September 2021

Family Law Week

NEWS

Organisations call on Education Secretary to protect the rights of unaccompanied children in Kent

Over 65 organisations have written to Education Secretary Gavin Williamson to express serious concerns over the treatment of unaccompanied migrant children arriving in Kent.

Extremely vulnerable, unaccompanied migrant children are being held in short-term holding facilities and accommodated in hotels with very limited adult supervision and care, according to reports in the media and to the Home Affairs Select Committee.

The organisations have complained concerning the Department for Education's authorisation for the Home Office to place children seeking asylum in Kent in minimally supported hotel accommodation.

The letter urges him to ensure these vulnerable children are given the care and protection they are entitled to by law.

For the letter, **click here**.

6/8/21

Domestic Abuse Act: statutory guidance consultation launched

The Home Office has issued a consultation seeking views on draft domestic abuse statutory guidance which will support the implementation of the definition of domestic abuse at sections 1 to 3 of the Domestic Abuse Act 2021. The key objectives of the guidance are to:

- provide clear information on what domestic abuse is in order to assist with its identification
- provide guidance and support to frontline professionals, who have responsibilities for safeguarding and supporting victims of domestic abuse, for example through outlining relevant

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strategic and operational frameworks

- improve the institutional response to domestic abuse by conveying best practice and standards for commissioning responses.

For details of the consultation, which closes on 14 September 2021, **click here**.

6/8/21

European Convention on Human Rights protocol no. 15 comes into force

On 1 August 2021 Protocol no. 15 to the European Convention on Human Rights came into force, following its ratification by all 47 State Parties. Amongst other changes, the protocol:

- includes a reference to the principle of subsidiarity (according to which the primary responsibility for protecting human rights under the European Convention on Human Rights falls to each individual State Party) and the doctrine of the margin of appreciation (the "space for manoeuvre" that State Parties are given in fulfilling their obligations under the Convention) to the Preamble to the Convention

- shortens from six to four months the time limit within which an application must be made to the ECtHR (this is from the date on which the final decision was taken at the national level, when all domestic remedies have been exhausted)

- removes the rule preventing rejection of an application that has not been duly considered by a domestic tribunal where the applicant has not suffered a "significant disadvantage".

For more details, **click here**.

6/8/21

President of the Family Division's transparency review update

Following a call for evidence, three days of oral submissions and further meetings with his panel of advisers, the President of the Family Division has now concluded his review on Transparency in the Family Court.

The President wishes to thank all those who have contributed to what has been a comprehensive and helpful process. For summaries of the sessions, **click here**.

The findings of the President's Review will be published in October. Full details of the launch and publication will be announced in due course.

6/8/21

Emotionally charged: costs on divorce and dissolution

The implementation of the Divorce, Dissolution and Separation Act 2020 (DDSA) will remove the elements of divorce that have been shown to provoke, or exacerbate, conflict between separating couples. While this is welcome, it raises questions about payment of the cost of the divorce process, including the £550 court (petition) fee and any legal fees, according to new analysis from the **Finding Fault** study, led by Professor Liz Trinder and funded by the Nuffield Foundation.

The study uses data relating to costs collected in 2015-2017 under the existing divorce law to consider the implications for the new legal framework for costs when the DDSA comes into force in April 2022. This analysis is presented in ***Emotionally charged: costs on divorce and dissolution***.

The report identifies multiple problems with how the current costs regime operates in practice. These include costs not being equally accessible to all petitioners, a decision-making process that is procedurally unfair to respondents, and exacerbation of conflict between divorcing couples.

Many of these difficulties can be attributed to the fault-based premise of current practice, but removing fault may not resolve all of them. There is, according to the study, evidence that whether and how people claim for costs can reflect moral judgements and attribution of blame between the parties and does not always map neatly onto the five facts. In addition, for some people, the £550 cost of the divorce petition puts extreme pressure on family finances post-separation, regardless of whether costs were claimed or awarded.

In light of this, the report makes a number of recommendations:

- Costs in matrimonial cases should only be available on the basis of litigation misconduct and 'conduct' should be tightly defined to exclude conduct prior to proceedings and/or as a consequence of proceedings. Costs may therefore only be claimed at conditional order stage, not on application.

- Any costs awards are restricted to compensation for additional expenses arising directly from the litigation conduct, therefore excluding the initial application (petition) fee or initial legal advice.

- There should be an increased focus on measures to prevent difficulties giving rise to litigation misconduct. Those measures could include: freezing or reducing the issue fee of £550 so that its financial significance is reduced; encouraging the voluntary sharing of the costs of the application; ensuring that information for respondents is clear and accessible, sets out precisely what steps respondents must take together with clear, but respectful, warnings about potential liability for costs for delayed or non-response; and ensuring that family justice stakeholders – lawyers, HMCTS and the judiciary – are clear about the cultural change that the DDSA

introduces for costs.

- The operation of the costs regime should be monitored to ensure it remains consistent with the policy aims of the DDSA.

For the report, **click here**.

6/8/21

Dispute Resolution in England and Wales: Call for Evidence

The Ministry of Justice is **seeking evidence on Dispute Resolution** from all interested parties, the judiciary, legal profession, mediators and other dispute resolvers, academics, the advice sector, court users.

The MoJ is particularly interested in collecting evidence from individuals or organisations with data to share on the relevant questions; or those who have had experience of dispute resolution within and outside of the courts system to support the development of more effective dispute resolution mechanisms. The MoJ would welcome frontline insights with tangible examples.

Responses will shape future reforms to civil, family and administrative justice, with Ministers determined to help more people resolve their issues without the stress and cost of a court case. The consutation will examine whether new technologies, as well as services such as mediation and conciliation, could provide smarter and less adversarial routes for finding resolutions.

The step looks to build on the success of recent reforms which have seen private law family claims, for example, move online.

The closing date for submissions is 30 Sept 2021.

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

6/8/21

New private law cases received by Cafcass in July fell by over 16 per cent

Cafcass received a total of 3,774 new private law cases in July 2021 which is 740 cases (16.4 per cent) fewer than the same period in 2020. These cases involved 5,588 children, which is 1,305 (18.9 per cent) fewer children than July 2020.

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

13/8/21

New public law cases received by Cafcass fell by 14 per cent in July

Cafcass received 1,481 new public law cases in July 2021 featuring 2,331 children; this represents a decrease of 14.3 per cent (248 public law cases) and a decrease of 16.3 per cent (453 children) on the 1,729 new public law cases received and the 2,784 children on those cases in July 2020.

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

13/8/21

Eleven Practice Directions updated

Practice Direction Update No 5 came into force from 15 July 2021 and amends eleven Practice Directions as detailed below:

- Practice Direction 3AA (vulnerable persons): to implement the changes made to the special measures' regime through the Domestic Abuse Act 2021;
- Practice Direction 5A (forms): to insert reference to the new contempt application form (FC600), which will come into use from 30 July, latest;
- Practice Direction 5B (communication and filing by email): to clarify procedure for debit/credit card information and for the sending of confidential information;
- Practice Direction 12J (domestic abuse and harm): makes amendments relating to sections 1 to 3 and 63 of the Domestic Abuse Act 2021;
- Practice Direction 17A and 22A (statements of truth): to clarify that providing false information can lead to contempt of court proceedings;
- Practice Direction 27B and Practice Direction 36J (legal bloggers): to make the Legal Bloggers pilot permanent and to make clear who this will apply to. In turn, pilot PD36J has been updated to note that it will come to an end on 30 September 2021, as from 1 October 2021 and that it will be replaced by the amended r27.11 FPR and PD27B;
- New Practice Direction 29D (court officers making corrections to orders): to make clear situations where a court office can make an amendment to an order, without prior reference to a judge or a Justices' Legal Adviser;
- Practice Direction 36M (online public law): to amend the expiry date of Practice Direction 36M to 1 February 2022 and to mandate use of the online public law service in certain Designated Family Judge courts;
- Practice Direction 36Q (pilot scheme: local variations to the CAP: Covid): to amend PD36Q from 1 October 2021 to require information to be given about local variations to the CAP;
- Practice Direction 36X (piloting mandatory use of online divorce): this new pilot practice direction will mandate use of the online divorce system by applicants' legal representatives, from 13 September 2021;
- Practice Direction 36Y (pilot scheme: modification of various PDs: post-Covid): this new pilot practice direction will come into place when the current Covid-related pilots PD36Q and PD36R come to an end. It will pilot for a further 12 months the

modifications currently in place under PD36Q and PD36R. The pilot practice direction includes a requirement for provision of information about local modifications to the CAP.

For the current version of the Family Procedure Rules, including the amended Practice Directions, **click here**.

15/8/21

Police awarded £11.3m for programmes to prevent domestic abuse and stalking crimes

The Home Office has awarded £11.3 million to 25 Police and Crime Commissioners (PCCs) in England and Wales, to go towards domestic abuse intervention programmes.

The programmes focus on interventions encouraging behaviour change to help stop perpetrators from committing domestic abuse, with the ultimate aim of preventing further crimes from being committed.

Funding will also focus on key areas such as stalking prevention and supporting adolescent perpetrators.

Specific interventions and projects across the country which the funding will go towards include:

- providing targeted support to address substance misuse, mental health and unemployment;
- therapy and Compulsive and Obsessive Behaviour programmes to address behaviours linked to stalking;
- behavioural change courses for children and adolescents who are abusive, violent or using self-destructive behaviour, often as a result of having been exposed to domestic abuse within their home environment;
- perpetrator support work in schools including healthy relationships education, delivered by professionals as part of the relationship and sex education requirement of schools.

For more details, **click here**.

15/8/21

Marriage rates for opposite-sex couples in 2018 the lowest on record

Marriage rates for opposite-sex couples in 2018 were the lowest on record, with 20.1 marriages per 1,000 unmarried men and 18.6 marriages per 1,000 unmarried women. The figures appear in the **latest marriage statistics** published by the Office for National Statistics which detail the number of marriages that took place in England and Wales analysed by age, sex, previous marital status and civil or religious ceremony.

There were 234,795 marriages in England and Wales in 2018; a decrease of 3.3 per cent compared with 2017 and the lowest since 2009.

In 2018, there were 6,925 marriages between same-sex couples, with 57.2 per cent between female couples; a further 803 same-sex couples converted their civil partnership into a marriage.

Around one fifth (21.1 per cent) of opposite-sex marriages in 2018 were religious ceremonies, the lowest on record; in contrast, religious ceremonies accounted for only 0.9 per cent of same-sex marriages.

In 2018, the average age at marriage for opposite-sex couples was 38.1 years for men and 35.8 years for women; for same-sex couples the average ages at marriage were 40.4 years and 36.9 years respectively.

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

15/8/21

Care leavers and council tax – Welsh Government consults

The Welsh Government is consulting on the removal of eligible care leavers from joint and several liability for council tax, and a proposal to amend legislation to remove this liability. At present joint and several liability for the payment of council tax would arise where another person in the household who is not exempt fails to pay their council tax.

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

21/8/21

£20 million to provide more early help for vulnerable families

The Department for Education has announced a multi-million-pound investment to improve access to early education, health and care services for vulnerable or low-income families in England.

The Government has set out plans to elevate its Family Hubs programme, backed by £20 million of new funding, that will support councils to set up new Family Hubs in up to 10 new areas.

Family Hubs offer families, children and young people somewhere to access a range of support services, which can include early education and childcare, mental health support, meetings with health visitors or attending parenting classes, counselling or advice for victims of domestic abuse.

The hubs – delivered in person and supported virtually via online services – help families, children and young people

more easily access the help they need, regardless of where in the country they live. They bring services together into one place, preventing parents and carers from having to search for different types of support that might otherwise be too hard to find, especially for those on lower incomes, helping build connections between families, professionals and voluntary services.

For more information, **click here**.

21/8/21

Judge makes appeal for return of Knox Jefferies

HHJ Wildblood QC, sitting as a Judge of the High Court in Bristol, has invited the press and the public to assist in finding a mother and child. The child is Knox Jefferies who is aged 10. The mother is Kelly Jefferies who is aged 42. Following the issue of care proceedings by South Gloucestershire Council, the mother and Knox went missing from the Patchway area of Bristol on or about 28th July 2021. They are believed to have travelled, initially, to the Oldham area of Manchester. However, their whereabouts remain unknown and it is not known whether they remain in that area.

