March 2021

Family Law Week

NEWS

'Duty on local authorities to fund community-based services should be included in the Domestic Abuse Bill'

The Children's Commissioner, Anne Longfield, the Victims' Commissioner, Dame Vera Baird QC, and the Domestic Abuse Commissioner, Nicole Jacobs, are jointly calling on the government to include a statutory duty on local authorities to fund community-based services in the Domestic Abuse Bill.

In a joint statement, the Commissioners say:

> "It is vital that the government takes this once in a generation opportunity to ensure that all victims of domestic abuse – including the children living in these abusive households – have access to local protection and support by including community-based services in the Domestic Abuse Bill's statutory duty.
>
> "We know that the majority of victims stay in the home and access community-based services rather than domestic abuse refuges. It is therefore clear that without a duty to commission community-based support, including specialist services, the Bill risks creating a two-tier system, which would leave most victims – including children and migrant victims – without appropriate support.
>
> "A statutory duty that includes community-based services will mean this Bill provides support which is inclusive and accessible to all. It is also vital that these community services are provided to children who experience abuse, or display abusive behaviours, in their own relationships. If the Domestic Abuse Bill is to be the truly transformational, landmark piece of legislation that the government proclaimed it to be, then we need to see this change."

To follow progress of the Bill, currently at committee stage in the House of Lords, **click here**.

5/2/21

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Home Affairs Committee investigates domestic abuse during Covid-19 pandemic

On 3 February 2021 the Home Affairs Committee held an evidence session to examine the prevalence of domestic abuse during the covid-19 pandemic and the adequacy of the Government's response.

Appearing before the Committee were designate Domestic Abuse Commissioner, Nicola Jacobs, and representatives of **Women's Aid** and the **Angelou Centre**. The Committee also took evidence on institutional accommodation with witnesses **Asylum Matters**, the **Helen Bamber Foundation** and **Medical Justice**.

Ahead of the session, the designate Domestic Abuse Commissioner supplied the Committee with data from domestic abuse victims and survivors helplines up to December 2020:

- For the period 1 April to 31 December 2020, calls and contacts?logged on the National Domestic Abuse Helpline database increased by 34 per cent on the same period the previous year (114,986 in 2020 compared with 85,771 in 2019). NDAH advisers made 3,785 referrals to emergency refuge accommodation in this period.

- For the same period the national LGBT+ helpline run by Galop received 5011 calls. This represented a 36 per cent increase on the 3,679 calls in the same period the previous year. Calls from 16-24 year olds increased by over 50 per cent on levels the previous year.

- The **Karma Nirvana** helpline for victims and survivors of so-called 'honour-based' abuse saw its most significant monthly increase (79 per cent) during the first lockdown.

- The **Respect helpline** for male victims of domestic abuse saw calls increase by 39 per cent over the nine-month period.

- The Respect helpline for domestic abuse perpetrators looking for help to stop saw calls increase by 62 per cent over the nine-month period.

Correspondence from the designate Domestic Abuse Commissioner is published on the Home Affairs Committee website **here**.

The Committee explored the scale and nature of domestic abuse during the pandemic as well as the adequacy of the response from Government and police. It investigated the further challenges faced by support services in providing financial and other support to victims during lockdown.

The session also looked at current conditions in Home Office institutional accommodation including both Immigration Removal Centres and asylum accommodation.

To watch the session, **click here**.

5/2/21

Civil Procedure (Amendment) Rules 2021

The **Civil Procedure (Amendment) Rules 2021**, which come into force on 6 April 2021, amend the **Civil Procedure Rules 1998** by –

- amending Part 1 (the overriding objective) to make it clear that dealing with a case justly includes ensuring, so far as practicable, that the parties can participate fully and that parties and witnesses can give their best evidence; and to introduce a new practice direction making provision for how the court is to give effect to the overriding objective in relation to vulnerable parties and witnesses;

- amending rule 3.17(3)(a) to provide that the court may not approve costs incurred up to and including the date of any costs management hearing (rather than, as previously worded, costs incurred before that date);

- amending rule 6.33 so that permission of the court is not required to serve out of the jurisdiction a claim where jurisdiction is based on a choice of court agreement (with consequential amendment in Part 12);

- amending Part 32 to make it clear that the restriction on collateral use of witness statements outside the proceedings in which they are served applies equally to such use of affidavits;

- amending rule 36.5 to add a new paragraph (5) making express provision for the position in respect of interest accrued after the expiry of the period for accepting a Part 36 offer;

- amending Part 40 to insert an explanatory cross-reference to the change made to rule 83.19(4)(b);

- amending Part 44 to enable additional work undertaken or expense incurred due to the vulnerability of a party or any witness to be taken into account in assessing whether costs are proportionate;

- amending Part 51 to remove spent transitional provisions and to insert a new rule allowing for practice directions to make temporary modifications to the rules to address issues arising for the work of the courts due to the coronavirus outbreak or any other public emergency;

- amending Part 55 to correct a reference in the table of contents for the Part;

- amending rule 61.9 to mirror for Admiralty claims the amendments made to rule 12.3 for default judgments more generally;

- making changes to the rules in consequence of the introduction of new Part 81 – Applications and proceedings in relation to contempt of court by the Civil Procedure (Amendment No. 3) Rules 2020.

- amending Part 70 to clarify that for foreign judgments not requiring registration in order to be enforceable, such a judgment is to be treated for enforcement purposes as if it were a judgment of the High Court or County Court; and to insert a new rule enabling provision to be made in a practice direction for procedure in relation to any debt respite scheme established under section 7 of the Financial Guidance and Claims Act 2018;

- amending rule 71.7 to clarify its application;

- amending rule 83.19(4)(b) to make it clear that the provision it makes for suspending issue of a certificate of judgment extends to all cases where there is pending an application to set aside or vary the judgment in question.

These Rules also amend the Civil Procedure (Amendment No. 3) Rules 2020 by revoking the transitional provision in relation to rule 83.2A (that rule 83.2A being revoked by these Rules.

For the 1998 Rules, **click here**. For the Amendment Rules, **click here**. For changes to the Practice Directions, **click here**.

7/2/21

Privy Council hears appeal concerning same-sex marriage

The Judicial Committee of the Privy Council has reserved judgment in an appeal brought by the Bermudan Government as to the validity of same-sex marriage in the British Overseas Territory.

In a hearing on 3 and 4 February the Judicial Committee heard that the Bermudian Parliament passed the Domestic Partnership Act 2018, which provided for same-sex couples to enter into domestic partnerships and declared that a marriage is void unless the parties are respectively male and female. The respondents, who are individuals affected by the legislation and a Bermudian church which supports and conducts same-sex marriages, applied to the Supreme Court of Bermuda for a declaration that the provisions of the 2018 Act which purported to revoke same-sex marriage contravened the Bermudian constitution.

The Supreme Court of Bermuda ruled in favour of the respondents, holding that s. 53 of the 2018 Act contravened sections 8 and 12 of the Bermudian constitution. The Court of Appeal for Bermuda allowed the Attorney General's appeal in part only, holding that s. 53 of the 2018 Act contravened section 8 (but not section 12) of the constitution, but the Court also held that s. 53 was void on the grounds that it was enacted for a religious purpose. The Attorney General has now appealed to the Judicial Committee of the Privy Council. The respondents are seeking to cross-appeal for a declaration that the 2018 Act contravenes section 12 of the constitution.

For an article concerning the case, **click here**.

7/2/21

Note all Financial Remedies Practitioners

Financial Remedies Courts now no longer 'pilot schemes'

1. The Financial Remedies Courts (FRCs) are now up and running in 18 zones in all parts of England and Wales. The President of the Family Division has confirmed that the FRCs should no longer be regarded as pilot schemes, but instead should be regarded as being an established and permanent part of the Family Court. A formal announcement is expected imminently.

2. An 'organogram' representing the judicial structure of the FRCs has been published which identifies the Lead Judges in the 18 zones and all the FRC Judges in each zone: see ***https://www.judiciary.uk/announcements/financial-remedy-court-organogram***.
Although the list will plainly change over time as judges are appointed, relocate and retire, the clear intention of the FRC Good Practice Protocol is that only judges on this list should be hearing Financial Remedies cases.

New procedures for issuing Forms A in the Financial Remedies Courts

3. We are pleased to make public some significant imminent changes to the way in which applications for Financial Remedies should be brought.

4. With effect from 15 February 2021 applications for Financial Remedies should be issued in the hub court of one of the FRC zones (as opposed to a Regional Divorce Centre).

5. FPR 2010 Rule 5.4 does not stipulate at which zone hub the application must be issued. It merely requires it to be issued in the Family Court. Therefore, in theory at any rate, the applicant can issue the application in the zone hub that he or she prefers. However, were the application to be issued in a non-local zone then the applicant will face the risk that the court will, either of its own motion or on the application of the other party, use its powers under FPR 2010 Rules 29.17 & 29.18 to transfer the case to be heard elsewhere, most likely in a local zone.

Digital applications

6. Many (or most) Financial Remedies practitioners will now have experience of the Digital Consent Orders (DCO) scheme which is now fully up and running. FRC Judges all around the country are now approving consent orders digitally. Approximately 2,000 consent orders per month are currently being approved in this way with a typical turnaround time of about two weeks. We are grateful to practitioners for their part in so rapidly adapting to this scheme. We will do our very best to keep up this level of performance.

7. Following fast behind the DCO scheme is its equivalent for non-consent order cases, the Digital Contested Cases (DCC) scheme. Under the DCC scheme, Forms A are issued on line and all documents (Forms E, Statements, Reports, Bundles etc.) are filed by uploading them on to the portal, to which all legitimate participants will have access. This is

already available in some FRC zones and will be rolled out to all FRC zones in the coming months. It is hoped that within a reasonable period of time this will become the routine method of filing documents in Financial Remedies cases. Under this scheme the applicant will nominate his or her preferred FRC zone for dealing with the application, subject to the same comments about transfer as set out above. All practitioners are encouraged to use this scheme at the earliest opportunity.

Allocation

8. One of the new features introduced by the FRCs is the facility for cases to be allocated to an appropriate judicial level. This can only be done if practitioners issuing Forms A routinely use the allocation questionnaire. This is particularly important if the case has complex features and should be heard by an experienced full time District Judge or Circuit Judge. Practitioners are encouraged to make use of this facility by getting used to completing the allocation questionnaire on issue.

9. Where an allocation is made without a hearing (as it almost invariably will be) then a party may request the court to reconsider this decision at a hearing: see FPR 2010 Rule 29.19. In the FRCs the allocation will frequently be made to a level of judge different to that specified by the Family Court (Composition and Distribution of Business) Rules 2014 in order to reflect complexity or the efficient use of local resources. It is unlikely that a court will wish to change such an allocation without very good reason and is unlikely that a separate hearing will be permitted for such a request to be considered.

Nicholas Mostyn

Edward Hess

5 February 2021

Changes to the Adoption and Children (Coronavirus) (Amendment) (No. 2) Regulations 2020

The Department for Education is seeking views on its proposal to extend or amend a limited number of flexibilities within the **Adoption and Children (Coronavirus) (Amendment) (No. 2) Regulations 2020**, in relation to Medical Reports, Virtual Visits and Ofsted Inspections.

The DfE says that the overriding objective in any amendments to the statutory framework is to enable the most effective support and protection to children and their families, by local authorities, local safeguarding partners and regulated services, within the statutory framework.

On 24 April 2020, the **Adoption and Children (Coronavirus) (Amendment) Regulations 2020** came into force to provide local authorities (LAs) and children's social care providers with temporary flexibilities to support them during the coronavirus (COVID-19) pandemic. In August 2020 the government consulted on whether to continue some of the flexibilities in the children's social care sector that came into effect in April. These were in relation to the stage of the respective approvals process for adopters and foster carers that the medical reports would be needed, virtual visits/contacts and Ofsted inspection intervals. Following the consultation, a further set of regulations were laid. These are due to elapse on 31 March 2021.

For the consultation document, **click here**. For a House of Commons Library briefing paper on the Adoption and Children (Coronavirus) (Amendment) Regulations 2020, their content, reaction from the sector, and the consultation, **click here**.

14/2/21

Family Division's Transparency Review: Update

The final publication of the Family Division's Transparency Review is now expected to be in Summer 2021.

In May 2019, the President of the Family Division, Sir Andrew McFarlane, announced he would undertake a review of the current arrangements for media/public access and reporting in the Family Courts (known as the Transparency Review).

Courts have continued to operate despite the challenges of the pandemic, but there have been unavoidable delays to the timetable Sir Andrew had envisaged when he launched the Review.

