November 2019

Family Law Week

NEWS

Commons debates Child Maintenance Service's performance in recovering payments

On Wednesday 2 October, the House of Commons held a Westminster Hall debate entitled **"Performance of child maintenance service in recovering payments from absent parents"**, led by Peter Grant.

In reply to the speeches of members, Justin Tomlinson, on behalf of the government, explained the service's response to a failure of non-resident parents to pay child maintenance:

> "Not only is there the annual review, but we now text the receiving parents proactively to ask whether there are any issues, and if there are issues, we ask that they should contact us immediately so we can either escalate ultimately to enforcement or move them on to the click-and-pay service. In the last quarter of last year, 9,000 people moved from direct pay to collect and pay. We are nudging that proactive level of support as quickly as possible.
>
> "The shadow Minister ... talked of 33% not being collected on collect and pay. The 67% was the last published figure, in June 2019, which is up from 62% in the previous year, and the improvement has been long standing. The amount unpaid in June 2019 was £18.5 million, down from £22 million. That is £18.5 million too much, but we are heading in the right direction, through a combination of better training of our frontline staff, so that they can explain the options and potential punishments to both the receiving parent and the paying parent; better enforcement ... ; and the regulations that we passed to strengthen our ability to investigate and enforce."

Closing the debate, Peter Grant said:

> "[F]irst, people do not need a clever accountant to hide their money; they only need an accountant who knows how to set up a private limited company, and it then takes years to find it. Secondly, we do not need to be Sherlock Holmes to find these scams; we only need a Facebook account, and then we can see the luxury yachts, the holidays, the umpteen fancy

Family Law Week is published by

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

Tel & Fax: 0870 145 3935

houses and so on. If somebody on benefits was boasting about their wealth to that extent, the DWP would have them very quickly. That is the speed at which we should be chasing down money from other people as well."

For the Hansard record of the debate, **click here**. For a House of Commons Library briefing paper prepared for the debate, **click here**. For a House of Commons Library paper looking at what steps can be taken by the Child Support Agency and the Child Maintenance Service in the vent of non-payment by a non-resident parent, **click here**. For the latest statistics from the Child Maintenance Service, **click here**.

6/10/19

New support for foster families to overcome trauma

The Department for Education has announced that "foster families will benefit from projects offering short breaks, mentoring, emergency sleepovers and social activities with other families to help create stability as they adjust to their new lives together."

Education Secretary Gavin Williamson has launched fostering projects in ten new locations in order to help foster families with practical and emotional support and advice amid the day-to-day challenges of taking in a vulnerable young person from care and create a stable environment for them to live in.

The **Mockingbird Family Model**, delivered by **The Fostering Network**, brings foster families together in groups, centred around one experienced foster carer who lives nearby to act as a mentor. This builds a network on which they can rely in difficult moments, in the same way that families who are together from birth often rely on the support of extended family, friends or neighbours, and helping them cope with challenging behaviour or problems caused by trauma before they escalate.

Expanding the Mockingbird Family Model into new areas builds on a programme which the DfE says has real value to foster families, helping them to form vital communities so that parents can rely on one another through tough times and vulnerable children get the safe, supportive home life they deserve.

The Dfe has also launched new projects in 18 council areas to support vulnerable children coping with chaotic home lives as a result of their parents' problems with mental health, domestic violence or addiction. Announced in April and backed by £84 million secured in last year's Autumn Budget, these projects reaffirm the core principle of the Children Act 1989 that where possible, children are best brought up with their parents.

For more information, **click here**.

6/10/19

BASW publishes responses to Public and Private Law Interim Reports

The British Association of Social Workers England and the Social Workers Union have completed a survey of members and formulated their response for the **Children Cases in the Family Court consultations on public law, and for private law**. The consultation period closed on 30 September 2019.

The full summary of the contributions to the Private Law report can be **read here**. BASW and SWU highlight the following:

- They agree with cutting out process driven activities but consider that the inevitable gains and losses need analysis.
- Out of court services sound "great" but adequate funding is desperately needed.
- It is not realistic for social workers to train court professionals on mediation and conciliation, especially in an environment of unmanageable caseloads and demand.
- Alternative means of conciliation is not a bad concept, but "shuttle mediation" is not 'meaningful' mediation.
- More analysis earlier on in the process to prevent people by-passing necessary systems is welcomed.

The full summary of the contributions to the Public Law report can be **read here**. BASW and SWU highlight the following:

- They support the principle of having continuity of the social worker and welcome recommendations for better multiagency work and a renewed focus pre-proceeding work and management of risk.
- They support the sharing of good practice and development of the conference chair and IRO role.
- They support the emphasis on the need for good relationship-based model during pre-proceedings and Public Law Outline in accordance with the BASW England 80/20 Campaign.
- They support a more collaborative approach to sharing information between local authorities and CAFCASS.
- More guidance is needed on the aftercare (post court) arrangements for Special Guardianship Orders on what to expect in terms of practical and financial support from local authorities.

For the interim reports, **click here.**

6/10/19

No age limit: older people and domestic abuse

Age UK has published **a report** calling on the Government "to make sure the voices of older people are heard, their rights are protected, and their needs included in future legislation addressing domestic abuse".

Age UK says that whilst people of any age can be affected by domestic abuse, older people can be particularly vulnerable to certain forms of domestic abuse, including abuse by a carer and financial abuse. Older people can face significant barriers in leaving abusive situations. These barriers can be severe for survivors who have been subject to years of abuse, are experiencing long term health conditions or disabilities, or those who rely on their abuser for their care or money.

The charity seeks the following changes:

- The definition of domestic abuse must include abuse by carers including friends and neighbours, as well as family members.
- There hould be training for health care practitioners, including GPs and practice nurses, who work with older people, particularly during hospital admission and discharge.
- Data on domestic abuse must be gathered for all ages, not just people aged 74 and under.
- Better links between the NHS and police are needed to make sure older victims of abuse are properly protected and supported.

For the report, **click here**.

6/10/19

Scottish Civil Partnership Bill introduced

A Civil Partnership Bill was introduced in the Scottish Parliament on 30 September. The Bill, if enacted, will enable persons of different sexes to be in a civil partnership. It was introduced by the Cabinet Secretary for Social Security and Older People, Shirley-Anne Somerville MSP.

In 2018 the Scottish Government consulted on two options for civil partnership in Scotland: scrapping civil partnership or making it available to mixed sex couples.

Last year, in ***R (ota Steinfeld and Keidan) v Secretary of State for International Development*** **[2018] UKSC 32**, the UK Supreme Court ruled the introduction of same sex marriage had resulted in the Civil Partnership Act 2004 no longer being compatible with the European Convention on Human Rights on equality grounds, because it denied mixed sex couples the opportunity to enter into civil partnerships, while same sex couples had the choice of either marriage or civil partnership.

Civil partnership in Scotland was introduced for same sex couples by the **Civil Partnership Act 2004**. This Act extends across the UK and took effect from 5 December 2005. The **Marriage and Civil Partnership (Scotland) Act 2014** introduced marriage for same sex couples. Civil partnership ceremonies can be religious or belief, or civil. They can be registered by a registrar, or an authorised religious or belief celebrant.

Other countries where mixed sex civil partnership has already been introduced include the Netherlands and New Zealand. The UK Government has announced it will make mixed sex civil partnership available in England and Wales by the end of 2019 and will introduce through secondary legislation.

For the Scottish Bill, **click here**.

6/10/19

HHJ Gaynor Lloyd appointed as Designated Family Judge for North Wales

The President of the Family Division has announced that, following an Expression of Interest exercise, HHJ Gaynor Lloyd has been appointed as Designated Family Judge for North Wales with effect from 9 October 2019.

10/10/19

Getting divorced if there is a no-deal Brexit

The House of Commons Library has published a briefing paper which considers how getting divorced might be affected by a no-deal Brexit and deals with the position in England and Wales except where stated otherwise. It does not deal with related family law matters relating to children and the payment of maintenance.

For the briefing paper, **click here**.

10/10/19

Kinship care in crisis, finds Grandparents Plus

A **State of the Nation Survey Report** by **Grandparents Plus** finds that kinship care is in a state of crisis.

Over 1,100 kinship carers took part in the survey, the results of which, says Grandparents Plus, highlight the chaos and confusion that are often experienced by new kinship carers at the time they take on the responsibility for children. This is compounded by a lack of support and independent advice which means many kinship carers, under a great deal of pressure, risk being penalised for stepping in to keep their families together.

The charity concludes that, as in previous years, many carers are not receiving the support they need for children to thrive.

Key findings include:

- 75 per cent of carers were asked to look after the children – of these 79 per cent by a social worker, 18 per cent by a parent, 6 per cent by police
- In 83 per cent of cases, children's services had been involved with the child's family
- 30 per cent of the children were previously in foster or residential care.

According to the survey, despite children's services involvement, many kinship carers step in quickly in a climate of crisis and fear, with little time or access to independent information and advice, or support to consider their options. Only later do they realise that support is determined by the child's legal order – it is usually discretionary and it can be means tested, time limited or cut for good.

Other findings are:

- 53 per cent were given no notice and took on the children in a crisis situation
- In 70 per cent of cases, kinship carers understood that the children would be taken into care if they did not step in
- 50 per cent felt under pressure when making this decision
- 84 per cent said they hadn't got the advice and information they needed when the child moved in
- 95 per cent said they hadn't had any form of training to help prepare them for their kinship care role
- 90 per cent said they hadn't been told by their local authority where to access peer support.

For the full report, including the charity's recommendations for policy and practice, **click here**.

10/10/19

Proportion of births in E & W to mothers born outside the UK falls for the first time since 1990

In 2018, the proportion of live births in England and Wales to mothers born outside the UK fell for the first time since 1990, decreasing from 28.4 per cent in 2017 to 28.2 per cent. The figures are revealed in **statistics released by the Office for National Statistics**.

There were 471,476 live births to women born in the UK, and 185,569 live births to women born outside the UK, decreasing by 3.1 per cent and 3.7 per cent respectively compared with 2017.

Poland and Pakistan remained the most common countries of birth for mothers born outside the UK, although the percentage of live births to women born in these countries fell in 2018.

Pakistan has been the most common country of birth for fathers born outside the UK since figures were first produced in 2008. Romania rose up the rankings and replaced Poland as the second most common country of birth for foreign-born fathers in 2018.

Kathryn Littleboy, Vital Statistics Outputs Branch, Office for National Statistics, commented:

> "In 2018, just over one in three children born in England and Wales had at least one parent who was born outside the UK. These parents could be long-time residents who moved here when they were younger, or those who moved to the UK more recently. However, today's figures also show the first decrease in the proportion of live births in England and Wales to non-UK-born mothers since 1990. And the first decrease for non-UK-born fathers since our time series for them began in 2008."

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

10/10/19

New private law cases received by Cafcass in September rose by 11 per cent year-on-year

Cafcass received a total of 3,803 new private law cases in September – 10.9 per cent (374 cases) higher than the same month last year. In eleven of the last twelve months the number of new cases has increased when compared with the corresponding month in the previous year.

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.

11/10/19

New care applications received by Cafcass in September fell by 5 per cent

Cafcass received a total of 1,000 new care applications in September – 62 (5.8 per cent) fewer than in the same month last year. New care applications received by Cafcass have decreased year-on-year in each of the last eleven 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.

11/10/19

Civil partnership registrations rise for third consecutive year

There were 956 civil partnerships formed in England and Wales in 2018, an increase of 5.3 per cent compared with 2017; this is the third annual increase following a large decrease between 2013 and 2015 after the introduction of marriages of same-sex couples in 2014. The figures were revealed in the latest statistics concerning civil partnerships, published by the Office for National Statistics.

Nearly two-thirds (65 per cent) of all civil partnerships formed in 2018 were between men, a similar proportion to the previous year (66 per cent). In 2018, the average age of women forming a civil partnership (51.6 years) was higher than for men (50.5 years). More than one in five (21 per cent) of those entering a civil partnership in 2018 were aged 65 years and over; this compares with just 4 per cent in 2013, prior to the introduction of marriages of same-sex couples.

London continued to be the most popular region for the formation of civil partnerships; 32 per cent of all formations in England and Wales in 2018 took place in London.

There were 927 civil partnership dissolutions granted in England and Wales in 2018, a fall of nearly a quarter (24 per cent) compared with 2017. More than half (56 per cent) of civil partnership dissolutions in 2018 were to female couples, a similar percentage to previous years.

Kanak Ghosh, of the ONS's Vital Statistics Outputs Branch, said:

> "The number of same-sex couples forming a civil partnership increased slightly in 2018, for the third consecutive year. Just under 1,000 couples preferred this option to marriage. Those choosing to form a civil partnership are more likely to be male or over 50.
>
> "The recent change in the law to make opposite-sex couples eligible to form civil partnerships from the end of this year is likely to bring further increases to the overall number of civil partnerships formed in England and Wales."

Scott Halliday, modern families expert at **Irwin Mitchell**, said:

> "It is really encouraging that the numbers of civil partnerships are continuing to increase modestly. I expect over the next three to five years for a significant further increase as heterosexual couples decide to enter into a civil partnership as opposed to marriages.
>
> "The increase may also be because there is greater awareness of the lack of protection for cohabiting couples. It is imperative that couples understand cohabitation laws do not provide the same types of protection as relationship status such as a civil partnership.
>
> "It is also incredibly important to remember that for the LGBTQ+ community, a civil partnership was the only route to a legally recognised relationship status before marriage became available to them. Recently the government had suggested it may abolish civil partnerships before deciding to extend them to heterosexual people after the landmark ***Steinfeld & Keidan*** **Supreme Court case** last year. This was a vital decision; the UK must have a secular alternative to marriage and not disregard the importance of the history of civil partnerships for LGBTQ+ couples."

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

11/10/19 (comment added 11/10/19)

The Queen's Speech Reintroduces Domestic Abuse Bill and Divorce Bill

The Queen has set out the Government's legislative plan in the House of Lords today at the state opening of Parliament.

In one paragraph The Queen addressed Family Law in particular:

> "My Government will bring forward measures to protect individuals, families and their homes. Legislation will transform the approach of the justice system and other agencies to victims of domestic abuse, and minimise the impact of divorce, particularly on children."

While the Domestic Abuse Bill and the Divorce, Dissolution and Separation Bill were noted there, the Immigration and Social Security Co-ordination (EU Withdrawal) Bill which ends free movement and ensures the right to remain for resident EU citizens was also hightlighted.

Reformation in adult social care in England to ensure dignity in old age was mentioned as was continued work in reforming the Mental Health Act to improve the care of those receiving treatment.

The transcript of The Queen's speech can be read on **The Government's website**.

14/10/19

Support for victims of domestic abuse in safe accommodation

The Ministry of Housing, Communities and Local Government has published its response to the consultation on future delivery of support to victims and their children in accommodation-based domestic abuse services.

It proposes placing a statutory duty on 'tier 1' local authorities (county councils, metropolitan and unitary authorities and the Greater London Authority) to commission services so that all victims of domestic abuse and their children, including those with protected characteristics, can access support in safe accommodation.

It also proposes the creation of a domestic abuse local partnership board in each area to work with the local

authority in carrying out these functions. The proposals will be included in the Domestic Abuse Bill.

For the response document, **click here**. For the consultation itself, **click here**. For the Domestic Abuse Bill, as introduced, **click here**.

17/10/19

Number of newborn babies in care proceedings has doubled in Wales since 2015

The number of newborn babies subject to care proceedings in Wales (per 10,000 births) more than doubled between 2015 and 2018. In 2015, for every 10,000 births in Wales 39 newborns became the subject of care proceedings within two weeks of birth. By 2018, the rate had risen to 83 cases per 10,000 births.

In 2018, 52 per cent of all infants (under one year old) subject to care proceedings in Wales were under two weeks old, a higher proportion than in 2015 (38 per cent). Around half of these babies were born to mothers who had previously appeared in care proceedings concerning another child.
Whilst there are some differences in the rates of care proceedings issued for newborns across Wales, all the family court areas recorded a marked increase in the numbers of newborns in child protection cases from 2015 onwards.

These findings come from the first ever analysis of newborns and infants in the family justice system in Wales, published by the Nuffield Family Justice Observatory. The research team, from the universities of Lancaster and Swansea, used administrative data produced by the Children and Family Court Advisory and Support Service in Wales (Cafcass Cymru). This report complements a study published in October 2018, which focused on newborn babies in care proceedings in England. Findings reveal some clear differences in practice, despite the fact that the two countries work to the same legal framework (the Children Act 1989).

Overall, the picture of a high proportion of infant cases issued within four weeks of birth is similar for Wales and England. However, the incidence rate is higher in Wales than England: newborns in Wales are more likely to appear in care proceedings than those in England.

In 2018, the most likely outcome for newborns at the end of care proceedings in Wales was a care order. This has changed since 2012, when the most likely outcome for newborns was to be placed for adoption. In contrast, the family courts in England make far less use of care orders at the close of care proceedings and this pattern has remained relatively stable over time. The reason for differences between England and Wales is not clear.

Further analyses using linked administrative and health data made available through the SAIL Databank at Swansea University will now be undertaken. The research team aims to understand why more newborns and infants are coming before the family courts in England and Wales and provide a far more holistic picture of what happens to these infants in the longer-term.

Lisa Harker, Director of the Nuffield Family Justice Observatory said:

> "The removal of a baby into care is perhaps the most difficult decision that professionals can make to intervene in family life. This study provides an important starting point for discussions about how to ensure that more babies are able to be safely cared for by their parents and that any intervention by professionals is designed to avert potential harm."

Professor Karen Broadhurst, Co-Director of the Nuffield Family Justice Observatory data partnership and Professor of Social Work and Co-Director of the Centre for Child and Family Justice Research at Lancaster University said:

> "The changing pattern of legal orders for newborn babies and infants at the close of care proceedings in Wales is particularly striking. It appears that the family courts are moving away from using the full range of orders available under the Children Act 1989. Conversations with policy and practice colleagues are an important next step if we are to understand these patterns and differences between England and Wales."

Professor David Ford, Co-Director of the Nuffield Family Justice Observatory data partnership, Professor of Informatics and Director of SAIL Databank at Swansea University said:

> "This ground breaking study is a wonderful example of how rarely used administrative data from a public agency can be used to shed new light on important areas of public service. The SAIL Databank, based at Swansea University, is delighted to be a part of the new FJO Data Partnership, bringing over a decade of experience of providing highly secure, responsibly governed and trustworthy data curation and linkage services to support research into family justice. This is just the beginning of a programme of research that will deliver many more important findings, whilst we also provide secure access to data to the wider research community."

For the latest report, relating to Wales, **click here**. For a summary, **click here**. Welsh language versionas are available for the report and summary from the **Nuffield Family Justice Observatory website**. For the 2018 report, relating to England, **click here**.

17/10/19

New government support for adoptive families

The Education Secretary Gavin Williamson has announced further funding for the Adoption Support Fund which aims to ensure that every family that needs it will be able to get therapeutic support until 2021. The commitment builds on the £130m already invested through the fund, which the government says has benefitted over 40,000 families.

The Education Secretary also announced almost £650,000 investment into Regional Adoption Agencies, who will coordinate work to find more adopters across the country, especially for harder to place children, such as siblings, older children and those from Black, Asian and Minority

Ethnic (BAME) backgrounds. This will include targeted digital work and work with black churches and mosques to increase the numbers of people from BAME communities coming forward to adopt.

For the announcement and comments made by the Secretary of State at Coram for National Adoption Week, **click here**.

17/10/19

Divorce, Dissolution and Separation Bill policy documents updated

The Ministry of Justice has produced updated versions of the policy documents originally published to accompany that of the Divorce, Dissolution and Separation Bill in June 2019. For all the documents, including a fact sheet and ECHR memorandum, click here.

For a newly published House of Commons Library research briefing concerning the Bill, **click here**.

17/10/19

Civil Jurisdiction and Judgments (Civil and Family) (Amendment) (EU Exit) Regulations 2019

These Regulations, which come into force immediately before exit day, are made in exercise of the powers conferred by section 8(1) of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively and other deficiencies in retained EU law (under section 8(2)(c) of that Act) arising from the withdrawal of the UK from the European Union.

Regulation 3 amends the Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019 ('the family SI') before the family SI comes into force. It makes clear that where proceedings are commenced, applications and requests for assistance have been received, or maintenance is due to be paid, before exit day relying on the provisions of Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 those provisions will continue to apply after exit day. Further, in the case of agreements made pursuant to paragraph 5 of Schedule 6 to the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011 these will continue to be valid after exit day. It also corrects an error in the family SI to retain a special rule for jurisdiction in relation to maintenance in Scotland. Finally, it makes clear that relevant jurisdictional rules are subject to the limit on proceedings contained in Article 18 of Convention on the International Recovery of Child Support and Other Forms of Family Maintenance concluded on 23 November 2007 at The Hague.

For the Civil Jurisdiction and Judgments (Civil and Family) (Amendment) (EU Exit) Regulations 2019, **click here**.

17/10/19

Crown Prosecution Service expands its guidance on FGM

Suspects accused of allowing Female Genital Mutilation (FGM) to be carried out can face prosecution in the UK, regardless of where in the world the procedure took place, the CPS has confirmed.

Following the first-ever UK conviction for FGM in February this year, which saw a woman sentenced to 11 years in prison for FGM offences, the CPS has now expanded **its guidance** to help prosecutors and police successfully bring more perpetrators to justice.

The refreshed guidance also gives clarity on the line between so-called "designer vagina" operations and FGM to guide prosecutors, given the rise in popularity in these procedures.

Jaswant Narwal of the CPS said:

> "Female genital mutilation is a sickening offence that can have a serious lifelong physical and emotional impact on victims.
>
> "We want to send a strong message that this crime does not have to be carried out in the UK for people to be prosecuted by the CPS - we will seek justice for people affected by this horrific practice. There is no hiding place.
>
> "We hope this new guidance will give victims, police and prosecutors the confidence and practical guidance they need to bring more perpetrators of this traumatic abuse to justice."