The Bristol court, police and South Gloucestershire Council are anxious to locate the mother and child, in order to ensure their safety and wellbeing. If anyone has any information that would help locate them, please will they contact the police by ringing 101 and quoting reference number 5221171972 or the Local Authority (whose website gives these numbers for safeguarding concerns – 01454-866000 or, out of hours, 01454-615165).
The Family Court at Bristol may be contacted by ringing 0117-366-4880 or emailing *family.bristol.countycourt@justice.gov.uk* .
21/8/21

'Bride price' judgment due

An important judgment that could align the law in England and Wales with sharia law in relation to 'bride price' payments is due to be handed down in the Central Family Court.

Bride price is money or property paid or promised by a groom or his family to the woman or the family of the woman he will marry.
Nazma Quraysha Brishty has brought proceedings against her former husband, former mother-in-law and former father-in-law, Maksudul, Shahinur and Izaharul Halder, to enforce payment of her bride price, which she says is worth approximately £55,000.

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

21/8/21

Is the public law family justice system failing those it is supposed to serve?

Celestine Greenwood, barrister of Exchange Chambers, offers a personal observation as to the extent that the family justice system adequately and properly serves our society.

My aim and hope in writing this article is to provoke thinking and discussion amongst practitioners engaged, and others interested, in the work of the public law family system.

I note that **the recommendations of the Public Law Working Group** are being implemented and that the issues raised in this article may have better served that process if raised earlier. It is not my intention to undermine that process but rather to add to the discourse. I also note however that **the interim report of The Independent Review of Children's Social Care** led by Josh MacAlister was issued on 17th June and that having made initial findings, the Review will now consider those findings further. Therefore, these observations, which are offered as a personal comment based on my professional experience rather than formal research, may be timely after all.

This article is based on 20-plus years at the Bar dedicated to family work and largely relies on direct personal experience as well as anecdotes gathered from years of conversations with other professionals. Having served the public in this way (and I do see what we do as 'service') for 20 years, in 2011 I took a sabbatical that morphed into an eight-year sojourn overseas. The lure of this noble profession, however, saw me return to practice in the summer of 2019. The frustrations and questions raised in this article are borne out of these decades of experience and a growing imperative that I cannot stand by and say nothing about issues that matter to me very deeply. I believe that some of the frustrations and questions I raise resonate with many of my colleagues and will resonate with the reader.

I wish to make clear that I do not intend, in any way, to demean the efforts of any engaged in the system – for the most part all concerned are dedicated and passionate about the work we do.

In my experience colleagues' dedication and passion are invariably married with a superlative work ethic. Indeed, these three qualities ensured that the system moved almost seamlessly to remote working and has continued to grind on in spite of the pressures imposed by a seemingly ever-increasing workload and the impacts of remote working. All concerned, judges, court staff, CAFCASS officers, lawyers and advocates, social work professionals are to be commended and respected – this article is not intended to diminish their efforts one iota.

However, 20-plus years at the 'coal face' of the family Bar doing public law work (care cases) has engendered several concerns and frustrations that cause me to question the extent to which the current system adequately and properly serves our society. These include, but are not necessarily limited to, questioning: the very purpose of the Family Law System (and the child protection system as a whole); whether the test for "good enough parenting" that we apply in practice is unrealistically high; the insufficiency of resources for the children's social care services and legal services; the availability and inconsistency of didactic and supportive intervention with families; whether the **26-week timescale implemented by the Public Law Outline** for the resolution of such cases is unrealistic; whether enough of those who comprise the system have become so risk averse that the system itself is now too risk averse; and ultimately, therefore, whether we have denuded the test for separating children from their family namely, it must be necessary and proportionate, to an unacceptable level.

The first and pivotal question to be asked in considering the fitness for purpose of the public law family system is to consider what society expects and needs the system to do.

The purpose of the public law family justice system

In public law children proceedings the Family Court acts as the gatekeeper and adjudicator of the local authority's application by determining whether the interference or proposed interference in the life of the family is lawful and justified. As Lady Hale said in her dissenting judgment in ***Re B*** **[2013] UKSC 33**, paragraph 204, "… the courts have the duty to assess the proportionality of the proposed interference for themselves." This requires the Court to scrutinise both the evidence advanced to satisfy the "threshold criteria" for the making of an order, namely whether the subject child "…is suffering or is likely to suffer, significant harm" (**Children Act 1989, section 31**) and if so, then to scrutinise the local authority's plan for the child, the test being whether it is both necessary and proportionate, and in the child's best interest (applying the checklist in section 1(3) of the Act). In short, the Court acts as a check and balance on the action of the State and its interference in the life of a family.

This adumbrates the role of the Court but does not necessarily address the key question: what Society wants the public law family justice system to do. District Judge Crichton, when formulating the idea of Family Drug and Alcohol Courts (FDAC) asked, "What is it that family courts are there to do? Just take away children? Or are we there to provide part of the whole construct of support around families to try to enable children to remain within their families?" (***Introduction to FDAC***) I respectfully echo his words and suggest that too often the current system can seem to exist simply to take children away rather work to enable them to remain within their families. In my view, we need to rethink the public law family justice system as a whole using the FDAC model as a useful template, in each case creating a team of professionals to provide the intensive treatment and support for parent(s) that is all too often needed as well as test capacity for change.

Good enough parenting and assessment

Whatever your view about the purpose of the system, we can probably agree that Society as a whole would generally expect parents to bear the responsibility for bringing up children they have brought into this world and would not expect that responsibility to be placed on others unless really necessary.

Accordingly, we do have to grapple with the issue of where the bar is set for the removal of children from parents. Generally, we refer to "*good enough parenting*." Inherent in this must, I would argue, be an acceptance that childhood is replete with risk of harm and that suffering some harm is not always inimical to our best interests or to our development as well-rounded, contributing members of society. There is no such thing as a 'perfect parent' and perhaps the generality of risk of harm inherent in being parented is best encapsulated by Philip Larkin in his poem, infamous to adolescents required to read it for GCSE English, ***This Be The Verse***.

Sir Andrew McFarlane, the President of the Family Division, reminded us all **in a speech given on 19th November 2019** of the wise and axiomatic words of judge Sir Alan Ward made in 1990 that in every case "there is a spectrum of abuse and an index of harm". The issue becomes where on that spectrum we set the cutoff (a) for care proceedings and (b) for the removal of children from parents.

In considering what we should expect from adults in terms of their capacity as parents we will recall the advice given by Lord Templeman in *Re KD (a minor ward)(termination of access)* [1988] 1 AC 806 at page 812,

> "The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not in danger. Public authorities cannot improve on nature."

This was subsequently emphasised by Sir Mark Hedley in the case of ***Re L (Care Threshold Conditions)*** **[2006] EWCC 2**, [2007] 1 FLR 2050 at paragraph 50,

> "…society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, whilst others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the State to spare children all the consequences of defective parenting. In any event, it simply could not be done."

My concern is that all too often the relatively low bar (of acceptable parenting) expostulated by Lord Templeman and Sir Mark Hedley is arguably improperly raised in individual cases. In many cases parents are subjected to psychological assessment and their scores in personality, psychopathology and intelligence testing are pored over by all concerned. It is perhaps ubiquitous that many parents who engage in this testing have their own experiences of harm and trauma, whether as children or as adults, and that these have either been influential in personality development or represent issues that would benefit from therapeutic input. Given the various harms to which many in society will probably have been exposed by the time they become a parent, to say nothing of the added difficulties that mental ill-health or low intellectual capacity

may add, I wonder just how many of us would sail through a psychological assessment without any features contraindicative to being a good enough parent.

Whilst experts conducting such assessments are often asked to opine on the parent's need for therapy and the timescales for the same, we are then often met with no available resources to provide the therapy identified as needed (or an indefinite waiting list to access the same) and/or with the assertion that the timescale for therapy is outside the child's timescales. This begs the question 'what is the child's timescales in such cases especially when balanced against the risks of harm inherent in permanent separation?' According to **Department for Education statistics for the year ended March 2019**, 10 per cent of looked after children had experienced three or more placements in the previous 12 months. There have certainly been some cases in which I have been involved, where I have struggled to see how this experience better served the child than remaining at home with a parent undergoing psychotherapy and/or striving to come to terms with an abusive relationship, traumatic childhood, addiction, or other issues. Further, the **outcomes for looked after children** suggest that these children are not necessarily thriving; educationally they tend to fare less well than other children.

Insufficiency of resources

This insufficiency of psychotherapeutic resources also extends, in some areas, to an insufficiency in resources amongst local authorities charged with protecting children and providing support to those 'in need' under section 17 of the Children Act 1989.

Upon my return to the Bar I was concerned to learn that the Sure Start Centre I would pass every day on my way into Chambers had, like many others, closed. At the peak of the programme there were over 3,500 such children's centres across the country. In my experience these local centres provided an invaluable lifeline to parents, some without any positive model of parenting in their own lives, via which they could learn skills and be reassured that they were not alone in their experiences, as well as a source of significant support to their children. I was not surprised therefore to read that research conducted in 2019 by the Institute for Fiscal Studies found that the availability of Sure Start Centres halved the differential rate of hospitalisation between the poorest and richest children, and that research conducted in that same year by a child psychiatrist found that closure of these centres has increased pressure on children's mental health services. It is estimated that since 2009 approximately 1,000 Sure Start Centres have closed and that funding for children's centres reduced by two-thirds nationally between 2011 and 2017.

The loss of children's centres is just one aspect of lack of funding for services that have the potential to make a real difference in the ability of parents to provide good enough parenting and for the holistic needs of the child to be met.

Didactic intervention and support and consistency of the same

As noted above, by the time a case gets to court as an application for a care order it is likely either that children's social care services already know a great deal about the issues afflicting the family (for example via pre-proceedings or assessment whilst children are accommodated under section 20, if that has taken place) or there has been a crisis event that nonetheless highlights in a profound snapshot of the issues affecting the carers and the child. It is not unusual for a parent involved in care proceedings to have little or no adequate modelling of good enough parenting. These parents need and deserve the opportunity to be taught, and then to demonstrate the requisite skills. Again, my professional experience reveals a significant disparity amongst local authorities in the availability and quality of parenting courses such as the **Triple P – Positive Parenting Programme**.

In some cases parents are given the opportunity to enter a residential assessment unit with their child(ren) during the proceedings. Once again, the quality of these resources varies as does the extent to which the assessment experience is actually didactic as opposed to purely observational. It seems obvious that placing a family in a unit where the assessment is largely or wholly observational serves little if any use, especially if the family has already been the subject of assessment in the community. In such circumstances it can seem more like a cruel sop to the interest of the system in being seen to have given the parents 'a chance.' Further, I question the resilience and internal resources required to bear the intrusion and pressure of continued observation over a 12-to-16-week period, including at least initially for 24 hours per day.

As argued above, a move towards a system akin to that used in FDACs would at least ensure that all parents are afforded the opportunity for appropriate professional input and support, not just observation and assessment.

26 weeks' time limit

The Public Law Outline introduced in April 2008 sets a 26-week timetable for the resolution of public law proceedings. At the time of its introduction, I was highly sceptical about the plan and concerned that limiting care proceedings to 26 weeks would inevitably lead to a reduction in time for meaningful assessment and for parents to appreciate the issues they need to tackle and to effect change. Indeed, it was my experience as of 2011 when I 'left' the Bar, and it continues to be my

experience, that cases that result in a return of children to the care of their parent(s) at the conclusion of the proceedings (having been removed at the inception) inevitably take longer than 26 weeks.

Since my return to the Bar not only has this previous experience been confirmed, but as statistics on the timescales for completion of public law proceedings are compiled locally and compared nationally there is significant pressure on the courts to constrict proceedings to meet this timescale or as close thereto as possible. In my experience it is unrealistic and impracticable to expect the sorts of changes in personal environment, context, and functioning required of many adults in care proceedings to be effected within 6 months. Just how long a child can wait for such change to occur will differ on a case-by-case basis. It may well, however, be in a child's overall lifelong interest for proceedings to take longer than the prescribed 6 months.

Risk aversion

In my view balancing risk is an integral part of the task of the Family Court judge in determining the best outcome for a child in care proceedings; as noted above, life, including childhood, is neither risk nor harm free. Given the opprobrium that it must seem is heaped upon social workers when the worst outcomes for a child occur (such as that following **the death of Baby P**) it is both understandable and appropriate if the default position is to seek to minimise risk as much as possible. However, it seems that the system has arguably become too risk averse. This was underlined to me recently when the other professionals in a case expressed surprise that I was raising a 'resolutions type care plan' under which professionals look for a network of protective adults to support a child in the care of a parent who previously has or may have caused physical injury to another child; it seems that this practice had gone out of use during my absence despite its demonstrated effectiveness.

