January 2014

Family Law Week

NEWS

Beneficiaries of offshore trusts ordered to disclose documents

In *Tchenguiz-Imerman v Imerman* [2013] EWHC 3627 (Fam) Mr Justice Moylan has given a judgment explainning his order in financial remedy proceedings for disclosure by beneficiaries of offshore discretionary trusts who had been joined as parties.

During the course of contested financial remedy proceedings, adult beneficiaries of a number of offshore discretionary trusts were joined as parties to the proceedings. The court subsequently ordered that the beneficiaries, as parties, should disclose copies of documents that had been provided to the Royal Court of Jersey as part of an application by the trustees. The Royal Court had given the beneficiaries permission to make such disclosure, if they were ordered to do so by this court. However, the Royal Court expressed a number of concerns and invited the court not to require such disclosure. The proceedings were resolved by a consent order but the parties requested a judgment dealing with the order for disclosure.

The parties married in 2001 and separated in 2008 and have one child. The husband was previously married and has three adult children who are the beneficiaries joined as parties to the proceedings. The husband's admitted wealth consisted of approximately £7 million of assets in his own name and approximately £20 million of assets held within nuptial settlements of which the husband is the principal beneficiary. The focus of the wife's claim, in reliance on the sharing principle, was the wealth held within trusts said at one point to be worth £360 million but said to have reduced to £130 million. The trusts were settled by the husband's father in 2008, the assets deriving from previous settlements which had been distributed to the husband's father. The assets included very substantial funds generated during the course of the marriage and previously held within a discretionary trust settled by the husband some years prior to the marriage. The original beneficiaries of the trust had been the husband, his spouse or widow and his children and remoter issue.

In an earlier judgment, Moylan J expressed the view that the trustees were in the best position to assist the court in the exercise of its powers under the Matrimonial Causes Act 1973. This was because the critical question before the court was whether the trustees were likely immediately or in the foreseeable future to exercise their powers in favour of or in some way for the benefit of the husband. The trustees provided some information about the trusts but declined to provide a considerable part of the information and documents sought by the wife and, it appeared, were not willing or were unlikely to be willing to provide evidence as witnesses. As the trustees were not participating, the adult beneficiaries were joined as parties because this would assist with the investigation and resolution of the issues in the case and the adult beneficiaries would be subject to direct disclosure obligations.

Moylan J provides a helpful analysis of the authorities and the position of the court when considering the need for the facts rather than drawing inferences in cases where it is the trustee who controls the availability of the wealth through the exercise of its discretion. In particular, it is necessary for the court to know trustees' reasons for coming to the conclusion that they do and therefore why the disclosure of the documents as sought was necessary.

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The judgment also provides a helpful analysis of the court's approach in relation to the Royal Courts of Jersey's judgment for their preference that there be no disclosure. Moylan J makes clear the respect for comity as between states while at the same time stating the need for courts to have the facts when considering an application for financial resources particularly involving trusts in cases of this sort.

Richard Harrison QC of 1 King's Bench Walk and Dakis Hagen of Serle Court (instructed by Withers LLP) acted for the applicant. Charles Howard QC and Harry Oliver of 1 King's Bench Walk and Jonathan Hilliard of Wilberforce Chambers (instructed by Hughes Fowler Carruthers) acted for the respondent. Christopher Pocock QC and Laura Moys both of 1 King's Bench Walk (instructed by Mills and Reeve) acted for the adult children.

For the judgments and case summary by Richard Tambling of 1 Garden Court, which is reproduced here, please click here.

Only half of public express confidence in the family courts on children matters

A survey examining public attitudes to the courts and, principally, court fees suggests that only half of those asked have confidence in certain aspects of the family courts. 48% said that they were very confident (9%) or fairly confident (38%) that the family courts make decisions which take into account the views of both parents when deciding who a child should live with. 29% said that they did not know how confident they were. 54% said that they were very confident (12%) or fairly confident (32%) that the family courts make decisions that are in the best interests of children. 25% said that they did not know how confident they were.

More confidence was expressed in the decisions of the civil courts. 64% were very confident (11%) or fairly confident (53%) that the civil courts took into account the views of both parties when dealing with disputes. 62% said that they were very confident (9%) or fairly confident (53%) that civil courts make fair decisions.

On the question of court fees:

- 83% of people agreed that divorce applicants should pay a fee towards the cost of the court service if they could afford to, 68% agreed that parents applying for a court decision on how often they see their children should do so, and 78% agreed that individuals using the civil courts should pay a fee if they could afford to.

- Overall, approximately half of respondents thought that people who earned less than £15,000 a year should not pay a court fee (52% for family courts and 48% for civil courts) compared with approximately a quarter who disagreed (24% for family courts and 27% for civil courts).

- Around a fifth of people thought that courts should be free to all at the point of use and fully-funded by the taxpayer (22% for family courts, 18% for civil courts).

- There were some socio-demographic variations in attitudes towards court fees, although there was no consistent pattern across questions for particular groups.

The survey can be read here.

Essex County Council responds to C-section care case

Essex County Council has responded to the media reports concerning the delivery, without the mother's consent, of a baby by caesarean section and the child's removal into care of the local authority.

The judgment in the care proceedings has now been published. It can be read here.

Essex County Council said that here have been lengthy legal proceedings in this case over the past 15 months.

On 13 June 2012 the mother was detained under Section 3 of the Mental Health Act. On 23 August 2012 the Health Trust, which had been looking after the mother, applied to the High Court for permission to deliver her unborn baby by caesarean section because of its concerns about risks to mother and child.

The mother was able to see her baby on the day of birth and the following day. On 24 August 2012 Essex County Council's Social Services applied for and obtained an interim care order from the county court because the mother was too unwell to care for her child.

Care proceedings ended on 1 February 2013. The mother applied to the Italian courts for an order to return the child to Italy in May 2013. Those courts ruled that child should remain in England. In October 2013 Essex County Council obtained an order from the county court to place the child for adoption.
It is understood that the mother has two other children which she is unable to care for due to orders made by the Italian authorities.

Essex County Council has said that its Social Services practice social workers liaised extensively with the extended family before and after the birth of the baby, to establish whether anyone could care for the child.

A spokesman for the Council said:

> "The long term safety and wellbeing of children is always Essex County Council's priority. Adoption is never considered until we have exhausted all other options and is never pursued lightly."

The judgment is here.

Women's Aid declares 'a state of crisis' in domestic violence services

Women's Aid, the national domestic violence charity, has declared a state of crisis in domestic violence services, as it publishes its Annual Survey. The charity says that the violence against women sector, which has suffered a history of chronic structural underfunding unusual even in the voluntary sector, has seen shocking gaps in funding and provision for women experiencing domestic violence. The charity is warning that unless cuts to specialist gender-specific services end soon, an entire network of domestic violence providers in England is likely to collapse.

The survey notes that there were 31% funding cuts across the domestic and sexual violence sector between 2010/11

and 2011/12 and one third of Women's Aid member services faced further cuts in 2012/13. In 2012, the UK had only 65% of the family places recommended by the Council of Europe as needed for women fleeing domestic violence, and as a result, many
organisations had to turn women away.

The survey states that:

- There has been a rise in generic service provision provided at a cheaper price, and a loss of specialist domestic violence providers.
- There is severe pressure on women-only services to provide support for men, despite lack of demand and lack of evidence that women's services are best placed to meet men's needs.
- The decline in specialist support for women increases the barriers women face to accessing services. This means more women and children are likely to remain in abusive situations and/or are more likely to return after they have left.
- Cheaper service provision is often affordable through a reduction in staff number and wages, and support hours, which places women and children at risk and results in a loss of expertise from the sector.
- In 2012 an estimated 27,900 women were turned away from the first refuge they approached; 7,085 victims were turned away from non-refuge services.
- There is stark regional variation in the net gains and losses of refuge places.
- Where they can, survivors will stay local and, in doing so, will more usually require support such as outreach, advice and children's services, rather than refuge. However, there have been almost uniformly consistent cuts to community-based outreach services for women at low to medium risk, children's services and resettlement support. Cuts to support in a woman's local area will result in women and children having to travel further from support networks to find safety.
- The cuts to resettlement services mean that women and children are often without support at vulnerable times; this can mean they are more likely to return to abusive relationships.
- Cuts to specialist services and services' inability to effectively meet survivors' needs results in greater pressure on and costs to statutory services including the police, health departments and social services.

In her foreword to the survey, Polly Neate, Chief Executive of Women's Aid, calls

> "for local commissioners to work closely with specialist providers in their area to understand need, and design a specification for service delivery which can best meet that need within the resources available. This is no more than good practice in strategic commissioning. And it will create significant savings in public services including health and criminal justice."

The *Women's Aid Annual Survey* can be read or **downloaded here**.

First national picture of foster carer recruitment published

A new report by the **Fostering Network** has, for the first time, provided a picture of foster carer recruitment across English local authorities. It reveals a huge variation in performance between local authorities which highlights scope for improvement.

Local Authority Fostering Service Benchmark, 2012/13 is based on research carried out as part of a Department for Education funded project and with the Fostering Network's consultancy partner iMPOWER. The research found that:

- On average 11 per cent of those who enquired about becoming a foster carer were approved (ranging from just 1 per cent to 37 per cent across local authorities);
- Only 75 per cent of those who completed preparation training chose to continue with the assessment, and in only 71 per cent of these cases did the fostering service also agree to continue the assessment. Only 62 per cent of those who continued the assessment following preparation training actually went on to become approved as foster carers;
- The average time taken for someone to progress from enquiry to becoming a foster carer was 281 days (ranging from 49 to 518);
- On average, local authorities fail to utilise 31 per cent of their foster care places (ranging from a very high vacancy rate of 68 per cent to just 5 per cent). While it is important to have some vacancies for placement choice, having an average of 31 per cent of places unused is very high. The average vacancy rate in the independent sector is also high at 39 per cent (Ofsted data, 2011-12).

The 68 local authorities which took part in the research will all receive an individual report on their performance compared to the national benchmark on over 30 metrics. Performance by these authorities varied hugely on all of the metrics studied.

The Fostering Network says that while some of this can be explained by different data collection methods and no sector consensus on what constitutes a formal enquiry, the spread does indicate that there is clear room for improvement for many local authorities that are struggling to recruit and retain the foster carer workforce they need to find the right homes for children.

James Foyle, recruitment and retention consultant at the Fostering Network, said:

> "We strongly recommend that fostering services compare these national averages with their own performance to identify local opportunities for improvement throughout the recruitment and retention process. Local findings may point to opportunities to improve the efficiency of the process and make financial savings, while still recruiting foster carers who can meet children's needs."

As a result of the research, the Fostering Network is working with 14 local authorities until March 2014 and a further 11 in 2014-15 to help them highlight areas of potential

improvement and to develop and implement action plans to achieve this.

The action plans will use the results of a survey into foster carers values and motivations, based on a system of psychometric profiling known as Values Modes, to identify new ways of identifying and targeting new foster carers, and supporting those already fostering. The Values Modes report will be published later in December.

The survey will be available on this page.

Children in foster care in England may stay with carers until 21

In a radical change to the care system, children in foster care in England will be able to stay with their foster carers until the age of 21, after the Government's decision to introduce an amendment to the Children and Families Bill. At present they have to leave their foster care at 18.

Robert Tapsfield, chief executive of the Fostering Network, said:

> "We are absolutely thrilled with this change in legal duty for local authorities, backed up with appropriate financial support, that will ensure that young people in England have the opportunity to enter adulthood supported by the foster families that have devoted their lives to caring for them.
>
> "The evidence has always shown that it will make real change for young people who have previously faced the prospect of living alone too soon, and we congratulate the Government and in particular the children's minister Edward Timpson for taking positive and constructive action.
>
> "This issue has, however, not been resolved for young people in Wales and Scotland. We will continue to campaign for this change in the law to be replicated. The next stage of this work begins today with the launch of the Chance to Stay campaign in the Senedd, where we hope that the Welsh Government will also be persuaded of the benefits of allowing young people to stay until 21."

Natasha Finlayson, Chief Executive of The Who Cares? Trust, which has also campaigned for several years on this issue, said:

> "Time and again we hear from young people who are extremely anxious about having to leave their carers when they turn 18 and effectively no longer having somewhere they can call home, especially when the average age for young people who aren't in care to finally leave home is 24-27.
>
> "When the state takes children into care, we have a moral duty to do our best to ensure that they are loved and cared for and to provide them with support and a home beyond their 18th birthday like all good parents do, including somewhere to come back to in the vacations if they go to university.
>
> "It is excellent news that the government has agreed that young people leaving foster care should not be left to fend for themselves at 18. We mustn't forget though that the 9% of young people in care who live in children's homes – many of whom leave when they are 16 or 17 – need and deserve the same level of support and we hope that the government will start to look towards ways of achieving this."

Supreme Court orders return of son to Texas in KL (A Child)

In *In the Matter of KL* (A Child) [2013] UKSC 75, the Supreme Court has unanimously allowed the appeal by the father and ordered the return of K, the parties' son, to the US on the basis of the undertakings offered by the father to enable the mother to live in Texas, independently of the father. The care of K will be shared between them, pending any application the mother might make to the Texas court to modify the order relating to K's residence. The sole judgment was given by Lady Hale.

Although the Court agreed that the habitual residence of K was the UK, it held that the judge did not ask himself the correct question That question is whether it is in K's best interests to remain in the UK, so that the dispute between his parents is decided here, or to return to Texas so that the dispute can be decided there.

The court, exercising its inherent jurisdiction found that the crucial factor is that K is a Texan child who is currently being denied a proper opportunity to develop a relationship with his father and with his country of birth.

Richard Harrison QC, Jennifer Perrins and Samantha Ridley, all of 1 King's Bench Walk (instructed by Bindmans LLP) represented the father. Henry Setright QC and Michael Gration, both of 4 Paper Buildings (instructed by Freemans), represented the mother. Reunite International, an intervener in the Supreme Court proceedings was represented by Teertha Gupta QC of 4 Paper Buildings, Edward Devereux of Harcourt Chambers and Michael Edwards of 4 Paper Buildings (instructed by Lyons Davidson).

The judgment is here.

Italian mother's lawyer in C-section case gives detailed interview

The lawyer of the Italian woman whose baby, born by caesarean section following an order of the Court of Protection, was taken into the care of Essex County Council, has given a detailed interview concerning these events.

Speaking to Victoria Derbyshire on BBC Radio 5 Live, Stefano Oliva said that the Court of Protection order that his client should have a C-section was 'absolutely unreasonable'. He said that his client was now well, had a job and begged for a chance to prove herself as a fit mother.

The baby was born in August 2012. According to her lawyer, the mother was 34 weeks pregnant [the preface to the judgment states that she was 39 weeks pregnant]. Mr Oliva said that until October 2012, when she returned to Italy in an effort to recuperate, she saw her child once a week. She returned to England in February 2013 and then saw her child once a month until May 2013. He confirmed that his client's other two children, aged 11 and 4, have been 'given in custody' to his client's mother by Italian social workers.

The Italian woman now wishes to take her three children to USA so that the children can be cared for by her 'with the protection of her wider family'.

The interview **can be accessed here** and the introduction to it, including an earlier interview with Sir Mark Hedley, is at 45 minutes.

The judgment in the Court of Protection proceedings has now been released for publication and will be accessible on the Family Law Week website tomorrow.

Non-means tested legal aid restored for patients detained under Mental Capacity Act 2005

In the Court of Protection case of ***UF v A Local Authority & Ors*** (judgment forthcoming), the Ministry of Justice and Legal Aid Agency have effectively restored non-means tested legal aid in s21A MCA cases.

The problem had arisen as a result of paragraph **5(g) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013**, introduced in April 2013, which provides for exemptions to means testing including:

> (g) legal representation in relation to a matter described in paragraph 5(1)(c) (mental capacity) of Part 1 of Schedule 1 to the Act to the extent that—
>
> (i) the legal representation is in proceedings in the Court of Protection under section 21A of the Mental Capacity Act 2005; and
>
> (ii) the individual to whom legal representation may be provided is—
>
> (aa) the individual in respect of whom an authorisation is in force under paragraph 2 of Schedule A1 to the Mental Capacity Act 2005.

This fell foul of the comments made by Charles J in *Re HA* [2012] EWHC 1068 (CoP), a case heard in February 2012, in which he stated:

> "8. In a discussion with counsel for the Official Solicitor I have indicated that my present view is that in the context of an application under s. 21A the court should not, for example, extend a standard authorisation (even if it has the power to do so under s.21A), or somehow continue the statutory scheme, whilst it determines the application. Rather, my present view is that the court should exercise its own powers to hold the ring whilst it determines the application and therefore give appropriate interim authorisations of any deprivation of liberty and make appropriate interim orders. If, when it determines the application, the court concludes that the relevant person should live in a care home, or be in a hospital, then, it seems to me, that it should generally direct that the statutory DOLS scheme should apply again to any deprivation of liberty. That regime has checks and balances that generally should be preferred to review by the court.
>
> 9. To my mind, on that approach, the application remains one under s. 21A notwithstanding that whilst it continues the court is exercising powers conferred by other sections and a, if not the, central issue is what available regime of care will best promote P's best interests. This is because the proceedings were issued under s. 21A and, in the exercise of the jurisdiction conferred by that section, the court has to consider amongst other things the best interests of P. I add that if, in those proceedings, the court reaches a conclusion that the statutory scheme should or would no longer apply to the regime in place to promote the best interests of P, it has more than adequate powers of its own motion to make longer term declarations and orders under ss.15 and 16.
>
> 10. The discussion that gave rise to this expression of view arose, and is relevant, because, at the moment, there is a distinction between the funding available from the Legal Services Commission in respect of an application under s.21A, and other applications before the court, albeit that they can often raise the same central issues. I have recorded those views to indicate why I have proceeded on the basis that this application is, and remains, an application under s.21A and that the court is making interim orders in those proceedings."

Under the April 2013 regulations, once the Court "held the ring" in line with HA and the standard authorisation was no longer in place, means-free legal aid was removed by the Legal Aid Agency. This was quite likely to arise just as P's application was being closely examined by the Court, including consideration of independent experts, alternative care plans and relevant records.

In the solution to this problem, and as to be seen shortly in the judgment of Charles J, the MoJ has accepted the principle that non-means tested legal aid needs to remain in these cases to satisfy Art 5(4).This generally follows European case law on this issue as per *Winterwerp v Netherlands* [1979] 2 EHRR 387 and *Megyeri v Germany* [1992] 15 EHRR 584.

In future, therefore, the court will continue to manage and authorise cases under s21A itself, and the MoJ will not hold this to be an inappropriate device which it would challenge. In this way such legal aid should continue whilst the court is considering a s21A application. The court will thus exercise its powers under s21A(3)(a) to vary the standard authorisation and extend an extant authorisation pursuant to section 21A (2) (b) MCA 2005. In addition the Court may need to consider making an order under s21A(6) MCA 2005 exonerating the supervisory body from liability for the extended period as the Court would have assumed the responsibility.

This has to be a very welcome development in that "free" legal aid is now restored, although it is unclear why the MoJ made the change to the Regulations in this way, which they protested loudly was not made in consideration of the HA case.

A sting may remain in the tail for legal aid practitioners even in these cases, as the MoJ has indicated that cases which drift too far into welfare considerations, especially under s15 and s16, may be subject to adverse costs assessments. It appears this was issue which the MoJ wanted to tackle in the new Regulations. However it is very unclear how a properly determined s21A application can frequently avoid extensive welfare considerations and so adequate legal

aid funding will remain a live question; and the court may need to confirm the key issue of s21A in their orders, where possible, to properly assist in the ongoing provision of legal aid.

In addition, of course, such non-means tested legal aid does not touch the increasing number of those whose Article 5 rights are infringed in "supported living" provisions (where DoLs does not apply); or where P is clearly detained in a hospital or nursing home but a DoL has not been put in place. Furthermore in such means tested cases, tightened means testing requirements introduced last April will put legal aid out of reach for many effectively denying them any remedy to detention.

Richard Charlton
Head, Mental Health, **Creighton & Partners**
Chair, Mental Health Lawyers Association

Children and young people's mental health neglected by local authorities

The **Children & Young People's Mental Health Coalition** has revealed a concerning new finding that two in three joint strategic needs assessments (JSNAs) do not specifically address children and young people's mental health. Furthermore, data most commonly used to estimate the prevalence of mental health need is almost a decade old.

