August 2018

Family Law Week

NEWS

Applications for legal aid supported by domestic or child abuse increase by 21 per cent

Applications for civil representation supported by evidence of domestic or child abuse increased by 21 per cent on the same quarter a year ago. The number of these granted increased by 14 per cent compared to the same period of 2017.

The figures were included in the **Ministry of Justice's legal aid statistics for January to March 2018**.

This quarter's figures for such applications are the highest since the inception of this type of application, in 2013. The proportion of applications granted remained steady at around 70 per cent from the inception of this type of application until the end of 2015, before increasing to around 80 per cent. In the latest quarter it was 77 per cent.

On 8 January 2018 changes to evidence requirements in private family law disputes came into effect. There is now no longer a time limit on abuse evidence, which previously stood at 5 years. Additionally, the range of documents accepted as evidence of abuse was widened to include statements from domestic violence support organisations and housing support officers. These types of evidence have contributed to the increase in applications seen this quarter.

This week the Ministry of Justice published research, conducted in 2016 and 2017, investigating the barriers some victims of domestic violence face when obtaining evidence required in legal aid applications for private family law disputes. For more details, **click here**.

For the full statistics, showing family law spending for the period, **click here**.

1/7/18

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Sir Andrew McFarlane 'supportive' of early intervention in post-separation arrangements for children

Sir Andrew McFarlane, who will soon succeed Sir James Munby as President of the Family Division, has reiterated his support for the 'Early Intervention Project' ('EI') promoted by Dr Hamish Cameron.

Delivering the **keynote speech to the Families Need Fathers Conference 2018**, Sir Andrew referred to his address to the NAGALRO Annual Conference in March entitled '**Contact: A Point of View**'.

In that paper he acknowledged that the judiciary had in the past pulled back from publishing guidance on the range of outcomes that are regularly considered to be the 'norm' in the majority of cases, and accepted that there might well be good reason for such reticence. Nevertheless, he quoted from his NAGALRO address, setting out his own perspective in these terms:

> "For a long time, going back to conferences chaired by Dame Margaret Booth and Dame Joyanne Bracewell 15 years ago, I have been interested in and supportive of the EI promoted by Dr Hamish Cameron and others. At the core of the EI approach is the need to manage the expectations of parents as to the post-separation arrangements for their child from the earliest point. Key to this approach is the issuing of general guidance on what a court would regard a reasonable amount or pattern of contact to be (in cases where there is no safeguarding risk to the child); to be of weight, such guidance can only come from the judiciary.
>
> "In addition to a statement of norms being of benefit as a thing in itself, other jurisdictions have linked this approach with other steps, some of which are now familiar here, including:
>
> • The early agreement to, or imposition of, a 'standing temporary order' based on the norms for the age of the child in order to maintain some contact in the interim stages;
>
> • Parenting Education Classes (similar to the PIPs that are currently available);
>
> • A Parenting Conciliation Session (similar to the current FHDRA appointment);
>
> • The making of a consent order.
>
> "Whether or not this is an idea that is taken forward and developed must be entirely a matter for the Family judiciary. For it to be authoritative, it would need to be developed and 'owned' by all levels of the judiciary, particularly the lay justices and district judges who hear the majority of these cases. The process of development would take time, but it is, in my view, a proposal that should now be given serious consideration by family judges."

Sir Andrew said that during his planned series of visits, this autumn, to meet every fulltime family judge at each of the 40 or so designated Family Court centres, he intends to canvass the family judiciary widely upon ideas on ways in which to improve the courts' ability to assist families to achieve a reasonable and child-focussed solution to private law disputes. If there is a groundswell of support for some form of judicial guidance of the type described by Sir Andrew, then he intends to take it forward.

He concluded:

> "I must stress, however, that for any such initiative to carry weight and respect it must genuinely arise from within the judiciary and carry the support of a good majority of the family judges and magistrates. Whilst I am firmly in favour of looking at this option, it will be for the family bench to decide whether to develop and deliver it."

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

For coverage of the speech by Families Need Fathers, including a response from Jerry Karlin, Chair and Managing Trustee of the organisation, **click here**.

1/7/18

Two million children growing up in families where there are serious risks, says Children's Commissioner

A **new study** from the Children's Commissioner for England, Anne Longfield, has revealed that over two million children in England are growing up in families where there are serious risks.

The report brings together a range of information held by various government departments, agencies and others to reveal the scale of child vulnerability in England.

The 2.1 million children growing up in families with complex needs include:

- 890,000 children with parents suffering serious mental health problems
- 825,000 children living in homes with domestic violence
- 470,000 children whose parents use substances problematically
- 100,000 children who are living in a family with a "toxic trio" (mental health problems, domestic violence and alcohol and/or substance abuse)
- 470,000 children living in material deprivation170,000 children who care for their parents or siblings.

Anne Longfield, the Children's Commissioner for England, responding to the report, said:

> "Over a million of the most vulnerable children in England cannot meet their own ambitions because they are being let down by a system that doesn't

recognise or support them – a system that too often leaves them and their families to fend for themselves until crisis point is reached.

"Not every vulnerable child needs state intervention, but this research gives us – in stark detail – the scale of need and the challenges ahead. Meeting them will not be easy or cost-free. It will require additional resources, effectively targeted, so that we move from a system that marginalises vulnerable children to one which helps them.

"Supporting vulnerable children should be the biggest social justice challenge of our time. Every day we see the huge pressures on the family courts, schools and the care systems of failing to take long-term action. The cost to the state is ultimately greater than it should be, and the cost to those vulnerable children missing out on support can last a lifetime.

"We get the society we choose – and at the moment we are choosing to gamble with the futures of hundreds of thousands of children."

For the report, **click here**.

6/7/18

Children lawyer becomes Law Society President

On 5 July, vice-president Christina Blacklaws became the 174th president of the Law Society of England and Wales and the fifth woman to hold this office.

In her inaugural speech at the Annual General Meeting at the Law Society in Chancery Lane, Ms Blacklaws identified three areas in which she 'could add most value':

- Promoting diversity and encouraging social mobility
- Focusing on the future of law and harnessing the power of legal technology and
- Ensuring the justice system is accessible to all.

In respect of the last, she said:

"As you would expect from someone who spent 20 years as a children's lawyer and a campaigner on social justice causes, I have a passion for access to justice and will strive to ensure we do everything that we can to protect the vulnerable and disempowered in our society.

"We are currently participating on the consultative panels of the government's review of legal aid, set up by the MoJ, on civil justice, criminal justice and family justice.

"During my presidency, I will continue to lead the Society's campaign on early advice.

"We believe that the current lack of free early legal advice can cause problems to escalate unnecessarily, which is harmful for the individuals involved as well as increasing the burden on courts and the cost to the public purse.

"The campaign was launched following the publication of new research by Ipsos MORI, which we commissioned, that shows a clear statistical link between receiving professional legal advice and resolving a problem sooner.

"We are calling for legal aid to be reinstated for family and housing cases."

For the President's inaugural speech, **click here**.

6/7/18

Local agencies are failing to spot the signs of neglect in older children, finds report

The neglect of older children sometimes goes 'unseen', and needs greater understanding and a more co-ordinated approach from local agencies, according to a **newly published report**.

The joint report - *Growing up neglected: a multi-agency response to older children* - from inspectorates Ofsted, HMI Constabulary and Fire & Rescue Services (HMICFRS), the Care Quality Commission (CQC) and HMI Probation, finds that older neglected children are not always receiving the support and protection they need.

Too often, says the report, local agencies are failing to spot the signs of neglect in older children. While neglect of young children is usually better identified, because the signs are more obvious, older children suffering the same abuse are slipping through the cracks.

The new report says that older neglected children often experience abuse outside the home as well as within it. Children escaping neglectful homes are more likely to go missing, to be vulnerable to exploitation, and at risk of being drawn into criminal activity. This makes it hard for professionals to meet their multiple, complex needs.

In some cases, local agencies see older children to be the 'problem'. The report shows that front line services work together to tackle issues like youth violence and gang involvement, but often there is little consideration of the underlying causes that contribute to this behaviour, such as neglectful parenting.

The inspectorates saw good practice in some areas, where agencies considered all risks to children, including neglect. In these areas, the child and their family are supported, and parents challenged where appropriate. Professionals understand the impact of neglect on the child, including how neglectful parenting increases vulnerability to abuse outside of the home. However, this was not the case everywhere.

In one relatively affluent area visited for the report, GPs recognise that neglect can happen even in wealthy families. They are alert to different forms of neglect, including

emotional neglect, and take steps to address them. For example, when children present with eating disorders or mental health problems, the GP will look beyond the immediate issues to ask questions about life at home, and relationships with parents.

Yvette Stanley, Ofsted's National Director for Social Care, said:

> "Some older children we saw had been neglected by their parents over many years. These children are incredibly vulnerable. They can seem 'resilient' and appear to be making 'lifestyle choices', when they are in fact finding unsafe ways of coping, like getting involved in gangs or misusing drugs and alcohol.
>
> "Behavioural issues must, of course, be dealt with. But unless local agencies consider the role of neglectful parenting, and take action to address it, as well as supporting children in a way that recognises the impact of their traumatic childhood, then their chances of a successful future will continue to be low."

The report also highlights the vital role adult services, including probation and adult health services, have to play in recognising neglectful parenting. But it finds that too often, mental health and substance misuse services do not think about the whole family and the impact of adults' behaviour on children. Information on adults who have limited parenting capacity due to mental health or substance misuse is not always shared with partner agencies.

The report calls for:

- A 'whole system' approach to identifying and preventing neglect, including from adult services working with parents;
- Better training for professionals in identifying the signs of neglect in order children;
- A more co-ordinated, strategic approach across all agencies working with children and parents; and
- The behaviour of older children to be understood in the context of the trauma they have experienced.

The findings are the result of inspections of services for children in six local authority areas. This includes children's services departments, police, youth offending services, education, health, and probation services.

The inspections looked at how well local agencies are working together to help and protect older children who are neglected or at risk of neglect. Inspectors spoke to professionals as well as children and parents, and looked at a range of cases from children aged seven to 15 years old.

For the report, **click here**.

7/7/18

House of Commons debate on the practice of forced adoption

On 12 July 2018, there will be a House of Commons debate on the practice of forced adoption in the UK, chosen by the Backbench Business Committee. The debate will take place in the Commons chamber.

The House of Commons Library will produce a briefing or material for the debate which, when it is available, will be accessible from **this page**.

A transcript of the debate will be available via Hansard online which can be accessed from **this page**.

7/7/18

Court of Protection application and appeal fees reduced

The Court of Protection, Civil Proceedings and Magistrates' Courts Fees (Amendment) Order 2018 has amended the Court of Protection Fees Order 2007 so that the fees payable in proceedings in the Court of Protection to make an application and to appeal have been reduced from £400 in each case to £385 in respect of an application, and £320 in respect of an appeal.

The changes come into effect from 25 July 2018.

For the Amendment Order, **click here**. For the 2007 Order, **click here.**

7/7/18

4,495 newly recorded FGM cases in year to March 2018

Between April 2017 to March 2018 there were 6,195 individual women and girls who had an attendance where FGM was identified or a procedure related to FGM was undertaken. The figures were set out in the NHS's Female Genital Mutilation annual report. These accounted for 9,490 attendances reported at NHS trusts and GP practices where FGM was identified or a procedure related to FGM was undertaken. Of the 6,195 women and girls, 85 cases of FGM took place in the UK.

There were 4,495 newly recorded women and girls in the period April 2017 to March 2018. Newly recorded means this is the first time they have appeared in the data released as part of the annual report. It does not indicate how recently the FGM was undertaken, nor does it mean that this is the woman or girl's first attendance for FGM.

Barnardo's, the children's charity, responding to the latest statistics, said that much more needs to be done to support survivors of female genital mutilation and protect girls at risk.

The charity noted that the National FGM Centre has said that it is vital for agencies, such as the police, education,

health and social care, to work better together to prosecute those who carry out this type of abuse.

The most common age range when FGM took place was between 0 and 10 years old. But the statistics reveal it can take years before a medical professional is aware of it – often during an appointment with an obstetrician or gynaecologist.

FGM was detected when the person was still a child (under 18 years old) in just 70 of the 6,195 cases – with it more commonly being discovered during a medical appointment when the woman was aged between 25 and 40.

The National FGM Centre is run by Barnardo's and the Local Government Association. Its head, Leethen Bartholomew, said:

> "Shockingly, the figures confirm that dozens of women and girls born in the UK have undergone FGM, despite the practice being illegal for over 30 years. Yet there still hasn't been a single successful prosecution to hold perpetrators to account. FGM is child abuse and it's vital that we work with affected communities to change hearts and minds about the practice.
>
> "Agencies must also work better together to prosecute those who fail to protect girls from this type of abuse."

To outline how the National FGM Centre works with affected communities and agencies, such as the police, education, health and social care, to achieve the target of ending FGM in the UK by 2030 – and also talk about what more can be done – it is holding a conference on Monday, 9 July 2018. The event at the Royal College of Obstetricians and Gynaecologists will not only feature the work of the centre but will also include clinical psychologist Nimmi Parikh, from Great Ormond Street Hospital, speaking about the psychological impact and Inspector Allen Davis speaking about the Metropolitan Police's work to tackle FGM.

For the full statistics, **click here**. For Barnardo's full response to the figures, **click here**.

8/7/18

Justice Committee calls for changes to Sentencing Council's guidelines on child cruelty offences

The Justice Select Committee has made a number of observations regarding the Sentencing Council's draft guideline on child cruelty offences, including that changes should be made to the section on failure to protect.

On 13 June 2017, the Sentencing Council published for consultation a group of sentencing guidelines covering offences involving child cruelty, along with a consultation paper seeking views on the draft guidelines. The offences covered by the draft guidelines are as follows:

- Cruelty to a child (section 1 of the Children and Young Persons Act 1933)
- Causing or allowing a child to die or suffer serious physical harm (section 5 of the Domestic Violence and Crime Act 2004) and
- Failing to protect a girl from the risk of female genital mutilation (section 3A of the Female Genital Mutilation Act 2003).

The Committee has responded to the consultation in a letter between the Chair of the Justice Committee, Bob Neill MP, and the Chair of the Sentencing Council, Lord Justice Treacy.

The letter focuses on particular themes on which the Committee felt it could contribute most usefully to the discussion around the guideline.

Failure to protect

The Committee calls for change to the draft to make a distinction in sentencing between failing to protect a child from cruelty and inflicting it.
The Council provides various mitigating factors which partly account for the lower culpability of an individual failing to protect a child from cruelty.

However, the Committee argues that the moral distinction between these two offences should also be captured and a lower starting point should be set for offenders who have failed to protect a child from cruelty rather than inflicting it, even if the mitigating factors are not present.

Definition of serious harm

The Council has defined serious harm as "serious psychological and/or developmental harm".

The Committee notes several respondents of the consultation called for further explanation or guidance, but feels this assessment should be left to sentencers, as it depends so closely on the facts of the case. Sentencers should be encouraged to seek expert advice.

Aggravating factors

The Committee agrees with respondents who felt that where an offender is a person in authority, for example a teacher or priest, this should be an aggravating factor.

Mitigating factors

The Committee agrees that if remorse is taken into consideration as a mitigating factor, it is essential that it must be genuine. The Committee notes that good character is a mitigating factor, but does not believe it is always relevant in such cases because a person of apparent good character can make use of it to inflict harm without being detected.

Causing or allowing a child to die or suffer serious physical harm

In the case of this offence, which is often but not exclusively used when it is not known who caused the harm to a child and there is more than one defendant, the Committee argues that causing and allowing serious physical harm should in principle be treated differently.

The distinction should be reflected in a lower starting point in sentencing for offenders who have allowed harm, but the Committee acknowledges that this will only be relevant in cases where it is known to the court which offender caused the harm.

Sentence ranges and starting points for the offence of failing to protect a girl from the risk of FGM

The Committee supports the Sentencing Council's approach. It believes that a custodial starting point is appropriate for sentencing for all but the least serious cases.

For the report, **click here**. For the Sentencing Council's guidelines, **click here**.

8/7/18

Government seeks to change law on deprivation of liberty safeguards

The Mental Capacity (Amendment) Bill, which was introduced to the House of Lords on 3 July 2018, seeks to replace the current system of 'Deprivation of Liberty Safeguards' (DoLs). The Bill will receive its second reading on 16 July 2018.

DoLs, the assessment system currently carried out on people who do not have the mental capacity to make their own decisions about their care, was criticised by a 2017 Law Commission review for being too complex and bureaucratic.

The government has now developed a new system, known as 'Liberty Protection Safeguards', set out in the Bill.

The reforms seek to:

- introduce a simpler process that involves families more and gives swifter access to assessments
- be less burdensome on people, carers, families and local authorities
- allow the NHS, rather than local authorities, to make decisions about their patients, allowing a more efficient and clearly accountable process
- consider restrictions of people's liberties as part of their overall care package
- abolish repeat assessments and authorisations when someone moves between a care home, hospital and ambulance as part of their treatment.

For the Bill, as introduced, **click here**. For the Department of Health and Social Care's announcement, **click here**. For the Law Commission's report, **click here**.

8/7/18

Separated migrant children to be granted legal aid

The Ministry of Justice has announced that it will amend the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) to bring immigration matters for unaccompanied and separated children into scope of legal aid.

The announcement was contained in a **written statement** to the House of Commons by Lucy Frazer, Parliamentary Under Secretary of State for Justice.

The statement noted that under current legislation, whilst legal aid is available in all asylum cases and immigration cases where someone is challenging a detention decision, legal aid for other immigration matters is available only via the Exceptional Case Funding (ECF) scheme.

Ms Frazer said:

> "Following a judicial review brought by the Children's Society, we have examined both the evidence presented as part of the case and our data on applications for funding. Based on the distinct nature of the cohort in question, and of our data regarding them, I have decided to bring these cases into the scope of legal aid to ensure access to justice."

The Children's Society's research suggested that thousands of children have been denied legal aid since LASPO came into force in 2013. Since then, only a small number have been able to access legal aid through Exceptional Case Funding.

The charity says that the change has left many children struggling to pay for the expert legal advice and representation they desperately need, which can cost thousands of pounds.

Reacting to the decision, The Children's Society Chief Executive, Matthew Reed said:

> "The Children's Society is delighted with this excellent news. This is an important change in policy which will go a long way to protecting some of the most marginalised and vulnerable young people in our communities.
>
> "Legal aid is absolutely vital for ensuring that children can access justice. For children who are subject to immigration control and who are in this country on their own, it is an absolute life line. The government should be commended for this significant change for children and young people."

In its recent report, ***Rights without Remedies***, **Coram Children's Legal Centre** estimated that there are several thousand children in local authority care where immigration is the primary issue, not asylum or trafficking. CCLC's Migrant Children's Project alone advised in the cases of 234 separated children and young people with an out-of-scope immigration issue last year. This advice casework formed the basis of a witness statement to the judicial review, brought by Islington Law Centre and The Children's Society, of the cuts to legal aid for this group.

For the MoJ written statement, **click here**. For The Children's Society's response, **click here**. For more information about the issue from CCLC, **click here**.

14/7/18

Government to proceed with new child maintenance compliance and arrears strategy

The Department for Work and Pensions **has announced** that it will proceed with a new compliance and arrears strategy proposed in its recent consultation document. It is intended implement any necessary changes to secondary legislation this autumn.

The DWP says that it has received broad endorsement for the key principles which will underpin the new strategy, which will:

- Continue to prioritise collecting money for today's children.
- Continue to encourage collaboration between parents.
- Build on the success of CMS by introducing tougher new enforcement measures and making the best use of current powers.
- Address historic arrears built up under the CSA schemes by offering a final chance at collection where this is possible at a reasonable cost to the taxpayer.
- Avoid taxpayers funding activity that won't result in money going to children.

The overall response to the proposals for improving the calculation of child maintenance liabilities was positive. There was a call for steps to be taken to include unearned income automatically when initially calculating a liability, as with historic income. As this would not be achievable without changes to primary legislation, the DWP has begun to explore with Her Majesty's Revenue and Customs ways to speed up the current process for sharing the relevant unearned income data they hold.

Respondents offered a range of views on the proposed new power to allow the CMS to derive a notional income from an asset for the purpose of varying a calculation. There was no clear consensus on the applicable percentage rate to derive a notional income or the minimum value of assets this should be applied to. The DWP has therefore opted to proceed with the 8% rate proposed in line with the Judgment Debts (rate of interest) Order 1993 and will set the minimum aggregate value of assets at £31,250. This, the DWP says, allows it to align its overall approach with how it handles unearned income, and best balances the interests of all parties. There will also be legal safeguards to ensure this new power only targets appropriate assets.

Respondents were generally in favour of the proposal to extend the government's ability to make deductions from benefits to include Universal Credit (UC) for those with earnings who are liable to pay flat rate maintenance. It is intended to introduce new regulations to allow it to make these deductions at the rate of £8.40 a week, aligning the treatment of these clients with others in a similar situation. Deductions from benefit will be extended so that arrears can be collected when on-going maintenance ends.

The DWP had already announced an intention to introduce new powers to make deductions from jointly held accounts, and this consultation sought views on a proposal to extend this to jointly held and unlimited liability partnership business accounts. The proposals will be amended to reflect concerns that there needed to be safeguards to prevent third party funds from being subject to deduction. This means that as well as the proposed representation periods of 28 days for Lump Sum Deduction Orders (LSDOs) and 14 days for Regular Deduction Orders (RDOs) the last six months' bank statements will be checked to establish ownership of funds before progressing the order. Where this is not possible there will be an rebuttable assumption that 50% of the funds in the account belongs to the paying parent.

The proposal to introduce a new power to confiscate passports from those who repeatedly refuse to meet their child maintenance obligations was well received. Regulations will provide that the ban can be revoked or reduced where full and part payment of the arrears covered by the disqualification order is made.

For the original consultation document, **click here**. For the government's response, **click here**.

14/7/18

Commons Select Committee examines Domestic Abuse Bill

On 17 July 2018 the House of Commons Home Affairs Select Committee will hear from experts on what measures should be included in the Domestic Abuse Bill.

The government set out its planned approach to the legislation in a **consultation** which has recently closed.

The Committee intends to explore not only what should be included in the Bill but also what other, non-legislative, policies should be pursued for the Government's strategy to be most effective.

Topics also likely to be covered are:

- The nature and prevalence of domestic abuse
- Resources and support available to victims of domestic abuse
- Proposed role of the Domestic Abuse Commissioner
- Protection and support for children.

The experts before the Committee in this session will be: Councillor Simon Blackburn, Chairman, LGA Safer and Stronger Communities Board, Local Government Association; Siân Hawkins, Head of Campaigns and Public Affairs, Women's Aid; Pragna Patel, Southall Black Sisters;

Professor Jane Callaghan, Stirling University; Jane Gordon, Sisters for Change; and Deputy Chief Constable Louisa Rolfe, National Police Chiefs' Council.

For more information and to view the session, **click here**.

14/7/18

Supreme Court will deliver judgment in Mills v Mills on 18 July 2018

The Supreme Court is to hand down its judgment in Mills v Mills on Wednesday, 18 July 2018.

The Court will determine the proper approach to applications to vary periodical payments orders made pursuant to s.31(7) of the Matrimonial Causes Act 1973 after the grant of a decree of divorce. In particular, it will consider whether, provision having already been made for the wife's housing costs in the capital settlement in the original consent order of 2002, the Court of Appeal was wrong in taking these into account when increasing the wife's periodical payments under the joint lives spousal maintenance provision contained in 2002 order.

Following their divorce in 2002, the parties' financial claims were settled by a consent order which, amongst other things, provided the wife with a capital sum and required the husband to pay spousal periodical payments for the wife of £1,100 pcm for joint lives.

In 2014, the husband applied to discharge the periodical payments order or, in the alternative, reduce the payments due thereunder. His case was that the circumstances pertaining in 2002 had changed in that the wife (i) had lost the capital she had been awarded in 2002 through gross financial mismanagement and (ii) was now in a position to work (or work more) in order to increase her earnings. The wife made a cross-application for an increase in her periodical payments on the basis that she was unable to meet her basic needs. The judge held that the order should continue at the current rate without any variation. The Court of Appeal allowed the wife's appeal and increased the maintenance payable by £341 pcm to £1,441pcm.

14/7/18

Commons to debate progress on protecting victims of domestic abuse in the family courts

On Wednesday, 18 July 2018 the House of Commons will hold a Westminster Hall debate on progress on protecting victims of domestic abuse in the family courts. The Member leading the debate is Jess Phillips MP.

In preparation for the debate, the House of Commons Library has published a **research briefing** on the subject.

For the briefing, **click here**. A transcript of the debate will be produced by Hansard which can be accessed **from here**.

15/7/18

Civil Partnership Act 2004 (Amendment) (Sibling Couples) Bill begins parliamentary passage

The **Civil Partnership Act 2004 (Amendment) (Sibling Couples) Bill** is due to receive its second reading in the House of Lords on Friday, 20 July 2018. The first reading was on 3 July 2018.

The short private member's bill, sponsored by Lord Lexden, seeks to amend the Civil Partnership Act 2004 to include sibling couples.

For the bill, as introduced, **click here**. For a research briefing, recently published by the House of Lords Library, **click here**. To follow progress of the bill, **click here.**

15/7/18

Online note published on Habitual Residence and the Scope of the 1993 Hague Convention

The Permanent Bureau has published a Note on Habitual Residence and Scope of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. The note is available in **English**, **French** and **Spanish**.