Conclusion

In the foreword to the Independent Review interim report, MacAlister said,

> "This is just the start of a conversation. Finding the positive, speedy and lasting solutions is the hard work that begins following the publication of this paper. This report poses a number of questions that we need to discuss and answer together. Whether you are someone with lived experience of children's social care, someone who works with children and families or a member of the public, we need you in this conversation."

This of course means us, family practitioners immersed in this work. Whether you agree with any of the points raised in this article or in the interim report of the Independent Review, you will have views about the purpose of and what does and does not work in the public law family justice system. The Independent Review will be receiving feedback, further ideas, views and further until 13th August 2021 – **the feedback form can be accessed here**. I urge you all to contribute your views to the conversation.

Called to the Bar in 1991, Celestine Greenwood is a human rights lawyer and activist recently returned to practise here in the UK in family law, specifically public law children cases. She is a member of ***Exchange Chambers****.*

05.08.2021

The resolutions approach: misunderstood and under-used

Patrick Gilmore, barrister of Deans Court Chambers, describes how the resolutions approach might assist cases in which a parent denies the harm caused to a child.

Assessing risk and parenting ability is a fundamental cornerstone of the family justice system. However, the way that families have been assessed has not drastically altered since the inception of the Children Act 1989. Over time the names of the assessments may evolve from a social work assessment to a core assessment and now a child and family assessment, but the basics remain the same. Local authorities still rely on a parent showing insight and accepting the alleged risks.

But the question that has always caused me concern is how do you approach a case when a parent denies the harm caused?

The prime example is a parent who has been involved in previous proceedings where a child has been injured. They may face a finding that they caused the injury. Alternatively, they may remain in the pool as an uncertain perpetrator. That parent then finds themselves in the position of wishing to care for their new born child but being told they remain a risk primarily because of previous findings which they continue to deny. The reality is, the standard method of social work assessment at this stage is reliant on a parent accepting the harm caused, in essence requiring them to accept guilt. Absent such an admission or insight (or an alternative form of placement such as residential or family placement), the standard assessment model is likely to conclude that separation is necessary due to the parents continued denial and the risk of future harm.

Is that the end of the road? The answer is no. It is at that point that consideration should be given to alternative forms of parenting assessment and here that the resolutions approach can assist the court.

It would be impossible to do justice to the resolutions approach within one article. The approach has already been the subject of multiple articles, books and lectures, but a trawl through the case law will find limited reference to it. Even less so when it comes to its application and the support services that are required to make it work and keep families together.

J (A Child) (Resolutions Model) [2021] EWFC 587

Recently in *Re J*, His Honour Judge Baker was invited to give a public judgment to demonstrate how the cumulation of circumstances within that case warranted the use of the resolutions approach.

HHJ Baker had presided over previous proceedings relating to the mother's younger child who had sustained inflicted injuries. The judge had made findings but couldn't conclude who caused the injuries and it remained a case of uncertain perpetrator. Mother went on to have another child and sought a resolutions assessment. The professionals in the case had their initial reservations about that assessment, albeit it was a relatively unknown assessment model to them. HHJ Baker authorised the assessment which ultimately led to the child returning home under a care order to the care of the mother under a strict safety plan.

It was argued there was a public interest to the judgment being published so that those working within the child protection system might see the positive role the resolutions approach played within this case. Whilst representing the mother I argued:

i. "Even though the resolutions approach has now been in place for a considerable number of years it is still not widely known. Indeed, even in this locality such an assessment is rare and perhaps it could be said under used. The number of reported cases utilising that assessment model with the UK are limited and it is therefore in the public interests for others to see that with commitment, engagement, and the multi-disciplinary support as provided in this case, the resolutions approach can be a successful form of parenting assessment.

ii. This case also provides an efficient model for such assessments. The interplay between the resolution's assessor, the social worker, the guardian, and the psychologist all led to a successful assessment and a detailed safety plan. It is again in the public interest to provide a clear example of how that assessment process can proceed within public law proceedings. In the hope that this will encourage the use of more creative models of working with parents and to match those assessments to the particular needs of that case."

For those who are unfamiliar with the resolutions approach, that is not unusual, and it was an obscure model of assessment even to the professionals within this case. HHJ Baker noted:

'36. The Resolutions Model challenges some aspects of social work practice in some cases. It is an unknown approach to many social workers. Ms Carboni says this in her final report:

"… Credit has to be given to the social worker, Ms Heatherington, who has worked well with me and been very committed to the work. By her own admission this has been a professional journey for her, but she is a reflective practitioner who has sought to understand the model in its complexity and the different way it seeks to develop future safety. Key to this is an open relationship where challenge and reflection takes place within a relationship of mutual honesty and respect. I have noticed Ms Heatherington's approach to conversation with the family being more relaxed whilst maintaining her authority and I have very much appreciated her input during the work and her honesty with myself and the family that she was learning as they were. Out of this has emerged a new relationship in which the family have come to appreciate her involvement, and all far are less guarded with the Local Authority.
…

I understand that this has been an unusual journey for the other professionals at times, and that in this case my initial hypothesis has been tested out by other assessments undertaken during this process by other professionals. Whilst this is unusual during the work, it was nonetheless reassuring that my original risk assessment stood the test of time, and the work has now been completed successfully. I do want to reassure the court that have always been mindful that what happened to Amber was profoundly serious throughout my work, and I have never sought to downplay or marginalise the past whatsoever. However my analysis is that there is safety in place now for Jane going forwards…

37. I am very pleased that the local authority and the Children's Guardian have been both flexible and challenging. I think that has led to a very thorough and strong care plan for Jane.'

The starting point

The resolutions approach requires professionals to work from a starting point that the parent, or parents, deny causing the alleged harm, but to then consider what steps can be taken to safeguard the child despite that denial. As HHJ Baker summarised:

'17. My understanding of the model was that, in the right set of circumstances, the fact that a parent denies causing an injury need not rule out the possibility of that parent resuming care of or involvement in the care of that child. It may be possible to use the entire family and support network to build a protective regime around the child to ensure the child's future safety.'

In the example given above, of an uncertain perpetrator or where a positive finding had been made, the starting point following the birth of a new child would be that the parents remain a risk. Their denial would under many forms of assessment exclude them from caring because they have not accepted their role in that harm. That is in essence a circular argument because whilst they continue their denial, the conclusion of that assessment is not going to change, either at the beginning or the end of proceedings. HHJ Baker noted:

'18 ……. it was highly likely that the outcome of the case was inevitable as any assessment that followed the 'standard' (and often wholly appropriate) risk assessment approach would reach exactly the same conclusion as Ms Poole.' (Miss Poole being the ISW who had reported in the case)

Often in cases such as those detailed above the court is faced with an inevitable assessment: one which could be written at the beginning of the proceedings. That is not to be critical of social workers, but if a parenting assessment or risk assessment starts from the perspective that the parents need to plead their guilt before one can work with them, how is it possible to pass that hurdle if the parents continue to plead their innocence, or if they believe they have changed despite those findings. The unfortunate answer in the standard assessment model is that it isn't. It is therefore necessary to think outside of the box and consider alternative ways to assess those parents and put in place other safeguards to reduce or remove the risk.

Under the resolutions approach pressure is not applied to gain an admission from the parent. The assessor works to identify and create a safety/support network (a collective of friends or family) who can supervise the parent(s) with the children and therefore minimise or ameliorate the risk(s) with the formation of a safety plan. The safety plan and the safety/support network are the foundations of the resolution approach and essential in order for it to move forward.

That plan will involve the friends or family agreeing to supervise the parent with the child. That may be 24 hours a day and may last for an extended period of time until it can be gradually reduced. HHJ Baker summarised the nature of that plan used in ***Re J***:

> '29. The plan involves a long period when Jane and Beverley are supervised when together. 24 hours per day, 7 days per week. There are five family members and a close family friend involved in that supervision. It operates on a shift pattern in blocks of time. Gradually, very short periods of unsupervised time (starting with 5 minutes) are allowed by the supervisors. The family are given very clear guidance about detecting any difficulties with Jane's health and presentation. They are given clear rules about what is and is not acceptable. They have been helped to understand what to look out for to ensure Jane remains safe and healthy.
>
> 30. Beverley's care of Jane will gradually become less supervised. As that happens the family members' roles change to one of looking after Jane's health and safety through planned and unplanned observations and very regular family meetings, all in cooperation with local authority staff.'

Those seeking to utilise the resolutions approach must be forthright and open with the parents' family and friends. This is an intrusive process which requires the commitment and devotion of those who sign up to the safety plan. They must be aware of the risks suggested by the local authority in order that they can protect the child from those risks, but they must also be willing to devote a great deal of time to supervising the parent and child. From my perspective when considering if the resolutions approach will be applicable to a case, I first consider if there are sufficient family and friends to form that network. It is not always possible to create such an all-encompassing network and it is often at this stage the resolution approach falls down.

It is important to note that the resolutions approach is not applicable to every case. As HHJ Baker identified, it was the specific circumstances of this case which meant that the resolutions model '*may be appropriate*' and those circumstances included:

- The parents had separated
- There had been some movement on the mother's part; she had come to accept that the injuries were inflicted, whereas she had previously stated they were due to accidents or infection
- Mother had a relatively large and supportive family
- Although the ISW's assessment of the mother had been negative, it did highlight a number of positives.

HHJ Baker granted the resolutions assessment, which was carried out by an expert, Miss Carboni, who had extensive experience of carrying out such assessments.

The success of the resolutions assessment cannot be attributed to one person alone. Although credit was given to the mother who made such progress, a plan cannot work without a multi-agency approach and in this case that included:

- The local authority who, following some initial reservations, fully committed to the assessment and the safety plan. HHJ Baker noting that:

  > '34. This case could not have progressed as it has without the cooperation and support of the local authority and in particular the social worker, Ms Hetherington.
  >
  > 35. It must always be remembered that bringing in an expert such as Ms Carboni, may be appropriate, but such experts leave the case. It is then the local authority that must remain involved and put the plan into action. If the local authority does not support the plan, it will not work.'

- The guardian

- The court directing a psychological assessment
- Drug testing of the mother
- The resolutions assessment by Miss Carboni
- The family and friends who formed the safety network and will continue as part of the safety plan.

Conclusion

The resolutions approach is a different way of thinking. Not a new way of thinking and not a new form assessment – indeed, it is used widely across the world, including in Australia and USA. It is unfortunately under-used in this jurisdiction, perhaps because of the cost (approx. £4,000 in this case), which ultimately falls upon the local authority, or perhaps because professionals are unaware of its existence and what it can add to the case.

The keen reader of *Re J* will note that it is not a quick process and not one which could easily complete within the statutory 26-week timescale. The resolutions approach requires a vigorous assessment and direct work. As in *Re J*, it can require the involvement of multiple professionals and experts. It is therefore essential that the resolutions assessment is identified at the earliest possibility, ideally at the first hearing. The child within Re J was born in May 2020 and the proceedings did not conclude until the 25th June 2021 – well outside of the 26-week timescale. Despite those extensions, that assessment enabled the court and the professionals to achieve one of the primary hopes for all child protection proceedings, to keep families together. HHJ Baker addresses the timetable and the delay that such an assessment caused:

> '43 b. This case has taken a long time. Some months delay were added by the Covid 19 pandemic. Face to face contact between Jane and her parents was suspended for many weeks and professionals were restricted in their ability to meet family members in person. However, even without the pandemic, it is difficult to imagine a case involving a Resolutions approach being completed within 26 weeks. I note Recommendation 31 from the Public Law Working Group Final Report (March 2021):
>
> > "Recommendation 31: Case management of cases in relation to new-born babies and infants. Applications in respect of new-born babies and infants should be the subject of strict case management directions and time limits. It is especially important that proceedings in respect of these children are concluded, whenever possible, within the 26-week limit. There will however be some cases, particularly relating to first-time parents, where parents are demonstrating their ability to respond in a sustainable manner to the advice and treatment provided to address concerns about their parenting, and where therefore proceedings may need to be extended."
>
> In this case it was of course a balance between delay and the likelihood of success. I did not think it would take quite so long when I permitted the assessment. In this case, the outcome has been positive for Jane. It may not have been. That, of course, is the burden and cost judicial discretion.'