A panel helping the President has recently been extended to include a senior family division judge. The panel's aim is to gather full and candid information for the Review. The panel members are:

- Mrs Justice Nathalie Lieven (Family Division High Court judge)
- Dr Eia Asen (consultant child and adolescent psychiatrist)
- Anthony Douglas CBE (former chief executive of CAFCASS)
- Clare Dyer (former Legal Editor of The Guardian)
- Nicola Shaw CBE (Executive Director of National Grid)

The President is grateful to all those who contributed to the Transparency Review call for evidence. In all, more than 100 submissions were received from individuals and agencies drawn from across the world of family justice. The President and panel have now been able to meet remotely to review all submissions and consider from whom to hear oral evidence.

Three oral evidence sessions are being held. The first was held on 2 February 2021. It included four participants, and was conducted remotely and according to witness preference (including reasonable adjustments). The panel heard from:

- HH Clifford Bellamy – Retired Judge & author of *The "Secret" Family Court: Fact or Fiction*? Judge Bellamy gave a presentation (for which, **click here**).

- Dr Carol Coulter – Director of Child Care Law Reporting Project, Republic of Ireland (for which, **click here**). More information is available on the **Child Law Project website**.

- Lisa Harker – Director of the **Nuffield Family Justice Observatory**.

- Professor Celia Kitzinger – Co-founder of the **Open Justice Court of Protection Project**.

The next oral sessions will take place on Monday, 8 March and Monday, 17 May. Invitations for them will be sent out shortly. These sessions will involve a range of respondents, and the logistics including formal invitations and methodology for each participant group are being finalised. In each case, provisions will be made to make the content of the sessions available either at the time or later if there are sensitivities or preferences defined by the respondent.

14/2/21

'Single parents more likely to experience problem debt and live in persistent poverty'

Gingerbread, the charity for single parent families, and **StepChange**, the UK's leading debt charity, have published a new report - ***The Single Parent Debt Trap*** - which shows the UK's 2 million single parents are more likely than any other sector of society to be living with problem debt.

Eighty-two per cent of single parents said that not having enough income to meet living costs meant they were forced to borrow money and ended up in debt. The research also showed that single parents were unable to work their way out of debt.

Counter-intuitively, those who worked full-time hours were more likely to be in problem debt, with increased childcare costs being the main reason for this. Single parents were more likely to use credit to pay for childcare the more hours they worked: 25 per cent of those working full-time (35 hours or more) paid for childcare by using credit, compared to 17 per cent of those working part-time (16-24 hours).

Victoria Benson, Chief Executive of Gingerbread said:

> "Before the pandemic around 70 per cent of single parents were in work but this didn't protect them or their children from poverty. It's shocking that in 2021 so many are forced to go hungry in order to repay debts built up as their income doesn't even cover basic living costs.
>
> "It's crucial that the Government protects low-income families from further poverty by maintaining the £20 uplift to Universal Credit beyond April 2021 and removes the benefit cap. Government also must review the childcare offering – it cannot be right that single parents actually work their way into debt rather than out of it. Without these crucial changes, single parents and their children will continue to experience poverty and to suffer the disadvantage this brings."

The report finds that the COVID-19 pandemic has acted as an accelerant for problem debt, exposing more single parent families to poverty. Single parents are more likely to have lost their jobs or to have been furloughed due to working in 'locked down sectors' such as hospitality and retail. In addition, home-schooling is more costly for single parents – they are twice as likely as couple parents to have no ICT equipment at home and twice as likely to have a child on free school meals. As a consequence:

- 49 per cent of single parents reported taking on more debt since COVID-19.

- The average amount of debt held by single parents increased by around 15 per cent during the pandemic (an average of more than £600 more debt per household).

- One in five (22 per cent) said that a temporary increase in the cost of living had negatively impacted their finances since the beginning of COVID-19.

According to the report, alongside poverty and high fixed costs, almost half (48 per cent) of single parents who had experienced problem debt had been affected by economic abuse. Those who have suffered economic abuse were more likely to have higher levels of debt, to be forced to make greater sacrifices to meet debt repayments and to be at a greater risk of struggling with their mental health. Many single parents have a child with their former abuser, meaning the abuse may well continue post-separation. For example, just 24 per cent of those who had experienced economic abuse received maintenance payments in full on a regular basis.
Being in debt pushed single parents into further poverty – and, in some cases, destitution. This has a detrimental impact on both living standards and mental health for single parents and their children. Single parents typically seek to protect their children as much as possible from the negative impacts of poverty but, as a result, often experience greater hardship themselves. The report shows that in order to make their debt repayments, 66 per cent of single parents have gone without food and 20 per cent have been forced to cut back on food for their children.

In addition:

- 51 per cent had fallen behind on making rent or mortgage payments as a result of making debt repayments

- 19 per cent of single parents had to use a food bank as a result of making debt repayments

- 69 per cent of single parents who were in debt reported struggling with their mental health and 68 per cent of indebted single parents suffered with depression specifically.

Following publication of this report, StepChange and Gingerbread are calling on the Government to:

- Maintain the £20 per week uplift to Universal Credit payments
- Extend the £20 uplift to legacy benefits
- Remove the benefit cap
- Increase the amount of child support payments that are collected through debt collection and effective enforcement mechanisms to tackle parents who attempt to avoid or minimise agreed child support payments
- Develop a Minimum Income Commission, as recommended by the Institute for Public Policy Research, similar to the Minimum Wage Commission, with a statutory remit of linking state support to actual living costs
- Better support low-income families looking to save, including by linking the Help to Save Scheme with UC, and considering how voluntary savings may be prioritised over non-priority Government debt
- Effectively implement the Financial Conduct Authority's vulnerability guidance to better support those affected by economic abuse by regulated financial services.

For the report, **click here**.

14/2/21

Legal Services Board data demonstrate fluctuating demand for family law services during pandemic

Since June 2020, the Legal Services Board (LSB) has been tracking multiple data sources to provide the clearest picture it can of the impact of Covid-19 on legal services. Its Covid-19 research dashboard indicates the effect on demand for different legal services and the health of the market in England and Wales.

Recent updates to the dashboard include additional indicators relating to divorce applications and referrals to the National Centre for Domestic Violence.

Divorce applications received by HM Courts & Tribunals Service in November 2020 increased by 16 per cent to 11,700 compared to 10,000 in November 2019. However, there were significant fluctuations within the 12 months. Between April 2020 and July 2020 applications increased by 93 per cent but dipped in August 2020 to below 2019 levels. This summer peak may indicate a reluctance to issue proceedings during the first national lockdown with a subsequent spike showing that pent-up need. Applications increased again by 46 per cent between August and October 2020.

Referrals to the National Centre for Domestic Violence increased by 13 per cent to 7,500 in December 2020 compared to 6,700 in December 2019. However, there were significant fluctuations within the 12 months. There was a 23 per cent increase between April 2020 and July 2020, followed by a downward trend between August and November 2020.

To view the LSB's Covid-19 research dashboard, **click here**.

14/2/21

Councils must give parents clear information during safeguarding investigations

The Local Government and Social Care Ombudsman is reminding councils of their duties to parents when asking them to leave the family home during safeguarding investigations, following an investigation into a complaint about Newcastle City Council.

A man complained to the Ombudsman that, following an allegation he had been harming his children, social workers told him to leave the family home, but did not make it clear to him this was voluntary.

The council did not review the agreement while the accusations were investigated and instead left the man with the distress and uncertainty of not knowing for how long he would be away from his family.

The allegations about the man's behaviour were withdrawn and the man returned home. The council referred the family to a family support worker but after just seven visits, that support was stopped without warning.

When the man complained, it took the council around seven months longer to complete its investigation than the timeframes in the children's services statutory complaints procedure. During the Stage Three hearing, the investigating officer offended the man by suggesting he may have misunderstood advice given to him, when he was asked to leave the family home, because his first language is not English.

The man was particularly upset because it was not true, it had not been raised previously, and the panel investigating his complaint was comprised only of white members, following an investigation conducted by a white investigating officer. The officer's comment led to the man losing trust in the objectivity of the council's complaints process, and believing that his ethnicity was a contributing factor in the investigating officer agreeing with the council.

In this case the council has agreed to apologise to the man and pay him a £1,150 in recognition of the time, trouble, uncertainty and distress his family have been caused. The council has also agreed to amend its Safety Plan template to ensure signatories understand the agreement is voluntary and to explain any consequences of not following the agreement. It will also remind relevant staff of the importance of providing parents with all the information they need to make informed decisions and keeping a record of any agreements. Furthermore, it will produce a strategy to ensure it meets the timescales for statutory children's complaints and provide guidance and training to relevant staff on unconscious bias and the importance of inclusive and diverse public services.

For the report of this case, **click here** and then click on the link at the top right of the page opened.

14/2/21

Civil legal aid bills consultation launched

The Ministry of Justice has launched a consultation on the proposed transfer from Her Majesty's Courts and Tribunals Service (HMCTS) to the Legal Aid Agency (LAA) of the assessment of all civil legal aid bills of costs other than those involving a detailed inter partes assessment.

In July 2020 the MoJ proposed that the assessment of all Court Assessed Claims would be conducted by the LAA and legal aid providers had the option to send these claims to the LAA or HMCTS. From 17 August 2020, it was made mandatory to submit Court Assessed Claims to the LAA. Currently the position is that providers can choose whether to send their bills to the LAA or HMCTS. The MoJ says that to date this transfer has made no discernible impact on appeals where providers have disagreed with the proposed payments, and the LAA has remained well within its published target for processing claims – which is for 90 percent of complete and accurate bills to be paid within twenty working days, suggesting that the current arrangement of the LAA assessing these claims is working effectively in ensuring legal aid providers are being paid as swiftly as possible.

The MoJ is now seeking views on whether the transfer of Court Assessed Claims from HMCTS to LAA should be made on a permanent basis.
The consultation closes on 10 April 2021.

For the consultation document, **click here**.

14/2/21

Launch of supervision order survey by National Family Justice Observatory

Nuffield FJO is launching a new consultation seeking views about supervision orders and their use in care proceedings. The survey relates to those cases where a stand-alone supervision order was made in relation to at least one of the children involved in the proceedings (in other words the supervision order was not attached to another order such as a child arrangements order or an SGO). Nuffield FJO wants to hear from parents, family members and professionals who have been involved in care proceedings in the last six years where a supervision order was made.

The survey will be open until 8 March 2021.

For the survey, **click here**.

19/2/21

Unregulated accommodation banned for vulnerable children under 16

Children in care under 16 will no longer be allowed to be accommodated in unregulated independent or semi-independent placements, helping to ensure the most vulnerable are cared for in settings that best meet their needs. Regulations have been laid in Parliament for the ban to come into force in September, as part of the Government's response to its consultation last year aimed at ensuring the highest quality provision for all children and young people in care.

The Department for Education's **response to the consultation** makes clear that while independent and semi-independent provision can be the right option for some older children where it is high quality and meets their needs, children aged under 16 are too young for this type of accommodation – which is intended to facilitate supported living for older children developing their independence before they leave the care system.

In his response, the Education Secretary has also announced that plans will be developed to support local authorities in creating more places in children's homes, backed by additional investment, building on the £24 million announced at the Spending Review and recognising that there are pressures on some local authorities to find the right placement for a child.

He also confirmed that he will progress plans for legislating at the earliest opportunity to give Ofsted new powers to take enforcement action against illegal unregistered providers, who should be registered as children's homes but are operating without the correct registration in place. This will enable Ofsted to take quicker action to register or close down these homes, building on their existing powers to prosecute providers operating without the correct registration and strengthening the options available to them.

The Government will also introduce national standards for unregulated settings that are accommodating 16 and 17-year-old children in care and care leavers, to raise the bar for the quality of this provision and ensure consistency across the country. The Department for Education will shortly launch a consultation on the new national standards, so that as more older children come into the care system, a high quality option is available where they can receive the support they need to prepare for adult life.

Statistics show that across the year 2018-19 there were 660 looked after children placed in independent or in semi-independent living accommodation who were under the age of 16 when their placement started. This is 5 per cent of looked after children in these settings during 2018-19. New data show the characteristics and placements in independent or semi-independent living accommodation for looked after children under the age of 16 in England.

For the announcement, **click here**. For the Government response to the consultation, **click here**. For comment by

the Children's Commissioner for England, calling for the ban to be extended to all under-18s, **click here**.

19/2/21

Children in care homes: Education Committee to launch new inquiry

The House of Commons Education Committee is to carry out **an inquiry into children's homes**, as part of its continuing work examining the issues faced by left behind groups.

The Committee notes that just 7 per cent of looked-after children achieve a good pass in GCSE English and Maths compared with 40 per cent of non-looked after children, while in the longer-term, around a quarter of both homeless people and those in prison are care-leavers. Looked-after children are four times more likely to have a special educational need (SEN) than other children. Children aged 16-17 living in children's homes are 15 times more likely to be criminalised than their peers of the same age.

