November 2014

Family Law Week

NEWS

New national standards for family court experts

Changes to the family court rules mean only qualified, experienced and recognised professionals will be able to give evidence as expert witnesses in family proceedings relating to children. This change follows the new laws implemented in April which mean expert evidence will now only be commissioned where a judge considers it necessary to resolve a case justly.

The standards, set out in a new **Practice Direction 25B**, include making sure that the expert:

- has knowledge appropriate to the court case,
- has been active in the area of work or practice and has sufficient experience of the issues relevant to the case,
- is either regulated or accredited to a registered body where this is appropriate,
- has relevant qualifications and has received appropriate training, and
- complies with safeguarding requirements.

The standards were developed in partnership with the **Family Justice Council**. These changes form part of wide-ranging work intended to make sure delays in courts are minimised so that children and young people do not face unnecessary uncertainty.

An article concerning the new standards, written by Louise McCallum of Zenith Chambers will be published by Family Law Week shortly.

Read the full practice direction **here**.

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180 divorce petitions dismissed in 'industrial scale' fraud

In *Rapisarda v Colladon (Irregular Divorces)* [2014] EWFC 35, the President has set aside decrees nisi and absolute and/or dismissed divorce petitions in 180 cases involving 'industrial scale' fraud.

In late February 2012 a member of court staff at Burnley County Court spotted that two divorces, involving Italian parties, used the same address in Maidenhead. Initial enquires of the local county court (Slough) revealed the address to be non-residential. The (then) President of the Family Division was notified and all cases in all courts stayed. A police investigation commenced and concluded on 1 October 2012.

Investigations revealed that between August 2010–February 2012 in 137 county courts 180 petitions had been issued using the same address. Most courts handled only one petition. In each petition the habitual residence of either the applicant or respondent was stated to be England and an affidavit was sworn to that effect. This affidavit used the name of a Reading solicitors firm (that had no knowledge of nor involvement in the proceedings). The divorces were orchestrated by Dr Russo who charged fees of upwards of 3,750 euros.

During the course of the proceedings, which involved the intervention of the Queen's Proctor, attempts were made to notify all parties involved in the petition. Only one case *Rapisarda v Colladon* chose to attempt to challenge the Queen's Proctor's plea to set aside the decree.

The President sets out the law of divorce in England and Wales. He concludes that:

> (1) 'simple' perjury will not make a decree void on the grounds of fraud
>
> (2) perjury that goes only to jurisdiction to grant the decree and not to jurisdiction to entertain the petition will not make a decree void on the grounds of fraud
>
> (3) if the court is 'materially deceived' by perjury, fraud of otherwise as to the jurisdiction to entertain the petition the divorce will be void
>
> (4) a decree may be void if there has been serious procedural irregularity involving fraud (for example concealment of the proceedings).

The President then:

> (1) dismissed the petitions of those divorces upon which no decree had been pronounced and
>
> (2) set aside all decrees absolute and nisi pronounced on the basis of fraud and dismissed the underlying petitions.

In the one contested case the President set aside the decree and dismissed the petition on the basis of fraud.

Munby P concludes by considering measure to prevent such 'industrial scale' fraud reoccurring, including the proposal to consolidate the processing of divorce petitions to far fewer centres.

Francesca Rossi, an Italian solicitor with **Tanda Migliorini** & Associates, an English-based firm acting for British and Italian clients, commented:

> "The judgment is welcome and goes a long way towards ensuring that this abuse of the system is not repeated. There is a (fundamentally wrong) perception in Italy that divorce in the UK is quick and easy in all cases, which has led many couples to participate in schemes such as this to avoid the long process of obtaining a divorce in Italy.
>
> "Under the current legislation, couples in Italy must be legally separated for 3 years before they can apply for a divorce: the term runs from the first hearing before the judge, and any time spent living apart prior to that does not count.
>
> "It may well be time for Italy to review its divorce procedure, but that is no excuse for people attempting to take a dishonest shortcut. Having said that, we have many divorce cases in the firm with Italian clients who legitimately reside in the UK, and I can only hope they will not be subject to suspicious scrutiny because of this case."

For the judgment and summary by Ayeesha Bhutta of Field Court Chambers (from which this news item is partially derived), **please click here**.

Guide to section 17 Children Act support published

The **Public Law Project** has published online **a useful guide** to the support available to migrant families under section 17 of the Children Act 1989.

The purpose of this guide, written by Clare Jennings, is to assist voluntary organisations working with destitute migrant families to identify which families can access support from social services. The guide is intended to help advisers advocate on behalf of their clients and to know when to refer a case to a solicitor. It is not intended to be a substitute for specialist legal advice.

The guide focuses on the support that may be available under s17 of the Children Act 1989 ("CA 1989") to families who are not entitled to mainstream welfare benefits or housing. This guide will primarily be relevant to those who are not lawfully resident in the UK (including those with outstanding immigration applications) which are not asylum claims and those lawfully in the UK but with a condition that they cannot claim welfare benefits or housing assistance.

The **guide is here**.

Court loosens 'nonsensical' six month deadline for surrogacy parents

Natalie Gamble, Solicitor, Natalie Gamble Associates

Until now, intended parents could only apply to become legal parents within six months of the birth of their child. But in *Re X (A Child: Surrogacy: Time limit)* [2014] EWHC 3135, the President of the High Court Family Division, Sir James Mumby, has said that even though the law states that an application must be made before a child is six months old, the court can accept late applications. In powerful words, he has criticised the strictness of the law, saying:

> "Can Parliament really have intended that the gate should be barred forever if the application for a parental order is lodged even one day late? I cannot think so. I assume Parliament intended a sensible result. Given the subject matter, given the consequences for the commissioning parents, never mind those for the child, to construe the law as barring forever an application made just one day late is not, in my judgment, sensible. It is the very antithesis of sensible; it is almost nonsensical."

The case involved a child born through surrogacy in India. The British parents thought they were the legal parents (understandable given that they were registered as such on the Indian birth certificate) but in fact UK law did not recognise their parenthood, instead treating the Indian surrogate and her husband as the parents. This only came to light when the British parents later separated, and the family court handling their divorce realised that they had missed the mandatory deadline for applying for a UK parental order – the court order which reassigns parenthood in surrogacy cases.

Following previous cases, everyone thought that it was too late to ask the court for a parental order. But Elizabeth Isaacs QC, representing the child, argued that the court should be able to make a parental order notwithstanding the hard deadline. Mumby P agreed, stressing how significant a parental order was for the child. He said:

> "[This] goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are… A parental order has, to adopt Theis J's powerful expression, a transformative effect, not just in its effect on the child's legal relationships with the surrogate and commissioning parents but also in relation to the practical and psychological realities of X's identity".

The case is significant for the thousands of other surrogate children living with UK parents who are not their legal parents. Working at the coal face of international surrogacy, we are painfully aware that this is not an isolated case. Many parents do not properly address the legalities after surrogacy abroad (whether innocently or knowingly), and the long term consequences for their children are potentially grave, with looming problems over inheritance, guardianship, nationality, financial maintenance, medical decision-making and many other basic rights. We know there is a big gap between the numbers of parental orders being made (213 in 2012) and the numbers of children being born through surrogacy to UK parents (reportedly 1,000 cases per year in India alone). For children living in the black hole of unresolved legal status, today's ruling is welcome because it means the door may not be closed to a remedy.

The case also demonstrates, yet again, just how out of date the UK's surrogacy laws are. A framework which makes the surogate and her husband the legal parents and then reassigns parenthood after the event might have been good enough when there were only a handful of surrogacy cases, all in the UK. But in the age of widespread UK and international surrogacy, the law is creaking under the strain. Again and again the family court is having to stretch the law to breaking point, and it makes a mockery of the rules.

That is why we are campaigning for a system of pre-birth orders in the UK. We want children born through surrogacy to UK parents to have a secure legal identity within the right family from the moment of their birth. As this case shows, our current law is leaving children vulnerable and disenfranchised, and reform is long overdue.

The **full text of the judgment is here**.

This article was first published on the website of Natalie Gamble Associates. Republished with the firm's kind permission.

TACT concerned at sharp rise in special guardianship orders

TACT, the UK's largest charity specialist provider of fostering and adoption services, has expressed concern at the further sharp rises in the use of special guardianship orders revealed by the **Department for Education's latest statistics** concerning children in care in England.

Those statistics show that the use of SGOs in England has risen 20.2 per cent from 2,770 to 3,330. Between 2010 and 2014 the figure has increased 158 per cent (in 2010 there were 1,290 SGOs).

TACT has been a strong supporter of the use of SGOs which can give children who have been in care the security and stability they need to thrive. Once an SGO is made the child will no longer be looked after. However, this sharp rise might indicate that the use of orders is extending beyond the original intentions.

TACT CEO Andy Elvin said:

> "SGOs were introduced to allow young people stability and permanence. We are, however, worried that this dramatic rise indicates that they are being increasingly used inappropriately. TACT is aware of foster carers being asked to consider special guardianship shortly after a placement is made, or placements being made only on condition that an SGO is part of the care plan. SGOs should only be considered when the time is right for carers and the young person."

The statistics also show an increase of 26 per cent to 5,050 in the number of children adopted (2013: 4,010). However, this growth is almost entirely due to the numbers of one to four year olds adopted (76 per cent of all adoptions). Numbers for children older than this have remained static. This demonstrates that the government's adoption reforms are having an impact, but only for younger children.

Secretary of State for Education, Nicky Morgan, said of the increased adoption rate:

> "Today's figures show a significant and sustained rise in the number of adoptions - an increase of 26% in the last 12 months. This means thousands more of our most vulnerable children are finding the loving and permanent homes they so desperately need.
>
> "We also promised to remove delay and frustration from the process for both children and adopters. Today's figures show that we are delivering on that promise. The system is working more quickly, as well as providing more support to families after an adoption has taken place."

Children are spending less time in care waiting to be adopted, with the average length of time between a child coming into care and being placed with their new family down by 2 months.

TACT is concerned that 38 per cent of care leavers are not in education, training or employment (NEET). This underlines the importance of the recently introduced staying put scheme, allowing care leavers to remain with their former foster carers until they are 21.

Dramatic drop in parents applying for child maintenance help as charges begin

New government figures indicate thousands of parents are choosing not to seek help from the new government Child Maintenance Service because of new charges brought in this summer, warns **Gingerbread**.

The recently published figures show for the first time the impact of the £20 application fee to use the new Child Maintenance Service (CMS), which is gradually replacing the Child Support Agency (CSA).

3,700 fewer parents applied to the new CMS in August than in May this year, after charges were introduced on 30 June, a drop of 38 per cent.

Although it is early days since the application charge was introduced, Gingerbread notes that this is three times the 12 per cent drop in applications to the new service that the Department for Work and Pensions (DWP) had predicted as a result of the £20 fee.

Gingerbread Chief Executive Fiona Weir said:

> "At the moment, only two-fifths of the UK's two million single parent families receive child maintenance payments from their child's other parent. We warned the government that the charge to access the new service could make this situation even worse. These early figures seem to confirm our fears.
>
> "Children in single parent families are already twice as likely to live in poverty as those in couple families. The government should not be putting barriers in the way of the three million children growing up in single parent families getting the support they need and we urge the DWP to drop the charge."

The charity is also calling on the DWP to publish data it is collecting on how many of the parents who, after calling the government Child Maintenance Options helpline, decide not to apply to the CMS, then go on to successfully make their own child maintenance arrangements.

Fiona Weir added:

> "We don't know yet whether the parents put off by the £20 charge are going on to make arrangements on their own, or are just giving up. The government must be transparent about the impact its reforms are having."

All new child maintenance cases are now handled by the CMS instead of the CSA and all CSA cases are gradually being closed, with parents facing fees to reopen their case with the CMS. The government wants to encourage as many separated parents as possible to come to their own private arrangements, but Gingerbread has warned that for many who have experienced relationship breakdown this simply is not realistic.

Converting civil partners will receive backdated marriage certificates

The government has confirmed that any couples who have their civil partnership converted to same-sex marriages will have the marriage certificates backdated to the date of registration of the civil partnership.

This means that couples will not receive a conversion certificate as previously suggested.

Couples in England and Wales will be able to convert their civil partnerships to marriages from 10th December 2014.

For more information, see ***Pink News***.

Children must be protected from parents' problem drinking – Children's Commissioner

Commissioned by the **Office of the Children's Commissioner** from **The Children's Society**, the report, ***"I think you need someone to show you what help there is,": Parental alcohol misuse – uncovering and responding to children's needs at a local level*** looks at ways of estimating the number of children affected by parental alcohol misuse and at the help available to them. The report is based on research with children and young people, alcohol misusing parents and professionals who work with them in three areas of England. It finds that local areas are committed to addressing alcohol misuse but that the focus on the effect on children of parental drinking still needs much work. Some local services for adults with alcohol problems and staff in children's services, may fail to adequately identify children's needs and assist them in getting help or protection. It also finds that local services do not all work together effectively to measure and address the impact on children of parental alcohol misuse.

The study identifies the steps service providers and co-ordinating bodies need to take, including health and social care services, to address children's safety and diminish the impact of problem drinking on children. These include the need to consistently share information across services and to develop joint approaches to commissioning and effective local strategies which involve all agencies. Those working with adults should also receive training to help them talk to parents who misuse alcohol about the impact their drinking may be having on their children and all those working with children and families need training to assist them in recognising the difficulties children may be experiencing so that they can get help.

The report follows the publication of ***Silent Voices*** by the Office of the Children's Commissioner in 2012 which reported that nearly one in three (30%) of children live with at least one parent who is a binge drinker and a fifth (22%) live with a hazardous drinker. It recommends Health and Wellbeing Boards and Local Children's Safeguarding Boards work together closely to identify and support children in families where there is alcohol misuse.

Legal aid cuts are biggest problem for solicitors in Wales

The latest Law Society annual firm survey shows that almost half of law firms in Wales are experiencing problems as a result of changes to the legal aid system. 46 per cent of Welsh law firms found that changes and cuts made by the UK government to the provision of legal aid are a significant problem for their firm.

Concern among solicitors follows the recent introduction of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) in 2012.

Law Society President, Andrew Caplen, said:

> 'It is clear that changes to the legal aid system will have a significant impact in Wales, particularly the areas KPMG indicated the cuts pose a very serious challenge, such as Amman Valley, Llanelli, Pembrokeshire, Colwyn Bay, Denbighshire, Mold and Wrexham.
>
> 'That is why it is imperative that solicitors submit a response to the Ministry of Justice consultation with an evidence-based case about the realities on the ground, the impact of the cuts and the volumes of work on the viability of their firms.'

The **survey is here**.

Updated family mediation guidance available from LAA

Changes are being made to family mediation funding which the Legal Aid Agency expects to come into effect on 3 November 2014 and will affect financially ineligible parties.

Why is this happening?
The changes are because of planned amendments to the **Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013**.

When do these changes apply?
They are expected to apply to all cases where the first mediation session after the Mediation Information and Assessment Meeting (MIAM) takes place on or after 3 November 2014.

What do the changes mean?
Financially ineligible parties will be exempt from the financial means test in respect of the first mediation session where the other party is financially eligible for legal aid.

The Legal Aid Agency (LAA) will pay half a single session mediation fee for the first session only in relation to the ineligible party. This will be in addition to the relevant fee payable in respect of the financially eligible party.

What will happen in future sessions?
For all subsequent mediation sessions following the first session legal aid will only be available for parties eligible for legal aid.

What does this mean for the reporting of mediation cases?
There are no changes to the way mediation cases are reported, and providers should continue to report the mediation as a single matter regardless of the fee payable in respect of each party.

What is the status of the draft amendments?
The LAA has published draft versions of amended guidance now for illustrative purposes only. This guidance should not be used prior to the amended regulations taking effect.

The guidance will only be effective from the date of implementation of the amended Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013.

Further information
Legal aid: family mediation – to download 'Family mediation guidance manual - November 2014 draft'.

Family mediation claim form – to download 'Guidance for reporting work under the family mediation contract - November 2014 draft'.

In addition, Resolution recently polled its members to reveal that reforms to the family courts were causing significant delays for both financial and children cases.

Over 60% of parents unrepresented in private children proceedings

Over sixty percent of parents are now without a lawyer when going to court to contest arrangements for their children, new government figures reveal.

Between April and June 2014, 12,554 parents out of a total of 20,126 in England and Wales went to court without a lawyer to decide issues such as child contact, residency and maintenance payments.

Prior to legal aid being withdrawn from lawyers for most family disputes, the proportion of unrepresented parents at court for the same matters stood at 42% in 2012/13. The latest quarterly figures for 2014/15 show this has increased to 62%.

The Ministry of Justice figures were revealed under the Freedom of Information Act following a request by Marc Lopatin, trained family mediator and founder of divorce and separation service LawyerSupportedMediation.

Commenting on the statistics, Marc Lopatin said:

> "Family courts are rapidly becoming lawyer-free zones. This is having a devastating impact on low-income families as well as creating delays for all parents attending court.
>
> "Ministers should admit they got it wrong. They need to stop seeing lawyers and mediators as an either or. Both professionals working in tandem can keep families out of court and promote the interests of the child."

The Ministry of Justice figures also showed that the number of unrepresented parties at court contesting financial matters had risen to over 30% for first time. Out of a total of 17,550 people at court to resolve how property and pensions should be split, 5,410 parties were now without a lawyer.

Faced with the prospect of being unrepresented, Marc Lopatin says, many parents are simply turning their back on the family justice system. In late September, the Ministry of Justice released official figures showing the number of cases featuring ex-partners going to court over child arrangements or finances fell to 9,291 between April and June 2014. This is a drop of 40% compared to the same period in 2013.

It is highly unlikely that many of these parents are opting for family mediation over going to court. The same Ministry of Justice figures showed that the number of publicly funded mediations getting underway between April and June 2014 had fallen by over 50%, compared to the same period in 2012 when legal aid was still in place for referring solicitors.

In August, the Law Society warned that falling numbers of parents going to court would lead to children being denied access to their parents which seriously undermines the concept of shared parenting being introduced by the government.

Closer solicitor–mediator collaboration is key to brighter future, says NFM

The chief executive of England and Wales' largest provider of family mediation has called for closer practical collaboration between lawyers and family mediators.

In a speech to Birmingham Law Society, Jane Robey, CEO of National Family Mediation (NFM) acknowledges "gaps" that have sprung up between the interests of professional mediators and solicitors, but says:

> "What family mediators want is a genuine partnership with members of the legal profession to help people get to quality legal advice on the options for their futures that they have developed in mediation."

Outlining common ground she explains NFM "shares the legal profession's concern with the 'low' payment made to solicitors for referral under the Help With Mediation scheme."

Urging NFM–Law Society discussions to begin, she outlines three initial proposals for closer mediator–solicitor collaboration:

On lawyers seeing both parties

Referring to the recent recommendations of the government's Family Mediation Task Force she says:

> "One of the recommendations provides an opportunity for us to do something different and that is for a lawyer to be able to see both parties who have been in mediation. I want to work together with the legal profession to achieve that change. I appreciate there are regulations but I think it is worth looking at. It will help us all provide more holistic services for families, it will keep the whole families interests and needs in the frame and will call time on adversarial proceedings."

On fixed fee advice

> "Another opportunity for working together is to get the help with mediation working for all clients not just the legally-aided. I know family lawyers are grappling with the fixed fee for family matters. Maybe there is a parallel here with fixed fee conveyancing which as we know has been around for many years. For us to be able to tell clients that they can have advice on the options they have developed in mediation and drafting services for a fixed would be enormously beneficial."

On the recommendations of the Financial Remedies Report

> "The Financial Remedies Report recommends a unified procedure for financial order applications after a divorce and Children Act Schedule 1 applications. This I think will be hugely beneficial for families and keeps the money closely aligned to the children. There is also the fact that the MIAM is compulsory for both child issues

and financial remedies and at every point there is emphasis on out of court settlement. which means there are opportunities for us to support families and the courts as people hover between the steps of court and reaching settlement."

She concludes:

"I don't just want to be here talking about 'working together', but for today to be the first stage of some practical collaboration: arrangements from which both lawyers and mediators can both benefit with end users – children and families - central to those discussions."

Jane Robey's speech is clear in some requests she has for the legal profession, including an acknowledgement that a great many of the issues that form the basis of court battles are not necessarily legal ones:

"We need lawyers to understand that the options developed in mediation may differ from those they are used to developing in the court setting or even in negotiation but that this doesn't make them wrong – just different.

"If a mediated agreement is manifestly unfair to one party or the other then legal intervention is right and just. But I speak with many years' experience – and I know many here will nod in agreement – when I say that in the large majority of cases what's being argued about in the settlement isn't the cake on the table, but the crumbs falling from it.

"We all know the plethora of cases we've been involved in where the Judge's adjudication revolves around issues that are relatively minor in the grand scheme of things, like pick-up times from school. Yet those aren't and shouldn't be seen as a legal issue.

"I want it recognised that families need legal advice and intervention that is proportionate - and relevant to what they have already been able to agree between themselves."

Jane Robey also outlines how the dramatic increase in the number of unrepresented people is profoundly affecting the types of questions people are asking NFM: "Those who used to approach us had more often than not had the benefit of some early legal advice which provided some realism about the options available and helped to manage client expectation."

She also points out an unintended consequence of legal aid changes from a government which aimed to raise the take-up of family mediation:

"LASPO has caused the collapse of referrals from solicitors to family mediators and has flipped referral processes on their head. There are more people today who think their only option is now to head straight to court. This I think is caused by the poor information that has been put out by government about the changes."

New private law cases received by Cafcass decline by 25% in September

In September 2014, Cafcass received a total of 2,858 new private law cases. This is a 25% decrease on September 2013 levels.

New private law cases have decreased in each of the last twelve months (compared to the corresponding month in the previous year). During the current year, ie since the beginning of April 2014, new cases have decreased by 37% compared with the same period in 2013.

A full breakdown of the Cafcass figures **is here**.

Care applications received by Cafcass in September 7% up on last year

In September 2014, Cafcass received a total of 902 care applications. This figure represents a 7% increase compared to those received in September 2013. Care application for the current year are running very slightly ahead of the figure for the corresponding period last year.

The month-by-month breakdown of care applications received by Cafcass **is here**.

Order for security of costs granted against Michael Prest

On the 15th October Lady Justice Gloster, sitting in the Court of Appeal, ordered Michael Prest to pay £20,000 security of his wife's costs in respect of his appeal against a committal order made against him.

At a hearing on the 28th July 2014 before Mr Justice Moylan **Jeremy Posnansky QC** of **Farrer & Co**, for Mrs Prest, applied for a committal order against Mr Prest for contempt of court arising from his failure to comply with orders in financial remedy proceedings brought by his wife.