The new guidance introduces a series of practical updates which are informed by CPS' experience prosecuting these offences. It includes extra guidance to investigators on which types of expert evidence can be secured to help build a robust prosecution case to bring before the courts, considering pathology, gynaecology, and expert evidence of ritual and religion. Furthermore, the guidance offers clarity on the position of genital piercing and genital cosmetic surgery under FGM legislation.

The guidance confirms that piercing female genitalia will not usually amount to FGM.

For the guidance, **click here**.

18/10/19

CSA caseload reduced by 200,000 from March to June 2019

The Child Support Agency's caseload continues to reduce. According to **figures released by the Department for Work and Pensions**, the number of CSA cases held on CSA or Child Maintenance Service IT systems decreased from 472,700 in March 2019 to 260,900 in June 2019. The reduction

in caseload is due to the closure of cases as outlined in the child maintenance compliance and arrears strategy.

The CSA historical debt balance continues to reduce. The amount of CSA debt held on CSA or CMS IT systems has decreased from £2,040 million in March 2019 to £915 million in June 2019. Debt owed to Government and debt which has no reasonable chance of being collected is being written off.

Between 13 December 2018, when the compliance and arrears strategy work started, and 30 June 2019:

- The CSA wrote to 135,100 parents with care to ask if they want a last attempt to be made to try to collect the debt owed to them.
- 398,000 cases on the CSA IT system with non-paying historical debt have had the debt adjusted or written off. These cases had system records showing a total debt value of £1,418 million. Of this £644m was owed to government only.

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

18/10/19

Separated migrant children given better access to legal aid

Separated migrant children have become eligible for legal aid to help with citizenship and non-asylum immigration applications and appeals from 25 October 2019.

The changes have been made through an amendment to Parliament Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012. This amendment means that separated children seeking to regularise their non-asylum immigration status in the UK will be within the scope of legal aid. In the past, separated children in this position would have had to apply for exceptional case funding.

Transitional arrangements have been introduced to enable separated migrant children to apply for legal aid in line with the new rules as quickly as possible. The Legal Aid Agency has provided a statement for legal aid providers and guidance for providers on the transitional arrangements.

For the Legal Aid Agency's press release, **click here**. For the guidance, **click here**. For comment by Coram Children's Legal Centre, **click here**.

27/10/19

New support for young people leaving care

Education Secretary Gavin Williamson **has announced** new cross-government support available to young people leaving the care system, together with £19 million of investment into programmes benefiting care leavers.

The new funding includes £10 million to create stable homes for care leavers as they become adults; £6 million to support young people leaving care to live independently and £3 million to help care leavers go into further education.

The Education Secretary has also committed to delivering 1,000 internships for care leavers over the next two years to help secure long-term jobs for care leavers. This will include expanding the existing Civil Service Internship Scheme and working with other public sector bodies including the NHS, Ministry of Defence civilian roles, police and the fire service to support care leavers into new employment opportunities.

For the Department for Education's announcement, **click here**.

27/10/19

'Government needs to do more to improve the welfare of separated families'

A **new report** published by the Social Security Advisory Committee highlights steps needed to improve the welfare of separated parents and their children.

There are 2.5 million separated families, including 3.9 million children, in Great Britain. The report considers the experience of separated parents and their children in the social security and child maintenance systems. It particularly looks at the experience of parents who are not the main carers, but who want a continuing parental role. Overall, it recognises the difficult public policy choices faced by governments but asks whether separated parents are getting the support they need through a challenging and stressful time in their lives.

The report finds that many separated parents share caring responsibilities for their children. However, those who need to claim social security can struggle to share care because the system assumes there is one main carer and so only one parent can be entitled to child-related benefits. The other parent can only receive single adult benefits which do not factor in the inevitable costs of caring for children even if parents are sharing care.
In particular, young non-resident parents may struggle to share care, as housing support in the private-rented sector typically only covers a room for an adult in shared accommodation. This can make it difficult, or impossible in some cases, for a parent to have their child or children to stay overnight.

Much of the existing research has understandably focused on the parent with whom the children live most of the time and highlights the severe negative impact that separation can have on their financial well-being. However, children may also experience hardship if and when they are with their other parent and emerging evidence suggests that paying child maintenance can push parents into poverty.

Research found that separated parents without main responsibility of childcare have a poverty rate of 30 per cent compared to 21 per cent amongst working age adults.

The report concludes that a lack of clear, consistent and helpful publicly available advice makes it hard for separated parents to navigate what is a complex social security system and so adds to their stress during separation. Sometimes parents feel they have been very poorly treated by the Child Maintenance Service, with poor communication resulting in confusion and unnecessarily long delays to child maintenance arrangements being set up.

The committee recommends that:

- The government clearly and publicly articulates a strategy for separated parents (including parents without main caring responsibility) and their children with respect to the social security system. It is recommended that a cross-departmental working group is set up to lead urgent action on the strategy and issues highlighted in this report.

- The quality and availability of data on parents without the main responsibility of care should be improved to get a better understanding of the scale and nature of the problems created by the social security system and its interaction with the child maintenance system. These data should also help define evidence-based policy solutions to deliver the government's strategy and allow progress against the strategy to be assessed and monitored objectively.

- No general recommendations are made to change benefit rules because the committee believes that better data and a clear overarching strategy are needed first. However, the report concludes that there are obvious challenges for separated parents to share care under current policy for housing support in the social security system. Therefore, the committee recommends that:

  a) The housing element of Universal Credit should enable young parents, under 35 years, who are sharing care and paying child maintenance, to have their children to stay overnight.

  b) Department for Work and Pensions (DWP) should consider options for the system to support all parents without the main responsibility of care and with more than one child to stay with them overnight.

For the report, **click here**. For the response of Gingerbread, the charity supporting single parent families, **click here**.

27/10/19

Privy Council to give judgment in Jersey financial provision case

On Thursday, 31 October 2019 the Privy Council will promulgate its judgment in the cases of C v C in which it will determine whether it was open to Jersey courts to treat the appellant as a 'parent' for the purpose of orders for financial provision under the **Children (Jersey) Law 2002**.

The appellant and the respondent met in Latvia in 2000 and were in a relationship until around the end of 2002. On 20 June 2003 the respondent had a child, A, and RZ was registered on the birth certificate as his father. The parties' relationship resumed in November 2005. In June 2006 they applied successfully in Latvia for the rectification of the birth certificate to register the appellant as the father. The parties moved to Jersey in 2008. The relationship broke down and in July 2010 the respondent moved with A back to Latvia. She applied to the Jersey court for financial relief for A's benefit. The appellant failed in his application to the Latvian courts for a further rectification of the birth certificate to remove his registration as A's father. The Jersey courts held that the appellant should be treated as a parent based on his status as such under Latvian law, and that he was liable to make financial provision for A.

The appeal was heard by Lady Hale, Lord Wilson, Lord Hodge, Lord Kitchin and Lord Sales on 20 February 2019.

27/10/19

Supreme Court judgment due as to use of inherent jurisdiction to order summary re-location

On 30 October 2019 the Supreme Court will promulgate its judgment as to whether the inherent jurisdiction can be used to order the summary re-relocation of a child where there is a statutory scheme and where the substantive and procedural characteristics of that scheme are avoided.

In *NY (A Child)*, an appeal from the judgment of the Court of Appeal in ***Re NY (A Child) (1980 Hague Abduction Convention) (Inherent Jurisdiction)* [2019] EWCA Civ 1065**, the appellant mother and respondent father were born in Israel and were married there in 2013. NY (aged 2) was born in November 2016. In November 2018, following marital difficulties and after some discussion, the parents moved with NY to live in England.

The move to England was not successful and on 10 January 2019 the parents agreed that they would divorce. On or about 14 January 2019, the father returned to Israel and commenced proceedings in the Rabbinical Court in Israel for divorce and custody of the child.

By letter dated 6th February 2019 the Israeli Central Authority sent an application under the 1980 Hague Child Abduction Convention ('the 1980 Convention') to the English Central Authority. Proceedings were commenced in England on 26th February 2019. The father's case was that an alleged wrongful retention took place on 10th January 2019. The mother's case was that NY was habitually resident in England at that date; that the father had consented to NY's removal from Israel and subsequent retention in England; and that Article 13(b) of the 1980 Hague Child Abduction Convention was established.

The first instance judge concluded that: NY was not habitually resident in England at the relevant date; that the father had consented to NY's "removal" from Israel; that the Article 13(b) defence was not established; and that, notwithstanding the father's consent, he would exercise his discretion to order NY's summary return to Israel. The

judge added that, had he been satisfied that NY was habitually resident in England, he would nonetheless have concluded that it was in her best interests for an order to be made under the inherent jurisdiction of the High Court returning her to Israel for decisions concerning her welfare to be made in that jurisdiction.

The Court of Appeal found that:

- there was no retention in breach of rights of custody in this case, such that the 1980 Convention does not apply;
- the judge properly took into account the identified protective measures and reached a determination that was open to him; and
- the judge was entitled to make an order for NY's return under the court's inherent jurisdiction and his summary welfare decision to do so is fully supported by the reasons he gave.

Reunite International, The International Centre for Family Law Policy & Practice and the International Academy of Family Lawyers intervened in the Supreme Court proceedings.

The appeal was heard by Lord Wilson, Lord Hodge, Lady Black, Lord Kitchin and Lord Sales on 18 July 2019.

To watch the morning session of the hearing, **click here**. For the afternoon session, **click here**. For the Court of Appeal judgment, **click here**.

27/10/19

'Justice should be devolved to Wales'

The Commission on Justice in Wales has published its report, ***Justice in Wales for the people of Wales***, recommending that justice be devolved to Wales.

The report concludes:

> "Justice should be determined and delivered in Wales so that it aligns with its distinct and developing social, health and education policy and services and the growing body of Welsh law. Policy would be developed and funding allocated to meet the needs of and provide greater benefit for the people of Wales."

In respect of family justice, the Commission found that there is a complex division between the responsibilities of the Welsh Government and the Westminster Government. It notes:

> "There has been an unsustainably high increase in the number of children being taken into care in Wales, with significant variations between local authorities. Often it is not in the best interests of the child to be taken into care as the consequences to the child and society can be disadvantageous."

The Commission considers that funds would be much better spent on support for children and their families to prevent problems arising. Whilst it welcomes the Welsh Government's recent initiative to hold local authorities to account for reducing the number of children in care, those placed out of county and those removed from parents with a learning disability, the Commission considers that significant further action to tackle this issue is essential in both the short and longer term.

In respect of access to justice, the Commission found that the significant cuts to legal aid made in 2012 have hit Wales hard. Proper access to justice is not available with the consequent threat to the Rule of Law. This has resulted in:

- 'advice deserts' in rural and post-industrial areas where people struggle to receive legal advice;
- a serious risk to the sustainability of legal practice elsewhere, especially in traditional 'high street' legal services; and
- increasing numbers of people representing themselves in courts and tribunals with a consequential adverse impact on outcomes and the efficient use of court resources.

Mark Drakeford AM, First Minister of Wales, welcomed the report. He said:

> "The publication of the Commission's report is an important landmark. It is the product of an unprecedentedly broad survey of the many challenges faced in providing an effective justice system for Wales. The comprehensive approach and the range of evidence gathered is unlikely to be repeated."

For the report, **click here**. For a summary, **click here**.

27/10/19

Financial Remedy & Divorce Update, October 2019

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

As usual, this update is provided in two parts, recent news and cases.

A. News

Family courts "failing" on wellbeing

Writing in the Bar Council's magazine, Counsel Professor Jo Delahunty QC comments on a number of efforts to implement Sir Andrew MacFarlane's wellbeing initiative but highlights that "they are an exception". Sir Andrew who has made wellbeing a priority since taking over the role, has encouraged discussions between the legal profession and each designated family judge to agree parameters for acceptable working practices, such as the earliest and latest times advocates should be expected to deal with emails. He has said he hopes to use these regional agreements to create a national template to identify "the bottom line expectations that should apply to all court centres".

Professor Delahunty QC refers to Her Honour Judge Roberts issuing a wellbeing practice note in Essex and Suffolk as well as His Honour Judge Tolson's draft directive for the Central Family Court which sets out listing and lunch times and that barristers are not obliged to reply to emails after 6pm.

Two-thirds of divorce clients pay fixed fees

Almost two-thirds of divorce and separation clients now pay fixed fees, but less than half of them end up paying the price quoted at the start, a report has found. It put the value of the UK family law market as a whole last year at £1.66billion and predicted that its value would increase "steadily, if unspectacularly" over the next five years. Researchers from IRN said 64% of divorce and separation clients were charged a fixed fee at the start, but less than half (31% of the whole sample) actually paid that fee. Most of this group (24% of the whole sample) were charged a higher fee, with only 9% charged a lower fee. The report also found that almost a third of clients (32%) were handling their divorce proceedings themselves from start to finish – in line with previous findings.

Clients who used law firms reported high levels of satisfaction, with just under eight out of 10 satisfied or very satisfied by the service. However, this fell to seven out of 10 when clients were asked to rate explanations of costs.

The report found that consumer decisions on legal advisers were "very gradually" being driven by digital channels.

ONS publishes latest population estimates

The proportion of the population aged 16 years and over in England and Wales who are married has continued to decline in 2018 to 50.5%, down from 51% in 2017.

Whilst the proportion of the population under age 70 years who are married has declined, the proportion aged 70 years and over who are married has increased from 50.3% in 2008 to 55.8% in 2018.

The number of people aged 16 years and over who are single and have never married has continued to increase, rising by 369,000 from 2017, to a total of 16.7 million people (35%) in 2018.

The number of people aged 16 years and over who live with a partner and have never married has continued to increase, rising by 1.3million people since 2008, to a total of 5 million (10.4%) in 2018.

New Family Division Judge appointed

Frances Judd QC has been assigned to sit in the Family Division.

B. Case Law Update

***AR v ML* [2019] EWFC 56** (Mr Justice Mostyn) 27 September 2019

This was an appeal by a husband against a final order allowing the wife to introduce further evidence relating to her housing needs after the financial remedies judgment had been delivered (though it had not been perfected).

At the end of a final hearing, the trial judge delivered a judgment which awarded the wife 49% of the total assets (£412,000 after debts had been paid). During the trial, the wife had been criticised for not providing adequate evidence to support her proposal that she would be able to re-house mortgage-free in a two-bedroom property with a garden in Crouch End. Even on her own case, after paying for debts, the wife would have been left with less than £530,000 to pay for all the costs of re-housing and she had been unable to provide any property particulars evidencing that property in that price bracket was available. She had also failed to look for property in any area other than Crouch End. The husband asserted that there would be no suitable properties on the market for less than £500,000.

Immediately after having heard judgment, the wife's counsel indicated that the wife wanted to appeal. There then followed lengthy discussions which resulted in the trial judge giving a second judgment and ordering the case to be adjourned for "finalising judgment and reconsideration of suitable housing fund for the [wife] and the child of the family". Directions were then made for the wife to file a statement as to her position on suitable housing and for the husband to file a statement in reply. The judge said that she had been persuaded that the wife should have the opportunity to put fresh evidence about her housing needs before the court (despite the fact that the evidence should have been put to the court first time round).

The husband appealed. Mr Justice Mostyn was firm in his assessment:

> "I have to say, with all due respect, that the judge's decision was not based on the correct legal principles as set out above and, inasmuch as it was an exercise of "discretion", was plainly wrong. There was no good reason shown why the judge should depart from the terms of her judgment. There was no reference to the principle of finality. There was no reference to the concept of due diligence. It was merely another example of counsel on behalf of a disappointed litigant seeking spuriously to try to get the judge to change her mind immediately after judgment has been delivered, to which the judge should not have succumbed. "

As a result, Mostyn J gave the husband permission to appeal and allowed the appeal. Setting aside the order, the trial judge was directed to make an order that reflected her original judgment.

***Ogunware v Ogunware* [2019] EWHC 2428 (Fam)** (Mr Justice Holman) 25 July 2019

In this case Mr Justice Holman opened his judgment by explaining that he could not describe the parties as 'husband' or 'wife' as he 'would appear to be pre-judging the very matter in issue between them'.

The applicant, Mr Ogunware, sought to establish that the marriage the respondent asserted had taken place in Nigeria on 30 December 2006 had not in fact taken place. He alleged that the marriage certificate she produced was bogus. The respondent was adamant that a ceremony had taken place and that the certificate was genuine.

Mr Justice Holman concluded that s.58 Family Law Act 1986 prevented him from making any declaration at all on the application. The application purported to be made under s.55 Family Law Act 1986 but what the applicant was asking the court to declare did not fall within any of paragraphs (a) to (e) of s.55(1). Section 58(3) expressly provides that on the dismissal of an application for a declaration under this part, the court does not have power to make any declaration for which an application has not been made. Further, s.58(5) expressly provides that:

> "No declaration may be made by any court, whether under this Part or otherwise—
>
> (a) that a marriage was at its inception void..."

The underlying case of the applicant was that there was simply no "marriage" or any kind of ceremony or event at all between these parties on 30 December 2016 i.e. the applicant was not contending that there was a marriage that was, for

some reason, a "void" one, but, rather, that there simply was not a marital event at all. As a result, the application was dismissed.

Holman J concluded his judgment by stating that it seemed to him that the only place where the matter could be reliably determined is in Nigeria, by the courts of Nigeria.

Surrogacy: BBC Radio 4's 'The Archers' storyline highlights legal issues for parents

Rachel Cooper, barrister, Coram Chambers, discusses current UK surrogacy legislation in relation to modern reproductive practices.

There was much excitement last week as Ambridge welcomed Alexander Macy-Craig (or Xander for short) to the BBC Radio 4's '*The Archers*'. Xander was born to parents Adam Macy and Ian Craig via a surrogacy arrangement with their friend Alexandra or 'Lexi'.

Xander was born unexpectedly last Monday calling Ian away from judging the Flower and Produce show. The maelstrom that likely caused in Ambridge paled into insignificance when his name was revealed on Friday night to grandparents Jennifer and Brian Aldridge. The revelation that the baby was to be named after his surrogate mother threw Jennifer into a panic that the name would increase the emotional connection between Lexi and Xander, making Adam and Ian more vulnerable to the surrogacy arrangement breaking down.

The BBC's surrogacy storyline fittingly coincides with the Law Commission's project looking into surrogacy law reaching the consultation stage. **The consultation period is open until 11 October 2019** with the full consultation paper available here. A Short Form Survey for consultees with personal experience of surrogacy is also **available here**.

Surrogacy and intended parents

The main legislation concerning surrogacy is the Surrogacy Act 1985 (SAA 1985) and (in respect of the making of parental orders) the Human Fertilisation and Embryology Act 2008 (HFEA 2008). Since 2008, same-sex couples have been able to apply for a parental order. A parental order is the means by which legal parenthood is switched from the surrogate mother to the intended parents.

Jennifer's concern that Adam and Ian remain vulnerable as intended parents in advance of a parental order being made is not wholly misplaced. While there have not been many reported cases of surrogacy arrangements breaking down in the UK, one of the driving reasons for intended parents seeking surrogate mothers overseas is the guarantee of clear and contractual rights in respect of the child.

Until the consent of the surrogate mother (and her spouse / civil partner) is enshrined in a parental order, the surrogacy agreement with the intended parents is an informal arrangement. The intended parents have no legal recourse for ordering the transfer of the child to them if the surrogate mother changes her mind. This is the case even where the child is biologically their own because the woman who carries a child is the prima facie legal mother of that child (HFEA 2008, s.33). This is an irrebuttable presumption in law.

In the UK, applying for a parental order can take up to a year post-birth. In advance of a parental order being made, only the surrogate mother (and potentially her spouse / civil partner) hold parental responsibility for the child. This means only the surrogate mother can make decisions if the child becomes ill. This exposes the child to significant risk if, as Xander is, he is living with his intended parents, becomes ill and the surrogate mother is unavailable to make emergency decisions about his care.

In order for a parental order to be made, a surrogate mother must give free, informed, and unconditional written consent (HFEA 2008, s.54(6)) in the correct format (Form A101A). Surrogacy arrangements are unenforceable as consent must be given within six months of the child's birth (SAA 1985, s. 1A / HFEA 2008, s.54(3)).

The surrogate mother has the first and primary claim to the child and can change her mind up until the parental order is granted. For Adam and Ian there is the additional risk that Lexi could remove Xander to Bulgaria where she is from.

Without any legal rights in respect of Xander in advance of a parental order being made, Adam and Ian would struggle to have Xander returned to the UK.

What's in a name?

Jennifer Aldridge became particularly exercised on Friday night on learning that Xander had been named after his surrogate mother. As Shakespeare's Juliet famously and rhetorically asked from her balcony of Romeo being a Capulet: 'What's in a name?'

***C (Children)* [2016] EWCA Civ 374** was not a surrogacy case. It was an appeal from a decision made in public law proceedings injuncting a mother from naming her twins "Cyanide" and "Preacher". The case is interesting for the purposes of discussing Adam and Ian's decision to name Xander after his surrogate mother because of what King LJ says in her lead judgment about a child's forename:

> "[40] …The forename finally chosen forms a critical part of his or her evolving identity. The sharing of a forename with a parent or grandparent or bearing a forename which readily identifies a child as belonging to his or her particular religious or cultural background, can be a source of great pride to a child and give him or her an important sense of 'belonging' which will be invaluable throughout his or her life.
>
> [41] If a baby cannot be brought up by his or her parents, often the forename given to him or her by their mother is the only lasting gift they have from her. It may be the first, and only, act of parental responsibility by his or her mother. It is likely, therefore, to be of infinite value to that child as part of his or her identity. […]
>
> [51] …given the fact that in the 21st century a child will predominantly use his or her forenames for most purposes throughout his or her life, that forename is now every bit as important to that child, and his or her identity, as is his or her surname."

In *Re D, L and LA (Care: Change of Forename)* [2003] 1 FLR 339, Butler-Sloss LJ (as she then was) said that both a forename and a surname reflected a child's "*roots*" (at 346).

In a surrogacy case, it is the surrogate mother (and possibly her spouse / civil partner) who will be registered initially as the child's parent(s) on the birth certificate. This must be the case as the birth must be registered within 42 days and the surrogate mother is not considered capable of giving consent for a parental order to be made in the first six weeks after the child is born (HFEA 2008, s.54(7)). It is therefore the surrogate mother who will register what the child's surname and forenames are to be. If the surrogate mother gives the child different names from those chosen by the intended parents, the name(s) can be changed once a parental order is made as the child's birth certificate is reissued with the intended parents' names set out as the child's legal parents.