The Committee's inquiry is likely to examine areas including:

- The data on academic outcomes and progression to destinations such as employment, apprenticeships and higher education for children and young people living in children's homes.
- What can be done to improve educational and longer-term outcomes for children and young people living in children's homes.
- The disproportionately high rates of criminalisation of young people in children's homes.
- What further support is needed to improve outcomes for children with special educational needs in children's homes.
- The quality of care, support and safeguarding in children's homes.
- The impact of the covid-19 pandemic on the children's residential care sector, and on the demand for children's home places.

The full terms of reference for the inquiry will be published shortly along with a call for written evidence. The Committee will be welcoming written evidence from everyone with experience of working in children's homes, academic and policy experts, and young people who live or who have lived in a children's home.

For more details of the inquiry, **click here**.

19/2/21

Family Procedure (Amendment) Rules 2021

The **Family Procedure (Amendment) Rules 2021**, which come into force on 6 April 2021, amend the Family Procedure Rules 2010 as follows:

- Rule 3 amends rule 6.43 of the FPR which makes provision for cases where service is to be effected on a respondent outside of the United Kingdom.
- Rule 4 inserts a new rule 36.3 into the FPR to enable provisions of the FPR to be modified or disapplied by Practice Directions to address issues for the work of the courts arising from a public emergency.

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

19/2/21

Domestic abuse in Wales and Covid-19

A survey is now open for people who live or work in Wales and have witnessed domestic abuse or its warning signs during the Covid-19 pandemic.

The survey forms part of domestic abuse research being delivered by The Wales Violence Prevention Unit and University of Exeter, investigating the experiences and behaviours of those who witness or have concerns about domestic violence and abuse and its warning signs during Covid-19.

The research team is asking members of the Welsh public to share anonymously their experience of witnessing or having concerns about domestic abuse during the pandemic, so bystanders can be equipped with the right knowledge, skills and training necessary to safely intervene and help more people in the future.

Since lockdown measures came into force early in 2020, there have been stark warnings from global leaders about the risk of a "shadow pandemic" of abuse taking place inside people's homes. In Wales, there has been a 41 per cent increase in the number of contacts made to the Live Fear Free helpline since April 2020.

As much of the population continues to observe the "stay home" guidance, there are fewer opportunities for survivors to seek support and for bystanders, such as concerned family, friends, volunteers and colleagues, to intervene. However, with many people now conducting much of their daily life from inside their homes, there are new opportunities for different groups of people, including neighbours, colleagues in virtual meetings and delivery drivers, to spot the warning signs of abuse and take safe action.

To participate in the survey, **click here**.

21/2/21

ADCS report highlights safeguarding pressures before and during pandemic

The Association of Directors of Children's Services (ADCS) has published the **full report of its latest iteration of Safeguarding Pressures research**. For over a decade ADCS has collected both qualitative and quantitative data from local authorities to evidence and better understand changes in demand for, and provision of, children's social care and associated services. This report outlines pressures faced by local authorities during 2019/20 while also including a focus on activity in the first six months of the Covid-19 pandemic.

The report draws together survey responses from 129 of all local authorities in England, covering 89 per cent of England's children and young people population. These, together with existing data, provide an insight into the safeguarding related pressures facing children's services across the country.
As of 31 March 2020:

- There were an estimated 2.5 million initial contacts received by local authorities in 2019/20, an increase of 5 per cent in the last two years.
- There were 642,980 referrals to children's social care in 2019/20, an increase of 19 per cent since 2008.
- The number of children subjects of child protection plans has increased by 76 per cent since 2008.
- Adults experiencing domestic abuse, mental health difficulties or substance misuse, are the most common reasons why children come to the attention of early help and/or children's social care services.
- The number of Section 47 Enquiries continues to rise, up 162 per cent since 2008.
- £824 million is required just for children's services to 'stay still'.
- Nearly half of the respondents to the survey reported a reduction in funding ranging between 15 per cent and 30 per cent.
- Funding for the Troubled Families Programme continues to prop up the delivery of early help services in children's services.

The report also captured some of the impact of the pandemic on children's services. In the six months up to 30 September 2020:

- It is estimated that 81,900 children were in care, an increase of 34 per cent in 12 years and up 6 per cent since 2018/19.
- There were an estimated 284,400 referrals to children's social care.
- There was a 4 per cent increase in children who were subjects of child protection plans at 30 September 2020 compared to the same period last year.

For the Safeguarding Pressures Phase 7 report, **click here**. For the executive summary, **click here**.

26/2/21

Message from the President of the Family Division: The Financial Remedies Courts

On 24 February 2021 the President of the Family Division, Sir Andrew McFarlane, issued the following message:

> I am pleased to announce that the Financial Remedies Courts (FRC) pilot project has now been completed.
>
> This project had its origins in a paper published in November 2016 and was formally initiated as a pilot project by my predecessor in January 2018. The first pilot zone, the West Midlands, started work in April 2018.
>
> The pilot project has been progressively rolled out and is now 'live' in 18 FRC zones covering all parts of England and Wales. With the conclusion of the pilot phase, the FRCs should henceforth be regarded as an established and permanent part of the Family Court.
>
> The FRCs will deal with all financial remedy applications, whether arising from divorce, or under the Children Act 1989, Schedule 1, or under the Matrimonial and Family Proceedings Act 1984, Part 3. It will also deal with all applications for enforcement of financial remedy orders. I am hopeful that in due course legislation will be passed which will allow the FRCs to hear applications under the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) and the Inheritance (Provision for Family and Dependants) Act 1975.
>
> The FRCs have a clearly defined structure. The zones and membership of the courts are set out in a helpful **organogram published by the Ministry of Justice**. The key governing constitutional documents of the FRCs are the **Good Practice Protocol** and the document "**Overall structure of the Financial Remedies Courts and the role and function of the lead judge**", both dated 7 November 2019.
>
> The zones and their lead judges are set out in this schedule. The structure is headed by Mostyn J with HHJ Hess as his deputy. I am very grateful to all involved for their hard work in bringing this project to fruition.
>
> In my judgment in ***Wodehouse v Wodehouse*** **[2018] EWCA Civ 3009** I stated at [56]:
>
> "I hope that this decision is evidence of the value of creating a Financial Remedies Court

– which is currently being piloted – so that only judges who are recognised for their knowledge of, and experience in, financial remedies cases following divorce will, in the future, sit on cases of this type."

The experience of the pilot project has vindicated my hopes. The FRCs have functioned exceptionally well during the current pandemic. Although there were initial delays and backlogs these have largely been resolved. Almost all hearings are now successfully conducted remotely by video. Electronic bundles are universally used.

Consent orders are now all dealt with online, which has substantially increased efficiency. With effect from 15 February 2021, Forms A are to be issued at the zone hub rather than the regional divorce centre. Allocation will take place immediately and the case will find its way to the right judge in the right place without delay. In about half of the zones it is possible now to issue Form A and to upload **all relevant documents online**; this will be extended to all the remaining zones in the coming months. I am expecting that online issue and filing will become the standard process before the year is out.

On 8 March 2021, under the auspices of the Judicial College, Peel J will give the inaugural FRC lecture to the FRC judges. I am expecting that this will be the first of many continuing education events that will be offered to FRC's judges. I am very keen that all of the judges should have their knowledge and experience kept right up-to-date.

I have noted that an increasing number of litigants are choosing to have their FDR conducted privately. I very much welcome this development. Private FDRs appear to have very high rate of success. Their successful use frees up more judicial time for the earlier hearing of those cases that are to be dealt with in court.

The establishment of the FRC has been a success and I am therefore very pleased formally to put the project on a permanent footing within the structure of the Family Court.

Sir Andrew McFarlane
President of the Family Division

26/2/21

Reforms to laws around intimate image abuse proposed to better protect victims

Proposals to improve protections for victims whose intimate images are taken or shared without their consent have been published by the Law Commission of England and Wales. The proposals include:

- An expansion of the types of behaviours outlawed by existing criminal laws on taking and sharing intimate images without consent to include 'downblousing' and sharing altered intimate images, such as deepfakes.
- Criminalising threats to share intimate images (including other forms of 'sextortion').
- Automatic anonymity for all victims of intimate image abuse.
- A new framework of offences better focused on this form of criminal conduct and the harm it causes.

The non-consensual taking and sharing of intimate images can have a significant and long-lasting impact on victims. The harms they experience are serious and significant. These can include psychological harm such as anxiety, depression and post-traumatic stress disorder (PTSD), worsening physical health and financial harm either through time off work or through withdrawing from online spaces which reduces access to networking opportunities. In some cases, there have been reports of attempted suicide and self-harm.

However, the law has not kept up with this behaviour, resulting in significant gaps that have left victims unprotected. These gaps include:

- Inconsistency over what type of intimate images are covered. For example, upskirting is currently a criminal offence but downblousing is not. Sharing an altered image – usually involving adding someone's head to a pornographic image is also not covered.
- Not all motivations for non-consensually taking or sharing an image are covered by current laws. Whilst motivations such as sexual gratification and causing distress are covered (although not consistently), other motivations such as sharing the images as a joke or to coerce an individual are not covered at all.
- Threats to share are not adequately covered, especially when a threat was made to humiliate, coerce, control or distress an individual.

The Law Commission's proposals, which are now being consulted on, aim to ensure that victims are adequately protected from a range of behaviours related to non-consensual taking and sharing of intimate images. The provisional proposals include a new framework of four offences which would cover a broader range of behaviours and motivations.

The Law Commission believes a new framework of offences is needed to cover the behaviours identified in the Consultation Paper. The proposed framework would provide a more unified and structured approach, providing victims with better protection and ensuring that appropriate orders are available to the courts when dealing with these offences.

The Law Commission is consulting on these proposals and wants to hear from a range of stakeholders including victims, experts and lawyers. The consultation period will close on 27 May 2021, following which, the Law Commission will use the responses to help develop final recommendations for reform.

To find out more about the project, to read a summary or to read the full report, **click here**.

26/2/21

Domestic Abuse Bill to proceed to Lords report stage on 8 March

The Domestic Abuse Bill will proceed to its report stage in the House of Lords on 8 March 2021. Report offers peers a further chance to scrutinise closely elements of the bill and make changes. The bill has already completed its passage through the Commons.

For the bill, as amended in committee, **click here**.

28/2/21

Disabled people more likely to suffer domestic abuse than non-disabled

Latest data from the Office for National Statistics shows that in the year ending March 2020, around one in seven (14.3 per cent) disabled people aged 16 to 59 years experienced some form of domestic abuse in England and Wales, significantly higher when compared with one in 20 (5.1 per cent) for non-disabled people of the same age. Similar proportions for both groups were observed in the year ending March 2019.

Disabled women (17.5 per cent) were more than twice as likely to experience domestic abuse than non-disabled women (6.7 per cent), a significant difference. While disabled men (9.2 per cent) were significantly less likely to experience domestic abuse than disabled women, they were more than twice as likely to have experienced domestic abuse than non-disabled men (3.6 per cent), a significant difference.

Disabled people were significantly more likely to experience domestic abuse than non-disabled people, regardless of age. Disabled people aged 16 to 24 years were almost three times more likely to have experienced any form of domestic abuse in the last year (19.5 per cent) than non-disabled people of the same age (7.3 per cent).

The experience of domestic abuse also varied with impairment type, though the variability of the estimates indicates comparisons between impairment types should be made with caution. In the year ending March 2020, disabled people aged 16 to 59 years who reported a mental health (20.5 per cent), a social or behavioural (20.0 per cent) or a learning impairment (19.1 per cent) tended to have experienced the highest levels of domestic abuse in the last year.

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

28/2/21

Financial Remedy Update, February 2021

Rose-Marie Drury, Principal Associate, Mills & Reeve LLP considers the important news and case law relating to financial remedies and divorce during January 2021.

As usual, the monthly update is split into two parts.

A. News Update

• AdviceNow has published a guide to helps parties understand pension assets and how they can be valued and split on divorce or dissolution – see **New help for divorcing couples as they are urged to consider sharing their pensions** and **A survival guide to pensions on divorce** .

• The House of Commons Library has published a briefing paper looking at the effect of Brexit on divorce proceedings: **click here**.

• HMCTS has updated guidance for those who use the online FR services: **click here**.

• The President of the Family Division has published *The Family Court and COVID 19: The Road Ahead 2021* which updates the framework for the operation of the Family Court during the pandemic: **click here**.

• The Courts and Tribunals Judiciary has published an organogram charting the national and regional structure of the Financial Remedy Court. For the organogram, **click here**.