These are the findings of ***'Overlooked and Forgotten'***, the Coalition's review of how children and young people's mental health is being prioritised in the current commissioning landscape. The report offers support and recommendations to health and wellbeing boards on how they can prioritise and address children and young people's mental health.

Professor Dame Sally Davies, Chief Medical Officer, Department of Health, said:

> "I welcome this publication by the Children and Young People's Mental Health Coalition as we know that 75% of adult mental health problems begin before age 18. I believe it is important that the Department of Health commissions a new survey of the prevalence of mental health problems in children and young people, to ensure they get the right support and treatment they need as early as possible."

Barbara Rayment, Chair of the Children & Young People's Mental Health Coalition, added:

> "Local authorities have difficult decisions to make about how to allocate dwindling health budgets. While it is very welcome that two-thirds of JHWSs are prioritising children and young people's mental health, too many are not giving this the priority it needs in order to help them develop the resilience and self-esteem necessary for making healthy choices and to deal with the challenges they face.
>
> "A recent study shows voluntary sector providers feel their data has been excluded from JSNAs, thus further excluding the issues that matter most to their local young people, therefore it is vital that the Coalition's evidence of good practice is shared. Reliable data must also be made available, as a basis from which the services that need to be funded as a priority can be identified."

Key findings of the review include:

- 2 out of 3 of JSNAs do not have a section that specifically addresses children and young people's mental health needs
- 1 out of 3 of JSNAs do not include an estimated or actual level of need for children and young people's mental health services in their area
- Data commonly used to estimate prevalence of need is outdated by almost a decade or does not provide a full picture of need
- Data about the mental health needs of 16-25 year olds is especially limited in the JSNAs
- 1 out of 5 JSNAs highlight the link between risk factors and their effect on children and young people's mental health
- 1 out of 3 JHSWs do not prioritise children and young people's mental health.

The full report is free to download **from this page** and the executive summary **from this page**.

Ten new projects help separated couples resolve parenting conflicts

Ten new projects have been announced by the Department for Work and Pensions to help separated couples resolve grievances and agree financial and parenting arrangements in their children's best interests.

The projects, worth £3.4m, will test new ways for separated parents to overcome conflicts that may have become entrenched over many years, as part of a £10m investment through the Innovation Fund.

The successful schemes include court-based 'shuttle mediation' sessions, practical family activities including painting, gardening and homework clubs to motivate change, and the latest international expertise on relationship support.

Work and Pensions Minister Steve Webb said:

> "These groundbreaking projects find new ways to help separated couples put aside their differences, so they can agree their own maintenance payments and parenting arrangements in the best interests of their children.
>
> "We are investing £20m to help separated parents through these innovative projects and a web app signposting relevant services.
>
> "We know it can be tough to negotiate with an ex-partner, but we want to help more parents break free of deadlock and sort out their own arrangements, rather than fall back on the state or resort to the courts."

The projects will be evaluated to identify what works best in helping separated parents to resolve their difficulties and collaborate in the interests of their children.

The government awarded £6.5m Innovation Fund money to 7 projects in April 2013 in the first round of bidding.

The new projects are as follows:

Children 1st – 3,119 families in Scotland
A bespoke online, telephone and face-to-face family decision-making service, based on a collaboration between Children 1st, Scottish Child Law

Centre and One Parent Families Scotland.

Family Lives – 180 Muslim couples in Leicester, Waltham Forest, Gloucestershire
Working with the Barefoot Institute, an Islamic relationship support organisation, the project will provide emotional support before encouraging joint working and parenting agreements.

Family Matters Mediate Ltd – 408 couples in Yorkshire, Lincolnshire and Notts
The service uses conversational analysis and response methodology and the principles of restorative justice will be used to engage and motivate parents so they address the issues identified by the children.

Headland Future – 120 parents in the Tees Valley
Trained therapists work with individual parents individually to identify blocks to change and triggers for conflict, and help the children express their views through art to help motivate their parents to change.

Mediation Now Ltd – 225 parents in Portsmouth and Hampshire
Provides support in communication and conflict management skills, incorporating expertise from a programme used by over 3 million couples in Canada, Australia, New Zealand and the United States of America.

National Association of Child Contact Centres – 4,685 families across England
For families where the conflict between parents is so entrenched that the non-resident parent is required to see their child on neutral ground at a supported child contact centre. Help for parents in 6 regional hubs and a new online screening tool.

National Family Mediation – 832 parents in Berkshire, Yorkshire and Herefordshire
Parents in the court system will get help through a new programme including 'shuttle mediation' to change attitudes and behaviour.

Pinnacle People Limited – 140 families in Bristol, Avon and the South West
Practical activities for parents and their children with a dedicated family coach to encourage parents to communicate and collaborate, including through painting, pottery, horticulture and homework clubs.

Sills & Betteridge Limited Liability Partnership – 2,400 families in Lincolnshire
Face-to-face or webcam and telephone support for families who struggle to get help because of low income, poor facilities and limited transport links. Assisted by Dr David Briggs, a leading psychologist who has developed programmes for behaviour change.

Tavistock Centre for Couple Relationships – 100 parents in London
Free therapeutic services for parents caught up in intractable conflict and litigation, including the first UK trial of a risk assessment tool devised in Australia, working with the London Children and Family Court Advisory and Support Service.

Caesarean section case: the judgments, statements and comment

Since the original story was published in the *Sunday Telegraph* concerning the birth of a child by caesarean section, without the mother's consent, and the child's subsequent removal into the care of Essex County Council, further information and various judgments, statements and comments have come into the public domain. They are as follows:

- The judgment in the Court of Protection, given by Mostyn J, permitting the caesarean section, cited as ***Re AA*** [2012] EWHC 4378 (COP), supplemented by a prefatory note written by Mostyn J in the light of the current public interest in the case, a transcript of the proceedings and the order made. They – together with a summary of the judgment by George Gordon of 1 King's Bench Walk – are here.

- The judgment in the care proceedings, titled *Re P (A Child)* (for which there is not at present a neutral citation), is here. It is believed that the judgment in the earlier proceedings in which an interim care order was made is not in the public domain.

- A comment by the Judicial Office, dated 4.12.13, concerning the refused application for a 'without notice' reporting restriction order prohibiting publication of the names and details of the child and family, is here. It is understood that a subsequent application to Charles J was partially successful. The judgment (added 12/12/13) by Charles J is here.

- A statement by Essex County Council, dated 2.12.13, about the proceedings is here.

- A statement by North Essex Health Trust, dated 2.12.13, is here.

- An interview with the mother's Italian lawyer was broadcast on Radio 5 Live (before the release of the Court of Protection judgment). That is here. It can he heard for the next two days. The interview begins at about 45 minutes.

First same-sex marriages from 29th March 2014

Women and Equalities Minister Maria Miller has announced that the first same sex weddings in England and Wales will be able to take place from Saturday 29 March 2014.

Following the Marriage (Same Sex Couples) Act 2013 successfully completing its journey through Parliament in July 2013, the government has been working hard to ensure that all the arrangements are in place to enable same sex couples to marry as soon as possible.

As a result of this work, the first same sex weddings can now happen several months earlier than anticipated, subject to Parliament's approval of various statutory instruments, to be laid in the new year.

Maria Miller said:

> "Marriage is one of our most important institutions, and from 29 March 2014 it will be open to everyone, irrespective of whether they fall in love with someone of the same sex or opposite sex.
>
> "This is just another step in the evolution of marriage and I know that many couples up and down the country will be hugely excited that they can now plan for their big day and demonstrate their love and commitment to each other by getting married."

Those couples wishing to be among the first to marry will need to formally give notice of their intention to marry on 13 March 2014.

It has also been announced that same sex couples who married abroad under foreign law and are currently treated as civil partners will instead be recognised as being married in England and Wales in March 2014.

Same sex weddings in some British consulates and armed forces bases overseas will be possible, and arrangements for same sex weddings in military chapels will be in place, from June 2014.

The government is working hard to ensure that couples wishing to convert their civil partnerships into marriages, and married people wanting to change their legal gender while remaining married, will be able to do so as soon as possible. We aim to do this before the end of 2014.

Number of new private law children cases falling

In November 2013, Cafcass received a total of 3,524 new private law cases. This is a 15% decrease on November 2012 levels.

The figures from April 2013 (33,356 new cases) show an increase of 8% from the 30,914 cases received in the same period last year.

The statistics are shown in detail on the **Cafcass website**.

Care applications, year on year, fall by 15% in November

In November 2013, Cafcass received a total of 816 applications. This figure represents a 15% decrease compared to those received in November 2012.

Since April 2013 Cafcass has received a total of 7,080 applications. This figure is 3% lower when compared to the same period last year, when 7,325 applications were received. The latest figures suggest a general trend downwards in recent months since May 2013 when there were just under 5,000 applications.

The full statistics are on the Cafcass website.

Marriages can be performed at Scientologists' churches, decides Supreme Court

The Supreme Court has decided that Scientology is a religion and since the church of the Church of Scientology, at the heart of this case appellants' church was a "place of meeting for religious worship", then it could be registered for the solemnisation of marriages under the Marriage Act 1949.

The appeal in ***R (Hodkin & Anor) v Registrar General of Births, Deaths and Marriages*** **[2013] UKSC 77** concerned the question whether a church of the Church of Scientology was recordable as a "place of meeting for religious worship", with the effect that a valid ceremony of marriage could be performed there.

The first appellant, Louisa Hodkin and her fiancé, Alessandro Calcioli, are members of the Church of Scientology and wish to be married in its premises on Queen Victoria Street, London. The second appellant is the proprietor of that church.

On 31 May 2011 a trustee of that church applied on behalf of the congregation to record the church under section 2 of the **Places of Worship Registration Act 1855** ("PWRA"). This statute provides that every "place of meeting for religious worship" may be certified to the Registrar General, who will cause that place of meeting to be recorded as such a place. Recording under PWRA then entitles the building to be registered for the solemnisation of marriages under the **Marriage Act 1949**, which in turn enables the building to be used for marriage according to the "form and ceremony" chosen by the marrying couple.

The Registrar General of Births, Deaths and Marriages stated that she was bound by the Court of Appeal's 1970 judgment in *R v Registrar General, ex parte Segerdal* [1970] 2 QB 697 ("Segerdal") to reject the appellants' application. In that case, which involved an earlier attempt by the Church of Scientology to record a chapel under PWRA, the Court of Appeal had held that Scientology did not involve "religious worship" since it did not involve "reverence or veneration of God or of a Supreme Being", but rather instruction in a philosophy.

The appellants judicially reviewed the Registrar-General's decision. In the High Court, Ouseley J held that he was bound by *Segerdal* to dismiss the appellants' judicial review claim. He concluded on the evidence that Scientology was a religion, but that the *Segerdal* definition of "religious worship" remained unfulfilled, since there had been no essential change in the nature and practices of Scientology since 1970. Since *Segerdal* would be binding at Court of Appeal level also, Ouseley J certified a point of law of general public importance for a "leapfrog" appeal directly to the Supreme Court. The appellants appealed.

The Supreme Court unanimously allowed the appeal. The leading judgment was given by Lord Toulson. Lord Wilson added a concurring judgment on the issue of whether the Registrar General's function in recording premises as "places of meeting for religious worship" is decisional or purely administrative.

The Registrar General has a decision-making function in recording premises as "places of meeting for religious worship" [26, 66f]. Historically, such recording had originally been instituted to enable some non-conformist churches to avoid criminal penalties directed at non- Church of England worship [70]. As a result, recording under those statutes was simply an administrative matter [71]. However, the PWRA had significantly changed the language and purpose of the requirement [75]. Properly construed, s. 2 PWRA gives the Registrar General a discretion to record, essentially for three reasons. Firstly, this is the natural meaning of the language used [76]. Secondly, this is consistent with the Registrar General's other functions under PWRA, which give her decision-making functions in relation to the renewal or cessation of use of recorded premises [77-79]. Thirdly, by the time that PWRA was enacted, the purpose of recording had altered: certification no longer only gave protection from criminal liability but also gave access to a number of privileges [79-82].

In considering whether the appellants' church qualifies for such recording, the first substantive question is whether Scientology is properly to be regarded

as a religion. The interpretation of "religious worship" in *Segerdal* carried within it an implicit theistic definition of religion: what the Court of Appeal required was reverence for God [31]. There has never been a universal legal definition of religion in English law, given the variety of world religions, changes in society, and the different legal contexts in which the issues arise. It is necessary for PWRA to be interpreted in accordance with contemporary understanding of religion [32-34]. Two judgments from other common law countries, one from the US Court of Appeals and one from the High Court of Australia, shed useful light on the issue [35-49].

The High Court correctly decided that Scientology was a religion [50]. Religion should not be confined to faiths involving a supreme deity, since to do so would exclude Buddhism, Jainism, and others [51]. Moreover, it would involve the court in difficult theological territory: Scientologists do believe in a supreme deity, but one of abstract and impersonal nature [52]. It is not appropriate for the Registrar General or the courts to determine questions such as whether this belief constitutes a religion [53]. In a different context, the Charities Act 2006 states that "religion" includes religions not involving belief in a god [54-55].

Religion could summarily be described as a belief system going beyond sensory perception or scientific data, held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system [57]. On this approach to religion, Scientology was clearly a religion [60]. The question that followed was whether the appellants' church was a "place of meeting for religious worship".

"Religious worship" includes "religious services" as well as the Segerdal concept of veneration or adoration of a deity [61-62]. This accords with the purpose of the statute: the authorisation to marry in conformity with one's faith should not depend on fine theological or liturgical niceties as to how believers see and express their relationship with the infinite [63]. Since marriages on non-registered premises could not involve any form of "religious service", if Scientologists were unable to marry in their church they could not have a legal marriage in accordance with their faith [64]. Since the Church of Scientology held religious services, it follows that its church is a "place of meeting for religious worship", and the Registrar General is ordered to record it as such [65].

Supreme Court press summary

Almost two children a day abducted abroad by parents

The number of parental child abduction and custody cases has more than doubled over the last decade , with almost two children being abducted abroad each day, according to new figures released today by the Foreign & Commonwealth Office and **Reunite**.

The FCO has launched a film entitled ***´Caught in the middle´***, which tells the story of Rebecca, a fictional case study of a child involved in a parental abduction case. It aims to highlight the issues and encourage parents to think of the consequences before doing something that could do lasting damage to the children and families involved.

The FCO reports that in 2003/2004 it was involved in 272 new parental child abduction and international custody cases. In 2012/13 that figure rose to 580, the second highest figure ever recorded.

This year alone, Reunite has dealt with 447 new cases involving 616 children. It reported a particular spike in cases after Christmas 2012 and again in September this year following the summer holidays.

Mark Simmonds, Minister for Consular Affairs, said:

> "We are launching this awareness campaign in the lead up to Christmas to try to prevent parents from doing something that would cause significant distress to themselves, their family and most importantly to the child. We also encourage parents to look for warning signs that their partner may be considering this. Once children are taken overseas it can be extremely difficult to secure their return to the UK. Many parents are not aware that by abducting their child, they may be committing a crime."

Alison Shalaby, Chief Executive of Reunite, said:

> "Parental child abduction is not faith or country specific – we see cases involving a range of countries from France and Poland to Thailand, Pakistan and Australia. The holidays can be a particularly stressful time for families, especially if the relationship between parents has broken down. However, there is help available if you think that your partner may be considering abducting your children. Last year we helped to prevent 412 cases involving 586 children which demonstrates something can be done to prevent it from happening to you."

The FCO warns that there is no typical 'abducting parent' – although abductions are more likely to take place where families have links to more than one country and, contrary to popular opinion, it is more likely to be the mother who abducts than the father (approximately 70% of abducting parents are mothers).

Jacqueline Renton, barrister at **4 Paper Buildings**, who specialises in international children law and contributes updates on such matters to Family Law Week, commented:

> "The increase in child abduction reminds us of the importance of carefully and cautiously assessing the risk of flight in all family cases and taking urgent preventive action where necessary."

The FCO is working with **Mumsnet** and **Families Need Fathers** to answer questions parents might have about this issue via their web pages.

For a table showing the countries, both Hague Convention signatories and non-signatories, to which children were most commonly abducted in 2012/13, **please click here**.

Help and advice concerning child abduction can be accessed **from this page**.

Attainment gap between looked after children and others narrows slightly but remains large

Statistics on outcomes for children looked after by local authorities in England, released by the Department for Education, show that the attainment gap between such children and their peer group is diminishing but is still great.

In particular, looked-after children have poorer educational outcomes than non-looked-after children. A high proportion (67.8%), have special educational needs and their emotional and behavioural health is often a cause for concern. However, despite poor outcomes, there have been improvements for nearly all of the measures covered by this statistical release. The percentage of looked-after children achieving 5 or more A* to C GCSEs or equivalent including English and mathematics has increased from 11.0% in 2009 to 15.3% in 2013.

The attainment gaps between looked-after and non-looked-after children for the main key stage 1, 2 and 4 measures have decreased or remained the same from 2012 to 2013. However the gaps are still large, especially for key stage 4, where 15.3% of looked after children achieved 5 or more A* to C GCSEs or equivalent including English and mathematics compared with 58.0% of non-looked-after children. Although this gap has narrowed in recent years to 42.7 percentage points, it is still higher than it was in 2009.

During the year ending 31 March 2013, 6.2% of looked-after children aged 10 to 17 had been convicted or subject to a final warning or reprimand and 3.5% of all looked-after children had a substance misuse problem.

Looked-after children are twice as likely to be permanently excluded from school and nearly three times more likely to have a fixed term exclusion than all children. Around half of all looked after children aged 5 to 16 were considered to be 'borderline' or 'cause for concern' in relation to their emotional and behavioural health.

The **statistical release is here**.

Ofsted publishes new framework for inspecting Cafcass

Ofsted has published its new ***Framework and evaluation schedule for the inspection of services for the Children and Family Court Advisory and Support Service*** (Cafcass).

The framework takes immediate effect and means that, for the first time, Cafcass will be inspected as one national organisation. This makes it unique in Ofsted's remit.

Cafcass is currently sponsored by the Department for Education and has statutory functions (under the Criminal Justice and Courts Services Act 2000) in family proceedings where the welfare of children is or may be in question.

Ofsted hopes that concentrating inspection activity on Cafcass as a single organisation will be the most effective way for Ofsted to support continued improvement, enabling Cafcass to respond to inspection findings and learning across the whole organisation.

Ofsted will evaluate the effectiveness of the new national inspection of Cafcass to ensure that future planning in 2014/15 remains the most appropriate means of supporting and challenging Cafcass to be 'good' or better.

The **framework document is here**.

Restrictions on hours and cutting of fees are 'driving away' experts from the family courts

A survey of members of the Consortium of Expert Witnesses to the Family Courts suggests that reductions in the legal aided fees payable to expert witnesses from 2nd December 2013 is causing experts to decline to undertake such work in the future.

The survey was conducted in November 2013 in anticipation of the introduction of new rates of remuneration for experts. Those rates and the maximum numbers of hours per case (above which prior authority is required) are set out in the **Legal Aid Agency's Guidance on the Remuneration of Expert Witnesses**.

240 members (or 42%) of the membership responded to the survey. Ninety per cent of the respondents were experts who have worked in the courts for ten years or more. The majority of the respondents were psychologists or psychiatrists although the Consortium includes a wide range of health and other professions.

A quarter of the respondents stated they no longer undertake family court work.

Psychiatrist Dr Judith Freedman, the convenor of the Consortium, said:

> "The survey confirms that two inter related problems are driving clinicians away from the family courts. Firstly the LAA by restricting the number of hours they will allow for an assessment without prior authority has made it impossible to accept instructions and maintain professional integrity. Secondly Family Court work demands high end administration, as without the input of secretaries, book keepers and IT the work it is impossible. Practices are closing because there is insufficient income to keep the doors open."

A third of those still working said they would accept the new rates of remuneration. A further third were not sure whether they would and the remainder said that they would either stop accepting instructions, or would only do so at higher rates of remuneration. This means that between 55 and 76% of the membership will no longer accept LAA rates.

Of those who had decided, or were contemplating, dropping family work, the expressed reasons were various:

- Higher fees could be earned in other work – 42%
- The conditions relating to family courts work were not acceptable – 33%
- The approved hours for assessments were not sufficient – 34%
- There was insufficient work to make the practice viable – 28%

- The income was insufficient to make the practice viable – 45%
- There were not expected to be enough future referrals – 20%
- Burn out – 9%.

(Respondents cited more than one reason.)

