November 2020

Family Law Week

NEWS

President of Family Division returns to work

The President of the Family Division, Sir Andrew McFarlane, has expressed his delight to be back at work after his successful open-heart surgery. The operation took place in early June and has involved a necessary recovery period and whilst he is back in post, he will still need to take a measured approach to the resumption of normal duties.

He has extended his sincere thanks to all those who tirelessly oversaw the operation of the Family Justice system in his absence: most particularly, Mrs Justice Theis, as the Acting President of the Family Division, who undertook all day-to-day PFD office duties, Lady Justice King who assumed other leadership responsibilities including attendance at the Judicial Executive Board and meetings at Heads of Division level, Mr Justice Hayden the Vice President of the Court of Protection and Lord Justice Baker who continued to lead the work on recovery for Family Justice.

Sir Andrew is extremely grateful to Family Division Judges and others who took on additional tasks during his absence.

He is very much looking forward to working with all again in what continue to be incredibly busy and exciting times for Family Justice.

1/10/20

Government doubles funding for child sexual abuse charities to £2.4 million

A joint Home Office and Ministry of Justice fund of £2.4 million will support national charities that work with children and adults who have experienced child sexual abuse.

The Home Office and the Ministry of Justice are awarding a two-year grant for the first time, in order to provide stability for voluntary sector organisations, several of which are facing increased demand for their services as a result of Covid-19.

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The Support for Victims and Survivors of Child Sexual Abuse Fund aims to assist national organisations in supporting both adult and child victims and survivors of child sexual abuse across England and Wales, with several organisations also providing support to parents, carers and family members.

Services the money will go towards include support lines, specialist telephone and digital counselling, support groups for survivors, training for professionals, support for victims with learning difficulties and their families, and development of online resources for victims and survivors.

For the announcement, **click here**.

1/10/20

Robert Peel QC appointed to High Court bench

Robert Peel QC of 29 Bedford Row has been appointed to the High Court and will be assigned to the Family Division. He will be known as The Honourable Mr Justice Peel.

Robert Peel was Called to the Bar (M) in 1990 and took Silk in 2010. He was appointed as a Recorder in 2009. He will take up appointment on 6 October 2020 consequential to the retirement of Mrs Justice Parker.

1/10/20

Black Country Family, Drug and Alcohol Court launched

The UK's 10th **Family, Drug and Alcohol Court** (FDAC) was launched this week in the Midlands. The Black Country FDAC, which covers the Walsall, Sandwell and Dudley areas, was officially opened on 28 September.

First piloted in London in January 2008, the UK now has 10 specialist FDAC teams, working in 13 venues and serving families in 20 local authorities. In them, a specialist multi-disciplinary team works closely with the judge and other professionals to provide intensive treatment and support for parents wishing to turn their lives around, helping them abstain from drugs and alcohol, thus enabling more children to be reunified with their parents.

At the event, District Judge Gailey, Chair of the FDAC Steering Group, welcomed Mrs Justice Knowles and Mr Justice Keehan, Family Liaison Judges for the Midland Circuit, alongside local councillors and stakeholders.

Mrs Justice Knowles said:

> "FDACs are the formative problem-solving courts – intensive and time limited within family proceedings, they work with families to facilitate change and ultimately safeguard the welfare of children. FDACs require a significant commitment from both local authorities and the judiciary as families have intensive multi-disciplinary support throughout the process and they meet with Judges every fortnight to ensure that progress is monitored. During the last decade FDACs have continued to demonstrate positive outcomes for families in Family Care proceedings and are now well recognised as an important alternative for these difficult cases.
>
> "Evaluation of FDACs is ongoing but has to date demonstrated the long term benefits as more children stay with their parents, 35% compared with 19% in non FDAC proceedings. Families also return to court less often with research finding that a year after care proceedings concluded 25% of FDAC families were reporting further neglect or abuse compared to 56% of comparison families. FDAC outcomes will be evaluated independently as part of the Department for Education's programme Supporting Families: Investing in Practice."

By April 2021, there are expected to be 20 FDACs across 35 Local Authorities and 13 Family Courts.

1/10/20

United Kingdom joins 2007 Child Support Convention

On 28 September 2020, the United Kingdom of Great Britain and Northern Ireland deposited its instrument of ratification to the HCCH Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (**2007 Child Support Convention**).

The United Kingdom is currently bound by the 2007 Child Support Convention by virtue of the approval of the European Union. This new instrument of ratification ensures continuity in the application of the Convention after the conclusion of the transition period following the withdrawal of the United Kingdom from the EU. The Convention will continue to be applicable to and in the United Kingdom until 31 December 2020, in accordance with the Withdrawal Agreement. The 2007 Child Support Convention will then enter into force for the United Kingdom on 1 January 2021.

The United Kingdom has been a Member of the HCCH since 1955 and is currently bound by 13 HCCH Conventions. Currently, 40 States and the EU are bound by the 2007 Child Support Convention.

For more details of the 2007 Child Support Convention, **click here**.

1/10/20

Lockdown has increased the risk of domestic abuse for older people: Age UK

Age UK is asking the government to consider how to make the best use of resources to tackle domestic abuse among older people, because "domestic abuse has no age limit".

In a new report from Age UK – *No Age Limit: the blind spot of older victims and survivors in the Domestic Abuse Bill* – it says that lockdown has increased the risk of older people experiencing domestic abuse, despite misconceptions that those living with others are 'fortunate' and 'safe'. Such abuse victims are likely to be dependent on the person abusing them financially or for their care. They will face, in addition to fear, barriers to reporting this abuse such as lack of physical and mental capacity and a lack of access to digital or other services.

The charity is calling for:

- training for health care practitioners, including GPs and practice nurses, who work with older people, particularly during hospital admission and discharge
- data on domestic abuse for all ages, not just people aged 74 and under.

The Local Government Association responded to Age UK's report, saying:

> "The upcoming Spending Review needs to provide the long-term, sustainable settlement for councils so they can protect individuals and families from the physical and psychological harm of domestic abuse, including investment in perpetrator programmes and a new National Domestic Abuse Perpetrator Strategy."

For the Age UK report, **click here**. For the full LGA response, **click here**.

1/10/20

Contacts to NSPCC helpline about domestic abuse up by nearly 50 per cent

Since the introduction of national lockdown measures, the number of contacts to the NSPCC helpline from people concerned about children living in homes with domestic abuse rose by 49 per cent.

The latest figures show that between April and September 2020, more than 4,500 concerns were raised by members of the public, with 818 contacts in August alone. The numbers are supported by the experiences of frontline staff who work with mothers and children facing domestic abuse at home.

Through its **Domestic Abuse Recovering Together** (DART) service, NSPCC has supported more than 2,000 women and children across the UK over the past 10 years. The charity stresses the importance of community-based support. Currently, however, there is no legal requirement to provide specialist support services. In the view of NSPCC such services are crucial in helping children recover from domestic abuse and move forward with their lives.

It is calling for:

- Local authority recovery services for children living with domestic abuse
- Such services to be made a legal requirement, and to receive funding
- Agencies to sign up to deliver NSPCC's community-based recovery service.

NSPCC says that its services such as DART help by:

- increasing mothers' self-esteem, confidence in parenting and affection towards their children
- reducing a child's emotional and behavioural difficulties and
- helping practitioners, mothers and children to work together.

For more details of DART, **click here**.

4/10/20

Family law disputes involving the EU: guidance for legal professionals from 1 January 2021

The Ministry of Justice has published guidance for legal professionals, applicable from 1 January 2021, in respect of family law disputes. For the guidance, **click here**.

The guidance covers:

- Divorce
- Maintenance
- International parental child abduction
- Children cases (parental responsibility)
- Placement of children.

The EU Commission has also published guidance on family law disputes, for which **click here**.

4/10/20

Senior District Judge Emma Arbuthnot appointed to High Court bench

Senior District Judge and Chief Magistrate Emma Arbuthnot has been appointed a Justice of the High Court. She will be known as The Honourable Mrs Justice Arbuthnot and will be assigned to the Family Division.

Emma Louise Arbuthnot, aged 61, was Called to the Bar (I) in 1986. She was appointed as a Deputy District Judge (Magistrates' Courts) 1999, as a Recorder in 2001, as a District Judge (Magistrate's Courts) in 2005, as the Deputy

Senior District Judge (Magistrates' Court) in 2012 and as the Senior District Judge (Chief Magistrate) in 2016.

She will take up appointment on 1 February 2021 consequential to retirements in the High Court.

9/10/20

Forty-one family Recorders appointed

The Queen has appointed 118 Recorders on the advice of the Lord Chancellor, The Right Honourable Robert Buckland QC MP, and the Lord Chief Justice of England and Wales, The Right Honourable The Lord Burnett of Maldon. The appointments will take effect from 12 October 2020. Of those appointed 41 have jurisdiction to hear family cases. The new Family Recorders and their circuits are:

Miss Sophie Kathryn Allan *Northern*
Ms Marisa Nichole Allman *Northern*
Mr Peter John Anderson *Northern*
Miss Christabel Ruth Ashby *Western*
Mrs Angela Mary Bowen *Midland*
Mr Alexander Charles Ross Chandler *South Eastern*
Miss Olivia Checa-Dover *North Eastern*
Mr Niran de Silva *South Eastern*
Mr David Gareth Evan Evans *Wales*
Mr John Kevin Gray *Midland*
Mr Michael Anthony Green *South Eastern*
Mr Joseph William Hart *South Eastern*
Mr Rupert James Hale Higgins *Midland*
Mr Stephen John Hocking *South Eastern*
Miss Elizabeth Jane Hodgson *North Eastern*
Ms Gillian Honeyman *South Eastern*
District Judge Bethan Japheth *Wales*
Mr Robert James McAllister *South Eastern*
Miss Kirsty Elizabeth McKinlay *Northern*
Miss Alison Meryl Meacher *South Eastern*
Ms Rachel Elizabeth Mellor *North Eastern*
Mr Neil Stanley Mercer *South Eastern*
Miss Julian Elizabeth Norman *South Eastern*
Miss Jane Sarah O'Leary *Western*
Mr Ian Christopher Peacock *South Eastern*
Miss Nicola Jane Phillipson *North Eastern*
Mr Jack Warren Redmond *Midland*
Mr David Robert Regan *Wales*
District Judge Nicholas Patrick Edward Rimmer *Wales*
Ms Catherine Eva Robinson *South Eastern*
Ms Sophia Roper *Western*
Miss Sharnpal Kaur Samra *North Eastern*
Mrs Louise Emma Stanbury *North Eastern*
Mr Simon Peter James Taylor *South Eastern*
Ms Anna Marie Trussler *Midland*
Mr Craig John Steven Vickers *South Eastern*
Mrs Fiona Walker *Northern*
Mr David Alexander Warner *Wales (Civil and Family)*
Mr Simon Ian Wilkinson *North Eastern*
Mrs Dawn Louise Worton *South Eastern*
Miss Yasmin Yasseri *South Eastern*

9/10/20

LawCare launches research study 'Life in the Law'

Legal mental health charity **LawCare** has announced a new ground-breaking research study '**Life in the Law**' ahead of World Mental Health Day on 10 October.

The charity has teamed up with leading academics in the field Dr Emma Jones (University of Sheffield), Professor Richard Collier (University of Newcastle), Caroline Strevens (Reader in Legal Education, University of Portsmouth) and Lucinda Soon (Solicitor and PhD researcher) along with Nick Bloy (Executive Coach and founder of Wellbeing Republic) and Kayleigh Leonie (LawCare trustee and solicitor) to develop the research study which will look at the impact of work culture and working practices on the wellbeing of legal professionals. The research seeks to understand the day to day realities of life in the law and uses three academic research scales for burn-out, psychological safety and autonomy. Anyone working in the legal industry, including support staff, can complete the online questionnaire across the UK, Ireland, Channel Islands and Isle of Man.

The results will form the basis of an academic paper and will be announced next year.

Elizabeth Rimmer CEO of LawCare said:

> "This is the biggest ever piece of academic research into wellbeing in the legal industry in the UK and Ireland and we hope it will give us a clear picture of how the culture and practice of law affects mental health. The results will help us to improve the support available to legal professionals and drive long lasting change in legal workplaces so that people working in the law can thrive. We would urge anyone working in the legal profession to take part."

Dr Emma Jones Senior Lecturer in Law at the University of Sheffield said:

> "This study is an opportunity to obtain important empirical data on the wellbeing of legal professionals. The findings will give us a valuable insight into the impacts of legal practice and legal culture on individual legal practitioners, raise understanding and awareness of the key issues influencing wellbeing and help shape the development of appropriate and sustainable responses."

To participate, **click here**.

9/10/20

New complaints handling guide offers advice to local authorities

The Local Government and Social Care Ombudsman has issued new guidance on effective complaint handling for local authorities.

Based on previous documents, the new guide offers practical, real-world advice and guidance on running a complaints system to ensure it is effective and helps improve services.

It runs through the steps authorities need to take to ensure complaints are properly identified, investigated and put right where necessary. It also examines statutory procedures for children's and adult social care complaints, guidance on dealing with third-party complaints, and advice on how to draw out the learning from the issues raised.

Michael King, Local Government and Social Care Ombudsman, said:

> "We have been investigating complaints for more than 45 years, and throughout that time we have seen both good and bad practices.
>
> "The guide we are issuing today offers practical advice, based on our vast experience, on how to run an effective complaints process.
>
> "We urge local authority complaint handlers to take on board our guidance because we know how valuable the learning from complaints can be.
>
> "The best authorities use complaints as a barometer of external opinion and as an early warning of problems that might otherwise stay unseen. They take that a step further and use critical feedback to drive a sophisticated culture of learning, reflection and improvement."

For the new guide, **click here**.

9/10/20

Adoption and Fostering (Wales) (Miscellaneous Amendments) (Coronavirus) Regulations 2020

The **Adoption and Fostering (Wales) (Miscellaneous Amendments) (Coronavirus) Regulations 2020**, which come into force on 1 November 2020, make amendments to two 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 in response to the outbreak and spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) in Wales and cease to have effect on 31 March 2021.

Regulations 3 to 6 make amendments to the **Adoption Agencies (Wales) Regulations 2005**, which set out the process for assessing the suitability of people to adopt a child and the suitability of children to be adopted. They make amendments to the approval process for prospective adopters to enable information that must currently be collected during stage 1 of the approval process to be collected during stage 2 and relax the timescale during which certain actions must be undertaken. Regulation 5 corrects typographical errors.

Regulation 8 amends the **Care Planning, Placement and Case Review (Wales) Regulations 2015** to extend the period (from 16 to 24 weeks) during which a person related to or otherwise connected with a child may receive temporary approval to act as a local authority foster parent for that child.

Regulation 10 makes savings provision to ensure that some of the amendments made by these Regulations continue to apply in certain circumstances after the expiry of the amendments on 31 March 2021 in accordance with regulation 9.

For the Adoption and Fostering (Wales) (Miscellaneous Amendments) (Coronavirus) Regulations 2020, **click here**.

9/10/20

Extra support for councils to expand services for domestic abuse victims and their children

The Government has announced funding of £6 million to enable councils to prepare for the introduction of the **Domestic Abuse Bill**.

The Bill is currently awaiting its second reading in the House of Lords having completed its passage through the House of Commons in July 2020. It is expected to come into force in April 2021. From that time local authorities in England will have a duty to?assess and?provide?support and safe accommodation?to victims of domestic abuse and their children.

Once the duty comes into forces, the new funding announced will?help councils in England to commission additional support for those victims of domestic abuse and their children who might currently be turned away from refuges and other safe accommodation because their needs cannot be met. The Government says that this new funding will mean that councils can plan accommodation and specialist services ahead of the Act coming into force and ensure that in all areas across the country services are joined up.

Councils can prepare by linking in with other agencies, such as police or health commissioners, and ensure their staff receive training in the new duty.

Minister for Rough Sleeping and Housing Kelly Tolhurst said:

> "Survivors of domestic abuse need safe refuge in order to escape this heinous crime, and support to start to rebuild their lives. Councils already provide much needed support, but the landmark Domestic Abuse Bill will mean for the first time councils will have a duty to provide support in safe accommodation for anyone fleeing abuse. The funding I am announcing today will help councils prepare for this new duty that will see thousands more survivors helped and a generation of their

children able to grow up safely and free from fear of abuse."

In addition, **a consultation** has been launched seeking views on the Government's proposals for allocation of this new burden funding associated with the duty to Tier 1 and Tier 2 local authorities.

For the Domestic Abuse Bill, **click here**. For the consultation, **click here**.

9/10/20

Education Secretary urges overhaul of adoption system

An overly bureaucratic system that places too high a burden on parents who want to adopt is making it harder for people who want to give a child a stable home, the Education Secretary Gavin Williamson has warned.