Alexander Macy-Craig by any other name would doubtless be as sweet. Seen in the light of *C (Children)*, Adam and Ian's choice of name is arguably a fitting reflection of Xander's identity as a surrogate child and of the gift provided by Lexi to this modern family.

Conclusion

In many US states, situations of this kind are avoided with legal mechanisms that put intended parents' names on the birth certificate from the get-go, often via a pre-birth order, which transfers responsibility to intended parents before the surrogate gives birth. This provides legal certainty for all parties, particularly the child.

There will doubtless be many further twists and turns in Xander Macy-Craig's life-story before the matter resolves. What the Archers' storyline accurately highlights is how out-of-step current surrogacy legislation is with modern reproductive practices, when a felicitous naming decision is the cause of such consternation because it risks destabilising the surrogate mother's decision to consent to a parental order being made. The current legislation governing UK surrogacy causes the process to be fraught with difficulty for intended parents, surrogate mothers and resultant children. Reform is urgently required in order to provide legal certainty for modern UK families and their children.

Children: Private Law Update (Autumn 2019)

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

In this update I will consider the following areas:

- Identity of the natural parent
- Cost orders
- Applications for fresh evidence on appeal
- Section 91(14) orders
- Termination of contact cases.

Identity of the natural parent

In *AB v CD & C* [2019] EWHC 1695 (Fam) the High Court was concerned with an unusual application, presenting the question as to whether a boy should be told who his biological father was.

The child, C, believed AB, the husband of the child's mother, to be his father. However, C was conceived as a result of an affair the mother had with X.

AB issued a raft of applications against the mother, including proceedings for breach of confidence, and a claim for the monies he had spent on C together with damages for the distress he had suffered.

AB sought an order for C to be informed who his biological father was and to reveal his identity. The mother submitted that C would not understand what he was being told and there should be a period of two years before being told. A Guardian was appointed for C and she recommended that C be told now rather than wait and run the risk of C finding out by other means.

Cohen J reached the view that X's position needed to be ascertained before his identity could be revealed to C, because if X did not want to play a role in C's life then this would impact on what C should be informed. The learned Judge drafted a letter, agreed by the parties, to be sent to X to confirm his position, and the matter to be listed for a further hearing once his position had been made clear. In the meantime various orders were made enforcing AB's role including the granting of parental responsibility and an order for C to spend time with him.

Cost orders

In *Timokhina v Timokhin* [2019] EWCA Civ 1284 the Court of Appeal was concerned with an appeal brought by the mother against an order for her to pay £109,394 in costs. The substantive application before the court was by the father for permission to remove the parties' son to Russia to live with him. During the course of the proceedings the mother travelled to Russia and was arrested for attempting to bribe police officers to instigate criminal proceedings against the father in order to gain advantage. The mother was remanded in custody in Russia. The final hearing on the leave to remove application was adjourned once by reason of the mother's incarceration. Her subsequent application for an adjournment was refused and the court granted the father permission to remove the child to Russia to live with him and made a cost order against the mother. The mother appealed the decision. King LJ, in refusing the appealing but reducing the cost order to £78,144, outlined the relevant jurisprudence, and the rarity of such orders in children proceedings:

> "For completeness it should be added that the general rule that costs will follow the event does not apply to an appeal to the Court of Appeal in any family proceedings (CPR 44.2(3)) and that only rarely will costs orders be made in children proceedings; see: ***Re S (A Child)(Costs: Care Proceedings)* [2015] UKSC 20**, [2015] 2 FLR 208. The concession on behalf of the mother that she should be responsible for costs (at least on a standard basis) in respect of the withdrawn appeal, rightly recognised that, on the facts of this case, notwithstanding the general approach to costs in cases involving children, an order for costs could legitimately have been made; see: ***Re T (Care Proceedings: Costs)* [2012] UKSC 36**, [2013] 1 FLR 133.

The appellate court also determined that it was plainly within the trial judge's discretion to make a cost order on an indemnity basis having regard to the principles in ***Three Rivers District Council v Bank of England* [2006] 5 Costs LR 714**.

Applications for fresh evidence on appeal

In ***Re E (Children: Reopening Findings of Fact)* [2019] EWCA Civ 1447** the Court of Appeal confirmed the procedure by which findings of fact may be challenged on the basis of further evidence. Jackson LJ confirmed that a party can seek to pursue an appeal accompanied by an application to file further evidence pursuant to CPR 1998 51.21(2) and the principles established in Ladd v Marshall. However, he goes on to say that there may be circumstances where in general an application to the trial court is likely to be the more suitable course pursuant to Part 18 FPR 2010. The trial judge will be in a far better position to assess the relevance and significance of such new evidence, and deal with any application more quickly.

Section 91(14) orders

***Re N (Children)* [2019] EWCA Civ 903** provides practitioners with a helpful reminder as to the fundamental requirements on making a section 91(14) Children Act order. The parties were involved in protracted proceedings regarding their two children which had been ongoing for five years. A directions hearing took place and the father did not attend, but did file a position statement. The Judge heard evidence from the Guardian and the mother and indicated after hearing the evidence that he was minded to make a s. 91(14) order against both parents and proceeded to make such an order for two years. The father applied to vary the order, but the mother did not attend and the court was not provided with a bundle, and the application was dismissed. The father appealed the decision and the Court of Appeal emphasised the very clear guidance in Re P [1999] EWCA Civ 1323 and comments of Tomlinson LJ in ***Re T (A child)(Suspension of contact)* [2015] EWCA Civ 719** as follows:

> "50. … Given the significant implications of this statutory intrusion into a party's ordinary ability to access justice, it is imperative that the court is satisfied that the parties affected:
>
> (1) Are fully aware that the court is seised of an application, and is considering making such an order.
>
> (2) Understand the meaning and effect of such an order.
>
> (3) Have full knowledge of the evidential basis on which such an order is sought.
>
> (4) Have a proper opportunity to make representations in relation to the making of such an order; this may of course mean adjourning the application for it to be made in writing and on notice.
>
> 51. These fundamental requirements obtain whether the parties are legally represented or not. It is, we suggest, even more critical that these requirements are observed when the party affected is unrepresented."

In ***Re P & N (Section 91(14): Application for permission to apply: Appeal)* [2019] EWHC 421 (Fam)** Cobb J sets out the correct procedure and test on applying for permission to apply for a section 8 order after the making of a s. 91(14) order. A s. 91(14) order had been made for three years against the father. He had applied previously for permission to apply for a section 8 order, which was refused. His second application was listed for a hearing without any formal notice to the mother, and the Guardian was not able to attend. The Judge granted permission to the father to make an application for a section 8 order. Cobb J decided that this approach was wrong and had been procedurally unjust. Cobb J sets out the legal context as follows in such applications:

> "i) Nothing in the CA 1989 or the FPR 2010 specifically prescribes how the court should approach an application for permission to apply for a CA 1989 order following the imposition of a section 91(14) order; I do not regard this as an application to which section 10(9) CA 1989 applies as the father would be 'entitled' (section 10(4)(a)) to apply for an order were it not for the court-imposed restriction;
>
> ii) A judge sitting in the Family Court generally enjoys a wide spectrum of procedure when determining applications under the CA 1989 (*Re B (Minors) (Contact)* [1994] 2 FLR 1 at p.6 1);

> iii) That there is no more recent or authoritative pronouncement on the appropriate procedure under review here than the Court of Appeal's judgment in *Re S* [2006] EWCA Civ 1190, [2007] 1 FLR 482 ('Re S');
>
> iv) Section 1(1) and section 1(3) of the CA 1989 do not apply to an application for permission to apply for an order, although the welfare of the child will be a relevant consideration. The court should, however, have some regard to the 'overriding objective' of family court process, and the obligations arising under *rule 1 FPR 2010* – in particular to deal with application "justly", "fairly", "ensuring that the parties are on an equal footing" and "saving expense" "

Cobb J goes on to identify two questions requiring resolution: i) What test should the court apply on an application for permission to make an application following the imposition of an order under section 91(14)? and ii) Should the application for permission be determined on notice to the other party or parties to the original litigation or not?

Cobb J reviews the previous authorities and provides the following summary:

> "40. The appropriate procedure for a court to follow when presented with such an application, in my judgment, is that laid out in the judgment in *Re S* (see [18] above), namely that the application should be considered 'in the first instance' on the papers, or at on an oral hearing which can be 'without notice' to the respondent particularly if there are concerns about the effect on the respondent of learning of a fresh application (what Wall LJ referred to in Re S at [92]/[93] as "certain sensitive circumstances… a case in which the stress of previous litigation has destabilised the family, and in which the fragile capacity of the resident parent may well be adversely affected by the service of an application for permission to apply"– see [18] above). If the applicant seeks an oral hearing, he/she should not be denied this. If the application is without merit, then it can be dismissed at that stage, and the potential respondent may well have been spared any engagement with the process. However, if the application shows sufficient merit (i.e. the applicant has demonstrated a *prima facie* case that there is a need for renewed judicial investigation on the basis that he has an arguable case), the court should list the application for an 'on notice' hearing to allow the respondent to make representations. This procedure is clearly indicated from the judgment in Re S but it was not followed here."

He goes on to make three further points:

> (1) First, the grounds laid out in an application for permission to make a fresh application may not tell the whole, or indeed a true, story; the situation 'on the ground' may not be as the applicant asserts. Before a judge opens the gateway to fresh litigation – in circumstances when a court has earlier taken the exceptional course of imposing a restriction on further applications – an opportunity should be given to the respondent to fill any factual gaps, or correct any factual errors (deliberate or unwitting), in the material on which the judge is being asked to consider the application, and to respond on the merits. On this point, it is illustrative to reconsider what I set out at [36] above.
>
> (2) Secondly, as Hale J contemplated in *Re N* (see [16]), there may be no "genuine need to invoke the court's assistance in the problem that had arisen" – a point which Thorpe LJ repeated in Re A (see [13] above: he referred to there being no need for "renewed judicial investigation"). It may be that the issue – when analysed with the benefit of both parties' contributions – does not warrant the expense and time of court intervention, thereby saving the parties' and the court's limited resources.
>
> (3) Thirdly, and yet more significantly, only by offering the respondent an opportunity to be heard will the judge, in my view, be fulfilling his or her obligation under the 'overriding objective' under the FPR 2010 to deal with case "justly" and "fairly" (see [10](iv) above): there will be few, if any, situations in which the respondent is not likely to be materially affected by the grant of the application to re-open the litigation. Justice and fairness surely require that the respondent is given the chance to inform and influence the decision whether further litigation should be instigated.

The application for permission to apply for a section 8 order was remitted to the Family Division Liaison Judge and listed for hearing on notice to the mother and Guardian.

Termination of contact cases

Re A **[2019] EWHC 612 (Fam)** is a helpful case for practitioners faced with applications to terminate contact. Cohen J was concerned with an appeal against an order which stopped all contact between the mother and a 7 ½ girl, A. The mother alleged that the father had sexually abused the child. The allegations were determined at a fact finding and were not made out. The court went on to make an order that A live with her father. The mother continued to make allegations to the local authority and police that the father had sexually abused A. The Judge made an order for no contact, various prohibited steps orders and a s. 91(14) order. Those orders were appealed by the mother on the basis that the Judge had failed to

consider the impact on the child from having frequent contact with her mother to no contact whatsoever, and in absence of expert evidence from a psychiatrist or psychologist to report on the effect on A.

On considering the appeal, Cohen J refers to the passages from Re J-M and the need for the court to grapple with all available alternatives before abandoning contact. He allowed the appeal in part and found that to 'terminate the child's relationship with the mother and sister is very draconian and it seems to me that this is a case where all available alternatives had not been fully explored.' The case was remitted for directions to consider whether a child and adolescent psychiatrist should be instructed.

When One Parent Kills Another – how should the family court approach this?

Care proceedings where one parent has killed the other are particularly tragic for the children involved. This article considers some of the issues that arise in these cases and explores some of the case law when dealing with the death of one parent killed by the other.

Judith Pepper, barrister **4 Brick Court**

Judith Pepper acted for the local authority in ***A local authority and C*** **[2019] EWHC 1782 (Fam)**

The family dynamics in these situations can be complex. When care proceedings have been commenced following the death of one parent at the hands of the other, the children can be caught in the midst of family and friends struggling to comprehend horrific events, as well as being surrounded by adults perpetuating friction that existed between their parents. In 1986, the child psychiatry team at the Royal Free Hospital, London, started to see children where one of their parents had killed the other (Black & Kaplan, 1988). The team subsequently moved to the Traumatic Stress Clinic. They noted that often when a father has killed a mother, extended family members step in to care for the children. Sometimes competition as well as hostility can be aroused between divided relatives, and the children can become caught up in a conflict similar to that between their parents which culminated in the death of their mother.[1]

General guidance

Mrs. Justice Hogg provided guidance in ***In the matter of A and B*** **[2010] EWHC 3824**. In this case the children had been placed within the paternal family. The court 'accepted the expert advice that generally children should not be placed within the perpetrator's family' (paragraph 6). However the Court found that the best interests of the children lay with them continuing to live with their paternal grandparents. The court later made special guardianship orders in favour of both sets of grandparents. Hogg J provided general guidance in these rare but difficult cases:

a. The threshold criteria will be met

b. The local authority should give immediate consideration to the issue of proceedings – it is not appropriate to leave the extended family to attempt to resolve matters through private law proceedings

c. If proceedings are commenced, a children's guardian should be appointed at the earliest opportunity and following issue the case should be transferred to the High Court

d. If there are concurrent criminal proceedings, there should be liaison between the local authority solicitor and the CPS case manager

e. Professionals should seek guidance from an appropriate child and family psychiatrist or clinical psychologist.

Mrs. Justice Hogg stated that it would be a misreading of the otherwise helpful research (Hendricks/Black et al) to assume that there is a presumption that the family of the perpetrator should be discounted as carers for the children.

What role does the criminal law play in a fact-finding?

In the case of ***R (Children)*** **[2018] EWCA Civ 198**, the Court of Appeal considered the extent to which the family court should import elements of criminal law into a fact-finding determination within child care proceedings.

In this case the mother of two young children died in the kitchen of their family home following a single fatal knife wound to her neck inflicted by the children's father. The father was acquitted of all criminal charges and Mrs. Justice Theis conducted a fact-finding hearing within care proceedings which concluded with a finding that the father had used 'unreasonable force and unlawfully killed the mother'. The father appealed this finding. The two issues which were the main focus of the appeal were:

> a. The extent to which the family court should import elements of criminal law into a fact-finding determination within child care proceedings
>
> b. Whether the amount of time allowed for preparation by the father's legal team in this case was so constricted that the resulting trial was unfair within the terms of Article 6 of the European Convention on Human Rights.

Time was spent during the appeal addressing 'loss of control' and its meaning as a criminal defence. The Court of Appeal interrupted the oral hearing to ask the parties why it was that the family court concerned itself with detailed aspects of the criminal law during a fact-finding hearing conducted for the wholly different purpose of determining issues as to the future welfare of children (paragraph 30). As a result of this intervention, all parties accepted that the structure and substance of criminal law should not be applied in the family court (paragraph 61). As McFarlane LJ, as he then was, pointed out, a case concerning the welfare of children is wholly different from the prosecution by the State of an individual before a criminal court. The criminal court is concerned with the culpability of an individual and if guilty, punishment for a specific offence. The family court determines facts, across a wide canvas, relating to past events in order to evaluate which of a range of options for the future care of a child best meets the requirements of their welfare. The cases of ***Re U (Serious Injury: Standard of Proof); Re B*** **[2004] EWCA Civ 567; [2005] Fam 123** and *A Local Authority v S, W and T* [2004] EWHC 1270 (Fam) were referred to as being cases that refer to the distinct roles of the criminal court and family court.

A particular concern held by McFarlane LJ was that the family court, if utilising the criminal law when analysing evidence at a fact-finding hearing, could become swamped in legal technicality (paragraph 66). This could lead the court to become side-tracked from the central task of simply deciding what has happened and what is the best future course for a child.

It was clear the local authority had been presenting its case on the killing in terms of the criminal law and that was the case the father understood he had to meet.

In relation to the Article 6 argument, father's leading counsel detailed the scale of the work that had been required. The submission, in essence, made in respect of this was that despite their very best endeavours, the father's legal team were simply not able adequately to prepare for the fact-finding hearing.

McFarlane LJ stated that when an experienced advocate says that the difficulties the father's legal team had in meeting the case against him were so severe that there was not a grip on the evidence, this must be taken seriously. He further noted that it was only in the local authority's opening note that the father read for the first time that a finding of 'deliberate' killing was being sought against him in the family court. It was important that the father's advocate was now raising the issue of whether there was one or two movements with the knife – a factor whose significance the advocate had not appreciated at the time, given the speed of preparation. Therefore, an important aspect of the father's case may not have been presented fairly to the court.

McFarlane LJ was persuaded that considering the two elements raised in the appeal together, and taking both elements into account, the father had not been afforded a sufficiently fair trial and the case had to be retried before a different tribunal. McFarlane LJ then turned to the recently updated Practice Direction FPR 2010, PD12J 'Child Arrangements and Contact Orders: Domestic Abuse and Harm' relating to private law proceedings and specifically directions for a fact-finding hearing.

McFarlane LJ concluded by stating that it does not follow when one of the parents has died in the course of an altercation with the other that it will be necessary for the court to determine precisely how the death occurred and the role, if any, that the surviving parent played in it. It may be necessary to investigate the broad context of the relationships within the family and the behaviour of the parents over a period of time. It is for each individual case to be considered on its own facts.

Should the family court make findings beyond the fact of a conviction for murder and what role does the conviction play in any fact-finding hearing?

The family courts have for some time explored allegations of controlling and coercive behaviour in fact-finding hearings, although many practitioners may at times have experienced the courts seeing allegations of these types as not being

sufficiently serious to merit fact-finding hearings. It is hoped that the creation of a new criminal offence of controlling or coercive behaviour in an intimate of family relationship [2] has sent an important message in respect of this type of behaviour or these types of allegations.

In the case of ***A local authority and C* [2019] EWHC 1782 (Fam)** Mrs. Justice Lieven considered whether or not it was necessary to make further findings beyond the fact of the father's conviction for murder. This was a case whereby the father was convicted of murdering the children's mother. By the time of the hearing in the family court, the father indicated a wish to appeal the criminal conviction and disputed any intention to kill or cause serious harm. The local authority sought findings beyond the fact of his conviction for murder, including those of controlling behaviour, such findings being relevant, it was contended, to whether the children would live with the maternal grandmother or paternal aunt, and also to the narrative the children would be given about what happened to their mother.

Mrs. Justice Lieven considered how to approach the father's conviction, the factual elements of his conviction, and thirdly the other factual matters that the local authority sought to rely upon. As set out in *McCauley v Hope* [1999] 1 WLR 1977, the Court of Appeal made it clear that a criminal conviction is not absolutely determinative that the offence took place and it is open to the defendant to argue in the civil case that the conviction was wrong.

Baker J, as he was then, considered this in *Z (A Child)* [2014] EWHC 2355,

> '…where a person has been convicted of criminal offences arising from facts which are subsequently in issue in a children's case, the doctrine of res judicata applies so that the conviction is accepted as evidence of the underlying facts. In practice, save in exceptional circumstances, a court in family proceedings will proceed on the basis that a criminal conviction is correct'.

The father did not accept his conviction but was not positively seeking to argue that the contrary was proved within section 11(2) of the Civil Evidence Act 1968. The father's defence in the family court was the same as the defence rejected by the jury in his criminal trial, with its higher standard of proof. Mrs. Justice Lieven accepted his conviction.

Mrs. Justice Lieven then went on to consider the issue of estoppel: whether it has any place in Children Act proceedings; and to the degree it has, what matters are covered by it. The roots of estoppel are found in the doctrine of public policy, namely that a later court is bound by the earlier ruling. In the case of *Re S, S & A (Care Proceedings: Issue Estoppel)* [1995] 2 FLR 244, Wilson J, as he was then, extended the import of the doctrine of issue estoppel into children's cases where the parties in both proceedings were the same. Hale J, as she then was, considered the issue of estoppel in Children Act proceedings in *Re B (Minors) (Care Proceedings: Issue Estoppel)* [1997] 3 WLR 1. She considered the weight of Court of Appeal authority was against the existence of any strict rule of issue estoppel binding upon the parties in children's cases. The court will have a discretion as to how the inquiry before it should be conducted.

Mrs. Justice Lieven therefore concluded her analysis of the case law as follows:

> a. Having accepted the criminal conviction, she was bound by the principle of issue estoppel to find the father intended to kill or cause serious harm to the mother. Issue estoppel must apply to the fundamental elements of the criminal conviction. She therefore rejected any suggestion by the father he did not intend to harm the mother.
>
> b. She concluded as a matter of judgment rather than estoppel that the jury must have rejected the father's version of what happened after the children went to sleep. Whilst the judge's sentencing remarks do not bind the court, she attached great weight to them.
>
> c. To the degree that the local authority relied upon evidence presented to the jury by the prosecution about the father's controlling and jealous behaviour towards the mother, no issue estoppel arose and therefore she determined she would approach that issue based upon the evidence before the family court.

Mrs. Justice Lieven did consider this was a case where it was necessary to make findings of fact about events earlier in the relationship. She went on to make findings that the father had been abusive and controlling of the mother and agreed with the criminal judge that he was both jealous and possessive. She found that his evidence in the family court was noteworthy for his lack of acceptance of the findings of the criminal court and he saw himself as the victim.

Given his lack of insight and the evidence he gave, the court could not see how he would be involved in creating any narrative that could be given to the children. The court made the section 34(4) order sought by the local authority.

In terms of expert evidence, Great Ormond Street Hospital was instructed, given their experience in working with children where one parent had killed the other. They were instructed within a particular remit, to undertake psychological assessment of the children and the support they would need, contact with their father and both sides of the family and how placement would impact upon them. Mrs. Justice Lieven was critical of their expressed preference within a professional meeting, given the significance of the issue of where the children should be placed, and observed that if they were to express a preference, they should have done so in a clearly written report with properly set out reasons.

