May 2020

Family Law Week

NEWS

How to submit an appeal during the COVID-19 crisis

The President of the Family Division has published a message on how to submit an appeal during the COVID-19 crisis. It is as follows.

The President of the Family Division has directed that all appeals to the Family Division must be submitted by email to **appeals.familydivision@Justice.gov.uk** .

The subject line of the e-mail should state 'APPEAL TO HIGH COURT: NEW APPEAL' If the appeal is urgent, this should be identified in the subject line.

All appellants, even those with PBA accounts or applying for fees exemption, will need to submit Form EX160B in relation to the issue fee in order to enable the Fees Office to process fees when the office re-opens. It is accepted that appeals may be issued and it will NOT be possible to pay the fee within the 5 days specified on EX160B.

All documents in support of an appeal must be supplied in digital format, preferably PDF or Word.

2/4/2020

Second report of Private Law Working Group published

The PrLWG was convened in 2018 under the chairmanship of Mr Justice Cobb to review the approach taken to private disputes between parents with respect to the arrangements for their children's future welfare following a separation.

In July 2019 the PrLWG published its first report and invited responses during a consultation period which ran until the end of September. The purpose of the Second Report is to draw together the key themes that were highlighted during consultation and to describe how the Group's thoughts have developed as a result during the past six months.

The major message of the work of the PrLWG, as described by the President of the Family Division in his announcement of publication, is that "the challenge of dealing with the

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fallout from many broken parental relationships is one that should be shared by society in general; the PrLWG rightly see a role for local agencies delivering a nationally supported resource for separating families. While there is always a role for a judge or magistrate sitting in a court room, the report re-ignites an important conversation about services for families, and dispute resolution, out of the courtroom."

Alongside the PrLWG's work, the Ministry of Justice has established a panel to consider the ability of the Family Court to engage with issues of domestic abuse and other serious offences when they arise. The work of this Panel is of importance. The PrLWG wish to take full account of the MOJ Domestic Abuse Panel's recommendations and the report published today should not, therefore, be seen as 'final' but a description of work in progress and will, in time, be followed by a third and probably further reports.

For the report, **click here**. For the President's announcement, **click here**.

4/4/20

Version 3 of 'The Remote Access Family Court' published

The Courts and Tribunals Judiciary has published the third version of "The Remote Access Family Court".

This version includes the new HMCTS guidance on remote platforms, access for vulnerable parties and reference to FPR r 3.4 as raised by the FLBA.

For the latest version, **click here**.

4/4/20

Victims' Commissioner publishes new report on domestic abuse

The Victims' Commissioner, Dame Vera Baird QC, has published a report – ***Sowing the Seeds: Children's experience of domestic abuse and criminality*** – exploring the overlap between children's experience of domestic abuse and children's offending behaviour. The report makes recommendations for early intervention and consistent practice.

The Commissioner notes that the review is published in the midst of the Coronavirus pandemic lockdown which presents an unprecedented risk for victims of domestic abuse, who are compelled to stay within a home shared with an abusive partner.

The findings of the report suggest this should not be regarded as a short-term problem: "Children who are exposed to domestic abuse are not casual bystanders and the evidence suggests impacts will be huge and far reaching."

Dame Vera Baird says:

> "My review finds there is an overlap between children's experience of domestic abuse and children's offending behaviour. A quarter of children who were identified as having socially unacceptable behaviour also have identified concerns about domestic abuse of a parent or carer. Practitioners who support children out of gang related activity tell us the children and young people they work with commonly come from backgrounds of domestic abuse."

The review finds children who experience domestic abuse may seek alternative relationships outside of the home, leaving them vulnerable to sexual and criminal exploitation. Children in alternative school provision, those in unregulated care homes and children sent far from home are also particularly vulnerable.

According to the review, early intervention to identify and support children and young people who experience domestic abuse is crucial.

Dame Vera Baird adds:

> "I hope that instead of sowing the seeds of violence, we can sow the seeds for a brighter future for our children and young people."

The Children's Society, responding to the report, said:

> "In the long term it's vital the Government invests in local early intervention services to end the current postcode lottery and ensure that children are identified and supported as early as possible. A national strategy is needed to tackle child criminal exploitation and define it in law."

For the report, **click here**. For The Children's Society's full response, **click here**.

4/4/20

Select Committee examines impact of COVID-19 on education and children's services

The implications of the coronavirus pandemic for the education sector and the impact on children and young people will be examined in a wide-ranging inquiry by the **Commons Education Select Committee**.

The inquiry will look at how the outbreak of COVID-19 is affecting all aspects of the education sector and children's social care system and will scrutinise how the Department for Education is dealing with the situation.

It will examine both short term impacts, such as the effects of school closures and exam cancellations, as well as longer-term implications particularly for the most vulnerable children.

For more details, **click here**.

4/4/20

Coronavirus: Domestic abuse

The House of Commons Library has published **an Insight** examining what the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 say about staying at home, and how they, alongside coronavirus more generally, could affect people at risk of domestic abuse.

The publication notes that anecdotal evidence is emerging of increased incidences of domestic abuse linked to coronavirus, both in the UK and globally.

The publication considers the relevant law, how it is being enforced, what impact coronavirus is having on domestic abuse services and what support is still available.

For the document, **click here**. For an article by June Venters QC in Family Law Week on this topic, **click here**.

4/4/20

Conducting international casework during the COVID-19 pandemic

Children and Families Across Borders (CFAB) has issued interim guidance on good practice in obtaining overseas assessments during COVID-19 and what CFAB can do to support this process. The full guidance can be **viewed here**. CFAB has also produced the following article, based on the guidance.

During the global pandemic of COVID-19, many social workers will be tasked with continuing their work remotely. This raises many ethical and practical questions – from how to keep social workers safe if working with extremely vulnerable families who may have COVID through to how to use technology to undertake work that used to be face to face. With over 170 countries restricting movement due to the pandemic, below are a few principles social workers should bear in mind when carrying on with international case work.

1. **The benefit to the child must be weighed against risk**
Principles of prioritising need and managing risk are central to the response during the pandemic. The same principles of upholding human rights, promoting social justice and maintaining professional integrity apply during the pandemic.

The current restrictions of movement are intended to be temporary, so social workers must seriously consider any additional risk of progressing child placements abroad during this time. If restrictions in movement are to be longer-term, it would be not possible to place a child abroad and therefore assessments of potential carers overseas will need to be delayed.

2. **Where possible, local experts should be involved**
Best practice has always been to work in collaboration with the authorities and professionals in other countries, making requests to local social workers abroad for any pieces of work to be completed within their country. For more information on why this is, see this **factsheet**. While many UK social workers may be using video technology to carry out their work with families here in the UK, this does not mean that the same methodology should apply to overseas work.

3. **Use of video technology can greatly expedite the work of social workers, particularly as a viability assessment to determine whether a potential carer should be ruled out or more thoroughly assessed at a later date**
In general, virtual interviews are sufficient for gathering basic, concrete and factual information of the nominated potential carers, such as their accommodation and living arrangements (identifying who lives in the household), employment and income, health history, support network, local facilities, or establishing if a person is willing to participate or should progress to further in-person assessments.

Follow-up home visits will verify the information gathered through the virtual interview session, as well as address the areas of the assessment that require thorough observations, threading direct observation into the dialogues and analysing their non-verbal responses and reactions.

4. **However, video technology is not appropriate in all situations**
Follow-up home visits will verify the information gathered through the virtual interview session, as well as address the areas of the assessment that require thorough observations, threading direct observation into the dialogues and analysing their non-verbal responses and reactions. Below are some of the potential limitations and risks of relying solely on a virtual assessment as a tool to determine a permanency of the child.

A. Due to the restricted screen coverage when using a video-link, *it is difficult to make accurate observations of non-verbal communication signals* beyond what the social worker is physically allowed to see or hear. The social worker may fail to notice subtle reactions or nuances in the interviewee's body language and facial expressions. It is not possible to be absolutely sure of what actually surrounds an interviewee; i.e. whether the interviewee is in the room alone or with other persons, or if there are other persons present in a nearby room, or even whether the video link is being screened to others who might have an interest. For example, when we see fleeting eyes, or body turning to a certain direction, we may sense that the interviewee may be looking to another person in the space for approval, disapproval, prompt, etc. but we will not be able to verify this on the video-link. This can have a significant effect on an interviewee's responses, for example, if s/he were in an abusive or controlling relationship, they may not be able to express their views and opinions freely.

B. It may also be *difficult to perceive delicate emotional responses correctly.* Careful observation of synchronicity between verbal and non-verbal responses is necessary to gauge complex human emotions and ultimately helps to determine whether the information that the interviewee provides is trustworthy or accurate, as well as measuring the emotional responses of the interviewee.

C. Through the virtual dimension, *social workers are limited to what they can see and hear*, and are entirely within the control of the interviewee. This limits the use of the senses that a social work assessor would usually apply in conducting an assessment. For example, smelling food-cooking, pets, cigarettes, alcohol, drugs, or activation of other senses such as shoes sticking to the floor (indication of dirty floor / bad home hygiene) and feeling draught or damp (indication of cold home environment) and so on.

D. Technical issues, for example a *poor internet connection or the device malfunctioning may affect the quality of the observation* or confuse the social worker with mixed or wrong messages. For instance, the social worker may struggle to differentiate the significance of a pause (hesitation to answer the question) with a delayed internet transmission or disturbance; or voice tremors (a sign of nervousness, distress or even anger) with the audio-device fault causing false sound-effect.

E. There may also be *risk of serious harm to the interviewee if the confidentiality of the information disclosed in the video link discussion were to become more widely known* in the community due to legal or illegal access to the video stream or as a result of a breach of confidentiality by any person with access to the process.

5. **A face to face visit should always be conducted before a final decision is made to place a child with the carer**

In some cases a virtual assessment alone may provide significant and detrimental enough information to determine the option is not viable. However, in many cases a delay to the completion of work to wait for a subsequent home visit may be justifiable and appropriate when placing a child overseas. Social workers should request a delay to the filing of a report until such time that it is possible to complete the assessment. Once a child is placed outside the jurisdiction of the UK Local Authorities and courts, monitoring and supporting the overseas placement may not be straightforward, in comparison to that of within the UK. Additionally, such delays can be afforded (within reason) as the actual physical relocation of the child from one country to another will be hampered for some time, due to international travel bans or entry restrictions (i.e. quarantine upon arrival, entry visa approval, etc.). Social workers are advised to do as much preparatory work (immigration checks, viability assessments, practicality of mirroring a placement order, preparatory support work with the potential carer, consideration of post-placement support, etc) in order to expediate cases as soon as the face to face visit can be concluded.

Carolyn Housman is CEO of Children and Families Across Borders, sits on the Professional Advisory Committee of the International Social Service Network and is a Steering Committee member of the Global Social Service Workforce Alliance. The international social work team at Children and Families Across Borders (CFAB) offers free advice to UK social workers and lawyers on international casework. Call the advice line on 0207 735 8941. Interim guidance on obtaining overseas assessments is also available on their website.

17/4/20

Trial by Skype

Sitting as a judge of the Court of Protection, Mr Justice Mostyn recently heard a difficult and sensitive welfare case, which was made more challenging by the movement restrictions due to the COVID-19 pandemic. Mr Justice Mostyn, with the agreement of all parties, decided that the case should take place using Skype for Business.

Mr Justyn Mostyn, solicitors, counsel and witnesses were all able to take part in the hearing via Skype and the applicant's solicitor arranged for all parties to have access to electronic bundles.

Recounting the experience, Mr Justice Mostyn said:

> "The hearing was conducted almost like any other. Each witness was asked to swear/affirm their evidence. I ensured the witness could be clearly seen on everyone's devices. Each counsel could introduce themselves, so the witness knew who was asking the questions, and expert witnesses were dealt with in the same way. Using Skype allowed parties to share video evidence, and documents could be shared on screen and discussed. The hearing was recorded and shared with all parties."

A solicitor who took part in the hearing commented:

> "The judicial leadership in the areas of family and civil justice has embraced the need for virtual technology to ensure justice continues. It goes without saying this is hugely necessary in a democratic society."

