January 2022

Family Law Week

NEWS

Upskirting prosecutions more than doubled over the second year since legislation introduced

Upskirting prosecutions more than doubled over the second year of the legislation being in force, with CPS analysis finding at least a third of offenders are also committing other serious sexual crimes.

In total, 46 men and one teenage boy were prosecuted for 128 offences under the **Voyeurism (Offences) Act 2019** between 1 April 2020 and 30 June 2021. According to CPS analysis, 15 of the men prosecuted for upskirting since last April were simultaneously charged with other sexual crimes – including child abuse, sexual assault, extreme pornography, and wider voyeurism offences.

Shops, particularly supermarkets, remain by far the most common location for upskirting to take place, accounting for 36 per cent of offences since last spring. Streets, parks, and public transport or connected areas made up the majority of the remaining locations where crimes occurred.

The evidence also shows some men are taking extensive measures to capture images and videos of women without their consent, hiding cameras in shoes or shopping baskets and using photography apps.

In one case, two men who arranged a visit to a shopping centre to upskirt women together and swapped covert images over WhatsApp were also found to have been sharing indecent images of children.

Siobhan Blake, CPS national lead for sexual offence prosecutions, said:

"Despite strict social distancing guidelines over past 18 months, it seems offenders have not been deterred from violating women's privacy in a most degrading manner as they go about their daily lives. These are disturbing patterns of behaviour, with our analysis showing many men are also committing other serious sexual offences, including child abuse. Therefore, I encourage anyone who is a victim or witness of upskirting to immediately report it to the police."

Family Law Week is published by

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

In the two years after the legislation came into force on 12 April 2019, a total of 63 defendants were charged with 175 offences of operating equipment under clothing without consent and recording an image under clothing without consent. This covers only finalised cases, with the vast majority resulting in conviction after guilty pleas.

For the Voyeurism (Offences) Act, **click here**.

5/12/21

Advocates' meetings

HHJ Lynn Roberts, Designated Family Judge for Central Family Court, has issued the following message.

> We are increasingly having to vacate hearings at CFC because of the absence or very late submission of position statements. On many occasions recently it has become obvious that the reason for this is that the advocates' meeting has taken place after court on the eve of the hearing. Can I remind everyone of recommendation 26 in Mr Justice Keehan's Public Law Working Group report:
>
> > "Recommendation 26: Advocates' meetings: using an agenda and providing a summary. Advocates' meeting should take place no less than two working days before a listed hearing. Advocates should agree at the meetings the core reading list, the schedule of issues and list of agreed matters. One sheet of A4 containing those matters should be produced following each advocates' meeting for the judge, and be provided to the judge by 4pm the working day before the hearing."
>
> Please can advocates' meetings for all hearings taking place at CFC be arranged, and take place, no less than two working days before the hearing. Please can the judge then receive the minute of the meeting, and the position statements by 4 pm on the eve of the hearing. I appreciate that this will not always be possible with emergency hearings.

5/12/21

Tougher penalties for child cruelty

The Ministry of Justice has confirmed plans to increase the maximum penalties for a range of cruelty offences.

Under the changes, anyone who causes or allows the death of a child or vulnerable adult in their care will face up to life imprisonment – rather than the current 14-year maximum. The offences of causing or allowing serious physical harm to a child, and cruelty to a person under 16, will also incur tougher maximum penalties – increasing from 10 to 14 years respectively.

It follows the tireless campaigning of the family of Tony Hudgell to see longer sentences for these crimes. As a baby, Tony was left severely disabled after suffering abuse at the hands of his birth parents, who both received 10 years in prison. Ministers are determined to ensure punishments fit the severity of these crimes and have confirmed that amendments to deliver 'Tony's Law' would be tabled to the Police, Crime, Sentencing and Courts Bill.

For the announcement, click here. To follow progress of the Police, Crime, Sentencing and Courts Bill, click here.

5/12/21

Domestic abuse and sexual offences to be treated as seriously as knife crime

Domestic abuse and sexual offences should be considered as seriously as knife crime and homicide, the government has said.

Changes to legislation currently being considered in Parliament will make clear that a new legal duty requiring public bodies to work together to tackle serious violence can also include domestic abuse and sexual offences.

The Home Office says that introducing a Serious Violence Duty will improve wholesale understanding of the drivers of serious violence and help prevent future crime. It will mean that police, government, and health bodies must collaborate locally, so that they can develop more holistic strategies to protect people from harm, including through early intervention.

The change to the Serious Violence Duty will be made via an amendment to the Police, Crime, Sentencing and Courts Bill, following careful consideration and widespread support from campaigners, including the Domestic Abuse Commissioner.

To follow progress of the Police, Crime, Sentencing and Courts Bill, **click here**.

5/12/21

Family Procedure Rules – contempt forms

On 2 December 2021 Mr Justice Mostyn issued the following message.

> On 30 July 2021, a new form for making **a contempt application**, FC600, was added to the prescribed list of Forms in FPR PD5A.
>
> In addition four further forms for the use of the court in contempt proceedings have been issued. These are:
>
> - FC601 (Summons to appear at court for directions to be given)
>
> - FC602 (Warrant to secure attendance at court)

- FC603 (Order upon determination of proceedings)

- FC604 (Warrant of Committal)

These new forms support the new **FPR Part 37** which came into force on 1 October 2020. That new FPR Part 37 is identical to CPR Part 81. Together, these new Parts provide a uniform process for contempt cases which is simpler and clearer than what went before. The new forms are identical to those supporting CPR Part 81 and have been approved by the Family Procedure Rule Committee.

Four of the current standard orders are covered by these forms, namely:

- Order 5.1 (Order for Immediate Committal): by FC603

- Order 5.2 (Suspended Order for Committal): by FC603

- Order 5.6 (Warrant to Tipstaff and Governor on Committal): by FC604

- Order 5.7 (Bench Warrant for Arrest): by FC602

Accordingly Orders 5.1, 5.2 and 5.6 are revoked.

Order 5.7 should not be used in committal proceedings but should continue to be used in other proceedings where it is necessary to secure the attendance of a party or a witness by a bench warrant.

The following orders remain in force:

- Order 5.3: Order for Committal under the Debtors Act 1869

- Order 5.4: Suspended Order for Committal under the Debtors Act 1869

- Order 5.5: Order Activating Suspended Order for Committal

- Orders 5.3 and 5.4 will only be used in proceedings under the Debtors Act 1869, as at present.

Order 5.5 will be used whenever a suspended committal order is activated, whether in proceedings under the Debtors Act 1869 or in committal proceedings under FPR Part 37, again as at present.

The above changes take effect immediately.

The zip file containing Volume 1 of the standard orders attached to **the announcement of 22 November 2021** reflects the above changes.

5/12/21

Electronic court bundles

On 29 November 2021 the Courts and Tribunals Judiciary issued general guidance on electronic court bundles. It is intended to ensure a level of consistency in the provision of electronic bundles for court hearings (but not tribunal hearings) in a format that promotes the efficient preparation for, and management of, a hearing.

It is subject to any specific guidance by particular courts or directions given for individual cases. It updates and replaces previous guidance published in May 2020.

1. E-bundles must be provided in pdf format.

2. All pages in an e-bundle must be numbered by computer-generated numbering, not by hand. The numbering should start at page 1 for the first page of the bundle (whether or not that is part of an index) and the numbering must follow sequentially to the last page of the bundle, so that the pagination matches the pdf numbering. If a hard copy of the bundle is produced, the pagination must match the e-bundle.

3. Each entry in the index must be hyperlinked to the indexed document. All significant documents and all sections in bundles must be bookmarked for ease of navigation, with a short description as the bookmark. The bookmark should contain the page number of the document.

4. All pages in an e-bundle that contain typed text must be subject to OCR (optical character recognition) if they have not been created directly as electronic text documents. This makes it easier to search for text, to highlight parts of a page, and to copy text from the bundle.

5. Any page that has been created in landscape orientation should appear in that orientation so that it can be read from left to right. No page should appear upside down.

6. The default view for all pages should be 100 per cent.

7. If a core bundle is required, then a PDF core bundle should be produced complying with the same requirements as a paper bundle.

8. Thought should be given to the number of bundles required. It is usually better to have a single hearing e-bundle and (where appropriate) a separate single authorities e-bundle (compiled in accordance with these requirements), rather than multiple bundles (and follow any applicable court specific guidance – see eg CPR PD52C Section VII (external link, opens in a new tab)).

9. The resolution of the bundle should not be greater than 300 dpi, in order to avoid slow scrolling or rendering. The bundle should be electronically optimised so as to ensure that the file size is not larger than necessary.

10. If a bundle is to be added to after it has been transmitted to the judge, then new pages should be added at the end of the bundle (and paginated

accordingly). An enquiry should be made of the court as to the best way of providing the additional material. Subject to any different direction, the judge should be provided with both (a) the new section and, separately, (b) the revised bundle. This is because the judge may have already marked up the original bundle.

For the full guidance, click here.

5/12/21

Fostering services face crisis in morale and funding: Observer report

The ***Observer*** has reported the findings of a survey by **Fostering Network** that there is a critical shortage in foster placements. The government stands accused of 'relying on goodwill of carers to supplement the state'.

According to the Observer, the survey "reveals a system under strain, resulting in mismatches between carers and the children they are asked to look after. Only 53% of the thousands of foster carers who took part said they had been given enough information about the children in their care. The survey also identified increasing mental health challenges among carers, who were often asked to take on more than their experience and expertise suggested they could reasonably manage without further training and support."

For the report, **click here**.

5/12/21

Improving the Family Court response to domestic abuse: Domestic Abuse Commissioner's proposals

The Domestic Abuse Commissioner has published proposals for a mechanism a mechanism, within the office of the Domestic Abuse Commissioner (DAC), in partnership with the Victims' Commissioner (VC), to monitor and report on domestic abuse in private law children proceedings.

The proposals follow extensive engagement with lawyers, judges, Ministry of Justice, Cafcass, Cafcass Cymru, HMCTS, domestic abuse service organisations, children's organisations and – most importantly – with survivors and young people.

The idea is that the mechanism will help to address the serious failings identified in the Harm Panel report making the courts and outcomes safer for children. It will do this by improving data and understanding of how private law children cases involving domestic abuse are treated and providing a means for the voices of survivors and children to be heard. Problems will be identified more quickly, and then hopefully – with family justice partners – addressed.

The mechanism is intended to improve both transparency and accountability within the family courts. It will aim to get to the heart of what is going on in the current system when it comes to domestic abuse. And importantly, it will centre the voices of survivors and children.

The mechanism will not impinge on the important principle of judicial independence – the Commissioners will not be able to review or overturn individual decisions. But through gathering data on key questions that need answers – such as the extent to which courts are complying with important guidance on how to treat survivors and their cases – accountability will be improved.

The DAC says that currently very little data on domestic abuse-related cases is gathered by the family court – so it's hard to get a full picture of what survivors are facing across the country, and it is difficult to monitor the impact of any reforms.

Monitoring work is expected to change this. The intention is to develop an evidence base that will allow all relevant agencies within the family justice system to implement the changes needed to ensure a safe, risk-focused system for survivors and children. The ultimate aim is to develop a national picture to help improve consistency across different court areas in England and Wales, and across different levels of courts, from magistrates to the High Court.

The next stage will be to prepare a full design for the pilot phase of the mechanism. It is anticipated that the design will be completed early in 2022, and the pilot phase of the mechanism will commence in late Spring 2022.

For the proposals, **click here**.

5/12/21

Membership of the Family Transparency Implementation Group (TIG) announced

The President of the Family Division has announced the membership of the Transparency Implementation Group. Due to the diverse strength and experience of applicants, membership was extended to include a junior barrister who is a family practitioner and a barrister who is a media specialist practitioner.

The TIG aim to meet before Christmas to begin this important work. Terms of reference will be published in due course.

For the membership of the TIG, **click here**.

11/12/21

Human Rights Committee recommends amendments to Judicial Review and Courts Bill

The Parliamentary Joint Committee on Human Rights has published **a report** calling on the Government to amend proposals in the Judicial Review and Courts Bill which have the potential to deny effective judicial remedies.