In **a speech** to coincide with National Adoption Week, the Education Secretary said "too many lifestyle judgements" are made on potential adopters, with the consequence that there are not enough adoptive parents. The shortfall is resulting in children being "bounced around the system" as they wait for a family.

Newly published figures show that there are currently around 2,400 children waiting for adoption but just over 1,800 approved adopters who are ready to give them a home.

The Government has provided £6.5 million to local authorities and regional adoption agencies to help adoptive families facing greater stress during the Covid-19 pandemic. This is alongside the Government's Adoption Support Fund which has provided nearly 61,000 adoptive and special guardianship order families across the country with therapeutic support since its launch in 2015, backed by nearly £175 million.

The Education Secretary also announced a further £2.8 million in funding for Voluntary Adoption Agencies. The money is intended to help them to continue to deliver their adoption activities during the pandemic, including recruiting adopters to be matched with children waiting.

Education Secretary Gavin Williamson said:

> "When it comes to adoption, what we have seen over a number of years is something I can only call narrow mindedness or even snobbery. For example, some local authorities make it harder to adopt if you rent your home rather than own it, or if you're not a perfect ethnic match. These outdated messages are putting off people who would otherwise come forward when the only qualification you need is the ability to love and care for a child.
>
> "I am urging local authorities to help us break down these barriers so that we can unite more children with the families they deserve so much."

The Education Secretary announced that whilst safeguards must not be relaxed and checks must remain in place, he intends to change the process that leads to lifestyle-judging that is making adoption a daunting experience for many.

He also warned that given Black and minority ethnic children often wait the longest to be adopted, we must end an "obsession with finding the perfect ethnic match for children", stating that there is no acceptable reason why adopters should be blocked from registering simply because there are no children of the same ethnicity waiting to be adopted.

A national campaign will launch next month to reach out to churches, mosques and other community groups starting with a pilot service in London and Birmingham, to reinforce these points and encourage more potential Black and other minority ethnic adopters to come forward.

The Department for Education has also published **research** that found Regional Adoption Agencies are taking a more strategic approach to marketing, incorporating targeted marketing activities, and developing inclusive websites to boost efforts to increase adopter diversity, which has been important for adopter engagement.

The Government has also confirmed that it is making £4.3 billion available for local authorities to manage the impact of COVID-19, including on children's services. Additional funding has also been provided to support the extension of the role of Virtual School Heads to promote the education of children who have left care through adoption, special guardianship or child arrangements order. This is the third year of this funding, which supports the new duties which came into force in September 2018.

For the Secretary of State's speech, **click here**. For the research on Regional Adoption Agencies, **click here**.

18/10/20

Effect of pandemic on children's wellbeing revealed in new report

A report published to mark World Mental Health Day on 10 October has provided a detailed picture of the experiences of children and young people during the pandemic and how it has affected their wellbeing.

Some challenges were identified, including isolation from friends, learning from home or worries that family or friends might get sick, but many parents also reported improved relationships with their children and that the majority of children spent time in outside green spaces at least a couple of times a week during lockdown.

The Government's second annual State of the Nation report finds that children and young people aged five to 24 generally responded with resilience to changes in their lives between March and September 2020, and despite indications of challenges to their mental wellbeing they report stable levels of happiness and only slight reduction in satisfaction with their lives.

The report brings together a range of published data to help the Government, schools and colleges, public services and parents better understand children and young people's experiences of the pandemic and the continued support that will be needed to ensure that recovery is maintained. It suggests that returning to school or college is likely to be playing a vital role in improving the mental wellbeing of many pupils by easing some of the main worries identified in the research: time off from education, being isolated from

friends, fewer opportunities to be more physically active and also providing access to pastoral support.

It comes as 97 per cent of local authorities confirm they have taken up training offered by the Government to enable teachers and education staff in schools and colleges to support their pupils wellbeing on their return to education. Backed by £8 million, the expert training programme Wellbeing in Education Return launched last month to provide continuing support during the Autumn and Spring terms for the additional pressures some young people may be feeling as a direct result of the pandemic including from bereavement, stress, trauma or anxiety over the past months.

The **State of the Nation 2020 report** captures a range of existing evidence on the impact of the pandemic on children and young people's wellbeing. Key findings include:

1. Friendships:
Most children and young people up to age 17 remain happy with their relationships with friends, but younger children's contact with friends varied – only one-third to one-half of primary age children had regular contact with friends between April and August. Loneliness was an issue for some older young people.

2. Family relationships:
Children's happiness with their families has remained high, with the majority of parents reporting their relationship with their children had remained the same over the pandemic – while more than 25 per cent say it had improved.

3. Health:
Children and young people have been worried about the potential that friends or family could catch Covid-19, while other common worries include catching it themselves and missing school. On the whole children are happy with their own health, though one in every 15 children has low happiness with their health. There are also indications that mental health difficulties have increased for some school-aged children over the months of the pandemic, and an increase in psychological distress has been found for older young people.

4. Remote learning:
In most cases, children and young people continued to learn to some extent through home schooling from parents and remote education from schools or other organisations, though they did not necessarily find this easy with consistent difficulties in maintaining motivation to learn, for parents to find time to help their children and to access enough support and guidance.

5. Physical activity:
The majority of children and young people were fairly physically active between April and July, although the proportion achieving the recommended amount of 60 minutes a day may have reduced.

6. Being outdoors:
The majority of children spent some time in green and natural places at least a couple of times a week between April and August.

There are indications from the data that some groups, such as young disabled people, have reported higher and increasing feelings of being anxious. Parents have also reported that children with special educational needs or a disability from Black, Asian and Minority Ethnic backgrounds may be feeling more anxious. Similarly, young people who were economically disadvantaged reported lower life satisfaction in April to early May than those who were financially better off, though between July and early September there was no significant different between these two groups.

Overall, however, the data collated in the report show a positive picture of the experiences of most children and young people during the time period covered, given the unprecedented challenges faced.

The Government has sought to use this evidence to make children's wellbeing and mental health a central part of its response to the coronavirus pandemic and informed the significant programme of mental health interventions introduced in its wake working closely with experts and charities. This includes its Wellbeing for Education Return training programme and online resources that reached thousands of school and college staff as they supported pupils during the summer term and as they returned for the autumn term.

For the State of the Nation 2020 report, **click here**.

18/10/20

FGM campaigner Nimco Ali appointed as Tackling Violence Against Women and Girls adviser

On 9 October 2020 the Home Office announced that Nimco Ali OBE, CEO of The Five Foundation, The Global Partnership To End FGM, had been appointed as an Independent Government Adviser on Tackling Violence Against Women and Girls.

She will advise the Home Secretary and other ministers on the government's new Tackling Violence Against Women and Girls Strategy, which will be published in 2021.

The new Tackling Violence Against Women and Girls Strategy is intended to help improve the targeting of perpetrators and support victims of these crimes, and increase the Government's ability to tackle new and emerging forms of violence against women and girls such as upskirting and revenge porn. A continued effort is required to shine a light on these often hidden crimes, the Home Office says.

The Home Office notes that Nimco Ali OBE is a leading voice in the UK and globally on violence against women and girls. As CEO of The Five Foundation, The Global Partnership To End FGM, she brings a wealth of both first-hand and professional experience in how to best protect

and promote the rights of women and girls. Nimco has spearheaded the campaign to elevate FGM as a priority issue in the UK and globally - including persuading Sudan to ban FGM in recent months and changing the narrative on how grassroots efforts to end FGM on the African continent and beyond need to be properly funded.

Home Secretary Priti Patel said:

> "Nimco Ali's dedication to raising awareness of the sickening practice of Female Genital Mutilation and advocacy for victims of gender-based violence, means she is ideally placed to advise the Government on tackling these appalling crimes."

Ms Ali will support the consultation process for the new strategy, which will engage with girls and women throughout the UK from a range of backgrounds. A key part of her role will be to hear from a wide range of people, so ordinary voices from across the UK are heard throughout this consultation, and practical solutions are found to make a real difference to people's lives.

18/10/20

Letter from Mr Justice Hayden: COVID-19 restrictions and the Court of Protection

The Honourable Mr Justice Hayden, Vice President of the Court of Protection, **has written** about the new tiered restrictions for England, announced in the House of Commons on 12 October 2020 (effective as of 14 October 2020).

The letter notes that the **Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020** Schedule 1, Tier 3 restrictions Part 1, section 5 permits contact with relatives 'staying' in Care Homes, under the same arrangements presently assessed as Covid-19 compliant. He says that it will undoubtedly be the case that the actual arrangements will have to be tailored to the particular individual and the circumstances within the home, during the course of what we have now recognised to be the second wave of the pandemic. What is important to emphasise is that these arrangements have been identified within the Regulations made by the Secretary of State and are therefore lawful.

For the letter, **click here**. For the Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020, **click here**.

18/10/20

Practice Note on bills of costs in the Court of Protection

A Practice Note on bills of costs in the Court of Protection has been published.

It addresses the practical consequences on the assessment of the bills of Deputies appointed by the Court of Protection of the decision of Costs Judge Whalan in ***PLK & others*** **[2020] EWHC B28 (Costs)**.

For the Practice Note, **click here**.

18/10/20

Privy Council to give judgment in reciprocal enforcement case

On 19 October 2020 the Judicial Committee of the Privy Council will promulgate the judgment in *Yearwood v Yearwood*, an appeal from the Court of Appeal of Antigua and Barbuda. The Privy Council will determine whether orders made by the High Court of England and Wales in family proceedings can be registered in Antigua and Barbuda under the Reciprocal Enforcement of Judgments Act; and whether Mrs Yearwood's application to register these orders should have been dismissed on the ground of issue estoppel, cause of action estoppel or abuse of process, and/or because the application was made out of time.

Mr and Mrs Yearwood were formerly a married couple. They divorced; the decree absolute was issued by the High Court of England and Wales on 8 December 2009.

The English High Court made various orders against Mr Yearwood as a result of the divorce proceedings. These included an order dated 10 May 2010 directing Mr Yearwood to pay Mrs Yearwood £3,144,456.80. On 31 May 2010, Mrs Yearwood applied to the Antiguan Court to register this order under the Reciprocal Enforcement of Judgments Act. However, Michel J held that the order could not be registered, and set aside the registration on Mr Yearwood's application.

On 27 June 2013, Mrs Yearwood applied to the Antiguan Court to register a default costs certificate dated 12 November 2010 and a further order made by the High Court of England and Wales on 9 July 2012. In response, Mr Yearwood sought a declaration that Mrs Yearwood is not entitled to register judgments, orders or directives of the English High Court. He also sought an injunction preventing Mrs Yearwood from seeking to register such judgments, orders or directives. Mr Yearwood applied for summary judgment of his claim.

Henry J found in favour of Mrs Yearwood. She dismissed Mr Yearwood's summary judgment application and granted Mrs Yearwood's application to register the English High Court order dated 9 July 2012. However, she refused Mrs Yearwood's application to register the default costs certificate, on the basis that the application was made out of time.

The Court of Appeal dismissed Mr Yearwood's appeal, but allowed Mrs Yearwood's counter-appeal to permit registration of the default costs certificate. Mr Yearwood now appeals to the Judicial Committee of the Privy Council.

18/10/20

Guidance on new three-tier Covid system and how it impacts adoption and fostering practice in England

CoramBAAF has published guidance circulated by the Department of Education in relation to the new three-tier system of restrictions which will apply to every region in England from 14 October 2020. It states that the regulations provide exceptions to 'the rule of six' and to the rule of household mixing for the purpose of making arrangements for prospective adopters (including their household) to meet a child or children who may be placed with them for adoption.

For the guidance, **click here**.

19/10/20

Coronavirus: Separated Families and Contact with Children in Care FAQs

The House of Commons Library has published a helpful paper providing brief information in response to some key questions regarding the impact of the Coronavirus outbreak on separated families, maintenance arrangements and access to children. For the paper, **click here**.

18/10/20

New private law cases received by Cafcass in September 14 per cent higher than 2019

Cafcass received a total of 4,262 new private law cases (involving 6,566 children) in September 2020 – 14.5 per cent (or 540 cases) higher than the same month last year.

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

18/10/20

New public law cases received by Cafcass increased by 7 per cent in September

Cafcass received a total of 1,499 new public law applications (involving 2,335 children) in September – 104 applications (7.5 per cent) more than in the same month last year. This is the second month since January 2020 in which cases have increased year-on-year.

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

18/10/20

8.7 million people report experiencing economic abuse

Approximately 16 per cent of all UK adults identify as having experienced economic abuse in their current or former relationship – but the numbers may be higher as more than twice as many have experienced economically abusive behaviours. More than 1.5 million adults (3 per cent) saw their economic abuse begin during the Covid-19 pandemic.

The figures are revealed in the report ***Know Economic Abuse*** published by **Co-operative Bank** and **Refuge** – five years on from launching their landmark campaign to tackle economic abuse. The report makes new recommendations for change, following the 2015 report which led to the introduction of the UK finance industry's Financial Abuse Code of Practice, a set of voluntary guidelines to help the financial services industry better identify and address the needs of someone experiencing economic abuse.

Nearly two out of five UK adults (39 per cent) – approximately 20 million people – have experienced economically abusive behaviour in a current or former relationship, according to the report launched today by The Co-operative Bank and Refuge, the UK's largest national domestic abuse charity. Despite this, only 16 per cent of people describe, or recognise, their experiences as abuse.

The *Know Economic Abuse* campaign aims to raise awareness of the true scale of economic abuse in the UK. Economic Abuse – sometimes called financial abuse – occurs when someone attempts to control another's ability to acquire, maintain access to, or use money or other economic resources on a sustained basis. This can include behaviour such as stopping someone from working, taking someone's money, preventing someone from accessing their own or joint bank accounts, or putting debts in their name. Nearly a million people (10 per cent of all who have experienced economic abuse) are currently in relationships with people who are abusing them economically.

Economic abuse most commonly begins early on in a relationship (18 per cent), but other key milestones can trigger it – such as moving in together (16 per cent), getting married (12 per cent), or at the point a couple formally joins their finances (8 per cent). Many people also experience economically abusive behaviour from former partners during and after separation, such as damage or theft of property, or spending money from a joint account without consent (24 per cent).

For the report, **click here**. For an article, by Rebecca Christie of Hunters, explaining the protections available to a divorcing client who has suffered economic abuse from their spouse, **click here**.

24 October 2020

New legal guidance from CPS tackles rape myths and stereotypes

The growing exchange of naked selfies, misconceptions about the use of 'hook up' dating sites and discussion of why sexual assault victims may remain in contact with their attacker all form part of **new draft guidance** for prosecutors on rape myths and stereotypes published by the Crown Prosecution Service.

The material is part of a wide-ranging revision of legal guidance for prosecutors on rape and serious sexual offences (RASSO) which is being launched for public consultation (ending on 18 January 2021). It is the first full 'refresh' since 2012 and includes updated guidance on dealing with digital material, as well as reasonable lines of enquiry. The suggested changes aim to reflect the changing world, especially the growth of the digital technology and its impact on sexual behaviours and encounters.

Siobhan Blake, CPS rape lead said:

> "There have been massive changes to the way people live their lives in the last ten years and this has undoubtedly transformed the way people interact, date and communicate with sexual partners. Rape remains one of the most complex criminal offences and that is why this updated legal guidance addresses 39 common myths and stereotypes.
>
> "As dramatic technological advances have changed the way people meet and connect, it's vital those in the criminal justice system understand the wider, social, context of these changes. For example, many teenagers believe that sending explicit photos or videos is a part of everyday life. Our prosecutors must understand this and challenge any implication that sexual images or messages equate to consent in cases of rape of serious sexual violence."

The CPS has worked hand in hand with victim support groups to update the myths and stereotypes guidance. A project focused on reasons for lower conviction rates in cases involving the 18-24 age group and sought expert views on what might be driving the trend. This work found that while established myths and stereotypes – such as belief that wearing a short skirt is proof of implied consent – are still common, changing use of technology has led to the emergence of new myths, linked for example to sharing of explicit selfies, use of dating apps, and casual sex.

The refreshed guidance aims to support CPS lawyers as they build the strongest possible cases to put before the court. Key changes include updates on:

- The impact of trauma, in particular how the memory of a victim or complainant can be affected. It is crucial that prosecutors understand the impact and are able to present the prosecution case in a way which contextualises this for a jury.

- Reasonable lines of enquiry – this section refreshes guidance on striking the appropriate balance between privacy and a thorough investigation. It focuses on obtaining early advice and the need for investigators and prosecutors to work together from the earliest stage in order to build strong cases and escalation processes.

Changes have also been made to guidance when considering cases involving same sex sexual violence, and when there are victim vulnerabilities, with a focus on psychological and mental health issues.