Mr Justice Mostyn also ensured that the relevant members of the media were invited to the hearing and sent the reporting restriction order, allowing them to follow the hearing and report on it – ensuring open justice and transparency can continue.

For Coronavirus (COVID-19) advice and guidance on the judicial website, **click here**.

17/4/20

Marriage rate for opposite-sex couples in 2017 lowest on record

Marriage rates for opposite-sex couples in 2017 were the lowest on record, with 21.2 marriages per 1,000 unmarried men and 19.5 marriages per 1,000 unmarried women. In total, there were 242,842 marriages in England and Wales in 2017, a decrease of 2.8 per cent from 2016. **The figures have been released by the Office for National Statistics**.

Less than a quarter (22 per cent) of all marriages in 2017 were religious ceremonies, the lowest percentage on record.

In 2017, there were 6,932 marriages of same-sex couples of which 56 per cent were between female couples; a further 1,072 couples converted their existing civil partnership into a marriage.

Nearly 9 in 10 (88 per cent) of opposite-sex couples cohabited before getting married in 2017; this proportion was slightly higher for couples who had a civil ceremony (90 per cent) compared with those who had a religious ceremony (81 per cent).

The average age at marriage of opposite-sex couples was 38.0 years for men and 35.7 years for women in 2017.

Zahra Pabani, a Family Law partner at **Irwin Mitchell**, reflecting on the decline in religious marriages, said:

> "The new statistics are unsurprising given the shifts we're seeing as family lawyers in the way couples from religious backgrounds adapt to modern societal standards and a more challenging economic landscape.
>
> "Times have moved on, and being a couple doesn't necessarily mean having a piece of paper to prove that. More couples are getting together from different religious backgrounds; while living together might be acceptable to traditional parents, getting married may be a step too far for the families – and so fewer religious ceremonies are taking place.
>
> "There's also the rise in civil ceremonies to take into account – instead of being at the church or mosque, couples can get married pretty much anywhere they want to, which is just another example of how times have changed."

The drop reflects a long-term trend; while religious ceremonies accounted for 85 per cent of marriages in 1900, this had dropped to 49 per cent by the 1970s and continued to plummet. The stats also note that civil marriages have outnumbered religious marriages every year since 1992.

Irwin Mitchell also note that the expense of a ceremony might put couples off getting married, particularly when house prices are also at their highest-ever levels. Zoopla currently estimates the average property value to be around £320,000 as of April 2020, while the average wedding cost for the UK currently runs at over £30,000 according to bridal website Bridebrook's 2018 statistics.

Ms Pabani continued:

> "It's a lot more difficult for people to get on the property ladder these days, and so couples might prioritise saving for a decent house deposit instead of an eye-wateringly expensive wedding – or even just wait until they're a bit older to get married, as there's no real rush, which is also reflected in the statistics.
>
> "At the end of the day, times have changed but love is still love; couples can still be committed to one another, but without the ring and expense of a wedding."

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

17/4/20

Legal Aid Agency: Updated coronavirus (COVID-19) information

The Legal Aid Agency is continuing to make updates to its contingency response page on coronavirus (COVID-19). The content has been streamlined with signposting to pages in specific areas of provider work:

- remote working
- processing and payments
- contract management and assurance
- working with clients

The idea is to make it easier for practitioners to find the information they need so that they can continue providing legal aid services for their clients during the coronavirus outbreak.

For the contingency response page, **click here**.

17/4/20

New private law cases received by Cafcass in March 15 per cent lower than 2019

Cafcass received a total of 3,443 new private law cases (involving 5,198 children) in March 2020 – almost 15 per cent (or 626 cases) lower than the same month the previous year.

In the twelve months from the beginning of April 2019, Cafcass has received 45,694 new private law cases, which is 1,852 cases (4.2 per cent) more than the same period the year before. These cases involved 69,553 children, which is 2,793 (4.1 per cent) more children than April 2018 to March 2019.

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.

17/4/20

New public law cases received by Cafcass fell 9 per cent in March

Cafcass received a total of 1,436 new public law applications (involving 2,266 children) in March – 153 applications (9.6 per cent) fewer than in the same month the previous year.

In the twelve months between April 2019 and March 2020 Cafcass received 18,053 public law applications featuring 29,120 children; this represents a decrease of 3.7 per cent (133 public law cases) and a decrease of 3.7 per cent (1,116 children) on the 18,367 new public law cases received and the 30,236 children on those cases between April and March 2019.

For the month-by-month figures for public law applications, **click here**.

17/4/20

Remote Access Family Court - version 4

On 17 April 2020 the President of the Family Division, Sir Andrew McFarlane, circulated a link to version 4 of the Remote Access Family Court. For that version, **click here**.

The judiciary website contains the latest advice and guidance from the judiciary in relation to the coronavirus pandemic (including the Remote Access Family Court). It will be updated when there are significant developments and should be checked on a regular basis to ensure you are kept informed of the latest position. For the section, **click here**.

19/4/20

Guidance as to the replacement of affidavits with statements of truth in non-contentious probate processes

On 17 April 2020 the President of the Family Division issued guidance to assist the courts and practitioners in relation to the use of statements of truth as a replacement for affidavits in non-contentious probate processes in current circumstances where at present many solicitors cannot access their offices or papers.

For the guidance, **click here**.

19/4/20

Victims' Commissioner and Domestic Abuse Commissioner call for Government to bring empty hotel rooms into use

The Government should act urgently to implement a scheme for suitable hotel rooms to be made available for victims of domestic abuse who need to escape in areas where refuges are full. That is the joint message from Dame Vera Baird QC, the **Victims' Commissioner for England and Wales** and Nicole Jacobs, the **Domestic Abuse Commissioner for England and Wales**.

The emergency measure is required following an increase in complains of abuse caused by the Covid-19 lockdown which is impacting on refuge capacity. It follows calls from Southall Black Sisters and Compassion in Politics who proposed the idea at the end of March, and who contacted hotels directly.

The two commissioners, who are supportive of the plan, have themselves sent a letter to hotel Chief Executives asking for them to help, with several indicating they would be receptive to the concept. In their letter the commissioners said:

> "Refuge remains the best place for victims and their children to flee to, but where forced to close due to Covid-19, or where demand outstrips supply, it is vital that victims have safe accommodation away from their abuser. Therefore, we call on you to offer a hotel in a publicly undisclosed place, free of charge, to women fleeing domestic abuse where they have been unable to access refuge."

Dame Vera said:

> "We have support for the premise from the charity sector and from the hospitality industry. I raised this with the Home Secretary last week, because it will only realistically work if the Government gets involved in helping to overcome any problems and prioritises this to protect those at serious risk from domestic abuse.
>
> "I was impressed with the speed by which they acted to secure accommodation for homeless people, and we are calling for equally speedy action now to house those experiencing domestic abuse.
>
> "Many victims will be worried that the social distancing rules prevent them from leaving their homes or that there is nowhere they can safely go. The Government must now to get involved now to make this plan a reality."

Nicole Jacobs said:

> "Refuges remain the best place for victims and their children, but as the pressure mounts on these services during the current pandemic – with many being full or forced to shut – alternative accommodation is required to help house domestic abuse victims fleeing abuse.
>
> "The hospitality industry, with hotels across the UK with empty rooms, could work together with us to mitigate an escalating crisis in domestic abuse.
> "Whilst we welcome the Government's current and ongoing discussions with multiple hotel chains, a fast and appropriate resolution in these unprecedented times is a high priority.
>
> "I encourage the Ministry of Housing, Communities and Local Government to seek expertise from the specialist Domestic Abuse sector to help shape this initiative.

"We need to communicate to victims experiencing abuse during lockdown that there are options and support available to them."

19/4/20

President of the Family Division considers the appropriateness of a remote hearing

In ***Re P (A Child: Remote Hearing)*** **[2020] EWFC 32**, the President of the Family Division has considered the appropriateness of a remote hearing, in a proposed fully contested composite finding of fact hearing, concerning allegations of FII made by a Local Authority against a mother.

The decision of the President distils a number of key principles to be borne in mind when parties, and indeed the Court, are considering whether a matter is suitable to proceed by remote hearing. Sir Andrew McFarlane has said that there is 'no one size fits all' approach. Just because a matter can be heard remotely it does not mean it must be, and practitioners must be alive to issues of fairness and to ensure all parties are on an equal footing, particularly when considering the ability of lay parties to participate in remote proceedings.

For the judgment and a summary of it by Liam Kelly, **click here**.

24/4/20

Legal aid evidence requirements for domestic abuse victims relaxed

The ***Civil Legal Aid (Procedure) (Amendment)*** **Regulations 2020**, which will come into force on 15 May 2020 expand further the types of evidence of domestic violence which may support an application for civil legal aid.

Regulation 8 of the Amendment Regulations amends Schedule 1 to the **Civil Legal Aid (Procedure) Regulations 2012**. Regulation 10 provides that the such amendments do not apply to applications for civil legal services made before the coming into force date of these Regulations.

Regulation 7 amends regulation 61 of the 2012 Regulations to set out circumstances when an individual applying for family mediation need not attend the provider's premises in person.

For the Amendment Regulations, **click here**.

24/4/20

Adoption and Children (Coronavirus) (Amendment) Regulations 2020

The **Adoption and Children (Coronavirus) (Amendment) Regulations 2020**, which come into force on 24 April 2020, make amendments to ten sets of Regulations to relax and amend requirements imposed under them. The amendments are being made in order to assist the children's social care sector during the coronavirus pandemic. They apply to England only and will cease to have effect on the 25 September 2020.

The Regulations amended are:

- the Adoption Agencies Regulations 2005
- the Care Planning, Placement and Case Review (England) Regulations 2010
- the Fostering Services (England) Regulations 2011
- the Children's Homes (England) Regulations 2015
- the Residential Family Centres Regulations 2002
- Her Majesty's Chief Inspector of Education, Children's Services and Skills (Fees and Frequency of Inspections) (Children's Homes etc) Regulations 2015
- the Children (Private Arrangements for Fostering) Regulations 2005
- the Children Act 1989 Representations Procedure (England) Regulations 2006
- the Education and Inspections Act 2006 (Inspection of Local Authorities) Regulations 2007 and
- the Children Act 2004 (Joint Area Reviews) Regulations 2015.

For the Amendment regulations, **click here**.

24/4/20

Domestic Abuse Bill second reading scheduled for 28 April 2020

Measures in the Bill include:

- introducing the first ever statutory government definition of domestic abuse, which will include economic abuse
- establishing a Domestic Abuse Commissioner to champion victims and survivors
- introducing new Domestic Abuse Protection Notices and Domestic Abuse Protection Orders to further protect victims and place restrictions on the actions of offenders
- prohibiting the cross-examination of victims by their abusers in the family courts
- providing automatic eligibility for special measures to support more victims to give evidence in the criminal courts.

The House of Commons Library has published an overview of the Domestic Abuse Bill in advance of its second reading. For that briefing paper, **click here**.

For the Bill, as introduced, **click here**. For an opinion piece in The Observer concerning the Bill, **click here**.

24/4/20

Children's Commissioner creates local area profiles of child vulnerability during Covid-19

Anne Longfield, Children's Commissioner for England has published **analysis of the extent of child vulnerability around the country**, warning that much of it is hidden from sight under lockdown.

The Children's Commissioner's local area profiles of child vulnerability will help national government and councils identify how many vulnerable children there are in each local authority area, and highlight groups at heightened risk during the coronavirus emergency – such as those in overcrowded or inadequate accommodation, with fragile parents, young carers, or without internet access. This analysis is being used to inform the Government's work to create a dashboard by which it can monitor the safety and care of vulnerable children and young people through the coronavirus crisis.

The Children's Commissioner notes that hundreds of thousands of children in England are living with a cocktail of secondary risks that Covid-19 may exacerbate: lack of food in the house, homelessness, sofa-surfing or living in cramped living conditions, neglect, domestic abuse, substance abuse and parental mental health problems.