The Note clarifies the scope of the Convention and the concept of habitual residence and is aimed at promoting greater consistency in the determination of habitual residence in Contracting States through case scenarios. It also provides guidance on the prevention of, and response to, problems arising due to the determination of the habitual residence.

For the English version of the Note, **click here**.

15/7/18

Supreme Court to deliver judgment on section 20 accommodation

On Wednesday, 18 July, the Supreme Court will give judgment in *Williams and another v London Borough of Hackney*.

The court will consider the lawfulness of the accommodation of the appellants' children by the respondent local authority under section 20 of the Children Act 1989.

On 5 July 2007 the appellants' children were taken into police protection pursuant to s 46 of the Children Act 1989 in response to allegations of assault and neglect. The appellants were granted police bail, a condition of which was that no unsupervised contact was permitted with the children. The respondent local authority placed the children with foster parents and sought the appellants' consent to continue the accommodation under s 20 after the police protection period ended. The appellants shortly thereafter objected to the accommodation beyond 23 July 2007

pursuant to s 20(7) but the children were not returned to them until 11 September 2007 after the bail condition was lifted. Criminal proceedings against the appellants were later discontinued. After pursuing complaints to the Local Government Ombudsman, the appellants issued proceedings for damages for misfeasance in public office, negligence, religious discrimination and for breach of their rights under the Human Rights Act 1998.

For the Court of Appeal judgment, prefaced by a detailed summary by Emily Ward of Broadway House Chambers, **click here**.

15/7/18

Law firm pledges funds in effort to save FDAC National Unit

A leading family law firm has been involved in discussions in an effort to save the Family Drug and Alcohol Court (FDAC) National Unit.

The **Unit could close in September** because of a lack of funds despite being hailed by ministers and the judiciary as being the central hub of one of the most important developments in family law in recent decades. Only last month, England's most senior family judge, Sir James Munby, suggested that the prospect of closure was "profoundly disturbing".

Hall Brown Managing Partner James Brown and Senior Partner Sam Hall recently met Nicholas Crichton, the retired district judge who helped establish the FDAC in 2008, and the Earl of Listowel, who is one of the system's most prominent parliamentary supporters. Describing the exchange as "immensely positive", Mr Hall said that Hall Brown had pledged £12,500 in each of the next three years towards the FDAC's annual £250,000 running costs. He called on 19 other family law firms to donate a similar amount.

> "We recognise the tremendously delicate nature of the work undertaken by the FDAC over the course of the last decade and the life-changing results which it has already yielded for many families.
>
> "Having listened in person to the concerns of Mr Crichton and Sir James about the potential consequences of such a service not being available, we decided that it was important to act.
>
> "We do not deal with the kind of cases which FDAC handles, cases which are highly specialised in nature. However, we and every one of our legal peers recognises how vital this work is. We are optimistic, therefore, that our proposal will be supported by other firms and the FDAC National Unit can be saved."

Academic research has found that out of 90 families who had been through the FDAC system, almost half of mothers and one-quarter of fathers had stopped their substance abuse by the end of the process – a far higher success rate than in ordinary care proceedings.

The funding crisis has emerged after the Department for Education stated that no further funding would be made available for the Unit, the body that supports local, existing FDACs and encourages the development of new sites.

The Department has funded the Unit from its inception and has thus been essential to the expansion of the FDAC system from London to nine other localities.

Mr Crichton said he was keen to explore the Hall Brown proposal.

> "Children belong in families – hopefully, their birth or extended families. What we have been able to do through the FDAC is increase the chances of that happening despite difficult domestic circumstances.
>
> "I and many others believe that the FDAC has made its mark and fully justifies its continuation.
>
> "Despite analysis showing not only that these courts change lives but save money too by reducing the future sums required to support the kind of families which we see, we find ourselves critically in need of cash.
>
> "I am grateful for Hall Brown's initiative and hope that it leads to a positive outcome and the saving of a valuable legal and social resource."

Nagalro expresses its concerns

Meanwhile, Nagalro has expressed concern that, without the National Unit to support, train and promote the ten current FDACs and to maintain consistency, they will simply be left to wither on the vine.

The professional association for Family Court Advisers, Children's Guardians and Independent Social Workers said:

> "One by one, cash-strapped local authorities, encouraged by the withdrawal of central government support, will find that funds can be directed elsewhere. Without the co-ordination, training and promotional activities of the National Unit, it is unlikely that new FDACs will be set up. This is a tragedy for the families who are helped by the FDAC, a severe blow to the children and, in the medium to long-term will mean increased costs to the public.
>
> "The astonishing thing about this decision is that it comes without explanation and in the face of consistent research showing the benefits of the FDAC system and the dividends it provides to public finances. Parents who are assisted to come off drugs do not need to commit offences to fund their habit; the costs of prosecuting them and imprisoning them is saved. Some will get jobs and pay taxes. Children who can, at the end of the process, be safely rehabilitated to their parents' care do not cost the taxpayers foster care allowances."

For the full statement from Nagalro, **click here**.

15/7/18

Court of Appeal determines issue of effective service of proceedings under Brussels IIa

In ***Thum v Thum*** **[2018] EWCA Civ 624** the Court of Appeal has held that no time-limit for service can be read into **r7.8 of the Family Procedure Rules 2010**, rejecting the husband's argument that service of a divorce petition should be effected "as soon as possible" or "as soon as practicable".

The wife had issued her divorce petition in England on 26 October 2015, while the husband had issued his petition in Germany on 20 January 2016. However, the husband was not served with the English petition until 27 February 2016, ie just over four months after the date of issue. Whether the wife had taken all necessary steps for effective service would determine whether the English or German Court was first seised for the purposes of Article 19 of BIIa.

At first instance, Mostyn J had dismissed the husband's application for a stay or dismissal of the wife's petition on the basis that the English court was second seised.

The husband appealed, arguing that Mostyn J's interpretation of the effect of the provision in Article 16(1)(a) was wrong, and that Mostyn J was wrong to conclude that the wife had not failed to take the steps necessary to have service effected. The husband relied on the wife's delay in effecting service and argued that service had been ineffective by virtue of the husband initially being served at his business address in Germany, rather than his home address. The husband sought that a time limit be implied into FPR r7.8, namely that service be effected "as soon as possible" or "as soon as practicable".

The wife submissions in reply were that she had not failed to take any required steps. FPR r7.8 specifies no time by which service must be effected and the question of what steps are required under the Article 16(1)(a) proviso is to be determined by domestic law. The issue of whether any additional obligations, as to time limits, should be imposed was, she argued, a matter for the Family Procedure Rule Committee, not the Court.

The Court of Appeal agreed with the wife's submissions and ultimately dismissed the husband's appeal. The Court of Appeal was persuaded that the wife had not failed to take any required step for effective service, nor could a time-limit for service be read into FPR r7.8. Moylan LJ giving the lead judgment commented at paragraph [60] that:

> "Service is a critical part in the conduct of proceedings and parties need to know easily and clearly what they must do in order to comply with the rules as to service. It might be sensible or even appropriate for some additional specific obligation to be included but I can see no principled basis on which such can be implied. What period would be selected and why would that period be appropriate? In this context, what would "as soon as possible" or "as soon as practicable" mean?"

However, the Court of Appeal judges were agreed that the outcome of the appeal was "not entirely satisfactory" and acknowledged that it could be "undesirable for a party to seise the court without the respondent being served reasonably promptly" [paragraph 77]. As such, the Court invited the Rule Committee to consider whether any additional obligations as to service should be included in the FPR 2010.

For the judgment, prefaced by a summary by Patrick Paisley of 1 Garden Court Family Law Chambers (from which this item is derived), **click here**.

15/7/18

Husband wins Supreme Court appeal against order to pay all wife's rental costs

In ***Mills v Mills*** **[2018] UKSC 38** the Supreme Court has allowed a husband's appeal against an order, secured in the Court of Appeal, which increased the level of his periodical payments so as to cover her shortfall between existing periodical payments and her current needs.

The Appellant and Respondent are former husband and wife. They divorced in 2002 after a marriage of approximately fifteen years, and the financial issues in the divorce were resolved by way of a consent order. Under the terms of that order the wife received £230,000 in settlement of her capital claims against the husband, and it was also agreed that the husband would make periodical payments to her at an annual rate of £13,200.

It was reasonably anticipated by the husband that the wife would use the £230,000 to purchase a suitable home for herself and their son without a mortgage, as the wife had been suffering from ill health which made it difficult for her to work. In the event, however, the wife did manage to take out a mortgage, and she duly purchased a more expensive home for £345,000. Between 2002 and 2009 the wife sold and purchased a series of different properties, and with each purchase the amount which she borrowed increased. In addition, she did not necessarily reinvest all of the sale proceeds from one property into the next and seemingly spent the balance, with the result that the amount of capital she had decreased over time. Eventually, in 2009 the wife sold her final property and began to rent accommodation. By April 2015, when the first-instance judge heard the case, the wife had no capital, and she had debts of around £42,000.

The hearing before the judge was to determine two cross-applications made under s.31(1) of the Matrimonial Causes Act 1973. The husband had applied for the discharge or downwards variation of the order for periodical payments, whereas the wife had applied for the order for periodical payments to be varied upwards. In determining the applications, the judge noted that there was a shortfall of £4,092 per annum between the wife's current needs and, when coupled with her own earnings, the existing level of the periodical payments. However, he also held that, although the wife's actions had not been profligate, she had not managed her finances wisely and her current financial needs, in particular her need to pay rent, had been increased by the choices which she had made. Consequently, the judge considered that it would be unfair to the husband if he had to make a full contribution to the wife's rental costs. The judge therefore declined to vary the order for periodical payments either upwards or downwards. This meant that

the husband would continue to contribute to around 60% of the wife's rental costs, and the wife would have to adjust her expenditure to accommodate the shortfall.

The wife appealed against this decision to the Court of Appeal, and was successful. The Court of Appeal considered that the judge had not given sufficient reasons why all of the wife's basic needs should not be met by the periodical payments from the husband, and increased the level of periodical payments to cover her shortfall, i.e. to £17,292. The husband now appeals against this decision to the Supreme Court.

The Supreme Court unanimously allows the appeal, concluding that the judge was entitled to decline to vary the order for periodical payments so as to require the husband to pay all of the wife's rental costs. Lord Wilson gives the judgment with which Lady Hale, Lord Carnwath, Lord Hughes and Lord Hodge agree.

The husband was granted permission to appeal to the Supreme Court only on a single ground – whether, in light of the fact that provision had already been made for the wife's housing needs in the capital settlement, the Court of Appeal was entitled to interfere with the judge's decision not to increase the periodical payments so as to cover all of the wife's current rental costs [32].

The Court of Appeal had erred in saying that the judge had given no reason for declining to increase the order for periodical payments – the judge had given a clear reason, namely that the wife's unwise decisions in relation to her capital had increased her basic needs by requiring her to pay rent, and that it was consequently unfair to expect the husband to meet these increased needs in full [33].

The Court of Appeal should have considered the impact of the original capital payment on the wife's current need to pay rent, and this involved a consideration of three earlier Court of Appeal authorities: ***Pearce v Pearce* [2003] EWCA Civ 1054**, ***North v North* [2007] EWCA Civ 760**, and ***Yates v Yates* [2012] EWCA Civ 532** [34-38]. These cases were correctly decided and in light of this, the judge was entitled, although not obliged, to decline to require the husband to fund payment of the rent in full. This respects the wide discretion conferred upon the court under s. 31(1) and (7) of the Matrimonial Causes Act 1973 in determining an application for variation of an order for periodical payments. Moreover, a court would need to give very good reasons for requiring a spouse to fund payment of the other spouse's rent in the circumstances of this case. A spouse may well be obliged to make provision for the other spouse, but an obligation to duplicate that provision in situations such as this is improbable [40].

Supreme Court Press Summary

Comments from the parties' solicitors

Beverley Morris, partner at **Lodders Solicitors**, acting for Mr Mills, said:

> "The decision has been hailed as a victory for Mr Mills, and whilst it is right to say we have won in the Supreme Court, the problem remains that Mr Mills is still paying a 'Joint Lives Maintenance Order' with no end in sight.
>
> "Within the element of maintenance, he is paying towards her rent, when the original award gave her a housing fund. It is therefore difficult to see it as a successful outcome when so many questions remain unanswered. The Family Court is tasked with finding a fair solution. There remains judicial uncertainty as to what is fair - the Court of Appeal gave one view which the Supreme Court has reversed.
>
> "At the heart of this case, however, is the issue of financial prudence and financial responsibility. Mrs Mills proved an unreliable witness with her evidence being described as 'not fully satisfactory' but, despite that, Mr Mills has an ongoing obligation to maintain her.
>
> "So, what now? It is time for us to contemplate this outcome and take time out to consider what would be the right outcome for this family going forward."

Joanne Westcott, partner at **Osbornes** who represented Maria Mills, said:

> "The Supreme Court were asked to determine a very narrow point about whether the court was entitled to increase spousal maintenance payments to meet rent when provision for the wife's housing needs had already been met in the original order.
>
> "Today's decision does not bring about the end of spousal maintenance for the wife, unattractively described as a 'meal ticket for life,' far from it. The original spousal maintenance provision of £1,100 per month from 2002 remains intact. What the Supreme Court decided was that the £341 increase provided for by the Court of Appeal was wrong because it took into account an element of her rent.
>
> "There has been a shift towards achieving a clean break and imposing a term on spousal maintenance but this does not apply in this case. This shift is closer to the Scottish system which provides maintenance payments for up to three years following a divorce.
>
> "Where Maria and Graham go from here is entirely dependent on them, either of them could ask to capitalise the maintenance payments. This means husband pay to the wife a lump sum to effectively buy a clean break and end monthly payments. Before running off to court to make any application they should certainly try and reach an agreement if possible.
>
> "Maria is disappointed and feeling bruised after almost four years of litigation to end up exactly where she was at the start."

Other comments

Hazel Wright, partner in the family department at Lincoln's Inn firm **Hunters Solicitors**, commented:

> "All maintenance cases ultimately have to answer one basic question: 'how long and how much?' Today's Supreme Court ruling regarding the divorce

maintenance settlement of Mr and Mrs Mills cuts to the heart of this question.

"Mr and Mrs Mills lived well during their 13 year marriage, largely due to his financial contribution as chairman of the surveying company Technics Group. On divorce, they negotiated a settlement by which she took most of the liquid capital, to provide her with housing and a lump sum. Once these has been provided, the only remaining link between them was the sharing of his income with her. There was no limit on how long this should last and nothing to stop either of them asking for a variation of that provision.

"Mrs Mills clearly wanted to go on living well after the divorce by relying on that income. Like many people, she decided to increase her own capital by buying and selling homes, trading up each time and eventually could not afford her mortgage. She has spent the rest of the capital from the divorce, so she found herself renting a home.

"Conversely, Mr Mills wanted simply to move on from the marriage and the divorce. He asked the court to break the income link. So he applied to court on the basis that Mrs Mills had been irresponsible over money and should be able to meet her own housing needs. He also wanted to buy out her remaining income dependence on him.

"Today, the Supreme Court agreed that it is time for Mrs Mills to be independent and to meet her increased housing costs herself.

"The court has ruled that it would be unfair to Mr Mills to be saddled with an obligation to keep up the maintenance payments to Mrs Mills at the level she wanted, £1,441 per month rather than the £1,100 per month he was paying. She had already had a clean break which provided for her housing. To give more of his income, Mr Mills would effectively be paying for her housing again."

Stacey Nevin, associate in the family & divorce law team at **Kingsley Napley**, noted:

"Today's conclusion of the Mills v Mills saga will be disappointing to those who wanted to see the end of lifetime maintenance obligations. However it was a victory for Mr Mills as the Supreme Court found favour with his argument that he should not be required to meet the costs of Mrs Mills' housing needs. In 2002, Mrs Mills had received liquid capital to allow her to purchase a mortgage free property, but a series of poor financial decisions saw her housing fund squandered elsewhere, leaving her in debt. She sought to increase her maintenance to support her housing needs now she was renting. Crucially, today's Supreme Court decision means that Mr Mills does not need to bear the consequences of her poor financial decisions and appears to shut the door on spouses coming back for housing claims in the future when they have already been factored into a capital award. Financially weaker parties will be relieved to see that the notion of maintenance for life has survived its latest test, albeit today's decision has not widened its scope."

For the judgment, **click here**.

18/7/18

Accommodation under s 20 agreement was lawful without parents' informed consent

In ***Williams and another v London Borough of Hackney*** **[2018] UKSC 37**, the Supreme Court has held that a local authority did not breach the Article 8 rights of parents when it accommodated their children under a section 20 agreement without having informed consent from the parents.

The appeal concerns the limits of a local authority's powers and duties to provide accommodation for children in need under **section 20 of the Children Act 1989** ('CA').

The appellants are the parents of eight children, at the relevant time aged 14, 12, 11, 9, 7, 5, 2 and 8 months. On 5 July 2007 their 12-year-old son was caught shoplifting. He told the police that he had no money for lunch and that his father had hit him with a belt. The police visited the family's home and found it in an unhygienic and dangerous state unfit for habitation by children. The police exercised their powers under s 46 CA to remove the children to suitable accommodation for a maximum of 72 hours. The children were provided with foster placements by the respondent local authority ('the Council'). The appellants were arrested and interviewed by the police, then released on police bail on condition that they could not have unsupervised contact with any of their children.

The appellants were asked to sign a 'Safeguarding Agreement' by the Council on 6 July 2007 by which they agreed that all the children would remain in their foster placements for the present time. They were not informed of their right, under s 20(7) CA to object to the children's continued accommodation after the expiry of 72 hours, nor of their right, under s 20(8), to remove them at any time. On 13 July, solicitors instructed on their behalf gave formal notice of the appellants' intention to withdraw consent. On 16 July the Council decided that the children should be returned home as soon as possible. However, it took until 6 September for the Council to arrange with the police for the bail conditions to be varied, whereupon the children returned home on 11 September 2007.

Criminal proceedings against the appellants were later discontinued. In July 2013 the appellants issued proceedings claiming damages, amongst other things, for breach of their rights under article 8 of the European Convention on Human Rights. The High Court dismissed all the claims except for the article 8 claim, which was upheld on the basis that, because the parents had not given their informed consent, there had been no lawful basis for the accommodation of the children after 72 hours, so that the interference with family life was not in accordance with the law. The judge awarded each of the appellants damages of £10,000. The Court of Appeal allowed the Council's appeal, holding that consent was not required and that there

had been a lawful basis for the children's accommodation under s 20 CA, and the interference with their article 8 rights had been proportionate.

The Supreme Court unanimously dismisses the appeal. It holds that the appellants did not object or unequivocally request the immediate return of the children, so there had been a lawful basis for the children's continued accommodation under s 20 CA. Lady Hale gives the only substantive judgment.

Local authorities in England look after a substantial number of children (over 70,000 in March 2017), either as part of a range of services provided for children in need, or under powers to intervene compulsorily to protect children from harm. Compulsory intervention by a local authority requires the sanction of a court process. No court order is required for the authority to provide accommodation for children in need under s 20 CA. However, it is subject to the right under s 20(7) for a person with parental responsibility for the child, who is willing and able to provide accommodation for him or arrange for accommodation for him, to object, and to the provision in s 20(8) that 'any person who has parental responsibility for a child may at any time remove the child from accommodation provided by or on behalf of the local authority under this section' [1-2]. In short, it is a voluntary service.

If a parent delegates the exercise of his or her parental responsibility for a child to the local authority under s 20 CA, such delegation must be real and voluntary. The best way to ensure this is to inform the parent fully of their rights under s 20, although delegation can be real and voluntary without being 'informed' [39]. No such delegation is required where the local authority steps into the breach to exercise its powers under s 20 where there is no-one with parental responsibility for the child, the child is lost or abandoned, or the parent is not offering to look after the child. In those circumstances active delegation is not required [40]. If a parent with unrestricted parental responsibility objects at any time pursuant to s 20(7), the local authority may not accommodate the child under s 20, regardless of the suitability of the parent or of the accommodation which the parent wishes to arrange [42-43, 47]. It is not a breach of s 20 to keep a child in accommodation for a long period but a local authority must also think of the longer term and consider initiating care proceedings in order to fulfil its other duties under the CA, and to avoid breaches of the child's or the parents' rights under article 8 [49-52].

In the present case, where the s 20 arrangements replaced the compulsory police protection under s 46 without the children returning home in the meantime, the focus was not on the appellants' delegation of parental responsibility to the Council, but on their rights under subsections 20(7) and 20(8) [53]. Entering into a safeguarding agreement was a matter of good practice, although it was important that it did not give the impression that the parents had no right to object or to remove the children [55]. The lawfulness of the s 20 accommodation depended on whether the appellants' actions amounted to an unequivocal request for the children to be returned. The bail conditions were not an insuperable impediment to the request and were not a reason to refuse [57]. However, the letters from the appellants' solicitors could not be read as an objection or as a request for immediate return: the solicitors were sensibly trying to achieve the return of the children as quickly as possible on a collaborative basis rather than push the Council into issuing care proceedings [59]. Although the Council could have provided earlier support for an application to lift the bail conditions, it was not possible to say what effect this would have had, given the independent concerns of the police [60].

Accordingly, there was a lawful basis for the children's continued accommodation under s 20 and the ground relied on by the judge for finding a breach of the appellants' article 8 rights was not made out [61]. The question of whether the Council's actions were a proportionate interference with the right to respect for family life throughout the time the children were accommodated was not fully explored in the lower courts and was not raised as an issue before the Supreme Court [62]. The appeal is therefore dismissed, albeit for reasons which differ from those of the Court of Appeal [63].

Supreme Court Press Summary

For the judgment, **click here**.

18/7/18

Bar Council launches 'LASPO: 5 years on' survey

Following the commencement of the Government's **Post-Implementation Review of Part 1 of LASPO and subordinate legislation**, the Bar Council is conducting a **second survey** of the Family and Civil Bar. The survey will inform the Bar Council's response to the review.

In 2014, the Bar Council conducted early research into the effect of LASPO (***The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One Year On Final Report***). A key part of the research was a survey of the Family and Civil Bar. Regrettably, it suggested that much of what the Bar Council had warned about had come to pass, including:

- A significant increase in litigants in person, especially in the family courts;
- Increased delays in court and additional burdens on already-stretched court resources;
- Increased and likely unsustainable pressure on frontline providers offering free legal support, advice or representation;
- A growing reluctance of solicitors and barristers to take on complex, low-value litigation, denying many access to legal advice and representation;
- A growing number of barristers actively considering the viability of a long-term career at the Bar; and
- Concern about the expertise of future practitioners, the impact on the young Bar and on diversity within the profession.

The stated aim of the Government's Post-Implementation Review of Part 1 of LASPO and subordinate legislation is to

"… conduct an evidence-based review to establish the impact of the changes and how this compared with the initial objectives and estimates outlined prior to consultation."

Meetings of the Consultative Groups for each practice area have emphasised the need for evidence collected from outside Government to inform the Review.

As part of its response, the Bar Council is conducting this further survey of the Family and Civil Bar. Answers to it will form a central part of its submissions to Post-Implementation Review.

The questions have been deliberately designed to mirror and develop those asked in the 2014 survey, to enable comparison with that early research and to improve the power of the data gathered.

To take the survey, **click here**.

19/7/18

Supreme Court to deliver judgment in Owens v Owens on 25 July

The Supreme Court will deliver its judgment in the case of *Owens v Owens* on Wednesday, 25 July.

The case concerns the interpretation of section 1(2)(b) Matrimonial Causes Act 1973.

The parties were married in 1978 and separated in February 2015. The appellant's wife filed a petition for divorce in May 2015 contending that the marriage had irretrievably broken down. The petition was based on the respondent husband's behaviour, which the wife argued meant she could not reasonably be expected to live with him within the meaning of s 1(2)(b) Matrimonial Causes Act 1973, and she gave particulars of incidents, which included occasions where the husband was alleged to have made disparaging or hurtful remarks to her in front of third parties. The husband defended the case and argued at the trial that the examples given of his behaviour were not such as to satisfy the requirements of s 1(2)(b). The judge agreed and dismissed the petition.

The wife's appeal was dismissed by the Court of Appeal, where the President of the Family Division noted:

> "The simple fact, to speak plainly, is that in this respect the law which the judges have to apply and the procedures which they have to follow are based on hypocrisy and lack of intellectual honesty. The simple fact is that we have, and have for many years had, divorce by consent, not merely in accordance with section 1(2)(d) of the 1969 Act but, for those unwilling or unable to wait for two years, by means of a consensual, collusive, manipulation of section 1(2)(b)."

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

19/7/18

New law designed to encourage first major reforms to divorce in 50 years

Draft legislation designed to encourage the Government to make the first major changes to divorce legislation for nearly 50 years was published on Wednesday, 18 July, when it received its first reading in the House of Lords. The date of its second reading has not yet been confirmed.

The **Divorce (etc.) Law Review Bill** follows research by experts which shows current divorce laws are causing needlessly painful and destructive breakups and exacerbating conflict between couples.

The Bill requires the Government to review the current law on divorce and civil partnership dissolution and to consider a proposal for a system of no-fault divorce. It is expected to have cross-party support.

The Bill, was introduced to the House of Lords by the former President of the Family Division, Baroness Butler-Sloss, and is a result of work by legal and relationship experts, politicians and family lawyers, following new research by **Professor Liz Trinder** from the **University of Exeter Law School**, published by the **Nuffield Foundation**.

