Civ 1030** in August 2020. Ms Justice Russell was concerned with AE, rising 18 and JE aged 14. They had been caught in a jurisdictional standoff between the English and Spanish courts. There is a long and complex litigation history. In brief, they have Spanish parents and proceedings commenced in Spain in 2013. At the end of 2013 the children and mother moved to England and have remained here. There have been conflicting proceedings brought by the father in Spain, and by the mother in England.

In 2020, Ms Justice Russell made a child arrangements order (CAO) that the children live in England and refused F's application under BIIa for registration and enforcement of an order of December 2018 made by a Spanish court that the children live with F in Spain. The English court provided for F to withdraw all family and criminal proceedings in Spain. F appealed to the Court of Appeal, and simultaneously applied to the Spanish Court for without notice orders, seemingly without informing the Spanish Court of Ms Justice Russell's orders. The Spanish Court ordered that if the children travelled to Spain they should be detained by police and placed with F. The mother and children travelled to Canarias on holiday, unaware of the orders.

The judgment recounts the traumatic events of: their removal from an aeroplane; their detention; separation from their mother who was arrested; being forcibly placed with their father; fleeing to France where they met up with the mother only for a European Arrest Warrant having been activated. The mother was further arrested, and the children were placed in foster care. The children contacted a solicitor in England, and were made wards of court. With the support and cooperation of the British Embassy in France the children were eventually returned to the UK. The mother further applied to the Spanish Court for recognition and enforcement of the Order of Mrs Justice Russell, but this was dismissed. The children sought a new CAO that they live in England with their mother and have no contact with their father. They intend to apply for recognition and enforcement in Spain pursuant to the 1996 Hague Convention of 19th October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Convention) or to BIIa (as the application predated 31.12.2020) to end the children's current position whereby they are unable to travel to Spain for fear of being detained and forcible placed with their father again. The CAO and declarations as to habitual residence sought were made.

Case summary by **Sarah Tyler**, Barrister, **Coram Chambers**.

## HW v WW [2021] EWFC B20

The parties agreed a consent order at an FDR on 12 March 2020, whereby the wife ("W") would retain the FMH and the husband ("H") would retain the parties' jointly owned company, which distributed commercial printers and copiers. W was to receive 40% of the available capital on the basis that H's choice to retain the company carried greater risk (and greater potential reward). The consent order included provision for H to pay W £1,000,000 by 12 April 2022 with the first lump sum of £750,000 payable by 10 June 2020.

H applied to stay the lump sum provision for 12 months on 5 June 2020 due to cash flow deficiencies in the company. W sought enforcement of the consent order. H applied to set aside the order in its entirety in November 2020, on the basis that "*circumstances that were unforeseen and unforeseeable have significantly changed the assumptions upon which the Order was made*". H estimated that the value of the company had fallen from £3,500,000 (as assessed by an SJE for the FDR) to £1,265,000 and claimed he had no prospect of raising the lump sum due.

HHJ Kloss accepted that the Covid 19 pandemic and its impact upon a key asset is a potential Barder event opening the door to set aside an order. The pandemic may be something unforeseen and unforeseeable occurring since the date of the hearing and altering the value of assets so dramatically as to bring about a substantial change in the balance of assets brought about by the order (*Cornick v Cornick* [1994] 2FLR 530). In this case, the "*event*" is the Covid 19 pandemic and the consequential impact upon the value and liquidity within the company.

H had to prove that the event was unforeseen and unforeseeable. The test for foreseeability was whether as at 12 March 2020 H could reasonably have foreseen a risk that the Covid 19 pandemic might have a significant impact upon the trading position of the company.

HHJ Kloss determined that the risk to the company was reasonably foreseeable at FDR because the Covid 19 pandemic was developing by 12 March 2020. H is an experienced and successful businessman and would have seen that the UK business world was preparing for disruption, emergency economic measures were being taken all over the world, and the stock market was falling dramatically. It is not required that the full extent of the impact of the event was foreseeable.

The SJE identified risks to the company in his report (e.g. Brexit, currency fluctuations, loss of exclusive distribution, paperless office) and had they come to pass H could not have sought to set aside the order, however severe the impact. H cannot be put in a better position with respect to the impact of Covid 19 than to other risks.

A Barder application must look to the long term and not a snapshot in time. The change to the company was to be evaluated by reference to the '*broad guide*' of the SJE valuation, while looking to the long term and viewing the assertions of the party seeking to resile from the order with a healthy degree of scepticism. The court must ask whether the changes are so dramatic and fundamental to justify the reopening of a final order, designed to bring an end to proceedings. The change to the value of company was not fundamental enough to meet the deliberately high Barder test because the company remains viable and profitable, particularly in the long-term.

Case summary by **Beth Hibbert**, pupil barrister, **1GC Family Law**.