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

24/10/20

Domestic abuse and sexual violence survivors encouraged to seek help during Welsh firebreak lockdown

As Wales moved towards the firebreak lockdown, the Deputy Minister and Chief Whip, Jane Hutt, issued a direct plea for friends and neighbours to look out for signs of domestic abuse, and encourage victims and survivors to seek help and escape from their homes if necessary.

Specialist services remain open and are available to help victims of harm or abuse during the firebreak lockdown. Perpetrator services, which work to prevent incidents of domestic abuse from happening, also remain open and will continue to provide support.

Jane Hutt said:

> "It is vital, if you are at risk, that you should seek support straight away. You will not be in trouble if you need to leave your home to seek help, and specialist services are open and operating, refuges will take referrals, and support is available to help you.
>
> "I want to emphasise this – if you are in danger or need to leave your home to escape domestic abuse, you are allowed to do so – you will not be in trouble. You can cross county boundaries and travel wherever necessary, and specialist services can help find you suitable emergency accommodation and support.
>
> "I urge communities, friends, neighbours, postal workers and delivery drivers across Wales to look out for each other, and act as the eyes and ears for victims of abuse who need help. These are scary times for all of us, but those at risk of abuse could be hanging on to life by a thread.
>
> "It is very important, for your safety and the victim's, that you don't intervene yourself, but you can help by calling 999 in an emergency or Live Fear Free (contact details below). You could be saving a life."

The Live Fear Free helpline is available 24 hours a day, seven days a week. For contact details, **click here**.

24/10/20

One in six children have a probable mental disorder

The proportion of children experiencing a probable mental disorder has increased over the past three years, from one in nine in 2017 to one in six in July this year.

The rate has risen in boys aged 5 to 16 from 11.4 per cent in 2017 to 16.7 per cent in July 2020 and in girls from 10.3 per cent to 15.2 per cent over the same time period, according to ***The Mental Health of Children and Young People in England 2020 report***, published by NHS Digital, in collaboration with the Office for National Statistics, the National Centre for Social Research, the University of Cambridge and the University of Exeter.

The likelihood of a probable mental disorder increases with age, with a noticeable difference in gender for the older age group (17 to 22 year olds); 27.2 per cent of young women and 13.3 per cent of young men in this age group were identified as having a probable mental disorder in 2020.

The report looks at the mental health of children and young people in England in July 2020, and how this has changed since 2017. Experiences of family life, education and services, and worries and anxieties during the coronavirus (COVID-19) pandemic are also examined. The findings draw on a sample of 3,570 children and young people aged between 5 to 22 years old, surveyed in both 2017 and July 20204.

Data in the publication are broken down into the following sections:

- Trends and prevalence of mental disorders
- Family dynamics
- Parent and child anxieties about COVID-19, and well-being
- Access to education and health services
- Changes in circumstances and activities.

In respect of family dynamics, the report revealed that among girls aged 11 to 16, nearly two-thirds (63.8 per cent) with a probable mental disorder had seen or heard an argument among adults in their household, compared to 46.8 per cent of girls unlikely to have a mental disorder.

For the report, **click here**. For a blog post by Tim Vizard, Branch Head for the Mental Health of Children and Young People Survey at ONS, **click here**.

24/10/20

Women divorced in later life may be missing out on substantial state pensions

Tens of thousands of women who divorce later in life may be missing out on huge sums in state pension rights because of a "complex and little understood system", according to **analysis from the financial consultancy LCP**.

During 1998 to 2018, more than 100,000 women aged 60 or over divorced according to figures from the Office for National Statistics. The vast majority of these women reached state pension age before 6th April 2016 and come under the 'old' state pension system which makes significant provision for divorced women. But if they divorce after pension age they benefit from a pension uplift only if they notify DWP of their divorce. There is worrying evidence, says LCP, that many may not be aware of this or are deterred from doing so.

LCP explains that under the old state pension system, a married woman who divorced can substitute her former husband's National Insurance record for her own up the date of their divorce for purposes of working out her basic state pension. This very often results in a significant uplift which might, over the course of a twenty year retirement, amount to more than £50,000.

For women who divorced (and did not remarry) before state pension age, any 'substitution' based on her former husband's NI record should have taken place when she claimed her state pension. But where women divorce post-retirement, there is no automatic process for an uplift to take place.

Steve Webb of LCP is now urging women who divorced over pension age and who reached pension age before 6th April 2016 to make sure that they notify the DWP as a matter of urgency in order to get their state pension reviewed.

For more information on this matter, consult the LCP website by **clicking here**.

25/10/20

Care leavers: new guidance to prevent homelessness

The Ministry of Housing, Communities and Local Government has published **new guidance** for councils to help ensure care leavers have the stable homes they need, and prevent them from becoming homeless. The guidance recommends how council housing departments and children's services should produce a joint protocol that sets out how they will work together to ensure:

- each care leaver has a tailored support plan as they transition to independent living
- those at risk of homelessness are identified early and action is taken to prevent it
- a quick, safe and joined up response for care leavers who go on to become homeless.

For the guidance, **click here**. For the announcement of the guidance, **click here**.

30/10/20

Two new appointments to the Family Justice Council

The Family Justice Council has announced the appointment to the Council of Bernadette MacQueen as the new Legal Adviser member and Fiona Straw as the new Paediatrician member.

The Family Justice Council is an inter-disciplinary body whose members are drawn from a cross-section of those who work, use or have an interest in the family justice system. They include judges, lawyers, doctors, social workers, academics and civil servants. The Council monitors the effectiveness of the family justice system, advising on reforms necessary for improvement and promoting an interdisciplinary approach to family justice in England and Wales.

The latest appointments are for three years from September 2020 in respect of Bernadette MacQueen and October 2020 in respect of Fiona Shaw. Both posts are unremunerated. The appointments process for each post was conducted in line with the principles set out in the Governance Code on Public Appointment.

30/10/20

Remote hearings in the family justice system: follow-up consultation report

The Nuffield Family Justice Observatory (NFJO) has published a follow-up consultation report entitled ***Remote hearings in the family justice system: reflections and experiences***.

Following the outbreak of the COVID-19 pandemic, and the introduction of social distancing measures, the family courts in England and Wales rapidly adapted to using telephone and video hearings. In light of this significant change, the President of the Family Division asked the NFJO to undertake a rapid consultation on the use of remote hearings in the family court. The consultation ran for a two-week period in April 2020 and more than 1,000 people responded.

The current report provides an overview of the findings of a follow up consultation process undertaken between 10 and 30 September 2020. 1,306 respondents completed a survey, several organisations submitted additional information, and focus groups and interviews were undertaken with parents.

The President of the Family Division, Sir Andrew McFarlane said in response to the report:

> "This emergency is without precedent. Judges and others have worked tirelessly, and continue to do so, so that the Family Court has continued to function without a break since the start of 'lockdown' in March. We have adjusted, developed and adapted our methods of working as the crisis has persisted. Much of the work of the Family Court cannot be left to wait as many cases, involving the welfare of children as well as adults, are urgent. Because of the need for social distancing most cases are currently heard remotely (either wholly or in part). The report highlights that everyone is doing their best in the circumstances.
>
> "This important piece of independent research, which holds a mirror up to the system, is a most valuable reflection after six months of remote working. Encouragingly, most professionals, including judges, barristers, solicitors, Cafcass workers, court staff and social workers, felt that, overall, the courts were now working more effectively and that there were even some benefits for all to working remotely.
>
> "However, the report highlights a number of areas of concern that need to be addressed. There are clearly circumstances where more support is required to enable parents and young people to take part in remote hearings effectively. It is worrying that some parents report that they have not fully understood, or felt a part of, the remote court process. Whilst technology is improving, there is clearly still work to be done to improve the provision of Family Justice via remote means. I am very alert to the concerns raised in this report, and I will be working with the judiciary and the professions to develop solutions."

Most professionals who responded to the survey felt that fairness and justice had been achieved in the cases they were involved with most or all of the time. However, professionals also have concerns about whether proceedings are perceived as fair by parties in all cases. Professionals also shared concerns about the difficulties of being sufficiently empathetic, supportive, and attuned to lay parties when conducting hearings remotely.

Common problems highlighted include: parents taking part in hearings remotely alone, and from their homes; a lack of communication between lay parties and their legal representatives before hearings; and difficulties with communication during hearings because of the need to use more than one device or to adjourn the hearing. Particular difficulties are experienced by parents who require an interpreter or who have a disability. There has also been widespread concern for litigants in person in private law matters.

Respondents have also expressed concern about the impact on the authority of the court.

There continue to be many technical problems encountered in most forms of remote hearing. Most problems relate to connectivity and common issues identified included difficulty in hearing people, difficulty seeing people, and difficulty identifying who is speaking.

There are wide variations in practice in terms of how hearings are organised. Some are working well. Where problems occur, they include a lack of advance notice, sudden cancellations, and a lack of clarity about which format will be used for the hearing.

For the report, **click here**.

30/10/20

1980 Child Abduction Convention celebrates its 40th anniversary

On 25 October 2020, the 1980 Child Abduction Convention celebrated its 40th anniversary.

The Child Abduction Convention has become one of the most visible HCCH Conventions since its entry into force on 1 December 1983. At its 40th anniversary, it counts more than a hundred Contracting Parties that span every continent.

The Child Abduction Convention is a crucial instrument for the international protection of children. It establishes a mechanism of cooperation between Central Authorities, ensuring a rapid procedure for the return of a wrongfully removed or retained child to the State of his or her habitual residence. The framework of protection that the Convention has put in place also acts as a deterrent to international child abductions. The Convention gives effect to the fundamental rights of the child, for instance, to maintain contact with his or her parents.

The **six Guides to Good Practice under the Child Abduction Convention** published by the HCCH have touched upon different topics such as mediation, enforcement and the exception of non-return provided for in Article 13(1)(b). The Convention has inspired the establishment of the '**Malta process**', the **International Hague Network of Judges**, and a case law database on international child abduction (**INCADAT**).

30/10/20

Draft Homelessness Code of Guidance relating to the Domestic Abuse Bill published

The Ministry of Housing, Communities and Local Government has published a draft Homelessness Code of Guidance in respect of the Domestic Abuse Bill. The Bill has completed its passage through the House of Commons and is due to have its second reading in the House of Lords on a date to be announced.

The Bill, if enacted in its current form, will amend Part 7 of the Housing Act 1996 to strengthen the support available to victims of domestic abuse. The Act extends priority need to all eligible victims of domestic abuse who are homeless as a result of being a victim of domestic abuse. The Bill would bring in a new definition of domestic abuse which housing authorities would have to follow to assess whether an applicant was homeless as a result of being a victim of domestic abuse.

For the Bill, as introduced in the House of Lords, **click here**. For the draft Homelessness Code of Guidance, **click here**.

30/10/20

Children: Public Law Update (October)

John Tughan QC of 4PB considers the latest judgments that Public law child lawyers need to know about.

Pandemic? What pandemic? The work of the public law Family Court continues apace and that should be a source of pride to the professions involved.

There are a number of interesting decisions to report in this quarter on the following issues:

- The burden of proof
- Similar fact evidence
- Stay
- Section 33 Children Act 1989 and change of nationality
- Disclosure of asylum documents
- Injuries: withdrawal of care proceedings
- Remote hearing Issues

1. The burden of proof

Shagang Shipping Company Ltd (in liquidation) [2020] UKSC 34 was a commercial case involving allegations of corruption, including bribery and torture. It is interesting for the debate centred on *In re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35; [2009] AC 11. Lords Hamblen and Leggatt gave the lead opinion and held this:

> "99. The requirement to discharge the legal burden of proof, which operates in a binary way, applies to facts in issue at a trial, but it does not apply to facts which make a fact in issue more or less probable. Lord Hoffmann was alert to this point in In re B as, immediately after the passage quoted above, he contrasted facts in issue with "facts which merely form part of the material from which a fact in issue may be inferred, which need not each be proved to have happened" (para 3). So, for example, in the present case (as already discussed) it was not necessary to prove that the prospect of leniency in fact caused the confessions to be made. That it may have done is sufficient to make it relevant to take into account in deciding whether a bribe had been paid. Judges need to take account, as best they can, of uncertainties and degrees of probability and improbability in estimating what weight to give to evidence in reaching their conclusions on whether facts in issue have been proved. It would be a mistake to treat assessments of relevance and weight as operating in a binary, all or nothing way."

2. Similar fact evidence

R v P (Children: Similar Fact Evidence) [2020] EWCA Civ 1088 was a private law judgment which, it is apparent, can be read across to public law fact finding principles. Peter Jackson LJ gave the lead judgment of the Court of Appeal. It was a case involving a Mother's allegations of coercive and controlling behaviour on the part of the Father. She sought to rely on his previous allegedly coercive and controlling behaviour towards another woman as similar fact evidence. At first instance the court refused to admit the evidence. The Mother appealed.

By similar fact the court was concerned with a contention that an individual's behaviour in other circumstances makes it more likely that he will have behaved in the manner now alleged because it is evidence of a propensity to behave in that way.

Lord Bingham in ***O'Brien v Chief Constable of South Wales Police*** **[2005] UKHL 26**; [2005] 2 AC 534 held:

> "3. Any evidence, to be admissible, must be relevant. Contested trials last long enough as it is without spending time on evidence which is irrelevant and cannot affect the outcome. Relevance must, and can only, be judged by reference to the issue which the court (whether judge or jury) is called upon to decide. As Lord Simon of Glaisdale observed in *Director of Public Prosecutions v Kilbourne* [1973] AC 729, 756,
>
> "Evidence is relevant if it is logically probative or disprobative of some matter which requires proof ….. relevant (ie. logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable".
>
> 4. That evidence of what happened on an earlier occasion may make the occurrence of what happened on the occasion in question more or less probable can scarcely be denied. … To regard evidence of such earlier events as potentially probative is a process of thought which an entirely rational, objective and fair-minded person might, depending on the facts, follow. If such a person would, or might, attach importance to evidence such as this, it would require good reasons to deny a judicial decision-maker the opportunity to consider it."

That analysis, given in a civil case, applies also to family proceedings:

> "23. There are two questions that the judge must address in a case where there is a dispute about the admission of evidence of this kind. Firstly, is the evidence relevant, as potentially making the matter requiring proof more or less probable? If so, it will be admissible. Secondly, is it in the interests of justice for the evidence to be admitted? This calls for a balancing of factors of the kind that Lord Bingham identifies at paragraphs 5 and 6 of *O'Brien*."

The next question was: to what extent do the facts relating to the other occasions have to be proved for propensity to be established? Lord Kerr in ***R v Mitchell*** **[2016] UKSC 55**, [2017] AC 571 answered that question in this way:

> ***"Propensity - the correct question/what requires to be proved?***
> 39. A distinction must be recognised between, on the one hand, proof of a propensity and, on the other, the individual underlying facts said to establish that a propensity exists. In a case where there are several incidents which are relied on by the prosecution to show a propensity on the part of the defendant, is it necessary to prove beyond reasonable doubt that each incident happened in precisely the way that it is alleged to have occurred? Must the facts of each individual incident be considered by the jury in isolation from each other? In my view, the answer to both these questions is "No".
>
> 43. The proper issue for the jury on the question of propensity… is whether they are sure that the propensity has been proved. … That does not mean that in cases where there are several instances of misconduct, all tending to show a propensity, the jury has to be convinced of the truth and accuracy of all aspects of each of those. The jury is entitled to – and should – consider the evidence about propensity in the round. There are two interrelated reasons for this. First the improbability of a number of similar incidents alleged against a defendant being false is a consideration which should naturally inform a jury's deliberations on whether propensity has been proved. Secondly, obvious similarities in various incidents may constitute mutual corroboration of those incidents. Each incident may thus inform another. The question … is whether, overall, propensity has been proved.
>
> 44. … the jury should be directed that, if they are to take propensity into account, they should be sure that it has been proved. This does not require that each individual item of evidence said to show propensity must be proved beyond reasonable doubt. It means that all the material touching on the issue should be considered with a view to reaching a conclusion as to whether they are sure that the existence of a propensity has been established."

These principles were also applicable to civil and family cases, with appropriate adjustment to the standard of proof.

3. Stay

In ***Re N (Children) (Interim Order/Stay)*** **[2020] EWCA Civ 1070** the Court of Appeal was dealing with an appeal from a decision involving the interim removal of children from their family. As to the approach to a stay of decisions pending appeal the Court said this:

"36. A short term stay to enable an application to be considered by an appeal court before an order is put into effect is to be distinguished from a stay pending a decision on permission to appeal or a stay pending appeal. Applications for stays of the latter kind will be considered in accordance with the principles set out in ***Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065**. By contrast, a short term stay is a purely practical remedy, distinct from the decision about permission to appeal. The correct approach for the court to take to an application of this kind was described by Wilson LJ in ***Re A* [2007] EWCA 899**....where he confirmed that the judge should always give serious consideration to allowing an applicant "a narrow opportunity" to approach this court so that the opportunity for a successful appeal is not unfairly eroded...