Whilst both the maternal grandmother and paternal aunt had impressed the court, the court made a special guardianship order in favour of the maternal grandmother. The overarching rationale for this was the context in which the children would grow up. The paternal family were struggling to come to terms with the murder and were all at different stages in this journey. The court felt it far more likely that the children would be able to retain memories and positive images of their mother if placed with her mother, in contrast to the likelihood that if placed with their paternal aunt, their mother's memory would gradually be squeezed out.

Conclusion

There will be cases where even with a criminal conviction relating to the death of one parent by another, it will be necessary for the family court to determine other findings in respect of the relationship between the parents. Close cooperation with the CPS will be required in order that disclosure from criminal proceedings is obtained in a timely fashion. As was seen in the case of R, it is unrealistic to expect even experienced advocates to assimilate large amounts of information within short timescales, and for any subsequent fact-finding hearing to be conducted fairly. This is particularly acute when adverse findings are sought against the remaining parent.

Members of the wider family can often feel in competition with one another or actually be in competition with each other to care for the children and the manner in which experts are instructed to report on the complexities of placement and future needs of the children must be considered careful

[1] Marital Conflict by Proxy After Father Kills Mother: The Family Therapist As an Expert Witness in Court, Tony Kaplan, Fam Proc 37: 479-494, 1998.

[2] Section 76 of the Serious Crime Act 2015

CASES

Re A (A Child: Female Genital Mutilation: Asylum [2019] EWHC 2475

Background

A was a 10 year old girl whose parents were of Sudanese origin but held only Bahraini citizenship. She had arrived in the UK with her family on 18 August 2012 and had remained here with her mother and older brothers since then (the father had left the UK very shortly after their arrival and was believed to have been detained in a military prison in Bahrain). On 2 September 2015 the mother made an application for asylum on the primary basis that if they returned to Bahrain A would be subjected to female genital mutilation (FGM). That application was refused. Following exhaustion of the appeal process the mother and the children were due to be deported in September 2018.

In 2017 the relevant local authority had commissioned an assessment by Barnardo's which found that there was no risk of FGM to A whilst the family remained in the UK, but recommended that an application should be made for a Female Genital Mutilation Protection Order (FGMPO) if the family returned to Bahrain. By contrast, the First Tier Tribunal had found on 25 July 2017 that there were '*not substantial grounds for believing there is a real risk of her [A] being subjected to any form of FGM.*'

On 27 September 2018 the Local Authority applied for an FGMPO. At the initial hearing on 1 October 2018 the Court: (a) prohibited the mother from leaving the jurisdiction with or in the company of A; (b) prohibited the Secretary of State for the Home Department (SSHD) or anyone acting on his behalf from removing, instructing, or encouraging any other person to remove A from the jurisdiction of England and Wales; (c) prohibited the SSHD or the mother from obtaining a passport or other travel documentation for A.

The matter then came before the President of the Family Division on the issue of whether or not the SSHD was bound by the terms of the FGMPO.

Submissions

The Local Authority accepted, relying on Re A (Care Proceedings: Asylum Seekers) [2003] EWHC 1086 (Fam), that the family court cannot deprive the Home Office of its powers of deportation or removal. The Secretary of State, who had agreed not to set any removal directions pending the outcome of this hearing, also relied upon the line of cases establishing that the family court does not have jurisdiction to injunct the SSHD in the exercise of the asylum jurisdiction, arguing that this applied to cases of FGM just as it did to any other family proceedings. The Children's Guardian's agreed (para. 40).

The mother on the other hand submitted that the line of authorities were confined to cases where the family court was exercising its jurisdiction under the Children Act 1989 or under the wardship or inherent jurisdiction, and sought to draw a distinction between those 'welfare' cases and FGM cases on the basis that FGM is highly likely to amount to a breach of Article 3 of the ECHR (prohibiting torture, inhuman or degrading treatment or punishment). She argued that FGM cases were therefore in a different category such that the family court when making an FGMPO does have the power to restrain the Secretary of State from removing a person from the jurisdiction of the UK.

Decision

The President accepted (as agreed by all parties) that an application for a FGMPO must be considered through the prism of Article 3 (para. 46). He did not accept, however, that in contrast to all other family proceedings the family court in FGM proceedings had jurisdiction to injunct the Secretary of State. He gave three main reasons for this: (1) even though in reality many asylum cases will also involve an alleged breach of Article 3, there is no suggestion in the decided case-law that there is an exception to the general prohibition on the family court granting orders against the SSHD where a risk of Article 3 treatment has been established; (2) if Parliament had intended to create such an exception the FGMA 2003 would have expressly provided for it; and (3) there is no evidence that without the family courts having the power to injunct the SSHD, the State in the exercise of its asylum and immigration jurisdiction would be in breach of its obligations under Article 3.

The President also noted the difference between risk assessment in a family case and risk assessment in the context of immigration and asylum claims. Contrary to the submissions of the SSHD that the family court should only depart from the assessment of risk undertaken by the First Tier Tribunal if there was good reason to do so, the family court was in fact under a duty imposed by Schedule 2, para. 1(2) of FGMA 2003 to form its own, unencumbered, assessment.

Of note, at para. 49 the judgment provides further clear authority for the fact that the jurisdictions operated by the Secretary of State and the family courts are separate and distinct, with '*simply no jurisdictional space in the structure that has been created by Parliament in which the family court can reach across and directly interfere in the exercise by the Secretary of State's exclusive powers with respect to the control of immigration and asylum.*'

Summary by **Abigail Bond**, Barrister, **St Johns Chambers**

A (Children), Re (Rev 1) [2019] EWHC 2334 (Fam)

The case concerned four children – A, B, W and S – whose parents had made serious cross allegations of domestic violence against one another. The allegations had previously been adjudicated at a fact-finding in front Mr Justice Keehan; however, his findings were successfully appealed and set aside. At the time of the re-hearing, the children had not seen their mother for over three years and were opposed to doing so.

As the allegations were so numerous and the parents' positions so diametrically opposed, the court ordered the allegations into three overarching factual disputes to which each of the more specific disputed events related, namely: (i) whether or not the mother and two of her sisters acted in a cruel and abusive manner towards the children; (ii) the manner in which the mother was treated by the paternal family throughout the marriage; and (iii) whether the father stranded the mother in Pakistan by stealing her passport. McFarlane P indicated that he came to his conclusions by looking at the "big picture" of the overarching issues from the "vantage point" of relatively few micro-episodes that had corroborating evidence [30].

After briefly summarising the legal context [15-18], McFarlane P painstakingly set out the evidence that he heard from the numerous witnesses, including A, over the course of the 9-day hearing, and his views on their credibility. Overall, he found that the mother's position in respect of the three overarching issues was proven: the mother and her sisters had not treated the children in a cruel and abusive manner; the mother was treated badly by the paternal family during the course of the marriage; and the father had stranded the mother in Pakistan, preventing her from returning to the UK. The court also held that the father had perpetrated "very significant child abuse" against the children by controlling and manipulating the lives of the mother and children so that the mother was excluded from contact with them for a large proportion of their childhood, and formed a negative view of her, including that she had abandoned them [253].

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

London Borough of Croydon v KR & Anor [2019] EWHC 2498 (Fam)

KR had suffered a life changing brain injury after a vicious attack. He has right sided hemiplegia, brain injury and epilepsy. He is unable to self mobilise, is confined to a wheelchair and only has movement in one arm. He is completely dependent on carers.

The LA brought the application because it had safeguarding concerns about KR's care given the couple had a troubled and at times highly antagonistic relationship. There was a record of problems with alcohol and depression in relation to ST. There were allegations of domestic abuse between ST and KR and KR was clearly very vulnerable to physical assault.

After evidence from two social workers, the LA made an application to withdraw, which was granted. However Mrs Justice Lieven gave full judgment to address the issues arising in the case.

The judgment provides a summary of the cases relevant to applications in relation to vulnerable adults with capacity under the inherent jurisdiction (paras 31-44) and an analysis of the Article 8 considerations (paras 45-52). The Judge identified 3 questions:

> i) Did KR fall within the inherent jurisdiction as set out in *SA (vulnerable adult with capacity: marriage)* [2006] 1 FLR 867 ?
>
> ii) If yes, are the terms of the order justified under Art 8 (2)? i.e. whether the interference with family life is justified
>
> iii) Are there any less intrusive means which could achieve the legitimate aim of protection of KR's health under Art 8 (2)?

The Judge analysed the evidence and found that by the time of the final hearing, KR did not fall within the SA test. Even if he had, there would not be justification to make the order because there were less intrusive ways of protecting KR.

In reaching that conclusion, the judge observed that

> - Although the MCA 2005 did not apply, the principles articulated in the Mental Capacity Act and code applied equally strongly to determining vulnerability within the meaning of SA [para 52, 63]
>
> - There may be occasions where the inherent jurisdiction could be used in extremely exceptional cases for long-term and permanent orders. It was not necessarily limited to provision of a "safe thinking space" away from possible coercion to allow the vulnerable person's true decision-making capacity to be re-established so that a decision could be made. However, use of the inherent jurisdiction to make permanent orders could be difficult to justify in terms of the level of interference with Art 8 rights [para 63]

Summary by **Martina van der Leij**, barrister, **Field Court Chambers**

A County Council v Children and Family Court Advisory and Support Service (Cafcass) [2019] EWHC 2369 (Fam)

Care proceedings were issued by the LA in respect of a child X. One of the matters relied on by the LA for threshold was an allegation made by a young person, AB, that X's father had sexually abused her. The father denied the allegation and applied for AB to be called to give evidence.

The issue arose of who should undertake enquiries and work with AB to assist the court in determining whether a non subject child should be directly involved in the proceedings, and to undertake a Re W assessment of her.

Various options were explored including the work being undertaken by a social worker from the LA and a social worker from A City Council who had previously been involved with AB and her family, or by an ISW. The circuit judge directed Cafcass to undertake the role (the appointment was not directed to the guardian appointed to represent X's interests). Cafcass objected on the ground that the direction was made in respect of a non-subject, non-party child and therefore fell outwith their statutory functions.

Ultimately, and in order to avoid any unnecessary delay, the circuit judge discharged the direction made in respect of Cafcass and directed the role should be performed by an ISW at the joint expense of the parties, but considered the issue a matter of general importance and the case was referred to Keehan J.

Section 12 of the Criminal Justice and Court Services Act 2000 details the principal functions of Cafcass and subsection 1 provides:

> (1) In respect of family proceedings in which the welfare of children [other than children ordinarily resident in Wales] is or may be in question, it is a function of the Service to
>
> (a) safeguard and promote the welfare of the children,
>
> (b) give advice to any court about any application made to it in such proceedings,
>
> (c) make provision for the children to be represented in such proceedings,
>
> (d) provide information, advice and other support for the children and their families.

Keehan J considered that the LA's interpretation of section 12 and the relevant rules would effectively place no limit on the work or the role a court could direct Cafcass or an officer of the Service to undertake. He could not accept that Parliamant intended to create a statutory national body to advise and assist the court in family proceedings, and to represent the children who are the subject of those proceedings, without any restriction or limit on its function and roles.

The advocates agreed that according to the best of their respective researches there was no reported authority on the interpretation of section 12 in respect of the scope of the function of Cafcass.

The use of the word 'function' in the singular in section 12(1) led Keehan J to conclude that the subsections of section 12(1) were not to be read disjunctively, but were instead to be read conjunctively. Since one part of that function is to 'make provision for the children to be represented in the proceedings' he was persuaded that the function and role of Cafcass is limited to the subject child or children of the proceedings. He also agreed that the opening words of section 12(1) 'in respect of family proceedings in which the welfare of children… is or may be in question' should be interpreted to mean the role of Cafcass is limited to the subject child or children of those proceedings.

Keehan J was in no doubt that a children's guardian, appointed to represent a child in public or private law proceedings, may be required to advise the court on the subject child's relationship with a non-subject child (eg a step-sibling). The guardian may be required to enquire into and advise the court about a wide range of matters and about a diverse group of people, which could include advising the court on the benefits/disadvantages of a non-subject child being called to give evidence. What was key, however, was that the objective and focus of those enquiries and of the advice was, and must be, establishing the welfare best interests of the subject child.

Keehan J was satisfied that the appointment of an officer of Cafcass, whether a children's guardian or otherwise, to work with and advise upon a non-subject, non-party child was outwith the statutory function and role of Cafcass. The preparatory work directed by the judge with AB ought properly to have been undertaken by a social worker from the LA and/or A City Council, or by an ISW.

Case summary by **Victoria Flowers**, Barrister, **Harcourt Chambers**

Raqeeb v Barts NHS Foundation Trust [2019] EWHC 2531 (Admin) and [2019] EWHC 2530 (Fam)

Brief Background

This tragic case concerned concurrent proceedings regarding a five year old girl, Tafida Raqeeb. On 9 February 2019 Tafida suffered bleeding on the brain, caused by a ruptured arteriovenous malformation (AVM). This is a rare condition and was undetected and asymptomatic in Tafida. The ruptured AVM resulted in extensive and irreversible damage to her brain.

Tafida's treating doctors were clear in their opinion that further life-sustaining treatment was not in her best interests. Tafida's parents sought for her to be transferred to the Gaslini Hospital in Italy, who had agreed that they would be able to offer her palliative care.

The consensus of the medical opinion (both in this jurisdiction and in Italy) was broadly, that Tafida was ventilator dependant (though the Italian doctors considered that the question of whether or not she could be weaned off of a ventilator following a tracheostomy required exploration), if she was aware, she was minimally so and that her everyday life did not appear to cause her pain. In respect of the options for her treatment and care, it was agreed that she would not substantially recover and continued medical intervention would be aimed at sustaining her life in or very near to her current condition and if maintained on mechanical ventilation, she would live for a substantial period time. Further, it was agreed that any transfer to the hospital in Italy could be effected with minimum risk (paras 19-34).

Application for Judicial Review

The first set of proceedings concerned an application on behalf of Tafida and her parents for judicial review of what was said to be the decision by the Barts Health NHS Trust (the Trust) not to agree to Tafida being transferred to the Gaslini Hospital for continued medical treatment pending the determination of an application to the High Court for a declaration regarding her best interests. It was argued that before any issue of best interests is considered, Tafida was entitled to what was termed an "anterior procedural ruling" in the claim for judicial review that the decision of the Trust to refuse her transfer to Italy was unlawful and that, accordingly, the decision of the Trust should be quashed, a mandatory order made requiring the Trust to retake the decision or a mandatory order made requiring the Trust to permit the transfer of Tafida with a declaration that the Trust may not prevent that transfer, following which decision the court would be functus as to Tafida's wider best interests.

They submitted that as a citizen of the UK and therefore of the EU, Tafida enjoyed the full benefit of EU free movement rights, and therefore the right enshrined in Art 56 of the Treaty on the Functioning of the European Union (TFEU) relating to the provision and receipt of services which included medical treatment and the provision of intensive care, palliative care and end of life care. It was argued that the choice of provider of medical services is a function of parental responsibility and in doing so on behalf of a child who is too young, or otherwise unable to make a decision for herself, constitutes an exercise of the child's directly effective EU rights. Therefore, Tafida had a right under Art 56 to receive healthcare services in another Member State and public authorities in this jurisdiction may not restrict the right to receive such services unless there is an imperative public policy reason (under Art 52 of TFEU read with Art 24 of the EU Charter of Fundamental Rights (CFR)). It was submitted that the Trust should have recognised that its decision to refuse to permit Tafida's transfer interfered with her right to receive services and should then have asked whether, having regard to her best interests as the primary consideration, that interference amounted to a proportionate public policy justification such that the Trust was justified in refusing to comply with the instruction Tafida's parents gave in the exercise of their parental responsibility. It was argued that where, having undertaken this analysis, an NHS Trust objects to a transfer request by parents, that Trust is bound to apply to the court for injunctive relief to provide a proper legal basis for the continued interference in the Art 56 rights that the objection constitutes by demonstrating to the court that the decision is justified (paras 43-55).

It was argued on behalf of the Trust that it had not made a decision to prevent, block or prohibit the transfer, but there was a decision taken not to agree to the parents request to take Tafida to Italy pending a result by the High Court of the question of what medical treatment is and is not in Tafida's best interests. It was argued that the Trust had not made any decision amenable to judicial review because a dispute had arisen as to Tafida's best interests which is a decision for the court and not the doctors, necessitating an application to the court for a decision on whether the transfer was in Tafida's best interests, which the court granted permission to make, and the Trust was obliged to bring that application pursuant to section 11(2) of the Children Act 2004 to safeguard and promote the welfare of children, in the absence of clarity on consent with regard to medical treatment. Further, that an application under section 8 of the Children Act 1989 is the appropriate statutory mechanism for a dispute that has arisen about children's best interests. In deciding to apply to the Family Division of the High Court (as the appropriate forum), the Trust argued it exercised no statutory power but rather followed the proper procedure for determining a dispute as to best interests. The Trust submitted there was no right or requirement to an antecedent ruling prior to a best interests decision being made by the court where the issue is not where the treatment takes place but whether it is in the child's best interests per se. Further, if Tafida did have the right to an antecedent ruling on her EU rights, then the Trust denied that its decision imposed restrictions on her accepted rights under Art 56. In the alternative, it was said that if the Trust had imposed restrictions, the same were justified by a legitimate and proportionate objective, namely the discharge of a requirement to seek a determination from the court as to Tafida's best interests. It was further submitted that its actions were justified by powerful reasons of public interest which, in the circumstances, demand that the dispute is determined by the court (paras 56-62).

The Trust accordingly invited the court to dismiss the judicial review proceedings and adopt the ordinary process in the Family Division of considering Tafida's best interests pursuant to its applications under the Children Act 1989 and the inherent jurisdiction of the High Court (para 63).

Children Act 1989 and Inherent Jurisdiction Proceedings

The second set of proceedings concerned an application by the Trust for a specific issue order and an application for a declaration that it was in Tafida's best interests for her current life-sustaining treatment now to be withdrawn, a course of action that would inevitably lead to her death.

The Trust said in support that Tafida cannot survive without mechanical ventilation and will always be dependent on the same, with either no hope of recovery or only a minimal level of recovery that will be adverse to her welfare (para 65). It was argued that there is plainly now no benefit to be gained by Tafida from continued medical treatment given the prognosis of no significant improvement in her condition (para 66). As to Tafida's wishes and feelings, the Trust cautioned the court as to what can be properly drawn from the evidence. Whilst accepting the evidence demonstrated that Tafida had knowledge of her religion and participated in aspects of it, it was submitted that at age 4 she could have had no real concept of her morality or of the possibility of her current situation and there is no evidence that she gave thought to what she would have wanted in this situation (paras 67-70).

Her parents argued that it is in her best interests to continue to receive life-sustaining treatment and, on the evidence available, that the court should so declare. Each case should be decided on its own facts, but there is no evidence that she suffers pain and the treatment is not overly burdensome for her (para 74). It was submitted that Tafida's wishes and feelings can be derived from the religious and cultural context in which she was raised. They argued that she understood the concept of religion and was developing her own religious identity. Therefore, even accepting that her capacity to understand the true nature and extent of her religious and cultural background was limited by her age, the court can be certain that she would have wanted to live in her current circumstances where the withdrawal of treatment causing death would not be in accordance with the beliefs and values of the religion with which she identified and the community to which she belongs (para 76). Regarding the sanctity of life principle, they argued that where she is medically stable and effectively ventilated, where she is not suffering pain and where there is no conflict in this case between sanctity of life and autonomy as articulated by her ascertained wishes and feelings, the sanctity of her life requires that she be allowed to live out the remainder of her life notwithstanding the severity of her disability (paras 77-81).

The guardian contended that it would be in Tafida's best interests for life-sustaining treatment to now be withdrawn. It was submitted that the burden of continued treatment upon her would be significant in that her life will be one that is mechanically sustained, one of no or minimal awareness, with an inability to derive comfort or to interact and with developing conditions set out in prognosis that, if she does recover some awareness, will make her aware of her very difficult situation, more aware of treatment and more aware of these consequential problems and illnesses (paras 82-83). Regarding her wishes and feelings, the Guardian accepted that the evidence can amount to evidence as to Tafida's wishes and feelings insofar as she understood her religion but that the proper question is whether she had a concept of the situation she is currently in bearing in mind her age, in order to form a view about it. It was submitted that Tafida would not have had an understanding of end of life or of the nature of a life lived with profound illness or disability and that at best, the court has evidence of Tafida's general views based on her childhood understanding of religious tenets – something which the Guardian was unable to attach significant weight to as the nature of the situation Tafida would be required to take a view on was one beyond her childhood conception. The Guardian accepted, however, that the case is not one that has an obvious answer and that the court may reach a different conclusion (paras 84-86).

Judgment

The relevant law, both European and domestic, is comprehensively set out at paras 87-139.

Application for Judicial Review

The court was satisfied that the decision was amenable to judicial review and that in making its decision not to agree to Tafida being transferred to the Gaslini Hospital pending a decision of the court, the Trust did not give any consideration to Tafida's Art 56 rights and, in particular did not ask itself whether its decision constituted an interference in those directly effective rights and, if so, whether it was nonetheless justified. The decision of the Trust was therefore unlawful.

However, had the Trust asked these questions and followed the correct approach, the matter would have arrived at precisely the same point that had been reached and so, in the circumstances, it would serve no practical purpose to quash the decision and in doing so it would mean remitting the decision to be retaken which would engender unacceptable delay for Tafida (paras 140-158).

Children Act 1989 and Inherent Jurisdiction Proceedings

The learned Judge described it as "*…a very finely balanced case and one that [he has] wrestled with in reaching [his] decision*" *(para 186) and said "balancing as I must the welfare factors I have summarised that inform the best interest evaluation, and having regard to Tafida's best interests as my paramount consideration, I am on balance not satisfied that I can conclude on the evidence before the court that life sustaining treatment is no longer in Tafida's best interests*".