The Bill proposes changes to the courts' power to make 'quashing orders' – i.e. orders that nullify or invalidate decisions or measures made by public authorities. It would introduce a power to delay a quashing order coming into effect (a 'suspended quashing order') and a power to prevent a quashing order affecting the lawfulness of things that have already happened (a 'prospective-only quashing order'). The Committee says that use of this latter power could result in people who have already been affected by an unlawful measure, including the person bringing the judicial review claim, getting no remedy or relief.

Of concern to the Committee is that the Bill would not merely allow the use of these powers, but actually require them to be used in certain circumstances. The Committee calls on the Government to remove this requirement as it would place an unnecessary limit on the courts' freedom to decide on the appropriate remedy to unlawful government decisions. It further calls for the legislation to be amended so that when courts consider whether to make a suspended or prospective-only quashing order they must have regard for the human rights, including the right to an effective remedy guaranteed by Article 13 of the European Convention on Human Rights, of any individual affected.

The Bill proposes to make changes to so-called 'Cart' judicial reviews that would effectively prevent claimants from using judicial review to challenge Upper Tribunal decisions to refuse permission to appeal. The Government argues that these judicial review claims are expensive and have a low success rate, however the report finds that they can provide an important protection against legal error. Given that 'Cart' judicial reviews predominantly concern immigration and asylum claims, the Joint Committee finds that their removal could result in people being wrongfully removed from the UK, putting them at risk of grave human rights violations in their country of origin. It calls on the Government to attempt procedural reform, for example extending time limits for cases to be brought, before removing a potentially crucial safeguard against tribunal errors.

In the opinion of the Committee, the proposal to remove 'Cart' judicial reviews amounts to an 'ouster clause', that would remove an area of decision making from review by the courts. Joint Committee is additionally concerned by suggestions from the Government that they would use a similar approach in other areas of legislation in the future. The Joint Committee finds that this could significantly undermine judicial review of public bodies and weaken a crucial mechanism for enforcing rights. It warns the Government to exercise great caution in the use of ouster clauses to ensure that accountability is maintained and human rights protected.

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

11/12/21

Responding to the rapid rise in demand for free legal advice

A new report from the Ministry of Justice explains how government funding has been directed to maintaining and expanding access to free specialist legal advice.

The report says that through the Covid-19 Specialist Advice Services Scheme (CSASS), £5.4 million was awarded in 2020/21 by the Ministry of Justice (MOJ) and Department for Digital, Culture, Media and Sport to the Law Centres Network and Community Justice Fund (CJF) to support not-for-profit specialist legal advice organisations and Law Centres. This funding enabled recipient organisations to remain operational and adapt their services, through investing in technology, to deliver support remotely and hire more staff to keep up with demand.

The MOJ has committed renewed 'seed investment' into the CJF over the financial year 2021/22.

The report's key findings are:

- 72 organisations received funding and remained operational despite the challenges created by the pandemic.

- The average size of the grants made was £71,000. The largest expenditure was on wages for staff where 71 per cent of funds were spent, indicating that the grants were primarily used by grantees to remain operational.

- Grantees reported increased activity than in the corresponding year prior to the pandemic - most had seen an increase in support offered to clients in areas of social welfare (namely Housing, Employment, and Debt).

- Grantees embraced remote means of communication allowing them to continue to deliver services despite restrictions – telephone was used most frequently when restrictions were in place, however, online means including email and chat functions were also adopted.

- Organisations are anticipating using a blended approach to delivery going forward – this will be dictated by client need.

For the report, **click here**.

11/12/21

Law Commission proposes reforms to protect disabled and LGBT+ victims, and criminalise extremist misogynist 'incel' hate material

The Law Commission has recommended that "sex or gender" should not be added to the protected characteristics for aggravated offences and enhanced sentencing as, it says,

it would be ineffective at protecting women and girls and, in some cases, counterproductive.

The Commission's recommendation is part of proposed reforms to hate crime legislation to ensure that disabled and LGBT+ victims receive the same protections as victims with other protected characteristics (race and religion). If enacted, the reforms would ensure all five characteristics are protected equally by the law.

The Commission is also making a number of recommendations to protect women and girls. These include extending the offence of stirring up hatred (behaviour that incites others to hate entire groups) to cover sex or gender and has recommended that the government consider the need for a new offence to tackle public sexual harassment.

Whilst enhancing protection for victims of targeted abuse, the Commission has also made a number of recommendations to safeguard freedom of expression and ensure the criminal law is focussed on the most egregious hate speech.

For more details of the proposed reforms, **click here**.

11/12/21

State of the Nation's Foster Care Report 2021 published

Children and young people in foster care will be faced with a crumbling and failing system unless urgent improvements are made, according to Fostering Network's State of the Nation's Foster Care Report 2021.

The report found that there is a crisis in the retention and recruitment of high-quality foster carers who can meet the needs of children in care. This is the biggest challenge facing the fostering sector today, as a lack of foster carers means that children are missing out on vital support.

The report, which is based on the most comprehensive survey within the fostering community, finds that the need to value and recognise the foster carer role is at the heart of the crisis.

Key findings of the report include:

- All but six of the fostering services surveyed reported having a shortage of foster carers to meet the needs of the children in their local population.

- The highest areas of need were for teenagers, large sibling groups, children with disabilities and parent and child placements.

- Key factors to improve the retention and future recruitment of foster carers are better pay, support and training, having the authority to make decisions for the child they are caring for

Over a third of foster carers said that the allowance for the child does not meet the full cost of the child's care, which means foster carers must dip into their own pocket to provide for the children.

Only half of foster carers surveyed (53 per cent) received sufficient information about a new child/young person coming into their care, making it harder to plan for, and support, their specific needs.

Only 42 per cent of foster carers said that children were able to visit their new home before moving into it, which can negatively impact how they feel about their new home, resulting in children feeling insecure and unstable in their attachments, which in turn can result in poorer outcomes in their education and mental health.

The report makes a range of strategic and practical recommendations to governments and services at a national, regional and local level, to steer us away from a potential crisis. The recommendations centre on improving the status of foster carers to stop high levels of turnover in the foster carer workforce and deliver better outcomes for children and young people.

For the report, **click here**.

11/12/21

Domestic Abuse Commissioner pledges to end the 'postcode lottery' of domestic abuse services

The Domestic Abuse Commissioner for England and Wales has vowed to end the "shocking" 'postcode lottery' of domestic abuse services in England and Wales.

As a first step Nicole Jacobs is launching **a comprehensive survey** which is aimed at all domestic abuse survivors who have used or thought about using domestic abuse services in the last three years.

Every year around 2.3m people experience domestic abuse. On average two women on average are killed every week in by a current or former partner.

Ms Jacobs said:

> "We know from reviews following domestic abuse related homicides that key failings are the lack of understanding about domestic abuse in services and wider society which leads to victims not getting or being signposted to the support they need. We also know that the specialist services for domestic abuse are often under strain and are underfunded. All victims across England and Wales deserve equal access to the services that they need to keep them safe – and to help bring perpetrators to justice."

Recent research commissioned by our office from the LGBT+ anti-abuse charity Galop found there were only 3.5 full time specialist frontline domestic abuse support workers for LGBT+ victims in England and Wales, further highlighting regional imbalances in service provision. The report also found that there were no funded LGBT+ 'by and for' domestic abuse services across the southwest, northeast

of England and Wales. 'By and for' services are those provided by and for the community they serve.

The Domestic Abuse Commissioner's national mapping work has so far found only two organisations that are 'by and for' disabled victims, and another two organisations that are 'by and for' Deaf victims. This means there could be swathes of the country where victims are not receiving the support they need. The national mapping work will also seek to identify the availability of organisations that provide 'by and for' support to Black and minoritised victims and will flag areas of the country where this is not available.

A 2016 report from Imkaan reported that in the space of a year, 50 per cent of Black and minoritised women's specialist refuges were forced to close or were taken over by a larger provider due to lack of funding over the last decade, while others continue to operate without any local government support.

The Domestic Abuse Commissioner's office is keen to hear from victims and survivors of all backgrounds, including women, men, those from black and minoritised communities, Deaf and disabled persons, those aged 16-25 and over 55, migrant victims, LGBT+ victims.

The survey will be available online until 31 January, 2022.

For the survey, **click here**.

11/12/21

Courts will continue as they have done over the course of the pandemic

The Lord Chief Justice and Senior President of Tribunals have issued a message concerning the courts' and tribunals' work following the announcement of Plan B restrictions by the Prime Minister.

The message states:

> "The work of courts and tribunals will continue as it has done over the course of the pandemic.
>
> The measures being introduced under Plan B mean that hearings should continue to take place in person alongside effective use of video hearings and remote attendance where that is in the interests of justice.
>
> The coming weeks will bring their difficulties across all jurisdictions both professionally and personally but we have been there before and are equipped to cope.
>
> We are grateful for the efforts of judges, tribunal members, magistrates, the legal profession, HMCTS and Judicial Office staff, and all involved in the justice system over the last two years in support of the administration of justice and we are sure they will continue to do so."

11/12/21

Committee on Experts in the Family Justice System newsletter published

The Committee on Experts in the Family Justice System has published an autumn newsletter describing its recent activities and listing forthcoming events.

16/12/21

Financial Remedy Court Organogram

For the latest details of the court structure in the Financial Remedy Court Organogram, **click here**.

16/12/21

Sarah Morgan QC appointed to the High Court

Sarah Morgan QC of 1GC has been appointed to the Family Division of the High Court. Her appointment will take effect from 11 January 2022.

Sarah Morgan, aged 57 will be known as The Honourable Mrs Justice Morgan. She was called to the Bar (Gray's Inn) in 1988 and took Silk in 2011. Sarah was appointed as a Deputy High Court Judge in November 2019.

16/12/21

Local Government Association welcomes announcement on supported accommodation for young people

Responding to the Government's announcement that it will implement mandatory national standards for supported accommodation for young people and require Ofsted to register and inspect this provision, Cllr Anntoinette Bramble, Chair of the Local Government Association's Children and Young People Board, said:

> "Councils want the very best for the children in their care and care leavers. Regulating all accommodation for these young people up to the age of 18 is a positive step towards ensuring they live in the right homes for their needs.
>
> "We look forward to working with the Department for Education and Ofsted as they develop new guidance and regulations and work to implement these as effectively as possible.
>
> "These new requirements are likely to increase costs to councils, and may impact on the number of placements available. New burdens funding already

announced will be very helpful and we urge close working with providers to ensure we have enough high quality placements.

"While this announcement is positive, it cannot tackle the current challenges in the system. A lack of suitable placements is causing significant problems already and too many children are not in the right homes for their needs. We urgently need to expand provision, especially for children with the most complex needs, and call on the Government to work with us to deliver this."

For the letter by the Education Secretary to Ofsted, **click here**.

17/12/21

Migrant victims of domestic abuse failed by government, says Domestic Abuse Commissioner

The Domestic Abuse Commissioner has criticised government failure to offer safe reporting mechanisms for migrant victims of domestic abuse.

Victims' safety must be put ahead of their immigration status, the Domestic Abuse Commissioner has said, as she criticised the Government's decision not to create a firewall which would have allowed survivors to safely report domestic abuse without fear of deportation.

Nicole Jacobs added:

"I am extremely disappointed with **today's decision** [following a super complaint submitted against both the National Police Chiefs Council (NPCC) and the Home Office by Liberty and charity Southall Black Sisters in December 2018] and very concerned that the measures put forward today will be inadequate when it comes to keeping migrant victims of domestic abuse safe from perpetrators and free from the risk of being deported for reporting their abuse."

The complaint concerned the sharing of victim and witness data to the Home Office by the police for immigration enforcement purposes and a perceived culture of police prioritising immigration enforcement over safeguarding and the investigation of crime.

The Domestic Abuse Commissioner – along with many specialist domestic abuse services – had been working closely with the Home Office as they conducted their review following the super complaint.

She said it was her conclusion (and that of those working within the domestic abuse sector) that a firewall would be necessary to enable victims and survivors of domestic abuse with insecure immigration status to safely report domestic abuse.

"The measures outlined in the protocol today do not go far enough to address the fear that information will be shared with immigration enforcement, which prevents many victims and survivors from reporting domestic abuse – as set out so clearly in the report by HMICFRS last year," she added.