37. The current arrangements are that this court can be contacted during working hours on **civilappeals.registry@justice.gov.uk** between 9.00 am and 4.15 pm and out of hours through the security officers at the Royal Courts of Justice on 020 7947 6260, who will refer the matter on to the Duty Clerk. Urgent applications should whenever possible be made within court hours. Unless already filed, the applicant or the applicant's representative will be required to give an undertaking to file the necessary application form and court fee. Instructions may then be given for the transmission of essential information by email so that the application can be considered by a judge, who may decide to grant a stay, for example until the end of the following working day, to enable further documents, such as a note of the judgment and draft grounds of appeal, to be sent to the court for consideration of the merits of a further stay."

4. Section 33 Children Act 1989 and change of nationality

***Re Y (Children in Care: Change of Nationality)* [2020] EWCA Civ 1038** held that a local authority was not entitled to take steps to change the nationality of a child in its care in the face of parental opposition and where the change might lead to a loss of the child's original nationality, without first obtaining approval from the High Court.

Compare and contrast the earlier decision of the effect of s. 33 Children Act 1989 on local authority powers relating to vaccination of children in care: ***Re H (A Child)(Parental Responsibility: Vaccination* [2020] EWCA Civ 664**.

5. Disclosure of asylum documents

The debate regarding the confidentiality of asylum documents and how properly to balance the considerations involved in questions of disclosure into family proceedings continues with ***H (A Child) (Disclosure of Asylum Documents)* [2020] EWCA Civ 1001**. This was a private case in which the Father faced serious allegations of domestic abuse and child sexual abuse. He was entitled, subject to certain redactions, to disclosure and inspection of documents from the Mother's successful asylum claim in which she had made the same allegations. On the particular facts, the strong public interest in maintaining the confidentiality of the asylum system was outweighed by the father's ECHR Art. 6 and Art. 8 rights.

The Court of Appeal held that whenever a party asserted exemption from disclosure, a judge had to conduct a balancing exercise of the competing ECHR rights, in particular the right to a fair trial of the party seeking disclosure or inspection as against the confidentiality rights of the other party and any person whose rights might require protection, bearing in mind that the denial of disclosure was limited to where it was strictly necessary. That approach applied to a range of documents, such as police records, local authority files, information held by central government departments, medical records, therapeutic and counselling notes. Information relied on by an asylum applicant should not be treated any differently. The fact that it was provided on a confidential basis and the public interest in maintaining the confidentiality of the asylum process, were both factors a judge had to take into account.

6. Injuries: withdrawal of care proceedings

In ***Re GC (A Child) (Withdrawal of care proceedings)* [2020] EWCA Civ 848** the Court of Appeal held that a judge was wrong to allow the local authority to withdraw the care proceedings. The case involved a small displaced oblique fracture of the right parietal bone with a 5mm subgaleal haematoma overlying the fracture site.

Baker LJ summarised the principles in play:

"19. As identified by Hedley J in *Redbridge London Borough Council v B and C and A* [2011] EWHC 517 (Fam) applications to withdraw care proceedings will fall into two categories. In the first, the local authority will be unable to satisfy the threshold criteria for making a care or supervision order under s.31(2) of the Act. In such cases, the application must succeed. But for cases to fall into this first category, the inability to satisfy the criteria must, in the words of Cobb J in *Re J, A, M and X (Children)*, be "obvious".

20. In the second category, there will be cases where on the evidence it is possible for the local authority to satisfy the threshold criteria. In those circumstances, an application to withdraw the proceedings must be

determined by considering (1) whether withdrawal of the care proceedings will promote or conflict with the welfare of the child concerned, and (2) the overriding objective under the Family Procedure Rules. The relevant factors will include those identified by McFarlane J in *A County Council v DP* which, having regard to the paramountcy of the child's welfare and the overriding objective in the FPR, can be restated in these terms:

> (a) the necessity of the investigation and the relevance of the potential result to the future care plans for the child;
>
> (b) the obligation to deal with cases justly;
>
> (c) whether the hearing would be proportionate to the nature, importance and complexity of the issues;
>
> (d) the prospects of a fair trial of the issues and the impact of any fact-finding process on other parties;
>
> (e) the time the investigation would take and the likely cost to public funds."

7. Remote hearing Issues

There have been several decisions in this area since the last update. They include ***Re Y (A Child) (Leave to oppose Adoption)*** **[2020] EWCA Civ 1287** which involved the court managing a remote hearing involving a litigant with hearing difficulties, the first such case before the Court of Appeal. The parents required the assistance of sign language interpreters and a deaf-registered intermediary. It was not appropriate to give general guidance for managing cases involving litigants suffering from such disabilities in the new landscape of remote and hybrid hearings. Those issues would be referred to the President of the Family Division for consideration as to whether already published guidance on the conduct of remote and hybrid hearings in the family jurisdiction needed amendment.

In *NP v A Local Authority* [2020] EWCA Civ 1003 the Court was dealing with removal of children in urgent circumstances and by remote hearing. The Court of Appeal held that the case demonstrated the difficulties facing courts required to conduct hearings remotely because of the restrictions imposed as a result of the pandemic. The recorder was faced with a series of decisions and applications which, if granted, would have removed three small children from the family for the first time. There was often no alternative to conducting truly urgent hearings remotely, but the experience of the last four months demonstrated that particular care had to be exercised when making such important decisions under what were inevitably sub-optimal conditions.

In ***Re D-S (Contact with children in care: Covid-19)*** **[2020] EWCA Civ 1031** the Court of Appeal held that the ordinary principles governing applications for contact with children in care under the Children Act 1989 s.34 continued to apply during the COVID-19 pandemic, even though outcomes might be affected by the practical difficulties facing local authorities.

In ***Re C (Children) (Covid-19: Representation)*** **[2020] EWCA Civ 734** the Court of Appeal refused to adjourn a fact-finding hearing because the Mother's leading counsel would be unable to attend court and would have to take part remotely. There was no inequality of arms and the Mother's participation was not prevented.

Stay well.

28.10.20

Falling Out of Love in Hong Kong – a quick guide to divorce and financial provision in the territory

Clare Williams, Professional Support Lawyer, and Lydia Pilati, Associate Solicitor, both at JMW explain the similarities and distinctions between the law of divorce and financial provision between Hong Kong and England and Wales

Political turmoil in Hong Kong has been in the news throughout this year and last, with critics calling the passing of China's new security law "**the end of Hong Kong**" (**1**). It feels as if life in the territory is undergoing fundamental – for many, unwelcome – changes, leading many expats to ask serious questions about what the future may hold for them. Hong Kong's many British residents may find themselves wrestling with the decision whether or not to return to the UK. For some, whose failed marriage has upheld Hong Kong's unfortunate reputation as the '**graveyard of marriages**', this decision may induce an additional dilemma of whether they should initiate proceedings in Hong Kong, given their resident status, or seek to issue in England and Wales, either immediately or after returning.

As its legal system was developed under British rule, Hong Kong is a common law jurisdiction, with the law on divorce and financial provision largely modelled on its English equivalent. Whilst there are many recognizable features, not least the acceptance of the post-White jurisprudence on financial provision, there is some divergence between the two jurisdictions. The most notable difference, however, is the lifestyle that many expatriate and local families choose to lead, their spending habits and the structure of their asset portfolio. It is not uncommon for local families, for example, to have their wealth tied up in the family business or a trust structure. In addition, the cost of living is comparatively high and, therefore, separating families who intend to continue to live and potentially raise their children in Hong Kong, will need to consider whether the matrimonial pot can afford to maintain two households.

Jurisdiction

Pursuant to section 3 of the Matrimonial Causes Ordinance (Cap 179), the courts in Hong Kong will have jurisdiction in divorce proceedings if either party to the marriage can satisfy one of the following requirements, as at the date of the petition:

1. They are domiciled in Hong Kong;

2. They have been habitually resident in Hong Kong for a minimum of three years; or

3. They have a substantial connection to Hong Kong.

This differs from the position in England and Wales whereby the court's jurisdiction is generally based on the familiar grounds set out in Article 3 of **Council Regulation (EC) No 2201/2003**, ("Brussels II Revised"), namely:

1. Both spouses are habitually resident here;

2. The parties were last habitually resident as a couple here, and one of them still lives here;

3. The respondent divorce petition is habitually resident here;

4. The applicant is habitually resident, having resided here for a period of 12 months ending in the date the application is made;

5. The applicant is domiciled here, having resided here for a period of six months ending in the date the application is made; or

6. Both parties are domiciled here.

Applicants unable to avail themselves of jurisdiction under Brussels II revised here or in another contracting state may of course rely on a single party's domicile in England and Wales (**2**), noting that the courts in England and Wales may nevertheless lack jurisdiction to deal with a needs-based claim due to the operation of the EU Maintenance Regulation.

In Hong Kong "substantial connection" is case dependent and it is not uncommon, when filing for the pronouncement of decree nisi, for the Hong Kong court to request a short affidavit from the petitioner setting out their substantial connection to Hong Kong. The affidavit should consider and set out how long the parties have been resident in Hong Kong, whether the parties work in Hong Kong and have a fixed employment contract, whether they have a tenancy agreement (most Hong Kong tenancy agreements run for two years with a one year break clause), whether they have bank accounts in Hong Kong, or any other assets, and whether their children attend school in Hong Kong. Commonly, Hong Kong practitioners will ask their clients to provide this information at the initial meeting so that the affidavit can be drawn up shortly thereafter with a view to automatically filing it with the court alongside Form 21 (the application for decree nisi) without the court having to request it, thus preventing any unnecessary delay.

Grounds for Divorce

Hong Kong's substantive divorce law (**3**) mirrors the current law in England and Wales, in that there is only one ground upon which parties may petition for divorce, i.e. that the marriage has irretrievably broken down. However, the facts upon which parties may rely upon do differ, the main difference being the availability of the two separation facts within shorter timescales.

1. The respondent's behaviour;

2. Adultery;

3. Separation for a continuous period of one year preceding the petition, with consent;

4. Separation for a continuous period of two years preceding the date of the petition, without consent; and

5. Desertion, the respondent having deserted the petitioner for a continuous period of one year preceding the date of the petition.

Happily, collaborative practice is encouraged in Hong Kong, and the majority of practitioners will advise their clients to petition for divorce citing the respondent's behaviour using mild particulars, to set proceedings off on the right foot and to prevent legal fees escalating unnecessarily. In addition, save for exceptionally rare cases if "obvious or gross" (**4**), the conduct of a party will not be relevant when the court considers the division of the matrimonial pot or the custody of the children and therefore it seems futile to engage in long protracted proceedings. Indeed the Hong Kong court has encouraged family practitioners "… to embrace a more proactive mindset to resolve family disputes through effective and proportionate means…" (**5**)

Generally, reliance in the petition on the fact of adultery is actively discouraged because when using this fact, the petitioner will need to prove their spouse committed adultery and the third party will need to be made party to the proceedings, unless excused by the court on special grounds.

Financial Provision

Similar to the legislation in England and Wales, under section 4 of the Matrimonial Proceedings and Property Ordinance (Cap 192) ("MPPO"), the Hong Kong courts can make the following orders for financial provision:

1. Periodical payments;

2. Secured periodical payments;

3. Lump sum;

4. Transfer or settlement of a property;

5. Sale of a property; and

6. Variation of settlement.

One stark difference between the financial provision orders the Hong Kong and English courts can make is with regard to pensions. In Hong Kong, a compulsory pension fund, the Mandatory Provident Fund (MPF), requires an employee and employer to contribute on a monthly basis to the scheme in proportion to the employee's salary. The disparity of pension provision can be very much a live issue in many expatriate families in which one party is employed or has formerly been employed in the territory, and the other has left their employment in their home country to join their spouse in Hong Kong, has been unable to find similar or suitable employment in Hong Kong and has not acquired an MPF or funds to pay into a private pension.

However, unlike the English courts, the Hong Kong courts do not have the jurisdiction to make pension sharing orders. Instead, pensions are taken into account as part of the matrimonial pot and are offset against the value of the other assets.

How the court decides

The factors to be taken into account when making one or more orders for financial provision in Hong Kong are set out in the MPPO, section 7. The court must "have regard to the conduct of the parties and all the circumstances of the case", including the following matters, which reflect to an extent those set out in section 25 of our Matrimonial Causes Act 1973:

1. the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;

2. the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;

3. the standard of living enjoyed by the family before the breakdown of the marriage;

4. the age of each party to the marriage and the duration of the marriage;

5. any physical or mental disability of either of the parties to the marriage;

6. the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family; and

7. the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.

Similarities can also be found in Hong Kong case law. The leading case in Hong Kong is *LKW v DD* [2010] HKCFA 70, which deals with financial provision and the division of matrimonial assets adopting the same principles found in the English cases of ***White v White*** **[2000] UKHL 54**, [2001] 1 AC 1996 and ***Miller v Miller: McFarlane v McFarlane*** **[2006] UKHL 24**. In the Court of Appeal, Cheung JA, whose judgment was upheld by the Court of Final Appeal, passed comment that English decisions are "*not binding on Hong Kong courts but highly persuasive authorities… the Hong Kong legislation on matrimonial property is still based on the almost identical United Kingdom legislation*".

As per the modern English case law, the case of *LKW v DD* sets out the fundamental basis and principles the Hong Kong court follows in exercising its power to make financial provisions for a spouse. The case of *LKD v DD* developed the principles of fairness, non-discrimination between the role of a husband and a wife, and the 'yardstick of equality'.

Same-sex unions and LGBTQ+ rights

This is one area in which Hong Kong differs markedly from England and Wales. Neither same-sex marriages nor civil partnerships enjoy legal recognition and there is therefore no right to apply for financial provision upon divorce or dissolution in the territory. A series of court cases have pushed forward the course of reform a little. For example, a male to female trans-person won the right to marry her male partner, leading to a change in the law (**6**). It is also now possible for a same-sex spouse or civil partner of an individual with an employment visa to enter the territory on a dependant's visa, provided of course that the marriage or civil partnership was contracted outside Hong Kong (**7**). However, there appear to be no immediate plans to introduce same-sex marriages or civil partnerships.

Thought must be given when choosing where to file for divorce. Not only must one consider if the client is eligible and meet the jurisdictional criteria of the court in which they are filing, but also how the court will deal with proceedings and assets once engaged. As in England and Wales, Hong Kong does not favour one party over the other, and the two systems are extremely similar in that regard. As mentioned, the cost of living in Hong Kong is particularly high, and parties may

need to consider how far the matrimonial pot can stretch. Factors such as these will undoubtedly influence a family's decision on whether a move back to the UK is best for them, and, in light of such, whether to issue proceedings here.

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Footnotes
1. See also '***This is the end of Hong Kong': China pushes controversial security laws*** (The Guardian)
2. Domestic and Matrimonial Proceedings Act 1973, s 5(2)
3. Part III of the Matrimonial Causes Ordinance, cap 179
4. Cheung JA in *SJH v RJH* [2012] 4 HKLRD 308, at para 9
5. *LLC v LMWA* [2019] 2 HKLRD 529
6. *W v The Registrar of Marriages* [2013] HKCFA 39
7. *QT v Director of Immigration* [2018] HKCFA 28

8.10.20

Economic Abuse and Divorce

Rebecca Christie, Associate with Hunters, explains the protections available to a divorcing client who has suffered economic abuse from their spouse.

The Domestic Abuse Bill currently before Parliament will, for the first time, explicitly include economic abuse within the definition of domestic abuse, reflecting the growing recognition of this form of abuse. As family lawyers, it is important that we are alert to signs that a client who has come to us for advice on divorce may have experienced economic abuse, so that we can advise them appropriately and adjust our conduct of their case accordingly.

What is economic abuse?

Economic abuse, also known as financial abuse, is a form of domestic abuse. The Domestic Abuse Bill provides as follows:

> 1 Definition of "domestic abuse"
> …
> (2) Behaviour of a person ("A") towards another person ("B") is "domestic abuse" if—
>
> (a) A and B are each aged 16 or over and are personally connected to each other, and
>
> (b) the behaviour is abusive.
>
> (3) Behaviour is "abusive" if it consists of any of the following—
>
> (a) physical or sexual abuse;
>
> (b) violent or threatening behaviour;
>
> (c) controlling or coercive behaviour;
>
> (d) economic abuse (see subsection (4));
>
> (e) psychological, emotional or other abuse;
> and it does not matter whether the behaviour consists of a single incident or a course of conduct.
>
> (4) "Economic abuse" means any behaviour that has a substantial adverse effect on B's ability to—
>
> (a) acquire, use or maintain money or other property, or
>
> (b) obtain goods or services.