The matrix of local child need is the latest stage in a three-year project by the Children's Commissioner to ask: if society doesn't know how many vulnerable children there are, how can it do enough to help them? Her 2017 Vulnerability Report was the first attempt to gather all the available data into one place, and this project remains the only comprehensive data on all risks to children in England.

The coronavirus crisis brings into sharp focus both the dangers of vulnerable children falling through gaps in services and policy, and the value of good data from the front line in order to identify where help is needed. Real-time data has been at the heart of the Government's battle against Covid-19.

The Children's Commissioner is calling for the same capabilities to be deployed to identify children at risk as the crisis unfolds, especially those who may not be getting help as social work and other services are pared back.

The lockdown has removed most of the usual ways of identifying children at risk. The Secretary of State for Education has this week written to school leaders and local authorities setting out the importance of encouraging vulnerable children into school which, the Children's Commissioner says, is a very welcome step. However, the great majority of children with a social worker are not attending school, and other community hubs – such as doctor's surgeries, youth centres, children's centres and libraries – are closed. Some schools are working with councils to ensure that all children known to be vulnerable are still being seen by professionals; the Children's Commissioner wants this replicated throughout the country.

For the profiles, **click here**. For the Children Commissioner's full statement, **click here**.

Responding to the Children's Commissioner report on vulnerable children during the coronavirus crisis, Cllr Judith Blake, Chair of the Local Government Association's Children and Young People Board, said:

"Referrals to children's social care have fallen by more than half in many areas and councils continue to work closely with local partners and communities to identify children who may be at risk.

"Understandably, many families are concerned for the health of their children and other family members if they attend school. Councils are working with schools and families to provide reassurance, and to make sure that where children aren't in school, they are still being spoken with regularly.

"It is essential that local safeguarding partners, including councils, the police and health, have the resources and capacity they need to keep children safe, and that communities know how to spot signs of risk and how to report these."

26/4/20

A word on Covid- 19, the use of arbitration and the Expansion of the Children's Arbitration Scheme to include Relocation of Children

Shiva Ancliffe, barrister Coram Chambers reviews the law in relation to the relocation of children under the expansion of the arbitration scheme.

On the 6th April 2020 the much talked about expansion of the children arbitration scheme came into effect. This is a significant change to the now well established scheme launched in 2016. The scheme has had amendments to its rules along the way but until now, it has not received an extension of its scope. In summary, the scope of scheme has been expanded to include both temporary and permanent relocation of children to foreign jurisdictions that fall within article 2.2(c) below. This development could not be timelier, serving to reinforce arbitration as a strong and worthy contender to litigation.

Arbitration now more than ever has a significant role to play in the process and administration of family justice. The ever growing delays in the family justice system, which pre-date the current crisis brought about by Covid-19, will only be exacerbated by these national events. The family courts are adapting as quickly as possible to remote hearings but irrespective of this, very sadly many trials, (unless urgent), are currently being adjourned into the distant future due to staff shortages. Private law cases which are not perceived as urgent will be pushed to the back of the growing queue.

The ability for parties to jointly select an arbitrator who can determine cases promptly is a clear way to bypass the current challenges. The DFJ at the Central Family Court in guidance issued on the 6th April 2020, encouraged parties to

> "please consider all alternative dispute resolution possibilities." [1]

Not all cases are suitable for arbitration but many private law children cases lend themselves to arbitration. The most straightforward can be dealt with on the papers without an oral hearing. However, where evidence is required this is not a bar to arbitration in the current climate. The hearing can be conducted remotely by the arbitrator using one of the skype platforms available. Directions for case management are often undertaken by way of a telephone hearing.

Arbitration is naturally flexible and the scheme enables the arbitrator and the parties to agree the manner in which the hearing will be conducted. The binding nature of arbitration is very often underpinned at the end of the process by a court order in the "same or similar terms as the determination, or the relevant part of the determination." [2]

Permanent relocation cases fall at the more complex end of children arbitration and are very likely to give rise to the instruction of an independent social workers to undertake enquiries and report on the child's wishes and feelings.

The Family Law Arbitration Children's Scheme, Arbitration Rules 2020, 4th Edition

Changes to the rules to provide for temporary and permanent relocation

Which countries are included in the scheme ?

The scheme covers relocation to jurisdictions which have ratified and acceded to either the Hague Convention on the Civil Aspects of International Child Abduction 1980 or the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children 1996. Brussells II bis (Council Regulation(EC) No 2201/2003 displaces the 1996 Convention. What this means is that whilst we are members of the European Union we remain bound the reciprocal provisions for recognition of orders, enforcement and return provisions for abduction.

The provisions with regard to safeguarding in Article 17 provide a filter for suitability. Furthermore in the expanded scheme to temporary removal, if a case is considered to run a real risk of abduction it is unlikely to suitable for arbitration.

Article 2 below reminds us of the overall scope of the scheme with the amendment to article 2.2 (c).

> **Article 2 –**
> 2.1 Save as provided by Art.2.2 below, the Children Scheme covers issues between parents (or other persons holding parental responsibility or with a sufficient interest in the child's welfare) which relate to the exercise of parental responsibility or the present or future welfare of the child concerned (including the child's upbringing, present or future living arrangements, contact and education) and extends but is not limited to matters which could be the subject of an application to the Family Court under section 8 of the Children Act 1989.
>
> 2.2 The following disputes and issues are not within the scope of the Children Scheme:-
>
> (a) any application under the inherent jurisdiction for the return of a child to England and Wales ('this jurisdiction') from a country which is not a signatory to the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 ('the 1980 Hague Convention');
>
> (b) any application for a child's summary return to this or another jurisdiction under the 1980 Hague Convention;
>
> **(c) any application for permanent or temporary removal of a child from this jurisdiction except where the proposed relocation is to a jurisdiction or country which has ratified and acceded to the 1980 Hague Convention or the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children ('the 1996 Hague Convention') and, for so long as the United Kingdom remains bound by the provisions of the Brussels IIA Regulation, to the jurisdiction of another member of the EU to which the Regulation also applies**; [3]
>
> (d) any application for the court 'to examine the question of custody of the child' under Art.11(7) of Council Regulation (EC) No 2201/2003 after an order of a foreign court on non-return to this jurisdiction made pursuant to Art.13 of the 1980 Hague Convention;
>
> (e) any application for cross-border access within the scope of Art.41 of the said Council Regulation which, if a judgment, would require a court to issue an Annex III Certificate;
>
> (f) any dispute relating to the authorisation of life-changing or life-threatening medical treatment or the progress of such treatment;
>
> (g) any case where a party lacks capacity under the Mental Capacity Act 2005;
>
> (h) any case where any person with parental responsibility for the child or who seeks to be a party to an arbitration under the Children Scheme is a minor; and any case where any person with parental responsibility for the child is not a party to the arbitration;
>
> (i) any case where the child concerned has party status in existing proceedings relating to the same or similar issues, or should in the opinion of the arbitrator be separately represented in the arbitration.

Further additional provisions relevant to relocation:

Article 13.5

> 13.5 Where the subject matter of the dispute includes an issue as to the permanent relocation of any child to any of the jurisdictions identified in Art.2.2(c), the arbitrator, after liaising with the parties to the arbitration, shall identify in the determination the steps necessary to give full effect to the terms of the relocation in the proposed jurisdiction including, in particular, contact with the party remaining in the jurisdiction. Such steps may include (following the appointment of an independent social worker to assist in ascertaining the wishes and feelings of the child concerned) recording the wishes and feelings of the child concerned by an appropriate finding in the determination. If a determination is made concerning a proposed relocation to which the Brussels IIA Regulation applies, the arbitrator shall attach to the determination a certificate in the form of and complying with Annexe III to the Regulation.

These provisions mirror closely the ambit of enquiries that would be undertaken by the Court in a relocation case through the Cafcass officer. Instead, in the arbitration they will be undertaken by an independent social worker jointly instructed by the parties. As in the court process, the arbitrator will also need to consider contact to the absent parent and anticipate enforcement issues.

… and finally, a change to the Disclosure Checks

Article 17.1.1(b)

> 17.1.1 Prior to the commencement of the arbitration (see Art.4.5) each party shall have a duty: (a) to provide accurate information regarding safeguarding and protection from harm in their Form ARB1CS and Safeguarding Questionnaire; (b) to obtain a Basic Disclosure from the Disclosure and Barring Service or from Disclosure Scotland, as appropriate, and promptly send it to the arbitrator and to every other party; or alternatively, to provide an up to date CAFCASS report or Schedule 2 letter prepared in current proceedings concerning the safeguarding and welfare of the child(ren), if applicable;

Previously safeguarding checks could only be obtained from Disclosure Scotland. This has changed and the Disclosure and Barring Service in England & Wales now permits application from private individuals. Article 17 enables checks to now be sought by either service.

[1] HHJ Tolson QC on the 6th April 2016

[2] Article 13.4

[3] Emphasis added to identify the amended clause

Financial Remedies and Moving/ Selling a Property in the COVID pandemic

Maria Scotland, barrister, **5SAH** and **Rosalind Fitzgerald**, associate solicitor, **Bindmans** consider the issues regarding selling properties and moving home in the current health crisis.

One of the largest capital assets, if not the main capital asset in most financial applications ancillary to a divorce in the UK is the family home and other buy-to-let or holiday properties. Post-Brexit and the General Election, the property market appeared to be stronger. However, selling a property to release (and share) this capital in the current health crisis poses a huge issue and the question is what a property is now worth and when/ how it can be sold. This article seeks to explore some of these issues –

Is there even a property market at the moment?

Mark Hayward, CEO of NAEA Propertymark (National Association of Estate Agents), hosted a webinar on Rightmove's website on 2 April 2020 indicating that Rightmove are still seeing millions of property searches on their website every week and receiving thousands of enquiries. He attributed this to the fact that there are still a lot of people with a huge interest in property. His view is that these people fall into two categories –

(i) those who *would like* to move (day dreamers) and

(ii) those who have to move (and will buy/move), for reasons including divorce.

He advised that people are doing their homework during the lockdown: looking and planning so that the moment the stay at home rules are lifted they will be able to move quickly.

The housing market is expected to see a massive spike in activity once the stay at home rules are lifted. As such the guidance, so far as estate agents are concerned, is that there is still mileage in placing a property on the market, leaving it on the market and/or looking for a new property to move to upon a divorce.

A selling/ purchasing party cannot undertake any viewings in person during the crisis but many estate agents now offer virtual tours using computer technology and so people can still virtually view a property and be in a position to make an offer and move as soon as the stay at home rules are lifted. Other groundwork can also be done remotely such as the EPC, the searches, obtaining a mortgage and valuing the property (lenders can do an automatic valuation online) and exchange of contracts. It is completion that is made difficult by the stay at home rules.

Can either parties complete on a sale and move at the moment (during the time of the current stay at home rules/ curfew)?

The government has issued guidance on moving home during the health pandemic. It **is here**. It says the following:

> "We urge parties involved in home moving to adapt and be flexible to alter their usual processes. There is no need to pull out of transactions, but we all need to ensure we are following guidance to stay at home and away from others at all times, including the specific measures for those who are presenting symptoms, self-isolating or shielding. Prioritising the health of individuals and the public must be the priority. Where the property being moved into is vacant, then you can continue with this transaction although you should

> follow the guidance on home removals. Where the property is currently occupied, we encourage all parties to do all they can to amicably agree alternative dates to move, for a time when it is likely that stay-at-home measures against coronavirus (COVID-19) will no longer be in place."

The guidance is therefore, where possible, to delay selling/moving while measures are in place to fight coronavirus. If contracts have already been exchanged and the property is currently occupied, then all parties are advised to work together to agree to delay matters (for contractual reasons). The government guidance does not require agents and parties to stop completing on a property purchase but to be flexible unless the move is critical. Properties/ situations where a move may well be possible and be compliant with the rules to stay safe include –

- If the property is unoccupied

- If the property is a newbuild (again unoccupied).