The report does say that no immigration enforcement action will be taken against that victim while investigation and prosecution proceedings are ongoing and the victim is receiving support and advice to make an application to regularise their stay. The Domestic Abuse Commissioner's office will work hard to ensure the protocol meets this commitment.

The Domestic Abuse Commissioner did welcome the commitment by the Home Office to offer support to any migrant victim who comes forward to report police and said she would work closely with the Government to ensure that this was properly funded in order to provide the support that was needed.

The Domestic Abuse Commissioner has called on Government to provide £18.7m over a three-year period for migrant survivors with no recourse to public funds and for further £262.9m over three years for a dedicated funding pot for specialist 'by and for' services including services for Black and minoritized victims which would go a long way in providing this support'.

This decision comes at a time, the Domestic Abuse Commissioner noted, when migrant survivors of domestic abuse have extremely limited options. Without recourse to public funds, too many are forced to either stay with their abuser or?face homelessness and destitution when they flee domestic abuse.

The Commissioner said:

"Without sufficient funding for appropriate advice and support to help migrant victims and survivors understand their rights and entitlements and escape domestic abuse, they will not be able to overcome the fear of reporting domestic abuse, which is perpetuated by perpetrators.

"We urgently need to see Home Office develop a strong support package so that victims and survivors of domestic abuse can access the accommodation, support and legal advice they so desperately need."

For the full response of the Domestic Abuse Commissioner and comment by Southall Black Sisters, **click here**. For the report by the Home Office, **click here**.

17/12/21

Human Rights Committee examines historic treatment of unmarried mothers in adoption inquiry

The Joint Committee on Human Rights has held the opening session of its new inquiry into the adoption of children of unmarried women between 1949 and 1976 when it took evidence from academics specialising in issues related to historic adoption.

Between 1949 and 1976, a range of historic practices led to unmarried mothers feeling forced to give their children up

for adoption. While parental consent was a legal requirement for an adoption to take place, there may have been other factors that led to women feeling they had little choice. This could include societal stigma around single mothers with an illegitimate child, inadequate levels of welfare support and a lack of information about where to get help. Direct pressure from family, peer groups, medical practitioners, and other social or religious institutions may also have unduly influenced decisions on adoption.

In this opening session of the inquiry, the Committee examined the adoption practices, and wider societal or familial influences, that led to unmarried mothers putting their child up for adoption. It also investigated what support is available to those affected by historic adoptions.

The witnesses appearing before the Committee were:

- Professor Gordon Harold, Professor of the Psychology of Education and Mental Health at the University of Cambridge and Director of the Rudd Programme for Adoption Research and Practice
- Dr Michael Lambert, Fellow in Social Inequalities, Lancaster University
- Dr Jatinder Sandhu, author of PhD thesis The birth mother and the evolution of adoption policy and practice in England since 1926.

For more information about the inquiry, **click here**. To watch the session, **click here**.

16/12/21

Consultation launched on reforms to Human Rights Act

The Ministry of Justice has launched a consultation on its proposals to revise the Human Rights Act 1998 and replace it with a Bill of Rights.

The government says that proposed new legislation aims to strike a proper balance between individuals' rights, personal responsibility and the wider public interest. This would be achieved while retaining the UK's commitment to the European Convention on Human Rights (ECHR).

According to the Ministry of Justice, the proposed measures will restore Parliament's role as the ultimate decision-maker on laws impacting the UK population, allowing more scope to decide how we interpret rulings from the European Court of Human Rights in Strasbourg, so putting an end to "us gold plating any decisions made by Strasbourg when we incorporate them into UK law".

The MoJ adds that the plans will give the Supreme Court more ability to interpret human rights law in a UK context, specifying that the Government can enforce rules designed to tackle forced marriages without fear of intervention from Strasbourg.

Proposals also include measures to introduce a permission stage which will intercept "frivolous" claims.

The consultation closes on 8 March 2022.

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

17/12/21

Placement orders in breach of Adoption Agencies Regulations 2005: CoramBAAF note

CoramBAAF is recommending that all local authorities check that their adoption and fostering procedures comply with the detail of the Adoption Agencies Regulations (AAR) 2005 to avoid potential difficulties.

The organisation notes that in November 2021 the High Court handed down judgment in ***Somerset County Council v NHS Somerset Clinical Commissioning Group & Anor*** **[2021] EWHC 3004 (Fam)** dealing with the lawfulness of placement orders made in ten separate cases. The court found that the Agency Decision Maker (ADM) had not made the decision that the child should be placed for adoption in accordance with the Adoption Agencies Regulations (AAR) 2005.

CoramBAAF says:

> "It appears that in these cases in Somerset, and possibly in many others, the Agency Medical Adviser had not completed the Child's Permanence Report as required by Regs 15 & 17 of the AAR 2005. She had not given advice on whether the child needed to have a medical examination and had not written a summary of the state of the child's health. In practical terms this omission had very little effect on the making of the ADM's decision, as she had full medical information from the initial health assessment of the child and any medical reports filed during court proceedings. In each case the medical adviser provided a full medical report before the child was matched to prospective adopters, and the local authority believed that this was an effective use of the limited medical advisor's time that they had available."

Nevertheless, the Court found that the breach of the Regulations was so fundamental that it could render the application for a placement order invalid.

The court was told that this situation is not unique to Somerset. CoramBAAF suggests that all local authorities check that their procedures comply with the detail of the AAR 2005 to avoid potential similar difficulties. Somerset have commissioned CoramBAAF to review all of their adoption and fostering procedures to ensure that children's futures are not put at risk by accidental breaches of the Regulations. CoramBAAF has encouraged its members to contact its Advice Line if they have concerns about their own procedures and want to discuss this further.

For more details, **click here.**

17/12/21

MIAMs decreased by 11 per cent in July to September 2021

ediation Information and Assessment Meetings (MIAMs) decreased by 11 per cent in the last quarter compared to the previous year and currently stand at around a third of pre-LASPO levels. Family mediation starts (covered along with outcomes in table 7.2) decreased by 2 per cent although total mediation outcomes increased by 8 per cent, of which 61 per cent were successful agreements, and are now sitting at over half of pre-LASPO levels.

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

MIAMs, family mediation starts, and outcomes decreased significantly following the covid-19 restrictions in March 2020. Since, volumes and expenditure rapidly increased to levels temporarily exceeding 2019 figures. However, in the current quarter, MAIMS have dropped and are down 18 per cent compared to the same period of 2019. Mediation starts have fallen to below 5 per cent of pre pandemic levels. While, mediation outcomes continue to exceed pre-pandemic figures (up 8 per cent).

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

16/12/21

Legal aid expenditure for family matters rose 5 per cent in July to September 2021

In July to September 2021 legal aid for family matters rose 5 per cent to £149.7 million. Legal aid for public family law, which accounts for more than 80 per cent of all civil legal aid, amounted to £120.7 million (an increase of 2 per cent). Legal aid in private family matters came to £29 million (an increase of 19 per cent).

In July to September 2021 family legal help starts increased by 12 per cent compared to the same quarter last year. Completed claims also increased by 7 per cent and expenditure remained unchanged. However, compared to the same period of 2019 (pre-Covid), family legal help starts were down by 26 per cent, completed claims were down by 16 per cent and expenditure fell by 13 per cent. There was a steep decline immediately following the implementation of LASPO Act in April 2013, with a more gradual decline over the last two to three years.

In July to September 2021, certificates granted for family civil representation work decreased by 12 per cent compared to the respective quarter of the previous year. Certificates completed increased by 10 per cent and the associated expenditure has also increased by 5 per cent over the same period. Compared to the same quarter of 2019, certificates granted were down 7 per cent, certificates completed fell 12 per cent and closed case expenditure fell 3 per cent below pre-pandemic levels. The volume and expenditure for closed case domestic violence civil representation increased following the initial impacts of Covid-19 and continues to exceed pre-covid-19 levels (35 per cent and 30 per cent higher respectively – compared to July to September 2019).

Applications for civil representation supported by evidence of domestic violence or child abuse decreased by 8 per cent compared to the same period of the previous year.

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

16/12/21

Average duration of care proceedings to first disposal up to 45 weeks

Between July to September 2021 the number of cases started in the Family Courts decreased by 11 per cent on the same quarter in 2020. In all, there were 63,084 new cases started in Family courts. This was due to decreases in all case types: matrimonial (15 per cent), public law (14 per cent), adoption (12 per cent), private law (10 per cent), domestic violence (8 per cent) and financial remedy (5 per cent) cases.

The figures are included in the latest statistics for the family court released by the Ministry of Justice.

The average time for a care or supervision case to reach first disposal was 45 weeks in July to September 2021, up 4 weeks from the same quarter in 2020. Only 24 per cent of cases were disposed of within 26 weeks – down 5 percentage points compared to the same period in 2020 .

By contrast, there was a decrease in the average time for divorce proceedings. The mean average time from petition to decree nisi was 26 weeks, and decree absolute was 55 weeks – down 3 weeks and up 4 weeks respectively when compared to the equivalent quarter in 2020. The median time to decree nisi and decree absolute was 14 and 32 weeks respectively.

There were 25,587 divorce petitions filed in July to September 2021, down 15 per cent on the equivalent quarter in 2020. There were 27,412 decree absolutes granted in July to September 2021, an increase of 16 per cent from the same period last year.

The number of domestic violence remedy applications decreased by 8 per cent compared to the equivalent quarter in 2020, while the number of orders made decreased by 10 per cent over the same period.

Adoption applications decrease while the number of orders increase. In July to September 2021 there were 954 adoption applications, down 14 per cent on the equivalent quarter in 2020. Whereas, the number of adoption orders issued increased by 7 per cent to 1,104.

There were 1,602 applications relating to deprivation of liberty in July to September 2021, down 8 per cent on the equivalent quarter in 2020. Orders increased by 18 per cent in the latest quarter compared to the same period last year.

For the full statistics, **click here**. For a BBC News report concerning the decrease in adoptions of looked after children, **click here**.

17/12/21

Outdoor weddings and civil partnerships consultation launched

The government has launched a consultation seeking views on its proposals to continue to permit outdoor civil marriages and civil partnerships on approved premises, and to permit outdoor religious marriages in the grounds of places of worship.

Since July 2021, couples have been able to have their civil marriage and civil partnership proceedings outside, in the grounds of buildings such as stately homes and hotels which are approved or become approved for civil ceremonies. This was made possible because the Government laid a statutory instrument amidst the Covid-19 pandemic to give couples more choice of setting and to support the wedding and civil partnership sector. However, that statutory instrument has effect only until 5 April 2022.

The government proposes to lay and bring into force a further statutory instrument to enable outdoor civil marriage and civil partnership proceedings to continue indefinitely.

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

20/12/21

Financial Remedy Update, November and December 2021


Sue Brookes, principal associate, and Robert Jackson, trainee solicitor, at Mills & Reeve LLP, consider the important news and case law relating to financial remedies and divorce during November 2021.

News Update

Message from Mr Justice Mostyn: Amendments to standard orders

Order No. 10.1 (Non-molestation order) has been amended to include the Respondent's date of birth in paragraph 1 on the FL401 application form. This takes place with immediate effect.

You can find the up-to date order by **clicking here**.

Acting for both sides "may become the norm" in divorce work

A future where lawyers act for both sides of divorces as a matter of course and where others move away from current models of family legal practice and exit regulated practice to work as providers in their own right as a 'licenced family adviser' or 'family legal adviser' and offer a new kind of service has been sketched out by Resolution.

You can read the full story by clicking **here**.

Costs in pension divorce case a 'shaming indictment' of our legal system

A family court judge, HHJ Edward Hess, has ordered a Husband to pay costs of £100,000 after his application to vary a pension sharing order on divorce was found to be 'hopeless from the outset'. The couple incurred more than £300,000 in costs between them dealing with the application.

His Honour Judge Hess rejected the application, stating it was "high time that a line is drawn under this seemingly endless litigation". You can read the full story by clicking **here**.

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 stated the changes in media, social media and instant reporting raises questions about how court cases are reported. The Covid-19 pandemic and the consequent need for technology to access court has raised further questions.