Economic abuse can take many forms and affect people from all walks of life. The campaign group Surviving Economic Abuse identify a number of behaviours which would amount to economic abuse including:

- Preventing a partner from working or training;

- Ensuring a partner's salary is paid into a joint bank account to which they do not have access;

- Controlling how money is spent, including dictating what a partner can buy, closely examining their bank statements/receipts and requiring them to justify all purchases;

- Building up debt in a partner's name, sometimes without their knowledge; and

- Holding all the family assets in their sole name and denying a partner information about the family finances.

Economic abuse can make it very difficult, from a practical as well as psychological perspective, for a victim to leave the abusive relationship. Economic abuse may isolate those who experience it from friends and family if they do not have money to socialise, damage their career prospects if they cannot work or train, and be destructive to their self-confidence, especially if they cannot buy clothes and hygiene or beauty products. Economic abuse is a form of controlling or coercive behaviour, and may also indicate that other forms of domestic abuse are present.

Some who have been subjected to economic abuse will not realise that what they have experienced is a form of abuse. The full picture may emerge as they respond to their lawyer's questions about their financial circumstances. Great sensitivity is required in raising with a client that what they have experienced may be a form of domestic abuse. It will be important for the lawyer to understand the nature and extent of the behaviour, so that appropriate consideration can be given as to what steps need to be taken to protect the client, and how the abuse may affect the conduct and outcome of the financial remedy proceedings. It may also be sensible to signpost the client to organisations that will be able to provide practical advice and support, such as Surviving Economic Abuse.

What applications might be needed where the client has experienced economic abuse?

Personal protection

As with all types of domestic abuse, it is essential to protect the client's personal safety. If the client is still living with their partner, it may be appropriate to seek an occupation order requiring the partner to vacate the family home under s33-40 Family Law Act 1996 ('FLA 1996'). When preparing a supporting witness statement, attention should be drawn to the practical and psychological implications of economic abuse, and the likely consequences for the client of having to continue to live with their partner throughout the financial remedy process. The need for the client to start rebuilding their life, and the harm they would suffer from delaying this, should also be addressed.

When granting an occupation order, the court can, under s40 FLA 1996, require the party who is vacating the property to pay the rent, mortgage or other outgoings on the property, as well as repair and maintenance costs. This may be essential if the client has no access to financial resources, in particular until a claim for maintenance pending suit can be made and determined.

If the client believes their partner will continue to behave abusively after leaving the home, for example by sending abusive messages, then it may be appropriate to apply for a non-molestation order limiting the contact they may have with them.

Preservation of assets

Economic abuse may indicate a heightened risk that the perpetrator will attempt to put assets beyond the court's reach as part of their efforts to continue exerting financial control over their partner. This could include transferring assets to third parties such as friends or family, charging assets and disposing of the cash released, or transferring assets out of the jurisdiction. If such a risk is identified then issuing financial remedy proceedings swiftly will be a sensible step, to limit the amount of time the perpetrator has available to rearrange their financial affairs before financial disclosure is required.

If the family home is in the other party's sole name, the client's matrimonial home rights should be registered as soon as possible to guard against transfer of or borrowing against the home. Applications to register Land Registry notices or restrictions against any other property owned by the perpetrator should also be considered.

It may be necessary to act fast to apply to prevent a disposition under s37 Matrimonial Causes Act 1937 ('MCA 1937'), or for a freezing order under the court's inherent jurisdiction. Whilst a history of economic abuse will not alone suffice for an injunction to be granted, alongside other evidence it can be important context evidencing the risk of disposal of assets.

Where assets have already been transferred by the abusive party in an attempt to defeat the client's claims, an application could be made under s37(2)(b) MCA 1973 to set aside the transaction. However, where the transferred assets represent a

relatively small proportion of the overall finances, the appropriate way forward is likely to be to argue that the assets should be "added-back" to the other party's side of the asset schedule.

Enforcement of financial disclosure orders

Where the other party has, throughout the marriage, denied the client access to information about the family finances, financial disclosure will need to be scrutinised particularly carefully as the client's capacity to identify assets that have been omitted will be limited, and the other party may fail to make full disclosure as a perpetuation of the economic abuse.

Solicitors will need to take a firm line, identifying gaps in financial disclosure through Schedules of Deficiencies. Enforcement can be sought through applying for a penal notice to be attached to a disclosure order and then applying for committal if compliance remains outstanding (as in **Young v Young [2013] EWHC 34 (Fam)**, where Mr Young was sentenced to six months imprisonment for his refusal to comply with a disclosure order).

Ultimately, if full disclosure cannot be obtained then the court can be asked to draw adverse inferences against the offending party (see ***Moher v Moher* [2019] EWCA Civ 1482** for a recent decision on this). Evidence of economic abuse and financial secrecy will be relevant to the court's assessment of whether undisclosed assets exist.

Payment of legal fees and ongoing living costs

Where a client has been denied access to family resources and/or prevented from developing a career of their own, they may be unable to afford to meet their daily living expenses or legal fees. An early application for MPS may therefore be required. The other party may provide limited financial support on an ad hoc basis, continuing their economic abuse by subjecting the client to financial insecurity. In such circumstances, an MPS application may be appropriate.

It is important to appreciate that putting together a budget may be challenging for someone who has not had control over their own finances for many years, or has been told that their (modest) spending aspirations are frivolous and wasteful. The client may therefore need considerable support with this. Similarly, once MPS is in place, do not underestimate the potential stress that the client may experience in having to manage their own financial affairs for the first time in many years.

In an economic abuse situation, the abusive partner may refuse to pay the other's legal fees even where this is affordable. A Legal Services Payment Order can be sought under s22ZA of the MCA 1973, but the client will be expected to take out a litigation loan instead where that is possible. Some clients may prefer this in any event as they would not then be dependent on the other party's compliance with an order to meet their legal fees, but those who have been subject to economic abuse through debt being accrued in their name may be concerned by the prospect of taking on more debt.

How might economic abuse affect the outcome of financial remedy proceedings?

Practical consequences of economic abuse

Economic abuse may have created financial realities which need to be factored into the financial settlement. If one party has not been permitted to work, then their earning capacity may be impacted, in both the short-term and the long-term, and this may be exacerbated by mental health difficulties resulting from the abuse. Debts may have been accrued by the abuser in the client's name which need to be repaid, and which may have caused long-term damage to the client's credit-rating and mortgage capacity. These realities will need to be accommodated in any settlement made.

Conduct

Under s25(g) MCA 1973 the court may take into account "the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it". In the recent case of ***OG v AG* [2020] EWFC 52**, Mr Justice Mostyn stated that this "can extend, obviously, to economic misconduct… If one party economically oppresses the other for selfish or malicious reasons then, provided the high standard of 'inequitable to disregard' is met, it may be reflected in the substantive award" (paragraph 35).

Mostyn J's view, expressed in *OG v AG*, was that conduct should only be considered to the extent that its impact is "financially measurable" (paragraph 72) and should not involve additional sanctions reflecting a "moral judgment" (paragraph 71). However a different view was taken by Cohen J in ***FRB v DCA (No. 2)* [2020] EWHC 754 (Fam)**, where he considered that the "emotional damage" suffered by the husband as a result of the wife concealing that the child of the marriage was conceived with another man should be reflected in the substantive award.

In the recent Court of Appeal decision of ***Rothschild v De Souza* [2020] EWCA Civ 1215**, the Court of Appeal confirmed that where assets are insufficient to meet needs as a result of one party's conduct, the court is entitled to prioritise the needs of the party who has not committed the conduct, meaning conduct can lead to a party receiving less than their needs.

It is clear that the financial consequences of economic abuse should be suffered by the perpetrator, not the victim, when the final award is made, and this may mean the perpetrator is left unable to meet their financial needs. In cases of severe economic abuse there may be an argument that the emotional damage suffered by the victim should also be taken into account, though it seems that judges will take different views on whether such arguments are legitimate.

Financial separation

Whilst s25A MCA 1973 requires the court to consider in every case whether a clean break is appropriate, striving to achieve a clean break is particularly important where there has been economic abuse. Whilst remaining dependent upon their former partner for maintenance may be inevitable (and will be, where there are children and child maintenance is payable), continuing financial ties should be minimised, as they provide an opportunity for further economic abuse. If the case has reached a final hearing, the importance of this consideration should be emphasised to the judge.

In respect of any aspect of the order where the other party's co-operation will be required (for example in selling the family home), it will be important to work through in advance how enforcement will work if they do not co-operate, and seek to build into the order as much protection for the client as possible (for example by giving them sole conduct of the sale). The history of economic abuse should explain the need for such provisions.

Litigation misconduct and costs

A party who has carried out economic abuse during the marriage may well continue this abuse by way of litigation misconduct in financial remedy proceedings, whether by failing to make full disclosure, refusing to negotiate, or otherwise. The courts are increasingly willing to penalise litigation misconduct with costs orders, with Mostyn J stating in *OG v AG* that litigation misconduct should be "severely penalised in costs" (para 39), "if you are guilty of deliberate non-disclosure…you will pay a penalty in costs" (para 89), and "if you do not negotiate reasonably you will be penalised in costs" (para 94). The Court of Appeal in Rothschild v De Souza helpfully made clear that in some cases litigation misconduct can also be reflected in the substantive award.

Conclusion

This discussion illustrates that economic abuse has the potential to affect many aspects of financial remedy proceedings. Increased awareness of economic abuse will enable family lawyers to recognise where it has been a feature of a marriage, enabling us to take steps to minimise the risk of the financial remedy proceedings providing further opportunities for economic abuse, and to support our clients on their paths to financial independence.

15/10/20

CASES

WS v KL [2020] EWHC 2548 (Fam)

The Background

The parents were both born in Hong Kong but had spent large amounts of their early lives elsewhere before returning to Hong Kong in their twenties. They relocated to the UK in 2016 with their daughters, born in 2012 and 2015 respectively. As the marriage ran into difficulties, the father was concerned that the mother might take the children back to Hong Kong. His application for a prohibited steps order was swiftly followed by the mother leaving the marital home with the children and applying for permission to relocate to Hong Kong. There were disagreements about the amount of time the children should spend with the father. At the final hearing the father sought a shared care regime.

First instance decision

The judge granted the mother's application, which was supported by the Cafcass officer. Having done so, he expressed the view that the mother's proposals for the father to have 28 days' contact per annum was not enough for the children. He indicated that if he had not granted the application he would have continued the current contact regime rather than ordering shared care.

The appeal

The relevant authorities are considered at §14-22 and the judgment under appeal summarised at §30-39. The analysis follows from §40-53.

While it was not for the appeal judge, without compelling reason, to go behind the factual findings, she was concerned about the application of those findings to the matters the judge was required to consider and concluded that the decision was wrong.

The judge had failed to undertake an analysis of the welfare factors relating to each of the available options. There was no reference to or analysis of the option of the children remaining in the UK with both parents resident here and only a glancing reference, following the decision to allow relocation, to the father's application for shared care. The only other mention of a different outcome was the finding that the mother would be devastated if she had to remain in the UK.

While the judge identified various factors in the welfare checklist he had failed to analyse why the mother's proposal was better for the children than the father's and it was difficult to discern why he preferred it. Without undertaking an explicit evaluation of his findings made in relation to the welfare checklist against the available options the reasoning was "profoundly flawed".

Further the judge had placed considerable weight on his finding that the mother had not wanted to come here in 2016, which cannot be a proper reason to decide that the children should return in 2020.

He had also failed to analyse the effect on the children of having a severely attenuated relationship with their father and his finding that the father's role would continue, albeit in a different fashion, after their relocation was an inadequate treatment of the relationship from the children's perspective and also the perspective of the father's Article 8 rights. While an evaluation of the merits of each parent's proposals should include consideration of how the relationship with the left behind parent is to be promoted, the judge had only addressed the mother's contact proposals after the decision on relocation had been taken.

There was no explicit proportionality assessment. Given the lack of evaluation of the realistic options, it was impossible to "read into" the judge's analysis of the welfare checklist the sort of proportionality assessment identified by Ryder LJ at §32 of ***Re F (A Child) (International Relocation Case)* [2015] EWCA Civ 882**, [2017] 1 FLR 979.

A rehearing will take place before a Deputy High Court Judge.

Summary by **Gill Honeyman**, barrister **Coram Chambers**

Re B (A Child) (Unnecessary Private Law Applications) [2020] EWFC B44

The judgment arises from a successful appeal granted by HHJ Wildblood QC. This judgment does not deal with the substantive appeal itself, this having been the subject of a separate judgment [2]. This published judgment has been given by HHJ Wildblood QC as a consequence of that appeal, to warn parties and lawyers against unnecessary private law children applications.

The substantive case concerned the successful appeal of a mother, against a disclosure order made by a Legal Adviser under delegated powers pursuant to FPR 2010 PD 2C and FPR 2010 r.4.1(3)(b). Where the subject child was not yet 2 years old, and disclosure had already been ordered for: (i) records from two Local Authorities for a five year period; and (ii) Police Disclosure for a 5 year period. Mother had accepted she did not visit the doctor in relation to any of the alleged incidents in the substantive proceedings save for one. She had been prepared to give disclosure of medical records from and including the date that she said that incident occurred [**5**]. The Legal Adviser had made an order for disclosure of five years' worth of medical records relating to the mother [**1**]. Mother appealed. HHJ Wildblood QC concluded that the order for disclosure of medical records was unnecessarily and disproportionately invasive of M's right to respect for her private life [**2**].

The Judge released this judgment to highlight the extent to which court lists are being filled with interim private law hearings that should not require court involvement [**3**]. He estimated his court would have double the number of outstanding private law cases in January 2021 that it had in January 2020 [3]. He observed '*not only is unnecessary litigation wasteful. It clogs up lists that are already over-filled – in terms of the over-riding objective, it amounts to an inappropriate use of limited court resources (see Rule 1.2(e) of The Family Procedure Rules 2010)*' [**3**].

The Judge said he was not pretending to give any guidance on the issues that he raises, and that it is not for him to so do [**4**]. However, as DFJ for the area he said he was aware of how much time was being taken up by unnecessary litigation of this nature [**4**].

HHJ Wildblood QC goes on to say:

> '[**6**] Judges at this court have an unprecedented amount of work. We wish to provide members of the public with the legal service that they deserve and need. However, if our lists are clogged up with this type of unnecessary, high conflict private law litigation, we will not be able to do so.
> …
>
> [**9**] Therefore, the message in this judgment to parties and lawyers is this, as far as I am concerned. Do not bring your private law litigation to the Family court here unless it is genuinely necessary for you to do so. You should settle your differences (or those of your clients) away from court, except where that is not possible. If you do bring unnecessary cases to this court, you will be criticised, and sanctions may be imposed upon you. There are many other ways to settle disagreements, such as mediation.'

Summary by **Bethany Scarsbrook**, barrister **St Johns Chambers**

Rothchild v De Souza [2020] EWCA Civ 1215

The Court of Appeal dismissed an appeal by the husband ('H') from an order made by Mr Justice Cohen following lengthy financial remedy proceedings (see ***TT v CDS* [2019] EWHC 3572 (Fam)** for background [1]). These proceedings were described by Cohen J in his December 2019 judgment as involving "*the most destructive litigation*." The legal costs in England at the time of the appeal were estimated to be in excess of £1m. The Court of Appeal agreed with the submission made on behalf of the wife ('W') that the costs would have been a fraction of what they were but for H's litigation conduct (Cohen J also having formed this view).

The basis of the appeal was that Cohen J had failed to take into account H's needs and had only considered W's needs in reaching his decision. It was asserted by H that Cohen J's decision was flawed because having stated that he was approaching the case on a 'needs' basis, the decision he reached could only be understood on the basis that he had taken into account H's litigation conduct. Litigation conduct being taken into account was not in and of itself an error (per s. 25(2)(g) MCA 1973) but, it was submitted on behalf of H, that the judgment was flawed as it failed to quantify the financial effect of that conduct in the final award made to W.

The Court of Appeal did not agree with H that Cohen J's approach had been wrong or that the award he had made was not justified in the circumstances of this case. The court considered it to be plain from Cohen J's judgment that H's conduct had been taken into account, as the court was entitled to do. The judge had approached the case with the needs of the children and their primary carer as his first consideration and taken H's litigation conduct into consideration when determining the final award. The Court of Appeal noted that if the sums of legal costs considered to be attributable to H's conduct (75% of W's costs or c. £600,000) were added to H's award, the disparity between the awards received by each party was reduced to almost nil.

In respect of Cohen J awarding H less than it was asserted was required to meet his needs. The Court of Appeal made clear that within financial remedy proceedings, litigation conduct can justify the court awarding the guilty party less than their needs in the final division. Moylan LJ agreeing with Moor J's observation in ***R v B and others* [2017] EWFC 33** that an order can be made which does not meet needs because to exclude that option "*would be to give a licence … to litigate entirely unreasonably*".