The learned Judge reasoned as follows:

> "The court must face head on the question of whether it can be said that the continuation of life sustaining treatment is in Tafida's best interests. There will be cases where it is not in the best interests of the child to

> subject him or her to treatment that will cause increased suffering and produce no commensurate benefit, giving the fullest possible weight to the child's and mankind's desire to survive. In this context, I do not discount the grave matters prayed in aid by the Trust. However, the law that I must apply is clear and requires that the best interests decision be arrived at by a careful and balanced evaluation of all of the factors that I have discussed in the foregoing paragraphs. Having undertaken that balance, in circumstances where, whilst minimally aware, moribund and totally reliant on others, Tafida is not in pain and medically stable; where the burden of the treatment required to keep her in a minimally conscious state is low; where there is a responsible body of medical opinion that considers that she can and should be maintained on life support with a view to placing her in a position where she can be cared for at home on ventilation by a loving and dedicated family in the same manner in which a number of children in a similar situation to Tafida are treated in this jurisdiction; where there is a fully detailed and funded care plan to this end; where Tafida can be safely transported to Italy with little or no impact on her welfare; where in this context the continuation of life-sustaining treatment is consistent with the religious and cultural tenets by which Tafida was being raised; where, in the foregoing context, transfer for treatment to Italy is the choice of her parents in the exercise of their parental responsibility and having regard to the sanctity of Tafida's life being of the highest importance, I am satisfied, on a fine balance, that it is in Tafida's best interests for life sustaining treatment to continue. It follows from this conclusion that I am also satisfied, the court having determined the dispute regarding best interests in favour of the treatment being offered to Tafida in Italy, there can be no justification for further interference in Tafida's EU right to receive services pursuant to Art 56." (para 187).

Consequently, the Judge declined to grant relief to Tafida on the application made on her behalf for judicial review and dismissed the applications made by the Trust for an order under section 8 of the Children Act 1989 and declarations under the inherent jurisdiction.

The effect of the decision is the Trust, the Gaslini Hopsital or another hospital will have to continue to provide Tafida with life-sustaining treatment and there is now no apparent justification for interfering with Tafida's Art 56 right to receive treatment in another EU Member State.

During the course of the case, Ms Gollop on behalf of the Trust urged the court to provide further guidance as to the proper course of action in cases where the child's EU rights are engaged. The learned Judge said the following in response:

> "The first point to make is that each case will fall to be decided on its own facts and in such circumstances, detailed guidance is likely to be unhelpful. Second, the detailed position is made clear in the body of this judgment. However, for the avoidance of doubt, it follows from the matters set out above that, as matters currently stand, when faced with a request by parents of an EU citizen child for transfer for medical treatment in another Member State, in deciding whether or not to agree to that course of action an NHS Trust will need to consider the directly effective EU rights of the child. That said, and again for the reasons set out above, where an NHS Trust, having properly considered those directly effective EU rights, considers that a transfer would not be in the best interests of the child and that an application to the Family Division of the High Court is required to determine the resulting dispute as to the child's best interests, it is highly likely that that decision will constitute a justified derogation from the EU rights engaged on public policy grounds.

Finally, as Hoffman LJ (as he then was) noted in *Airedale NHS Trust v Bland* at 825 "*Modern medicine therefore faces us with fundamental and painful decisions about life and death which cannot be answered on the basis of normal everyday assumption*". As Dr Smith notes in his report, "*We have the technology to maintain the lives of children with severe neurodisability, the question for each individual child is whether it is right to make use of it*." These difficult issues that arise from question are also now far more likely to require answering in a public rather than a private context. In the decision of the US Supreme Court in Cruzan v Director, Missouri Department of Health B (1990) 110 S.Ct. 284 Brennan J observed:

> "Medical advances have altered the physiological conditions of death in ways that may be alarming: highly invasive treatment may perpetuate human existence through a merger of body and machine that some might reasonably regard as an insult to life rather than as its continuation. But those same advances, and the reorganisation of medical care accompanying the new science and technology, have also transformed the political and social conditions of death: people are less likely to die at home, and more likely to die in relatively public places such as hospitals or nursing homes. Ultimate questions that might once have been dealt with in intimacy by a family and its physician have now become the concern of institutions."

Within this context, and particularly where a child is not in pain and is not aware of his or her parlous situation, these cases can place the objective best interests test under some stress. Absent the fact of pain or the awareness of suffering, the answer to the objective best interests tests must be looked for in subjective or highly value laden ethical, moral or religious factors extrinsic to the child, such as futility (in its non-technical sense), dignity, the meaning of life and the principle of the sanctity of life, which factors mean different things to different people in a diverse, multicultural, multifaith society. Nevertheless, the gold standard against which cases of this nature are measured and determined remains that of the child's best interests and as the march of medical innovation continues to bring cases of this nature before the courts the courts will be required to apply this standard to the best of their ability. That is what I have endeavoured to do in this very sad case" (paras 189-191).

Case summary by **Sophie Smith-Holland**, barrister, **St John's Chambers**

LCC v AB [2019] EWCOP 43

Mr Justice Keehan, sitting in the Court of Protection in May 2019, was asked in an application by Lincolnshire County Council to determine whether P, a 51-year-old-man who has a fascination with female sex workers, had capacity to make decisions about his contact with sex workers. Based on expert opinion that P does have capacity to consent to sex but does not have capacity to make decisions about his contact with others, and particularly with sex workers, the parties agreed (inter alia) that P did not have capacity to make decisions about his contact with others. Lincolnshire County Council subsequently sought the court's approval of its care plan not to facilitate P's access to sex workers, which approval was granted, despite being opposed by P through his litigation friend.

Background

P is recorded in the judgment as having a number of diagnoses, including autistic spectrum disorder, moderate learning disabilities, and harmful use of alcohol and psychosis due to solvent abuse. His childhood is described as chaotic, with concerns about inappropriately sexualised behaviour from a young age. When P was approximately 17-years-old he was first detained under the Mental Health Act 1983 (MHA). In his early adulthood, he appears to have lived relatively independently, although this period included 10 further detentions under the MHA. When he was approximately 35-years-old, P was evicted from his own property, having caused significant and substantial structural damage, which may have come about during his relationship with a woman, together with whom he fell into a pattern of drinking and engaging in antisocial behaviour in public.

Between approximately age 35 and age 42, P was again detained under the MHA in various psychiatric facilities. It appears that at approximately age 42, when he was discharged under the MHA, P developed a friendship with a local prostitute and thereafter, began his fascination with female sex workers.

The judgment refers to P's placements during this time period and living "at a number of residential properties" but it is unclear what level of care and support he received from the local authority. The judgment does state that P was facilitated to access sex workers, and that on occasions, P was facilitated to travel to the Netherlands to have sex with prostitutes there. It is unclear who facilitated such access and travel.

Law

Mr Justice Keehan noted that a care worker who causes or incites sexual activity by an individual for payment, with another person, commits a criminal offence, pursuant to ss. 39,42 and 53A of the Sexual Offences Act 2003. He set out that, if any care worker who was looking after or supporting P, were to facilitate such activity, they would be committing a criminal offence. A declaration by the court would not alleviate their liability to be prosecuted. Mr Justice Keehan acknowledged that in the Netherlands, prostitution and payment for sexual services are not illegal, but concluded that if a care worker in England arranged for P to travel to the Netherlands for the purposes of having sexual activity with a woman for payment, that care worker would be at risk of being prosecuted for a breach of the Sexual Offences Act 2003.

Conclusion

The judgment clearly concludes that the local authority has adopted the right decision and approach, in not seeking to facilitate P's contact with sex workers either here or abroad. The court acknowledged that P will be disappointed with the outcome and noted that a transcribed short extempore judgment was requested, so that P may know why the court came to its conclusions.

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

Re B (Appeal) [2019] EWHC 2613 (Fam)

The matter came before Ms Justice Russell on appeal from His Honour Judge Tolson QC.

At the substantive hearing in the court below, the Appellant Father had sought a Child Arrangements Order, alongside a Prohibited Steps Order to prevent the Respondent Mother from removing the parties' child ('L') from the jurisdiction. The Mother had applied for a Child Arrangements Order and orally, for permission to temporarily remove L from the jurisdiction to Iraq.

Background

The parties were both born in Iraq. The Appellant had lived in the UK since 2002, but had returned to Iraq in 2012 where he met the Respondent. The parties married in 2014 and L was born in Iraq. In August 2016, the parties and L moved to the UK – (the reason for the relocation was disputed). In June 2017, the Appellant travelled to the USA for employment related training. Whilst the Appellant was in the USA, the Respondent returned to Iraq with L with the assistance of the Appellant's sister, thus leading the court to find that the Appellant had known of the move, despite his submissions to the contrary.

The Appellant waited a number of weeks before returning the UK. Once he had returned, he took steps to obtain another passport for L. He then, at the end of September 2017, travelled to Iraq and removed L – bringing him back to the UK without notice or warning to the Respondent. Once in the UK, in October 2017, the Appellant issued an application for a Prohibited Steps Order to prevent L being removed from his care.

Hearing before HHJ Tolson QC

By the time the matter had reached final hearing, the parties had largely agreed on Child Arrangements – L was to live with the Respondent Mother in the UK with a pattern of contact with his father. The main point of contention was the issue of temporary removal from the jurisdiction. Evidence was heard from the parents, and CAFCASS officer. An independent legal expert had been instructed to provide detail on the specific means by which the return of L could be secured if he were to be retained there by the Respondent. The expert did not provide information regarding the situation "on the ground", or on the safety and security in the Kurdistan region of Iraq. Nonetheless the expert evidence was unchallenged and duly considered by the court. The main (and indeed, only independent) evidence before the court regarding security and safety in Iraq, was the advice provided by the FCO, which was disclosed to the court by the Appellant.

Alongside making the aforementioned Child Arrangements Orders, the Judge dismissed the Appellant's application for a Prohibited Steps Order, and the Respondent was permitted to take L abroad for a period of up to 1 month. The Appellant sought to appeal the dismissal of his Prohibited Steps Order Application, and the grounds for appeal were three-fold:

> i. The Judge failed to consider adequately the risk that the Respondent would not return L to the jurisdiction and the concomitant risk of harm to L if he were to be retained
>
> ii. The Judge failed to adequately assess the risk to L's safety and security in Iraq
>
> iii. The Judge failed to put adequate safeguards in place.

The grounds reflected the three-related assessment of risk and balancing exercise described by Thorpe LJ in the Court of Appeal in *Re K (Removal from jurisdiction: practice)* [1999] 2 FLR 1084.

Decision of the Appellate Court

Ms Justice Russell noted that following Re R [2013] EWCA Civ 1115, in each case of temporary removal from the jurisdiction to a Non-Hauge Convention county, the best interests of the child remains the overriding consideration of the court.

It was considered that in this case, the evidence before the court was that the risk of harm of abduction lay with the Appellant and not with the Respondent; Judge Tolson QC had found that L had not been abducted by the Respondent when she returned to Iraq with him, but had been abducted by the Appellant when he returned to the UK in September 2017. Similarly, the Judge had found that there was no risk that the Respondent would seek to retain L in Iraq, and it was in fact beneficial for L to expertise his heritage and culture therein. Moreover, the Judge had found that the Respondent had consistently sought to promote the relationship between L and his father thereby further reducing the risk of abduction or retention.

In respect of L's safety and security in Iraq, there had been no evidence before the trial court that L would be unsafe in Iraq. Notably, there had been no evidence that the Appellant had himself been unsafe when he lived there between 2012 to 2016 and the parties had not fled Iraq for fear of their safety. Moreover, despite seeking to argue that the trial judge had failed to put adequate safeguards in place prior to permitting travel to Iraq, the Appellant was unable to articulate to the Appellate court precisely what safeguards would be required, or would be adequate.

Ms Justice Russell therefore concluded that HHJ Tolson QC had not erred in reaching the decisions he reached, having heard and exercised his discretion regarding the weight to be given to the evidence of each party. Furthermore, on review of the case, the evidence filed and the transcript of the judgment did not support the Appellant's argument that the Judge was wrong in his analysis or conclusions reached, nor were the Judge's conclusions illogical or capricious; as the Judge had found that the risk of retention by the Respondent was low, the decisions he then went on to make about safeguards logically followed on from that decision.
The Father's appeal was therefore dismissed.

Case summary by **Mavis Amonoo-Acquah**, barrister, **Harcourt Chambers**

P, Re [2019] EWCOP 42

Background

Prior to a stroke, P was a businessman who was in the course of finalising his estate. He intended to make specific provision for one of his children, X, but lost his capacity to order his affairs before he had decided on the precise kind of provision. P's partner, M, and his other child, H, made an application for authority to execute a statutory will on behalf of P. They also sought orders to dispense with any requirement to serve X because they feared for their safety, and that of P himself, if X was made aware of these proceedings. They alleged that X had over several years threatened to kill P and everyone else in the family unless he was given sums of money. The Official Solicitor supported M and H's application to dispense with service on X.

Quaere

Could X be lawfully excluded from these proceedings?

Ratio

The application required initial analysis under Article 6 and 8 ECHR. If the application was refused, M and H may well withdraw entirely from the legal process given their fears about X's consistently menacing behaviour. If their application was granted, X's right to procedural fairness could also be breached. The Court had to decide which harm was graver, and in so doing, HHJ Hilder resolved the matter by adopting a proportionality test as applied to the Court of Protection Rules 2017.

The mandatory joinder rule did not apply here as it was accepted by all that the application was brought expressly on the basis that X's position would not be adversely affected as compared to the provision P made for him in his last will in 2009 when he had capacity. As such, X did not come within the ambit of paragraph 9 of PD9E which mandated that certain persons must be joined as a respondent and served.

X was, however, covered by paragraph 5 of PD9B as a person who should be presumed to have an interest in being notified of the application. Where a person retains this interest, but is not likely to be materially or adversely affected by an application, a proportionality analysis is required in respect of an application to effectively exclude him from the proceedings. The judge framed the balance as follows;

> a. If X is excluded, the Court may effectively have to determine the substantive application without all the relevant material. Exclusion may also actually bring about the evils the applicants fear once X finds out about the statutory will after his father dies.
>
> b. If X is not excluded, the Court must consider whether P's deputies will make any application at all.

Taking all the circumstances into consideration, and having agreed with the parties that X's interests would not be materially or adversely affected by the statutory will before the Court, the judge was satisfied that it was appropriate to dispense with any requirement to notify X of these proceedings or serve him with the application papers.

Case summary by **Dr. John-Paul McCarthy**, Barrister, **Coram Chambers**.

O (Children) [2019] EWCA Civ 1721

The mother and the children were deemed overstayers. Their applications for visas had been refused by the First-Tier Tribunal, and permission to appeal to the Upper Tribunal and subsequent permission for judicial review had been refused.

Throughout the judgment, the Court of Appeal stressed the importance of legal representation in committal proceedings. Despite the mother's conduct and admissions, along with her having solicitors at least in the latter part of the proceedings, the court allowed the appeal.

Whilst the mother had eventually secured legal aid, she was not represented at the hearing at which the suspended committal order was made or when it was activated. Several hearings had previously occurred at which the court had noted the mother's wish for representation and adjourned because of this. At the hearing at which the suspended order was made, the judge had noted that there may be issues with the way in which the Legal Aid Agency had applied its own rules to the mother's case. The mother did have representation from the hearing subsequent to the one at which the suspended order was made, although the level and quality of this was questioned. At the hearing at which the suspended order was activated, she had come to court with an unsigned letter from her solicitors stating that they had been unable to find appropriately-experienced counsel. The mother had admitted her breach of orders throughout the proceedings, and was noted by the judge at several hearings to have engaged in 'tactical manoeuvring' to prevent the return of the children. The trial judge found the reason contained in the letter for seeking an adjournment was 'incredible', as the mother had been represented by the solicitors at a hearing two months prior when the date had been set. The trial judge therefore made a committal order.

The appeal succeeded. The following explanation was given by the Court of Appeal:

> "31. As to the order of 2 October, the judge understandably regarded the reason given by the solicitors for seeking an adjournment (inability to find suitable counsel) as incredible, but he should nonetheless have confronted the unexplained absence of any legal representation by deferring a decision, if only for a very short period, in order to investigate what was on the face of it an inadequate legal service to a litigant facing a serious penalty. I appreciate that the mother accepted to some extent that she was in breach of the order but, in my view, this further highlights the impact that legal representation might have had. It cannot be known what the outcomes of both hearings might have been had the mother being represented: they might very well have been the same, but they might not have been.
>
> 32. There may be circumstances where the court will decide to proceed with hearing a committal application without the alleged contemnor having legal representation, for example because it is just to do so where an adjournment is likely to prejudice the litigant himself. There may be other similar circumstances. But this was not such a case."

The case emphasises the importance of legal representation in such cases, and the need for the court to actively take steps to ensure that a respondent to committal proceedings, who does wish to be represented, is in fact so represented. Whilst practitioners working in private family law will be used to coming across litigants in person, this case serves as a reminder that when proceedings become quasi-criminal, the situation evolves and further steps may need to be taken by the court.

Summary by **Rebecca Davies**, Barrister, **Field Court Chambers**

Re H (Parental Alienation) [2019] EWHC 2723 (Fam)

Background

H, aged 12, lived with his mother. The parties separated in 2007 and there had been almost continuous court proceedings in respect of H. This was the sixth set of private law proceedings. Mother had raised allegations of domestic abuse against the father on several occasions, all of which had been dismissed.

H had enjoyed regular good quality contact with his father and paternal family until March 2018. There had been no direct contact since then. Messages sent by H to his father in May indicated that the mother had told H about, or allowed him to read, an intemperate email sent by the father to the mother.

In summarising the law, Keehan J highlights the decision of the President in ***Re L (A Child)*** **[2019] EWHC 867 (Fam)**.

Evidence

Mr Justice Keehan sets out the evidence of Dr Braier, who assessed both parents and H, at length. Dr Braier observed that H's current expressed wishes may reflect mother's difficulty in providing H with an accurate mirror of his own feelings as a child. H's presentation suggested he is triangulated within his parents' conflictual relationship and was prioritising his mother's needs over his own. His responses to the Child Attachment Interview, perception of parent's scale and Bene Anthony Family Relations test were all consistent with those typically seen in alienated children (exclusively negative messages to his father and paternal family and almost exclusively positive items towards his mother). H's lack of ambivalence made his presentation more likely to be alienation than estrangement resulting from his father's behaviour. His response was extreme and excessive, a presentation not seen in children whose parents have been neglectful or abusive. While H may on the surface appear to be fine emotionally, he is not.

Mother's views were entrenched. Therapeutic intervention aimed at a restoring H's relationship with his father whilst in the care of his mother was ill-advised. A change of residence may cause H transient distress. The court records Dr Braier's view that cases like these require practitioners with experience and specialised training in the area of implacable hostility and alienation. For the transition, she recommended residential therapy with H and his father in the paternal home over at least 4 days and 4 nights, with a 12 week follow up of therapy sessions.

A s.37 report was undertaken by a social worker with no previous experience of cases of parental alienation. The report was "woefully inadequate", being critical of the father but not of the mother and paying scant regard to Dr Braier's recommendations. The court took no account of the report or of the evidence of its author.

The court was critical of the NYAS caseworker. Her report contained serious omissions and deficits. Of note, she made only passing reference to Dr Braier's report, considered the negative issues about the father but failed to give consideration to the adverse role of the mother, and accepted H's expressed wishes and feelings at face value. She had spoken only once to each parent briefly on the phone. In her report, the NYAS caseworker made an unequivocal recommendation that H should live with his mother and have no contact whatsoever with his father. In her oral evidence, she completed a volte face, making no recommendation about with whom H should live or the contact he should have.

The court had the benefit of a transition plan prepared by an ISW.

The court formed a positive view of the father. Father readily accepted he had made errors in the past and had drawn H into the conflict, he had reflected on his past behaviours, was genuine in expressing remorse and was committed to undertake the work and therapy advised by Dr Braier.

Mother lied repeatedly in her evidence. She was wholly passive aggressive in giving evidence about supporting co-parenting and did not resist any opportunity to castigate and blame the father.

Conclusions

Keehan J accepted the opinion of Dr Braier without hesitation. He records that parental alienation is very harmful to a child, skewing the ability to form any and all sorts of relationships. He set out the factors for/against a move and did not underestimate the trauma of a move for H but concluded that any trauma or stress would be of short duration.

He found the following:

- Mother had alienated H from his father;
- The absence of father from H's life has and will cause H emotional and social harm;
- The only means by which H can enjoy a relationship with both parents is to transfer residence to the father.

The court made a child arrangements order for H to live with his father and spend time with his mother, subject to a three month embargo on direct contact while H settles.

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

CP, R (On the Application Of) v North East Lincolnshire Council [2019] EWCA Civ 1614

CP is a 22-year old woman with global development delay, learning difficulties and an autistic spectrum disorder. She does not communicate verbally. She can communicate to an extent by behaviour, gesture and vocalisation. She cannot be left alone at any time, is doubly incontinent and requires assistance with washing and dressing. Her behavioural difficulties can make her challenging. She wakes every night and requires a carer to be with her. She uses a wheelchair when in the community. She lives with her parents in Lincolnshire.

The dispute centred on whether CP should be funded by the local authority for attending provision run by a charity, which had been set up by her father and in which he was actively involved. The local authority disputed his suitability to act as litigation friend.

Haddon-Cave LJ gave the substantive judgment. Flaux and Moylan LJJ agreed.

The court reviewed the history of the disputes between the local authority and CP's parents about whether her needs were to be treated as social care or educational needs. [paras 8-36]. The local authority refused to accept that the activity centre was "education". It accepted that the cost of CP's personal assistant who took her to the activity centre and stayed with her should be met through social care. It declined to pay for the use of the centre.

An appeal to SENDIST (FTT) led to a direction that there should be an EHC plan for CP as she required education including life-skills and speech and language therapy. The council complied but did not name a placement. Further litigation before the FTT led to the activity centre being named as the provision.

By the time the judicial review was to be decided at first instance the local authority had agreed to make payment for CP's use of the activity centre, but not retrospectively. The judge refused the application for judicial review.

The Court of Appeal [at paras 37- 45] reviewed the "overlapping" provisions of the Care Act 2014 and Children and Families Act 2014 and the applicable Statutory Guidance [para 46-48].