An order was made to commit Mr Prest to prison but its implementation was suspended until 28th October 2014, on terms that it would not take effect if the relevant arrears of maintenance had been paid by that date. Mr Prest has appealed against that order and applied to the Court of Appeal for a general stay of execution until the conclusion of the appeal process. Gloster LJ granted that general stay, but at the same time heard the application by Mrs Prest for security in the sum of £20,000 in respect of her costs of the appeal. **James Turner QC** of **1 King's Bench Walk**, for Mr Prest, argued that an order for security of costs offended his client's unfettered right of appeal. That argument was rejected and Gloster LJ ordered Mr Prest to pay £20,000 into court within 28 days from the 15th October. Unless that sum is paid by Mr Prest within the stated period he cannot pursue his appeal.

The judgment in this matter has not yet been published.

Practice Guidance: Family Court – Duration of ex parte (without notice) orders

The President of the Family Division has issued **practice guidance in respect of the duration of ex parte (without notice) orders**.

The Magistrates' Association and the National Bench Chairs' Forum had raised with the President the question of whether it is proper to grant an ex parte non-molestation injunction for an unlimited period. The President states in the guidance that to grant an ex parte (without notice) injunction for an unlimited time is wrong in principle. The practice of granting such orders for an unlimited time must stop.

The Presidents says that the same principles, as set out in the guidance, apply to all ex parte (without notice) injunctive orders made by the Family Court or by the Family Division, irrespective of the subject-matter of the proceedings or the terms of the order.

The guidance suggests the form of order to be used.

The **guidance is here**.

No need for human rights proportionality evaluation in private law children proceedings

In ***Re Y (Children)*** **[2014] EWCA Civ 1287** Lord Justice Ryder, in the Court of Appeal, has stated that it is neither necessary nor appropriate for the Family Court in ordinary private law applications where there are no public law consequences to undertake a separate human rights proportionality evaluation balancing the effects of the interference on each person's Article 8 rights so as to evaluate whether its decision is proportionate.

The Court had heard an appeal from the decision of a deputy circuit judge dismissing an application to permanently remove two children, age 11 and 7, from the jurisdiction. The father and the children's mother had separated in 2009, the father had been the primary carer, and in 2011 a residence order (as it then was) had been made in the father's favour. The father had remarried and he and his wife had had a third child, now aged 2. This youngest child was not the subject of any application before the court. The father's wife was from the USA and was said to be unhappily isolated in the UK. The father and his wife sought permission to move the two children permanently to the wife's home town in the USA as part of the family unit comprising the father, the father's wife, the two subject children and their young half-sibling. The subject children's mother had successfully opposed the father's application.

Ryder LJ found that the deputy circuit judge had not misdirected himself and had made his decision on the basis of a value judgement as he was entitled to do. The appeal was dismissed.

In respect of a submission that "the judge failed to consider the Article 8 ECHR rights of all of the children, i.e. including the child who is not the subject of the relocation application," (para 36) Ryder LJ held that the court was not required to undertake a proportionality assessment in private law children proceedings. That submission, it was said:

> "[…] can only be an attempt to impose the concept of 'horizontality' into private law children cases where the agency of the state is not the principle actor seeking to interfere in the family or the private life of those concerned. If that is right, the submission is misguided. In private law applications it is a person with parental responsibility who seeks to interfere with the Article 8 rights of the other relevant persons, be they other adults with parental responsibility or the children themselves. Parliament has provided a legislative mechanism for such a decision that is human rights compliant. It is neither necessary nor appropriate for the Family Court in ordinary private law applications where there are no public law consequences to undertake a separate human rights proportionality evaluation balancing the effects of the interference on each person's Article 8 rights so as to evaluate whether its decision is proportionate. [Counsel for the father] could point to no jurisprudence to suggest otherwise. That position is quite distinct from public law applications where such an evaluation is required by reason of the fact that a local authority applicant is a public authority seeking itself to interfere in the rights that are engaged." (para 43)

For the judgment and summary by Marlene Cayoun of 1 Garden Court Family Law Chambers, from which this news item is derived, **please click here**.

Hundreds of new FGM cases reported by hospitals

New figures produced by the Health and Social Care Information Centre reveal that in September 467 newly identified cases of FGM were reported by acute hospital providers in England. There were 1,279 active cases.

The figures were set out in the Female Genital Mutilation Prevalence Dataset which is a monthly return of data from acute hospital providers in England. It is an aggregated return of the incidence of FGM including women who have been previously identified and are currently being treated (for FGM related or non FGM related conditions as at the end of the month) and newly identified women within the reporting period. It has been a mandated collection from 1 September 2014.

125 of the 160 eligible acute trusts in England submitted signed off data for the report.

In July 2014 the Prime Minister, International Development Secretary Justine Greening and Home Secretary Theresa May announced at the **Girl Summit 2014** a new package of action and funding to protect millions of girls at home and abroad from female genital mutilation and forced marriage. For details **please click here**.

The **HSCIC report is here**.

Revised regulations published for conversion of civil partnerships into marriages

Couples in a civil partnership will have the option to convert it into a marriage before Christmas once regulations laid before Parliament today (15 October 2014) are approved.

The change means couples in existing civil partnerships will be able to convert them into a marriage from 10 December this year.

Campaigners have called for a simple conversion into a marriage in a local register office, or couples can have a ceremony at an approved venue of their choice, including religious premises registered for marriages of same-sex couples.

Couples will be issued with a marriage certificate, which will show the marriage should be treated as existing from the date of the original civil partnership.

Minister for Skills and Equalities Nick Boles said:

> "I know how important it is for couples to have the option of marriage available to them. This is the final stage in ensuring every couple has the option to be married.
>
> "This puts couples in control. They have the choice of whether they would like a simple conversion or would prefer to celebrate the occasion with a ceremony."

In July the government laid draft regulations before Parliament based on responses to a public consultation which called for a simple process for conversion. The regulations have now been revised, taking into account views expressed over the summer.

The revised regulations – once approved by Parliament – give couples greater choice and still provide the religious protections, for any ceremony following a conversion into marriage, which are enshrined in the Marriage (Same Sex Couples) Act 2013.

For the first year, all couples who formed their civil partnership before 29 March 2014 (when marriage was extended to same sex couples) will be able to receive a £45 fee reduction. This means there would be no cost for the 1-stage option.

The **draft regulations are here**.

Fewer than one in four couples seeking counselling to save marriage

A new survey has revealed that fewer than one in four couples seeks professional counselling to try to save their marriage when they are going through a difficult time in their relationship.

Research by the Family and Divorce Law team at **Irwin Mitchell Solicitors**, which has offices across the country, found that while 37% of couples going through a rocky patch said they thought counselling would help, only 23% were actively seeking help.

The survey of 2,000 people also revealed that on average couples sought counselling for four months with 12% saying it helped to save their marriage. However the statistics also showed that gender played a part in the difference in attitudes to counselling with 45% of females believing that it would help save a relationship compared with just 28% of men.

Both men and women agreed that they would confide in their best friend first regarding their relationship (33%) with 23% saying they turned to their mum for advice. Worryingly, 35% said they confided in no one – rising to 40% of men.

Last month the Prime Minister announced a rise in funding available for ante-natal counselling to £20m. This support will include relationship advice on the potential stresses of having children and health visitors will be asked to offer relationship support to new parents.

The Irwin Mitchell report also gave insight as to how hard couples are prepared to fight to save their marriage with 75% believing that people give up on relationships too easily and couples believing that they should try to save the relationship for at least 11 months on average.

Lack of communication was the biggest driver in break-down of marriages (40%) while 25% said that money worries and taking each other for granted were major issues.

Alison Hawes, a Partner in the Family and Divorce Law team at Irwin Mitchell said:

> "The survey suggests that people are looking to friends and family to help them get through a separation or divorce but there are other experts who may be able to help.
>
> "There are differences between attitudes to counselling from both men and women which could mean that it is important that counsellors can get both partners on side quickly when trying to help.
>
> "We know from experience that counselling can help people going through a difficult period but perhaps there is a stigma attached that people are struggling to overcome. People may also feel that deep down counselling may be the final proof that their relationship is finally over and they may be putting it off on that basis. Good counsellors will be able to help couples to come to terms with what is best for both partners.
>
> "Seeking professional help about something so sensitive and personal can feel like admitting failure but instead it should be seen as a positive sign to each other that you are committed to getting the best possible support."

Parental involvement provision comes into effect on 22nd October

The importance of children having relationships with each parent following family breakdown will be reinforced by a new law taking effect next week, Family Justice minister Simon Hughes has said.

The parental involvement provision in **section 11 of the Children and Families Act 2014** will come into force on 22 October and will apply to cases started on or after that date. It will not apply to cases already going through the courts prior to 22 October.

The Ministry of Justice has been at pains to emphasise that the parental involvement provision is not about giving parents new 'rights' or the 50/50 division of children's time but about 'achieving a culture change by making clearer the court's approach to these issues'.

The change is intended to encourage parents to be more focused on children's needs following separation and the role they each play in the child's life. The new law will require family courts to presume that each parent's involvement in the child's life will further their welfare – where it is safe. However the needs of the child will always remain the paramount priority of the courts.

Justice Minister Simon Hughes said:

> "We have made bold reforms so that the welfare of children is at the heart of the family justice system, and there can be no doubt that parents play a very important role in every child's life. Following break up of relationships we are encouraging all parents to focus on the needs of the child rather than what they want for themselves.
>
> "No parent should be excluded from their child's life for no good reason. This change in the law is not about giving parents new 'rights' but makes clear to parents and everybody else that the family courts will presume that each parent will play a role in the future life of their child."

Children and Families Minister, Edward Timpson:

> "Having spent almost ten years as a family barrister, I know nothing is more important than taking the time to listen to children and making sure their voices are heard loud and clear.
>
> "This is a brand new system which puts the needs of children first, protects families from harmful and stressful battles in the courtroom and gives them greater support."

Omnibuses for non-molestation and occupation orders released for comment

Following the issue by the President of the **Practice Guidance: Family Court – Duration of Ex Parte (Without Notice) Orders** Mr Justice Mostyn has released for comment the omnibuses for Non-Molestation and Occupation orders prepared by the Family Orders Project team.

Comments should be sent to Joanna Wilkinson (**Joanna.wilkinson@judiciary.gsi.gov.uk**) by 10 November 2014.

Mostyn J says in the consultation document:

> "I emphasise that consistently with para 79 of the Report of the Financial Remedies Working Group of 31 July 2014 it is intended that these orders, once adopted, will have the status of forms within Part 5 of the FPR 2010. Therefore, by virtue of FPR, rule 5.1(2) these orders may be varied by the court or a party if the variation is required by the circumstances of a particular case. The circumstances when a variation is acceptable are undoubtedly numerous and departure from the standard form will not prevent an order being valid and binding; but the standard forms should represent the starting point, and usually the finishing point of the drafting exercise."

The consultation document with accompanying orders **can be found here**.

President envisages radical reform of divorce law

The President of the Family Division, Sir James Munby, has questioned whether divorce should remain subject to judicial supervision. In a speech at the Legal Wales Conference in Bangor he asked whether it was now appropriate to legislate to remove all concepts of fault as a basis for divorce so that irretrievable breakdown would be the sole ground (presumably without the five facts which constitute the reasons for divorce). This, he conjectured, might lead to separating the process of divorce from that of adjudicating claims for financial relief following divorce.

Sir James said that the child arrangement programme and the fact that parties will no longer be represented in the majority of cases demand a new approach to private law cases.

For more details of the President's speech, which considered other reforms of family law, see the report in ***The Law Society's Gazette***.

'Worrying concern' as to impact of child maintenance changes: Public Accounts Committee

Margaret Hodge MP, Chair of the House of Commons Public Accounts Committee, has said that there is 'worrying uncertainty' as to the impact that the introduction of charges for statutory child maintenance services will have.

Mrs Hodge's comments accompanied the publication of the Committee's report into the early progress in the implementation of the child maintenance 2012 scheme.

She said:

"The Department for Work and Pensions has made good progress in simplifying the way it administers child maintenance.

"However, there is a worrying uncertainty around the impact that the introduction of charges for statutory child maintenance services will have.

"The Department's primary aim is to encourage more parents to make family-based arrangements rather than rely on the statutory scheme. It has an ambitious expectation of reducing the number of statutory cases by 250,000 – one quarter – by 2018-19.

"It is unclear, though, whether charges have been set at the right level to achieve this objective.

"In evidence to us Gingerbread told us it believes the Department had been unrealistic about the number of parents who would be able to reach their own private arrangements that last.

"According to a survey of callers who were informed of the choices available for child maintenance, the number of parents intending to choose family-based arrangements reduced by more than a third from 5,540 in August 2013 to 3,590 in March 2014.

"Research suggests that for parents on low incomes the £20 application fee would be a significant barrier to applying to the statutory service.

"There is a risk that some parents end up reaching no arrangement at all, to the detriment of the children involved. The Department must monitor closely the number of parents that choose family-based arrangements following the introduction of charging for the statutory scheme.

"It must also maintain regular contact with groups supporting families to determine whether changes are needed to improve the support available to parents.

"The Department does not have a good record of implementing reform programmes and it should learn from the good practice evident in the introduction of this scheme – particularly the importance of implementing reforms carefully in stages under stable leadership.

"There is no evidence of the backlogs or IT failings with which previous child maintenance schemes have struggled. The prudent approach did, however, result in increased costs of the programme and some delays.

"Risks remain regarding closing legacy cases and moving them to the new scheme. Delays in setting it up the 'data warehouse' required to close the legacy cases from the previous systems, have resulted in increased costs to the Department. It must ensure that it has the necessary systems in place by the time it closes complex cases.

"We will watch the progress carefully to see whether the Department can secure the full benefits of the scheme for separated families.

"We welcome the progress the Department for Work and Pensions (the Department) has made in simplifying the way it administers child maintenance, through the introduction of the first phase of the child maintenance 2012 scheme. The Department implemented the scheme carefully in stages, and there is no evidence of the backlogs or IT failings with which previous child maintenance schemes have struggled. However, there remain risks ahead, from the introduction of charging for statutory services, and from closing legacy cases and moving them to the 2012 scheme. Responses to charging are uncertain and the Department will need to monitor whether, in practice, parents take up family-based arrangements as planned, rather than rely on state intervention through the Department's scheme.

"The 2.5 million separated families in the UK have several options for arranging child support. Around 1.1 million rely on statutory government-run schemes that assess, collect and make payments. Other families set up their own (family-based) arrangements or use the court system. Around 600,000 families have no arrangements at all. In December 2012, the Department introduced the first phase of the child maintenance 2012 scheme. This replaces two previous schemes for child maintenance which had struggled with IT problems, leading to poor customer service and incomplete information about outstanding debt. The 2012 scheme is designed to maximise the number of children benefiting from child maintenance arrangements and reduce government spending on administering child support. It introduced new rules for calculating payments, a new IT system for managing cases, and charges for using and enforcing the scheme. Newly separated parents access information through an online and telephone 'gateway', which explains the benefits of the choices available, and provides guidance on how to set up family-based arrangements.

"The first phase of the 2012 scheme introduced new systems and processes, and simplified the way maintenance is assessed. The second phase, which was due to start in June 2014, involves the introduction of charges for parents using the statutory service (a £20 application fee, a 20% collection fee for paying parents, and a 4% fee deducted from maintenance paid to receiving parents), and the staged closure of legacy cases until 2018."

Gingerbread was pleased to see that single parents' concerns about the impact of the new charges to use the

Child Maintenance Service had been taken up by the Public Accounts Committee. The **charity's response is here**.

The **report itself is here**.

Government publishes its response to Looked-after children-improving permanence consultation

The Government's response to its consultation Looked-after children-improving permanence (which ran from 30 September 2013 to 29 November 2013) has been published. **Click here for details**

The Government had sought comments on its proposals to:

- strengthen the team around looked-after children
- improve the status and stability of long-term foster care and
- strengthen the requirements for returning children home from care

These were developed following extensive discussions with two expert groups: one on long-term foster care and another on returning home from care. These expert groups included representatives from national organisations, academics, local authority managers, social work professionals and foster carers.

Annexe A of the response document (page 46) contains a tabular summary of the responses to the consultation and the Government's response to that input.

There is an overall commitment by the government to take forward the majority of the proposals set out in the consultation.

Key elements of the Government's response include the following:

1. Regulations will require that delegated authority be discussed at every review meeting.

2. So far as reasonably practicable, the wishes and feelings of carers should be taken into account as part of the review process.

3 Care planning guidance ("CPG") is to be strengthened to make it clear that foster carers and registered managers should be invited to review meetings (where held).

4. CPG to be amended to make it clear that permanence for children can be achieved through long-term foster care

5. CPG to be amended so that where long term foster placement is identified as the right permanence option it's made clear that this could be with foster carers or with those sought for and matched with specific children.

6. A legal definition of long term foster care will be introduced

7. The nature of long term foster care arrangement must be clearly communicated to foster carers (method and format of this will be for Local Authorities to determine

8. CPG to make it clear that while the review process should continue every 6 months, a review meeting may only need to happen once per annum

9. CPG will emphasise the importance of recording where changes to the care plan are proposed, communicating those to relevant parties, and ensuring that actions from previous reviews have been undertaken.

10 Guidance will specify factors to be taken into account re frequency of review meetings

11. Regulations to be amended so that the expectation to undertake an assessment to inform a decision to return a child home from care is made explicit.

12. In cases where someone with parental responsibility removes a voluntarily accommodated child, Guidance will explicitly require the Local Authority to satisfy itself that the environment to which the child has returned will safeguard and promote the child's welfare.

13. A decision to return a voluntarily accommodated child home is to be signed off by a nominated officer but not where the return home is unplanned (due to removal by parents or the decision by an older child to go home) or where the child has been looked after for only very short periods

14. There will be no formal requirement for Local Authorities to visit former looked-after children. The government concluded that existing guidance provides a framework for ongoing assessment, planning and review of outcomes

15. Consideration will be given to how the expectation that Local Authorities should provide ongoing support to children and their families following a return home can be made more explicit in Guidance.

There is also a commitment to continue to work with the expert group on how best to implement the changes and encourage the dissemination of good practice.

For the full document **click here**

Government announces £2 million "support package" for separating couples

The Government has announced a new package of support developed with the intention of keeping disputes out of court and providing support for parties whose family disputes do go to court..

The Government's "support package" is said to include:

- improving online information so that it is accurate, engaging and easy to find

• a new strategy agreed between the Ministry of Justice (MOJ) and the legal and advice sectors which will increase legal and practical support for litigants in person in the civil and family courts

• a new 'supporting separating parents in dispute helpline' pilot run by the Children and Family Court Advisory and Support Service (Cafcass) to test a more joined-up and tailored out-of-court service

For cases which do go to court, Justice Minister Simon Hughes said that "it is imperative that they have the right advice and information" and indicated that the new support "will make sure that separating couples and parents are able to access the right advice, information and support at the right time."

Improved Government Online Resources

The government's improved online information for separating couples will include the websites 'Sorting Out Separation' and GOV.UK to make sure these "*include all key information and guidance.*"

New Court Support Service for LIPs in Family Cases to be Piloted

A court support service for litigants in person will be introduced in civil and family cases. A new court support service for Litigants in Person is to be piloted in selected court centres with the aim of rolling out across England and Wales.

The service is intended to facilitate access to practical support and information for those who do need to go to court and to "*provide them with a route to free or affordable legal advice*".

The support service has been agreed between a number of organisations working in partnership with the Ministry of Justice and will begin to expand immediately. The Personal Support Unit (PSU), the RCJ Advice Bureau, LawWorks and Law for Life: the Foundation for Public Legal Education will work together to provide support through the civil and family courts for those who need it.

It is said that,

"The funding will see:

• more PSUs opened in more courts across England and Wales to provide practical information and support including emotional support

• additional LawWorks Clinics established to increase the supply of initial legal advice, work with the local legal professions and advice agencies, and with law schools where possible

• advice made available by phone and email to local and regional centres from RCJ Advice, together with information and materials produced through working with Law for Life and via Law for Life's online Advicenow project

• one named person in each court centre to manage the new service as well as an appointed judge in each court centre with particular responsibility for litigants in person"

Resolution, the professional association of family lawyers described the new Government court support as a 'sticking plaster' for a wounded family justice system.

Resolution's Vice-Chair, Nigel Shepherd, fears that "this initiative is more about supporting the courts, rather than the families trying to navigate them." He went on to say,

"We know that solicitor negotiation and referrals to mediation and other forms of out of court dispute resolution are hugely successful in helping many people to resolve their differences more effectively, and with a minimum of conflict. Surely this is where the Government should be focusing resource, if it is truly committed to helping people find fair, appropriate and lasting outcomes for them and their families."

Cafcass-run Helpline to Help Parents "Drifting into Dispute Addiction"

The Attorney General's Pro Bono Envoy, Michael Napier CBE, QC (Hon) who helped develop the scheme, said:

A free phone 'supporting separating parents in dispute helpline' pilot will start in November and run for 6 months, aimed at separating parents who have been unable to resolve disputes and want to avoid court battles over their children or who need help in doing so. The helpline, run by Cafcass, will put callers through to an experienced professional who will act as their single point of contact throughout the dispute.

They will talk through the difficulties being faced, assess what support the parent needs and will offer impartial information and guidance. This will include putting callers in touch with the relevant local professionals and support services, including mediation. Cafcass will follow-up with the parent to see how efforts to resolve the dispute are progressing and, if necessary, will provide further assistance.

Anthony Douglas CBE, Cafcass' Chief Executive said,

"In this pilot, we'll be using our in-court skills before court in the community, providing an out of court service to separated parents…….. We will be trying to re-focus parents on the needs of their children.... particularly where their parents are drifting into "dispute addiction."

He went on to describe how Cafcass will also be "*coordinating and building up community services in the pilot areas, aiming to have in place affordable community support services which remain viable even when budgets continue to be under extreme pressure*".

For the Minister's Written Statement **click here**

For the MoJ's Press Release **click here**

For Resolution's Press Release **click here**

For the Guardian's article *Inititaive promises legal advice for those without lawyers in court*s by Owen Boycott, legal affairs correspondent **click here**

The President discharges location order due to failure to comply with the direction as to the service of the order

Sir James Munby, President of the Family Division's judgment in Olaribiro v Shoyemi, will serve as a forceful reminder of how failure to comply with directions as to service of orders can lead to difficulties.

The President heard an application for the discharge of a location order on the ground that there had not been proper service of the order.

At the top of the original order was the following direction:

> "Note that service of this order upon the respondent and any other person is to be effected only by the Tipstaff. The copy provided to the applicant must not be used for service upon any person."

