December 2021

Family Law Week

NEWS

Financial Remedy Proceedings Consultation launched

Mr Justice Mostyn and His Honour Judge Hess have launched a consultation on a proposal to introduce a Standard Reporting Permission Order to enhance the transparency of, and public confidence in, financial remedy proceedings in the Financial Remedies Court.

Comments are invited on this proposal by 26 November 2021 and should be sent to HMCTSFinancialRemedy@justice.gov.uk

For the consultation document, click here.

01/11/21

Transparency in the Family Courts Report published

The President of the Family Division, Sir Andrew McFarlane, has published a report presenting his conclusions following an extensive review of the provisions relating to transparency in the family courts.

The main conclusion is that accredited media representatives should be able, not only to attend hearings, but to report publicly on what they see and hear. Such reporting must, however, be subject to very clear rules to maintain the anonymity of children and families, and to keep confidential intimate details of their private lives.

Sir Andrew writes that the dual goals of the review have been to enhance public confidence in the Family Justice system and to maintain the anonymity of those families and children who turn to it for protection. He considers that these twin principles of confidence and confidentiality are not, in his view, mutually exclusive and it is possible to achieve both goals.

He adds:

> "I now intend to lead the process of implementing these changes, which will involve a number of initiatives. Any change in the court process will

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require the approval of the Family Procedure Rules Committee and Ministry of Justice ministers. Insofar as there is a need to amend statute law, this is, of course, a matter entirely for Parliament and not the judiciary."

For the report, details of the evidence sessions and the Financial Remedies Proceedings Consultation document, **click here**. For the response of Cafcass to the Transparency Review findings, **click here**.

31/10.21

CSA collection and write-off strategy nears completion

The Department for Work and Pensions has published its final release of Child Support Agency (CSA) Quarterly Summary Statistics. It includes data up to the end of June 2021. The large scale selection of cases eligible for representation and write-off under the Compliance and Arrears Strategy is now complete. A small number of cases with CSA arrears remain and some will start the representation process after June 2021 due to changes in circumstances.

Between 13 December 2018, when the compliance and arrears strategy work started, and 30th June 2021:

- The CSA has written to 253,300 parents with care to ask if they want a last attempt to be made to try to collect the debt owed to them - this includes all 134,700 parents with an eligible case on the CSA system and 118,600 parents with a case on the CMS system.

- Of these cases, 211,900 (84 per cent) parents did not respond or did not want their debt collected, whilst 39,200 (15 per cent) parents did want the debt to be collected.

- 34,500 case groups have reached the debt collection stage. They have completed representation, parents have requested debt collection and attempts to collect the arrears have commenced. For 29,800 of those case groups, collection or write off of arrears is either partially or fully completed - £61.9 million of debt has been collected to date.

- 606,600 cases with non-paying historical debt have had their debt written off- system records showed these cases had a total debt value of £2,036.3 million, of which £854.8 million was owed to government only.

41,800 cases remain with CSA historical arrears only, most of which are paying cases. These cases have a debt balance of £291.1 million, of which all £291.1 million is owed to parents with care. The CMS will continue to monitor and maintain compliance on these cases. Some additional cases with CSA debt remain which also have a separate on-going case with the CMS, these cases are counted in the CMS caseload.

For the report, **click here**.

31/10/21

Number of children in need at lowest figure since 2013

There were 388,490 children in need in the year ending 31 March 2021. This figure is down 0.2 per cent from 2020 and is now at its lowest point since 2013. The statistics come from the annual Children in Need Census, which provides data on children in England referred to children's social care services, assessments carried out relating to those children and whether a child became the subject of a child protection plan.

There were 50,010 child protection plans, down 2.9 per cent from 2020, now at its lowest point since 2015. This represents 41 child protection plans per 10,000 children, down from 43 in 2020, now at its lowest point since 2013.

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

31/10/21

'Honour-based' offences rose by 81 per cent in last five years

The Guardian has reported that the number of honour based abuse (HBA) cases rose from 884 in 2016 to 1,599 last year – a rise of 81 per cent. The figures came from the responses of 28 out of 39 constabularies to freedom of information (FoI) requests. HBA cases include offences such as rape, death threats and assault.

For the report, **click here**.

31/10/21

Legal aid: launch of high cost family fixer service

The Legal Aid Agency has launched a new 'fixer service' to help providers who hold high cost family case contracts.

The 'high cost family fixer' service has been set up in response to feedback from providers. It aims to build upon the success of other services already dealing with application and claim errors. These are known as 'civil claim fix' and 'application fixer'.

'High cost family fixer' can help with a range of issues which are explained on our training and support website. Examples include:

- case plan problems
- provision of documents
- cost limits.

The new email service does not deal with billing issues for high cost family cases. These should continue to be dealt with through the 'civil claim fix' service.

For more information, **click here** and scroll to Civil / High Cost Family Fixer.

7/11/21

Developing and Maintaining Relationships for Care-Experienced People report published

A recent roundtable event, chaired by John Simmonds, Director of Policy, Research and Development at Coram BAAF, and organised by University College London, brought together care-experienced people, academics, policy makers and practitioners. They discussed how to improve the relational experiences of children in care and those who have spent time in the care system through changing policy and practice.

The roundtable report summarises the findings. It highlights key areas where the sector could do better and innovate in supporting care-experienced people to experience positive relationships that will help shape their futures. It recommends that consideration is given to:

- investing in innovative ways to support professionals to promote loving relational environments in their work with children in care and care-experienced people

- considering relationship building as essential for meaningful participation

- building towards relationships that last beyond formal care and recognising diverse pathways to relationship stability.

For the report, **click here**.

7/11/21

Government publishes report showing progress under Istanbul Convention

The Home Office has published its **fifth report** showing the UK's progress toward ratification of the Council of Europe Convention on Preventing Violence Against Women and Domestic Violence ("the Istanbul Convention").

The government signed the Istanbul Convention in 2012 to reaffirm the UK's commitment to tackling violence against women and girls (VAWG). The Convention consists of 81 articles aimed at tackling VAWG which focus on prevention, protection of victims, prosecution, and integrated policies.

The report notes that on 29 April 2021 landmark Domestic Abuse Act 2021 was passed, including necessary legislative measures on extraterritorial jurisdiction for England and Wales, Scotland and Northern Ireland as required by Article 44. The Act came into force on 29 June 2021.

On 21 July 2021 the Government published a new cross-Government Tackling Violence Against Women and Girls (VAWG) Strategy to help ensure that women and girls are safe everywhere – at home, online and on the streets. The VAWG Strategy sets out our approach to tackling VAWG, such as 'honour'-based abuse, stalking and sexual violence, as well as online forms of violence against women and girls. It sets out that priority will be given to prevention, supporting survivors, pursuing perpetrators and creating a stronger system.

The strategy commits to a number of actions which include:

- the introduction of a new full-time National Policing Lead for Violence Against Women and Girls to take the lead for this area nationally

- a national communications campaign with a focus on targeting perpetrators and harmful misogynistic attitudes, educating young people about healthy relationships and ensuring victims can access support

- working to criminalise virginity testing, to send a clear message that this practice is wholly unacceptable in our society

- introducing a £5 million 'Safety of Women at Night' fund, in addition to the £25 million Safer Streets Fund, focused on the prevention of violence against women and girls in public spaces at night, including in the night-time economy

- appointing a Transport Champion to make public transport safer for women and girls

- piloting a tool, StreetSafe, which enables the public to anonymously report areas where they feel unsafe and identify what it was about the location which made them feel this way. The data will be used to inform local decision-making

- better supporting teachers to deliver the recently introduced Relationships, Sex and Health Education curriculum

- providing funding to invest in high quality, evidence-informed prevention projects, including in schools, to ascertain what works to tackle violence against women and girls

- providing an additional £1.5 million this year for specialist support services and to increase our funding for helplines, such as the Revenge Porn Helpline.

For the report, **click here**.

7/11/21

£12 million Transformation Fund launched to support family hubs

The Department for Education has launched a £12 million Transformation Fund to support around 12 local authorities in England to open family hubs. This first fund will enable the DfE to learn more about the process of local transformation, build its evidence base, and create valuable resources and learning for those local authorities who follow. Start for Life will be a key element of each of these projects. The fund is now open to applications from local authorities.

The DfE has published guidance and an application form for local authorities who do not currently have family hubs to submit a proposal for funding to open family hubs in their area.

The DfE has carried out feasibility studies of family hub models looking at local delivery models and approaches to evaluation as part of the family hubs evaluation innovation fund. For the studies, **click here**.

For the guidance and application form, **click here**.

For the Children's Minister's address to the National Centre for Family Hubs to launch the transformation Fund, **click here**.

3/11/21

More specialist support for LGBT+ victims of domestic abuse needed: Domestic Abuse Commissioner

The Domestic Abuse Commissioner has launched a new report produced by the charity Galop which shows the need for more specialist support for LGBT+ victims of domestic abuse.

The report finds:

• There are a small number of LGBT+ domestic abuse services; most are victim support services based in London.

• LGBT+ domestic abuse support is largely provided by LGBT+ 'by and for' organisations with a domestic abuse service.

• On a lesser scale, LGBT+ specialist support also exists within VAWG and generic domestic abuse organisations.

• No funded LGBT+ 'by and for' domestic abuse services exist in the South West and North East of England, or in Wales.

• There are no LGBT+ specific services for LGB+ and or T+ perpetrators and/or perpetrator programmes.

• There is a lack of emergency accommodation/ housing services for LGB+ and/or T+ people, in particular GB+ and/or T+ men.

• There is a lack of service provision for LGB+ and or T+ children and young people outside of London.

• LGBT+ 'by and for' domestic abuse services often work outside of their geographical remit and beyond their capacity to meet the demand.

• On average, LGBT+ domestic abuse services are small, with just one or two staff members employed.

• There are currently 3.5 FTE LGBT+ IDVAs based in 4 services: Galop, LGBT Foundation, RISE and LGBT Birmingham.

• Most services have no main source of funding. The management of multiple funders is an extra set of pressures for the LGBT+ specialist domestic abuse sector.

• VAWG and domestic abuse organisations providing a specialist LGBT+ service are less likely to adopt key indicators for LGBT+ inclusion relevant to the needs of non-binary and/or trans+ service users.

• Partnership working appears to be underdeveloped; only a small number of services indicate referral pathways to their local MARAC suggesting that most others are not embedded in their local 'coordinated community response' to domestic abuse.

• Two 'by and for' LGBT+ organisations are not funded to provide support for domestic abuse, but continue to deliver this work due to demand.

The report recommends:

• Increase and make long-term funding available for LGBT+ 'by and for' domestic abuse services. For example, Safelives' Safe Fund report recommends that £10 million would be needed to ensure full provision for LGBT+ victims and survivors of domestic abuse across England and Wales.

• Recognise that LGBT+ specialist domestic abuse services need time for recruitment and training, planning, and supervision to provide meaningful services.

• Ensure sustainable funding to ensure both continued implementation of services and continued support for those programs once they are implemented.

• Develop specific measures to ensure there is sustainable and accessible support for high-risk LGBT+ victims and survivors, including IDVA advocacy and refuge provision wherever they live. This should mean both an increase in the geographical coverage of specialist LGBT+ provision, and an increase in the capacity of existing services to meet local need.

• Develop specific services/programmes for LGBT+ perpetrators.

• Increase emergency accommodation and housing programs/provision for LGBT+ people and in particular for GBT+ men and non-binary people.

• Increase training opportunities to further build/develop the capacities of practitioners supporting LGBT+ victims and survivors (including training on terminology and monitoring for sexual orientation and gender identities).

• Training packages should be designed and delivered by specialist LGBT+ domestic abuse services or experts.

• LGBT+ specialist training should be a requirement for all staff working with victims and survivors of domestic abuse and be embedded in available funding pots to allow organisations and services to work with external experts.

• Promote and increase opportunities for partnership working with other relevant voluntary and statutory services to improve the support for multiple and complex needs of LGBT+ victims and survivors.

• Encourage VAWG and domestic abuse organisations to establish close links with specialist LGBT+ domestic abuse services, to be able to signpost and make informed referrals.

• Increase opportunities for LGBT+ 'by and for' domestic abuse services to develop referral pathways to their local MARAC and to become embedded in their local Coordinated Community Response to domestic abuse.

• Provide funding for an independent evaluation of services for LGBT+ victims and survivors, to underpin the development of a framework of quality standards and best practice for the delivery of quality service.

For the report, **click here**.

3/11/21

Judge criticises 'nihilistic' family law litigation

Mr Justice Peel has criticised the 'nihilistic litigation' conducted by the parties in ***Crowther v Crowther & Ors (Financial Remedies)*** **[2021] EWFC 88**.

The judge noted 'with dismay' that the wife's s25 statement was her 15th statement in the proceedings and the husband's his 26th. There had been 34 court hearings. The bundles (4 of them; a core bundle, a library bundle and two supplemental bundles) exceeded 6,000 pages.