The Court held that:

> (1) the fact that a provision is "education and training" under s.21 of the CFA 2014 does not mean that it cannot also provide an element of social care; and vice-versa. The two matters are complimentary, not mutually exclusive. [para 74]
>
> (2) the Council's failure when drawing up CP's support plan dated 11th April 2016 to ensure that CP's personal budget included adequate payment for her needs, including her weekly attendance at the activity

centre, represented a failure by the Council ab initio to comply with its statutory duties under s. 26 of the Care Act 2014 (and the linked duties under ss. 18, 24 and 25 of the Care Act 2014) read in the light of the statutory Guidance. [para 75]

(3) A local authority's statutory duty under s. 26 of the Care Act 2014 to provide a personal budget to meet a person's care and support needs is fundamental to the operation of the care and support scheme which the Care Act 2014 underpins. [para 82]

(4) having found the Council in breach of its statutory duties, the judge should have gone on to hold that the Council had acted unlawfully and, accordingly, was liable in principle to compensate CP in respect of any monetary shortfall in accordance with normal public law principles of legal accountability of public bodies. [para 83]

(5) The fact that the Council was held by the FTT also to have been in breach of its duty to issue an EHC plan under the overlapping provisions of s. 37 of the CFA 2014 in no way replaced or expunged the separate breach of s. 26 of the Care Act 2014. The question of liability under s.26 could in no sense be 'ceded' to the FTT. [para 85]

(6) The agreement to pay did not remove the fact that CP had been out of pocket for her liability to pay for the earlier time spent at the activity centre and she was entitled to compensation for the unlawful conduct in that period. The fact that these were JR proceedings did not preclude a court granting that relief. It was not academic [para 86] and was not a private law claim [para 89]

(7) There was no evidence that the activity centre was not a genuine arms-length charity and therefore:

(a) There was no conflict of interest which precluded the father acting as litigation friend; [para 87]

(b) it was not a payment for care being provided by a designated family carer. [para 88]

Case summary by **Nicholas O'Brien**, barrister **Coram Chambers**

Read v. Panzone & Anor [2019] EWCA Civ 1662

The Parties & Background

This was the second appeal in financial remedy proceedings.

Mrs Read, the husband's mother, was the appellant in this appeal, and had been the 2nd respondent at first instance.

The Wife ('W'), was the applicant at first instance, and the first respondent in this appeal.

The Husband ('H'), was the first respondent at first instance and appeared as the second respondent in the appeal.

H and W married in 2002 and separated in 2014. The two children of the marriage were aged 13 and 9 at the time of this appeal.

King LJ, who gave the leading judgment, noted that '*This is yet another case where a highly educated couple with young children has engaged in lengthy, destructive and disproportionate legal proceedings… The costs to date are in excess of £500,000. The only substantial asset in the case, a flat in Panama ("The Panama property"), has a net value of only £298,377*' [1].

The Panama Property

In September 2007, H signed a contract for the purchase of an off-plan Panama Property. He paid a number of instalments towards the purchase price between 2007 and 2010.

In 2010, Kensington Realty Co S.A. ("The Company") was incorporated. All 100 shares were issued to Mrs Read, reflected in a share certificate dated 28 May 2010 [13 & 17].

On 24 June 2010, the Panama Property was conveyed from the developers directly to The Company, H having paid the final instalment of the purchase price [21].

H produced various key documents for the first time during the course of the final hearing. This included three documents, all dated 26 February 2010. Each was in identical terms and recorded '"Board Resolutions" which:

(i) Authorise the issue of all the one hundred shares in the Company to Mrs Read;

(ii) Appoint the husband, wife and Mrs Read as corporate officers; and

(iii) Authorise the Company to acquire the Panama Property and the husband to "take delivery of the above property and sign the deed and other associated paperwork"' [13].

The DJ was very surprised at the timing of disclosure, stating '*I find it extremely curious that these important and relevant documents were only disclosed in the way they were*' [18].

The Resolutions appeared to be signed by all three parties, and although W first accepted the validity of the share certificate, she later had second thoughts and expressed her 'grave reservations' as to the authenticity of the documents produced by H [19 & 20].

W maintained that at no time had there been any suggestion that the property would be a gift to Mrs Read, and in any event the parties were not in a position to make such a gift. [25]. W claimed that the beneficial ownership was held jointly between H and herself.

H's case was that Mrs Read (through The Company) held the beneficial ownership. H claimed that he had given his mother, as a gift, the funds used to buy the Panama property, although the funds had not actually been transferred to her in advance of the property [31]. H had taken responsibility or everything to do with the property, and during the hearing it was clear that H had not given Mrs Read any money at any time and *the entire transaction, including payment, had been conducted by him…*' [33].

First Instance

A trial at first instance began on 18 July 2016, with both H and W appearing in person. Mrs Read was represented and attended on 18 and 19 July 2016, but was told on 20 July 2016 that her attendance was not necessary and she left the court building [34]. Oral judgment was given on 29 November 2016. After the judgment, no submissions were made by the parties, either about the judgment or any consequential orders that flowed from it [36]. Mrs Read did not attend the handing down of judgment. She was unwell and filed a medical certificate, her request to adjourn the hearing was declined [36]. A further hearing was listed on 06 January 2017 to work out the final order [36]. Mrs Read was not present on 06 January 2017.

The Final Hearing in July 2016, was, in essence, focussed on the single issue of who owned the beneficial interest in the Panama Property [38].

Findings at First Instance

The Judge at first instance preferred the evidence of W. He was 'absolutely clear that the wife was completely genuine when she said, with some force, that she had no conception that the flat, through the company, was in the name of Mrs Read…' [40].

He went on to make the following findings:

(a) 'On balance I prefer the evidence of the wife. I accept she was not aware of any gift to Mrs Read in 2007 or 2010 or subsequently. I think that the evidence to the contrary of Mrs Read is so thin as to have little weight and I reject the evidence of the husband that he made it clear all along.

(b) There is no evidence of an intention to make this gift in 2007. No contemporary record at all. I think there would have been and I think that when he initially purchased the property he did so in his own name for himself.

(c) There is the evidence of the company records and the board meetings said to have taken place on 26 February 2010, supported by the email on 02 March 2010. I find that the wife's signatures were scanned in and do not show that she was aware of the transaction on that day. I am astonished that such important documents were only provided in the way they are if they are genuine. Mr Read must have been aware of the relevance of the fundamental issue of ownership.

(d) There is no evidence, however, that the husband held the property on behalf of himself and the wife jointly. At most it is his property which is subject to the exercise of my powers under Section 23 of the Matrimonial Causes Act.

(e) Either the husband and Mrs Read are making up, or backdating a contemporary intention that the property should be held by Mrs Read, or the husband was gifting matrimonial assets to his mother without the knowledge of his wife at some time since 2010.

The test is the civil balance of probability. I do not think that the board meeting in 2010 actually happened or that the wife was aware of it. However, I do find that this was his property and it is at least possible that he subsequently formed the intention to give it to his mother and caused this to be entered into the share register. It may well be, in fact I think it is the case, that he prefers his mother to have it than for his wife to have a share. If so he has behaved in an underhand way' [45].

King LJ observed that the findings above may have been enough for the judge at first instance to dispose of the matter. However, the District Judge went on to comment that:

> 'There is no application before me under section 37 of the MCA but if there were, this would be a case for the avoidance of the disposition. I think that the test in section of 37(2)(b) of the MCA is made out… whether I need to deem an application to be made, or an application is made at this stage, my intention is that this disposition should be set aside so that the property shall be treated as being in the ownership of Mr Read' [46].

At the hearing on 06 January 2017, H sought clarification as to whether the DJ had or had not intended to make a finding that, either on 26 June 2010 or a later date, H after buying the property for himself had disposed of it to Mrs Read by way of a gift [47].

In clarification the judge said:

> '…I will make it clear that as far as I am concerned it is any transaction during the relevant period that is intended to have this effect. My judgment, I think, is quite clear as to what I think (a) about the beneficial interest and in so far as the beneficial interest was subsequently transferred at any point by gift, then it should be set aside…
>
> … my point is that, and I make it very clear, so that [H] can understand, my view is that this was his property, that the company was used as a means of holding it, that beneficially, whether it was in the company's name or otherwise it was owned by [H]. Insofar as he at some point formed an intention to give it to his mother, that is the transaction that is set aside, if he did so. Does that make it clear?' [50-51].

The Order

The Order then read:

> 'Avoidance of Disposition Order
>
> The purported transfer by the First Respondent (H) to the Company dated on or about 26 June 2010 is hereby set aside; if some other disposition of the Panama property to the Second Respondent (Mrs Read) occurred after 26 June 2010 that disposition is hereby set aside.
>
> Lump Sum Order
>
> By no later than 4pm on 06 June 2017, the First Respondent shall pay or cause to be paid to the Applicant, a lump sum of £150,000.'

First Appeal

H and Mrs Read both appealed. Parker J heard the appeal on 02 February 2018. The order was not drawn up or sealed until 25 November 2018.

Parker J dismissed the appeal. She concluded that the judge at first instance had been entitled to make an order under s37(2) MCA and the court had the power to do this without an application having been made.

Mrs Read then filed her notice of appeal. King LJ gave permission to appeal.

Appeal to the Court of Appeal

Grounds of Appeal

Mrs Read's three grounds of appeal were:

> 1. The judge was wrong in law to find that the decision of the District Judge was not unjust because of serious procedural irregularity in the proceedings.
>
> 2. The judge was wrong in law to find that the order made by the District Judge declaring that the husband is and was at all material times the sole beneficial owner of the Panama property was one he was entitled to make.
>
> 3. The judge was wrong in law to find that the avoidance of disposition order made by the District Judge was one he was entitled to make [67].

Ground 1

King LJ allowed the first ground of appeal.

Neither H or Mrs Read had the opportunity to address the court regarding the making an Avoidance of Disposition Order. The issue was not before the court, and occurred to the court only during the writing of judgment and was not raised previously.

The absence of an application is not, in itself, inevitably fatal. The court may, in appropriate circumstances, allow an oral application or deem an application to have been made [73].

King LJ held that:

> 'For my part, I am in no doubt that the way in which the avoidance of disposition order came to be made, amounted to a serious procedural irregularity. Not only was there no application at any stage, but the issue was not raised at trial and through no fault of her own, Mrs Read was not present when judgment was deliver not, crucially, was she present at the hearing on 06 January' [78].

She was clear that this procedural irregularity led to an unjust outcome [80]:

> 'As a consequence of the failure to raise the matter during the course of the trial, not only was there no focus on each of the elements which must be satisfied prior to the making of a section 37 order, but no evidence was led as to the essential ingredients in respect of the husband's intention at the date of any transfer, whenever that may have been' [81].

Ground 3

Ground 3 was also allowed by the Court of Appeal.

The judge at first instance found on a proper evidential basis that H had retained the beneficial interest of the property at all times [86]. At no time had H held the legal interest, as this was transferred directly from the developers to the Company [86]. There had therefore been no disposal, of either legal or beneficial interest, that was capable of being set aside [86].

Ground 2

King LJ here stepped back to ask where this left the court, once the Avoidance of Disposition Order was set aside? Counsel for H and Mrs Read argued that the totality of the order should now be set aside.

King LJ disagreed and refused this ground of appeal, concluding that there was still a basis upon which the court could order H to pay the lump sum to W. This was due to the judicial finding at first instance that H was and still remained the beneficial owner of the Panama property [92].

> '… In my judgment, the judge's "belt and braces" addition of an avoidance of disposition order "just in case" has, unhappily, served significantly to muddy the waters in this case but has not, in any way, undermined the District Judge's fundamental and, it may be thought, completely predictable finding on the evidence, that the husband has at all times held the beneficial interest in the Panama property' [107].

> '… It follows from the rejection of Ground 2, that the lump sum order in favour of the wife remains and it is now a matter for the husband whether he requires the legal owner, his mother Mrs Read, to sell the property in order to raise the money with which to satisfy the order, or whether he chooses to raise it in some other way' [111].

Summary by **Bethany Scarsbrook**, barrister, **St John's Chambers**

Re G (Children) 2019 EWCA Civ 1779

Brief Facts

This case concerned a mother who has a total of 11 children, by four different fathers. The family had been receiving assistance from social services for many years, with regular referrals from other agencies about a number of issues. On a number of occasions, some or all of the children had been the subject of child assessment investigations under s.47, and on other occasions subject to child protection plans. In May 2018, care proceedings were started in respect of the ten younger children. One of those children was placed in a residential unit in the course of the proceedings and has stayed there subsequently under a full care order. The other nine children remained in the care of the mother. At the final hearing of the care proceedings, on 21 December 2018, threshold was agreed. At the conclusion of the hearing, Recorder Leong placed all nine children under care orders on the basis of care plans which provided for the children to remain at home with their mother. The mother was fully aware that the court considered that she was very close to losing her children and that the plans must be complied with 'fully and without excuse.

The LA contended that following the final hearing the mother did not comply with the requirements under the care plan and after several months decided the six younger children could not safely remain at home. After receiving a letter from the LA, which stated that the children would be removed from her care on 1 July 2019, mother applied to discharge the

care orders in respect of the nine children and applied for an order pursuant to s.8 of the Human Rights Act 1998 to prevent children's removal. At the initial urgent hearing an order preventing the LA from removing the children from the mother's care was made (unless circumstances were akin to those justifying the making of a EPO or to justify police protection powers being exercised).

On 29 July 2019 the matter was heard by a different circuit judge. Mother's counsel raised whether the hearing was to be a final hearing on the discharge application or whether further assessments would be needed before the court was able to make a decision. The judge stated that the options before her were to discharge the care order or dismiss the application. When counsel referred to the application for an injunction under the Human Rights Act, the judge stated that she did not think that she had jurisdiction to make an injunction under that Act as she was not a s.9 judge and did not have any inherent jurisdiction. The judge concluded that she had there and then to decide the application whether or not to discharge the care orders. Evidence was heard over the day. In closing submissions, Mother's counsel made a further passing reference to the possibility of an adjournment of the application with the injunction being extended or, alternatively, an undertaking by the local authority not to remove the children until the final decision. The judge again indicated that she did not have the power to deal with the injunction. The options were, in her view, either to allow the order to continue, with the result that the children would be removed into foster care, or discharge the care order, which would remove the local authority's parental responsibility and require it to start fresh proceedings if it continued to think that there were grounds to seek the children's removal into care.

An ex tempore judgment was delivered. In summary, the judge reiterated her view that she was not a judge authorised to make injunctions under the Human Rights Act; she expressed some reservations about the observations of the Recorder in his judgment when making the care order and expressed the view that he may have been imposing an impermissible condition on the care order; she stated that she considered that all the children were still at risk, to some extent, of harm in the mother's care; and, she considered the evidence, noting some signs of improvement in the children's circumstances. The judge concluded that she was not satisfied, on the evidence, that the mother's care of the children had deteriorated since December when the care orders had been made. She expressed concern about dismissing the application and thereby allowing the children to be removed into urgent placements in foster care, which were not necessarily appropriate. The judge concluded:

> 'This has all the feeling of a case which was not ready for determination or at least not on the basis of the local authority's plans. I'm going to allow mother's application to discharge the care orders unless the parties are able to come to some other scheme, leave the children at home and meet their various needs, which would seem to me to involve now having that home help, dedicated family support worker, actual modelling work and some form of report from the two talking therapists who the mother has engaged, but that would then only be on the basis that the application was adjourned. It might be that the parties prefer to have the care orders dismissed so they can revert to children being in need.'

After the judgment clarification was sought. The LA sought permission to appeal, which was refused. a transcript was ordered and the judge added a code to her judgment.

Appeal

The LA appealed submitting that the judge was wrong to treat the hearing on 29 July as a final hearing, particularly as she recognised that the evidence was incomplete and the case not ready for determination. The LA also contended that the judge was wrong to say that she had no jurisdiction or power to extend the injunction under the Human Rights Act. Given her view that the case was not ready for determination, she should have adjourned it and, if appropriate, extended the injunction. The LA further submitted that having heard the application, the judge was wrong to discharge the care order on the evidence available. The Guardian supported the appeal. Mother opposed the appeal. In the alternative, it was argued on her behalf that if the judge was wrong to determine the discharge application at that stage, the appeal court should proceed to reimpose the injunction under the Human Rights Act, to last until the final hearing of the discharge application.

Decision

Expressing considerable sympathy for the judge, who was faced with what she considered to be a binary choice between either discharging the care order, Baker LJ decided that the judge's error was her belief that she had no power to extend the injunction granted by the designated family judge preventing the local authority removing the children save in an emergency until the conclusion of these proceedings. The judge was under the impression that the power to grant injunctions was only available to a judge authorised to sit in the High Court. The authorities make clear the power to grant injunctions in these circumstances arises not under the High Court's inherent jurisdiction but under the Human Rights Act: see *Re DE* [2014] EWFC 6 approved in *Re S* [2018] EWCA Civ 2512.

In his judgment Baker LJ surveys the legislation and caselaw, including sections 6(3), 7(1)(b) and s.8(1) of the Human Rights Act, *Re S, Re W* [2002] UKHL 10, R*e V (Care Proceedings: Human Rights Claims)* [2004] EWCA Civ 54 and *Re S (Care Proceedings: Human Rights)* [2010] EWCA Civ 1383, which are authority that in the family law field the court has the power, in appropriate circumstances, to grant injunctions under the Human Rights Act in the course of care proceedings to prevent a local authority unlawfully interfering with Article 8 rights.

The Court of Appeal held that had she realised that she did have that power, it seems highly likely that the judge at first instance would have exercised it as she was concerned the local authority was proposing to remove the children without carrying out an essential further assessment and she thought that taking that course was unjustified. In those circumstances, it is highly likely that she would have concluded that the removal of the children was an unlawful interference with the family's Article 8 rights so as to justify extension of the injunction. Accordingly, the appeal was permitted on that ground.

Finding it difficult to judge whether, having decided to continue with the hearing, the judge was wrong to discharge the orders, Baker LJ ultimately, felt no need to express a view on that matter.

The Court of Appeal set aside the order discharging the care orders, remitted the discharge application for a case-management directions hearing, and extended the injunction in similar terms to those imposed before but only to last until that next case management hearing.

Emily Ward, Barrister, **Broadway House Chambers**

Cumbria County Council v R [2019] EWHC 2782 (Fam)

The proceedings concerned a girl aged 1 year 8 months at the time of final hearing. Parker J had made findings at a previous fact-finding hearing of non-accidental injury caused by shaking during a momentary loss of control by one or both parents, both of whom were present at the time the injuries were sustained [2]. The mother at the welfare hearing before MacDonald J invited the court to consider fresh evidence in the form of a subsequent account given by the father, which she maintained should exclude her from having perpetrated the injuries or being present at the time [3]. The father had told an ISW during a risk assessment that he had accidentally dropped the child on its head at the relevant time and that the mother was absent [7].

MacDonald J sets out the law on revisiting findings as a result of evidence arising following a split hearing at [17-19], noting that 'the task of this court is not to plunge into a full re-opening of the factual issues […] but rather to consider whether the recent "confession" of the father justifies revisiting those findings'; the legal burden remained on the LA, but the evidential burden was on those seeking to displace the earlier findings [20].

The judge rejected the father's supposed admission, finding him to be a 'deeply unimpressive witness', although he stopped short of finding that the parents had colluded in this respect [46]. Further, the father's explanation was not generally supported by the expert medical opinion in the case [47].

On the basis that the findings stood, neither parent sought a return of the child to their care, although, having heard the evidence, the judge was clear that it was extremely doubtful that he would have ordered reunification in any event [50-56].

As to disposal, the judge made neither the SGO sought by the LA nor the final care order sought by the CG to secure the placement with the grandparents. Instead an interim care order was made on the basis that (a) the multiple challenges and vulnerabilities faced by the grandparents in an untested placement and the deficiencies in the SG support plan made an SGO premature, but (b) that the making of a final care order in those circumstances would conflict with the guidance in *Re P-S (Children)(Care Proceedings: Special Guardianship Orders)* [2019] 1 FLR 523 as regards 'short term care orders' [57-72].

Summary by **Iain Large**, barrister **St. Johns Chambers**

An NHS Foundation Trust v AB (Contraception) [2019] EWCOP 45

The Trust applied for a declaration that it was in AB's best interests to have an intrauterine contraceptive device (IUD) fitted when she had a caesarean section, with the benefit of a spinal anaesthetic, after an earlier order. Following numerous capacity assessments, all parties agreed with the outcome that AB, at that time, lacked capacity in respect of decisions as to contraception.

AB was a 25-year-old woman diagnosed with moderate learning disabilities and 38 weeks pregnant. The circumstances by which AN had become pregnant whilst visiting Nigeria had not been established. AB's adoptive mother, CD, was a midwife and native of Nigeria. The third respondent local authority (LA) had provided support to AB, who had been assessed as lacking capacity to consent to sexual intercourse or to the use of contraception. In earlier proceedings it had been determined it was in AB's best interests to deliver her baby by means of a caesarean section.

The LA and the Official Solicitor (OS) argued AB could gain capacity to make decisions regarding contraception if further education was provided. The LA and OS also argued that, on the evidence, the risk of AB having a further unplanned pregnancy was 'in effect *nil*' [10]. The judge was unconvinced by the local authority's plans to safeguard AB and expressed concern that the LA and OS had assessed the risk as nil. By contrast, the judge was impressed by the medical evidence from

three specialists in support of the application. After the conclusion of evidence, the LA and the OS did not oppose the application.

The court considered the provisions of the Mental Capacity Act 2005, ss 1-3 regarding capacity and s 4 in respect to best interests. Capacity was to be determined on the balance of probabilities and the relevant caselaw was considered.

The judge made the declaration applied for being satisfied that: AB remained at an appreciable risk of experiencing a future unplanned pregnancy [33]; at present it was 'highly unlikely that AB would gain capacity in respect of these matters' [37] ; it was impossible with any degree of certainty to establish AB's wishes on the use of contraception [39]; and it was in AB's best interests to be fitted with an IUD at the time of the caesarean section procedure [48] .