Parliament last looked at divorce law in the mid-1990s after concerns that the law was unfair, confused and caused unnecessary bitterness and hostility. Parliament passed the Family Law Act 1996 which would have introduced a no-fault divorce law, but the statute was never implemented due to an overly-complicated process. The problems with the divorce law were not addressed.

Baroness Butler-Sloss said:

> "The present law on divorce is not fit for purpose. Research by the University of Exeter, funded by the Nuffield Foundation, has illuminated its deeply unsatisfactory state. Most judges do not apply the law as set out in the 1973 legislation; in order to get a quick divorce petitioners have to make allegations of unreasonable behaviour by the other spouse which can be very wounding for the respondent; but much more important these allegations are extremely upsetting for the children. This modest bill asks the Lord Chancellor to review the divorce law and the schedule to the bill sets out the suggestions for no-fault divorce."

Professor Trinder's recent **Finding Fault** research found that the problems created by an outdated law have continued, even getting worse. The law is unclear, unfair, expensive to operate and, above all, creates unnecessary conflict that can impact on children.

There is widespread recognition that the existing law needs to be reformed. Calls for a review have come from top judges including successive Presidents of the Family Division and Supreme Court Justices, including Lady Hale, as well as Resolution (representing family lawyers) and the Marriage Foundation.

The Bill requires the Government to consider in its review a scheme where one or both parties could register that their marriage (or civil partnership) has broken down

irretrievably. The divorce or civil partnership dissolution would be granted if one or both confirmed the application after a nine-month 'cooling off' period.

Professor Trinder said:

> "Our aim is to encourage the Government to consider change sooner rather than later. There is general agreement that the divorce law is a mess, and has been so for many years. It is really easy to get a divorce in a few months by blaming the other spouse. We think there is a very good case for a law where divorce is granted automatically after a nine-month cooling off period, if one or both parties confirm that they still think the marriage has broken down irretrievably. That would avoid the mud-slinging that the law currently encourages and that helps nobody, not least the children."

The Nuffield Foundation has funded Professor Trinder's research, including her work with Baroness Butler-Sloss on the Private Members' Bill. Tim Gardam, Chief Executive of the Nuffield Foundation said:

> "Professor Trinder's research has shown that divorce law is increasing conflict and suffering for separating couples and their children, and is at odds with wider reforms in the family justice system that focus on reducing conflict and promoting resolution. This evidence suggests that reforming the law would improve the lives of many of the 100,000 families each year affected by divorce, something that Parliament has previously agreed in principle 20 years ago."

The proposed legislation is a 'duty to review' Bill, which places a duty on government to conduct a review of the law, with a built-in presumption that law reform is required and setting out a scheme that must be considered. The Bill will require the Lord Chancellor to report to Parliament, with a progress report in the first six months of the Bill passing and every six months until the review is complete. The scheme to be considered by the Lord Chancellor sets out how divorce can be granted through a process of registration and confirmation, after a nine month 'cooling off' period, where a marriage or civil partnership has broken down irretrievably.

Nigel Shepherd, immediate past Chair of Resolution and long-time campaigner for no-fault divorce, said:

> "Every day Resolution members up and down the country experience the reality of relationship breakdown through our clients. We know only too well that basing a divorce on fault does nothing to help resolve family problems constructively. In a recent survey 90 per cent of our members said that the current divorce laws make it harder to reduce conflict and confrontation. This is why we welcome and fully support Baroness Butler-Sloss's private member's bill, which we hope will highlight the widespread support for divorce law reform and lead to the change that is long overdue.
>
> "We need a better way for separating couples to move forward with their lives. We need to end the blame game and we need to end it now."

For the Bill, **click here.** To follow progress of the Bill, **click here**.

20/7/18

Sir Andrew McFarlane receives Legal Aid Lawyer of the Year's Outstanding Achievement award

Lord Justice Andrew McFarlane, who takes over as President of the Family Division and Head of Family Justice on 27 July 2018, has been named winner of the Legal Aid Lawyer of the Year's Outstanding Achievement award.

Sir Andrew, who was appointed to the Court of Appeal in 2011, will be the first former childcare legal aid lawyer to become President of the Family Division. He was presented with his award by Baroness Doreen Lawrence OBE, in front of an audience of 500 legal aid lawyers at the central London ceremony.

Sir Andrew told the audience he had always been a champion of legal aid, which he described as a vocation. He added:

> "It is very good that we live in a country which has developed a sophisticated understanding of the importance of human rights. But those rights are no good to anybody unless people have access to them. The only way to access them is to have a key, and the key is the lawyer. Without lawyers, access to justice is just an empty phrase."

Other family and children lawyers honoured by the awards were:

- **Tony McGovern**, **Creighton & Partners** – Family legal aid, including mediation (sponsored by Resolution)
- **Martha Cover**, **Coram Chambers** – Legal aid barrister (sponsored by The Bar Council)
- **Dan Rosenberg**, **Simpson Millar** – Children's rights (sponsored by Anthony Gold Solicitors).

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

20/7/18

Public Accounts Committee has 'little confidence' in government's court modernisation plans

The House of Commons Public Accounts Committee has expressed little confidence in the government's ability to carry through its planned modernization of the courts and tribunals system.

A report, published on 20 July, says that HM Courts & Tribunals Service's £1.2 billion programme to modernise the courts is hugely ambitious and on a scale which has never been attempted anywhere before.

Transforming the courts and tribunals system in this way will change the way people access justice by digitising paper-based services, moving some types of cases online, introducing virtual hearings, closing courts and centralising customer services.

Such sweeping changes will be extremely challenging to deliver. The Committee believes that the performance of HMCTS to date shows that it has much to learn if it intends to do everything it plans.

Despite extending its timetable from four to six years, HMCTS has already fallen behind, delivering only two-thirds of what it expected to at this stage, and it still has not shared a sufficiently well-developed plan of what it is trying to achieve.

The pressure to deliver quickly and make savings is limiting HMCTS's ability to consult meaningfully with stakeholders and risks it driving forward changes before it fully understands the impact on users and the justice system more widely.

HMCTS needs to ensure that the savings expected from these reforms are genuine rather than the consequence of shunting costs to other parts of the justice system such as the police, prison service or Crown Prosecution Service all of which have their own pressures to manage.

Without a better grip on these wider issues, the Committee considers that there is a significant risk that HCMTS will fail to deliver the benefits it expects.

In respect of the move to online access to the courts, the Committee says:

> "Although HMCTS assured us that it is testing digital services, like online forms, with users, this does not amount to a proper evaluation of the wider impacts of the changes in the real world. We are concerned that HMCTS told us a great deal about processes and products and not enough about how the changes might affect people. Moving services online without assessing the impact could have serious implications for users of the justice system. We share concerns raised by legal professionals and in written submissions that, without sufficient access to legal advice, people could make uninformed and inappropriate decisions about how to plead, and that the roll-out of virtual hearings could introduce bias and lead to unfair outcomes."

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

20/7/18

FGM Bill receives second reading

The **Children Act 1989 (Amendment) (Female Genital Mutilation) Bill** has received its **second reading** in the House of Lords. It will proceed to committee on a date to be announced.

This Private Members' Bill, sponsored by Lord Berkeley of Knighton, seeks to amend the Children Act 1989 to state that proceedings under Section 5A of, and Schedule 2 to, the Female Genital Mutilation Act 2003 are family proceedings.

The purpose of the proposed amendment is to enable the courts to make interim care orders under the Children Act 1989 in child cases relating to FGM, in addition to FGM protection orders. If a court was satisfied that there were reasonable grounds for believing that the child is suffering, or is likely to suffer, significant harm, an interim care order could be made. The interim care order would mean that a local authority would have shared parental responsibility for the child concerned until a final hearing.

At present, provisions under the Children Act 1989 enable interim care orders to be made only in certain 'family proceedings' as defined by the Act. These 'family proceedings' do not currently include proceedings under the Female Genital Mutilation Act 2003—which Lord Berkeley's Bill seeks to change.

For the Bill as introduced, **click here**. For the second reading debate, **click here**. For a research briefing, prepared by the House of Lords Library in anticipation of the second reading debate, **click here**. To follow progress of the Bill, **click here**.

21/7/18

More must be done to protect women and girls from violence, equality body warns

Women are still being "failed" in many areas of life, the Equality and Human Rights Commission has warned in its largest ever review of women's rights.

In its latest report – ***Pressing for progress: women's rights and gender equality in 2018*** – which is being presented to the United Nations in Geneva on 23 July 2018, the Commission says more action is needed to better protect women and girls from violence.

The report sets out a number of concerns and recommendations including better support for survivors of domestic violence, higher prosecution and conviction rates for violent crimes against women and girls, and a review of hate crime legislation.

The report also emphasises the importance of ensuring that there is no regression in equality and human rights protections as a result of the changes introduced as we leave the EU, and that we do not lag behind future developments in equality and human rights. It also highlights that funding for women's services may decrease as a result.

Rebecca Hilsenrath, Chief Executive of the Equality and Human Rights Commission, said:

> "[I]t is estimated that only 15% of survivors of sexual violence report their experience to the police, and social movements such as #MeToo continue to shine a spotlight on areas where women are being failed. The priority must now be ensuring that women and girls of all ages can enjoy their basic right to feel safe in their everyday lives. Our recommendations are

> intended to improve the lives of women and girls and to protect their fundamental rights. This centenary year is a good time to take action."

The Commission has called for the following changes to end violence against women and girls:

- ensuring police take a victim-centred approach when dealing with sexual violence and consent and improve the reporting and prosecution and conviction rates of sexual violence and domestic violence crimes
- strengthening support services for survivors of violence including those that provide specialist services to Black and ethnic minority women, disabled women and women with complex needs
- improving the police response to so-called 'honour-based' violence
- developing a sustainable funding model for refuges and domestic abuse services and withdrawing proposed changes to housing benefit that would prevent women from using it to pay for refuge accommodation
- providing funding to community groups working closely with communities where FGM is practiced and ensuring that all relevant public sector professionals receive mandatory training in how to identify and support women and girls affected by FGM and other harmful practices
- committing to a full-scale review of hate-crime offences and enhanced sentencing powers and consider amending hate crime legislation to extend protections on the basis of gender
- putting forward legislation to end the cross-examination of survivors of domestic violence by their perpetrators in the family courts
- offering Universal Credit as single payments to individuals rather than joint payments to avoid exacerbating financial abuse for women experiencing domestic violence
- reconsidering the 'spare room subsidy' regulations which discriminate against survivors of domestic abuse who have safe rooms
- introducing a mandatory duty on employers to take reasonable steps to protect workers from harassment and victimisation in the workplace
- introducing a statutory code of practice on sexual harassment and harassment at work
- investigating ways of reducing barriers to women's participation in politics such as the intimidation of female MPs and making it easier for domestic abuse survivors to register to vote anonymously
- improving data collection and understanding of sexual harassment and sexual violence in schools, disseminate guidance and improve teacher training on how to recognise and address such behaviour.

The review has also highlighted the continued need to tackle discrimination in the workplace and ongoing concerns around the treatment of women in immigration detention.

The full report and list of recommendations have been submitted to the United Nations as part of its review into the UK's women's rights record.

For the report, **click here**.

23/7/18

The President of the Family Division issues Guidance on arrangements for adoption visits

On 24 July 2018 the President of the Family Division issued Guidance on adoption visits arrangements. The President draws attention to the President's Guidance 10 April 2018; *Listing Final Hearings* in Adoption Cases which sets out Guidance in relation to the arrangements for adoption visits and in particular paragraph 28 which provides that:

> "It is expected that any adoption visit(s) shall take place outside normal court sitting hours. They shall not be listed or referred to in the daily court list."

The President was concerned to read a number of tweets which indicated that this Guidance was not always being followed.

The President states that:

> "It is vital that judges and HMCTS staff do everything possible to separate adoption visits from other proceedings, both in terms of the timing and, wherever possible, by arranging for them to be dealt with in separate parts of the building. This will often require careful planning, but it must be done. We owe the families nothing less."

For the Guidance **click here**

24/7/18

Supreme Court dismisses appeal in Owens v Owens

In ***Owens v Owens*** **[2018] UKSC 41** the Supreme Court has unanimously dismissed Mrs Owens' appeal against the dismissal of her petition for divorce.

PRESS SUMMARY

Owens (Appellant) v Owens (Respondent) [2018] UKSC 41
On appeal from [2017] EWCA Civ 182

25 July 2018

JUSTICES: Lady Hale (President), Lord Mance, Lord Wilson, Lord Hodge, Lady Black

BACKGROUND TO THE APPEAL

The Appellant, Mrs Owens, and the Respondent, Mr Owens, were married in 1978 and have two adult children. Mrs Owens had been contemplating a divorce since 2012 (when she consulted solicitors who prepared a draft divorce petition for her) but it was not until February 2015 that she left the matrimonial home. The parties have not lived together since her departure. In May 2015 Mrs Owens issued the divorce petition which is the subject of the current proceedings. It was based on s.1(2)(b) of the Matrimonial Causes Act 1973, and alleged that the marriage had broken down irretrievably and that Mr Owens had behaved in such a way that Mrs Owens could not reasonably be expected to live with him. It was drafted in anodyne terms but when it was served on Mr Owens he nevertheless indicated an intention to defend the suit, arguing that the marriage had largely been successful.

In October 2015 the matter came before a recorder for a case management hearing. In light of Mr Owens' defence, the recorder granted Mrs Owens permission to amend her petition so as to expand her allegations of behaviour. The recorder also directed that the substantive hearing of the dispute would take place over the course of a day (Mrs Owens had originally suggested a half-day would suffice) and that there would be no witnesses other than the parties themselves. Mrs Owens duly amended her petition so as to include 27 individual examples of Mr Owens being moody, argumentative, and disparaging her in front of others, but at the one-day hearing her counsel ultimately focussed on only a very few of these.

The judge found that the marriage had broken down, but that Mrs Owens' 27 examples were flimsy and exaggerated, and that those relied on at the hearing were isolated incidents. Accordingly, the test under s.1(2)(b) was not met and Mrs Owens' petition for divorce was dismissed. Mrs Owens appealed against this decision to the Court of Appeal, but her appeal was also dismissed. She now appeals against the Court of Appeal's decision to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the appeal, with the result that Mrs Owens must remain married to Mr Owens for the time being. Lord Wilson gives the majority judgment, with whom Lord Hodge and Lady Black agree. Lady Hale and Lord Mance each give a concurring judgment.

REASONS FOR THE JUDGMENT

It is important to bear in mind the legal context to this dispute, namely that defended suits for divorce are exceedingly rare. While the family court recognises that s.1 of the Matrimonial Causes Act 1973 must be conscientiously applied, it takes no satisfaction when obliged to rule that a marriage which has broken down must nevertheless continue in being [**15**]. The expectations are that almost every petition under s. 1(2)(b) will succeed, that the evidence before any contested hearing will be brief, and that the judgment of the court in such a hearing will almost certainly result in the pronouncement of a decree [17]. This is the background to the contested hearing in this case, and explains why Mrs Owens' advisors agreed to a short hearing with no external witnesses to corroborate her evidence [**14-15**].

When applying s. 1(2)(b) the correct inquiry is: (i) by reference to the allegations of behaviour in the petition, to determine what the respondent did or did not do; (ii) to assess the effect which the behaviour had upon this particular petitioner in light of all the circumstances in which it occurred; and (iii) to make an evaluation as to whether, as a result of the respondent's behaviour and in the light of its effect on the petitioner, an expectation that the petitioner should continue to live with the respondent would be unreasonable [28]. This test has been applied for many years but the application of the test to the facts of an individual case is likely to change over time, in line with changes in wider social and moral values [30-32]. The most relevant change over the past forty years is the recognition of equality between the sexes, and of marriage as a partnership of equals [**34**].

At the hearing, the judge gave himself the correct self-direction; he understood he was applying an objective test, but with subjective elements [**39**]. The majority nevertheless have concerns about other aspects of the judge's analysis. In particular, they have an uneasy feeling about the summary despatch of a suit which was said to depend on an authoritarian course of conduct, when the judge had scrutinised only a few individual incidents of Mr Owens' behaviour [**42**]. However, uneasy feelings are of no consequence in an appellate court. A first-instance judge has many advantages in reaching the relevant conclusions, and Mrs Owens' complaints about the judgment have already been rehearsed and dismissed by the Court of Appeal. In such circumstances it is most unlikely for it to be appropriate for the Supreme Court to intervene [**43**]. However, the majority invite Parliament to consider replacing a law which denies Mrs Owens a divorce in the present circumstances [**44-45**].

Concurring judgments

Lady Hale agrees with Lord Wilson as to the legal analysis, but has several misgivings about the judge's judgment [**47-48**]. Her gravest misgiving relates to the fact that this was a case which depended upon the cumulative effect of a great many small incidents (which were said to be indicative of authoritarian and demeaning conduct over a period of time), yet the hearing before the judge was not set up or conducted in a way which would enable the full flavour of such conduct to be properly evaluated [**50**]. In light of her misgivings, she considers that the proper disposal is to allow the appeal, and send the case back to the first-instance court to be tried again. However, this is not a disposal which Mrs Owens is actually seeking, and Lady Hale is therefore reluctantly persuaded that the appeal should be dismissed [**53-54**].

Lord Mance also agrees with Lord Wilson as to the wider legal analysis, however he does not share the concerns expressed by Lord Wilson and Lady Hale about the judge's judgment. Lord Mance considers that the judge did not misdirect himself at any stage, and that the judge properly concluded that there was nothing in the case overall [**57, 59**]. Moreover, although the hearing of the defended divorce petition was listed for a relatively short period, this was how the judge was invited to decide the matter. It would be inappropriate for the Supreme Court to interfere at this

stage and say it was not possible in the circumstances for the judge to have reached a fair determination **[58]**.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

For the full judgment **click here** and scroll down.

Strong reaction to the Supreme Court's Judgment in Owens v Owens

Family lawyers have been quick to criticise the current law of divorce and to call for the urgent need for reform following the Supreme Court judgment in **Owens v Owens [2018] UKSC 41**

Nigel Shepherd, Resolution's past Chair commented:

> "As an organisation who intervened in the case in support of Mrs Owens, we are disappointed at today's judgment and what it means for her."
>
> "Whilst the Supreme Court has, reluctantly, applied the law correctly, the fact that they have done so confirms there is now a divorce crisis in England and Wales, and the government needs to take urgent action to address it.
>
> "In this day and age, it is outrageous that Mrs Owens – or anybody – is forced to remain trapped in a marriage, despite every judge involved in the case acknowledging it has come to an end in all but name. Today's judgment underlines just how vital it is that government now urgently reforms the divorce law."
>
> "It should not be for any husband or wife to 'prove' blame as the law requires many to do – this is archaic, creates needless conflict, and has to change."

The judgment comes as Resolution revealed that, since the last unsuccessful attempt to introduce no fault divorce, in the 1996 Family Law Act, more than 1,720,000 people cited adultery or unreasonable behaviour in their divorce petition.

"*Since 1996, over 1.7 million people have assigned blame in the divorce process. That's a huge number of people making allegations against their ex – many of whom didn't have to,*" said Mr Shepherd.

Outdated divorce process not fit for purpose

> "A large number of those will have been parents, so one can only wonder what the long-term damage is to separating families across the country, needlessly caused by an outdated divorce process that is no longer fit for purpose."

Resolution has called on government, and politicians from all parties, to support legislation proposed by Baroness Butler-Sloss, committing the Lord Chancellor to review the current law, and report findings back to Parliament.

Resolution's Chair, Margaret Heathcote, speaking about the Private Member's Bill, said:

> "Conflict has been proven to have a negative effect on both divorcing couples and their children. Each day the government fails to act creates unnecessary conflict for hundreds more families at a time that is already extremely emotional and traumatising for them."
>
> "Resolution members across the country know there is a better way for separating families. Ministers need to end the blame game and they need to end it now."

Hazel Wright partner at Hunters Solicitors comments:

> "The prospect now is grim: to obtain a divorce parties will be forced to make vigorous allegations against each other which will entrench division which can help no one, least of all children. For years, family law practitioners and the Courts have agreed to interpret the legislation in such a way as to avoid its worst effects, but this is no longer possible. Only the Government can help by bringing forward legislation to change the law as quickly as possible, and this judgment will give impetus to the reforming efforts of Resolution and The Times amongst others. However, its eye is not on this ball at the moment, and we may have a long wait."

Alexandra Bishop, Associate in the Family & Divorce law team at Kingsley Napley, comments:

> "The Supreme Court's decision in Owens v Owens has today highlighted the urgent need for reform of our divorce law. Unfortunately, the Justices' hands were tied over this case - they are there to interpret the law and not to change it. Mrs Owens will now need to wait until 2020 for her divorce relying on the ground of 5 years' separation and Parliament must now take swift action to change the law. … family lawyers should not have to "beef up" particulars in divorce petitions in order to satisfy the statutory requirements to get divorces off the ground. As it stands, our law requires a marriage to be irretrievably broken down and one party to be deemed 'at fault' before a divorce can be granted – this simply leads to unnecessary hostility and distress for both parties, and in particular any children involved. In tabling her recent Private Members Bill to change this, Baroness Butler-Sloss described the current law as 'unfit for purpose'. This has been highlighted in glorious technicolour today. It is, of course, extraordinary that Mrs Owens' situation exists in modern times. MPs from all parties need to support the Bill requiring a review of our divorce law for Mrs Owens and all other spouses in this country who don't want to wait years for a divorce if their spouse objects to the end of their marriage. The fight must continue to make sure that divorce law is apt for today's modern society."

National Family Mediation CEO, Jane Robey, said:

> "The current laws fuel conflict and only serve to promote protracted litigation, costing families a fortune. This case is no exception and should go to the heart of the growing call for changes to these outdated laws."

For ***BBC News*** coverage **click here**

For the article ***Unhappy marriage not grounds for divorce, supreme court rules*** by Damien Gayle published in the Guardian **click here**

25.7.18

Retirement of the President of the Family Division and Head of Family Justice for England and Wales: The Right Honourable Sir James Munby

The Right Honourable Sir James Munby retired as President of the Family Division with effect from 28 July 2018.

In 2013, Sir James was appointed President of the Family Division, Head of Family Justice for England and Wales and President of the Court of Protection.

During his tenure, Sir James published regular bulletins: View from the President's Chambers. He drove the family justice transparency agenda whose aim was to increase public awareness, scrutiny and understanding of the Family Justice system. He also established the Family Orders Project with the issuing of standard forms of order for use in all family cases.

Sir James gave regular speeches and lectures on a variety of topics pertaining to family law demonstrating a rare, rich and deep knowledge of the history and development of family law.

His learned judgments, tireless work, commitment and steely determination have done much to improve the family justice system.

He has not hesitated to speak out about some of his continued frustrations and prevailing injustices.

In his September 2016 View from the President's Chambers ***Care Cases – the Looming Crisis*** he drew attention to "the fact is that we are approaching a crisis for which we are ill?prepared and where there is no clear strategy to manage the crisis."

In ***X (A Child) (No 3)*** **[2017] EWHC 2036 (Fam)**, a case where a vulnerable teenager urgently needed a place in a suitable, secure clinical/hospital setting but there was, it seemed, no such place available anywhere in the country, he said, in forthright terms:

> "What this case demonstrates, as if further demonstration is still required of what is a well-known scandal, is the disgraceful and utterly shaming lack of proper provision in this country of the clinical, residential and other support services so desperately needed by the increasing numbers of children and young people afflicted with the same kind of difficulties as X is burdened with. We are, even in these times of austerity, one of the richest countries in the world. Our children and young people are our future. X is part of our future. It is a disgrace to any country with pretensions to civilisation, compassion and, dare one say it, basic human decency, that a judge in 2017 should be faced with the problems thrown up by this case and should have to express himself in such terms."

In a talk entitled Because it is the right thing to do at the 6th Annual 'Voice of the child' The Family Justice Young People's Board ("FJYPB") Conference in Manchester just a few days before he retired, he issued this call to action:

> "You must continue fighting. You, the FJYPB, have a vital role to play in the ongoing struggle to improve the family justice system. You know what needs to be done. Your voice is clear and important. You must continue speaking truth to power and arguing for what is right. Like the child in Hans Christian Andersen's famous fairy tale, you must not be afraid to say that "The Emperor has no clothes." You and all our other children and young people are our future. We ignore you at our peril."

For the article ***Sir James Munby retires: his best quotes*** published in the Law Society Gazette by Monidipa Fouzder **click here**

For ***A tribute to Sir James Munby – the people's president*** by Christina Blacklaws, President of the Law Society published in Family Law **click here**

Sir Andrew McFarlane succeeds Sir James as President of the Family Division.

29.7.18

President's Guidance: Addition to Compendium of Standard Family Orders

On 26 July 2018 the President of the Family Division issued Guidance in respect of the addition of three new orders to the Compendium of Standard Family Lawyers.

They comprise:

- Order 22.1: Stay pursuant to Arbitration Act 1996 section 9 and/or under the court's case management powers

- Order 22.2: To enforce an arbitrator's peremptory order under Arbitration Act 1996 section 42

- Order 22.3: To secure the attendance of witnesses under Arbitration Act 1996 section 43

For the links to those orders **click here**

29.7.18

President's Guidance: Children Arbitration in The Family Court

The Guidance concerns "the interface between the Family Court and Arbitrations conducted in accordance with the provisions of the Arbitration Act 1996 (AA96) where the parties to a post-relationship breakdown private law dispute relating to the welfare of a child or children in respect of whom either or both of them have parental responsibility or are otherwise concerned have agreed to submit the issues in dispute for decision by an arbitrator whose decision is to be binding upon them."