Re J is a prime example of the resolutions approach. It shows that with the correct support, and the correct set of circumstances, including a supportive family, the professionals can come together to agree a safety plan that can enable rehabilitation of a child to their parent despite their continued denial.

If those reading this article take away only one idea or concept I would hope that it is this: open your mind to alternative forms of parenting assessment and match the type of assessment to the individual needs of the family.

10/08/2021

Rebalancing the Family Justice System

Syvil Lloyd Morris, Solicitor Advocate and co-founder of **Bastian Lloyd Morris**, challenges three precepts of the Family Justice System.

Since the advent of the Covid-19 pandemic and the etymological development of the word 'lockdown', the Family Court has become replete with cases where men (and it is usually men) are accused of either having abused their children, or posing a serious risk of abuse to their children, in some way. In fact, ss. 1, 17, 31, 37, 38 and 47 Children Act 1989, not to mention PD 12J FPR 2010 and the provisions of Part IV Family Law Act 1996, where appropriate, have never been so often litigated. It is not anticipated that the current high volume of these cases will decrease, now that the cross-governmental definition of domestic abuse and its impact on children is on a statutory footing (see ss. 1 and 3 Domestic Abuse Act 2021). In a somewhat curious way, this intense preoccupation with domestic violence, its impact on children and the effects of child abuse is what we have come to expect, if not want, in the Family Court, in these difficult times (see e.g. ***Re H-N and Others (children) (domestic abuse: finding of fact hearings)*** **[2021] EWCA Civ 448**). In this sea of cases, especially those which involve the local authority, and/or the police, we will usually find three precepts sailing under the flag of so-called 'professional caution': namely a) a social worker's mere suspicion often becomes inexorably conflated with being actual fact; b) 'disbelieving' family members are often automatically ruled out of consideration to become alternative carers; and c) 'temporary' separation of the allegedly abused child from the biological family is often the starting point for intervention, rather than the last resort.

In the 14 or so years, since 'Baby P' we've really come a long way, and escaped the web of inertia epitomised by the death of Victoria Climbie in 2000. Civilised Society cannot tolerate any form of abuse and it (society) must be cautious to ensure that there is a firm response; right? Indeed it has been said that 'child protection work is today carried out in a rabid and unforgiving atmosphere, generated by a well-grounded public fear that too many children are being abused in our society' (***AA & 25 Ors (Children)*** **[2019] EWFC 64**). Therein lies the standpoint of 'professional caution', sailing in the same waters which carry the concepts of the 'burden of proof', the 'standard of proof' and what might stand as being a lighthouse for 'reasonable grounds' to justify a local authority issuing care proceedings, or a police officer implementing protective measures. We will look at all of this in more detail after briefly constructing a floating analytical platform.

Proving a 'fact in issue' in the Family Court operates on a binary axis (see ***Re B (Minors)*** **[2008] UKHL 35**). He who alleges a wrong must prove it on the balance of probabilities; otherwise as far as the law is concerned it simply didn't happen. Whilst there is plenty of scope to deploy reasonable inferences to help establish the necessary proof (see e.g. ***Re I-A (Children)*** **[2012] EWCA Civ 582**) there is quite literally no room in law to say 'it might have happened' (*Re B (Minors)* [2008]). It either did happen or it didn't. But before jumping in one end of the pool or the other, the court should be careful to ensure that it has heard and read all of the relevant evidence, including, importantly, what the parents have to say (*Re I-A (Children)* [2012]). It is essential that the court forms a clear assessment of the parents' credibility and reliability and explains how and why their oral evidence was relevant. Put another way, the court has to 'survey a wide evidential canvas' (***Re U, Re B 9 (Serious Injuries: Standard of Proof)*** **[2004] EWCA Civ. 567**), because 'a consideration of credibility will necessitate a wide consideration of all the circumstances' (***Re H-N and Others (children) (domestic abuse: finding of fact hearings)*** **[2021] EWCA Civ 448**).

On the other hand, the statutory construction, 'reasonable grounds to believe', operates on a different analytical paradigm. Using the language of the costs judges, here we are looking at a belief which falls so far short of being fantastical or incredible, that to act upon it cannot be viewed as being 'reprehensible' or in any way representative of being an 'unreasonable stance' (see ***Re T (Children)*** **[2012] UKSC 36**). Equally, here we are definitely not seeking to equate the 'reasonable belief' with being an incontrovertible fact. Think everything in the middle, typically what is 'sensibly' possible

(see ***Re K (A Child): Threshold Findings)*** **[2018] EWCA Civ 2044**). Put another way, 'probability' is not to be conflated with 'possibility'. Now back to our three usual precepts.

Firstly, suspicion of child abuse, quite wrongly, is often narrated as being synonymous with an incontrovertible fact that there is or has been actual abuse. This may be explained by standard 'professional caution', which might be expected, for example in so-called 'shaken baby' cases or 'unexplained injuries' cases. Less understandable is where this risk-averse approach is taken in minor injury cases, or even minor bruising cases. Often, a child's presentation with the relevant symptoms will, of course, quite rightly point to reasonable suspicion, but the practical effect of professional caution, in some cases, is that the parent assumes there is a requirement for him to prove his innocence. Although this assumption is obviously wrong in law, parents can be driven by a powerfully psychological imperative to do so, even eventually conducting their cases on that basis (see e.g. *AA & 25 Ors (Children*) [2019] EWFC 64).

In the 'unprecedentedly complex case' of *AA & 25 Ors (Children)* the court pointed out that the 'legal consequences of exoneration are no different from those where the court has declined to make a finding'. The decision is binary and '[a]ny such person is not and must not be treated as being left under a cloud of suspicion'. But the judge did then go on to say that a party seeking a finding of exoneration assumes an evidential burden to satisfy the court of their innocence on the balance of probabilities (see also ***Re BB (Children)*** **[2021] EWFC 2021**). He then proceeded to positively exonerate a number of named people, whilst stressing that there should be no future distinctions made on those who had been exonerated, and those of whom no findings were made. This exemplifies the powerful psychological value of being exonerated, despite the fact that usually there is no legal value if a finding has not been made.

Secondly, in these cases, family members are usually (yes 'usually'!) ruled out as so-called alternative carers simply because they don't share the professionals' belief that a beloved son/brother/father/partner could have knowingly or deliberately perpetrated the alleged abuse. However, this lack of belief is, in the opinion of many, a completely natural reaction, but not the one that accords with social work practice. On any view, it is unrealistic to expect family members, even distant ones, to react to serious allegations, which involve significant harm, with the detached forensic analysis of a seasoned professional. In the case of ***Re V-Z (Children)*** **[2016] EWCA Civ 475** the court pointed out how intellectually unattractive it is to criticise alternative carers for 'lacking insight' in relation to concerns where the relevant material had not been shared. Actually, in the mundane reality of private practice, this is pretty much the norm. Nevertheless, the received wisdom persists that lack of belief equates to lack of insight.

Most importantly, professional caution will almost certainly result in the alleged abused child being 'temporarily' removed into the care of the State. Since the advent of the Covid-19 pandemic, professionals and the courts now subscribe even more to a risk-averse culture. 'Temporarily' in this context is a legal term of art, usually meaning 26 weeks. In practice it can be very much longer, especially where the child's injuries are 'unexplained'. It has to be said that sometimes the period is lengthened because of the State's limited resources, in terms of court time, the number of suitably qualified judges and the availability of professional social workers and other experts on the ground.

As many commentators have pointed out, many times, quite rightly, this is a situation exacerbated by the Covid-19 pandemic, notwithstanding the current 'red hot' input of the Cloud Video Platform (CVP) online court hearing resource (Ryan, M., Rothera, S., Roe, A., Rehill, J., and Harker, L. (2021) *Remote hearings in the family court post pandemic: Nuffield Family Justice Observatory*). Actually receiving evidence via video hearings is not new in the Family Court (see e.g. ***Re S (Relocation: Parental Responsibility)*** **[2013] EWHC 1295 (Fam)**; and ***Re ML (Use of Skype Technology)*** **[2013] EWHC 2091 (Fam)**). However it has never been the norm, nor should it be (The Remote Access Family Court – Version 5; Mr Justice MacDonald). Under any objective analysis the ineluctable lack of gravitas, in an online hearing, is simply unacceptable where professionals are making such life-changing decisions.

So 'what is to be done!' is the plaintive cry. Obviously, there is no single 'magic bullet' but the analytical picture could be brightened by combining the following five possible approaches. We will briefly look at these now.

Various attempts have been made to lift the so-called 'veil of secrecy' in the Family Court. Reporting restrictions continue to abide despite journalists' presumptive right of access (see r. 27.11 FPR 2010; PD 12I; PD 36J; s. 12(1) Administration of Justice Act 1960; s. 97(2) Children Act 1989). Perhaps the fire of momentum needs to be re-ignited. Actually, despite the fact of three so-called 'rapid consultations' on remote court hearings, since May 2020 (the most recent being in July 2021), the opportunity has been missed to specifically involve the press. Surely there needs to be a balance between privacy and openness ***(Re J (A Child)*** **[2013] EWHC 2694 (Fam)**), but a system that is shrouded in secrecy does not engender good practice. It is extremely important that the 'Overriding Objective' is seen to be a real thing of value, rather than a mere recitation of words. The 'equal footing' principle in r. 1.2 FPR 2010 needs to be seen as being an actual reality, working in practice and action. Variations of these arguments have been rehearsed time and time again. The fact that 'courts should be astute to assist reporters seeking to attend a hearing or to relax reporting restrictions' (*Practice Guidance (Family Courts: Transparency)* [2014] 1 WLR 230; President's Guidance as to Reporting in the Family Courts, 2019) does little, if anything to provide comfort.

Quite a lot is currently being written about the new Domestic Abuse Act. I won't add to the many words of wisdom that have already migrated to the printed page. Under any objective analysis, the Act does much to redress the balance of injustice that some victims face in the justice system. I do however ask whether the pendulum has swung too far, almost founding a presumption of guilt, in these cases? This may be exemplified by the police power to issue Domestic Abuse

Protection Notices (DAPNs) and apply for Domestic Abuse Protection Orders (DAPOs) (see Part 3 Domestic Abuse Act 2021). Speaking anecdotally, I would suggest that many men accused of domestic abuse feel as though they come to court having to prove their innocence. This is more than a passing concern. *Re AA & 25 Ors (Children)* [2019] is a very good example of this phenomenon where the judge was asked by a number of parties to go beyond the findings and to expressly exonerate named individuals from complicity in the 'gross perversions' alleged.

This leads on to a third but very important ancillary point. If there was greater recognition that women are also capable of perpetrating abuse, there might be less of a tendency to assume that the male abuser is simply a perpetual abuser, who until now, had not been caught. I am not suggesting that women default to abuse, just highlighting the fact that neither do most men. I would suggest that this perhaps obvious fact is shrouded by the uncritical acceptance that we live in a 'patriarchal' society and that domestic abuse is a 'gendered' phenomenon.

Fourthly, perhaps the 'disbelieving alternative carer' should be afforded some form of legal protection, so that they are automatically treated with less 'professional caution'. This is not as radical or controversial as it, at first, sounds. It could result in fewer children being 'temporarily' removed from their biological family. As a matter of logic, it is simply absurd to conflate lack of belief with lack of insight. That is tantamount to assessing risk in a vacuum, something which the Court of Appeal strongly disapproves of (see e.g. ***Re T* [2004] EWCA Civ 558**, [2004] 2 FLR 838).

Finally, when an obvious mistake has been made, in relation to an allegation that has been proved to be either malicious or fallacious, no step should be left unturned to facilitate the prompt return of the child to his or her birth family. It is simply not good enough to blame delay on lack of resources or lack of time, or the pandemic. To paraphrase the words of Ecclesiastes, 'the tears of the Accused have no comforter', so facilitating a prompt return to normality is the very least that the State can do.

10/08/2021

CASES

H v R (Habitual Residence in Pakistan) [2021] EWHC 2024 (Fam)

Questions to be determined

1) Is S, a boy of nearly 13 who has been in Pakistan for nine months, habitually resident (HR) in England and Wales?

2) If so, should the court order his return to this jurisdiction?