You can view the session by clicking **here**.

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 the Family Courts to meet proper professional standards.

You can read the memo by clicking **here**.

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.

You can read the memo by clicking **here**.

Wellbeing is a two-way street, judge tells 'wildly optimistic' lawyers

A judge who finished hearing a case at 6pm has told lawyers to stop underestimating the time it takes to deal with interim applications - and to remember that wellbeing goes both ways.

The parties' agreed position was that the hearing of two interim applications and a contested first appointment could be hearing within two-and-a-half hours. Recorder Alexander Chandler stated this was "wildly optimistic to the point of absurdity", following over 3 hours of oral submissions. He had to reserve judgment and adjourn the first appointment.

You can read the full story by clicking **here**.

Parents could face costs order for clogging up family court

Dominic Raab is reportedly drawing up plans that would financially penalise parents who unnecessarily clog up the courts.

Raab recently told the Conservative party conference that too many civil cases go to court and there should be more use of alternative dispute resolution

You can read the full story by clicking **here**.

Case Law Update

Al Saleh v Nakeeb [2021] EWHC 3186 (Fam) (26 November 2021)

This case deals with divorces, in this jurisdiction and in Syria. Both parties thought they divorced at different times. The timing was important in this case as it had implications on the wife's immigration status, their third child's legitimacy, and the wife's financial position now and on the husband's death.

Mr Justice Poole heard an appeal from the husband ("H"). The parties divorced in Syria in 2010, but this divorce was revoked by the Syrian courts in 2017 as the parties reconciled. H asserted that the wife's ("W") divorce petition in England in 2016 was null and void as, from a pre-2017 perspective, they were already divorced at the time. Mr Justice Poole dismissed H's appeal, finding the 2017 revocation treated the marriage as continuing at 2016, so W's divorce petition was valid.

Background

The couple married in Syria in 2000, which was recognised as a valid marriage in England and Wales. They moved to England in 2001 and had two children together. They returned to Syria in 2010, following which the husband attended a local Shari'a court to pronounce talaq and the local civil registry issued divorce documents shortly thereafter (the "2010 talaq").

They then started cohabiting in England again and reconciled within the three month waiting period – the idda. In August 2014, H signed a certification confirming his marriage to W, but in December 2014 he pronounced *talaq* to W directly (the "2014 talaq"). W did not accept this 2014 talaq as an effective divorce.

The Syrian family register showed the parties as divorced, albeit because of the 2010 talaq. The husband proceeded to marry his second wife in Syria in August 2015.

In 2016, the wife applied to the Syrian court to revoke the 2010 talaq and applied to an English court for a declaration under s55(1) Family Law Act (FLA) 1986 that she and H remained married. She then petitioned for divorce in the English court a month later. Decree Nisi was pronounced in November 2016. The Syrian court then decided in January 2017 that the 2010 talaq was revoked in 2010, due to the couple's reconciliation during the *idda* period. This meant the marriage remained through 2010 and beyond.

In November 2018, H applied to the Syrian court for recognition of the 2014 talaq. The Syrian court granted this.

H applied to the English court, pursuant to s44 FLA 1986, to recognise the 2014 talaq. In January 2020 HHJ Bromilow dismissed this application, declaring that it was not effective and the 2014 talaq would not be recognised in this jurisdiction as, at that date, the parties were lawfully married. They were living together in Bristol, they regarded themselves as

married, save for the 2010 talaq which was revoked in 2017 either way, and they had reconciled and had another child. Their marriage subsisted.

In March 2021, the court granted W's application made in July 2016 for a declaration she and H remained married at the time of her application. This meant she was able to petition for divorce in this jurisdiction. The court found the 2010 talaq did not constitute an overseas divorce capable of recognition under the FLA 1986, due to the reconciliation in the idda. This meant they were treated as married when W petitioned for divorce in England in 2016.

H appealed, arguing that:

> (1) The Syrian divorce was effective until it was revoked in January 2017, meaning in 2016 there was no marriage capable of being recognised under the FLA 1986; and
>
> (2) the Judge should have refused to make W's 2016 declaration that they were still married as it would be contrary to public policy, under s58(1) FLA 1986.

Determination

Mr Justice Poole dismissed H's appeal, finding that the parties were still married at the time of W's divorce petition in 2016 and that the petition was therefore valid. He found that the Syrian courts considered the marriage to have remained from 2000 until March 2015, as the 2010 talaq was revoked. The 2014 talaq could not be recognised in this jurisdiction, applying s44 FLA 1986. The marriage therefore continued beyond the 2014 talaq, including up to the time of W's divorce petition on 31 August 2016. This meant they were married for the purposes of s1 MCA 1973, and W's petition was not null and void by reason of the parties already being divorced. Conversely, if the parties were not in a marriage this jurisdiction recognised at August 2016, W's petition would therefore have been null and void.

Expert opinion was provided that retrospective decisions are effective in Syria, so the Syrian courts viewed the 2017 decision as revoking the 2010 talaq and the parties remained married until March 2015 (when in Syria the 2014 talaq took effect). The fact the decision revoking the 2010 talaq was not made until 2017 did not alter the parties' true marital status I the period from 2010 to 2017.

The husband's submission that the declaration W sought in 2016 was against public policy under s58(1) FLA 1986 only applied to declarations made under Part III. A similar public policy exception existed under s51(3)(c) FLA 1986 to enable the court to refuse recognition of a divorce obtained overseas. Mr Justice Poole found that the public policy exception did not apply as there were no exceptional circumstances.

Mr Justice Poole dismissed H's appeal.

Full case **here**.

MQB v Secretary of State for Work and Pensions and SRB (CSM) [2021] UKUT 263 (AAC) (19 October 2021)

A case about how unearned income from dividends is considered pursuant to a Child Maintenance Service assessment. Confirmation that Regulation 69(6) does not apply if the non-resident parent still has the asset in question.

Upper Tribunal Judge Poynter heard the father ("F") apply for permission to appeal against the decisions of the First-tier Tribunal about his liability to pay child support maintenance for the period from 27 September 2016. Judge Poynter allowed permission to appeal the decisions, as the First-tier Tribunal made a legal mistake in their decision by misunderstanding Regulation 69(6). In doing so, Judge Poynter set aside those decisions and remitted the cases to the First-tier Tribunal for reconsideration.

The secretary of state decided on 09 March 2017 that F's liability for child maintenance from 27 September 2016 would be £234.22 per week ("Decision 1"). They further decided on 05 May 2017 that F's liability from 05 April 2017 would be £132.61 per week ("Decision 2").

F appealed Decision 1 and M appealed Decision 2. The First-tier Tribunal refused F's appeal and confirmed Decision 1 and allowed the appeal of the mother ("M"), and set aside Decision 2 and substituted a decision that F continued to be liable to pay £234.22 per week.

In making this decision, the tribunal relied upon Regulation 69 of the Child Support Maintenance Calculations Regulations 2012, relating to unearned income. The tribunal held that, although H had not received dividends on his company shares since April 2015, there was sufficient unallocated profit in the company that F could have generated dividends if he wanted and noted he had drawn sums through his Director's loan account. They were capable of providing unearned income. The tribunal further found that as F still owned the underlying asset, the shares, which had generated unearned income in previous years, they were able to take them into account. F appealed.

Judge Poynter found that the tribunal had misunderstood Regulation 69(6). It is an exception to Regulation 69(3) which limits the circumstances in which the Secretary of State may agree a variation, rather than expanding them. Where the non-resident parent still possesses the source of income, Regulation 69(6) does not apply. The non-resident parent needs to have actually received at least £2,500 in unearned income. Nothing in Regulation 69 allows the secretary of state or tribunal to deem the non-resident parent to have received unearned income they have not received.

The judge added F's withdrawal of monies from the Director's loan account created a debt to the company which was not unearned income as defined in Regulation 69(2).

This matter was remitted to the First-tier Tribunal as, whatever decision is reached regarding Regulation 69, there is an issue as to whether F diverted the income he borrowed from his companies within Regulation 71.

Both appeals were allowed and the matter remitted to the First-Tier Tribunal for reconsideration.

Full case **here**

Aldoukhi v Abdullah [2021] EWHC 3086 (Fam)

This case is about parties having more than one matrimonial home. It is the first reported case where jurisdiction for a financial relief order was based on s15(1)(c) Matrimonial and Family Proceedings Act (MFPA) 1984. This has the caveat that any award must not exceed the equity in the matrimonial home(s) (s20 MFPA 1984).

The parties divorced in Kuwait with the wife ('W") receiving £14,000 capital and £8,000 pcm maintenance. W owned no assets apart from her interests in three London properties – purchased as joint tenants with W subsequently having severed the joint tenancies.

W sought a declaration the parties held the properties as tenants in common in equal shares and applied for orders for sale pursuant to s14 Trust of Land and Appointment of Trustees Act (TLATA) 1998 and for financial remedy under Part III MFPA 1984 claiming that two of the properties were matrimonial homes.

The first London property ("AG") was asserted as matrimonial by W, as the parties and their children would often stay there when visiting London, including a 73 day stay between June and August 2013. The second property ("CG") was accepted as being an investment property, as the parties never stayed there. The parties stayed in the third property ("CS") for 50 days in the summer of 2016, across two visits, although H and W stayed in separate rooms. W again asserted this was a matrimonial home.

H's claimed that any interest in the properties W held was for him absolutely and he financed the properties on the common understanding W would transfer her interest in them to H if he requested. In respect of the Part III MFPA 1984 claim he argued that the properties were investments and W's claims should be dismissed on the basis that this was a Kuwaiti family, the Kuwait Court had been fully seized and the English court had no business interfering given that the parties were merely "*birds of passage*" in London.

Dealing with the consolidated proceedings Mr Justice Moor drew adverse inferences from H's disclosure and considered H's true financial position to likely be capital in excess of $10M and net income over $500,000 p/a.

Mr Justice Moor found there was an express declaration of trust in relation to all three properties that they were held on trust as joint tenants. Following the severance of the joint tenancies W owed H the sum of £767,042 by way of equitable accounting.

Dealing with W's claims under the MFPA 1984 Mr Justice Moor found AG and CS to be matrimonial homes. Any investment motive was irrelevant to the issue of whether or not they were matrimonial homes. The parties had furnished AG to their tastes, shipped items over from Kuwait, told the mortgagor they were residential, were hardly rented out and they contained paintings, personal possessions and family photographs. The family had stayed for relatively long periods at both properties including spending summer holidays in London when it would have been too hot in Kuwait, treatment for W, enabling the children to attend summer school in London and just enjoying being in London. The fact the parties had separated bedrooms was irrelevant to the status of CS.

Mr Justice Moor found that W's needs for a London and Kuwaiti property could be met with half the equity in the three London properties (£1.9m) and so ordered H to pay a lump sum back to W equivalent to the sum due from W to H for equitable accounting.

Full case **here**

T v T (variation of a pension sharing order and underfunded schemes) [2021] EWFC B67 (10 November 2021)

This case involved an extreme example of moving target syndrome and it is a salutary lesson to lawyers advising on pension sharing orders. HHJ Hess' judgment very helpfully sets out a summary of the procedures involved in both making and implementing pension sharing orders, as well as the proper legal tests to be applied when dealing an application to vary a pension sharing order under Matrimonial Causes Act 1973 s 31.

The parties had separated and divorce proceedings were begun in June 2013. The wife (w) issued form A on 1 April 2014 and the final hearing took place in August and September 2015, with the judgment being delivered orally at the end of the hearing. The order included a 40% pension sharing order in W's favour of the husband (H's) defined benefit pension and, overall, W received just over 50% of the available resources including the family home.

The order also included a substantive spousal maintenance order, which H subsequently appealed. However, neither party appealed the pension sharing order nor suggested that the split initially ordered by the court had been wrong.

Unfortunately, it was not until May 2016 that the ordered was perfected and sealed. In August 2016, the pension administrators then commented on the sealed pension sharing annex and stated that, in paragraph F, the external box should be ticked because the trustee of the scheme did not permit internal transfers. Notwithstanding that they had also confirmed that failure to tick the box did not invalidate the annex, the parties submitted an amended annex to the court and the court then sealed the annex, with the external transfer box ticked, and the pension administrators received the amended sealed annex in 2017.