That direction was repeated in the covering letter with the order when it was sent to the applicant's solicitors.

However, at the request of the applicant's solicitors the order was not actually served by the Tipstaff. The solicitors had not wanted the location order to be served until they had had the opportunity to serve some disclosure orders.

The applicant's solicitors sent the order to Miss Shoyemi.

The President concluded that in those circumstances he would discharge the location order and accompanying directions.

For a summary of the case by Sally Gore of Fenners Chambers and for the full text of the judgment **click here**

Charity aiding male victims of DV supports proposed law change

The **ManKind Initiative**, a charity supporting male victims of domestic violence, is supporting the recommendation that there should be a specific offence of domestic abuse that sets out that coercive and controlling behaviour in an intimate relationship as a criminal offence.

The charity believes that this offence will support male victims of domestic abuse by ensuring that there is a better recognition by statutory agencies and by society of both the existence and extent of this form of abuse on male victims (and their children).

The introduction of this offence would help to ensure that the 'believability threshold' for male victims is at the same level as it is for female victims. This is especially important, says the ManKind Initiative, as male victims are more likely to suffer from non-violent forms of partner abuse than violent forms.

The charity also believes that the law would help ensure that the threat and use of false allegations and the threat of denying parental contact is fully recognised as a controlling and coercive behaviour. This also includes recognising the continual and purposeful breach of parental contact orders as a form of domestic abuse.

The charity considers that any criteria and guidance to police, statutory agencies, the justice system and also domestic abuse sector practitioners in the change of law has to be unequivocal in setting out that it applies to both female and male victims, and, that all training and practitioner guidance is explicitly clear on this.

English court refuses to enforce foreign custody order

***AA v TT* [2014] EWHC 3488 (Fam)** has been published at and concerns an application by a father who is of Turkish origin and a Turkish citizen from birth, for the recognition and enforcement of a Turkish court order in relation to his children.

The background to the case is set out in Holman J's extensive judgment.

The Turkish court had made an order in favour of the Father. Holman J was invited to apply the "the relatively underused" European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration on Custody of Children. ("the 1980 European Convention").

Turkey is not a signatory to the Hague Convention nor is it a member of the EU so that the EU Regulation Brussels ii and Brussels ii Revised did not apply. However, the 1980 European Convention did apply because it is an instrument of the Council of Europe of which Turkey is a member state.

The last reported decision on the 1980 European Convention was in 2005 (a judgment of Singer J in ***W v W* [2005] EWHC 1811 (Fam)**, which is quoted in Holman J's judgment.

The background to the case is that an order had been made in Turkey based on a misconception, namely that, " the mother had chosen to live with her new husband in Turkey and had abandoned the children to her parents in England and was not looking after them." That was not the case.

Whilst recognising that it was clearly undesirable for there to be a proliferation of litigation in different states concerning the same children, the judge concluded that the overriding consideration set out in the preamble to the 1980 European Convention and throughout Article 10 is the welfare of the child or children.

The judge went on to say,

> "it is fundamental to our law that if, in truth, a parent is living in England and actually caring for her children here, a decision is not made and implemented which is based on a mistaken proposition that she is living in Turkey and has effectively abandoned her children to their grandparents here."

The 1980 European Convention has the force of law in the UK to the extent provided for in s.12 of the Child Abduction and Custody Act 1985 and Schedule 2 to that Act.

Article 7 of the 1980 European Convention provides that:

> "A decision relating to custody given in a Contracting State shall be recognised and, where it is enforceable in the State of origin, made enforceable in every other Contracting State."

His Lordship concluded that the welfare of the children required that the so called "Defence" to the 1980 European Convention applied in this case and also found the defence under 10(1)(b) made out i.e. change of circumstances.

Accordingly, he dismissed the Father's application for recognition and enforcement of the Turkish decision and order.

This case is thought to be the only instance, where the 'incompatibility defence' (under Article.10(1)(a) of the 1980 European Convention has succeeded.

The judge paid tribute to **Edward Bennett** of **Field Court Chambers**, counsel for the Mother and to his instructing solicitors **Freemans Solicitors** (**Jenny Moore**) who acted pro bono. The judge pointed out that it would have been quite impossible for the mother to represent herself in this "technical and complex matter" (the mother could not afford to pay for legal representation and did not qualify for legal aid).

Progress with Care Leaver Strategy reviewed

The **Care Leaver Strategy**, launched a year ago, set out the actions that government departments would take in order to improve the support care leavers receive during their transition to adulthood and independence. The government has now published a **one-year-on document**. It reports on progress made and sets out how it is intended to further improve support for care leavers.

Since last year's strategy was launched, there has been introduced the **'Staying Put' arrangements** which will allow thousands of children in foster placements to remain with their foster carers until age 21, improving monitoring of the care leaver's journey through to adulthood through the collection of enhanced data, and providing care leavers with Personal Adviser support until the age of 25 (if they remain in education) or training, or have plans to return to education or training.

The Progress Update sets out how departments have been and continue to work together to help improve services and support in the following areas:

- Education
- Employment
- Financial support
- Health
- Housing
- Youth Justice
- Access to advice and support
- Harnessing social action
- Data collection.

It includes case studies that document the experiences of care leavers and describes how the strategy has affected their lives. It also shows how departments have embedded support for care leavers in their policies and programmes. A summary of progress on the specific commitments made in the strategy is provided at annex 1.

The **Progress Update is here**.

Referrals to children's social care up by 10%

The Department for Education has published **information as to the characteristics of children referred to and assessed by children's social services as children in need** between 1 April 2013 and 31 March 2014.

There were 657,800 referrals to children's social care in 2013-14 – an increase of 10.8% compared to the previous year when there were 593,500 referrals. Data collected for the first time, on the source of referrals, shows that nearly a quarter of referrals were from the police.

There were 397,600 children in need at 31 March 2014 – an increase of 5.0% from 378,600 at 31 March 2013, although the longer-term time series does fluctuate.

Of those 47.2% were identified as having a primary need consequent upon abuse or neglect. This is the most common primary need, followed by family dysfunction at 18.6%. This has remained broadly similar to the previous year.
There were 142,500 section 47 enquiries carried out in 2013-14 – an increase of 12.1% on 127,100 last year.

48,300 children were the subject of a child protection plan at 31 March 2014 – an increase of 12.1% on 43,100 at 31 March 2013 and an increase of 23.5% since 31 March 2010.

The **statistical release is here**.

ARTICLES

Finance & Divorce Update October 2014

Jessica Craigs, senior solicitor of Mills and Reeve LLP

This update is set out in two parts. The first section summarises News items and the second comprises a case law update in which I summarise those key cases that were published in September which are likely to be of most interest to family lawyers.

NEWS SUMMARY

DWP reports 50,000 children to benefit from child maintenance shake up

The DWP states that single and separated parents who have previously received no maintenance from their former partner could start receiving payments for the first time.

The CSA has begun the process of closing its 800,000 historic cases. Parents who have previously received 'nil-assessed cases' (i.e. where no maintenance is due from the non-resident parent) will be invited to consider their options.

The reason for the invitation is because the parents' circumstances may have changed since the initial assessment. Furthermore, under the new statutory child maintenance system, details about parents' financial circumstances are more accurate using data from the tax authorities.

Anyone who receives a letter from the CSA is urged to look closely at the options.

For a copy of the full press release **click here**

National Family Mediation reports sharp uptake in first half of year

The largest provider of family mediation, National Family Mediation has reported an increase of between 30 – 40% in numbers of people attending mediation compared with the same period in 2013.

Jane Robey, Chief Executive of National Family Mediation anticipates further significant increases in the number of couples attending mediation in the autumn months when people return to work after the summer holidays.

Further delays in courts LiP divorce cases

The Telegraph reports that on average, divorces are taking three weeks longer than last year.

The study, carried out by law firm Hugh James shows that from the first application to dissolution of the marriage took on average 23.9 weeks. This was compared to last year's timescale of (on average) 20.8 weeks.

Cases brought by litigants in person took an average of 32.6 weeks.

The full article **can be read here**

Sharland divorce to be heard in June 2015

Alison Sharland has been granted permission to have her divorce case heard in the Supreme Court after it was discovered her husband had misled both her and the High Court over the value of his company.

Mr and Mrs Sharland separated after 17 years of marriage. During the final hearing, the parties reached an agreement whereby Mrs Sharland would receive £10.355m in cash and properties.

Shortly afterwards and before the order was sealed, it emerged that Mr Sharland's company (which had been valued during the proceedings at between £31.5m and £47.25m) might be worth significantly more (the press report up to £1bn) and that, contrary to Mr Sharland's evidence during the hearing, an initial public offering (IPO) was being prepared.

Lord Justice Briggs, who disagreed with the other appeal judges hearing the appeal, said that the husband's fraud undermined the whole agreement. He was concerned that as a matter of public policy the court's processes must be protected from fraud and this was more important than economy and speed.

Mr Sharland was ordered to pay the costs of the appeal.

MoJ statistics show Family court's caseload falling by 19% from last year

The Ministry of Justice has published **court statistics for April to June 2014**.

The number of cases that started in family courts in England and Wales in April to June 2014 dropped 19% to 57,720 compared with the equivalent quarter of 2013. A total of 60,287 cases were concluded.

Divorce made up 48% of new cases in family courts, with private law contributing 16% and financial remedy cases 15%. In total, relationship breakdown cases account for four-fifths of the courts' caseload.

The statistic showed that for private law in April to June 2014, 9,291 private law cases started (about 41 % lower than the equivalent quarter in 2013) and 13,028 cases that reached a final disposal (continuing the upward trend).

For Financial remedy (formerly 'ancillary relief') there were 8,775 cases started and 7,677 cases with a disposal in April to June 2014.

In general, across all case types, cases where both parties, or only the respondent had legal representation took longer than those cases where only the applicant was represented or where both parties were without legal representation.

For the full statistics **click here**.

CASE LAW UPDATE

AB v CB [2014] EWHC 2998 (Fam)

Judgment in respect of wife's claim for ancillary relief and of a subsequent application by trustees of property for permission to appeal against the award; application dismissed and guidance given as to the procedure on such applications.

Background

The wife petitioned for divorce on 15 October 2012. Decree Nisi was pronounced on 17 April 2013. Form A was issued on 19 November 2012 in the Principal Registry of the Family Division and the proceedings were transferred to the Swansea County Court where it was listed for a 4 day final hearing. Mr Justice Mostyn sat in Swansea County Court to hear the case due to the complexities of the dispute.

The wife was aged 44 and was a journalist. The wife and husband met in 1999 and the wife had by then acquired her first home in Bristol. This property was retained and ring-fenced as 'pre-marital'. She bought another property prior to the marriage which was also denoted as 'non-matrimonial'.

The husband was aged 41. On paper, he had relatively modest assets (approximately £38,000) and a modest income (of just under £3,000 per month). However, the husband was the third child of DB and VB and was from a distinguished Welsh family who own substantial lands in South Wales and had done so for generations.

The husband's modest income was derived from his profession as a copywriter. In addition to this, he worked within the overall family enterprises as an agent for the family in advising on developments. The Judge found that 'On any view, although there is no sense of entitlement on his part, his position in terms of financial security is absolutely assured'.

In 2002, the parties moved to Pembrokeshire and lived together in the husband's parents' home. They married on 8 February 2003. Prior to the marriage the husband and wife had established a media consultancy company which they each held a 50% shareholding. Shortly after the marriage the company was incorporated with four directors, the husband, his brother and his parents each holding a 25% share.

In 2004 the couple were gifted a property on the family estate. This was sold in 2005 and the proceeds was used largely to discharge debts. The parties then moved into a farmhouse and some of the proceeds of sale from the cottage were used to fund the renovation.

On 21 April 2009 a trust was established in relation to the farmhouse. The wife says she only discovered the trust existed after the breakdown of the marriage when she was told about it and the Judge accepted this. However, the judge found (after written and oral evidence) that the wife understood that the property was not owned by her and her husband, nor would it be owned by them. At paragraph 36 Mostyn J states:

> 'She knew, in my judgment, that there was some kind of an arrangement whereby it was intended that it would stay in the family and after it had been used by them, possibly for their entire lives, it would revert to the family estate. Of that I have no doubt at all.'

The trustees, who intervened in the proceedings argued that the trust was not a nuptial settlement. At paragraph 45 of the judgment, Mostyn J refers specifically to what Lord Nicholls said in Brooks v Brooks as to the test for what comprises a nuptial settlement, namely: " any arrangement which makes some form of continuing provision for both or either of the parties to a marriage".

Counsel on behalf of the trustees said that the only aspect which was within the Court's dispositive powers and capable of variation was the husband's right to occupy under the terms of the trust and the occupation agreement, rather than the property itself. Mostyn J dismissed this submission. The trust included a clause that gave the trustees specific powers to advance all of the property to the husband during his lifetime. Therefore all of the property contained within the trust was regarded as a variable nuptial settlement.

Mostyn J held that the wife was to receive £23,000 from the trust outright (the value of her contributions), and an additional award of £134,000 on the terms of a life tenancy which would revert to the estate on her death. The additional element was designed to reflect the sharing principle in relation to the matrimonial home (referable to Lord Nicholls judgment in *Miller v Miller* [2006] UKHL 24) while, at the same time, recognising the existence and purpose of the trust. The total award to the wife (£157,000) corresponded to half the net value of the farmhouse.

Mostyn J cross-checked his judgment with the needs principle. Both parties had formed new and settled relationships. The judge described these as 'a significant fly in the ointment in the assessment of need. One cannot make assumptions, if it is not full blown cohabitation akin to marriage, that it will grow into that..'. The conclusion reached was that even if the wife was "assuredly single" her capital position would be sufficient to meet her needs.

Permission to appeal ([2014] EWHC 2990 (Fam)) (see paragraphs 72 onwards of the principal judgment)
No application was made for permission to appeal by any of the parties when judgment was given on 25 June 2014. However, on 16 July 2014, an application was made by the trustees to appeal the above judgment.

Mostyn J expressed his opinion that an application for permission to appeal should always be made to the court at first instance, before an approach is made to the Court of Appeal. He therefore directed the application to himself.

His Lordship referred to CPR 52.3 and CPR Practice Direction 52A 4.1 and the endorsement of the Court of Appeal in *Re T (A Child)* [2002] EWCA Civ 1736. He set out five reasons why the application should be made to the court of first instance:

> i. The judge below is fully seised of the matter and so the application will take minimal time;
>
> ii. An application at this stage involves neither party in additional cost;
>
> iii. No harm is done if the application fails;
>
> iv. If the application succeeds and the litigant subsequently decides to appeal, it removes the necessity for a time consuming permission application at the subsequent hearing; and
>
> v. No harms is done if the application succeeds but the litigant subsequently decides not to appeal.
>
> Mostyn J added a sixth reason, namely that the judge at first instance may be (as clearly he undoubtedly is) a specialist in the field. His Lordship went on to say [para 77] that,

It is therefore my clear view that in the future, in the field of ancillary relief at the very least, an application for permission to appeal must always be made to the judge at first instance before an approach is made to the Court of Appeal.

The application for permission in the instant case was dismissed

H v W (Costs) [2014] EWHC 2846
Mrs Justice Eleanor King heard the application by the Appellant husband that an order for costs should be made against the Respondent wife following the husband's successful appeal against an order made in financial remedy proceedings.

At first instance, the District Judge made an order for joint lives maintenance and for the payment by the husband to the wife of 25% of his annual bonus, also on a joint lives basis.

In the application for permission to appeal, Mr Justice Mostyn gave a strong steer that in his view the right solution was for there to be a cap on the share received by the wife on the husband's bonus. He directed the parties to engage in mediation to try and resolve matters consensually. If mediation were unsuccessful then Mostyn J directed that he would deal with an application by the wife for a legal costs order in relation to the appeal on paper.

Mediation did not take place. Mostyn J refused the wife's application saying that the wife had been unreasonable in her approach to mediation. The case continued to a fully contested appeal and the combined costs in respect of the appeal were approximately £48,000. The husband's appeal to cap the sharing of his bonus payments was allowed.

Counsel for the husband argued (successfully) that the reasoning in *Judge v Judge* [2009] 1 FLR 1287 and *Baker v Rowe* [2010] 1 FLR 761 that an appeal was in connection with and not in financial remedy proceedings and therefore, not subject to FPR r28.3(5).

Reviewing the wife's approach to mediation and the direct consequence this had on the costs of the appeal, the husband was awarded his costs.

Transgendered Parents and Private Law Children Proceedings

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Cases in which one parent is undergoing gender reassignment present specific challenges for any practitioner. Whilst there is little relevant guidance forthcoming from public law proceedings, the issue arises increasingly regularly in the private law arena. This article therefore deals with private law proceedings when one parent is transgendered, whether pre- or post-operative. As all cases predate the changes brought about by child arrangements orders, the terms 'contact' and 'residence' are retained.

Practitioners will also be aware of the concomitant issues arising for transgendered clients, whether legislative, procedural, practical or emotional. A subsequent article will deal with issues arising under the **Gender Recognition Act 2004**, as well as approaches taken by experts in the field.

A child's knowledge and the importance of avoiding delay

A point of bitter contention in gender reassignment cases is the manner in which the children of the relationship should be informed of their parent's new gender role. The non-transgendered parent frequently does not wish for this information to be imparted to the child: the transgendered parent understandably wishes to reintroduce themselves to the child in their new gender role and build or resurrect a relationship. Problems also arise however when the transgendered party does not wish for the children to be informed of their gender reassignment. Whilst ***J v C and Another*** **[2006] EWCA Civ 551** encompasses a number of discrete points regarding parentage in cases of gender reassignment and artificial insemination, the basic application was simple. The parties had married and subsequently had two children, conceived by means of artificial insemination by donor. Following the breakdown of the marriage, the respondent wife learned that the applicant husband was female at birth. Significant exploration of the applicant's 'correct' gender followed, which is outwith the remit of this article. Ultimately, however, the applicant's appeal against a declaration that he was not the children's father was dismissed.

The court went on to note that the 'real question in the case is how both [children] are to be informed about their respective origins'. The applicant had sought an order that the parties' younger child (who remained within the provisions of the Children Act 1989) should not be informed of her parentage, the reason for the relationship breakdown or the father's gender except in a manner advised by an agreed consultant child psychiatrist. The respondent had previously given an undertaking in similar terms and the applicant's appeal was consequently dismissed. As a footnote, Lord Justice Wall concluded that informing the children of their parenting is 'a highly sensitive matter, but it does not seem to me to be one which is ultimately justiciable by way of orders under **CA 1989 section 8**. What [the mother] says to [the children] is, in my judgment, a matter for her, and not for the court to determine. There is a limit to which the court can and should seek to govern parental behaviour' (paragraph 41).

This approach may surprise many practitioners who have dealt with issues of gender reassignment within Children Act cases, in which the issue most urgently requiring judicial intervention is how to inform a child of their parent's gender reassignment. In the author's experience, such challenges are best dealt with in a comparable manner to issues regarding parentage in other Children Act proceedings: agreeing on a structured approach which avoids delay is paramount.

In the same year as *J v C*, ***Re C (Contact: Moratorium: Change of Gender)*** **[2006] EWCA Civ 1765** highlighted the importance of adopting that approach. Lord Justice Thorpe (with whom Lord Justices Wall and Hooper were in agreement) emphasised the importance of breaking the news to children appropriately, without delay and in a precisely planned manner. The father in this matter had not had contact with the children (aged 11 and 8 at the time of the application) for five years. An expert report had urged the importance of telling the children the truth without delay, expressing real concern that they were likely to be damaged if they found out independently. The expert recommended assistance from the National Youth Advocacy Service (NYAS) in informing the children, a suggestion rejected by the judge at first instance. The judge instead put in place a 20 month moratorium on proceedings with indirect contact only; only

towards the end of that time would the mother effectively be required to inform the children of their father's gender reassignment.

The court held on appeal that Coleridge J had failed to distinguish the two separate issues of contact and disseminating relevant information about their father's gender to the children. Coleridge J recognised the importance of the children being told the truth sooner rather than later and particularly before they could discover it for themselves: the moratorium imposed stood in the way of that objective. The children were therefore joined as parties and NYAS involvement was directed.

Perhaps reflecting a growing recognition of the need for speed when dealing with children, ***Re T (A Child)*** **[2008] EWCA Civ 85** rejected an appeal from the applicant – the child's biological father – that the child should not be informed of her gender reassignment. The applicant had a relationship with the child in her new gender role. The applicant objected on the grounds that the child was too young for such information at 8 years old and that this knowledge would damage her relationship and contact with her son. Lord Justice Wall was sympathetic to the applicant but noted that 'conventional wisdom is that a child, one of whose parents has undergone gender reassignment, needs to be told at as early a stage as is consistent with his or her welfare that this is what has occurred, so that the child can adjust to the change and, it is hoped, maintain a relationship with the parent who has undergone the change' (paragraph 3).

In a rather different approach from that set out in *J v C,* Wall LJ gave detailed instructions regarding the information to be imparted to the child. Such information included the identity of his father, the fact that the father had undergone gender reassignment, the father's new identity and clarification as to the parents' biological roles. The child would also be made aware of the identity of his paternal grandparents, often one of the first familial links to break in any private law matter.

Under **s12 of the Gender Recognition Act**, the fact that a person's gender has become the acquired gender does not affect their role as father or mother of a child. Any appropriate application for parental responsibility should feasibly prove less problematic than the issues of disclosure and – the most problematic – contact.

Contact between the child and transgendered parent

The importance of contact between a child and their parents is fully recognised by the courts and it is arguable that such an approach applies just as fully to transgendered parents. Pertinent authorities on contact between transgendered parents and their children are, however, few and far between. In the authorities noted above, contact was not wholly ruled out but did not resume within those proceedings and the outlook was generally bleak.

In *Re C*, Lord Justice Thorpe went further by suggesting that the father's application for contact was potentially unwise. He noted:

> 'The father might well in this case have sought not an order for contact; he might have accepted that that was something that could only develop in a, perhaps, distant future of the children's own volition; he might have sought only the order to ensure that they were protected from chance discovery of the reality' (paragraph 12).

It is fair to note that there had been no contact in this matter for five years, contact apparently ceasing when the father began to live as a woman. Proceedings also seem to have been put on hold whilst the father underwent gender reassignment surgery. Given the inevitable delays incurred when a parent transitions to another gender – as well as the time and emotional effort often required for the other parent to accept that change – it is a sad reality that most cases may involve a significant break in contact.