• The Rt Hon Lady Black of Derwent retired as a Supreme Court Justice on 10 January 2021. The President of the Supreme Court, Lord Reed, made a short video to pay tribute to her work and to say a fond farewell to her on behalf of everyone at the Supreme Court.

• Among various amendments to the civil aid eligibility criteria, the existing cap on the amount of mortgage debt that can be deducted from a property's value has been removed. This means all mortgage debt will now be deducted which in turn means that more individuals will now pass the financial eligibility criteria for civil legal aid. This change came into effect on 28 January 2021. For more details, **click here**.

• The Ministry of Justice has published a webpage bringing together guidance for legal professionals about what they need to do from 1 January 2021. The page includes guidance for legal professionals about family law disputes involving the EU, published on 30 December 2020. For the guidance page, **click here**. For a page bringing together guidance for people who are involved in UK-EU cross-border family law disputes and explaining what needs to be done from 1 January 2021, **click here**.

Cases

Rattan v Kuwad [2021] EWCA Civ 1

The Court of Appeal gave judgment following the Wife's appeal against an order of HHJ Oliver.

The parties had married in 2009 and separated in 2019. The Wife subsequently commenced divorce and financial remedy proceedings in April 2019. The Wife applied for maintenance pending suit. The application was heard by a deputy district judge in October 2019 and the Husband was ordered to pay MPS of £2,200 pcm. The Husband appealed that order. HHJ Oliver allowed the appeal, finding that the DDJ had not carried out a critical analysis of the Wife's needs, school fees had been included in the order and there had been an assumed reduction in the mortgage instalments of £600 pcm. Whilst the judge was sure the Wife needed maintenance he did not consider he was in a position to decide what order should be made in place of the DDJ's order. The Wife appealed.

Giving the lead judgment for the Court of Appeal, Moylan LJ commented that the application for MPS did not require any extensive analysis but could be determined justly with a succinct summary and consideration of the relevant factors.

The substantive question was whether the judge was right to decide the DDJ had failed to undertake a critical analysis of the Wife's needs. Moylan LJ found that the DDJ had undertaken a sufficient analysis and had not been wrong to include school fees as part of the maintenance order. The DDJ's order for maintenance was restored. The court was required to undertake an analysis which was sufficient to be satisfied that the award was reasonable. In some cases that might require a detailed examination of a budget but in others it would be immediately apparent whether the listed items represented a fair guide to income needs. The fact that some items might not be incurred every month did not mean they should be excluded for the purposes of determining maintenance nor was it necessary for an applicant to provide a list of income needs distinct from that in Form E.

Moylan LJ concluded that it would be appropriate for a court determining any appeal of MPS to also determine what alternative order, if any, should be made.

AA v AHM [2020] 2 WLUK 743

The Wife and Husband were Kuwaiti. They married in Kuwait in 2002 and had three children together. They subsequently separated and divorced in Kuwait with a final judgment in financial remedy proceedings being given in 2019.

The parties owned three properties in London in joint names. In February 2019 the Wife brought proceedings under the Trusts of Land and Appointment of Trustees Act 1996 for a declaration that the parties equally owned the beneficial interest in the properties and applied for an order for sale. Those proceedings were ongoing and the Husband was defending that application.

The Wife then applied under Part III Matrimonial and Family Proceedings Act 1984 (Part III MFPA 1984) in June 2019 in relation to two of the properties which had been former matrimonial homes. The matter came without notice before HHJ O'Dwyer who granted permission for the Wife to bring her application to consider whether permission should be granted to the Wife. The Husband applied to set aside the order, claiming that HHJ O'Dwyer did not have jurisdiction to grant permission, that only a High Court Judge had jurisdiction, that the properties were not matrimonial homes and the Wife was misleading/there were deficiencies in her application.

Moor J found that HHJ O'Dwyer had jurisdiction to grant permission. In general an application for permission could be heard by judges of the Financial Remedies Court, which would usually be a District Judge but might be a Circuit Judge. They should only come before a High Court Judge if they were exceptionally complex.

The allocation directions in the Family Court (Composition and Distribution of Business) Rules 2014 state proceedings under sections 12 and 13 MFPA 1984 where one of the parties did not consent to the grant of permission or the parties consent to the grant of permission being granted but did not consent to the substantive order sought should be dealt with before a judge of High Court level. However, in *Barnett v Barnett* [2014] EWHC 2678 (Fam) Holman J had considered that routine applications for leave should be made to a local district judge who would then decide whether an application to the High Court was necessary. Such a procedure was sensible, saved time, costs and inconvenience. Holman J had recommended that r8.26(a) FPR 2010 should be amended to remove 'district judge', which had been done. Further, paragraph 25 of the President's Guidance: Jurisdiction of the Family Court: Allocation of cases within the Family Court to High Court judge level and transfer of cases from the Family Court to the High Court 2018 had highlighted generally proceedings under s12 and s13 Part III MFPA 1984 should be allocated to a district judge for both permission and the substantive decision unless the case had some special feature or complexity.

Moor J was satisfied that the Wife had established a prima facie case that two of the properties were matrimonial homes. It was open to the Husband to contend at a final hearing that they were not matrimonial homes but his contention did not

justify setting aside permission for the Wife to bring the application. Whilst the Husband made various criticisms of the Wife's application there was no 'knockout blow' justifying set aside.

AZ v FM [2021] EWFC 2

The parties were married for 15 years before divorcing. They had one child together who was age 19 at the time of the hearing. A final order was made in financial remedy proceedings in June 2011. In 2017 the Husband applied to vary the child maintenance he paid. DDJ Butler made an order capitalising the Husband's child maintenance payments. The Husband appealed. HHJ Everall QC refused permission to appeal on paper. The Husband applied for an oral permission hearing and the matter came before Mostyn J.

Mostyn J considered that the statutory provision was clear. The lump sum had not been ordered under s31(7A) or (7B) Matrimonial Causes Act 1973 (MCA 1973) since that applied only to a party to the marriage and only following the discharge of a periodical payments order. He considered the lump sum had been ordered under s31(5) MCA 1973. Whilst there was a prohibition in s31(5) MCA 1973 that, subject to certain exceptions, the court could not on a variation application impose a property adjustment order in favour of a party to the marriage or a child of the family nor could it impose a lump sum order in favour of a party to the marriage, there was no such prohibition on it imposing a lump sum in favour of a child of the family.

Mostyn J was satisfied the jurisdiction to order a lump sum existed and the trial judge had been entitled to exercise it in the case but commented it was a 'very rare bird indeed'. On the facts, a lump sum was justified because of the combination of incessant litigation on which the Husband was found to have thrived, repeated defaults by the Husband and the age of the child and relatively short period until the maintenance liability expired.

FRB v DCA (No3) [2020] EWHC 3696 (Fam)

In March 2020 Cohen J handed down judgment following the final hearing in the financial remedy proceedings. Cohen J's order had the effect that the Husband was to pay the Wife £64 million comprising of the matrimonial home mortgage free (£15 million) and a lump sum by instalments totalling a further £49 million. The lump sum was to be paid as follows:

> a) repayment of the mortgage (approximately £12 million) on the matrimonial home within six months and then transfer of the property;
>
> b) £30 million to be paid within six months of the date of the order;
>
> c) £19 million to be paid within 18 months of the date of the order.

The order provided for interest to be paid at the rate of 4% pa or such higher rate as the court subsequently ordered in the event of late payment of b) or c) and that if b) was not paid on time the whole balance would become payable. The Husband was further ordered to pay certain bills at the matrimonial home, periodical payments to the Wife at the rate of £720,000 pa to be reduced pro rata by the proportion of the amount of the £49 million that had been paid and an order for child maintenance and school fees.

The Husband appealed and was refused permission in August 2020. In September 2020 the Husband then applied to vary the quantum and timing of payments in the order or alternatively for the lump sum to be set aside and re-quantified on a *Barder* event basis. In November 2020 the Wife applied for an increase in her periodical payments to £2.5 million pa, interest on the three unpaid lump sums together and an increase in the rate of interest to 8% and a legal services order in the sum of £1.4 million.

The parties' applications came back before Cohen J.

Cohen J dismissed the Husband's applications. Cohen J found that there was a lack of any evidence submitted by the Husband to show a fundamental change in his worth and he noted the Husband had not provided trading figures, profit and loss accounts, underlying documentation or valuations. Whilst some of the sectors the Husband and his family were involved in, such as hotels and airlines, would have been negatively affected by the pandemic, his interests were varied and it was not obvious there was a collapse in his fortune. Cohen J further noted it was important to consider the long term and most commentators believe at some stage in the next couple of years the world economy will be back to where it was prior to the pandemic.

Dealing with the Wife's applications, Cohen J found in the current economic climate it would be excessive to increase the rate of interest above 4%. He confined payment of interest to the second lump sum as the Husband was continuing to pay the mortgage on the matrimonial home (and the Wife was therefore not being kept out of that element of the award) and the non-payment of the third lump sum had not yet arisen.

Cohen J found that in principle the Wife's periodical payments should be increased to give the Husband incentive to make payment.

The Wife received a legal services order to enable her to pay her unpaid costs (with credit being given to the Husband against the final payment of the lump sums), to fund proceedings between the parties over artwork and Children Act proceedings.

Ralph v Ralph [2020] EWHC 3348 (QB)

Morris J heard an appeal by the Claimant against an order dismissing his claims for a declaration of beneficial interest in a property owned in the parties' joint names and an order for sale under the Trusts of Land and Appointment of Trustees Act 1996.

The Claimant was the Defendant's eldest son. The property which was the subject of proceedings was the Defendant's home where he lived with his wife and two of their children. The Claimant had lived in the property between 2003 and 2007 but had not lived there since.

The parties purchased the property in joint names in 2000. The TR1 recorded that the parties held the property on trust as tenants in common in equal shares. The Claimant's position was that was an accurate reflection of the parties' intention. The Defendant's case was that the declaration was made under a common mistake, the parties never intended joint beneficial ownership in equity and the Claimant was only included on the title to assist him in securing a mortgage. The Claimant made no contribution to the purchase price or mortgage. The Claimant sought a declaration that the property was held by the parties as tenants in common in equal shares and an order for sale. At first instance the judge dismissed the Claimant's claim.
The Claimant appealed.

Morris J found that although the Defendant had not formally pleaded a claim for rectification or rescission, there was no requirement for a formal claim for such to be made for the court to make an order for the same. It was only necessary for a vitiating factor relating to the express declaration of trust to be asserted, which the Defendant had done. Whilst the Defendant had not provided a properly particularised counterclaim impeaching the express declaration on the basis of mistake, the judge was entitled to exercise his discretion to allow the Defendant's defence to be considered. Morris J found that this approach was just on the facts of the case and the Claimant was not prejudiced by the lack of a formally pleaded counterclaim.

Morris J held that at the time of purchase the parties had agreed joint legal ownership but had reached no agreement as to beneficial ownership. The correct approach therefore was to reflect this by rectification, deleting the express declaration of trust from the TR1. In the absence of an express declaration of trust it was for the court to decide the parties' beneficial interest based on an implied trust. The judge at first instance had found that, on the basis of the parties' common intention constructive trust, the Claimant had no beneficial interest and the Defendant was the sole beneficial owner. The Claimant's appeal was dismissed.

Kleinhentz v Harrison and another [2020] EWHC 3439 (Ch)

The Claimant and First Defendant lived together for most of the period between 1990 and 2011. The Claimant alleged that they had been in a relationship together, which the First Defendant denied. In 2005 the First Defendant purchased a house in his sole name using money provided by his father. When he asked the Claimant to leave in 2011, the Claimant asserted a beneficial interest in the property. The parties subsequently entered into a written agreement under which, subject to certain conditions being met, the Claimant would receive a payment of £250,000 and withdraw his claim of a beneficial interest. It also provided for the First Defendant to have in place a Will leaving a gift of at least £250,000 to the Claimant which was not subject to conditions. No money was paid under the agreement. The property was subsequently sold and part of the proceeds went to purchase a property in the name of the Second Defendant (who by that time was in a civil partnership with the First Defendant). The Claimant alleged that the agreement had been varied and the First Defendant should have paid him £250,000 when the property was sold.

Robin Vos, sitting as a Deputy High Court Judge, found that the parties had been in a long-term committed relationship from 1990 to sometime between 2005-2008. After that they were good friends. It could not be inferred from the parties' conduct that the Claimant should have a beneficial interest in the properties purchased by the First Defendant. The written agreement in 2011 was a valid binding agreement and remained so, including the term regarding the First Defendant's will. However, the requirement for the First Defendant to pay the Claimant a lump sum of £250,000 was conditional upon the First Defendant receiving sufficient funds from his father after the date of the agreement to do so. The proceeds of sale of the property did not satisfy the condition because although the funds to purchase the property had come from the First Defendant's father they were received prior to the 2011 agreement. The agreement had not been subsequently varied. The Claimant's claims were dismissed.