Almost a third had been asked to pay back fees for work done before the cap on fees imposed in October 2011. Over a half of respondents said that there had been instances in which the time permitted to complete their report had been cut but they finished the work.

Dr Freedman added:

> "The value of our work has been advising the Courts on the medical and mental health problems that brought families to their doors and the prognosis for their future. The President, Sir James Munby, suggests that Social Workers and Guardians can provide that evidence. They cannot as they are not trained so to do. Neither are they independent as they bring the applications to remove children from their families to the courts. Our concern is that justice for children and their families is being sacrificed with these cuts and once the knowledge and skills of senior clinicians are lost to the courts, it will take a long time to regain."

At the end of January 2013 changes were made to **Part 25 of the Family Procedure Rules**, including:

- a change to the test for permission to put expert evidence before the court from 'reasonably required' to 'necessary';
- a list of factors to which the court is to have regard in reaching a decision whether to give permission, including the impact on the timetable and conduct of the proceedings and the cost of the expert evidence. Additional factors are specified in proceedings involving children. These include what other expert evidence is available, including any obtained before the start of proceedings, and whether the evidence could be obtained from another source, such as one of the parties or professionals already involved in the case;
- in proceedings involving children, an application for permission to instruct an expert should state the questions which the expert is required to answer and, where permission is granted, the court will give directions specifying the questions that are to be put to the expert.

In June 2013 **Cafcass published research** which showed a 20% reduction in the proportion of care cases in which expert witnesses were instructed. Experts were instructed in 70% of the cases in its study sample; but in a similar exercise in 2009, the proportion had been 92%.

Divorcing couples regret the impact on children but don't tend to seek help, survey finds

Divorced couples significantly regret the impact that their split had on their children but tend not to seek help with their relationship, according to **a survey** conducted by **Seddons** in conjunction with **The Marriage Foundation**.

One-third of divorced or separated couples state that their biggest regret about splitting up was the impact it had on their children. However, the survey results point toward a discrepancy between a couple's perceived impact of their split on the children and the wide body of scientific and clinical evidence which chronicles such impact. Nearly one-quarter (24 per cent) of respondents reported no perceived negative impact on their children whatsoever. Furthermore, most indicated that both their relationship with their child (74 per cent) and their children's personal relationships (70 per cent) had not been affected.

This is despite significant proportions of those with children reporting that it made their child's emotional state (32 per cent), school performance (22 per cent) and general behaviour deteriorate (17 per cent). Only a very small number (8 per cent) of respondents with children report that they were more emotional and affectionate as a result.

Other biggest regrets cited were the financial consequences (24 per cent) and the way the divorce was conducted (21 per cent). Overall, a majority of respondents (61 per cent) did not regret marrying or cohabitating, despite it ending in a divorce or separation.

The survey also identified that the vast majority of couples (79 per cent) failed to get any counselling when the relationship was in difficulty, with large proportions having decided that it was "too late" (38 per cent) or that they "never thought about it" (26 per cent).

The findings also suggest that even fewer couples seek preventive help, with nearly 84 per cent not attending a marriage preparation or relationship education course during the early stages of their relationship. Among the reasons cited include the fact that they "never thought about it" (44 per cent) and that they "didn't know there were such courses" (37 per cent).
However, if given the chance to change the way in which they separated, some 24 per cent indicated that they would increase communication with their partner.

Commenting on the research, **Deborah Jeff**, Head of Family at Seddons, said:

> "The findings ... reinforce the essential role that education and communication play in both making a marriage work and bringing it to an end in the least damaging way. It is staggering how few couples seek help through the process, either before entering into marriage or when it starts to break down. The resources exist to help people at all stages of a relationship, and utilising them would address many of the issues and regrets unearthed by the research."

Sir Paul Coleridge, Founder and Chairman of The Marriage Foundation, added:

> "This is really important and persuasive research. It highlights the dangerous level of ignorance amongst those who embark on separation and divorce about the potential impact on their children, despite the evidence and scale of the problem nationally.

> "But just as important is the level of ignorance about the availability of relationship education and counselling courses to help couples before the relationship has hit crisis level and when it has. If we are to do anything about confronting this huge problem in a constructive and meaningful way, the benefit of relationship education, before and during marriage, needs to be both appreciated and become the norm not the rare exception."

The research was conducted by leading market research group OnePoll and surveyed 867 individuals who had gone through a divorce or separation, nearly 63 per cent of whom were women. The survey was conducted in mid-November 2013.

The findings **can be viewed here**.

No less than 'good' for children's homes demands Ofsted

Ofsted has published proposals for a new framework to improve standards in children's homes and drive up quality for the country's most vulnerable children.

The inspectorate is making its registration, inspection and enforcement practice of children's homes more robust, challenging and effective in parallel with the programme of regulatory reform proposed by the Department for Education. The new framework is said to be integral to those reforms and is open for consultation.

The consultation sets out the criteria for 'good' as the benchmark and minimum standard that children and young people should expect. As such, the current 'adequate' judgement is replaced by a judgement of 'requires improvement'.

The framework **is accessible here**.

Government should reconsider legal aid proposals, says Human Rights Joint Committee

The **Parliamentary Joint Select Committee on Human Rights** has said that the Government should reconsider its proposals for the reform of legal aid.

The Committee's recently published **report** considers proposed changes to civil and criminal legal aid. The committee fears that without broader exemptions to the proposals, a residence test for civil legal aid could lead to breaches of the fundamental right of effective access to justice in individual cases.

The Committee:

- recommends that any residence test be introduced through primary legislation, rather than secondary legislation, to allow for full Parliamentary scrutiny of the details of a measure which interferes with the right of effective access to court;
- suggests that all children should be exempt from any residence test;
- concludes that the test could severely impact the right of access to court of individuals who lack specific mental capacity, and are prevented from litigating in person; and
- asks the Government to consider expanding the limited exemptions from the residence test for victims of domestic violence.

The Committee is also concerned about the proposal to remove cases with borderline prospects of success from legal aid funding, as these cases may include determination of significant human rights issues. The Committee concludes that this may raise equality of arms issues, and lead to a potential problem in relation to the creation of precedent to guide lower courts which will in turn affect a large number of cases.

The **report is available here**.

Scottish social workers in contempt of court for defying contact order

STV reports that two social workers, working for Edinburgh City Council, have been found to be in contempt of court for preventing a mother from seeing her children in accordance with a court order.

Sheriff Kathrine Mackie held that the two unnamed care workers had deliberately ignored a court order made in May 2013. No punishment was imposed upon the couple.

Sheriff Mackie said:

> "It must be emphasised that social workers are in no different a position from anyone else and require to comply with orders of the court, Children's Hearings and the general law."

Families Need Fathers Scotland commented:

> "Family law cases are rarely easy for any of the parties involved. However we welcome the sheriff's stern reminder to these social workers that they should have upheld the court's decision on contact. Professionals must be transparent in their actions and accountable for them the same as anyone else."

For more information, visit the **STV website**.

Alison Russell QC appointed to the High Court bench

Alison Russell QC has been appointed a Justice of the High Court with effect from 13 January 2014. The Lord Chief Justice will assign Ms Russell to the Family Division.

Miss Russell, 55, of **1 Garden Court Family Law Chambers** was called to the Bar by Gray's Inn in 1983 and took Silk in 2008. She was appointed a Recorder in 2004 and is approved to sit as a deputy High Court Judge.

Court of Appeal hears case in which husband misled the court about plans for company

A Cheshire woman has taken her divorce case to the Court of Appeal after it emerged that her former husband had misled her and the court over the potential value of shares in his business and how soon the shares were likely to be offered to the market. As a consequence she claims that she signed an agreement which meant that she may have missed out on millions of pounds.

Mrs Sharland established an autism charity with Mr Sharland during their marriage. She says that although her husband, who runs a software business, was the main earner, she had equal rights in the marriage because she cared for their disabled son rather than working and will continue to do so. The couple had been married for 17 years when they separated in 2010 and had built up the substantial assets during the marriage.

In 2012, during the course of divorce proceedings, Alison Sharland signed an agreement with her ex-husband, Charlie, compromising her claim for a half-share in the matrimonial assets by taking more of the liquid assets but giving up her claim to an equal share in the husband's business. She says that she did this on the basis that the value of her husband's shares was no more than £32m and that there were no plans to float the business. However media reports on a public listing suggested that his share could be worth £132m. It was also found at first instance that Mr Sharland was actively planning a stock market flotation.

At first instance the judge found that despite the husband's dishonesty he would not re-examine the original court order. Mr Sharland maintains that although he misled his wife, the original court order was fair.

Ros Bever, of Irwin Mitchell representing Mrs Sharland, said:

> "Mrs Sharland had accepted a settlement that appears to be based on inaccurate information disclosed by her husband so the agreement for half of the couple's assets does not technically give her an equal share, something which Mrs Sharland had believed to be the case when she entered into an agreement with him.
>
> "The original court order was based on much a much lower value than Mr Sharland appears to have believed his company to be worth at the time the agreement was reached. She therefore feels that the court order is unfair and that her husband is getting away with his dishonesty in deliberately misleading her over the value of his shares and the timing of his shares turning into cash.
>
> "This case is not just about Mrs Sharland achieving justice, it is about ensuring that the Court sends out a powerful message that dishonesty will not be tolerated, proving that fairness will prevail in divorce settlements."

Ms Bever added:

> "The Court of Appeal has to determine whether the previous judge went too far in exercising his discretion because he had not heard all of the evidence when approving the agreement reached and subsequently ordering that Mrs Sharland should be bound by its terms. Despite withdrawing her consent to an agreement founded on dishonesty, she is effectively stuck with it. The husband would not get away with this behaviour in the commercial courts so why should it be acceptable in the family court?"

Beth Wilkins and James Brown of JMW LLP, who represented Mr Sharland, said:

> "An agreement was reached between Mr and Mrs Sharland half way through a two week final hearing before Sir Hugh Bennett. Mrs Sharland had been seeking a 50% interest in Mr Sharland's shares irrespective of when those shares realised any value.
>
> "The agreement was reached after Sir Hugh shared his initial thoughts - that perhaps the most appropriate way for the shares to be dealt with would be to give Mrs Sharland a tapering interest to reflect Mr Sharland's post-separation endeavour. Mrs Sharland then agreed to receive more than half of the parties' liquid capital and a 30% interest in Mr Sharland's shares without a taper, thereby guarding against her interest potentially tapering down to zero.
>
> "Following press reports (which have since turned out to be incorrect) Mrs Sharland applied to re-open the case.
>
> "A fundamental tenet of family law is that the court's jurisdiction can never be ousted. Accordingly, when deciding whether Mrs Sharland's application should succeed, the question Sir Hugh had to ask himself was not "What would Mrs Sharland have done?" Rather, he had to ask "Is the agreement materially different from the order I would have made?". He decided it was not. No flotation has taken place and Mrs Sharland has a non-moving and substantial interest in the shares irrespective of when they realise value. As a result the agreement is no worse than what he would have ordered, particularly in light of the fact the parties separated over 3 years ago - a fact that would be significant when considering a tapering interest.
>
> "Mr Sharland is prepared to stand by the parties' agreement and Sir Hugh's decision. Mrs Sharland received more than half of the liquid capital and an interest in his shares which balances entitlement against post separation endeavour - fair and appropriate against the back drop of family law as it stands at the moment."

Judgment was reserved until next year.

Runaway children at risk because of new police guidance

Vulnerable children who run away from home or care in England are more likely to 'fall through the gaps' because of new police definitions, The Children's Society has said.

Earlier this year, the Association of Chief Police Officers (ACPO) introduced new definitions of 'missing' and 'absent' persons. In a change to previous guidance, children and adults defined as 'absent' (ie"a person not at a place where they are expected or required to be" but where there is no

apparent risk) do not require an immediate response from the police.

The Children's Society has welcomed **new research** – published by Portsmouth University, ACPO and the National Crime Agency – on how children defined as 'absent' are safeguarded, something it says was missing when the police introduced new definitions in April this year.

The charity says the report raises issues that the police need to urgently address to keep vulnerable children safe.

Matthew Reed, Chief Executive of The Children's Society, said:

> "The police have said these changes are about better targeting resources. But without proper training and oversight, these changes are in danger of becoming a cost-cutting exercise that puts children at risk of serious harm. ... [T]he report reveals that most police call handlers have not been trained in spotting the signs of child sexual exploitation. And in some police forces, call handlers are not even expected to risk assess 'absent' cases."

The report **can be read here**.

BAAF rated 'outstanding' in recent Ofsted inspection

BAAF – the British Association for Adoption and Fostering – has been rated as 'outstanding' once again by Ofsted in its recent inspection.

BAAF not only received an overall rating of 'outstanding', but was also rated 'outstanding' in every area that was assessed, recognising the excellence of all services provided by the charity.

Louise Hocking, BAAF's Director of Child Placement and the Registered Manager of its adoption agency in England said:

> "I am delighted that BAAF's work as a Voluntary Adoption Agency and Adoption Support Agency in England and Wales has again achieved a result of outstanding in all areas. This reflects the work that the staff at BAAF undertakes and recognises their continuing dedication to improving the lives of vulnerable children and young people. It is great to have their effort and expertise acknowledged in this way."

Srabani Sen, BAAF's Chief Executive and the Responsible Individual for BAAF's adoption agency in England said:

> "I am so pleased that BAAF's efforts have been recognised in this way. We work hard to make a difference to everyone affected by adoption. I am proud that the contribution of our excellent staff has been so highly commended."

The report can be accessed **from this page**.

Care cases taking 36 weeks, according to latest court statistics

The average time for the disposal of a care or supervision application dropped to 36 weeks (down 25% from July to September 2012 and down 34% from July to September 2011). This has been revealed by the **latest statistical bulletin for the courts** (covering July to September 2013).

The average duration for private law disposals where both parties were represented was 23 weeks (up 39% from July to September 2012).

Family courts deal with around 270,000 new cases each year. The number of cases that started in family courts in England and Wales remained at around 70,000 in July to September 2013 with the largest proportion (43%) being for divorce applications.

Public law: in July - September 2013 there were 3,673 new cases (fairly stable since 2011) which related to public law and 4,220 cases that reached a final disposal (continuing the upward trend). The average time for the disposal of care and supervision cases was 35.8 weeks.

Private law: there were 14,053 cases started (similar to equivalent quarters in previous years) in private law and 14,944 cases that reached a final disposal (an increase over the first two quarters of the year, as seen in previous years), in July - September 2013.

Divorce: there were 28,427 petitions filed for divorce and 29,960 decrees absolute made in July - September 2013.

Financial remedies: there were 10,924 cases started and 8,805 cases with a disposal in July - September 2013.

Domestic violence: there were 5,387 cases started and 4,971 cases with a disposal in July - September 2013, both continuing the upward trend seen over recent quarters.

Forced marriage protection : there were 43 new forced marriage protection order cases, and 32 cases with a disposal made in July - September 2013.

Adoption: there were 3,952 cases started and 3,479 cases disposed, under the Adoption and Children Act 2002 in July - September 2013.

The **statistical bulletin is here**.

President calls for radical changes in family courts' approach to transparency

The President of the Family Division, Sir James Munby, has called for radical changes in the approach of the family courts and the Court of Protection to transparency.

Sir James's comments were made in his judgment delivered in ***Re P (A Child)* [2013] EWHC 4048 (Fam)**. This was an application by Essex County Council for a reporting restriction order in relation to Alessandra Pacchieri, whose daughter, P, was delivered by caesarean section, by order of the Court of Protection, and was later taken into the care of Essex County Council.

The President's judgment gives a detailed chronology of the key events in the case. In relation to the reporting of the court proceedings, he concludes:

> "How can the family justice system blame the media for inaccuracy in the reporting of family cases if for whatever reason none of the relevant information has been put before the public?
>
> "... This case must surely stand as final, stark and irrefutable demonstration of the pressing need

> for radical changes in the way in which both the family courts and the Court of Protection approach what for shorthand I will refer to as transparency. We simply cannot go on as hitherto. Many more judgments must be published. And, as this case so very clearly demonstrates, that applies not merely to the judgments of |High Court Judges; it applies also to the judgments of Circuit Judges."

The judgment **can be read here**. An earlier short judgment relating to the reporting **restriction application is here**.

Mr Justice Charles appointed Vice-President of the Court of Protection

The Lord Chief Justice, following consultation with the Lord Chancellor, will transfer Mr Justice Charles from the Family Division of the High Court to the Queen's Bench Division of the High Court with effect from 13 January 2014, and appoint him as Vice-President of the Court of Protection, for a three-year term, from the same date.

Section 5(2) of the Senior Courts Act 1981 allows the Lord Chief Justice to transfer a judge to a different Division of the High Court after consulting the Lord Chancellor. The Vice-President of the Court of Protection is appointed by the Lord Chief Justice, under Section 46(4) of the Mental Capacity Act 2005, again following consultation with the Lord Chancellor.

Mr Justice Charles was appointed a High Court Judge (Family Division) in 1998. He was appointed Judge-in-charge of the Court of Protection in 2011 and President of the Administrative Appeals Chamber, Upper Tribunal on 4 April 2012. He will replace the Chancellor of the High Court (Sir Terence Etherton) as Vice-President of the Court of Protection.

Mr Justice Charles has sat on a number of committees and bodies relating to the creation and work of the Court of Protection, and since 2011 has been Judge-in-charge of the Court of Protection, which is not a statutory role. His appointment as Vice-President will allow him to continue with the work he has begun as Judge-in-charge, but with a statutory position. At High Court level, the work of the Court of Protection is linked with the Family Division rather than the Chancery Division, hence the appointment of the former Judge-in-charge with his family background and his extensive experience acquired as Judge-in-charge, to support the President. Following Mr Justice Charles taking up his responsibilities as Vice-President, the position of Judge-in-charge will be further considered.

Would-be adopters helped with new online resources

For the first time fully interactive, clickable maps have been published to help potential adopters find out more about agencies in their area and across the country, help them make an informed choice based on performance and assist them to access the most appropriate recruitment agency for them. The maps are hosted on the website of **First4Adoption**.

Publication follows the successful launch of the first ever adoption maps at the start of this year, prompting a surge of enquires to the First4Adoption service.

The Department for education has also announced that a further £50 million will be made available to councils as they prepare to implement reforms and work with voluntary adoption agencies and each other to recruit more adopters for the 6,000 children waiting for an adoption.

A new adoption leadership board has been established to support local authorities to drive through the reforms in the Children and Families Bill, and help adoption agencies stay on track recruiting more adoptive parents.

Children and Families Minister Edward Timpson said:

> "I've seen promising progress this year – a significant rise in adoptions and a huge increase in the numbers of adopters, but I am determined to do everything in my power to ensure the 6,000 children waiting are offered safe and caring homes. This Christmas I want anyone considering adoption to look carefully at the information in our interactive maps and consider whether they can offer a child a stable and loving home.
>
> "There remains significant work to do next year. Our new adoption leadership board will play an important role ensuring local authorities and adoption agencies stay on track and recruit more adopters – and a further £50 million for councils in 2014 will help them put the building blocks in place to implement our reforms."

The DfE is extending the Adoption Reform Grant (ARG) into 2014, providing £50 million to local authorities in recognition that they need to implement the changes in the Children and Families Bill based on the needs of their local communities. This year councils have used the £150 million ARG to work with voluntary adoption agencies, support the drive to recruit more adopters in their areas, provide better post-adoption support and streamline their services to make them swifter and more efficient for would-be adopters.

ARTICLES

Finance & Divorce December 2013 Update

Jessica Craigs, senior solicitor, and David Salter of Mills and Reeve LLP
This update is provided into two parts:

1. News in brief
2. Case law update

News in brief
This section of the update highlights some of the news items that will be of particular interest to practitioners who advise on divorce and financial remedy cases.

'Quickie divorces' for Italian couples
The Telegraph reports that the President of the Family Division, Sir James Munby has been asked to cancel 180 divorces after being told the UK courts have been exploited in a massive fraud by Italians seeking a quick end to their marriages.

British residency has allegedly been 'faked' so that the UK justice system can be used to divorce.

The alleged fraud was spotted when court officials realised that in 179 cases the address was the same.

For the full article click here

Norway states 'date nights' key to good marriage
Norway's ruling Populist party is promoting date nights as a cure for flagging marriages in an attempt to reduce the country's divorce rate. It should be noted that date nights are not planned to be mandatory.

Divorce rates are 40% with 40 – 44 year olds being the most likely to separate.

For the full article click here.

Publicly funded mediations decline by a third
Compared to the same period last year, the number of separated couples undergoing publicly funded mediation has dropped by almost a third.