One exception is a situation such as that set out in *Re T*, where contact has continued in the new gender role but without the child knowing the relation between the parent and him or herself. The court held that the 'critical issue in the case is whether or not and in what circumstances the applicant should be able to resume her relationship with her son. That is the crucial issue. ...S is rising eight, he will be eight at the end of this year, and of course he has his entire life before him. I agree with the applicant when she submits that it is very important that we should now, if possible, get things right so that the relationship can be restored at an early stage, and S can form – or re-form, I should say – a proper and sensible relationship with the applicant'.

The likelihood for contact succeeding will inevitably turn on the preexisting and current relationship between the transgendered parent and their child. In a case where one parent is immovably hostile to the idea of contact with the transgendered parent, it is unfortunately doubtful that contact will resume in an organic way. Practitioners representing transgendered clients might derive some small assistance from the hope expressed within *Re T* that a child should form or resume their relationship with a transgendered parent where possible.

Expert assistance for children and parents

It is, of course, accepted that the gender transition of one parent can present extreme emotional challenges, both for the other parent and for the child. Expert evidence had been sought in Re C and the difficult issues surrounding gender reassignment were highlighted for the court. Professional support was recommended, particularly given the mother's

reaction to the father's decision. The expert in that matter emphasised that the highly specialised work required could not be undertaken by the Child and Adolescent Mental Health Services (CAMHS), which – at least at that time – did not have the resources. The expert recommended the National Youth Advocacy Service (NYAS), which was willing to complete the work.

NYAS was able to provide a specialist social worker to assist in *Re C*, whose suitability to undertake the work was not in doubt. Despite the increasingly scarce resources available in the family courts, particularly in relation to expert evidence, it may be that psychological or sometimes psychiatric assistance will be more appropriate in certain cases. Such was the approach taken in *Re F (Minors) (Denial of Contact)* [1993] 2 FLR 67, albeit not in the current financial climate. The children were aged 9 and 12 and had previously lived with both parents. Following the father's departure from the home, the elder child – unaware of the father's gender dysphoria at the time – refused to see him and received assistance from a child psychiatrist in treating consequent phobias. The younger child had seen his father dressed in his female role and also refused to see him: the psychiatrist was clear that the younger child suffered no psychiatric illness.

It is to be hoped that, whether with the intervention of expert assistance or simply a judicial guiding hand, any issues experienced by the children could be overcome to allow contact to resume. It was emphasised in *Re C* that the judge at first instance might have assisted the mother in making the 'adjustments that have to be made, for the sake of the children, if he had more strongly emphasised to her the very deep psychological roots and impulses that underlie transsexuality'.

Many transgendered parents will have to overcome a significant amount of emotional and practical resistance from their ex-partners. In *Re L (Contact: Transsexual Applicant)* [1995] 2 FLR 438, an unmarried couple had separated when their daughter was four years old; the father (the applicant) continued to have regular contact with the child. The applicant had experienced gender dysphoria from a young age and began the process of gender reassignment. The applicant presented as a female in public but reverted to a male role for the purposes of contact, meaning that the child remained unaware of the applicant's transition. This approach was ultimately unsustainable and the respondent mother refused to allow any further contact. No contact took place for nine months, during which time the applicant had almost finalised her transition to the female gender.

Thorpe J held that the applicant had clearly displayed sufficient commitment and attachment to warrant a parental responsibility order. The issue of direct contact was however conceded by the applicant at the conclusion of the hearing. Indirect contact was ordered and a family assistance order made. The application for direct contact was adjourned in the hope that therapy would assist the mother to accept the position, although she appeared adamantly against this course.

Thorpe J noted that transsexuality is 'a huge challenge for any family, particularly when its emergence postdates the breakdown of the relationship and when its progress is so rapid and when its disclosure is through antagonistic and not co-operative channels of communication'. Thorpe J therefore felt that 'the strength of the mother's emotional rejection of what has happened' and any therapeutic assistance was 'entirely understandable'. The reaction of the non-transgendered parent is of course case-specific and it should not be forgotten that many families manage to adapt to their new reality, often without the assistance of the courts.

The way forward

Even within the current funding regime, expert assistance for children should be sought wherever possible. Whilst it is highly unlikely that the legal aid budget would stretch to therapeutic input for the non-transgendered parent, every effort should be made to locate alternative resources. Importantly, the non-transgendered parent should be encouraged to engage with any professional assistance offered during a potentially profoundly painful time. The non-transgendered parent often becomes the child's primary carer and may correspondingly have to act as their primary support whilst the child adjusts emotionally: therapeutic input for the parent may be imperative. The emotional challenges of gender dysphoria and gender transition cannot be understated for either parent but the potential damage for a child of the process being managed inappropriately must supersede both.

The wider family, despite being outside the remit of the court, will also play a significant role in the child's ability to accept the new reality. In conjunction with expert intervention, is there also a role for family mediation to assist in the transition – both physical and emotional – that the family will need to undergo?

Local Authority Focus - October 2014

Sally Gore, barrister, **Fenners Chambers**

In this focus I shall consider:

- Age assessments
- Families with no recourse to public funds
- Assistance by local authorities to children who are not ordinarily resident in their area
- Promotion of the education of looked after children.

Age assessments

R(J) v Leicestershire County Council C2/2013/0445 (2nd July 2014) is the latest decision on age assessments to reach the Court of Appeal. The appellant sought to argue that the Judge of the Upper Tribunal was required to follow the practice adopted in *R(N) v LB Croydon* [2011] EWHC 862 (Admin) and ***R(AS) v LB Croydon* [2011] EWHC 2091 (Admin)** in which the Court considered the evidence and made a declaration of age notwithstanding the agreement of the parties as to the respective claimants' ages. Permission to appeal was refused, with Richards LJ describing the appellant's argument as 'nonsensical'.

The Upper Tribunal (Immigration and Asylum Chamber) routinely hears age assessment cases now as it is better equipped than the Administrative Court for considering the oral evidence that is required following *R(A) v London Borough of Croydon;* ***R(M) v London Borough of Lambeth* [2009] UKSC 8**. The Tribunal had been presented with a consent order recording the parties' agreement as to the claimant's date of birth. It had subsequently refused to grant the appellant a declaration as to his age. The refusal of permission to appeal to the Court of Appeal effectively endorsed this approach.

No recourse to public funds

***PO v London Borough of Newham* [2014] EWHC 2561 (Admin)** considered the lawfulness of the London Borough of Newham's policy in relation to the support provided under **s.17 of the Children Act** to families with no recourse to public funds. The London Borough of Newham had at the time a policy in place which paid a 'standard rate' of subsistence to families with no recourse to public funds. In a witness statement, the local authority explained that these rates were derived from the current rates of child benefit payments.

The crucial flaw in the policy was that child benefit is not intended to meet in full the needs that a child has for financial support. A further flaw was that a policy based on child benefit rates, which in turn were based on the number of children in the family, took no account of the fact that a local authority providing s.17 support to a family is providing support not only to the child(ren) but also to the adults in the family who care for them. Whilst the amounts payable for the adults' subsistence need not be more than is required to avoid a breach of their Convention rights, they did need to be amounts in addition to that judged necessary to meet the subsistence needs of the children.

However, the Administrative Court rejected the claimant's implied submission that a policy such as this should never be based on 'standard' rates. A local authority formulating a policy to provide for families that are destitute can be assumed to have some conception of what is normally appropriate to meet the children's needs in accordance with the general duty imposed by s.17. Nonetheless, any such policy must always have the flexibility to provide for exceptional circumstances as identified by a proper assessment of need.

In more recent news on the subject of support for families with no recourse to public funds, the Public Law Project has recently published a guide on the support that may be available to such families under s.17. The intention behind this guide is to assist voluntary organisations to identify when a destitute family with children may be able to access s.17 support from their local authority.

Local Government Ombudsman finds Doncaster MBC misapplied Part III, Children Act 1989

A homeless 17-year old who claimed she had fled her family home after being physically and emotionally abused by her father was turned away by Doncaster Children's Services. She had initially travelled from her home in North Yorkshire to her boyfriend's home in Doncaster. When her father threatened to burn down the boyfriend's home she sought help from the local authority. Doncaster social workers refused to carry out any assessment of her circumstances as she was not ordinarily resident in their area. They offered her a discretionary payment of £50 to return home to North Yorkshire.

A homeless 16 or 17-year old seeking assistance from a local authority is a feature of much of the case-law on **s.20, Children Act 1989**. The authorities have been clear, certainly since ***R(G) v Southwark London Borough Council* [2009] UKHL 26** that a duty is owed under that section to any child 'within the area' of the local authority who satisfies the other elements of s.20(1). See ***R(A) v London Borough of Croydon* [2008] EWCA Civ 1445**.

There is no requirement that a child be 'ordinarily resident' in the area of a local authority to which they present themselves and case-law has already established that the local authority to which a child presents is expected to assess their needs and not simply assist or encourage them to go to the area of a different authority: ***R (Liverpool City Council) v London Borough of Hillingdon* [2009] EWCA Civ. 43**.

Following **a complaint to the Ombudsman** which was upheld, Dr Jane Martin, Local Government Ombudsman, said:

> "I am concerned that a vulnerable young girl, who has repeatedly asked for help from Doncaster council, has been told at every turn that she is 'not their responsibility.
>
> "The law is clear on this, a child does not have to be 'ordinarily resident' in a council's area – and Doncaster council should have assessed the girl's situation when she came to them and presented as homeless.
>
> "I hope this case reminds other councils of their legal position when considering children in need who are from outside their area."

By way of a remedy, Doncaster MBC agreed to apologise to the teenager for failing to assess her as a 'child in need' and for failing to take appropriate action. The local authority paid her £500 for the distress caused to her and for the the unnecessary risk it placed her in by not providing her with accommodation.

Promoting the education of looked after children

In July 2014, the Department for Education issued **revised statutory guidance** aimed at promoting and enhancing the educational opportunities for looked after children. Amongst other matters dealt with in the revised guidance, the new guidance reflects the statutory requirement imposed by **s.99, Children and Families Act 2014** (which inserts new s.22(3B) and s.22(3C), Children Act 1989) that local authorities appoint a named officer to safeguard the educational achievements of looked-after children (a so-called Virtual School Head).

The guidance relates to the need for local authorities to ensure that their Virtual School Heads have sufficient resources, time and support to carry out their duties properly. The guidance also deals with the need for local authorities to monitor the attendance at an educational institution and the progress in education of the children whom they look after.

The New Standards for Expert Witnesses

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Practice Direction 25B – "The Duties Of An Expert, The Expert's Report And Arrangements For An Expert To Attend Court" came into force on 1 October 2014.

Background

The 2010-2011 Family Justice Review elicited concerns regarding the delays ensuing from, and the quality of, some expert evidence in the family courts. Feedback submitted to the Family Justice Review indicated weaknesses in the system of oversight of experts.

In May 2013 the Family Justice Council and Ministry of Justice jointly published a consultation document entitled '*Standards for Expert Witnesses in the Family Courts in England and Wales'.* This consultation paper contained proposed standards drafted by the Experts Working Group of the Family Justice Council. The response to the consultation essentially indicated clear and overwhelming support for the introduction of new minimum standards for expert witnesses in family proceedings relating to children. The proposals contained in the consultation paper are substantially incorporated in the Practice Direction.

Aims

The Practice Direction is of course part of the wider substantial reforms to the family justice system. The 'necessary' test must be surmounted: the court being under a duty to restrict expert evidence to that which in the opinion of the court is necessary to assist the court to resolve the proceedings justly. Having reduced the occasions when expert evidence will be given in children cases, the Practice Direction now aims to produce improvements in the quality of such evidence.

The changes, requiring minimum standards for experts are intended to ensure all experts providing evidence to the family courts in proceedings relating to children are prepared and able to demonstrate an acceptable level of competence and experience. Changes to public funding rules will also ensure that in publicly funded cases involving children, solicitors may instruct only those experts who meet the standards.

The provisions

The Practice Direction of course supports FPR Part 25 and should also be read in conjunction with:

- Practice Direction 25A (Experts – Emergencies and Pre proceedings Instructions);
- Practice Direction 25C (Children Proceedings – The Use of Single Joint Experts and the Process Leading to an Expert Being Instructed or Expert Evidence Being Put Before the Court);
- Practice Direction 25D (Financial Remedy Proceedings and Other Family Proceedings (except Children Proceedings) – The Use of Single Joint Experts and the Process Leading to Expert Evidence Being Put Before The Court);
- Practice Direction 25E (Discussions Between Experts in Family Proceedings); and
- Practice Direction 15B (Adults Who May Be Protected Parties and Children Who May Become Protected Parties In Family Proceedings) gives guidance relating to proceedings where an adult party may not have capacity to conduct the litigation or to instruct an expert.

- *Guidelines for the instruction of medical experts from overseas in family cases' published by the Family Justice Council in December 2011*. An expert working outside the UK must now demonstrate compliance with these under the new Standards.

The Practice Direction ('PD25B') applies to 'children proceedings' as defined by **FPR 25.2(1)**.

Who is an expert?

Under FPR 25.2(1) an 'expert' is a person who provides expert evidence for use in family proceedings. **Section 13(8) of the Children and Families Act 2014 Act** ('the 2014 Act') excludes social workers, Cafcass officers and Guardians from the scope of expert evidence.

The previous definition contained in the existing PD25B is used. Pursuant to paragraph 2.2, 'expert' includes a reference to an expert team which can include ancillary workers in addition to experts. As before, the final expert's report must give information about those persons who have taken part in the assessment and their respective roles and who is responsible for the report.

Need for the court's permission

Para 5.1 restates the need for the court's permission to put expert evidence (in any form) before the court, as provided by section 13(5) of the 2014 Act and FPR 25.4(2). The overriding objective in FPR1.1 applies when the court is exercising this duty. In children proceedings, the court's permission is required to instruct an expert and for a child to be medically or psychiatrically examined or otherwise assessed for the purposes of the provision of expert evidence in the proceedings as provided in section 13(1) and (3) of the 2014 Act.

The expert's duties

Under para 3.1, PD25B an expert in family proceedings continues to have an overriding duty to the court that takes precedence over any obligation to the person from whom the expert has received instructions or by whom the expert is paid.

Para 4.1, PD25B lists the particular duties of the expert to which the expert must have regard. The duties reflect those already in place, save for the key change that under para 4.1(aa) in children proceedings, an expert must comply with the *Standards for Expert Witnesses in Children Proceedings in the Family Court* set out in the Annex to the practice direction.

Standards for expert witnesses in children proceedings

These standards are comprehensively set out in the Annex. Subject to any order made by the court, expert witnesses involved in family proceedings (involving children) in England and Wales must comply with the standards. Significantly this requirement applies whatever their field of practice or country of origin.

Eleven minimum Standards are required by PD25B:

1. The expert's area of competence is appropriate to the issue(s) upon which the court has identified that an opinion is required, and relevant experience is evidenced in their CV.

2. The expert has been active in the area of work or practice, (as a practitioner or an academic who is subject to peer appraisal), has sufficient experience of the issues relevant to the instant case, and is familiar with the breadth of current practice or opinion.

3. The expert has working knowledge of the social, developmental, cultural norms and accepted legal principles applicable to the case presented at initial enquiry, and has the cultural competence skills to deal with the circumstances of the case.

4. The expert is up-to-date with Continuing Professional Development appropriate to their discipline and expertise, and is in continued engagement with accepted supervisory mechanisms relevant to their practice.

5. If the expert's current professional practice is regulated by a UK statutory body (see Appendix 1) they are in possession of a current licence to practise or equivalent.

6. If the expert's area of professional practice is not subject to statutory registration (e.g. child psychotherapy, systemic family therapy, mediation, and experts in exclusively academic appointments) the expert should demonstrate appropriate qualifications and/ or registration with a relevant professional body on a case by case basis. Registering

bodies usually provide a code of conduct and professional standards and should be accredited by the Professional Standards Authority for Health and Social Care (see Appendix 2). If the expertise is academic in nature (e.g. regarding evidence of cultural influences) then no statutory registration is required (even if this includes direct contact or interviews with individuals) but consideration should be given to appropriate professional accountability.

7. The expert is compliant with any necessary safeguarding requirements, information security expectations, and carries professional indemnity insurance.

8. If the expert's current professional practice is outside the UK they can demonstrate that they are compliant with the FJC 'Guidelines for the instruction of medical experts from overseas in family cases'.

9. The expert has undertaken appropriate training, updating or quality assurance activity – including actively seeking feedback from cases in which they have provided evidence- relevant to the role of expert in the family courts in England and Wales within the last year.

10. The expert has a working knowledge of, and complies with, the requirements of Practice Directions relevant to providing reports for and giving evidence to the family courts in England and Wales. This includes compliance with the requirement to identify where their opinion on the instant case lies in relation to other accepted mainstream views and the overall spectrum of opinion in the UK.

11. The expert should state their hourly rate in advance of agreeing to accept instruction, and give an estimate of the number of hours the report is likely to take. This will assist the legal representative to apply expeditiously to the Legal Aid Agency if prior authority is to be sought in a publicly funded case.

Statutory bodies

The Standards require experts to have appropriate accreditation, and/or professional registration. The Appendices are designed to assist practitioners to identify by or with whom an expert should be so accredited/registered.
Appendix 1 of PD25B sets out extensively the UK Health and Social Care Professions and Statutory Regulators with responsibilities within England and Wales.

Appendix 2 sets out examples of professional bodies / associations relating to non- statutorily regulated work.

Content of the expert's report

Para 9.1 sets out in detail the matters that must be contained in the report and emphasises that the report must be filed in accordance with the court's timetable. These duties reflect those contained in the existing practice direction. The provisions concerning the Statement of Truth are however bolstered to give effect to the new Standards imposed upon experts.

Statement of truth

A significant provision of PD25B is that the report must be verified by an amended statement of truth set out at para 9.1 (j). The first paragraph reflects that already in place, the second paragraph is an addition:

Where the report relates to children proceedings the form of statement of truth must include –

"I also confirm that I have complied with the Standards for Expert Witnesses in Children Proceedings in the Family Court which are set out in the Annex to Practice Direction 25B- The Duties of an Expert, the Expert's Report and Arrangements for an Expert to Attend Court"

Under **Rule 17.6 of the Family Proceedings Rules**, proceedings for contempt could therefore be brought against an expert who asserted, dishonestly, that they had complied with the Standards for Expert Witnesses set out above.

Practicalities

The Practice Direction otherwise reflects its predecessor. Para 6 of PD25B continues to set out the procedure for making preliminary enquiries of an expert (complemented as before by PD25C and PD25D). Para 8 sets out the information that should be obtained from an expert, in time for the permission hearing or advocates meeting, if held earlier.

Para 10 of PD25B sets out details of the practical arrangements that should be made further to the expert's attendance at court. This includes matters such as ensuring that a date and time for the expert to give evidence is arranged in good time, achieving a logical sequence to expert evidence and narrowing the issues which the experts are to address.

Conclusion

The new Standards bring about significant change. Some of the responses to the Consultation suggested that the previous system for assurance of experts was virtually non-existent. The requirements will not of course guarantee the quality of evidence given, but will ensure that experts are appropriately qualified and experienced. In those very rare cases where an expert dishonestly misrepresents their expertise, contempt proceedings could be brought.

The requirement to instruct an expert who fulfils the Standards will inevitably result in more pre-instruction work for solicitors. Further, it remains to be seen what effect the imposition of these Standards will have on the availability of experts. Most practitioners will already have seen a reduction in the small pool of experts willing to give evidence in this sensitive field, following the imposition of lower fees for experts. It is hoped that the effect of these Standards will only be to filter out the expert lacking necessary experience, rather than deter the good expert. On careful reading the good expert will see that they are readily able to comply with the Standards.

Family Drug and Alcohol Court: A Practitioners' and Judge's Perspectives

Sarah Jennings & Esther Lieu, barristers, 3PB, with District Judge Julie Exton

What is FDAC?,

"A strikingly successful example of courts innovating to deal with complex problems." [1]

The Family Drug and Alcohol Court was originally set up by District Judge Nicholas Crichton at the Inner London Family Proceedings Court in 2008 with funding from the Department for Children, Schools and Families, the Ministry of Justice, the Home Office and the Department of Health as well as the three local authorities involved in the pilot scheme. In 2012, direct governmental funding was withdrawn at the conclusion of the pilot scheme and the local authorities involved (as well as two additional London local authorities) continued funding the FDAC themselves. In March 2013 District Judge Julie Exton worked with Gloucestershire County Council to start an FDAC in Gloucestershire. Milton Keynes and Buckinghamshire have also recently started using the FDAC model and it is hoped that the model will be rolled out across the country in the next few years.[2]

Why does FDAC exist?

In over 50% of FDAC cases the mother/ parents have already had one child removed at the conclusion of previous care proceedings and in almost all those situations it was due to the same drug and alcohol dependence that instigated the subsequent proceedings. FDAC recognises that unless such dependency is properly addressed then those parents will continue to struggle to care for their children irrespective of how many times they try.

Who 'attends' FDAC?

To qualify for the FDAC scheme parents must have a significant drug and/or alcohol problem and be at a stage at which they are willing to tackle that addiction. In Gloucester, Gloucestershire County Council and Gloucester NHS Trust fund the Turn Around for Children Team (TACS team), which consists of drug and alcohol professionals who will recommend a referral to the FDAC if they assess a parent as having the necessary motivation for achieving abstinence. Once accepted into FDAC, proceedings are immediately timetabled for both the positive route (abstinence and safe parenting mean that the children remain at home) and the negative route (removal).

How does FDAC differ from standard care proceedings?

As we know, it is very difficult for a parent to show abstinence within the 26-weeks allowed for court proceedings. For this reason FDAC is recognised as an exemption to the 26 week limit provided that there is evidence to show (i) motivation to change, (ii) ability to maintain that change and (iii) that this can be achieved within the children's timescales (Re S: A child [2014] EWCC B44 (Fam) (16 April 2014), para 38 (Sir James Munby)).

How does FDAC work?

The parents are expected to engage in a highly intensive programme of drug intervention work and parenting assessment. Addressing an addiction may entail separating from their partner, relocating and distancing themselves from their social networks. Alongside the physical and emotional toll of reducing their usage, the parent may be asked to address, through therapy, the traumatic experiences that have influenced or perpetuated substance abuse. They are required to attend several appointments a week, sometimes several a day, whilst ensuring that they attend contact on time and in the appropriate frame of mind to interact with their child. Above all the parent is required to engage openly with the TACS team, informing them of any relapses or difficulties.

What are the benefits of FDAC?

- FDAC works to create a relationship between the professional drug workers, social workers, judiciary and the parents. The transparency of this relationship seems to assist the parents in accepting their issues and working towards a better future.

- Judicial continuity builds a relationship between the parent and the judge, and the non-lawyer reviews enable them to communicate with the judge directly. It is not uncommon for the parents to thank the judge at the end of a case even if the children are ultimately to be removed from their care.

