July 2019

Family Law Week

NEWS

Law Commission Calls For Court To Be Removed From Surrogacy Arrangements

Sir Nicholas Green, Chair of the Law Commission, has called the current laws governing surrogacy, "*outdated and no longer fit for purpose*" as the Commission publishes its Surrogacy consultation paper, ***Building families through surrogacy: a new law.***

The current law is that once the child is born, the intended prents have no legal rights until a parental order is made by a court. The Law Commission has proposed a change that would make intended parents the legal parents once the child is born, with the surrogate having a right to object within a short period of time.

The Commission has also proposed other changes including,

- The establishment of a surrogacy regulator
- Removing the requirement of a genetic link between the intended parents and the child, where medically necessary
- Creating a national register, allowing children born of surrogacy to access information about their origins

The Law Commission has also criticised the "unclear" law surrounding payments of reasonable expenses to the surrogate and has requested the public's views.

Sir Nicholas Green, chair of the commission, said:

> "More and more people are turning to surrogacy to have a child and start their family. We therefore need to make sure that the process is meeting the needs of all those involved. However, the laws around surrogacy are outdated and no longer fit for purpose. We think our proposals will create a system that works for surrogates, the parents and, most importantly, the child."

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The **full statement** from the Law Commission and the overview of the **surrogacy project** are both available via the hyperlinks.

9.6.19

Court Rules Youth At Grave Risk From Gang Violence Cannot Be Placed Into Secure Accommodation

In ***A City Council v LS & Ors (Secure Accommodation Inherent Jurisdiction)*** **[2019] EWHC 1384 (Fam)**, Sir Justice MacDonald ruled that a 17 year old boy, KS, could not be placed into secure accommodation despite being at serious risk from gang violence.

KS had been involved in a number of gang related incidents and apparent retaliatory attacks by rivals, and was considered by the local authority to be "at risk of significant harm or harming someone else" if he were to remain in the care of his mother. The police had indicated that there was significant risk to KS's life.

Sir Justice MacDonald found that a child cannot be placed into secure accommodation if they are not looked after by the local authority and the child's parent objects to the placement, as was the case here. Such an order would authorise the removal of KS from his mother's care without her consent, while she retains exclusive parental responsibility for him but objects to the course of action.

The full judgment can be read using the link above.

10.6.19

Number Of Children In Secure Homes Drops

New figures published by the Department For Education has revealed that the number of of children accommodation secure children's homes has dropped by 16%.

On March 31st 2018, 204 children were accommodated in comparison to 172 on March 31st 2019. Meanwhile, the number of places approved for use was up slightly.

More figures can be found in the **full report** and reports from previous years can be found in the **Department For Education's archives**.

10.6.19

Study Links Domestic Violence And Mental Illness Risks

A study in the British Journal of Psychiatry has found that wpmen who experience domestic abuse are three times as likely to develop a serious mental illness. The study also found that they are twice as like to already have some form of mental illness.

The study carried out by the University of Birmingham, compared 18,547 women who had been documented to have experienced abuse with 74,188 women who had not. The group exposed to domestic violence were found also to have a higher rate of obesity, excessive drinking, smoking and were more socioeconomically deprived.

The full study can be read via the link above and the BBC's report can be read **on their website**.

10.6.19

New Official Solicitor and Public Trustee appointed

Sarah Castle has been appointed to the role of Official Solicitor and Public Trustee (OSPT).

Sarah Castle has more than 20 years' experience working in legal services and handling child protection issues for local government in Kent and Berkshire. She will be joining OSPT from a role at Reading Borough Council and will take up her new post from 4 July 2019.

12/6/19

Significant numbers of children are denied their statutory right to advocacy: Children's Commissioner

A new report from the Children's Commissioner for England – ***Advocacy for Children*** – states that there is a significant group of children being denied access to advocacy despite having a statutory entitlement to it. In some local authorities, fewer than 75 per cent of care leavers' referrals for advocacy are being taken forward.

The report follows previous studies commissioned by the Children's Commissioner's office and other recent research into advocacy. The work builds on research by the Children's Commissioner in 2016, which also explored the provision of advocacy across England and found substantial variation across local authorities, with spend per child or young person ranging from £2 to £668 each year.

The new report intends both to take stock of advocacy provided by local authorities three years on and to highlight ongoing issues observed by the Children's Commissioner's Help at Hand service, which provides advice and representation for children in care, care leavers and children living away from home.

The report makes several key recommendations. First and foremost, local authorities should be required to set out a clear strategy for a local offer for all children eligible to advocacy, showing how advocacy will be delivered and should work towards a highly visible universal advocacy service for children and young people up to the age of 25.

The Children's Commissioner says:

> "We know the enormous financial pressures on councils and that advocacy services can be the first to

> go when services are cut. But listening to the children they care for should be central to the work they do. Thirty years on from the UNCRC and the Children Act 1989, it seems some of the core values they enshrine, like many of the kids we care for, are still fighting to be heard."

For the report, **click here**.

14/6/19

CPS issues statement clarifying decision-making on sexual offence cases

The Crown Prosecution Service has issued a statement clarifying its approach to decisions whether to prosecute rape and sexual offence cases.

The statement follows news that End Violence Against Women, a coalition of specialist women's support services, researchers, activists, survivors and NGOs, has begun legal action against the CPS, claiming that it has covertly changed its policy and practice in relation to decision-making on rape cases, leading to a dramatic fall in the number of rape cases being charged. EVAW has launched a CrowdJustice appeal to fund the proceedings against the CPS.

EVAW, represented by the Centre for Women's Justice, argue that the alleged change in practice, and the resulting collapse in cases going to court, discriminates against women and girls, and is a major failure to protect their human rights.

The CPS statement says:

> "There are a number of stories today about how the CPS makes its decisions about prosecuting rape and sexual offences.
>
> Sexual offences are some of the most complex cases we prosecute and we train our prosecutors to understand victim vulnerabilities and the impact of rape, as well as consent, myths and stereotypes.
>
> Decisions whether or not to prosecute are based on whether our legal tests are met – no other reason – and we always seek to prosecute where there is sufficient evidence to do so.
>
> We understand that the falling charge rates for rape is a cause of concern. However, it is not indicative of a change of approach or lack of commitment to prosecute by the CPS.
>
> There has been no change of approach.
>
> There are however a number of factors which we believe have contributed to this, including a fall in referrals from the police? and an increase in cases where the CPS has given the police early investigative advice? and where we have asked for further work to be done?.
>
> We have also seen an increase in the volume of digital data and the analysis of evidence gathered by following reasonable lines of enquiry.?
>
> Victims have the right to ask for a review of their case by another prosecutor, independent of the original decision-maker, and this is another way we make sure we are fair and transparent in what we do.
>
> The High Court can also consider the lawfulness of the decisions made in individual cases under the Victims Right to Review procedure.
>
> Finally, we are a partner in a cross departmental review of the handling of rape and sexual offences which includes hearing from victim's groups.
> We are looking honestly and openly at how the CPS, police, courts and others can work together to improve the overall handling of these cases."

For the EVAW announcement of legal proceedings, **click here**. For coverage in *The Guardian*, **click here**. For the CPS's prosecution guidance on rape and sexual offences, **click here**.

14/6/19

Vulnerable children removed from foster carers who wanted to adopt them

The Local Government and Social Care Ombudsman has asked East Riding of Yorkshire Council to apologise to a foster couple after it removed two vulnerable children, they hoped to adopt, from their care.

According to the Ombudsman's report, the couple took on the children after their birth parents were unable to look after them. When they were removed from their parents' care, the children were described by the judge as 'to a considerable degree unmanageable'.

The children needed significant therapy and support, but after two years, the couple decided they wanted to adopt the children. They told the council they would need ongoing support with the children to help them progress.

Assessments of the couple by various professionals suggested they were giving the children a stable, caring home life. The council allowed the children to attend the couple's wedding and take the children on holiday abroad. However, the council says it started to have concerns about the couple's ability to look after the children long term given the amount of care they were requesting.

The children were removed from the couple's care; social workers picked the children up from school without telling the couple of their intentions.

The Ombudsman's investigation has found numerous faults in the council's social work practice, including unreasonable delay in starting adoption assessments of the couple, poor record keeping, poor decision making when deciding to remove the children from the couple's care and poor complaints handling. The council also failed to be

transparent with the couple about the concerns it had about them. This denied the couple the chance to challenge the council's decision through the courts before the children were removed from their care.

Michael King, Local Government and Social Care Ombudsman said:

> "Councils must base key decisions about the welfare of children in their care, on sound, balanced evidence and go through the proper process, which takes into account legal requirements and statutory guidance.
>
> "In this case, vulnerable siblings who had had a chaotic background, were removed from their first taste of a stable family life with a couple who had been clear about wanting to give them a permanent home. And, while reports suggest the children are now content in their current placement, we cannot say what effect the sudden removal will have in the long-term.
>
> "I urge East Riding Council to accept the recommendations in my report to ensure crucial decisions such as these are not made in the same way in future."

In this case the Ombudsman said that the council should apologise to the couple and consider issuing a document stating its reasons for not approving them as prospective adopters, so they can challenge this through an Independent Review Mechanism. It should also pay them £5,000 for their avoidable distress and a further £500 for their time and trouble in pursuing the complaint. Additionally, it should place a copy of this report on the couple's files so that, if they apply to another adoption agency, the new agency will have access to the information in this report.

In recognition of the potential harm caused, the council should set aside £2,000 for each child in a savings account for when older. It should place a copy of this report on their social care files so, when older and, if the children request access to their files, they can see the efforts the couple made to pursue their concerns about the children's removal as well as their clear wish for the children to have remained with them long term.

The Ombudsman has the power to make recommendations to improve processes for the wider public. The Ombudsman has recommended the council ensures Independent Reviewing Officers are, in future, actively involved and consulted when there is to be a significant change to a looked after child's care plan. It should ensure social work staff follow the requirements to hold a 'looked after' child review when making significant decisions, unless there is a safeguarding issue requiring immediate removal of a child; and it should report back on its review of foster care procedures and training on record keeping.

For the report, **click here**.

14/6/19

Draft Domestic Abuse Bill report published by Joint Committee

The Parliamentary Joint Committee on the Draft Domestic Abuse Bill has published **its report** on the Bill and called for it to be amended to give greater protection to victims of domestic abuse.

The Committee says that the recommended changes to the Bill are to ensure that all those affected by domestic abuse receive protection and a tailored response to their differing needs. The Committee welcomed the proposed measures in the Bill, but was concerned with ensuring their effectiveness in practice.

The Committee was particularly concerned to ensure that children who experience domestic abuse, either as witnesses to it or in intimate relationships, are treated as victims and their needs responded to appropriately. In recognition of the fact that survivors of abuse require different support services, the Committee recommended that the Bill should require public authorities to have regard to the gendered nature of abuse and provide suitable services accordingly.

The Bill would establish the role of Domestic Abuse Commissioner to promote best practice in providing services to survivors and perpetrators of domestic abuse. Because of concerns that the Commissioner would not be sufficiently independent of the Home Office and would not have power to enforce recommendations on those providing public services, the Committee put forward several changes to the Bill to increase independence, concluded that government departments should be included among the bodies which would have a duty to co-operate with the Commissioner.

The Committee recommended that the lead Minister on implementing the strategy on domestic abuse should be based in the Cabinet Office, not the Home Office. This was to encourage cross-departmental and multi-agency working and to support the independence and reach of the Commissioner. The Committee considered that overall there should be a complete review of the approach taken to establishing Commissioners offices with independence built into each by using the Cabinet Office as the sponsor department.

Other recommendations for changes to the draft Bill before it is brought back to Parliament include:

- In relation to courts, the Committee strongly supported the proposal to require the provision of special measures such as videolinks and separate waiting rooms to protect witnesses in criminal proceedings from coming into contact with their abusers, but recommended that these measures should be extended to family and other civil courts.

- At present survivors of abuse may be subjected to cross-examination by the perpetrators in the course of family and other civil proceedings. The Committee called for a mandatory ban on this where there is evidence of domestic abuse.

- The Committee welcomed the Government's announcement that it plans to introduce a statutory

requirement for accommodation support services in England to be provided for survivors of domestic abuse, but said the Government needs to provide clarity on how other support services (such as advice and counselling) would be provided and funded under the new statutory duty proposed and what arrangements will be made for the national provision of specialist services to groups such as BAME women and those with disabilities.

- The draft Bill would introduce a new type of Order to protect victims, a Domestic Abuse Prevention Order. The Committee welcomed a number of aspects of these orders but was concerned about the potential for inconsistent application between civil and criminal courts and that the courts would be reluctant to impose the orders in all but the most exceptional of circumstances.

- The Committee called on the Government to urgently bring forward legislation to increase the length of time suspects can be released on pre-charge bail in domestic abuse cases, and to create a presumption that suspects under investigation for domestic abuse, sexual assault or other significant safeguarding issues only be released from police custody on bail, unless it is clearly not necessary for the protection of the victim.

- The Committee supported the idea of establishing a firewall to separate reporting of crime and access to support services from immigration control.

- Currently, none of the proposed changes to the law on domestic abuse would apply to Northern Ireland, and the lack of a Northern Ireland Executive and Assembly means that this situation would not change. (Scotland has its own Legislation.) The Committee recommends that that the provisions of the draft Bill be extended to Northern Ireland unless and until Northern Ireland enacts its own legislation in this area. The draft Bill should be amended to include a 'sunset clause' to this effect.

Commenting, Mrs Maria Miller MP, Chair of the Joint Committee, said:

> "The Government's draft bill on Domestic Abuse has been widely welcomed by organisations representing survivors of Domestic Abuse and those providing support services. The Bill is the culmination of many months of work and consultation and has been said by the sector to be a 'once in a generation opportunity to address domestic violence' and having 'the potential to create a step change in the national response'.
>
> "The committee has made detailed and wide-ranging recommendations that affect many aspects of the Bill, drawing from the excellent evidence we have received including oral evidence from those who have survived domestic abuse themselves. These include important recommendation relating to the treatment of children and migrant women, the importance of cross-departmental working in prevention and early intervention and the need for Commissioners to be fully independent and have the powers they need to enforce improvements in the provision of services."

For the report, **click here**.

14/6/19

Divorce, Dissolution and Separation Bill introduced

The **Divorce, Dissolution and Separation Bill** received its first reading on 13 June. It will receive its second reading on a date to be announced.

The Bill will establish 'no fault' divorce by substituting section 1 of the Matrimonial Causes at 1973.

It will:

- Replace the current requirement to evidence either a conduct or separation 'fact' with the provision of a statement of irretrievable breakdown of the marriage (couples can opt to make this a joint statement).

- Remove the possibility of contesting the decision to divorce, as a statement will be conclusive evidence that the marriage has broken down.

- Introduce a new minimum period of 20 weeks from the start of proceedings to confirmation to the court that a conditional order may be made, allowing greater opportunity for reflection and, where couples cannot reconcile and divorce is inevitable, agreeing practical arrangements for the future.

Justice Secretary David Gauke said:

> "Marriage will always be a vitally important institution in society, but when a relationship breaks down it cannot be right that the law adds fuel to the fire by incentivising couples to blame each other.
>
> "By removing the unnecessary mud-slinging the current process can needlessly rake up, we'll make sure the law plays its part in allowing couples to move on as amicably and constructively as possible.
>
> "I'm proud to introduce this important legislation which will make a genuine difference to many children and families."

Margaret Heathcote, Chair of Resolution, said:

> "We're delighted that the government is introducing legislation which will help reduce conflict between divorcing couples.
>
> "Every day, our members are helping people through separation, taking a constructive, non-confrontational approach in line with our Code of Practice. However, because of our outdated divorce laws, they've been working effectively with one arm tied behind their backs.

> "These proposals have the support of the public, politicians, and professionals. We therefore call on MPs and members of the House of Lords to pass this Bill without unnecessary delay, and end the blame game for divorcing couples as soon as possible."

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

14/6/19

New private law cases received by Cafcass in May up by 8 per cent year-on-year

Cafcass received a total of 3,950 new private law cases in May – 8.5 per cent (311 cases) higher than the same month last year. Private cases received by Cafcass have increased year-on-year in ten of the last twelve months.

For the month-by-month figures, **click here**. From that page, a further link shows private law case demand and number of subject children by DFJ area.