The total costs stood at about £2.3 million. The wife's legal costs (excluding divorce, children, and occupation order proceedings, but including the costs of Admiralty proceedings and a preliminary issue referable to financial remedies) amounted to £1,427,606; the husband's (on a like for like basis) were £920,316.

He added:

> "Each party thinks the other is, to use their own words, 'out to destroy' them. These proceedings have been intensely acrimonious. They, and their lawyers, have adopted a bitterly fought adversarial approach. I asked myself on a number of occasions whether the aggressive approach adopted by each side has achieved anything; it seems to me that it has led to vast costs and reduced scope for settlement. The toll on each party is incalculable (W was visibly distressed during the hearing) and, from what I have heard, the impact on the children has been highly detrimental."

Mr Justice Peel concluded:

> "The only beneficiaries of this nihilistic litigation have been the specialist and high-quality lawyers. The main losers are probably the children who, quite apart from the emotional pain of seeing their parents involved in such bitter proceedings, will be deprived of monies which I am sure their parents would otherwise have wanted them to benefit from in due course."

For the judgment, **click here**.

7/11/21

Justice Committee examines the future of court reporting in changing media landscape

The Justice Committee examined the future of court reporting in a session on Tuesday, 9 November 2021, as it continued its inquiry into open justice.

The Committee says that long-term changes to the media landscape, combined with the growth of social media and instant reporting, have raised questions about how court cases are reported. The Covid-19 pandemic and increased use of new technologies to facilitate court proceedings raised further questions around how well access to courts was protected and supported.

In this evidence session the Justice Committee heard from court reporters about the role of the media in the wider justice system, the challenges they face in reporting and what more can be done to support open justice. The Committee also examined how data about court proceedings in England and Wales can be improved, both in terms of publicising hearings and ensuring that judgments are easily accessible.

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

14/11/21

Education Committee examines adequacy of children's homes for children with special educational needs

The House of Commons Education Committee is continuing its inquiry into Children's Homes with an evidence session examining education, support and outcomes of children in children's homes with special educational needs or disabilities (SEND), and the sufficiency of children's home places across England.

Children living in children's homes are twenty times more likely to be in special education than all children nationally, with more than half attending special schools. Around 75 per cent of children living in children's homes have?a?primary special educational need (SEN) relating to their social, emotional and mental health.

The cross-party Committee of MPs is likely to question the panel on issues such as the quality of education received by children with SEND who live in children's homes, system accountability, and whether placements offer value for taxpayer money.

The Committee may also ask the panel of sector leaders about longer-term outcomes for children in residential care, and the transition between residential care to independent living.

This third evidence session of the Children's Homes inquiry, which launched in March this year, will take place on Tuesday, 16th November 2021.

For more details, **click here**.

14/11/21

Looked after children: out of area, unregulated and unregistered accommodation in England

The House of Commons Library has published a research briefing providing information on out of area placements for looked after children in England. It also provides information on placements in unregulated and unregistered accommodation. The briefing notes concerns raised by some stakeholders about the increase in the number of out of area placements, including:

- Children are being placed out of area because of a lack of suitable provision closer to home.
- That being placed so far away can be traumatic for children who already have had difficult upbringings.
- The vulnerability of children living far away from home means that they are at greater risk of going missing.
- Children can feel isolated and often do not see loved ones often enough when placed out of area.

For the briefing, **click here**.

14/11/21

Ofsted: Lack of foster carers mean children missing out on support

A continued lack of capacity in the foster care sector is leading to vulnerable children missing out on the care and support they need, Ofsted says.

Despite numbers of fostering households and foster carers in England being at their highest levels ever, these increases are not keeping up with demand in the sector, according to **Ofsted's annual fostering statistics**.

The number of foster carers in England has increased by only 4 per cent since 2014, while the number of children in foster care has increased some 11 per cent. And while the number of fostering households and carers has gone up, Ofsted research suggests that the range of carers available are not always able to meet children's increasingly complex needs.

As the number of children in care continues to grow, matching them with the right carers becomes increasingly difficult. This makes it more likely that very vulnerable children will face placement breakdowns and further disruption to their lives.

Meanwhile, the number of family and friends fostering households is at its highest level yet. These carers are a vital part of the system – but their impact on overall capacity is limited by the nature of their role.

Although record levels of enquiries were received from prospective fostering households last year, statistics show these are not translating into applications. Of 160,000 initial enquiries from prospective fostering households, only around 10,000 resulted in applications – a decrease on previous years.

For the annual fostering statistics, **click here**. For comment by the Association of Directors of Children's Services, **click here**.

14/11/21

Charities respond to Supreme Court ruling on children's privacy and data rights

Coram Children's Legal Centre has joined with Liberty and Inclusion London to call for privacy rights, data protection and access to justice to be equally available to everyone, after a landmark court ruling.

On 10 November, the Supreme Court, in ***Lloyd v Google LLC* [2021] UKSC 50** overturned a previous ruling and found that four million victims of alleged breaches of data protection laws by Google cannot bring a joint – "representative" – claim for compensation.

In a case brought by an individual claimant, Mr Lloyd, on behalf of approximately four million iPhone users, the Court of Appeal said in 2019 that the victims of alleged breaches of data protection laws should be able to bring a joint claim to seek compensation.

Lloyd also argued that loss of control of personal data is important – and merits compensation – regardless of whether or not "distress" is caused by a data breach.

The Supreme Court has ruled that individuals must suffer financial loss or distress to receive compensation, and Lloyd could not bring a representative action because the damage caused to each person must be assessed individually.

At the Supreme Court earlier this year, Liberty, Inclusion London and Coram Children's Legal Centre filed a joint intervention to argue that everyone should be able to seek justice if a company or public body breaches their data rights – whether or not they felt distress due to the breach. The groups argued that some people, such as young children and some disabled people, might not feel or show "distress" in the context of a data breach in the same way as other people, but should still be able to obtain justice.

The charities also argued that it is important for the principle of access to justice that breaches of our data rights can be challenged through representative actions, whereby a legal claim can be started by on behalf of many people – overcoming barriers such as cost that might prevent individual claims.

Rosalyn Akar Grams, Managing Director of Legal Practice and Children's Rights at Coram, said:

> "We are disappointed by today's judgement and specifically the lack of consideration of the position of children set out in the arguments we put forward. Children's lives are increasingly impacted by the digital world and it is vital that their rights to data protection and privacy are protected. We will continue to advocate for their rights to redress and compensation when their data rights are breached regardless of whether they experience distress as a result of that breach."

For the judgment, **click here**. For the Supreme Court's summary of the judgment, **click here**.

12/11/21

President of the Family Division: Witness statements

The President of the Family Division, Sir Andrew McFarlane, has issued a memorandum setting out how witness statements should be prepared for use in the Family Courts to ensure they meet proper professional standards.

For the memorandum, **click here**.

12/11/21

President of the Family Division: Drafting orders

The President of the Family Division, Sir Andrew McFarlane, has issued a memorandum setting out the approach for drafting orders in the Family Court, in order to mitigate a number of problems.

For the memorandum, **click here**.

12/11/21

Expressions of Interest sought for membership of the Family Transparency Implementation Group

On 29 October 2021, the President of the Family Division launched his **Report on the Transparency Review in the Family Courts**.

The Transparency Implementation Group (TIG) will manage, pilot and evaluate the implementation of the recommendations of the report.

Leadership of the TIG is:

> **Sir Andrew McFarlane**, The President of the Family Division
> **Mrs Justice Lieven** Co-Chair of the TIG
> **Family Circuit Judge** Co-Chair of the TIG

Membership of the TIG will include those essential to the efficient implementation of the recommendations. TIG membership selection will be conducted by EOIs (judicial and public) and direct appointment for specific roles.

Expressions of interest are welcomed from those with expertise/experience in the following areas.

> Academia – Family Justice System with Transparency as area of interest/research
> Family Practitioner (Barrister)
> Family Practitioner (Solicitor)
> Media Representative x 2 – Journalist/legal blogger.

For more details, **click here**.

19/11/21

Reforms to child age assessments in Nationalities and Borders Bill investigated

The Joint Committee on Human Rights has continued its legislative scrutiny of the Nationalities and Borders Bill with a session on 17 November 2021 focusing on the asylum decision making process and age assessments.

The Nationalities and Borders Bill introduces a number of changes to speed up the decision-making process. It

proposes changes to age assessments, where an individual seeking asylum or making an immigration application claims to be a child, but the authorities have insufficient evidence to be sure of their age. The Bill gives the Home Secretary the power to set out most of the detail concerning age assessments within secondary legislation, including the details of a new centralised decision-making body. The Bill also provides powers for the Home Secretary to allow the use of scientific methods to determine age, although the exact methods will be set out in secondary legislation.

The Government has also indicated that it will lower the threshold for giving age-disputed individuals the benefit of the doubt, however, the test has not been set out in the Bill.

In its session the Committee examined how well the rights of children are protected in the legislation and examine the accuracy of age assessments.

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

19/11/21

Cuts led to vulnerable children 'crisis': House of Lords Public Services Committee

More than a million vulnerable children in England have had their life chances reduced by cuts to early years and youth support since 2010. These cuts should be reversed. That is the finding of a new report from the House of Lords Public Services Committee.

The Committee states that lack of investment in protecting children at risk of serious harm has been felt disproportionately in the most deprived areas, resulting in worse life chances for children, bigger bills for taxpayers and more pressure on social services.

The Committee wants the Government to pledge to return to higher 2010 levels of investment in early help services to support children and families. Ministers should set out urgently a national cross-Government funded strategy with a plan for a nationwide roll-out of Family Hubs (centres where families and young people get joined-up help with a range of problems) at its heart.

According to the report, a government Spending Review commitment to fund a small number of Family Hubs in only half of local authority areas will not compensate for the closure of children's centres and falls "far short" of the vision set out in its own Early Years review, chaired by Dame Andrea Leadsom, which recommended that all families should be able to access a Hub.

Spending on early intervention support in areas of England with the highest levels of child poverty fell by 53 per cent between 2010 and 2019, research by Pro Bono Economics for the committee found, including:

Walsall—down 81 per cent

Manchester—down 75 per cent

Liverpool—down 65 per cent

The Government's pledge to spend £492 million on early help services over the next three years is welcomed by the Committee, but after a decade of underinvestment this would not repair the creaking public services infrastructure on which vulnerable children rely, or make up for the £1.7 million-a-year cuts to council services such as Sure Start centres and family support since 2010.

A survey of almost 200 public service professionals found that half had seen a rise since the start of the pandemic in the number of children and families requesting help with mental ill-health, domestic violence and addiction problems.

Lack of coordination by Government and regulators has undermined the ability of local services to work together effectively, intervene early and share information to keep vulnerable children safe and improve their lives, according to the committee.

For the report, **click here**. For an enhanced summary of the report, **click here.** For comment by the Local Government Association, **click here**.

19/11/21

Mental Capacity Act: consultation launched on Small Payments Scheme

The Ministry of Justice has launched a consultation seeking views on potential changes to accessing limited funds belonging to an individual who lacks mental capacity without a Lasting Power of Attorney or Court of Protection order.

It is a long-held legal principle that an adult must have proper legal authority to access or deal with property belonging to another adult. Where an adult has mental capacity, this legal authority can be provided by an ordinary power of attorney. Where the adult lacks mental capacity the Mental Capacity Act 2005 (MCA) provides the framework for them to grant legal authority by a lasting power of attorney while they still have mental capacity, or for third parties to obtain legal authority through applications to the Court of Protection.

Concerns have been raised with the Ministry of Justice regarding the length and the complexity of the Court of Protection process when trying to access small balances. Some consider the process disproportionate and overly-burdensome where there are limited sums of money involved. Further investigation has revealed that there may be some individuals who require access to small amounts of money to support the specific needs of a person without mental capacity but may feel a Court of Protection order is not appropriate or find the application process for a one-off order off-putting, too complex or disproportionate to the amounts of funds involved.

In light of this the Ministry of Justice has been examining the case for legislation to enable third-party access to limited funds without the need to?obtain the form of legal authority currently required under the Mental Capacity Act.

Under the proposals:

• Payments or withdrawals would be up to a total value of £2,500 over a six month period, with the possibility of a single extension if the full value of the account had not been withdrawn.

• An applicant would have to prove their suitability to access the fund on behalf of the individual, rather than it being limited to only family members – for example, a guardian.

• Once the maximum £2,500 has been withdrawn from an account no further withdrawals would be permitted.

• The scheme would be run by financial services firms, such as banks or building societies.

• In cases where longer term management of accounts was needed, families and guardians would be encouraged to consider a deputyship and to apply to the Court of Protection if necessary.

The consultation closes on 12 January 2022.

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

19/11/21

Marriage and Civil Partnership (Minimum Age) Bill given second reading

The Marriage and Civil Partnership (Minimum Age) Bill has been given an unopposed second reading in the House of Commons, with support coming from both the Government and opposition benches. The Bill, sponsored by Pauline Latham, would raise to 18 the minimum age for marriage and civil partnership in England and Wales. It would also make it an offence, punishable with up to seven years' imprisonment, to carry out "any conduct for the purpose of causing a child to enter into a marriage".