Background

The parents married in 2007, have three children, S, U (10) and T (4). They separated in February 2021. The mother (M) alleges a history of domestic abuse. Over the years S has spent time in Pakistan, including a period of 11 months in 2016 when he went to school there.

In October 2020 M went to Pakistan for elective surgery, taking S and T with her. F and U joined them for a month in November, when his father was gravely ill. M returned to the UK in February 2021 with T. The parents dispute the basis for S remaining in Pakistan, where he is living with the paternal family. F says that the parents agreed that S should attend school in Pakistan whereas M contends that this was discussed but not agreed and that she was coerced into leaving without S. S was enrolled in a private school (the one he had attended in 2016) a month before she left. M sent an email to the education authority in England saying that she and F had decided to send S to this school on a trial basis and would bring him back if he did not settle.

Proceedings

M now alleges for the first time that there was an incident in February 2021 when S was touched inappropriately by one of the family's drivers. S has written a letter saying this did not happen and expressing concern that his mother has made it up.

S was interviewed by a Cafcass officer and set out his views very clearly; he said that even before he went to Pakistan with his mother in October 2020 there had been discussions about him attending school there. When his mother left, in February 2021, they had a "big goodbye" and she told him he was "going to be good in school and be an educated man". He was comfortable with the paternal relatives with whom he was staying, settled in his school and secure in his Pakistani heritage. He does not currently wish to return to the UK although he hopes to attend university here.

The Law

A suggestion by M's counsel that the approach to HR has changed since Brexit was not pursued; the court was clear that "there is nothing to suggest that the test for habitual residence, as distinct from the legal framework within [which] that concept subsists, has changed". MacDonald J briefly summarises out the well-known caselaw at §17-19.

He goes on to consider the proper approach to applications for summary return under the inherent jurisdiction at §20-24 with particular reference to *Re NY (A Child)* UKSC 49. He notes that nobody suggests in this case that it is unreasonable to invoke the inherent jurisdiction, and that the question of summary return turns on welfare. It is appropriate to consider the first six items on the CA1989 "welfare checklist". In cases such as this, where there are allegations of domestic abuse, the court must consider whether, and if so in what way, it should conduct an inquiry into the allegations.

Discussion (§25-37)

- Before leaving for Pakistan in October 2020 S was HR in England and Wales.

- A child will take longer to lose HR in a country he or she has left if they had strongly integrated ties as compared to a child whose integration is more tenuous.

- S was born and primarily brought up here and spoke English as his first language, but he wasn't in school in October 2020 following a move and his homelife, according to M, was regularly disrupted by domestic abuse.

- Prior to October 2020 S had durable ties to Pakistan and has spent extended periods there, which made it likely that he would integrate more quickly into social and family life there than if it was a country he had never visited.

- The court found that the parents had agreed for S to be educated in Pakistan, subject to him settling.

• He is settled and well cared for; there is no basis for a finding that he had been inappropriately touched as M claims.

• S's strongly expressed wishes and feelings demonstrate that he considers himself to be integrated in a social and family environment in Pakistan; given his age and understanding his informed wishes are capable of indicating a significant level of integration.

• Accordingly, the court found S to be HR in Pakistan.

Conclusion

Given the finding on HR the court has no jurisdiction and the mother's application under the inherent jurisdiction was dismissed.

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

H v An Adoption Agency (No.2)(Declaration of Parentage and Public Policy) [2021] EWHC 1943 (Fam)

1. The application made by birth father, Mr H is for declaration of parentage in respect of his child T, who was adopted.

2. On 29 September 2020, McDonald J handed down his first judgment in this matter, in which he made a decision that the High Court has jurisdiction pursuant to s 55A(1) of the Family Law Act 1986 to grant to a birth parent a declaration of parentage in respect of a child following the lawful adoption of that child under the Part 1 of the Adoption and Children Act 2002.

3. That decision was entirely separate from from the question of whether such a declaration should be made following the adoption of the child. The first judgment was published as ***H v An Adoption Agency (Declaration of Parentage Following Adoption)* [2020] EWFC 74**. This judgement goes on to consider that question.

4. T became the subject of care proceedings under Part IV of the Children Act 1989, and placement proceedings under Part 1 of the Adoption and Children Act 2002, in 2015. Mr H was not named on T's birth certificate. Following a DNA paternity test which indicated that Mr H was the birth father of T, he was made a party to those care proceedings. On 6 April 2016 a final care order and placement order was made in respect of T.

5. Mr H sought permission to appeal the placement order which was refused. Following refusal of permission to appeal, T was placed for adoption and an application was made for an adoption order by the then prospective adopters. Mr H applied for permission to oppose the making of the adoption order. That application was refused and T was made the subject of an adoption order pursuant to s 46 of the Adoption and Children Act 2002 on 12 April 2017.

6. Mr H applied for permission to appeal against the refusal of permission to oppose the making of the adoption order which was also refused.

7. Mr H then issued his application for a declaration of parentage in respect of T on 2 March 2020. The C63 application form made no mention of the fact that T had been made the subject of an adoption order.

8. McDonald J considered the provisions of S58(1) FLA 1986 in respect of declaration of parentage applications, including the provisions of s57-65 of the Adoption and children Act 2002 which. Introduced a new statutory regime for the control of protected information including identifying information about an adopted person. In addition he applied the FPR r.14.24 which creates a separate jurisdiction with respect to the control of the confidentiality of court adoption records,

9. McDonald emphasised that the fundamental nature of the change of legal status visited on the child and the adoptive parents by the making of an adoption order is further emphasised by the fact that an adoption order will act to terminate the birth parents' Art 8 right to respect for private and family life with the child who was the subject of the adoption order.

10. He also considered whether or not the court is able to and if so should disapply some or all of the FPR 2010 rules most particularly FPR r8.22. In doing so he considered the decision of the court of Appeal in the case of *Re F((Paternity:Registration)* [2013]2 FLR 1036.

11. McDonald J came to the view that if discretion to disapply r 8.22(1) exists, as the Court of Appeal made clear in Re F (Paternity: Registration), such a discretion must only be utilised in exceptional circumstances and with an eye to the statutory context in which recourse is being had to the powers conferred by the procedural rules.

12. McDonald J came to the conclusion that whilst unusual, in circumstances where he found that the court has jurisdiction under s.55A of the Family Law Act 1986 to grant to a birth parent a declaration of parentage in respect of a child following the lawful adoption of that child under the Part 1 of the Adoption and Children Act 2002, the application made by Mr H,

and the situation it gives rise to, was not exceptional in nature, permitted as it is by the statutory scheme and open, in principle, to any birth parent seeking a declaration of parentage.

13. Having considered all the relevant authorities and statutory provisions applicable to the issues in the case, he concluded that it would manifestly be contrary to public policy to grant to Mr H a declaration of parentage in respect of T subsequent to her adoption.

14. McDonald. J expounded the essential elements of public policy as it related to adoption as follows:

> a. The result of an adoption order should be that an adopted child ceases to be the child of his previous parent and becomes, for all purposes, the child of the adopters, that change of status being final and permanent and the family unit thereby created being inviolable.
>
> b. The integrity of the adoption process is dependent on certain matters remaining confidential. In particular matters relating to the identity of adoptive parents, the adoptive name of the child and the location of the adoptive placement not ordinarily being disclosed to the natural parents unless agreed by the adoptive parents and/or mandated by the court.
>
> c. The adopted person should be entitled to determine whether they wish to have information about their birth relatives or not and, if they choose to seek that information, should be provided with it after they have been offered counselling and intermediary support services.
>
> d. An adopted child should, where possible and appropriate, know his or her biological parentage and other cardinal matters relating to his or her origins, including cultural and genetic information.
>
> e. The legal status of an individual in society should be spelled out accurately and in clear terms and recorded in properly maintained records.

15. McDonald J declined to make a declaration of parentage in favour of Mr H on the ground that to do so would manifestly be contrary to public policy for the purposes of s.58(1) of the Family Law Act 1986

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

Re G (Young Person: Threat to Life: Unavailability of Secure Placement) [2021] EWHC 2066 (Fam)

Background

G is an extremely vulnerable 15-year-old who is currently living with his mother and younger siblings. He has had a 'troubled and traumatic' childhood which has included repeatedly absconding from home, being out of the education system for two years, involvement in serious offending, and affiliations with known gangs. He is recognised by the National Referral Mechanism as a victim of criminal exploitation [1]. There is a serious and credible threat to his life and an 'Osman' warning was issued to him by police. Cobb J was satisfied that G's life is in real and immediate danger [2].

The applications

The Local Authority considered G needed to be in secure accommodation or in a highly protected environment where he could be shielded from harm and which would reduce the risks to himself and others in the community. It also considered there were grounds on which it could and should acquire PR [3].

On 15 July, applications for an ICO and a secure accommodation order were made and listed before Peel J on the following day. Directions were given and the applications adjourned for a short time [4]. Peel J requested the attendance of the Secretary of State for Education and the Children's Commissioner at the hearing [15].

On 21 July, the parties appeared before Cobb J. The Local Authority said it felt unable to pursue the applications as it could not identify a safe or secure placement for G or effectively exercise PR while he remained living at home [4]. Cobb J was satisfied that the Local Authority had made enquiries of more than 250 establishments in England and Scotland [5].

The Local Authority had considered whether it could create a bespoke secure or protected placement for G in accordance with its duties under s.22C(5)/ s.22C(6)(d) and s.22D(2), but the proposal was not advanced for 2 reasons:

> (i) the Local Authority felt unable to put such a bespoke placement together in a short space of time due to what it would require; and
>
> (ii) such a placement would not be regulated and would become unlawful within the next few weeks [6].

Implications of the current situation

Cobb J stated that 'The intolerable consequence of the current situation is that the State […] is wholly unable to ensure the safety of G who is not yet 16 years of age, notwithstanding its positive obligation under Article 2 of the ECHR' [9]. He highlighted how G's situation is far from unique and referenced cases with similar characteristics from recent months [10].

Despite the challenges already being faced, Cobb J said they are only likely to become 'significantly greater' following the implementation of the *Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 (SI 2021/161)* which will have the effect of prohibiting the placement of looked after children under the age of 16 in 'other arrangements' settings [11].

The Secretary of State for Education/ The Children's Commissioner

A letter was sent prior to the hearing on behalf of the Secretary of State. It discussed the need for the Local Authority to fulfil their 'sufficiency duty', but also expressed sympathy regarding the challenges in the case and the difficulty in commissioning suitable accommodation for some children with complex and very high needs [15]. There was also mention of work being undertaken with Local Authorities and others across Government to address the situation [15]. Cobb J stated the proposals would not yield a placement for G [16].

The representative of the Children's Commissioner indicated her intention to discuss G's situation with the Independent Children's Homes Commissioner and to pursue her own enquires with the SWCU [17].

The outcome

The Local Authority was directed to prepare a statement urgently setting out in detail its proposals to try and keep G safe while he remains at home. The applications were adjourned until 26 July.

Case summary by **Diana Panizzon-Pineda**, Pupil, **St John's Chambers**

Re D (Care Proceedings:1996 Hague Convention: Article 9 Request) [2021] EWHC 1970 (Fam)

The background

The background is complex but for the purpose of this summary can be distilled to the following key events. In April 2017, care and placement orders had been made by Recorder Samuels QC in relation to F (the mother's older child who was understood to have been conceived by the mother following IVF treatment in Denmark). D was born in Barbados in 2018. In November 2019 the mother, who by now was living with D in Switzerland, was arrested and remanded in custody pursuant to a European Arrest Warrant in connection with proceedings arising out of the care given to F, and D was placed in foster-care. Neither she nor D had any permit or legal permission to live permanently in Switzerland and no pre-existing connection there. The mother was extradited to the UK in June 2020 (the CPS decided in April 2021 that the proceedings against her should be discontinued and a not guilty verdict was entered in respect of each count of the indictment). In November 2020 the Local Authority issued care proceedings in respect of D and the matter was transferred to the High Court. The purpose of the application was to provide a framework in which any necessary decision could be made for D within this jurisdiction. The Local Authority then applied to transfer the matters relating to D to this jurisdiction pursuant to Article 9 of the 1996 Hague Convention, hoping to explore the possibility that D could be adopted in this jurisdiction or even placed alongside F. In February 2021 the Local Authority had a change of heart, taking the view that this process would be outside D's timescale and would risk damaging the attachment he had with his foster-carers with whom he was a well-settled, French-speaking child. The Local Authority therefore applied to withdraw both the Article 9 transfer request together with the public law proceedings, accepting that Swiss law provided a framework for the consideration of DNA testing, adoption and inter-country adoption and that there was no justification for the ongoing role of this court in those matters. In March 2021 the Swiss authorities made final orders in relation to D, confirming his placement with his foster family, and suspending the mother's contact. At the final hearing in the High Court the Local Authority's applications were supported by the mother, although the Guardian advanced an Article 9 transfer request limited to the issue of contact between D and F rather than a request aimed at wider welfare considerations.