With respect to decisions needing to quantify the effect of a party's conduct, Lord Justice Moylan reiterated what he said in Moher v Moher, namely that "*Every financial remedy judgment should clearly set out how the award has been calculated*" [at 144(iii)]. Moylan LJ was clear that a structured approach which quantified the financial effect of each finding of conduct litigation on the final award was not required in every case, however, a judgment expressly setting out how conduct had been taken into account alongside a reasonably structured analysis of its effect on the ultimate award was to be encouraged and would protect decisions from challenge.

The judgment is helpful to family practitioners as it sets out the legal framework with respect the correct approach to the issue of litigation conduct within financial remedy proceedings, including in 'needs' cases **[61] – [80]**. The Court of Appeal confirm that the depletion of matrimonial assets through litigation misconduct will not be (and often cannot be) remedied by an order for costs and that when it comes to the final distribution of matrimonial assets on divorce/ dissolution, the following must be remembered:

> "[78] …What is important is that, whether by taking the effect of the conduct into account when determining the distribution of the parties' financial resources (both income and capital) and/or by making an order for costs, the outcome which is achieved is a fair outcome which properly reflects all the relevant circumstances and gives first consideration to the welfare of any minor children."

1 Commentary on this case can be found on the **FLW weekly podcast episode with Zoe Bloom**, season 2 episode 1

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

Cumbria CC v T (Discharge of Interveners) [2020] EWFC 58

Background

These were public law care proceedings, brought by Cumbria County Council in July 2019 and which stayed the father's private law application for a child arrangements order, issued in November 2018. The father's private law application had been brought when contact between the child and his father had ceased, following the mother asserting that the child had made allegations against the father. The allegations were said to be indicative that the child had been sexually abused by his father and also encompassed the child's elder half-sibling. The child's allegations were said to also concern graphic violence and accounts of being exposed to bizarre actions of a sexual nature when in his father's care.

The child currently does not wish to see his father and there has been no contact between them since September 2018, when the child was 4 years old.

The father has denied all allegations that the child has been sexually abused in his care, including by way of being exposed to sexual activity between others or to pornographic material. Likewise, the interveners denied the allegations of sexual abuse made against them by the mother.

The child's allegations were said to have been made primarily to his mother, although some of the allegations against the father only (not the interveners) were made to the child's social worker and to police officers during an Achieving Better Evidence (ABE) interview, which may have had numerous leading and suggestive questions in breach of ABE guidance. Both of those instances (to the social worker and the police) were said to have followed the mother's intervention.

In October 2019, two medical reports were inconclusive, but allowed for the possibility of anal abuse. In February 2020, the police confirmed they were taking no further action against the father. The interveners were never subject to any police investigation resulting from the child's alleged statements to the mother relating to them.

In July 2019, Cumbria CC was granted an Interim Care Order with an interim care plan for the child to continue living in the care of his mother.

The parties' positions

The local authority had by this hearing concluded that it would not be possible to making findings on the balance of probabilities that the sexual abuse said to have been alleged by the child took place and sought findings instead that the allegations were untrue and that either:

> (i) the mother had developed an unreasonable and false belief that the child was sexually abused by the father, or
>
> (ii) the mother had deliberately fabricated false allegations of sexual abuse and induced the child to make false allegations of sexual abuse against the father.

The mother's position was that the local authority's findings would not be made out, and to support her case she intended to have the interveners, whether or not they were discharged, appear as witnesses in order to challenge their denials.

The local authority submitted that its case would be identical to that of the interveners and the local authority would challenge any assertions made by the mother regarding the intervener's denials by way of testing the evidence through cross-examination and submissions. This position would be mirrored by the father, who will in effect, likewise be advancing the same case. Therefore the local authority argued that the interveners should now be discharged and that it was neither necessary nor proportionate for the court to determine the allegations of sexual abuse that the mother makes against them. The interveners were content that their rights would be protected because their cases would be mirrored by the cases of the local authority and the father.

At this hearing (on 9 September 2020) the court thus considered whether or not it was necessary and proportionate for the court to determine the findings of fact sought by the mother against the current interveners and, accordingly, whether or not it was appropriate for each of the interveners to be discharged as interveners in these proceedings.

The law

The judgment reviews the case law on deciding whether to determine a disputed fact, including:

> ***A County Council v DP, RS, BS (By the Children's Guardian)*** **[2005] 2 FLR 103,**
> ***Re F-H (Dispensing With Fact-Finding Hearing)*** **[2008] EWCA Civ 1249, [2009] 1 FLR 349**
> ***Re W (Care Proceedings: Functions of Court and Local Authority)*** **[2014] 2 FLR 431**
> ***A Local Authority v X, Y and Z (Permission to Withdraw)*** **[2018] 2 FLR 1121**

In particular, the nine factors set out in A County Council v DP and others by McFarlane J (as he then was) remain essential:

> i. the interests of the child (which are relevant but not paramount);
>
> ii. the time that the investigation will take;
>
> iii. the likely cost to public funds;
>
> iv. the evidential result;
>
> v. the necessity or otherwise of the investigation;
>
> vi. the relevance of the potential result of the investigation to the future care plans for the child;
>
> vii. the impact of any fact finding process upon the other parties;
>
> viii. the prospects of a fair trial on the issue;
>
> ix. the justice of the case."

Because the mother in this case would call the interveners as witnesses, even if they were discharged as interveners, the court also weighed whether a person appearing as a witness in public law proceedings who will face allegations being put to him or her during the course of the hearing, but against whom findings are not sought, justifies maintaining their intervener status. The case law the court considered on this issue included:

> ***Re S (Care: Residence: Intervener)*** **[1997] 1 FLR 497 CA)**
> ***Re BJ (Care: Third Party Intervention)*** **[1999] Fam Law 613**
> ***Re H (Care Proceedings: Sexual Abuse)*** **[2000] 2 FLR 499**
> ***Re H (Care Proceedings: Intervener)*** **[2000] 1 FLR 775**
> ***Re T (Children)*** **[2011] EWCA Civ 1818**

The crux of this question was summarised by Lord Justice Thorpe in Re H (Care Proceedings: Sexual Abuse):

> "…unless the accused adult deliberately absents himself from the proceedings, thereby inviting condemnation, it is vital that his evidence should be before the court. Unless he is made a party, that is left to the discretion of the other parties marshalling their cases. Unless he is a party, he will not be sufficiently represented and protected during the forensic process. Unless he is a party, he will not be joined in the collection of essential expert evidence."

But Butler-Sloss P noted in *Re H (Care Proceedings: Intervener)* that there is no right for non-parties against whom allegations are being made to intervene: each case has to be looked at on its own merits and the court has to identify the particular reason why it is necessary for a person to intervene.

The court also considered the President's Guidance "The Family Court and COVID 19 – The Road Ahead"; the overriding objective; the common law privilege against self-incrimination as qualified by the Children Act 1989 section 98 and *Re EC (Disclosure of Material)* [1996] 2 FLR 725; and a very old rule that the answers of an opponent's witness on matters of credit

or other collateral matters will be treated as conclusive and may not be contradicted by calling other evidence (see *Harris v Tippett* (1811) 2 Camp. 637 and also *Palmer v Trower* (1852) 8 Exch. 247).

Conclusions

After considering all of the above, the court decided it was not necessary or proportionate to determine the findings of fact sought by the mother and that it was appropriate for each of the interveners to be discharged.

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

FS v RS and JS [2020] EWFC 63

> "This is a most unusual case. Indeed, so far as I am aware, and the very experienced counsel who appear before me do not dispute this, the case is unprecedented. Certainly, the researches of counsel have identified no decision directly in point. The applicant's own description is that his applications are "novel." I suspect that the initial reaction of most experienced family lawyers would be a robust disbelief that there is even arguable substance to any of it."

This is how Sir James Munby opens his magisterial judgment in the case of a 41-year old man seeking ongoing maintenance and financial relief from his parents. This judgment is well worth a read. This summary will deal with the headline points only.

TS' claims were made pursuant to:

> (a) the Matrimonial Causes Act 1973, s. 27;
>
> (b) Schedule 1 to the Children Act 1989;
>
> (c) The inherent jurisdiction.

In support of each of his claims, the applicant prayed in aid his rights under Articles 2, 6 and 8 of the ECHR, taken on their own, and, read together with Article 14.

The applicant's parents are and at all material times have been married and living together. The parents were said to be very wealthy. The applicant is highly educated having completed various postgraduate studies and being a qualified solicitor. The applicant asserted that he has various difficulties and mental health disabilities. While the court was unclear as to the extent of these issues, the court was prepared to assume that he was vulnerable and noted that he had been unemployed since 2011. The applicant contended that his difficulties constituted "special circumstances" as used in s.27(6B)(b) of the 1973 Act and paragraph 2(1)(b) of Schedule 1 to the 1989 Act, and that he was "vulnerable" per the authorities relating to the inherent jurisdiction.

In summary, Sir James concluded that the statutory language of s. 27 MCA 1973 and para 2(4) of Schedule 1 of CA 1989 were clear:

> (a) The claim under s. 27 failed because there had been no previous periodical payments order in place: s. 27(6A) and (6B). The court also agreed with those representing the respondents that there is no free-standing jurisdiction under the 1973 Act for a child to bring a claim for maintenance against a party to a subsisting marriage **[40]**; and
>
> (b) The claim under Schedule 1 failed because his parents are living with each other in the same household: paragraph 2(4) **[45] – [46]**.

Sir James in his judgment examined the legislative history of section 27 and of Schedule 1 **[25] – [38]**. The court noted that the purpose behind amendments made to the law over time had been to place the children of married and unmarried parents who were separated, divorced or divorcing on an equal footing. It allowed both to seek financial provision from their parents in specific circumstances. Sir James noted that The Law Commission had been clear in recommending that the powers to make orders on the application of an adult child should only be available if the parents' relationship has broken down. He quoted what Ms Justice Hale (as she was) had said in *J v C (Child: Financial Provision)* [1999] 1 FLR 152 "*that children are entitled to provision during their dependency and for their education, but they are not entitled to a settlement beyond that, unless there are exceptional circumstances such as a disability, however rich their parents may be.*" Sir James observed that disability would probably be one of the most obvious examples of a 'special circumstance' under s. 27(6B)(b) MCA 1973 or paragraph 2(1)(b) of Schedule 1.

The court was invited to read down the statutory sections in accordance with s. 3 of the Human Rights Act 1998. Sir James found that he could not read down the legislation in the way proposed on behalf of the applicant **[48] – [60]**. He noted what was said by Lord Nicholls of Birkenhead and Lord Rodger of Earlsferry in *Ghaidan v Godin-Mendoza* [2004] UKHL 30 that the interpretative function of s. 3 HRA 1998 does not allow the courts to adopt a meaning inconsistent with a fundamental feature of legislation. Any words implied must "*go with the grain of the legislation*". Sir James considered that the reading

down sought by the applicant was flatly contrary to the schemes clearly laid down by Parliament in both the MCA 1973 and in the CA 1989 and contradicts the will of Parliament.

The applicant did not seek a declaration of incompatibility in accordance with s. 4 of the HRA 1998. Sir James nevertheless dealt with this finding that the case made under the convention was not made out [**61**] – [**98**].

Finally, dealing with the claim under the inherent jurisdiction. Sir James began by remining himself that the inherent jurisdiction was a 'safety net' [1] and not a 'springboard' to a claim. The court agreed with the respondents that there was no power to award maintenance under the inherent jurisdiction, maintenance being a creature of statute and not the common law [**106**]. On behalf of the applicant it was argued that the lacuna that the inherent jurisdiction needed to fill was the one that prevented the applicant from making any claim under statute and which mean that he would "face the prospect of not only penury and degradation but also squalor and abuse" [**109**]. This risk of harm to the applicant is one that the court's powers could properly be used to protect him from. Sir James did not agree and considered that the inherent jurisdiction could not operate as the applicant argued it could for the following reasons:

> (i) The claim lies far outside the accepted parameters of the branch of the inherent jurisdiction prayed in aid by the applicant. The branch of the inherent jurisdiction used to protect vulnerable adults existed to protect the autonomy of adults who while having capacity are vulnerable [**114**] – [**122**];
>
> (ii) the inherent jurisdiction cannot be used to compel an unwilling third party to provide money or services [**123**] – [**131**];
>
> (iii) The inherent jurisdiction cannot be used to simply reverse the outcome under a statutory scheme, which deals with the very situation in issue, on the basis that the court disagrees with the statutory outcome [**132**] – [**138**].

The applicant was ordered to pay the respondents' costs in the sum of of £57,425.

[1] Per Lord Donaldson of Lymington MR ***In re F (Mental Patient: Sterilisation)*** **[1990] 2 AC 1**

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

Re ND (Court of Protection: Costs and Declarations) [2020] EWCOP 42

This case concerned ND (age 18). ND has a diagnosis of Autism Spectrum Disorder. On 31st May 2018 an application was made by Shropshire Council ('the local authority') for care orders under section 31 of the Children Act 1989 in respect of ND and his five sisters. This was after many years of concerns about the chaotic and poor home conditions in which all of the children lived; and, the disruptive and unpredictable behaviour of ND who had not attended any state education for a number of years. Just prior to the issue of the applications, on 26th May 2018, ND's mother left the jurisdiction to live with the girls in Poland. Threshold was disputed by ND's parents. No finding of fact hearing was held.

ND was initially cared for in a residential unit. ND's medical assessment noted he was underweight, had significant health issues and appeared delayed in his self-help skills and hygiene issues. During the currency of the care proceedings ND had various placements, he absconded from some, and was also cared for by his father for a period.

At hearings which took place on 9th and 10th April 2019 the public law proceedings were transferred to the Court of Protection; the interim care order in respect of ND was discharged, as his father agreed to section 20 accommodation; and, the court declined to make declarations pursuant to s.48 of the Mental Capacity Act 2005 that ND lacked capacity to make decisions regarding his residence and care, but that the court was satisfied on an interim basis that ND lacked capacity to conduct the proceedings. On 30th April 2019 a declaration was made that ND was a vulnerable young person and the court was satisfied that protective relief under the High Court's inherent jurisdiction was necessary in the interim pending expert evidence being obtained on the issue of ND's capacity to make decisions in the relevant areas. At a later hearing on 17th December 2019, after receipt of an expert report the court declared that ND had capacity to: conduct these proceedings and make decisions regarding his residence, his care and support, the contact he has with others, his finances, and social media/internet use.

Throughout the proceedings there was a catalogue of failings by the local authority in relation to compliance with court orders, necessitating repeat extensions and further hearings. Documents which were filed were incomplete, inadequate or contained a litany of deficiencies. At a final hearing listed to take place in October an ISW, solely funded by the local authority, was ordered. The care and support plan for ND due to be filed by the local authority after the ISW report was late and inadequate, requiring yet further directions.

Dr Rippon, the appointed expert, was critical of some aspects of the care afforded to ND by the local authority. This opinion resulted in the third declaration sought by the Official Solicitor: see below. In light of the concerns about the care

afforded to ND at his previous residential unit and more recent events, Keehan J understood and agreed with the opinions expressed by Dr. Rippon.

At the final hearing the court declared that ND had capacity in all relevant areas in light of the opinions of Dr Rippon. It was recorded in the order that the local authority had failed to file a choate care and support plan and pathway plan in accordance with the court's order without application to vary. A fifth extension was granted over the six-month period .

The Issues

At this hearing, the Official Solicitor invited the court to exercise its powers under section 15(1)(c) of the 2005 Act and declare that the local authority had acted unlawfully by:

> 1. failing to provide ND with a choate pathway plan in accordance with its duties to ND as a relevant and now former relevant child under section 23 of the Children Act 1989;
>
> 2. failing to provide ND with a choate care and support plan in accordance with its duties under section 25 of the Care Act 2014 (to include identification of suitable accommodation) and court order; and
>
> 3. failing to support ND having regard to its statutory duties under the Children Act 1989 and Care Act 2014 which has exacerbated ND's presentation, reinforced his poor view of the local authority, and resulted in ND being reluctant to engage with all professionals or seeking support should the need arise.

The Official Solicitor also invited the court to depart from the general rule on costs and make a costs order against the local authority, pursuant to Part 19.5 of the Court of Protection Rules 2017.

The local authority opposed the application for declaratory relief and also costs.

Legal Framework

Keehan J sets out the relevant legal framework within his judgment, including:

- Section 15 of the 2005 Act; and
- The Court of Protection Rules relating to costs in COPR Part 19, specifically 19.3 and 19.5.