The Guidance is primarily directed towards disputes as to child arrangements including

- where the child lives,
- contact,
- division and allocation of holidays,
- education,
- religious upbringing,
- medical treatment for non-life threatening or life changing conditions and
- other issues as to the exercise or limitation of parental responsibility of either of the parties.

For the Guidance **click here**

30.7.18

ARTICLES

Divorce & Financial Remedy Update, July 2018

Sue Brookes, Principal Associate and Rose-Marie Drury, Senior Associate, both with Mills & Reeve LLP, analyse the news and case law relating to financial remedies and divorce during June 2018.

As usual, this update is provided in two parts:

A. News in brief and

B. Case Law Update

A. News in brief

Divorce petitions take almost a year from start to finish

The latest release of family court statistics show that whilst the number of cases starting in the Family Court has dropped, the time taking to deal with them has increase. The stats show that there has been a drop in financial remedy, private law children and divorce cases since last year although domestic abuse remedy orders and personal injunctions increased. A divorce from petition to decree absolute is now taking 51 weeks.

New standard orders and revised forms

Sir James Munby, has issued Guidance promulgating standard children and other orders for general use. At the same time, revised versions of Forms A, A1 and D50C have come into operation.

Legal aid applications up 21%

The MoJ's legal aid statistics for January to March 2018 also show that the number of applications granted has risen by 14% compared to last year. Applications are at their highest since 2013 and reflect the changes to domestic abuse evidence requirements that were brought in in January this year.

At the same time, the MoJ has published research looking at the barriers domestic abuse victims face when obtaining evidence for legal aid applications. Conducted in 2016 and 2017, the research highlights a number of factors that prevent individuals from evidencing abuse including accessing evidence (e.g. health professionals being unwilling to write letters, data protection issues when trying to access information from the police and language barriers), problems with the time limit and the rigidity of the process.

New appointments

Lady Justice Arden DBE, Lord Justice Kitchin and Lord Justice Sales are to be elevated to the Supreme Court. Lady Justice Arden DBE and Lord Justice Kitchin will join the Supreme Court as Justices on 1 October 2018, followed by Lord Justice Sales on 11 January 2019. They will replace Lord Mance, Lord Hughes and Lord Sumption.

And there are also seven new Court of Appeal judges, including Mr Justice Baker.

First forced marriage protection order for boy

The order was obtained by South Yorkshire Police to safeguard a 19 year old who had received threats for not complying with a pre-arranged marriage which his family had promised he would consent to when he was five years old.

For further details **click here**.

B. Case Law Update

Kelly v Pyres [2018] EWCA Civ 1368

H and W met in Brussels in the late 1990s and were married in 2005 in Italy. They had two children, the first born in 2006 in London and the second born in Italy on 2008. In 2015 the marriage broke down. W commenced divorce proceedings in England based on her habitual residence (although she did not pursue this) and her English domicile.

It was common ground that H's domicile of origin was India and W's was Ireland.

H was born in India to Indian parents and moved to England in 1957 aged 13. He completed his education in England and married an English woman. He purchased 2 properties in England and also bought a retained a farmhouse in Italy. Between 1972 and 1995 he was seconded to the European Parliament in Luxembourg.

W was born in England in 1972 to Irish parents. The family returned to Ireland when W was a baby and she remained there up to and included her university education. In 1995, aged 23, W moved to Manchester for her Master's degree and obtained a British passport. She lived in England for some 18 months before moving to Brussels in March 1997 for an internship and thereafter to work as an employee of the European Commission. W worked in Brussels until 2001 when she moved to work for a company in London on a time limited contract. W and H cohabited in a property H owned in London which was in multiple occupation.

By June 2002 W had applied for a post in Albania and she left London in November 2002. W and H went to Ireland to collect W's belongings from her parents' home which she then left in storage at the London property. H followed W to Albania in 2005. Shortly before their wedding in 2005, at H's instigation, the parties signed a prenuptial agreement describing them as 'British subjects' and 'farmers' and declaring that they were 'habitually resident and domiciled in Italy'.

W returned briefly to London in the summer of 2006 to have her first child although she left shortly after the birth to spend her maternity leave in Italy before returning again to Albania.

In October 2006 H moved to Sarajevo where he remained until his retirement in 2009. W remained in Albania and the parties had a long distance relationship.

In 2009 W was posted to Sarajevo and in the same year the parties attended marriage counselling in London.

At first instance Mr Justice Cobb found:

1. From 1998 W had used a London address for all formal and business correspondence and from 2000 to date W had used the London property as her address for most purposes.

2. W kept personal possessions she had retrieved from Ireland at the London property.

3. There was not any agreed firm, long term plan about the use of the London property as a home. It was one of a number of options. The floor plan of the property did not support her case that when renovated the basement was designed to be self-contained although he accepted W was concerned about the ceiling heights which was indicative of an interest in living there herself.

4. W paid income tax in England from 1997 to 2000.

5. W paid NI from 2002 reflecting she saw herself returning to England to retire.

6. W's pension for the EU delegation was paid according to weighting referable to a base in England, not Ireland.

7. W returned to London for antenatal and postnatal checks with her first child and postnatal treatment with her second. Both children received vaccinations in London and both parties were registered with GPs in London. It was W's instinct and habit to return to London for any significant medical treatment.

8. W's relationship with her Irish family was strained. She had no state pension or equivalent rights in Ireland and only a dormant bank account. W regarded Ireland as not offering a multicultural life and described Ireland as too monocultural, too small land too remote.

9. W had chosen not to spend time in England when she could, preferring to be in Europe or further afield. She had never taken holidays in England and when living in England in 2001 she was applying for jobs abroad not further afield.

Mr Justice Cobb was satisfied W had lived in England sufficiently to qualify for establishing a domicile in the jurisdiction. She had viewed London as her base and adopted home in place of Ireland and developed a singular and distinctive relationship with London. Although she spoke with little worth or attachment towards England as a country London had become the centre of gravity and place of her permanent home. She had acquired a domicile of choice from 2000 at the latest in England which had not been lost. H appealed.

H argued that a domicile of choice can only be acquired if the intention to remain permanently or indefinitely is established whilst a person is resident in the relevant country. The judge had erred in treating the period from 1995 to 2000 as a continuum to find a domicile of choice was established during that period. A domicile of choice could not have been acquired between March 1997 and 2000 when W did not live in England.

W submitted that she had the necessary intention to acquire a domicile of choice when she was living in Manchester between 1995 and 1997 and the judge's findings in relating to the period 1997 to 2000 were capable of supporting such a finding. She further submitted that it remained open to the judge to have found that she acquired a domicile of choice in England between October 2001 and November 2002.

Giving the lead judgment for the Court of Appeal Lady Justice King found that the judgment could not be interpreted in the way W sought. There was no suggestion she intended to remain permanently or indefinitely in England in 1997 and no evidence she had any plan to return to live in England. There was no evidence she formed the requisite intention to obtain a domicile of choice during that period of residence. The developing intention to replace her relationship Ireland with London did not show the necessary co-existence of residence and intention nor was it possible to conclude the requisite intention was present between 2001 and 2002.

Whilst in some cases the requisite intention to establish a domicile of choice could be established din a day W's temporary residence of 11 months with an expressed intention to retire in England in several decades' time was not enough without more cogent evidence to create a domicile or origin. Far from establishing herself and her family in England following her period of residence between 2001 and 2002 W chose not to marry, holiday, spend her maternity leave or give birth to her second child in England. The judge was rightly concerned by W's emotional detachment to England. It was her fiscal base and she utilised the country's medical expertise but she demonstrated no personal nexus never choosing to spend time or just enjoy being in her 'adopted home'. Her intention to retire in several decades in England was not sufficient to demonstrate her intention.

Whilst it is possible for a person working abroad to acquire a domicile of choice in England one would expect England would be truly 'home' and all the evidence would point to that person regarding himself as living in England but working abroad.

A v B (No.2) [2018] EWFC 45

A (the Husband) and B (the Wife) met in 1980 and married in 1983. In 1986 B gave birth to the parties' first child, E and a further child, F, was born in 1989. In 1991 the parties' relationship broke down and they divorced in 1992.

A remained in the family home with E and F. B lived with her new partner, C and over time the children had overnight weekend contact on alternate weekends with W.

In 1992 B was made redundant and she received a lump sum of £30,000. B said she paid £10,000 to A and produced a bank statement showing a debit of £10,000 although A did not recall receiving such a sum.

B then suggested that A move with E and F to live with his girlfriend and B and C would move into the family home to sell it, which they did so albeit A claimed he was under pressure to do so.

In 1994 the family home was sold. B's case was that there was negative equity of around £6,000 which was paid by C. There were also four endowment policies in joint names which B said were shared between the parties. A did not recollect any negative equity or recall retaining any of the policies, although in cross-examination he accepted there had been four policies and the parties had shared them.

Thereafter the children continued to live mainly with A and B paid maintenance for them. B had a series of jobs arranged around being the children's primary carer although for a period of time he worked full time. In 2001 A began a long-term relationship with D.

B's career continued successfully and in 1999 B married C. In 2003 B was made redundant again and in view of C's significantly improved financial position she decided to retire from paid employment and she invested sums from the redundancy payments in property in her and C's names.

In 2006 A was admitted to hospital suffering chest pains. In a series of conversations B agreed to increase the maintenance paid for the children, to clear A's credit card debts and that C would purchase a property for A to live in with the children. At the same time E was involved in a serious road accident and underwent a long convalescence. A gave up work to care for him and in Autumn 2006 C paid for A, D, B, C, E, F and C's children to go on holiday together to the Maldives. In the meantime, A found a property to purchase and moved in November 2006.

B and C subsequently funded a significant extension to the property. A argued this was to make the property sufficient for D and her children to live in it whilst B maintained it was to increase the investment value. B and C permitted A to have lodgers and to retain the rent.

In 2009 D moved into the property and A and D. In 2012 they spent sums on a workshop at the property for D's business and they were married in 2013.

In 2013 A emailed C requesting that C and B provide A with a right to occupy the property. C subsequently replies explaining that as a result of C and b's financial position they needed to sell the property as by 2014/2015 they would no longer be able to afford to keep it.

In 2014 D sold her property and purchased another. In 2015 C then emailed A asking what his and D's plans were. A replied that they had seen a property to purchase but it needed work carrying out for it to be their home and to run their business from there and he guessed they would vacate in late 2016/2017. C agreed to a backstop date of February 2017.

A subsequently took legal advice and, understanding he could pursue financial claims pursuant to the MCA 1973 if the claim had been made in his original divorce petition, he proposed to B that they attend mediation. B issued a section 21 notice for A to vacate the property and A issued a Form A. B filed to strike out A's claim on the grounds of lack or jurisdiction in accordance with s28(3) MCA 1973 and FPR rule 4.4(1)(a) and 4.4(1)(b). B subsequently abandoned her claim under rule 4.4(1)(a) on the basis of evidence from A's solicitor it was standard practice to tick all of the boxes in the petition including the prayer for ancillary relief.

In January 2018 B's claim for strike-out was refused.

A had no assets in his own name save for a pension with preserved benefits of just under £60,000 and liabilities including legal costs of £40,000. His wife, D, had assets including another property but A had no interest in it.

B had assets of approximately £4.7m plus a pension of £780,000. B's assets included a number of properties in her own name and others which she owned jointly with C.

A sought to occupy X house for life. B offered a lump sum of £40,000 to be reduced pound for pound by the extent of B's legal fees from the date of the offer which by final hearing would extinguish the entirety of the lump sum.

Mr Justice Baker found that B was an impressive and measured witness whereas A was hesitant and at times inconsistent. Whilst he was not deliberately evasive overall his evidence was not reliable on a number of key issues.

He accepted that B had paid £10,000 to A in 1992, that the former family home was sold with negative equity and the net liabilities paid by C. He further accepted A's evidence as to the division of the endowment policies.

Despite the absence of a formal agreement he was satisfied th4e parties reached an informal agreement between 1992 to 1994 which was fair in all the circumstances and which amounted to a comprehensive resolution of the financial arrangements arising from the marriage and divorce.

He accepted that the house purchased in 2006 was to help A get back on his feet so that he could continue to care for and support the children and neither B or C made any promises he would be able to live there indefinitely. When A had written to C in 2013 he was requesting C to grant a right which would be binding not to put in writing a right he already enjoyed and his conduct in the email exchanges in 2013 and 2015 was inconsistent with his case he genuinely believed he had a right to occupy the property for life.

Although it was not correct, as asserted by C in emails, that the parties could not afford to keep the property that did not affect the overall circumstances surrounding the acquisition and occupation of the property.

The case was distinguishable from *Pearce*, *M v L* and *Wyatt v Vince* on the basis that:

> 1. Unlike the parties in those cases A and B had reached a comprehensive agreement concerning the division of the limited resources in 1992 to 1994. They reached a fair and amicable resolution of all financial issues that existed at that stage in their lives.
>
> 2. A received considerable assistance by way of financial provision and other support from B throughout the children's minority. In particular, he was provided with a rent-free property of substantial size, it was

renovated and extended at no cost to himself, his debts were paid off and the level of periodical payments were increased. Thereafter he was allowed to have lodgers and to keep the rent.

The responsibility for caring and supporting the children had been shared between the parties.

3. A's financial needs were not needs which B could be fairly asked to meet. A's wife, D, had a property in which they could live. In so far as A and D needed assistance to support their business it was not fair to expect B to provide it. It would not be unreasonable to expect B to seek alternative paid work if his business did not make higher profits in the future.

4. A had not suffered a disadvantage so as to found a claim based in compensation. A was able to work full-time for periods during the children's minority. His current employment in D's soft furnishing business was a career choice he had been able to make because of the financial support he had received from B.

5. B had assumed financial obligations towards A and arranged her financial affairs on the assumption that A could not and would not make any claim against her. She would not have agreed to the provision she made in 2006 had she thought he would do so.

6. The reason for delay in bringing the claim was that both parties considered that they had resolved the financial issues arising on their divorce in the informal agreement they had reached in 1992 to 1994.

Bruzas v Saxton [2018] EWHC 1619 (Fam)

The parties divorced in 2013 and a consent order in relation to the finances was made on 27 March 2014. W subsequently applied to set aside the consent order and on 11 December 2017 (the December 2017 hearing) her application was dismissed by Parker J.

In January 2018 Parker J received a quantity of documents and material from a person employed during 2017 as a paralegal by the firm acting for H (who had acted both in 2013/2014 and in 2017). The documents including an account of things allegedly said between H and his solicitor and junior counsel. Parker J supplied copies of the documents and material to both parties and listed a hearing on 22 February 2018 (the February 2018 hearing) to consider what should happen to the documents.

In advance of the February 2018 hearing W sent an unissued application notice to overturn the judgment made at the December 2017 hearing on the grounds H had committed perjury and perverted the course of justice. It appeared the application was triggered by the contents of the documents and material sent to the parties.

At the February 2018 hearing H applied for Parker J to recuse herself on the ground she had seen material which was protected by legal professional privilege. Parker J allocated the matter to another judge to consider the future conduct of the matter including how the court shall determine the admissibility or inadmissibility of the documents and material on the basis W would issue her application to set aside (which she did not).

The matter came before Holman J. He was unable to deal with the substantive issues on the basis that:

1. The transcripts of the judgments given by Parker J in December 2017 and February 2018 were unavailable and so it was unknown what all her reasons were for dismissing the application to set aside and it was unknown what reasons/observations were made at the February hearing.

2. Intense consideration was required to be given to the law in relation to legal professional privilege – the case raised a novel issue of deliberate disclosure (rather than accidental) to the court of prima facie privileged material.

3. Sooner or later a judge was likely to have to read the documents and material before ruling on their admissibility unless the court was persuaded that the material simply cannot be seen by the court on the basis of legal professional privilege.

4. W had not issued her application to set aside (which she undertook to do before Holman J).

Holman J directed the matter to be listed before the President of the Family Division for hearing later this year.

MT v OT [2018] EWHC 868 (Fam)

The parties had twin daughters together aged 17 (one of whom suffered from various difficulties including chronic asthma, mobility issues, was very forgetful and struggled with school work). The parties had never married and had separated in 2003. Litigation had ensured in both England and Nigeria for most of the children's lives and F had not seen the children since 2005.

In 2007 Mr Justice Charles gave judgment in the first application for financial provision pursuant to Schedule 1 Children Act 1989 which is reported at [2008] 2 FLR 1311.

Throughout the litigation F took the "millionaire's defence" and accepted that he was worth at least some £40m. In reply to an order to provide an outline of his means he stated that included some £15m of property in the UK held in trust with the balance of his significant assets being in Nigeria and his income was £790,000 per annum.

M was a qualified lawyer in Nigeria and F's case was she should now be in paid employment. Save for small periods of unpaid work in 2004-5 and 2010-2011 she had been unemployed for some 18-20 years and there was no evidence before the court as to what employment she might reasonably be able to obtain.

M and the children lived in London pursuant to the provision in Mr Justice Charles' order for F to provide a property up to £975,000 with a provision around replacement of the property in the event of a significant issue arising which reasonably required the relocation of the twins. M sought an order that she be permitted to move house on the basis the property was no longer suitable for the family. F's position was that the court had no power to make such an order and that would be tantamount to a second settlement of property. Mr Justice Cohen rejected that submission. On the basis the property M lived in was now worth £1.35m he ordered F to provide a housing fund of £1.35m or the greater of the actual sum obtained on sale of the current property. H was further ordered to pay up to a maximum of £50,000 (of which no more than £25,000 was to be spent on equipping the property and removals with the balance to be spent on works to the property).

Pursuant to Mr Justice Charles' Order and taking into account RPI increases F paid £6,500 pcm maintenance. M sought an increase to £10,000 pcm whilst F argued £7,000 pcm until the children finished secondary education and thereafter £6,000 pcm during a gap year and afterwards their living costs to be dealt with within a sum set aside for tertiary education. Mr Justice Cohen found an appropriate budget was £7,500 pcm for the remainder of the children's secondary education and £6,000 pcm to include either 4 years' tertiary education or 3 years with a gap year) with the maintenance from September 2019 to be index-linked. It was agreed that F would lodge such funds with M's solicitor's to administer the monthly payments.

F was further ordered to pay:

1. £121,900 for the completion of the children's secondary schooling.

2. £8,617 to clear some of M's debts (her other indebtedness relating to sums which were excluded from Mr Justice Charles' order in 2007).

3. £5,495 being the shortfall in M's costs allowance.

4. £22,000 for M's car (being index-linking from Mr Justice Charles 2007 Order less the sum M had received on sale of her previous car).

5. £7,500 into M's solicitor's account to restore a contingency fund for the purpose of advising her on making application pursuant to the Children Act.

6. £5,000 per annum towards insurance and maintenance costs of the property for 5 ½ years (comprising 1 ½ year secondary education and tertiary education.)

7. A tertiary education fund of £158,750 (being a total of 7 years' tuition fees on the basis one child might do a 4 year course and the other a 3 year course, accommodation costs of £12,000 per child per annum and a kitting out fund of £5,000 per child).

8. £32,880 for individual tuition for the children.

9. £27,500 for medical and dental expenditure and a skills tutor and other help the children may require.

10. £7,920 for M's solicitor to administer the fund.

11. £100,000 as a further reserve fund not be utilised without agreement or further order of the court.

JS v SSWP and ZS (CSM) CCS/605/2017

M and F separated in 2010. M applied for child maintenance in August 2015. Save for a four month period in which there was equal care it appeared that they had agreed F would have care of the child every Thursday and Friday night and each alternate Saturday night. M's position was that the 4 month period was an isolated case as her work pattern was non consistent.

F argued that in determining child maintenance the Secretary of State should have applied regulation 46(3) Child Support

Maintenance Calculations Regulations 2012 (CSMC Regulations 2012) so as to split the shared care arrangements into one period of four months and one period of eight months on the basis that the pattern of care had been very different. M argued taking a 12 month period was the appropriate period to assess maintenance.

Before the First-Tier Tribunal the Tribunal concluded a 12 month period was appropriate. On appeal to the Upper Tribunal Judge Wright concluded a 12 month period was appropriate as:

> 1. The starting point was regulation 46(2) CSMC Regulations 2012 that the determination would be based on a 12 month period. Regulation 46(3) CSMC Regulations 2012 permitted the Secretary of State to allow a shorter period but that was an exception to the rule. No period of more than 12 months could be used.
>
> 2. The use of the word "appropriate" vested a broad discretion in the Secretary of State or First-Tier Tribunal in deciding whether a period of less than 12 months should be applied. The jurisdiction of the Upper Tribunal would require a finding that First-Tier Tribunal failed to take into account all the relevant circumstances or the interests of all the parties or that the decision was legally perverse. These tests were not satisfied by arguing that on the evidence a four month and then eight month period should have been used to assess child maintenance. To do so would be to improperly interfere in the fact-finding and evaluative functions of the First-Tier Tribunal.
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> 3. The First-Tier Tribunal had not made any material error of law by not referring in its reasoning to the focus of the legal test it had to apply being on the 'expected' incidents of shared care in the 12 months from 23 August 2015.
>
> 4. Although the First-Tier Tribunal did not refer to regulation 46(4) of the CSMC Regulations 2012 or whether there was an agreement between the parties for a shorter period its doing so would not have assisted F and so could not amount to a material error of law because on the face of the evidence a pattern of shared care had been established over the past 12 months from which the 4 month period was an exception and there was no agreement between the parents as to the shorter period than 12 months.

R (of the application of Steinfeld and Keidan) (Appellants) v Secretary of State for International Developments (in substitution for the Home Secretary and the Education Secretary) (Respondent) [2018] UKSC 32

This was an appeal brought by Rebecca Steinfeld and Charles Keidan who were seeking a declaration that sections 1 and 3 of the Civil Partnership Act 2004 (CPA) infringed their rights under Article 14 and Article 8 of the European Convention on Human Rights (ECHR) with a declaration of incompatibility under section 4 of the Human Rights Act 1998 (HRA).

Under the CPA, only two people of the same sex may enter in a civil partnership. The Marriage (Same Sex) Couples Act 2013 (the 2013 Act) introduced marriage for same sex couples, meaning that, because the CPA was not repealed when the 2013 Act was introduced, same-sex couples now have the choice between marriage or a civil partnership if they want to formalise their relationship. Different-sex couples can only choose either marriage or cohabitation, which leaves those who choose not to marry because of genuine ideological objections to marriage financially vulnerable.

When the 2013 Act came into force, the government decided to leave the CPA as it was and await clarification of social attitudes towards civil partnerships, rather than either extending civil partnerships to different-sex couples or abolishing them for same-sex couples as an interim measure. The outcome of their initial investigations was inconclusive and the government chose to carry out further investigations before making any change in the law. The government had recognised that there was an inequality between the treatment of same-sex and different-sex couples. However, the government decided that it was proportionate to obtain more data before acting to remedy the inequality. It considered that sufficient information would be available by September 2019 and that there would then be a further consultation "at the earliest" in 2020, although there was no indication about how long the consultation period would be nor the likely date that any further legislation might be enacted.

In 2016, the High Court dismissed the application for judicial review on the basis that the difference in treatment did not infringe a right to family life and, even if article 8 were engaged, there was sufficient objective justification for maintaining the disparity whilst the government took stock.

In 2017, the Court of Appeal found that the case did in fact come within article 8. However, the majority (Briggs LJ and Beatson LJ) found that interference was, at least for the time being, justified and the "wait and evaluate" approach was not disproportionate. Arden LJ considered that it was disproportionate, but that it pursued a legitimate aim.

The Supreme Court allowed the appeal. It rejected the government's argument that ECHR case law required a wide margin of appreciation, as this had no place in domestic law. The English court has to confront any interference with an ECHR right and decide whether or not it is justified.

Whilst it was reasonable for the government to have time to reflect when dealing with an inequality that it has come to

recognise due to evolving societal attitudes, the same does not apply when the government has deliberately created the inequality in the way that it had here. It was unreasonable to create the issue and then to ask for several years to decide how to rectify it.

To be "legitimate", the aim had to be "intrinsically" connected to the unequal treatment and in this case it was not. Tolerance of discrimination whilst determining how to remedy it cannot be characterised as a legitimate aim. The government had to eliminate the inequality immediately upon the 2013 Act coming into force.

The interests of the community in denying civil partnerships to different-sex couples who do not want to marry were unclear, whereas the consequences of denial for such couples may be far-reaching because of the financial predicament they may be left in.

The Supreme Court therefore declared that sections 1 and 3 of the CPA were incompatible with article 14 and article 8 of the ECHR to the extent that they precluded a different-sex couple entering into a civil partnership. Although this does not oblige the government to do anything, the court should not be reticent about making such a declaration.

XW v XH [2017] EWFC 76

The husband (H) and the wife (W) had been married in Italy in 2008. They did not have a pre-nuptial agreement, but at the wedding they signed a "marriage deed" which included a "*separazione dei beni*" confirming that they had chosen the separation of goods regime under Italian law. They separated in 2015. They had one child, who sadly had significant disabilities, to whom they were both very committed.

H was Italian. W was from an Asian family. H and W had lived in England before and throughout the marriage, whilst also owning properties around the world.

W's family were very wealthy and her mother specifically had provided her with substantial financial support before and during the marriage. H was a very successful business man. He had considerable wealth prior to the marriage, but between 2011 and 2015 the company of which H was the CEO increased spectacularly in value because of one product which is used by millions of people around the world. When the company was sold in 2016, H realised about $540million.