The greater risks arise where completion of sale and the prospective move of home are into a previously occupied property (due to the risks of transmission of COVID-19). The **Law Society guidance** to conveyancing solicitors is that there is nothing to prevent its members completing on a sale where both parties to the transaction are willing so long as PHE guidance is followed and the properties are not occupied with cases of COVID-19 or suspected cases nor are the occupants self-isolating at the date of completion and all parties abide by social distancing during the move. This is of course easier where the move is into an unoccupied or new property. It would be advisable otherwise to sanitise the property prior to moving in. It would be worth a buyer considering having the property subjected to a professional deep clean before moving in. The government has given some advice, as follows –

> • Wear disposable or washing-up gloves and aprons. These should be double-bagged, then stored securely for 72 hours then thrown away in the regular rubbish after cleaning is finished,
>
> • Using a disposable cloth, first clean hard surfaces with warm soapy water. Then disinfect these surfaces with cleaning products. Pay particular attention to frequently touched areas and surfaces, such as bathrooms, grab-rails in corridors and stairwells and door handles,
>
> • If an area has been heavily contaminated, such as with visible bodily fluids, from a person with coronavirus (COVID-19), consider using protection for the eyes, mouth and nose, as well as wearing gloves and an apron,
>
> • Wash hands regularly with soap and water for 20 seconds, and after removing gloves, aprons and other protection used while cleaning.

What is a "critical" move?

The caveat to the government guidance is where parties have already exchanged contracts and the move is "critical". "A critical move" is not defined but is being interpreted as transactions where one party has to move due to work, family or health reasons (including vulnerability). No body (whether the government, Police or the Law Society) is policing the completion of sales so responsibility for deciding whether a sale is critical is subjective and down to personal judgment.

What if a party's move is in a chain?

The responsibility for whether a property sale completes therefore falls to the parties to the transaction and the conveyancer – to ensure that if the transaction completes it is done safely. If one party wants to withdraw or delay from a transaction, this usually has a domino effect down the chain and therefore a great deal of communication and flexibility is required. The key is tolerance, patience and communication.

What about removal companies (to move a party)?

The British Association of Removals ("BARS") has set out that they will not provide lorries or movers during the pandemic. BARS says its members have to touch an average of 700 items during a house move, which poses a health risk to each removal person. This leaves people who are moving (those who consider the move to be critical) to self-move or find a removal company who are not a member of BARS, which should be done with caution.

What about mortgage offers?

The usual mortgage in principle offer expires after six months, which may pose an issue if completion is delayed. However, UK mortgage lenders and building societies have given their commitment to extend existing mortgage offers for three months from their current expiry dates where clients have already exchanged contracts on the same mortgage rate as the original mortgage offer. This allows the chain to delay completion whilst moving home is difficult, and after the government advice that moves should be delayed where possible. That said, it is a concern that the Lloyds Banking Group and Barclays have now temporarily pulled many of their mortgage offers from the market unless the customer has a deposit of at least 40 per cent of the value of the property. The lender may also ask for updated proof of income at the date of completion which again may be problematic if the borrower's circumstances have changed and they have not worked during the stay at home rules or not worked at the same level of remuneration, and if so this will be subject to the lender's discretion.

What if we need to delay implementation of a financial remedy order?

Given the issues highlighted above, parties who are currently implementing financial remedy orders may need to agree extensions to dates for sales, transfer of property and payments of lump sum funded by mortgage offers yet to be obtained. Courts will almost certainly grant coronavirus related requests for extensions to deadlines. **HCMTS have confirmed** that there are no application fees to apply for a coronavirus related adjournment of a hearing. Whilst no such relief has been granted with regards to application fees for requests for extension to a court deadline, it is certainly worth asking the court to waive the fee if the request is coronavirus related.

Are valuations worth the paper they are written on?

A more fundamental question is the impact of the pandemic on valuations of property and assumptions of value obtained prior to the crisis. For cases in proceedings or in discussions as to settlement, there will be understandable nervousness about relying on recent valuations. Where valuations and housing need assessments are critical to settling needs cases, parties may be advised to take a wait and see approach. Can we settle cases at all based on current valuations? As always in financial remedies, this depends on the attitude to risk for those involved.

Is a final order or agreement undermined by the current uncertainty?

There has been much discussion amongst financial remedy practitioners as to whether the current crisis could constitute a Barder event. In other words, if a case has recently settled on the basis of an assumption as to valuation, and the property market has collapsed, is this a new event which could invalidate the basis upon which the order was made and allow it to be revisited? In ***Myerson v Myerson*** **[2009] EWCA Civ 282** the 2008 financial crisis and the massive consequential collapse in the value of the husband's shareholding did not amount to a *Barder* event and the court found that "*the natural processes of price fluctuation whether in houses, shares or any other property, and however dramatic do not satisfy the Barder test*". At present it is too early to tell what the long-term impact will be on house prices because of the difficulties in valuing property in a market which is effectively on hold. There is an argument that the worldwide pandemic and completely unprecedented shut down of business and housing market could not have been foreseen as a "natural price fluctuation" and it seems likely that it will be worthwhile for at least some practitioners to argue the case for a Barder appeal. Whether or not such arguments will be successful is as unpredictable as the global pandemic itself and the long-term impact on the economy and house prices generally.

Summary

Selling properties and moving home, like all areas of life, have been made problematic by the health crisis with the inevitable impact on financial applications in divorce. Parties are being urged by the courts and tribunals to consider arbitration and mediation in all financial remedy cases. Early communication between parties and flexibility is key.

Children Arbitration: A Speedy Solution for Contact Disputes during Covid-19 and beyond (including 3-step printable guide)

Hassan Khan, MCIArb, Barrister and Children's Arbitrator at **4PB**, explains how arbitration may offer a prompt and appropriate remedy for children disputes between parents.

Speedy access and prompt decisions in private law children disputes are among the worst hit casualties during the Covid-19 pandemic. I have received numerous calls from concerned solicitors relating to clients relying on Covid-19 as a basis for denying time spent with a parent, with the result that nothing can supposedly be done until a court eventually hears the dispute. Of course, the Family Division and Cafcass have issued their own guidance in relation to what is expected in these cases. But what about the significant number of parents who remain in deadlock and cannot wait until a court can hear their case?

Children Arbitration offers a speedy and prompt solution. A specialist and experienced children barrister acts as your private judge, and whether as a swift paper exercise, or after listening to both sides (remotely), can provide a written determination quickly. All this is likely to shave months off any court-ordered decision, especially now. Arbitration is also something to consider for most private law cases, given the increasing burden on public resources.

With Arbitration, clients can be assured that the determination made by an Arbitrator is legally binding in the same way as a court-ordered decision and any resulting court order can be enforced through the courts. The previous President, Sir James Munby, expressly endorsed the Family Law Arbitration Scheme and produced **practice guidance in 2018**. The current President, Sir Andrew MacFarlane, at the Resolution Conference in 2019 stated that

> "there has got to be a better way." than "using the Family Court to resolve straightforward, non-abusive, relationship difficulties between parents who separate is unlikely to be an effective course to follow, costs a great deal of money and is not seen, by many of its users, to be working effectively."

This is where Arbitration comes into play.

CHILDREN ARBITRATION PRACTICE GUIDE

Stage 1 - Suitability

First, check if the nature of your dispute is covered and suitable for Arbitration.

The scheme covers:

- Issues between parents (or those with parental responsibility or a sufficient interest in the welfare of the child) which relates to the exercise of parental responsibility or the present or future welfare of the child.
- This includes: where and with whom the child shall live, contact, arrangements concerning the child's upbringing e.g. division and allocation of holidays, religious upbringing, schooling, medical treatment for non-life threatening or non-life changing conditions.
- Children Act 1989, s.8 orders.

- Relocation where country signatory to 1980 and 1996 Hague Convention and Brussels IIA.

The scheme does not cover:

- Child abduction cases.
- Relocation cases where country not signatory to 1980 and 1996 Hague Convention or Brussels IIA.
- Article 11(7) and 41 of Brussels IIA.
- Medical treatment for life threatening or life changing conditions.
- Mental Capacity Act cases.
- Child litigant or child party.

STAGE 2 - STARTING THE PROCESS

- **The parties must agree** to use arbitration to deal with either the whole of their dispute, or just one part of it. If in the middle of proceedings, you must agree to halt them. Once arbitration starts you should not start new court proceedings simultaneously.
- **Choose an Arbitrator** registered with the **Institute of Family Law Arbitrators** . You can approach a specific Arbitrator directly, and the Arbitrator will inform IFLA to ensure the correct forms are completed. At this stage, you can agree the Arbitrator's fees.
- **Disagree on identity of Arbitrator?** IFLA can nominate one.
- **Sign and submit Form ARB1CS** (now in its 4th edition) to IFLA's administrator **info@ifla.org.uk**. The parties include full details of their dispute.
- **Conditions of Arbitration**: parties must agree to comply with the terms set out in the ARB1CS Form, which includes an obligation to comply with the Arbitration Rules, comply with decisions made by the Arbitrator and agree that the determination of the Arbitrator is final and binding (subject to certain exceptions).
- **Safeguarding**: As part of the ARB1CS, the parties must also obtain a 'basic check' from the Disclosure and Barring Service (DBS). If the parties are in current proceedings, they must provide the up to date welfare/cafcass reports or any local authority/ safeguarding checks.
- **Arbitrator accepts appointment and Arbitration commences!** Once an Arbitrator has been appointed, the Arbitrator will contact the parties, to agree the terms of the arbitration, including the nature of the dispute, the procedure to be adopted and fees. A venue may also be considered but most Arbitrators can use their Chambers or Offices, if face-to-face meetings are required.

STAGE 3 - THE ARBITRATION

- **English law applies** to the substance of the dispute.
- **Parties in control of process**. The Arbitration process can be done as a paper exercise (where the Arbitrator can decide, based on the papers submitted) or by telephone or face-to-face meetings.
- **Procedure:** The parties can agree a general procedure or an alternative procedure.
- **General procedure** is one where the arbitrator will conduct a case management conference at the start of the process and set down a final meeting if this is required.
- **Alternative procedure** is one that is agreed between the parties – for example a document only procedure or some other expedited process.
- **Final Meeting** can be agreed to suit everyone's availability and be set down swiftly.
- **Prompt Determinations** are delivered, which will include full reasons.

- **Fees of Arbitrator** must be settled before the determination is delivered, as well as any other costs, such as experts and venue hire.
- **Court Order**: The determination of the Arbitrator can be converted into a court order by the parties.
- **Enforceability**: The court order is enforceable in the usual way.
- **Right of Appeal**: The Arbitrator's determination is subject to a right of appeal if there are legal errors or serious irregularity.

Click here for the printable practice guide

Adoption & Children (Coronavirus) Regulations 2020 – a step too far

Madeleine Whelan, barrister, **Fourteen**

The **Adoption and Children (Coronavirus) (Amendment) Regulations 2020** quietly came into force on 24.04.2020 following little scrutiny from Parliament. They were made on 21.04.2020, laid before Parliament on the Thursday and hurriedly passed on Friday; there was not the usual 21 day scrutiny period.

This should be a concern to all family lawyers and children's' rights advocates. In the explanatory note, it is said that these amendments are passed *"in order to assist the children's care sector during the coronavirus pandemic and cease to have effect on 25th September 2020"*.

Some of the key changes introduced by these measures include:

- The statutory LA visits to looked after children under the Care Planning, Placement and Case Review Regulations 2010 no longer need to take place every 6 weeks, instead can be "*at regular intervals*" and can take place via telephone or video link

- The LA no longer need to review the child's case within 20 days, but simply "*as soon as is reasonably practicable*"

- Reg 24 temporary fostering provisions now apply to anyone, rather than a "*connected person*" and a placement plan is no longer required before placement with the carer

- Reviews of a child's care no longer have to take place every 6 months

- No longer a statutory requirement for residential children's homes to "*promote and make proper provision for the health and welfare of residents*" and complaints procedure has been relaxed

- Unannounced visits to and reports on the standard of residential children's homes by the registered provider no longer need to take place once a month

- Twice yearly Ofsted inspections are no longer required

- Adoption panels no longer need to be properly constituted or referred to

- Fostering panels are optional

- Emergency placements with local authority foster parents which previously could only last 6 working days can now last up to 24 weeks

- 'Short break' placements for children can last up to 75 days (previously 17 days)

- A child can be deprived of their liberty in a children's home if infected with coronavirus

Clearly these amendments make extremely concerning reading in relation to the safeguards present for children in care, who are already an overwhelming vulnerable group. The relaxing of supervision via panels, visits from social workers and inspections by registered bodies combined mean a long period with very little third party scrutiny over the standard

of care being provided to looked after children in the UK. The politically minded may remember that in 2016 the government attempted to give local authority the chance to "opt out" of their obligations under social care regulations, in a clear attempt to undermine those safeguards. Since then, they have couched these relaxations as a narrative of "freedom" for local government to manage looked after children how they see fit in their area, when it is patently an attempt to weaken the rights of children in the looked after sector and avoid strict obligations on local authorities.