Decision

Keehan J made the three primary declarations sought by the Official Solicitor for the following reasons:

> i) between June and December 2019, five extensions to the deadline for the local authority's final evidence were necessary due to a series of non-compliance;
>
> ii) during that period, whilst plans were submitted it became a recurring theme that the evidence submitted was not fit for purpose;
>
> iii) The hearing on 17th December 2019 could have been avoided had the local authority complied with court orders;
>
> iv) The court had in mind the case law cited by the Official Solicitor highlighting the importance of compliance with directions;
>
> v) the difficulties in ND's behaviour and his failure consistently to engage positively with the social workers do not justify or excuse the failures of the local authority referred to above, per *R (J) v Caerphilly County Borough Council* [2005] EWHC 586 (Admin) that; and
>
> vi) whilst there may be occasions when a local authority is faced with difficulties and does all that it can to make progress, but to no avail, the difficulties faced by the local authority in this case are not sufficiently cogent reasons for their failure to have progressed the matter in a more satisfactory and timely manner.

Whilst acknowledging the dicta in *N v ACCG*, Hayden J did not consider that a full fact-hearing hearing is or was required in order to obtain the necessary context in which to consider the declarations sought by the Official Solicitor. Given the clear pattern of unjustified non-compliance by the local authority, the court was content to make the declarations sought based upon what is already known, including reliance on recitals to previous orders.

Keehan J was satisfied, given his findings in relation to declaratory relief and the failure by the local authority to comply with court orders, that there are cogent reasons to justify departure from the usual rule on costs.

Keehan J was satisfied that ND was failed by this local authority.

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

P v Griffith [2020] EWCOP 46

The court considered the contempt alleged to be a criminal contempt being '*an act which so threatens the administration of justice that it requires punishment from the public point of view.*', *a criminal contempt being a contempt which is a crime of itself and where* '*liability is not strict in the sense referred to, for there has to be shown not only knowledge of the order but an intention to interfere with or impede the administration of justice – an intention which can of course be inferred from the circumstances.*'. Such an application required the court's permission to be made, which was granted. The court noted, as confirmed in *Att-Gen v Times Newspapers Ltd* [1992] 1 A.C. 191 it had also to be satisfied on the criminal standard of proof that the contemnor had mens reas in the form of an intention to interfere with or impede the administration of justice, an intention which may be inferred from the circumstances demonstrated by the admissible evidence.

The court first set out the procedural 'imperatives' that must be followed in the committal process, the court having to consider the contemnor's failure to attend either of the committal hearings or the discrete sentencing hearing [para 5]. The court considered *Sanchez v Oboz* [2015] EWHC 235 (Fam), a decision of Cobb J, which set out the relevant legal principles to be considered when a court is considering whether to proceed in the contemnor's absence or not, also noting that Articles 6(1) and 6(3) of the ECHR were engaged. The court considered inter alia that, in the light of a failure to substantiate that she was too ill to attend a prior adjourned committal hearing, that the contemnor wished to exercise her right to silence and instead rely on the challenges to the evidence made by her advocate, the court was content to proceed bearing in mind the likely, considerable prejudice to the PP of any further delay.

During protracted CoP proceedings, the court held that the PP had suffered significant brain damage, having a diagnosis of Minimally Conscious State Minus. There had been disputes amongst the contemnor and the other parties as to, inter alia, the PP's condition and prognosis, treatment and a DNR CPR notice. A number of disclosure orders related to the protected parties' medical notes were made with each being disclosure only to solicitors instructed by the Official Solicitor. The contemnor had made an application for disclosure of P's 'full medical file', but this was dismissed. A further application was made, and, again, dismissed. The applications were referred to on 3 instances in court orders as having been considered, the court concluding that it was not satisfied the disclosure orders were required.

Notwithstanding that, the contemnor later wrote to Barts Health NHS Trust [Barts] by email attaching what purported to be a court order, which bore a date pre-dating her first application for disclosure, requesting disclosure be sent to a firm of solicitors that she had instructed. This came to light, completely by chance, when a further disclosure order made by Cobb J was sent to Barts, who indicated they had already received such a request, which included a copy of a court order.

In her defence, the contemnor claimed that the she had sent the purported order, which had been drafted by another, unidentified person, possibly someone at her solicitors, 'in good faith', and that certain parts of a number of other case management orders made by the court would have given Ms Griffith the idea that she was entitled to the disclosure sought by the purported order.

The court found the contemnor in contempt for falsifying a court order with the requisite mens rea.

The court adjourned the matter for sentencing to allow the contemnor a further opportunity to attend court. She failed to do so, sending the court an email saying she was ill, but providing no medical note. The court refused an application for a further adjournment and proceeded to sentence the contemnor.

With regards to sentencing, the judge considered *Patel v Patel and Ors* [2017] EWHC 3229 (Ch), noting that the objective of penalty in such a case was '*to uphold the authority of the court by marking the disapproval of the court of the contemnors actions and to deter others from engaging in the conduct comprising the contempt*', noting also that in *R. v. Montgomery* [1995] 2 Cr App R 23 Potter LJ held that "an immediate custodial sentence is the only appropriate sentence to impose upon a person who interferes with the administration of justice, unless the circumstances are wholly exceptional".

The court noted the contemnor's mitigation but concluded given:-

i) the falsification was deliberate;

ii) it was done in the face of repeated, principled decisions of the court;

iii) there was no indication that the contemnor appreciated the gravity of her conduct,

iv) 'the act of forging a court order strikes at the very heart of the due administration of justice.';

v) '[a]ny course that acts to undermine confidence in the integrity of court orders is accordingly highly corrosive of both the administration of justice by the courts and to the rule of law more widely.';

vi) such a course being considered a very serious contempt of court; and

vii) in order 'to deter others from engaging in the course pursued by the contemnor',

that an immediate term of imprisonment of 12 months should be imposed, reduced from 18 months by reasons of mitigation that the contemnor had not to date experienced prison, and the current impact on the nature of custody of the COVID-19 pandemic. It is a reminder of the jealous zeal with which the court protect the integrity of its orders and the administration of justice.

Summary by **Barry McAlinden**, barrister **Field Court Chambers**

A Local Authority v MM & Ors [2020] EWFC 65

Nineteen months after the commencement of care proceedings, the father applied to transfer the case under article 15 of Council Regulation (EC) No 2201/2003 ("Brussels IIa"). All the parent parties supported the application, which was opposed by the local authority and the children's guardian.

The parents and children (W, X, Y and Z) were Romanian nationals and identified as part of the Romani ethnic group. Z and W came to England from Romania in 2015 aged seven and six respectively. Z and W were born in England. Since June 2018, the children have lived with English-only speaking foster carers under the terms of an interim care order. Following a fully contested fact-finding hearing in August 2019, extremely serious findings were made against the parties. Subsequently, in the criminal court, the parties were found guilty of offences including child cruelty and abduction and were sentenced to terms of imprisonment (only MM's sentence was suspended).

When this application came before Mostyn J, the second, third and fourth respondents remained in prison. All the local authority's viability assessments were negative. Assessments of alternative carers were positive; in particular that of W's maternal grandparents who were willing to care for W only. Further assessments were outstanding.

Mostyn J considered article 15 and the judgment of Munby J in *AB v JLB (Brussels II Revised; Article 15)* [2009] 1 FLR 517 amongst others, noting three questions for the court. First, does the child have a 'particular connection' (within the meaning of article 15(3)) with the other Member State? Second, would the court of the other Member State be better placed to hear the case or part thereof? Third, is it in the best interests of the child to transfer the case?

Answering question 1, Mostyn J, found the 'particular connection' existed. Regarding question 2, Mostyn J concluded the respondents 'have not come anywhere close to discharging the burden posed' and the application had been made far too late. In terms of the children's best interests, Mostyn J noted the children had settled well with consistent foster care and that any further move should be their final permanent move and that he could not countenance their removal to a temporary placement in Romania.

Dismissing the application, the judge said, "a transfer of these four children to Romania at this stage of the proceedings would be liable to be seriously, even disastrously, detrimental to their situation."

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

K (Threshold - Cocaine Ingestion - Failure to give evidence) [2020] EWHC 2502 (Fam)

Background

Lieven J was concerned with four children, aged from 7 months to 11 years of age. Their sister, K, aged 3, died in hospital in the early hours of 6 April 2019. She had been unwell with vomiting overnight on 3 April 2019 and was sleepy and had puffy eyes the following day. She was taken by her mother to the GP on the afternoon of 4 April 2019. The GP called an ambulance. In hospital, K was drowsy with fluctuating responsiveness. It was suspected that she might have meningitis or sepsis. On 6 April 2019, she suffered a sudden cardiac arrest and, despite CPR, did not recover. During the paediatric post-mortem investigation, Dr Palm was concerned at the findings. K's heart muscle showed necrosis. Post-mortem toxicology detected cocaine. As a consequence, a special post mortem was undertaken. The parents and grandmothers were arrested. Subsequent hair strand testing of the adults and the children showed the presence of cocaine and its metabolites. The local authority issued proceedings and the children were placed in foster care under ICOs. Their youngest sibling joined them when she was born.

The LA alleged that K died as a consequence of cardiac necrosis caused by the deliberate administration or accidental ingestion of cocaine while she was in the care of one or more of her mother, father, PGM or MGM; and that those four individuals had failed to protected her.

Hearing

The fact finding hearing was listed for four weeks in April 2020. The expert evidence focused on whether K's death was caused by cocaine use and the extent of drug use by the parents and grandmothers. Other evidence concerned issues of drug use (including F's involvement with drug supply) and domestic abuse.

The COVID pandemic impacted significantly upon the conduct of the hearing. The expert evidence was heard remotely and the case adjourned to June 2020 to enable a hybrid hearing. Case management decisions were appealed and the appeal refused ([2020] EWHC 1233 (Fam) and **[2020] EWCA Civ 734**).

In June 2020, the matter was further adjourned as the mother had taken an overdose. In July 2020, Dr McEvedy assessed the mother as capable of giving evidence. The mother filed a statement that she was not in the right frame of mind to give evidence. No party sought to compel her to give evidence.

This is a very lengthy judgment. The law is set out in detail, in particular the approach to be taken to hearsay evidence and the weight to be given to the mother's evidence, in light of her decision not to give evidence. Lieven J endorsed the approach of Brooke LJ in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324. Lieven J noted:

> • These are inquisitorial proceedings rather than adversarial. The court is required to survey all the evidence and to avoid compartmentalisation.
>
> • The legislative framework allows for the admission of hearsay evidence.
>
> • The approach to lies in Lucas requires a measured approach. There is a spectrum. At one end, where the court is satisfied a person has deliberately, without excuse, refused to come to court to support their written statement, the court may refuse to place any weight on any of their evidence and draw inferences against them. In other cases, the court will consider the circumstances of their failure to give evidence, the explanations, the evidence itself and the issues it goes to. Where there is compelling evidence explaining an inability to attend, full weight might be given and no inferences drawn. In between will be cases where the court might determine it is appropriate to give weight to some evidence but not to other evidence and to draw some but not necessarily all possible inferences.

Evidence

The documentary evidence exceeded 8000 pages. The court heard oral evidence from 7 expert witnesses: Dr Cirimele (forensic toxicologist)d, Professor Forrest (forensic toxicologist), Dr Hawcutt (consultant general paediatrician and lecturer in paediatric or clinical pharmacology), Dr Ashworth (consultant paediatric pathologist and special cardiac lead at GOSH), Dr Cary (consultant forensic pathologist), Dr Palm (consultant paediatric pathologist) and Prof Bu'Lock (consultant in congenital and paediatric cardiology). Professor Jacques, paediatric neuropathologist, also provided a report but was not called to give evidence.

Lieven J sets out the expert evidence in great detail. She analyses in particular the toxicological evidence, considers the nuance of hair strand testing in children and assesses potentially conflicting HST results.

At the conclusion of the expert evidence, the local authority significantly amended the finding sought and alleged that cocaine was ingested by K while in the care of and due to the culpable actions or neglect of either M, F or PGM. Alternatively, they culpably failed to protect her. Findings were not pursued against MGM as it was accepted that her HST and the drug screening of her home were consistent with exposure to drugs from others' actions. The parties all accepted that K had ingested cocaine at some point which had caused the cardiac necrosis, which led to her death. The circumstances of how she had come to ingest cocaine remained in issue.

Lieven J sets out and analyses the factual evidence from the lay parties with care. In particular, she addresses the weight to be given to the mother's evidence, the father submitting it should be discounted. Lieven J notes that though the mother was not subjected to cross examination, she could get a sense of her character and reliability as a historian from the recordings of her police interviews. The father was an unreliable and often dishonest witness; PGM was an unsatisfactory witness though with moments of honesty. While M, F and PGM bear responsibility, they are not one-dimensional bad characters. MGM was the only honest, reliable witness.

Conclusion

Lieven J draws together the evidence and made findings in respect of drug use by the mother, father and PGM; and the nature of the parents' relationship. In respect of K, the judge found that she died as a result of ingesting cocaine in M's home at some point in the afternoon or early evening of 3 April 2019. F bore responsibility for bringing the cocaine into the home and leaving it carelessly so as to be ingested by K. M was aware of F bringing cocaine into the home and processing it. Despite being generally protective, M did not prevent this due to their relationship and her own recreational use. A reasonable person ought to have identified the risk posed by F and taken steps to protect the children.

Though a disclosure to hospital staff of the possibility of cocaine might have led to action to prevent K's death, Lieven J was not satisfied that the possibility of K having ingested cocaine was on M's radar. She was prepared to accept that if F

had known K had ingested cocaine, he would have somehow indicated this. He was sufficiently self-absorbed and unaware of the children's welfare that it might not have occurred to him that the children may have ingested cocaine that he had left lying around. PGM did not bear direct responsibility for K's ingestion but bears indirect responsibility as the head of a family steeped in Class A drug use over many years and her cavalier attitude to the risks.

Lieven J observes that K's death was needless and avoidable. She concludes: "*If ever there was a lesson of the perils of drug misuse this provides it. I have little doubt that adults, young people and children will continue to die from the deliberate and inadvertent ingestion of illicit drugs. The complacency that accompanies frequent misuse is perhaps one of the biggest problems. Whether this family is able to learn from this tragedy remains to be seen. I hope they and others do*".

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

Y (Leave to Oppose Adoption), Re [2020] EWCA Civ 1287

Background

Care proceedings were brought in respect of Y and his older half-siblings after Y, then a few weeks old, was taken to hospital and found to have sustained 10 fractures of various ages and a number of bruises. The parents (M and F) accepted that the injuries had been inflicted by F. There was a fact-finding hearing in April 2019 at which HHJ Wicks made a number of serious findings against the parents (some accepted by them and some not) [findings set out at para 6].

The parents accepted that the findings ruled them out as carers. A final hearing took place in July 2019. Y's half siblings were made subject to care orders and placed with the maternal aunt and uncle. There were no other family members to put forward as possible carers for Y so, there were only two realistic options for him: adoption (sought by the Local Authority) and long-term fostering (sought by the parents). HHJ Wicks approved the Local Authority's care plan and made care and placement orders.

Y had been with his foster carers for nearly 18 months. They expressed a wish to adopt him and on 6 September 2019, filed an adoption application. The parents then filed an application under s.47(5) of the Adoption and Children Act 2002 for leave to oppose the adoption.

This application also came before HHJ Wicks. After the hearing was adjourned twice, the matter was listed for determination by written submissions. The learned judge granted leave on 29 June 2020. He was satisfied that there had been a significant change in the parents' circumstances and that when considering Y's welfare throughout his life, the parents had a solid case for opposing the making of an adoption order.

HHJ Wicks refused the local authority's application for permission to appeal and a notice of appeal was filed with the Court of Appeal on 6 July 2020. Permission to appeal was granted.

The appeal

The appeal was opposed by the parents but supported by the Guardian.

The Court of Appeal held that HHJ Wicks had identified and properly applied the correct legal principles, was entitled to proceed on the basis of written submissions, had not taken the parents' assertions of change at face value, had undertaken a careful and balanced analysis of Y's welfare and correctly identified that he was not evaluating the prospect of Y being returned to the parents' care but, rather, the prospect of the parents successfully opposing the making of an adoption order [paras 34-39]. Put simply,

> "…he concluded that, having identified changes in circumstances sufficient to open the door, it was in the interests of Y's welfare throughout his life to have another look at the question whether the need to preserve family relationships, in particular sibling relationships, continues to be outweighed by the greater permanency which adoption would bring." [para 39]

The local authority complained that when HHJ Wicks had considered its "schedule of clarifications" submitted following his judgment, he had replied with concern that the sibling contact had been so limited (direct contact having taken place only three times since the making of the placement order) when "*[his] welfare analysis in the care proceedings was in no small part based upon the fact that the local authority had committed itself to finding prospective adopters who would be willing to promote sibling contact*" [para 18]. It was accepted in the Court of Appeal that the learned judge's recollection on this point may have been mistaken, however this did not materially undermine his assessment of whether the issue should be reviewed again in the context of the adoption application [paras 40-41].