W sought half of the increase in value of H's business throughout the marriage i.e. £235million. H offered her £20m and his share of a jointly owned property because of the separazione dei beni. He also argued that the increase in value was a non-matrimonial asset; his company should be attributed as having a latent value at the date of marriage which was higher than the formal valuation received in the proceedings; and because the increase in his wealth was a result of his special contribution.

H also referred to W's own wealth, which he argued included the benefit of a trust set up by her mother worth £23m, and so he said W's needs were met and this was a needs case. In response, W argued that the trust (which was clearly non-nuptial as it pre-dated the marriage) was discretionary, so she was not entitled to any of the funds, and that it was intended to benefit her mother so any future benefit to W was pure speculation.

W argued that she had not understood the *separazione dei beni* because it was in Italian and she had not been given any proper explanation about the legal implications of signing such a document or agreeing to the regime, either from H or the priest who had conducted the wedding ceremony. Nor had she been given the opportunity to take legal advice or to have a translator present at the wedding. She asserted that the increase in H's wealth was a matrimonial asset in relation to which she was entitled to half; the court should adopt the conventional approach to valuing the business at the date of the marriage and ring-fence only the expert's valuation plus any passive increase calculated by reference to the appropriate index; this was not a short marriage of the type said to justify a distinction between "unilateral assets" and matrimonial property which should be shared; and H had not made a special contribution or, if he had, she had matched it in her role looking after the parties' son.

Having heard detailed evidence from the parties, as well as from W's mother, the priest who married them and three experts in Italian matrimonial law (two party appointed and one SJE), Mr Justice Baker gave a very detailed judgment in which he worked through the various issues and explored the relevant case law. He found as follows.

> 1. It was plain and obvious that the discretionary trust was set up for W's benefit. Although her mother was named as the primary beneficiary, she was only to benefit as much as she needed, and the evidence was that she would not need much from the trust because of her own very substantial wealth. The long term aim of the trust was to benefit W and her children so there was a strong possibility that W would benefit from the trust in its entirety. It was therefore a resource that she was likely to have in the foreseeable future under s25(2)(a).
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> 2. An agreement incorporating the election of a European separation of goods regime can be a nuptial agreement falling within the *Radmacher (No.2) Financial Remedy: Marriage Contract)* [2011] EWHC 2878 (Fam). However, the parties must also have intended the agreement to apply in the event of a divorce, wherever they might be divorced and, in particular, if they were to be divorced in a regime that operated a discretion-

ary equitable distribution. Whilst it may be appropriate for the court to uphold an agreement as to the matrimonial property regime in some cases, it would not be fair to do so where the election was made in an unfamiliar language and the implications were not made fully clear. W had understood in basic terms the nature and effect of the *separazione dei beni*, but she did not understand the circumstances in which its implementation in a jurisdiction other than Italy may affect the scope of any remedy which would otherwise be available. The judge was also satisfied that the wording of the signed agreement did not indicate that the parties had chosen Italian law to govern their property relations. The personal and property relations were therefore governed by English law in this case. However, even if the judge were wrong and the parties had agreed Italian law would govern them, that would only be evidence of their intentions at the time and it would not be enough to oblige the English court to uphold the agreement. It would therefore be manifestly unfair to hold W to this agreement, particularly given the wholly exceptional increase in the value of the assets over the 7 years of marriage, and so no weight was attached to the agreement in this case.

3. Having considered the various cases dealing with matrimonial and non-matrimonial assets, including the recent case of *Sharp,* the judge was not persuaded to extend the concept of "unilateral assets" to the facts of this case. There will only be a small minority of cases in which there should be a departure from equality simply because the assets were generated by one party. There is no authority for the proposition that the concept of "unilateral assets" should be extended to cases in which there are children of the marriage. On the contrary, the rationale for allowing a departure from equality in short marriages where there is less of a contribution does not apply where there are children and the domestic contribution will continue a long time after the marriage has come to an end. Particularly where the child has special needs, excluding H's wealth would fundamentally undermine the principles of financial remedy claims in our jurisdiction by undervaluing W's domestic contribution, which would be discriminatory. The increase in H's wealth was therefore an asset which should be considered as part of the property adjustment exercise.

4. However, the fact that the shareholding was worth around half a billion pounds because of H's activity cannot be ignored entirely. Fairness has a broad horizon and whilst it would be wrong to exclude H's assets from the sharing principle, the nature and source of the assets may be taken into account when deciding how to share.

5. The exceptional nature of "special contribution" is reflected in the infrequency in which it has been successfully argued (only 4 reported cases). However, whilst it may be right to describe the concept as "rare as a white leopard", the decision in *Work v Gray* confirms that it is "neither a unicorn nor, for that matter, a dodo".

6. Taking as his lodestar the dictum of Moylan J (as he then was) in *C v C* that the court's focus remains on achieving a fair result, the judge concluded that it was fair to depart from equality in this case and leave H with a significantly greater proportion of the assets because of the following.

6.1 The parties had chosen to keep their finances separate and the way the couple have run their lives may be taken into account as per Miller.

6.2 The assets which grew so substantially in value were H's business interests. Ultimately it does not matter whether these are called matrimonial because the growth occurred during the marriage or non-matrimonial because H ring-fenced them in his sole name. The nature and source of the property is still relevant in deciding how the assets should be shared.

6.3 There was, as H had argued, a latent value in the business as at the date of marriage, which was not reflected in the SJE value. The ultimate phenomenal success was due in part to developments and decisions taken pre-marriage. Neither the approach in *Robertson* (treating 50% of the value of the business at the date of sale as having been created pre-marriage) nor the linear apportionment approach in *WM v HM* was appropriate in this case. The court must look at the reality as much as it can. Adopting Moylan LJ's approach in *Hart v Hart* the evidence did not establish a clear dividing line between matrimonial and non-matrimonial property and it was neither proportionate nor feasible to seek to determine a clear line.

6.4 The increase in value of H's assets was on a scale sufficient by itself to bring the case within the concept of special contribution. However, in any event, H's contribution was also of a quality which could justify departing from the sharing principle.

The judge therefore awarded W the jointly held property which H had offered and a lump sum of £115million which was equivalent to 25% of the increase in the value of H's shares from the SJE valuation as at the date of the marriage (increased to take account of passive growth applying the MSCI World Technology share index) to the value achieved when the shares were sold in 2016. W was therefore left with £152.45m or 28.75% of the total assets.

W has subsequently appealed this order.

XW v XH [2018] EWFC 44

This judgment arose from the applications submitted by both parties in the above case for reporting restrictions because of the risk to the family, particularly the parties' son. W was also concerned about her mother and her wider family, if the family could be identified. Although H was not personally famous, his products are used by millions around the world, and it would not hard to identify the family on the facts set out in the judgment.

H argued that the case should not be published because the details were incapable of camouflage and, if it were published, it should be anonymised and significantly redacted. W was neutral on the question of publication but strongly supported the need for anonymization.

Mr Justice Baker summarised the law on reporting restrictions and the publications of judgments in matrimonial cases. He concluded that there is a public interest in the publication of his judgment which deals with a number of issued in financial remedy cases, which are of interest not just to the "small clique of specialist practitioners" as H argued, but to the individuals who find themselves in similar proceedings in the future. That interest does not however require the judgment to be published in a version which identifies the family.

Article 8 rights include the need for confidentiality attaching to the disclosure which parties are obliged to make in financial remedy proceedings, as well as to the right against unwanted intrusion into one's personal space. It is significantly likely that the intrusion here would be on a scale to cause harm to the vulnerable son, so the court should take all reasonable steps to protect the family.

There was no reason to delay the reporting until after W's appeal had been heard.

Although the restrictions would only apply to this jurisdiction it was still appropriate to restrain the publication of information notwithstanding that it was already in the public domain.

Enforcement and the powers of the family court: VS v RE [2018] EWFC 30

Michael Horton, barrister at **Coram Chambers** explains the jurisdiction of the family court in relation to enforcement proceedings and highlights considerations which impact on the drafting of recitals to consent orders.

Enforcement is tricky. It must be, because the Law Commission has said so. Its report, **Enforcement of Family Financial Orders**, Law Com 370, was published in December 2016. It recommended reform, given that the rules governing the enforcement of family financial orders are difficult to access and understand, and are inefficient. In this article, I examine the decision of Mostyn J in **VS v RE [2018] EWFC 30** relating to the enforcement of a charging order. The family court is supposed to have the same powers as the High Court, by virtue of s 31E(1) of the Matrimonial and Family Proceedings Act 1984. What is the extent of the powers conferred by s 31E(1), and does this provision really enable the family court to 'enforce' a charging order?

In *VS v RE*, the respondent was ordered to pay a lump sum to the applicant, and to pay costs, in a Schedule 1 claim. The order was made by a High Court judge. The respondent did not pay, and so the applicant applied to enforce. The judgment tells us the applicant sought a host of charging orders, that eventually an order was made by Mostyn J dealing with the means of payment of the sums due, but otherwise gives us very few details.

The bulk of the judgment deals with a bugbear common to Mostyn J and Munby P – proceedings being issued in the High Court when they should have been issued in the family court. The substantive Schedule 1 proceedings had apparently been issued in the High Court. This had been done because the proceedings had been started with an application before a High Court judge for a freezing order. Mostyn J rightly pointed out that this is not permitted. The High Court and the family court both have jurisdiction in proceedings under Schedule 1 to the Children Act 1989, but FPR rule 5.4 provides that, where both courts have jurisdiction, the proceedings must be issued in the family court save in very limited circumstances. There is no right to choose to issue in the High Court. The mere fact that a freezing order is sought does not change that position.

On 28 February 2018, Munby P issued guidance on the jurisdiction of the family court and High Court: ***President's Guidance (Jurisdiction of the Family Court: Allocation of cases within the family court to High Court judge level and transfer of cases from the family court to the High Court)***. In the event of complexity, the case should be allocated to a High Court judge sitting in the family court. In particular, where a freezing order is sought, the application should always be heard in the family court, but may be allocated to a judge of High Court level (para 24 of the guidance).

So much for the main proceedings. What justification was there for the enforcement proceedings to be in the High Court? The issue of the enforcement application in the High Court was said to be justified with reference to the following provisions in the rules and Practice Directions:

> (i) FPR rule 40.4(1), which provides that an application for a charging order must be made to the family court or to the High Court, as appropriate;
>
> (ii) FPR PD40A, para 4.1, which states that the High Court and the county court (subject to the limit of county court's equity jurisdiction) can enforce a charging order by an order for sale. The paragraph cross-refers to CPR rule 73.10C; and
>
> (iii) CPR rule 73.10C.

The relevant provisions of CPR rule 73.10C are (with my emphasis added):

> (1) Subject to the provisions of any enactment, the court may, upon a claim by a person who has obtained a charging order over an interest in property, order the sale of the property to enforce the charging order. ...
>
> (3) Subject to paragraph (2) a claim for an order for sale under this rule should be made to the court which made the charging order, unless that court does not have jurisdiction to make an order for sale.
>
> (4) The claimant must use the Part 8 procedure.
>
> (5) A copy of the charging order must be filed with the claim form.

Counsel for the applicant relied on FPR PD40A para 4.1 and CPR rule 73.10C, and submitted that only the High Court or county court could order a sale of property which was the subject of a charging order.

Mostyn J disagreed. His Lordship held:

> (a) the apparent choice of court in FPR rule 40.4(1) in which to apply for a charging order was subject to FPR rule 5.4, which as we have already seen, provides that where both have jurisdiction, proceedings must be issued in the family court;
>
> (b) it would be absurd that the family court had no power to order a sale of property to enforce the charging order. That would mean the family court had less power than the divorce county courts it replaced. It would also be absurd that the family court could order interim sale under the Married Women's Property Act 1882, an order for sale after a final hearing under s 24A of the Matrimonial Causes Act 1973, but no power to order a sale to enforce a charging order;
>
> (c) the family court had power to order a sale of property subject to a charging order under s 31E(1)(a) of the Matrimonial and Family Proceedings Act 1984.

In doing so, His Lordship referred to para 15 of the President's Guidance of 28 February 2018:

> 'Section 31E(1)(a) of the 1984 Act provides that "In any proceedings in the family court, the court may make any order … which could be made by the High Court if the proceedings were in the High Court." This does not permit the family court to exercise original or substantive jurisdiction in respect of those exceptional matters, including applications under the inherent jurisdiction of the High Court, that must be commenced and heard in the High Court. It does, however, permit the use of the High Court's inherent jurisdiction to make incidental or supplemental orders to give effect to decisions within the jurisdiction of the family court.'

Mostyn J therefore held that the power to order the sale of a property subject to a charging order was a 'supplemental order giving effect to the substantive order.' Where the family court had made a charging order, any application to enforce it should also be made to the family court. His Lordship concluded by saying that this case was 'a classic example of lawyers rushing off to the High Court at the first sign of complexity. This is a practice that must cease.' The President had seen the judgment in draft and approved its terms.

Analysis

Mostyn J is rightly punctilious about the incorrect use of the High Court as opposed to the family court. However, with the greatest of respect, I venture to suggest that His Lordship's conclusions, and each limb of the reasoning at (a) to (c) above, are incorrect.

First, the court to which a person must apply for a charging order is determined not by FPR rule 5.4, but by s 1 of the Charging Orders Act 1979. Subject to some important exceptions, the effect of that section is that you must apply for a charging order to the court which made the judgment you are seeking to enforce. Accordingly, FPR rule 40.4(1), which provides that the application for a charging order must be made to the High Court or family court, as appropriate, is entirely apposite. Section 1(2)(b) of the 1979 Act relates to a High Court maintenance order or an order for costs made in family proceedings in the High Court. Such an order may be enforced by way of charging order in either the High Court or the family court. FPR rule 5.4 would appear to operate here, and require an application for a charging order to enforce such an order to be made to the family court.

Secondly, the old divorce county courts did in fact have limited jurisdiction to enforce a charging order. The reason is this. A charging order creates an equitable charge over the property. The equitable charge so created must be enforced by separate proceedings. Where the amount secured by the charge exceeded the county court's equity limit, the claim to enforce the charging order had to be made to the High Court. Paras 4.1 to 4.3 of CPR PD73 explain all this: in particular, para 4.1A: 'A claim under rule 73.10C is a proceeding for the enforcement of a charge, and section 23(c) of the County Courts Act 1984 provides the extent of the county court's jurisdiction to hear and determine such proceedings.' The equity

limit used to be £30,000, so that a great many charging orders had to be enforced in the High Court, but it was increased to £350,000 with effect from 22 April 2014.

Thirdly, s 31E(1) of the 1984 Act does not help. If an application to enforce a charging order were made within the existing proceedings, the family court would have the power to order a sale of property subject to a charging order: the High Court could make the order, and the family court has all the powers of the High Court if the proceedings were in the High Court. But the application to enforce the charging order is not made within the existing proceedings. It is 'a claim'. The Part 8 procedure (required by CPR r 73.10C(4)) is a procedure for starting a new civil claim. A claim form (see r 73.10C(5)) is what starts a new set of proceedings. So a claim to enforce a charging order is an entirely separate set of proceedings. Although Mostyn J did not cite sub-paragraphs (4) and (5) of CPR rule 73.10C in his judgment, the words in sub-paragraphs (1) and (3) emphasised above (which His Lordship did cite) make this clear, as do paras 4.1 to 4.3 of CPR PD73.

This should not be a surprise. The family court has no general property or equity jurisdiction. It has no general jurisdiction to enforce a charge, whether created by a charging order or otherwise. In addition, where A has obtained a charging order over B's interest in property owned by B and C; A cannot use CPR rule 73.10C, but must make a separate claim under the Trusts of Land and Appointment of Trustees Act 1996. Of course, the family court has no jurisdiction under the 1996 Act.

So, para 4.1 of FPR PD40A is entirely correct. It is only the High Court and the county court that can order a sale of property subject to a charging order. Part 40 and PD40A were drafted with some care and scrutinised by the Family Procedure Rules Committee before they became law in April 2016. The first draft of the new rules submitted to members of the Committee for consideration included a rule equivalent to CPR rule 73.10C, providing that the High Court and family court could order a sale of property subject to a charging order. This provision was removed from the rules before they were made, because it was generally accepted within the Committee that the family court had no power to make this order.

The ambit of s 31E(1)

As the President's Guidance makes clear, s 31E(1) of the 1984 Act cannot expand the original substantive jurisdiction of the family court. Any attempt to argue that the family court can determine a bankruptcy petition, because if the proceedings were in the High Court, the High Court could deal with the bankruptcy, would be a leap too far. What s 31E(1) means is this. If the family court has jurisdiction to entertain substantive proceedings, its powers within those substantive proceedings are the same as if those substantive proceedings were proceeding in the High Court. So the family court can issue a bench warrant to secure the attendance of a judgment creditor at an enforcement hearing, just as the High Court can. But it cannot entertain substantive proceedings outside the carefully prescribed limits on its jurisdiction in family law legislation.

This raises two potential headaches. The first relates to intervener claims. The family court has no ToLATA jurisdiction. Yet judges in the family court are happy to determine property claims of third parties who intervene in the financial remedy proceedings. This headache is cleared by the decision of the Court of Appeal in Tebbutt v Haynes [1981] 2 All ER 238. The court there held that the court had jurisdiction when determining an application under s 24 of the Matrimonial Causes Act 1973 to determine the rights and interests of any third parties who had intervened in the application to claim an interest in the subject property, as it was fundamental to the s 24 jurisdiction that the court should know over what property the court was to exercise its discretionary powers of adjustment.

The second headache is harder to cure. Financial remedy consent orders often include recitals containing agreements by the parties which take effect as contracts. The consent order will give liberty to apply as to implementation. But how can the family court, which has no contract jurisdiction, enforce the terms of a contract, albeit one recited to a financial remedy order?

In civil proceedings, most settlements are effected by a *Tomlin* order. This form of order stays the proceedings, save for the purpose of carrying into effect the schedule to the order (which contains the contract by which the proceedings have been compromised), and usually provides that the parties have permission to apply for that purpose without the need to issue fresh proceedings. This is entirely unobjectionable, as the civil court has jurisdiction in contract matters. Strictly speaking, the enforcement of a contract scheduled to a *Tomlin* order is a new cause of action and a new claim. It is a benevolent legal fiction that allows enforcement within the existing proceedings rather than insisting on a new claim form (and issue fee). *Foskett* describes the structure of a *Tomlin* order as representing 'something of a compromise between competing legal and practical considerations' (*Foskett on Compromise*, 8th edition, para 9-24).

For the family court to be able to enforce contractual recitals to financial remedy orders, we must fall back on s 31E(1) of the 1984 Act again. After all, if the proceedings were in the High Court, the High Court could make orders to enforce these contractual recitals. On that basis, the family court can do so too. This is probably right, but not beyond doubt. The same point that arose in *VS v RE* also arises: what are 'the proceedings'? If the proceedings to enforce a financial remedy contractual recital are, in reality, a new set of proceedings, s 31E(1) would not help. But if parties to civil litigation are afforded the facility of enforcing without issuing a new claim, there is no reason why parties to financial remedy litigation should not also have this facility. I suggest that, to minimise the risk of any enforcement issues, financial remedy consent orders should contain express provision that the parties have permission to apply to carry into effect the terms of any contractual recitals, and may do so without the need to issue fresh proceedings but by application notice within the existing proceedings.

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28 June 2018

Surrogacy and HFEA Update: July 2018

Andrew Powell, barrister of 4 Paper Buildings, considers recent important judgments concerning surrogacy and highlights the focus of the Law Commission's review of the law of surrogacy.

Andrew Powell, barrister, **4 Paper Buildings**

Since my last update in March, there have been a trickle of cases concerning surrogacy, however of the two reported cases each have added to the rich case law already in existence.

X (A child – foreign surrogacy) [2018] EWFC 15

In this case the President of the Family Division was hearing an application for a parental order. Very little detail as to the background of the case is included in the judgment. However, in summary, the issue in the case concerned consideration of s54(2) of the HFEA 2008, which provides that the applicants must be married, in a civil partnership or in an enduring family relationship and s54(4)(a) of the HFEA 2008 which provides that *"At the time of the application and the making of the order. the child's home must be with the applicants."* All of the well-known criteria under s54 were satisfied.

In respect of the first issue, the applicants were married. However, one of the applicants was gay and the parties remained married, in what they described as a "platonic and not romantic" relationship. The question before the President was whether the status of their marriage satisfied the s54(2) criteria. The President was unequivocal that the applicants were able to satisfy this part of the s54 criteria. The President observed:

> *7. The marriage, which took place in this country, complied with all the requirements of the Marriage Act 1949. There is, as Ms Fottrell has demonstrated, no ground upon which the marriage could be declared voidable, let alone void. There can be no question of the marriage being a sham. In short, the marriage is a marriage. The fact that it is platonic, and without a sexual component, is, as a matter of long-established law, neither here nor there and in truth no concern of the judges or of the State. One needs look no further than Nigel Nicolson's Portrait of a Marriage, his acclaimed account of the unusual marriage of his parents, Vita Sackville-West and Harold Nicolson, to see how happy and fulfilling a marriage, more or less conventional, more or less unconventional, can be. But it is really none of our business. As the first Elizabeth put it, we should not make windows into people's souls.*
>
> *8. A sexual relationship is not necessary for there to be a valid marriage. The law was stated very clearly, if in Latin (for the use of which I apologise), by Sir James Wilde in A v B (1868) LR 1 P&D 559, 562:*
>
> > "The truth is, *consensus non concubitus facit matrimonium*."
>
> The law has always recognised that a couple may take each other as wife and husband *tanquam soror vel tanquam frater* (as sister and brother), as our ancestors would have put it applying the canonists' maxim: see Sir John Nicholl in *Brown v Brown* (1828) 1 Hagg Ecc 523, 524, Sir Cresswell Cresswell in *W v H (falsely called W)* (1861) 2 Sw&Tr 240, 244, and, more recently, *Morgan v Morgan (otherwise Ransom)* [1959] P 92."

Satisfied that the applicants met this part of the s54 criteria, the President went on to consider s54(4)(a). The applicants resided in separate homes and the child's time was split between the two homes.

The President endorsed the approach adopted in number of cases where the applicants had separated by the time of the application and this provision was under scrutiny (see e.g. Theis J's judgments in ***Re A and B (Parental Order)*** **[2015] EWHC 2080 (Fam)**. The President concluded that it was absolutely clear the child's *"home"* was with both applicants and therefore found that it was manifestly in the child's best interests to make a parental order.

This case is interesting because it highlights that the court's approach in such cases is always to ensure that the child, the intended parents and indeed the surrogate, are afforded the optimum legal protection, which can only be guaranteed through the making of a parental order that has a transformative effect on all parties.

AB v CD ETC [2018] EWHC 1590 (Fam)

In this case Keehan J was concerned with twin children born in October 2010 following a surrogacy arrangement in India. The respondents were the children's biological parents: CD and EF.

CD and EF subsequently separated. CD remarried, and her new husband, AB, was the applicant in the proceedings.

At the time the children were born and placed in the care of CD and EF, they were not aware of the need to apply for a parental order, and no such application was made, and therefore, the children's legal parents remained the surrogate and her husband.

The proceedings began when AB made an application for a parental responsibility order in respect of both children. The application for PR was later withdrawn.

The following applications remained before the court:

- EF had also requested the court consider granting him parental responsibility.
- A joint application made by AB and CD to make the children wards of court.
- Applications made by both AB and CD for child arrangements orders that the children live with them, and orders restricting the exercise of EF's parental responsibility.

The court directed that the allegations made by CD and EF would have to be subject to a fact finding hearing. The second respondent (EF), who lived in another jurisdiction, declined to engage in the proceedings and elected not to give evidence in person or via video-link in support of his denials of the first respondent's (CD) allegations, or indeed findings he sought against the first respondent.

1. The court made the findings sought by CD and dismissed the findings sought by EF.

2. The legal reality on the ground was that the surrogate and her husband remained the twins' legal parents, it not being possible for CD and EF to satisfy two of the s54 criteria: s54(2) (i.e. that the applicants must be married or in an enduring family relationship) and s54(4)(a) (i.e. that the child's home must be with the applicants).

3. Keehan J went on to consider whether the court had the power to make a parental responsibility order in respect of EF. Keehan J observed:

> *46. The provisions of s.4 of the Children Act 1989, dealing with the acquisition of parental responsibility, and the making of parental responsibility orders, exclusively refer to the term 'father' and not in addition or alternatively 'a biological parent'. In law, the second respondent is not the father of the children and thus he cannot acquire parental responsibility as provided for by that section, nor can the court make a parental responsibility order in his favour.*
>
> *47. The provisions of s.4(a) of the Children Act 1989, dealing with the acquisition of parental responsibility by a step parent, provide:*
>
> > *'One, where a child's parent, parent A, who has parental responsibility for the child, is married to or a civil partner of a person who is not the child's parent, the step parent, (a) parent A, or if the other parent of the child also has parental responsibility for the child, both parents may, by agreement with the step parent, provide for the step parent to have parental responsibility for the child, or b) the court may, on the application of the step parent, order that the step parent shall have parental responsibility for the child'.*
>
> *48. The applicant in this case is not married to a person who is, in law, the mother or the parent of the children. Accordingly, the court has no power to make a parental responsibility order in his favour.*

Accordingly, the court had no power to make a parental responsibility order, in respect of any of the parties.