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

Maughan v Wilmot [2019] EWHC 2765 (Fam)

These were extremely long-running proceedings arising from the ill-fated marriage of the parties which ended in 1999. Since then, there had been dozens of hearings before numerous judges. There was no doubt that the respondent was an exceptionally vexatious litigant. Mostyn J made an extended civil restraint order against him in April 2014, which was subsequently extended to January 2020. The order had not been effective to restrain the respondent's vexatious conduct.

The respondent had not confined his vexations to these proceedings, receiving (for example) an extended civil restraint order in 2017 following an extremely protracted and toxic dispute with his local planning authority.

The respondent had continued his campaign against his wife, his children, and his wife's legal representatives. He had continued to bombard the court with emails and spurious applications. He made an utterly meritless application to the Administrative Court seeking judicial review of Mostyn J's decision to appoint a receiver back in 2014. In blatant breach of an injunction made restraining him from communicating with the applicant's solicitor via her domestic email address, the respondent had sent dozens of messages.

The applications before Mostyn J sought the following relief:

> 1. An order that the applicant's actual costs incurred be summarily assessed and paid to her, and that provision be made to cover her anticipated implementation costs.
>
> 2. An order that the receiver's actual costs incurred be summarily assessed and paid to him, and that provision be made to cover his anticipated implementation costs.
>
> 3. An order permitting and authorising the transfer of the respondent's pension to Curtis Banks where the respondent's SIPP was held and which was under the authority of the receiver.
>
> 4. An order permitting the receiver to disinvest and pay out the sums necessary to satisfy the costs orders.
>
> 5. A general civil restraint order for 2 years.
>
> 6. An order pursuant to the Protection from Harassment Act 1977 restraining the respondent from harassing the applicant, the children, the applicant's solicitor and the applicant's barrister.
>
> 7. An extension of the existing freezing order.

Mostyn J considered the costs orders and concluded that the respondent's conduct had been at the top end of misconduct for the purposes of CPR 44.2(4)(a). It had been abysmal and an order for costs was fully justified. Mostyn J made costs orders in respect of (1) and (2). (3) was unopposed. An order in respect of (4) was granted. The freezing order application sought to freeze £100,000 to allow some headroom over the £68,307 caught by the costs orders. Mostyn J granted that amount as he pessimistically apprehended that the respondent would engage in more vexatious conduct generating further costs on the part of the applicant and the receiver.

Mostyn J was fully satisfied that the criterion for a general civil restraint order was satisfied. This was one of the worst cases of vexatious litigation misconduct he had ever encountered. The extended order had not worked therefore a general order was amply justified. The order was to last until 21.10.21.

It was not reasonable to expect the applicant to return to court every two years to renew the general order. This case cried out for an indefinite civil proceedings order which is made at the suit of the Attorney General and would be heard by a Divisional Court of the QBD. Mostyn J directed that a copy of the judgment be supplied to the Attorney General and asked he give careful consideration to making that application.

As to the application for an order under the Protection from Harassment Act 1997, there was no doubt that the respondent had grossly harassed the applicant, their children and her legal representatives. Mostyn J was satisfied that he had full power to validate the application which had been technically issued in the wrong division of the High Court and granted the application in the terms sought.

Since distributing the judgment in draft, the respondent's solicitor-advocate made an application for 'amplification' of the judgement and permission to appeal. An advocate is not entitled to seek further and better particulars of a judgment. The provision is confined to permitting advocates to draw attention to material omissions or obvious errors so that they may be repaired before the matter proceeds to an appeal. The respondent's solicitor-advocate was seeking to take points which he did not argue before but which he should have done, or to reargue points which had already been rejected. Both applications were refused.

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

Ali v Barbosa [2019] EWHC 2776 (Fam)

Mrs Justice Lieven, sitting in the Family Division of the High Court in October 2019, considered whether issues relating to the Family Procedure Rules regarding the service of a divorce petition would make subsequent orders and decrees void. She found that where reasonable steps have been taken to serve a petition and there is no prejudice to the party being served due to the mode of service used, any procedural errors would more likely not render subsequent decrees and orders void but voidable. Such cases remain fact specific but should also take into account any attempts to avoid service.

Background

The husband, a Pakistani national, and wife, a Portuguese national, married in April 2014. The wife's divorce petition was issued in June 2015. An Edinburgh address was given by the wife for service at which the husband accepted he lived from March – 28th October 2015. The wife's case is that the husband continued to live there or had access to it after that period.

The Court posted the petition which was "Returned to Sender" in June 2015. The wife's solicitors used a process server on 30th October 2015 who filed an affidavit of service stating he had knocked and left a calling card addressed to the husband. The server unsuccessfully attempted service twice more having received a call from someone who the server says identified themselves as the husband and arranged to accept delivery. The wife's solicitors sought permission to dispense with service. The Court replied that "*having established the* [husband] *does live at the address they should instruct their agents to leave the papers at the address and apply for deemed service.*"

In February 2016 DDJ Yeshin at the Family Court at Romford made an order: "*having read the affidavit of the process server, it is ordered that the petition was deemed served on the respondent on 8th January 2016.*" Subsequently a decree of entitlement to divorce was issued, and decrees nisi and absolute pronounced.

The husband had petitioned for divorce in Scotland in September 2016, with the Edinburgh Court pronouncing decree absolute in November 2016.

In December 2016 the Home Office revoked the Husband's residence card as he was no longer a family member of an EEA national. The Wife had remarried and sponsored her second husband's application for leave to remain.

The dates of the divorce petition and decrees are highly important to the husband's immigration status. If a marriage exceeds three years a family member can retain the right of residence. The Scottish decree would exceed the three year period, the English one would not.

Issues

1. Was the petition or application in the English proceedings served in accordance with the FPR?

2. Should the DDJ's order for deemed service be set aside?

3. If there were a procedural irregularity, can it be rectified?

Law

Lieven J noted the complicated case law in such matters and looked to ***M v P*** **[2019] EWFC 14** in which the then President set it out the relevant precedents in considerable detail from paragraph 47 onwards. She noted a number of key cases: *Everritt v Everritt* [1948] 2 All ER 545, *Wiseman v Wiseman* [1953] 2 W.L.R. 499, A*li Ebrahim v Ali Ebrahim (Queen's Proctor Intervening)* [1983] 1 WLR 1336, *Batchelor v Batchelor* [1984] FLR 188, and *Manchanda v Manchanda* [1995] 2 FLR 590. Lieven J then considered the then President's conclusions in M v P [paragraph 94], and his reasoning from paragraph 99 onwards regarding the differences between void and voidable, quoting:

> [100] "That apart, there are, I think, three general conclusions to be drawn from this survey of the jurisprudence:
>
> > i) First, a general lack of appetite to find that the consequence of 'irregularity' – I use the word in a loose general sense and not as a term of art – is that a decree is void rather than voidable…
> >
> > ii) Secondly, a general recognition that only if the decree is held to be voidable, and not void, will the court be able to do justice to all those whose interests are affected and having regard to the particular circumstances of the case.
> >
> > iii) Thirdly, recognition of the public interest, where matters of personal status are concerned, in not disturbing the apparent status quo flowing from the decree and the certainty which normally attaches to it…"
>
> [101] "Putting the issue in its wider context, Mr Murray helpfully took me to the discussion, in the eighth edition of De Smith's Judicial Review … of current thinking about the distinction in public law (that is, public law as the expression would be understood by administrative lawyers, rather than as it might be understood by family lawyers) between acts or decisions which are void and those which are voidable. It is reassuring to see that family lawyers are not the only ones who struggle with the distinction, for the authors observe that "Behind the simple dichotomy … lurk terminological and conceptual problems of excruciating complexity" and go on to cite (para 4-070) a dispute within the Academy where the view of one corner is denounced by the other as "a tissue of pseudo-conceptualism behind which lurks what is in reality a pragmatic conclusion." Grateful though I am to Mr Murray, it is neither necessary nor appropriate for me to chart these difficult waters, though I note the view of the authors that in the public law context the distinction has been "eroded" by the courts, which "have become increasingly impatient with the distinction."

Lieven J extracted the following principles:

> i. The Court has a lack of appetite to find that the decree is void; see *M v P* at paragraph 100;
>
> ii. The Court has a concern to try to recognise what is the apparent status quo flowing from the degree and the certainty which normally attaches to the decree;
>
> iii. That must be in part because where one party has changed their position on the basis of the decree and, in particular, of course on the facts, the most likely way is going to be by remarrying, then efforts should be made to uphold that change of position in law;
>
> iv. There is a trend in divorce law, and as can be seen from paragraph 101 of *M v P*, and in public law administrative law, to move away from technical distinctions of void and voidable and look perhaps more rigorously at prejudice and change of position; and
>
> v. There plainly remains a category of case where a decree or an order will simply be void, see *M v P* paragraph 94, but in my view, the most obvious examples of that is where there is simply no jurisdiction to make the order or where there is fraud.

Her view is that for cases related to service it is appropriate to look at the nature of what went wrong and where any prejudice may lie. Errors related to service do not necessarily render a decree void as that would create obvious injustice, particularly in cases where a party may seek to avoid service. The principle of the outcome being void is not one dictated by the Rules themselves, let alone statute.

Conclusion

Applying those principles to the facts of this case, Lieven J found:

> - The wife took reasonable steps to ascertain the husband's location and there were no grounds for the wife not to put the Edinburgh address on the application. The process server tried personal service and spoke to someone purporting to be the Husband. The server was fully entitled to believe that the husband was still living at the address.
>
> - There is some evidence that the husband sought to avoid service. No factual findings were made but given the husband's precarious immigration status it is surprising he did not take steps to account for his mail.
>
> - DDJ Yeshin did not make any error of law in making the order for substituted service under Rule 6.16.
>
> - Any procedural errors there may have been did not render either the order or the subsequent decrees and orders void.

- There was no prejudice to the husband from the failure to serve, however, there was extreme prejudice to the wife as she has remarried and had a child, her second marriage being made at a time when the first marriage otherwise would have persisted.

Therefore, any failure to comply fully with the Rules rendered the various orders voidable not void and Leiven J declined to exercise her discretion to order them to be set aside.

Summary by **Tadhgh Barwell O'Connor**, Pupil, **1KBW**.

AA & 25 Ors (Children) [2019] EWFC 64

The focus of this hearing was mainly on 3 female siblings, AA (15), and twins AB and AC (14). In essence the LA allege that there was a paedophile ring centred on the home of the A girls' grandparents AGF and AGM who systematically and over a number of years sexually abused AB and AC. The A girls are in foster care, but the other children have remained within their families. The guardians stressed the protective arrangements, ongoing for over 18 months, has had drastic consequences on the families.

The allegations demonstrate 'gross perversions' including penetration by penis, digital and tongue and the Judge comments that the allegations *'include perversions which I have not previously encountered in evidence'*.

This case is essentially about risk and the likelihood of future significant harm. There is no evidence that any child involved in these proceedings, other than 3 A girls, has in fact been abused- indeed they all have flourished in their family care.

The judge commented that this has been an unprecedently complex case. It involves four local authorities, 24 respondents and five intervenors, with 21 of those being named as alleged perpetrators. There are 49 parties. The trial has required a courtroom that can seat 120 people. It was, in effect, 15 care cases being tried concurrently, as all the essential evidence was common to all.

Disclosure was a continual issue, with 42,000 pages in evidence, 67 ABE interviews, and 150 electronic devices were seized yielding 800,000 pages of data.

Preparation for Trial

The Judge praised the co-operation of all parties and HMCTS. Wi-fi was upgraded to enable a paperless trial. The Local authorities commissioned and paid for the CaseLines system which was used for documents.

His Honour Judge Andrew Greensmith was appointed and the case management judge. All interlocutory applications were made before him as were any welfare issues that arose out of the protective measure for the other children.

Q constabulary first became involved in 2017 but most of the allegations emerged in the Summer of 2017 and it was then that most of the local authority protective measures were put in place. It became the most complicated case of its type within the experience of that particularly constabulary.

It was accepted that care proceedings could not wait upon criminal proceedings. Arrests and interviews took place in summer of 2018 and the CPS made a decision not to charge in September 2018. Disclosure was then made, but the police have stated they will take stock of the matter after the trial.

The Management of the Trial

A Re W hearing had taken place and it was agreed that the three A girls should give evidence, subject to their willingness at the time do so. The Judge met with each girl in the place they would give evidence with the guardian's solicitor, the girls' intermediary and a court clerk, and it enabled some preliminary discussions, for example explaining to them that there was not going to be any direct reference to them lying, and that the girls would not be able to see their ABE interviews before they gave evidence.

Both AA and AC gave evidence but AB did not. The evidence was taken by four counsel (guardian for the A girls, grandparents, and the respondents agreeing questions to be asked by one other counsel) asking questions, with the judge, being present with the witness in the remote location. This meant that the judge was largely not seen by the other advocates in the court room and he was not present in the courtroom for most of the trial.

After the Local Authority had completed their evidence, they asked for a few days to consider their position. They intended to continue against all respondents. A submission was made on behalf of all respondents and intervenors, save for the grandparents, that the court should stop the proceedings on the basis that there was not a proper case to answer. This application was refused, albeit the court decided that the court did have the power to make such an order.

The Uncontentious Background

The parties are connected either by blood or marriage and partnership. The majority of the children's birth parents are

separated and there are obvious adult feuds, however most of the children have thrived, the glaring exception being the three A girls.

The A girls' mother is the daughter of AGF and was married to AF. The A girls are the youngest of six children. The family home was characterised by chaotic behaviour and inadequate parenting, including domestic violence and serious neglect. There was regular involvement of Social Services, and although there is no positive evidence of child sexual exploitation, there is evidence that inappropriate and pornographic materials that may have been available, there is evidence of disinhibited sexual behaviour, leading to the question as to what the children might have seen.

When the A girls were removed in April 2009, they had suffered serious emotional and psychological damage, were in poor physical condition, had obvious learning deficits (particularly the twins) and they were almost entirely unsocialised. A number of witnesses used the word 'feral' to describe their behaviour and condition. All six children they were removed to the paternal grandparents for a few days at which point the three girls were placed with the maternal grandparents.

The A girls remained at the maternal grandparents until December 2010 when they were placed in foster care after an incident between the AGF and DM who is the daughter of AGM and AGF. The children returned to the maternal grandparents in April 2012 under an SGO once an extension had been built to accommodate the girls.

There has been no investigation as to what happened in the foster placement but it is clear there is no love lost between the maternal grandparents and the foster carers. It was also a very unhappy time for AA. The girls were removed from their grandparents in February 2017, a removal that is now undoubtedly permanent.

The Judge commented that the maternal grandparents must be given credit for the substantial improvement to the visible welfare and wellbeing made by the girls over their time with them. AA's behaviour at school was unpredictable and sometimes extreme; she struggled to make friends and was very demanding on adults. Complaints emerged of AGM's physical harshness and AGF's uncomfortable touching, and on one occasion AA was removed overnight but then stated she wanted to return home. Matters came to a head in early 2017 when AA made similar complaints resulting in the removal of all three girls to foster care.

For the first 10 days the girls were with Mrs D, they were placed with Mrs P on 17 February 2017. AA stayed there until August 2017 when she moved to the home of Mrs E until 18 December 2017 when she was moved again to a specialist foster carer Mrs F until December 2018 when AA was admitted to respite care.

AB and AC remained with Mrs P until late 2018 when they were moved to separate and individual therapeutic foster placements, where they remain. The Judge comments on the girls that, *'It is important not to lose sight of how truly demanding they were, how truly damaged they were and to consider how all this might affect the evidence'*.

AA has had 12 changes of placement, and AC and AB eight each. Whatever the reasons, this would have had a significant emotional impact on the girls with a number of changes taking place close to the time of the trial.

The twins did not make any allegations until they had been with Mrs P for some time. AC alleged abuse against the maternal grandparents and seven others, essentially on an individual basis. AB specifically, alleged a paedophile ring and abuse from aged 5 onwards from all those her sister and cited and a further 12 individuals involving multiple acts of abuse by adults acting together.

There is no corroborative or supportive evidence for the allegations. There is no evidence of organisation, child pornography or regular association, nor do the girls effectively corroborate each other.

AA/IB Incident

In August 2015 the maternal grandparents took the girls to France with their daughter, IM and her two sons including IB who was 6 at the time. During this holiday something happened between AA and IB. As a result AA became more isolated from the family and she could not go unsupervised to certain children's activities. She spent time alone with AGF and on some occasions, the police were involved. There was a formal investigation but a decision was taken 10 months later not to pursue criminal proceedings as they did not think that sexual intent on the part of AA could be proved.

AA blamed IB and IM, she was extremely angry about it and has given varying accounts of what happened, including an admission of her involvement to her foster carer Mrs D in November 2017. AA seems to have interfered with IB's bottom, the Judge comments that this does not seem to be inspired by sexual gratification other than to do something that involved a dominant role. AA was first surprised by the reaction of others, and then was ashamed by what she had done.

Outstanding Factual Issues

The first question is whether the girls have been sexually abused, and if so by whom.

The three girls were examined by an experienced forensic medical examiner, Dr M. She found no sign of clinical injury which is consistent with AA's allegations of no penetrative activity. AB and AC do allege penetrative activity but the absence of injury does not disprove that.

The Law

In this case the LA alleges sexual abuse against all three girls by or permitted by AGF and AGM. By reason of the 2012 SGO the grandparents are treated as the parents in this case.

The Judge commented that in his experience, the burden of proof perhaps has a greater role to play in practice than Baroness Hale expressed in ***Re B (Children)*** **[2008] UKHL 35**, *'generally speaking a judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof'.*

The Judge further commented that

> 'it is extremely important to underline that in family proceedings the cost of a mistake either way is equally serious', the Judge states that 'the task of the court, if not easy, is certainly clear. In relation to each allegation made against each named person, has the local authority proved it on the balance of probabilities? My legal duty extends no further than that'.

During the proceedings the Judge was asked to give a section 98 warning to the witnesses:

> 'In these proceedings you are not allowed to refuse to answer questions put to you and you must answer them. It is almost certain that if the police ask for it, they will be allowed to have the evidence that you give to this court. If the police interview you again, they may ask you in that interview about the evidence you have given to this court. Whether any part of the police interview can then be used if there is a trial in the Crown Court will be decided by a Crown Court judge and not by a judge of this court.'

The judge had not come across such a request before but was assured by counsel that it was now common practice. The judge read the warning in open court in the presence of all the respondents. The judge did not want to address each respondent personally for fear that it may be intimidating before they begin their evidence.

The Judge also made comment on the relevance of the guidance for investigating allegations from Lord Justice Baker in *Re S (a child)* [2018] EWCA Civ 2738:

> 'This document describes good practice in interviewing victims and witnesses and in preparing them to give their best evidence to court. Whilst it is advisory and does not constitute a legally enforceable code of conduct, practitioners should bear in mind that significant departures from the good practice advocated in it may have to be justified in the courts […]'
>
> 'The principles underpinning the guidance are, however, relevant to all investigations, which include interviews of alleged victims of abuse, whether or not the interviews purport to have been conducted under the guidance'.

The Investigation of the Case

The Judge was clear the investigation needs to consider what has been said and what has not been said. He comments that, '*Child protection work is today carried out in a rabid and unforgiving atmosphere, generated by a well-grounded public fear that too many children are being abused in our society'.*

The Judge was provided with a 61 page document entitled 'Chronology of breaches' which was prepared and agreed by 31 counsel and agreed and adopted by all respondents and intervenors. The schedule offers a fair picture of what has happened, without the need for close examination of its commentary.

The Judge accepted that each investigator was well-intentioned and well-motivated but that this was not enough in an area where many of those involved could and should have known that it is sensitive, confidential and prone to error. Many of the investigators had training that was either outdated or inadequate and the judge cautioned that great care must be taken where others, including foster carers, are allowed or even encouraged to take part in information gathering.

The Judge stated that the social worker Mrs G was in an impossible position, her focus was on AA and the IB allegation and she never saw herself as conducting an investigation. Even when the children were removed in February 2017, he focus was on AA, her behaviour and complaint.

Whilst AA tended to ensure she had a high profile, she was chatty and deliberately provocative in terms of her behaviour; the twins were very different and they portrayed no behavioural issues. They had additional educational needs but were otherwise below the radar.

Once AB and AC started making allegations, Mrs G, was understandably, far out of her depth. Essentially, the LA let the police to take the lead in the investigations and took little further effective responsibility.

Mrs P, the foster carer was at the heart of the investigatory process, the three A girls were her first and last placement. During the placement Mrs P kept precise and detailed records, she sent her records to the fostering agency who regarded them as confidential. Mrs P kept a parallel record, which she disclosed to the police, and she was in regular contact with

the social worker.

AB and AC began to talk whilst in Mrs P's care, but this was difficult for them and were given notebooks or diaries. They had already fallen in the habit of communicating by leaving notes around the place. Mrs P made substantial 1-1 time with the girls and made a record of these conversations as well as praising them for their bravery. The judge notes that in all this, she was motivated by a desire both to do her best for the twins and by a belief that what they said was, by and large, true and should be uncritically accepted.

There is generally no record of the questions asked by Mrs P and it is difficult to work out which bits the girls said spontaneously. AA was acutely jealous of the attention being received by the twins but refused to say anymore. AA felt she was being coached and after she had moved from this placement made no more extensive allegations that she had at any stage before.

The judge notes the serious risk that the twins were taking the message that if they continued to make allegations, the praise and attention would continue, as indeed they did; and this was an important fact when considering credibility.

The foster carer should never have been put in this situation. The LA had taken a step back and the police thought Mrs P should be allowed to continue these conversations as the girls had confidence in her. The police would ask her for extra detail and she would revert this back to the girls. The judge states he has considerable sympathy for Mrs P, but this does not blind him in forming a view as to the reliability of the information emerging from this process.

AA added nothing additional in her 9 ABE interviews but the judge discussed issues in relation to the twins' interviews.

> 1. There were multiple breaches of the guidance. DI P stated that the guidance had to be departed from due to the educational limitations of the girls who stated the all the police can do is get the best evidence that the child can give.
>
> 2. Many of the interviews are conducted in a manner which conveys the expectation that the girls have specific allegations to make. Even why they sought to say that a respondent hadn't done anything, the questioning continues until AB makes an allegation. There is little free narrative from the girls and on many occasions Mrs P was with them during the breaks.