Oberman v Collins and another [2020] EWHC 3533 (Ch)

The Claimant and First Defendant were in a long term relationship between 1995 and 2015. The Second Defendant was a company in which both parties were shareholders. Over the course of their relationship, the Claimant and First Defendant had built up a portfolio of properties which were held in a mixture of their sole and joint names and in the name of the company. The ownership of the properties was often dependent upon financial advice. The Claimant sought (i) a declaration that she was entitled to 50% of a number of properties held by the Defendants either under a common intention constructive trust or a partnership and (ii) relief under sections 994 and 996 of the Companies Act 2006 on the grounds of unfair prejudice. Tom Leech QC, sitting as a Judge of the Chancery Division, held that all of the properties, regardless of legal title, formed part of a single portfolio in the common ownership of the parties. There was an express agreement between the parties that it had been their common intention that the portfolio would be held jointly and equally and the Claimant had relied on that to her detriment (making financial contributions and working unpaid). The common intention doctrine could apply to a fluctuating portfolio of properties provided the requirement of a valid trust were satisfied. If that was wrong, then a common intention constructive trust could be established by inferring that the parties intended to acquire that property in equal shares from their express agreement about the portfolio and their subsequent conduct in the use of rents and sale proceeds. There is no rule that common intention trusts arise only in the domestic context although it is more difficult to establish these trusts in a commercial context.

11.2.21

Practice Direction 12J & Scott Schedules – Rearranging a spider's web

Jeremy Ford, Partner at Cambridge Family Law Practice LLP, calls for clarity in the court's attitude to Scott Schedules when considering what is relevant to its welfare determination

Sir Andrew McFarlane, the President of the Family Division, Lady Justice King and Lord Justice Holroyde (with extensive experience in criminal matters) have recently heard four linked appeals related to family proceedings involving the welfare of children.

It is anticipated that the Court of Appeal will give general guidance on the approach taken by the family court in cases in which domestic abuse is alleged.

My concern is that whatever the Court of Appeal says, the fundamental issue is time. Time for the court to consider the evidence, time to marshal the evidence, time to appropriately hear the matters in dispute, time to make findings, time to give judgment, time to list any fact-finding hearing swiftly, time to consider interim contact.

Judges, as well as litigants, may find themselves quoting Samuel L. Jackson in the movie Changing Lanes, "*I need you to give my time back to me. Can you give me back my time? Can you give my time back to me? Huh? Can you*?"

The answer is no. Given the awful delays in the family justice system as a result of an avalanche of applications, legal aid cuts, court closures and the pandemic, I worry that the Court of Appeal will be hampered in effecting the obvious change that is required.

The purpose of **PD12J** is to protect children and adults from the consequences of harmful behaviour.

The reasons that PD12J and its application are hit and miss are because:

- allegations are not case managed at the earliest opportunity;
- Cafcass is often ordered to report prior to statements being filed;
- there is insufficient time at directions hearings for the court to consider the evidence and decide what is relevant and must be determined, let alone the time to deal with interim child arrangements;
- fact finding hearings take too long to list.

PD12J

The application of PD12J on the family court is **mandatory**. Yet, there are countless experiences amongst the legal profession of PD12J being utilised as a straitjacket or just ignored/minimised.

In ***Re A (A child)*** **[2015] EWCA Civ 486** at [§48-59], McFarlane LJ referred to the 'requirement' of the court to consider and follow PD12J in a case involving allegations of domestic abuse:

> "Any court dealing with a case where domestic violence or abuse is established is required to afford appropriate weight to such findings in accordance with the Re L decision and to conduct a risk assessment in accordance with PD12J, paras 35 to 37."

The word relevance is extremely important in the application of PD12J; ie. would a finding be relevant to the welfare decision that is to be made?

The President in ***V (A Child)*** **[2015] EWCA Civ 274** said this at [§34-36 and §46]:

> "There is a danger, I fear, that in any case where the label 'domestic abuse' or 'domestic violence' is used, there is a semi-automatic reaction generated in the minds of CAFCASS officers and other professionals in the court proceedings to think that inevitably all such allegations need to be thoroughly investigated no matter how old or disconnected to the child they may be and, more worryingly, that all such allegations, if found proved, indicate that there should be no direct contact between the abusive parent and the child."
>
> "It is necessary therefore to remind oneself of basic principles. Those are to be found in the well known authority of this court in the case of *Re: L, Re: V, Re: M, Re: H* [2000] 2 FLR 334. I am not going to read into my judgment now what is so carefully set out, in particular by Dame Elizabeth Butler Sloss, the then President, in her judgment but I do make one or two observations. The first is this: that the case was not a narrow case which simply looked at domestic violence and then considered the negative consequences of that upon children; a much more sophisticated evaluation is described in the pages of the judgment and there is a further distinction to be made within that. The first third of the then President's judgment is spent describing the important advice that the court had from Dr Claire Sturge and Dr Danya Glaser, both consultant child psychiatrists, on the issue of domestic violence and contact. Even those well seasoned in family law would benefit from going back to this decision now in 2015 and re reading. There the reader finds a balanced description of the benefits and potential detriments to a child where domestic abuse of some form is alleged. It does not recommend an automatic provision of a solution but it describes a sophisticated weighing of the checks and balances of the benefits and detriments of contact."
>
> "The court must ascertain at the earliest opportunity whether domestic violence or abuse is raised as an issue of risk of harm to the child which is likely to be relevant to any decision of the court relating to the welfare of the child, and specifically on the making of any child arrangements order."
>
> "A new judge now needs to get hold of this case and to take ownership of it. The progress of the case is not to be dictated by a CAFCASS officer. The judge who takes this case needs to form his or her own evaluation of what needs to be decided, what needs to be evaluated and, if necessary, what contact needs to be attempted in controlled and safe circumstances. Seemingly, on my restricted knowledge of the case, that has not happened to date and for my part that is highly regrettable."

Discussion on PD12J and Scott Schedules

Like many professionals I've seen PD12J used well and used poorly. It was designed as a shield but is sometimes used as a sword. Oftentimes the mere mention of any allegations automatically leads to the cessation of contact for a parent until a fact-finding hearing is listed – any semblance of welfare is shelved. A fact-finding hearing takes at least eight months to be heard. In that time the children have little or no contact with the other parent. Obviously, this has to be balanced against the risk of the children spending time with a parent who may be a perpetrator of domestic abuse. Proper consideration of the impact upon the child of a cessation or reduction of contact, which must be undertaken alongside an assessment of the potential risk to the child of having contact (of any form) with an alleged perpetrator of domestic abuse, requires a hearing of appropriate length. It often cannot be done (or done properly) at an FHDRA or subsequent directions hearing when it will necessarily compete for time with consideration of directions and proper case management. Obtaining an interim hearing can be difficult. If it is possible to convince the court to list one, it may not be possible for it to be heard until many months in the future.

We have all prepared for fact-finding hearings and, come the day of the hearing, the judge says something like, "Once I make the findings you are stuck with them. Are you sure you can't go outside and sort this out?" What follows is no or partial acceptance of the allegations, an order containing a few recitals or undertakings to attend an anger management course, a slow pattern of contact and endless review hearings where the same issues rear their head, leading to the frustration of contact on the basis of the same, undetermined allegations or, alternatively, with the parent making the allegations being painted as an alienator, re-raising allegations for no good reason when in fact they may be true.

What is frequently missed is: what message has been/or is going to be given to the child(ren)? This step should be the springboard for contact. Again, we have all taken down a judgment finishing at 16:05 either making some or no findings for one parent to go home and provide the children with their own truth; thus hindering any future progress.

There are usually mixed messages being passed to children during this period. It is not uncommon for children to be receiving therapy for an alleged event (unbeknownst to the court or other parent). Nor does the court have an independent view as to whether the children do or do not wish to see the other parent.

Mixed into the PD12J case is the use(fulness) of Scott Schedules in dealing with certain allegations.

Hayden J gave his very recent view in ***F v M [2021]* EWFC 4** deprecating the use of Scott Schedules but leaving the use of them to the individual judge's discretion.

> "Ms Jones has invited me to make comment on the use of Scott Schedules (i.e. a table identifying the allegations and the evidence relied on in support) in cases involving this category of domestic abuse. Having given the matter considerable thought I have come to the clear conclusion that it would not be appropriate to give prescriptive guidance. Whilst I entirely see the advantage of carefully marshalling the evidence and honing down the allegations, I can also see that what I have referred to as a particularly insidious type of abuse, may not easily be captured by the more formulaic discipline of a Scott Schedule. As I have commented above, what is really being examined in domestic abuse of this kind is a pattern of behaviour, possibly over many years, in which particular incidents may carry significance which may sometimes be obvious to an observer but to which the victim has become inured. It seems to me that what is important is that the type of abuse being alleged is made clear to the individual who is said to be the perpetrator.
>
> An intense focus on particular and specified incidents may be a counterproductive exercise. It carries the risk of obscuring the serious nature of harm perpetrated in a pattern of behaviour. This was the issue highlighted in the final report of the expert panel to the Ministry of Justice: 'Assessing Risk of Harm to Children and Parents in Private Law Children Cases' (June 2020). It is, I hope, clear from my analysis of the evidence in this case, that I consider Scott Schedules to have such severe limitations in this particular sphere as to render them both ineffective and frequently unsuitable. I would go further, and question whether they are a useful tool more generally in factual disputes in Family Law cases. The subtleties of human behaviour are not easily receptive to the confinement and constraint of a Schedule. I draw back from going further because Scott Schedules are commonly utilised and have been given much judicial endorsement. I do not discount the possibility that there will be cases when they have real forensic utility. Whether a Scott Schedule is appropriate will be a matter for the judge and the advocates in each case unless, of course, the Court of Appeal signals a change of approach."

The tension

The tension is that the family court has a wide discretion as to how it manages its cases as per the FPR 2010 and specifically,

> **FPR 2010**
> The overriding objective
> 1.1
> (1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.
>
> (2) Dealing with a case justly includes, so far as is practicable –
>
> (a) ensuring that it is dealt with **expeditiously and fairly**;
>
> (b) dealing with the case in ways which are **proportionate to the nature, importance and complexity of the issues**;
>
> (c) ensuring that the parties are on an equal footing;
>
> (d) saving expense; and
>
> (e) **allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases**.
>
> Application by the court of the overriding objective
> 1.2
> (1) The court must seek to give effect to the overriding objective when it –
>
> (a) exercises any power given to it by these rules; or
>
> (b) interprets any rule.

Duty of the parties
1.3
The parties are required to help the court to further the overriding objective.

Court's duty to manage cases
1.4
(1) The court must further the overriding objective by actively managing cases.

(2) Active case management includes–

(a) setting timetables or otherwise controlling the progress of the case;

(b) **identifying at an early stage–**

(i) **the issues; and**

(ii) who should be a party to the proceedings;

(c) **deciding promptly –**

(i) **which issues need full investigation and hearing and which do not**; and

(ii) the procedure to be followed in the case;

(d) **deciding the order in which issues are to be resolved**;

(e) controlling the use of expert evidence;

(f) encouraging the parties to use a non-court dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;

(g) helping the parties to settle the whole or part of the case;

(h) encouraging the parties to co-operate with each other in the conduct of proceedings;

(i) considering whether the likely benefits of taking a particular step justify the cost of taking it;

(j) dealing with as many aspects of the case as it can on the same occasion;

(k) dealing with the case without the parties needing to attend at court;

(l) making use of technology; and

(m) **giving directions to ensure that the case proceeds quickly and efficiently**.

These rules give Judges the option to manage cases as they see fit. Some may prefer the use of a Scott Schedule, some may not. The issue is still the same, what allegations are *relevant* and does the court have the *time* to consider them fully.

Scott Schedules

As to the use of Scott Schedules, the below gives an inkling of McFarlane P and King LJ's likely views.