Turning first to adoption, undoubtedly one of the most controversial practices of the social care system anyway and a clear breach of Article 8 unless in accordance with law as is necessary in a democratic society, the previous safeguards enshrined in law ensured that each potential adoption decision and prospective family was scrutinised by an independent panel. This is no longer required under the coronavirus amendments – it is unclear logically how the pandemic affects the ability of a panel to make independent decisions on behalf of a child. Clearly, panels and meetings can take place and be properly constituted even under a lockdown. It is concerning that this is a freedom the government has previously attempted to remove and has taken the first opportunity to erode in the name of public health. The justification for these amendments that they "assist the children's social care sector" is not expanded upon within the explanatory note and without the 21 day scrutiny it is very hard to see how relaxing the requirements of proper review of adoptions is assisting anyone, least of all the children concerned.

For practitioners, the most immediately relevant passages are undoubtedly those relating to Reg 24 fostering placements. Previously, a child could be placed with a 'connected person' who was not a local authority approved foster carer and the local authority had the power to approve the placement for up to 16 weeks. The Coronavirus Amendments remove the requirement for that person to be 'connected' to the child, which, again is difficult to justify on public health grounds. Relaxing the connection the potential carer must have with the child does not seem to "assist" the local authorities in the exercise of their duties, it simply removes a basic protection for the child that they have an existing relationship with the carer before being placed. It could be argued that these changes make it easier to source carers for children in the pandemic, but this can easily be countered by the fact that placing children with people to whom they are not 'connected' undermines the stability of that placement and undoubtedly creates more work for the social care team in the long-term. This, combined with the fact that the local authority do not need to have a placement plan prepared before placement, meaning there will be less analysis of the stability and future of placements for children.

In relation to the deprivation of liberty provisions, the new amendments make a fundamental change to previously understood laws on the deprivation of liberty of children. Prior to this, the deprivation of liberty of children in children's homes had to be sanctioned by a court order in accordance with the Children's Homes Regulations 2015. However, there is a significant amendment introduced which now allows for the restraint of deprivation of liberty of children "*in accordance with an exercise of powers under Schedule 21 to the Coronavirus Act 2020*". That Schedule relates to the powers conferred on public health officials in relation to "potentially infectious persons". Essentially, children may be restrained and/or detained within their children's home if they are infected with coronavirus. Further, where children are detained on the date of expiry (25th September 2020), they shall continue to be so as if the coronavirus regulations remained in force. The provisions are silent on when this should be lifted or reviewed.

There are a huge number of smaller but significant amendments brought into force by these provisions. It is important for all practitioners to be aware of the reduced obligations on local authorities during this crisis and the potential challenges this may present as proceedings are ongoing in the pandemic. Fortunately, little has been altered in terms of the obligation to promote and provide contact for families, which is something the local authority must continue to promote and offer in some form. However, the recourse to third party review and independent analysis of the conditions for looked after children throughout this pandemic have been sorely affected and practitioners on all sides must be alive to this to ensure that looked after children do not fall through the cracks at such a dangerous time.

28.04.2020

CASES

W v H (divorce financial remedies) [2020] EWFC B10

1. This case is notable principally due to the approach taken to pensions – it is a rare published case where pension sharing is addressed in a needs-based context and on a set of facts that is within the range of 'day-to-day' matters seen by many family law professionals. The judge has given specific consideration to the report of the Pension Advisory Group, to the extent of quoting significant passages from the report itself, and the judgment very helpfully addresses some of the most common and most important factors involved many pensions cases.

2. The three key pensions points addressed here are:

a. Whether to divide pensions according to capital value or income value

b. Whether to exclude pension assets acquired before the marriage (a.k.a. 'apportionment' or 'ring-fencing')

c. Whether to treat pensions separately or whether to 'offset' the division of pension assets against the division of other assets

3. Helpful references for readers may include:

a. The report of the Pension Advisory Group, which can be accessed here

b. This author's previous article summarising the PAG report and explaining some key concepts and terminology around pensions on divorce, which can be accessed here

4. It is notable that at paragraph 59 of the judgment the judge indicates he has approached the three pensions points above with specific reference to, and reliance upon, the PAG report, which is noted to have

'the support of the Family Justice Council and the President of the Family Division and should, in my view, be treated as being prima facie persuasive in the areas it has analysed, although of course susceptible to judicial oversight and criticism.'

The facts of this case

5. The wife ('W') was 50 and The husband ('H') was 48. Length of relationship including cohabitation was 17 years. There were three children of the marriage, ages 18, 16 and 10. W and the children remained in the former family home. W was principle carer for the children and H earned the more significant income both during the marriage and after separation. W's anticipated future income from working was relatively modest (c.£14,000 per annum gross) and H's was relatively significant (c.£144,000 per annum gross plus bonuses). The key assets in the case were the former family home, with a market value of c.£730,000 and a net equity of c.£240,000, and H's defined benefit ('DB') pension fund with a cash equivalent ('CE') figure of c.£2.1m. Both parties had notable debts including litigation costs.

6. The judge concluded that the case was a needs case, and that there was a reasonable requirement for W to remain in the family home until the end of the existing mortgage product's interest-only term, namely November 2024, which meant that H's housing needs would be met until that time via the rental market. Thereafter H had a reasonable need to purchase his own property (see judgment paragraph 38). The parties were agreed that it was a case where spousal maintenance should be paid (and where child maintenance would be paid) and by the time of the final hearing there was a relatively nominal difference in the figures the parties were presenting on maintenance (see judgment paragraph 40).

Housing, income, maintenance, debts

7. The court's approach to housing, income, spousal maintenance and debts was a careful and methodical one that makes the judgment very accessible, and does not require summary or repetition, on the basis of it being specific to the facts of the case and not the notable factor in the judgment. That being said, there is a helpful short summary of the key principles of *contributions and equal division of capital* at paragraphs 46 to 53 that may be of assistance for practitioners looking for a helpful reference point on these matters.

8. There is also a helpful mention at paragraph 70(i) of the case of ***AB v CD*** **[2017] EWHC 3164** on the issue of global maintenance orders, the judge here noting that whilst AB v CD provides 'strong support' for the making of such an order, it is worth bearing in mind that

'The existence of a global order carries with it the complication of knowing how to proceed in future if, for example, circumstances change … if a disaggregated order can be made fairly then it is often the better approach…'

Pensions

9. The treatment of pensions is the notable factor in this case and takes up a majority of the judgment. The three key pensions points identified are those set out above, and summarised in the judgment at paragraph 58.

10. On the first issue, namely whether the court should divide pensions with a view to *equality of capital or equality of income*, the following observations are made at paragraph 60:

a. There is no 'one size fits all' answer to this issue

b. Whilst there are a number of situations where reference to the overall / capital value figures is likely to be the appropriate means of calculation for the purposes of division (for example where pension assets are relatively small, where parties are relatively young, where pension assets are relatively straightforward) (60(i)) …

c. … there are scenarios where division with reference to capital value '*may well not represent a fair solution*', in particular where there is a defined benefit pension involved and/or where parties are closer to pension age. (60(ii))

d. The PAG report makes specific reference to this, and the judge has quoted at 60(iii) from the report itself. Key parts of that quotation being '*Given that the object of the pension fund is usually to provide income in retirement, it will often be fair … to implement a pension share that provides equal incomes from that pension asset … Equality of income will often be a fair result … A division that pays little or no attention to income-yield may have the effect of reducing the standard of living of the less well-off party significantly.*'

e. The Family Justice Council's report 'Guidance on Financial Needs on Divorce' makes a similar point, namely that '*In small to medium money cases .. where needs are very much an issue, a more careful examination of the income producing qualities of a pension may well be required…*'

f. On the facts of this case, as a needs case, the starting point was assessed to be pension sharing with reference to equality of income, not capital

11. Whilst it is not said explicitly in this judgment, the writer would submit it is apparent from both this judgment and the PAG report that if one were to suggest a 'normal', 'standard' or 'default' approach or assumption to pension sharing, it would be that other things being equal, sharing pensions with reference to income, not capital, is more likely to generate a fair result. Whilst of course this cannot be treated as any sort of formalised or strict approach, the broader principle of sharing with reference to *income* accords with the broader nature of what a pension asset is actually for – it is an asset that produces income upon retirement. Thus, it makes good sense that one would consider a pension's income figures, in preference to its capital value figures, when determining how it should be divided.

12. On the second issue, namely whether the pre-marital portion of the pension should be excluded from division (often known as '*ring-fencing*' or '*apportionment*'), the following observations are made at paragraph 61:

a. Although it has been '*an established practice in some courts*' to make a straight line deduction in order to exclude pre-marital pension contributions, '*this approach carries with it significant risks of unfairness*' (61(i)).

b. The justification of the above approach to deduction is sometimes said to originate from the case of *H v H* [1993] 2 FLR 335, but in fact there are very good reasons why this is not now applicable, including '*that at the time it was delivered pension sharing did not exist, White v White had not been decided and the use of CEs in these cases was not widespread.*' (61(ii))

c. Pensions apportionment is in one sense '*no more than, in modern parlance, the identification of non-matrimonial property*' (61(iii))

d. Crucially, it is said at 61(iv), that in a needs case '*Where the pensions concerned represent the sole or main mechanism for meeting the post-retirement income needs of both parties, and where the income produced by the pension funds after division falls short of producing a surplus over needs, then* ***it is difficult to see that excluding any portion of the pension has justification****. In the words of Lord Nicholls in* ***White v White* [2000] UKHL 54***: "in the ordinary course, this factor"..i.e. the factor that the property concerned is non-matrimonial…"can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property".*' (emphasis added by the writer)

e. The rationale behind this is emphasised with reference at 61(v) to the PAG report, which points out that pensions should be treated no differently to other classes of assets when it comes to meeting needs – if an asset is required to meet needs then its source and date of acquisition is secondary, potentially to the point of irrelevance:

f. "*The vast majority of cases … will be needs-based. … It is important to appreciate that in needs-based cases, just as is the case with non-pension assets, the timing and source of the pension saving is not necessarily relevant - that is to say, a pension-holder cannot necessarily ring-fence pension assets if, and to the extent that, those assets were accrued prior to the marriage or following the parties' separation. It is clear from authority that in a needs case, the court can have resort to any assets, whenever acquired, in order to ensure that the parties' needs are appropriately met*"

g. The nature of the Lifetime Allowance being to limit the tax benefits of pension assets worth more than the Lifetime Allowance figure (presently £1,055,000) means that 'it is quite unlikely that pension funds will themselves take the case outside the category of a needs case.'

h. The unfairness identified at 61(i) is expanded upon at 61(vii) in relation to defined benefit pensions, where it is pointed out that most DB schemes acquire more value towards the end of the contributions period than at the beginning, and so to exclude on a straight line basis fails to reflect the disproportionate nature of contributions.

13. On the third issue, namely *whether to treat pensions separately or to 'offset'* the division of pensions against the division of other assets, the judge at paragraph 62 is keen to highlight the PAG recommendation to try where possible to avoid offsetting, due to the risks of unfairness that accompany the exercise. The judge notes at 62(ii) '*that mixing categories of assets runs the risk of unfairness in that valuation issues become very difficult, and, absent agreement, it may be unfair anyway to burden one party with non-realisable assets while the other party has access to realisable assets.*'

14. The writer would also draw attention to the PAG recommendation that usually where offsetting is being considered, it requires expert assistance from a Pensions on Divorce Expert ('PODE') to be able to undertake suitable calculations for such purposes. To proceed with offsetting in the absence of PODE advice as to how to approach the calculations carries with it a significant risk of liability for professional negligence.