The court accepted that by the time the care proceedings were issued D was habitually resident in Switzerland and that under Article 5 of the Convention the judicial or administrative authorities in Switzerland had jurisdiction. Although D was neither habitually resident nor present in England and Wales at that time, Knowles J was nonetheless satisfied that it was entirely appropriate for care proceedings to have been issued: it was likely that D was a British national at birth and jurisdiction could therefore have been exercised in relation to him under the parens patrie jurisidiction of the High Court.

Article 9 request by the Guardian

In *Child and Family Agency v D (R intervening)* [2017] 2 WLR 949, the Court of Justice of the European Union held that, with respect to applications for transfer pursuant to Brussels IIR, the court with jurisdiction must determine whether the transfer to the other court will provide genuine and specific added value. Applying the same test to applications under the 1996 Convention by analogy, Knowles J concluded that the court should not make an Article 9 request to the Swiss authorities. She referred first to the principle of comity which requires the court to apply the principle of mutual trust and involves the assumption that the authorities of the other Contracting State are, in principle, competent to deal with all aspects of a case. She then found that it was clear from the expert legal evidence (a jointly instructed Swiss lawyer) that

there was a legal framework in place in Switzerland which was capable of resolving any of the issues which might arise in considering contact between D and F, and that an assessment of the frequency and nature of contact between D and F was better undertaken by the Swiss authorities in whose area D lived. There was no genuine and specific added value to a transfer of jurisdiction in so far as contact issues were concerned. Moreover, if jurisdiction with respect to contact were to be transferred to the High Court, it was unclear what the appropriate vehicle for those issues would be now that the Swiss authorities had already assumed parental rights with respect to D (para. 74). Significant practical and legal difficulties would arise from the fact that the Swiss authorities would be a principal respondent in, for example, an application by F or his adopters for a child arrangements order.

Sibling relationships and Article 8 issues

The court emphasised the enduring importance of the sibling relationship (para. 77) and the importance to D and F of having a relationship if that could be properly established: '*the existence of a sibling relationship is crucial for healthy emotional and identity development though it can be attenuated by time, distance, conflict and legal separation.*' Knowles J also noted its particular potential benefit to D and F in mitigating the harms they had each experienced separately in their mother's care. D's Article 8 right to private life in exploring the potential for contact between him and F did not require the proceedings to be transferred to the High Court since a clear legal framework already existed in Switzerland for the exploration of and establishment of contact between D and F. In any event, even though the final determination made by the Swiss authorities in relation to D had not mentioned the possibility of future contact between the siblings, there was no danger that this issue would be overlooked by the Swiss authorities in future decision-making concerning D: the principle of comity extended to disclosing the judgment to the Swiss authorities and requiring them to treat the contents of this High Court judgment with the utmost respect.

Withdrawal of care proceedings and the Local Authority's Article 9 request

This was the first reported decision concerning the withdrawal of an application for transfer under the 1996 Convention. The Judge considered that such an application fell within the scope of FPR 2010 r.29(4) and that the permission of the court was required to withdraw it. By analogy with applications for permission to withdraw an application under the 1980 Hague Convention on the Civil Aspects of Child Abduction, the test for permission centred on those matters set out in the overriding objective at FPR 2010 r 1(2) and welfare issues were unlikely to feature at all. The Judge permitted the local authority to withdraw its application for an Article 9 transfer and its application for a care order on the basis that the two sets of proceedings no longer served any forensic utility.

The judgment concludes by making a number of recommendations of (a) practical steps that could be taken by the Local Authority to assist the Swiss authorities, and (b) areas that the Swiss authorities may wish to consider in future decision-making concerning D.

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

North Yorkshire County Council v M & Others (Medium Secure Bed) [2021] EWHC 2171 (Fam)

Applications

North Yorkshire County Council (NYCC) sought

- permission to invoke the inherent jurisdiction and make a 15-year-old girl, M, a ward of court
- an order under the inherent jurisdiction to deprive her of her liberty
- an injunction against Leeds City Council (LCC) prohibiting them from discharging her from her current placement.

Background

M has highly complex needs and significant offending history. She was placed in September 2020 at a secure children's home under a Detention Training Order (DTO) after being sentenced for criminal offences. The unit also has "welfare" beds.

In April 2021, after her presentation became increasingly complex and dangerous, she was assessed as needing a medium secure tier 4 bed in a Medium Secure Unit. Such units accommodate young people with mental and neurodevelopmental disorders who present the highest risk of harm to others. NHS England asserted in its position statement that the NHS does not have capacity to provide such a bed. In fact it was established at the hearing that there are two appropriate units which each have five empty beds but both have refused to accept M.

When the DTO ended in June, LCC agreed that M could remain at her placement for a short time in a welfare bed, funded by NYCC. An order was made authorising M being deprived of her liberty. Shortly afterwards it became clear that M

needed a higher level of segregation, supervision, and support; additional funding was required from NYCC to free up two other beds and thus redirect resources to M. The NHS also provided substantial additional resources.

So far in 2021, up to 12th July, M has required 192 restraints; she self-harms at least twice a day and needs to be segregated in a locked unit. She has several staff members allocated at all times of the day and night and does not leave the unit. She has recently assaulted staff including headbutting and kicking one in the head. A psychiatric assessment concluded not only that she continues to need a medium secure tier 4 bed but that her current placement cannot put in place the medication and seclusion needed for her to engage and make therapeutic gains.

All agree that discharging M into the community would put her at risk of serious self-harm including risk to life.

The parties all agree the following way forward:

- LCC agrees to M remaining in her current placement subject to NHS England continuing to provide additional support, NYCC continuing to pay for two beds to remain vacant and it being clear that the placement will come to an end following the next hearing;

- Joinder of the NHS Mental Health Trusts responsible for the two units that have declined to offer one of their available beds to M, in order that to the court can properly investigate the reasons for their refusal;

- Statements from the directors of those Trusts explaining the obstacles to admission and how they may be overcome;

- A statement from the Director of Mental Health for NHS England confirming the support that it is willing to commission to ensure that M can be admitted to one of the free beds;

- Joinder of the Secretary of State for Health in order that discussion about provision can take place at the highest level.

The Law

The court authorised the deprivation of liberty on the basis of well-established case law, with the caveat that the Supreme Court was to deliver its judgment in Re T the following day.

At §21-25 here is a brief overview of authorities relevant to the issue of whether the current placement was so unsuitable as to breach Art 5. The court also stressed at §26 the importance of having regard to the fact that M's Art 8 rights extend "*to the right to psychological and physical integrity, personal development and the development of social relationships and physical and social identity.*"

Discussion

It could not be disputed that "*at her current placement M's situation simply cannot improve and, moreover, that effluxion of time in containment will exacerbate her problems as her primary mental health needs continue to go unmet.*"

While the court did not determine the point, it was accepted that there must be a cogent argument that the current placement is so unsuitable as to amount to a breach of her Art 5 right to liberty and arguably her Art 8 right to respect for private life.

There are also potentially disastrous consequences for the unit should M remain there in that other young people and staff are negatively affected and there is also a real possibility that the unit could be sanctioned and even closed for breaching its statement of purpose.

Absent very cogent reasons it is difficult to see how it can be sustainable for the two Trusts that have refused M one of their beds to continue to refuse to admit a vulnerable young person who has been assessed as requiring such provision.

Conclusion

It is profoundly depressing that the court has had to act as mediator/facilitator between NHS England and two NHS Mental Health Trusts in order to procure a tier 4 provision that the NHS is responsible for providing and M has been assessed as requiring, particularly as each day M spends at an unsuitable unit compounds her difficulties.

The court considered the parties' agreed way forward to be the best opportunity to break the impasse.

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

Re YW (A CHILD) (ADEQUACY OF REASONS) [2021] EWCA Civ 1174

These care proceedings concerned YW who was taken to hospital with a large bruise and swelling over the left forehead extending to under the right eye and behind the left ear. At the fact-finding hearing the parents, three interveners (NA, SA and SN) and the mother's sister gave evidence as well as two social workers. No evidence was called from the treating physicians or the court appointed medical expert. The father acted in person with the assistance of a translator.

The Local Authority sought a range of findings including that YW had sustained significant facial bruising which, "had a high likelihood of non-accidental injury" and was inconsistent with the suggested mechanism; that the mother, NA and SA had colluded to provide misleading and false explanations of the causation of the injury; that the injury was inflicted "deliberately, recklessly or negligently" by NA, SA or SN (not, it should be noted, the mother); and that, in the absence of a finding against one perpetrator, "neither [sic] can be ruled out".

At the conclusion of the evidence the LA expanded the schedule of findings sought to include reference to an earlier injury (details of which had emerged during the oral evidence); and failure to protect on the part of the father who, the LA said, knew about the mother's lifestyle and therefore the risks to YW.

The judge found that the mother had inflicted both injuries. In the case of the latter injury, NA had seen and heard this but failed to take steps to protect YW. The mother had failed to take steps to protect YW by not seeking medical attention following the earlier injury. The mother had made false allegations against NA. Both had lied about the circumstances surrounding the mother's trip abroad around the time the latter injury was inflicted. The mother's lifestyle was chaotic/itinerant and led to instability for the child. The father had been aware of this and had left YW at risk.

The mother filed a notice of appeal. Permission was granted in respect of the grounds concerning the findings relating to the injuries to YW. The father sought permission to appeal on the grounds that the process by which findings had been made against him was unfair.

With regard to the mother's appeal the Court of Appeal concludes that the judgment at first instance was insufficiently reasoned. The criticisms are set out at paragraph 56 onwards.

The judgment lacked a clear structure such that elements one might expect to see were absent. There was no summary of the issues, or the findings that each party was seeking on the issues. There was only a partial chronology. There was no discussion section drawing together the different threads of the evidence. A rigorous and coherent analysis was required before the judge arrived at her conclusions.

The Court again highlights the observation of Dame Elizabeth Butler-Sloss P in *Re T* [2004] EWCA Civ 558 at paragraph 33:

> "Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to the other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion of whether the case put forward by the Local Authority has been made out to the appropriate standard of proof."

In this case there was no explanation of why the judge concluded that the mother's lies were probative of her responsibility for the injuries when: (1) NA and SA had also lied repeatedly about the circumstances of the injury on 31 October; (2) there were plainly many other reasons why the mother might have lied; and (3) the medical evidence was, at least, capable of supporting the conclusion that each of the injuries had been sustained accidentally. Having accepted that the accident mechanism proffered as an explanation for the latter injury had in fact occurred the judge concluded that this was not the cause of the injury but had not explained why she reached this view in light of the more nuanced views of the medical expert (who did not give oral evidence). In this case the judge had fallen into the trap of evaluating the evidence in separate compartments and failed to exercise an over view of the totality of the evidence (paragraph 61)

The Court of Appeal is critical of the judge's approach in providing a "running commentary" as to her views of the credibility of each the witnesses as she went through the evidence. The conclusions should have been reached after she had considered the totality of the evidence. An inconsistency in the way in which the judge dealt with the lies of the mother as compared to the lies of others is noted.

Ultimately the Court of Appeal, considered that the judge had fallen into the same error observed and cautioned against by Macur LJ in ***Re Y (A Child)* [2013] EWCA Civ 1337** at paragraph 7:

> "… I consider the case appears to have been hijacked by the issue of the mother's dishonesty. Much of the local authority's evidence is devoted to it. The Children's Guardian adopts much the same perspective. It cannot be the sole issue in a case devoid of context. There was very little attention given to context in this case. No analysis appears to have been made by any of the professionals as to why the mother's particular lies created the likelihood of significant harm to these children and what weight should reasonably be afforded to the fact of her deceit in the overall balance. "

The findings made by the judge as to the mother's lies, and to her character and lifestyle, may be relevant to her overall analysis, but she did not provide any or any sufficient explanation of why they led her to the conclusion that the mother had inflicted the injuries.