In ***F (A Child) (International Relocation Cases)* [2015] EWCA Civ 882**, Ryder LJ endorsed the use of a balance sheet in child welfare assessments. McFarlane LJ, as he then was, was more cautious:

> "Whilst I entirely agree that some form of balance sheet may be of assistance to judges, its use should be no more than an aide memoire of the key factors and how they match up against each other. If a balance sheet is used it should be a route to judgment and not a substitution for the judgment itself. A key step in any welfare evaluation is the attribution of weight, or lack of it, to each of the relevant considerations. One danger that may arise from setting out all the relevant factors in tabular format, is that attribution of weight may be lost, with all elements of the table having equal value as in a map without contours." [§52]

King LJ, in a medical treatment case, ***Re A (A Child)* [2016] EWCA Civ 759** endorsed those views when a balance sheet was used:

> "I would respectfully endorse those views. The courts have long recognised that in disputes in respect of serious medical treatment the matter should be brought before the court. See for example *NHS Trust v SR Radiology and Chemotherapy* [2013] 1 FLR 1297. At the end of the day, as was emphasised by Baroness Hale in the Aintree case, the test to be applied by the courts in such cases is simply this: what is in the best interests of the child at the particular time in question, having regard to his welfare in the widest sense, not just medical, but social and psychological? Too heavy a focus on a balance sheet may, as was recognised by McFarlane LJ, lead to a loss of attribution of weight." [§57]

Balance sheets are different from Scott Schedules but the principle is the same. In order to make a decision, the court must consider the entire canvas rather than be constrained by a schedule. It is not unusual for a judgment on a fact finding to describe aspects of the evidence, and then to go through the Scott Schedule and to say "I find this proved" or "this is not proved" with little to no analysis of each particular allegation. Such a judgment is particularly unhelpful because you then do not find out important things such as:

> a) If the allegation is proved, what was behind the perpetrator's behaviour in acting in that way?
>
> b) If it is not proved, what was the parent's motivation in making the allegation (if it is possible to discern that)?
>
> c) What is the harm to the child either way?

Legal Principles

The fundamental legal principles that must be applied when determining the applications before the court are neatly summarised by MacDonald J in ***AS v TH (False Allegations of Abuse)*** **[2016] EWHC 532 Fam** [§23-29]:

> "The decision on whether the facts in issue have been proved to the requisite standard must be based on all of the available evidence and should have regard to the wide context of social, emotional, ethical and moral factors (***A County Council v A Mother, A Father and X, Y and Z*** **[2005] EWHC 31 (Fam)**). Where the evidence of a child stands only as hearsay, the court weighing up that evidence has to take into account the fact that it was not subject to cross-examination (*Re W (Children)(Abuse: Oral Evidence)* [2010] 1 FLR 1485).
>
> If a court concludes that a witness has lied about one matter, it does not follow that he or she has lied about everything. A witness may lie for many reasons, for example, out of shame, humiliation, misplaced loyalty, panic, fear, distress, confusion and emotional pressure (*R v Lucas* [1981] QB 720).
>
> The court must not evaluate and assess the available evidence in separate compartments. Rather, regard must be had to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward has been made out on the balance of probabilities (*Re T* [2004] 2 FLR 838 at [33]).
>
> There is no room for a finding by the court that something might have happened. The court may decide that it did or that it did not (*Re B* [2008] UKHL 35 at [2]). However, failure to find a fact proved on the balance of probabilities does not equate without more to a finding that the allegation is false (***Re M (Children)*** **[2013] EWCA Civ 388**).
>
> In principle the approach to fact finding in private family proceedings between parents should be the same as the approach in care proceedings. However, as Baroness Hale cautioned in Re B at [29]:
>
> > "…there are specific risks to which the court must be alive. Allegations of abuse are not being made by a neutral and expert Local Authority which has nothing to gain by making them, but by a parent who is seeking to gain an advantage in the battle against the other parent. This does not mean that they are false but it does increase the risk of misinterpretation, exaggeration or downright fabrication."
>
> Within this context, it has long been recognised that care must be taken not to focus attention on statements made by the child at the expense of other evidence, particularly where allegations of abuse arise in the context of private law disputes. The Best Practice Guidance of June 1997 Handbook of Best Practice in Children Act Cases Section 4, Annex para (k) cautions that:
>
> > "Any investigation which focuses attention on the statements of the child runs the risk of producing a false result if what the child says is unreliable or if the child's primary care taker is unreliable, particularly where the allegation emerges in bitterly contested section 8 proceedings."

The reality

I do not envy the family court. The pressure of time means that a judge has the unenviable task of narrowing the issues at a rushed directions hearing without full knowledge of what is being put. A slavish adherence to, say, six allegations in a Scott Schedule (with strict compliance on sub-allegations) means that patterns of behaviour, third party evidence usually fall away – thus rendering any finding almost meaningless in the welfare context.

I sense that judges, aware of the inherent delays in the system, encourage parties to settle their disputes or case manage in a "let's see how we get on" way. This almost never benefits the children or the parties.

Russell J in ***JEG v IS*** **[2014] EWHC 287 (Fam)** (13 February 2014) puts it clearly at §73-74:

> "Had these allegations been made in public law proceedings the court would not have delayed in hearing the evidence to determine whether there had been abuse or whether the child had been made to believe in such abuse, for as the Guardian observes, both constitute real harm. The need for judicial determination of the facts in private law cases is as necessary as it is in public law cases as the court has a duty to protect children and ensure that decisions and orders are made which are consistent with their best interests and welfare. To do so requires that the factual basis on which orders are made is not permitted to become the subject of a continuous dispute between the parties. It is necessary that there is judicial determination of issues such as there were in this case at the earliest opportunity to avoid proceedings being drawn out and conducted by way of review."
>
> "An early determination of the facts followed swiftly by a welfare hearing at which the medium and long term pattern for time spent with each can be put in place is the just and proportionate way to deal with private law cases."

The Magic Wand

By and large the framework for the court's approach in a PD12J case is already there. The PD just needs to be followed.

If I were able to wave a magic wand, the imperfect solution would be this:

- Statements and Scott Schedules lodged with C100, ie. prior to FHDRA;
- Other parent to respond in statement and state whether the allegations are being falsely made;
- Safeguarding letter to address views on risk of contact having seen statements and Scott Schedule – address what allegations are relevant to welfare;
- FHDRA – Decision as to what matters are relevant to welfare, consider interim contact, is further evidence required, list for PTR and fact-finding hearing;
- In the meantime Cafcass to meet children – provide an outline to the court of the state of mind of the children, what have they been told, what do they believe, do the children want to see the other parent?;
- PTR – is the matter ready for FF, interim contact considered;
- Fact-finding hearing with an initial welfare decision, consideration as to how the children are informed of the outcome (as is already provided for in the FPR).

Most of all, the magic wand would give the court the **time** to consider at the earliest stage the evidence to enable it to make a decision as to what is relevant to the welfare determination it will ultimately need to make. My concern is that this is a forlorn hope and the likely message from the Court of Appeal will be that PD12J must be followed and that the court is under a duty to consider the wider canvas rather than be constrained by a Scott Schedule, though I do not expect to see them outlawed.

2/2/21

The Covid-19 Pandemic as a Barder Event

Richard Kershaw, partner at **Hunters Law LLP**, considers the implications of Mr Justice Cohen's judgment in FRB v DRC (No 3)

Introduction

Could the Covid-19 pandemic constitute a Barder event? This was a hot topic of debate among family lawyers last spring as it became clear that the pandemic would bring serious economic disruption in its wake. Given the caselaw following the 2008 financial crash, most commentators were dubious about the prospects of such claims succeeding, and Mr Justice Cohen's judgment in ***FRB v DRC (No 3)* [2020] EWHC 3696 (Fam)** suggests that their doubts were well-placed. However, the evidential weakness of the application before the court leaves open the possibility of a different result in a stronger case.

When can the court re-open capital settlements based on subsequent events?

The circumstances in which the capital elements of a financial settlement can be re-opened as a result of subsequent events are narrow, reflecting the importance the court attributes to the finality of litigation.

Under the *Barder* jurisdiction, a financial remedy order may be set aside where an event taking place shortly after the order invalidates the basis on which the order was made, so long as the application is made promptly and there would be no prejudice to third parties. In the tragic case of *Barder v Barder* [1987] 2 FLR 480, Mrs Barder's suicide and murder of the parties' children led the court to set aside an order made five weeks earlier transferring the family home to her.

In addition to the *Barder* jurisdiction, under s 31(2)(d) MCA 1973, lump sums payable by instalments can be varied not only as to the amount and timing of the instalments, but also as to the overall quantum. The Court of Appeal in *Westbury v Sampson* [2001] EWCA Civ 407 held that this should only be considered "*when the anticipated circumstances have changed very significantly, and/or for cogent reasons rendering it quite unjust or impracticable to hold the payer to the overall quantum of the order originally made*". The Court of Appeal noted that this gives the court "*a little more latitude*" than it has under the Barder jurisdiction.

Past attempts to re-open final orders based on changes in asset values have not generally succeeded. In her influential judgment in *Cornick v Cornick* [1994] 2 FLR 530 (concerning a rise, rather than fall, in value), Hale J (as she then was) distinguished between:

- situations where an asset "*changes value within a relatively short time owing to natural processes of price fluctuation*", which do not fall within *Barder;* and
- those where "*something unforeseen and unforeseeable had happened since the date of the hearing which has altered the value of the assets so dramatically as to bring about a substantial change in the balance of assets brought about by the order*", which may fall within *Barder.*

Hale J went on to say that the "mere fact" of unforeseeability was "*not sufficient to turn something which would not otherwise be a Barder event into one*". In Cornick, the tripling in value of the husband's business, whilst unforeseeable, was a natural ("albeit dramatic") change in value, and thus not a *Barder* event.

Following the 2008 financial crash, the Court of Appeal rejected two applications to re-open financial settlements following dramatic declines in asset values. In ***Myerson v Myerson (No 2)*** **[2009] EWCA Civ 282**, where the extent of the fall in value in the husband's shares meant that the wife would receive over 100 per cent of the parties' assets, the Court of Appeal confirmed that natural processes of price fluctuations, however dramatic, do not satisfy the Barder criteria. It was additionally relevant that the order had been reached by consent, with the husband choosing to retain his shares and pay cash to the wife. Similarly in ***Horne v Horne*** **[2009] EWCA Civ 487**, [2009] 2 FLR 1031, the Court of Appeal considered it relevant that the husband had agreed to his business being treated as a liquid asset for the purposes of the final hearing, and held that its decline in value following the global economic crash was a natural process of price fluctuation and therefore not a *Barder* event.

It can be appreciated, then, that any application to re-open an order due to the financial implications of Covid-19 was always likely to face an uphill battle.

What was the situation in FRB v DCA (No 3)?

Practitioners may recall the factual circumstances from ***FRB v DCA (No 2)*** **[2020] EWHC 754 (Fam)**, in which Cohen J presciently remarked "It would be over-optimistic of me to think that this hearing will bring to an end the gladiatorial combat between the parties". Both parties came from very wealthy backgrounds, and the main issues in the case were the wife's conduct in allowing the husband to bring up the child of the marriage in the mistaken belief that he was the child's natural father, and the husband's seriously deficient financial disclosure. Ultimately the wife's conduct and the husband's non-disclosure were set off against each other, and Cohen J ordered that the known marital acquest of £128m be shared equally. This resulted in an award of £64m to the wife, comprising the FMH worth £15m, and a lump sum payable by instalments of £49m.

The final hearing took place in January and February 2020, with a draft judgment circulated on 28 February 2020 and a hearing on 27 March 2020. The first national lockdown had commenced a few days earlier, on 23 March 2020. At the hearing on 27 March the husband's counsel asked Cohen J to defer handing down judgment on the basis that the economic effects of Covid-19 were "such that the basis of the order was likely to be fundamentally undermined", and suggested that the court should adjourn the case until September 2020. This was refused and the parties went on to discuss the terms of the order.

In his judgment Cohen J had expressed concern about the lack of evidence on liquidity and had raised the possibility of the husband paying part of the amount due to the wife by way of an asset transfer, rather than a cash payment. The husband however, at the hearing on 27 March, elected not to take up that option. Crucially, the timing of the lump sum instalments was set out in the order based on dates volunteered by the husband: £30m was to be paid within six months of the date of the order, and £19m within 18 months. Notably, therefore, it was after the husband had already raised concerns about the economic implications of Covid-19 that he opted to pay the wife's award in cash and agreed the payment schedule.

The first lump sum payment was due to take place by 30 September 2020. On 28 September the husband applied, based on the alleged economic consequences of Covid-19, to vary the lump sum payable by instalments, both as to overall quantum and the timing of the payments. Alternatively, he sought to have the lump sum order set aside under the Barder jurisdiction and re-quantified. It is worth noting that a significant number of the husband's business interests were in the international hotel sector.

Why did Cohen J reject the husband's application?

Cohen J set out that whilst he had jurisdiction to vary the overall lump sum quantum under s31 MCA 1973, it would be "exceptional" to do so in circumstances markedly different from those which would justify a *Barder* variation.