16/6/19

New care applications received by Cafcass in May fell by 11 per cent

Cafcass received a total of 1,152 new care applications in April – 11.5 per cent lower (149 applications) than in the same month last year. New care applications received by Cafcass have decreased year-on-year in eleven of the last twelve months.

For the month-by-month figures, **click here.** From the linked page, a further link provides details of quarterly demand by local authority area.

16/6/19

President issues guidance on forms of order in children cases

The President of the Family Division, Sir Andrew McFarlane, has published **guidance on Forms of Orders in Children Cases**, for judicial and practitioner's information.

In the guidance, the President states:

> "[T]he Family Court is currently experiencing a very high number of children cases. In these circumstances, I have reluctantly come to the view that the detriment, in terms of time taken to prepare lengthy narrative orders after every hearing, outweighs the benefit that such orders bring. In short, in the current climate, the court simply does not have time in every case to meet the need for the preparation of full orders after every hearing. Where, as expected, the standard forms of order are used care should be taken to ensure that only the essential information is included.
>
> 9. Despite the pressure on the system, I remain persuaded that the first order made in any child case (public or private law) should comply with the previous Practice Guidance [of 6 June 2018] or PD12B, para 14.13, so that the key information in each case is recorded there. For subsequent orders (other than final orders) the court, while following the previous Practice Guidance, should tailor the order to the particular circumstances of the case, without the need to include lengthy narrative material which does not relate to the requirements of the particular order. The minimum required content in an order following a second or subsequent interim hearing will be:
>
> i. A recital of who attended and their representation;
>
> ii. A recital of the issues determined at the hearing;
>
> iii. A record of any agreement or concession made during the hearing;
>
> iv. A recital of the issues that remain outstanding; and
>
> v. The text of any orders that were made.
>
> It is expected that this approach will enable the court to limit the content of orders to what is strictly required for effective case management.
>
> 10. Following a final hearing, the court order should, as has always been the case, set out in full the orders that the court has made, together with any appropriate recitals.
>
> 11. It is my intention that the use of shorter forms of order as explained in this Guidance should be seen as a temporary measure to support the effective preparation of court orders. The ultimate goal remains, as stated in the June 2018 Guidance, for court orders eventually to be drawn with ease from an electronically supported system once such systems are widely available."

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

18/6/19

Financial Remedies Courts project extended to eight new zones

Mr Justice Mostyn has announced the successful extension of the Financial Remedies Courts (FRC) project from its single original pilot zone (in operation since last year in Birmingham) to eight new zones.

These are the new zones announced by the President of the Family Division last year. Lead Judges are in post in all zones. FRC ticketed judges have been identified in all zones. All zones are now operationally up and running, as planned.

He said:

> "My aim in taking the Financial Remedies Court project forward is to ensure that cases are dealt with

by ticketed judges who have a knowledge and experience of financial remedies work. It is important that cases are properly allocated from the outset to the right level of judge in the right place and allocation procedures are in place in all zones. We think it important to ensure that judges of all levels, including Circuit Judges and Recorders, are involved with first instance cases.

"We are enthusiastically working on plans to develop the project. Our plan is to digitalise all financial remedies work and the necessary IT development is well under way, being in use in some areas with a plan to spread it rapidly and widely."

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

21/6/19

Divorce, Dissolution and Separation Bill scheduled for second reading on 25 June 2019

The **Divorce, Dissolution and Separation Bill** is due to receive its second reading on 25 June 2019.

The **Nuffield Foundation** has published a very useful **briefing note** ahead of the second reading. As the note says, the Bill proposes to retain irretrievable breakdown as the sole ground for divorce but to remove the requirement to establish a 'fact' such as adultery or behaviour. Instead, one or both parties would be required to file a statement of irretrievable breakdown which would be confirmed after a minimum waiting period of six months.

This change is consistent with evidence from a wide-ranging empirical study of how the divorce law in England and Wales is currently operating. The **Finding Fault** study was led by **Professor Liz Trinder** (Professor of Socio-legal Studies at the University of Exeter) and funded by the Nuffield Foundation.

The study highlighted many problems with the current divorce law, including conflict, gaming of the system and unfairness:

- The requirement for 'fault' is little more than an empty legal ritual where petitioners assemble a suitable petition which the court can only rubber stamp. In the Finding Fault survey, 43% of respondents to a fault divorce reported that the fact used was not closely related to the 'real' reason for the separation. Although the court has a duty to inquire into facts alleged, in practice, the court has only an average 3-4 minutes to scrutinise each file.

- The requirement for 'fault' creates or fuels conflict which can have a negative impact on children and undermines a modern, problem-solving family justice policy that seeks to minimise the consequences of family breakdown for adults and children. In the Finding Fault national survey, 62% of petitioners and 78% of respondents said that in their experience using fault had made the process more bitter.

- The court's inability to test allegations can seem procedurally unfair to respondents who dispute the allegations but cannot afford to defend them. The only option for a respondent is to record that they do not accept the allegations, but the court will still grant the decree.

The Nuffield Foundation states:

"The Bill represents a pragmatic reform that reflects evidence from the Finding Fault study. The reform will remove the problematic elements of an archaic law and introduce a more transparent, fairer and less harmful process for families undergoing a difficult transition."

For the Bill as introduced, **click here**. For the Nuffield Foundation's briefing note, **click here**. To follow progress of the Bill, **click here.**

21/6/19

President of the Family Division's Working Group on Medical Experts in Family Proceedings: Symposium on 4 July

When: 4 July 2019, from 5-8pm
Where: Court 33, Royal Courts of Justice, Strand, London
What: Draft report on shortages of experts, causes and solutions

The Working Group on Medical Experts in Family Proceedings was set up by the President of the Family Division, Sir Andrew McFarlane, to explore the issue of shortages in the availability of medical experts to participate in family cases.

Chaired by Mr Justice Williams, the group is holding a Symposium to discuss the results of a questionnaire sent to medical experts, the judiciary and the legal profession.

In particular, they will be looking to discuss possible solutions to the range of causes which appear to underpin the shortages. The group's draft report will then be finalised and sent out for consultation.

If you are a medical expert, judge or legal professional working in the family justice system and would like to attend, please email **rebecca.leharne@justice.gov.uk**

NB: Numbers are limited. To ensure a spread of attendees from all areas, places will be allocated and confirmed by Friday 28 June 2019.

Prior to the Symposium, a list of issues will be circulated to attendees to guide the discussion.

22/6/19

Whitehall's paralysis is letting down Children in Need: Children's Commissioner

The Children's Commissioner for England, Anne Longfield says that the DfE's **Children in Need Review**, published on 17 June, "brings into sharp focus the absolute paralysis currently affecting much of Whitehall and Westminster".

Whilst welcoming the analysis within the review, she says:

> "It is three years since Brexit became the national political priority – three years in which half of the youngest children in need have grown up failing to meet their early development goals, a lifetime disadvantage. While the Westminster manoeuvring continues, on and on interminably, Government itself has ground almost to a halt and the prospects for many of these kids remains wretched. Soon we will have the third Prime Minister of my tenure as Children's Commissioner. More departmental upheaval could follow, and the chance to get a grip of tackling childhood vulnerability delayed again."

She adds:

> "I cannot find any commitments in [the] review to dramatically improve the services the Government knows can change life chances. Worryingly, there is only one mention of the Troubled Families programme. Similarly, there is a strong focus on poor early years outcomes, but no mention for example of how more health visitors could help. And the only action points relating to children's services are promises about improving Ofsted grading and social work practice. Telling schools they ought to 'do more' is unrealistic and unfair when the services on which they and families rely are being cut to shreds.
> ...
> "Ultimately, the next Government must look seriously at the life chances of vulnerable children in England. The new Prime Minister will have to decide whether this is a priority for him, and today's Children in Need review is yet another reminder of the scale of the challenge. Will the new occupant of Downing Street be up to it, or will they allow more generations of vulnerable children to grow up without the advantages and opportunities they expect by right for their own kids? Of course, the great tragedy for thousands of children is that these decisions could and should have been made ages ago."

For the Review, **click here**. For the Children's Commissioner's full statement, **click here**. For the response of the Association of Directors of Children's Services, **click here.**

22/6/19

Family Justice Panel update

On 21 May 2019 the Ministry of Justice (MOJ) announced a public call for evidence steered by a panel of key representatives from across family justice, to gather evidence on how the family courts protect children and parents in cases of domestic abuse and other serious offences.

The inaugural panel meeting took place on Friday 14 June 2019, marking the start for the three-month call for evidence. The panel members represent key organisations from across family justice including the Judiciary, academia, social care, policy officials and third sector organisations which represent and advocate for victims of domestic abuse, (full details below).

The call for evidence will specifically focus on the application of Practice Direction 12J, Practice Direction 3AA, The Family Procedure Rules Part 3A, and s.91(14) orders, and will build a more detailed understanding of any harm caused during or following proceedings in the family court.

The panel members are:

- Melissa Case & Nicola Hewer, Director of Family and Criminal Justice Policy, MOJ (Chair)
- Professor Liz Trinder, University of Exeter
- Professor Rosemary Hunter FAcSS, University of Kent
- Professor Mandy Burton, University of Leicester
- Mr Justice Stephen Cobb, Judiciary
- District Judge Katherine Suh, Judiciary
- Nicki Norman, Acting Co-Chief Executive, Women's Aid
- Dierdre Fottrell QC & Lorraine Cavanagh QC (joint representatives), Association of Lawyers for Children Isabelle Trowler, Chief Social Worker for England (Children & Families).

The panel will also be supported by analysts, researchers and relevant policy officials from MOJ.

22/6/19

Laws around taking, making and sharing intimate images without consent to be reviewed

The Ministry of Justice has announced that the Law Commission will undertake a review of the criminal law as it applies to taking, making and sharing intimate images without consent.

This follows a recommendation made in the Commission's Abusive and Offensive Online Communications Scoping Report, published in November 2018. The Commission concluded that the criminal law's response to online privacy abuses should be reviewed, considering in particular whether the criminal law can deal adequately with emerging technology such as "deepfake" pornography and the harmful behaviour it facilitates.

The project will consider legislation such as the "revenge pornography" provisions under section 33 of the Criminal Justice and Courts Act 2015, and if necessary, propose means of reform. This project is part of the second phase of the Abusive and Offensive Online Communications Project.

The Commission aims to publish a Consultation Paper, inviting views on any recommendations for reform, in 2020.

Prof David Ormerod QC, Criminal Law Commissioner, said:

> "Taking, making and sharing intimate images without consent causes distress and can ruin lives.
>
> "If the criminal laws are not up to scratch, we will propose reform that protects victims more effectively from this criminal behaviour."

The Law Commission has two related projects:

- A review of the law relating to hate crime.
- Reform of the communications offences (in section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003), including the glorification of violent crime online and the encouragement of self-harm online, as well as a review of the law relating to coordinated harassment by groups of people online. This project also forms part of Phase 2.

It is anticipated that consultation papers on each of these projects will be published in Spring 2020.

26/6/19

Divorce, Dissolution and Separation Bill receives second reading

The **Divorce, Dissolution and Separation Bill** received its second reading on 25 June 2019. The Public Bill Committee will now scrutinise the Bill line by line. The first sitting of the Public Bill Committee will be on Tuesday, 2 July 2019. The Committee is expected to report by Thursday, 4 July 2019.

The Nuffield Foundation published a very useful **briefing note** ahead of the second reading. As the note says, the changes proposed by the Bill are consistent with evidence from a wide-ranging empirical study of how the divorce law in England and Wales is currently operating. The **Finding Fault study** was led by Professor Liz Trinder (Professor of Socio-legal Studies at the University of Exeter) and funded by the Nuffield Foundation.

For the Bill as introduced, **click here**. For the Nuffield Foundation's briefing note, **click here**. For a briefing note prepared by the House of Commons Library in advance of the second reading, **click here**. To follow progress of the Bill, **click here**.

27/6/19

Applications and orders for domestic violence remedies at ten-year high

In January to March 2019, there were 7,180 applications made for a domestic violence remedy order, up 15 per cent on the same quarter in 2018. This is the highest quarterly number of applications since records began in this form in 2009.

The figures are revealed in the latest **Family Court statistics**, released by the Ministry of Justice.

Between January to March 2019 – and in common with previous years – most of the applications were for non-molestation orders (82 per cent) compared to occupation orders (18 per cent). Applications for non-molestation orders in January to March 2019 were up 16 per cent compared to the same period in 2018, while occupation order applications increased by 11 per cent.

There were 7,976 domestic violence orders made in January to March 2019, up 10 per cent from the same period last year, also representing the highest number since the beginning of 2009. 93 per cent were non-molestation orders and 7 per cent were occupation orders, with non-molestation orders up 9 per cent and occupation orders up 16 per cent compared to the equivalent quarter in 2018.

Legal aid applications in private family law supported by evidence of domestic abuse

In January to March 2019, applications for civil representation supported by evidence of domestic violence or child abuse increased by 17 per cent compared to the same period of the previous year. The number of these granted increased by 13 per cent over the same period. 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. The provisional figure for the latest quarter is 77 per cent.

Applicants are granted legal aid funding for these cases if they can prove the incidence or risk of domestic violence or child abuse through a range of prescribed forms of evidence. The range of documents accepted as evidence of abuse was widened from January 2018 to include statements from domestic violence support organisations and housing support officers.

For the full statistics in respect of domestic violence applications, **click here**. The domestic violence figures are in section 7, beginning on page 10. For those in respect of legal aid applications, **click here** and go to page 11.

27/6/19 (supplemented as to legal aid statistics: 28/6/19)

Care proceedings taking, on average, 33 weeks to first disposal

On average, the time taken for a care or supervision case to reach first disposal was 33 weeks in January to March 2019, more than three weeks up from the same quarter in 2018. 42

per cent of cases were disposed of within 26 weeks – down 7 percentage points compared with the same period for 2018.

The figures are revealed in the **latest statistics for family courts from the Ministry of Justice**.

66,340 new cases started in family courts in January to March 2019, up 5 per cent on January to March 2018, due to a 6 per cent rise in matrimonial cases (44 per cent of all case starts, mainly divorce proceedings), and an increase in domestic violence (15 per cent) and private law (12 per cent) cases.

For divorce proceedings, the average time from petition to Decree Nisi was 33 weeks, and Decree Absolute was 59 weeks, up 6 and 8 weeks respectively compared to the equivalent quarter in 2018.

In January to March 2019, there were 13,677 private law cases started, up 12 per cent on the same quarter in 2018. Applications also increased by 12 per cent.

The number of domestic violence remedy order applications increased by 15 per cent compared to the equivalent quarter in 2018. The number of domestic violence remedy orders made increased by 10 per cent over the same period. For more information specific to domestic violence applications and orders, **click here**.

There were 126 forced marriage protection orders made in January to March 2019, more than double the equivalent quarter in 2018 but similar to the previous quarter.

Adoption applications and orders were up for the second quarter in a row, following a downward trend. In January to March 2019, there were 1,324 adoption applications, up 1 per cent on the equivalent quarter in 2018. Over the same period the number of adoption orders issued increased by 3 per cent to 1,331.

There were 1,326 applications relating to deprivation of liberty in January to March 2019, up 9 per cent on the equivalent quarter in 2018. Deprivation of liberty orders were up 17 per cent over the same period, but down 4 per cent compared to the previous quarter.

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

28/6/19

MIAMs increased 9 per cent in last quarter year-on-year

Mediation Information and Assessment Meeting volumes were 9 per cent higher than in the same quarter of 2018 and currently stand at just over a third of pre-LASPO levels. Mediation starts were also 10 per cent higher and outcomes were 1 per cent higher than the same period last year. Mediation starts are now sitting at around half of pre-LASPO levels.

The figures appear in the latest legal aid statistics for the Ministry of Justice, for which **click here**.

28/6/19

Female BAME domestic violence victims 'being failed' in Manchester

Sisters For Change (SFC) and The Manchester Maya Project warn of institutional racism and sexism in a **new report** that analyses local authority responses and approaches to domestic abuse within the Greater Manchester area.

Public authorities in Manchester are failing to uphold the human rights of ethnic minority women and children who have been victims of domestic abuse, according to a report.

The report from Sisters For Change, in partnership with The Manchester Maya Project, warns of institutional racism and sexism at the local level in Greater Manchester. It also highlights that women and children from Black, Asian and minority ethnic backgrounds (BAME) are not being adequately protected or getting the specialist help they need after suffering domestic abuse.