The mother's appeal was allowed. It was unnecessary to resolve the father's appeal as the matter was remitted for a full hearing before a different judge.

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

P (A Child) (Abduction: Inherent Jurisdiction) EWCA Civ 1171

Background

In March 2017 M and F entered into a custody agreement in New Jersey which permitted F to travel with P without M's consent. A sole custody order was made in F's favour by the New Jersey Court on 2 May 2017. F claimed the sole custody order was because M knew he was moving to India with P, and M claimed it was because she told he needed it to travel to India for one month with P.

On 28 June 2017 F told M he had bought one-way tickets for himself and P, leaving on 27 July 2017. The parents disagreed about whether M was aware that F intended to move to India permanently, and that F (at least) took the view the parents' relationship was over. M contacted New Jersey lawyers on 3 August 2017 to discuss abduction.

M commenced proceedings on 12 July 2018 and obtained an order for joint custody on 16 September 2018. F became aware of the order shortly after. M made a criminal complaint against F for kidnapping and an international arrest warrant appears to have been issued against F. He was arrested under that warrant on 2 October 2020, having travelled to England on 1 October 2020. F alleges that M lured him to bring A to England in order to facilitate his arrest. F remains in prison. P was in foster care in England and has been re-introduced to M through video contact.

M had issued Hague Convention and inherent jurisdiction proceedings and (following P's arrival), P was made a ward of court. On 23 March 2021 the New Jersey Court awarded M temporary custody of P to secure his return to the US so that the court could take longer term decisions about P.

The Convention proceedings were heard from 15-19 March 2021. At that hearing M sought P's return to the US and F sought his return to India. The Guardian supported P's return to the US if M's account was accepted, and P's return to India if F's account was accepted. On 26 March 2021 the judge dismissed M's application that P return to the US, and ordered that he should return to India.

On 9 April 2021 the wardship was discharged, and the judge directed that P should return to India on 16 April 2021. The judge preferred F's account of P's departure from the US. M applied for permission to appeal on 12 April 2021 and a stay was granted on 15 April 2021. Following the decision P moved to his paternal aunt's care in anticipation of his return to India, and remained there following the grant of permission to appeal on 16 April 2021.

Issues on appeal

There were 3 broad grounds of appeal:

(1) A failure to respect international comity by ignoring the New Jersey Court order for P to return there;

(2) An inadequate welfare analysis, and in particular the (un)likelihood of contact between M and P if P returned to India;

(3) A challenge to the finding that M consented to permanent removal from the US to India.

Decision

The court dismissed ground 3, the challenge to the finding about consent. M argued that the trial judge gave insufficient weight to the fact she sought legal advice a matter of days after P's departure to India. The Court of Appeal noted that there was other evidence which supported F's case, and that the judge's conclusions were sustainable on the evidence as a whole.

In relation to ground 2 (judicial comity), it was noted that the court was not being asked to recognise or enforce the New Jersey Court orders (and noted the US has not ratified the 1996 Hague Convention on Jurisdiction, Applicable Law Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children). More fundamentally, the US orders were made on the basis of M's allegation of abduction, and in light of the trial judge's finding that P had not been abducted, she was entitled to give no weight to the existence of those orders. Ground 2 was therefore also dismissed.

The Court of Appeal noted that ground 1 (welfare analysis) was really the crux of the appeal. At the outset, Jackson LJ noted the unusual circumstances that P had been taken from the US (a Convention signatory) to India (not a signatory), hence the hybrid nature of the hearing, considering both Convention defences and the inherent jurisdiction. Having considered the leading Convention authority of ***Re M (Children)* [2007] UKHL 55** and the leading inherent jurisdiction authorities of *Re J* [2005] UKHL 40 and ***Re NY* [2019] UKSC 49**, Jackson LJ confirmed [para 39] that "what is therefore needed in all cases is an inquiry that sufficiently identifies what the child's welfare requires". Whilst recognising that the judge could have expressed her decision more fully, the Court of Appeal dismissed M's appeal on this ground, concluding that the judge was entitled to find that M did not offer a viable placement for P at this time, as her actions had led to P being removed from F's care and being placed with strangers (para [47]).

Case summary by **Julia Belyavin**, Barrister, **St John's Chambers**

F-S (A Child: Placement Order) [2021] EWCA Civ 1212

Background

The case concerned four children, B, A, C and D. The children were removed from the care of the mother and Mr S at the start of proceedings in November 2019 as a result of domestic violence and poor home conditions. Findings were made that Mr S had caused facial bruising to A.

Plans to rehabilitate B and A to the mother's care were changed in 2020 as it was discovered that the mother had secretly resumed her relationship with Mr S. The court found they had purposefully deceived the court and the LA. Mother conceded she could not resume care of B and A 'at this time' and proposed that they be cared for by the maternal grandmother (who had been negatively assessed) or remain in foster care so that she might resume care in future.

The eldest child, B, who was almost 6 at the time of the appeal, had been placed on his own in foster care. He had global developmental delay and it was unclear whether he would be able to live independently as an adult. He had thrived in foster care.

At the conclusion of the final hearing on 8 March 2021, Her Honour Judge Campbell made a placement order for B with a view to an open adoption by his foster carers, including regular contact with his siblings and his mother. A was made subject to a placement order. C and D were placed with their paternal grandparents under a care order.

In April 2021, the mother applied to revoke the placement order in respect of A. This was dismissed and permission to appeal refused.

Appeal

The mother's appeal related to B only. The grounds of appeal asserted the judge was wrong in law for three reasons:

> (1) As the LA care plan contemplated only placement with the current foster carers who were prepared to continue to care for B without a placement order, it was unreasonable to conclude that a placement order was necessary;
>
> (2) The judge applied the wrong test indicating what course would best meet B's needs rather than setting out why no other course was possible; and
>
> (3) The reasons were insufficient to demonstrate that a placement order was required.

At the appeal, it was accepted that a care order had been inevitable and that the realistic choice was between adoption and adjourning under an ICO to allow for an application for an SGO. M submitted that the judge was wrong to prefer adoption where the less interventionist SGO would offer equivalent benefits.

Lord Justice Peter Jackson gives the lead judgment. He sets out the key parts of HHJ Campbell's judgment. This included a balance sheet of the advantages and disadvantages of the realistic options (long term fostering with a view to an SGO vs adoption) and reasoned conclusions. He observed that it was a 'notably careful decision'. Such decisions are extremely hard to unsettle on appeal [***Re A* [2015] EWCA Civ 1254**, para 37-9].

The Court of Appeal did not accept that the judge made any error of law. The judge's description of a placement order for B as that which 'best meets his welfare needs' must be viewed alongside her other statements including that B's needs 'can only be met' by adoption. The Judge undoubtedly applied the correct test. A specialist judge can be assumed to know how to approach a familiar task unless the contrary is demonstrated, and an isolated turn of phrase, even at a key stage in the reasoning, must be seen in the context of the judgment as a whole.

The judge's reasons were not inadequate. If further explanation had been required, it could have been requested.

Peter Jackson LJ rejected the arguments put by the mother. In particular:

(1) The judge was entitled to take into account the foster carer's preference for adoption. The argument that their willingness to continue to care for B without a placement order demonstrates that a placement order is not necessary is a non sequitur. The court's statutory assessment cannot be dictated, though it may be influenced, by the attitudes of individuals.

(2) The judge was entitled to consider it essential that B receives the very best possible parenting now and throughout his childhood. Given his likely complex needs, his permanent carers should have the freedom to make decisions for him without being answerable to the LA or to the mother.

(3) The greater stability offered by adoption is relevant. A child's welfare is measured not only by the care he will receive but also by '"the enduring sense of belonging within a family" [**[2013] EWHC 3974 (fam)**]. The judge was entitled to regard it as a factor of critical importance.

(4) An SGO is not irreversible. It might be unsettled by disruptive future challenges by mother.

(5) The plan for an open adoption was significant. B's relationship with his mother and siblings is important and there is an opportunity for it to be preserved. The judge was entitled to regard that as counting for more than the mother's loss of a parental responsibility that had sadly not served B well in the past.

(6) It is not enough to say that the Judge could have made a less interventionist order if the reality is that a lesser order would not adequately meet B's childhood and lifelong needs. The Judge explained why a lesser order is not good enough for B. She was fully entitled to make a placement order.

Appeal dismissed.

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

Re C (A Child) (Child Abduction: Parent's Refusal to Return with Child) [2021] EWCA Civ 1216

Factual background

C, a six year old boy, was born in France. His parents separated shortly afterwards and the father went to Israel for a time, effectively abandoning him. There was a significant history of extreme conflict; the father could be aggressive and insulting, partly because of what the French court describes as his "bipolarity", while the mother could be irrational in her refusal to entrust the child to him. There was litigation about C periodically in the French courts from 2015. In 2019 an order confirmed residence with mother and father had alternate weekend contact at his father's home. The family judge in Paris had a high level of concern about the impact on C of the conflict.

On 15th March 2020, shortly after a hearing in the Paris court but before judgment was handed down, the mother brought C to England for what she claims was a short break. Covid-19 lockdowns in England and France intervened, but when in June 2020 the mother could have taken him back she decided that it was better for him to remain here. The father eventually discovered his whereabouts and made a Hague application in November 2020.

The mother raised a variety of defences to the application, including under Art 13(b). She asserted that if the court were to order C's return she would not go with him. Cohen J did not believe that this loving mother, whose original rationale for staying in the UK was her son's best interests, would in reality allow him to return without her but if this did come to pass the father and paternal aunt could collect C, who could live with the aunt.

The appeal

The mother relied on several grounds, most of which were considered not to be arguable and were swiftly dealt with: see §46-57.

She did not seek to appeal the determination that C would not have been placed at risk of grave harm if she returned with him. The key issue was the judge's conclusion that mother would return if C were ordered to go.

It was suggested on behalf of mother that the court fell into error by not requiring the mother to give oral evidence on this point. No application or suggestion was made at the hearing that she should do so and oral evidence is generally not adduced in Hague proceedings save in respect of disputed habitual residence or alleged consent/acquiescence. Accordingly the court could hardly be criticised for not itself requiring mother to give evidence.

There was no suggestion that the available accommodation with maternal grandfather was unsuitable or that the protective measures offered by father, combined with additional measures, would not provide sufficient security for

mother and C. Coupled with the judge's appraisal that this was a loving and devoted mother these factors led him to conclude that she would go with C if his return was ordered. It was plainly open to the court to make that finding.

It was also asserted by the mother that the judge had approached the factual issue on the basis of his own objective assessment of what it would be reasonable for the mother to tolerate as opposed to what she would actually do. The judgment had however set out the correct question and then answered it in terms that made it clear that the judge was not considering whether mother's expressed refusal to return was reasonable but rather gave a bespoke answer focused on this particular mother. There was no basis for asserting that the judge had fallen into error.

Accordingly the appeal was dismissed.

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

T & Anor v L & Ors (Inherent Jurisdiction : Costs) [2021] EWHC 2147 (Fam)

The applicants were attorneys under registered lasting powers of attorney granted by K who was a former work colleague. In 2020 they were informed that K had applied to revoke the LPA's and substitute new LPAs appointing members of his family (the 1st and 2nd Respondent). K had also executed a new will making significant new bequests to his carer B and the 1st and 2nd Respondents. The applicants were also concerned that K's capacity was failing was being improperly influenced and B was preventing K have any direct or indirect contact with friends.

After correspondence and a round table meeting they issued the application on 18 January 2021 seeking

> i) directions for the investigation by the court of the revocation of their LPAs,
>
> ii) suspension of the process of revocation of new LPAs which had been purportedly entered into in October 2020,
>
> iii) investigation into the validity of a new will drafted in November 2020, and
>
> iv) the replacement of K's carer, Ms B, and the installation of a new carer / care package.

K was joined as a party and represented by the Official Solicitor.

There were 3 assessments of capacity. The first was completed after an order to prevent security guards who had been engaged by the 1st and 2 respondents or at least with their support from interfering with a visit by K's lawyers and the expert.

The second was undertaken by an expert instructed by the 1st and 2nd Respondent without the agreement or even knowledge of the other parties.

The third was a joint visit by the 2 experts.