The Bill has been sent to a Public Bill Committee which will scrutinise the Bill line by line and is expected to report to the House by a date to be confirmed.

For the Bill, as introduced, **click here**. For a House of Commons Library briefing, explaining the provisions of the Bill and its background, **click here**. To follow progress of the Bill, **click here**.

19/11/21

Supreme Court to give judgment in case involving capacity to consent to sexual relations

The Supreme Court case will hand down judgment on 24 November 2021 in ***A Local Authority (Respondent) v JB (by his Litigation Friend, the Official Solicitor).***

The Supreme Court will determine whether to have capacity to decide to have sexual relations with another person, a person needs to understand that the other person must have the capacity to consent to the sexual activity and must in fact consent before and throughout the sexual activity.

In this case the appellant, JB, is a 37 year-old single man with a complex diagnosis of autistic spectrum disorder combined with impaired cognition. JB has expressed a strong desire to have a girlfriend and engage in sexual relations. However, his previous behaviour towards women has led the respondent local authority to conclude that he cannot safely have unsupervised contact with them.

The local authority filed an application in the Court of Protection seeking declarations as to JB's capacity in various areas, including his capacity to consent to sexual relations. The expert evidence was that JB understands that mechanics of sexual acts and the risks of pregnancy and sexually transmitted disease, but his "understanding of consent is lacking".

In the Court of Protection, the judge held that it was not necessary for a person to understand the need for their sexual partner's consent and declared that JB has capacity to consent to sexual relations. The Court of Appeal disagreed. It held that, to have capacity to engage in sexual relations, a person needs to understand that their sexual partner must have the capacity to consent to the sexual activity and must in fact consent before and during the sexual activity. JB appeals to the Supreme Court.

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

19/11 21

Better adult outcomes for children cared for by relatives – new research

New research from University College London's Institute of Epidemiology & Health Care shows that of adults who spent some or all of their childhood in care, those who were cared for by relatives as children had better socio-economic outcomes than their peers who did not.

The researchers, led by Professor Amanda Sacker, examined whether socio-economic, family, and living arrangements of adults who had been in non-parental care across the first three decades of adult life varied by type of care (residential, non-relative and relative).

They did this using longitudinal data from the Office for National Statistics Longitudinal Study (LS) from 1971-2001 which enabled them to look at the care experiences of 18 year-olds and then follow them into their 20s, 30s and 40s when they could compare socioeconomic, family, and living arrangements by different out-of-home care (OHC) experiences.

The Nuffield Foundation funded research showed OHC increased the likelihood of poorer functioning in family formation, relationships, and living arrangements during participants' 20s, 30s and 40s. The worst outcomes were

observed for those with a history of residential care, followed by non-relative OHC, and the least adverse outcomes for relative OHC.

There was, in addition strong and consistent evidence of widening of inequalities in outcomes across childhood census years.

Commenting on the latest findings from the project, Professor Sacker said:

> "Children who spent time in non-parental care report poor outcomes in many aspects of their later lives on average, but less is known about differences by type of care, something our research seeks to explore. This research provides further worrying evidence of enduring inequalities faced by people who for a host of reasons largely outside their control are not able to live with their parents when they are children. The research reinforces our earlier findings and adds weight to the evidence supporting policies to place children in the type of care that will benefit them most in the long-term. The research findings suggest children are placed in a family setting whenever possible, with relative care always considered as a possibility."

For more details of the research, **click here**.

19/11/21

Number of looked after children at all-time high

In the year ending 31 March 2021 there were 80,850 looked after children. This is an increase of 1 per cent on the figure in 2020 and represents an all-time high.

There were 67 looked after children per 10,000 children. This is the same proportion as in 2020 and the highest recorded.

The figures were given in statistics released by the Department for Education.

During the course of the year to 31 March 2021, 2,870 looked after children were adopted. This is a reduction of 18 per cent on the corresponding figure in 2020. This continues a fall from a peak in 2015. The large decrease this year is likely driven by the impact on court proceedings during the pandemic, where cases progressed more slowly or were paused.

The Association of Directors of Children's Services commented:

> "ADCS research shows that the number of children looked after has increased by a third since 2008, while local authorities have faced a 50 per cent reduction in budgets since 2010. Despite the barriers and backlogs caused by the pandemic, we continue to work intensively with children and families to enable them to stay together safely. Only through long-term national investment in early help can we ensure that children are not taken into care when they could have stayed with their family had their needs been met earlier. The government must provide the sector with a sustainable, equitable and long-term financial settlement that enables children to thrive, not just survive in the wake of the pandemic."

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

19/11/21

Coram Children's Legal Centre celebrates its 40th anniversary

On 23 November Coram marked the 40th anniversary of the establishment of the Coram Children's Legal Centre (CCLC) with publication of **a report** setting out how CCLC has changed the legal landscape for hundreds of thousands of children and young people through legal advice, representation and information since it was established as the Children's Legal Centre in 1981.

An event to mark the anniversary included contributions from The Rt Hon Sir Andrew McFarlane, President of the Family Division England and Wales, Dame Rachel de Souza, the Children's Commissioner for England, and Baroness Hale of Richmond, President of the Supreme Court of the United Kingdom until 2020.

Over its 40-year history, CCLC has dedicated itself to using the law to promote and uphold the rights of children. The free Child Law Advice Service, established in 1982, today answers legal queries from thousands of families every year, while its online legal information receives two million downloads annually. In 2011, the Children's Legal Centre amalgamated with Coram to become Coram Children's Legal Centre, and it has gone from strength to strength over the last decade. The Legal Practice Unit delivers specialist legal aid representation in family law, community care, education and immigration law whilst the Migrant Children's Project delivers innovative early advice services including outreach in community settings, second tier advice to professionals working with migrant children and workshops co-delivered with young people. The international team has worked to promote child rights-related legal reforms in over 90 countries around the world.

For the report, **click here**. For more details of CCLC's work, **click here**.

25/11/21

'Rampant, hidden violence' against Sikh women revealed by report

A new report published by Sikh Women's Aid has highlighted the 'rampant, hidden violence against women and girls in the Sikh/Panjabi community'.

Of the 674 women who responded to a survey in the summer of 2021, 70 per cent saw themselves of survivors of domestic abuse but only 34 per cent had told anyone about it. Child sexual exploitation or abuse has been experience

by 35 per cent of those asked, 87 per cent of it against females. The data suggest that victims are more likely to be abused by someone in their family setting or someone known to them (38 per cent) than by online exploitation (1.5 per cent).

Sixty-five per cent of respondents say that their abuse has had a long-lasting impact on their physical or mental wellbeing.

The report calls for more academic research to be carried out on the extent of abuse in the Sikh/Panjabi community. The report also recommends:

- A focus on early education and respectful recommendations;
- Properly funded prevention programmes;
- Culturally sensitive and trauma informed projects and service accessible to victims; and
- Multi-lingual and culturally appropriate perpetrator programmes.

For the report, **click here**.

25/11/21

FGM statistics published

Between July 2021 and September 2021 there were 1,530 individual women and girls who had an attendance where FGM was identified. These accounted for 2,550 attendances reported at NHS trusts and GP practices where FGM was identified.

There were 665 newly recorded women and girls in the period between July 2021 and September 2021. 'Newly recorded' means that this is the first time they have appeared in the dataset. It does not indicate how recently their FGM was undertaken, nor does it mean that this is the woman or girl's first attendance for FGM. The number of newly recorded women and girls has reduced over time. This is to be expected as the longer the collection of data continues, the greater the chance of a woman or girl having been recorded in it previously.

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

25/11/21

Ombudsman issues guidance to help domestic abuse survivors

The Local Government and Social Care Ombudsman has called on councils to use its latest report to examine the services they provide to victims of domestic abuse.

As councils take on more responsibility under the new Domestic Abuse Act, the Local Government and Social Care Ombudsman is urging them to reflect on their own practices and procedures using the lessons contained within its report and identify whether they can improve the way they work.

Councils, notes the Ombudsman, have a key role in responding to domestic abuse, and working with other agencies, such as the police and health services, they provide appropriate support to victims of domestic abuse, for example through housing and homelessness services, children's safeguarding or to adults at risk of abuse or neglect.

In the report, the Ombudsman uses the experiences of a number of victims whose cases it has investigated to offer guidance and insight to councils, and suggest ways in which those services could have responded better.

Issues highlighted in the report include councils questioning victims' lived experiences and downplaying the impact of the trauma they have endured, failing to work with other local services to keep victims safe, and leaving people at risk for longer than necessary.

In one case, a victim's personal information was shared with her abusive former partner, causing huge stress and anxiety. In another, a pregnant mother and her four-month-old baby were assaulted by their abuser when they were not rehoused quickly enough by their local council.

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

> "Navigating the myriad processes that might be involved when victims of domestic abuse first call on their local council for help can be daunting enough, even without the trauma and stress of having gone through such awful experiences.
>
> "The key thing therefore is for councils to provide services for victims of domestic abuse as soon as they ask for help – and those services provided by authorities and partner agencies need to be seamless to avoid compounding the trauma.
>
> "I would urge councils across England to take the report in the constructive manner in which it is intended and use it to scrutinise their systems and procedures to see whether they can make changes for the better. If this helps drive action to keep even a single person safe from abuse, then it must be worth it."

For the report, **click here** and then click on the link at the top right side of the page opened.

25/11/21

Domestic abusers to be moved from the family home

The Guardian has reported on initiatives being pursued by several local authorities in England to provide housing for domestic abuse perpetrators, so enabling their victims to stay in the family home. Such plans are a response to calls from charities and campaigners.

The article quotes a recent report from the Domestic Abuse Housing Alliance which said that "without the option to remove and rehouse a perpetrator, victims, including children, will continue to suffer by remaining trapped in abusive relationships or being forced to flee their home".

For example, a key message from an independent engagement exercise, carried out by Sunderland City Council with women with lived experience of domestic abuse, was that victims and their children should not have to leave their home. Women perceived this as disruptive for them and their children and unnecessary if safety plans could be put in place to protect themselves and their children. They identified a key factor for their recovery would be provision of alternative accommodation for the perpetrator.

For the Guardian report, **click here**. For the draft strategy of Sunderland City Council, **click here**.

28/11/21

Standard Orders: Amendment to non-molestation order

Mr Justice Mostyn has announced that order No. 10.1 (Non-molestation order) of the standard orders is amended to include in para 1 the respondent's date of birth, the omission of which has caused occasional identification problems and unnecessary automated alerts from the Police National Database.

The application form FL401 requires the applicant to provide the respondent's date of birth.

The amended order takes effect immediately.

For a copy of the amended order, together with zip files containing volumes 1 and 2 of the standard orders in their up-to-date form, **click here**.

25/11/21

CPS charging rates for domestic abuse fell for the third year, ONS statistics show

In response to the Office of National Statistics **latest figures on domestic abuse**, the Domestic Abuse Commissioner, Nicole Jacobs, said:

> "Domestic abuse recorded by the police remains at near record volumes across England and Wales. Last year the numbers recorded by police were up 79,000 (6 per cent).
>
> "During the national lockdowns, we heard of huge demand for support for domestic abuse services across England and Wales, and of helplines being sometimes overwhelmed with calls. The increase in police recorded crime is a small reflection of the difficulties and dangers faced by victims of domestic abuse during this time, as well as the increased awareness of domestic abuse amongst the public.
>
> "While I am encouraged that more domestic abuse is being recorded by the police, I am increasingly concerned that the CPS charging rate has fallen for the third consecutive year.
>
> "Not only are cases less likely to be charged, but the time taken to charge has quadrupled from 4 days in 2014 to 18 days between 2020 to 2021. This is shocking.
>
> "[The] publication also demonstrates the variation in the criminal justice response across England and Wales. It is concerning to see that, for example, in the South West it took an average of almost two months (52 days) for the CPS to make a decision on charging domestic abuse related crimes, compared to an average of 14 in the East Midlands. This post code lottery simply must not be allowed to continue.
>
> "Delays mean that domestic abuse victims are not getting the action or protection that they so desperately need. This not only adds to their distress but can lead to fewer victims coming forwards in the first place.
>
> "Now that lockdown restrictions are over we mustn't forget about victims of domestic abuse – and must recognise that risk to victims can actually be higher. It is critical that the criminal justice system prioritises domestic abuse, in order to keep victims safe and hold perpetrators to account. It's also essential that we all continue to look out for signs of domestic abuse with our neighbours, colleagues and friends.
>
> "The Crime Survey for England and Wales did not capture information on domestic abuse prevalence following the move to telephone surveys during the pandemic. It is disappointing that we are unable to say what the impact of the pandemic has been on the overall prevalence of domestic abuse, but we know from services, helpline data, and research that intensity, frequency and severity of abuse has increased. It is very important that the ONS are able to report on prevalence through the Crime Survey for England and Wales as soon as possible."

For the ONS report on domestic abuse and the criminal justice system in England and Wales, **click here**.