The information supplied to lawyersupportmediation.com showed an even greater reduction in July during which the number of mediations fell by 43% compared with last year.

For more information, click here.

Father committed for contempt for breach of order to file Form E
In *Ball v Shepstone* [2013] EWCC 6 (Fam), Mr Shepstone failed to appear at the committal hearing. HHJ Everall QC found him guilty of contempt of court by failing to comply with the order and committed him to prison for 14 days. The order was suspended to permit Mr Shepstone to serve the Form E in the interim. It is not known whether he has done so.

Standardised Financial Remedy orders out for consultation
A significant number of standard template orders for financial remedy have been released for consultation.

The orders have been drafted by a team led by Mr Justice Mostyn. The first release includes a financial remedy 'omnibus' which is, in essence, a consent order with 87 clauses containing as many permutations as the authors could think of.

Use of the final versions is expected to be mandatory from April 2014.

For the first batch of the proposed standard form orders click here

Resolution reports on the "worrying lack of awareness" about divorce process
Publication of new polling results showed a worrying lack of awareness about a wide variety of non-court based solutions.

Reportedly, there is 'patchy understanding' and 'ill-founded scepticism' about alternatives to going to court during break-ups.

For the full report click here.

Case law update

M v M [2013] EWJC 3372 (Fam)
Application by wife for indemnity costs following findings amounting to serious litigation misconduct by the husband's respondent companies. Applications granted.

Background
An application by Mrs M following judgment handed down on 2 August 2013 in relation to her Part III (Matrimonial and

Family Proceedings Act 1984) application. Mr M neither attended the trial nor the costs hearing.

In addition to Mr M, there were five other respondents.

The trial was heard in the High Court between 24 January 2013 and 1 February 2013. Judgment was reserved pending the Supreme Court delivering their judgments in Prest. In January 2013, Mr M and the companies were put on notice that Mrs M intended to seek indemnity costs at the conclusion of the trial.

At the final hearing, the court made a number of findings amounting to serious litigation misconduct on the part of both Mr M and the companies.

Mrs Justice Eleanor King DBE concluded (at paragraph 10) that FPR 2010, Part 28.3 and PD 28A applied as these were 'financial remedy proceedings' – the definition of which includes applications under Part III of the 1984 Act. The general rule in financial remedy proceedings is that the court will make 'no order' as to costs. The court may make a costs order where:

> "it considered is appropriate to do so because of the conduct of a party in relation to the proceedings (whether before or during them)" (Part 28.3(6))

Mrs Justice King concluded that both Mr M and the companies' conduct was such that making an order for costs against both was inevitable.

When assessing on the indemnity basis, the court has regard to all the circumstances in deciding whether costs were (i) unreasonably incurred; or (ii) unreasonable in amount (CPR 44.4(2)).

Mrs M cited a number of points from the case which were "out of the norm" in a way to justify an order for indemnity costs. In particular:

- The failure of both Mr M and the companies to make full and frank disclosure and engage in proceedings;
- Their lack of respect for the authority of the court;
- Mr M and the companies' breach of court orders;
- The companies' late involvement in the case;
- Mr M and the companies' failure to file statements or to call witnesses in support of their case;
- The companies' running their case in the face of 'blindingly obvious' evidence supporting Mrs M's case; and
- The finding that Mr M had forged Mrs M's signature on two occasions.

Mrs Justice King at paragraph 33 states:

> "This is, in my judgement, a case, if ever there was one, where an order for indemnity costs is the correct order. Litigation conduct of the type exhibited by the Husband and, at his direction, the Companies, is of the most extreme type and thankfully not often seen.'

She ordered Mrs M's costs to be paid in full.

***Tchenquiz-Imerman v Vivian Saul Imerman* [2013] EWHC 3627**

During the course of contested financial remedy proceedings, adult beneficiaries were joined as parties on their application. Mr Justice Moylan ordered that the beneficiaries, as parties, should disclose copies of documents which had been provided to them for the purpose of an application which had been made to the Royal Court of Jersey by the trustee of some of those trusts. The Royal Court had given the beneficiaries permission to make such disclosure if they were ordered to do so by the English court. But, they expressed a number of reservations and invited the court not to make such disclosure.

Background

The parties were married in 2001 and separated in 2008. They had one child. The husband had three adult children from his first marriage who were the beneficiaries joined to the proceedings.

The husband's wealth consisted of approximately £7m in his own name and approximately £20m of assets held within a nuptial settlement of which the husband was the principal beneficiary.

Two of the key issues in the financial remedy proceedings were: (a) whether the Trusts were nuptial settlements for the purpose of s24 Matrimonial Causes Act 1973 and (b) whether the assets of the Trusts were financial resources available to the husband (s25(2)(a) of the MCA 1973).

The trustees were joined as parties but none participated in the proceedings following applications to their respective national courts. The Jersey trustee applied to the Royal Court for approval of its decision (a) not to submit to the jurisdiction of the English court and (b) to disclose information about the Trusts' assets to the husband's father in the knowledge that he was likely to disclose it to the husband. These decisions were approved by the court on 15 July 2011.

The trustees provided some information about the Trusts but declined to provide a considerable part of the information and documents sought by the wife. The wife submitted that the courts must examine this inference and look at all the circumstances.

The Royal Court gave permission for information and documents to be disclosed by the beneficiaries in this case, if, the English court made an order to that effect. It was made clear that, normally, the court would have refused permission but for the "very unusual circumstances" of this case.

Although permission was given the Jersey court asked the Family Division to consider very carefully whether it needed to make any order that the adult beneficiaries disclose material in relation to the July proceedings. They categorised the material into: privileged, sensitive and "other". Permission for the privileged material to be disclosed was not given.

Sensitive material was specifically referred to:

> "[33]…However, we hope very much that the Family Division will respect the nature of the July proceedings and not order disclosure of the sensitive material."

Mr Justice Moylan confirmed at paragraph 23 that, "I therefore need to explain why I considered it necessary to order disclosure of both the sensitive and the other material despite the Royal Court's expressed wish that I should not do so." He then carries out a brief revision of the relevant cases relating to trusts and the treatment of them in financial remedy proceedings.

At paragraph 44, the judge concludes that the importance of seeking to understand how and why the trustee was likely to exercise its powers was of 'pivotal importance'. The critical paragraph is at paragraph 45 as follows:

> "However, in my judgment, any light on the internal thinking of the trustee would be significantly preferable to none….This extends to why the trustee did not consider it to be in the interests of the beneficiaries for the trustee actively to challenge the wife's claims within these proceedings, either as a party or as a witness, when those claims are said to be, factually, wholly without merit and when the Trusts hold significant wealth within this jurisdiction….I remain puzzled as to why such a trustee should not consider it in the interests of the beneficiaries to provide the evidence which will rebut a case if the trustee has the evidence available to it…If it does not, as referred to above, the English court will be left to draw inferences and make assumptions."

Accordingly, the adult beneficiaries were ordered to disclose the material considered necessary and proportionate to assist the court in determining the issues raised in those proceedings.

***Duncan v Duncan* [2013] EWCA Civ 1407**

Appeal by wife against an order setting aside an order in financial remedy proceedings on the basis of counsel's conflict of interest. Appeal allowed, order set aside and original order restored.

Background

On 19 April 2011, District Judge Morgan MBE made an order in an FDR hearing. On 12 November 2012 this was successfully appealed by Mr Duncan, having identified a procedural irregularity.

The issues in the second appeal related to the involvement of counsel who had previously been involved in FDR proceedings on behalf of the husband in relation to his first marriage, five years earlier.

On the day prior to the hearing, counsel alerted his solicitors that he had previously represented the husband. The husband's solicitors were informed and the husband consented to him doing so.

On appeal, the judge (Her Honour Judge Moir) described the husband's position on the morning of the hearing as invidious. He was faced with the prospect of delay and lacked "understanding or appreciation as to what he was consenting".

At paragraph 16 Lady Justice Macur points to the relevant facts of this appeal:

> 1) Counsel for the "second wife" had previously appeared for husband in a different financial dispute five years earlier;
>
> 2) The assets in the second financial dispute involved assets subject to dispute in the first case;
>
> 3) When he was made aware of it, counsel for the second wife made immediate disclosure of his previous association with the husband;
>
> 4) The husband was represented by counsel in the second case
>
> 5) Counsel for the husband in the second case gave an unequivocal assurance to the Court that the husband consented to the case proceeding before District Judge Morgan. The husband did not dispute the fact that he had given his consent;
>
> 6) No objections were raised during the hearing that cross examination of the husband was unfair or unfounded upon the evidence filed in the second case.
>
> 7) Apparently, no objection was raised in the two months between conclusion of the hearing or the handing down of the judgment and was only notified one month later;
>
> 8) The husband was patently aggrieved as to the outcome.

At paragraph 17, the judge revisits counsel's professional obligations with reference to the Bar Code of Conduct.

The case concludes that the husband's appeal was 'patently opportunistic'. The wife's appeal was allowed and the order of District Judge Morgan restored.

***G v B* [2013] EWHC 3414**

Financial remedy application brought by the wife.

Background

The parties met in 1999 and in 2000 the wife moved to London. They were married in February 2004 and in March 2004, their son was born. Later that year, the parties moved to a 3 bedroom penthouse at a rent of £1,400 per week.

The husband at the date of trial was aged 62 and the wife was 46.

A feature of the case was the fact the husband was an only child and had a very close relationship with his father. He was entirely dependant on his father financially, and his father was a successful business man who lived his last 25 years in Monte Carlo.

With the husband's father's support, the couple were able to enjoy a very good standard of living.

By 2004, the husband's father was very unwell and he subsequently died in January 2005. Over the period 2004 – 2005 a Liechtenstein foundation was formed and the father's

assets were transferred into it. The husband fully acknowledged during the course of proceedings that the assets of the foundation were financial resources within the meaning of MCA s25(2)(a).

The wife accused the husband of failing to disclose the extent of his assets. Her case was that he had undisclosed assets of between £1.5 to £2.5m.

At paragraph 31 Mr Justice Blair categorises the husband's 'failure' of disclosure but concludes (at paragraph 32):

> "Without excusing any non-disclosure, I do not think that the disclosure history in itself tends to the conclusion that there are further assets which have still not been disclosed."

After a careful summary of each of the relevant categories under s25 MCA the judge concludes (at paragraph 61) that the total net assets were between approximately £6.1m - £6.6m.

Needs was a "magnetic factor" of the case and that appeared to be agreed. The judge performed a careful examination of both parties' housing needs and standards of living.

However, the derivation of the assets was important and the wife did not reflect this in her proposal. The husband's position was that for the court to fix the wife's award at such a level so as to deplete the resources of the foundation to an extent which deprived the other beneficiaries, was wrong.

At paragraph 81, Mr Justice Blair comments: "It is submitted that assessment of need is not an insulated metric, and the presence of pre-marital property may lead to a more conservative assessment of need….

[82] …I consider that the derivation of the funds is a factor to be given some but not great weight. However, I consider that achieving an outcome that is fair to both parties, recognition has to be given to the position of the other grandchildren as beneficiaries of the foundation."

An order of £1.6m was made in favour of the wife with global periodical payments of £65,000 per annum on a joint lives basis.

***Young v Young* [2013] EWHC 3637**

An application for a full range of financial remedies brought by the wife after six years of litigation "conducted in the full glare of the media" [2].

Background

The parties met in 1988 and began to cohabit in 1989. Their two daughters were born in 1992 and 1994 and in 1995 the parties married. The marriage broke down in 2006 and therefore was of "significant length" numbering 17 years it total [26].

The husband at the date of trial was aged 51 and the wife was 49.

The husband was a self-professed entrepreneur and had generated extreme wealth through his multiple business endeavours. The wife, whilst possessing experience in the fashion industry prior to the marriage, had devoted herself to the roles of mother and homemaker. Moor J found that the parties had started with nothing but had come to enjoy an extremely high standard of living (although found to be overly-exaggerated by the wife).

Both parties were found to have made equal contributions to the marriage. Thus, any assets found would be treated as generated during the marriage and be equally divided between the parties.

The wife sought an order for a lump sum, pursuant to section 23(1)(c) MCA 1973.

A key feature of the case was that the husband suffered a financial meltdown of his business empire in 2006. H asserted that his "business implosion had left him nothing but debts to HMRC, the Bank of Scotland and his business friends and colleagues" [59].

The wife contended that the Husband had manufactured the financial meltdown to allow him to extract as many assets as possible to hide from her reach. Her case was that her husband had failed to disclose assets he retained control of from 2006, totalling hundreds of millions of pounds.

The husband had failed to provide full and frank disclosure and consequently he had been imprisoned for 6 months in 2013 for contempt of court.

At paragraph 19, Moor J reinforced the obligation of full and frank financial disclosure on the parties. At paragraph 20 he said that where there have been shortcomings in disclosure, thus allowing the court to draw appropriate inferences, "it is up to the respondent to open the cupboard door and show that the cupboard is bare".

The wife's needs of £5 million for housing in central London, £500,000 for refurbishment and £2 million for a holiday property were not deemed to be unreasonable given the standard of living enjoyed. Maintenance of over £350,000 per annum was said to be more than sufficient [110]. Referring to the appropriate Duxbury formula for capitalisation, a lump sum of £9.4 million would meet the wife's needs.

The court found in relation to the husband's undisclosed wealth that, whilst his current financial value could not be accurately estimated, he had retained control over large assets in 2006 – notably that he had extracted £20 million in share certificates from his solicitor, Mr Beller (which consequently resulted in Mr. Beller being struck off the roll of solicitors for non-compliance with undertakings given to the husband's creditors) [177]. Moreover, Moor J found that the husband had to date £45 million hidden from the court which after a deduction of £5 million for his debts would leave a net total of £40 million to be shared between the parties [178].

At paragraph 179, Moor J stated that a lump sum of £20 million met the wife's reasonable needs generously assessed and so nothing more would be awarded.

Throughout his judgment, Moor J brought the conduct of the parties into question; the husband's failure to comply with court orders and the wife's tendency to "[see] conspiracy everywhere", leading her to raise "issues completely unfounded" [100] and [185]. Consequently, Moor J summarily assessed costs and awarded the wife her costs on an

indemnity basis of what he considered should have been the cost had the litigation been properly conducted.

Moor J gave direction as to how the court will deal with such cases that present "truly eye- watering" amounts spent [5]. He said at paragraph 11:

> "I am quite sure that in cases such as this, there should be rigorous control on the amount spent, in particular, on expert evidence… If the solicitors and the clients are not willing or able to do so, the court will have to impose limits. Without such restraints, litigation funding will be put off supporting these cases"

Young v Young - An Analysis of the Judgment

Thomas Dudley, barrister, **1 Garden Court Chambers**

A final award has at last been granted in the long-running case of ***Young v Young*** **[2013] EWHC 3637 (Fam)** - a case described by Moor J as "as complicated a Financial Remedies case as has been dealt with before these courts".

Background

The husband was aged 51 and the wife 49. The parties met in 1988 and began to cohabit in 1989. They married on 31st March 1995. The marriage broke down in November 2006 and was therefore treated as a 17 year marriage, of "significant length". Both parties suffered health problems, arising in large part from the toll taken by the long running litigation. There were two children of the family: Scarlett, aged 21 and Sasha, who turned 19 during the final hearing. Both were students in London and continued to reside with the wife.

The husband was, in his words, an "entrepreneur" whose business activities had been principally in the fields of property, technology companies and investing 'seed corn' capital into start-up businesses. The wife had, by the time of the breakdown of the marriage, been a housewife for many years and it was accepted that she had no earning capacity.

There was a huge disparity between the parties' positions on the level of the level of the husband's wealth. The husband claimed to be insolvent, owing £28 million, but the wife claimed that he was worth "many hundreds of millions" or, at one stage "a few billion at least" [17].

Conduct of the litigation

Preceding the 20 day long final hearing before Moor J, there had been 6 years of litigation in which 65 preliminary hearings had taken place, the wife had incurred around £6.4 million in legal costs and costs of forensic accountants (an amount described by Moor J as "completely unacceptable") [9], and the husband had been sentenced to 6 months' imprisonment for contempt of court in not having complied with orders for disclosure. Moor J commented that the case had been as complex a financial case as had ever been dealt with by the Family Division, but that the way it had been conducted had also fallen foul of "just about every part" of the overriding objective in Rule 1.1 of the 2010 Family Procedure Rules and was a prime example of "how not to litigate" [3] and [10].

The wife had, for the earlier part of the proceedings, had the assistance of litigation funding to the tune of £4 million, but that had ceased and she was now represented on the basis of her legal team accepting that they would only be paid in the event of her receiving a substantive award. The husband acted in person.

Noting that the wife's litigation funding had been spent long before the final hearing, Moor J stated that "I am quite sure that in cases such as this there should be rigorous control on the amount spent, in particular, on expert evidence... Maximum figures need to be placed on the disbursements incurred. If the solicitors and clients are not willing or able to do so, the court will have to impose limits." [11]

The wife had made a number of interim applications for inspection orders, for search and seizure orders, as well as for orders against various computers used by the husband. The husband had been in contempt of court in not providing complete or even adequate disclosure and for that Moor J found that he was to be criticised substantially. On the other hand the number of applications for orders by the wife had been higher than any other case known to Moor J and had there been any more it would have amounted to an abuse of process. [80] In some respects, for example signing letters of authority for the wife to make enquiries of various professionals and waiving privilege to all files held by some of his previous solicitors, the husband had not obstructed the process of evidence gathering. Further, some allegations made by the wife, such as the allegation that the husband had an interest in American Idol, were without evidence and should not have been made. [82]

Moor J also expressed reservations about the use in this case of the procedure set out in the case of ***OS v DS (Oral disclosure: Preliminary hearing)*** **[2004] EWHC 2376 (Fam)**. A four day hearing before Mostyn J had taken place in which oral evidence had been heard from a number of witnesses, but Moor J found that all of the important evidence had to be repeated before him. He considered that he had not been assisted by the OS v DS hearing, which had taken up considerable time and expense. He suggested that the only circumstances in which such a hearing would be useful were:

> a. as in care proceedings where fact-finding on certain specific issues would lead to those issues not having to be revisited at the final hearing and
>
> b. by analogy with the case of *Khanna v Lovell White Durrant* [1995] 1 WLR 121, as an exercise in obtaining pre-trial discovery of documents where the witness is asked to give specific evidence by way of explanation of the document or how it came into his or her possession.

The wife had also made an application in June 2013 for the husband to be prevented from participating in the final hearing pursuant to the case of *Hadkinson v Hadkinson* [1952] P 285 given that he had been found to be in contempt of court. Moor J rejected that application. He held that although the *Hadkinson* jurisdiction does apply in family law cases and that there will be certain cases in which it is proportionate and not in breach of a litigant's Article 6 rights, he was concerned about the use of it in contested final hearings for financial remedies. [90] Given that the court has to "get to the bottom of the financial affairs of the parties" it is important that it makes a proper investigation and produces a fair judgment.

Husband's financial position

Moor J sets out the background to the husband's business career at paragraphs [32] to [48]. One important element of the case was that the husband had held a close relationship with a solicitor, Stanley Beller of Beller & Co, who had written to a bank in Monaco in July 2005 that the husband was worth in excess of £120 million. Moor J considered it "tolerably clear" that in February 2006 Mr Beller and the husband were telling the world that Mr Beller held at least £24 million in assets that belonged beneficially to the husband. Mr Beller would later be struck off owing to his inability to comply with undertakings he had given to hold money for the Husband following the Husband's removal of share certificates from his office without his knowledge.

Moor J summarises the husband's alleged financial meltdown in 2006 owing to an unsuccessful property venture entitled "Project Moscow" at paragraphs [49] to [59], which, on the Husband's case, led to the implosion of his business empire with nothing but debts to the Bank of Scotland, HMRC and his business friends and colleagues. [44]

Paragraphs [63] to [65] of the judgment contain background as to commercial litigation brought against the husband by creditors in 2006.

On 9th April 2009 the husband was made bankrupt on a petition brought by HRMC. There were a total of 20 creditors, claiming to be owed £27 million. On 1st June 2012 the wife applied to annul the bankruptcy. Moor J adjourned that application generally on 2nd October 2013 on the basis that the wife could renew it in the event that she obtained a significant sum at the final hearing.