The report recommends:

- The Greater Manchester Combined Authority (GMCA) should consider the findings and recommendations of the report to support the development of an inclusive VAWG Strategy that provides protection and support to all victims of domestic abuse across Greater Manchester, including BME and migrant women.

- GMCA should ensure that specialist BME VAW service providers are given a real opportunity to contribute to the development of a more inclusive Greater Manchester VAWG Strategy through its recently established BME network.

- GMCA should provide guidance and support to all Greater Manchester local authorities to develop domestic abuse strategies based on the assessed needs and priorities of their respective local areas. Data on the nature and prevalence of domestic abuse should be collected in each local authority area to ensure that strategies are in line with local demand and are responsive to the needs of all communities.

- As part of its VAWG Strategy, GMCA should, in consultation with the ten local authorities of Greater Manchester, develop a cross-border protocol establishing a system of local authority co-operation which defines responsibilities for the provision of housing and care and support services when victims of domestic abuse are transferred across local authority areas. The protocol should include a process for resolving disputes regarding responsibility for providing support in individual cases.

- Manchester City Council should consider the findings and recommendations of this report to support the development of a more inclusive approach to the commissioning of domestic abuse services, which recognises the important contribution that specialist BME VAW support services make in supporting BME victims of violence across Greater Manchester.

- Manchester City Council's No Recourse to Public Funds Service set up to respond to individuals and families who do not have access to welfare benefits or housing assistance – because they have insecure immigration status or are subject to immigration control – but are in need of care and support should be recognised as a model of good practice and adopted by other local authorities across England.

- The Government should re-think its current VAWG funding and commissioning model. Localism has led to an inconsistent approach to VAW services and a failure to ensure diversity and specialist service provision. The Home Office should adopt a policy of ring-fencing a proportion of central VAW funding for specialist BME VAW service providers.

- Housing authorities across Greater Manchester should review their homelessness policies and assessment procedures to ensure that accommodation secured for BME women and children made homeless due to domestic abuse is suitable to their needs and that those assessing suitability take account of social considerations that might affect the suitability of accommodation, including any risk of violence, racial or religious harassment or hate crime in a particular locality, as required by the Housing Act 1996.

For the report, **click here**. For coverage in *The Guardian*, **click here**.

28/6/19

Law Commission review launched into marriage ceremonies in England and Wales

The Government has launched a Law Commission review into marriage ceremonies in England and Wales.

The two-year project, which is the first of its kind, will review the current laws on how and where marriages can take place – many of which date back to the 19th Century. It will look at removing unnecessary red-tape to increase the choice and lower the cost of venues. It could open up opportunities for civil ceremonies at sea, in private homes or military sites for service personnel. Subject to the findings from the independent Law Commission the changes would ensure couples can marry in a way that is individually meaningful for them, while continuing to preserve the dignity of marriage ceremonies.

Separately, the Government will accelerate plans to allow civil weddings and civil partnerships to be held outside and will look to implement these through secondary legislation, subject to any necessary consultation.
Any new venues would have to meet the existing test of solemnity and dignity.

Welcoming this progress, Prime Minister Theresa May said:

> "As both Home Secretary and Prime Minister I have been proud to sponsor the legislation that created equal marriage, and to extend civil partnerships to ensure all couples are given the same choices in life. The vital institution of marriage is a strong symbol of wider society's desire to celebrate commitment between partners. But we can do more to bring the laws on marriage ceremonies up to date and to support couples in celebrating their commitment. This review will look at how we can ensure marriage keeps pace with modern Britain."

The Government recognises the role of religious services as a preferred option for many couples, and values the continuing status of the Church of England as the established church in England. However, a Law Commission report in 2015 raised concerns around marriage laws, citing a patchwork of inconsistent and highly technical provisions, which have lacked fundamental reform since 1836.

Under current law couples are limited in their choice of wedding location. Civil ceremonies must take place at register offices or in approved premises that have been licensed for the purpose by local authorities.

For the full announcement, **click here**. For the original Law Commission scoping report and summary, **click here**.

29/6/19

82 per cent of parents in contact with Child Maintenance Options had an arrangement within six months

Out of the 45,500 parents who had contact with Child Maintenance Options between August and October 2018, 82 per cent had an arrangement in March / April 2019. **The figures** have been released by the Department for Work and Pensions.

Just over a fifth (22 per cent) of parents who had contacted Child Maintenance Options between August and October 2018 had a family-based arrangement. Fifteen per cent set up or changed their family-based arrangement after contacting Options, while six per cent already had a family-based arrangement in place or could not remember if they set up or changed their arrangement after speaking to Options.

Not all parents with family-based arrangements will contact Child Maintenance Options so the true number of parents with family-based arrangements in society will be higher.

Sixty per cent of parents who had contacted Child Maintenance Options between August and October 2018 had an arrangement with the Child Maintenance Service. Fifty-seven per cent set up or changed their Child Maintenance Service Arrangement after contacting Options, while 3 per cent already had a Child Maintenance Service arrangement in place or could not remember if they set up or changed their arrangement after speaking with Options.

Seventeen per cent of parents had not agreed a child maintenance arrangement after contacting Options.

Ninety per cent of parents with a family-based arrangement thought it worked 'fairly' or 'very well'. Out of the parents

whose family-based arrangements involved regular financial payments, 98 per cent said their payments were on time and 96 per cent said they received 'some' or 'all' of their payment.

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

29/6/19

Financial Remedy & Divorce Update, June 2019

Naomi Shelton, Associate, **Mills & Reeve LLP** considers the important news and case law relating to financial remedies and divorce during May 2019.

As always, this update is split into two parts, recent news and cases.

A. News

Opposite-sex civil partnerships legislation a step closer

On 26 May 2019, the Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019 came into force. Sections 2(1) and (2) empower the Secretary of State to amend the Civil Partnership Act 2004 to allow opposite-sex couples to form civil partnerships and to do so by 31 December 2019.
Courts and Tribunals (Online Procedure) Bill receives second reading
The bill, if enacted, will establish a judicially-chaired committee tasked with developing new, simplified rules around online services in civil, family and tribunal proceedings.

View from the President's Chambers (May 2019)

- The President has visited 24 courts and by mid-June will have spent a day at another nine. He aims to have visited all courts by October, or early November. On the subject of collective well-being of those working in the system, Sir Andrew says that "it is crystal clear that there is indeed a need to own up to the impact of the current workload in emotional, social and physical terms on each of us in whatever role we play in the Family Justice system."

- In keynote addresses on public law to the ALC Conference in November 2018 and on private law to the Resolution Conference in April 2019, Sir Andrew has set out broadly the work of the Public and Private Law Working Groups. He stresses that any change in practice must come "organically from across the professions and be developed in partnership rather than being imposed from above" and that there is a need to work in partnership with all involved whether they be lawyers in private practice, or professionals working in CAFCASS, HMCTS, the Legal Aid Agency, the MOJ or DfE.

- Sir Andrew notes that reports of the progress of the Pilot for the Financial Remedy Court at Birmingham continue to be entirely positive. The Pilot is being rolled out in a further nine areas and he would be happy to approve its adoption in any additional areas which indicate that they are ready to do so.

- Sir Andrew is confident that the senior staff at HMCTS are "entirely clear that the unacceptable service levels currently experienced from the paper-based centres is not to be repeated" as the new national Civil and Family Service Centre at Stoke on Trent takes on more of the work of the Divorce Service Centres.

- In early June the President will issue Practice Guidance on Short Form Court Orders in Children Cases [this has now been done: **click here**]. Following the recent decision of Sir James Munby in *M v P* [2019] EWFC 14, Sir Andrew is preparing Practice Guidance on Defective Divorce Petition/Decrees to replace the interim Guidance on this topic issued by Sir James on 23 April 2018.

- There will be established a 'Transparency Review', during which all available evidence and the full range of views on this important topic can be considered (including evidence of how this issue is addressed in other countries). The aim of the review will be to consider whether the current degree of openness should be extended, rather than reduced.

President releases draft guidance on reporting in the Family Courts

The draft guidance, which has been open for consultation, follows the appeal in *Re R (A Child) (Reporting Restrictions)* [2019] EWCA 482 Civ. The case demonstrated that there remains a need for greater clarity and guidance in relation to applications by journalists to vary or lift statutory reporting restrictions.

Amendment to Practice Direction 28A FPR 2010

In force from 27 May 2019, Practice Direction 28A FPR 2010 now reads (amendment in bold):

> "4.3 Under rule 28.3 the court only has the power to make a costs order in financial remedy proceedings when this is justified by the litigation conduct of one of the parties. When determining whether and how to exercise this power the court will be required to take into account the list of factors set out in that rule. The court will not be able to take into account any offers to settle expressed to be 'without prejudice' or 'without prejudice save as to costs' in deciding what, if any, costs orders to make.
>
> 4.4
> In considering the conduct of the parties for the purposes of rule 28.3(6) and (7) (including any open offers to settle), the court will have regard to the obligation of the parties to help the court to further the overriding objective (see rules 1.1 and 1.3) and will take into account the nature, importance and complexity of the issues in the case. This may be of particular significance in applications for variation orders and interim variation orders or other cases where there is a risk of the costs becoming disproportionate to the amounts in dispute. **The court will take a broad view of conduct for the purposes of this rule and will generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs. This includes in a 'needs' case where the applicant litigates unreasonably resulting in the costs incurred by each party becoming disproportionate to the award made by the court. Where an order for costs is made at an interim stage the court will not usually allow any resulting liability to be reckoned as a debt in the computation of the assets.**
>
> 4.5
> Parties who intend to seek a costs order against another party in proceedings to which rule 28.3 applies should ordinarily make this plain in open correspondence or in skeleton arguments before the date of the hearing. In any case where summary assessment of costs awarded under rule 28.3 would be appropriate parties are under an obligation to file a statement of costs in CPR Form N260."

B. Case Law Update

Cases

Purvis v Purvis [2019] EWFC 31 (Mr Justice Mostyn) 1 May 2019

Within financial remedy proceedings, the husband applied for an order that a letter of request be issued to the US authorities for the wife (who lived in America) to be examined and to produce specified financial documents. The couple had separated in 2005 and the husband had applied for a divorce in England in 2009. Decree nisi had been pronounced in 2018. The husband in particular wanted information about the foreclosure of a property in 2008 and the liquidation of a business in 2013, allegedly owned by the wife.

The husband made the application under r.24.12 FPR 2010 which was unusual because applications under this rule tend to be made against a non-party. However, Mr Justice Mostyn noted that there was nothing in the FPR 2010 to prevent the rule being used against a party. He considered that there was nothing to suggest that anything other than the well-established principles (*Charman v Charman* [2006] EWHC 1879 (Fam)) – aimed at "fishing expeditions" – applied.

Here Mostyn J found that the husband's application was "manifestly" a fishing expedition. It was highly relevant that there had been a lengthy period of time since the couple had separated and the husband had produced no evidence that the wife had actually had any assets in the US. The husband's conduct – he was a "dangerous" serial sex offender who had most recently been imprisoned in 2015 for 14 years – was also taken into account. Mostyn J refused to issue the letter of request on the grounds of unlawfulness and disproportionately.

Crowther v Crowther [2017] EWCA Civ 2698 (Sir Andrew McFarlane (P), Lady Justice Macur and Lord Justice Henderson) 9 February 2017

This was an appeal by a husband, in very long-running litigation, against an order that the wife retain the matrimonial home which was purchased entirely from an inheritance that the wife received following the death of her parents.

The couple had been married for ten years. On separation, the husband – who was confined to a wheelchair – went to live with his parents. The wife had mental health problems and during the financial proceedings concerns were raised about her capacity to litigate. She acted in person throughout the proceedings whilst the husband had legal representation.

One of the key issues in dispute between the couple was the sale of the former family home. The husband wanted the property sold and for the proceeds to be split 50:50. The property had been purchased by the wife from an inheritance received from her parents.

Since the wife had difficulties in cross-examining the husband, the trial judge stepped in to assist her by asking questions. These questions related to the husband's ability to live independently. McFarlane P noted that the judge's questioning ran to some 26 pages of transcript before the judge invited the wife to ask any further questions. The final award made gave all the capital to the wife because of her needs and that decision was based in part on the answers the husband gave to those questions.

The husband successfully appealed the award on the ground that his ability to live independently had never been raised by the wife, i.e. the first time it had been raised was by the trial judge and so the husband had had no warning to expect to be questioned about this. The process was found to be unfair because the husband had not had the opportunity to take steps to present his case and adduce appropriate evidence. McFarlane P stated that the judge's questioning 'did unfortunately go beyond simply assisting the litigant in person to present her case'.

Gladwell v Gladwell [2019] EWFC 32 (Mr Justice Mostyn) 14 May 2019

In this case, Mostyn J assesses and sets aside a number of orders in what should have been general enforcement proceedings for payment of a lump sum by the husband to the wife.

The respondent had applied to the Chelmsford Family Court for a writ of control in respect of unpaid sums under a financial remedy order. Chelmsford County Court generated a document stating the writ was issued in the Queen's Bench District Registry of the High Court and commanding an enforcement officer to seize the applicant's goods and realise the unpaid sums. After payment of the sum owing, the applicant applied to the "Chelmsford District Registry" to set aside the enforcement application. (The applicant did not deny that the lump sum was due but stated that the respondent had not complied with another point of implementation of the financial order – the disposal of timeshares – and he explained that he did not have the disposable capital to meet the sum in question.)

The Chelmsford Family Court issued a notice that the application would be heard at the Family Court sitting at Ipswich. However, a district judge granted the respondent's request to vacate the hearing and transfer the case to the High Court District Registry because the case related to a High Court writ and the Family Court lacked jurisdiction. The file was duly transferred to London rather than the Chelmsford District Registry.

Mr Justice Mostyn observed that numerous errors had been committed and orders had been made without jurisdiction, resulting in funds being unlawfully taken from the applicant. Mostyn J said that he would spell out the relevant principles in the hope that such events would not reoccur.

The powers of the High Court and county court to issue writs and warrants (Parts 83 and 84 CPR 1998) are available to the Family Court under r.33.1 FPR 2010. An application can be made for the transfer of an order made in the Family Court to the High Court for enforcement and the transfer has effect on the filing of the application (r. 3.4(1) and (3) FPR 2010). However, r.33.4(3) FPR 2010 is subject to r.29.17(3)(a) and 29.17(4) FPR 2010 which provide that a case cannot be transferred from the Family Court to the High Court unless authorised by the President of the Family Division, a judge of the Court of Appeal or a puisne judge. Mostyn J could not think of a case where such a transfer would be appropriate and concluded that r.33.4(3) FPR 2010 was potentially misleading and should be revoked. He highlighted that r.33.4(3) FPR 2010 results in any application effecting a transfer to the High Court – something that the judge said could not have been intended. Neither could it have been intended that r. 29.17(3) and (4) FPR 2010 should not apply to an application to transfer a judgment to the High Court for enforcement.

In this case, the High Court writ was set aside because there had been no order sanctioning the transfer of proceedings to the High Court and the applicant was reimbursed. The transfer of proceedings by the district judge was also set aside.

Lachaux v Lachaux [2019] EWCA Civ 738 (Lord Justice Baker and Lord Justice Moylan) 1 May 2019

The wife unsuccessfully tried to appeal an order recognising a divorce obtained by the husband in Dubai.

The husband had petitioned for divorce in Dubai in April 2011. There then followed acrimonious children proceedings in this jurisdiction resulting, in the end, with the child being placed with the husband. In September 2015, the wife issued a divorce petition here; unfortunately, the court failed to inquire into the status of the Dubai divorce (contrary to s.1(3) MCA 1973) and decree absolute was pronounced in April 2016. The husband applied for an order recognising the Dubai divorce and setting aside the English divorce orders. At first instance, Mr Justice Mostyn had found the Dubai divorce valid under Part II Family Law Act 1986. The divorce, he considered, was effective under UAE law and when proceedings had started, both parties had been habitually resident in Dubai (***Lachaux v Lachaux* [2017] EWHC 385 (Fam)**).

The Court of Appeal upheld Mostyn J's decision despite acknowledging that the judge should have heard expert evidence before examining the meaning and effect of Dubai law. His conclusions had been based on what had taken place and the parties' conduct and Mostyn J had been satisfied that the wife had known about the Dubai proceedings and had participated in them.