In the meantime, both parties had delayed applying for decree absolute, meaning that the original pension sharing order had not legally taken effect.

In October 2016, H's pension had been revalued and H received a substantially higher CE than the original figure of c.£826,000, which had been used back in court in September 2015. However, by December 2016, the company had substantially reduced the CE for the purpose of external transfers as the scheme was then underfunded. In June 2017, the CE had reduced from to c. £1.65million to only c.£722,000, i.e. less than it had been at the time of the order.

W feared that she would lose substantial amounts of pension credit by having to take an external transfer, following the information received from the pension administrators in August 2016. W therefore applied for a declaration of the court that her 40% share was to apply to the value of the CE as it had been at its highest point (c.£1.7million in January 2017), an application which was wholly misconceived as the court could not make such a declaration.

Neither W's lawyers nor the pension administrators had alerted her to the fact that she could have selected an internal transfer for the pension sharing order, once the scheme had become underfunded. H was not aware of this option either. Whilst the pension trustees are allowed to reduce the CE on external transfer if a scheme is underfunded, if they choose to do so they must also offer a non-member spouse an internal transfer using the full value of the member spouse's CE. The non-member spouse can then take the internal transfer at full value or, if they choose, they can have an external transfer at the reduced rate, as long as they understand both the reasons for the underfunding and the likely timescale for the underfunding to be rectified. These two points must be explained by the trustees to the non-member spouse before an external transfer can be chosen.

W finally applied for decree absolute in September 2017 and the court initially stayed the pronouncement on H's application. H then immediately applied to vary the pension sharing order, which then prevented the pension sharing order from taking effect until the variation application had been determined (Matrimonial Causes Act 1973 s31(4A)(b).

Decree absolute was then granted on 22 December 2017. It is not clear whether W was aware that, by applying for decree absolute when she did, she would have lost out on substantial widow's benefits had H died after 22 December 2017, and she would also not have the benefit of the pension sharing order because that part of the order had still not taken effect.

In April 2018, the company reversed their policy of reducing CEs for external transfers. H became aware of this but he did not disclose this to W and she was not aware of this development until March 2021.

H continued to pursue his variation application, seeking an order that W received 17% and not 40% so as to give her broadly equivalent to the sum she could have expected to receive when the order was first made in 2015, plus an uplift for inflation.

By August 2021, the CE of the pension had increased further c.£2.5million, almost entirely a result of changes in actuarial assumptions over the nearly six years since the order had been made.

Considering H's application, HHJ Hess confirmed the court will treat variations of pension sharing orders as any other variation of capital. As per Bodey J in *Westbury v Sampson* [2002] 1 FLR 166 and ***Birch v Birch* [2017] UKSC 53**, variation of overall quantum is a viable option in only a few cases and, noting Mostyn J in ***BT v CU* [2021] EWFC 87** the only way to change the overall quantum should be to satisfy all the Barder conditions. Adopting Bodey J's approach, rather than

Mostyn J's, HHJ Hess held that H could only succeed in a downwards variation if he could establish that "the anticipated circumstances have changed very significantly, and/or for cogent reasons rendering it quite unjust or impracticable to hold the payer to the overall quantum of the order originally made".

HHJ Hess concluded there were three reasons why a change of CE alone does not justify a variation of the percentage split ordered by the court.

- H appeared to have misunderstood what the CE of a defined benefit fund represents and he had ignore that the actuarially calculated figure will change as market conditions and gilt yields change. Suggesting W should receive a fund based on the CE calculated in 2015, even with an uplift based on inflation, would be very unfair to W in practice.

- H was ignoring that he is keeping 60% of the higher CE and therefore benefits from the perceived windfall far more than W.

- The reason the pension sharing order had not taken effect for six years was due to the delay in decree absolute and largely due to H's own application to vary the order. To this extent, it was H's fault that there has been such a delay and such an extreme case of moving target syndrome.

Significant amount of costs were incurred in this case (over £300,000 between the parties) because of both party's failure to address the potential for an internal transfer when the scheme had been underfunded back in 2016/17 and also because of H's failure to disclose that external transfers were no longer being made with reference to a reduced CE. Additional issues also included the pursuit, primarily by H, of a further PODE report, despite the PODE which had been ordered by the court having already declined instructions on the basis that there were flaws in the letter of instruction and little to justify a further pension sharing report in this case. H had also failed to negotiate openly and in a reasonable way.

The judge concluded that H's application to vary was hopeless from the outset. He had initially applied in part to block W's misconceived application for a declaration from the court, but he should instead have pointed out the potential for her to take an internal transfer at that stage. He should then subsequently have disclosed the change in the company's policy on external transfers, at which point, W could have withdrawn her own application.

The judge ordered H to pay W's costs and assessed these at £100,000 out of the £130,000 she had incurred, rather than ordering the full sum, to reflect that at least some of the costs arose from her misconceived application.

Full case **here**

A v M [2021] EWFC 89 (05 November 2021)

This was the final hearing of the wife (W)'s financial remedy application in a case involving properties in several countries, two private equity funds, various trust funds, and costs applications by both parties.

The husband (H) worked in private equity and had set up his own fund in 2015. W is the daughter of extremely rich parents and the beneficiary of valuable trust funds.

Mostyn J used his judgment to give guidance on the approach to private equity in financial remedy claims, following the case of ***B v B* [2013] EWHC 1232 (Fam)**. He makes the following points:

- In his opinion, carried interest is neither exclusively a return on capital investments as argued by W nor an earned bonus as argued by H. It is a hybrid resource with characteristics of both.

- The marital acquest should be calculated as at the date of the trial unless there has been needless delay in bringing the case to trial or a completely new asset has been brought into being between separation and trial. In most cases, the economic features of the parties' marital partnership will have remained alive and entangled up to that point and the fruits of the partnership will not have been divided and distributed.

- The marital, and therefore shareable, element of the carry should be calculated linearly over time, with the marital fraction of the carry being expressed as a percentage of the whole interest in the fund. In this case, the marital portion of H's carry was to be shared equally.

- It was untenable for W to argue that she should be able to share future carry generated after the date of the trial simply because of her ongoing contributions caring for the youngest child. The concept of sharing is predicated on the parties being in an economic partnership. That comes to an end at the final settlement and there can be no valid ongoing claim to share either assets which have already been divided and distributed or earnings/profits generated after the end of the partnership.

- Mostyn J noted H's view that any Wells sharing should be limited in size and range. Rather than give W an interest in both of H's private equity funds, he attributed to her an interest in just one of them. Rather than simply adding 50% of the marital element of each fund and attributing that to fund 1, he looked at the projected yields and the difference between the two, concluding that, in this case, giving W 48.53% of H's carry in fund 1 fairly reflected her marital sharing claim to both funds.

- He then allocated the co-invest in both funds in much the same way.

- In practice, W was to receive her share of the carry and co-invest by means of contingent lump sums against H, rather than a formal transfer of part of his interests in the fund.

- Whilst the actual returns would vary, and there could be no guarantees that anything would be received, Mostyn J concluded the chances of W receiving nothing would be negligible and took that into account with the rest of his judgment.

W had sought periodical payments of £225,000 annually, which the judge found to be unrealistic and unprincipled. She was backed by large amounts of discretionary trusts money and, whilst the trustees had said they would only lend money to W, the judge could not see any good reason why the money would not be made available to her outright. It is an elementary principle that a claimant of periodical payments must meet her need first from her own resources before a call is made on the resources her ex-husband retains from the settlement. After the end of a marriage, there is no legal duty on one ex-spouse to support another.

Mostyn J looked at nominal maintenance as a way to protect W in the event that she did not receive the currently projected future returns. His views is that nominal maintenance orders are contrary to s25A Matrimonial Causes Act 1973. As far as Mostyn J is aware, there has never been a reported case where they have successfully been enlarged and he views them as never more than a "symbolic irritant". The court has to peer into the future and make factual findings. If it is satisfied that it is more likely than not that a claimant will not suffer undue hardship if her claims were to be dismissed, the court should dismiss the claims. The respondent should not act as a potential insurer in respect of remote risks which might eventuate years after the ending of the marriage.

W's costs (£554,000) were said to be exorbitant and completely disproportionate to the issues. She was also criticised for failing to include third party costs on her form H1. H's costs (£273,000) were said to be high but not exceptional. The difference between the two was completely unacceptable. The judge accepted that W's costs would be more because of the additional work her lawyers had to do, but not to the extent they were.

Dividing the resources equally, either after the costs have been paid or with W's costs owed as debt, would be wrong, when W's costs were excessive. Mostyn J therefore added back in £150,000 as a notional asset of W which he regarded as her excessively incurred costs.

Following distribution of the judgment in draft, both sides applied for a costs order against the other. Mostyn J considered the offers each had made and concluded the stance of both parties up to the PTR had been equally unreasonable. There should be no order for costs for that part of the proceedings. H then made an offer which W had intransigently rejected and her refusal to negotiate then led to the emotional and financial expense of the trial. Litigants must understand that they must negotiate openly, reasonably and responsibly. If they do not, they will suffer a penalty in costs. W was therefore ordered to pay half of H's costs from PTR to the conclusion of the trial.

Finally, Mostyn J also included further comments on anonymisation of financial remedies judgments, following applications from both parties on this issue. In ***BT v CU* [2021] EWFC 87**, he had said that his default positon would be to publish financial remedy judgments in full without any anonymisation, save that any children will continue to be granted anonymity. In that case as with this one, the parties had come to trial with a reasonable expectation that the hearing would preserve their anonymity and it would not be fair now to spring the new approach on them. The reported judgment is therefore anonymised, but he repeats his previous comments in relation to his approach going forward. In response to the surprise which had been caused by his previous judgment, he denies having snatched away the parties' right to anonymity and he questions how the practice of routinely anonymising judgments came about in the first place.

Full case **here**

E v B (Interim Maintenance Inaccurate Time Estimate) [2021] EWFC B90 (04 November 2021)

Recorder Chandler heard the wife (W's) application for interim maintenance and a costs allowance within her Part III claim for financial relief after an overseas divorce.

The judgment highlights a number of problems which judges have to deal with, including:

- the agreed time estimate was grossly under-estimated to the point of absurdity;
- the witness statements were too long and too densely detailed;
- the court bundle was 480 pages including position statements (28 pages) and authorities;
- the expectation of judicial pre-reading were unclear and/or unreasonable; and
- the length of oral submissions bore no resemblance to the agreed time estimate.

Just as practitioners should not receive unreasonable demands from the judiciary, judges should not be put in the sort of position this court faced. If they do, they should be aware of the possibility of adjournment and costs sanctions. Well-being is a two-way street. Realistic time estimates must be given.

W initially applied for £192,795 per year interim maintenance and a £68,000 costs allowance. She then reduced this to £3,700 a month, plus nursery fees and health insurance cover and £49,500 plus VAT for her costs to FDR. H was ordered to pay W interim monthly maintenance of £3,000, plus nursery fees and health insurance cover, but no costs allowance.

The judge agreed with W that it was appropriate to make robust assumptions about H's ability to provide interim financial support. In the absence of hearing evidence, no findings of fact could be made but, from what the judge knew about the proceedings to date, on the balance of probabilities a view could be formed. The judge concluded that H could afford to pay more than he had been paying voluntarily.

However, W's evidence about her own income was unclear. Her entitlement to receive rental income from properties she co-owned was something the court should take into account, even if it was not currently being paid to her. Some adjustment should therefore be made for income which the court could reasonably conclude was available to W.

The judge had not been provided with any evidence of W's form E budget of £192,795 and, whilst an interim budget is not necessary in every claim, it would be helpful for the court to be given some understanding of the evidential basis for W's interim claims.

In support of her costs allowance application, W had produced evidence from two banks refusing to offer her personal loans. W also produced a letter from a mortgage company indicating it would not be "possible to source you a residential mortgage in your sole name" and that raising funds against the properties, would require the co-owner's consent as a party to the mortgage. However, this evidence did not satisfy the requirement to show that W could not reasonably obtain a litigation loan (*Currey v Currey (No 2)* [2007] 1 FLR 946).