An important element of the wife's case centred around files recovered from a computer given by the husband to the children after separation. Despite the husband's attempts to wipe the hard drive, the wife's computer experts were able to recover a number of deleted documents, in particular:

a. a schedule prepared in December 2002 by Coutts Bank showing his assets totalling £319 million, albeit £279 million of the assets were classified as "high risk".

b. A document headed March 2006 prepared for the Bank of Scotland providing a "Current Value" figure for the assets of £382 million. The Husband denied ever owning or having an interest in certain of the assets listed in this document.

The wife further relied at the final hearing on a number of sources of evidence:

a. A "Preliminary" report from Mr Mark Bezant, a Chartered Accountant from FTI Consulting dated 14th April 2012;

b. An Affidavit of Malcolm Hebron of Guidepost Solutions dated 7th November 2012;

c. A Statement of Luke Steadman, Partner in Alvarez and Marsal also dated November 2010;

d. The Report of L Burke Files dated 22nd October 2013;

e. Various letters from Mr Carl Biggs, a New Zealand Chartered Accountant, who is also an Associate of the Institute of Chartered Accountants in the UK;

f. The evidence of various witnesses she summonsed to court and, in particular, the husband's former solicitor, Stanley Beller; and

g. Documents obtained by her during the discovery process that she argues are inconsistent with the husband's case.

The wife also asserted that the husband had made two offers of settlement to her which revealed his true wealth. In October 2009 he was said to have offered £27 million. There was evidence heard from a professional photographer to whom the husband was alleged to have said that he offered the wife £27 million. Moor J found that he could not rely on the evidence of the photographer, who had at one point in his oral evidence said he could have been wrong as to what he had heard, and then at another stage said he was "1000% sure" of it. Moor J concluded on the balance of probabilities that no such offer had been made. [114]-[117]

The wife also stated that the husband had made an offer in a meeting on 25th August 2009 of £300 million. From an inspection of the attendance note created at this meeting, Moor J considered that this offer had not been a serious one capable of acceptance. [120]

Law

Moor J recounted the factors for the court to take into consideration under s25(2) of the Matrimonial Causes Act 1973. He noted that conduct was rightly not alleged by either party (save for the husband's alleged non-disclosure). He recalled that it was made clear in the seminal House of Lords decision of ***White v White* [2000] UKHL 54**, [2001] 1 AC 596 that there is to be no discrimination in financial remedy cases between the breadwinner and the homemaker, as each, in their respective roles, contribute equally to the family.

As to the allegations of the wife that the husband had vastly greater wealth than he had disclosed, Moor J confirmed that the standard of proof is the balance of probabilities. He provided a summary of the relevant caselaw relating to inferences to be drawn from non-disclosure, quoting Sachs J from *J v J* [1955] P 215 (a decision approved in *Baker v Baker* [1995] 2 FLR 829) in which Sachs J stated at p227:

"In cases of this kind, where the duty of disclosure comes to lie upon the husband; where a husband has – and his wife has not – detailed knowledge of his complex affairs; where a husband is fully capable of explaining, and has the opportunity to explain, those affairs, and where he seeks to minimise the wife's claim, that husband can hardly complain if when he leaves gaps in the court's knowledge, the court does not draw inferences in his favour. On the contrary, when he leaves a gap in such a state that two alternative inferences may be drawn, the court will normally draw the less favourable inference – especially where it seems likely that his able legal advisers would have hastened to put forward affirmatively any facts, had they existed, establishing the more favourable alternative."

And at p229:

> "...it is as well to state expressly something which underlies the procedure by which husbands are required in such proceedings to disclose their means to the court. Whether that disclosure is by affidavit of facts, by affidavit of documents or by evidence on oath (not least when that evidence is led by those representing the husband), the obligation of the husband is to be full, frank and clear in that disclosure. Any shortcomings of the husband from the requisite standard can and normally should be visited at least by the court drawing inferences against the husband on matters the subject of the shortcomings – insofar as such inferences can be properly drawn."

The result of the husband remaining, at the time of the final hearing, and undischarged bankrupt, was that any assets that were owned either beneficially or legally by the Husband on 9th April 2010 (when he was made bankrupt) were vested in his joint trustees in bankruptcy (section 306, Insolvency Act 1986). Pursuant to *Re Holliday (A Bankrupt)* [1981] Ch 405, the Court was therefore precluded from making property adjustment orders. The Court was not, however, precluded from making a lump sum order, provided consideration is given to the level of his debts, statutory interest and the costs of the insolvency when weighing in the balance the quantum of any lump sum order (*Hellyer v Hellyer* [1996] 2 FLR 579). [22]

Court's findings as to the husband's wealth

Moor J's assessment of the wife as a witness was that although she was honest, he did not consider her to be reliable; she saw "conspiracy everywhere". It had also been erroneous for the wife to require friends of the husband who had provided him with financial support (Sir Phillip Green and Richard Caring) to give evidence. He accepted their evidence that they had not held money on behalf of the husband and were providing the Husband with assistance / loans from their own resources. They should not, in Moor J's view have been required to give evidence.

The husband, in Moor J's view, faced "serious evidential difficulties" arising from having been found to the criminal standard of proof to be in contempt of court twice for failing to provide full and frank disclosure. On the other hand that led to a need for caution when assessing the husband's claims made in the documents produced by Coutts in 2002 and for the Bank of Scotland in 2006. Indeed the husband's own case was that he was "bigging himself up" in those documents. Moor J considered he was unable to rely on those documents without more.

Moor J analyses the expert evidence provided by the wife, some of he did not accept, at paragraphs [121] to [131]. The Coutts and the Bank of Scotland schedules are analysed at paragraphs [136]-[139] and [140]-[148], Moor J concluding that he could not rely on them. He also held that the letter written by Mr Beller in July 2005 in which he "confirmed" that the assets of the husband were over £120 million had been mistaken and indeed "foolish", even though there was no reason to doubt that Mr Beller believed it at the time. [149]

However, Moor J found that the husband did have substantial assets in March 2006. On the balance of probabilities he found that he "overstretched" himself in Project Moscow and, having difficulty servicing the borrowing, cut his losses and rescued as much as he could, whilst allowing the rest of his business empire to implode.

He found that the husband had indeed removed share certificates from Mr Beller in March 2006 worth around £20 million. [158] He further held that he had other undisclosed assets at that date worth around £25 million. This finding arose out of the husband's failure to deal satisfactorily with a number of points raised by the Wife, of which Moor J provides examples at [162].

The husband's total assets at March 2006 were found to have been around £45 million. Moor J considered that it would be wrong to find a higher sum than this, since had it been worth significantly more, he considered that the Husband would have dealt with the fall-out from Project Moscow and the action taken against him by the Bank of Scotland rather than "running away". [177]

He also declined to make any findings that various individuals and corporate entities were holding assets on behalf of the husband (which would have assisted the wife in enforcement proceedings) because (a) none of the individuals or entities had been joined to proceedings and (b) he was quite unable to say where the husband had secreted his money.

Moor J stated that he had "no idea what has happened since then" [178], but doing the best he could, found that the husband still had £45 million hidden from the court. As against that, he deducted £5 million for the husband's debts, making a net total of £40 million.

The wife's needs

The wife had stated in her Form E that she required £5 million to purchase a home, £500,000 for refurbishment, and a further £2 million for a holiday home. She sought maintenance of £29,635 per month, equating to £355,620 per annum. Using the Duxbury formula for capitalisation, this would require a lump sum of £9.4 million. She subsequently claimed a much higher budget in her section 25 statement, which Moor J rejected as being "entirely litigation driven". He also held that she had exaggerated the parties' standard of living (specifically rejecting her assertion that the family spent £1 million per year in restaurants) albeit the standard of living had been "extremely high" [31]. He held that her original budget was reasonable, but the amount required to purchase a home needed to be adjusted for house price inflation in central London. Overall he assessed her needs as being £20 million. [108]

The wife's award

The wife was consequently entitled to half of £40 million as a lump sum. Moor J commented that £20 million "happen[ed] to equate with my view of her reasonable needs, generously assessed" [179], so there was no question of awarding her more than half of the assets.

There was no reason why the husband should not pay the lump sum quickly, given that half of the money he had in 2006 was held in shares which would have been readily realisable, and therefore Moor J ordered the husband to pay within 28 days. Moor J commented that the rate of interest

on High Court judgment debts, 8%, would give the Husband a huge incentive to pay quickly.

Moor J further held that in light of his findings, the maintenance pending suit order had been "fully justified" [180] and therefore he dismissed the application to remit the arrears and ordered that they be paid within 28 days. He did not, however, extend the period of arrears further.

Prospects of enforcement

Moor J commented that as his findings as to the husband's wealth had been made on the balance of probabilities a Judgment Summons would not be possible without further evidence to satisfy the court beyond reasonable doubt that the husband had the means to pay the judgment debt. However, he commented that the debt will exist for all time and the husband would never be free of it and it was in his interests to discharge it so he could move on with his life. The court had not ordered the much higher lump sum sought by the wife so he hoped that the husband would take the view that he would be better off paying the lower sum and concentrating on rebuilding his life. [181]-[182]

Husband's passport

The husband's passport had been seized pursuant to an order of Hogg J on 12th March 2009 and the court had held it ever since. Moor J decided that the husband's passport had been kept from him for an excessive period of time already and that there was no longer a reason for not returning it.

Costs

Further argument on costs would follow from the judgment, but Moor J indicated that he was inclined to order the husband to pay the wife's costs on an indemnity basis and that he was not inclined to order a detailed assessment. The basis for this was that the husband had misled the court, had made no reasonable offer to settle and had disobeyed Court orders. Although the wife had made some unfounded allegations, many of her lines of enquiry about his finances had been brought on by the husband's own failure to provide disclosure.

Moor J concluded by expressing sympathy for the parties' children, particularly in light of how the case had been played out in the full glare of the media, and commented that he hoped no other children had to go through the same process.

Local Authority Focus - December 2013

Sally Gore, barrister, 14 Gray's Inn Square

Judicial review

The role and scope of judicial review in the context of ongoing care proceedings has often caused uncertainty for practitioners. In *R (H) v Kingston upon Hull City Council* [2013] EWHC 388, some clarity has been provided. This case concerned the familiar problem of the extent to which a local authority may engage unilaterally in decision-making in respect of a child when there is an interim care order in place. In this case, the local authority had removed children from their placement with paternal grandparents to foster care following a negative viability assessment of the grandparents. The Children's Guardian had not been consulted, there had been no attempt to return the matter to court, and, it was held, no meaningful consultation with the parents. The mother therefore applied for a judicial review of the decision to move the children. This case therefore concerns not only the question of what a local authority may do in terms of exercising parental responsibility whilst the family court is seised of the child's welfare, but also the role of judicial review and the Administrative Court which makes decisions on an entirely different basis from the family court. Whereas the judge hearing the care proceedings must regard the children's welfare as paramount, a claim for judicial review considers only the lawfulness of the decision being challenged.

The judgment of HHJ Richardson QC, sitting as a judge of the Administrative Court, therefore focuses on whether, and in what circumstances, the family court or the Administrative Court should hear a challenge to local authority decision-making when care proceedings are extant and an interim care order is in force. It is suggested that there are limited instances in which judicial review would be appropriate but that these include:

- When a person affected by the decision is not a party to the care proceedings and is unable to be made an intervener in those proceedings.

- Where (as in this case) a party does not wish to challenge the basis of the interim care order but merely a decision made by the local authority as to its implementation.

- Where the local authority has reached a decision that it refuses to alter, despite a request from the court that it should do so.

In relation to the third of these points, recent authority from the Court of Appeal has made it clear that the court retains jurisdiction to decide which public law order is appropriate (if any) and it is not constrained in this evaluation by the view of the local authority as to the need for a particular order. If the local authority refuses the court's requests to provide a care plan setting out what services it can provide under the placement option(s) and order(s) that the court wishes to consider (and not just those which the local authority wishes it to consider), or indicates that it would decline to implement the plan preferred by the family court, an application for judicial review may follow: *W (A Child) v Neath Port Talbot County Borough Council* [2013] EWCA Civ 1227, in particular paras 71-102. For an article focusing on the Neath case, see *W v Neath Port Talbot – Courts, Local Authorities and a Mexican Stand-off*, by Andrew Pack.

The judgment in R (H) does not suggest that this list is exhaustive. Although the observation is made that the circumstances in which judicial review is appropriate are likely to be highly fact-specific, all of the examples given are essentially an application of the principle that judicial review is intended as a remedy of last resort. Perhaps this gives a clue as to how this judgment will come to be applied in future cases.

The question of whether or not a child is or has been looked after continues to generate case law. However, the latest case of *Re B* [2013] EWCA Civ 964 is somewhat different. In that case, a district judge hearing care proceedings had assumed jurisdiction to decide whether or not the child was 'looked after' for the purposes of s.22(1) Children Act 1989. This had been upheld by the circuit judge on appeal. Neither county court judge had jurisdiction to determine this issue. Consequently, both judgments were quashed by the Court of Appeal. This case serves as a stark warning to practitioners of the need to be aware of when points arise in the context of care proceedings that, in the absence of agreement, can only be properly resolved by means of an application for judicial review. The fact that the parties had agreed to the matter being determined by the district judge in this way did not cure the jurisdictional deficit.

The substantive issue in this case, on which the Court of Appeal made comment but was unable to rule, was one that frequently occurs in practice. The local authority had commenced care proceedings but the child's grandparents attended the interim care order hearing and put themselves forward as carers. This led to an interim residence order being made in favour of the grandparents. Later in the proceedings, when the issue of funding the child's longer-term care with the grandparents arose, they sought to argue that the child was 'looked after'. In the absence of an interim residence order, they would clearly have been correct: *Southwark LBC v D* [2007] EWCA Civ 182; *R (SA) v Kent County Council* [2011] EWCA Civ 1303.

However, in this case, despite the fact that the local authority could be said to have played a central role in placing the child with the grandparents, the preliminary view of the Court of Appeal was that the interim residence order meant that the child was not looked after. The

reasoning, which is consistent with the view taken in earlier cases (*GC v LD & Ors* [2009] EWHC 1942 (Fam), [2010] 1 FLR 583), was that the parental responsibility conferred on the holder of a residence order is wholly inconsistent with a continuing duty under s.20(1) Children Act 1989 to accommodate the child. By analogy, a residence order has the effect of discharging a care order (s.91(1) Children Act 1989) and so it logically follows that it should also bring to an end any duty under s.20(1).

Part 1, CYPA 2008 comes into force

On 12th November 2013, Part 1 of the Children and Young Persons Act 2008 came into force in England. This legislation allows local authorities to delegate their functions in relation to children in care and some functions in relation to care-leavers to third parties. On the same date, the Education Secretary gave a speech at the NSPCC headquarters praising local authorities who are adopting a more innovative approach to social work and calling on others to do the same.

Part 1 CYPA 2008 allows a local authority to delegate its social services functions in relation to a child who is looked after by it and in relation to its advice and assistance functions under sections 23B to 24D of the Children Act 1989 to 'a body corporate' which may not be another local authority. Social services functions have the meaning set out in section 1A of the Local Authority Social Services Act 1970. However, there are a number of restrictions on the delegation of such functions. In particular, local authority functions in relation to independent reviewing officers may not be delegated and a local authority's functions as an adoption agency may only be delegated to a registered adoption society.

A number of authorities have been involved in a pilot of this legislation since 2008. Those authorities have been encouraged to develop a Social Work Practice model of service-provision. This typically involves a small, autonomous "professional practice" which operates outside the hierarchy of local authority decision-making. It consequently has greater autonomy as well as control over its own budget.

Although the Government had considered removing the requirement that third parties providing social work services are registered with Ofsted, the sunset provision in section 6, CYPA requiring it to be brought into force by November 2013 coupled with opposition to this proposal from the House of Lords meant that time has not allowed for this to happen. Part 1 CYPA is therefore supplemented by the Providers of Social Work Services (England) Regulations 2013. However, the Government remains of the view that Ofsted regulation of third-party providers is unnecessary in light of the requirement that local authorities enter into appropriate contractual relationships with these providers.

Local authority procedures

In *LB v The London Borough of Merton* [2013] EWCA Civ 476, the child had been accommodated pursuant to section 20, Children Act 1989 throughout the care proceedings up until a care order was made at the final hearing. The local authority had not at any point sought an interim care order. A final care order and placement order were made and the mother appealed. The appeal centred on whether it had been permissible for the local authority to take the case to its adoption panel for a decision to be made about whether the local authority ought to formulate a care plan of adoption when the mother did not agree with the possibility of the child being adopted and the local authority did not have parental responsibility for the child.

This appeal, which was unanimously refused by the Court of Appeal, draws an important distinction between decisions that a local authority may take in respect of a child which amount to an exercise of parental responsibility and those which are purely administrative functions, duties and powers of the local authority. In this case, the local authority had been duty-bound to take the case to panel by virtue of the wording of section 22 of the Adoption and Children Act 2002.

The facts of this case arose prior to the amendment of the Adoption Agencies Regulations 2005. Regulation 19 of those Regulations requires an adoption agency to take into account the recommendation of the adoption panel in coming to a decision about whether a child should be placed for adoption applied to these proceedings.

There is relatively little case law on what constitutes an exercise of parental responsibility by a local authority. This case may be of wider application in that it confirms and clarifies that not every aspect of decision-making in respect of a looked-after child amounts to an exercise of parental responsibility. It is difficult to see how the Court of Appeal could have come to any other conclusion since a contrary decision would have entirely undermined the foundations of voluntary arrangements for children generally and section 20 placements in particular.

Although the Adoption Agencies Regulations 2005 have now been amended by the Adoption Agencies (Panel and Consequential Amendments) Regulations 2012, the result being that a panel-decision is no longer required prior to making an application for a placement order, it seems safe to assume that the reasoning of the Court of Appeal is equally applicable to the new regime, which still requires a decision about the child's best interests by the agency decision-maker prior to such an application.

Fostering awards and allowances

R (ota X) v London Borough of Tower Hamlets [2013] EWCA Civ 904 is the latest case to consider differential payments to foster carers who are related to a child as opposed to those who are not. In this case, unlike in the case of *R (L and others) v Manchester City Council* [2002] 1 FLR 43, the difference was not in the allowance paid (which reflects the cost of providing for the needs of the children) but in the fees element (fees are a form of remuneration for foster carers). A significant part of the judgment considers the relevant statutory guidance, all of which makes it clear that 'family and friends' carers should not be treated differently in respect of either element unless the local authority in question has cogent reasons for doing so.

The carer in this case was the aunt of three children with disabilities. Whilst it was common ground that she received sufficient to meet the needs of the children, the policy adopted by Tower Hamlets was that the additional increment paid to foster carers of disabled children

contained both an 'allowance' element and a 'fees' element. Family and friends carers were entitled to the 'allowance' for disabled children but not to the reward/fee element.

Dismissing the appeal, the Court of Appeal followed the reasoning of Males J at first instance. The factual differences between the present case and the Manchester case were not the key issue in this case; rather, it was whether the local authority had cogent reasons for departing from the statutory guidance. The guidance was clear that there should not be differential treatment such as that outlined and the council's reasons for departing from it were essentially that they disagreed with it. To provide the same remuneration for family and friends carers would impact on their ability to provide other services. However, like Males J, the Court of Appeal was of the view that the council had not considered all of the options open to it, such as the possibility of having a fee structure that recognised carers with additional qualifications. Unrelated carers for whom fostering was an occupation were more likely to have undertaken further courses and qualifications. This would be a lawful way of differentiating between different carers as long as the policy was universally applied.

Sally Gore is the author of *The Children Act 1989: Local Authority Support for Children and Families*.

11/12/13

Children: Private Law Update (December 2013)

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In this article I will consider recent decisions relating to the following areas of private law:

- Jewish schooling
- Procedural formalities on without notice applications
- Change of name
- Termination of parental responsibility
- MMR vaccinations
- Domestic violence and contact
- Evidence from non-English speaking witnesses
- High conflict cases and Article 8 rights.

Jewish schooling

EG v JG [2013] EW Misc 21 (CC)
This case concerned the father's application for a specific issue order in respect of the choice of secondary school for the parties' four younger children aged 4, 6, 9 & 11. The family was from the Hasidic Jewish community.

In 2012 the Court of Appeal in *Re G* [2012] EWCA Civ 1233 refused the father's application to appeal a shared residence order and order that the parties' eldest child attend the school proposed by their mother. The court held that the mother's choice of schooling would best serve the child's interests.

The mother wished for the younger children to go to the same school which she considered to be more liberal than the father's choice and was co-educational. The father disagreed and sought for the children to go to an orthodox school. It was accepted that there was little educational difference between the proposals.