The French courts had declined to recognise the Dubai court's judgment, considering it to be discriminatory and contrary to French public policy. The wife had argued that the French court's decision contained findings about the same issue that was being determined by the English court, creating an estoppel issue. However, her argument depended on whether the French court's decision that the "provisions" were "manifestly discriminatory", and that the dismissal of the wife's counterclaim lacked "any effective reasoning", were findings which could be separated from the context of their determination. The context was the husband's application for recognition of the Dubai judgment and the wife's opposition on public policy grounds. It was unclear whether "provisions" referred to the terms of Dubai law or the judgment, or both. In any event, courts in different countries might reach different conclusions about what was sufficiently discriminatory to engage their respective concepts of public policy (Yukos Capital Sarl v OJSC Rosneft Oil Company [2012] EWCA Civ 855). The underlying findings could not be separated from the public policy decision. The judge had been entitled to find that the discriminatory content of the Dubai judgment did not affect the divorce to the extent that it rendered recognition contrary to public policy.

Mediation post-LASPO

Philippa Hemery, mediator at **One Pump Court Chambers**, tracks the recent history of family mediation take-up and looks at what might be done to increase access to mediation.

Mediation has a long history. Resolving a dispute with the assistance of an independent third party can be traced back to the teaching of Confucius in the fifth century BC in China. In the United Kingdom, family mediation started as a grass roots initiative in the 1970s in response to the Finer Committee recommendations. The concept, advocated by Sir Morris Finer QC, of mediation being used to help separating families negotiate with each other and reach agreements, as far as possible, was soon recognised by the courts as a useful adjunct to the court process, and was codified in Part III of the Family Law Act 1996 and again in the Access to Justice Act 1999.

The Government has increased its focus on the use of mediation to resolve private family law disputes in recent years. First, the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) removed most private law family cases from the scope of legal aid from April 2013 – although legal aid remained available for mediation. Second, in April 2014 the Children and Families Act 2014 placed a statutory requirement on applicants in relevant family proceedings to first attend a MIAM before making an application to court, unless an exemption applies. This was followed by a dedicated policy-making task force, overseen by the Ministry of Justice, and involving front-line family mediation practitioners. The Ministry of Justice also undertook a wide-ranging publicity campaign, arranging for the publication of articles about mediation in the consumer, national and specialist media.

The anticipated rise in the take-up of mediation did not, however, occur. Instead, the number of publicly-funded MIAMs plummeted from 30,662 in 2012–13 to 13,354 in 2013–14, a drop of 56 per cent. The number of publicly-funded mediation starts also fell, although not as dramatically, from 13,609 in 2012–13 to 8438 in 2013–14, a drop of 38 per cent.

Fast forward to 2019, and while the numbers of publicly-funded MIAMs and mediation starts have increased from their initial post-LASPO plunge, they have not recovered to anywhere near pre-LASPO levels. The latest round of Ministry of Justice Court Statistics show that in October to December 2018, Mediation Information and Assessment Meetings (MIAMs) increased by 4 per cent in the last quarter of 2018 compared to the previous year. Whilst this is a welcome rise, MIAMs currently stand at just over a third of pre-LASPO levels. During October to December 2018, mediation starts also increased by 6 per cent and outcomes by 5 per cent, but this compares against a particularly low October to December quarter in 2017 and in context is an overall flattening of the trend. They are now sitting at around half of pre-LASPO levels.

At the same time, there has been a huge rise in applications to the family courts. In his first '*View from The President's Chambers*', the President of the Family Division, Sir Andrew McFarlane has highlighted the unprecedented and unsustainable volume of cases in the family justice system. He notes in particular the increase in the workload pressure in private law children cases where there are a high number of applications. The most recent MOJ Court Statistics show that in October to December 2018, applications for civil representation supported by evidence of domestic violence or child abuse increased by 18 per cent compared to the same period of the previous year.

How to explain the apparent anomaly between the push to increase access to mediation and the take-up? In large part, the blame lies with the disastrous impact of LASPO. Once solicitors were taken out of the picture for legally aided clients, those clients had no source of information about mediation, and they were no longer channelled into mediation via solicitors by the requirements of the legal aid funding code. The Law Society president Christina Blacklaws explains,

> "Cuts to legal aid failed to recognise that solicitors providing early advice were a significant source of referrals to mediation – avoiding costly court hearings. We believe that without early advice from a solicitor, many people do not know that the option of mediation exists, or how to access it…"

The dramatic reduction in referrals to mediation from solicitors also meant that some family mediation services – especially not-for-profit services – which had been heavily reliant on legal aid referrals went out of business. In their submission to the government's Post-Implementation Review of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO), National Family Mediation (NFM) outlines,

> "Amongst LASPO's effects was an exponential rise in 'litigants in person', leading to severe delays and blockages in courts, combined with legally aided solicitor referrals to mediators drying up. Yet it was over a year before legislative efforts to increase family mediation take-up were implemented. This gap had a devastating impact upon voluntary sector mediation providers, resulting in the closure of a number of service providers due to declining numbers of referrals. Even now the knock-on effect is still felt with more provider organisations crumbling."

As to the requirements implemented by the government in 2014, many argue that they are frequently ignored, and that the culture in the court system has yet to change. The NFM submission states,

> "Our experience is that magistrates, judges, and court officials are bypassing the necessary process of getting the C100 and Form A paperwork signed by a mediator at a MIAM.
>
> There is no evidence that courts have altered their practice and embraced the revised procedure rules or child arrangements programme that would prove pivotal in transforming the culture of litigation in divorce in this country."

The NFM submission proposes a number of remedial actions. Amongst these are measures to increase the involvement of courts in encouraging separating families to use mediation, including:

> " - Courts should always properly check the respondent has been approached, rather than allowing a situation where forms have simply been signed to smooth the applicant's route to court.
>
> - There needs to be a court focus on promoting and supporting mediation, and ensuring that all applicants and respondents to court have at the very least attended a MIAM before they have an appointment with court."

These are positive proposals. A culture change is needed so that courts do not just expect people to have a 'signed form' but to have really considered mediation. Judges should take every opportunity to put this point across to parties. Directions from the Ministry of Justice, reinforced by the senior judiciary, that attendance at MIAMS is mandatory would be useful in effecting change in this regard.

Action is required at the government level too. In February 2019 the government launched the Legal Support Action Plan responding to the review of the changes to legal aid made under LASPO. Promising an extra £8 million in funding, the Plan is said by the government to prioritise early intervention. In respect of mediation, under the Legal Support Action Plan, the government promises to build awareness of legal aid and mediation into their work to improve signposting of how people can access support. There will be a campaign launched to this end by autumn 2019. This is to be welcomed. Certainly the provision of information, and directing people to available resources can be very important to support someone to resolve a legal problem early.

What more could be done? The Law Society, the Family Mediation Council, National Family Mediation and others have suggested action that could be taken to increase the take-up of mediation, including funding MIAMs for both parties, reinstating legal aid for early advice in family cases, and introducing a system to register mediated agreements with the court. These are all measures that could boost access to out-of-court dispute resolution services and increase the take-up of post separation assistance outside of the family court arena.

One wonders, though, whether there is a more fundamental reason why separating families are not accessing family mediation. As Lisa Parkinson has explained in her book "Family Mediation", a basic paradox in mediation is to expect more from couples who are splitting up than would normally be expected from those living together in relative harmony. Many individuals may decline mediation because they find the expectation of reasonable negotiation too daunting, or impossible to imagine. It is easy to see how an individual going through the emotional and psychological impact of separation may struggle to comprehend how mediation could possibly succeed as a mode of dispute resolution.

Yet with understanding and empathy, skilled mediators can help to settle even the most conflicted cases. Mediation provides opportunities to speak and be heard in ways that the courts do not offer. An intractable dispute on children issues may turn out to be rooted in other family issues that need to be understood. And when settlements are reached, research has shown that mediation is not only less costly, it produces better long term outcomes for the children of separating couples. If a settlement is negotiated via lawyers, parties may remain unable or unwilling to communicate directly. The

process of mediation, by contrast, facilitates communication and increases insight and understanding. Arrangements for children are likely to depend on good communication, and the children of separated parents need parents who can talk and cooperate with each other.

Parties need to understand how mediators can help them to achieve a much better outcome than through litigation. They need to understand how mediation works and why it works. If it is right that people are reluctant to mediate because they cannot see how the mediation process can help to resolve their dispute, then at a time where the court system is bursting at its seams, it is essential that the government and those working in the family justice system tackle this issue.

The most recent Ministry of Justice Court statistics are good news. The numbers are moving in the right direction. But clearly more needs to be done to improve the take-up of family mediation. Increasing the numbers of separating couples able to access mediation can only be beneficial, both for the individual families and for the family justice system.

7.6.19

Lessons to be learned from Re: L [2019] EWHC 867 (Fam)

Anarkali Musgrave, barrister with **Coram Chambers**, looks at Re: L, a case involving an application by the father for change of residence of a child, in which the Guardian chose not to seek the child's wishes and feelings.

When children make allegations of abuse there are typically two outcomes: either there is truth in the allegations, or the allegations are false. The difference between these scenarios, in my view, lies at the heart of disputes involving parental alienation and intractable hostility. For the child involved, damage will almost certainly be sustained either way.

Re: L (A child) **EWHC 867 (Fam)** is a case which examines what happens to a child in the latter scenario, where the allegations were found to be false. In this case, HHJ Tolson QC found at first instance that the boy had been manipulated (albeit not coached) by the maternal family into making allegations of sexual and physical abuse against his father, with whom he actually enjoyed a very good relationship. At first instance the judge determined that only the father would allow the child to have an unfettered relationship with both parents and duly transferred residence. The mother appealed.

The case is interesting for throwing up a number of points about the way in which a parent's hostility towards the other ought to be addressed by the court and professionals. In the writer's view, it very much diminishes the applicability of the 'weapon of last resort' test which is so frequently wheeled out by resident parents in cases of this sort. It also addresses the duties of Guardians in situations such as these, where the requirement to provide the child's wishes and feelings to the court clashes with the overarching concern of the child's welfare.

Change of residence – no longer a weapon of last resort

Both at the appeal hearing and in his written judgment McFarlane LJ rejected the language of the ***Re: A (Residence Order)*** **[2009] EWCA Civ 1141** test, saying:

> 'whilst having the greatest of respect for the two judges who gave judgments in Re: A, I would wish to distance myself from the language used insofar as it refers to a decision to change the residence of a child as being a 'weapon' or 'a tool'… such language in my view risks moving the focus of the decision making away from the welfare of the child which must be the court's paramount consideration.'

It is perhaps not surprising that a judge who has previously described the nomenclature of 'Residence' and 'Contact' orders as 'pejorative' would be keen to distance himself from such pugnacious vocabulary. Nevertheless, the President's point is acute: and in this the actions of the court mirror the situation on the ground – the child is too often lost whilst the focus rests so heavily on the parent. Hopefully, this judgment will help to return the family court's gaze more resolutely towards the child in line with the overarching concern of the Children Act.

What is retained from previous caselaw is the principle in *Re: C (Residence)* [2007] EWHC 2312 (Fam): that resident parents who harm their child by not giving them permission to have a relationship with the other parent should be given a chance to improve matters if they have demonstrated sufficient insight. The insight of the parent with whom the child lives is likely to be the turning point in cases of this nature because of the competing trajectory of the delay principle.

This really begs the question of how, practically, insight is to be assessed. In public law proceedings this is achieved either when an expert report is obtained or a judge hears evidence and determines the matter. However, private law proceedings

have a much greater capacity to drift endlessly by way of uneasy 'consent' orders, passed around any and all available judges who already struggle with overflowing lists. The danger of this situation, as we find in ***Re J (Contact Orders: Procedure)*** **[2018] EWCA Civ 115**, is that while litigation drifts on and on, the children, in contrast, develop fast; too often in the context of one parent's hostility towards the other. The corollary of allowing cases to drift within an environment of hostility is that children become more entrenched and more damaged as a result with the prospect of permanent estrangement becoming more realistic.

The best way to avoid such situations continuing is to refuse to allow cases to bounce back interminably. Too often, parents who do not promote contact will find that the inherent delay of the court system is their best ally. To that end, the introduction of legal advisors sitting alone for private law hearings is very much a step backwards. Put plainly, if there is ever to be a change of residence the first requisite is judicial findings of some sort, which plainly requires a hearing with evidence and allegations. Practitioners will know that it can be a daunting battle to secure that sort of hearing in the first place; and Re: L is an excellent example of this insofar as alienation and the damage to the child had been a recurrent concern, both of the father and the Cafcass officers involved, for the preceding 6 years of litigation.

The test for transfer

This is an interesting aspect of the case, especially when we arrive at what the 'threshold' for a change of residence may be. At paragraph 59 of *Re: L* the President says:

> 'It is important to note that the welfare provisions in CA 1989 S1 are precisely the same provisions as those applying in public law children cases where a local authority may seek the court's authorisation to remove a child from parental care either to place them with another relative or in alternative care arrangements. Where, in private law proceedings, the choice, as here, is between care by one parent and care by another parent against whom there are no significant findings, one might anticipate that the threshold triggering a change of residence would, if anything, be lower than that justifying the permanent removal of a child from a family into foster care.'

One of the peculiarities of the current system is that moving a child away from the parent it lives with is so very much harder to do in private than in public law proceedings. Naturally this is largely to do with the nature of the cases: private cases are private essentially because they do not meet the trigger for public law proceedings to be issued. It stands to reason that a case not serious enough to justify local authority involvement will require different remedies typically. However, in entrenched parental hostility cases, where parents can be quite emotionally abusive to their children, there is also in my view quite a significant judicial and professional reluctance to move children away from the abusive parents. *Re: L* goes someway to addressing this by making it clear that the trigger may be less serious than that in public law proceedings. This is a significant change to the regime and could mark a very different approach to the courts with change of residence cases – ie that they become much more possible. There appears in this approach to be some consistency with the President's 2018 speech to NALGRO where he compares the loss of a relationship with one parent to adoption. Given what is said in *Re: L* it is clear that once a private law case moves into the sphere of a s37 report being commissioned, the possibility of a change of residence, regardless of the outcome of that report, should be firmly on the judicial table.

The obtaining of ascertainable wishes and feelings

In Re: L the Guardian was heavily criticised by the mother for failing to ask the 8-year old child with which parent he would like to live. On the face of it, the criticism is easy to understand: not only is the court required to consider these wishes and feelings as part of any decision-making process but Guardians are required to report to the court the wishes of the child 'in respect of any matter relevant to the proceedings' as per PD 12A para 6.6(b).

In the instant case the Guardian had made the decision not to ask the child where he would like to live on the basis that to do so would harm him. The child was already withdrawn, monosyllabic and only talking to make up more allegations against his father when he came to see his Guardian. For her part, she was anxious to avoid heightening his anxiety on the matter or to do anything which would lead him to reject verbally his father more than he was already doing. At the time she had not observed the child's contact with his father but when she did so she described it as a 'highly positive relationship' in direct contrast to the way in which the child spoke about it away from his father. She did not think that the child knew of his father's application to live with the child and did not wish to bring the child any further into the litigation ring.

At first instance HHJ Tolson QC determined that the answer of the child would have been obvious anyway – he would only ever have said he wished to live with his mother. Whilst the mother did not appear to disagree with that analysis she argued that the failure to have asked the child was so great a procedural breach that it invalidated the judge's judgment and subsequent decision to transfer.

What this argument ended up exposing went to the heart of the case before the court. Essentially, the child was so damaged that his wishes and feelings could not be clearly ascertained even if they had been asked for. The court was reminded that 'ascertainable' does not simply mean what children say but also how they behave

This is clearly in line with earlier Court of Appeal decisions including *H v H* [2014] EWCA Civ 733 and *Re A* [2013] 2 All ER D 62. In *H v H* the Court of Appeal quoted with approval what was said by Parker J at first instance: '*I have more than once stressed in this case, as in others, that the word used in the Children Act about wishes and feelings is "ascertainable" and not "expressed". "Ascertainable" often means that the court has to look at the actions rather than the words.*' In Re A, McFarlane LJ (as he was) said at paragraph 68: '*The evaluation of the weight to be given to the expressed wishes and feelings of a teenage child in situations where the parent with care is intractably hostile to contact is obviously not a straightforward matter, no matter how consistently and firmly those wishes are expressed.*'

Bluntly put, however, this point took the argument forward little further in this case. In the end, the court determined that the welfare principle took precedence over the procedure which went towards fulfilling the requirements of other parts of the Act. Therefore, the Guardian's decision not to press the child on this matter was upheld by the judge as being compatible with the over- arching framework of the dominant welfare principle.