## AA v BB [2021] EWHC 1822 (Fam)

At the commencement of a fact-finding hearing, counsel for the respondent father raised a number of preliminary points. The point about the evidence was that the mother's statement included allegations going beyond the five permitted in the Scott Schedule, and so did the other statements. The order of 27th October had specified that the parties' statements should be limited to the evidence in respect of the allegations on the Scott Schedule and there was no direction (either requested or granted) for statements from any other witnesses. The Recorder was asked to exercise case management powers under FPR 22.1 and exclude the additional evidence.

The Recorder granted the application, for the most part, and directed that the mother file a replacement statement omitting specific material. He allowed a short statement from the nanny which was general in its allegation that the father came across as abusive and controlling. The grandmother's statement was said to be objectionable in parts but there was no direction for it to be redacted or redrawn and filed. Evidence from professionals as to what had been said to them and counsel's opinion to the father in an employment case.

The judge sympathised with the father's objections, given the terms of the direction and the filing of the evidence shortly before the fact finding. The original directions had been given before the decision in *Re H-N* and neither appealed nor varied. However, the fact-finding had been adjourned for administrative reasons to September 2021 and so there would have been time for the father to prepare and respond to the new issues and evidence. Judd J decided that the evidence to be filed from the mother was relevant saying

> "The allegations beyond those in the Scott Schedule were not either inadmissible or irrelevant; quite the opposite. The fact that the father was alleged to have hit the older child not once but several times was plainly an allegation of a pattern of behaviour which is highly relevant to an application for contact. So too were allegations he had forced the mother to have sex on several rather than one occasion, that as well as being physically violent to him the father treated the older child in a humiliating manner, and that he was a bully. These matters are also relevant to the father's case, in particular that the mother was the one who was violent, not him, and that she was alienating the children from him. These allegations (some of which had been set out in the mother's initial C1A) demonstrated that strict adherence to single incidents in the Scott Schedule would have to be reconsidered.

But she added that:

> "There will be occasions when a judge refuses to admit relevant evidence produced at the last minute before a hearing, when, for example it is not highly significant in relation to the other evidence and/or it cannot be adduced fairly without an adjournment of the trial which will itself cause harm and delay for the child."

Directions were then given for the mother to file a fresh narrative statement setting out the factual matters on which she relied including any allegations of a pattern of violent, abusive or controlling behaviour, to which the father was to reply including any allegations which he makes. A PTR was set to consider the allegations and what factual issues need to be resolved by the court. The need for evidence from treating doctors, the grandmother and nanny would be considered in this context.

The judge noted the President's comments in "The Road Ahead" (2020) about the limited time the courts could make available to determine factual dsiputes, saying that she therefore does not underestimate the challenges of case management in these cases.

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

# T(A child) [2021] UKSC 35

THE COURT ORDERED that no one shall publish or reveal the name or address of the Appellant who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Appellant or of any member of her family in connection with these proceedings.

## Justices

Lady Black, Lord Lloyd-Jones, Lady Arden, Lord Hamblen, Lord Stephens

## Background to the Appeal

This appeal concerns the use of the inherent jurisdiction of the High Court to authorise a local authority to deprive a child of his or her liberty. The background to the litigation is the shortage of provision for children who require special limitations on their liberty, for example by a placement in one of the small number of approved secure children's homes in England and Wales, but for whom no space is available, or who would be better served by highly specialised care albeit still with their liberty limited. This shortage has forced local authorities to seek orders from the High Court under its inherent jurisdiction authorising alternative restrictive placements of children elsewhere than in an approved secure children's home. A secure children's home is typically accommodation designed for the purpose of restricting liberty, and while the regime may vary from home to home, would commonly include extensive CCTV, high fencing or walls with limited views, and reinforced and locked doors and windows.

These proceedings were begun by Caerphilly County Borough Council ("CCBC") in July 2017 to address the care of T, who was then a 15-year-old in CCBC's care by virtue of a care order. In view of her particular needs, CCBC intended to accommodate T in a placement in England which was not a registered children's home or approved for use as secure accommodation, in circumstances which involved her being deprived of her liberty. It applied to the High Court for an order under the inherent jurisdiction authorising it to deprive T of her liberty there, and the order was granted. After that placement broke down, the court authorised CCBC to deprive T of her liberty in a registered children's home in England, which was not approved for use as secure accommodation.

There are two main issues before the Supreme Court:

> i. **First**, is it a permissible exercise of the High Court's inherent jurisdiction to make an order authorising a local authority to deprive a child of his or her liberty in this category of case? T argues that such a use of the inherent jurisdiction in this case is barred by the Children Act 1989 (the "*CA 1989*") and contrary to article 5 of the European Convention on Human Rights (the "*ECHR*"). This argument was not advanced before the courts below.
>
> ii. **Secondly**, if contrary to T's argument the High Court can have recourse to its inherent jurisdiction to make an order of the type in question, what is the relevance of the child's consent to the proposed living arrangements? T argues that consent is highly relevant, and that as she consented to the placements, it was contrary to her best interests to make the orders. These issues are no longer of relevance to T personally, whose circumstances have changed, but they continue to affect a significant number of children.