W had also produced evidence from two litigation loan providers refusing funding. Recorder Chandler attached little weight to this evidence because the lenders had based their decisions on W's "self-serving assertion" that she was unable to sell co-owned properties without the other owner's consent. This ignored the court's powers to force a sale under section 14 Trusts of Land and Appointment of Trustees Act 1996.

W's application for a costs allowance was therefore dismissed. The question of costs would be dealt with at the adjourned FDA.

Full case **here**

BT v CU [2021] EWFC 87 (01 November 2021)

This was the husband (H)'s *Barder* application to set aside parts of financial order due to the impact of Covid on his school meals business.

In October 2019, following a four day contested hearing, H had been ordered to pay the wife (W) £950,000 in a series of lump sums, to transfer 30% of his pension to her, to pay her spousal maintenance in lieu of interest and to pay child maintenance and school fees. The assets totalled £4.75million and the overall capital split was 58%:42% in H's favour. The departure from equality was because H was retaining, by agreement, the business which he had set up prior to the marriage and which was inevitably more risky than W receiving cash.

Following lockdown and the closure of schools, H applied pursuant to FPR r9.9A to set aside parts of the final order, arguing that the arrival of the pandemic had been both unforeseen and unforeseeable and its impact had been so devastating that the fundamental assumptions on which the order had been made were invalidated and, as a result, he was unable to discharge his unpaid obligations.

Pursuant to FPR PD 9A para 13.8, in January 2021, HHJ Evans-Gordon directed a preliminary issues hearing to address: if Covid is capable of being a Barder event; and if H had established sufficient grounds to set aside the final order in part or in full. Mostyn J agreed that separating the ground-establishment phase from the disposition phase is a sensible and useful

procedure in a case such as this. If H had not established the grounds for setting aside the final order, his application would be dismissed and that would be the end of it.

Mostyn J sets out the conditions which must be proved for a set-aside pursuant to *Barder v Barder* [1988] AC 20 and, added to them, the further condition that the applicant must demonstrate that no alternative mainstream relief is available to him which broadly remedies the unfairness caused by the new event *Penrose v Penrose* [1994] 2 FLR 621; *Myerson v Myerson (No.2)* [2010] 1 WLR 114; J v B (Family Law Arbitration: Award) [2016] 1 WLR 3319.

Noting Thorpe LJ's judgment in *Myerson (No.2)*, the court must consider whether, even if an applicant has satisfied all of the Barder conditions, there is an argument that the business owner has made his or her bed and must lie in it. However, Mostyn concludes that this argument will only apply where the final order was made by consent and the applicant is a buccaneering market trader.

Cases where assets have been correctly valued at the time of the order, but change value within a relatively short time owing to the natural processes of price fluctuation, will very rarely satisfy the Barder conditions as the fluctuation will usually have been foreseeable. Major economic downturns are cyclical by nature. They may cause financial devastation, but they cannot be said to be unforeseeable or to have invalidated the basis on which an order was made.

In this case, looking at the figures and H's own projections, Mostyn J was sceptical that the impact on the business was as dramatic as H predicted and, even if it was, he could not accept that the events which caused the movements in both turnover and costs of sale were unforeseeable. A reasonable person would have said in 2019 that there was a chance that there would be an economic downturn in 2020 which would affect the business in this way. The original judge had made very clear in her judgment that she was taking into account both the potential value of the business and the potential risk to H as well.

The downturn suggested by H in this case, even if accurate, was a pale shadow compared to the devastation caused to Mr Myerson and H had failed to establish sufficient grounds to satisfy the first *Barder* condition. As such, his application was dismissed.

Mostyn J noted there are two possible alternative routes of relief available to H: to vary or stay the order inasmuch as it is executory Thwaite v Thwaite [1982] Fam 1; and an application to vary on the grounds that it is, objectively, a lump sum by instalments variable under *s31(2)(d) Matrimonial Causes Act 1973*.

Noting the Committee in *Barder* itself did not decide the case by referent to the *Thwaite* doctrine, although the order had been executory, Mostyn J agreed with counsel for W that the Committee must be taken as having impliedly rejected this route as a legitimate source of relief. *Thwaite* goes no further than to confirm the existence of an equitable jurisdiction to refuse to enforce an executory order if, in the circumstances, it would be inequitable to do so. Mostyn J clearly remains of the view he expressed in *SR v HR (Property Adjustment Orders)* [2018] EWHC 6060 (Fam) that *Thwaite* does not enable the court to make a completely different order and any application under Thwaite should be approached "*extremely cautiously and conservatively*".

The court has the power to increase the time for payment of lump sums or to stay execution of their payment for no longer than a reasonably short period. Further to *Masefield v Alexander (Lump sum: extension of time)* (1995) 1 FLR 100, it can extend time to comply with an executory order or stay its execution for a limited period, where the extension does not strike at the heart of an order. Also, pursuant to CPR 40.8A, the court has power to award a stay of an executory order where matters have occurred since judgment. Mostyn J held that a permanent stay could only be lawfully ordered under this rule, or FPR 4.1(3)(g) if the Barder test is fully satisfied.

Mostyn J noted that four reported judgments have rejected his earlier approach in *SR v HR*: Roberts J in *US v SR* [2018] EWHC 327 (Fam) noted *Thwaite* had been followed uncritically in *L v L* [2006] EWHC 956 and concluded that the power to vary an executory final order existed; ***Akhmedova v Akhmedov & Ors (No.6)* [2020] EWHC 2235 (Fam)**; ***G v C*** **[2020] EWHC B35 (OJ)** ; and ***Kicinski v Pardi*** **[2021] EWHC 499 (Fam)**.

With respect, Mostyn J does not agree with those decisions which he believes conflicts with the binding precedent of Barder.

Section 31 MCA 1973 is a carefully devised scheme which was democratically enacted by Parliament. The Thwaite exception as developed in *L v L* drives a coach and horse through the statutory scheme. If proponents of the executory order doctrine are correct, the entire litigation in Barder itself was conducted on completely the wrong footing.

Moving on to consider the variation of lump sums by instalments, Mostyn J notes the original recommendation from the Law Commission was that they should be variable only as to timing and not quantum of the overall sum ordered. Mostyn J also refers to a number of cases which he suggests have misread the relevant provisions and assumed that s31 MCA 1973 allows the court to vary the overall quantum of a lump sum payable by instalments as well as just the schedule of payments.

Giving a hypothetical example of an order requiring H to pay £5,000 on 1 January and a further lump sum of £4,000 payable in monthly instalments of £1,000 starting on 1 March and ending on 1 June, Mostyn concludes that the correct legal position is as follows:

- pursuant to FPR 9.9A, the order could be set aside if all five conditions in *Barder* were all satisfied and it was proved that the new event was unforeseeable;

- the date for the payment of the first lump sum could be varied to, say 1 February, under the inherent power of the court pursuant to *Masefield v Alexander;*

- under s31(1), (2)(d) and (7) MCA 1973, the scheduled payments of the instalments of the second lump sum of £4,000 could be varied to eight monthly payments of £500 commencing on, say 1 March and ending on 1 October.

Mostyn J noted the practice which has developed of framing what, to all intents and purposes, is a lump sum by instalments as a non-variable series of lump sums, so as to avoid any risk of the amount being varied, and that the judge in this case had herself made clear she was ordering a series of lump sums, which should not be susceptible to variation. Mostyn J's own conclusion is that the order in this case was in fact to be characterised as a lump sum by instalments and concludes that it is not variable as to overall quantum under s31 MCA 1973 (as that power can only recalibrate the payment schedule) and that the overall quantum could only be set aside or altered under the *Barder* doctrine.

Mostyn J then adds a postscript about anonymity. He had originally intended that, when handing down this judgment, anonymity should extent only to the children, in order to reflect the increased emphasis on transparency in financial remedy proceedings.

H had argued for the judgment to remain anonymous. However, Mostyn J noted that the application was H seeking to set aside the original order. He did not have to make the application and his evidence had not been disclosed under compulsion. In these circumstances, Mostyn J would not usually grant his application for anonymity.

Mostyn J no longer holds the view that financial remedy proceedings are a special class of civil litigation justifying the veil of secrecy being thrown over the details. Secrecy becomes even more difficult to defend when one considers appeal judgments, which are not anonymised in the same way, and the divergence in practice, depending on whether the application is proceedings at first instance or on appeal, is impossible to defend.

H had argued that naming H would lead to identification of his business and its financial details would be of great interest to its competitors. Mostyn J makes clear that mere assertions of this nature do not justify the imposition of secrecy. Hard evidence is needed before he will accept such an argument.

Mostyn J did however accept H's arguments that naming W would identify the children so granting anonymity to them would be rendered ineffective and the parties had come to the hearing with the reasonable expectation of the judgment being anonymised, based on the usual convention in the Family Court. Whilst Mostyn J makes clear that the convention of anonymous judgments should now be abandoned, it would be unfair to spring this approach on the parties in this case without forewarning.

Mostyn J concludes by stating that it should be clearly understood that his default position from now on will be to publish financial remedy judgments in full without anonymisation, save that any children will continue to be granted anonymity. Derogation from this principle will need to be distinctly justified by reference to specific facts, rather than by reliance on generalisations.

Full case **here**

Cathcart v Owens [2021] EWFC 86 (01 November 2021)

This was the application by a wife (W) pursuant to FPR PD 9A para 13.7 to dismiss the husband (H)'s application. H had applied pursuant to FPR 9.9A to set aside financial consent orders made in 2002, 2011, 2019 and 2020 on the basis of W's alleged fraud, relating to W's IVF treatment after the parties had separated.

Mostyn J noted the parties had been in unremitting, furious, hostile and embittered litigation for over 20 years.

The parties married in August 1997. By agreement, in April 2000, W engaged in IVF treatment at a fertility clinic in California. Conception was successful and the parties' first child was born in March 2001.

The parties separated in June 2001. They agreed a financial settlement which was recorded in a consent order in April 2002. W left the marriage with £2,148,842 in cash and £87,257 in pensions.

After separation and during the proceedings, without disclosing that she was doing so, W had taken preparatory steps with the fertility clinic to have another child. In July 2001, she paid the clinic to store unused frozen embryos with H's sperm and, two months before the financial remedy order, she started taking hormones with a view to further IVF. She stopped taking the hormones after a month. Then, after the 2002 order had been made, she continued with the IVF, got pregnant but miscarried in July 2004. She did not disclose this to the husband that she had done this.

In September 2004, H and W then entered into an agreement, unbeknown to his new wife, that H would provide further sperm to enable W to conceive a sibling to their first child, in exchange for a promise by W that she would never seek child maintenance from H. W backed her promise with a £100,000 bond to stand as security for any future maintenance claims.

H now alleged that W fraudulently signed a form with the fertility clinic on his behalf in February 2005, although the judge noted that this was difficult to believe she had done that, when H accepted that he had previously entered into the agreement with W and that he subsequently received and retained the £100,000 bond, following W's financial claims.

The parties' second child was born in November 2005.

Very sadly, both children had profound learning difficulties and extensive care needs. Unable to cope financially, W pursued various Schedule 1 claims against H, which were comprised by way of consent orders. There were also separate contentious injunctive proceedings in relation to H wanting the tell the children their true biological parentage; a dispute over the parentage of the youngest child, which resulted in conclusive evidence that H was the biological father; and orders were made by the court to prevent H and his new wife having any contact with either child until they were 18.

Very sadly, the oldest child died in August 2020.

In April 2021, H applied to set aside the relevant consent orders, alleging fraud by W.

Mostyn J noted that fraud has to be distinctly pleaded and distinctly proved by the person alleging it. There are of course cases where material non-disclosure is inadvertent and therefore not fraudulent (*Jenkins v Livesey* [1985] AC 24). Whether it is fraud or non-disclosure, the order will only be set aside if the order was substantially different from the order which would have been made, had the disclosure taken place.

If there is sufficient evidence to clarify whether or not the order would have been different, that will be the end of it. If there is a lack of evidence, following *Sharland v Sharland* [2016] AC 871, the initial burden of proof is on the claimant to prove the defendant practised deception with a view to financial or personal gain and, once that is proved, it is for the defendant to prove that consent would not have been withdrawn if there had been disclosure and that the fraud was not materially causative of the wrong order being made.