Conclusion

One of the difficulties of this decision (and one not put by the mother, interestingly) is that it is likely to be applicable to a large swathe of children in proceedings of this sort up and down the country. In cases such as these it is very easy to imagine circumstances where the mere posing of a question about residence or similar could risk harming the child by increasing its anxiety, making it feel it had to take sides in a parental dispute, or by indirectly suggesting it has agency in what will ultimately be an adult decision. There is a faint risk with the Guardian's approach approved in Re L, that fewer children will be asked for their views in circumstances where ordinarily they would have been – and the courts may be the poorer for it. After all, taken to its logical extreme, the welfare principle is hardly compatible with much litigation at all, considering the stress and anxiety which litigation typically carries for both children and their parents.

What is plain is that this judgment was not intended to water down any requirement for the court to hear from the children through their Guardians. The court very carefully did not endorse the suggestion that questions must not be asked if they can harm children. Instead, each case must be carefully considered on its facts not just by the court but also by the professionals working directly with the children and parents. Instead, the judgment can be seen as a return to the language and values embedded in the Children Act itself. The President holds that it is not for the courts to put a 'gloss' on the balance of harmtest, which in and of itself is straightforward enough. He has indicated also that a change of residence does not need to meet the s31 threshold test. It is time for the courts and practitioners to catch up.

CASES

I (Children) [2019] EWCA Civ 898

This is an appeal following delivery of a judgment in a finding of fact hearing in care proceedings concerning two unexplained skull fractures sustained by a baby ('A'). The Local Authority ('LA') sought specific findings, namely that each of the injuries were inflicted by A's mother.

In relation to the first, left hand side, fracture the judge concluded that the fracture was an older injury, not a birth injury and which, on the balance of probability, occurred whilst the child was in her mother's care. The trial judge said that 'after much consideration I have concluded that beyond that I will be entering into the realms of speculation as to what happened.'

In relation to the second fracture, the trial judge concluded that '...all this set the context for a sudden loss of control resulting in an injury to A inflicted or caused by an anxious, stressed mother. Alternatively, and there is some evidence for this from M herself in her police interview and in the children's reported conversations in the car [that] she left A unattended and was downstairs at the time.' (Para 133)

The mother filed six grounds of appeal. Permission was refused in relation to a number of those grounds, two were not pursued by mother, leaving the only ground as: 'In reaching the conclusion that there are two potential explanations for the injury the learned judge has failed to make a determination of facts.'

All parties agreed that the appeal must be allowed. The issue of the appeal court was the proper order to make upon the appeal being allowed.

Mother submitted that para 133 should be amended to add at the end of the paragraph: 'Consequently, I am unable to reach a clear finding as to what caused the right-hand fracture and it remains unexplained.' In doing so Mother accepted that this would have the effect that any risk assessment of her would proceed on the basis that each of the fractures sustained by her baby whilst in her sole care are unexplained. The LA and the Guardian submitted that there should be a re-hearing before a different judge to determine how the right sided injuries were caused, that being essential in order to lead to a fair and comprehensive assessment of the mother as a future carer for the children.

The events surrounding the handing down of judgment are set out in the appeal judgment. In summary:

> (A) Throughout the proceedings and at trial mother's case had been that A had fallen off the bed whilst she was in the room.
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> (B) Before the court was also a statement from the social worker, who described a conversation which took place between A's sister and half brother. The younger child described her mother as being in the room when A sustained the second injury; the elder brother said that he did not see him fall and their mother had been downstairs when it had happened. The social worker's evidence was that the elder child had said the younger child was to stop lying. Following the conclusion of the trial the elder child told an adult at his school that he had been in the room when the child fell and that he feared that he had hurt the child.
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> (C) Mother then filed an unsolicited statement, on 20 February, in which she changed her account to suggest that she had gone downstairs and heard a long bang and ran upstairs to the rescue.
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> (D) A draft judgment was circulated on 14 February. Paragraph 133 read differently at that stage (see para 14).
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> (E) Mother's representative emailed the court with observations and requests for 'clarification' (see para 15).
>
> (F) At the hearing listed for the handing down of judgment Mother's representative invited the Court to refrain from handing down judgment and hear further evidence from mother. This was refused; there was no appeal in relation to this case management decision.
>
> (G) Judgment was handed down, with paragraph 133 as above. This left two inconsistent findings.

Moylan LJ granted permission to appeal, and gave directions that the parties should invite the trial judge to provide clarification of the findings. The response to the request is set out at paragraph 20. The trial judge said, unequivocally, that the right sided head injury had been inflicted by the mother. This left unresolved the fact that, 'on the face of it, there is fresh evidence, untested evidence, ostensibly in support of the original, alternative, explanations suggested by the judge in paragraph 133, namely of the fracture resulting indirectly from a negligent action on the part of the mother as a consequence of having left A unsupervised with C whilst she went downstairs to make up a bottle.' (para 21)

The appeal court concluded that, notwithstanding the substantial delay, a complete re-hearing before a different judge is inevitable.

Two further areas of concern were thrown up:

> (A) the extent of clarification of the judgment on behalf of the mother (paras 25-41); and
>
> (B) The filing of the mother's statement between receipt of the draft judgment and handing down of the judgment. (paras 42-45)

As to clarification of the judgment, the relevant jurisprudence is as follows: *English v Emery Reimbold and Strike Ltd* [2002] EWCA Civ 605, *Egan v Motor Services (Bath) Limited Note* [2007] EWCA Civ 1002, ***Re A and another (Children) (Judgment: Adequacy of Reasoning)* [2012] 1 WLR 595 (the Practice Note)**, *Re M* [2009] 1 FLR 117, ***R (Mohamed) v Foreign Secretary (No 2)(CA)* [2010] 3 WLR 554 (Mohamed)**, ***Re C (Placement Order: Appeal)* [2014] EWCA Civ 70**. Reference is made to FPR PD30A para 4.6, in relation to 'material omissions' from a judgment of the lower court.

King LJ notes that it has become, as the Court of Appeal understands, 'almost routine' for a draft judgment to be followed up with extensive request for 'clarification' which 'in many cases can be regarded as nothing other than an attempt to reargue the case or, as here, water down the judge's judgment.' King LJ further notes that, provided the term 'material omission' found in paragraph 4.6 of FPR PD30A is taken to embrace the totality of the matters included in paragraph 16 of Munby LJ's Practice Note in Re A, then she would agree and endorse the observations of Mostyn J in *WM v HM* [2017] EWFD 25 at para 39.

In conclusion Her Ladyship states:

> 'It is neither necessary nor appropriate for this court to seek to identify any bright line or to provide guidelines as to the limits of the appropriate nature or extent of clarification which may properly be sought in either children or financial remedy cases. I would merely remind practitioners that receiving a judge's draft judgment is not an "invitation to treat", nor is it an opportunity to critique the judgment or to enter into negotiations with the judge as to the outcome or to reargue the case in an attempt to water down unpalatable findings. Requests for clarification should not be routine and should only be made in accordance with the Practice Note which I repeat is: "*to raise with the judge and draw to his attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process.*' (Para 41)

As to mother's statement, King LJ concluded that:

> (A) 'Fresh evidence' should never be confused with nor regarded as part of the clarification process.
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> (B) Immediately fresh, and potentially relevant, evidence is brought to the attention of a party, it is their duty to inform and provide the evidence to all the other parties in the case. Any statements subsequently drafted and upon which a party wishes to rely must be served on all the parties and absent express consent in writing, should not be sent to the judge.
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> (C) In the event that a party wishes to make an application that the judge should delay the handing down of judgment in order to consider whether, and if so to what extent, there should be further evidence in the case, proper notice should be given to both the judge and the parties in order to enable the judge to have a directions hearing and to hear submissions from all sides.
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> (D) It is for the judge then to determine, using his or her case management powers what, if any, steps should be taken to consider the fresh evidence. Although in this case a re-trial was ordered, such an outcome is by no means inevitable, and indeed might be regarded as unlikely, where an alleged perpetrating parent files a statement by which they completely change their story between receipt of a draft judgment and the handing down of the same judgment.

The appeal was allowed by consent and remitted for retrial.

Summary by **Emily Ward**, Barrister, **Broadway House Chambers**.

Crowther v Crowther [2017] EWCA Civ 2698

The parties had endured protracted financial remedy proceedings in relation to a single issue: the future of the Family Home. The Family Home, it was accepted, had been purchased entirely from an inheritance the wife received following the death of her parents. It was a mortgage free four-bedroomed property worth c.£200,000. W continued to live in the property. H lived with his parents who were in their seventies. W argued that H should receive no benefit from the capital contained within the property. H sought to receive c.£100,000, i.e. equal to 50% of the value of the Family Home.

Despite the dispute being succinctly summarised as above by McFarlane LJ, he acknowledged that HHJ Tolson QC had faced numerous complicating factors at the final hearing, including that:

> • Both parties were vulnerable from a mental health perspective. W had appeared in person throughout the proceedings. At earlier directions hearings her presentation had been of sufficient concern to raise questions of capacity. Time was then spent attempting to assess W's capacity and engage the Official Solicitor. Attempts were also made for W to receive legal aid. The appeal does not consider the detail of these avenues, but observes that the result was that W remained in the same position as at the beginning; namely not lacking capacity but continuing to act in person.
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> • W's position was heavily focussed upon her account of her own past, and the role of H in her past, and also the role of other sources. As a result her position was focussed upon the history and she described the impact of this upon her. McFarlane LJ explained that '*she is preoccupied by these matters and the unfairness of the events that she has encountered in her life to the extent that she really cannot see that the husband is entitled to have any claim against her now* [3].' W argued primarily that H was not entitled to any claim over the Family Home because it represented her inheritance from her parents.
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> • H was also vulnerable as '*He presented to the court, as he does to all the world, as a physically disabled man*…[4].' H was confined to a wheelchair and the court described him as '*very limited in his ability to look after himself or engage in anything approaching a normal life because of those limitations* [4].' McFarlane LJ explained that '*In the course of the proceedings the husband was assessed, both by an orthopaedic surgeon and by a psychiatrist, and the resulting expert opinion was that there was really very little physical explanation for the husband's apparent disability and that there was a very significant element of functional overlay, causing him to present as… described* [4].'

The latter stages of the proceedings were managed by HHJ Tolson QC, the DFJ at Oxford. At the contested final hearing, W appeared in person and H was represented by Mr Dance of counsel. After Mr Dance had undertaken examination-in-chief of H, HHJ Tolson QC indicated to W that he had a number of matters that he wished to raise of H, before W asked questions herself. HHJ Tolson QC then questioned H for 26 pages of transcript before inviting questioned from W. In the last 5 to 6 pages of transcript, the Judge asked H whether he could, as a matter of reality, actually live independently from his parents in the way he sought to on his own case. H's case was that he would move out of his parents' property and purchase a one-bedroom property nearby and live on his own there '*with little or no outside support [6].*'

HHJ Tolson QC concluded in his judgment that:

> • '*I cannot envisage that this solution would in fact meet [the husband's] needs. Before, however, we get to that point I express my doubts as to whether that is something which he will even undertake. It appears to me he has been an individual who for much of his life, perhaps all of it, has been dependent upon others and there is no significant body of evidence before me as to his ability to function independently…*
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> *… I do not think the solution proposed would meet [the husband's] needs. It is clear that no share of the property less than 50% would serve any useful function as far as [the husband] is concerned and of course to grant him a sale and the full 50% would not in any way reflect the contribution which [the wife] made from her family to the purchase of the property in the first place.*'
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> • He additionally observed the mental struggle that W said she would experience if she were to move from that property.
>
> • He ordered that H should not be awarded any of the capital.

Whilst Mr Dance raised specific points of appeal regarding the trial judge's analysis, and his approach to contribution, McFarlane LJ considered the most significant argument raised on H's behalf more broadly concerned the fairness of the process. In particular:

> '*The judge's questioning of the husband as to his ability to live independently introduced… for the very first time into the case a question mark over H's ability to live in that way [11].*'

While s25(2)(e) MCA 1975 requires the court to consider any physical or mental disability of the parties, Mr Dance argued on H's behalf that the issue was introduced in an unfair and improper manner at the trial. Furthermore, it was argued that the Judge's questioning extended beyond the remit of s.31G(6) MFPA 1984. This was because it presented a case regarding H's ability to live independently which was not part of W's case before the court [11]. When directly asked by the appellate court, W confirmed that this was not part of her case before the court [13].

The Court of Appeal expressed professional sympathy for any judge in the not uncommon scenario where one party appears in person and the other has a strong legal team:

> '… The requirement for the court to achieve a fair process by assisting the litigant in person almost inevitably draws the judge into the role of inquisitor, albeit on behalf of the litigant. It is a difficult line to tread, and if

> this appeal is successful I wish to be in no way critical of Judge Tolson, who on the day will, I am sure, simply have been doing his best to achieve a fair process for these parties [12].'

However, in spite of this, McFarlane LJ concluded that Mr Dance on H's behalf was right in asserting that the 'independent living point' was raised for the first time in the Judge's questions, which did unfortunately go beyond simply assisting the litigant in person to present her case, which was set on a different basis. The process was therefore inadvertently unfair because H had had no advance warning of the point being raised in order to take steps to present his own case in order to meet it [14]. The appeal was therefore allowed.

Whilst both parties had hoped for a redetermination, this was not possible on the information before the Appellate Court. The matter was therefore remitted to the family court for a rehearing.

Summary by **Bethany Hardwick**, barrister, **St John's Chambers** .

R (A Child) [2019] EWCA Civ 895

Her Honour Judge Anderson heard a fact-finding hearing within care proceedings concerning five children from two related families. The focus of the hearing had been to establish how two young children, LM and LR, came by inflicted injuries at different points in time.

After a hearing lasting 25 days, the judge made a number of findings in relation to the parents' drug use, domestic abuse, and the father's volatile and aggressive behaviour, such that each exposed any child in their care to a real risk of harm. The judge also found that LM had suffered extensive bruising to her head and face as a result of at least four forceful blows by one of her parents, but could not determine which one, albeit that both knew the truth and had persistently lied about it. There was no appeal against these findings.

The judge also made findings against the paternal grandmother, namely that she had failed to protect LR from her parents by facilitating unauthorised contact on more than one occasion. There was no appeal against these findings.

Finally, the judge also found that, aged 11 weeks, LR had suffered inflicted injuries. She could not identify a perpetrator, but found that the pool comprised the parents and the paternal grandmother. The paternal grandmother appealed against her inclusion in the pool.

The Court of Appeal paid tribute to the judge's lengthy judgment, although noted that she did not explain in it the basis for her finding that the paternal grandmother was in the pool. When asked for clarification as to her reasoning, the judge provided the following explanation:

> • The grandmother had suffered from long-term depression.
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> • She was playing a larger role in the care of LR than had been anticipated and on 8 November she was also caring for one other young grandchild: "Her ability to care for two children at this age alone for a prolonged period is unknown."
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> • Her emotional state was not under professional scrutiny in the way that the aunt's was. "I take into account that looking after a very young baby may be a demanding task for a lady who suffers from depression, and from a level of anxiety which sometimes made it difficult for her to leave her house."
>
> • The grandmother was under a stressful conflict of loyalties. "This will not have been an easy role for someone who experiences acute anxiety."
>
> • "The grandmother has been described as someone who lives on her emotions, which the family have attempted to portray in a positive light. However, the grandmother herself describes a loss of temper, albeit with her adult child and in an emotionally charged situation. In her police interview she describes the occasion at the medical centre when the family were shown bruising to LR's back. She describes that her first response to being shown the bruises was to wonder whether she had done it by 'patting' or 'jiggling' LR followed by her "bursting into tears", and then, after the father had "lost his rag", she "obviously, lost (her) temper with [him]" before attempting to calm him down."

The Court of Appeal allowed the appeal on the basis that it was not permitted on the evidence before the judge. None of the above matters could be said to add significant support to the conclusion that there was a real possibility that the paternal grandmother caused the injuries, and to that extent irrelevant or insubstantial matters were unduly brought into account. Further, the judge gave no weight to the findings about the character of the parents or their behaviour in relation to LM.