Cohen J noted that a "striking feature" of the husband's evidence was "how very little of it relates specifically to the assets which I found either to belong to [him] or in which he has an interest". Rather, the husband's statement focused on the "macro-economic" situation arising as a result of the pandemic, and the references in his evidence to the impact of Covid-19 on his assets were "general in the extreme", such as pointing out that some tenants had fallen behind on their rent, and that hotel occupancy had fallen. Further, instead of indicating what he now considered he could pay and when, the husband simply asked the court to order a revaluation of all of his assets - an exercise Cohen J considered would cost £300,000 - £400,000 plus tax and expenses and take six months.

The husband's failure to provide prima facie evidence that there had been a fundamental change in his worth so as to justify re-opening the settlement was fatal to his case. Whilst some sectors in which the husband had interests had

undoubtedly suffered as a consequence of the pandemic, his interests were varied, making it "far from obvious" that his worth had collapsed. Cohen J was clear: "It is not sufficient for [the husband] just to invite the court to look to the general global financial situation. If that was the case, huge numbers of cases would be being reopened on no basis other than the fact that further inquiry might reveal something specific".

That the husband had given no indication of what he said he could pay, or when, was also harmful to his case. Of particular significance was his lack of explanation as to what had changed about his ability to pay between 27 March, when he had volunteered the timeframes subsequently enshrined in the order, and the date of the application. Further, referring to the Court of Appeal's decision in Myerson, Cohen J noted that "it was a material fact that there, as here, the husband chose to pay a capital sum rather than transfer assets in kind".

The prospect of further valuations was also unappealing, not only given that Cohen J considered, in light of his past findings on the husband's credibility, that the valuer was unlikely to be provided with adequate information, but also because the "topsy-turvy financial times in which we now live" meant that any valuation would almost certainly be overtaken by events before a subsequent hearing.

Of more fundamental significance for anyone considering applying to set aside an order based on the financial implications of Covid-19, however, was Cohen J's statement that it is "essential" in such applications to take a "long term" view. Cohen J noted that the major stock market indices have rebounded to above their pre-Covid-19 levels, and added that "most commentators believe that at some stage within the next couple of years the world economy will be back to where it was". Cohen J did however note that the husband may have an argument that the timing of the payments of the lump sum should be re-calibrated – but no such argument had been made.

The financial circumstances were taken into account by Cohen J in determining the interest payable on the overdue lump sums. The final order had provided that in the event of late payment interest would be payable at 4 per cent or such higher rate as the court may subsequently order, and the wife applied to increase the rate to the judgment debt rate of 8 per cent. Cohen J considered that in the current economic climate it would be "excessive" to order interest at 8 per cent. Further, whilst the order had provided for the entire lump sum to become immediately payable if the husband defaulted on the first instalment, Cohen J declined to order interest on the second instalment as he considered that would be "oppressive" in the current financial circumstances.

As a matter of mechanics, interest was not yet payable as decree absolute had not been made– meaning interest could accrue but was not enforceable. To get around this, Cohen J increased the wife's periodical payments by an amount equivalent to the interest which would be payable, making clear in his follow-up judgment, ***FRB v DCA (No 4)*** **[2021] EWHC 116 (Fam)**, that interest would not accrue separately. Cohen J also held that as a result of interest on the first tranche of the lump sum becoming payable, the step-down in maintenance anticipated by the original order on payment of the first tranche would come into effect.

The presumption of no order as to costs does not apply in set aside applications, and the husband was ordered to pay 80 per cent of the wife's costs.

What are the wider implications?

If there was ever a case that was going to succeed in setting aside a financial order due to the implications of Covid-19, it was not this one. The husband's evidence of the pandemic's impact on his financial position appears to have been negligible, and the judge had formed a negative view of his credibility in the main proceedings only a few months earlier. The judge had made numerous findings in the substantive litigation, including that there had been "blatant shenanigans" relating to the valuation of a hotel in India and, generally, "blatant attempts" to minimise the assets in the case. Further, the husband had, after the pandemic had already hit, not only declined the option of satisfying part of the wife's award in shares rather than cash (which would have reduced his financial risk) but also proposed the payment schedule.

Nevertheless, Cohen J's comments that it is necessary to take a long-term view given the anticipated economic recovery mean that even if financial loss resulting from Covid-19 is significant and well-evidenced, it looks unlikely to be sufficient to re-open an award, either under s31 MCA 1973 or *Barder*. There may however be cases where more persuasive arguments could be made to re-open a case due to the consequences of the pandemic. If, for example, a business has failed and had to be wound up due to the economic implications of Covid-19, then the fact that the wider economy is likely to recover may be of less relevance.

Non-financial consequences of Covid-19 could also potentially found a claim, for example if a party suffered serious health consequences, or if the pandemic led to a significant change in the family's living arrangements – in ***Nasim v Nasim*** **[2015] EWHC 2620 (Fam)** it was considered that the children moving to live with the husband following a violent incident six weeks after the order may be a *Barder* event.

Inheritances received unexpectedly soon may also found a claim, as in ***Critchell v Critchell*** **[2015] EWCA Civ 436** where the husband's father died within a month of the consent order being made, leaving him an inheritance, which the Court of Appeal held fell within the *Barder* jurisdiction.

Any such application would, however, be highly speculative, and entail the risk of an adverse costs order. A less risky way forward for those who have been hard hit by the pandemic would be to focus on seeking to extend time for any payments still to be made, and a downward variation of maintenance payments. All such applications should be well-evidenced and commenced promptly, with efforts made to reach a negotiated solution.

25.2.2021

CASES

Finch v Baker [2021] EWCA Civ 72

The DJ's decision was given in January 2019. Leave to appeal on limited grounds was granted by Roberts J. The appeal was heard in September 2019 by HHJ Brownlow, who allowed the appeal and reduced the husband's lump sum and pension share. However, with leave of King LJ she further appealed to the Court of Appeal. The Court of Appeal dismissed her 2nd appeal. The principal issue of interest is the approach to pension valuation evidence.

The report on pensions had been obtained in March 2018 based on gross benefits calculated in October 2017. The husband was about 67 and the wife 55 when the case came before the DJ. The principal pension asset was the wife's BBC pension. When Roberts J considered the permission to appeal leading counsel for the wife was asked whether he was applying to adduce fresh evidence and he said no. The judge at the first appeal, asked for confirmation that he was to consider the appeal on the basis of the information before the DJ and this was agreed. When he delivered his draft judgment to the parties' requests for clarification were put in on behalf of the wife and by the wife herself, which the judge characterised as an impermissible attempt to reargue the appeal. In those arguments it was suggested that he should have updated information. He declined to change his judgment. It was too late to be raising arguments about the adequacy of the agreed report.

When the matter came before the Court of Appeal there was a late request (although not a formal application) for permission to file further evidence about the pension value and tax consequences. The court agreed to consider it "de bene esse". It transpired that it was not a report by a pensions expert and indeed many of the calculations about the tax effects of the order were done by the wife herself and had not been raised in the courts below. The Court declined to consider the material both because it was too late to seek to adduce further evidence (given the opportunities to do before the lower court) and because this was not expert evidence.

The court noted that a solution proposed on behalf of the wife that the court should have decided how much should be paid to the husband is not permitted by the statute. The court must fix the percentage in the order.

Moylan LJ also noted that the effect of s34 Welfare and Reform Pensions Act 1999 is to delay the implementation date of the order and it may be delayed further if there is any delay in the granting of decree absolute (s24B(2) MCA 1973 and by any appeal brought within time Regn 9 of The Divorce etc. (Pensions) Regulations 2000 (SI 2000/1123). Therefore there is always the possibility that when implemented the order will have a different effect. He noted that this was

> "another example of the court's powers under the MCA 1973 being exercised in a broad, discretionary manner and not necessarily with the expectation of achieving mathematical precision."

In dismissing the wife's appeal Moylan LJ also observed that the DJ decided that the husband's conduct was not such that it would be inequitable to disregard it. The Court therefore rejected attempts to bring it back into the assessment as a "negative contribution".. Moylan LJ also rejected the suggestion that there should have been greater consideration of the parties' needs saying that the judge was able to assess the needs without extensive "banal cross-examination".

Case Summary by **Nicholas O'Brien**, Barrister, **Coram Chambers**

JB (a child) Re (sexual abuse allegations) [2021] EWCA Civ 46

E, born in 2009, had been removed from her mother's (M) care in August 2013 in previous proceedings that concluded in 2014 with a special guardianship order to W. The issues in those proceedings were neglect, drug and alcohol abuse and domestic abuse. E had occasional contact with M post proceedings until an altercation between W and M ended all contact. Subsequent to that, W reported that E's behaviour deteriorated including sexually abusing her sister, injuring the family pet and urinating on property. In December 2017, W reported to the LA that E had alleged she had been sexually abused by her mother while in her care. A social worker and police officer spoke to E at school, and following that an ABE interview was conducted. In the days leading up to that interview, E wrote a series of notes in which she described acts of abuse. These formed the basis of the ABE interview.

In 2019, M became pregnant again and gave birth to J. The LA issued proceedings, J was removed from her care and subsequently placed with relatives. M conceded her history of alcohol and drug misuse, and J's father's criminal history. In addition the LA sought findings in relation to E's allegations of sexual abuse.

The judge acknowledged that there had been "clear breaches" of the ABE guidance but considered that they were not of sufficient magnitude to discredit the process of the evidence collected. He went on to find the allegations of sexual abuse proven. The mother appealed, relying principally on grounds that i) the judge had failed to consider whether E was a reliable and credible witness and ii) that the judge's analysis of the context in which the allegations were made was flawed.

Appeal allowed. Newey LJ emphasised the importance of complying with ABE guidance, referring to previous judgments (para 11) and distilling the elements of those cases that were of particular relevance. While acknowledging the Judge had set about the difficult task diligently and conscientiously, the findings of abuse could not be sustained. An important feature was the age of the child and the delay between last living with her mother and making the allegations. (para35). Another important matter was that the ABE interview departed from the guidance to such an extent it seemed wrong to describe it as an ABE interview at all (para39). There had been no "rapport" phase establishing ground rules, and no "free narrative" phase, since it consisted largely of the officer reading E's notes and asking her about the content.

The court noted that in many cases where allegations of sexual abuse are set aside on appeal, it is appropriate to remit for re-hearing. However in this case given the child's very young age at the time of the alleged incidents, the delay between the alleged incidents and the allegations made and the child's history of lying and manipulative behaviour the deficiencies in the investigation were on a scale that no court could properly make findings. The court also took into consideration that M conceded that J could not return to her care. In the circumstances. The findings relating to sexual abuse were set aside and the case listed for disposal.

Case Summary by **Martina van der Leij**, Barrister, **Field Court Chambers**

A City Council v X, Y and Q (DOLS: Lack of secure placement)[2021] EWHC 123 (Fam)

Q is 16, and will be 17 soon. He was taken into care aged 2, and adopted aged 3. His adoptive parents separated 5 years later, and his adoptive mother reported that his behaviour was difficult to manage as a single parent (both adoptive parents had reported this prior to their separation). He was referred to CAMHS and diagnosed with ADHD. At the age of 10, Q was accommodated by the local authority at his adoptive mother's request. His first foster placement broke down after a year due to his behavioural difficulties. He moved to a residential school for a little over 2 years, but this broke down due to further concerns about his behaviour, including concealing weapons and assaulting staff. He moved to a residential unit, but this broke down within a month because of continued behaviour which posed a risk of harm to both himself and staff. Q then moved to a specialist secure accommodation unit from August 2017 until February 2018. In March 2018 he was made subject of a final care order. From February 2018 until the autumn of 2019 Q then remained in a single occupancy placement, which broke down after an allegation Q had caused a younger child to touch his penis.

In December 2018 a deputy High Court judge made an order under the inherent jurisdiction authorising the deprivation of Q's liberty as he was, by that stage, supervised by 2 staff day and night, and was not free to leave his placement. Specialist advice was sought in relation to Q's inappropriate and harmful sexual behaviour, and whilst Q seemed relatively settled in a new placement, sexualised behaviour remained difficult to manage, and further restrictions were put in place in relation to use of internet and telephone, and a requirement for constant supervision.

Despite tight restrictions, Q was able to abscond from placement and in August 2020 committed several sexual offences during a 24 hour period which resulted in a sentence of an intensive referral order for 12 months from October 2020. Shortly after the commission of the offences the Local Authority's plan changed to one of secure accommodation, and pending the identification of a placement, the restrictions on Q's liberty were further tightened, including 3 to 1 supervision and a prohibition on leaving the placement at all, including a prohibition on going in the garden.

The case was transferred up due to ongoing concerns about the lack of a secure placement, and was first heard by Knowles J on 24.11.2020.

Efforts were made to obtain information as to why a bed was not available for Q, and in particular whether a 'justice' bed could be spot purchased for Q as a 'welfare' bed.