The court must first ask if the respondent, in the period leading up to the making of the order, practised a deception with a view to gaining a financial or personal advantage.

If the answer to this question is "yes' or "probably", so there was fraud, the court must ask either would a reasonable person have nonetheless agreed to the terms of the consent order or, if the order was not made by consent, would the court have made a substantially different order had it known about the matter concealed.

If the answer to the question is "no", or 'probably not", so any non-disclosure was not fraudulent, or if the applicant (who bears the burden of proof at the first stage) has not adduced enough evidence, the set-aside application will be dismissed.

Mostyn J conducted a summary disposal of the set-aside application based on written material and counsel's submissions and without oral evidence, as he is entitled to do under rule 9.9A FPR. Mostyn J was wholly satisfied by the evidence that there was no fraud and, even if there were, a different order would not have been agreed or made by the court. As the evidence was clear, there was no issue as to where the burden of proof should lie in this case.

Mostyn J could not accept that W was under any legal obligation to disclose her initial preparatory steps taking hormones before the 2002 order. Such preparatory steps cannot be said to be sufficient to be classed as practising deception, which much cross the line and be an active attempt to deceive. Under criminal law, preparations are not punishable but attempts are and arguably the same can be said to apply here. Those preparatory steps would not have made the slightest difference to the 2002 order.

The other allegations of fraud were even more implausible and H's application was therefore dismissed.

Full case **here**

Siddiqui v Siddiqui & Anor [2021] EWCA Civ 1572 (02 November 2021)

In this judgment, Lord Justice Moylan considers whether adult children of parents who are not separated can bring financial remedy proceedings against them.

A 41 year old man ("C") applied for financial provision from his parents ("P") pursuant to s27 Matrimonial Causes Act (MCA) 1973, s15 and Schedule 1 of the Children Act (CA) 1989, and the inherent jurisdiction. At first instance Sir James Munby dismissed C's applications citing a lack of jurisdiction to make orders under s27 MCA 1973 or s15 CA 1989 in favour of C. He rejected C's position that various articles of the ECHR applied, finding the "*various claims do not fall within the ambit of any of them*", rejected C's claim that the statutory provisions were discriminatory under article 14 and he rejected

C's application for an order under the inherent jurisdiction, commenting there is "*a comprehensive statutory scheme dealing […] with the circumstances in which a child, including as here, an adult child, can make a claim against a living parent*." C appealed and the matter came before the Court of Appeal for permission to appeal.

Giving the lead judgment with which Dingemans LJ and Underhill LJ agreed Moylan LJ refused permission to appeal.

Moylan LJ confirmed that s27 MCA 1973 and Schedule 1 CA 1989 is directed towards the needs of children in the context of their parents' relationship having broken down.

Moylan LJ further found that that for the purposes of Article 14 ECHR only differences in treatment based on an identifiable characteristic or 'status' could amount to discrimination. Not permitting an order to be made in favour of a child whose parents still live together did not run counter to the purposes of article 14 or the aim of the ECHR. Being the child of parents who live together in the same household is not a personal or identifiable characteristic. It does not define the child, it is "merely a description of the difference in treatment itself". Nor was there a difference in treatment between persons living in relatively similar situations - C was not in a relatively similar situation to adult children whose parents have divorced or are not living together. C's claims did not come within the ambit of any of the substantive rights in the ECHR. Finally, there was a legitimate aim in the legislation to address the financial consequences of a breakdown in the parents' relationship which was proportionate as granting children whose parents have not separated the right to apply for financial provision would pursue a different aim.

Full case **here**

CASES

Re A (A CHILD) (supervised contact) (s91(14) Children Act 1989 orders) [2021] EWCA Civ 1749

Factual background

The mother is a doctor originally from Hungary. She has three other children from previous relationships. She met the father in 2013 and A was born in 2015. In 2017 the mother returned to Hungary for 6 months and left all 4 children in the care of the father. In 2018 she again went to Hungary with A leaving the other children with the father who had agreed to this trip so that A could receive medical treatment. The mother did not return in accordance with the agreement and therefore the father issued abduction proceedings to secure the return of A to the jurisdiction.

Unbeknown to the father, the mother returned with A to the UK, firstly to Hastings then to Northern Ireland but failed to comply with court orders to return A to the care of the father. Such were the welfare concerns that a Children's Guardian was appointed to represent A's interests in what were described by the court as "long running and destructive private law, child arrangements proceedings".

Since the summer of 2019 A has lived with her father.

A fact-finding hearing took place in October of that year with the court finding that the mother had taken steps to deliberately frustrate the relationship between A and her father. As the mother remained in Northern Ireland, she had telephone contact with A but this had to stop when the mother made wholly unfounded allegations of sexual abuse of A by the father. What followed thereafter was a campaign against the father by the mother of very serious allegations.

Assessments followed of the mother and child. The expert clinical psychologist concluded that the mother had a personality disturbance that meant she had been exposing her children to maltreatment without being aware of the impact of the same upon them and recommended DBT for some 24 months to treat emotional dysregulation. The prognosis was however pessimistic as the mother lacked insight into her difficulties and thus did not accept the need for treatment. The treating and expert paediatricians found no evidence of sexual abuse or neglect of A by her father as alleged by the mother.

At the final hearing HHJ Dawson decided that A would live with her father and have professionally supervised contact with the mother for 6 hours every other weekend. The judge made an order under s91(14) prohibiting either party from making an application to the court without leave for a period of two years.

It is noteworthy that the mother made multiple complaints against professionals and experts in the case as detailed at paragraphs 13, 21 and 24 respectively. She also sent large volumes of correspondence to the father and continued to make complaints to various authorities about his care, each requiring some form of enquiry and intrusion in the lives of A and her father.

Application

The grounds upon which the mother was permitted to appeal focused on the following point: that an order that contact is to be supervised when coupled with the making of a s91(14) order, does not allow for progression to unsupervised contact unless the mother undertakes the therapy recommended by the clinical psychological expert and that this is an impermissible fetter on the development of a more natural mother daughter relationship.

It was properly conceded that when the judge at first instance was faced with the choice of no direct contact or supervised contact there was no safe alternative to professional supervision given the facts of this case.

Discussion

The legal principles as set out by Butler-Sloss LJ in *Re P* continue to be endorsed by the court but are now of course some 22 years old. In this judgment the guidance is helpfully placed into a modern context whereby the court notes the changes in the forensic landscape with the advancement of technology and the impact this has on the way that we now communicate along with how the withdrawal of legal aid has affected the conduct of litigation, especially in difficult cases such as this one.

In this modern world, the court must consider the overall conduct of a party including the way in which they communicate which in this case included multiple vindictive complaints and a bombardment of correspondence, all amounting to a real intrusion into the lives of the father and A. The court describes this as "lawfare" - the use of the court proceedings as a weapon of conflict and as such warrant an order under s91(14) being made.

The court also considered how the provision in s67 of the Domestic Abuse Act 2021 may impact upon the guidelines in *re P*. Whilst not yet in force, King LJ forms the conclusion that the proposed s91A dovetails with the modern approach that she examines in this judgment.

The court when considering the law found no error of law or principle by the trial judge. The effect of the s91(14) order is only as a filter and if there is credible evidence that comes to light within the 2 year period to change the contact order, permission will be given upon application to either party who seeks it. What the order provides is protection to A from further litigation and all that brings with it. The judge was right to make such an order as it was overwhelmingly in A's best interests to do so as it was to make the s8 order about professionally supervised contact. Had the orders not been made, the reality is that contact would be limited to indirect only.

The appeal was therefore dismissed.

Case summary by **Anna Walsh**, Barrister, **Coram Chambers**

YP (Adoption of 18 year old) [2021] EWHC 3168 (Fam)

The applicant, "A", is a Swiss national living in London who applied to adopt "YP" supported by YP's, mother "R" who is also a Swiss (and Spanish) national, and lives in Switzerland with YP. A and R had been married and then divorced but subsequently, A, R and YP resumed living as a family unit in Switzerland for a period following which R and YP both regularly visited A and it was clear that A was YP's emotional father. Accordingly, the court approached A's application as being akin to application for a stepparent adoption order.

Until 2019, YP also had regular contact with his birth father "X" with whom he had never lived, but this stopped for reasons which were not known to the court at the time of the application. Although X had been served with notice of the application and, at one stage, had expressed an intention to oppose it, he made no concerted efforts to do so. Legal advice was obtained from a Swiss lawyer in relation to X which confirmed that he did not have Parental Responsibility for YP as he and R were never married and did not enter into any joint custody agreement in relation to him so X was not, therefore, automatically a respondent to the application. The same lawyer also confirmed that an adoption order, if made, would be recognised in Switzerland.

The author of the Local Authority's first Annex A, Rule 14 report, despite noting that A had played a significant and consistent paternal role in YP's life, had shown his commitment to YP in a number of ways by guidance, practical, emotional and financial support, that YP values his advice and opinions and concluding that, "*…in short, A is the consistent father figure in YP's life*." opposed the application due to a concern that YP would lose his connection to his birth family if the adoption order was made. That recommendation was, however, superseded by a subsequent report filed after it became clear that X was not going to engage with the proceedings, and in which it was recommended that the order should be made.

When the matter came before Mrs Justice Arbuthnot, ("The Judge"), she noted that she had to consider the following issues pertinent to the application [13-16]:

> a) Whether the pre-conditions for the making of an adoption order are satisfied.
>
> b) Whether A is the partner of R within the definition of the Adoption and Children Act 2002 ("ACA 2002").
>
> c) Whether YP has had his "home" with A "at all times" during the six months preceding the application, it being accepted that YP was in Switzerland during this period as if not then the criterium in section 42(3) of the ACA 2002 were not met and an adoption order could not be made.
>
> d) Finally, if the pre-conditions were met, whether it was in YP's best interests to make an adoption order.

Given the somewhat unconventional nature of the relationship between R and A, the Judge first had to consider whether A was indeed the partner of R within the meaning of section 144(4)(b). Irrespective of where each of the parties were throughout the year, it was clear that A, R and YP all deemed A and R to be in a relationship and the three considered themselves to be in a family unit. Accordingly, at [83] the Judge found that "on balance that they are living as "partners in an enduring relationship" sufficient for the Act's purposes.

As X did not have PR and it was not necessary to dispense with his consent in order to proceed with making the order, the focus then moved to the question of whether YP did indeed have his home with A in order to find the condition set out in section 42(3) of ACA 2002 met. The Judge accepted that COVID restrictions had impacted on YP's ability to spend time with A as he otherwise would have done but had constantly remained in touch during the relevant period.

At [87-96] the Judge analysis the wealth of case law dealing with this particular question before making the following observations at [110 & 111]:

> I have asked myself whether the rather nebulous meaning of "home" set out above puts a strain on section 42(3) of the ACA 2002. I am fortified by the observations of past judges who have noted that no definition of home is set out in the ACA 2002. Other judges have approved a wide and flexible interpretation of "home". It is a concept which may also have different meanings in different contexts. Mr Powell contends

> that the European Convention on Human Rights demands an interpretation of the ACA 2002 which gives effect to the undoubted Article 8 rights of A and YP.
>
> The original intention of the requirement in section 42(3) was to enable the local authority to observe the child and the prospective adopter together in their home. There is no suggestion from either the social workers or the Cafcass reporting officer that they have not been able to assess the relationship between A and YP. We have all become used to working effectively but remotely in the past 18 months and that is what the Annex A report writers and the Cafcass reporting officer have done.

Having done so, at [112] she concluded that she there was:

> … no doubt that there is a family tie between A and YP and in my judgment, this is a situation where the court should act to enable that tie, those family rights, to be maintained. The concept of "home" should be given a wide and flexible interpretation. This is not a case where a particular geographical location is required, I do not consider that R and YP need to be living with A in one place for YP to have a home with A. I have concluded that home in this context of an 18 year old who has known the applicant almost all his life, who is bound to him emotionally and sometimes geographically and regards him as his father meets the requirement of having "had his home with the applicant…at all times during the period of six months preceding the application" even though YP was in Switzerland during this period.
>
> The Judge found, therefore, that YP did have his home at all times with A during the preceding six month period and that, accordingly, the application for an adoption order met the criteria set out in the ACA 2002 such that, upon being satisfied that it was in YP's best interests to do so, she made the order on the basis that this will "ensure that the de facto strong and enduring family relationship between A and YP is recognised legally."