In concluding his judgment, Keehan J observed that he was wholly satisfied that the welfare best interests of the twins required him to:

- make the children wards of court for the time being,
- make a child arrangements order in favour of CD and AB,
- make no order as to contact between EF and the children,
- give EF permission to withdraw his application for a child arrangements order,
- dismiss EF's deemed application for a parental responsibility order, and
- make an order restricting the exercise of the parental responsibility of the surrogate and her husband

Keehan J went on to observe that the law created an "absurdity" in not recognising the first and second respondents at the twins' parents and that the losers were "predominately the children who do not have their biological parentage recognised in law."

Finally, Keehan J observed:

> *76. I find myself extremely frustrated, as no doubt are the first and second respondents, that I am prevented, without any obvious good, legal or policy reason from making orders which explicitly recognise them as the legal mother and the legal father of these children. Instead, I am forced, as have other judges before me, to construct a set of orders to secure the welfare of the children which fall very far short of the transformative effect of a parental order.*

Yet again, this case serves to highlight the inadequacy of the legal framework which currently exists and at times, fails to provide the children born through surrogacy arrangements the optimum level of protection that is only afforded by a parental order.

Surrogacy and the Law Commission

The Law Commission confirmed on 4 May 2018 that the law related to surrogacy would be under review. Professor Nick Hopkins, Law Commissioner for England and Wales stated:

> *"Our society has moved on from when surrogacy laws were first introduced 30 years ago and, now, they are not fit for purpose."*
>
> *"For many, having a child is the best day of their lives and surrogacy can be the only option for some who want a genetic link to the baby. But the issues are difficult and there is no quick fix. Now we want all those with an interest to get involved and help us make the law fit for the modern world."*

The Law Commission has already identified 3 areas of concern, and lists them as:

- difficulties with parental orders – a parental order transfers parentage from the surrogate mother to the intended parents. But that process can only happen after the baby is born and is subject to conditions which may require reform.
- international surrogacy – the uncertainty in the current law may encourage use of international arrangements, where there are concerns about exploitation of surrogates.
- how surrogacy is regulated – the rules governing how surrogacy is undertaken should be brought up to date and further improved.

The Law Commission will now undertake a three year project which will contain law reform recommendations. It is anticipated that the Law Commission will publish a consultation paper by May 2019.

The HFEA paperwork cases

Re AL (Human Fertilisation and Embryology Act 2008) [2018] EWHC 1300 (Fam)

Sadly, these cases continue to come before the courts. In *Re AL*, the President was invited to make a declaration of

parentage in respect of X, who together with Y, underwent treatment at a clinic at a time when they were not married.

The clinic discovered an irregularity in the forms, after the child was born, however by this time the X and Y had already registered the child's birth in good faith. Like so many of these cases, the first that they learnt of an irregularity was when the clinic contacted them.

A WP form consent form could not be identified but the court was satisfied that an internal consent form would suffice and meet the statutory requirements under section 37 of the 2008 Act, and the court was able to make the declaration sought.

17 July 2018

Children Private law update Summer 2018

Alex Verdan QC of **4 Paper Buildings** reviews recent important judgments in private law children cases.

In this update I will consider the following areas:

- Preservation of a child's life – 'Alfie'
- Leave to remove
- Transfer of residence
- Parental orders

Preservation of a child's life – 'Alfie'

In ***Alder Hey Children's NHS Foundation Trust v Evans & Ors* [2018] EWHC 818 (Fam)** Hayden J was dealing again with the welfare of Alfie, and was concerned with an application by Alfie's parents for a writ of 'habeus corpus' to release Alife from hospital.

This application followed a number of hearings where the court was dealing with very sad circumstances, where Hayden J had concluded, in his earlier judgment, that Alfie has suffered with a neuro-degenerative disease which corroded his brain to the extent that 'his life was futile.' The court had declared that it was not in his best interests for ventilation to continue. This reflected a consensus of global medical opinion.

Alfie's parent's appealed that decision to the Court of Appeal and were unsuccessful. They subsequently sought permission to appeal to the Supreme Court and European Court of Human Rights but were refused.
The Court of Appeal had directed that the matter be listed on short notice before Hayden J in respect of the implementation of the terms of the 'end of life plan', or the date for the withdrawal of artificial ventilation.

Alfie's parents, with the assistance of a new legal team, sought a writ of 'habeus corpus', predicated on the rights of the parents in English law, to release Alfie from hospital.

Hayden J took the view that the argument was 'entirely misconceived', and further clarified the test the court is concerned with on such applications being the child's best interests. Hayden J repeated Lady Hale's comments, made at the permission hearing, comparing the test to the gold standard:

> "A child, unlike most adults, lacks the capacity to make decisions about future arrangements for themselves. Where there is a dispute, it is for the court to make a decision, as it would in respect of an adult without capacity. This is the gold standard by which most of these decisions are reached. It is an assessment of best interests that has been concluded to be perfectly clear."

Hayden J further clarified the writ of habeus corpus applies 'only to individuals unlawfully detained or whose civil liberties have been compromised in some way. It is axiomatic, given my conclusions as to where Alfie's best interests lie, that there can be no compromise of his liberty in the circumstances where the identified best interests are being met.'

Alfie's parents appealed this decision to the Court of Appeal, which was refused. The Court of Appeal making clear that the 'application of a different label, namely habeus corpus, does not change the fact that the court has already determined the issues which the parents now seek, again, to advance.'

Leave to remove

In ***S v V (Children – Leave to Remove)*** **[2018] EWHC 26**, Mostyn J was concerned with an application by a mother for the permission of the court to return with the parties' children, aged 5 and 2 years, to Ukraine.

Mostyn J neatly summarised the applicable legal test as follows:

> "[2]. The legal test to be applied is now very straight-forward. It is the application of the principle of the paramountcy of the children's best interests, as taxonomised by the checklist in section 1(3) of the 1989 Act. That principle is not to be glossed, augmented or steered by any presumption in favour of the putative relocator. Lord Justice Thorpe's famous "discipline" in *Payne v Payne* [2001] 1 FLR 1052 is now relegated to no more than guidance, guidance which can be drawn on, or not, as the individual case demands. In fact, most of the features of that guidance are statements of the obvious. Obviously, if the applicant's case is not well thought out and is not supported by evidence it will likely fail. Obviously, if the applicant's case, or the respondent's defence, is not advanced in good faith but rather is driven by an unworthy ulterior motive, then that case, or defence, will fail. Obviously, the court must consider the impact on the mother if the application is refused as well as the impact on the father if it is granted.
>
> [3]. It is said that in trying these cases the court must undertake a "global" or "holistic" or "360 degree" exercise, which again to my mind is to state the obvious. Plainly, the court is not going to undertake a partial or superficial or limited or incomplete survey of the case.
> ……
> [5]. The court's function in a relocation case is one of evaluation rather than a pure exercise of discretion (see *Kacem v Bashir* [2010] NZSC 112). Inevitably, the court will have to resolve disputed facts and there is a burden of proof on the party alleging the facts in issue. But once the facts are established there is no formal legal burden of proof on the applicant: see Payne v Payne at para 25 where Lord Justice Thorpe stated: "I do not think that such concepts of presumption and burden of proof have any place in Children Act litigation where the judge exercises a function that is partly inquisitorial." However, common sense dictates that where one parent seeks that a well-functioning status quo should be changed she has to make the running in terms of the evidence and argument to show that change would be more in the children's interests than no change. Notwithstanding the partly inquisitorial function of the court to my mind the maxim affirmati non neganti incumbit probatio should loosely apply to the case for change."

The mother was Ukrainian, and the father Russian. The parties met in Vienna and were married in Ukraine in 2012. They then came to live in London. The arrangements for the children were intended to have been settled by a Ukrainian parenting agreement, which specified that the children were to live with their mother permanently in the UK. The mother originally sought to move to California with her partner, and then revised her plans to move back to Ukraine.

The mother then travelled to Ukraine, during the proceedings, with the children, without notice to the father and in breach of her earlier assurances. Nonetheless, the mother was permitted to remain in Ukraine pending the determination of the leave to remove application.

An independent social worker had been instructed, and recommended that the children remain in London, there being heightened concerns about the mother's partner's controlling influence, especially given that he now refused to return with the mother to London, and the consequential impact on the children.

In refusing permission Mostyn J found:

> (i) The refusal of the mother's partner to give evidence led him to find that he had something serious to hide. Mostyn J referred to the principles in ***Prest v Petrodel Resources Ltd & Ors*** **[2013] UKSC 34** that inferences can be drawn from the absence or silence of a witness, who might be expected to have material evidence to give on an issue in an action; and if a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party, or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (ii) The mother's case was 90% about her partner rather than returning to Kiev.
>
> (iii) The court accepted the evidence of the ISW that the following presented concerns about the proposed move:
>
> (a) The mother had fallen out with the grandmother who lived in Kiev and was close to the children.
>
> (b) The partner's influence and controlling behaviour.

(c) The travelling for the children to London and back would be tiring.

(d) Any contact with the father in Kiev will not be of the same quality as in London where the children will be with the paternal family.

(e) Infrequent and lengthy visits will not foster the same relationship.

(f) The mother having dismissed the children's nanny removed a protective part of the move.

(iv) The court also expressed a concern about the mother's willingness to comply with orders.

Transfer of residence

In ***Re C (A child)*** **[2018] EWHC 557 (Fam)** Knowles J was dealing with an appeal against a decision which transferred the residence of a 6 year old from her mother to her father by reason of the mother's opposition to progressing contact.

The mother had been found to be wholly opposed to any progression of contact, which had been positive. The court made a stepped order for a progression of contact and a family assistance order. Within three weeks of the order the father applied to enforce it. Cafcass had reported that the mother was not engaging with the family assistance order. C was subsequently joined as a party to the proceedings and a guardian was appointed.

The court concluded at the final hearing that the mother had a deeply ingrained hostility to the father and his family, and would only agree to contact on her terms, which did not include overnight and holiday time. It was further found that it had been impossible to progress contact despite the involvement of Cafcass, a guardian and a family assistance order. The court ordered that on balance it was in child's best interests to move to live with her father.

The mother appealed the decision, on two grounds: (i) Cafcass and the guardian had been inconsistent in ascertaining in the views of the child, and a lack of judicial continuity had resulted in further conflict between the parents; and (ii) the Judge had failed to apply the welfare checklist properly.
In dismissing the appeal, Knowles J found that there had been no criticism of the guardian's procedures raised at the final hearing, and there was no evidence that the lack of judicial continuity had any adverse impact on the parties.

As to the Judge's said failure to apply the welfare checklist properly, Knowles J found that whilst the judgment makes no express reference to the child's wishes and feelings that "was not an omission I regard as significant given the Judge's very careful analysis of the other matters…… which included C's emotional need to have a normal relationship with her father and to be spared adult conflict and the likely effect upon her of what would be a significant change in her circumstances."

Parental orders

In ***AB v CD EF GH & IJ*** **[2018] EWHC 1590 (Fam)** Keehan J was concerned with two children: GH and IJ. The children were born as a result of a surrogacy arrangement entered into in India. In accordance with that agreement, the mother, KV and her husband, HV handed over the care of the children to the first and second respondents, CD and EF, but neither of the respondents was aware of the need to apply for a parental order, and therefore, the legal parentage remained with KV and HV.

The respondents subsequently separated and the first respondent entered into a relationship with the applicant, AB, and the children lived with them. AB then made an application for parental responsibility orders in respect of both children, which was subsequently withdrawn, because s. 4 Children Act 1989 exclusively refers to the term 'father' and not 'biological parent' in relation to the acquisition of parental responsibility, and given that the applicant was not married to a person who was, recognised as the legal mother of parent, the court had no power to make a parental responsibility order.

Thereafter, applications were made by the applicant and the first respondent for: (i) the children to be made wards of court; (ii) a letter requesting the court to consider granting the second respondent parental responsibility for both children.

The court found itself in a statutory lacuna. Keehan J was "extremely frustrated, as no doubt are the first and second respondents, that I am prevented, without any obvious good, legal or policy reason from making orders which explicitly recognise them as the legal mother and the legal father of these children."

Neither of the respondents was able to satisfy the conditions for the making of a parental order pursuant to s. 54(2) or 54(4)(a) Human Fertilisation and Embryology Act 2008 ('HEFA').

Accordingly, only the surrogate mother and her husband could be treated as the mother and father of the children.

In light of this void in the statute to recognise the respondents as the mother and the father of the children, the court found that it was wholly necessary in accordance with the children's welfare to: (i) make them wards of court for the time being;

(ii) make a child arrangements order in favour of the first respondent and the applicant; (iii) make no order as to contact between the second respondent and the children (findings of sexual assault and controlling behaviour having been made); and (iv) to restrict the exercise of parental responsibility of the surrogate mother and her husband.
Keehan J said of the current state of the law:

> "[74]. The absurdity of the law not recognising the first and second respondent as the mother and the father of these children is plain. The losers are predominately the children who do not have their biological parentage recognised in law.
>
> [76]. ….. I am forced, as have other judges before me, to construct a set of orders to secure the welfare of the children which fall very far short of the transformative effect of a parental order."

26.7.18

CASES

Re RD (Deprivation or Restriction of Liberty) 2018 EWFC 47

At a proposed final hearing in Part IV proceedings the court was asked to consider whether RD, a fourteen and a half year old girl with "a range of complex therapeutic needs", was being subjected to a regime in her residential placement at Lennox House that was depriving her of her liberty in such a way as to engage her Article 5 ECHR rights as asserted by the Guardian.

As part of his judgment, Mr Justice Cobb ("the Judge"), gives a detailed analysis of the applicable law in such instances at [21-34] and identified the "core" issue in this case as being whether "RD is under 'complete or constant supervision and control' on the basis that [31] "…'complete' or 'constant' defines 'supervision' and 'control' as indicating something like 'total', 'unremitting', 'thorough', and/or 'unqualified'."

Having conducted a thorough analysis of the various restrictions in place and the regime, generally, for RD in Lennox House, the Judge concludes at [37] that although RD was not free to leave Lennox House permanently, this would be no different for any other child of the same age if she were still living at home and thus this was not a determinative feature of her living arrangements at Lennox House.

Similarly, at [38] he considers the argument put forward on behalf of the child that the staff/resident ratio of 1:1 amounted to the residents being subjected to complete or constant supervision and control and concludes that this is rather tantamount to residents being provided with 1:1 support as opposed to 1:1 supervision making it qualitatively different.

Having formed that view, at [39] he considered "…to what extent the 'supervision' of the staff over RD is different from the watchful eye or supervision of a reasonable parent?" In doing so, the Judge noted that the monitoring of RD when in the grounds of Lennox House is, "ordinary quasi-parental good sense" given that it is situated on a main road which would pose risks to any child and deemed "the fact that the staff accompany RD and her parents on some but not all of her contact visits…is more by way of support than supervision, particularly given that the parents have struggled with RD's behaviours in the past; moreover, and not insignificantly, the parents are unfamiliar with the local area, and without transport on their visits."

At [41] he found that, although there were restrictions on RD's movements, this did not amount to her being under the 'complete control or supervision' of the State and, accordingly, that considerations of 'deprivation' under Article 5 were not engaged on the basis that [45] "the regime at Lennox House does not possess the "degree or intensity" of complete control or supervision of RD which justifies the description of 'deprivation' of her liberty…insofar as the staff impose limits or boundaries on her movements and freedoms, these represent restrictions of the type which a child of her age, station, familial background and relative maturity would have placed upon her."

Summary by **Lucinda Wicks**, barrister, **Coram Chambers**

P (A Child) [2018] EWCA Civ 1483

The Mother, who brought the appeal, was an alcoholic with a significant history of drinking, rehabilitation and sobriety, followed by relapse.

L had two older sisters, M and B. Tragically, in 2014 and before L was born, M had died of Sudden Infant Death Syndrome on a night when the Mother had been drinking. M's death led to the involvement of the Local Authority and care proceedings were issued in relation to B. The Mother was referred to an alcohol treatment programme at a specialist rehabilitation service for six months from 23 January 2015 to 17 July 2015. The Mother made good progress and maintain sobriety such that B was rehabilitated to her care under a supervision order. Unfortunately, the Mother then began to drink again, and by December 2016, hair strand testing indicated that she had been drinking between May and November 2016.

In February 2017, the Mother, who was by now pregnant with L, was arrested for shoplifting. The Local Authority were given permission to withdraw their application for an extension of the supervision order and sought a care order in relation to B. An interim care order was granted and B was placed with her paternal grandmother, with whom she still lived at the date of the appeal.

Proceedings in relation to L

L was born on 20 July 2017 and placed in foster care. The local authority removed L at birth with a care plan for adoption. They therefore did not offer the mother any support during the course of the proceedings.

Of her own accord, the mother had, in the absence of support from the local authority, located and engaged independently with the AA, a community drug and alcohol service, and worn a SCRAM bracelet. Up until the final hearing of the local

authority's application for a placement order, the mother was having contact with L four times a week and all reports were that she had a good relationship with L and that contact was good.

The Mother had remained sober, a fact that was not in dispute, and she had "done all that could have been asked of her" in terms of addressing her alcoholism. By the time of the final hearing in February 2018, the Mother had also begun to develop insight into her addiction and its effects on her children.

Dr Hallstrom, an adult psychiatrist specialising in psycho-pharmacology, had completed a report on the Mother during both the care proceedings in relation to B, and again during these proceedings for L. He noted substantial change in the Mother, saying that she was "a very different person".

Final hearing and first instance decision

At the final hearing, the Mother sought, on the basis of her progress and Dr Hallstrom's report, an adjournment for a period of 6 months, to continue her sobriety and to see if she could capitalise and solidify the progress that she had made to date.

The Local Authority sought a final care order and a placement order.

The Judge accepted the shift in relation to the mother's admissions as to the extent of her drinking and the duration of her sobriety, but regarded them as "green shoots". She concluded that there was a real risk of relapse and of the mother not being able to be open and honest with the professionals. In those circumstances, she refused the Mother's application to adjourn and made the care and placement orders sought.

The Appeal

The Appeal Court held that the judge placed too much emphasis on historic lies, "to the extent that the judge seemed to regard this feature alone as determinative of the case" (para 45).

The Court held, again at para 45 that: "There was, as a consequence, a failure properly to set those undoubted and serious concerns against the genuine and significant progress made by the mother. If this progress was maintained the mother's likely future level of honesty could be assessed in the context of sobriety and with a developing understanding and insight as against her historic drunkenness and lack of insight."

The Court of Appeal was further troubled that insufficient consideration was given to L's young age, the evidence that she was able to make good attachments, and the fact that the adjournment sought was one in which the Mother could demonstrate real change, within L's reasonable timescales. In those circumstances, the judge had been wrong to refuse the adjournment, and it followed that the Judge had been wrong to make final care and placement orders.

Aftermath

The Court noted that the hearing of the appeal was some 6 months from the original trial and that, even once permission to appeal had been granted, the Local Authority had reduced L's contact with her Mother to once per week and discontinued its engagement; Lady Justice King said in relation to this:

> "I hope that the local authority may, on reflection, regret that approach and on reviewing the case conclude that in the interests of L, once Moylan LJ had granted permission to appeal, the better way would have been once again to have become active in the case, and to have engaged with the mother in order to see whether, their worst fears about the mother continued to be justified such that in the best interests of L the last resort of adoption remained the only option."

Summary by **Millie Benson**, barrister, **1 King's Bench Walk**

RVH v TF Non Hague Convention Refusal of Summary Return) [2018] EWHC 1680 (Fam)

The High Court was concerned with an application by the father, RVH, for the summary return to the Ivory Coast of his children with the respondent, C a girl aged 3 and D a boy aged 21 months. The application was made under the inherent jurisdiction. The parties commenced a relationship in 2012, and moved to the Ivory Coast in 2013 as a result of the mother's employment – both children had been born there and had lived there since, save for periods in which they travelled for holidays to England, the Netherlands and other locations. The mother removed the children from the Ivory Coast to England on 27 March 2018, and did not tell the father she was doing so. The mother opposed the father's application for return.

The parties were in agreement as to the relevant legal principles (§24-26). Accordingly, the Court was required to determine the following issues:

(i) where the children were habitually resident; and

(ii) whether it was in the children's best interests for the Court to order their summary return to the Ivory Coast, or for there to be a more detailed examination of the parents' dispute in this jurisdiction.

Considering the issue of habitual residence, the Court concluded that the children were habitually resident in the Ivory Coast (§33). In its view, the children had resided in the Ivory Coast for a whole of their lives, save for holidays, the family had made its life there and integrated into the ex-pat community there. While the mother may not have intended to remain there (as was her case), there was no identified end date to the family's residence. The family's immigration uncertainties when living in the Ivory Coast had been managed for several years by both parents – they had not prevented them from establishing or maintaining integration into the country (§34). That the family's had integrated into the ex-pat community (rather than the Ivorian community more generally) was a factor of lesser importance, given the children's ages and experience of life (§36).

As to issue (ii), the Court went to decide – on a fine balance – that it was not in the children's best interests to be returned following the summary hearing. The court balanced several factors, not least the mother's deception in removing the children (§51), the children's immigration status were they to return (§53), the advantages of contact with the father (who continued to live in the Ivory Coast) and the children's familiarity with the place (§55). Having the benefit of expert evidence, the Court did not consider the slight differences in the approaches of the family Courts in both jurisdictions decisive in its decision (§52). What "tipped the balance" was the sheer diversity of options both parents were considering for the children's long term residence, and the lack of a firm position – in short, the Court was unwilling to sanction a return to the Ivory Coast which may well have led to yet a further move for both children in due course (§§64-69). The father's application was accordingly dismissed.

Summary by **Anita Rao**, barrister, **Field Court Chambers**

Chaston & Anor v Chaston [2018] EWHC 1672 (Ch)

The parents had four children. The parents bought a property in Wales in 1972 as beneficial joint tenants and severed the tenancy in 1982. In 2004 the mother died and the legal title to the property passed to the father absolutely by survivorship. The mother's beneficial half share passed under her will on discretionary trusts (the trustees in 2013 appointed the four children as equal beneficiaries). When the father died in 2010 his half share went directly to the children in equal shares under his will.

In 2014 one of the children sold and transferred her 25% share in the property to her brother (the respondent to the appeal). Thus, at the time of trial the beneficial ownership of the property was 50% to the respondent and 25% to the other two children (the appellants). The respondent sought to buy his siblings' interest in the property and made an application under s 14 of the Trusts of Land and Appointment of Trustees' Act 1996 ("TLATA") that he be permitted to do so at a price to be determined by a valuation exercise. The appellants agreed that the property should be sold, but wanted to do so on the open market.

The District Judge granted the application, but took 4 months to deliver written judgment. The appellants appealed to His Honour Judge Matthews, sitting as a High Court Judge.

The appeal

The appellants argued that the 4 months' delay between the hearing and the production of the judgment was ground in itself for an appeal. The judge disagreed. He referred to the decision of the Court of Appeal in *Bond v Dunster Properties Ltd* [2011] EWCA Civ 455, in which a 22-month delay in producing a judgment was held not to be good ground for allowing any appeal in and of itself, in the absence of any other basis for challenging the trial judge's conclusion (§9-11).

The main appeal concerned the substantive direction that the respondent be permitted to buy out the other beneficiaries' interests at a price to be determined by a valuation report. The judge set out the law on this issue as recently considered by the Court of Appeal in *Bagum v Hafiz* [2016] Ch 241 (§12-16) and the High Court in *Collins v Collins (No 2)* [2016] 2 P & CR 6, para 87 (§17).

The first appellant raised the following criticisms of the judge's exercise of his discretion, all of which were rejected by the judge:

1) The court had no power to direct the sale of the property to only one of the beneficiaries under s 14 TLATA. The judge said there was 'nothing in this point'. The Court of Appeal had determined in Bagum that the direction could be given where appropriate in all the circumstances, recognising that it is an unusual form of order. This was such a case (§16, 18-19).

2) It was wrong for the trial judge to take into account a previous agreement in principle to sell the property to the respondent at a value to be agreed with the appellants, as such had never been a legally enforceable

agreement (§20). The judge disagreed; it was a relevant consideration and – arguably – on the facts it raised an equity in favour of the respondent in any event (§20).

3) The trial judge should not have paid any attention to the wishes of the beneficiaries, because they had no right of occupation and not all were trustees (§23). The judge dismissed this as misunderstanding the difference between an interest in possession (which the beneficiaries had) and a right to occupy (which was a practical consideration). Further, he could not find support anywhere in the statute or authorities for the contention that the wishes of beneficiaries cannot be taken into account unless they were trustees (§24-26).

Two further points were argued on behalf of the second appellant, neither of which were accepted by the judge:

4) As trustee she was bound to obtain the best possible price for the sale of the trust asset, which could only be done through a sale on the open market (§29). The judge disputed that a trustee was always bound to obtain the best possible price; the duty was to obtain the 'best price reasonably obtainable in the circumstances'. Further, this was a trust (now) with only three beneficiaries of full capacity and if there was a private sale to one of themselves at a given price none could have complained. Further, and crucially, the fundamental problem with the appellant's argument was that this was not a decision taken by a trustee to sell, but was a decision being taken by the court within its discretion as provided for by statute (§30-32).

5) As the property was unique the value could not be obtained by valuation mechanisms, but only by marketing it on the open market. This was, the judge found, entirely untrue on the facts of the case and was contrary to an express finding made by the trial judge (§33-36).

The judge therefore concluded that there had been no error of law, or procedural unjustness. The trial judge's decision fell well within the generous ambit of discretion afforded to him under TLATA. The appeal was dismissed.