Participation of disabled litigants at remote hearings

Y's parents are profoundly deaf and participated in the court proceedings with the assistance of sign language interpreters. M was also assisted by a deaf-registered intermediary. Their participation in the proceedings had been made more difficult as the hearings were conducted remotely.

This was the first remote hearing before the Court of Appeal involving litigants with hearing difficulties. The court declined to give updating guidance for managing such cases but referred the matter to the President and MacDonald J to consider whether the guidance on the conduct of remote and hybrid hearings in the family justice jurisdiction needs amendment to address the difficulties faced by disabled litigants in general and those with hearing loss in particular [para 2].

The court confirmed that, in the meantime, the guidance given in ***Re C (A Child)* [2014] EWCA Civ 128** applies, including in the Court of Appeal. It was noted that in the case of a remote or hybrid hearing, where the party, interpreter and/or intermediary are not together in the same room, it will be necessary to consider how they can communicate with each other separately from and alongside the platform through which the hearing is being conducted. That may or may not be a matter for a court direction, but it will certainly be something to be considered and arranged by the parties' solicitors [para 3].

Summary by **Sophie Smith-Holland**, barrister **St Johns Chambers**

CTD (A Child: Rehearing) [2020] EWCA Civ 1316

Re-hearings

The court proceeds in three stages:

(1) It asks whether the applicant has shown that there are solid grounds for believing that the previous findings require revisiting.

(2) If that hurdle is overcome, it decides how the rehearing is to be conducted.

(3) It rehears the matter and determines the issues.

Taking each stage in turn:

(1) The first stage:

a. ***Re E (Children: Reopening Findings of Fact)* [2019] EWCA Civ 1447** at [28-34] sets out the proper approach. There is no strict rule of issue estoppel in children cases, but that a decision to allow past findings to be relitigated must be a reasoned one and that the considerations identified by Hale J in Re B (Children Act Proceedings: Issue Estoppel) [1997] Fam 117 at 128 provide a useful framework:

i. The court will wish to balance the underlying considerations of public policy.

ii. The court may well wish to consider the importance of the previous findings in the context of the current proceedings.

iii. Above all, the court is bound to want to consider whether there is any reason to think that a rehearing of the issue will result in any different finding from that in the earlier trial.

b. There may be other factors to be borne in mind.

c. In *Re E* it was noted that the court will need to be satisfied that the challenged finding has actual or potential legal significance: is it likely to make a significant legal or practical difference to the arrangements that are to be made for these or other children?

d. Three are significant cases following ***Re B (Birmingham City Council v H (No. 1) [2005] EWHC 2885 (Fam) (Charles J); Birmingham City Council v H (No. 2)* [2006] EWHC 3062 (Fam)** (McFarlane J); and *Re ZZ* [2014] EWFC 9; [2015] 1 WLR 95 (Sir James Munby P), establish that at the first stage the applicant must show that there are solid grounds for believing that a rehearing will result in a different finding. Mere speculation and hope are not enough.

(2) The second stage:

a. The court makes case management decisions governing the arrangements for the rehearing.

b. This also an important discipline to ensure that the hearing does not become a free-for-all in which evidence is repeated and issues reopened without good reason.

c. A methodical approach to the tests at the first and second stages will provide important protection against unmeritorious attempts to relitigate settled findings while allowing cases that genuinely require reconsideration to be identified and revisited in a proportionate way that uses the resources of the court sensibly and is fair to all the parties

(3) The third stage:

a. The third stage is the rehearing itself. At this stage the issues are determined afresh on the basis of the whole of the evidence.

b. The description of the event as a rehearing rather than a review is deliberate: once a decision has been taken to reopen the case the court approaches the task of fact-finding in the conventional way and reaches its own conclusions. It does not give presumptive weight to the earlier findings, as that would risk depriving the exercise of its fundamental purpose of doing justice and achieving the right outcome for the child.

c. The burden of proof remains throughout on a party seeking findings of fact to prove them to the civil standard in the normal way.

d. The court assesses the evidence on its merits, without privileging earlier evidence over later evidence, oral evidence over written evidence, or contentious evidence over uncontentious evidence.

e. At all events, a rehearing is quite distinct from an appeal, in which findings stand unless they are shown to be wrong.

f. Having regard to other case law, concepts of 'a starting point', 'strong' evidence, 'making the running' and 'an evidential burden' which have ebbed and flowed in the distinguished judgments that developed the ground rules in this area, can now be laid aside as adding nothing and as being a possible source of misunderstanding.

g. The simple position is that when it carries out a rehearing the court looks at all the evidence afresh and reaches its own conclusions, requiring the party seeking the relevant findings to prove them to the civil standard in the normal way.

The present case

In a judgment given on 19 August 2015 in care proceedings concerning four children the court found that a family friend (AO) had caused a number of serious injuries to the youngest child (C) who was then under two years old, at times when she was caring for C on behalf of her parents. Those findings were reconsidered at a rehearing by MacDonald J, which came around as in later proceedings concerning a number of children, including the four children of these parents and a child of AO, MacDonald J had heard evidence and made findings of very serious sexual and physical abuse of all four children by both parents at and before the time of C's injuries. That evidence had not been available to the judge in the other proceedings, who had accepted the evidence of the parents in preference to that of AO.

At the rehearing MacDonald J heard oral evidence from the two expert witnesses whose reports had been before Judge Hughes, from a second radiologist, and from AO and the parents. In his judgment he described his approach in the following way:

> "In considering whether to amend the ?ndings made by Her Honour Judge Hughes, the task of the court is not to re-try the issue *in toto* but rather to consider whether the ?ndings should be the subject of amendment considering the new information. The forensic focus therefore, must be on that new information evaluated in the context of the evidence previously before the court. …"

MacDonald J confirmed the finding that one injury been caused by AO, but he amended the findings in relation to four earlier bony injuries and substituted a 'pool finding' that those injuries had been caused either by the father or by AO.

No challenge to that decision has been made by F, but AO now appeals, contending that the wrong approach was taken to the assessment of the evidence at the rehearing.

The appeal

Permission to appeal was granted to AO on three grounds:

> (1) The judge adopted a standard of review in relation to the earlier ?ndings that gave excessive weight to the judgment of HHJ Hughes and insuf?cient weight to the evidence which had caused him to reopen the ?ndings made by her.

(2) The judge adopted a standard of review in relation to the earlier [finding] that was incorrect in so far as it led him to a conclusion that was not supported by any of, and was contradicted by some of the evidence.

(3) In adopting the incorrect standard of review the judge reversed the standard of proof, requiring the applicant/appellant to demonstrate that the original ?ndings were wrong rather than requiring the local authority to prove them.

Conclusion

The judge's description of his task as 'not re-trying the issue in toto' was not correct, but the judgment shows that this misdirection did not lead to any error of substance. He fully reheard the case and factored in all of the evidence when reaching his conclusions. He did not privilege the previous findings or discriminate against the later evidence. He did not reverse the burden of proof. Ground 1 was refused.

The Court of Appeal further rejected the submission that there was a failure to adequately address and act upon the many arguments made on behalf of AO in the changed circumstances where the parents had been revealed as serious child abusers. The judgment shows that MacDonald J fully grasped the issues and it was not necessary for him to set out every submission and response in full detail. The conclusion that AO was responsible for this injury was based on a process of reasoning that cannot be successfully challenged. Against this background it is also impossible to say that the judge was wrong to conclude that there was a real possibility that AO had caused the earlier injuries.

The appeal was dismissed.

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

Re JB (Costs) [2020] EWCOP 49

Keehan J ordered a local authority to pay the costs of a failed injunction application. Within welfare proceedings the authority had applied for an injunction to stop a care provider requiring JB to leave. The application was opposed by the care provider and the Official Solicitor who both argued that the court had no jurisdiction as the court could only act in the same way as P. The contract for care was between the local authority and the provider and the notice given was done in accordance with the contract. JB could not have stopped the provider ending the contract and so neither could the court. The judge gave the authority permission to withdraw the application, but agreed with the care provider's and the OS's analysis of the law when deciding the costs issue [paras 17-18]. Having decided that the application was "totally without merit" he concluded that it was unreasonable conduct and therefore the court was able to conclude that the presumption against costs in welfare proceedings need not apply: COP Rules 19.5(2)(b).

He refused a further costs argument based on the delay in seeking the joinder of the CCG, accepting it might have been prudent and might have led to an earlier move to a new home, but he had doubts about that. He was also not satisfied that the delay in seeking their joinder added to the costs.[paras 26-27].

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

Re H Interim Care Scottish Residential Placement [2020] EWHC 2780 (Fam)

H is 15 and has been in local authority care since August 2019, initially under s20 and, since 15.06.2020, under an interim care order. Prior to that he had been in his father's care under a residence order. After 2 short-term unregulated placements, H was placed in a children's home in South Lanarkshire, Scotland ("the home"). All parties agreed that the home was meeting H's needs well, but the issue with which the court had to grapple was the legal framework under which a child subject to an (English) interim care order could be placed in a Scottish children's home. (If the home was a secure accommodation placement, the amendments to the Children Act 1989 brought about by the Children and Social Work Act 2017 would have provided a solution.)

Cobb J identified 4 questions:

(1) Was there power to place H in Scotland when he was accommodated under s20?

(2) Is specific court approval needed to place H in Scotland under an ICO? If so, what is the jurisdictional route for the English court to give such approval?

(3) Is the English ICO recognised and/or capable of enforcement in Scotland? Does it enable the English LA to take steps in relation to H in Scotland? Does the English order give the placement any authority over the child? (Cobb J identified these are essentially matters of Scottish law)

(4) Is H being deprived of his liberty at the home, and if so, should the court authorise this? Can this be formalised in Scotland?

Before considering those matters, Cobb J highlighted failures on the part of the LA during the s20 process, and in particular that they failed to notify, let alone consult H's mother. Whilst the mother's consent was not required because of the residence order in the father's favour, the LA retained duties to consult her "so far as is reasonably practicable" to ascertain her wishes and feelings. Secondly, there was a delay of almost a year in issuing proceedings (and part of that was a 4 month period in which the LA had decided to issue proceedings, but failed to do so).

Turning to the specific questions:

(1) Placing a child accommodated under s20 in Scotland

Regulation 11 of the Care Planning, Placement and Case Review (England) Regulations 2010 ("the 2010 Regulations") envisages the possibility of placing a child outside of the LA area and outside England and there is nothing in the Children Act or the 2010 Regulations which requires court approval, although the duties under Part III of the Act and to prepare a proper placement plan and consult appropriately must be complied with. The judgment was prepared and written on the assumption this had been done for H.
The court received advice from a Scottish QC which agreed with this analysis but noted H would not become a looked after child in Scots law

(2) Placing a child subject to an (English) ICO in Scotland

CA 1989 s33(8) (which applies to interim and final care orders) contemplates arrangements for a child living outside England and Wales (but within the UK: see s33(7)). Regulation 12 of the 2010 Regulations specifically relates to placements outside England and Wales. Cobb J noted that the written consent of all those with PR (or court dispensation with such consent) is only required if the move is outside of the UK or is to live abroad, so there is a statutory route for a child under an ICO to live in Scotland or Northern Ireland. Paragraph 19(1) of Schedule 2 of the Children Act states that "[a] local authority may only arrange for, or assist in arranging for, any child in their care to live outside England and Wales with the approval of the court". Cobb J held that it relates to long-term and permanent arrangements (given the use of the word 'live': cf. the 'disregard' provisions in relating to boarding school arrangements when determining ordinary residence).

Turning to the Children's Hearings (Scotland) Act 2011 (Transfer of Children to Scotland – Effect of Orders made in England and Wales or Northern Ireland) Regulations 2013 ("the 2013 Regulations") Cobb J noted that they apply only to a care order "made under s31(1)(a)", i.e. a final care order, and that the receiving (Scottish) authority then "takes over" the care of the child. The care order then has effect "as if it were a compulsory supervision order". Pursuant to the Children's Hearings (Scotland) Act 2011 (Consequential and Transitional Provisions and Savings) Order 2013, the full care order ceases to have effect for the purposes of the law of England and Wales.

The temporary placement of a child under an ICO outside England and Wales but within the UK can therefore be achieved under s38 as a result of the provisions of s33(7) and (8), but temporary placement outside the UK requires the use of the inherent jurisdiction of the High Court.

(3) Effect of an (English) ICO in Scotland

Cobb J consider the following in terms of recognition and enforcement:

(i) An ICO is not an order that extends to Scotland (s108(11) CA 1989)

(ii) The Family Law Act 1986 does not provide any intra-jurisdictional framework for public law cases, and as an ICO is not an order made under Part 1 of the FLA 1986, it is not capable of automatic recognition in Scotland

(iii) The Civil Jurisdiction and Judgments Act 1982 does not apply to provisional measures (s18(5)9d))

(iv) BIIR is generally understood to have no application to issues between territorial units within the same EU member state;

(v) The expert evidence provided to Munby J in *Re X & Y (albeit in the context of secure accommodation orders)* was that an English ICO would not be recognised in Scotland

The expert evidence suggested that enforcement and/or recognition of the ICO would probably require a petition to the *nobile officium* of the Inner House of the Court of Session (comment: this seems to be akin to the English High Court exercising its inherent jurisdiction). Cobb J held that there was currently no benefit to the parties or H of such a petition given the lack of dispute about where H should live under the ICO.

The expert advice was that the Local Authority would not be empowered under the ICO to take steps in relation to H. The parents did retain rights and responsibilities in Scotland, including the right to 'regulate the child's residence' (Children (Scotland) Act 1995 s2(1)(a)), and the Scottish courts would entertain applications relating to H's "immediate protection" if disputed between the parents (ibid, s14(3)(b)), although it would be expected that through judicial liaison under the 2018 Judicial Protocol steps would be taken to avoid concurrent proceedings in two jurisdictions.

Finally, the expert advice concluded that the home's authority came from the parents' consent to the placement rather than the ICO

(4) Authorising any DOL to take effect in Scotland

Any order under the (English) inherent jurisdiction to deprive H of his liberty would require a petition to the Inner House of the Court of Session for orders under the nobile officium. As established in *Salford CC v M (Deprivation of Liberty in Scotland)* [2019] EWHC 1510 (Fam), there is no method by which a child's liberty can be lawfully deprived in Scotland in a placement which is not approved by Scottish minister. (See also *Re RD (Deprivation or Restriction of Liberty)* [2018] EWFC 47.)

Cobb J concluded by repeating the plea that the remaining lacunae in the law are addressed, so that there is a proper mechanism by which interim placements are recognised and enforced.

Summary by **Julia Belyavin**, barrister, **St John's Chambers**.

Lancashire County Council v G (Unavailability of Secure Accommodation) [2020] EWHC 2828 (Fam)

G has spent most of her life in foster care. Since January 2020 she has had twenty in-patient admissions as a result of suicidal ideation and high-risk self-harming behaviours. She has a diagnosis of PTSD and may be developing an emerging personality disorder; she needs the support of mental health services.

A previous deprivation of liberty order was made in August. She was subsequently detained under s2 MHA in an adult mental health ward, due to a lack of CAMHS intensive care beds, and was about to be discharged.

Mr Justice MacDonald found it difficult not to conclude that the local authority's application for a secure accommodation order was effectively forced on it by the lack of suitable provision in this jurisdiction for children and adolescents who, while not meeting the criteria for detention and treatment under the MHA, need assessment and treatment in a restrictive clinical environment.

The criteria under s25 CA1989 were clearly met but no secure placement was available anywhere in the UK. Indeed, the only placement that the local authority could find was not only unregulated, but had decided that it would not apply to Ofsted for approval.

The guardian therefore could not support the local authority's application for G to be deprived of her liberty, albeit recognising that the court had very little option given the extreme risks to G were no order made.

Mr Justice MacDonald described the "brutal reality" that if not deprived of her liberty there was an unacceptable risk that G would end her own life or cause herself, or possibly others, very serious physical harm.

The President's Practice Guidance, "*Placement in unregistered children's homes in England or unregistered care home services in Wales*", requires the court to satisfy itself that appropriate steps are being taken to apply for registration; in the present situation, where there will be no such application, the best that could be done was to make the order only for the shortest possible time and require information from the local authority about the steps being taken to ensure that the placement was safe and suitable, while a more suitable permanent placement was being sought.

In making the order, the Judge asked himself whether, where the choice is between a sub-optimal placement or allowing G back into the community where she may end her life, the court is really exercising its welfare jurisdiction or being forced by circumstances to make an order irrespective of welfare considerations. He was left acutely conscious of his powerlessness and inability to do more for G.

Summary by **Gill Honeyman**, barrister **Coram Chambers**