25/11/21

Supreme Court decides on capacity to have sexual relations

The Supreme Court has dismissed the appeal of JB, a 37-year-old single man with a complex diagnosis of autistic spectrum disorder combined with impaired cognition. The Court of Appeal had held that in order to have capacity to engage in sexual relations, a person needs to understand that their sexual partner must have the capacity to consent

to the sexual activity and must in fact consent before and during the sexual activity.

In ***A Local Authority v JB (by his Litigation Friend, the Official Solicitor)*** **[2021] UKSC 52** the Supreme Court heard that A Local Authority commenced proceedings in the Court of Protection seeking declarations under the Mental Capacity Act 2005 ("the Act") as to JB's capacity in various matters, including a declaration that JB lacked capacity to consent to sexual relations. A question arose as to whether, in assessing JB's capacity to consent to sexual relations, the judge should have regard to whether JB had capacity to understand that the other person involved must give consent, and did in fact give and maintain consent throughout the act. The judge found that this was not relevant information for the purposes of determining if an individual had capacity to consent to sexual relations under the Act.

The Local Authority appealed to the Court of Appeal. The Court of Appeal recast the relevant matter as whether JB had the capacity "to engage in", rather than "consent to", sexual relations. The Court of Appeal found that in deciding whether a person had the capacity to engage in sexual relations, a judge should have regard to whether that person can understand that the other person involved must be able to consent and gives and maintains consent. The Local Authority's appeal was therefore allowed. JB, by his Litigation Friend, the Official Solicitor, appealed to the Supreme Court.

Respond (a charity providing services to children, young people and adults with learning disabilities), and Centre for Women's Justice (a charity seeking to combat male violence against women and girls) provided written submissions as interveners in the appeal.

Lord Stephens gave the judgment, with which all members of the Supreme Court agreed.

Lord Stephens considered each of the grounds of appeal in turn.

Ground 1 [86 – 91]

The Appellant argued that it was wrong to recast the relevant matter as whether JB had capacity to "engage in" sexual relations because section 27(1)(b) of the Act, which sets out those decisions which cannot be made on behalf of a person, refers to "consenting to have sexual relations". The Appellant argued that this section should be read as controlling the scope of section 2(1) of the Act, which relates to whether a person lacks capacity.

The Court rejected this interpretation of the statutory scheme and found that the wording of section 2(1) of the Act is broad and flexible. The Court also rejected the alternative submissions on behalf of the Appellant that JB's desire to initiate sexual relations was not a "decision" within the meaning of the Act.

Ground 2 [92 – 96]

The Appellant argued that even if the relevant matter was recast as whether a person had capacity to "engage in" sexual relations, in answering that question, it was not relevant to look at whether that person understood that the other person must be able to consent, and did in fact give and maintain consent throughout the act. The Appellant argued that this interpretation of the Act inappropriately extended its purpose to protecting the general public, and moreover created an impermissibly "person-specific" test for capacity.

The Court rejected these submissions. First, the Court found that it was correct that the Court of Protection should have regard to reasonably foreseeable adverse consequences with the aim of protecting members of the public, as well as the person who may lack capacity. Second, the Court found that the test in section 2(1) was decision-specific, not person-specific.

Ground 3 [97 – 116]

The Appellant argued that to have regard to whether a person had capacity to understand that the other person must be able to consent and must in fact consent before and throughout the sexual relations creates an impermissible difference between the civil and criminal law.

The Court found that no impermissible difference arose, and that there were strong policy justifications, including the Court of Protection's responsibility to protect persons who may lack capacity as well as to protect others, for any higher standard in the civil law test for consent. The Court also found that any differences between the civil law test and the criminal law test should be assessed as they arose in individual cases.

Ground 4 [117 – 119]

The Appellant sought to argue that the Act must be construed compatibly with Article 8 of the European Convention on Human Rights which provides for a right to respect for private and family life. This ground was not raised prior to the appeal to the Supreme Court, and permission to raise it was refused. The Court nevertheless found the operation of the Act is compatible with Article 8.

Ground 5 [120]

The Appellant argued that the Court of Appeal's test for capacity to engage in sexual relations was inconsistent with article 12(2) of the United Nations Convention on the Rights of Persons with Disabilities, which provides for recognition that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

The Court rejected this argument as there is no separate standard for persons with disabilities. Furthermore, the Court noted that in ***R (SC, CB and 8 children) v Secretary of State for Work and Pensions*** **[2021] UKSC 26**, the Supreme Court had recently confirmed that it would not examine whether the UK has violated provisions of an international treaty which are unincorporated in domestic law.

[References in square brackets are to paragraphs in the judgment.]

Supreme Court Press Summary

The new family law and cultural revolution of Abu Dhabi: why Abu Dhabi remains forum non conveniens on financial remedy and children matters when compared to England

Byron James, Partner and Head of the **Expatriate Law** team in the United Arab Emirates, explains recent changes in the family of Abu Dhabi.

The law in Abu Dhabi recently underwent a considerable change – announced one day in a national newspaper. Thereafter existed a cultural revolution that catapulted the largest Emirate in the UAE into a progressive and modern outlook for the future.

This development followed an announcement, similarly out the blue, in Dubai, almost exactly a year previously, when it was proclaimed that both sex outside marriage and alcohol use would no longer be criminal offences prosecuted under the law. Each Emirate trying to outdo the other in their reaching for modernity.

With the Dubai law change, questions abounded: if it is now no longer illegal to have sex outside of marriage, does this mean it is also no longer illegal to cohabit, and what of a child produced by this arrangement? Do they remain illegitimate under the law and not recognised by the Court, the police, the criminal law, schools, hospitals et al? Children's rights are enshrined in the UAE under "***Wadeema's Law***" but there remained many cracks through which so called "illegitimate children" could fall. Many of the changes were headline grabbing and – ultimately – in respect of cohabitation and alcohol use, endorsed fairly common practice which was rarely punished unless linked to other, more egregious, conduct. The changes did not answer those follow-on questions and left the position in Dubai in flux: there has been an announcement of a possible welcome destination, but the journey very much remains ongoing.

The Abu Dhabi changes went further. These were substantial and deeply cultural, but still opened the door to jurisprudential questions that will require further watching to see how they are developed in years to come.

The law changes create a new forum for non-Muslims, one that allows them to step outside of the hitherto strictures of Sharia Law. For years, expatriates occupied a headspace where despite living in a country applying Sharia Law in all aspects of family and criminal law, they would conduct themselves as if living in simply a sunnier clime of England, a county just removed down South and a bit to the East. There was a clear and obvious distinction between the *de facto* and

de jure: with the two only colliding in acrimonious disputes between , say, partners, neighbours or colleagues. Consequently, when it came to having alcohol at home or a live-in partner, many fell foul of laws they did not know applied to them or even existed, despite many years of living in the Middle East.

For non-Muslim expatriates, they are now able to obtain a civil marriage, as long as they are over 18 and both consent. The prior requirement for a pre-marital examination – to confirm whether the wife was pregnant thereby rendering the marriage not possible – has been removed entirely from this process.

When divorcing, non-Muslim expatriates are able to access a no-fault divorce procedure: no behaviour allegations are required. The previously compulsory "Family Guidance" stage has been dispensed with, where once it was intended (in the same way as Part II of the Family Law Act 1996) to try to keep couples married and away from divorcing. Much like the failed English version, it was too paternalistic and often provided more nuisance value than help. We are therefore presently occupying a world where one can obtain a no-fault divorce in Abu Dhabi but not yet in England.

A new range of financial remedy considerations are also available – unless otherwise provided for in a marriage contract – thereby rendering an interesting new and important market for pre-marital agreements for those seeking to marry and live in the UAE. The Abu Dhabi Court now has a wide discretion to apply a number of relevant factors: the length of marriage, the ages of the parties, the resources of the parties, contributions, conduct, compensation, needs of children – all items well understood in England and accordant with what one might find in section 25, Matrimonial Causes Act 1973.

As regards child arrangements, there is a specific provision which confirms that the default position on separation will be shared custody between a mother and a father. There is no hierarchy between the parents and the phrase 'primary carer' – often wrongly used in children cases in England – has been specifically dispensed with and disabused. The intention and focus of the new law is to protect children from the negative effects of divorce by removing arguments regarding their care.

It is of note that the Abu Dhabi personal status court follows a civil law system wherein precedent is not binding and case law does not have the same status as, say, in England. It is more difficult to both predict and monitor how these laws will be applied in future: does it matter whether you give a wide discretion to judges if they are not prepared to exercise it? To what extent will the largely socially conservative judiciary in Abu Dhabi seek to embrace wide ranging financial remedy orders against parties to a divorce? How does a discretionary system operate in financial remedies when there is no precedent to guide thorny issues such as short marriages that have produced significant assets, intermingling of non-matrimonial property, intervenor/third-party ownership issues, etc, etc... As we in England have discovered, there are many ways for financial remedies law to produce challenging problems that need to be solved through careful and consistent application of principle over many years. How will Abu Dhabi seek to implement that and over what timeframe?

Whilst admirable in intent, gaps still exist in the law. The interim remains something without remedy: no freezing injunctions, no legal funding orders or reviewable dispositions? How would the Abu Dhabi Court resolve the inequality of arms between a wealthy husband instructing elite lawyers as against a wife impoverished by the convenience of historic martial financial arrangements. Will there be a concept of matrimonial property and sharing, or will the current conduct driven only arguments of Sharia continue to endure with regards to capital? What of pensions – entirely unrecognised in the UAE – will they remain entirely outside the ambit of the Court? What of foreign property – will they avail themselves of a more *in personam* style order – as used in England – which enables the transfer of property based anywhere in the world?

The most significant omission is in the rules of disclosure. Still no procedural rules exist for family proceedings and there is no general duty of full and frank disclosure on either party, albeit that of course there can be judicial requests for specific items as and when the same

becomes relevant. The reason for this omission previously was that there was no property sharing nor any conception of matrimonial property to be shared. The new law does not seem to specifically introduce new capital orders or sharing, but if it does it can only do so alongside a disclosure duty presently not extant under the law. This alone often renders decisions as between England and the UAE quite different, and the latter requiring further resolution via Part III, MFPA 1984 in England.

Without these issues being addressed, the law changes remain probably unsuitable where: there is a capital or income disparity between the parties; there is property based abroad; issues of third-party ownership are relevant; and no interim issues of legal funding or protecting or recovering assets exist. For these reasons, it is unlikely that the English Court could presently consider Abu Dhabi *forum conveniens* over an outcome in England: it is the difference between established law and good intentions. There is also an interesting aspect for husbands/fathers: whereas once the law in Abu Dhabi could be described as detrimental to both parties, just in different ways (women would lose out financially and in terms of no parental responsibility and men in terms of losing time, especially overnight, with children), an unintended consequence of the law change is it removes one considerable disadvantage for men without quite balancing the scales for women.

As regards children matters, whilst the changes to the default on separation is very welcome, what of leave to remove (a common problem for expatriates in the UAE) where there remains no comparable law to the *Payne* criteria in England. Nor is there an organisation comparable to CAFCASS and therefore no social work involvement in the way it is available in

England, depriving the Court of its "eyes and ears" in a private child dispute. The UAE also remains outside of the Hague Convention in relation to child abduction, and there stands a considerable jurisprudential hole where it could be.

The above review is not intended as criticism. There is no more modern or progressive Muslim country in the world than the UAE. The changes made in the last 12 months are extraordinary, brave and an important step on the ladder. Sheikh Khalifa bin Zayed Al Nahyan and his Abu Dhabi legal team deserve immense credit for the brilliant work they have done for expatriates in Abu Dhabi: the default and baseline position for expatriates is now entirely tolerable but that is a different question from whether it offers a comprehensive and viable alternative forum for a financial remedies claim to be determined. Whilst the basic aspect of child arrangements on separation has been remedied to something to be applauded, what of the more complex questions as to when a party wishes to change country or make complex allegations against the other – there is presently no comparison between England and the UAE jurisprudentially.

The new law changes in Abu Dhabi are an amazing and welcome first step, but there remains much progress to be had before it stands as a *forum conveniens* as against England for most English expatriates.

23/11/21

CASES

A Local Authority v Mother & Ors [2021] EWHC 2794 (Fam)

The Background

The LA brought an application for public law orders under the Children Act 1989 in respect of three children. A 4-day final hearing was listed to begin on 19 July 2021. Intermediaries were appointed for both parents.

DM was approached to act as intermediary for the Father. DM frequently acts as an intermediary, and also as an agency for other intermediaries. DM accepted instruction to act as intermediary, but on 14 July 2021 he notified Father's solicitors that he would not be available. DM put forward MH to stand in his place. DM presented MH as a competent intermediary who had '*acted as intermediary for XX numerous times.*'

During the hearing, it became apparent that MH had not seen the list of questions to be put to the Father, which had been agreed at the ground rules hearing. MH had not read the Father's cognitive assessment or his intermediary assessment. MH had no knowledge of the relevant Advocate's Toolkits. The Father informed the Court that during the hearing he had not understood parts of the evidence and had not been assisted by MH at those times. It further transpired that MH did not understand the role of an intermediary and had minimal experience of acting in that capacity.