15. In this case, therefore, the judge rejected H's proposed apportionment approach as unfair (and it is interesting to note how different the division would have been - see paragraph 63(iv) in particular for the figures) and determined that equalisation of pensions income at age 60, on the facts of this case, was the fair outcome. The judge also rejected W's proposed offsetting of pensions assets against equity in the family home on the basis that it would not provide H with adequate capital to re-house by way of future purchase.

16. The key terms of the final order to be made are found in the judgment at paragraphs 65, 71 and 76.

Costs

17. On the matter of costs, it is worth reading paragraph 41, where the judge rejects a request from W for an extra £1,000 per month in periodical payments for 26 weeks (the writer assumes this is a typographical error and should refer to months) to pay her outstanding legal costs of £26,000, on the basis that it would be a back door costs order that was not justifiable, bearing in mind FPR 28.3(5).

Summary by **Matthew Richardson**, barrister at **Coram Chambers**

Re P (A Child: Remote Hearing) [2020] EWFC 32

The decision of the President distils a number of key principles to be borne in mind when parties, and indeed the Court, are considering whether a matter is suitable to proceed by remote hearing. There is 'no one size fits all' approach. Just because a matter can be heard remotely it doesn't mean it must be, and practitioners must be alive to issues of fairness and to ensure all parties are on an equal footing, particularly when considering the ability of lay parties to participate in remote proceedings.

Procedural History

- Proceedings were issued in April 2019, but, as the President notes, 'this young person has been subject of contested private law proceedings for a good deal longer than that.' [1]
- The matter was listed for a 15-day finding of fact hearing to be heard by a Deputy High Court Judge sitting in the Family Court in Guilford beginning Monday 20 April 2020.
- At A CMH on 13 March 2020 the 'lockdown' had not yet commenced, and the possibility of a remote hearing was not considered.
- At the PTR on 3 April 2020, the parties, along with the judge, accepted that the hearing would now go ahead remotely having been influenced by MacDonald J's 'The Remote Access Family Court' document which gave accounts of early successful remote hearings.

- On 16 April 2020, the President of the Family Division convened a short hearing to consider the merits of the matter proceeding remotely.

The Parties' Positions

The Local Authority maintained, in the course of their submissions, that despite the complex nature of the allegations it was nonetheless '*a hearing that can be properly undertaken over the remote system*' [14]. In support of the same, the Local Authority sought to assert that the witnesses, save for the parents, are professional witnesses and as such it would be possible for the trial process to be conducted remotely.

In addition, the Local Authority maintained that the young person was already suffering, and would continue to suffer, significant emotional harm by being held in a position of limbo, only abating once a decision is made. A further delay, submitted the Local Authority, would only serve to prolong and further that harm and, as a result, the matter '*must be heard now to meet her welfare needs*' [15].

In the event that the Court did not support that view and remained concerned about the Mother's participation throughout the hearing. Leading counsel, Mr Taylor QC, submitted that the Court could hear the professional witnesses now and convene a hearing at a later date for the lay parties or, again in the alternative, have a split hearing [16].

The Father supported the Local Authority position, albeit he was not involved in the FII part of this case. The Father 'remained concerned for his daughter's welfare and wishe[d] for the determination to be made now.' [17].

The Children's Guardian, represented by Miss Howe QC, supported the Local Authority in that it was submitted on the Guardian's behalf that the Court should hear '*…the full hearing or, as the Local Authority submit, in some way that at least achieves the hearing of professional witnesses at this stage.*' [18]

Miss Howe on behalf of the Guardian suggested that technical difficulties which may prevent the Mother's participation with her lawyers or at the hearing could be overcome and should not be a reason for an adjournment.

The Mother, represented by Miss Allison Munroe QC, leading Mr Tautz, opposed the Local Authority position and sought to adjourn the matter. It was accepted that the Mother did not initially oppose a remote hearing at the PTR on the 3rd April 2020, but at that point it was understood that there would be a hearing that would be undertaken by remote hearing in light of the Covid-19 pandemic.

The Mother submitted, in light of recent guidance given to judges by the Presidents of their respective divisions, but also in light of the mother's inability to effectively participate within the proceedings (due to an unstable internet connection and her ability to receive advice and to give instructions throughout the hearing), that '*this is a case that falls outside the category of hearing that could be contemplated as being able to be concluded over a remote platform in a manner that meets the requirements of fairness and justice.*' [19]

The President made note that some judges have allowed the attendance of lay parties, and their representative, to attend court to give evidence however this was not deemed appropriate in this matter due to the Mother's suspected infection with Covid-19. [20]

The President's Decision

In short, the President considered

> '…that a trial of this nature is simply not one that can be contemplated for remote hearing during the present crises. … I would hold that this hearing cannot be properly or fairly be conducted without her physical presence before a judge in a courtroom.' [29]

As a result of that decision, the President re-listed the matter until such time that the restrictions relating to Covid-19 are lifted.

General principles to be distilled from the President's decision

- 'The Remote Access Family Court' written by MacDonald J '*does not offer guidance or give direction*' as to whether a hearing should be heard remotely. The document, in the President's words, is 'aimed firmly at the mechanics' [8] of remote hearings.

- 'E*stablishing that a hearing can be conducted remotely, does not in any way mean that the hearing must be conducted in that way.*' [8] (emphasis added by the President).

- FII is a type of child abuse which requires '*exquisite sensitivity and skill on the part of the court.*' Furthermore, it is an 'extremely unusual disorder' and investigation of the same is 'incredibly challenging.' [11] The President considered, in matters of FII, it crucial '*for the judge to be able to experience the behaviour of the parent who is the focus*

of the allegations throughout the oral court process; not only when they are in the witness box being examined-in-chief and cross-examined, but equally when they are sitting in the well of the court reacting…' [12]

- The letter issued by the 'Presidents' to judges on 9 April 2020 does not give guidance and should be considered as setting parameters which may assist the Court in determining whether or not a remote hearing should proceed.

- Parties are reminded of the President's guidance issued on the 27 March 2020:

> '…we must not lose sight of our primary purpose as a Family Justice System, which is to enable the courts to deal with cases justly, having regard to the welfare issues involved [FPR 2010, r1.1 'the overriding objective], part of which is to ensure that parties are 'on an equal footing' [FPR 2010, r1.2]. In pushing forward to achieve Remote Hearings, this must not be at the expense of a fair and just process.' [23] (emphasis added by author)

- In deciding whether to proceed, the Court and the parties may consider a range of factors including, the seriousness of the case, available facilities, the party's available technology, personalities and expectations of participants and the tribunal's experience of remote working to name but some. That is why, says the President '*…that the decision on remote hearings has been left to the individual judge in each case, rather than making it the subject of binding national guidance.*' [24]

- The impact on professional diaries of vacating hearings cannot be a factor which weighs very significantly when deciding whether to proceed with a remote hearing. [25]

- The Court should be mindful, even where all parties appear to consent to proceed by way of remote hearing, whether any particular case can proceed properly or fairly without the physical presence of a lay party in the courtroom. [29]

Summary by **Liam Kelly**, Pupil Barrister, **Deans Court Chambers**

Re C-D (A Child) [2020] EWCA Civ 501

Brief Facts:

- There had been longstanding concerns about the parents and their care of B. This was because of a number of issues including domestic violence; the father's criminality culminating in a significant term of imprisonment in 2011; and the mother's mental health and generally neglectful care of B.

- Proceedings began with the making of an Interim Care Order and Recovery Order. B was found in October 2018 after a nationwide search.

- A raft of evidence was obtained for the proceedings. This included a psychiatric report of the mother; an ISW's assessment of the mother; an initial viability assessment of Maternal Aunt as a carer for B; a special guardianship assessment of Maternal Aunt by the ISW; and a psychological assessment of B. The detail of the assessments, as far as they relate to understanding the appeal, appear at paragraphs (25)-(55) of the judgment.

- The final hearing became a split hearing. The Maternal Aunt was given permission to and did attend the hearing. The care plan was for B to live with foster carers or in a residential home under the auspices of a care order. Mother accepted on day one of the hearing that B could not return to her care. Mother and B's father sought for her to be placed with Maternal Aunt under a SGO. The Guardian supported the LA position.

- On 23 August 2019 the trial judge gave her substantive decision, finding the s.31 criteria were established and approving the care plan in terms of a reduction in contact between B and his parents. She also accepted the, effectively unanimous, professional evidence that a SGO in favour of Maternal Aunt would not meet B's needs and would place him at risk of further unacceptable harm. The only "realistic option" which the judge considered would meet B's future needs was a care order.

- However, the judge decided that before the proceedings were finally determined further assessments should be undertaken of Maternal Aunt to see whether B might be able to live with her as a kinship foster carer. The LA agreed to amend its care plan and to instruct an ISW to undertake a kinship foster assessment.

- A case management hearing took place on 4th October 2019. The judge was informed that a foster placement for B, which could be either short or long term, had been identified. B had been in a residential placement since early June 2019 following the breakdown of his then foster placement. The judge refused the mother's application for Maternal Aunt to be joined as a party. She also informed the parties that she proposed, at the next hearing, to consider whether to make an order under s.91(14).

- At the adjourned hearing on 28th October 2019 the judge made a final care order. She decided that it was "not in B's welfare interests for further investigations as to his placement and contact arrangements to be made outside the looked-after children process". The judge also made an order under s.91(14) in respect of both the mother and the father until 18th October 2021.

Grounds of Appeal

Mother appealed.
The grounds of appeal, were as follows:

(1) that the arrangements for contact between B and his mother were approved without the court hearing evidence or submissions;

(2) that the judge was wrong to make a care order in the absence of any or any sufficient analysis of the available options;

(3) that the judge wrongly equated foster care with a family member to foster care with a non-family member resulting in no consideration of proportionality;

(4) that the final care order was made prior to the completion of Maternal Aunt's assessment as a foster carer and without any support plans;

(5) that appropriate provision was not made to ensure that Maternal Aunt had effective access to justice;

(6) that the judge failed to consider the welfare checklist in full and omitted other relevant factors; and

(7) in respect of the s.91(14) order, that the court was wrong to make this order.

Held:

Ground (1): That the arrangements for contact between B and his mother were approved without the court hearing evidence or submissions is not sustainable. The judge approved the arrangements for contact in the care plan in her August 2019 judgment which followed the substantive hearing in July. There is no suggestion that any party sought to adduce any further evidence at this hearing and they were plainly able to make submissions as they considered appropriate. In any event, the judge had more than sufficient evidence to determine this issue.

Ground (5): Reliance was placed by Mother upon the trial judge having commented that Maternal Aunt '*requires representation*'. Mother also submitted that this should have been achieved by the court directing that an application for an SGO be made and/or by joining Maternal Aunt as a party, as required and set out in In re P-S at [52]-[56]. This argument was rejected on the following basis:

- The circumstances of the present case are very different from those in In re P-S. In that case both the LA and the Guardian proposed that the children should live with their respective grandparents following positive special guardianship assessments. The failure to make them parties in those circumstances meant that that "did not have effective access to justice" such that the "procedure was unfair".

- The Court of Appeal noted ***In re W (A Child) (Adoption: Grandparents' Competing Claim)*** **[2017] 1 WLR 889**, ***In re S (A Child) (Interim Care Order: Residential Assessment) (Note)*** **[2015] 1 WLR 925** and also what Black LJ said in ***Re B (Paternal Grandmother: Joinder as Party)*** **[2012] 2 FLR 1358** about the relevant factors when the court is deciding whether to join a party to care proceedings including, at [48], "plainly the prospect of success of the application that is proposed".

- Despite the trial judge's initial comment in August 2019, an application for joinder of Maternal Aunt was made and rightly rejected.