## Judgment

The Supreme Court unanimously dismisses the appeal. It holds in particular that the use of the inherent jurisdiction to authorise the deprivation of liberty in cases like the present is permissible, but expresses grave concern about its use to fill a gap in the child care system caused by inadequate resources. Lady Black gives the main judgment, with which Lord Lloyd-Jones, Lord Hamblen and Lord Stephens agree, and Lord Stephens gives a short concurring judgment, with which Lady Black, Lord Lloyd-Jones and Lord Hamblen agree. Lady Arden gives a short judgment setting out her additional reasons for agreeing with the judgments of Lady Black and Lord Stephens.

## Reasons for the Judgment

### *Issue 1: the use of the inherent jurisdiction to authorise a deprivation of liberty*

Local authorities have statutory duties to protect and support children, including a specific duty to provide any child in care with accommodation. Section 25 of the CA 1989 in England, and section 119 of the Social Services and Well-Being (Wales) Act 2014 in Wales, are the basis of a regime for placing, in limited circumstances, a child who is being looked after by a local authority and who is at risk of harm in accommodation provided for the purpose of restricting liberty ("*secure accommodation*"): **[30]-[44]**. Regulations provide that a children's home must only be used as secure accommodation if it has been approved for that purpose by the Secretary of State for Education (in England) or by the Welsh Ministers (in Wales); and that children's homes must be registered with Ofsted (in England) and Care Inspectorate Wales (in Wales). Any person who carries on or manages a children's home without being registered commits an offence: **[45]-[62]**.

The shortage of such placements has prompted local authorities to seek orders from the High Court under its inherent jurisdiction, authorising them to deprive children of their liberty in other accommodation. The inherent jurisdiction is a means of providing protection for children whose welfare requires it. It has been described as the great common law safety

net which lies behind all statute law: **[63]-[68]**. But it is subject to limits. Section 100 of the CA 1989 prohibits the use of the inherent jurisdiction to confer, in particular, power to determine any question in connection with any aspect of parental responsibility for a child on a local authority. That, however, reflects the requirement of the CA 1989 that local authorities which need such a power must obtain a care order. It does not prevent recourse to the inherent jurisdiction in a case such as this, where the local authority already had parental responsibility by virtue of a care order: **[106]-[121].**

As to the contention that the use of the inherent jurisdiction cuts across section 25 of the CA 1989, there are no findings as to the precise regulatory status of T's placements. But it is in any event unthinkable that the High Court should have no means to keep children safe from extreme harm. If the local authority cannot apply for an order under section 25 because there is no secure accommodation available, the inherent jurisdiction can be used to fill that gap. Where there is absolutely no alternative and where the child, or someone else, is likely to come to grave harm if the court does not act, the inherent jurisdiction may be used to authorise a local authority to deprive a child of his or her liberty, notwithstanding that the placement will be in an unregistered children's home in relation to which a criminal offence would be being committed: **[122]-[145]**. Nor does the use of the inherent jurisdiction in these circumstances fall foul of article 5 ECHR, given the safeguards which the courts have devised, in particular by mirroring the procedural protections applicable in a section 25 application: **[150]-[155]**.

Lord Stephens notes that any order made under the inherent jurisdiction to authorise a deprivation of liberty where the placement is in an unregistered children's home does not authorise the commission of a criminal offence or prevent an offence from being committed. He emphasises the matters which must be considered prior to a court authorising a placement in an unregistered children's home and the ongoing monitoring which must take place thereafter: **[170]-[172]**, and notes that such a placement may also be justified, and required, where the positive operational duties to take steps to protect life or prevent inhuman or degrading treatment under articles 2 and 3 ECHR are engaged: **[174]-[177].** This is a temporary solution developed to deal with an extremely difficult situation caused by a scandalous lack of provision. The appropriate permanent solution is the provision of appropriate accommodation**: [178].**

Lady Arden states that she has difficulty with the limits of the inherent jurisdiction in this case. She goes no further than to countenance its use in the exceptional circumstances described by the Secretary of State, for children 16 and above, which are likely to arise in an emergency following a placement breakdown where the consequences of the court being unable to authorise a deprivation of liberty are likely to be dire: **[181]-[182]**.

## *Issue 2: the relevance of the child's consent to the proposed arrangements*

T argues that it would have been conducive to her welfare if the court had placed more weight on her consent to the restrictive placements, rather than making an order. But, Lady Black notes, an apparently balanced and free decision made by a child may be quickly revised. That is illustrated by the facts of this case, where T's behaviour in the first placement confirmed the judge's view that her consent was not genuinely expressed. There is therefore no basis for holding that the judge was wrong to authorise restriction of liberty in T's case, and her argument is entirely academic. Lady Black acknowledges, however, that any consent on the part of the child will form part of the circumstances that the court must evaluate in considering an application for an order authorising a local authority to restrict a child's liberty: **[156]-[161].**

*References in square brackets are to paragraphs in the judgment*

**Supreme Court Press Summary**