- Notwithstanding their approachability, the authority of the judge remains crucial to FDAC:"parents have to know and understand that the nice person listening to them and wanting to help, also has the authority to say they won't get their children back.' (DJ Crichton)

- In our experience, FDAC also seems to promote kinship placements because a parent is less likely to destabilise a placement once they have accepted that they have drug and alcohol issues and are working towards abstinence. The TACS team also work with the family as a whole to indentify triggers and signs of relapse. As District Judge Crichton has said, FDAC is "better for parents, better for children, better for families and ultimately better for our society." (BBC Radio Three, Law in Action "Drug And Alcohol Misusing Families" 15th March 2012)

View from the Bench (by District Judge Exton)

The judge in charge of a Family Drug and Alcohol Court needs to be able to play the good cop and the bad cop. Parents at the outset of proceedings are left under no illusion: everyone in the room wants them to succeed; but, if they are unable to become, and remain, abstinent within the child's timeframe, the judge will have no hesitation in removing the child from their care. They are also told that this is the best chance they will ever have of turning their lives around.

One of the unique, and crucial, features of the FDAC is that parents attend fortnightly, non-lawyer reviews with the judge who discusses the progress they have made. Initially nervous about that aspect, once familiar with the process, the lawyers' concerns disappear. They understand their client's relationship with the judge empowers them, they feel more in control of their case and they appreciate (often feeling this for the first time) that someone is actually interested in them. And, importantly for the success of their case, they do not want to let the judge down.

Even when parents do not succeed, they have never in the Gloucestershire FDAC contested the final recommendation; they know they have had the best possible chance and appreciate that it is not safe for the child to return to their care. But they have often themselves made significant progress.

There have been some spectacular, and unexpected, successes and, because the judge has got to know them so well, in Gloucestershire she sees the parents six months into their supervision order. The parents look forward to that meeting. Likewise, the judge who regards the FDAC as her favourite day of the fortnight!

Conclusions

Following FDAC's inception five years ago, an evaluation was carried out in May 2014 by Brunel University (lead by Professor Judith Harwin) and consultants RyanTunnardBrown, funded by the Nuffield Foundation. Of the 90 families that were sampled the team found:

- FDAC mothers had higher rates of substance misuse cessation (40%) than those who had been through ordinary care proceedings (25%).

- FDAC families had higher rates of family reunification (35%) than those who had been through ordinary care proceedings (19%).

- The rate of neglect or abuse one year after children returned home was lower for FDAC parents (25%) than parents who had been through ordinary care proceedings (56%).

The report concluded that FDAC is "more focused, less antagonistic and more informal, yet sufficiently rigorous when needed" compared with the standard court system. In our experience this sentiment is echoed by professionals working within the FDAC process. To quote Lord Justice Munby, "the simple reality is that FDAC works" (*Re S (A child)* [2014] EWCC B44 (Fam)).

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[1] Building Better Courts: Lessons from London's Family Drug and Alcohol Court. The New Economics Foundation, Stephen Whitehead. July 2014.

[2] In June 2013 Sir James Munby , the President of the Family Division declared his wish for a family drug and alcohol court in all 44 DFJ areas in England

Sources

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Project Website

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CASES

Abuchian v Maksoud [2014] EWHC 3104 (Fam)

An application by a Husband for a Wife's applications under the Married Women's Property Act 1882 and Family Law Act 1996 to be struck out and an application by a Wife that the hearing of the Husband's application be set aside and that the grant of permission or leave be brought forward so that it could be heard during the course of the same hearing as had already been fixed as a pre- trial review in relation to the Wife's claim under the Married Women's Property Act 1882 and the Family Law Act 1996, and the Husband's cross - claim for possession.

The Husband issued his application to strike out the Wife's applications pursuant to rule 4.4 (1) (c) of the Family Procedure Rules on grounds that the applicant had failed to comply with, and was in breach of, the order of Sir Paul Coleridge dated 13 May 2014 as the Wife was 2 days late in filing her reply to the Husband's points of defence. The application was also made on grounds that the Wife had failed to file a questionnaire.

Holman J held that the Wife had not failed to supply answers to questionnaires as the court had not fixed any timetable within which the questionnaire should be answered. In respect of the order to file and serve points of claim and reply the Judge ordered that it was disproportionate and unjust to strike those claims out on the basis of aggregate slippage of three and a half days. The Judge dismissed the application notice to strike out the Wife's claims under the Married Women's Property Act 1882 and the Family Law Act 1996.

To encourage a quick resolution the Judge ordered that the issue as to whether or not the grant of leave or permission should be set aside be brought forwards and that there be just one, rather than two, lengthy hearings in order to open the way to a full, fair, final hearing of all the issues between the parties and thus the Judge enlarged the listing to seven days. The Judge was clear that the accelerated timetable must be adhered to.

In summary, the Judge ordered that there be no strike out of the Wife's application and that the whole timetable be brought forward.

Case summary by **Joseph Moore**, barrister, **1 Garden Court Family Law Chambers**

L v M [2014] EWHC 2220 (Fam)

This case concerned an application by the wife for the husband to show cause as to why he should not be held to a concluded agreement entered into by the parties as set out in a separation agreement and reflected in a draft consent order signed by both parties.

From the commencement of the proceedings until a hearing before Keehan J in June 2014, the husband was represented. Thereafter, the husband ceased to participate in the proceedings, save for two emails sent on 13 and 22 June 2014; the latter being sent to the court by a firm of Zimbabwean lawyers. Despite the husband's absence Bruce Blair QC (sitting as a Deputy High Court Judge) fully investigated the merits of the case during a hearing lasting 5 days.

The parties, both British, commenced cohabitation in the Spring of 2006, and married in January 2008. Their only daughter is now aged 6. The husband has substantial connection, both business and personal, with Africa, and these were maintained during the marriage. The parties' principal matrimonial home was in Harare, and they had a holiday-type home in Kenya.

On 5 May 2010, having come to believe that the husband was contemplating issuing divorce proceedings in Zimbabwe, the wife instructed lawyers to issue in England. During that period in email correspondence with the wife, the husband wrote of having had an introductory meeting with "the divorce lawyer" as he "wanted to find out what was involved if there was a split" and to a previous introduction to a Zimbabwean lawyer with whom he had an introductory meeting. The husband stated that he would like to "start a process of settlement going".

Thereafter, the parties entered into a dialogue. On around 13 May 2010, the wife sought to instruct Mishcon de Reya and left telephone messages which went unanswered. The wife asserted that the next day the husband informed her that she could not consult Mishcon de Reya as he already had. In any event, towards the end of May 2010, with the assistance of a solicitor friend of theirs whose services they engaged, a draft agreement was produced which culminated in a separation agreement signed on 6 August 2010, and a consent order. The principal terms of the agreement are set out in full at paragraph 11 of the judgment. In a nutshell, the husband was to pay the wife a lump sum of £2,000,000 in four instalments and global maintenance on a decreasing scale until the child completed university or attained the age of 25, whichever occurred earlier.

The husband had paid the first instalment of £100,000 in part-payment of the lump sum, and interim maintenance at the rate prescribed by the agreement until May 2012. Thereafter, he reduced the payments until December 2012, and ceased to pay for a period, re-starting payments at a further reduced rate at a later date.

The husband sought to resile from the Agreement and defended the application to show cause on the following grounds:

a. Insufficient financial disclosure at the time of the agreement;

b. Lack of any legal advice rendered to him as to the terms or implications of the agreement or consent order;

c. The fact that there are elements of the consent order which are beyond the court's jurisdiction (these are my words; but they better reflect, I think. what he meant to say); and

d. In any event he is simply not in a financial position to make the payments agreed.

The husband's case is set out in paragraphs 14 to 21 of the judgment. In brief, the husband also contended that, in any event, there had been a change in his financial circumstances and sought to argue that any order made should take into account not only the change, but also the brevity of the marriage; his very limited assets, and the funds already passed to the wife.

The wife's contentions were that the agreement was freely entered into on both sides with ample knowledge of the other's financial situation, and that each party eschewed the need for detailed and documentary formal disclosure. Further, both parties knew the full consequences and implications of the agreement, and as the agreement itself records both parties had "had legal advice or the opportunity to take legal advice". In fact, she said, it was the former of these alternatives: the husband received legal counsel both in Zimbabwe and in England, although she cannot know its scope or precise substance. It was the wife's case that the husband told her that he had received advice from Mishcon de Reya.

The parties exchanged Forms E in February 2014. Both parties served substantial questionnaires in March 2014. The wife answered the husband's questionnaire and it was noted that the husband had not complained about the answer nor had he served a further questionnaire or a schedule of deficiencies. Following a hearing at which MPS was in issue, the husband was ordered to reply to the wife's questionnaire, and in particular to provide information and documentation requested concerning a Mauritian Foundation. The wife was given liberty to apply for directions if the husband failed to provide the documentation requested by a certain date. At the same hearing, it was recorded that the husband was also requested to provide an undertaking to the wife's solicitors to obtain his entire solicitors' file from Mishcon de Reya, but he declined to do so.

The wife's questionnaire remained totally unanswered. The wife made an application before Moor J for the Mauritian Foundation to be ordered to disclose the information she requested. Moor J granted her application, and recited that it was likely that the judge hearing this case will draw adverse inferences against the husband as to his financial circumstances if this information is not provided.

The judge considered the relevant section 25 factors at paragraphs 35 to 37 of his judgment. He found that the level and detail of the husband's current income remained a mystery. He then considered the parties' case concerning the main assets at paragraphs 46 to 62 of the judgment, noting throughout that the husband was twice ordered by the court to answer the wife's questionnaires and that he remained in breach of the orders, having given no answer or documentary evidence at all.

Mr Blair QC summarised the relevant law at paragraphs 66 to 70 of his judgment.

Turning to the husband's contentions, the learned judge found that it was hard to fathom what the husband meant by insufficient financial disclosure partly because he had not particularised any assertion that the wife's disclosure was inadequate, and the agreement contained a recital that recording the parties' the lack of disclosure and the parties' acceptance thereof.

Of the lack of veracity in the wife's Form E, it was noted that this allegation had not been particularised or forensically pursued.

Concerning the lack of legal advice, the judge concluded that in light of the evidence, on the balance of probabilities, the husband did have at least some legal advice as to the financial consequences of divorce, and he had ample opportunity to take such advice. If that is wrong, the lack of advice would have been the husband's decision "uncontaminated by any lack of knowledge, inequality of bargaining power or other vitiating factor", and the agreement was in any event freely entered into by the husband with a full appreciation of its implications. Further, the learned judge made a finding that the husband was wholly content with the agreement's provisions in 2010, and that they sat comfortably with the worth and substance of his financial resources.

When considering the brevity of the marriage the core quantum of the settlement was not such as to offend judicial sensibility so as to render intrinsically unfair especially when fairness is judged with one eye focussed on the fact of the parties' consensus and the finding that the husband was content with the agreement.

The husband's assertion that there had been a change in his circumstances and the current funds were insufficient had consumed most time in the course of the hearing. The wife's case that the husband's disclosure is wholly unreliable was inescapable. The wife was, with justification, able to go as far as asserting that the statement provided by the husband was highly unconvincing and false. Mr Blair QC concluded that had this been a conventional financial remedies case, on the evidence before him, applying the relevant standard of proof, his finding would have been that the husband was worth many millions of pounds and his assets included the main assets considered in this judgment. The husband had fallen short of persuading the court to find the change of circumstances for which he contended.

The husband was held to the fundamental terms of the agreement, having not shown just cause why he should not be. Some modifications were made to the agreement in respect of issues which the court lacked jurisdiction to order. These are set out at paragraph 79 of the judgment, and the rate of interest was varied. Periodical payments were ordered premised on the agreement, and the husband was ordered to make good his default to set up a trust for the child as agreed.

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

Rapisarda v Colladon (Irregular Divorces) [2014] EWFC 35

In late February 2012 a member of court staff at Burnley County Court spotted that two divorces, involving Italian parties, used the same address in Maidenhead. Initial enquires of the local county court (Slough) revealed the address to be non-residential. The (then) President of the Family Division was notified and all cases in all courts stayed. A police investigation commenced and concluded on 1 October 2012.

Investigations revealed that between August 2010 – February 2012 in 137 county courts 180 petitions had been issued using the same address. Most courts handled only one petition. In each petition the habitual residence of either the applicant or respondent was stated to be England and an affidavit was sworn to that effect. This affidavit used the name of a Reading solicitors firm (that had no knowledge of nor involvement in the proceedings). The divorces were orchestrated by Dr Russo who charged fees of upwards of 3,750 euros.

During the course of the proceedings, which involved the intervention of the Queen's Proctor, attempts were made to notify all parties involved in the petition. Only one case *Rapisarda v Colladon* chose to attempt to challenge the Queen's Proctor's plea to set aside the decree.

The President sets out the law of divorce in England and Wales. He concludes that:

(1) 'simple' perjury will not make a decree void on the grounds of fraud

(2) perjury that goes only to jurisdiction to grant the decree and not to jurisdiction to entertain the petition will not make a decree void on the grounds of fraud

(3) if the court is 'materially deceived' by perjury, fraud of otherwise as to the jurisdiction to entertain the petition the divorce will be void

(4) a decree may be void if there has been serious procedural irregularity involving fraud (for example concealment of the proceedings).

The President then:

(1) dismissed the petitions of those divorces upon which no decree had been pronounced and

(2) set aside all decrees absolute and nisi pronounced on the basis of fraud and dismissed the underlying petitions.

In the one contested case the President set aside the decree and dismissed the petition on the basis of fraud.

Munby P concludes by considering measure to prevent such 'industrial scale' fraud reoccurring, including the proposal to consolidate the processing of divorce petitions to far fewer centres.

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

T v S [2013] EWHC 2521 (Fam)

The case concerned a 6 year old boy whose parents had been engaged in acrimonious litigation about him for over four years. There was little or nothing upon which they could agree.

As a result, the child had been made a ward of court and in December 2012 Hedley J had made a detailed order, setting out when each parent was to have care and control and delegating the exercise of parental responsibility by way of a schedule (following the structure of *A v A* [2004]).

One heading of the schedule set out issues where one parent had to "inform and consult" (but was not obliged to obtain consent from) the other before making a decision; this included "planned medical and dental treatment".

Hedley J had also ordered that all applications were to be listed without notice to the other party in the first instance. Thus it was that the matter came before the President in May 2013, on which occasion he gave directions, including for the production of a transcript of Hedley J's judgment.

Although the adjourned hearing remained on a without notice basis, those acting for the mother became aware of it and attended court.

The reality of the father's application was that it was an attempt to both re open the matters on which Hedley J had only recently adjudicated and to seek to persuade the court to investigate a "litany" of further similar complaints against the mother.

The President drew on the earlier judgment, which emphasised that it was for the parents to decide on issues pertaining to the child and that (importing his own terminology) the court simply could not "micro-manage" the parental relationship and their handling of the child. One example, cited in the previous judgment and commented upon here, was the parents' inability to decide at which part of Clapham Junction station handover should take place. There was nothing to justify throwing all the arrangements so recently determined by the court back into the "melting pot" and, accordingly, the President declined to give the father permission to pursue these matters.

As to the specific issue of dental care, there were two competing treatment plans upon which adjudication was sought.

The President considered and rejected the route of inviting further (expert) evidence and coming to a judicial decision. To do so would, he opined, be to undermine both the specifics and the underlying philosophy of Hedley J's order. In terms of the specifics, there was no duty for one parent to obtain the consent of the other and thus, each could lawfully pursue the chosen plan without so doing. If this meant one "stealing a march" on the other, unsatisfactory though it might be, it was unavoidable.

As to the underlying "wise" philosophy promulgated by Hedley J (that the parents must get on with the task of deciding what is to happen to their son) the court could not engage in micro-management of each and every dispute that might arise throughout the boy's childhood without being inconsistent with both that philosophy and the details of the order.

Accordingly, the President declined to make orders as sought and, instead, dismissed the father's applications, including that in relation to dental care.

Given that there was little doubt one or other party would seek to engage in further litigation, the child should remain a ward, the case should remain in the High Court and there should be future judicial continuity to be achieved by naming an allocated judge. Unusually (and because deemed to be of assistance to the future judge) a transcript of the proceedings was to be provided at public expense.

Following the judgment, the father raised a further issue as to the meaning of the "the father" (and by implication, "the mother") in the existing order in the context of who was to conduct handover i.e. whether it meant "the father" or "the mother" and no-one else or "the father or his agent" (or by implication "the mother" or her agent). Noting that "the order means what it says" and that to make any modification would be to provide a "fruitful source of future controversy or dispute", the President, once again, declined the application and made no amendment.

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

Re X (A Child) (Surrogacy: Time limit) [2014] EWHC 3135 (Fam)

The commissioning parents married in 1998 and in 2011 they made a surrogacy agreement in India with the surrogate parents (which was accepted by all parties to be valid under Indian law). The surrogate mother conceived using eggs donated by a third party and the commissioning father's donor sperm. The child, X, was born in India on 15 December 2011. X entered the UK on a British passport on 6 July 2013. On 4 August 2013 the surrogate parents confirmed, in separate written documents, that they wished to relinquish all their parental rights and responsibilities in respect of X, which they confirmed on 1 December 2013.

In June 2013 the commissioning parents separated but did not divorce. In July 2013 the commissioning father applied in the Birmingham County Court for a residence order in respect of X.

Section 54(1)(c) of the Human Fertilisation and Embryology Act 2008 provides that in certain specified circumstances "the court may make an order providing for a child to be treated in law as the child of the applicants" – a parental order – "if … the conditions in subsections (2) to (8) are satisfied." Subsection 54(3) provides:

> "the applicants must apply for the order during the period of 6 months beginning with the day on which the child is born."

This requirement had not been complied with in this case owing to the commissioning parents being unaware of the need to apply for a parental order, let alone the terms of section 54. In the absence of a parental order being made, they did not have parental responsibility for X and indeed the surrogate parents remained X's legal parents and the surrogate parents were unable to transfer their parental responsibility to the commissioning parents. Further, it was agreed that adoption of X by the surrogate parents would not be an attractive solution owing to the commissioning father's existing biological relationship with X and a parental order presented the "optimum legal and psychological solution for X" (paragraph 7).

In light of the problem presented by section 54, the case was transferred to the High Court. X was made a ward of Court and an order made that X's living arrangements be split between the two commissioning parents' homes.

Following an opinion (provided in January 2014) from leading counsel instructed on behalf of X's Guardian that it was arguable that the commissioning parents could still apply for a parental order, they duly lodged a joint application for a parental order on 12 February 2014. They then reconciled in June 2014.

The parental order application came before Sir James Munby, P, for final hearing.

Sir James Munby, P, conducted a detailed review of the case law concerning the time limit for applications for parental orders, noting that it had always hitherto been considered that there was no power make an order if the 6 month time limit had not been complied with: see *In re X (Children) (Parental Order: Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] Fam 71, [2009] 1 FLR 733, *Re S (Parental Order)* [2009] EWHC 3146 (Fam), [2010] 1 FLR 1156, *JP v LP and others* [2014] EWHC 595 (Fam) and *Re WT (A Child)* [2014] EWHC 1303 (Fam).

However, he held that the previous assumption held in the above cases had not been correct and that there was indeed power to make an order notwithstanding the expiry of the 6 month time limit.

He arrived at this conclusion firstly as a result of consideration of the line of authorities following *Howard v Bodington* (1877) 2 PD 203 culminating in *Newbold and others v Coal Authority* [2013] EWCA Civ 584, [2014] 1 WLR 1288 concerning the effect of non-compliance with statutory provisions.

In particular, he cited the recent dicta of Sir Stanley Burnton in *Newbold and others v Coal Authority* [2013] EWCA Civ 584, [2014] 1 WLR 1288, at para 70, Sir Stanley Burnton:

> "In all cases, one must first construe the statutory … requirement in question. It may require strict compliance with a requirement as a condition of its validity … Against that, on its true construction a statutory requirement may be satisfied by what is referred to as adequate compliance. Finally, it may be that even non-compliance with a requirement is not fatal. In all such cases, it is necessary to consider the words of the statute … , in the light of its subject matter, the background, the purpose of the requirement, if that is known or determined, and the actual or possible effect of non-compliance on the parties. We assume that Parliament in the case of legislation … would have intended a sensible … result."

Applying this to the present question, the President noted that parental orders went to the most fundamental aspects of status and to the very identity of the child and have a transformative effect on the child's legal relationships with the surrogate and commissioning parents and the practical and psychological realities of the child's identity, thus having an effect extending far beyond the merely legal, which is, for all practical purposes, irreversible. The President could not think that Parliament had intended that the gate to the making of an order should be barred even if the application was one day late. Such a result would be "almost nonsensical" (paragraph 55) given the myriad potentially innocent reasons there might be for non-compliance with the time limit.

Further, even if straightforward application of the principle in *Howard v Bodington* (1877) 2 PD 203 did not allow this conclusion, the President held that the same conclusion would be amply justified having regard to the ECHR. He stated at paragraph 58 that the statute had to be "'read down' in such a way as to ensure that the 'essence' of the protected right is not impaired and that what is being protected are rights that are 'practical and effective' and not 'theoretical and illusory.'" He drew a parallel with the interpretation which Theis J had taken of section 54(4)(a) (the requirement for both parents to apply) in *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] 2 FLR 145. He further cited the later decision of the Supreme Court in *Pomiechowski v District Court of Legnica, Poland and another* [2012] UKSC 20, [2012] 1 WLR 1604 in support of this proposition.

On the facts of this case, the President considered that the commissioning parents should be allowed to pursue an application notwithstanding that it was made two years and two months after X's birth. Although the delay was in some senses a long time, given that (1) a parental order went to both status and identity as a human being, (2) the court was looking to a future stretching many decades and (3) the court was concerned not only with the impact on the applicants of its decision but the welfare of the child, a more liberal and relaxed approach than that taken in relation to time limits in such cases as *Adesina v Nursing and Midwifery Council* [2013] EWCA Civ 818, [2013] 1 WLR 3156 was appropriate. Beyond this, the President did not purport to lay down any general principle and stated that every case will be fact specific (see paragraphs 64 and 65).

The President than had to consider whether the other requirements of subsections (2) to (8) of section 54 were satisfied and, if so, whether to exercise his discretion in favour of making an order. Although the parents had been separated at the time of the application they remained married so they remained "husband and wife" for the purpose of section 54(2)(a). Further, X's "home" was with "them" at the time of the application notwithstanding that he was splitting his time between their separate homes. He considered that he should exercise his discretion to "authorise" payments made to a mediator and the surrogate mother under section 54(8) which he held (applying the principles set out by Theis J in *Re WT (A Child)* [2014] EWHC 1303 (Fam)) had been made in good faith and without "moral taint".