Importantly, at the end of his judgment, Peter Jackson J clarifies the test for permission to appeal. Given its importance, his clarification is quoted in full from paragraph 31, as follows:

> 'This appeal represents an opportunity to resolve any remaining doubt. The test for the grant of permission to appeal on an application to the Court of Appeal or to the High Court or Family Court under the first limb of the relevant sub-rule is that the appeal would have a real prospect of success. As stated in *Tanfern v Cameron-MacDonald (Practice Note)* [2001] 1 WLR 1311 CA at [21], which itself follows *Swain v Hillman* [2001] 1 AER 91 CA, there must be a realistic, as opposed to fanciful, prospect of success. There is no requirement that success should be probable, or more likely than not.'

Case summary by **Thomas Wilson**, barrister, **1GC** .

J-S Children [2019] EWCA Civ 894

Ground of Appeal

These were (at §7):

> (1) that HHJ Owens was wrong to conclude that the continued separation of the children was proportionate (in continuing interim care orders), and,
>
> (2) that there is a need for guidance on the availability of tagging in a 'standard' care case that does not involve the risk of abduction.

Ground One – Permission to Appeal

It was submitted on behalf of the father (at §9) that the judge's overall assessment of risk was flawed. Namely, that the judge was entitled to find the gravity of risk of harm to be serious given the background of the case but that she had not properly considered the likelihood of that harm occurring. Particularly, by not properly weighing up the protective possibilities of electronic tagging.

Lord Justice Peter Jackson (with whom Lord Justice Baker agreed) did not hesitate in refusing permission to appeal (at §11). Notably, HHJ Owens was fully entitled to find that even if tagging could be put in place, it would be insufficient to mitigate the risks in the present case. His lordship also noted that an appellate court will rarely interfere with an interim order and all the more so where the central disputed issue would be resolved in a future fact-finding hearing.

Ground Two – Appeal

This ground became academic in the light of the judge's core decision that she would not order tagging and the Court of Appeal's refusal to grant permission to appeal (at §12). The court was referred to the statement of principle in *Hutcheson v Popdog Ltd. (Practice Note)* [2012] 1 WLR 782, where Lord Neuberger MR held that, save in exceptional circumstances, the Court of Appeal may only entertain an academic appeal where three conditions are met (reiterated at §13). None of those conditions were satisfied in this case. First, the court was not aware of any pressing demand for further guidance on electronic tagging in 'standard' care cases (at §14). Second, the Local Authority and the Guardian did not consent to the appeal going ahead and there was no realistic form of costs protection (at §15). Third, for the issue to be fully argued, the court would have needed to hear from the MOJ, the LAA and potentially other organisations – the expense and delay to do this would have been disproportionate (at §16).

Lastly, the court noted that the judge was persuaded to grant permission to appeal on the second ground on the basis that there was a compelling reason for the appeal to be heard (at §19). However, at the same time, she had refused permission to appeal on ground one – thus there was a possibility that the appeal would turn out to be academic. Caution was therefore urged to grant permission in such circumstances and in most cases, it would be preferential to leave the decision to grant permission to the Court of Appeal (at §21).

Summary by **Max Turnell**, barrister, **1 King's Bench Walk** .

A Clinical Commissioning Group v P (Withdrawal of CANH) [2019] EWCOP 18

In this case, MacDonald J was asked to consider whether P lacked the capacity to make decisions regarding clinically assisted nutrition and hydration (hereafter CANH) and if so, whether the court should consent on P's behalf to the withdrawal of that treatment, a step that would result in her death.

It was an unusual case in that all of the parties to the proceedings were all in agreement that P lacked capacity and that CANH should be withdrawn. However, the staff at the unit that were caring for P expressed certain contrary views and P's treating clinicians took a neutral position. It was within this context that the CCG brought the matter to court and MacDonald J considered it appropriate to deliver a fully reasoned judgment.

The learned judge summarises the evidence before him at [6]-[41] and the law at [42]-[54].

At [55] onwards the learned judge sets out his well-balanced conclusion and analysis in light of the specific facts of the case. The learned judge concluded that P lacked capacity to make decisions regarding CANH and that continuing treatment was not in P's best interests. As such, it was decided that upon an end of life care plan being agreed and approved by the court, the court should withhold its consent for ongoing CANH on behalf of P.

In reaching the conclusion that P lacked capacity, the learned judge considered the evidence of P's treating clinician (Dr H) and the court appointed expert (Dr Pinder) both Consultants in Neurological Rehabilitation. It was concluded that P was in a minimally conscious state rather than a vegetative state (albeit that her diagnoses had varied between the two previously). The judge noted that there was a mismatch between the perception of many of the staff at the Unit and P's family as to her level of awareness and response. The staff at the unit were of the belief that P was exhibiting behaviours denoting a higher level of awareness including laughing, smiling and being able to make certain choices. However, on close examination of the medical evidence, the judge considered that these behaviours were merely reflexive in nature and P was unlikely to ever recover significantly.

In respect of deciding what was in P's best interests, the overriding factor for the learned judge was P's express wishes prior to losing capacity. It was considered that her views: 'could be ascertained with sufficient certainty and, on the particular facts of this application, should prevail over the very strong presumption in favour of preserving her life where those wishes were clearly against being kept alive in her current situation' [62]. P was previously involved in the decision making of whether her former partner's life support should be terminated. The judge accepted the evidence from the family that P made clear to them at that time that she would not want to be left in such a condition herself if anything happened to her. The judge concluded: 'on the balance of probabilities that prior to becoming incapacitated, P expressed a clear and firmly held view that she would not want to be kept alive in circumstances in which she now finds herself' [65].

The learned judge considered that this was consistent with her character and outlook on life generally. She was described by her family as 'the life and soul of the party' and very conscious of her appearance and presentation. At [67] the learned judge states: 'I am further satisfied within this context that the court can properly infer that the loss of the ability to communicate, to socialise, to sing and dance, or to return to her active vivacious self, would all have had a profound negative impact upon P and would have informed her decision making on the issue now before the court.'

MacDonald J also considered that P would have been reinforced in her views by the impact on her daughter of her being kept alive in such a state. The evidence of P's half-sister who was caring for her niece was that this was having a negative effect on her wellbeing at her young age and P would not have wanted this.

This decision supports the line of case law set out by Charles J in *In re Briggs (Incapacitated Person) (Medical Treatment: Best Interests Decision) (No.2)* at [71], and Hayden J in *M v N* at [32]. Namely: 'that the wishes and feelings of an incapacitated adult, ascertained with sufficient certainty through their cogent and authentic communication to the court via family or friends, can found a compelling and cogent case as to what P would have wanted and would have decided in respect to the decision under consideration' [71].

This case is the next step in the Court of Protection reaffirming the importance of dignity and autonomy rather than allowing paternalism and the principle of the sanctity of life to triumph at all costs.

Summary by **Asha Groves**, barrister, **St John's Chambers** .

TY v HY (Return Order) [2019] EWHC 1310 (Fam)

A father applied for the return of the child NY to Israel following the parents' marriage breaking down while in England. The parents and child were Israeli. The marriage had been in trouble for some time. The parents decided to come to England for a fresh start in the hope that their marriage could be saved. After 6 weeks it became clear that the situation was worsening and the father proposed that they returned to Israel. The mother refused and the father went back to Israel. The mother and child stayed here.

The judge heard oral evidence from the parents and the mother's friend HR. There was evidence indicating that HR was advising the mother on the tactics she should adopt to secure a gett and to prevent NY having to go back to Israel including allegations of domestic abuse and fear of abduction by the father.

The judge reviewed and (usefully) summarised the law on the issues he had to decide:

(a) Habitual residence [paras 35-40]

(b) The High Court's power to order a return even if the child was habitually resident in England at the date of the Hague application [para 41]

(c) Consent to removal and retention for the purposes of Art 13 [paras 42-44]

(d) Intolerable harm [Paras 45-47]

(e) Discretion to order or refuse to return if a "defence" under Article 13 is established. Paras 48-51]

He then answered the questions concluding that:

• the child's situation never achieved the level of stability or integration which led to her acquiring habitual residence in England [53-60];

• that the father had consented to a move to England and the parents had not agreed that it be limited in time or circumstance and that he had not been induced by misrepresentation or fraud to give his consent. He was not able to withdraw the consent once it had been acted upon. [61-64];

• that in examining the allegations of harm he should adopt "the methodology endorsed by the Supreme Court in Re E by which the court assumes the risk relied upon at its highest is not an exercise that is undertaken in the abstract. It must be based on an evaluation of the relevant admissible evidence that is before the court, albeit an evaluation that is undertaken in a manner consistent with the summary nature of proceedings under the 1980 Hague Convention. The court does not simply assume, without more, the maximum level of risk contended for by the abducting parent. Rather, the court examines the information available to it and, having considered that information, arrives at a reasoned and reasonable assumption as to the maximum level of risk having regard to the available evidence" [para 64] and having done so the level of risk and the protective measures would be sufficient. [65-67]

• That the exercise of discretion required the child to be returned to Israel. [68-71]

Summary by **Nick O'Brien**, barrister, **Coram Chambers** .

Dorset Council v E (Article 15 BIIR) (Rev 1) [2019] EWFC 35

Background

The case concerns a family in which all adults and children were born in Slovakia, except the eldest daughter who is approximately age 8, who was born in England. The eldest boy, approximately 9 years old, currently lives in Slovakia with his maternal grandfather. The other children are 7 and 2 years old. All three children who are living in England speak English very well. The mother speaks Slovak and some Roma. She identifies with the Slovak Roma community.

In 2016, the family went through care proceedings in Kent. The reasons for Kent bringing care proceedings centred around neglect, physical and sexual abuse of the mother by the children's father, and non-accidental injury to the then 5-year-old younger son. These were set out thoroughly in Theis J's judgment, which made findings, and are repeated in this judgment. In those proceedings, Theis J concluded that the children concerned were not habitually resident in England and Wales. The children returned to Slovakia and were placed in institutional care pending assessments and proceedings there. The Slovak court gave judgment in October 2017, returning the children to their mother's care and not mentioning the judgment or findings of Theis J.

The family moved again to England in March 2018 with a settled intention to remain here. A video came to light showing the mother assaulting her eldest daughter, who was approximately 8 years old at the time. The children were removed on 15 March 2019 under police protection and the LA initiated investigations.

At a hearing on 26 March 2019, HHJ Dancey sitting as a section 9 judge made a declaration by agreement that the court has jurisdiction based on the children's habitual residence being here. At a hearing in mid-May 2019, the court heard submissions from the parties, all of whom agreed that he children were habitually resident in England. The court also read full written submissions by the Head of the Centre for the International Protection of Children and Youth of SCA, who had requested to transfer proceedings to the Slovakian courts pursuant to Article 15 of BIIIR. HHJ Dancey reserved judgment until late May 2019.

The Law

The general rule under Article 8(1) Council Regulation (EC) No 2201/2203 (BIIR) is that jurisdiction lies with the courts of the Member State in which the child is habitually resident. An exception may arise under article 15 if at least one party accepts that another Member State (where the child has a particular connection) would be better placed to hear the case, or a specific part thereof, and if this is in the interests of the children. The interests of the children in this context is "a different question from what eventual outcome to the case will be in the child's best interests" as stated by Baroness Hale in *Re N (Children) (Adoption: Jurisdiction) (AIRE Centre Intervening)* [2016] UKSC 15 (para 44). Because Article 15 envisages transfer of all or part of the proceedings, it is open to the court to deal with fact-finding and then transfer for assessment and evaluation, as Theis J did in *Re MP (Fact-finding hearing: Care Proceedings: Art 15)* [2013] EWHC 2063 (Fam).

Conclusion

All parties agreed that the children had a particular connection to Slovakia. The SCA argued that the Slovakian courts were better placed to hear the case and it would be in the interests of the children. The mother accepted the SCA arguments. The LA and guardian opposed transfer. The court refused the request, primarily on the basis of the children being settled in their foster placement in England, the need for a fact-finding and police investigation here, and the ability through Member State cooperation to undertake assessments of the wider family in Slovakia.

Summary by **Lauren Suding**, barrister, **Field Court Chambers**.

A City Council v LS & Ors (Secure Accommodation Inherent Jurisdiction) [2019] EWHC 1384 (Fam)

MacDonald J was considering the following issue: Does the High Court have power under its inherent jurisdiction, upon the application of a local authority, to authorise the placement in secure accommodation of a 17 year old child who is not looked after by that local authority within the meaning of s 22(1) of the Children Act 1989, whose parent objects to that course of action, but who is demonstrably at grave risk of serious, and possibly fatal harm. His Lordship concluded that the answer is 'no'.

Brief Facts

The proceedings concerned KS, born in 2000 and at the time of the judgment, aged 17. The risks identified by the local authority ('LA') stemmed from KS's alleged involvement with gang activity, which was said to include involvement in so called 'county lines' drug dealing, alleged involvement in knife crime and a recent shooting, with the associated risks of reprisals, and continuing possession of or access to firearms.

A fuller background to KS's history, set out at paragraphs 6 to 11 of the judgment, indicates that since 2017 KS has been considered to be at risk of criminal exploitation, and that the police assessment of KS is that he is an active member of a named organised crime gang ('OCG'). Over the period 2017 to the date of the application KS,(i) was found to be in the company of an OCG drug dealer; (ii) witnessed a gang related stabbing; (iii) was found in possession of baseball bat and brick; (iv) was arrested for racially aggravated assault; (v) was made the subject of a Child Protection Plan; (vi) was found in possession of a quantity of heroin and an offensive weapon and arrested for conspiracy to supply Class A drugs; (vii) was arrested at a festival in possession of cocaine and on suspicion of selling drugs; (viii) was suspected of being involved in a street altercation; (ix) was convicted of possession of an offensive weapon and ABH and therefore made the subject of a youth rehabilitation order; (x) was attacked in the streets by a male yielding a machete and a knife; (xi) was suspected off being involved in the discharge of a firearm; (xii) was arrested following a knife attack that police intelligence indicated was a targeted attacked by members of the named OCG; (xiii) was served with a disruption notice and was identified as being on of the top six gun crime nominals in the police force area; (xiv) was identified by police as a suspect in the shooting of an adult male who was shot in broad daylight; and, (xv) was arrested on suspicion of attempted murder and bailed.

The LA issued its application on Form C66 for an order under the inherent jurisdiction, stating it to be 'deprivation of liberty' and a 'DoLs order.' The form indicated it was 'ex parte'. The Form C66 also stated 'recovery application also issued', an incomplete application under s.41 of the ACA 2002 having been appended to the Form C66.

An order was made by HHJ Sharpe under the inherent jurisdiction of the high court, the terms of which were expansive, and which are set out at paragraph 15 of the judgment. The order purported to delegate to the police power to enter any premises, detain and retain KS and thereafter transport him to a placement that will deprive him of his liberty, considered by MacDonald J to be an attempt to replicate the terms of a recovery order pursuant to s.50 of the ACA 2002.

The parties position are set out at paragraphs 18 to 21. The LA submitted that in circumstances where it is not open to the LA to make an application under s.25 of the CA 1989, it was in KS's best interests for orders authorising his secure accommodation to be made under the inherent jurisdiction. It was suggested that the orders do not contravene s.100(2) of the CA 1989 as such orders would not 'require' the LA to accommodate KS, but rather simply 'authorise' such accommodation. It was further submitted that in circumstances where the statutory regime does not provide a remedy for the grave risk to KS's welfare contended for by the LA, by reason of his not being "looked after" for the purposes of s 25 of the CA 1989, a statutory lacuna exists in respect of minors in KS's position who are in urgent need of the type of protection that would be available to them were they amenable to the jurisdiction conferred by s 25 of the CA 1989. Within this context, having regard to the terms of s 100 of the CA 1989, the LA submitted that the evidence before the court demonstrated that the risk of harm to KS is extremely high, that in the circumstances there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the him he is likely to suffer significant harm, and that the result which the LA wish to achieve cannot not be achieved through the making of any order the LA is entitled to apply for.

It was noted on KS's behalf that he was not, and never has been, 'looked after'; that KS's age prevented the application of a care order; that KS's mother was willing and able to provide accommodation for him and who objects to him being accommodated for the purposes of s.29(7); and, that it is not possible bring him within the terms of s.25 CA 1989. It was argued that the use of the inherent jurisdiction per the LA's case contravenes s.100(2)(b) of the CA 1989, relying upon *Re E*

(A Child) [2012] EWCA Civ 1773 and *Re M (Jurisdiction: Wardship)* [2016] EWCA Civ 937. Mother supported the position put forward by the KS. The Guardian (who was not legally represented) supported the LA, on the basis of risk of KS.