MH's deficiencies as an intermediary led to the trial judge adjourning the trial. The LA, the parents, and the Children's Guardian all sought their costs for the abandoned hearing. The costs application against DM and MH was transferred to the High Court, and DM and MH were joined as parties solely for the purpose of this hearing. The LA represented the unified view of the other parties.

DM and MH appeared in person, and DM produced written evidence. It appeared from DM's documentation that MH had acted as an intermediary in one previous matter in June 2021, having been proposed by DM. DM's email to the solicitor in the June case was deemed relevant to the instant application, because it was seriously misleading in respect of MH's ability to act as an intermediary. DM suggested in the email that he had prepared MH for the role, yet MH had not read or been made aware of the Advocate's Gateway nor was she aware of the need to read the client's intermediary assessment. DM described MH as having limited experience but at the time of the email she had no experience at all as an intermediary.

Costs orders against non-parties

The application for costs was made under s.51 of the Senior Courts Act 1981 ('SCA') and the FPR r46.2. Section 51(3) of the SCA provides:

> "51(3) The court shall have full power to determine by whom and to what extent the costs are to be paid."

The ability to make a costs order against an expert was considered and confirmed by Keehan J in ***Re ABCDEF*** **[2019] EWHC 406 (Fam)** . The principle that a third party, who is not a funder but who is involved in court processes, can be subject to a costs order is established.

The Judge noted the tests under the *wasted costs regime in s.51(6) of the SCA, and in Ridehalgh v Horsefield* [1994] Ch 205 where the Court applied a three-stage test. Namely, (1) did the legal representative act improperly, unreasonably or negligently; (2) did that conduct cause the applicant unnecessary costs and (3) was it just in all the circumstances to order costs. Although this was not a wasted costs application, the approach was deemed to be analogous to those to be applied in applications against third parties.

The requirement for causation between the third party's actions, and the costs incurred, was clearly established. There was no doubt that without the behaviour of DM and MH, the wasted costs would not have been incurred.

Submissions

The LA argued that this was a straightforward case, and that the wasted costs were entirely caused by DM's conduct. The LA also relied on the fact that in the June 2021 matter, DM had put forward MH and suggested she had some experience when this was not true.

DM argued that the trial judge should have ensured the intermediary was competent, that the Court was not obliged to use MH, and the solicitors were not obliged to put her forward. The responsibility was therefore on them to ensure she was competent. Further, the Intermediary Oath was not taken.

MH did not submit a statement and in her oral submissions she was extremely apologetic and said she would not work as an intermediary again. MH appeared to believe that the role of an intermediary was simply to be there as a supporter or friend to the party.

Conclusion

The lack of clear guidance on the use and roles of an intermediary makes it difficult to ensure that the person who puts themselves forward as an intermediary understands the role and is competent to perform that role. The lack of guidance also means there is no definition on who may be appropriate to act as an intermediary, what training or qualifications they have, or what checks a judge or solicitor should undertake.

The Judge determined that what went wrong in this case was the result of misrepresentation by DM and not a lack of guidance, or any default, by the Judge or the Father's solicitors. DM acted inappropriately in putting MH forward as an intermediary given her very limited experience and complete lack of training or preparation for the role without at the very least fully explaining the position to the solicitors. His failure to act appropriately in this regard directly led to MH being appointed and in turn to the hearing collapsing.

There were exceptional circumstances which justified a costs order against DM. The Judge did not consider it just to make an order against MH given that it was clear she had no idea what the role entailed or what she was getting herself into.

This judgment will be passed to the President of the Family Division, for him to consider what steps it may be appropriate to take within the Family Court to ensure that intermediaries appointed are competent to undertake the role.

Case summary by **Kate Pearson**, Barrister, **St John's Chambers**

Lincolnshire County Council v CB & Ors [2021] EWHC 2813 (Fam)

In this case the Judge considered the argument put forward on behalf of the parents that it was necessary for there to be a separate fact -finding hearing of up to 20 days in length and with a raft of witnesses proposed, to resolve the question of what, if any, role of either / both of them had in the death of their child, XE, following an investigation by the police which was ultimately closed without any charges in relation to his death being brought against them.

The Local Authority and Guardian argued that this was neither necessary or proportionate and proposed that the disputed factual matters could be dealt with as part of a composite 5-day final hearing. In doing so, significant emphasis was placed upon the inevitable delay that a 20 day fact – finding hearing would give rise to as the surviving subject children had been in care since 26th January 2021 (so for nearly 10 months at the time of the judgment), and had been assessed as being in particular need of complex therapeutic input which should only start once they are in their long term placement so that their carer(s) can support them through this process.

In the course of her judgment, the Judge reiterated the competing factors which must be borne in mind and which are well established by the existing rules and case law, but also paid deference to the particular impact that COVID-19 has had upon the family courts in general.

In doing so, she confirmed at [**17**] that as this is a case management decision, the starting point is FPR rule 1.1 namely that: "Dealing with a case justly includes, so far as is practicable:

> (a) ensuring that it is dealt with expeditiously and fairly;
>
> (b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
>
> (c) ensuring that the parties are on an equal footing;
>
> (d) saving expense; and
>
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

At [**18**] she also referred to the recent Court of Appeal decision *Re H-D-H (Children)* [2021] 4 WLR 106, which reiterated the principles espoused in *A County Council v DP* [2005] 2 FLR 1031, at [24]-[25], namely that: "24*…amongst other factors, the following are likely to be relevant and need to be borne in mind before deciding whether or not to conduct a particular fact finding exercise*:

> a) The interests of the child (which are relevant but not paramount);
>
> b) The time that the investigation will take;
>
> c) The likely cost to public funds;
>
> d) The evidential result;

e) The necessity or otherwise of the investigation;

f) The relevance of the potential result of the investigation to the future care plans for the child;

g) The impact of any fact finding process upon the other parties;

h) The prospects of a fair trial on the issue;

i) The justice of the case"

and the court's view in the case that: "24…*Amongst the pertinent questions are: Is there a pressing need for such a hearing? Is the proposed fact finding hearing solely…'to seek findings against the father on criminal matters for their own sake?' Is the process, which will be costly and time consuming…proportionate to any identified need?*"

At **[19]** she also reiterated the various factors to be considered as set out by the Court of Appeal in *Re H-D-H* at paras 22 and 23.

In reaching her decision, the Judge pointed out that although it is a consideration, the children's welfare is not a paramount concern in this context **[20]** but that, in this case, such was the prospect of a significant delay arising were the matter to be listed as proposed on behalf of the parents that "*…the importance of achieving an appropriately speedy outcome for the children remains an important consideration and that factor here is particularly weighty*" in view of the children's need for therapy and the recommendations that this should only commence when they are in their long term placement.

Ultimately, at **[22]** she concluded that: "*The true question is whether the fact finding is truly "necessary" for the ultimate welfare decision that the Court has to make. If it is not necessary for that decision, then a fact finding hearing should not be undertaken.*" and drew attention to the fact that the need to consider the impact upon the court's resources and to properly apply this test is all the more essential in the current climate.

In reaching her decision, and taking into account the suggestion on behalf of the parents that even if there was not to be a separate fact-finding hearing, 5 days would not be sufficient, the Judge concluded that not only was the disputed issue a sufficiently narrow one for the court to be able to deal with it at a composite final hearing, but also to obviate the need for the raft of witnesses sought on behalf of the parents; none of whom could offer direct evidence regarding the incident itself, and whose evidence would, therefore, carry little forensic weight over and above that which could be derived from the bodycam footage and recordings of the 999 call. On this basis, she rejected the parents' proposals in their entirety and agreed with the Local Authority that a time estimate of 5 days for the composite final hearing was appropriate accordingly.

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

ES v LS [2021] EWHC 2758 (Fam)

The facts

The parents are both from Latvia. They have 2 children aged 14 and 12 at the time of the hearing. The mother brought the children to the jurisdiction in December 2019 to live with her new partner. The father commenced his application in March 2021 with a without notice application for a location and passport order. The mother raised 4 defences i) Settlement under Article 12, ii) Children's Objections under Article 13, iii) Consent and Acquiescence under Article 13(a), iv) Grave risk of harm and intolerability under Article 13(b). The judge decided that he would consider the settlement and objections defences and only then, if necessary, the other defences. He decided that the father knew of the mother's move and where she and the children were and by the time that proceedings were begun the children were settled. He refused to make the return order on the basis that the mother's first 2 defences were made out.

The procedural issues.

The judge identified matters which he regarded as poor practice, which should not be repeated in other cases. He was concerned that such cases are taking up too much of the High Court's time. He specifically noted

1. There were 2 bundles 484 and 153 pages contrary to PD27A r 5.1.[350pp in 1 file], and a bundle of authorities with 14 authorities (409 pages), contrary to PD27A r4.3A.1 (maximum of 10 authorities);

2. The case had been listed for 2 days with the expectation of oral evidence from the Family Court Adviser and the parents. When Practice Guidance: C*ase Management and Mediation of International Child Abduction Proceedings* issued by Sir James Munby P para 3.8 says that oral evidence will **rarely** be directed and only if it is **necessary**. The procedure was supposed to be a simple summary remedy in effect an interim order (similar to a freezing order) pending the substantive welfare decision in the country from which the children came, if return is ordered. Oral evidence would rarely be required to determine any of the defences in such circumstances.

3. Although the father knew where the children lived he made a without notice application for amongst other things location orders and orders to secure details of the address from Government departments. The application was unnecessary and the evidence did not comply with the requirements of the Practice Guidance (above) paras 2.1-2.2 and the case law which founded the Guidance. The routine use of such applications should have ceased and "the time had come to insist on the scrupulous observance of the Practice Guidance". He drew attention to the practice in the Administrative Court of imposing sanctions on lawyers who made baseless applications ***Re the Court's exercise of the Hamid jurisdiction*** **[2021] EWHC 1895 (Admin)** .

Article 12

4. The judge held [paras 36] that "in order to be settled somewhere, a person must not only physically reside in a new home as a permanent residence but must genuinely intend to establish that place as a new home. Thus there must be proof of both a physical constituent and a mental constituent. For a younger child the relevant mental state will be that of her primary carer; for an older child it will be the mental state of the child herself". He rejected the need for there to be a finding that the subject children are living in a stable, contented, normative, conflict-free family environment. (in this case discord had arisen between the mother and her new partner after 11 months). [para 46-50].

5. He also construed "now" as referring to the time the judge came to decide the proceedings and not as at the commencement. [para 69]. In this he accepted he was reaching a different conclusion to Bracewell J in *Re N (Minors) (Abduction)* [1991] 1 FLR 413. He also accepted that it was not necessary for him to do so as he was satisfied on the facts that the children had become settled well before the proceedings began so that it did not make a difference to the conclusion.

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

AB v XS [2021] EWCOP 57

Lieven J determines that the Court of Protection does not have jurisdiction under Mental Capacity Act 2005 to direct the return of XS to this jurisdiction as XS is habitually resident in Lebanon.

She considers the test to apply in cases of incapacity. She also concluded that it would be inappropriate to use the Inherent Jurisdiction of the High Court as to do would cut across the statutory regime. In any event it is in XS's best interests to remain in the care home in Beirut.

The Facts

XS is 76. She was born in Lebanon. She came to the UK in 1971. She now holds dual UK and Lebanese citizenship. In 2013 she was diagnosed with Alzheimer's Disease. In May 2014 during a hospital admission, following a fall, there was a best interests meeting at which the professionals agreed she did not have capacity in respect of her residence and that she should be discharged to a care home. The notes at this time refer to her discussing going to Lebanon to visit her family and friends, including her brother R. There is some reference to her wanting to visit but not want to stay there forever. On 9 September 2014 there is a case note that records XS saying that she would like to visit Lebanon to "trial it out". She was certainly keen to go to Lebanon for a time without there being evidence of her committing to a permanent move. On 10 September 2014 a capacity assessment was undertaken, and it was concluded that XS had capacity to enter into a Lasting Power of Attorney ('LPA'). XS's solicitor, Ms Perkins, produced an attendance note at the time which indicated she believed XS had capacity. Further, she was examined by Dr Ruth Allen, a consultant old age psychiatrist, who also confirmed her capacity. The LPA was entered into on 11 September 2014 and was later registered. (Lieven J had upheld the validity of the LPA at a previous hearing). Later in September 2014 XS travelled to Lebanon and she moved into a flat very close to that of her brother, R. R died in April 2016. XS was then moved into a care home in Beirut. Although the evidence at this point is not entirely clear, there is a strong implication from the material before the judge that by this date XS no longer had capacity, certainly in respect of where and in what country she lived. Her nephew, GH, who is R's son, filed a witness statement in these proceedings referring to having tried to consider what was best for XS at that time, and her having been moved to a care home. The fact that GH was deciding these matters, and the sense of his evidence, is that XS had lost capacity by this point.