Finally, the President considered it plainly to be X's interests for a parental order to be made (paragraph 77) and he therefore made the order sought.

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

Re An Application by Gloucestershire County Council for the Committal to Prison of Matthew John Newman [2014] EWHC 3136 (Fam)

This was an application for committal made by Gloucestershire County Council in the aftermath of care proceedings. Mr Newman was the father of a child, X, who had been made subject to a final care and placement order. Permission to appeal against those orders had been refused by the Court of Appeal.

By orders made on 16 May 2014 and 16 July 2014, Mr Newman was prohibited from trying to ascertain the whereabouts of X or his foster placement, from harassing local authority employees, and had been ordered to delete material relating to X, the proceedings and members of local authority staff from the internet and social media. The local authority brought the committal proceedings as they alleged that Mr Newman was in breach of parts of these orders.

Unfortunately, neither of the orders in question complied with the requirement of r.37.9, Family Procedure Rules, namely that, to enforce such an order, a penal notice warning of the consequences of breach must be prominently displayed on that order. However, in accordance with PD37A, para 13.2, the President, hearing the committal application, was satisfied that no injustice was done to Mr Newman by these defects.

The first allegation was that Mr Newman had breached the order prohibiting him from using any device to try to locate his son in foster care. Following a contact session, a mobile phone had been found in X's changing bag which, when touched, displayed the following message:

> "! Help ! I lost my device! Can you please help me get it back? You can reach me at 000000 newman1985@hotmail.co.uk Blow me fucker, give me my son back".

Whilst the President was satisfied that there was a prima facie case that Mr Newman had placed the phone in X's bag, there was no evidence that it was, or could be, used as a means to locate X. On this allegation, therefore, the court found there was no case to answer.

A further ground (ground (iv)) was that Mr Newman had breached the order that prohibited anyone from publishing certain information about X and the proceedings. However, this order was not drafted in such a way as to refer to the person or class of persons to whom it was addressed. Consequently, the President found that it could not be enforceable as an injunction.

Having dismissed grounds (i) and (iv) as giving rise to no case for Mr Newman to answer, the judgment then turns to grounds (ii) and (iii).
Ground (ii) was an allegation that Mr Newman had harassed local authority employees (and, in one case, a family member of a social worker) by a number of Facebook messages and e-mails. The texts of these messages are annexed to the judgment. Having considered the dictionary definition of 'harassment', the judge had no difficulty in finding this allegation made out to the criminal standard of proof.

Allegation (iii) was also made out to the criminal standard. This was that Mr Newman had breached the order of 16 July 2014 requiring him to delete the Facebook account in the name of X. Evidence before the court in the form of screenshots taken in August showed that that Facebook account was still active at that time.

Sentencing was adjourned whilst the local authority considered whether it wished to pursue a further application for committal. The judgment concludes with some comments about the need to balance freedom of speech against the protection of individuals who work in family justice from harassment and intimidation.

Summary by Sally Gore, barrister, **Fenners Chambers**

A Local Authority v M & Others [2014] EWCOP 33

The case concerned M, a vulnerable adult aged 24, diagnosed with autistic spectrum disorder and a learning difficulty. Until M was 18 he lived with his mother and father and there was no involvement from local authority services.

From 2008 the parents (E and A) sought the assistance of the local authority in M's care and he was placed in a series of residential placements. During the course of the involvement of professionals, concerns arose about E's behaviour, in particular that M's medical needs were being exaggerated/ fabricated; that he was subject to unnecessary treatments and a restricted diet; and that E was incapable of working with the local authority. The parents considered that they were the victims of a campaign to remove M from their care. They also considered that M's difficulties were caused by the administration of the MMR vaccine when he was a toddler. The parents had joined group litigation brought by (the now discredited) Andrew Wakefield and sought a full enquiry into the effects of the MMR vaccine.

Baker J conducted a thorough fact-finding into the allegations. This hearing involved 33 files of evidence and 32 witnesses heard over 20 days. The mother and father were in person and extensive steps were taken by the court and lawyers to accommodate and facilitate their case.

There was no dispute that M lacked capacity. Baker J found that the local authority allegations were true. In particular:

(1) There was no evidence that M's autism was caused by the MMR vaccine;

(2) The parent's accounts of M's adverse reaction to the vaccine was fabricated;

(3) The mother had given many false accounts of M's health and he had never suffered from the disorders she described;

(4) As a results of the mother's false accounts M had been subject to numerous intrusive and unnecessary tests;

(5) The mother failed to obtain proper treatment for a dental abscess which caused M 14 months unnecessary pain;

(6) The mother insisted that M be subjected to an unnecessary alternate therapy regime including a restrictive diet and supplements;

(7) The mother abused her position as M's deputy to control all aspects of his life;

(8) The mother was incapable of working with the social workers and many of the other staff entrusted with M's day to day care; and

(9) Taken together, the mother's behaviour amounted to a factitious disorder imposed on others. The mother in addition suffered from a combination of narcissistic and histrionic personality disorder with elements of an unstable personality disorder.

Final orders about M's care were not made. Baker J held that there should be no change in interim arrangements (whereby M lived in a residential placement). The issue of deprivation of liberty was not analysed but would be considered at a final hearing. Baker J made an interim order for M to receive a tetanus injection if his GP recommended the same and that his diet was in the hands of the residential home.

Baker J expressed the hope that the parents could work with the local authority. If there were no fundamental changes in their attitude their involvement in M's life would be restricted.

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

JS (A Child) [2014] EWHC B20 (Fam)

This was a decision by Mr Justice Roderic Wood, dismissing the father's application for permission to remove the parties' son, aged five and a half, to Dubai for the purposes of a six day holiday. The mother had cross-applied for a prohibited steps order to prevent the trip from taking place.

Both parties and the child were UK citizens. The father's brother and the brother's family lived in Dubai.

There was a lengthy history of Children Act litigation between the parties. Including a previous application made by the father in December 2013 to remove the child to Dubai for a holiday. At that time the mother opposed the holiday on the basis that the long-haul flight would be too disruptive for the child and the court agreed. The order from the hearing recorded as a recital:

> "And upon the court indicating that it would not be in [the child's] best interests to be taken by his father on a long haul flight or journey beyond Europe until 2014."

The mother did consent to a holiday within Europe and the father had taken the child to the Netherlands.

The mother's opposition to this application was borne out of an anxiety that the child might not be returned from Dubai, a non-Hague convention country. It was the mother's case that the father's family had spoken in the past of relocating to Dubai, but the judge was unable to make a finding on that issue. The mother agreed in her evidence that the father had had ample opportunity in the past to abduct the child if he had wanted to do so.

It was the father's case that he was tied to the UK by:

a) His employment;

b) His ownership of an investment property;

c) His friends and family being here; and

d) His acceptance that the child is well and settled in school with friendships of his own and he would not disturb that progress and socialisation of his son.

An expert's report had been obtained to set out the position in Dubai if the child were unlawfully kept there. It was the view of the expert that the father had left it too late to put in place protective measures that would ensure the return of the child to the mother and to this jurisdiction. The judge was not satisfied on the basis of the report that any protective measures could in this case guarantee the return of the child.

The judge found that the motherly was overly anxious and at times inconsistent. The judge found the father to be a credible witness and on the basis of the totality of the facts, found that any risk of abduction (which he doubted there was) was a minute one.

The judge reminded himself that he was to apply s.1(1) of the Children Act 1989 (welfare of the child as the paramount consideration) and s.1(3) (the welfare checklist). The judge further reminded himself that Article 8 of the ECHR applied and that it was the child's Article 8 rights that took priority. The judge considered the relevant authorities and considered that the tenor of those was that some safeguards should be put in place, particularly bearing in mind the consequences of abduction if one occurred.

Even though the judge found the risk of abduction to be minute, the judge considered that the safeguards which had been offered by the father and which could be timeously put in place were insufficient. The offer of a bond in the sum of £5,000 was not a large enough sum to enable the mother to realistically fund proceedings to secure a return of the child if the father was to unlawfully retain him in Dubai. Bearing in mind the consequences of such a retention for the child, the judge was not satisfied by the safeguards and dismissed the father's application.

Summary by **Amy Perkins**, barrister, **1 Hare Court**

K and KT (Children) [2014] EWCA Civ 1211

This case concerned an appeal brought by maternal grandparents against an order authorising the local authority to place their four grandchildren for adoption. Care proceedings commenced due to the third child sustaining a fractured tibia and fibula. The injuries were found to be non-accidental, and the perpetrator either the mother or her partner.

The maternal grandparents put themselves forward as potential carers for the children, and were made party to the care proceedings at an early stage. The maternal grandparents' challenge largely rested on the process and procedure adopted at court, and the approach taken by the experts and the judge to certain historical allegations against them.

The issues raised by the grandparents were as follows:

(a) The independent social worker instructed to conduct an assessment of the grandparents had been separately briefed by the children's social worker and the Guardian prior to meeting the grandparents, thus her view had been coloured by them.

(b) The expert psychologist disclosed that he had had communication with the Guardian and he was told by the latter " that it was (his) job to make sure that (the grandparents) don't get (their) children back."

(c) On the day of the hearing the expert psychologist and the independent social worker had a meeting which resulted in the independent social worker changing her mind. The grandparents had not been made privy to what was said in the meeting.

(d) The Guardian gave evidence, and strayed into giving an opinion, on the effect of the maternal grandmother's medication and the impact of depression on both grandparents.

(e) The Guardian and the expert psychologist had relied on reports of abusive behaviour made against the grandparents by the mother and her sister when they were children. These allegations were not proven and were not considered by the judge until the final hearing.

Considering the issue relating to the historical allegations at (e) above first, McFarlane LJ stated that " (it) is almost a common place of care proceedings involving children that the experts are instructed to conduct their assessments at a stage prior to the court determining the truth or otherwise of historical or factual allegations". His Lordship further stated that the expert psychologist was an expert familiar with the territory adopting a sensible approach to the allegations.

In making findings, HHJ Meston QC had relied on the evidence of a social worker involved with the family at the time, as well as the grandfather's partial acceptance of the description of life in the family home during the relevant years. Whilst the Judge had not made findings of physical abuse, the emotional climate was of equal, if not greater, concern. It was not the case as the grandparents alleged on this appeal that the allegations were not proven. There was absolutely no indication that the Judge paid any credence to the fact that the Guardian believed or did not believe the allegations. Equally, the Judge had not simply endorsed the recommendation of the Guardian and the expert psychologist, including their apparent acceptance of the validity of the historical allegations; he had reached his own conclusion.

In relation to the contention that the Guardian and social worker briefed the independent social worker ('ISW') at (a) above, McFarlane LJ found that the material before the court did not establish that that took place. The grandparents had not reported any disclosure from the social worker that this took place. "It was an entirely acceptable and commonplace step for someone undertaking an assessment of this sort" to have discussions with the social worker and the Guardian. There is no reason for concern about this process in these proceedings as the discussions took place after the ISW had already conducted three meetings with the grandparents.

In respect of the allegation that the Guardian briefed the expert psychologist at (b) above, the Guardian denied having any communication with the latter. Whilst the grandparents' counsel had cross-examined the expert at the final hearing, that allegation had not been put to him. Neither had the grandfather made this allegation when giving evidence at that hearing. McFarlane LJ found that the material before the court in no way substantiated this very serious and striking allegation.

In respect of the allegation at (c) above, the grandparents' position had changed and it was no longer alleged that there had been a formal meeting, sanctioned by the Judge. Both experts denied having had a meeting. It was accepted that they had spoken to each other in the waiting area, but on matters not related to the case. Counsel for the local authority denied having taken an active part in any discussion about the case. Further, the transcript of the ISW's evidence showed that she had formulated a changed view as matters developed and became clarified in cross-examination by the local authority.

On the final issue, it was apparent that the Guardian at times strayed into giving an opinion which was plainly based on medical information or analysis of pharmaceutical matters, contrary to the maternal grandmother's GP's view. He had also produced a report which only listed the negatives about the grandparents, explaining in his evidence that he understood that CAFCASS Officers were only required to list negatives to keep reports short and to focus the resources deployed in any case. However, all these matters were before the Judge, and there was no sign that the Judge's judgment had been infected by them.

HHJ Meston QC had had conduct of the proceedings throughout. At the end of the welfare hearing, he had given a lengthy and detailed judgment running to 300 paragraphs described by the Court of Appeal as a model of the approach to be taken, and as thorough and careful as it is possible to contemplate.

The grandparents' appeal was dismissed as on further investigation the Court of Appeal found no valid ground of appeal.

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

CH v London Borough of Merton [2014] EWHC 3311 (Fam)

This was an application brought by CH, the mother of an 8 month old child, LRP, for permission to oppose the adoption application brought by the London Borough of Merton. The application was refused by Pauffley J after hearing oral evidence and submissions.

By way of background, Pauffley J had made a placement order in favour of LRP on 12th December 2013 (judgment reported separately as *Re LRP (a child) (care proceedings: placement order) [2013] EWHC 3974 (Fam)*). On 19th December 2013, LRP was placed with prospective adopters. There was no communication between the parents of LRP and the local authority between December 2013 and March 2014, whereupon the mother contacted the local authority and reported she had separated from LRP's father. On 24th June, LRP's prospective adoptive parents lodged their application to adopt. The mother attended the first hearing in person and sought "to appeal the adoption" of her daughter. Her application for leave to oppose the adoption application was allocated to Pauffley J and heard on 2nd October 2014.

In refusing the mother's application, the judge considered the two-stage legal test for the grant of leave to oppose an adoption application. The first question is whether there has been a relevant or material change of circumstances of a nature and degree sufficient to reopen consideration of the issue. This is a question of fact. The second question is whether leave should be given. In answering this, the court should assess the applicant's ultimate prospects of success in opposing the application and the child's welfare is paramount.

The essential principles are found in *Re P (Adoption: Leave Provisions)* [2007] 2FLR; *Re B* [2013] 2 FLR 1075; *Re B-S (Adoption: Application of s.47(5))* [2013] 2 FLR 1035; *Re W (Adoption Order: Leave to Oppose) Re H (Adoption Order: Application for Permission to Oppose)* [2014] 1 FLR 1266.

After hearing evidence and submissions, the court rejected the mother's application at the first stage. Pauffley J went on to state obita dicta that if she had been required to consider the mother's eventual chances of success in resisting the adoption order, she would have reasoned them to be nil. In such circumstances, it would have been "cruel" to grant leave for an application that was bound to fail, and the second stage of the test would also have failed.

Summary by **Charlotte Hartley**, barrister, **1 King's Bench Walk**

K v D [2014] EWHC 3188 (Fam)

This case concerned the Hague Convention. The child in question was five years old, her maternal grandmother was the applicant, the mother was the respondent. All the family members were nationals of the Czech Republic.

The applicant grandmother alleged that the child was unlawfully retained in this country. The respondent mother raised two defences:

i. The grandmother consented to the child coming to England and staying here.

ii. Article 13(b) of the Hague Convention– that there was a grave risk of harm to the child should the child return to the Czech Republic or that she would be in an intolerable situation if she were to be sent back.

Jackson J granted the application.

Background

Until 2011 the entire family was living in the Czech Republic. Due to drug problems and the mother's age the care of the child gravitated towards the maternal grandmother. There was an order in the Czech Republic on the 5 December 2011 that the child should live with her grandmother.

In 2012 the mother came to England where she remained. In 2014 the grandmother issued proceedings to become Eva's foster carer. These proceedings are still in existence.

The mother's position was that when she was brought to England in 2012 she was the victim of a criminal gang and trafficking, that she was imprisoned and forced to work, amongst other things, in prostitution. The mother escaped in 2013 and criminal proceedings were taken against her captors who were subsequently convicted.

The maternal grandmother came to England on 18 June 2014 with the child. After arriving, the grandmother was in conflict with the mother. The grandmother contacted the police and the Czech embassy stating that the child had been taken from her care. Nothing came of this and she subsequently returned to the Czech Republic on 8 July 2014 where she immediately made an application through the International Child Abduction and Custody Unit.

On the 16 July 2014 the mother issued an application for a prohibited steps order to prevent the grandmother from removing the child from her care.

Decision

In relation to the first of the mother's defences – that the grandmother consented, Jackson J found that there was no such consent as:

i. There was no evidence that there was an agreement that the child was coming to this country permanently when she arrived and no evidence from prior communications.

ii. Given the estrangement between the mother and grandmother and their unfamiliarity with England it was unlikely that a final decision would have been taken before the journey was made.

iii. Given the grandmother's reaction, it was more likely that that she was coming to England to investigate the situation.

iv. The mother's steps to stop the grandmother removing the child did not sit easily with there being an agreement.

In relation to the second of the mother's defences, under Article 13(b), Jackson J did not find that there was a grave risk that the child's return would expose her to physical or psychological harm or otherwise place her in an intolerable situation. He found that there was no solid established evidence of a threat to the child in this country or the Czech Republic. He proceeded to find that, even if there was a risk of harm, that that risk would not alter if she were to return to the Czech Republic and that in any case any risk in London may increase were the child to be with her mother. Jackson J was also satisfied that adequate arrangements could be made to protect the child.

Summary by **Joshua Viney**, barrister, **1 Hare Court**

King's College Hospital NHS Foundation Trust v T and Others [2014] EWHC 3315 (Fam)

Application by an NHS trust to withdraw the mechanically assisted ventilation for ZT, a baby of 17 months and the son of Ms T and Mr V. On 5 and 6 December 2013 ZT suffered cardiac arrests leading to an irreversible hypoxic-ischemic injury to the brain. Subsequent independent medical opinion unanimously reported there had been an enormous destruction of most of ZT's brain tissue including the brain stem. The extent of the damage to ZT's brain was so severe that there was no prospect he would ever recover. The parents did not agree to the withdrawal of ventilation because they loved their son, they believed that he responded to them and, as committed and devout Christians, they believed that they did not have the right to agree to life sustaining treatment being withdrawn.

The judge acknowledged that the test to be applied was the best interests test including all the factors, not just medical, but emotional and social as well. In particular the judge was mindful of the guidance in *Wyatt v. Portsmouth NHS Trust* [2006] EWCA 1181 and in the case of *An NHS Trust v B and others* [2006] EWCA 507.

The judge acknowledged that there is a strong presumption in favour of action which prolongs life, and that was the court's starting point. That presumption was rebutted, however, when considered against the medical, emotional and other welfare issues. The unanimous medical opinion was that treatment served no purpose for ZT and conferred no benefit to him. The court acknowledged that the only sensation that ZT was capable of responding to appeared to be pain. The court concluded that the mechanical ventilation was only just sustaining life with no other benefit. With great reluctance the court granted permission to withdraw the mechanically assisted ventilation.

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

KK v FY [2014] EWHC 3111 (Fam)

The applicants were a married childless couple (although the male applicant had children from a previous marriage).FY was a woman who moved in with them having came from Pakistan to the UK with three children The youngest was C, who was then about 6 months old. After some months, in late 2005, FY returned with the two older children to Pakistan, leaving C in the care of the applicants. A declaratory document executed by her stated that she considered it in C's interests to stay in the UK with the applicants with a "view to ultimate adoption".

C remained in the care of the applicants for the next nine years. He did not know, until told during the proceedings, that the applicants were not his biological parents and he regarded the male applicant's children as his siblings.

As C had only limited leave to remain in the UK, when the matter came before Mr Justice Holman, he invited the Secretary of State to intervene should she wish to resist the making of an adoption order which would confer British nationality on C. Having considered correspondence with the Treasury solicitors, he was satisfied that the Secretary of State had been given proper notice and had chosen not to participate or to resist.

With regard to the provisions of section 52(1) of the ACA 2002 (governing dispensation with parental consent) Holman J was not prepared to consider the declaratory document of 2005 as providing consent. Furthermore, although consent might well be dispensed with on the basis of the child's welfare, the realities of this case were that, despite exhaustive enquiries having been conducted, neither FY nor any father of C could be found. Having commented that there had to be "some proportionality" read into the wording "cannot be found" in section 52 and that, even in a situation as grave as adoption, there had to be some limit to the extent of enquiries to find parents who had disappeared, the judge confirmed that he was satisfied that he could dispense with parental consent.

The clear recommendations of the child's guardian and the local authority social worker were that C was thriving, that he understood adoption and was keen to be adopted.

Accordingly an adoption order was granted.

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

W (Children) [2014] EWCA Civ 1303

This appeal arose from care proceedings involving six children, although the appeal concerned only the three youngest children, girls aged 6, 4 and 2. The children were part of a sibling group of 9, the eldest three not having been the subject of proceedings. The judge had made final care orders in respect of all six children, and placement orders in respect of the youngest three.

During the course of the hearing, it had become apparent that the children's current foster carers would consider putting themselves forward as either adopters or special guardians for those three children. The mother had sought an adjournment until it could be known whether these were viable options but this course of option was rejected by the judge who favoured the local authority's care plan to assess the foster carers alongside the time-limited search for adopters for the youngest three children.

The focus of the appeal, however, was on the judge's conclusion in her judgment that Dr Butler, the child and adolescent psychiatrist, who had been instructed to assess the children, had concluded in her oral evidence that nothing other than adoption would meet the needs of these three children.

The second issue concerned the reasons for the Guardian's apparent change of position. In his final report, he had opposed the making of placement orders as there was the possibility of the three children remaining together in their current foster placement. In the judgment, however, the judge records his position as being that the placement orders were required regardless of whether the option of the current foster carers as adopters came into fruition.

Unfortunately no transcripts were available of the evidence of the Guardian or of Dr Butler.

The mother's appeal was that firstly, the evidence of both Dr Butler and the Guardian had focused on the priority of keeping the children in their current stable placement and that the judge should have reflected this; secondly, that the proper course was to adjourn whilst the position of the foster carers was explored; thirdly, that there was no clue in the judgment as to why Dr Butler and the Guardian had apparently changed their minds and fourthly that the judge had not explained how she had reached her own conclusions from the evidence that she had heard.

McFarlane LJ, giving the lead judgment of the Court of Appeal, dealt first with the suggestion that the judge had misinterpreted the evidence. Noting that there had been no complaint about inaccuracy in the immediate aftermath of the judgment, and that the original grounds of appeal, as drafted, did not make this complaint, and further that the Guardian's

position in the appeal was that he agreed with the judge's summary of his evidence, this ground was found not to be made out.

With regards to the suggestion that the judge had not given reasons, there had been no attempt to go back to the judge and ask her to explain her reasoning. It was clear from the judgment that she had aligned herself with the reasoning of Dr Butler in particular and so her reasons, though shortly stated, were adequate.