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

F v M [2021] EWHC 3133 (Fam)

Background

In private law proceedings, Hayden J made 'serious and far reaching' findings about the coercive and controlling behaviour of F in two separate relationships. F's behaviour was sinister and sadistic. Hayden J found F to be profoundly dangerous, dangerous to women who he identifies as vulnerable and dangerous to children. In respect of M, the findings included that F had raped M and had coercively controlled her by isolating her, preventing her access to ante-natal care, controlling her money and food, and deliberately curtailing her freedom, which amounted to emotional abuse. The fact finding judgment had been sent to the police [FPR PD12G].

The court was concerned with F's application for a child arrangements order to spend time with the children and a specific issue order to change the name of the younger child. M had applied for: a specific issue order divesting F of parental responsibility; permission to disclose documents to the police and Home Office; and disclosure of documents from F's immigration solicitor.

F had not engaged with the Cafcass officer. He had filed a statement expressing an intention to engage with a course to promote positive relationships. He asserted that he was effectively prohibited from engaging with the Cafcass officer or the court because to do so may incriminate him and potentially expose him to prosecution.

Application

F invited the court to make a prospective determination that any statement or admission that he made (if any) in relation to the findings should not be disclosed to the police or the CPS. In the alternative, F sought to be afforded protection identical to that in s.98 CA 1989. Hayden J observed he was in an 'evidential vacuum', being asked to fetter his own discretion in respect of unknown material.

M contended that applications for disclosure should be considered at the conclusion of the welfare hearing. F suggested this left him in an uncertain position. As the findings against him were so serious, if the court did not grapple with this issue, the likely consequence that F would have no choice but to remain silent. F submitted this was an unreasonable interference with his Art 6 right to a fair trial. Further, the proceedings could not operate in the best interests of the children.

F placed emphasis on the observations of Hedley J in *D v M* [2003] 1 FLR 647. Hayden J endorsed the description of frankness as 'a rich evidential jewel' but frankness cannot come at any cost [per Hedley J]. F distorted Hedley J's reasoning.

F suggested it may be an error that s.98 CA 1989 protections did not apply to private law proceedings. This was rejected: there are sound reasons for the distinction with public law proceedings. Even so, s.98 is not an impenetrable defensive

shield. It exists not for the protection of the parent but to promote the best interest of the child. It promotes the central philosophy of the CA 1989 that, wherever possible, children should be cared for by their parents and within their families.

Decision

Parliament has confined the ambit of s.98. It is not open to a judge to extend the provision beyond that which Parliament intended. The relief sought by F requires a construction of the legislation which could not be supported either within the framework of the Children Act 1989 or consistent with its central philosophy. Application refused.

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

M (A Child) [2021] EWHC 3225 (Fam)

Background

The parents met online in 2015 when the mother was a "cam girl", living in Eastern Europe, providing sexual services online to paying customers and the father was a client from England. They met in person in 2016 and a relationship developed, albeit with a period when the father stopped all contact for several months. The mother moved to England in 2017 to live with the father and the following year became pregnant. They separated a few weeks after the child was born and there were disputes about the father's contact and about money. In December 2019 mother removed the child to her home country; father made applications under the 1980 Hague Convention and the Children Act and mother was ordered to return the baby which she did in February 2020. She applied for leave to remove and father applied for a child arrangements order. Mother made serious allegations of domestic abuse, including three allegations of rape, one in circumstances where she alleged she was unconscious and not consenting.

The fact-finding hearing took place in November 2020 on a hybrid basis, with both parents giving their evidence in the court-room but neither being physically present to hear the other's testimony. This arrangement had been put in place at an earlier procedural hearing because of the court's Covid-19 precautions and at no stage was any application made, or consideration given, to participation directions or a ground rules hearing. Both parties were represented.

The judge heard oral evidence from family members as well as the parents, read a huge bundle and watched and listened to a large numbers of recordings, including extensive videos of the parents having sex, including one in which mother said she was unconscious, asserted that she had no memory of the events, and said it was rape as she had not been capable of consenting. In a reserved judgment she rejected the mother's allegations of rape and sexual abuse and found that she had made her allegations to improve her chances of obtaining leave to remove. She also rejected the father's allegations that mother had tried to control his contact with the child.

The Law (§17-27)

1. The appeal court's task in respect of an appeal against fact finding is to determine whether the judgment is sustainable, nothing less. (§17-19)

2. In general appeals brought on a matter not raised at first instance will not succeed, but there are exceptional cases in which the court would not apply that general principle. (§20)

3. PD12J sets out the process the court should adopt in determining disputed allegations of abuse. This case was heard before the judgment was handed down in ***Re H-N and Others (Domestic Abuse: Finding of Fact hearings)*** **[2021] EWCA Civ 448** in which it was observed that the Family Court should be concerned with how parties behaved and what they did to each other and their children rather than whether their acts came within the definition of specific crimes. (§21-24)

4. The case was decided prior to implementation of s63 of the Domestic Abuse Act 2021 but the court had been obliged to follow Rule 3A and PD3AA in respect of vulnerable witnesses. If a vulnerable witness is to give evidence there must be a ground rules hearing to consider how the evidence should be given and direct the manner of any cross examination. (§25-27)

The allegations (§28-29)

As well as the rape allegations, mother asserted that father has an obsessive sexual compulsive disorder and has desires towards young looking girls. She said he had been controlling, manipulative and intimidating, financially controlling and physically violent. She alleged inappropriate behaviour towards the baby and referred to her in abusive terms.

The father alleged that mother had caused the child emotional harm by removing her from her home, controlled how the father spent his time with the child and that she used abusive terms to refer to the child.

The judgment (§30-38)

The judge had identified that the circumstances of the parents' meeting could give rise to a power imbalance but one should not assume that all sex workers are vulnerable. She was satisfied that the relationship was not controlling, manipulative or abusive and that they had a consensual sexual relationship throughout, with both parties having the freedom and capacity to consent; she said there was no credible evidence that any sexual acts during the relationship were

not consensual. She described mother as "relaxed" rather than unconscious in the video of the alleged rape. She rejected the allegations of violence and considered the mother's allegations were manufactured to aid her case for removal. She found that the father preferred adult women younger than himself which was a legitimate sexual preference and rejected the allegation of inappropriate behaviour with the child. While she noted concerning discussions about maintaining a certain body weight she did not consider this evidence of controlling behaviour.

The judge considered the mother was not controlling of the child's time with her father and her behaviour was that of an anxious first time mother.

The Appeal (§39-49)

Permission was given on two grounds, firstly the absence of special measures sought or implemented for the mother and secondly whether the judge balanced the evidence properly looking overall at the allegations.

It was pointed out that on day 1 father spoke directly to the judge saying that he could not see mother on the screen, to which the judge responded that he ought to be able to see her when she was in the witness box, and if he could not he should raise his hand. It was said that consideration should have been given about whether mother should in fact have been visually shielded from the father. It was also argued that, given the clear risk that mother could be asked questions about her sexual history that could be humiliating and intimidating, there should have been a ground rules hearing to consider what topics could be covered in cross examination. This did not happen and it was asserted that mother had been re-traumatised; further it was suggested to mother that because she had consented to certain sexual acts she had given a blanket consent to everything.

It was also argued that the judgment lacked analysis and the evidence was compartmentalised and not put into context. As well as criticising the basis on which the judge appraised mother's overall credibility, mother's counsel emphasised what was said to be a failure to address the question of mother's vulnerability. It was said that the judge gave too much weight to the many videos of the parents having consensual sex.

Father's case (§50-58)

The father sought to uphold the judgment; not only were most of the points raised in the appeal not taken at first instance, but at no stage did mother show distress during or before giving evidence.

Discussion and conclusions (§59-88)

Ground 1

Consideration of Rule 3A and PD 3AA are mandatory and the obligation to consider vulnerability is the court's. This was a very sensitive case and cried out for participation directions and a ground rules hearing. It is not possible to know what effect the lack of special measures had on the mother. The judge did not find the mother's evidence credible and found the father a much more impressive witness. The failure to abide by the procedural rules was so serious that the decision cannot stand. This was a stark reminder to all that these matters need to be addressed to avoid the integrity of the trial being undermined.

Ground 2

The judge did not give sufficient consideration to whether the mother might have been vulnerable or over-dependent in the relationship, which is important because a vulnerable person might act differently from a more independent and confident one if they are exploited or abused in a relationship. The judge's belief that mother would not have stayed in an abusive relationship led her to conclude that she was lying about it, which tainted her views of her evidence as a whole.

The appeal was allowed and a retrial will be held before a Family Division Judge.

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

Borg v El Zubaidy [2021] EWHC 3227 (Fam)

Poole J considered that the father had taken no steps to comply with the orders and held him to be in contempt of court, sentencing him to 12 months' imprisonment. The father had on three previous occasions been sentenced to imprisonment for contempt of court, in relation to his failure to comply with orders for the return of the children.

Poole J noted at the outset of the judgment that previous court orders had sanctioned publicity with a view to locating the children and as such, no reporting restrictions were made.

By way of background, in 2015 the father had retained two of the parties' children in Libya and refused to return them. The mother brought an application before the High Court for the return of the children. The youngest child was made a ward of court. The eldest child was over the age of 18 but was declared by Mostyn J to be a vulnerable adult in whose best interests it was to make orders for her return.

In 2017, the High Court ordered the return of the children from Libya to this jurisdiction, where both parents reside. Numerous subsequent orders were made for the return of the children, with which the father failed to comply. He was made subject to committal proceedings in 2017 and Moor J sentenced him to 12 months' imprisonment for contempt of court. The father went on to breach further such orders and in February 2018, he was sentenced by Mostyn J to another 12 months' imprisonment for contempt. There were further breaches later that same year and in November 2018, the father again was sentenced by Hayden J to two years' imprisonment for contempt.

In 2019, the mother commenced proceedings in Libya against the paternal grandmother who was understood to be caring for the children. The mother was awarded custody of the children by the Libyan courts, however the paternal grandmother then went into hiding with them. Although further orders were made by the High Court in this jurisdiction for the return of the children, they remained in Libya, the position being that the mother was unable to remove them from Libya without the father's consent.

On 8 February 2021, Judd J ordered the father to execute and serve a consent to the children travelling from Libya with the mother, without him accompanying them. The document was to be signed, dated and witnessed by an official of the Libyan Embassy/Consulate in London. On 5 May 2021, Russell J made an order in similar terms, however referring only to the younger child who remained a ward of the court. Penal notices were attached to both orders.

The mother alleged that the father had breached the orders and she issued an application for his committal for contempt of court. The first application failed to comply with Part 37 of the Family Procedure Rules and the mother made a second application.

The father's counsel submitted at the committal hearing that the fresh application still did not comply with FPR r.37.4 and that the application should be dismissed. Poole J considered that the second application was compliant with the rules under Part 37 and that, in any event, any irregularity with the requirements of Part 37 would not necessitate dismissing a committal application where it had caused no prejudice to the defendant. The father's application to dismiss the committal application was thus refused. However, the Judge did note that the second application was not as clear as it might have been and that the information required to be included under r.37.4(2) should not be conflated with evidence in support of the contempt application.

Poole J went on to find that the father was guilty of contempt of court for breaching the court orders of 8 February 2021 and 5 May 2021. The Judge considered that the father understood that by refusing to take steps to execute the consent form, he was frustrating attempts to give effect to the return orders and the custody order made in Libya and that he had wilfully chosen not to make any attempts to execute the form as ordered.

Sentencing was adjourned for a period of twelve days. The father did not, in the intervening period, take any steps to produce the consent form. At the sentencing hearing, Poole J considering that the father's continued refusal to assist in securing the return of the children was "*clearly deliberate*" and the father was sentenced to 12 months' imprisonment for each of the two breaches, to run concurrently.

Case summary by **Olivia Kirkbride**, Barrister, **Coram Chambers**