AB, XS's cousin, sought to bring XS back to the UK. AS brought proceedings in Lebanon and the court there appointed a guardian. In September 2020 authorisation was granted for AB to arrange for XS to return to England and Wales. 2 of XS's nephews who live in the USA obtained a travel ban preventing the move. There was expert evidence before Lieven J doubting the validity of the travel ban. AB therefore brought proceedings in England and Wales. The nephews were given notice but took no part. XS was represented by the OS. The proceedings in Lebanon were due to be heard in October 2021.

Mental Capacity Act 2005

For the Court of Protection to exercise powers in respect of a person overseas P must (in personal welfare cases) be habitually resident here: s63 MCA 2005, Schedule 3 (7) para (1). Lieven J considered ***An English Local Authority v SW*** **[2014] EWCOP 43** Moylan J and *Re MN* [2010] EWHC 1926 (Fam) Hedley J and concluded that

> "if an incapacitated person is moved from one country to another, then they can change their habitual residence once the requisite degree of integration is achieved, regardless of their inability to have exercised any decision making in that choice. The position might be different if the person was removed unlawfully…" [26]. She explained at [27] that "One could have an incapacitated adult who retains strong roots in the original country, such as a home and family, and who had expressed an unequivocal desire to return before s/he lost capacity. That person might remain habitually resident in the original country even after a prolonged stay in the new country. However, it must be the case that after a sufficiently long period in the new country, the sheer fact of physical integration may become overwhelming and habitual residence moves to the new country. This would be the case even if the individual had originally wished to return to their earlier country of habitual residence. The focus of the test being on integration rather than intention, means that the fact of physical integration will ultimately be determinative." She added [29] "It is not possible to determine what she would have said in 2014 if told her brother would die in 2016. However, that is not the correct question. Rather, the question is whether she is now integrated into society in Lebanon…"

Inherent Jurisdiction orders

Having concluded that the Mental Capacity Act 2005 could not be used, she went on to consider whether the Inherent Jurisdiction could be used instead. She concluded that it was not appropriate to use the High Court's powers when to do so would be to contradict a limit imposed by Parliament. [35].

Lieven J then went onto consider the medical evidence which showed that XS was well-settled and well treated in the care home in Lebanon and given her frailty and advanced dementia a move to England and Wales was not in her best interests. Therefore even if she could have made orders under either the MCA or the Inherent Jurisdiction she would not have done so.

Summary by **Nicholas O'Brien**, Barrister, **Coram Chambers**

Crowther v Crowther & Ors (Financial Remedies) (Rev1) [2021] EWFC 88

This is a case which might be described as how not to do it. These were the third set of reported proceedings in relation to the dispute. The parties' total costs were £2.3m, the judge concluded that the parties' net assets were £738,375. The judge describes the lack of cooperation between the parties and their lawyers as "very apparent" and is critical of their failure to make any meaningful attempts to settle even trivial matters.

Although this is clearly a case which turned on its own facts there is some useful commentary as to the interplay between a Tomlin order reached in civil proceedings and financial remedy proceedings at paras 42 – 47 and 53; in relation to non-disclosure at 56 – 62 and as to conduct at 63 – 65.

The judge's final paragraph should be a warning to anyone seeking to litigate in the way that these parties have:

> "**Last word**
> 87. The only beneficiaries of this nihilistic litigation have been the specialist and high-quality lawyers. The main losers are probably the children who, quite apart from the emotional pain of seeing their parents involved in such bitter proceedings, will be deprived of monies which I am sure their parents would otherwise have wanted them to benefit from in due course."

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

Re W [2021] EWHC 2844 (Fam)

The Local Authority sought a care order in relation to a 12 year old boy ('W') who had serious disabilities arising from a genetic defect and who required one-to-one care throughout the day with two-to-one care for moving and handling. Proceedings were commenced after the private care company responsible for delivering the care package stated that they were no longer prepared to do so, citing what they perceived to be interference and resistance from W's parents.

The court had earlier approved the instruction of Dr Hellin, a consultant chartered psychologist and psychotherapist, to undertake a psychological assessment of the parents. Her '*landmark report*' was influential in the resolution of the dispute and agreement on the way forward, ie through the use of systemic intervention to assist the professionals and the parents to move from their polarised beliefs about each other and to minimise mutual blame and recrimination. Notably, Dr Hellin had identified that what was required was a recognition by the professionals that they were dealing with ordinary parents facing extraordinary circumstances, and that the evaluation of the issues in terms of the parents' perceived failures and/or mental health difficulties was therefore unhelpful.

In agreeing that the expert assessment had '*unlocked the case*' and '*changed the landscape,*' Mr Justice Hayden revisited two older authorities (both where judgment was given by Hedley J) noting that cases concerning profoundly disabled children

with complex needs do not fit easily into the scope of Part IV of the Children Act 1989 and that resort to litigation is rarely constructive in these circumstances.

Of far wider application (ie not limited to cases concerning disabled children) is the reminder of what is meant by '*the care given to the child…not being what it would be reasonable to expect a parent to give to him*' under section 31(2)(b)(i) of the Children Act 1989. This must be evaluated by reference to the circumstances the parent is confronting and the individual child, rather than to some unachievable gold standard of parenting. Above all, it requires recognition that '*in a challenging situation many of us may behave in a way which might not objectively be viewed as reasonable*' (para. 19).

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

Disclosure and Barring Service v AB [2021] EWCA Civ 1575

The Background

The appellant was the Disclosure and Baring Service ("the DBS") appealing a decision by the Upper Tribunal Hearing that it was no longer appropriate for the name of the respondent, ("AB"), to be included in what is known as the children's barred list, that is, a list of persons barred from engaging in certain activities relating to children.

AB was an organist and choirmaster in respect of whom allegations were made by four girls in the choir that they had engaged in inappropriate sexual conduct with him (when they were over 16 years old) one of whom went on to have sexual intercourse with him (when she was over 18 years old), which led to his name being placed on the children's barred list and then transferred to the children's barred list.

AB sought to have that decision reviewed by the DBS under paragraph 18 of Schedule 3 of the Protection of Children Act 1999 ("the 1999 Act"), on the basis that, although he recognised that his previous conduct was below the standard required, he had demonstrated an ability to modify his behaviour and the DBS granted permission for a review as this suggested a material change in his circumstances. Having conducted its review, the DBS decided that his name should remain on the list prompting AB to appeal to the Upper Tribunal.

In an interim decision, the Upper Tribunal found that decision of the DBS was based on three errors of law, namely (1) an implied assumption that AB's sexual interest in teenage girls created a risk, or more of a risk than that presented by other heterosexual men, of the behaviour being repeated without giving reasons for that assumption (2) the decision did not explain why AB's self-interest was less of a mitigating factor than insight into harm and (3) the DBS had failed to enquire into, or make findings of fact about, two incidents involving one of the four girls when she was 19 years old.

In its final decision disposing of the appeal, the Upper Tribunal held that it had power to determine whether it was appropriate for AB to remain on the children's barred list and decided it was not for the reasons already given in its interim decision and directed the DBS to remove his name from the list.

This DBS then sought to appeal both the interim and final decision of the Upper Tribunal on the grounds that it had:

> (1) erroneously identified errors of law in the DBS decision of 26 May 2016;
>
> (2) erred in its findings of fact;
>
> (3) erred in its disposal of the appeal as it misinterpreted section 4(6) of the Act in its approach to remittal and incorrectly decided the question of appropriateness of the inclusion of the respondent in the list itself rather than remitting the matter to the DBS.

The Appeal

The leading judgment in the appeal was delivered by Lord Justice Lewis ("The Judge"), who, having addressed the legal framework for including the name of a person in a list of persons barred from working with children at [8-13], went on to analyse the decisions of the DBS [21- 23] and Upper Tribunal [24-35] respectively.

In delivering the court's decision, the Judge considered the law and submissions presented having divided the issues into errors of law and fact [37- 62] and the powers of the Upper Tribunal on an appeal [63-77].

Having done so, at [76] the Judge found, "*significant parts of the fact finding exercise the Upper Tribunal conducted to be dubious.*" and, ultimately, concluded that [81]:

> "The Upper Tribunal erred in its interim decision in finding that the DBS had failed to give adequate reasons for certain implied assumptions said to underlie its decision of 21 May 2016. On a fair and proper reading of the decision letter, the DBS had not made any such assumptions and it did not, therefore, err in law by failing to give reasons for such assumptions. The Upper Tribunal erred in finding that the DBS acted unlawfully by not investigating the circumstances, or making findings of fact relating two incidents

> involving EF in 2002. The Upper Tribunal erred in exercising its powers under section 4(7) of the Act to find certain facts in its interim decision. Further, the Upper Tribunal erred in its interpretation of section 4(6) of the Act. The Upper Tribunal may not consider the appropriateness of a decision to include a person's name in a barred list in deciding whether to direct the removal of a person's name from a barred list or remit the matter to the DBS. The Upper Tribunal ought only to direct removal where, as a result of its findings of law or fact, the only decision that the DBS could lawfully come to would be to remove the person's name from the barred list. I would set aside the interim decision of 29 June 2018 and the decision of 11 March 2020 and remit the matter to a differently constituted Upper Tribunal."

Finally, having made his decision, the Judge considered how the appeal should be disposed of given that, as an appeal on a point of law, this is governed by section 13 of the Courts, Tribunal and Enforcement Act 2007 ("the 2007 Act") and should be remitted to a differently constituted Upper Tribunal which, due to the passage of time, it might not be able to now tell whether the circumstances have changed. He concluded that this was the only realistic choice as AB remained entitled to have the decision reviewed by the Upper Tribunal and it was for him to decide whether to do so and whether to make an application under paragraph 18A as well as, or instead of an appeal, concluding that it is ultimately for the DBS to deal with as the appeal court can only exercise the powers conferred upon it by section 14 of the 2007 Act.

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

JM v KK [2021] EWFC 54

Background

At the time of judgment, H was now aged 50 and W aged 41. They had a 14 year marriage. The parties had 1 child together (N).

The parties had lived in England before moving to India and then to the Middle East. H had a succession of jobs in the Gulf region as in in-house recruiter and commanded a high salary and incurred minimal tax liability. Towards the end of the marriage, W took jobs as an events' organiser. As a result, the parties lived a comfortable lifestyle.

Following an argument in December 2019, H flew with N to England without informing W. H petitioned for divorce on 23 December 2019 on the jurisdictional basis of domicile in England and Wales.

There followed litigation in respect of N which eventually resulted in a final order for N to live with her mother in India and spend approximately 2 months of the year with H in England (orders previously having been made for N's return to Bahrain). This had the consequence of the parties spending approximately £150,000 on legal proceedings. H had also lost his employment as a result of W taking steps before the religious court in Bahrain.

Assets

H was living in a 2-bedroom flat with an equity of c.£130,000. The property had been purchased during the marriage and rented out. N had also lived there with H for a brief time before moving to India.

There were an additional 2 properties in India: 1 flat on the outskirts of Dehli, lived in by W and N, held in joint names with an equity of c.£23,500 and 1 holiday home with negligible equity.

The parties' bank accounts and assessments which were of minimal value were ignored, as was W's jewellery and the family car abandoned by W somewhere in the UAE (with the judge simply ordering that if it was located and sold the proceeds were to be divided equally).

Thus, the realisable total assets were c.£154,000.

W also had debts of £43,000, of which £10,000 were regarded by Cohen J as immediately repayable.

Income

H, after 35 unsuccessful applications, managed to find a job as an employment coach with gross income of just over £23,000.

W had no income of significance and, despite her efforts, was only working on a piecemeal basis by the final hearing.

Pensions

H had a pension of £80,000 placed in the Isle of Man, the majority of which was non-matrimonial. W asserted that a greater share than the 9% matrimonial value was justified on the basis that as a result of decisions taken during the marriage, she had forgone the opportunity to build her own pension.

Positions of Each Party

H offered W a lump sum of £40,000 for a clean break. He also offered to forgo his claim for a costs order in respect of the proceedings arising out of W's actions in Bahrain.

W's offer was for her debts to be cleared and the remaining assets to be divided equally. She sought a clean break and for H to pay maintenance for N at a rate of £6,000 p/a.

European Regulations

As the divorce petition was filed 8 days before the European Regulations ceased to apply to the United Kingdom, W argued that Cohen J was bound Article 3(c) if the EU Maintenance Regulations, Council Regulation (EC) No 4/2009. Cohen J was referred to ***Moore v Moore*** **[2007] 2 FLR 339** as justification for concluding that the "maintenance" definition covered the present case.

W submitted that Cohen J must: (a) assess what the assets are; (b) take off what he found the debts to be; and (c) divide the balance by 2. If H's reasonable housing needs were more than 50% of that figure, this was immaterial as the consideration of needs is outside of the terms of the Regulations.