The judge had not been in the position of the judge in *Re A (Children)* [2013] EWCA Civ 1611, that is, of contemplating adoption but only in very narrow circumstances. She was satisfied, as were the experts in the case, that only adoption would do. Therefore, she would not be justified in law in adjourning the case to oversee further assessment of the foster carers to ascertain whether they could be the adopters.

The unanimous view of the Court was therefore that the appeal should be dismissed.

Summary by Sally Gore, barrister, **Fenners Chambers**

Y (Children) [2014] EWCA Civ 1287

Ryder, Patten and Longmore LJJ heard an appeal from the decision of a deputy circuit judge dismissing an application to permanently remove two children, age 11 and 7, from the jurisdiction. The father and the children's mother had separated in 2009, the father had been the primary carer, and in 2011 a residence order (as it then was) had been made in the father's favour. The father had remarried and he and his wife had had a third child, now aged 2. This youngest child was not the subject of any application before the court. The father's wife was from the USA and was said to be unhappily isolated in the UK. The father and his wife sought permission to move the two children permanently to the wife's home town in the USA as part of the family unit comprising the father, the father's wife, the two subject children and their young half-sibling. The subject children's mother had successfully opposed the father's application.

Ryder LJ took the leave-to-remove authorities at pace, finding that the deputy circuit judge had not misdirected himself and had made his decision on the basis of a value judgement as he was entitled to do (paras 9 – 16). Ryder LJ then briefly considered the father's 'ancillary' grounds of appeal and did not find them meritorious (paras 18 – 23).

The father had been granted permission to appeal on the grounds that (i) the deputy circuit judge had failed to consider the risk that the new family unit would be fragmented or broken apart if relocation was not permitted, and (ii) the circumstances of the youngest, non-subject child in that context had not been adequately considered by the deputy circuit judge.

In relation to ground (i) Ryder LJ found as a matter of fact that this issue had not been advanced before the judge in written evidence and – assuming oral evidence had not taken this further, in absence of a transcript – held that the assertion that the deputy circuit judge had failed to grapple with the issue was based on a misapprehension of fact (paras 25 – 35).

In relation to ground (ii), Ryder LJ commented that it was trite that section 1(3) of the Children Act 1989 mandates a judge to have regard to all the circumstances of the case, and said that those circumstances include consideration of the position a non-subject child who is part of the family unit. Ryder LJ said,

> "That is not the same as elevating that child's best interests to the point where a paramountcy determination has to be made about her such that the court balances the best interests of a non subject child with the best interests of the subject children." (para 38)

Moreover, in respect of the submission that "the judge failed to consider the Article 8 ECHR rights of all of the children, i.e. including the child who is not the subject of the relocation application," (para 36) Ryder LJ held that the court was not required to undertake a proportionality assessment in private law children proceedings. That submission, it was said,

> "[…] can only be an attempt to impose the concept of 'horizontality' into private law children cases where the agency of the state is not the principal actor seeking to interfere in the family or the private life of those concerned. If that is right, the submission is misguided. In private law applications it is a person with parental responsibility who seeks to interfere with the Article 8 rights of the other relevant persons, be they other adults with parental responsibility or the children themselves. Parliament has provided a legislative mechanism for such a decision that is human rights compliant. It is neither necessary nor appropriate for the Family Court in ordinary private law applications where there are no public law consequences to undertake a separate human rights proportionality evaluation balancing the effects of the interference on each person's Article 8 rights so as to evaluate whether its decision is proportionate. [Counsel for the father] could point to no jurisprudence to suggest otherwise. That position is quite distinct from public law applications where such an evaluation is required by reason of the fact that a local authority applicant is a public authority seeking itself to interfere in the rights that are engaged." (para 43)

The appeal was therefore dismissed.

Summary by **Marlene Cayoun**, barrister, **1 Garden Court Family Law Chambers**

London Borough of Barking & Dagenham v SS [2014] EWHC 3338

The case concerned SS, a Romanian by birth, and Roma by background and culture. She was believed to be 15 years old. SS had lived most of her life in Spain with her mother and five siblings until December 2012 when she was the victim of child trafficking as she was 'sold' by her mother to a Roma man. SS was brought to England by him and experienced physical and sexual abuse and was also forced to undertake criminal activities for him. SS came to the attention of the police on a number of occasions and was initially remanded by the Youth Court to the care of the local authority. Care proceedings were instituted which were followed with proceedings for a Secure Accommodation Order. The Secure Accommodation Order expired in July 2014 and SS was placed with foster carers. At the time of the hearing SS was very settled and wished to remain in this placement.

The local authority applied for a Care Order on 29 April 2014. Cobb J considered the jurisdiction of the court to make orders in respect of SS and he concluded that SS was habitually resident in England at the time the court was seised thereby founding jurisdiction under Article 8 Council Regulation 2201/2003 ('BIIR'). Cobb J was satisfied that even if SS was not habitually resident in this jurisdiction on that date, she was not habitually resident in either Spain or Romania but physically present here on 29 April 2014 thereby founding jurisdiction on an alternative basis, namely under Article 13 of BIIR. Finally, Cobb J accepted that while SS had connections with Spain and Romania, the courts of this country were better placed to hear the case, and it was in the best interests of SS that the courts here should determine her future in accordance with Article 15 of BIIR. It is noted that the Romanian authorities did not actively seek a transfer of the proceedings.

In reaching his conclusions Cobb J considered the factual issue of the degree of integration by SS into a social family environment (Re A (Jurisdiction: Return of Child). He also accepted that SS's own perception of habitual residence was a relevant factor (*Re LC (Reunite: International Child Abduction Centre Intervening)* [2014] UKSC 1). Cobb J expressed little doubt that by October 2014 (the date of the hearing) SS was habitually resident in England. The position was not so clear in respect of the date the application was issued (April 2014). Cobb J acknowledged that the position of SS at this time was precarious; she was a trafficked child; upon arrival she probably had no automatic right to reside here; she had no permanent or settled home as such, and she lived a life largely as an outlaw. However, Cobb J identified sufficient factors pointing to establish a sufficient degree of integration; the fact SS had been in this country for at least 14 months; by April 2014 as a Romanian national and she was lawfully here; she had ceased to be looked after or taken care of by her family; she had obtained work and had a social network and by April 2014 SS 'perceived' England as her home, and showed every sign of wanting to remain in this jurisdiction.

Interestingly, Cobb J highlighted that the mere fact that SS had lived on the fringes of society did not mean that she was not a member of that society and could not acquire habitual residence in the country in which she had settled and made her home.

Summary by **Alison Easton**, barrister, **Coram Chambers**

In the matter of an application by Gloucestershire County Council for the committal to prison of Matthew John Newman No.2 [2014] EWHC 3399

This judgment follows from the judgment given by the President in In the matter of an application by *Gloucestershire County Council for the committal to prison of Matthew John Newman* [2014] EWHC 3136 (Fam) on 3 October 2014. At that hearing, Mr Newman had been found guilty of contempt of court for breaching two orders made by HHJ Wildblood QC following care proceedings relating to Mr Newman's son. Mr Newman had subsequently pursued a campaign of harassment against the local authority and individuals connected to it. This had included posting details of his son (who was the subject of a placement order) on social media.

Sentencing had been deferred whilst the local authority took time to consider whether it intended to pursue a second application for committal for further alleged contempts. By the time of this hearing, the local authority was no longer pursuing that application so all that remained was for the judge to consider sentence for the breaches for which Mr Newman had been found guilty.

There had been no further breaches by Mr Newman since the hearing which took place on 25 September 2014. With this in mind, the President decided at this hearing to adjourn sentencing until 25 September 2015. The reason for this was that he regarded this as a more effective means to achieve what the original orders had set out to achieve – that is, to prevent Mr Newman engaging in any more of the type of conduct that was prohibited by the orders in question. The President describes this as leaving Mr Newman with the 'sword of Damocles' hanging over his head.

In the judgment, the President is keen to stress that this is in no sense intended as leniency and that, in the event of further breaches, Mr Newman could expect a heavy prison sentence. If there are no further breaches in the

next 12 months, Mr Newman would not be subject to any further order.

Summary by Sally Gore, barrister, **Fenners Chambers**

Southwell v Blackburn [2014] EWCA Civ 1347

The Court of Appeal heard the appeal against the order of HHJ Pearce-Higgins QC that the Appellant should pay the Respondent £28,500 to satisfy her equitable interest in a property, under the doctrine of proprietary estoppel. Tomlinson LJ gave the leading judgment.

The judge at first instance made findings of fact as follows; the parties met in early 2000. At that stage the Respondent was aged 40 years. She married in 1987 and was recently divorced with two young daughters, then aged 11 and 12. She had limited resources having left the marriage with about £25,000, but had secured for herself a rented house in Manchester, from a housing association, on which she had spent between £15,000 and £20,000 fitting out and furnishing. The Appellant was then aged 41 and unmarried. In 2002 they set up home together. The property in question was purchased in the Appellant's sole name (£100,000 mortgage and £140,000 equity raised from the sale of his previous house).

The judge concluded that it was most unlikely that the Appellant would have or did make any clear promise to the Respondent that she would become an equal owner in the house with him or that he had promised her that she would at some future date. As such the judge did not find that there was a constructive trust. However, the judge did find that she had an equitable interest under the doctrine of proprietary estoppel. He found at paragraph [16]:

> "The discussions they had were not specific as to ownership of the home they were moving into. They were specific as to the nature and extent of his commitment to her and the provision of secure accommodation for her. He promised her secure rights of occupation at the house that they were in effect buying together, although in his sole name. He led her to believe that she would have the sort of security that a wife would have, in terms of accommodation at the house, and income. And she relied on that. Without such promise and assurance she would not have given up her house and moved in with him."

There were three grounds of appeal:

> i. The assurances found proved by the judge in relation to the Respondent's security of tenure lacked the requisite specificity to engage the doctrine of proprietary estoppel;
>
> ii. The judge erred in finding that the Respondent suffered detriment in reliance on those assurances, asserting that such detriment as may have been initially incurred by the Respondent in giving up a secure tenancy and moving in with the Appellant was dissipated over the course of the relationship, which lasted for about nine years; and
>
> iii. The judge was wrong to find that the Appellant acted unconscionably in denying to the Respondent the right or benefit that she expected to receive.

First ground of appeal

Tomlinson LJ held that "a representation, if it is to found a claim based on proprietary estoppel, must be clear and unequivocal" – as per Lord Scott of Foscote in *Thorner v Major* [2009] 1 WLR 776.

He went on to consider Oliver J's judgment in Taylors Fashions Limited v Liverpool Victoria Trustees Co Ltd [1982] 1 QB 133 where he stated that the principle of proprietary estoppel:

> ". . . requires a . . . broader approach which is directed at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to enquiring whether circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour."

Tomlinson LJ highlighted that HHJ Pearce-Higgins QC had found that:

> i. What was said by the Appellant was said by him in the belief that he was providing the Respondent with a home for life.
>
> ii. He reassured her that "she would always have a home and be secure in this one."
>
> iii. He told her that he was taking on a "long-term commitment to provide her with a secure home".
>
> iv. Further, "he led her to believe that she would have the sort of security that a wife would have, in terms of accommodation at the house, and income."

The thrust of which was to the effect that the Respondent would have an entitlement which would be recognised in the event of breakdown of the relationship, just as would be the contribution of a wife to the assets of a marriage in the event of marital breakdown.

Second ground of appeal

Tomlinson LJ considered the dicta of Robert Walker LJ in Gillett v Holt, where he highlighted that detriment is not a narrow or technical concept and that it must be approached as part of a broad inquiry. He then acknowledged Lord Walker in *Thorner v Major*, concluding that detriment must be assessed and evaluated over the course of the relationship.

Tomlinson LJ quoted paragraph [26] of HHJ Pearce-Higgins QC's judgment, where he stated:

> "The promise made was not of a half share in the house, but it was of security. His promise has not been fulfilled. What has she lost? And how is it to be quantified? In my judgment it would be unconscionable for the Defendant to do anything other than to seek to put her back in much the same position as she was before she gave up her own house."

Tomlinson LJ acknowledged that whilst the Respondent had benefited during the course of the relationship, so had the Appellant.

He concluded that the essence of the promise here upon which the proprietary estoppel was sought to be based was that the Respondent should have a home for life, on the strength of which she gave up her own secure home in which she had invested about £15,000 and in turn invested £4,000 - £5,000 as her contribution to the setting up of the new home in which she was to live with the Appellant.

Tomlinson LJ found that HHJ Pearce-Higgins QC had correctly focused on the causal link between the assurance relied upon and the detriment asserted, as enjoined by Slade LJ in Jones v Watkins.

Third ground of appeal

In relation to unconscionability, it was the Appellant's case that the judge had lost sight of the fact that this was not a marriage and not a relationship that was expected or intended to endure indefinitely. As such, since the relationship had come to an end, during the course of which the Appellant had provided for virtually all of the Respondent's essential financial needs, and those of her children, how could it be unconscionable for the Appellant to require the Respondent to leave the house?

Tomlinson LJ found that this argument focused on the relationship, rather than the promise and the detrimental reliance. The detriment to the Respondent was not that she embarked upon a relationship with the Appellant but that she abandoned her secure home in which she had invested and invested what little else she had in a home to which she had no legal title.

Appeal dismissed.

Summary by **Joshua Viney**, **1 Hare Court**

Olaribiro v Shoyemi [2014] EWHC 3365

Ms Shoyemi had applied for the discharge of a location order made by His Honour Sir Gavyn Arthur (sitting as a Deputy High Court Judge) on 29 August 2014. In accordance with usual practice, a copy of this order had been sent the applicant's solicitors. At the top of that order, the following words were displayed prominently:

> "Note that service of this order upon the respondent and any other person is to be effected only by the Tipstaff. The copy provided to the applicant must not be used for service upon any person."

This direction was repeated in the covering letter with the order when it was sent to the solicitors. Notwithstanding this, the solicitors then purported to serve the order on Miss Shoyemi by post with an accompanying cover letter.
The location order had never been properly served on Miss Shoyemi (that is, by the Tipstaff). This was at the request of the applicant's solicitors who wished to serve some disclosure orders prior to her being served, they apparently being concerned about Miss Shoyemi being 'tipped off'.

In the circumstances, the President concluded that the only appropriate course of action was to discharge the location order and any other orders and directions made by Sir Gavyn Arthur on 29 August 2014.

Summary by Sally Gore, barrister, **Fenners Chambers**

Prest v Prest [2014] EWHC 3430 (Fam)

The wife had applied for a judgment summons on 11 April 2013.

Moylan J found that the Husband was in default of the sum of £360,200, relating to a period up to April 2013 and imposed a suspended term of four weeks imprisonment. The suspension was to last for three months and was conditional on the Husband paying the sum due within the three-month period. Paying the sum would continue the suspension beyond three months.

Moylan J reminded himself of the relevant law, specifically s.5 of the Debtors Act 1869:

> "Subject to the provisions herein-after mentioned, and to the prescribed rules, any court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court.
>
> …
>
> (2) That such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same."

He also considered FPR r 33.13:

> "(1) No person may be committed on an application for a judgment summons unless -
> ...
>
> (c) the judgment creditor proves that the debtor -
>
> (i) has, or has had, since the date of the order the means to pay the sum in respect of which the debtor has made default; and
>
> (ii) has refused or neglected, or refuses or neglects, to pay that sum."

He summed up that before making a committal he must be satisfied:

> (a) that the Husband has, or has had, since the date of the order the means to pay the sum in default; and
>
> (b) that he has refused or neglected, or refuses or neglects, to pay that sum.
> He summarised and repeated the dicta of three authorities, namely *Zuk v Zuk* [2013] , *Bhura v Bhura* [2013] and Mohan v Mohan [2014].

In applying the law, Moylan J reminded himself that that the burden of proof is on the Wife and that before he could make a committal order, he must be satisfied so that he was sure of the requisite elements as set out in s.5 of the Debtors Act 1869 and repeated in the Family Procedure Rules 2010 r.33.14(1)(c)(i) and (ii). Moylan J then went on to ask himself the following questions:

1. Is the Husband in default of the £428,200 alleged by the Wife?

He found that the Husband was in default to the sum of £360,200. To reach that figure he subtracted the amount paid by the Husband, namely £36,300 from £396,500, the total amount due for the period up to April 2013.

2. Has the Wife proved that the Husband has or has had since 16th February 2012 the means to pay the sums due in respect of maintenance?

He found that since the 10th February 2012 the Husband had the means to pay the sum of £360,200, for the following reasons:

a. The Husband had paid sums totally just under £215,000 as set out in his schedule.

b. The Husband applied in April 2012 for an extension of time to the Court of Appeal to enable him to pay the sum of £600,000 in order to enable him to pursue his appeal. Moylan J was satisfied that he would not have made that application if he had not had the funds available to make the required payment.

c. Although the Husband gave evidence in three statements, he failed to provide any proper exposition of his financial circumstances.

d. The case advanced by the Husband as to the collapse of his trading business, as set out in his first statement in answer to the judgment summons, was inconsistent with his case as advanced in 2011.

e. The Wife's evidence as to the Husband's extravagant holiday expenditure incurred in 2012 and 2013 was preferred over the Husband's evidence.

3. Whether the Husband has refused or neglected to pay the sum due.

Moylan J found that it was axiomatic from the above that he had.

Summary by **Joshua Viney**, **1 Hare Court**

Quan v Bray [2014] EWHC 3340 (Fam)

The husband and wife met in 1990 and shared a "passion for the cause of saving the Chinese tiger" (paragraph 2). They began living together in 1997 and married in 2001. Both parties invested time and money into a venture loosely described as the 'Chinese Tiger Project'. In 2000 the wife established Save China's Tigers ('SCT UK') in the UK. In 2002 a "Framework Agreement" was signed between SCT UK, the Husband, the Wife, the Chinese government and another trust established in Mauritius – the Chinese Tigers South Africa Trust ('CTSAT') – which formed the basis of ongoing cooperation for their shared cause.

The parties' relationship deteriorated and in July 2012 the wife was removed as a director of SCT UK. On 15 August 2012 she petitioned for divorce and her application for financial relief came before Coleridge J. He commented (paragraph 5) that at the time of her petition, the wife's primary concern was to ensure the preservation of the funds which had thus far been provided for the Chinese tiger project. However, during the course of proceedings, her case came to be that CTSAT had been established not only to advance the cause of the Chinese tiger but also to provide financial benefit and support for the parties personally over the long term. This was hotly denied by the husband. The wife filed an application by way of amendment to her Form A seeking "variation of the post nuptial settlement –Chinese Tigers South Africa Trust" (paragraph 8).

Since the issue was of such central importance to the wife's claims (CTSAT holding assets of up to £25 million and there being - relatively speaking - almost no assets in the parties' names) Coleridge J considered it appropriate to list a preliminary hearing utilising the OS v DS procedure, to enquire into:

"(i) The circumstances under which the China Tiger trusts were set up;

(ii) The purpose of those trusts;

(iii) Whether those trusts are nuptial settlements;

(iv) The availability of funds within those trusts to the parties; and

(v) Whether the funds within those trusts can only be utilized for tiger conservation."

A number of other parties, including SCT UK and CTSAT were joined to the proceedings. The wife's case at the hearing (see paragraph 17) was that:

1. The CTSAT arrangement was a nuptial settlement and all parts of the CTSAT group were within the settlement. The fact that the trusts were also intended to benefit another third party did not prevent this settlement from being nuptial.

2. It was always intended by the parties that it should benefit one or both of them. It had powers to enable the parties to be expressly added as objects of the power, create sub-entities which the parties would then benefit from, give a direct benefit to the parties by, for example, paying for services for the parties, and create other vehicles whereby matrimonial assets could be held on the expectation that these could be used medium to long term to benefit the parties.

3. Even if the trusts were not created with the ultimate intention of benefiting one or both of the parties to the marriage, they subsequently acquired that character by the husband deciding that he could and would use this for benefiting the parties.

4. One of the motivations of the Husband was to shelter his fortune from the attentions of tax authorities

5. Examples of the asserted nuptiality of the trust included it being used to purchase the parties' home, holding the leases of land in South Africa for the benefit of the parties and holding the husband's South African flat. The wife further suggested that once the Framework Agreement were to come to an end (when the tigers cared for by the charities returned to China) the trust would be wound up and it was expected that the funds would go to the parties.

Coleridge J reminded himself of the relevant legal principles relating to the definition of post-nuptial settlements, summarised in Ben Hashem v Al Shayif by the current President of the Family Division and also on the question of whether a non-nuptial trust could later become nuptialised (in *Burnett v Burnett* [1936] P1) – see paragraph 56. He noted that "Post nuptial settlements are unusual legal animals that can come in all shapes and sizes. They do not have to involve a conventional written trust instrument although they usually do. All kinds of transactions and arrangements have over time and from time to time been held to be 'settlements' within the meaning of the statute which contemplates the possibility of their variation" (paragraph 54). He described his function as being to "examine the true nature of the arrangement" (paragraph 57) embodied in CTSAT, not forgetting that the relevant transaction in this case was embodied in a formal written document. He went on to state that (paragraphs 59 and 60):

> "[59] The essential features of a PNS seems to be an existing disposition in favour of, one, other or both parties to the marriage (in their capacity as husband or wife) and for their present or future benefit. An existing intention to benefit one of the spousal beneficiaries is obviously a prerequisite.
>
> [60] In my judgment on the authorities, a settlement which is non nuptial at its creation could itself later become "nuptialised" if there was, in fact, a flow of benefit to the parties during the marriage from the trust . Alternatively a later disposition from the trust can itself constitute a post nuptial settlement without the main or superior trust necessarily becoming nuptial."

The Court heard a significant amount of evidence (from both parties and 8 other witnesses, including lawyers from South Africa and Mauritius) during the course of the hearing, which lasted 25 days. He was impressed by the evidence of the husband, who he found to be a truthful witness. In contrast, he did not consider the wife credible (see paragraphs 27 to 37 for discussion of her evidence), holding that she had become "blinded by her desire for revenge [leading] her to fabricate where she thinks it will assist her case" (paragraph 37) He distilled the salient points of law into the following:

> a. Could CTSAT be categorised as a post-nuptial settlement and one or other of the parties as a beneficiary of that trust, in spite of neither party on the face of the written instrument being named as a beneficiary, merely because CTSAT, as a fully discretionary trust, was capable of being amended or adjusted (by adding trustees or terms) to make them such? The Judge's answer to this was 'no' (paragraph 69a). The mere fact that a trust is a conventional fully discretionary trust capable of being varied to add other beneficiaries including the parties does not of itself render it a post-nuptial settlement.
>
> b. Should CTSAT nevertheless be regarded as having become a PNS if there was, by the time of the application to vary, an existing intention to benefit one or both of them which is evidenced by past receipts from the trust? Coleridge J considered that it should: if there had been a regular flow of receipts paid from CTSAT to the parties (in their capacity as spousal beneficiaries) for their benefit, it could be evidence of a pre-existing intention to benefit them whatever the instrument said on its face and would render the trust a post-nuptial settlement (paragraph 69b).
>
> c. If the parties had not to date received such benefits is a mere intention to benefit one of the spouses in an unspecified way and at some unspecified time in the future sufficient of itself to constitute a post-nuptial settlement? Coleridge J considered that it did not. if all that was established is a vague, unspecified intention at some time in the future, depending on the circumstances then prevailing, to benefit the parties possibly by way of amending the trust deed or in other ways, that is not enough to turn a non nuptial settlement into a post-nuptial settlement and could not amount to an existing disposition (paragraph 69c).