Decision

MacDonald J surveys the relevant law at paragraphs 32 to 44 of his judgment, including s.25 of the CA 1989, the inherent jurisdiction, section 100 CA 1989, Articles 2, 5 and 8 of the ECHR, and relevant caselaw, including: *A Metropolitan Borough Council v DB* [1997] 1 FLR 767, *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180, *Re B (Secure Accommodation: Inherent Jurisdiction)(No 1)* [2013] EWHC 4654 (Fam), *A Local Authority v S* [2016] 2 FLR 616, *Re T (A Child)(Secure Accommodation Order), Re E (A Child)* [2012] EWCA Civ 1773, *Re M (Jurisdiction: Wardship)* [2016] EWCA Civ 937, and *Re A (Wardship: 17 Year Old: Section 20 Accommodation)* [2018] EWHC 1121 (Fam).

MacDonald concluded that the Court was not permitted to use its inherent jurisdiction to authorise KS's placement in the secure accommodation in the manner requested by the LA. The reasons for the decision are as follows:

> (A) There is no care order in force in respect of KS and an application for such an order cannot be made by virtue of his age (CA 1989 s 31(7)).
>
> (B) KS has not been accommodated by the LA for the purposes of the CA 1989.
>
> (C) KS's mother retains exclusive parental responsibility for him. She did not and does not consent to his accommodation and, accordingly, KS cannot be accommodated by the local authority for the purposes of s.29(7) of the CA 1989 Act.
>
> (D) In the circumstances, KS is a child who is neither "in the care of" the local authority or "provided with accommodation" by the local authority.
>
> (E) The two key consequences of that are:
>
> > (A) KS is not a "looked after" child for the purposes of s 25 of the Children Act 1989 and does not therefore fall within the terms of that section. The LA seeks an order under the inherent jurisdiction because s25 of the CA 1989 cannot apply to KS.
> >
> > (B) where KS is not and (in circumstances where his mother objects to his accommodation and where KS cannot be made the subject of a care order by reason of his age) cannot be a looked after child, the order the LA seeks under the inherent jurisdiction is one which would not only authorise the accommodation of KS in a secure placement, but would have the effect of authorising his removal from his mother's care without her consent for this purpose in circumstances where his mother, who retains exclusive parental responsibility for him, objects to this course of action. In the circumstances, the effect of the order sought by the LA under the inherent jurisdiction would be to require KS to be removed from his mother's care and be accommodated by the LA. This course of action is prohibited by s 100(2)(b) of the CA 1989.
>
> (F) The intention and effect of Section 100(2)(b) is to prevent the court in wardship or under the residual inherent jurisdiction making any order which has the effect of requiring a child to be accommodated by a local authority. That end can only be achieved by satisfying the requirements of the statutory regime for accommodating children provided by (amongst other provisions) s 20 of the CA 1989. That outcome cannot be achieved in this case under the statutory regime.

In conclusion, MacDonald J found that '*it is clearly established that the High Court cannot exercise its inherent jurisdiction to grant authority to the local authority to accommodate a child where the local authority would not otherwise be able to do so under the statutory scheme (*Re E (A Child) *[2012] EWCA Civ 1773 at [16] and* Re M (Jurisdiction: Wardship) *[2016] EWCA Civ 937 at [39]).*'

MacDonald J concluded that the orders sought by the LA lie outside the scope of the court's power under the inherent jurisdiction, however the LA were not criticised for seeking to 'explore the outer boundaries of the court's jurisdiction in an effort to protect KS from the risks it has identified.'

Summary by **Emily Ward**, barrister, **Broadway House Chambers.**

NG v GA (Jurisdiction Art 10 BIIa) [2019] EWHC 1412 (Fam)

Background

The parents were in a relationship from 2006-2012. Their only child, MA, now aged 10, has a genetic disorder, Cornelia de Lange Syndrome (CdLS), as does the mother. This impacts an individual in a varied manner, including cognitive impairment.

Following the parents' separation, the father was the primary carer. Prior to MA's removal to Ghana by the father on 24 July 2018, he had been having extensive contact with the mother, including time after school most days and staying contact.

On 30 November 2018, the father returned to the United Kingdom without MA, who remained in Ghana. On 11 January 2019, the mother applied under the inherent jurisdiction for MA to be made a ward of court and for an order requiring the father to return him to his jurisdiction.

Parties' Positions

Mother's contended that father stated he was taking MA on holiday to Ghana and he would return in time for the start of the new school term. Mother reported difficulties in securing indirect contact while MA was in Ghana and that the father had stonewalled about his return.

Father resisted the application on the basis that the mother agreed to MA going to Ghana to improve his education. In any event, he contended it was in MA's best interest to remain in Ghana for two years to catch up educationally. In oral evidence, the father conceded that the mother had at no point expressly agreed that MA could be taken to Ghana for a period extending beyond the summer holiday.

Decision

The court found the MA was wrongfully retained in Ghana by his father from September 2018. MacDonald J considered jurisdiction, specifically whether MA had become habitually resident in Ghana. It was "beyond argument" that prior to being taken to Ghana, MA had been habitually resident in England and Wales. Accordingly, the court's jurisdiction was grounded in Art 8 of BIIa. Within the context of the case – including that the father had represented the trip to Ghana as a holiday and this was the mother's and MA's understanding on departure - the court was satisfied that MA remained habitually resident in England and Wales on the date he was wrongfully retained. Pursuant to Art 10 of BIIa, the court retained jurisdiction.

Though there was no formal welfare assessment before the court, MacDonald J was satisfied that there was sufficient information to determine the mother's application. Factors taken into account included:

(i) MA's very specific educational and medical needs arising from his CdLS.

(ii) In Ghana, there was no one with PR in the jurisdiction to make decisions.

(iii) MA had a cardinal need to maintain a full relationship with each parent.

(iv) The importance for MA's identity and his understanding of living with CdLS of continued contact with the mother. Retention in Ghana was acting as an impediment to maintaining this vital relationship.

(v) MA has greater connections in this jurisdiction. The father provided a link to MA's Ghanaian heritage in this jurisdiction.

(vi) The material from the school in Ghana made no mention of his CdLS, its impact or the steps taken to address it.

MacDonald J was not satisfied that the advantages to MA's educational development of continuing schooling in Ghana were such that they justified prioritising his education over the other clear benefits to his welfare should he return to this jurisdiction, including direct contact with his mother. Return was ordered. Within the context of Ghana being a non-Convention country, it was in MA's best interests, and beneficial in seeking his return, to make him a ward.

Summary by **Victoria Roberts**, barrister, **Coram Chambers**.

Salford CC v M (Deprivation of Liberty in Scotland) [2019] EWHC 1510 (Fam)

The background to the mater was set out by Mr Justice MacDonald [§9-19]. The mother and her four children (M, L, N and H) moved to England from Easter Europe in 2012/2013. Salford City Council became involved in 2013, with all the children being subject to Child Protection Plans for various periods. M presented with significant challenging behaviours

including aggression and sexualised behaviour, would regularly go missing from home and school and was considered a victim of child sexual exploitation.

Care proceedings were issued after the mother felt unable to parent M, and M was subject to an interim care order and was placed in a residential children's home. Whilst there she continued to abscond, was exploited by older men, including drugs, alcohol and sexual activity. M was moved from this to a placement in Scotland, in circumstances where no suitable placements were identified in England, on 8 September 2018.

At a hearing on 4 October 2018 HHJ Butler gave the local authority permission to invoke the inherent jurisdiction and made an interim declaration authorising the deprivation of M's liberty at her placement [§16]. The local authority failed to bring to the attention of the court until 23 April 2019 legal advice it had received on 8 November 2018 from Scottish solicitors to the effect that there is no method by which a child's liberty can be lawfully deprived in the jurisdiction of Scotland in a placement that is not approved by the Scottish Ministers [§17].

The questions before Mr Justice MacDonald were thus threefold [§6]:

> i) Was M currently deprived of her liberty in her placement in Scotland?
>
> ii) If so, should the court permit an adjournment to enable the local authority to petition the Inner House of the Court of Session in Scotland for orders under the nobile officium "to find and declare that the measures ordered by the High Court in respect of [M] should be recognised and enforceable in Scotland as if they had been made by the Court of Session" (see *Cumbria Country Council and Ors, Re Children X, J, L and Y* at [35])?
>
> iii) If so, should the court further extend the current interim deprivation of liberty authorisation in respect of M's current placement in Scotland pending a decision by Inner House of the Court of Session?

Mr Justice MacDonald undertook a review of the evidence presented by an expert in Scottish law, Mr Inglis [§20-23]. Broadly, Mr Inglis' evidence was that a petition to the Inner House of the Court of Sessions was very unlikely to succeed. The submissions by the parties [24-30] largely focused on this being an unduly pessimistic attitude. Mr Justice MacDonald then summarised the applicable law on deprivation of liberty and cross border secure placements in Scotland [§32-53].

Mr Justice MacDonald found that that the regime that pertains in M's placement did act to deprive her of her liberty for the purposes of Art 5 of the ECHR, that the application to adjourn these proceedings should be allowed to permit the local authority to petition the Inner House of the Court of Session in Scotland for an order finding and declaring that the measures ordered by the High Court in respect of M should be recognised and enforceable in Scotland as if they had been made by the Court of Session and that, in the circumstances and the interim declaration authorising the deprivation of M's liberty should be continued pending the determination of petition in Scotland [§54].

On deprivation of liberty he stated that M's movement were significantly restricted and she was closely supervised for the vast majority of the day. As a result he found this was continuous supervision or control amounting to confinement to a certain limited place for a not negligible period of time, satisfying the *Storck* criteria.

Mr Justice MacDonald was satisfied that the application for adjournment should be granted. He stated that whilst this court could not decide whether the Scottish court has the power to apply the nobile officium in the circumstances of this case, he found there were a number of factors that went against the expert's pessimistic attitude about the likelihood of success [§64].

As a result he found the local authority's proposed petition was sufficiently arguable [§66] to justify the adjournment. He further stated this was something that had not been considered in previous case law such as *Cumbria Country Council and Ors, Re Children X, J, L and Y*, and it was in M's interest, and other children in similar situations, for the matter to be subject to clarification [§69].

In the interim, he found that on the balance of convenience favoured continuation of the interim orders authorising M's deprivation pending the petition by the local authority [§76].

He raised that the Family Court Practice was in error about the ratio of various cases concerning this area [§79-81]:

> i. *Re X (A Child) and Y (A Child)* is not authority for the bare proposition that a child can be placed, without more, in a placement in Scotland not approved as secure accommodation by the Scottish Ministers pursuant to an order authorising the deprivation of the child's liberty made pursuant to inherent jurisdiction of the English High Court. Rather, it is authority for the proposition that, whilst the *English* court has power to make such an order, unless the Inner House of the Court of Session in *Scotland* agrees to invoke the *nobile officium* in respect of such a course of action, such placement may be without legal authority in Scotland.
>
> ii. The ratio of *Cumbria Country Council and Ors, Re Children X, J, L and Y* is not that any orders made under the inherent jurisdiction of the English High Court authorising the deprivation of liberty of a child in a placement in Scotland not approved as secure accommodation by the Scottish Ministers will be recognised

under the nobile officium *jurisdiction. Rather, the ratio of the case is that where there is demonstrated a prima* facie case that the nobile officium might apply to a particular type of order made under the inherent jurisdiction of the English High Court, and the balance of convenience favours an interim order pending full argument, the Court of Session is able, in an appropriate case, to grant interim orders under the *nobile officium.*

iii. *Cumbria Country Council and Ors, Re Children X, J, L and Y* is not authority for the proposition that whenever a child is placed in accommodation in Scotland pursuant to an order made under the inherent jurisdiction of the High Court an application can and must be made for a 'mirror order' to regularise the legal status of such a placement in Scotland. This may be the ultimate outcome of the local authority's petition to the Inner House of the Court of Session in this case. However, as matters stand, the question of whether a Scottish court will invoke the *nobile officium* in circumstances where the placement of a child in Scotland amounts to a deprivation of her liberty for the purposes of Art 5 of the ECHR, which deprivation of liberty has been authorised by an order made under the inherent jurisdiction of the High Court but where the placement is not a placement approved by the Scottish Ministers for the provision of secure accommodation of children for the purposes of the relevant Scottish legislation, is one that remains undecided.

Case summary by **Victoria Halsall**, barrister, **1 King's Bench Walk**

London Borough of Wandsworth v Lennard (Application for Committal) [2019] EWHC 1552 (Fam)

LB Wandsworth ('the LA') applied for an order committing Mr Lennard ('Mr L') to prison for contempt arising out of an alleged breach of an order dated 6.7.18 which prohibited him from behaving in the following ways:

(a) Using offensive, foul, threatening words or behaviour towards AB or GO as employees of the applicant local authority working in the Children Looked After Team 2.

(b) Sending offensive, foul or threatening communications, emails or messages to AB or GO as employees of the application local authority working in the Children Looked After Team No (2) by texting or using the internet or social media to communicate.

MacDonald J set out that the process of committal for contempt is highly technical, and summarised the strict procedural requirements that must be complied with.

Mr L's son and daughter were made the subject of care orders to the LA in 2016. An issue arose regarding the commencement of ADHD medication for his son. Mr L felt that the LA had not sufficiently involved him in the decision. On 13.2.19 Mr L attended Wandsworth Town Hall. The LA alleged that Mr L's behaviour included barricading two social workers in a room, being verbally abusive, and making threats of harm towards GO. Mr L accepted that he used foul language towards the two social workers, detained them in a room for 10 minutes, and acted inappropriately. GO was not physically present during the incident.

The LA alleged that Mr L breached the order of 6.7.18 in that he 'used offensive, foul, threatening words towards GO'.

The issue was whether the injunction had, in fact, been breached on its terms. MacDonald J was satisfied that Mr L's counsel had made good the submission that there had not been a breach in this case having regard to the plain terms of the order. It was not disputed that at the time Mr L used words that were at least 'foul', GO was not present. MacDonald J was satisfied that in those circumstances, the foul language was not directed 'towards' GO for the purposes of the protective injunction from which she benefited. MacDonald J favoured the narrow interpretation of the word 'towards' in this context, and took the order to mean that Mr L was prohibited from using offensive, foul, threatening words or behaviour *in the presence of and in the direction of GO*. On the LA's single pleaded allegation the court was concerned with words spoken about, but in the absence of, GO. MacDonald J took this view on the proper interpretation of 'towards' in these circumstances primarily by reason of the fact that a breach of the injunction carries penal consequences. The application of the LA was not proved to the requisite standard and stood dismissed.

Summary by **Victoria Flowers**, barrister, **Harcourt Chambers**

Re NY (A Child) [2019] EWCA Civ 1065

MacDonald J ordered the summary return of a two-year old child to Israel under the 1980 Hague Child Abduction Convention ("the 1980 Convention"), making it clear he would have made the same order under the inherent jurisdiction.

The appeal issues were: whether there had been a retention within the scope of the 1980 Convention; whether the judge had dealt with the issue of protective measures correctly; and whether the judge had been wrong to order the summary return under either the 1980 Convention or the inherent jurisdiction [**2**]. The mother submitted: the judge had failed to address the matter of retention under the 1980 Convention; if retention had been addressed then no retention would have been found; and had the 1980 Convention not applied then the judge was wrong to make a determination under the High Court's inherent jurisdiction [**35**].

The parties had been born and married in Israel and NY was born there in 2016. In The parties had secure employment in Israel and their close extended families and friends lived there. The parties and NY speak Hebrew, the mother also speaks English and it was said that NY speaks some French and English. On facing marital difficulties, the parties moved with NY to live in England. After six weeks in England, on 10th January 2019, the parties decided to divorce and the father said he wished the family to return to Israel to end their marriage. The father returned to Israel and began divorce and custody proceedings in the Rabbinical Court in Israel. The mother issued divorce proceedings in London's Rabbinical Court. ICACU received the application and proceedings began in England in February 2019.

The father's case was that a wrongful retention occurred on 10th January 2019; the mother alleged NY was habitually resident in England on that date and the father had consented to NY's removal from Israel and retention in England; and that Article 13(b) was made out.

At the hearing below the judge determined: NY was not habitually resident in England at the relevant date; the father had consented to NY's 'removal' from Israel; the Article 13(b) defence was not made out; despite the father's consent the discretion to order summary removal to Israel would be exercised; and, regardless of the finding as to NY's habitual residence, it would be in NY's best interests to make the summary return order (under the inherent jurisdiction) for decisions about her welfare to be made in that jurisdiction.