Cohen J's Decision

The judge disagreed with W's submissions for a number of reasons:

> i) The division of matrimonial assets is governed by reaching a fair outcome in all the circumstances of the case; in some circumstances equality will be appropriate but in others it will not.
>
> ii) The interests of N were the court's first consideration.
>
> iii) The judge did not accept that his discretion was removed and that he was bound to produce an arithmetical result from the exercise even if it is unfair.
>
> iv) The court must arrive at a fair division of the matrimonial assets. Payment of a lump sum or transfer of property is not necessarily in the nature of maintenance as set out in the third proposition extracted by the Court of Appeal in Moore at paragraph 80.
>
> v) The court was ordering a payment or transfer of property intended as a division of assets arising out of a matrimonial relationship. The payment in part reflects W's interest in the Tunbridge Wells property which is held in H's name.
>
> vi) The judge was entitled to take into account H's application for costs in relation to the proceedings arising out of W's conduct in Bahrain as a factor which impacted the award. While the judge accepted W's argument that she had, in effect, already paid half of those costs as they had been paid from resources build up during the marriage (likewise H had contributed to her payments), he refused to make a precise arithmetical deduction of that sum.

The judge concluded that a departure from equality was indeed justified in N's interests to ensure that both parties had proper housing in which they could look after N when spending time with her.

The judge ordered:

> i) The property in Kent to remain in H's sole name. H to pay W a lump sum of £48,000 (to be implemented within 3 months). H having ascertained that he could borrow a further £30,000 on the mortgage and borrow £10,000 from his parents, the judge realised that this award required him "to go further than he wishes" [§44(i)].
>
> ii) The 2 Indian properties to be transferred to W's sole name at her expense.
>
> iii) The judge regarded W's suggestion that H should pay 1 third of his net income by way of child maintenance as unreasonable. Considering the child support tables and deducting the cost of contact in the form of 3 return journeys to India (2 for N and 1 for H) and deducting a percentage of 14.29% for nights spent with H, the judge ordered maintenance payments at £177 per month.
>
> iv) The judge considered affording W a 25% share of H's pension was an appropriate order (to be implemented within 3 months).
>
> v) Clean break.
>
> vi) Sale in default of payment of lump sum/pension share.

The judge provided concluding remarks that this case was a "*classic example*" of how so-called small money cases can be "*infinitely more difficult than cases involving larger sums*" [§49]. In particular, in respect of this case, the litigation in respect of N had been hugely detrimental to them both financially.

Case summary by **Lucy Bennett**, Barrister, **1GC**

Rowland v. Blades [2021] EWHC 2928 (Ch)

Facts

The parties had commenced a relationship in 2006. They each already owned their own homes.

In early 2009, the parties purchased Tadmarton House. The property was purchased with the intention to spend their free time together (Per Dr Rowland), and at weekends and holidays, share with family and friends, and to live in when they retired (Per Ms Blades). (HHJ Jarmon QC held that for the purpose of this judgment, there was no material difference between the descriptions for purchase given by each party [2]).

The property was purchased for just over £1.5 million. The purchase monies and associated costs were supplied by Dr Rowland [3]. The property was registered in the names of both parties.

Later in 2009, Ms B discovered that Dr R had formed a relationship with another person. She told Dr R she did not want him to take his new partner to Tadmarton House. Dr R agreed not to do so. Ms B spent most weekends at the property during the period. In October 2015, Dr R's new relationship broke down and thereafter there was nothing to stop him spending time at the property. However, he chose not to do so after this time [5].

Court at first instance (Deputy Master Hansen)

The court at first instance had ordered that the property should be sold and the net sale proceeds be divided equally between the parties. This was not challenged on appeal [4]. The court had also found that Ms B had excluded Dr R from the property, but only for 3 days per week over weekends in a period from 01 November 2009 to 31 October 2015. This was similarly not challenged on appeal [6].

After setting out his findings in the draft judgment at first instance, Deputy Master Hanson invited the parties to make written submissions as to the sum to be awarded on the basis of his findings [8].

The Single Joint Expert had provided valuations for the period 2009 to 2018 on three different basis: (1) annual rent value; (2) the rental that would have been paid for occasional weekend and holiday use at any time of choice based on daily rent by day of the week; and (3) the rental payable for "occasional weekend and short usage" [9].

Dr R argued the appropriate rate was £650 per day for three days per weekend, and then divided by 2 to reflect Ms B's use, therefore seeking a compensation figure of £288,800. [12].

Ms B argued that the appropriate figure was £36,000. She submitted this was the appropriate figure to compensate H for loss of opportunity of enjoying alternate weekends at Tadmarton House for 6 years (2009-2015). In the alternative, that £36,000 was the appropriate figure by taking the valuation (3) figure for the relevant period of £59,958, but with an additional discount because Ms B argued that not every opportunity to use the property at the weekend would have the value to Dr R which equated to the rent different people would pay for a weekend break [13].

Deputy Master Hansen rejected Dr R's proposed figure of £650 per day [17]. He concluded that Valuation (3) was the most relevant and helpful on the facts of this case. He then applied the daily figures for the six-year exclusion period, thereby calculating a total of £59,958 [16, 18]. The daily rate was applied by Deputy Master Hansen to a three-day stay only twice per month. This was to reflect that following the parties relationship breakdown, they would be unlikely to spend the same weekends at the property [19].

The Appeal

The cross-appeals before HHJ Jarman QC were on a narrow point as to the appropriate calculation and quantum for occupation rent ordered at first instance.

Dr R appealed arguing the compensation for exclusion should have been £216,199 for the period November 2009 to October 2015. Ms B argued that Dr R's award should have been compensatory and based on loss of enjoyment rather than rental values, meaning the appropriate figure was £36,000. In the alternative, that the award should be the £59,958 or the reasons given by the master [1].

HHJ Jarman QC concluded that loss of opportunity for Dr R to enjoy Tadmarton House as his own home in his free time was something different to renting someone else's property for a weekend break [29]. He observed that the facts of this

case were unusual and did not fit neatly into any of the scenarios that the SJE had been asked to consider and value. The Master had therefore had to do the best he could on the evidence before him [30].

The difficulty with Dr R's position, was that the figures proposed by him came close to the annual rental figure (valuation (1)). If that figure was divided by two to allow for both parties' separate use, then what Dr R was seeking actually exceeded the figure under that valuation mechanism. The Court held that '*In my judgment this would overcompensate Dr Rowland for loss of the enjoyment which the master found, namely the loss of long weekends rather than loss of full time enjoyment*' [35].

HHJ Jarman observes that:

> '…the difficulty in this case is deciding which valuation given by the expert, or which combination of valuation, most accurately reflects Dr Rowland's loss as a result of the exclusion as found. Such an exercise needs to take account of fact that the purpose of purchase was to provide a weekend home for this couple which purpose had come to an end and neither enjoyed it during the period in question in the way that had been intended. However, in my judgment, the exercise also has to take into account the fact that Dr Rowland was deprived of a weekend holiday home, rather than a weekend rental. It had been chosen and intended as such, not as a place to rent for the odd weekend' [39].

HHJ Jarman QC went on to conclude that:

> - Dr R lost a grand weekend country home, not just an "occasional weekend and short usage" rental [41].
>
> - It was the loss of a grand holiday home which was in question [41.
>
> - However, when determining the appropriate compensation for exclusion, account must be given for the fact that Dr R would not have stayed in the property for 4 days during the week [41].
>
> - That there should not be a deduction to reflect the possibility that Dr R would not go to the property on every weekend he could have [42].
>
> - That '*Where, as here, such loss is not financial, the exercise of assessment inevitably includes an evaluative element rather than being purely arithmetical. In my judgment the loss is more than occasional weekend and short usage but less than the loss of a home, and falls roughly at the midpoint between the two*' [43].

HHJ Jarman QC therefore allowed Dr R's appeal, ordering a total award of £120,000. Ms B was given permission to bring her cross-appeal but it was dismissed [45].

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

Derby CC v CK and Ors (Compliance with DOL Practice Guidance) [2021] EWHC 2931 (Fam)

The court should not ordinarily countenance the exercise the inherent jurisdiction where an unregistered placement makes clear that it will not or cannot comply with the requirement of the President's Practice Guidance to apply for registration.

Background

In ***Tameside MBC v AM & Ors (DOL Orders for Children Under 16)* [2021] EWHC 2472 (Fam)**, MacDonald J decided that it remains open to the High Court to authorise, under its inherent jurisdiction, the deprivation of liberty of a child under the age of 16 where the placement is prohibited by the terms of the statutory scheme, subject always to the rigorous application of the President's Guidance of November 2019 and the addendum dated December 2020. In this case, MacDonald J considered the question of whether it remains open to the court to exercise its inherent jurisdiction in cases where a placement either will not or cannot comply with the Guidance.

MacDonald J had before him 3 cases (one of which was also in *Tameside MBC*) concerning young people under 16 with a very high level of need. Each was placed in an unregistered placement in circumstances where an application for registration had not yet been made (and was not imminent) or where an application would not be made (such as placement in a holiday park). The merits of the applications will be determined separately.

Legal Framework

The judgment sets out the statutory and regulatory framework in detail. Terminology is clarified: an 'unregulated' placement is one which does not constitute a children's home for the purposes of s.1(2) of the Care Standards Act 2000 and therefore does not have to be registered. An 'unregistered' placement constitutes a children's home but has not been registered in accordance with the requirement under the Act.

There is discussion of the status of the President's Guidance, as non-statutory guidance, particularly in light of its treatment in ***Re T* [2021] UKSC 35**. The focus of the Guidance is to ensure that where a court authorises placement in an unregistered unit, steps are taken immediately by those operating the unit to apply for registration so the placement will become regulated within the statutory scheme as soon as possible.

The Secretary of State and Ofsted submitted that Re T set categorical limits on the exercise of the inherent jurisdiction to authorise the deprivation of liberty of children in unregistered placements, one of those limits being "strict compliance" with the Practice Guidance. The local authorities submitted that compliance with the Guidance was not a condition precedent to the exercise of the inherent jurisdiction.

MacDonald J reiterates the principles and the seminal importance of the existence of the inherent jurisdiction of the High Court as a protective bulwark for children where no other option is available. It is the ultimate safety net.

Discussion

MacDonald J noted the absence of a concerted effort by those responsible to remedy the current acute shortage of suitable provision. Lack of resources underlies these cases. It was not for the court to arbitrate the respective financial responsibility of central and local government. However, MacDonald J noted the obligations upon the state as identified in *Boumar v Belgium* (1989) 11 EHRR 1.

The President's Guidance requires local authorities and providers to comply in a timely fashion with a pre-existing mandatory obligation. Failure to follow the Guidance deprives young people of the protection determined by Parliament, such as quality standards and inspection. The court is not in a position to replicate the rigour of the regulatory regime that applies to registered placements. However, following the Guidance may risk a vulnerable child having nowhere to go.

The deployment of the inherent jurisdiction is only effective if it safeguards and promotes children's welfare. Compliance with the Guidance is central to the safe deployment of the jurisdiction in a manner consistent with Art 5. Where an unregistered placement makes clear that it will not or cannot comply with the Guidance, and in particular the requirement to issue an expeditious registration application, a number of factors militate against the deprivation of the child's liberty in such a placement being in the child's best interests.

MacDonald J makes some observations on categories of placements that will not apply for registration. It *may* be understandable if a provider does not ordinarily make such provision, such as a private landlord or holiday park owner. However, it is placements of this kind which are most likely to be wholly unsuitable. They expose the child to the double deficit in the form of a sub-optimal placement that is also outwith the statutory regulatory regime designed to safeguard him or her.

Decision

Compliance or non-compliance with the Guidance is not determinative of the *existence* of the court's substantive jurisdiction. An unwillingness or inability to comply with the terms of the Guidance does not act per se to oust the inherent jurisdiction of the High Court to authorise the deprivation of a child's liberty in an unregistered placement confirmed in *Re T*. The question for the court in such circumstances is whether that jurisdiction *should* be exercised where there has been non-compliance with the Practice Guidance.

Unwillingness or inability to comply with the guidance will be a factor that informs the overall best interests evaluation on an application under the inherent jurisdiction. Each case will turn on its own facts. However, the court should not *ordinarily* countenance the exercise the inherent jurisdiction where an unregistered placement makes clear that it will not or cannot comply with the requirement of the Guidance to apply for registration.

Where a provider refuses to apply for registration, it is unlikely the court will conclude that the exercise of the inherent jurisdiction to authorise the deprivation of the liberty of a child with that provider is in the child's best interests. In such circumstances, the court may be required to make a very short order (i.e. days not weeks) to hold the ring whilst alternative arrangements are put in place. This will particularly be the case where a placement is required immediately in order to meet the operational duties under Art 2 of Art 3 of the ECHR by keeping the child safe and the unregistered placement is the only means of achieving this. The authorisation given for a deprivation of liberty in that situation should be for the least time possible. The court should set a timetable for the identification of a placement that is registered (or willing to apply), registration of the placement being essential to ensuring that the child is kept safe in the medium and long term.

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

Re C (Looked After Child) (Covid-19 Vaccination) [2021] EWHC 2993 (Fam)

The Application

C, who was almost 13, was the subject of a care order. He wished to have the COVID-19 and winter flu vaccinations. The LA and CG agreed it was in his best interests. F supported C. M strongly opposed C being vaccinated on safety grounds. She did not accept that the vaccines would protect children or that the national vaccination programmes were based on sound evidence.