The father sought for any decision to be delayed until a welfare report had been obtained as to the children's wishes and feelings, arguing that different considerations were to be applied to the younger children.

The judge decided that a delay in obtaining a report carried a risk of damaging the choices available in schools for the children, and even if it did not, a report was filed last year upon which a decision had been made and a further report was not necessary. The court found that it was in the best interests of the children to go to their mother's choice of school and made a decision in respect of all the children.

Procedural formalities on without notice applications

C (A Child) & Anor v HK [2013] EWCA Civ 1412
This was an appeal by the father against an order prohibiting him from removing his son, aged 5 years, from the mother or from his school.
The mother made a without notice application for a prohibited steps order preventing the father from removing the child from her care and control or from the child's nursery. This followed concern that the father might abduct the child. The judge heard oral evidence from the mother and duly made an order.

The matter was subsequently listed for a First Hearing Dispute Resolution Appointment and a number of directions appointments, which provided, inter alia, for a section 7 report to be filed. The father was subsequently arrested for going to the child's nursery.

The Cafcass officer, being mindful that she would not be able to comply with the court timetable because of the intervening event, emailed the court, without notice to the father, to inform it that the father had withdrawn his application for contact; although he may have threatened to do so, he had not in fact done so. The Cafcass officer was also a complainant in the criminal proceedings against the father but continued to be involved in the case.

The report filed by the officer detailed allegations of fact previously unknown to the court in terms which read as if the allegations had been found.

The matter was listed for a contested hearing and the court ordered that the injunctive relief remain. The father was to have indirect contact.

The father's appeal was allowed on the basis of significant procedural errors made by the court below. In his judgment Ryder LJ provided helpful guidance on the formalities to be complied with in regard to without notice applications and the principles set out in the private law programme:

(i) Evidence adduced orally at a without notice hearing must be recorded on the face of the order, transcribed or contained in a witness statement and served on the respondent: r18.10(2) FPR 2010.

(ii) No reason was given as to why the father was constrained to have 24 hours to vary or set aside the order.

(iii) There is a need for 'exceptional urgency' to justify the making of a without notice order.

(iv) The pre-application protocol for mediation information and assessment (PD3A) was not complied with. This is not optional.

(v) The Cafcass officer was a complainant in criminal proceedings against the father. It was wholly inappropriate for her to remain involved in the case.

(vi) The Cafcass officer's report contained allegations of fact by the mother against the father which had not been established. However, these were recorded as if true. The report should have emphasised that this was not so.

(vii) At the contested hearing the Cafcass officer gave evidence behind a screen. There should have been an on notice application made to the parties as to the necessity for this.

The appeal was allowed, the contact order set aside and directions made for a rehearing before another judge.

Change of name

***Re W (Children)* [2013] EWCA Civ 1488**
This was an appeal by a mother from an order that D, aged 2, have his name changed to include his father's forename as a middle name.

The appeal was allowed on the basis that the first instance court had failed to apply the principles in *Dawson v Wearmouth* [1992] 2 AC 308 and subsequently *Re W, Re A, Re B (Change of Name)* [1999] 2 FLR 930:

"(9) The present position, in summary, would appear to be as follows:

(a) If parents are married, they both have the power and the duty to register their child's names.

(b) If they are not married the mother has the sole duty and power to do so.

(c) After registration of the child's names, the grant of a residence order obliges any person wishing to change the surname to obtain the leave of the court or the written consent of all those who have parental responsibility.

(d) In the absence of a residence order, the person wishing to change the surname from the registered name ought to obtain the relevant written consent or the leave of the court by making an application for a specific issue order.

(e) On any application, the welfare of the child is paramount and the judge must have regard to the s1(3) criteria.

(f) Among the factors to which the court should have regard is the registered surname of the child and the reasons for the registration, for instance recognition of the biological link with the child's father. Registration is always a relevant and an important consideration but it is not in itself decisive. The weight to be given to it by the court will depend upon the other relevant factors or valid countervailing reasons which may tip the balance the other way.

(g) The relevant considerations should include factors which may arise in the future as well as the present situation.

(h) Reasons given for changing or seeking to change a child's name based on the fact that the child's name is or is not the same as the parent making the application do not generally carry much weight.

(i) The reasons for an earlier unilateral decision to change a child's name may be relevant.

(j) Any changes of circumstances of the child since the original registration may be relevant.

(k) In the case of a child whose parents were married to each other, the fact of the marriage is important and I would suggest that there would have to be strong reasons to change the name from the father's surname if the child was so registered.

(l) Where the child's parents were not married to each other, the mother has control over registration. Consequently, on an application to change the surname of the child, the degree of commitment of the father to the child, the existence or absence of parental responsibility are all relevant factors to take into account.

(10) I cannot stress too strongly that these are only guidelines which do not purport to be exhaustive. Each case has to be decided on its own facts with the welfare of the child the paramount consideration and all the relevant factors weighed in the balance by the court at the time of the hearing."

The judge had failed to apply the correct test. This was to consider what added benefit could be brought by the change of name rather than to apply strictly the welfare checklist.

The case was remitted for a rehearing.

Termination of parental responsibility

***A v D (Parental Responsibility)* [2013] EWHC 2963 (Fam)**
This case concerned the mother's application for a residence order in respect of A, a boy aged 4 years, an order granting her permission to change the child's forename and surname and an order terminating the father's parental responsibility.

The father had a history of extensive violence against the mother, which A had witnessed.

The father did not attend the hearing and was serving a term of imprisonment for GBH against the mother.

The test in respect of a change of name was confirmed as that set out in *Re W, Re A, Re B (Change of Name)* [1999] 2 FLR 930. The judge found that in this instance a change of name would reduce the chance of the father ascertaining the child's whereabouts; although the 'biographical integrity' of the child should be respected where possible. Accordingly, the judge made an order.

In respect of the termination of parental responsibility Wood J identified the two relevant authorities: *Re P (terminating parental responsibility)* [1995] 3 FCR 753 and ***CW v SG* [2013] EWHC 854 (Fam)** and crucially at [59] of that judgment:

'As in *Re P*, I find that if the father did not have parental responsibility it is inconceivable it would now be granted to him, and that this is factor I should take into account when considering the application to terminate his parental responsibility. Furthermore, like Singer J in Re P, I find that in this case there is no element of the bundle of responsibilities that make up parental responsibility which this father could, in present or

foreseeable circumstances, exercise in a way which would be beneficial for D.'

Wood J found that to leave the father as a joint holder of parental responsibility would leave the mother in an intolerable situation and might lead to instability. Furthermore, the father had failed to express any interest in A. Accordingly, to prevent any further insecurity to the child's placement the judge terminated the father's parental responsibility.

In respect of the making of a residence order, given there was nowhere else for A to live and applying the no order principle, there did not appear to be a necessity for an order. However, the court did make an order for the following reasons: (i) it would recognise the reality of the past, present and future care arrangements; and (ii) it would give the mother a sense of security as to the court's approval of arrangements.

Application for a child to receive the MMR vaccination

***F v F* [2013] EWHC 2683 (Fam)**
The parents had previously agreed that their daughter, now aged 15, should not receive the MMR booster and their second child, aged 11, should not be immunised at all.

The parties subsequently separated and the father sought the mother's agreement for both children to be immunised. The mother did not agree.
A Cafcass report was filed which stated that the children did not want to be vaccinated because they were concerned about the possible side effects.

The court considered the case of *Re C (welfare of children: immunisation)* [2003] 2 FLR 1095, which confirmed that the paramount consideration was the child's welfare but that each case was fact specific and the benefits and risks of vaccination would need to be considered.

Theis J made a declaration that it was in the children's best interest to receive the vaccination for the following reasons:

(i) The children's wishes and feelings had been influenced by their mother's views. The children should not be treated differently in this instance as both children lacked the ability to consider the advantages and disadvantages of the vaccination. Their wishes and feelings were not determinative and the benefit of the vaccination on their health outweighed their wishes.

(ii) The medical advice was for the children to be vaccinated, although there were potential side effects.

(iii) The children had a secure and strong relationship with both parents which would ensure that the consequence of the decision would be managed properly.

Domestic violence and contact

***Re M (Children)* EWCA Civ 1147**
This was an appeal against an order refusing the father contact with his three sons, aged 7, 5 and 3.

The circumstances of this case were that the father had inflicted significant violence on the mother, which was witnessed by two of the children. The father also had convictions for assault. The father had not seen the boys for 18 months and had attended a number of courses aimed at intervention.

The judge was left in 'no doubt whatsoever of the mother's terror of the father' and had found that the father was 'minimising his behaviour, attributing blame to the victim of his violence ….. He failed to satisfy me that he had learned anything from his engagement with the assessments and therapy save what he needed to say in order to attain his goal.'

The Court of Appeal found that the judge's assessment of the parent's character was unassailable on appeal; however, the draconian nature of the order was not.

In applying *Re L (Contact: Domestic Violence)* [2000] 2 FLR 334, the court said that domestic violence was not a bar to direct contact but must be assessed in the circumstances as a whole. Moreover, the court must address the parents' and child's article 8 rights.

The judge had diverted her focus from consideration of supervised contact. She had been adversely influenced against direct contact by reason of her perception that the father would press for unsupervised contact. The judge fell into error by failing to address adequately 'why the children's safety and the management of the mother's anxieties could not be achieved under any circumstances of supervision.'

Macur LJ held:

"24. However, there is no question but that an order that there should be no contact between a child and his non residential parent is draconian. In this case, the order dated 17 May 2013 can only be lawful within the meaning of Art 8(2) of the Convention if the order for no direct contact is necessary in a democratic society for the protection of the right of the mother, and consequently the minor children in her care, to grow up free from harm. In order to reach that conclusion the court must consider and discard all reasonable and available avenues which may otherwise promote the boys rights to respect for family life, including, if in the interests of promoting their welfare during minority, contact with their discredited father."

The appeal was allowed, the order set aside and matter remitted for rehearing.

Evidence from non-English speaking witnesses

***NN v ZZ & Ors* [2013] EWHC 2261 (Fam)**
Jackson J provided the following guidance on obtaining evidence from non-English speaking witnesses:

(1) An affidavit or statement by a non-English-speaking witness must be prepared in the witness's own language before being translated into English. This is implicit from Practice Direction 22A of the Family Procedure Rules 2010, paragraph 8.2 of which states that:

Where the affidavit/statement is in a foreign language –

(a) the party wishing to rely on it must –

(i) have it translated; and

(ii) must file the foreign language affidavit/statement with the court; and

(b) the translator must sign the translation to certify that it is accurate.

(2) There must be clarity about the process by which a statement has been created. In all cases, the statement should contain an explanation of the process by which it has been taken: for example, face-to-face, over the telephone, by Skype or based on a document written in the witness's own language.

(3) If a solicitor has been instructed by the litigant, s/he should be fully involved in the process and should not subcontract it to the client.

(4) If presented with a statement in English from a witness who cannot read or speak English, the solicitor should question its provenance and not simply use the document as a proof of evidence.

(5) The witness should be spoken to wherever possible, using an interpreter, and a draft statement should be prepared in the native language for them to read and sign. If the solicitor is fluent in the foreign language then it is permissible for him/her to act in the role of the interpreter. However, this must be made clear either within the body of the statement or in a separate affidavit.

(6) A litigant in person should where possible use a certified interpreter when preparing a witness statement.

(7) If the witness cannot read or write in their own native language, the interpreter must carefully read the statement to the witness in his/her own language and set this out in the translator's jurat or affidavit, using the words provided by Annexes 1 or 2 to the Practice Direction.

(8) Once the statement has been completed and signed in the native language, it should be translated by a certified translator who should then either sign a jurat confirming the translation or provide a short affidavit confirming that s/he has faithfully translated the statement.

(9) If a witness is to give live evidence either in person or by video-link, a copy of the original statement in the witness's own language and the English translation should be provided to them well in advance of the hearing.

(10) If a statement has been obtained and prepared abroad in compliance with the relevant country's laws, a certified translation of that statement must be filed together with the original document.

Guidance on the court's approach to high conflict cases

***Re A (A Child)* [2013] EWCA Civ 1104**

This case concerned a girl, M, aged 14 years, who was the subject of a long running high conflict case.

The father sought to appeal the final order made for no direct contact and a s. 91(14) order until October 2013.

Litigation commenced in 2001, and since 2006 there had been 82 court orders, seven judges and more than ten Cafcass officers. During the 12 years of litigation the mother had alleged that the father had sexually abused M. Following a five day fact finding hearing no findings were made on the allegations. The mother's health also deteriorated significantly over this time, having been diagnosed with Crohn's disease. The father had been granted residence for a short period whilst the mother's health was poor. M then returned to her mother, expressing a wish to do so and contact did not take place thereafter.

Dr Weir was instructed to provide a report and concluded that the mother could not be trusted to support contact. He strongly recommended that a transfer of residence should be considered. However, by the time of the hearing some 1 ½ year later, his view had been diluted not least because of the extremely limited contact there had been. In light of the duration of the case the judge considered that M's interest lay in making an order for no contact with s. 91(14) orders in respect of both parents, whilst accepting that the family justice system had failed the child and parties.

The crux of the father's appeal was that the decision made was incompatible with his article 8 rights and the rights of the child. In considering ***Re B (A Child)* [2013] UKSC 33** McFarlane LJ clarified that the trial judge's task must be to exercise his discretion in a way which was not incompatible with the Article 8 rights that are engaged. McFarlane LJ held:

> "65. Standing back, therefore, and looking at the process from October 2011 as part of the proceedings as a whole, I can only conclude, as I have stated, that collectively the combined interventions of the court over this very extended period have, from a procedural perspective, failed to afford due consideration to the Art 8 rights of M and her father to a timely and effective process in circumstances where there is no overt justification for refusing contact other than the intractable and unjustified hostility of the mother. The failure that I have identified is of such a degree as to amount to an unjustified violation of M's and the father's right to respect for family life under ECHR, Art 8."

It was on this basis that the order was set aside and the father's application for residence / contact would be reheard before a judge of the Family Division.

McFarlane LJ also provided the following guidance on high conflict cases:

- Implacability and hostility must be identified and addressed at the earliest opportunity.
- There is a strong need for judicial continuity, judicial case management including effective timetabling, a judicially set strategy for the case and consistency of the judicial approach.
- There should be involved a multi-disciplinary teams to assist in moving cases such as these forward.

18/12/13

CASES

B v IB [2013] EWHC 3755 (Fam)

The husband was born in 1938 and the wife was born in 1949. They married in 1984. The husband had been married previously and there were two daughters and a son from his first marriage. The husband owned the majority of shares in a company, which was sold in 2000 and the bulk of the sale price was paid in 2002. The minority shareholdings of the wife of 10% and the husband's son (IB) of 5% were transferred back to the husband before sale.

In 2002, the husband transferred £1.2M to IB, on IB ceasing to be employed by the company. In April 2005 he transferred £30,030 to IB and in September 2006 he transferred a further £1.75M to him. It was IB's case that all payments reflected his shareholding or were a gift to him to reflect his part in the company's success. The wife did not accept IB's contention. The wife pointed out that IB had received 65% of the net proceeds and queried why payments were made in 2006, four years after the sale moneys were received.

In 2009, the wife filed a petition for divorce and in October 2009 she applied to set aside the money transfers to IB between 2002 and 2006 under s.37 Matrimonial Causes Act 1973 so as to bring back those moneys into the assets available within the financial remedy proceedings. She obtained an ex-parte freezing order in respect of the husband's assets. The order stated on its face that it was made both pursuant to s.37 MCA 1973 and the court's inherent jurisdiction.

IB was joined as second Respondent in June 2010 but by July 2010 the Husband was very ill and unable to give instructions. Medical opinion was that he lacked capacity to litigate. There was no evidence that he had been incapacitated as at the date of the transfer(s). He became represented by the Official Solicitor.

In March 2011 District Judge Aitken sitting at the PRFD set aside the transfer from H to IB which had been made on 21 September 2006 of £1.75M. She dismissed the applications to set aside the transfer of £1.2M in 2002 and £30,030 in April 2005. IB appealed. The wife did not cross-appeal. In September 2011, Mostyn J granted permission to appeal and set aside the order because the District Judge had specifically disbelieved IB on a point which arose in cross-examination on behalf of the husband about which the judge had asked questions, but upon which IB ought to have been challenged, and in respect of which the wife ought to have been recalled. There were other evidential points and it was held that the district judge had not given a clear explanation as to why she had exercised the discretion to set aside the transaction. A retrial was ordered.

In October 2011 the wife's solicitors served notice that as well as pursuing the s.37 set aside remedy that also she intended to apply for an order under s.423 Insolvency Act 1986 (IA 1986), restoring the financial position of the husband to that which would have existed had he not made the transfers to IB of £30,030 in 2005 and £1,750,000 in 2006 and for an order waiving compliance with any other procedural requirements that might otherwise exist in respect of the making of the application under s.423 IA 1986.

The wife's solicitors argued that although the two provisions are similar in effect, s.423 does not require proof that the transaction about which complaint is made had been effected with the intention of defeating a claim under the MCA 1973, which she was otherwise required to establish since the two transfers had been made more than three years before the date of her application.

The two applications came before Parker J for hearing on 25 to 28 June 2012. The hearing outran its allotted span and was adjourned. The husband died on the night of 10 July 2012.

The wife's legal team wanted to consider the legal consequences and their client's position and a hearing was not reconvened until April 2013. The parties now agreed that the right to pursue an application to judgment does not extend past joint lives and that the s.37 jurisdiction had come to an end.

The husband's will, made in 2010, replacing an earlier will and made shortly after the wife had presented her petition, named IB as executor together with another individual. His estate was left on trust for his surviving children. The wife was to receive nothing under the will. The wife also intended to commence proceedings under the Inheritance Provision for Family and Dependants Act 1975 ("I(PFD)A 1975").

The wife owned half of the former family home. The husband's remaining estate is about £2M. The wife sought to set aside the transaction so as to bring back the sum of £1.75M into the estate and sought to have the s.423 route available to her as well as the statutory route under s.10 I (PFD)A 1975. The issue for Parker J to determine was whether the application made by the wife under s.423 Insolvency Act 1986 should be dismissed or not.

After consideration of the law and the relevant case law and in particular the interrelationship between s.423 IA 1986 and s.10 I(PFD)A 1975, Parker J held that it was not impossible to restore the position, at least in law, as to ownership, to what it was at the date of the transaction, that she did not accept that s.423 only applies to cases where the estate is insolvent and that the s.423 test is wider than the s.10 test and that the remedy was therefore different. The judge held that applications were not indistinguishable. In her judgment, Parker J held that s.423 provides an additional remedy which may be of utility in the case, that an application can be issued in its own right pending the making of a claim, and that it did not require formal insolvency: the husband or his estate may be characterised as the debtor and the wife (and indeed the co-beneficiaries) as victims of the transaction. It was held that the court had jurisdiction and the merits of the applications will be tried in due course. On the issue of costs, the judge held while there was a possibility that the case may settle that to decide on costs now would not serve the overriding objective.

Case summary by **Richard Tambling**, barrister, **1 Garden Court**

In the Matter of KL (A Child) [2013] UKSC 75

The father (F) of K was a US citizen in the US Air Force. The mother (M) had indefinite leave to remain in the UK. K, aged 7, was born in Texas and was a US citizen.

The parents married in 2005 in Texas. They divorced in March 2008 and US court consent orders provided that M and K would continue to occupy the former matrimonial home in Texas, for the duration of F's tour of Afghanistan. However, in July 2008 M took K to London. In Autumn 2008 M applied for indefinite leave to remain for K without notice to F and resisted the agreed contact arrangements.

At a welfare hearing in March 2010, the Texan court decided that it was in K's best interests to return to live with F in the US and to have contact with M in the UK. Therefore, K moved back to the US. M applied to the US Federal District Court for an order under the Hague Convention that K had been habitually resident in the UK in March 2010 and that F was wrongfully retaining him in the US. In a decision described by Thorpe LJ as "bizarre in the extreme", M was successful. K returned to the UK in August 2011. Instead, F appealed to the US Court of Appeals, which overturned the District Court in July 2012, holding that K had been habitually resident in the US in March 2010. M was ordered to return K to the US on 29 August 2012, but she did not comply.