- As to the suggestion that the Court could invite or suggest that an application for an SGO to be made, unless clear that someone was intending to make such an application, the Appeal Court found it difficult to see how the court could direct the making of such an application. Although no application was made by Maternal Aunt, the judge could have raised this herself. In either event, the court would have had to consider the prospects of success of any application for an SGO and the court's clear response would have been to decline even to invite Maternal Aunt to make any application and to refuse to join her as a party. As to the former, an application for an SGO may not be made without permission, something which would have clearly been refused. As to the latter, there was no need for Maternal Aunt to be joined as a party to enable the judge properly and fairly to determine whether making a special guardianship order was a viable, realistic option for B's future care. The judge had ample evidence and was able fully to consider the issue.

- The trial judge's determination in her August 2019 judgment was, therefore, not undermined by the absence of MA as a party.

Grounds (2), (3), (4) and (6): These are taken together and collectively challenge the judge's decision to make a care order. Mother submitted that the court was not in a position properly to determine the care proceedings because there was no information available as to the support services which might be available to Maternal Aunt and/or the work which might take place with the mother and Maternal Aunt to support B living with her. This meant, in particular, that the option of an SGO was rejected without the court having any analysis of how the concerns identified about this option might be ameliorated or addressed.

The Court of Appeal found that:

- the judge was able to reach a properly informed conclusion;

- the ISW and the Guardian had both provided the court with a very careful analysis of the available care options including that of an SGO in favour of Maternal Aunt;

- there was no gap in the evidence;

- specifically in relation to ground 2, the court had comprehensive assessments which provided a full analysis of the available care options. The judge was plainly entitled to accept that evidence and decide that an SGO in favour of MA was not a realistic care option;

- As to ground (3), the judge did not equate foster care with a family member to foster care with a non-family member. The judge expressly referred to the "many advantages" of B living with Maternal Aunt. There is no basis for contending that her order was not proportionate;

- In relation to ground 4, the final care order was made prior to the completion of the Maternal Aunt's assessment. The Court of Appeal refers to the case of ***In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291**, in which Lord Nicholls made a number of observations, at [92]-[100], directed towards the question of "how far courts should go in attempting to resolve … uncertainties before making a care order and passing responsibility to the local authority", at [92]. He considered, at [97], that there was a "somewhat imprecise line" with, on one side, cases in which uncertainties should be resolved, in particular if they needed to be resolved "before the court can decide whether it is in the best interests of the child to make a care order at all", at [93], and, on the other side, those cases in which "the uncertainties involved in a care plan will have to be worked out after a care order has been made and while the plan is being implemented.' In this case, when asking the question, did the judge's decision in the present case fall on the wrong side of the line or was there sufficient clarity "of the likely way ahead for the child for the foreseeable future"? the answer is no. This was plainly not a case in which there was an uncertainty which needed to be resolved before the court could decide whether it was in B's best interests to make a care order at all, and the care plan was sufficiently specific as to the LA's long-term plan for B's care that there was no uncertainty which required resolution before the court made a care order. The judge did not need to await the formal outcome of the assessment of Maternal Aunt as a foster carer not only because that outcome was sufficiently clear but also because, as the judge decided, this did not justify further delaying the determination of the proceedings.

- In relation to the submissions that the judge failed to consider the welfare checklist in full and omit other relevant factors, the overarching question is, as set out by Peter Jackson LJ in ***Re DAM (Children: Care Proceedings)* [2018] 2 FLR 676**, at [7], whether the judgment is "adequately reasoned" and enables "the reader, and above all the family itself, to know that the judge asked and answered the right questions". The trial judge took into account all the relevant welfare factors.

Ground (7): The trial judge was entitled to make an order under s.91(14). Such orders are not confined to cases of repeated and unreasonable applications, for example see *Re K (Special Guardianship Order)* [2013] 1 FLR 1265. There were powerful reasons for concluding that B required a "period of calm" and that the mother could not be trusted not to "attempt to return the matter to court".

In conclusion, "the option of B living with [Maternal Aunt] pursuant to" an SGO was comprehensively considered and the judge was able properly and fairly to determine this issue without Maternal Aunt being represented. The appeal was dismissed.

Summary by **Emily Ward**, Barrister & Deputy Head of Family at **Broadway House Chambers**.

BP v Surrey County Council &Anor [2020] EWCOP 17

This was an urgent application made on behalf of BP by his daughter and litigation friend FP. BP is an 83-year-old diagnosed with Alzheimer's disease who currently resides in a care home where he has been since 25.06.19. He was discharged from hospital to the care home after falling ill at home and his placement was authorised on 12.08.19 as a necessary and proportionate deprivation of liberty. The standard authorisation was due to expire on 2.02.20 but was extended to 3.06.20 by order dated 6.03.20.

BP is deaf but can communicate via a "communication board". He is unable to use a telephone, facetime or skype. BP has consistently and unambiguously expressed a desire to return home. His capacity remains a live issue, and there is an outstanding assessment delayed because of the COVID-19 crisis. Prior to 20.03.20 when the care home decided to suspend all visits by family members and also any expert assessors, BP enjoyed frequent visits from many family members and was visited at least once a day

The present application sought (para 11):

- A declaration that if the care home did not take steps to arrange a cognitive assessment and reinstate family visits, the it was not in BP's interests to remain in the care home

- An order that if the care home did not comply with the above, that the order dated 6.03.20 (extending the standard authorisation) be revoked

- A declaration that the total ban on visits was a disproportionate interference with BP's Art 5 & 8 rights

- An interim declaration that whilst the restriction on visits remained, it was in BP's best interest to return home with a package of care

The judgment provides a thorough summary of the legal framework to be applied at paras 13- 25 including Art 15 (derogaton in time of emergency) and the Council of Europe's European Committee's statement of principles in relation to the COVID 19 pandemic (para 21)

It was recognised that the restrictions on visiting were an interference with BP's right to family life that were further aggravated by his deafness. The court noted that the matter was listed for further directions on 3.06.20 and that the derogation was to cover a limited period of time. The Judge noted that on the proper construction of the authorities it was not essential to signal in advance a notification of derogation to the Council of Europe and in any event, it would not be practical to do so. The court would send notification of the decision. (para 27)

Exploration of the family's alternative proposals (for care at home) and for allowing continuation of visiting were found not to be practicable as the family "with the help of their advocates began to absorb some of the stark realities of the situation" (para 36). A plan was ultimately put together that allowed for some remote visiting and assistance with educating BP to use electronic means of communication.

The Court also addressed the issue of remote capacity assessments (para 37) and determined that a capacity assessment should be facilitated to be undertaken remotely (para 37-38)

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

AD & Ors, R (On the Application Of) v London Borough of Hackney [2020] EWCA Civ 518

This case involved an appeal of a judicial review decision in respect of the Respondent Council's policy in relation to provision to support children who have special educational needs and disabilities ("SEND"). The policy in question involved a 5% reduction in one of the funding elements for SEND provision to schools. The Appellants were children who have SEN and disabilities and attend mainstream schools in Hackney.

Following a 3 day substantive hearing in April 2019, Supperstone J dismissed the judicial review claim in respect of the Council's policy on all grounds ([2019] EWHC 9430 (Admin)). Permission to appeal was granted by the Court of Appeal solely on the issue of whether the Council was in breach of a duty to consult under s 27 of the Children and Families Act 2014 ("the 2014 Act").

Section 27 of the 2014 Act provides that, when reviewing its education and care provision, a local authority must consult children and young people in its area with special educational needs and disabilities and their parents, amongst many other parties.

The Council did not dispute that in respect of the specific policy change in question, they had not consulted with the relevant children and their parents. However, they argued that the correct interpretation of s27 did not require them to consult in respect of this particular change. The respondents submitted that s27 refers to a global or strategic review of

educational provision to be carried out from time to time and on which the very extensive consultation required by s 27(3) with all the parties listed therein would have to take place. The Council considered that not every budget decision affecting SEND provision engages s 27, if that were the case, it would be overly burdensome for local authorities.

The Appellants argued that s 27 required an ongoing process by which the local authority is alert to any changes which may require it to consult about the sufficiency of the SEND provision in the borough. They considered that the budget changes in the present case were sufficient to 'trigger' the Council's duty to consult and as such they had failed in their statutory duties. The Appellants were of the view that the Council's interpretation would allow many substantial changes to local SEND provision but no consultation upon any of them until the next strategic review happened to take place, which might be long after the impact of the changes had been felt by the children and young people concerned. It was also submitted that there is no obligation under s 27(3) to consult every person or organisation in the list of subsections: it would be sufficient for the local authority only to consult those people or bodies identified which are relevant to the function being exercised. On this basis and on the basis that de minimis changes would also not trigger the duty to consult, it was submitted that this was not too much of a burden on local authorities.

The court specifically considered the decision ***R (Hollow) v Surrey County Council*** **[2019] EWHC 618 (Admin)**; [2019] PTSR 1871 where the Divisional Court concluded that the interpretation adopted by the Respondent was correct. The court also considered the case of ***R (ZK) v London Borough of Redbridge*** **[2019] EWHC 1450 (Admin)** where Swift J observed in paragraphs [63]-[64] that the s 27 duty is in the nature of a strategic obligation and that local authorities should be best placed to decide for themselves what the elements of a review should be, subject to review by the courts against Wednesbury standards.

The Court of Appeal agreed with the Respondent's submissions, in their entirety and dismissed the appeal. The court observed the following at [43] and [44]:

> 'There is no limitation of the duty to consult each of the people and bodies on the list created by s 27(3)(a)-(j). The local authority can add to the list (s 27(3)(k)) but not subtract from it…'
>
> 'Section 27 is concerned with consideration at a strategic level of the global provision for SEND made by a local authority; and … the duties are to be performed from time to time, as the occasion requires, with no particular "trigger" for the duty being specified.

The court's conclusion is succinctly summarised by Lord Justice Bean at [48]:

> 'I do not consider that this modest reduction in one element of SEND funding was sufficient to trigger a strategic review under s 27(1)-(2) with the consequent requirement of widespread consultation under s 27(3)… I would leave for another day the issue of what level of major budget cuts or transformation of a local authority's SEND provision would trigger a wider duty to consult either under s 27 or at common law.'

Summary by **Asha Groves**, barrister, **St Johns Chambers**

T v Derby City Council, A, B and X [2020] EWCA Civ 507

The father appealed a decision of HHJ Williscroft made following a 6 day fact finding hearing concerning A (a boy now aged 12), B (a boy now aged 10) and X (a girl now aged 9). Permission to appeal was granted by Peter Jackson LJ.

The father appealed against the sexual abuse findings made against him, not the findings of physical abuse. Neither the mother nor her then domestic partner W appealed the findings made against them which included a very large number of findings sexual abuse.

The findings against the father were that 1) between 2015 and July 2018 in X's bedroom at the father's home he sexually assaulted X by touching her genitals and digitally penetrating her vagina, and 2) between 2015 and July 2018 he encouraged X to have sexual intercourse with him. She refused to do so.

The appeal hearing was one of the first to be conducted remotely and the judgment records that a very satisfactory hearing was conducted.

X spent the first 4 years of her life with both parents and with A and B. The father left in February 2015 when the parents separated, and in May 2015 the mother suffered a serious accident and sustained injuries of a life-changing nature. For the first 6 months thereafter the children were in the care of friends of the mother, and they then moved to the paternal grandparents' home. The father lived there from time to time. In 2018 the mother moved to live with W. In July 2018 the mother accompanied by her friend S went to the grandparents' home and demanded the children be handed over to her. The grandparents felt unable to refuse and the children were brought to the home where the mother and W were living.

The children then lived with the mother and W until the Police removed them in October 2018. In that 11 week period the children lived in what was described as a depraved atmosphere. Included in the acts of abuse found against W were sexual assaults on and digital penetration of X, acts of the same character as found against the father. The mother played a full part in that abuse: she was present when acts of abuse took place; she herself sexually assaulted X and encouraged W in his own acts of abuse perpetrated on X. The children were encouraged to be naked in the home and to keep secrets.