The LA applied to the High Court for confirmation that it was entitled, pursuant to s.33 CA 1989, to exercise its PR to arrange and consent to C's vaccination. In the alternative, the LA sought a declaration under the inherent jurisdiction that it was in C's best interest to have the vaccinations.

Decision

Poole J considered and applied the Court of Appeal decision in ***Re H (Parental Responsibility: Vaccination)*** **[2020] EWCA Civ 664**. He determined that the principles in *Re H* applied to the COVID-19 and winter flu vaccination programmes. In the absence of contraindications for a particular child, decisions for a child to undergo standard or routine vaccinations as part of national programmes are not to regarded as 'grave' decisions.

Poole J noted one qualification to the principles in *Re H* in respect of Gillick competence. In *Re H,* the Court of Appeal was concerned with very young children rather than those of secondary school age. If a Gillick competent child refused vaccination, it would raise different questions about whether the LA could override the child's decision and whether the issue should be brought before the court. Poole J did not determine this issue as it would have been academic in the circumstances of C's case.

Accordingly, under s.33(3)(b) CA 1989, an LA with a care order (or interim care order) can arrange and consent to a child in its care being vaccinated for COVID-19 or the winter flu virus notwithstanding the objections of the child's parents where: (i) the vaccination is part of an ongoing national programme approved by the UK Health Security Agency); (ii) the child is either not Gillick competent or is Gillick competent and consents; and (iii) the local authority is satisfied that it is necessary to do so in order to safeguard or promote the individual child's welfare. There is no requirement for any application to be made for the court to authorise such a decision before it is acted upon. As per Re H, it would be for the parent to make any application to seek to prevent the vaccination.

It was not appropriate for the court to embark on an investigation of the merits of whether the national programmes of COVID-19 and winter flu vaccination of children are justified as being generally in the best interests of children in those age range. Expert evidence in such cases might only be considered necessary if (i) there is a well-evidenced concern that a vaccine is contraindicated for a particular child, or (ii) new peer-reviewed research evidence indicated significant concern for the efficacy and/or safety of one or more of the vaccines that is the subject of the application. Mere assertion that a vaccine is unsafe, however strongly expressed, is not sufficient for the court to require expert evidence to assist the court.

Poole J concluded by reiterating that s.33(3) CA 1989 does not give an LA carte blanche to proceed to arrange and consent to vaccinations in every case. If vaccination would have enduring or profound consequences for the child, it may make the decision to vaccinate 'grave' and thus require the LA to apply to the High Court. Further, pursuant to s.33(4) CA 1989, the LA must make "an 'individualised' welfare decision in relation to the child in question prior to arranging his or her vaccination." (per King LJ in *Re H*).

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

Cumbria, Northumberland Tyne & Wear NHS Foundation Trust & Anor v EG [2021] EWHC 2990 (Fam)

Backgound

EG is a 49 year old man. He has diagnoses of pervasive developmental disorder (but not a learning disability), emotionally unstable personality disorder with some features on the autistic spectrum, and paedophilia. He was convicted of sexual offences and detained under s37/41 MHA 1983, in 1994. In 2014 he was conditionally discharged by the First Tier Tribunal (FTT) to live in a care home. The care plan involved constant supervision and monitoring including of his telephone and internet use and a plan to secure his return if he left. He has not received treatment at the hospital since discharge.

Following the decision of the UKSC in *Secretary of State for Justice v MM* [2019] AC 712 where the Court found that a restricted patient could not be discharged from hospital under the Mental Health Act 1983 on conditions that amounted to a deprivation of liberty, EG was recalled to hospital. However, this was a technical recall as he remained at the care

home having been granted leave under s17 MHA 1983 with a condition under s17(3) that he remained deprived of liberty at the care home. The effect of the recall was to trigger an automatic referral to the FTT.

The FTT concluded that as EG did not require treatment in hospital he had to be discharged but that his mental state meant that he needed to remain liable to recall. They therefore again conditionally discharged him. They were satisfied that he had the capacity to consent to his treatment and care.

The Secretary of State and the Trust appealed to the Upper Tribunal. The judge sat both as a judge of the Upper Tribunal and also as a judge of the High Court to decide whether to authorise any deprivation of liberty using the inherent jurisdiction in relation to vulnerable adults (with capacity).

The issues

The issue in the case was whether EG can lawfully remain in the community, rather than in hospital, but be deprived of his liberty in the community. This issue arises as a consequence of the Supreme Court decision in. If EG cannot be deprived of his liberty, the Trust would recommend to the Secretary of State and the Secretary of State would accept the recommendation that EG should be recalled to hospital (in real terms rather than the theoretical recall which is currently in place) because if EG is to remain in the community it needs to be with the clear legal authority to deprive him of his liberty.

The judge defined the issues in the case as:

> a. Whether s.72 MHA 1983can be construed to allow the detention of a restricted patient in a community setting pursuant to s.17(3) MHA where that person has not resided in, or been treated by, a hospital for a considerable period of time. That issue itself is in two parts:
>
> > (i) Whether such a construction can be arrived at under a purely domestic statutory interpretation of the MHA alone;
> >
> > (ii) Whether reliance on s.3 of the Human Rights Act 1998 ('HRA') can allow such a construction.
>
> b. If the answer to (a) is no – then whether the patient, assuming he has capacity and therefore does not fall within the jurisdiction of the Court of Protection, can be subject to a conditional discharge and deprived of his liberty pursuant to the inherent jurisdiction of the High Court.

Interpretation of s72 Mental Health Act 1983

The judge decided that on the basis of the wording of s72(1)(b)(i) MHA 1983 the FTT was correct as there was no need for EG to receive any treatment in hospital (whether as in patient or outpatient). He had not been to the hospital for 7 years and it would be counter-therapeutic for him to do so [paras 49-53].

The impact of s3 Human Rights Act 1998

The judge then considered whether the application of s3 Human Rights Act 1998 would produce a different outcome and concluded that as requiring EG to be deprived of his liberty in hospital would give rise to a breach of his rights under Article 5, s72(1)(b)(i) needed to be read as if "liable in law to be detained for treatment" included even where that treatment is being provided in the community. [paras 54-72]. Therefore the FTT was not obliged to discharge EG as to do so would breach his rights under Article 5(1) [para 73]. The appeal from the FTT was therefore allowed.

The use of the inherent jurisdiction

The judge having reviewed the authorities on the use of the inherent jurisdiction concluded that it was not possible to use a protective jurisdiction to dictate that EG was deprived of his liberty. In doing so she disagreed with the obiter conclusion of Baker LJ in *Mazhar v Birmingham Community Foundation Trust* [2021] 1 WLR 1207, preferring the analysis of Cobb J in ***Wakefield DC v DN* [2019] EWHC 2306**. She therefore dismissed the application under the inherent jurisdiction [paras 74-93].

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

Re P (Presumption of Death) [2021] EWHC 3099 (Fam)

Factual background

P was born in 1972 and grew up in the south of England. As an adult he worked as cabin crew for ten years then became involved in setting up a restaurant in Barcelona. He formed a relationship with D in 2008; after she became pregnant with their child he spent most of his time with her in England although he also travelled to Barcelona in connection with the restaurant. Their son, C, was born in 2010. P was a devoted father. In April 2011 he went on holiday to South America with a friend, travelling in Peru, Colombia and Ecuador. P was in regular contact with D until, when he was in Lima, Peru, all

communications abruptly ceased, the last being a text on 16th May. Neither man has been heard of since despite many efforts to find them, including by police, FCO and Peruvian authorities as well as a poster campaign in Peru.

P's father died shortly after P's disappearance. More recently his grandmother died, leaving him a bequest.

D, who was in person, had meticulously complied with the requirements of the Act. The court had witness statements from D, family members and a friend detailing the many enquiries made, not just in Peru but in the UK. Disclosure orders against bodies such as the NHS, DWP and Salvation Army, produced no trace. An advertisement directed by the court similarly produced no results.

The Application

D applied on P's behalf as his litigation friend. While anyone may apply for a declaration under the s1 of the 2013 Act, the court must refuse to hear the application if:

> (a) the application is made by someone other than the missing person's spouse, civil partner, parent, child or sibling, and
>
> (b) the court considers that the applicant does not have a sufficient interest in the determination of the application.

As P's partner rather than spouse/civil partner, D was concerned that if she applied in her own right, the court might refuse to hear the application. The court noted that it was unfortunate that as a long-term cohabitee D had to use her son as the claimant to be sure of the application being determined.

Discussion

The criteria under s1(3) of the Act were satisfied in that, on the day on which P was last known to be alive, he was domiciled in England and Wales and had been habitually resident in England and Wales for at least 12 months ending with that day.

Pursuant to s2 of the Act,

> (1) On an application under section 1, the court must make the declaration if it is satisfied that the missing person—
>
> > (a) has died, or
> >
> > (b) has not been known to be alive for a period of at least 7 years.
>
> (2) It must include in the declaration a finding as to the date and time of the missing person's death.
>
> (3) Where the court—
>
> > (a) is satisfied that the missing person has died, but
> >
> > (b) is uncertain at which moment during a period the missing person died, the finding must be that the missing person is presumed to have died at the end of that period.
>
> (4) Where the court—
>
> > (a) is satisfied that the missing person has not been known to be alive for a period of at least 7 years, but
> >
> > (b) is not satisfied that the missing person has died, the finding must be that the missing person is presumed to have died at the end of the period of 7 years beginning with the day after the day on which he or she was last known to be alive.

Poole J considered whether the situation came under subsection 3 or 4. Although it is arguable that the sudden cessation of communication indicated that P had died, there is no evidence about the circumstances and a declaration that someone has died should not be made without clear evidence. Accordingly, pursuant to s2(4), the court found that P was presumed to have died at the end of the 7 years beginning with the day after the day on which he was last known to be alive.

A declaration was made that P is presumed to have died at midnight on 16th May 2016.

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

MG v AR [2021] EWHC 3063 (Fam)

Mostyn J granted an application for security for costs. The father had applied for an order in England seeking that a child living in Canada should live with him in Dubai. Mostyn J gives a detailed explanation as to the principles to be applied when considering such an application, noting the rarity of these applications in family proceedings given the rarity of costs orders in both children's cases and at the conclusion of financial remedy applications.

He summarised the principles to be applied at para 53 (having considered each step in more detail) at follows

> "i) The court must find as a fact which gateway condition applies (referring to FPR270.7(2)(a)-(d).
>
> ii) The court must have regard to all the circumstances in order to determine whether to make the order for security would be just. In making that determination the court will form a value judgment until it reaches the stage of quantification of the amount of security, where it will exercise a true discretion.
>
> iii) If the applicant has a meritorious case and is of limited means so that the imposition of an order for security would hinder or stifle his substantive application then it would not normally be just to make an order for security.
>
> iv) Subject to para (iii) above, the court must have regard to the merits of the substantive application and to the strength of the defence, as well as to the means of the parties, in order to determine if the respondent has a good chance of being awarded an order for costs at the final hearing of the substantive application. If the court concludes that the respondent does not have that good chance, then it would not normally be just to make an order for security.
>
> v) When assessing the ability of the applicant to pay an order for costs and, ex hypothesi security for those costs, the court should apply the principles in ***TL v ML* [2005] EWHC 2860 (Fam)** [1] at [124] and make robust assumptions about his ability to pay where his disclosure had been deficient or where he maintains that a source of support has been cut off.
>
> vi) If the court determines that the respondent has that good chance, it must then be satisfied by evidence adduced by her that there is a real risk (albeit not as high as a 50% probability) that she will not be in a position to enforce an order for costs against the applicant. Findings as to gateway condition (b) or (d) are likely to be highly relevant to the assessment of this risk.
>
> vii) In determining whether it would be just to make an order for security the court will pay particular attention to whether the application for security was made promptly. It may not allow historic costs if the application for security was made unduly late.
>
> viii) If the court decides to make an order for security it will fix the amount in a robust, broad-brush manner, deploying a wide discretion. Historic costs are fully claimable. The evidence of the respondent seeking security must provide full detail of claimed historic costs and a detailed estimate of future costs.
>
> ix) The court may reflect future litigation uncertainties, as well as potential reductions on a detailed assessment, in a percentage discount from the sum claimed.
>
> x) In the first instance, security should only be provided in a financial remedy case up to the FDR; in a children's case it should be provided up to the pre-trial review (or equivalent). Security should be payable in monthly instalments rather than in a single lump sum.
>
> xi) Before making an order for security, the court must finally stand back and satisfy itself that what it is going to do is just. In a children's case the court must be satisfied that what it is proposing to do is consistent with the best interests of the children, or at least not contrary to their interests.
>
> xii) In the event of default in the provision of security there should not be an automatic strikeout of the claim. Rather, the respondent should be entitled to apply urgently for a hearing at which the court will consider what measures should be taken in the light of the default. Such measures will include a summary dismissal of the substantive application, but in children's proceedings the court must be satisfied that such an order is in the best interests of the children, or at least not contrary to their interests."

[1] A decision of Nicholas Mostyn QC sitting as a Deputy High Court Judge.

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