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

The Child and Family Agency (Ireland) v M & Ors [2018] EWHC 1581 (Fam)

The case concerned J, a boy, who was born in Ireland in 2015 and was the subject of care proceedings in that jurisdiction. In 2014, J's brother, R, had been removed from his parents' care in Wales after being admitted to hospital with multiple soft tissue and bone injuries. Care proceedings in respect of R ensued and whilst the mother initially claimed not to know how R sustained the injuries, she later claimed to be "100% certain" that the father had inflicted the injuries on R. After a 4-day contested hearing, the Judge found that one of the parents had inflicted the injuries on R but he could not determine which one. R was therefore made the subject of care and placement orders and was later adopted.

The mother was pregnant with J during the final hearing in respect of R and in late 2015 she travelled to Dublin, where she gave birth to J. Shortly after his birth, J was made subject to protection by the Gardaí and was subsequently placed with foster carers with the mother's consent. An application for an interim care order and a care order was later initiated on 29 July 2016 and between 2015 and 2017, a number of professional assessments were undertaken of the mother. It was not until 9 May 2017 that the CFA issued an application for transfer of the proceedings to England and Wales pursuant to Article 15 of EC Regulation 2201/2003, notwithstanding that on 3 May 2017 the Irish court determined that the Irish court had jurisdiction pursuant to Article 13 BIIa, namely J's physical presence in Ireland.

On 4 October 2017, a hearing took place in the Irish courts and on 6 October 2017 the Judge concluded that the first two of the three requirements set out in Article 15(1) were satisfied. He held that the courts of England and Wales were better placed to hear the case because (i) the father of R was present in England and Wales and would be a compellable witness as to the circumstances of R's injuries, when he would not be compellable in Ireland and (ii) the documentary evidence relating to R's injuries would be admissible in proceedings in England and Wales but might not be in proceedings in Ireland. In a subsequent judgment, the Judge decided that the third requirement set out in Article 15(1) was also satisfied, namely that it was in J's best interests for such a request to be made.

Current Proceedings

The current proceedings considered the application pursuant to Article 15(5) of BIIA made by the CFA on 23 January 2018 inviting the courts of England and Wales to assume jurisdiction. In addition to the parents and the child's guardian, Flintshire County Council (who had brought proceedings in respect of R) and Denbighshire County Council were identified as "interested parties" because both had the potential to become the designated authority should the transfer been accepted.

All of the parties to the proceedings provided lengthy skeleton arguments and the issues that arose can be broadly summarised as follows:

1. Should there be a reference to the Court of Justice of the European Union in respect of a number of issues relating to the interpretation of Article 15, as suggested by the CFA?

2. Was the application now out of time given the six-week time limit to accept jurisdiction under Article 15(5) had passed?

3. Was it in J's best interests for this court to accept the request?

4. If so, which local authority should be designated?

In respect of issue (1), the court considered Art. 267 of the Treaty of the Functioning of the European Union, which sets out the circumstances in which a Preliminary Reference may be made to the CJEU, and concluded it was not necessary to make a reference to the CJEU as the court could interpret Article 15 having regard to fundamental principles, in particular Article 24 of the EU Charter of Fundamental Rights. The court raised additional concerns about the delay that any reference to the CJEU would have to a permanency plan for J.

In respect of issue (2), the court held that the time limit contained within Article 15(5) should not be strictly applied so as to prevent the court accepting a request outside the six-week limit. The Judge's reasoning, which is set out at paragraph 31, focuses largely on what is in the best interests of the child.

In respect of issue (4), the court noted that whilst Article 15(5) BIIa does not state that the receiving state should make its own evaluation of the best interests of the child, it is implicit in the Regulation and confirmed in the case law that that it is the essential function of the receiving court. After considering the relevant CJEU and domestic case law, the court held on a provisional basis that it was in J's best interests to accept the request for transfer, as this would allow the determining court to have the best evidence available before it when making decisions about J's welfare. The decision was given on a provisional basis until such time as the court received confirmation that J could remain with his foster carers in Ireland for the duration of the care proceedings in Wales.

Finally, the court held that the designated authority was Flintshire County Council as it was the authority in which the circumstances of the injury to R arose.

Summary by **Bianca Jackson**, barrister, **Coram Chambers**

Thum v Thum [2018] EWCA Civ 624

The wife had issued her divorce petition in England on 26 October 2015, while the husband had issued his petition in Germany on 20 January 2016. However, the husband was not served with the English petition until 27 February 2016 ie just over four months after the date of issue. Whether the wife had taken all necessary steps for effective service would determine whether the English or German Court was first seised for the purposes of Article 19 of BIIa.

At first instance, Mostyn J had dismissed the husband's application for a stay or dismissal of the wife's petition on the basis that the English court was second seised.

The husband appealed arguing that Mostyn J's interpretation of the effect of the provision in Article 16(1)(a) was wrong, and that Mostyn J was wrong to conclude that the wife had not failed to take the steps she was required to take to have service effected. The husband relied on the wife's delay in effecting service and argued that service had been ineffective by virtue of the husband initially being served at his business address in Germany, rather than his home address. The husband sought that a time limit be implied into FPR r7.8, namely that service be effected "as soon as possible" or "as soon as practicable".

The wife submissions in reply were that she had not failed to take any required steps. FPR r7.8 specifies no time by which service must be effected and the question of what steps are required under the Article 16(1)(a) proviso is to be determined by domestic law. The issue of whether any additional obligations, as to time limits, should be imposed is a matter for the Family Procedure Rule Committee, not the Court.

The Court of Appeal agreed with the wife's submissions and ultimately dismissed the husband's appeal. The Court of Appeal was persuaded that the wife had not failed to take any required step for effective service, nor could a time-limit for service be read into FPR r7.8. Moylan LJ giving the lead judgment commented at paragraph [60] that:

> "Service is a critical part in the conduct of proceedings and parties need to know easily and clearly what they must do in order to comply with the rules as to service. It might be sensible or even appropriate for some additional specific obligation to be included but I can see no principled basis on which such can be implied. What period would be selected and why would that period be appropriate? In this context, what would "as soon as possible" or "as soon as practicable" mean?"

However, the Court of Appeal judges were agreed that the outcome of the appeal was "not entirely satisfactory" and acknowledged that it could be "undesirable for a party to seise the court without the respondent being served reasonably

promptly" [paragraph 77]. As such, the Justices invited the Rule Committee to consider whether any additional obligations as to service should be included in the FPR 2010.

Summary by **Patrick Paisley**, barrister, **1 Garden Court Family Law Chambers**

M (BIIa Article 19: Court First Seised) [2018] EWCA Civ 1637

The Mother is Polish, the Father Hungarian, they resided in England as a family from 2012 to 2016. On 19 May 2016 the Mother travelled with the children to Poland for a holiday and refused to return, informing the Father that she wanted a divorce. The children's time spent with their Father between 2016 – 2018 was sporadic, the Mother bringing them back to the UK, the Father unilaterally taking them to Hungary, and the Mother again unilaterally taking the children back to Poland. The Court of Appeal observed that neither parent could be proud of their actions.

Litigation:

Both parents sought to establish jurisdiction, and a raft of applications followed:

> (a) On 2 June 2016, the mother applied to the Polish Court for Custody, this application was dismissed as it was not served on the Father, as the children were in England at that time, the Polish Court held it lacked jurisdiction.
>
> (b) On 4 July 2016 the Father, applied to the English Court for a child arrangements order and a prohibited steps order to prevent the children's removal from England. This order was granted, and at the return date hearing on 18 July, the mother raised the issue of jurisdiction but did not inform the court that her application had been dismissed. The judge therefore stayed the English proceedings pending confirmation from the Polish court that there were applications pre-dating the application to the English court and, if such confirmation were received, invited the Polish court to determine the issues of jurisdiction and habitual residence. In the meantime, the court ordered that neither parent was to remove the children from England and Wales, save for Court hearings in Poland. It was in purported reliance on this proviso that the mother removed the children to Poland on 30 July 2016 without the father's knowledge.
>
> (c) On 13 July 2016, the mother issued an application for divorce in Poland.
>
> (d) On 1 August 2016, the mother requested the Polish Court reverse its decision to assume jurisdiction. On 5 August, the Polish Court accepted jurisdiction, established the children's residence with their mother until a final decision could be made. On the same day the Father's application for enforcement in this jurisdiction was heard, the Court considering Mother had been entitled to take the children to Poland for a hearing but ordered their return to England by 10 August. On that date the Polish court supplied the English Court with information about the Mother's application of 2 June 2016, inferring it already had jurisdiction.
>
> (e) In October 2016 the father issued a child abduction application to be heard by the Polish Court, which was heard and dismissed on 7 December on the grounds that the children were not habitually resident in this jurisdiction when they were removed to Poland by the mother, and on the basis of grave risk of harm (Article 13b). On 28 March 2017, the father appealed that decision along with the decision of the 5 August 2016 in relation to jurisdiction. Both of Father's appeals were dismissed by the Polish Court on 13 June 2017, which, importantly, found that in respect of jurisdiction the Polish proceedings "started on 2 June 2016", that the judge's decision on habitual residence had been correct and that the December decision in regard to the child abduction application had also been correct.

The sequence of events giving rise to the appeal were that in March 2017, the father applied to lift the stay on his Children Act proceedings and sought declarations establishing an English jurisdiction over the children and an order for their return. The mother did not attend that hearing she asserted that the Polish court had exclusive jurisdiction and asked for the English proceedings to be suspended, and in the alternative, that her evidence be heard by video link "by way of judicial assistance by the Polish court". The matter was listed for a 2 day hearing. Both parents were required to attend that hearing, but for the mother to give evidence by video link if she notified the court and the father's solicitors of her wish to do so by 26 June. The matter came before Mostyn J on 31 October and 1 November 2017. The mother did not attend. Mostyn J found that the English court had exclusive jurisdiction, and he ordered the mother to bring the children to this country by 15 December for them to live in the family home with alternating week-on week-off care from each parent: see *GM v KZ* [2017] EWFC 73. The mother immediately responded on 15 November, drawing attention to the requests made by her in her message to the court of 26 June asking for assistance with the video link. Mostyn J treated the mother's response as an application to set aside his judgment under rule 27.5 of the Family Procedure Rules 2010, and listed the matter for hearing.

On 21 November, the Consular Section of the Embassy of the Republic of Poland in London wrote to the court asserting that a request to take direct evidence from the mother had to be made via the Polish Central Authority pursuant to Article 17 of Council Regulation (EC) No. 1206/2001 ("the Evidence Regulation"). The mother had agreed to attend by video link

but the English court had not approached the Polish court to make the necessary arrangements for her to do so. On 22 November, the matter again came before Mostyn J. The father attended but the mother did not. He ruled that FPR 27.3 required the mother's personal attendance, but that the order of 15 November had allowed her to attend by telephone or video link as a concession, and he noted that she had been given all the necessary contact numbers. As no oral evidence would be taken on a set-aside application, the Evidence Regulation was not relevant. In the light of what the judge described as "the continued meritless obstacles generated by the mother to remote participation in any form.

On 4 December 2017, the mother formally applied to set aside the 14 November order on the basis that the procedure under the Evidence Regulations had not been followed. Mostyn J heard the matter on 22 January 2018 and dismissed the mother's application to set aside his November decision, refixed the date for the children to be returned to England as being 27 February: see *GM v KZ (No 2)* [2018] EWFC 6.

The Mother sought, and was granted permission to appeal on the basis that: (1) The judge was wrong to hold that the Polish Court was not seised of the matter as at 4 July 2016, when the English proceedings were first issued, (2) The judge impermissibly reviewed the jurisdiction and merits of the decisions of the Polish courts, (3) The judge was wrong to find that the mother did not have a good reason for attending the hearing on 31 October, (4) An order for the children's return should not have been made as it did not take proper account of their welfare (5). In consequence of all the above, the decision in January not to set aside the November decision was wrong:

The Law:

The Court of Appeal considered inter alia the law regarding applications to set aside orders, jurisdiction in matters of parental responsibility, and the taking of evidence from EU Member States. (1) Rule 27.5 of the Family Procedure Rules 2010 which governs the approach to setting aside a judgment or order following a party's failure to attend sets out as follows:

> "**27.5**
> (1) Where a party does not attend a hearing or directions appointment and the court gives judgment or makes an order against him, the party who failed to attend may apply for the judgment or order to be set aside.
>
> (2) An application under paragraph (1) must be supported by evidence.
>
> (3) Where an application is made under paragraph (1), the court may grant the application only if the applicant –
>
> (a) acted promptly on finding out that the court had exercised its power to enter judgment or make an order against the applicant;
>
> (b) had a good reason for not attending the hearing or directions appointment; and
>
> (c) has a reasonable prospect of success at the hearing or directions appointment."

The hurdles presented by sub-rule (3) are cumulative. If the application is to succeed the applicant must clear them all.
...

36. It should be noted that FPR 27.3 requires that unless the court directs otherwise, a party shall attend a hearing or directions appointment of which that party has been given notice. This provision is specific to family cases, but it is not infrequently relaxed, particularly in international cases where a party is represented or able to attend by telephone or video link: it will all depend upon the circumstances.
...

38. Questions of jurisdiction, recognition and enforcement in matters of parental responsibility are governed by the Council Regulation (EC) No 2201/2003 ('Brussels IIa'). The purpose of the Regulation is to promote judicial cooperation (Recital 1), with recognition and enforcement of judgments to be based on the principle of mutual trust (Recital 21).

39. Article 8(1) supplies the foundation for jurisdiction in cases of parental responsibility:

> "**Article 8**
> **General jurisdiction**
> 1. The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.
>
> …"

40. Articles 19(2) and (3) relate to actions proceeding in more than one state:

"**Article 19**
Lis pendens and dependent actions
…

2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court.
…"

41. Article 16(a) defines seising:

"**Article 16**
Seising of a Court
1. A court shall be deemed to be seised:

(a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent;
…"

The requirement of the proviso is not an obligation to serve but rather an obligation to take the steps one is required to take to have service effected, as prescribed under domestic law. It is therefore necessary to know what domestic law requires before it can be said that there has been a failure.

...

43. Articles 24 and 26 preclude the review of matters of jurisdiction or of substance:

"**Article 24**
Prohibition of review of jurisdiction of the court of origin
The jurisdiction of the court of the Member State of origin may not be reviewed.
…
Article 26
Non-review as to substance
Under no circumstances may a judgment be reviewed as to its substance."

...

45. Article 55 provides a mechanism whereby information about a child's situation can be obtained from another state:

"**Article 55**
Cooperation on cases specific to parental responsibility
The central authorities shall, upon request from a central authority of another Member State or from a holder of parental responsibility, cooperate on specific cases to achieve the purposes of this Regulation. To this end, they shall, acting directly or through public authorities or other bodies, take all appropriate steps in accordance with the law of that Member State in matters of personal data protection to:

(a) collect and exchange information:

(i) on the situation of the child;
…"

46. Finally, the taking of evidence from another Member State is governed by the Evidence Regulation. Article 17 establishes a machinery whereby the court requesting the evidence submits a request in prescribed form to the central authority of the other state. Arrangements can then be made for the witness to attend at the domestic court, either to give evidence to a judge there, or to give evidence by video link to the requesting court. These provisions are incorporated into our rules of court by FPR Practice Direction 24A, in particular at paragraph 9.

Decision of the Court of Appeal:

In conclusion, allowing the Mothers appeal, and finding that the Polish Court was seised with jurisdiction, the decision of the Court of Appeal was as follows:

Neither parent could be proud of their actions. It is understandable that the judge was concerned at the mother's removal of the children from England without the father's knowledge and agreement, not once but twice, and by her reluctance to participate in these proceedings except on her own terms. He was also clearly bemused at the Polish court's reversal of its original ruling on jurisdiction. Nevertheless, it was concluded that the Learned Judge's decision to refuse the mother's application for the re-opening of his November decisions was wrong in a number of ways:

(i) The mother's non-attendance: the judge was wrong to give no weight to her argument, subsequently reinforced by the Polish authorities, that she should have been given the opportunity to give evidence under the procedure contained in the Evidence Regulation, with arrangements for that being made court-to-court.

(ii) Where there is a reasonable prospect of success the court should not take a very rigorous approach to what constitutes a good reason for non-attendance, particularly when it is considering an international case with a foreign litigant in person. The judge mis-evaluated the issue under rule 27.5(3), in that he held the Evidence Regulation to be irrelevant, and that (in the light of the jurisdictional merits discussed below) he took an unduly rigorous approach to the mother's explanation for non-attendance.

(iii) Reasonable prospects of success: On the question of jurisdiction, the first issue is whether the Polish court became seised on 2 June 2016. There is no doubt that it did, on the lodging of the mother's application. The next, and critical, issue is whether the Polish court remained seised between 14 July 2016 (when the mother's application was dismissed) and 5 August 2016 (when it was granted), or whether, as the judge found, seisin was lost by virtue of the decision of 14 July 2016, with the result that the English proceedings that had begun on 4 July 2016 then took precedence.

(iv) Under BIIa, where there are proceedings in more than one Member State, seisin is the gateway to establishing which proceedings take precedence. One must therefore identify what were the relevant "proceedings" for purposes of Articles 16 and 19 of BIIa. Here, the position under the domestic law of the Member State becomes significant. As these are domestic proceedings, the answer is in all normal circumstances one that the domestic court is best placed to provide. Here, it was of considerable significance that the Polish courts of first instance and of appeal considered that their seisin had continued uninterrupted since 2 June 2016. That was something to which the judge was obliged to give very considerable, and arguably decisive, weight but did not.

(v) The judge's analysis of the issue of seisin was accompanied by his own evaluation that the children had "obviously" been habitually resident in England, both on 2 June and 4 July. This in turn led him to characterise the Courts decisions in the Polish Court as incorrect. Whatever its merits, the critique by the learned Judge amounted in a review of jurisdiction and of substance that was impermissible by virtue of Articles 24 and 26.

(vi) Service: The judge's conclusion at paragraph 33 of his first judgment was that in order to seise the Polish court definitively it was necessary to serve the process on the father. That is not correct as a matter of EU law. A court is seised when proceedings are "lodged", but subject to the proviso that the applicant has not failed to take the required steps for service to be effected. In this case, it seems that the court was responsible for service, and the judge had no evidence that could have led him to conclude that the mother was in default so as to trigger the condition that would remove seisin from the Polish court. This issue therefore could not represent the obstacle to the mother's case that the judge considered it to be.

(vii) The overall consequence is that the mother's application to set aside the 14 November 2017 order should have been allowed on the basis that she had had a good reason for non-attendance and a reasonable prospect of success within the terms of FPR 27.5. Even if the English court had had jurisdiction, the judge was wrong to direct the summary return of the children to England. They had been in Poland for 18 months by the time of the January order. They were subject to active Polish proceedings in which the father had participated, and the Polish court had specifically declined to order their return, both at first instance and on appeal, and had placed conditions upon the father's contact. In these circumstances, an order for summary return into the alternating care of each parent was an exceptionally strong order and one that required strong justification. The judge did not have enough reliable information to know where the children's best interests lay. At the least, the judge should have considered obtaining further information, for example through the Article 55 mechanism, about the children's perspective and current circumstances before considering a return order and an order for their transfer into equal shared parental care.

(viii) The purpose of the Brussels regulation is to foster practical comity between jurisdictions for the benefit of families. This calls for an acceptance of outcomes that are on occasion surprising or unpalatable. Where a case does not fall within the grounds for the non-recognition of orders under Article 23, criticism of the courts of other jurisdictions is not warranted.

(ix) In conclusion, the Polish court became and has remained seised of jurisdiction in relation to these children as from 2 June 2016. Accordingly, the English courts must under Art. 19(3) decline jurisdiction in relation to matters of parental responsibility in favour of the courts of the Republic of Poland. The Mother's appeal was allowed, the proceedings brought by the father were dismissed. The outcome was said to be very far from resolving the many difficulties in the family's situation, but at least it removed the additional obstacles that arose from the existence of irreconcilable decisions.

Summary by **Judi Evans**, barrister, **St John's Chambers**

Williams and another v London Borough of Hackney [2018] UKSC 37

PRESS SUMMARY

18 July 2018

BACKGROUND TO THE APPEAL

This appeal concerns the limits of a local authority's powers and duties to provide accommodation for children in need under section 20 of the Children Act 1989 ('CA').

The appellants are the parents of eight children, at the relevant time aged 14, 12, 11, 9, 7, 5, 2 and 8 months. On 5 July 2007 their 12-year-old son was caught shoplifting. He told the police that he had no money for lunch and that his father had hit him with a belt. The police visited the family's home and found it in an unhygienic and dangerous state unfit for habitation by children. The police exercised their powers under s 46 CA to remove the children to suitable accommodation for a maximum of 72 hours. The children were provided with foster placements by the respondent local authority ('the Council'). The appellants were arrested and interviewed by the police, then released on police bail on condition that they could not have unsupervised contact with any of their children.

The appellants were asked to sign a 'Safeguarding Agreement' by the Council on 6 July 2007 by which they agreed that all the children would remain in their foster placements for the present time. They were not informed of their right, under s 20(7) CA to object to the children's continued accommodation after the expiry of 72 hours, nor of their right, under s 20(8), to remove them at any time. On 13 July, solicitors instructed on their behalf gave formal notice of the appellants' intention to withdraw consent. On 16 July the Council decided that the children should be returned home as soon as possible. However, it took until 6 September for the Council to arrange with the police for the bail conditions to be varied, whereupon the children returned home on 11 September 2007.

Criminal proceedings against the appellants were later discontinued. In July 2013 the appellants issued proceedings claiming damages, amongst other things, for breach of their rights under article 8 of the European Convention on Human Rights. The High Court dismissed all the claims except for the article 8 claim, which was upheld on the basis that, because the parents had not given their informed consent, there had been no lawful basis for the accommodation of the children after 72 hours, so that the interference with family life was not in accordance with the law. The judge awarded each of the appellants damages of £10,000. The Court of Appeal allowed the Council's appeal, holding that consent was not required and that there had been a lawful basis for the children's accommodation under s 20 CA, and the interference with their article 8 rights had been proportionate.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. It holds that the appellants did not object or unequivocally request the immediate return of the children, so there had been a lawful basis for the children's continued accommodation under s 20 CA. Lady Hale gives the only substantive judgment.

REASONS FOR THE JUDGMENT

Local authorities in England look after a substantial number of children (over 70,000 in March 2017), either as part of a range of services provided for children in need, or under powers to intervene compulsorily to protect children from harm. Compulsory intervention by a local authority requires the sanction of a court process. No court order is required for the authority to provide accommodation for children in need under s 20 CA. However, it is subject to the right under s 20(7) for a person with parental responsibility for the child, who is willing and able to provide accommodation for him or arrange for accommodation for him, to object, and to the provision in s 20(8) that 'any person who has parental responsibility for a child may at any time remove the child from accommodation provided by or on behalf of the local authority under this section' [**1-2**]. In short, it is a voluntary service.

If a parent delegates the exercise of his or her parental responsibility for a child to the local authority under s 20 CA, such delegation must be real and voluntary. The best way to ensure this is to inform the parent fully of their rights under s 20, although delegation can be real and voluntary without being 'informed' [**39**]. No such delegation is required where the local authority steps into the breach to exercise its powers under s 20 where there is no-one with parental responsibility for the child, the child is lost or abandoned, or the parent is not offering to look after the child. In those circumstances active delegation is not required [**40**]. If a parent with unrestricted parental responsibility objects at any time pursuant to s 20(7), the local authority may not accommodate the child under s 20, regardless of the suitability of the parent or of the accommodation which the parent wishes to arrange [**42-43, 47**]. It is not a breach of s 20 to keep a child in accommodation

for a long period but a local authority must also think of the longer term and consider initiating care proceedings in order to fulfil its other duties under the CA, and to avoid breaches of the child's or the parents' rights under article 8 [**49-52**].

In the present case, where the s 20 arrangements replaced the compulsory police protection under s 46 without the children returning home in the meantime, the focus was not on the appellants' delegation of parental responsibility to the Council, but on their rights under subsections 20(7) and 20(8) [**53**]. Entering into a safeguarding agreement was a matter of good practice, although it was important that it did not give the impression that the parents had no right to object or to remove the children [**55**]. The lawfulness of the s 20 accommodation depended on whether the appellants' actions amounted to an unequivocal request for the children to be returned. The bail conditions were not an insuperable impediment to the request and were not a reason to refuse [**57**]. However, the letters from the appellants' solicitors could not be read as an objection or as a request for immediate return: the solicitors were sensibly trying to achieve the return of the children as quickly as possible on a collaborative basis rather than push the Council into issuing care proceedings [**59**]. Although the Council could have provided earlier support for an application to lift the bail conditions, it was not possible to say what effect this would have had, given the independent concerns of the police [**60**].

Accordingly, there was a lawful basis for the children's continued accommodation under s 20 and the ground relied on by the judge for finding a breach of the appellants' article 8 rights was not made out [**61**]. The question of whether the Council's actions were a proportionate interference with the right to respect for family life throughout the time the children were accommodated was not fully explored in the lower courts and was not raised as an issue before the Supreme Court [**62**]. The appeal is therefore dismissed, albeit for reasons which differ from those of the Court of Appeal [**63**].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: *http://supremecourt.uk/decided-cases/index.html*

Mills (Appellant) v Mills (Respondent) [2018] UKSC 38

PRESS SUMMARY

***Mills (Appellant) v Mills (Respondent)* [2018] UKSC 38**
On appeal from **[2017] EWCA Civ 129**

18 July 2018

JUSTICES: Lady Hale (President), Lord Wilson, Lord Carnwath, Lord Hughes, Lord Hodge

BACKGROUND TO THE APPEAL

The Appellant and Respondent are former husband and wife. They divorced in 2002 after a marriage of approximately fifteen years, and the financial issues in the divorce were resolved by way of a consent order. Under the terms of that order the wife received £230,000 in settlement of her capital claims against the husband, and it was also agreed that the husband would make periodical payments to her at an annual rate of £13,200.