The Local Authorities' Witnesses

There were at least 12 professional witnesses that the judge has not referred to in his judgment. He notes that there were many occasions when AA could have made a complaint and did not. The overall impression she created was that she was happy living with her grandparents.

Mrs D, the first foster carer, states there was some sexual activity between the girls and they had been acting out 'what he did to them'. AA made a comment to her next foster carer that she was 'not going to say anymore about private things and she was jealous of her sisters having private time and telling bad things about her grandad'.

Mrs E the next foster carer for AA reported that she had mentioned that she had a husband, her grandfather, and that AA had self-harmed but Mrs E could never understand the triggers.

Mrs N was the most important witness. She lived in the grandparent's home with the girls from October 2015- May 2015 and had a good individual relationship with the three girls. Mrs N described how the children were not well liked by other members of the family, that they were aware of this and they craved 1-1 time. Mrs N never observed any sexual activity between the children. Mrs N observed a lot of physical affection in the home and that AA was closer to her grandfather but had not seen any physical discipline, had not seen any other adults go upstairs in the home and described a modest flow of visitors.

The A Girls

The judge was conscious that he knows much more about AA than the twins, and that it is the twins that make the most serious and extensive allegations. The judge notes the physical condition of the girls improved dramatically by 2017 but the same cannot be said of their emotional and psychological condition.

Ostensibly, AA is the one most damaged by her experiences of life. This can be seen in her erratic behaviour, social isolation aggravated by the IB incident and her admitted use of pornography and obsession with masturbation over which she has little real control.

AA has an IQ of 81, the very lowest end of normal. AA talked to Mrs P about seeing films behind her eyes, hearing voices and seeing people in her room.

Whilst complaints were made, there is a consistency to them about her grandfather's handling of her, which she found increasingly uncomfortable. There is an absolute refusal to expand on her complaints and a determination not to be drawn into complaints against anyone else apart from her grandfather.

The judge states he appreciates the need for caution with AA's evidence but finds that it is potentially credible and must be considered as evidence of value.

AC is very different from her twin and had a low profile in this case before she started to talk to Mrs P. The judge is clear that AC believes the truth of what she said then, and believes it now. He is also clear that she had no idea as to what would be put in train as a result of what she has said. AC alleges ghastly abuse by her grandparents, and seven other members of her family. She does not allege group abuse but her allegations against her grandparents go far beyond anything alleged by AA, although they include the same sort of things.

The judge notes that AC has no track record of lying about things of importance, she has a genuine educational deficit and has a significantly defective memory and a genuine failure to recall. The judge does not dismiss her evidence but states its reliability is seriously called into question.

AB make allegations against all those her sisters have mentioned plus a further 12. Allegations of abuse, and also that they were performed in concert with as many as 16 people at one time. AB did not give oral evidence and the judge again does not dismiss her evidence but approaches it with the greatest of caution.

The judge was satisfied that AB and AC have had some exposure to pornography, both at the grandparents' home and in care. It is impossible to discern the extent or nature of what was viewed, and the impression it made on them.

Were the A Girls Sexually Abused?

Everyone named by the girls denies they were a perpetrator of abuse. The LA submit that the sheer range and detail given by the girls is explicable only by lived experience.

The judge is satisfied that there was a real degree of fantasy in this case. A literal reading exceeds 2000 incidents of abuse which just could not have happened. The girls found rich emotional reward in making allegations and this incentive is powerful when seen through the eyes of two very damaged and needy girls.

However, the judge states that although pornography has a part to play, as does transference of sexual activity from one part to another, this cannot account for all that has happened.

Firstly, some details, including descriptions of internal physical feelings in their body, could not have been learnt save through experience and it is beyond their capacity to invent. Secondly, their developed accounts suggest a grounding in some experience, even if that experience was a much lesser on that those described.

The judge states he has no way of knowing the point at which lived experience becomes fantasy.

Was there an Organised Paedophile Ring?

The twins' evidence probably depends on AGM being the organiser of the ring, based in her home. The judge is clear that he is entirely satisfied that no such ring exists, or ever has existed. There is no evidence of regular communication despite the very large number of mobile telephones seized. The suggestion of mass attendance at AGM/AGF's home is inconsistent with the evidence of Mrs N. There is no reliable evidence of excessive visiting/ parking at or near the home. These children were visible with good school attendance any many activities- the opportunities for the abuse on the scale described were simply not there. It has been shown that many of the respondents could not or would not have been at this address at the times alleged, or in some cases at all. This allegation received no support from AA who has always felt some degree of responsibility over the twins.

The Allegations against the Grandparents

The Judge described the force of AGF's denials and his impression was that they were intended to conceal. The evidence of AGM was characterised by an overriding determination to protect her husband, and to a lesser extent, herself.

The judge describes the nickname given to AGF amongst the younger females of the family as AGF 'the perv'. The judge states this was a family acknowledgement that he was wholly insensitive to physical boundaries, it was obvious from his own evidence that he still has no idea what the fuss was about.

AGM admitted to smacking AA once in France, the only time that other family members were around. The judge found that physical punishment was a part of the grandmother's armoury but that it never went beyond bare-handed smacking. The judge found that AGF has a temper and could shout at the girls, frightening them. He may rarely have smacked the girls. The judge stated that viewed on its own, this matter would not satisfy the threshold criteria and its relevance is to credibility.

The Case against the other Respondents

The judge outlines his perception of the oral evidence of the respondents and other intervenors making proper allowances for entirely proper family loyalty and also for the intensely personal invasiveness of much of the evidence.

The Findings of the Court

The judge repeats that he has found that AB and AC have been the victims of sexual exploitation to some degree, but the dividing line between fact and fantasy is not possible to determine. The judge states that he is confined to answer, what, if anything, can be proved against the named respondents in this case. The judge comments that reliability is the lode-star of fact finding and describes the art of finding flashes of truth from unreliability.

The judge makes no findings of child sexual exploitation against any of the 12 respondents named by AB. The judge could not safely identify any individual perpetrator, in respect of at least two of them, AB insisted at one stage that she had not been abused by them, and either because the opportunities for the abuse to occur were not there and/or because physical descriptions were unconvincing. The Judge stated he accepted the denials of several witnesses, that without an organised paedophile ring such events could not reasonably have occurred, and there is no medical evidence of injury which is at least, surprising.

The judge cites the same reasons for not making findings against those who are subject to allegations made by both AB and AC. Additionally, the judge notes that the twins gave very different evidence about group abuse, and it would be surprising for the girls to be treated so differently.

Further, AA gives no unambiguous evidence of any penetrative abuse, nor of any abuse by anyone other than AGF. The judge found that AA mothered the twins and it was inconceivable that she would have not known about it if it were happening, nor would have colluded on it. Additionally, although the judge recognises AA's wish not to expand on abuse suffered by her, he does not accept that she would apply that stance to abuse suffered by the twins.

The evidence against AGF comes from all three girls. The earliest comments the twins made to Mrs P related to AGF and were initially very much in line with what was being said by AA.

AA's evidence comes from a very troubled young person who manifested that distress in many ways and her evidence must be treated with caution. The judge found her accounts of physical punishment to be essentially true. Secondly, although her pattern of complaints may have been irregular, the substance of those complaints have been fairly consistent. The judge found AA's description of her as AGF's wife, her relishing the attention this gave her, and her explanation the he could not help himself in the way he touched her, lead to a conclusion that what she was saying about AGF is true.

The judge found that AGF's behaviour frequently and increasingly crossed the line from spontaneous affection to sexual gratification, albeit one that never involved a penetrative act. At worst it involved lying on top of her with his dressing gown open but wearing boxer shorts, and then fondling and kissing parts of her body in what must have been known to him, a sexual manner.

The judge comments that it would be unjust to use these findings to underpin findings of a wholly different order of sexual depravity alleged by the twins. However, AA stated that one matter that provoked her to action was that AGF had started to behave with the twins as he had with her. That is mirrored by the earliest allegations made by the twins after their removal. The judge was satisfied that AGF had begun to behave with the twins as he had with AA, but was not prepared to go any further in his findings and makes no finding of penetrative activity or of intentional grooming.

The judge states that clearly threshold has been crossed on this point and there was a likelihood of further significant harm in the future- a harm that was unlikely to have been less than that already suffered.

Regards AGM, the judge was satisfied that she knew of some of AGF's conduct towards AA and indeed resented some of the attention he gave her. AGM chose not to do or say anything and sought to dissuade AA from saying anything. AGM compounded this by giving some knowingly false evidence to the court in her determination to protect and support her husband.

The judge also found that AGM colluded in the abuse of AA, and also her behaviour created a space for this abuse to happen to the twins as well.

This evidence concludes that the twins have been sexually abused beyond that of which AGF is responsible, the extent, when, where and by whom remains unknown. The judge states that '*All I can say is that there is nothing in the evidence that would allow any named respondent or intervenor to be treated as being under a cloud of suspicion, although no one can escape the cloud of unknowing.*'

Exoneration

The Judge was asked by a number of parties to go beyond the findings and to expressly exonerate named individuals from complicity in the matters alleged. The judge was clear that the legal consequences of exoneration are no different to those where the court has declined to make a finding. The decision is binary, and any such person is not and must not be treated as being left under a cloud of suspicion.

The judge stated that a party seeking exoneration assumes an evidential burden to satisfy the court of their innocence on the balance of probabilities. The judge decided that a fair assessment of the evidence allowed him to positively exonerate 15 named people but stressed that there should be no future distinctions made on those who have been exonerated, and those of whom no findings have been made.

Epilogue
The judgment ends with an epilogue praising the cooperation of all parties, whilst also sounding caution for the training of those conducting investigations and communication between safeguarding leads.

Summary by **Harriet Dudbridge**, barrister, **St John's Chambers**

Redcar Cleveland v PR (Costs) [2019] EWHC 2800 (Fam)

Background
Proceedings were initially brought by Redcar and Cleveland Borough Council (the Local Authority, "LA") in March 2019 concerning a vulnerable adult [2019] EWHC 2305 (Fam). The LA had undertaken to protect a vulnerable adult due to their fears regarding parental coercive control and other serious concerns. By the time the proceedings were before Cobb J the parties were largely in agreement about a way forward and the proceedings concluded. Cobb J indicated any party could informally apply to him regarding the question of costs (by a certain time) and the issue would be resolved in writing. Both parents sent written submissions seeking to recover their costs from the LA arguing that the proceedings were unnecessary as the LA had not attempted to resolve the matters with the family before issuing proceedings. The LA opposed by written submissions. They maintained that the application was reasonable given the context and time pressure, and that once it was clear the proceedings were no longer achieving their objective the LA had applied to bring them to an end.

Issue
Cost principles and their application under the inherent jurisdiction in relation to a vulnerable adult.

Law
In Cobb J's view the *Civil Procedure Rules 1981* applied because the proceedings concerned a vulnerable adult, not the *Family Procedure Rules 2010* which only apply to 'family proceedings'. Regardless of where started, as in this case the Family Division, this matter should not be categorised as 'family proceedings', citing the definition of that term as found in Section 32 of the *Matrimonial and Family Proceedings Act 1984*.

He explained that Section 61 (1) of the *Senior Courts Act 1981* ("SCA '81") sets out the 'Distribution of Business' and refers to Schedule 1 which assigns cases to the Family Division. There is no reference in Schedule 1 "*to the exercise of the inherent jurisdiction of the High Court in relation to vulnerable adults*" [para 5]. Therefore, Section 51 (1) SCA '81 provides that, subject to rules of court, costs shall be in the discretion of the Court. As such, Rule 44.1 CPR 1998 grants the Court discretion as to costs orders. This includes disregarding the usual practice that the loser pays the winner, provided the Court has had regard to all circumstances, including conduct, as set out in Rule 44.2 (4) & (5).

There was no clear winner or loser to these proceedings, so no clear application of the usual practice as referred to above.

Conclusion
Cobb J referred to this case as a "paradigm example" [para 15] of the extremely challenging issues faced by LAs, and found the LA application to be reasonable. Notifying the parents beforehand could have exposed the vulnerable adult to undue or inappropriate pressure. Indeed, "the stakes could not have been higher" [para 16] given fears that the vulnerable adult was contemplating and threatening suicide.

Once the proceedings started, Cobb J was satisfied that the LA "responded appropriately to the evolving picture" [para 17], making changes where appropriate and seeking to conclude proceedings as soon as practicable. The vulnerable adult remains living away from her parents' home.

While not unsympathetic to the parents' views regarding their expenses incurred, Cobb J was satisfied that "it was not unreasonable for the Local Authority to approach the court for protective orders, rather than attempting to obtain voluntary agreements to the safeguarding regime which they wished to create" [para 18]. He therefore saw no justification for making the LA foot the parents' bill and there was no order as to costs.

Summary by **Tadhgh O'Connor**, pupil **1KBW**

In the matter of NY (A Child) [2019] UKSC 49

On appeal from [2019] EWCA Civ 1065
JUSTICES: Lord Wilson, Lord Hodge, Lady Black, Lord Kitchin, Lord Sales

BACKGROUND TO THE APPEAL

This appeal concerns a father's application for an order for the immediate return of his daughter from England and Wales to Israel. The issue raised is whether the Court of Appeal, having determined that such an order could not be granted under the Hague Convention on the Civil Aspects of International Child Abduction 1980 ('the Convention'), was nonetheless entitled to grant it under the inherent jurisdiction of the High Court to make orders in relation to children ('the inherent jurisdiction').

The child's parents are Israeli nationals who married in 2013. She is their only child and is now aged almost three. Her parents lived at first in Israel but moved to London in November 2018. There the marriage broke down. The father returned to Israel, but the mother refused to do so, and remained in London with the child. The father applied under the Convention, which is set out in Schedule 1 to the Child Abduction and Custody Act 1985 ('1985 Act'), for a summary order for the child's immediate return to Israel. The allegation underpinning his application was that, on 10 January 2019, when the marriage broke down, the mother had wrongfully retained the child in England.

The High Court granted the father's application. On appeal, the Court of Appeal ruled that it had not been open to the judge to make an order under the Convention and set his order aside. It held that there had been no grounds for concluding that the mother's retention of the child in England had been wrongful, and so the Convention had not been engaged. However, it then referred to passing observations made by the High Court judge to the effect that, if he had found that the child had been habitually resident in England, he would have reached the same decision to order the child's immediate return under the inherent jurisdiction as he had under the Convention. Relying on those observations, the Court of Appeal made a summary order for the child's return under the inherent jurisdiction. The mother appealed to the Supreme Court.

JUDGMENT
On 14 August 2019, the Supreme Court unanimously allowed the appeal and set aside the Court of Appeal's order. Owing to the urgency of the decision, a judgment giving reasons was not issued at that time. Lord Wilson now gives the unanimous judgment of the court setting out its reasons.

REASONS FOR THE JUDGMENT
The appeal raises two questions. First, was the inherent jurisdiction available to the Court of Appeal in principle? Second, if so, was the exercise of it flawed? The answer to both questions is "yes" [2-3].

Inherent Jurisdiction Available

The mother argued that the inherent jurisdiction had not been available to the Court of Appeal on the grounds that a summary order (i.e. an order made without a full, conventional, investigation) for the child's return outside the Convention could only have been made as a 'specific issue order' under the Children Act 1989 ('the 1989 Act') [26]. A specific issue order is an order made to decide a question connected with any aspect of parental responsibility for a child: had it been appropriate on the facts to make such an order here, it would have been open to the Court of Appeal to do so [27-28].

Before the introduction by the 1989 Act of specific issue orders, summary orders for the return of a child abroad could be made under the inherent jurisdiction [29-30]. Such orders continued to exist alongside orders under the Convention after it was introduced into domestic law by the 1985 Act, since differences between the inherent jurisdiction and the Convention mean that an order for a child's return may, in some circumstances, be required under the former, but not the latter, legal framework [31]. But did the 1989 Act do away with the inherent jurisdiction to order a child's return [32]?

The mother argued that para 1.1 of Practice Direction 12D, supplementing the Family Procedure Rules 2010, showed that the 1989 Act did have that effect: for it instructs that the inherent jurisdiction should only be invoked where the issues 'cannot be resolved under the 1989 Act' [33-36]. However, practice directions have no legal authority to the extent that they state the law incorrectly [37-38]. There is no statutory basis for the instruction in para 1.1, and the case-law indicates that an order can be made under the inherent jurisdiction even where a specific issue order would also have been available [39-43]. Therefore the instruction in para 1.1 goes too far. However, if an order is available by both routes and a party chooses to invoke the inherent jurisdiction, the judge will need to be persuaded early in the proceedings that that choice was reasonable [44]. Nor does the court accept the mother's argument that an application for a summary specific issue order requires a different inquiry from an analogous application under the inherent jurisdiction. The same approach is required under both frameworks, as both are based on the principle that the child's welfare is paramount [45-50].

Exercise of Inherent Jurisdiction Flawed

The Court of Appeal did not inquire into whether the child's welfare required a summary order for her return, as it considered that the High Court had made that determination and had not erred in doing so [51]. Yet the judge had not made a determination under the inherent jurisdiction [52]. Nor could his determination under the Convention stand as one under the inherent jurisdiction: for the Convention, unlike the inherent jurisdiction, is not based on the paramountcy of the child's welfare [53].

The fact that the father had not invoked the inherent jurisdiction did not prevent the Court of Appeal from making an order under it. But it did place a duty on the Court of Appeal to ask whether the mother had had sufficient notice of its intention to use the inherent jurisdiction to allow her to seek to oppose it [54]. The Court of Appeal should also have considered eight further questions before making its order under the inherent jurisdiction, including whether the evidence

before it was sufficiently up to date, and whether the High Court judge had made findings sufficient to justify the order [55-63]. Its failure to consider any of these questions is what led the Supreme Court to uphold the appeal [64].

References in square brackets are to paragraphs in the judgment.

Summary provided by The Supreme Court Press Release

University Hospitals Bristol NHS Trust v RR [2019] EWCOP 46

At a best interests meeting held on 19 July 2019, the medical staff charged with the responsibility of caring for RR concluded unanimously that there was such an unfavourable prognosis for a second bone marrow transplant that it should not be attempted. A major contributing factor in their decision was the expectation that RR himself would be unable to adhere strictly to the required lengthy and complex care plan. The Trust sought a declaration that it would lawful to refuse a second transplant operation. By the time the case was heard on 9 August 2019 RR had been discharged home and the prognosis was that he would die in a matter of days.

Cobb J applied the analysis of MacDonald J in *Kings College NHS Hospital v C & V* [2015] EWCOP 80 paras 25-39 reminding himself that the issue was RR's capacity at the time of the hearing. He directed himself of the "*need to be particularly vigilant to ensure that those who are looking after RR professionally have not come to a conclusion about his incapacity out of expediency or because they have, for instance, applied the wrong criteria, or because they have been overwhelmed by the palpable tragedy which surrounds RR and his situation.*", reflecting the importance the Mental Capacity Act 2005 places on RR's autonomy and an objective assessment of best interests.

The judgement demonstrates the process of deciding on capacity: the identification of an impairment of, or a disturbance in, the functioning of his mind or brain and articulation of how that rendered RR unable to make the relevant decision. In this case it was not simply the fear of impending death but the way that fear combined with identified long established personality traits (the disorder) prevented him making decisions about his care and treatment. [Judgment paras 36-37].

Having concluded that RR lacked capacity the judge reviewed the prospects of successful surgery (which he concluded would be futile) and RR's past and present expressions of his wishes and feelings and those who knew him best as well as the treating team, and concluded that a palliative care to reduce pain and enhance dignity were in RR's best interests."

RR died 2 days after the decision.

Summary by **Nicholas O'Brien**, barrister **Coram Chambers**

FRB v DCA [2019] EWHC 2816 (Fam)

Cohen J struck out the husband's claim for damages in respect of W's deceit over the paternity of C.

The Judge struck out H's claim under Part 3.4(2)(a) and (b), that is:

> (a) the Particulars of Claim disclose no reasonable grounds for bringing the claim; and
>
> (b) the Particulars of Claim are an abuse of the court's process or are otherwise likely to obstruct the just disposal of the proceedings.

The parties married in 2003, C was born several years later. They separated in 2017. In 2018 C was subject to a DNA test. That test revealed that H was not C's biological father.

H threatened to invoke "conduct" in the financial remedy proceedings and made a claim in the tort of deceit in the QBD. Master Cook transferred the latter proceedings questioning:

> "what this action can achieve given the remedies sought and the nature of the proceedings already under-way in the Family Division. This is arguably pointless and futile litigation".

H said that by W's deceit and misrepresentations he had suffered loss and damage. In July 2019 some claimed losses were removed by H following his decision, after considerable reflection, that he wished to continue to be C's psychological father. He accepted that his claim for restitution of the money spent by him on C could not survive.

The issues before Cohen J were:

ii) Does the tort of deceit in respect of intimate matters ("paternity fraud") exist between husband and wife?

iii) If it does exist, can it run as a separate cause of action in parallel with financial remedy proceedings or is it an abuse of the court's process and/or otherwise likely to obstruct the just disposal of those proceedings?

Before the Law Reform (Husband and Wife) Act 1962 matrimonial torts were not permitted. Authority exists that paternity fraud applies to unmarried couples: *P v B (Paternity: Damages for Deceit)* [2001] 1 FLR 1041.

Cohen J's view was that the tort of deceit can exist between married couples:

> "I can see no logical reason why the law should encourage honesty between unmarried couples so as to create an obligation which if breached opens the wrongdoer to an action to deceit yet absolves from such liability a wrongdoing spouse. It seems to me contrary to public policy that the law should be so interpreted".

However given the financial remedy proceedings and s25 of the Matrimonial Causes Act, Cohen J opined that the Claim was fundamentally incompatible and amounts to an improper collateral attack on, the Court's jurisdiction with regard to the mandatory requirements of s.25. Section 25(2)(g) requires the court to have regard to "the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it". Bad behaviour by a party therefore falls to be considered if, and only if, it crosses the line.

Financial remedy proceedings are listed for 15-20 day in early 2020. Current costs are about £3m; H's costs for the strike out were in excess of £230,000.

Summary by **Suzannah Cotterill**, barrister, **Field Court**