McCombe LJ, in a judgment with which King and Peter Jackson LJJ agreed, concluded that in light of the extremely tenuous nature of the evidence, the allegation against the father of encouragement of X to engage in sexual intercourse could not be sustained. The circumstances of a Police Officer's conversation with X on 15 October 2018 about the allegation against the father, inadequately recorded as it was, rendered the contents of that conversation unacceptable as evidence. The allegation was never repeated and did not feature in anything X said in either Police interview. There was really no satisfactory evidence of it at all.

As to the allegation of digital penetration of X, the evidence had a number of unsatisfactory features. The principal evidence was found in the first formal Police interview with X and was repeated, entirely as a result of prompting, 8 days later in the second Police interview. A number of features of those interviews demonstrated a failure to comply with the applicable Guidance. Failure to comply with the Guidance will not always render evidence obtained incapable of establishing acts of sexual abuse however deficiencies of this type can be very significant. In this case they were just too numerous to be overcome in order to sustain this single finding in the context of the serial sexual abuse that had been perpetrated by W and the mother against the children in the immediately preceding 11 week period. The value of the evidence about this single alleged act of abuse, elicited at a very late stage of a long interview and only as a result of a distinct prompt about a conversation with S, was reduced to vanishing point.

The transcript and recorded interview did not sit easily with HHJ Williscroft's description of X's statement being clear and spontaneous. The information that was obtained arose from directed questioning of a distracted and tiring child, with no narrative or free recall of any details that might make it possible to understand the circumstances. This was particularly significant where the possible allegation was so strikingly similar to the abuse that the child was recently suffering on a number of occasions at other hands.

The findings against the father did not reflect the domestic context of serial sexual abuse by W and the mother in which the allegations first arose, and the judgment below did not provide a careful assessment of the father's own credibility and an identification of the reasons why his denials were not to be accepted.

The appeal was allowed and the findings of sexual abuse made against the father were set aside.

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

Maughan v Wilmot [2020] EWHC 885 (Fam)

These proceedings had been running for a long time, and after giving judgment in October 2019 (neutral citation: **[2019] EWHC 2765 (Fam)**), Mostyn J hoped they would come to an end. However, investigations revealed that the factual footings on which he had given his 2019 judgment were faulty. He therefore conducted another hearing, by Zoom, in April 2020 to try to get to the bottom of matters.

The history of the litigation was as follows:

- In December 2013 an initial freezing order against the husband was made by Bodey J. It froze £400,000, unencumbered, and extended to funds at Aegon. It was implicit in the order that if the husband made a disposition of his assets, he would have to give notice of that fact and explain how his remaining unencumbered assets exceeded £400,000. (The figure was later reduced by Mostyn J to £300,000.)

- In June 2015 the husband moved £740,980 from Aegon to Curtis Banks (which offered a flexible drawdown facility). This was not notified by the husband to the wife and the funds left behind were largely inaccessible.

- In September 2015 there was a hearing before Mostyn J, who was informed that the husband had moved £700,000 from Aegon to Curtis Banks.

- In October 2015 the husband wrote to Curtis Banks informing them that the monies transferred to Curtis Banks were not subject to any freezing order. This was not true as the inaccessible funds left at Aegon would not qualify as unencumbered because they were incumbered by their inaccessibility.

- Substantial sums were then withdrawn from Curtis Banks in the husband's favour. This was not known to either the wife or to the receiver.

- In March 2016, Mostyn J made an order prohibiting Curtis Banks from paying any funds received from Aegon to the husband or any other party, apart from in accordance with the order.

- The husband continued to make withdrawals from Curtis Banks after Mostyn J's order of March 2016. The sums removed from Curtis Banks by the husband were in breach of the original freezing order inasmuch as he had not demonstrated that he had left the sum frozen unencumbered. In addition, the removals after March 2016 were in breach of the March 2016 order.

In October 2019 Mostyn J made costs orders in favour of the wife and the receiver totalling £68,307. He froze £100,000 to allow some headroom for inevitable future litigation. He did not specify over which assets the freezing order should range, but intended that it would be directed first and foremost to the funds held by Aegon. This was based on an assurance given by Stephen Meachem, the solicitor-advocate representing the husband, that the pension funds held in both Curtis Banks and Aegon/Hargreaves Lansdown were worth in excess of £350,000 and that the orders therefore only needed to be directed to Aegon/Hargreaves Lansdown and to Curtis Banks. It was implicit in the assurance that there were substantial funds in both places.

However, subsequent investigations revealed that although there were funds in Aegon/Hargreaves Lansdown worth £370,000, these were not easily realisable and only £25,369 could be easily extracted. The balance could not be accessed unless it was transferred to a flexible drawdown product offered by another provider, which would require the consent and cooperation of the husband. This would plainly not be given. Further, the funds in Curtis Banks would have been easily accessible, but had fallen to only £93.

It was therefore clear that Mostyn J had been misled about the scale and liquidity of the funds held by both Aegon/Hargreaves Lansdown and Curtis Banks. Had Mostyn J known the truth, he would have made a freezing order in a materially larger amount to allow for the inevitable costs in achieving access to the remaining funds held in Aegon/Hargreaves Lansdown.

In the course of the investigations by the wife and the receiver to try to establish the true facts, substantial costs had been incurred. Since October 2019, the wife had incurred £43,529, the husband £9,737, and the receiver £27,944 (less £1,443 on client account). The receiver estimated that a further £25,620 would be incurred in implementing the costs orders against the Aegon funds, on the basis that the husband would refuse to cooperate in their transfer to a flexible drawdown product. A total of £95,648 had therefore been incurred or was likely to be incurred in costs as a direct result of misrepresentations made to Mostyn J in October 2019.

Mostyn J was of the opinion that the costs incurred by the wife and the receiver since October 2019 had all been reasonably incurred and should be paid by the husband, in addition to the costs it was ordered he should pay in October 2019. This came to a total of £137,746, and did not include the costs of the receiver's own work, which he was also entitled to charge and recover under the receivership order.

Further headroom was required in anticipation of more vexatious litigation misconduct by the husband. Mostyn J therefore froze £200,000, and directed the order primarily at Aegon.

Just 37 minutes before the hearing was scheduled to begin on Zoom, Mr Meachem produced a witness statement made by him. This sought to argue that the husband was not in breach of the original freezing order because at all times his total 'unencumbered' funds remained above the capped limit, and that because the freezing order did not distinguish between liquid and illiquid assets, the existence of the inaccessible Aegon funds satisfied the terms of the freezing orders. Mostyn J rejected these arguments. It was clear that the husband had been in breach of the original freezing order and of his order of March 2016.

Mr Meachem also made three claims for positive relief. Given that the husband was the subject of a Civil Restraint Order and needed permission to make any application to the court, Mostyn J refused to hear any arguments in respect of these claims.

Following the distribution of his judgment in draft form, Mostyn J received an email from Mr Meachem challenging the quantum of costs claimed by the wife and the receiver. Mostyn J rejected this challenge.

Given the misconduct of the husband, Mostyn J considered that any assessment of costs must be on the indemnity basis. On a summary assessment this meant that any doubts as to any sum claimed should be resolved in favour of the payee, i.e. the wife and the receiver.

Case summary by **Henrietta Boyle**, Pupil at **1 Hare Court**

A CCG v AF and others [2020] EWCOP 16

The hearing concerned whether AF should continue to receive Clinically Assisted Nutrition and Hydration (CANH) through a Percutaneous Endoscopic Gastrostomy tube (PEG) inserted into his stomach. This followed a stoke which had left him with serious brain damage and consequent immobility and impaired speech. There was no dispute that as a consequence of the stroke AF lacked the capacity to make the decision himself. The issue was therefore whether it was in AF's best interests for CANH to be stopped. AF was able to take in food and drink by mouth, but this was more for the sensory pleasure of taste and texture as it was insufficient to be life sustaining. The judge found that if CANH ceased it would inevitably lead to AF's death. AF's daughter sought the withdrawal of CANH, not because she wanted her father to die but because she believed that it was what he would have wanted AF's GP opposed the application as did the Official Solicitor on AF's behalf. The judgement involves an analysis of past expressions by AF, based on his experience working in hospitals and his care of his wife and disabled daughter (both of whom had predeceased him), that he did not want to be "a body in a bed", the absence of an advance decision [s24-26 MCA 2005] and the reports of his responses to visitors, music, poetry and favourite foods. This led to Mostyn J finding "AF is sentient, cognitively active, emotionally aware and possessed of motor functions, albeit grossly impaired physically and mentally [and] impossible to conceive that he would ever have written an advance decision mandating being starved to death were he to find himself in his present position.".

He concluded that it was in AF's best interests to continue to receive CANH. This, he acknowledged avoided the need to consider the complex legal and ethical questions which would arise under Article 2.1 ECHR

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally …"

and with what the judge described as "the somewhat impenetrable meaning" of s4(5) Mental Capacity Act 2005

> "Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death."

The case has attracted considerable publicity for another reason. It was the first contested hearing undertaken by Skype in the COP and Family Courts as a result of the Covid-19 pandemic. The judge described how he heard 11 witness over 3 days with the witnesses, parties and legal representatives scattered across the country and it proceeded "almost without a hitch". A more varied set of perspectives appears in articles by **Nageena Khalique QC and Sophie Roper**, and **Celia Klitzinger** from Coma And Disorders Of Consciousness Research Centre.

Case summary by **Nicholas O'Brien**, Barrister at **Coram Chambers**

EK (A Child) [2020] EWFC 25

EK's mother had a troubled past, which included being in care herself and having been subject to care proceedings as a teenager. EK's mother and father had two children (only one of whom was the biological child of EK's father) removed from their care in 2016 and 2017. These children have subsequently been adopted by the same adoptive parents. The adoptive parents, whilst not in a position to adopt a third child, made clear that they would promote, if a placement order was made and subject to the views of the adoptive parents of EK, sibling contact. Mostyn J found this an advantage material to his decision.

The relationship between mother and father was beset with domestic abuse and controlling behaviour on the part of the father. Following EK's birth an interim care order was made, the plan being for EK to move with her mother to a mother and baby foster placement. Mother and EK were later moved to supported accommodation on the strict understanding that mother would keep the baby away from father. In August 2019 EK was removed from her mother's care following receipt of evidence that the parents were in contact with one another. After signing a written agreement, which included not taking EK to stay anywhere overnight without the LA's agreement, mother engaged in some 'truly reckless' behaviour, including becoming involved with another man who posed a risk to her and to EK.

During the proceeding assessments were conducted by the LA, and and ISW in respect of father. The Local Authority and EK's Guardian were of the view that EK's welfare required the making of Care and Placement Orders. The parents argued, in essence, that the 'end of the road has not been reached' and that they should be afforded the opportunity to show that they are fit to raise EK.

The final hearing was listed to commence on 24 March 2020, the previous day having been allocated for judicial reading. The Prime Minister announced the national lockdown on 23 March, by which time Mostyn J had already ordered that the hearing should proceed by Skype for Business. The hearing involved five witnesses giving evidence, including one who was based in Scotland. Mostyn J says this at paragraph 5 in respect of the hearing:

> 'I am very grateful to the solicitor for the local authority, Shamima Ali for setting up and testing the remote hearing which proceeded well. I am equally grateful to all the other lawyers for their diligent cooperation with the process. There were a few hitches, which I think were all referable to one of the locations having a

> poor Internet signal. However, the problems were all overcome. I heard evidence from five witnesses, one of whom was in Scotland. I had an excellent e-bundle which contained all relevant documents. Counsel were all able to make their submissions without a hitch. This is the second case in consecutive weeks which I have heard in this way. Plainly, for as long as this emergency continues this will be the only way in which the majority of cases can be heard. It is reassuring that notwithstanding the national shutdown the wheels of justice have been enabled to turn.'

Mostyn J agreed with the professional view of the Social Worker, ISW and Guardian and approved the final care plan for EK making final care and a placement orders.

Whilst recognising that there is a national emergency and that this may well mean there is a delay in matching EK with proposed adopters, Mostyn J was clear that this is not a reason for delaying the implementation process and '*it is not a reason for adopting a futile experimental adjournment.*'

Case summary by **Emily Ward**, Barrister and Deputy Head of Family at **Broadway House Chambers**