It was reasonably anticipated by the husband that the wife would use the £230,000 to purchase a suitable home for herself and their son without a mortgage, as the wife had been suffering from ill health which made it difficult for her to work. In the event, however, the wife did manage to take out a mortgage, and she duly purchased a more expensive home for £345,000. Between 2002 and 2009 the wife sold and purchased a series of different properties, and with each purchase the amount which she borrowed increased. In addition, she did not necessarily reinvest all of the sale proceeds from one property into the next and seemingly spent the balance, with the result that the amount of capital she had decreased over time. Eventually, in 2009 the wife sold her final property and began to rent accommodation. By April 2015, when the first-instance judge heard the case, the wife had no capital, and she had debts of around £42,000.

The hearing before the judge was to determine two cross-applications made under s.31(1) of the Matrimonial Causes Act 1973. The husband had applied for the discharge or downwards variation of the order for periodical payments, whereas the wife had applied for the order for periodical payments to be varied upwards. In determining the applications the judge noted that there was a shortfall of £4,092 per annum between the wife's current needs and, when coupled with her own earnings, the existing level of the periodical payments. However, he also held that, although the wife's actions had not been profligate, she had not managed her finances wisely and her current financial needs, in particular her need to pay rent, had been increased by the choices which she had made. Consequently, the judge considered that it would be unfair to the husband if he had to make a full contribution to the wife's rental costs. The judge therefore declined to vary the order for periodical payments either upwards or downwards. This meant that the husband would continue to contribute to around 60% of the wife's rental costs, and the wife would have to adjust her expenditure to accommodate the shortfall.

The wife appealed against this decision to the Court of Appeal, and was successful. The Court of Appeal considered that the judge had not given sufficient reasons why all of the wife's basic needs should not be met by the periodical payments

from the husband, and increased the level of periodical payments to cover her shortfall, i.e. to £17,292. The husband now appeals against this decision to the Supreme Court.

JUDGMENT

The Supreme Court unanimously allows the appeal, concluding that the judge was entitled to decline to vary the order for periodical payments so as to require the husband to pay all of the wife's rental costs. Lord Wilson gives the judgment with which Lady Hale, Lord Carnwath, Lord Hughes and Lord Hodge agree.

REASONS FOR THE JUDGMENT

The husband was granted permission to appeal to the Supreme Court only on a single ground - whether, in light of the fact that provision had already been made for the wife's housing needs in the capital settlement, the Court of Appeal was entitled to interfere with the judge's decision not to increase the periodical payments so as to cover all of the wife's current rental costs [**32**].

The Court of Appeal had erred in saying that the judge had given no reason for declining to increase the order for periodical payments – the judge had given a clear reason, namely that the wife's unwise decisions in relation to her capital had increased her basic needs by requiring her to pay rent, and that it was consequently unfair to expect the husband to meet these increased needs in full [**33**].

The Court of Appeal should have considered the impact of the original capital payment on the wife's current need to pay rent, and this involved a consideration of three earlier Court of Appeal authorities: *Pearce v Pearce* [2003] EWCA Civ 1054, *North v North* [2007] EWCA Civ 760, and *Yates v Yates* [2012] EWCA Civ 532 [**34-38**]. These cases were correctly decided and in light of this the judge was entitled, although not obliged, to decline to require the husband to fund payment of the rent in full. This respects the wide discretion conferred upon the court under s. 31(1) and (7) of the Matrimonial Causes Act 1973 in determining an application for variation of an order for periodical payments. Moreover, a court would need to give very good reasons for requiring a spouse to fund payment of the other spouse's rent in the circumstances of this case. A spouse may well be obliged to make provision for the other spouse, but an obligation to duplicate that provision in situations such as this is improbable [**40**].

References in square brackets are to paragraphs in the judgment

NOTE

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Lancashire County Council v A, B and Z (A Child Fact Finding Hearing Police Disclosure) [2018] EWHC 1819 (Fam)

This case concerned Z, a girl aged 22 months. On 16 August 2017 Z's sister X died of severe brain and spinal injuries caused by a shaking injury with impact. X also sustained haemorrhaging to her eyes and bruising, and 36-72 hours before death sustained head injuries, bruising and a metaphyseal fracture of her left femur. On both occasions X was in the care of her mother (A) and father (B), and Knowles J found both parents had lied about what happened and found that X was injured by either A or B, and could not decide who was responsible. [§1]

Knowles J set out the legal and practice framework in relation to disclosure [§7-10] and summarised the key features of disclosure relevant to this case [§11], including the local Protocol adopted by Lancashire Constabulary ("the police"). [§13].

Knowles J outlined the disclosure that had taken place in these proceedings [§15-26] On day five it came to light the police held material that they did not consider relevant, including a statement from the social worker about A's handling of Z during contact [§26] and extracts from the parent's social media accounts [§28]. On day nine, 900 pages of extra material were provided [§2, §25]. This extended the hearing time to ensure the proceedings were fair, and that all parties had time to consider the evidence, and 2-3 days of court time were lost [§28].

One of the main issues was that Disclosure Team within the police did not have access to the HOLMES2 system managed by the Force Major Investigation Team, meaning they were unable to see the full list of material in the possession of the police relating to X's death [§31].

At the conclusion of the hearing the police and the parties were invited to submit in writing what had gone wrong and how this could be avoided in future [§4]. Upon hearing these submissions, Knowles J proposed a number of practical solutions to the problems of police disclosure.

Firstly, she advised that all the police forces in England and Wales should check their own data management systems to ensure that the problem evident in this case was not present in their own organisation. Local authority lawyers should also check with their local police force which data management system is being used to record information and confirm the disclosure team in that force has access to the relevant system [§33-34, §47].

Secondly, there was confusion from junior officers as to what may be relevant information for family proceedings and the difference between adherence to the Protocol (local or national), and compliance with a court order. Such training issues needed to be addressed [§35].

Knowles J highlighted that these proceedings are quasi inquisitorial and the local authority bear the lion's share of assisting the court to determine its application and pertinent issues in the case, and it does so by ensuring the evidence is complete and in order [§40]. The local authority must be fair, independent and objective and should always act in the interests of justice and not solely for the purpose of obtaining the order it may seek [§41]. The judge highlighted the jurisprudence on this matter [§42-44].

Mrs Justice Knowles [§48] quoted the judgment of Francis J in *London Borough of Southwark v US and Others* [2017] EWHC 3707 (Fam) where he suggested that:

> i) The local authority will make a protocol request to police at least 14 days prior to issue of S31 proceedings, unless made on short notice when the request shall be made on issue.
>
> ii) Not later than seven days prior to the CMH, the local authority will issue an application (and serve it on the police) for disclosure against the relevant police authority. The local authority will invite the court to list the application for disclosure on the same day as the CMH. The senior investigating police officer should be invited to attend the CMH and be legally represented.
>
> iii) Applications to withhold disclosure should be made not less than two days prior to the CMH, setting out clear reasons why disclosure is opposed.
>
> iv) Upon receipt of application for disclosure or protocol request, the police will provide a schedule of all relevant evidence and material, including a description, whether they agree to disclosure and if not why disclosure is opposed.
>
> v) At the CMH the police will provide the court with details of any offences, whether the suspect has been charged, custody status, any applicable bail conditions and criminal court timescales.
>
> vi) If the police oppose disclosure for irrelevance, they will provide a copy to the court for determination.
>
> vii) The local authority will continue to liaise with the police following the CMH and will update the parties and the court.
>
> viii) Prior to any fact finding/final hearing the police will confirm any new evidence and provide a further list or schedule.
>
> ix) Any PII application should be made as soon as practicable and in any event within seven days of that objection.
>
> x) Case management directions should be sufficiently clear to ensure the reader can understand the key decision making timetable. The pro forma disclosure order within the protocol should be used.
>
> xi) It is the police and local authority's responsibility to ensure police evidence is disclosed or the court has the time to determine any issues sufficiently in advance of any fixture to enable the fact finding/main hearing to proceed effectively.

In relation to (iv) – she stated the schedule should be provided 2 clear working days before the CMH, and should contain all evidence and material in the possession of the police at that time, not just what is deemed relevant by the police [§49]. There should be no obligation on the police to produce any of this evidence/material for inspection until either agreement is reached or the court has ruled on the matter. [§49].

She also suggested (at odds with the provisions of both the national and local Protocols) that consideration should be given to whether the court orders disclosure of all relevant evidence and/or material in the possession of the police [§50].

In addition to (v), the police should provide a copy of each adult's criminal record [§51].

In relation to continued liaison, Knowles J stated the police should produce an updating schedule of evidence/material 14 days before the IRH/directions hearing before any fact finding. This should be circulated to the parties and should identify: (a) what has been disclosed; (b) what has been deemed to be irrelevant; (c) anything which the court has ruled should not be disclosed; and (d) any new material or evidence and whether disclosure is opposed in relation to each piece of new evidence and, if so, on what basis. Having seen this schedule, the parties should let the local authority know what they consider to be relevant and, if agreed, the police should disclose the information to the local authority for onward transmission to the parties without delay. If disclosure is resisted, the police should make an application to the court. [§52]

Knowles J suggested 5 days prior to any IRH/directions hearing before a fact finding, a recorded meeting should take place between the local authority solicitor (preferably with the advocate conducting the case) and the police disclosure team, to check disclosure is complete and provide the court updates on the criminal process. This is not designed to

provide the police information about the family proceedings and prior to the meeting the parties should agree what the police should know (particularly as the publicly funded advocates may not be in attendance [§54]). Such a meeting should be authorised by the court at the CMH, and may be cancelled if unnecessary. [§53]

Finally, at the IRH/directions hearing before a fact finding the police should provide a signed declaration that the order for disclosure has been complied with [§55].

Summary by **Victoria Halsall**, pupil, **1 King's Bench Walk**

D (A Child) (Temporary Relocation) [2018] EWHC 1571 (Fam)

The mother had applied to remove the parties' son, D, to permanently live in Japan. That application was refused but the Judge lifted the Prohibited Steps Order ("PSO") which had prevented the mother from removing D from the jurisdiction. The father appealed the lifting of the PSO, his most significant argument being that the Judge had not considered the availability of measures in Japan to secure the return of the child.

The father described Japan as an "outlier" within the 1980 Hague Convention. He drew the court's attention to an article written by Mr David Williams QC (as he then was) and others published in the May 2017 edition of Family Law ([2017] 547). The article set out concerns about the limitations of enforcement remedies in Japan and that the Japanese system relies largely on voluntary compliance with an order. The authors suggested that "any parent faced with an application for temporary leave to remove to Japan should consider whether expert evidence is necessary to enable the court to determine the issue".

Baker J allowed the appeal. The Judge had failed to analyse the difficulties which may arise when seeking to enforce an order in Japan.

The father had proposed there be a PSO for a limited period of 2 years to enable the trust between the parties to be restored. Baker J considered this to be a proportionate and balanced proposal and duly substituted this order.

Summary by **Hannah Gomersall** barrister, **Coram Chambers**

Owens v Owens [2018] UKSC 41

PRESS SUMMARY

Owens (Appellant) v Owens (Respondent) [2018] UKSC 41
On appeal from [2017] EWCA Civ 182

25 July 2018

JUSTICES: Lady Hale (President), Lord Mance, Lord Wilson, Lord Hodge, Lady Black

BACKGROUND TO THE APPEAL

The Appellant, Mrs Owens, and the Respondent, Mr Owens, were married in 1978 and have two adult children. Mrs Owens had been contemplating a divorce since 2012 (when she consulted solicitors who prepared a draft divorce petition for her) but it was not until February 2015 that she left the matrimonial home. The parties have not lived together since her departure. In May 2015 Mrs Owens issued the divorce petition which is the subject of the current proceedings. It was based on s.1(2)(b) of the Matrimonial Causes Act 1973, and alleged that the marriage had broken down irretrievably and that Mr Owens had behaved in such a way that Mrs Owens could not reasonably be expected to live with him. It was drafted in anodyne terms but when it was served on Mr Owens he nevertheless indicated an intention to defend the suit, arguing that the marriage had largely been successful.

In October 2015 the matter came before a recorder for a case management hearing. In light of Mr Owens' defence, the recorder granted Mrs Owens permission to amend her petition so as to expand her allegations of behaviour. The recorder also directed that the substantive hearing of the dispute would take place over the course of a day (Mrs Owens had originally suggested a half-day would suffice) and that there would be no witnesses other than the parties themselves. Mrs Owens duly amended her petition so as to include 27 individual examples of Mr Owens being moody, argumentative, and disparaging her in front of others, but at the one-day hearing her counsel ultimately focussed on only a very few of these.

The judge found that the marriage had broken down, but that Mrs Owens' 27 examples were flimsy and exaggerated, and that those relied on at the hearing were isolated incidents. Accordingly, the test under s.1(2)(b) was not met and Mrs Owens' petition for divorce was dismissed. Mrs Owens appealed against this decision to the Court of Appeal, but her appeal was also dismissed. She now appeals against the Court of Appeal's decision to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the appeal, with the result that Mrs Owens must remain married to Mr Owens for the time being. Lord Wilson gives the majority judgment, with whom Lord Hodge and Lady Black agree. Lady Hale and Lord Mance each give a concurring judgment.

REASONS FOR THE JUDGMENT

It is important to bear in mind the legal context to this dispute, namely that defended suits for divorce are exceedingly rare. While the family court recognises that s.1 of the Matrimonial Causes Act 1973 must be conscientiously applied, it takes no satisfaction when obliged to rule that a marriage which has broken down must nevertheless continue in being [**15**]. The expectations are that almost every petition under s. 1(2)(b) will succeed, that the evidence before any contested hearing will be brief, and that the judgment of the court in such a hearing will almost certainly result in the pronouncement of a decree [17]. This is the background to the contested hearing in this case, and explains why Mrs Owens' advisors agreed to a short hearing with no external witnesses to corroborate her evidence [**14-15**].

When applying s. 1(2)(b) the correct inquiry is: (i) by reference to the allegations of behaviour in the petition, to determine what the respondent did or did not do; (ii) to assess the effect which the behaviour had upon this particular petitioner in light of all the circumstances in which it occurred; and (iii) to make an evaluation as to whether, as a result of the respondent's behaviour and in the light of its effect on the petitioner, an expectation that the petitioner should continue to live with the respondent would be unreasonable [28]. This test has been applied for many years but the application of the test to the facts of an individual case is likely to change over time, in line with changes in wider social and moral values [30-32]. The most relevant change over the past forty years is the recognition of equality between the sexes, and of marriage as a partnership of equals [**34**].

At the hearing, the judge gave himself the correct self-direction; he understood he was applying an objective test, but with subjective elements [**39**]. The majority nevertheless have concerns about other aspects of the judge's analysis. In particular, they have an uneasy feeling about the summary despatch of a suit which was said to depend on an authoritarian course of conduct, when the judge had scrutinised only a few individual incidents of Mr Owens' behaviour [**42**]. However, uneasy feelings are of no consequence in an appellate court. A first-instance judge has many advantages in reaching the relevant conclusions, and Mrs Owens' complaints about the judgment have already been rehearsed and dismissed by the Court of Appeal. In such circumstances it is most unlikely for it to be appropriate for the Supreme Court to intervene [**43**]. However, the majority invite Parliament to consider replacing a law which denies Mrs Owens a divorce in the present circumstances [**44-45**].

Concurring judgments

Lady Hale agrees with Lord Wilson as to the legal analysis, but has several misgivings about the judge's judgment [**47-48**]. Her gravest misgiving relates to the fact that this was a case which depended upon the cumulative effect of a great many small incidents (which were said to be indicative of authoritarian and demeaning conduct over a period of time), yet the hearing before the judge was not set up or conducted in a way which would enable the full flavour of such conduct to be properly evaluated [**50**]. In light of her misgivings, she considers that the proper disposal is to allow the appeal, and send the case back to the first-instance court to be tried again. However, this is not a disposal which Mrs Owens is actually seeking, and Lady Hale is therefore reluctantly persuaded that the appeal should be dismissed [**53-54**].

Lord Mance also agrees with Lord Wilson as to the wider legal analysis, however he does not share the concerns expressed by Lord Wilson and Lady Hale about the judge's judgment. Lord Mance considers that the judge did not misdirect himself at any stage, and that the judge properly concluded that there was nothing in the case overall [**57, 59**]. Moreover, although the hearing of the defended divorce petition was listed for a relatively short period, this was how the judge was invited to decide the matter. It would be inappropriate for the Supreme Court to interfere at this stage and say it was not possible in the circumstances for the judge to have reached a fair determination [**58**].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

A (Children) [2018] EWCA Civ 1718

In a family of five children one of the children, S (who was ten years old), was found dead at around 10 am in the bedroom she shared with two of her siblings. A 999 call was made. It was initially believed that S's death was as a result of an accident, in that she had been strangled by some decorative netting around her top bunk.

A special post mortem was later conducted. In a preliminary report, it was concluded that S's death was probably the result of a sexually motivated homicide. As such the police were prompted to treat the death as a potential crime.

Unfortunately, the opportunity to gather critical evidence was lost due to the delay and the deficiency in the police investigation. The police investigation was the subject of considerable criticism at first instance.

Not only the parents, but also A (now aged 16) and B (now aged 14) were represented. The two boys had separate representation throughout as B had been considered by the police potentially to be responsible for his sister's death and both were within the "pool of potential perpetrators" in the care proceedings.

At first instance the Judge refused the Local Authority's applications for care orders in respect of the five children on the basis that the Local Authority had failed to prove that "the genital injuries and the fatal neck injuries suffered by S were deliberately inflicted". The Local Authority appealed those findings of fact and sought a re-trial.

The appeal

On behalf of the parents and A and B it was accepted, to various degrees, that the first instance judgment was susceptible to significant challenge. Despite this they each submitted that the judge had been entitled to reach the conclusion that he had. Further, each argued that if the judgment must be set aside there should be no further proceedings or retrial.

A range of criticisms were levied at the first instance Judge by the Local Authority, including that he had failed to properly analyse the nature and relevance of the genital injuries suffered by the child.

In addition, the Local Authority criticised the Judge's approach to the burden of proof. The Judge at first instance had held that, where there are rival hypotheses, the Judge is not bound to make a finding and that as a consequence the burden of proof is the only course to take. He noted that this this was "one of those unusual cases where the burden of proof comes to the judge's rescue". The Judge then aggregated the probability of 'innocent' causes (i.e. non-inflicted – suicide or accident) and found their aggregate to be more than 50 per cent. As such the Judge found that the Local Authority had not discharged the burden of proof.

The Court of Appeal held that the use of percentages and or 'aggregation' is not the proper approach to the judicial function in respect of the "simple application of the balance of probabilities". Rather, the starting point remains the test as articulated by Baroness Hale in Re B (Minors) [2008] 3 WLR 1HL. In the present case the Judge mistakenly attached a percentage to each of the possibilities and thereafter, added together the percentages which he attributed to an innocent explanation and before concluding that, only if the resulting sum was 49% or less, could the court make a finding of inflicted injury.

Rather, the court must look at each possibility, both individually and together, factoring in all of the evidence available including the medical evidence before deciding whether the "fact in issue more probably occurred than not". In particular:

> " i) Judges will decide a case on the burden of proof alone only when driven to it and where no other course is open to him given the unsatisfactory state of the evidence.
>
> ii) Consideration of such a case necessarily involves looking at the whole picture, including what gaps there are in the evidence, whether the individual factors relied upon are in themselves properly established, what factors may point away from the suggested explanation and what other explanation might fit the circumstances.
>
> iii) The court arrives at its conclusion by considering whether on an overall assessment of the evidence (i.e. on a preponderance of the evidence) the case for believing that the suggested event happened is more compelling than the case for not reaching that belief (which is not necessarily the same as believing positively that it did not happen) and not by reference to percentage possibilities or probabilities."

In essence, the judge had failed to look at the whole picture. The Court of Appeal held that "not only did he fail to marry up the fact that S sustained two sets of injuries (one of which was fatal) but the judge, faced with incontrovertible evidence in relation to the genital injuries, carried out no analysis of the available evidence in order to see whether an accident (for example) was a likely cause." "Only if, having carried out such a comprehensive review of the evidence, a judge remains unable to make findings of fact as to causation, can he or she be thrown onto the burden of proof as the determinative element." "In this most difficult of cases and in the most trying of circumstances, the judge failed to carry out such an analysis before relying on the burden of proof."

As such the appeal was allowed and the case was remitted for a re-trial.

Summary by **Luke Eaton**, barrister, **1 GC Family Law**

Harris v Harris [2018] EWHC 1836 (Fam)

The parties were married for three years and separated a few months before the birth of their son, who was 10 years old at the date of the appeal. The final order, which was made in 2009, provided for the payment of various lump sums, spousal maintenance in the sum of £1,250 per month for a term, and child maintenance at the rate of £850 per month.

In 2015, the husband applied to vary the spousal maintenance order. This application was settled by a consent order which Mr Justice Cohen described as "unusual". It provided for spousal maintenance, which was referred to as "representing only childcare costs", in the sum of £500 per month until the end of June 2017, and then £250 per month until the end of June 2018, when it would cease altogether, with a section 28(1)(a) bar. It also required the wife to provide the husband annually with copies of her employment contact, a breakdown of past childcare costs, and an estimate for future childcare costs.

Because the wife failed to comply with these obligations, the husband unilaterally decided to stop making these payments from June 2016. He applied for an order discharging him from the obligation to pay the wife spousal maintenance and requiring the wife to repay him £3,500 in "overpaid childcare costs". The wife cross-applied for capitalisation of spousal maintenance in the sum of £9,500 (which is £500 per month until June 2017, and then £250 per month until June 2018). In view of the husband's income, which was in excess of £200,000 per annum (gross), the court permitted the wife to amend her application to include a variation of the order for child maintenance.

The trial judge concluded that the spousal maintenance should be capitalised in the sum of £9,500. He directed the husband to pay the capitalised maintenance by December 2017, ordered him to pay £250 per month until he met the capitalised maintenance order, and directed that there would be interest on the sum of £9,500. The effect of this was that a total of £11,693 would become payable by 30 June 2018, assuming that the husband did not make the capitalised maintenance payment until June 2018 [10]. The trial judge also varied the child maintenance order to £1,600 per month, which would mean that the wife would receive c.£900 per month, owing to the 40.09% tax on maintenance payments in accordance with Belgian maintenance regulations. He backdated this to June 2017.

The husband brought an appeal against this order on multiple grounds. Mr Justice Cohen gave him permission to appeal on the following grounds:

In respect of spousal maintenance:

1) whether the spousal maintenance should cease when the child maintenance increased;

2) whether payment of the capitalised sum should fall due in advance of the termination date; and

3) whether it is proper to award both interest and continued maintenance in default of payment.

In respect of child maintenance:

4) whether it should be backdated to the period when spousal maintenance was still being paid;

5 the relevance of the CMS figure; and

6) the quantum of the order.

Cohen J allowed the husband's appeal in respect of spousal maintenance to the extent that awarding the wife capitalised maintenance, plus continuing maintenance, plus interest was double-counting [13-15]. He considered that it was open to the trial judge ***either*** to make an order for capitalised maintenance with spousal maintenance continuing at the rate of £250 per month until payment or to make an order for capitalised maintenance with interest running on that sum and child maintenance at the increased rate, backdated to June 2017.

Cohen J dismissed the husband's appeal in respect of child maintenance. He was satisfied that the trial judge had found that the wife needed in excess of £900 per month (net), although this was not maintaining her at subsistence level [18]. He considered that the trial judge had properly taken into account the fact that the husband's income was £11,000 per month and the wife's income was less than £2,000 per month, in determining that the husband should bear the burden of the tax [19]. Cohen J considered that those conclusions dealt with the husband's argument in respect of quantum and the relevance of the CMS figure [20]. In the absence of reasoning by the trial judge in respect of how the spousal maintenance and child maintenance interrelate, Cohen J decided that it was fair for the increased child maintenance figure to commence in June 2017 (as the trial judge had ordered), but that spousal maintenance of £250 per month should cease at that point [20-21].

Cohen J thus substituted the trial judge's order with an order which provides for the capitalisation of spousal maintenance in the sum of £6,500 plus interest; this figure is £3,000 less than the trial judge's figure on account of removing the spousal maintenance obligation (£250 per month) from June 2017, when the increased child maintenance commenced.

The judge at first instance had not dealt with the costs of the parties' applications and so the parties had agreed that this should also be dealt with by the appeal judge. Cohen J decided that the husband should pay 60% of the wife's costs. This decision was based upon on the one hand the husband's litigation conduct, and on the other hand the no order principle which applies in a variation application [23-25].

Finally, Cohen J held that there should be no order for the costs of the appeal [27]. The husband's appeal in respect of spousal maintenance had succeeded but his appeal in respect of child maintenance had failed. Cohen J noted that he had encouraged the parties to go to mediation, given the small sums involved; and that they could have protected their position by making offers but neither had done so.

Summary by **Georgina Howitt**, barrister, **1 Hare Court**