F subsequently issued proceedings under the Hague Convention in the UK. His applications were dismissed at first instance: [2013] EWHC 49 (Fam) and by the Court of Appeal: [2013] EWCA Civ 865. The Supreme Court granted permission to appeal on 2 grounds: (1) that M's retention of K after 29 August 2012 was wrongful and that K was habitually resident in the US; or (2) that the UK court should have exercised its inherent jurisdiction to return K to the US, even if not required to do so under the convention.

Lady Hale delivered the sole judgment. It was held that K was habitually resident in the UK, but that he should be returned under the Court's inherent jurisdiction.

Hague Convention
The tie-breaker was K's habitual residence at the point when M had disobeyed the Texan return order. Lady Hale applied the uniform understanding of the concept of habitual residence extracted from the recent decision of the Supreme Court in A v A [2013] UKSC 60 and consistent with the decision of the CJEU in Mercredi v Chaffe [2012] Fam 22.

Parental intention played a part in establishing or changing the habitual residence of a child, but as one of many factors relevant to whether there was a sufficient degree of stability to amount to a change of habitual residence. For F to argue that, where a child was permitted to live in a foreign country pursuant to an order that was under appeal, he could not acquire habitual residence was seeking to place a legal gloss on the factual concept.

In this case, M had come home; neither she nor K had perceived the return to the UK as temporary, irrespective of the pending appeal. K had become integrated into a social and family environment since August 2011 and the judge had been entitled to find him habitually resident here.

Inherent jurisdiction
Under the Family Law Act 1986 the court could exercise its inherent jurisdiction by virtue of K's habitual residence or presence in the UK. It was long established that the existence of an order made by a competent foreign court was a relevant factor. The correct question for the judge was whether it was in K's best interests to remain in the UK, to determine the parental dispute here, or to return to Texas, to determine the dispute there. Lady Hale considered the benefits of each. The crucial factor was that K was a Texan child being denied a proper opportunity to develop a relationship with F and his birth country. There was nothing to suggest K would suffer harm through a return to Texas, in light of the protective undertakings offered by F. K was to be returned to the US.

Summary by **Thomas Dance**, barrister, **1 King's Bench Walk**

EG v JG [2013] EW Misc 21 (CC)

This case concerned an application for a specific issue order in respect of the choice of secondary schools for the four youngest children of Jewish parents. The issue before the court was which parent should be responsible for making the application for secondary schools and deciding the choice of schools. In 2012, the Court of Appeal had rejected the father's application to appeal against a shared residence order and an order that the children attend schools proposed by their mother: See *Re G* [2012] EWCA Civ 1233.

The mother and father come from families of the Chassidic (Hasidic) or Chareidi community of ultra-orthodox Jews. The mother had petitioned for divorce. A major reason for the parties' marriage breakdown was that the mother no longer wished to follow the strict tenets of that community. She remains an orthodox Jew but wished for a way of living for herself and the children which allowed greater diversity of educational, personal and economic opportunity than would be likely within the Chareidi community. The mother's own parents and siblings are no longer in contact with her.

Following the proceedings in 2012, the mother took the view that she was responsible for the future choice of schools for the children. The father disagreed with her choices, but both parents were proposing that the children should attend state funded schools.

The matter was heard by HHJ Million. The judge was not in a position to decide which particular school ZG or the other children should attend as the parents were still at the selection stage. Therefore, the court could only decide which schools should be on the application form, and in which order.
It was the mother's strong wish that the children all have a more "liberal" co-educational schooling, and go to the same Jewish secondary school, if possible. The father viewed his choice as a reasonable compromise, where children from both "modern orthodox" and "orthodox" families attend. The father used those adjectives in preference to the Judge's use of "orthodox" and "ultra-orthodox" respectively.

There was some urgency as the eldest child ZG, is due to start secondary school in September 2014. ZG had told his father that he wanted to attend the school of his father's choice.

The mother sought an immediate decision about the issue. The father argued that the decision should be delayed until a report from CAFCASS or an independent social worker was available about the elder child's wishes and feelings. The representatives for both parents accepted that there was no significant difference in the educational standards between the mother's first choice and the father's first choice for ZG.

Taking into account ZG's wishes, the judge decided that he should not be asked directly about the choices available.

Finding that it was in the best interests of the children to go to schools of their mother's choice, and to make a final decision in respect of all the children, the Judge concluded:

> "...a delay to obtain a further report about the children's wishes and feelings carries practical risks of damaging the choices for ZG in the schools application process (as already described). Even if it did not (and it does not in respect of the younger 3 children) it would be merely to repeat the exercise carried out last year. It would draw the children again into the conflicts between the parents. In any event ZG and the younger children are not in a position to be able to weigh up and decide the complex factors involved in their long-term welfare interests. These are decisions for adults and, where the adults do not agree, for the court to decide."

HHJ Million relied on the report prepared by CAFCASS for the proceedings in 2012.

Finally, the judge was critical of the father for spending a considerable amount of money on litigation whilst making minimal contribution towards the maintenance of the parties' five children, which he found was a "grossly disproportionate misdirection of the father's available financial resources". Whilst HHJ Million did not make an order for costs, he warned that any further similar application would carry the risk of the court intervening through such an order.

Summary by **Katy Chokowry**, barrister, **1 King's Bench Walk**.

Re AA [2012] EWHC 4378 (COP)

An NHS Trust applied to the Court of Protection for a declaration that it was in AA's best interests for her baby to be delivered by means of planned/elective caesarean section, under sedation by general anaesthetic if deemed appropriate, and with the use of reasonable restraint if deemed necessary and appropriate. The NHS Trust proposed to carry out the procedure the following day.

AA was 39 weeks pregnant and suffering from a significant mental disorder which was psychotic in nature. She was detained under s.3 Mental Health Act 1983 and was represented by the Official Solicitor. On behalf of AA the Official Solicitor did not oppose the application and agreed that the proposed delivery by caesarean section was in the best interests of the patient herself who risked uterine rupture with a natural vaginal birth (the risk was expressed as 1%).

The application was supported with evidence from a consultant obstetrician and the patient's own treating psychiatrist.

Mostyn J determined that the case fell squarely within the guidelines given in *Re MB (Medical Treatment)* [1997] 2 FLR 426, CA. Whilst the court was not concerned with the interests of the unborn child, the risk of harm following a ruptured womb applied both to the mother and the unborn child. The judge also held that it would be in the mother's best interests that her child should be born alive and healthy and that such risks attendant should be avoided. In determining what is in the mother's best interests the court must have regard to the principle of 'least restriction' but that principle does not seek to define the expression 'best interests'.

The judge therefore made a declaration that AA lacked capacity in relation to this decision and that it was in her best interests for her baby to be delivered by caesarean section, with the use of reasonable restraint in order to achieve that operation safely and successfully.

Mostyn J offered advice to the local authority in terms that it would be heavy handed for it to invite the police to remove the baby from the mother using powers under s.46 Children Act 1989. Instead he proposed that it should apply for an interim care order at a hearing where the mother could be represented by the Official Solicitor. The resulting care proceedings took place at Chelmsford County Court and concluded in the making of a care and placement order. The judgement of HHJ Newton is reported as ***Re P (A Child)***. Mostyn J's judgment is dated 23 August 2012. In light of recent public interest in the case, he has now authorised its release together with a prefatory note (dated 4th December 2013), the verbatim transcript of the proceedings and the order made.

Summary by George Gordan, barrister, **1 King's Bench Walk**

RGB v Cwm Taf Health Board & Ors [2013] EWHC B23 (COP)

This was an application to the Court of Protection by the husband (Mr B) of an elderly woman (Mrs B) with dementia. He sought a series of declarations that the Health Board had acted unlawfully by preventing his wife from living with him and having contact with him.

The couple had ceased to live together in November 2010 when Mrs B left the family home, first to live with her son and later with her daughter from a previous marriage. The police were involved as Mr B alleged that she had been kidnapped by her children but two social workers who interviewed her concluded that she had capacity to decide where she lived. A consultant psychiatrist formed the same view when he assessed Mrs B for the purposes of an earlier application to the Court of Protection in February 2011.

Later in 2011 Mrs B issued divorce proceedings. She subsequently completed an Advance Statement setting out that she did not wish her husband to be informed if she became unwell and that she wished to live with her daughter and not to return to the home she shared with Mr B.

Mrs B was admitted to hospital in June 2012. Mr B visited her in August 2012. However, subsequently, he was prevented from visiting in accordance with the Advance Statement. In March 2013, Mr B instigated the application that led to this judgment. By this time the divorce proceedings had been stayed as Mrs B now lacked litigation capacity.

Moor J felt it was necessary in the circumstances to make a series of findings of fact as to Mrs B's wishes and whether she had capacity at the time she indicated those wishes and feelings. He referred to the evidence of numerous witnesses that Mrs B did not wish to live with her husband and did wish to divorce him, evidence which he described as "overwhelming". He therefore found that these wishes were genuine and were not the result of the undue influence of Mrs B's children as alleged by Mr B. She had held these views consistently and over a period of time. He found that at all relevant times, Mrs B had the capacity to make these decisions.

As Mrs B now lacked litigation capacity, the Court of Protection was able to rule on matters relating to her welfare. On the basis of the evidence, Moor J rejected Mr B's application for an order that he be permitted to have contact with Mrs B. This was in accordance with her Advance Statement and the evidence of a psychiatrist that there would be no benefit to her from such contact and it might be distressing for her.

Moor J concludes that the Health Board acted entirely correctly in refusing to let Mr B see Mrs B when she lost capacity. He therefore refused the application for the declarations sought by Mr B. His claims for damages, access to Mrs B and information about her well-being, and to be appointed as her welfare deputy were also refused.

Summary by **Sally Gore**, barrister, **14 Gray's Inn Square**

YLA v PM & MZ [2013] EWHC 3622 (Fam)

This judgment was made in Court of Protection proceedings regarding a vulnerable adult, PM, who had moderate to severe learning difficulties. PM was Islamically married to MZ. Prior to a civil ceremony the local authority registered a caveat against the marriage. The Registrar was satisfied as to capacity and the ceremony proceedings. At the ceremony PM was slapped by her mother to force her to smile for photographs.

PM became pregnant. Shortly before the birth PM and MZ left PM's family home alleging abuse by PM's family. Following birth of their child, B, he was placed in a supportive foster placement with his parents. PM and MZ did not share a room in the placement. PM was unable to care for B even for short periods. MZ's attitude to PM caused concern in the placement.

Parker J first considered the question of capacity. In relation to the capacity to consent to sexual relations she found that, despite PM understanding the mechanics of sex, she lacked the capacity to understand the health risks from such relations and the capacity to say 'no'. Parker J determined that she lacked capacity to consent to sexual relationship. Similarly while PM understood some basics concepts of marriage she did not have the capacity to consent to marriage.

Parker J concluded by considering the question of capacity and forced marriage and guidance given to Registrars. She said that an incapacitous marriage is a forced marriage: if a person cannot consent he or she cannot give free and full consent. Protection could be effected by a forced marriage protection order. In future a court may need to decide whether such an order could be made against the Registrar General.

Summary by **Ayeesha Bhutta**, barrister, **Field Court Chambers**

Asaad v Kurter [2013] EWHC 3852 (Fam)

The petitioner was Syrian, the respondent Turkish; they underwent a ceremony in Syria in the Syriac Orthodox Church. Although the petitioner was able to produce a "marriage certificate" document, the marriage was not registered with the Syrian authorities, nor was permission obtained - as was required - as the respondent was not a Syrian national.

Following the ceremony, they travelled to Turkey, from where the petitioner applied for (and was granted) a spousal visa to join the respondent in the UK. They separated after a two year period, during which they had lived and worked together.

Upon the issue of divorce proceeding, the respondent asserted that the court had no jurisdiction and sought dismissal of the petition on the basis that there had never been a marriage, the ceremony having been merely a "blessing".

The issues for Mr Justice Moylan to determine were therefore:

- The nature of the ceremony
- The effect of the ceremony, in the light of the its non-registration, on permission and registration
- The remedies, if any, available to the petitioner under English law.

Although the petitioner initially sought a decree of divorce (asserting that there had been a valid marriage) she subsequently sought either (a) a decree of divorce to be predicated on a declaration that the marriage was valid by presumption, relying on the ceremony and period of cohabitation, or, (b) a decree of nullity on the basis that although the failure to comply with the formalities of Syrian law rendered the marriage not valid, it was sufficient to entitle her to a nullity decree.

The court heard oral evidence from both parties and Archbishop Dawod of the Syriac church, who knew the couple and had not only provided the petitioner with a religious divorce but had done the same for the respondent in respect of a previous marriage. The court had sight of various photographs, videos and documents provided by the petitioner in respect of the ceremony and subsequent events.

The court also had written expert evidence confirming that, in the absence of the necessary registration/permission required, the marriage would not be valid under Syrian law.

Unfortunately, the expert had erroneously conflated concepts from Syrian and English law (failing to take into account recent UK case law) and (rather than recognising that the fact that a legal marriage has not been effected does not necessarily make it a "non marriage") asserted that because the marriage was not legal under Syrian law it was not legal under UK law and was therefore a "non marriage".

In response to further questions, confirmation was provided that Syrian law did recognise the concept of a " non marriage" but not that of a "void/voidable marriage". Accordingly, either the marriage would have to have followed due process and be valid or, if not, under Syrian law, it would be a "non marriage".

In respect of the petitioner's submission that, in the (conceded) absence of compliance with the formalities, reliance should be placed on the presumption of marriage, Mr Justice Moylan was of the view that the clear evidence of non compliance was sufficient to rebut any such presumption.

In respect of her alternative case, the petitioner argued that the court should follow English law (in particular Burns v Burns [2008] and grant a nullity decree in respect of an invalid marriage.

The respondent submitted that the ceremony was merely religious and did not create even a void marriage.

In reaching his decision, Moylan J dealt first with the nature of the ceremony. He preferred the evidence of the petitioner and Archbishop, opining that he could find no reason why the latter would have - as alleged by the respondent - forged documentation. He concluded that the ceremony was intended by both parties to be a marriage ceremony.

He went on to consider the effect upon the ceremony under Syrian law of the failure to register or seek permission. He reiterated his concerns about the conflation of English and Syrian law and noted the additional evidence from the expert (that it was a "non approved marriage" and that Syrian law lacked the concept of void/voidable and non marriage). Although he considered that he too might be seeking to interpret this by reference to English law, in his view the effect of the evidence was simply that, as no legal marriage was effected, there was no marriage.

He then turned to the third element, namely whether or not the petitioner was entitled to a decree of nullity or if there was no remedy available in English law. Having conducted a comprehensive survey of the relevant statues and case law, he concluded that:

> (a) whether the defect makes the marriage valid or invalid is a matter to be determined by the applicable law, being in the case of the formalities of marriage the law of the place where the marriage was celebrated;
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> (b) the English court must determine the effect of the foreign law by reference to English law concepts; if the applicable foreign law determines the effect of the defect by reference to concepts which clearly (or sufficiently) equate to the same concepts in English law then the English court is likely to apply those concepts; if the foreign law does not, then it is for the English court to decide which English law concept applies; and
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> (c)in any event, it is for the English court to decide what remedy under English law, if any, is available for the reasons set out in *Burns v Burns* para. 49.

He considered that the effect of the expert evidence was that, as a legal marriage had not been effected, there was no marriage. Syrian law had no separate concepts of a marriage being void or voidable or a non-marriage; the marriage in this case was clearly not valid and had been described as being either a "non-approved" marriage or a "non-marriage". It would be simplistic merely to take the words "non-marriage" or even "non-existent" marriage and apply those words in an English law sense when Syrian law did not have the same terms.

It was clear that the ceremony was not, in English law terms, a non-marriage. It was a ceremony which was capable of conferring the status of husband and wife, had the parties subsequently complied with the necessary formalities. It was not "so deficient" that it could be described in English law terms as a "non-marriage".

Moylan J found that it was a marriage which was not valid as a result of a failure to comply with the required formalities and as such was to be properly described in English law terms as a void marriage. Accordingly, the Petitioner was entitled to a decree of nullity.

Summary by **Katy Rensten**, barrister, **Coram Chambers**

AH v PH [2013] EWHC 3873 (Fam)

The wife was aged 30 and the husband aged 33. The parties are from a Scandinavian country. The wife moved to England on the husband's invitation, prior to marriage. The marriage lasted for four years with approximately one and a half years' cohabitation beforehand. The parties had two children, aged 5 and 4. Following the breakdown of the marriage the wife would have preferred to return to Scandinavia but decided to remain in this jurisdiction with the children in the long term.

All the assets were 'non-matrimonial' as they were inherited by the husband prior to the marriage. He was the primary beneficiary of various Jersey based settlements with a combined value of £76 million. Although the assets were not liquid, the husband accepted that he could meet any reasonable order of the court within 6 to 12 months. In permitting the husband to describe his means in this way the judge stated [para 30]:

> "…in any case that does not involve the principle of sharing the marital assets and is, instead, one based primarily on the needs of the claimant, it is perfectly proper for a litigant to give a broad outline of his or her overall wealth and then to run the Millionaire's defence."

Moor J held that, subject to the relevance of the marriage settlement, the case was quintessentially one that fell to be

considered on the basis of consideration of the wife's reasonable needs, generously assessed.

The expert evidence in respect of the foreign law applicable in the Scandinavian country in which the marriage settlement was signed suggested that the document would not be upheld in the country of origin because it included an advanced agreement for the distribution of assets, which was not permitted. Although not vital to the validity of such an agreement, the marriage settlement had not been judicially registered in the country of origin.

The judge concluded that where a party was not fully aware of the implications of a marriage settlement, because he or she lacked all the material information, it would depend upon the circumstances of the case as to how much weight the agreement should nevertheless be afforded.

The marriage settlement provided that the wife should receive 10,000,000 Kroner (which was worth £850,000 at the time of the agreement) in order to purchase a property in Scandinavia. The wife accepted that this provision was more generous than that which she would otherwise have received under the law of the country in which the agreement was signed.

Moor J decided that, in most respects, the marriage settlement should be disregarded as it did not provide for English housing for the wife and it did not prevent a claim for maintenance (albeit the definition of maintenance in the country where the agreement was signed was much more restrictive than in this jurisdiction). However, the agreement was a relevant factor as "one of the circumstances of the case" in so far as it protected the husband's inherited wealth. Therefore the judge determined that the husband's inherited wealth should be invaded to meet the wife's housing needs and her need for capitalised maintenance only. He accepted that in the absence of the marriage settlement he would have reached the same conclusions by virtue of the short marriage, the age of the parties and the origin of the husband's wealth.

The judge made a capital award to the wife of £7,775,000 on a clean break basis and on the basis that the husband would have a charge on the wife's London property in the amount of £2 million, to be exercisable on Mesher terms, when both the children had completed tertiary education. The figure included capitalised maintenance of £200,000 per annum until the youngest child should finish secondary education (totalling £2,250,000). In determining whether maintenance should be capitalised, the judge rejected any attempt to assess the wife's future prospects of remarriage: *Dixon v Marchant* [2008] 1 FLR 655 applied. The husband was also ordered to pay the children's school fees and a further £20,000 per annum per child (index linked).

Summary by **George Gordon**, barrister, **1 King's Bench Walk**

Re H, R and E (Children) [2013] EWHC 3857 (Fam)

The father applied under the Hague Convention for the summary return of three children to the Netherlands. In opposing the return the mother argued that the father consented to the removal of the children pursuant to Article 13a of the Convention; that subsequent to the removal the father acquiesced to their living in this jurisdiction pursuant to Article 13a; and thirdly that the children would be at grave risk of harm and/or would be placed in an intolerable position if the court were to order their return to the Netherlands pursuant to Article 13b of the Convention.

In a review of the authorities in relation to acquiescence and/or consent the court confirmed that acquiescence is a subjective state of mind, it is a pure question of fact and the burden of proving it is on the abducting parent. The court said that judges should be slow in inferring acquiescence from attempts to reconcile or agree a voluntarily return. Furthermore consent needs to be clear and unequivocal although this can be inferred from the circumstances of the case. *H v H (Abduction: Acquiescence)* [1997] 1 FLR 872; *D v S (Abduction: Acquiescence)* [2008] 2 FLR 293; *K (Abduction: Consent)* [1997] 2 FLR 212; *P-J (Abduction Habitual Residence : Consent)* [2009] 2 FLR 1051; and *TB v JB (Abduction : Grave Risk of Harm)* [2001] 2 FLR 515 approved.

The court held that there was no evidence of anyone speaking directly to the father about the removal. Taken at its highest the maternal family's evidence was that the father would have known about the plan to move to the UK at a time when there were discussions between the families regarding reconciliation. Waiting two months after becoming aware of the removal to try and affect reconciliation was reasonable. The court found nothing in the father's conduct which could amount to acquiescence.