The above analysis led Coleridge J to distil the factual questions which he had to determine into the following:

> a. Was the husband ultimately capable, one way or another of procuring changes to CTSAT to enable the parties to benefit from it? Coleridge J found that he was. The husband could theoretically seek to procure changes/additions to the beneficiaries. However he did not find that the trustees would be likely or be expected to be guided by his wishes (paragraph 70a).
>
> b. Was there evidence to demonstrate past, present or future benefit to one or other of the parties from CTSAT? Coleridge J found there was not. He was fully satisfied by both the evidence of BDO and the husband that nothing had been paid to the spouses from CTSAT (or indeed from SCT UK). The highest the wife's case could ever be put, even on her own evidence, is "a vague, unspecified intention at some time in the future, depending on the circumstances then prevailing, to benefit the parties possibly by way of amending the trust deed or in other ways", which was insufficient to render the trust a post-nuptial settlement (paragraph 70b).
>
> c. In the end what was or were the intention or intentions underlying the creation of CTSAT? Coleridge J found, in line with the husband's evidence, that at the time CTSAT was established it was with only one intention and it had only one, sole, purpose: to further the Tiger Project via SCT UK. No conversations subsequently which took place which established an intention to benefit the husband and wife or either of them and there was no ulterior /secondary purpose.

Accordingly, Coleridge J held that CTSAT was not a post-nuptial settlement and therefore could not be directly invaded by court order.

He added that he considered, on the balance of probabilities and on the basis of his reading of the Mauritian Trusts Act 2001, s.11(5), that the courts in Mauritius would not enforce an order varying the trust if it were in the teeth of opposition from the trust.

As he found the husband's evidence to be truthful, Coleridge J annexed to his judgment the husband's statement concerning the creation and funding of the tiger project, in order to provide a fuller narrative of events and the context of the Court's findings. He concluded by commenting that he hoped that the husband would now creatively deal with the wife's legitimate claim for financial relief.

Following receipt of the judgment in draft form, in response to the Court's invitation to submit proposed typographical and minor amendments, the wife's representatives filed a "Barrell" application inviting the court to re-write the judgment, supported by 99 pages of further written submissions. Coleridge J held, in a post-script to the judgment, that the Barrell application by the wife was quite the wrong use of the procedure, which was designed to allow the court to look again at particular conclusions if evidence had been obviously omitted or had changed since the hearing, otherwise the litigation would have no end. He had found nothing in the written submissions supporting the wife's Barrell application to cause him to revisit any of his findings, which had been made after very careful consideration of the evidence and arguments advanced.

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

A and B (Children - Brussels II Revised - Art 15) [2014] EWHC 3516 (Fam)

The two children had been the subject of care proceedings for six months. X, the father of the older child, made an application to request a district court in a specified town in the Czech Republic to assume jurisdiction pursuant to Article 15 of Brussels II Revised. The application was supported by the mother, but opposed by the Local Authority and the Guardian.

The mother and her family had a long history of involvement with Czech Social Services ('OSPOD'). In May 2011, the mother and her family fled to the UK when OSPOD was about to initiate proceedings in the Czech Republic.

In 2013, the family came to the attention of East Sussex County Council. Proceedings were issued in April 2014, but had not proceeded beyond the case management stage. X was due to be released from prison and deported to the Czech Republic. X had not participated in any hearing until September 2014. Four production orders had failed to yield to his presence at court. He obtained legal representation as a result of direct communication between the HHJ Jakens and the prison governor.

Prior to this hearing, the Local Authority's care plan was for adoption in England without direct contact to the parents. During the hearing, its position was significantly altered to suggesting a further assessment of the mother's grandmother, W. X supported the return of the children to the mother. The mother wished to return to the Czech Republic to obtain the support of her grandmother and intended to seek the equivalent of a Section 38(6) residential assessment there. In the event that the children were not placed with her or within the family, the mother advocated a long term foster placement reflecting the children's Roma heritage in the Czech Republic.

The Czech authorities had been in communication with the court. Whilst the Czech Embassy reported that it saw no compelling reason to suggest transfer of jurisdiction, the Czech Central Authority supported proceedings under Article 15 or Article 56 of Brussels II Revised and offered the court its assistance. Liaison between the court and the Czech Central Authority enabled further positive information to be obtained about the mother's grandmother, as well as information concerning the logistics of a transfer of the proceedings to the Czech court.

Pauffley J summarised the applicable legal framework at paragraphs 34 to 43 of her judgment. Before the court can exercise its powers under Article 15, the following three questions must be answered in the affirmative:

(a) That the child has a 'particular connection' with the other Member State - Article 15(3) provides further guidance as to what should be considered in respect of 'particular connection';

(b) That the court of the other Member State would be 'better placed' to hear the case or a specific part thereof;

(c) That the transfer is 'in the best interests of the child'.

There could be no dispute about the children's connection with the Czech Republic, as inter alia both children are Roma Czech nationals as are their mother and fathers. In addition, child A was habitually resident there prior to moving to England.

In concluding that the Czech court was by a wide margin better placed to determine the issues, Pauffley J relied on the following factors:

(i) the intervention of the Czech social services with the maternal family spanned some thirteen years, whereas the Local Authority was a relative newcomer;

(ii) the proceedings in Brighton were still at case management stage, no evidence had thus far been heard. Judicial continuity was currently of extremely limited relevance;

(iii) as a matter of natural justice, although the application for transfer had been made late in the day and there had been no change in circumstances since it was determined that jurisdiction lay in England and Wales (in April 2014), X was entitled to have a voice in the debate concerning whether an article 15 request should be made;

(iv) it was overwhelmingly likely that the proceedings will centre upon assessments of the long term possibilities for the children with the great grandmother at the forefront. Any enquiries from England would be burdensome, and international procedures for obtaining such assessment may fail to achieve their stated aim to the satisfaction of the Local Authority and the court. The current geographical distance between the mother and her grandmother would place almost insuperable obstacles in the way. In addition, there were legal constraints applying to social workers from foreign States in the Czech Republic. The assessment of the kind required would only be possible if the Czech court accepted jurisdiction and the mother travelled there;

(v) by contrast the Czech authorities could initiate an assessment without delay; there would be no language barrier. The individuals concerned were geographically close, and the information relating to the events of significance arising from the history would be available to the assessor(s) who would have knowledge of available local agency support mechanisms;

(vi) it was unimportant that the mother and X were currently habitually resident in England and Wales. Furthermore, the fact that the English allocated social worker and the Guardian would be lost to the children was not a factor contraindicating a transfer request. Although the children were becoming settled in the UK, they were Czech Roma children and the courts in the Czech Republic would be better placed to decide on their futures;

(vii) It was significant that the Czech authorities were ready to respond to a transfer request.

In considering the best interests of the children, Pauffley J stated that the question is whether the transfer will be in the children's best interests, not what outcome will best serve their welfare needs. The Learned Judge rejected the Local Authority and the Guardian's argument that the transfer would result in unacceptable delay. It was noted that the Czech court has only 6 weeks to respond to a request under Brussels II Revised. It was of considerable significance that the 'last resort' proposal for the family members was long term placement in the Czech Roma community in the Czech Republic. A cursory consideration of family finding potential added to the conclusion that it was in the children's best interests to transfer the proceedings. The children's identity, nationality and citizenship had been taken into account in making the decision. It was thus straightforward to answer the third question in the affirmative.

A transfer pursuant to Article 15 of Brussels II revised was ordered.

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

G (A Child) [2014] EWCA Civ 1365

The child, H, now aged 18 months, was placed for adoption in September 2013 after care and placement orders had been made in December 2012. The mother (with the support of the father) asked the court to admit new evidence which she submitted challenged the court's finding of a non-accidental injury to H. That fresh evidence was the report of 8th April 2014 by Dr Wayney Squier. The local authority opposed the application and challenged the court procedure used by the mother to obtain the report, whilst the Children's Guardian's position was neutral.

When H was less than a month old he was taken to hospital as he was 'off colour'. H was found to have external marks and bruising, ischaemic injury, and haemorrhages to the left cerebral hemisphere and the retina. The parents could not explain his condition and no evidence of congenital injury or natural disease was found.

A fact finding hearing heard evidence from two radiologists and a neuro-developmental paediatrician, and found the parents were each one of only two likely perpetrators. After the welfare application, the care and placement orders were made. H's prospective adopter's filed an adoption application in December 2013, which the parents opposed. M filed a statement to say she had been treated for an infection after H's birth which she had discovered might have infected H, as he passed through the birth canal, and which may be linked to his brain injury.

In February 2014, HHJ Roberts adjourned the adoption application to allow the parents to consider making an out of time appeal. The judge permitted the instruction of an expert to review the evidence and conclusions of the previously-instructed experts and ordered disclosure of all relevant documents from the care proceedings.

The mother's subsequent application for leave to appeal and to adduce new evidence was considered on the papers and adjourned for an expedited hearing. At that hearing the court first addressed the merits of the application to adduce fresh evidence. Days before the appeal, all concerned became aware that Dr Squier was appearing before a Fitness to Practice Panel after an allegation that she had "acted as an expert witness … [and] provided expert opinion evidence … outside her field of expertise … and brought the reputation of the medical profession into disrepute." Nevertheless, the appeal court assumed Dr Squier to be a credible witness for the purpose of the appeal, as the allegation against her had not yet been adjudged.

In her leading judgment, Macur LJ was satisfied that the medical experts who appeared before the judge at first instance had explored all reasonable possibilities including infection and birth injury. In addition, she found that Dr Squier had misinterpreted some of the research papers upon which she had relied. Macur LJ was satisfied that, on the agreed facts, it was not likely that H had been infected during his birth.

Thus, the new evidence was not admitted and the application was refused.

Macur LJ gave her obiter view that when a sealed order, after a fact finding hearing, is challenged then that challenge must be to the appeal court. Thus, the mother should not have been allowed to apply to the first instance court to re-open factual issues, and the county court judge did not have the jurisdiction to grant permission for a fresh expert report on concluded factual issues in the context of an adjourned application for permission to oppose adoption.

Summary by **Sara Hunton**, Barrister, **Field Court Chambers**

K (A Child) (Hague Convention: Child's Objections) [2014] EWCA Civ 1364

The child 'A' had lived with both parents in Lithuania for her whole life until in July 2013 when her mother brought her to the UK to visit A's sister 'V'. The father consented to the trip on the understanding they would return on 2 September 2013. They did not, and the mother informed the father that she did not intend to return. The Lithuania Central Authority made a request under the Civil Aspects of international Child Abduction 1980 ('the Hague Convention') for the return of A, and proceedings were issued in the Family Division of the High Court on 18 October 2013.

The matter came before His Honour Judge Bellamy sitting as a High Court Judge on 6 February 2014, the delay being partly due to the mother's difficulties in obtaining legal aid (she was ultimately assisted at first instance and on appeal by Ms Ricci through the Bar Pro Bono Unit). A was nearly 11 years old at the time of his decision.

There was no dispute that the mother's failure to return the child to Lithuania was in breach of the father's rights of custody. In her defence the mother argued that A objected to being returned to Lithuania and that it was appropriate to take account of her views given her age and maturity (Article 13), and further that there was a grave risk that returning A would expose her to physical or psychological harm (Article 13(b)).

HHJ Bellamy rejected the Article 13(b) defence holding it was not borne out where in fact the mother was willing to facilitate a relationship between A and her father should A remain in England, and A had begun communicating with F via text message.

The Cafcass Officer, Mr McGavin, provided the court with a written report and oral evidence setting out his meetings with A and A's teacher; the report concluded that A had a very strong wish to remain in the UK which the court 'may consider amounted to an objection in Hague Convention terms'.

HHJ Bellamy accepted that A's views amounted to an objection in Hague terms, being of sufficient age and maturity and her objection was 'authentically her own' notwithstanding having undoubtedly been exposed to the sentiments of her mother and sister.

In determining whether to exercise his discretion to order the return under Article 12 the judge held that in weighing A's welfare alongside the objectives of the Convention, the balance came down in favour of accepting A's objections as determinative, and he refused the father's application.

Following a renewed application for permission to appeal, Ryder LJ approved the making of a request to Judge Bellamy for a supplemental judgment further particularizing how he reached his conclusion which was provided. In July 2014 Ryder LJ directed that the matter be listed before the full Court with the appeal to follow immediately should permission be granted.

Moore-Bick, Black and Vos LJJ (judgment delivered by Black LJ) granted permission but dismissed the appeal.

The father did not challenge the conclusion that A objected to a return to Lithuania. The challenge was that while the judge may have directed himself properly on the legal framework for the exercise of his discretion, he had not properly followed such direction. In particular he had not given sufficient reasons for reaching the conclusion he did, and had been wrong

to find that A was settled and to afford weight to such 'settlement' given the lapse of time had not been his fault and was in any event less than 12 months.

The father argued that the judge did not have sufficient evidence before him to make decisions in respect of A's welfare, having heard only from the Cafcass officer, and, having not been in a position to resolve factual disputes as to, for example, her enjoyment of school in Lithuania, the judge had not been able to properly consider the long term impact on A of not returning to Lithuania.

The Court observed that over the course of the initial and supplementary judgment, the judge took into account the fact that the father's text messages and telephone manner had frightened A and 'provided a degree of reasonable justifications' for her objections; that A's strong objections were rational having been borne out of experience and not entirely one-sided; A's positive feelings about her school close relationship with her sister in England; and that there may have been 'more than a grain of truth' in A's description of home life in Lithuania characterised by F's excessive drinking and parental arguments (§40).

The Court considered that whilst bearing these factors in mind, HHJ Bellamy had been mindful of the policy of the Hague Convention, the argument that Lithuania was the more appropriate forum for a 'long term holistic evaluation' into A's welfare and the fact that A had identified positives about her life in Lithuania as well as negatives.

The weight afforded to the policy of the Convention and other factors including the child's views was a matter for the trial judge who had the benefit of hearing evidence. Whilst the Court felt that the judge could have been more explicit and detailed in setting out his reasoning process, they concluded that the factors and reasons emerged adequately over the course of the two judgments such that there was sufficient foundation for the order (§37), and accordingly dismissed the father's appeal.

Summary by **Esther Lieu**, barrister, **3 PB**

West Sussex County Council v H [2014] EWHC 2550 (Fam)

In this case Theis J had to determine whether the English courts had jurisdiction to hear care proceedings concerning a 16 month old girl, H, who was an Albanian citizen without a regularised immigration status in the UK.

It was necessary to consider the inter-relationship between and application of Council Regulation (EC) No 2201/2003 ("Brussels II Revised") and The Hague Convention of 19th October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children ("the 1996 Hague Convention"). Albania is not a Member State for the purposes of Brussels II Revised but is a signatory to the 1996 Hague Convention.

The court followed the President's guidance in Re E [2014] EWCA 789 that jurisdictional disputes should be determined at the earliest opportunity in proceedings.

Applying the test in *A v A & Another (Children: Habitual Residence) (Reunite International Child Abduction Centre and Others Intervening)* [2013] UKSC 60, the court concluded as a matter of fact that H was habitually resident in England, and accordingly the English courts had jurisdiction to determine the case [28]. Having made this determination, the court next considered whether to make a request under Article 8 of the 1996 Hague Convention for the proceedings to be transferred to Albania. The operation of Article 61 (a) Brussels II Revised meant that jurisdiction should only be exercised under that Regulation, and, as the practice guide to the Regulation observes: "the scope for using Article 8 must be limited," [30]. Accordingly, the court concluded it was not obliged to consider actively the transfer of proceedings to Albania and no transfer request was made.

Summary by **Charlotte Hartley**, barrister, **1 King's Bench Walk**

Kirklees Council v RE [2014] EWHC 3182 (Fam)

This judgment follows a declaration by Moor J in August 2014 that it was lawful for doctors treating a seriously ill baby boy, SE, to discontinue life-sustaining treatment and to provide him with palliative treatment only.

SE had been born at 29 weeks gestation and, although he was the subject of an interim care order in favour of Kirklees council, he had been an impatient in hospital throughout his life due to a number of serious and life-threatening conditions.

The Local Authority brought the application, supported by the NHS Trust. SE's mother did not oppose the application, saying she did not wish him to suffer any more. His father had played no role in these or the care proceedings and SE's Guardian, though he did not oppose the application, wished the expert evidence to be fully tested by cross-examination.

The judge had granted the applications sought and SE had passed away peacefully the following day. However, given the importance of the case, the judge decided to provide a full public judgment.

In the judgment, the judge first outlines the relevant issues for the court to consider following the cases of *Wyatt v Portsmouth Hospital NHS and another* [2006] 1 FLR 554, *NHS Trust v MB* [2006] EWHC 507 and *Aintree University Hospitals Foundation Trust v James* [2013] UKSC 67; [2013] 3 WLR 1299.

He then refers to the Royal College of Paediatrics and Child Health Guidelines "Withholding or withdrawing Life Sustaining Treatment in Children", which set out the two types of situations in which life-sustaining treatment may be withdrawn – where the child has 'no chance', that is, the treatment simply delays the child's death, and the 'no purpose' situations, where, although the child may survive the treatment, their degree physical or mental impairment will be so great that it would be unreasonable to expect them to endure it.

The Court heard evidence from two of SE's treating doctors. Dr Shore outlined that SE had no chance of recovery and ongoing treatment would be painful and distressing and would simply prolong his death. Even if treated, she considered it highly likely that he would succumb to a further respiratory infection at some point. In her view, this was therefore a 'no chance' and a 'no purpose' situation.

Dr Chetcuti, the second treating doctor, was of the view that SE's lung disease had become worse. He was distressed both on and off the ventilator. The clinical situation was hopeless. He did not feel it was in SE's interest for him to be reventilated and that his care should be palliative.

SE had also been examined by an independent expert, Dr Ward Platt. He had found 'a constellation of grave health problems', of which he considered SE's neuro-developmental impairment to be the most serious. SE needed cardiac surgery but there was little reason to believe he would survive long enough to have the surgery. He felt that SE's chances of survival were so low and the distress he would suffer by being kept alive was so high that it would be wrong, and perhaps cruel, to do so.

Having heard this evidence, the judge considered that whilst there was a strong presumption in favour of preserving life, and SE had settled periods and benefitted from the support of devoted foster carers, the overwhelming balance of the evidence fell in favour of granting the declarations sought. He commended all of the professionals involved for the way in which they had approached the case.

Summary by Sally Gore, barrister, **Fenners Chambers**

Re DM [2014] EWHC 3119 (Fam)

The local authority applied under the Human Rights Act 1998 and the inherent jurisdiction for anticipatory declaratory relief to sanction a birth plan that contemplated: (i) interference with the mother/baby relationship following birth to a degree of forced separation, and (ii) the mother not being informed of key aspects of the plan.

Hayden J adjourned the case from Friday to Monday to allow the professionals to reflect on the application. On Monday, the local authority sought permission to withdraw its application, which was granted without hesitation – Hayden J noted that he was far from persuaded of the necessity for or proportionality of the relief sought.

The couple were vulnerable adults; however, the expectant mother had twice been assessed to have capacity to make decisions (i) as to contact she has with professionals, (ii) in relation to the safe management of the birth of her baby, including to decide whether and when to undergo an induction, and (iii) the treatment she should receive following birth of the baby.

The expectant mother had given birth on eight previous occasions and each of the children had been removed from her care. A range of professionals on multiple occasions concluded that the couple were unable to provide a sufficiently safe or nurturing environment for a baby or child in their care, either together or separately, even if provided with extensive support. During a previous pregnancy, the mother had gone into hiding and given birth to twins at home, placing her health at severe risk. On this occasion, the local authority were concerned that the mother might disappear again, jeopardising her and the baby's health.

Hayden J noted that the Mental Capacity Act 2005 put in place a statutory regime to facilitate decisions in the welfare interests of those who lack capacity, but that the law is "vigorous to protect the fundamental principle of personal autonomy". There is a presumption of capacity, which can only be dislodged by cogent evidence and the "tension between a desire to protect the welfare of a vulnerable adult and the obligation to respect her autonomy has fallen into sharp focus in this application".

Hayden J also noted that the starting point is that local authorities have an obligation to consult parents in care planning for their children and/or unborn child, which is emphasised in the guidance to the Children Act 1989 and the Public Law Outline.

Hayden J made it clear, with reference to case law, that a foetus, in UK law, has no rights of its own until it is born and has a separate existence from its mother. This case therefore involved the future rights of a child, which would crystallise on birth, and the present and existing rights of the pregnant capacitous woman. Reference was made to St George's Healthcare NHS Trust v S and R v Collins &Ors, ex parte S [1998] when Lord Justice Judge, in the Court of Appeal, concluded that a capacitous adult should be entitled to decline medical treatment even if her life or that of her unborn child depended on it.

It was noted that the jurisdictional route of the application lay in the decision of Munby J (as he then was) in *Re D (Unborn baby)* [2009], which crystallised the concept of "anticipatory declaratory relief". Whilst the local authority were seeking a similar anticipatory relief, Hayden J emphasised the "wholly exceptional" circumstances in *Re D*, where there was a high risk of very serious injury or death of the mother and/or child that was "at the most serious end of the spectrum". The courts and the local authority must "be vigilant to ensure that the wholly exceptional nature of this relief is never lost sight of". In the context of a capacitous adult, granting the declaratory relief sought will require a level of "exceptionality", characterised by the "imperative demands" and in the interest of safety of the new born baby in the period immediately following birth – beyond this, it would be unhelpful to provide more prescriptive guidance.

Whilst the professional instincts were sincere, they were ultimately misconceived. The judge was satisfied that the woman will have contemplated the real difficulties likely to arise on the birth of the child and she will have anticipated the local authority's plans. His Lordship noted that it would be possible to keep the mother and baby together in a manner that maintains the respective rights of both until the court could hear the inevitable applications.

Summary by **Ariel Ricci**, barrister, **Coram Chambers**.

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