It was eventually agreed that K lacked testamentary capacity and capacity to make decisions about his property and financial affairs and his welfare. It was also agreed that none of the parties should act under LPAs and a professional deputy should be appointed in respect of K's property and affairs and another deputy should be appointed in relation to welfare. B had in the meantime resigned as a carer and been replaced by an agency. A statutory will was to be executed. All of these were to be subject to orders in the Court of Protection.

The 1st and 2nd Respondents sought for their costs (£215000) to be paid from K's funds. The Applicants agreed to bear their own costs (£15000) The Official Solicitor was to recoup her costs (£140000) from K's estate and she opposed the 1st and 2nd Respondent's application.

Cobb J concluded that the applicable costs rules were those under the CPR and not the FPR for the reasons he had set out in Redcar & Cleveland v PR [2019] EWHC 2800 (Fam) and summarised the principles to be applied at para 25.

> i) The Senior Courts Act 1981 and the CPR 1998 confirm that he had a wide discretion in relation to costs;
>
> ii) Proceedings brought under the inherent jurisdiction relating to a vulnerable adult have many of the same essentially welfare-oriented characteristics of proceedings under the inherent jurisdiction relating to minors (see McFarlane LJ in *DL v A Local Authority* [2012] EWCA Civ at [61], and see also Wall LJ in ***Westminster City Council v C* [2008] EWCA Civ 198**; [2009] 2 WLR 185 at [54]: "I am in no doubt at all that the inherent jurisdiction of the High Court to protect the welfare of incapable adults, confirmed in this court in *Re F*

(Adult: Court's Jurisdictions) [2001] Fam 38 survives, albeit that it is now reinforced by the provisions of the *Mental Capacity Act 2005* (the 2005 Act)"). Therefore, although the *CPR 1998* applies to such proceedings, the costs principles which apply in family proceedings are likely to be highly relevant in this regard;

iii) In family proceedings where the welfare of a minor is concerned, it is usual to make no order as to costs;

iv) One of the underlying philosophies of this rule is that the proceedings under the inherent jurisdiction in relation to minors or vulnerable adults are significantly essentially inquisitorial in character;

v) Thus, it is no particular surprise that the 'ordinary rule' of no order as to costs in cases under the inherent jurisdiction concerning a vulnerable adult appears to have been assumed by Peter Jackson J in *NHS Trust v D* at [14], and not apparently subsequently doubted;

vi) It is significant that that *rule 44.2(2)* opens with the words "If the court decides to make an order…" (emphasis by underlining/italics added) which stresses that the court may well consider not making an order at all.

Cobb J concluded that all the parties should bear their own costs, for reasons he set out at paras 29 35.

The judgment does not indicate whether the court was invited to compare with the situation in the Court of Protection where the rules distinguish between personal welfare and property and financial affairs. For proceedings or that part of the proceedings which relate to personal welfare the general rule is that there will be no order as to costs) but for property and affairs the general rule is the general rule is that the costs of the proceedings or of that part of the proceedings that concerns P's property and affairs, shall be paid by P or charged to his estate. (COPR r156-157)

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

I-A (Children) (Revocation of Adoption Order) [2021] EWCA Civ 1222

Background

Care and placement orders were made by HHJ Booth in June 2019 in respect of three children. Permission to appeal was refused.

Adoption applications were issued. The parents' applications for leave to oppose the adoptions were refused in February 2020. Permission to appeal was refused in March 2020.

The adoption application was listed for hearing on 6 April 2020. Mother was given notice of the hearing. Mother's application by email for an adjournment to allow more time to investigate options for family placements abroad was refused.

On 1 April 2020, the adoption social worker sent the mother a text informing her that due to COVID19, the hearing would take place by telephone. Later that day, the social worker sent another text informing the mother that HHJ Booth had excused all parties from attending the hearing and there would be no telephone hearing. The adoption orders were made on 6 April 2020.

Revocation application

On 21 July 2020, the mother applied under the inherent jurisdiction for revocation of the care and placement orders and/or the adoption orders. The mother relied upon serious procedural irregularity and unfairness. Members of the wider family applied to be joined to the proceedings to seek assessment.

Mother submitted that the failure to hold a full hearing was in breach of Article 6 and so unjust as to nullify the entire process. Pursuant to FPR 14.3, the mother was a party to the adoption application and entitled to notice of the hearing under FPR 14.15. Under FPR 14.16(1), she was entitled to attend the hearing but under rule 14.16(2), as her application for leave to oppose the adoption had been refused, she was not entitled to be heard on the question of whether an order should be made. [Mother had not made any application for post-adoption contact].

At the final hearing on 18 December 2020, Peel J dismissed the mother's applications and the application by the family to be joined. He concluded that FPR 14.16 provided a knockout blow to the mother's case. She had no right to be heard on the final adoption order. He determined the judge was entitled to excuse her attendance. If she was dissatisfied, the mother should have appealed.

Appeal

Baker LJ granted permission to appeal the dismissal of the mother's application to revoke the adoption orders on two grounds only: that Peel J had misdirected himself or erred in law in holding that (i) FPR 14.16 provided a 'knock out blow' to the mother's application and (ii) HHJ Booth was entitled to excuse her attendance at the final adoption hearing.

Baker LJ gives the lead judgment. He quotes with approval the principles set out by MacDonald J in ***HX v A Local Authority and others (Application to Revoke Adoption Order)*** **[2020] EWHC 1287 (Fam)** in respect of the power of the High Court to revoke an adoption under the inherent jurisdiction. The Court's discretion under the inherent jurisdiction to revoke a lawfully made adoption order can only be exercised in highly exceptional and very particular circumstances. Those circumstances must comprise more than mistake or misrepresentation or serious injustice: they should amount to a fundamental breach of natural justice.

Adoption changes a child's status and identity. The process by which it happens is governed by rules which must be strictly followed. An adoption order must be made at a hearing, not merely by the stroke of the judge's pen.

The decision to make an adoption order without a hearing in the absence of the mother was a procedural irregularity. The plain meaning of FPR 14.16(1) is that the mother was entitled to be present at the hearing. It was not a question of HHJ Booth excusing her attendance. In any event, he cancelled the hearing altogether. While an unopposed adoption hearing may be conducted remotely, there is nothing in the case law or guidance to justify the course taken by HHJ Booth.

However, the irregularity did not amount to a fundamental breach of natural justice so as to give the High Court a discretion under the inherent jurisdiction to revoke the orders. As the mother did not have permission to oppose the adoption, there was nothing she could have done to prevent the adoption. The court was required to consider contact arrangements [s.46(6) ACA 2002], but the mother was not having direct contact and had not sought leave to make an application under s.51A. In respect of contact, the mother's position is unchanged: she may still apply for leave to bring an application for contact.

Baker LJ further observed that the better course in these circumstances would have been to seek permission to appeal. If an adoption order is to be set aside, the applicant should bring proceedings swiftly once the fact of the irregularity is known. In this case, the mother knew about the irregularity before the order was made and it was incumbent upon her to bring any challenge as soon as possible.

Appeal dismissed.

Summary by **Victoria Roberts**, Barrister, **Coram Chambers**.

B (Children), Re [2021] EWCA Civ 1221

This case involved the mother of two children, B aged nearly 3 years and C nearly 5 months old.

1. They were subject to care proceedings in May 2021 and placed in foster care. B's father S had played no part in her life and the mother raised serious concerns about his abusive behaviour prior to her birth. The mother therefore did not want S to be told about the care proceedings. Her application to dispense with service was dismissed; the Court of Appeal finding that the Judge had the relevant principles in mind and had carried out the necessary balancing exercise fairly. Each case would depend on its own facts and the authorities showed a broad consistency in the court's approach. However it would be necessary to carefully consider how S was notified given his lack of involvement in B's life.

2. With regard to who is an automatic party to care proceedings, the statutory framework provided by the Family Procedure Rules differentiates between a father with and without parental authority. If a father has PR he is an automatic party, if he does not he must be notified of proceedings. Unless the court directs otherwise, the applicant must serve every person who is believed to be a parent who doesn't have PR, a copy of Form C6A, to provide notice of hearings to non-parties (FPR PD 12C).

3. The Court of Appeal considered that in ***re X (a Child) (Care Proceedings: Notice to Father without Parental Responsibility)*** **[2017] 4 WLR 110** , helpfully encapsulated the overall position with regard to the tensions and difficulties in these kind of cases. HHJ Bellamy sitting as a High Court Judge said at [46]:

> "46. Each year local authorities issue care proceedings in the Family Court in which the fathers of the children concerned do not have parental responsibility and who, though not parties, are nonetheless entitled to receive a copy of Form C6A. Until they receive Form C6A some fathers are in a state of ignorance about the existence of their child. Others are aware of the existence of the child and of the fact that they are the child's biological father but have thus far shown no interest in the child's life. For the children involved it is important that attempts are made to engage with their birth father and perhaps also his wider family. The starting point must be two-fold. First, that it will normally be in the interests of the child that her birth father should receive a copy of Form C6A thereby enabling him to apply for party status so that he can participate in the proceedings. Second, that the child and her mother should not be put at risk of harm as a result of seeking to engage the father in the proceedings. It is a matter of balance and that is the case whether or not the father is entitled to the protection of Article 8 and Article 6."

4. The mother asserted that B was conceived following rape by S and his reaction when becoming aware that she was pregnant was so abusive that she had fear for her own and B's safety if he was told about the care proceedings. The Judge accepted the mother's evidence and proceeded on the basis that S had no PR, no relationship with his daughter and there was evidence of 'intimidation, control and sexual exploitation' by S. She argued he had no Article 8 or 6 rights, and when this was balanced against the risk to B and her mother if he was notified, the balance should fall squarely in favour of dispensing with service upon him.

5. However, the Judge noted the factors relied upon in ***Re A local authority v B (Dispensing with Service)*** **[2020] EWHC 2741** and the need for 'rigour in analysing the risk and the gravity of harm feared' before taking such an 'exceptional' and 'last resort' step. He considered that the authorities to which he had been referred related to "really very significant violence and abuse over sustained periods of time" and that in the current case, contact between the mother and S had ceased following the threats and measures could be put in place to protect the mother. It was also necessary to consider B's Article 8 rights to know the truth about her paternity.

6. Having weighed all these factors the Judge was not satisfied this was an 'exceptional' case to justify not informing the father, and the risk could be managed, but that the notification did need to be handled sensitively.

7. The mother appealed against this decision on two grounds:

> 1. The Judge failed to take into account that S had no Article 8 rights regarding family life with B
>
> 2. The Judge erred in the balancing exercise, applying a higher test of exceptionality to justify the non-service of form C6A, failed to take into account the interference with the Article 8 rights of mother and child and wrongly assessed the risk.

8. The Local Authority and Children's Guardian maintained that the Judge's decision was reasonable in all the circumstances and the Court of Appeal agreed.

9. The first ground was dismissed as without merit; the Judge had not proceeded under any misapprehension that S had any Article 8 rights.

10. With regard to the proper exercise of balancing competing rights, the Court of Appeal referred to ***Re A (Adoption Notification of Fathers and Relatives)*** **[2020] EWCA Civ 41** where Peter Jackson LJ considered "that there is a broad consistency in the court's general approach to the issue of notification of fathers and relatives. In my judgement, the balance that has been struck between the competing interests in these difficult cases is a sound one and there is no need for any significant change of approach". The Court of Appeal agreed that the decision as to whether confidentiality should be maintained can only be made by striking a fair balance between the factors that are present in each individual case.

11. However, the Court of Appeal did need to address the use of the word 'exceptional' in the first judgment. It was argued on behalf of the mother that there was a distinction between a test of 'higher exceptionality' and 'exceptionality', the former applying to those with Article 8 rights. The Court of Appeal considered this an attempt to revive the difficulties caused by attempting to distinguish between 'wrong' and 'plainly wrong' which had to be put to rest by the Supreme Court in ***In re B (A Child) (Care Proceedings: Threshold Criteria)*** **[2013] UKSC 33**. The 'test' should not be a semantic one, as this will detract from the essential task of balancing the fact specific features in every case. This exercise will inevitably reveal that some features of a particular case are heavily weighted against dispensing with service but different combinations of factors will apply in every case and different weighting will be merited by those individual circumstances.

12. The Court of Appeal determined that the Judge had in mind the relevant legal principles that he must and demonstrably did apply. However, concern was raised about the lack of thought given to the actual process of serving S, given the potential sensitivities. Therefore the Local Authority was ordered not to serve the C6A notification upon S without the approval of the allocated Judge about the way it should be done.

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