The appeal court noted that the lower court judge did not address the issue of a retention that would fall within the ambit of the 1980 Convention.

The Court of Appeal found that the father's consent was relevant only in respect to the alleged retention (not the removal) and agreed with the mother's position that the judge needed to decide whether the retention on 10th January 2019 was wrongful (under Article 3) as this was the sole basis upon which the case came within the scope of the 1980 Convention. On this basis, the Court of Appeal found that the 1980 Convention "cannot bite" because of the court's findings on the basis of the family's move to England [**59**].

However, it was found that the judge had sufficiently set out his reasons for making a summary return order and that that a clear analysis of NY's best interests had been performed [**71**]-[**72**]. As to protective measures, the judge had assessed the risk of harm and determined that the proposed or identified protective measures would appropriately address the risk [**70**].

Moylan LJ gave the leading judgment, with which Flaux LJ and Haddon-Cave agreed, dismissing the appeal but substituting the judge's order with an order made under the inherent jurisdiction rather than the 1980 Convention.

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

B v A Local Authority [2019] EWCA Civ 913

Summary of Background

The Local Authority applied for declarations in respect of B, a 31 year old woman who lived at home with her parents with occasional respite care and some community support and who was assessed as requiring support to maintain her safety when communicating with others. B frequently used social media to search for potential boyfriends and engage in "sex chats" which led her to meet Mr C, who has convictions for multiple sex offences and is the subject of a Sexual Harm Prevention Order, despite which B did not accept he posed a risk and maintained regular contact with him, including staying overnight, and expressed her intention to live with him and have his baby.

This prompted the Local Authority to apply for declarations that B lacked capacity to litigate, consent to sexual relations, and to make decisions as to her contact with others. Subsequently, the court was also asked to, and did, impose an interim injunction on Mr C to prevent him contacting B which he was later found to have breached leading to him receiving a suspended custodial sentence.

On 21 February 2019, Cobb J made declarations in relation to B's ability to make decisions about her residence, care, contact with others, sexual relations and social media usage referring to the relevant sections of the MCA which he observed produced anomalous results in so far as this meant that B could be assessed as having capacity in relation to one matter but not another. In reaching his decision, Cobb J relied upon the judgment of Theis J, in *LBX v K, L, M* [2013] EWHC (Fam) in which she sets out lists of information to be referred to when making decisions about a person's capacity to make decisions and his own judgment in *Re A* [2019] EWCOP 2.

Cobb J concluded that B did have capacity to make decisions in relation to her residence having referred to the list of relevant information that B would need to be able to understand, retain and use / weigh in order to do so as set out by Theis J (at [43]) in *LBX*.

By contrast, having referred to the list of information set out at [29] in LBX, Cobb J determined that B lacked capacity to make decisions about her care and that further education would not assist her in understanding her care needs, before making a declaration under section 15.

Regarding B's capacity to make decisions about contact, Cobb J, again, referred to LBX and the list of information to be considered set out therein before concluding that B lacked capacity to make such decisions and made a declaration of incapacity under section 15 on the basis that no amount of practicable help was likely to enable her to make capacitous decisions in this respect.

Cobb J referred to his own judgment in Re A to consider B's capacity to decide to use social media, the subject in Re A being distinguishable from B in that he also used social media to access paedophilic material. Cobb J repeated his list of relevant information for assessing capacity to make decisions in social media as set out in Re A (at [39]), and having applied done so, concluded that B did not currently have capacity to decide to use social media in order to make connections with others but only made an interim declaration under section 48 on the basis that B should be offered practicable help in order to assist her in acquiring the capacity to do so.

As to B's capacity to make decisions as to sexual relations, Cobb J applied the following list of relevant information to consider:

> i) the sexual nature and character of the act of sexual intercourse, the mechanics of the act;
>
> ii) the reasonably foreseeable consequences of sexual intercourse, namely pregnancy;
>
> iii) the opportunity to say no; i.e. to choose whether or not to engage in it and the capacity to decide whether to give or withhold consent to sexual intercourse;
>
> iv) that there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections;
>
> v) that the risks of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom.

and found that B had an adequate understanding in relation to (i) – (iii), but that her understanding was "fundamentally flawed" in respect of (iv) and (v) as she regarded this to be a "matter of hygiene". Accordingly, he concluded that she, therefore, lacked capacity to make decisions as to sexual relations but only made an interim declaration under s.48 as there was evidence that she previously had capacity in this respect and directed that B receive education about the risks of STIs and be reassessed thereafter.

The Grounds of Appeal

The OS's grounds 1 and 2 were summarised as being that:

> "Cobb J erred in his formulation of the relevant information which B needs to be able to understand, retain and use or weigh for the purposes of making the decision to use social media and the internet by importing limbs (iii) (offence to others by sharing media) and (vi) (potential to commit crimes by sharing media) from the case of Re A when they were irrelevant to B's case. In so doing, he failed to strike an appropriate balance between protecting incapacitous individuals, and protecting their personal autonomy"

And Ground 3 was deemed to be that:

> "Cobb J erred in his formulation of the relevant information which B needs to understand, retain and weigh in order to have the capacity to consent to sexual relations by importing limbs (iii) (right to say no) and (v) (prevention of sexually transmitted infections by use of a condom)."

The local authority cross-appealed on the following six grounds:

> "Ground 1: Cobb J reached a decision that B had capacity to make her own decisions about residence without following the steps required in the statutorily mandated decision making process; in particular, by failing to address the questions of whether B had the ability to understand, retain and use or weigh the relevant information, and by failing to address whether B was engaging with support offered to her to outline the risks of living with Mr C.
>
> Ground 2: Cobb J failed to identify all of the foreseeable consequences of B going to live with Mr C.

> Ground 3: Cobb J wrongly treated the question as to whether B had capacity to make decisions about (a) care services; (b) who she should have contact with; (c) her access to social media; and (d) sexual relations with Mr C or others as not being relevant information in relation to the decision about residence in this case.
>
> Ground 4: Cobb J wrongly treated the list of relevant information identified in LBX as being an exclusive list of factors and thus failed to take account of other information which he ought to have treated as relevant.
>
> Ground 5: Cobb J erred in holding that B understood, in broad terms, the care she would receive when living with Mr C. This conclusion was contrary to the evidence before the Judge, and he gave no reasons for departing from it.
>
> Ground 6: Cobb J reached contradictory conclusions in relations to B's capacity to make decisions about residence and her capacity to make decisions in relation to care, contact, social media and sexual relations.

The Decision

At [36] the court reiterates that the MCA ss1-3 make clear that determination of capacity is "decision-specific" as per *York City Council v C* [2013] EWCA Civ 478, [2014] 2 WLR 1, at [35], endorsed in *IM v LM* [2014] EWCA Civ 37 at [51], and that a "functional" as opposed to an "outcome" approach is to be taken. The court also emphasised the importance of taking care not to discriminate against persons suffering from a mental disability by imposing too high a test of capacity.

Capacity to decide to use social media

The OS objected to Cobb J's direct importation of the list of information to be considered as applied by him in *Re A* on the basis that the cases were factually different making some of the information considered in that case, irrelevant to B. In doing so, the OS's counsel proposed an alternative list of 3 matters for consideration as an alternative approach to that espoused by Cobb J in *Re A*.

As the OS was appealing on the basis of Cobb J's reasoning and not his findings or his order, the only issue was the relevant information to be considered when determining capacity to decide to use social media. The court, therefore, focused upon Cobb J's list and his elaboration of the list (at [29]) in Re A and the OS's proposed alternative list of three questions and concluded that there was no "particular advantage to the tripartite formulation proposed on behalf of the OS as Cobb J's list [44]: "*is to be treated and applied as no more than guidance to be adapted to the facts of the particular case*".

Capacity to consent to sexual relations

The OS submitted that Cobb J's decision was flawed as he had taken irrelevant matters into account; objecting to three of the five relevant matters that he concluded should be taken into consideration on the basis that points (iii)- (v) in particular are "*inapposite in all cases*" those points being:

> "(iii) the opportunity to say no; i.e. to choose whether or not to engage in it and the capacity to decide whether to give or withhold consent to sexual intercourse."
>
> "(iv) that there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections;"
>
> "(v) that the risks of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom."

The court notes that a final decision is awaited from Hayden J in *London Borough of Tower Hamlets v N*B [2019] EWCOP 17 in respect of the test to be applied, and that, it was not otherwise disputed that the test for capacity to consent to sexual relationships is general and issue specific, rather than person or event specific [49].

At [51] in respect of matter (iii), the court observes that the conclusion of Parker J that "awareness of the ability to consent to or refuse sexual relations is more than just an item of relevant information" in *The London Borough of Southwark v KA* [2016] EWCOP 20 (at [52]), is "plainly correct" and irrelevant to B in any event on the basis of her deemed understanding of this.

The court went on to dismiss the OS's third ground of appeal having rejected their contention that matter (iv) was incorrect in that the authorities only require there to be an appreciation of a connection between sexual intercourse and a potential risk to health. In doing so, the court deemed the OS's position on point (iv) to be connected to their objection to matter (v) [56], and reiterated what is stated at s 3(4) of the MCA and in para 4.16 of Chapter 4 of the Code of Practice and (at [57]), before observing that:

> "…in accordance with the MCA s.3(1)-(4), the ability to understand and retain those facts at least for a period of time and to use or weigh them as part of the decision whether to engage in sexual intercourse are essential to capacity to make a decision whether to have sexual intercourse. What is critical is not that a person, whose capacity is being assessed, is permanently aware of how sexually transmitted infections may be caught and

> that protection may be provided by a condom…Rather it is an assessment of whether the person being assessed has the ability to understand those matters when explained to him or her and to retain the information for a period of time and to use or weigh it in deciding whether or not to consent to sexual relations."

and (at [59]), that according to s.1(4) of the MCA, making an unwise decision is not tantamount to being unable to make a decision but, as per the Code of Practice, "…can form part of a capacity assessment…".

Capacity to decide on Residence

At [62] the court rejects the Local Authority's criticism of Cobb J's application of the Theis J's list in *LBX*, again deeming the intention to that this will be used as "no more than guidance to be expanded of contracted or otherwise adapted to the facts of the particular case".

However, (at 63-64]), the court upheld the appeal in respect of the Local Authority's overarching contention that Cobb J's decision that B has capacity to make decisions in relation to residence was flawed in:

> "(1) failing to take into account relevant information relating to the consequences of each of those decisions, and
>
> (2) producing a situation in which there was an irreconcilable conflict with his conclusion on B's incapacity to make other decisions, and so
>
> (3) making the Local Authority's care for and treatment of B practically impossible.
>
> and agreed with the contention that "…the Judge's flawed conclusion followed from his approach in analysing B's capacity in respect of different decisions as self-contained "silos" without regard to the overlap between them"

The court found that it was "plainly relevant" [65] that Cobb J made a declaration that B did not have capacity to make a decision as to the persons with whom she has contact as this "conflicted directly" with his conclusion that she did have capacity to decide to move in with Mr C. The court found this was also in direct conflict with the interim declaration that B did not have capacity to consent to sexual relations [66] and Cobb J's conclusion that B had a sufficient understanding of the care she would receive if living with Mr C despite having made a declaration that she did not have capacity to make decisions about her care [67]. Similarly, there was also a conflict between Cobb J's decision that, despite B's lack of capacity to make decisions about her care and limited understanding of her care needs, she did have capacity to decide to reside with her parents rather than move to residential care.

Accordingly, the Local Authority's appeal was allowed and the OS's appeal was dismissed.

NB At [33] having concluded that the OS had failed to comply with the same as they "*…do not identify as concisely as possible in a separate document the respects in which the judgment of Cobb J was wrong, and they include the reasons why the decision was wrong rather than confining those to the skeleton argument…*" the court reiterates the importance of complying with CPR 52CPD para 5, as emphasised by Hickinbottom LJ (at [56]-[57]) in *Harverye v Secretary of State for the Home Department* [2018] EWCA Civ 2848 when drafting grounds of appeal.

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

MB v EB [2019] EWHC 1649 (Fam)

It is a truism, Cohen J says, that marriages come in all different shapes and sizes. The size and shape of a relationship are both key to the quantum of a financial remedy, but it is PG Woodhouse-esque drama is what brings this wonderfully readable judgment to life.

In this case the court was asked at the direction of Roberts J to determine preliminary issues within financial remedy proceedings brought by H. The preliminary issues being the length of the marriage; the impact of a separation agreement; and whether there was any marital acquest.

Husband and Wife now in their late-50s/ early 60s met 20 years ago in 1999. She was a business woman from a very wealthy family with an eye on British citizenship. He was an artist, college drop-out, and part-time model who had suffered with mental health issues for a number of years. She was his first and last client as a male escort.

They married in early 2000 only for this to be followed a couple of weeks later by H falling, hitting his head on the pavement and suffering a cerebral haemorrhage. He was in a coma for around 3 weeks. They moved to live with W's father in Munich and from there moved to glorious Vienna where sometimes they lived together and sometimes separately. In

2004, W was arrested and remanded in custody for a scam related to her obtaining Austrian residency. She spent between a few days (W's case) and 9 months (H's case) in custody.

Upon W's release her passport was confiscated and she could not leave Austria. H travelled to England without her and met Georgina (who would later become Lynne, followed by Sabine). H moved to the UK to live with Georgina in early 2005. H spent a weekend with W in Monaco and as he was about to board his flight back to England asked W for a divorce. She refused.

W moved to London in 2006 and between 2006 and 2016, H and W were emotionally (if not sexually) entangled in what H described as "toxic co-dependency". In 2013, W bought the flat above H's flat in Hove and 2015, they acquired their "boys" Lucca and Lui (minature greyhounds) to whom Cohen J notes that they were devoted.

In 2011, a deed of separation was signed in full and final satisfaction of all financial claims between the parties. Both parties were represented by solicitors in the reaching of this agreement, which was initiated by H in 2009. The deed allowed the parties remain married which would enable W to secure British citizen in time and provided H with a lump sum to meet his housing need and an addition sum on top.

Things went pear-shaped in 2017 when W got the hump about H living with Sabine in the flat below hers. When W installed CCTV at her flat overlooking H's flat, he wrote reminding her that their deed of separation meant that they had no further claims against each other and then issued an application for a financial remedy order.

Despite the emotional entanglement between H and W that endured from Georgina to Sabine, Cohen J found that the marital partnership had ended in 2004. Cohen J found that there had been no marital acquest during the period up to 2004 or subsequently. W had at all times been dependent on her family to fund what H described as her socialite lifestyle.

In respect of the impact of the separation agreement, Cohen considered Radmacher v Granatino [2010] 2 FLR 1900 and Versteegh v Versteegh [2018] EWCA Civ 1050. The court found that H had no ground for vitiating that agreement save for a potential argument that it did not meet his needs.

There was no evidence that W, a "larger than life figure", had put any pressure on H to agree or had sought to exploit her dominant financial position. Both parties had been received independent legal advice. H could not (and did not) claim that he had received bad advice. H knowingly entered into the agreement without there being full financial disclosure. He did not know the full picture and did not need to. Both parties if asked would have answered the question as to whether either had a claim left against the other in the negative (A v B (No 2) [2018] EWFC 45). The final agreement was essentially on the terms H had sought in 2009.

What troubled Cohen J about the agreement was the issue of H's needs. The agreement provided for H's capital needs but did not provide for H's ongoing income needs. This was the case in circumstances where W's resources (she accepted) were in the region of £50 million. The agreement had left H without any means of generating an income but for renting out rooms in his home while he lived in the converted garage. There was a shortfall of some £35,000 between H's stated income needs and the income he generated from renting out rooms in his flat. Holding H to the agreement would place him in a position of real need. The financial consequences of this finding though, we are teased reader, are for another day…

Cohen J concluded with a salutary warning about costs. At the time of the preliminary issues hearing, the parties had between them already spent £1 million on legal costs. A sum considered by the court to be wholly disproportionate to the claim. H's position was particularly troubling: his only asset was his home, valued at c.£300,000, against which there was a charging order pursuant to a LASPO in the sum of £236,000. In addition, he owed his solicitors £170,000. Without further financial provision, the court noted, H would be bankrupt.

Summary by **Rachel Cooper**, barrister, **Coram Chambers**