In respect of risk of harm the mother asserted that she had been physically and sexually abused by the father during the relationship. The court found that the mother had lied about the sexual abuse and there was insufficient evidence to support a finding of physical abuse. However the court proceeded on the basis of the mother's case in respect of the physical abuse for the purpose of the judgment. On either party's case there had been no contact between the parents from February and September 2012 when the mother moved to the UK. The father offered undertakings to regulate his behaviour towards the mother and the court was satisfied, based on the mother's ability to call upon the assistance of the Dutch courts and police and the father's undertakings, that there was no grave risk of harm.

Finally in the event the court had been wrong in its conclusion under Article 13b and the question of discretion arose, the court confirmed that it would unhesitatingly conclude it was manifestly in the best interest of the children to return to the Netherlands where they had lived all their lives prior to September 2012. Accordingly it was ordered that the children should be returned to the Netherlands.

Summary by **Georgina Clark**, barrister, **Field Court Chambers**

Muema v Muema [2013] EWHC 3864 (Fam)

The parties had lived together with their two children at the property in question, which they leased from the Local Authority, until June 2009 when the Wife moved out. The Husband was then ordered to leave under an exclusion order in October 2009 (following which the Wife moved back in). There followed, due to rent arrears, a number of possession orders followed by suspensions of these, in the Croydon County Court. In July 2011 the Wife indicated a wish to leave the property and was offered homeless accommodation. Following the Wife vacating the property the Husband then moved back in.

In January 2012 the Wife signed a notice to quit. There was a factual dispute between the Husband, the Wife and the Local Authority, as to whether this was an effective notice to quit. That issue was decided in favour of the Local Authority at a hearing in Croydon County Court on August 2012. In the meantime, in May 2012, there had been a shared residence order made in relation to the parties' children under which the Wife cared for them for slightly more time than the Husband.

The Husband thereafter applied to the High Court for an order under section 37(2)(b) of the Matrimonial Causes Act 1973 in order to set aside a notice to quit the former matrimonial home that had been signed by the Respondent Wife.

Peter Jackson J, hearing the application, noted that the case of *Hammersmith and Fulham London Borough Council v Monk* [1992] 1 AC 478 establishes that a joint tenancy between a landlord and two tenants continues only for so long as all three will it. It was further established in the case of *Newlon Housing v Alsulaimen* [1999] 1 AC 313 that a notice to quit was not a disposition for the purpose of section 37(2)(b) and therefore there was no power to set it aside under that section. The Husband argued that that authority could not survive the coming into force of the Human Rights Act 1998, as it was, in his submission, in contravention of Article 8 of the ECHR.

Peter Jackson J considered that it would be surprising if the Husband's argument were to succeed, given that the Human Rights Act has been in force since 2000 and there was no more recent authority on the point. However, he considered the Husband's argument on its merits, and held, at paragraph 9 of his judgment that:

> (a) The decision in Monk was not in conflict with either Article 8 or Article 1 o the First Protocol of the ECHR. This had recently been decided in the Court of Appeal in *Sims v Dacorum Borough Council* [2013] EWCA (Civ) 12.
>
> (b) The decision in Alsulaimen therefore remained good law and the scope of section 37 should not be extended to encompass notices to quit. Moreover the overall framework of possession proceedings enabled tenants to have their Article 8 rights respected.
>
> (c) Even had the Court had jurisdiction to set aside the notice to quit, it would not have been appropriate to do so in this case. There had only been one tenancy allocated to the family by the Local Authority, and the Local Authority was entitled to have taken this position (hard headed though it may seem). The set aside of the notice to quit would only have been to the disadvantage of the Wife, who cared for the children for a slight majority of their time.

Application dismissed

Summary by **Thomas Dudley**, barrister, **1 Garden Court Family Law Chambers**

A Local Authority v DB & Others [2013] EWHC 4066 (Fam)

In the morning of 21.04.13 a 19 month old child was taken to hospital from his home where it was found that he had suffered massive brain damage. Life support was withdrawn and he died 3 days later. The court was required to determine whether it could be established that the child's brain damage resulted from inflicted trauma and if so, whether a perpetrator could be identified by the court.

Mr Justice Keehan considered the law relating to fact findings:

> 1) The standard of proof is the balance of probabilities, nothing more, nothing less. [*Re B (Care Proceedings: Standard of Proof)* [2008] 2 FLR 141]
>
> 2) The medical expert evidence is but one part of the evidence available to the court at a fact-finding. [*Re U; Re B*]
>
> 3) If it is clear that identification of the perpetrator is not possible, then the judge should reach that conclusion. [*Re D (Care Proceedings: Preliminary Hearing)* [2009] 2 FLR 668]
>
> 4) *Re T (Abuse: Standard of Proof)*[2004] EWCA Civ 558 [2004] 2 FLR 838 at paragraph 33 Butler- Sloss P. said that "Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases has to have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof."
>
> 5) "A person comes within the pool of possible perpetrators where the evidence establishes that there is a 'likelihood or real possibility' that a given person perpetrated the injuries in issue: *North Yorkshire CC v. SA* [2003] 2 FLR 849"
>
> 6) The need for judges to give themselves a Lucas direction when considering witnesses credibility.

Mr Justice Keehan considered the medical evidence. All experts were of the opinion that the child had suffered injuries as a result of a non-accidental injury. He was satisfied on the balance of probabilities that the child was a victim of inflicted head trauma and that this was the only explanation for his injuries.

He considered the Mother's and her partner's evidence and found that both had lied during their evidence and in particular in relation to the child's last evening and morning

at the family's home. He concluded that the only reason they lied was because they knew how the child came to be injured.

The mother and her partner accepted that if the court found that the child had suffered inflicted injuries, they were the only people who could be within the pool of perpetrators. Mr Justice Keehan accordingly found that the injuries were caused by either the mother or her partner but was unable to determine further who the perpetrator was.

Summary by **Laura McMullan**, barrister, **Coram Chambers**

Re A (A Child) [2013] EWHC 3502 (Fam)

This judgment follows a re-trial ordered by the Court of Appeal (neutral citation number [2012] EWCA (Civ) 1905) after the Court had allowed the father's appeal on the principal ground that the first instance judge who conducted a fact-finding hearing had failed to make appropriate provision for the father's learning difficulties and that, as a result, he had not received a fair hearing. The learned judge had found that the child's head injury had been inflicted non-accidentally by the father.

Prior to the re-trial before Baker J, a comprehensive assessment was carried out to identify ways in which the father could be assisted to participate fully through the hearing. As a result, a number of steps were taken, in particular the father had assistance from an intermediary, in addition to his litigation friend. The advocates were advised to ask questions in a fashion that reflected the father's difficulties, and the court allowed regular breaks in the evidence.

Endorsing the submissions made by the advocates in the case, Baker J gave the following guidance when dealing with parents who suffer from a learning disability:

> (a) There is duty on those acting for the parent(s) to identify their client's need for assistance in responding to questions and giving instructions, which must be considered by representatives at the outset of their instruction. Any need for support must be addressed at the earliest opportunity.
>
> (b) When this is known prior to the outset of proceedings, on issuing, local authorities should draw the issue of competence and capacity to the court's attention. In turn, on the day following issue, the court will give directions for the appointment of a litigation friend. The new PLO envisages that in those circumstances the court should give directions for special measures at the case management hearing to take place by day 12 of the proceedings.
>
> (c) When the issue of capacity and competence is not identified at the outset, it should be addressed fully at the case management hearing. At that hearing, those representing the parents should apply for special measures, where the case for such measures can be made out without any expert advice. Alternatively, where expert advice is necessary to identify the existence or extent of the learning difficulties, they should make an application in accordance with Part 25 of the FPR for an expert to carry out an immediate assessment of the capacity and competence of the party.
>
> (d) The legal representatives should normally by the date of the case management hearing identify an agency to assist their client to give evidence through an intermediary or otherwise if the court concludes that such measures are required. If the court is satisfied that an expert report is necessary to determine whether the party lacks capacity or competence and/or as to the extent of any special measures required, it may direct a further case management hearing to take place once the expert has reported so that detailed directions can then be given for the instruction of an intermediary and/or such other assistance as may be necessary.
>
> (e) So far as funding is concerned, there is a distinction between the cost of obtaining a report from an expert as to capacity and competence, and the cost of providing services from an intermediary. The former will, subject to the approval of the legal aid agency,whereas the latter, as a type of interpretation service, will be borne by the Court Service. Those representing the relevant party should address these funding issues at the earliest opportunity. They should obtain prior approval from the legal aid agency for the instruction of the expert and, as soon as possible, give notice to Her Majesty's Courts and Tribunal Service that the services of an intermediary are likely to be required.

Further, Baker J reiterated the well-established principles applicable to findings of fact hearings when dealing with cases of alleged non-accidental injuries, which his Lorsdhip had previously summarised at length in *Re JS* [2012] EWHC 1370 Fam and *Devon County Council v. EB* [2013] EWHC 968 Fam. Applying those principles, the learned Judge found that the child had suffered a minor injury comprising of bruises, subdural and retinal haemorrhages and encephalopathy while in the care of the father. The mother was absolved of any responsibility for the injuries.

Summary by **Katy Chokowry**, barrister, **1 King's Bench Walk**

Re HA [2013] EWHC 3634 (Fam)

This was a final hearing in care proceedings in which the local authority sought a final care order and placement order. The mother had three older children, including two boys who had both died. Although Baker J had concluded at an earlier fact-finding that the mother did not kill the boys, he also found that she had neglected all three older children. HA's older sister was already the subject of a care and placement order. HA was born during the course of the earlier proceedings.

All of the assessments of the mother in respect of HA were negative. This included a detailed 'Capacity to Change' assessment. She suffered from a learning disability and a personality disorder and was living in supported accommodation. Although her life had become more settled since the proceedings in respect of her older children, there was still a concern about her history of relationships with men. It was a central feature of the local authority's case that the mother was extremely vulnerable to abuse by men and that she lacked insight about the risk to which a child in her care would be exposed as a result.

In this judgment, Baker J considers the background to the case in some detail and the applicable law. He draws attention in particular to the recent case-law on the approach to be taken in final hearings of this nature, in particular *Re B* [2013] UKSC 33, *Re B-S* [2013] EWCA Civ 1146 and *Re W* [2013] EWCA Civ 1227. This judgment demonstrates the application of these decisions and is structured in such a way as to show that the judge had applied the 'balance sheet' approach and weighed up the pros and cons of the two alternative placements (adoption or a return to the mother's care).

Having considered the impact of these decisions, he then considers in detail the competing arguments by the mother on the one hand and the local authority on the other in this case. The mother focused on H's right to be brought up within her biological family and the progress she had made since the deaths of her sons and the removal of her older daughter.

The local authority, on the other hand, focused on the 'comprehensive' findings against the mother in the earlier proceedings and on the negative 'Capacity to Change' assessment in these proceedings which was comprehensive and appears to have covered every aspect of the case and the mother's history and lifestyle. The local authority had filed evidence that was compliant with the requirements described in *Re B-S* and the Guardian had carried out a similar exercise of analysing the pros and cons of the alternative placements.

Having observed that the evidence before the court was fully compliant with the requirements set out by the Court of Appeal , Baker J concludes unhesitatingly that having weighed up the evidence as he was required to do, HA's welfare required him to make the care and placement orders.

Summary by **Sally Gore**, barrister, **14 Gray's Inn Square**

J (A Child) [2013] EWCA Civ 1685

The child was K, aged nine. K had been known to protective services since 2009. Care proceedings were initiated in 2010 and resulted in January 2012 in a supervision order. Many of the mother's difficulties arose from her use of alcohol. In August 2012 K was removed again from the mother's care when the mother had a serious fall whilst on a cliff. Prior to this there were concerns about the mother's ability to manage K's behaviour.

In the care proceedings the mother dispensed with her solicitors and was 'assisted' by her then partner. The mother, influenced by her partner, refused to accept the authority of the court and did not comply with orders. This made the management of the case challenging.

The judge at first instance made a final care order after considering evidence from the mother, local authority and Guardian.

The mother appealed. Her partner was no longer involved and the mother accepted that his influence had been misguided and she put her appeal on more constructive grounds than those originally advanced.

The Court of Appeal considered four challenges to the judgment:

Witnesses: the Court did not consider that the mother was prejudiced by the judge's refusal to allow her to cross-examine or call certain witnesses. The decision was proportionate to the issues and evidence already available.

Assessment: the Court did not agree that the judge should have adjourned the proceedings for further assessment. The mother was not seeking such an adjournment at the final hearing. Further the assessments before the court covered the mother's future prognosis. In addition, the allocated social worker had provided the court with up to date assessment and information. The mother's behaviour in February 2012 (when she assaulted a social worker) would not have encouraged the judge. In these circumstances an assessment was not necessary.

Threshold: the mother claimed the judge made insufficient threshold findings. She accepted there were problems in her care but sought to blame the local authority for not providing adequate support. The Court briefly considered the evidence and concluded that the judge was entitled to make the findings he did.

Reasons for making a care order: the first instance judgment was given before *Re B-S* and *Re G*. Whilst it was short the judge adequately explained his reasons for making a care order and there was abundant evidence upon which he could base that decision.

The appeal was therefore dismissed.

Summary by **Ayeesha Bhutta**, barrister, **Field Court Chambers**

Re A (Children) [2013] EWCA 1611

Care proceedings took place in relation to five children aged 3 to 12 due to concerns including drug and alcohol abuse and chaotic parenting. Proceedings commenced in June 2011. By July 2012 the parents accepted that none of the children would return to their care. The final hearing took place in January and February 2013. The judgment had been given in May 2013 and a further hearing took place in August 2013 as to the form of order. The timetable of the case is subject to comment by McFarlane LJ (paragraph 13).

At the final hearing, the parents accepted the care plans for the oldest three boys, namely long term foster care. The issue was the type of placement for the youngest two children, M and K. A child psychologist had been instructed to advise as to the best outcome for M and K and her analysis was that the placement choices were complicated by the significant relationships existing between the five children and in particular, the very close relationship between M and K who could not be separated. M also had behaviour issues and was particularly attached to his older siblings. These factors therefore affected the decision making in relation to K, who would otherwise have been a prime candidate for adoption.

The trial judge took on board a 'shopping list' set out by the child psychologist as to the requirements concerning the

future placement for M and K, and felt that none of the items, including direct sibling contact, should be sacrificed for the purpose of making the children 'more adoptable'. The judge commented in her judgment that she had been concerned as to whether the social worker had disclosed the challenges of caring for the children when setting out to attract possible adopters, either properly or at all. The judge set out a number of requirements to the adoptive placements (see paragraph 14) and also made an order for contact under ACA 2002 s 26.

The local authority appealed the requirements, labelling them 'conditions' and challenged the judge's jurisdiction to have attached them to her order. The s. 26 order and a further direction of the judge reserving the case to herself were both also part of the appeal. The mother opposed the appeal and considered the requirements were just an 'invitation' to the local authority. She cross-appealed on the basis that if the requirements or conditions were removed, the placement orders should be set aside. The guardian supported the mother's position.

No party challenged the local authority's description of the statutory boundary that exists between the role of a court and that of a local authority upon the making of an order authorising placement for adoption under ACA 2002, s 21. McFarlane LJ stated that the statutory structure established in relation to placement for adoption orders is, in this respect, on all fours with that which applies to final care orders under CA 1989, s 31. The House of Lords' decision, and in particular Lord Nichols' description of the inability of a court to impose conditions upon a final care order, in *Re: S; Re: W (Care Order: Care Plan)* [2002] UKHL 10, applies in like manner with respect to an order under ACA 2002, s 21 authorising placement for adoption. There cannot be any ground for drawing a distinction between the two statutory schemes in this respect (paragraph 29). When a placement order is made, the court retains only limited powers arising from the court's jurisdiction to vary or revoke the placement order (ss 23 and 24) or make orders for contact (s 26). Reference was also made to Wilson LJ (as he then was) in *Re A (A Child) (Adoption)* [2007] EWCA Civ 1383. The only opportunity that a family court has to consider the merits of a particular person to adopt a child who is the subject of a placement for adoption order occurs when that person applies for an adoption order (see paragraph 31).

McFarlane LJ felt that the various labels attached by the parties were mere semantics and was 'in no doubt that the judge's order in this case, together with the stipulations in her judgment, fall well beyond the line that divides the role of the court and the role of a local authority under a placement for adoption order' (paragraph 33). Accordingly the local authority had made good its appeal (paragraph 36). In and of itself, the judge's decision to reserve future hearings to herself was not a matter of concern, indeed judicial continuity is encouraged, but given the other aforementioned matters which were beyond her jurisdiction, the decision amounted to the judge overseeing the implementation of the care plan in a manner which was impermissible (paragraph 34).

In relation to the Mother's cross-appeal, McFarlane LJ considered that the trial judge must have contemplated the following question: what was she to do in circumstances where she was satisfied that the welfare of a child required adoption only if an adoptive placement could be found which met a number of specific attributes, but, if those attributes were not present, the child's welfare would not be best served by adoption? Citing *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535 and *Re B (A Child)* [2013] UKSC 33 and considering ACA 2002 s 52(1) in relation to dispensing with parental consent, McFarlane LJ stated that, as already determined, it was not open to the court to seek to limit or exert direct influence over the choice of prospective adopters under a placement for adoption order. On that basis, and on the express findings of the judge, it was simply not open to the court to go on to conclude that the welfare of either M or K required adoption as opposed to something short of adoption; it was not possible to hold that 'nothing else will do'. The test in ACA 2002, s 52(1), insofar as it relates to a placement order, must be read in the light of s 21(1) with the welfare requirement being evaluated on the basis that the placement is to be 'with any prospective adopters who may be chosen by the authority'. The ground for dispensing with parental consent in this case was simply not established and as a result the court did not have jurisdiction to make placement for adoption orders. The Mother's cross-appeal was therefore also allowed and the placement orders were set aside (see paragraphs 37 to 42).

McFarlane LJ noted that the local authority were still able to continue searching for adopters under the final care orders (which would remain) and if prospective adopters were identified, the local authority could make a fresh application under ACA 2002 s 21 and at that time, the court will then be in a position to match the welfare requirements of the children against the attributes of the identified adopters (paragraph 44).

The s.26 order fell away with the setting aside of the placement orders but McFarlane LJ commented that he would not have allowed the appeal on that point as the judge had acted entirely within her jurisdiction in holding that it was necessary to establish that the children's welfare required continuing inter-sibling contact. The order was to be replaced by a contact order in the same terms under CA 1989 s 34.

Summary by **Thomas Dudley**, barrister, **1 Garden Court Family Law Chambers**

Re LRP (A Child) (Care Proceedings - Placement Order) [2013] EWHC 3974 (Fam)

The parents' previous two children had been removed from their care at the ages of 19 months and 6 months respectively, following a three week fact-finding and final hearing concluding in March 2013. At that hearing various findings as to physical and sexual harm as well as inability to protect the children were made. At the time of the hearing the parties had sought to persuade the court that their relationship was simply platonic, a position which was undermined by the subsequent birth of LRP.

Following LRP's birth the mother and child were placed in a specialist mother and baby foster home. However the mother remained there for only 11 days before returning to live with the father, leaving LRP with the foster carer. Thereafter, the mother failed to attend for any arranged contact sessions.

Neither parent attended the substantive hearing but both attended for judgment, presenting as a couple. Pauffley J found that the threshold criteria were established and considered the report of the ISW which indicated a poor prognosis for the parents achieving the requisite change within reasonable timescales. The ISW recommended adoption for LRP as soon as possible. Pauffley J explored the position of the parents, who opposed the orders in principle although not actively, accepting that adoption was the likely outcome. Her Ladyship noted that although the parents seemingly acknowledged the need for change they clearly struggled to understand the findings and judgment and the resulting implications. Both parents sought indirect contact with LRP post-adoption.

In considering the limited options for LRP, Pauffley J rejected long-term foster care as being "an extraordinarily precarious legal framework for any child" and as such that the remaining options were either a return to the parents or placement for adoption. Her Ladyship went on to weigh the advantages and disadvantages of adoption, including that adoption would mean that LRP was not brought up within her natural family. On balance Pauffley J concluded that LRP's interests would best be served by adoption and accordingly dispensed with the parents' consent before making a placement order.

Summary by **Stephen Jarmain**, barrister, **1 Garden Court Family Law Chambers**

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