In December 2020 Q moved to a different single-placement registered children's home, but was still able to access a mobile and apparently take pictures of his genitals.

Enquiries showed that the lack of a secure bed for Q was not just down to the usual high level of demand for beds, because at times between July 2020 and January 2021 there were vacancies in the secure estate, but as units cannot currently be compelled to explain why they do not offer a bed to a child, it was unclear why Q had never been offered a bed.

In the absence of any secure bed, draconian safeguards were approved, including:

- 3 : 1 supervision when awake

- 2 : 1 supervision when asleep (waking night staff)

- 3 : 1 supervision for any necessary trips out of the unit

- No unsupervised telephone access or the internet (to include not being permitted to hold any devices)

- No access to any social media

- No access to the grounds/garden

- Frosted windows to his room

- No access to open windows

A report from the Youth Offending Service made for what is accurately described in the judgment as "alarming and depressing" reading. The likelihood of a placement being found which can offer Q the highly specialised therapeutic input required to offer him a realistic chance of change is low, and yet without that help his prospects are bleak. The judge urged the Local Authority to convene a multi-agency professionals' meeting, given Q's fast-approaching 18th birthday, in an attempt to give him the best opportunity possible upon leaving care.

Whilst the case does contain any new legal principles, it is a further reminder (if needed) of the on-going shortage of beds in the secure estate, leaving many highly vulnerable children waiting for a placement that meets their therapeutic needs but also keeps them safe.

Case Summary by **Julia Belyavin**, Barrister, **St John's Chambers**

IU anonymised [2020] EWFC 98

Cohen J's judgment is long (48 pages, 288 paragraphs). This is unsurprising in circumstances where the litigation lasted over 3 years, where the court heard from 12 witnesses (including H and W), where hand-writing experts where asked to assess various documents produced by H (and his team) which themselves required translation and where orders had to be obtained on behalf of W for documentation to be produced by H's solicitors (producing previously withheld and relevant evidence). W's costs (including interest) were c. £2.5-£2.6m.

Interesting points of note from the judgment include:

• In having regard to the all the circumstances of the case, Cohen J has regard to the very particular financial circumstances of living within the former Soviet Union in the Ukraine (and the impact of the collapse of the same) on this family;

• Cohen J's approach to non-disclosure by H in reaching a decision on the award to be made to W (following Moher v Moher); and

• Cohen J's consideration of a post-nuptial agreement and his affirmation of the circumstances which are likely to cause a court to determine that it can place no weight on such an agreement.

Summary

Within the lifetime of the proceedings, W issued a claim to set aside under s. 37 Matrimonial Causes Act 1973 the disposition of certain shares which H had transferred to his son by his first marriage, AS. In addition, a claim commenced in the Business & Property Court by H's first wife, GS, (mother of AS) for a declaration that H held one of the properties in issue within the financial remedy proceedings on trust for her (and consequently an order directing HM Land Registry to cancel and vacate the unilateral notice which W lodged against the property) was transferred to the Family Division and heard with the financial remedy application.

Cohen J explores the financial impact of the latter years of the Soviet Union in Ukraine and immediately thereafter. He considers the particular way that people made money in these circumstances and how this impacted on the circumstances of this family (as asserted on behalf of H). Cohen J is careful to consider the cultural and financial realities for people who lived through that historical period of time and is equally careful to be clear that certain described behaviours were not discounted for reason of appearing 'unusual' to a Western eye. This included evidence about money being accrued as a result of buying and selling on a cash-based black-market for profit and saving money in cash as opposed to keeping savings in bank accounts.

The case involved a post-nuptial agreement ('PNA') signed between the parties at a point in time when their marriage was in difficulties. The agreement was heavily weighted in H's favour and was financially disadvantageous to W. Cohen J referred back to the decision of *Radmacher v Granatino* and the Supreme Court's emphasis that when it comes to ante-nuptial agreements that "*each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end.*" Cohen J gave the PNA no weight. He determined this for the following reasons (re-emphasising the factors that practitioners and parties to PNA should have in mind in the drafting process of such documents):

(a) **Lack of disclosure**: W had received no disclosure of H's income, business assets or overall wealth;

(b) **Fairness / Provision for a parties' needs**: the agreement was unfair and did not provide for W's or the parties' child's needs (per decisions of *Brack v Brack* [2018] EWCA Civ 2862; *Ipekci v McConnell* [2019] EWFC 19 and *S v H* [2020] EWFC B16 and arguably cf. *Radmacher*);

(c) **Legal advice**: W had received no legal advice. Whilst the Supreme Court in *Radmacher* made clear that legal advice is not essential for a PNA to be enforceable (see also *Versteegh v Versteegh* [2018] EWCA Civ 1050), Cohen J considered that the PNA in this case was not one which would have been easy for a lay person to understand; and

(d) **Undue pressure**: W was placed under pressure and hurried into the agreement by H and his friends / advisors.

The court found that the debt that it was asserted H owed his ex-wife was a sham and that she consequently was the beneficial owner of one of his properties was dismissed. The court found that various documents that were dated at various points over a 15-year period but bearing identical printer defects had been created at the same time in order to defeat W's claim. The court held that all of the three UK properties and the three companies in issue were the sole property of H. A transfer of the shares of a company to AS was set aside under s. 37 of the MCA 1973. The court did not find that H had any of the liabilities which he asserted produced a negative balance when assessed against his assets.

Cohen J found W's needs-based claim to be £6.65m [272]. He went on to consider what share of the marital acquest she might be entitled to under the sharing principle. The court found that H's non-disclosure had deprived the court of the opportunity of assessing what if any sharing claim W may have. The court was unable to assess what assets (or the value of such assets) H held in the Ukraine. The court referred to approach set out by the Court of Appeal in Moher v Moher [2020] 1 FLR 225 and drawing on the information available to him, Cohen J concluded that the total in the matrimonial pot to be shared was £16m. His view being that whatever award he made to W that H would still be left with control over substantially greater assets, albeit he could place no figure on the disparity that would exist as a result of his award due to H's non-disclosure.

Cohen J considered that an award of £8m to W on a sharing basis would still leave H with substantially more assets under his control than W would have under hers. In addition, the court ordered that W have a $5m charge against one of H's properties as security against any liability in any Ukraine litigation in which she is a defendant (to be released upon her discharge from that litigation, which the court held to be in H's gift). Income for the child was agreed at £19,200 per annum and W's ability to make capital claims for the child was left open.

TK v. ML [2021] EWFC 8

Background

The extensive background to the case is set out in paragraphs 6-22.

M and F were both British citizens with an Irish background. They married in 2001.

O was born in 2005 in Nepal, where she was abandoned by her natural parents and placed in an orphanage. O was adopted by M and F in July 2008 under Nepalese laws. After the adopting, M and F took O to live in Dubai. O grew up in Dubai, although she gained British citizenship in September 2008 [6-8].

In 2011 the marriage broke down and M was deported from Dubai. M issued divorce proceedings in Guildford. Decree nisi was pronounced in 2013 and made absolute a year later in 2014 [9].

Custody proceedings concerning O were initiated in Dubai. The court at first instance awarded custody to M in 2012 [10]. In reliance on the Dubai decision, one month later M applied ex parte to the High Court in London to make O a ward of court. That application was granted and an order was made placing O in the care and control of M to be exercised in England and Wales [11].

F appealed the first instance Dubai decision. He was unsuccessful in the Dubai Court of Appeal but ultimately successful in his further appeal to the Court of Cassation. He was awarded custody of O [12].

F applied in 2015 to discharge the wardship made in 2012. A question arose at that time as to whether the court had jurisdiction to entertain F's application. The parties reached an agreement that the court did have jurisdiction at this time. This was pursuant to: (i) s.2(1)(b)(i) FLA 1986 in circumstances where there was a recently concluded divorce in 2014; and (ii) Art 12(3) of Council Regulation No. 2201/200 ("Brussels 2"), this being established by virtue of M being habitually resident and O being a British Citizen [13]. Mostyn was clear that F's agreement to established jurisdiction was only for the

purposes of the matter before the court at this time; F was not giving any jurisdictional blank cheque to the court of England and Wales for any future proceedings that M might commence [14]. Macdonald J's judgment recording the parties jurisdiction agreement and the court's approval is recorded at *QS v. RS* [2015] EWHC 4050 (Fam).

In 2016, the parties jointly applied for recognition of O's Nepalese adoption under the common law. Mostyn J observed that:

> '[16]… On 10 October 2016 Macdonald J gave an extensive judgment in which he navigated formidable legal obstacles on the way to his conclusion that the adoption could be validly recognised at common law. He further made a declaration under section 57 of the Family Law Act 1986 that O was the adopted child of the mother and father. He made a child arrangements order that she live with her father in the UAE and spend time with her mother both in the UAE and England: see ***QS v. RS & Anor*** **[2016] EWHC 2470 (Fam)**.
>
> [17] That order remains in force, although its status is somewhat uncertain. As I will explain, there is no jurisdiction in this case for the court to entertain any child arrangements dispute of any nature, and that want of jurisdiction extends for sure, to any application to discharge or vary the residence or contact terms in the order of 10 October 2016.'

O was briefly made a ward of court for the second time in January 2019, after M did not return O following a period of Christmas contact. Mostyn J observes his assumption that the jurisdictional basis for this was O's presence in England and Wales for that contact (ss.2(1)(b)(ii) and 3(1)(b) FLA 1986) [18]. A collection order was duly executed and wardship discharged on 08 January 2019. O returned to Dubai with F the following day. She has not returned to England since [19].

On 05 August 2020, O and F relocated from Dubai to Ireland. This was a permanent relocation. O began school in Ireland on 28 August 2020 [20].

On 11 September 2020, M issued her application with the court in England and Wales to determine 'with whom the child should live' under s.8 CA 1989. This was issued in the context of communications between O and M where M alleged that O had expressed a desire to move to live with M in England [22].

Jurisdictional Question

The preliminary issue for Mostyn J was whether the court had jurisdiction to entertain M's application.

O was not habitually resident in England. Jurisdiction could not be established under Article 8 of Brussels 2, nor under Article 12(3) [25]. There was no other ground within Brussels 2 or under the Hague Convention 1996 to establish jurisdiction to hear M's application [26]. There was no doubt that O and F had established habitual residence in Ireland [33].

Mostyn J therefore turned to consider the so-called residual jurisdiction under ss.2(1)(b)(1) and 2A(1)(a)(i) of FLA 1986:

> '[27] …conflating these provisions, they say that *where neither Brussels 2 nor the 1996 Hague Convention applies*, the court here has jurisdiction where the question of making the child arrangements order "**arises in or in connection with**" divorce proceedings which are "**continuing**". However, s.42(2) gives an extended meaning to "**continuing**". It provides:
>
> > "For the purposes of this Part proceedings in England and Wales or in Northern Ireland for divorce, nullity or judicial separation in respect of the marriage of the parents of a child shall, unless they have been dismissed, be treated as continuing until the child concerned attains the age of eighteen (whether or not a decree has been granted and whether or not, in the case of a decree of divorce or nullity of marriage, that decree has been made absolute."
>
> ...
>
> [28] Section 2A(4) allows the court, where the residual jurisdiction is established, to make an order that no child arrangements order shall be made by any court under that jurisdiction if it considers that it would be more appropriate for that matter to be determined outside England and Wales.'

As the divorce proceedings were finalised, in such a situation the residual jurisdiction could only be invoked if the current application is "i**n connection with**" those finalised divorce proceedings [39].

Mostyn J agreed that a clear causal link between the child arrangements application and the divorce must be demonstrated. '*A causal link requires the facts giving rise to the present application to be fairly traceable to the now concluded divorce. This must be so because any other interpretation would make a mockery of the statutory requirement that the question of making the child arrangements order arises "in connection with" divorce proceedings*' [42].

Mostyn J agreed with the analysis of Parker J in ***AP v. TD*** **[2010] EWHC 2040 (Fam)**, [122], where she stated:

> [122]… in my judgment to fall within the residual jurisdiction there must be proximity between the divorce proceedings and the court being asked to determine a question of making an order in relation to children.

> in any case it may be that essentially the same application or issue has been before the court, unresolved, for some time, but once an order has been made, then in my view the connection with the matrimonial proceedings would terminate.'

Mostyn J saw the criterion of temporal proximity to be the prime metric, (albeit it not the only one), for establishing whether there was a causal link between the child arrangements application and an earlier now concluded divorce [43].

In the presence case, this criterion led Mostyn J to the unambiguous conclusion that M's application for a child arrangements order dated 11 September 2020 was neither "in" nor "in connection with" the parties divorce proceedings, which had concluded with Decree Absolute in 2014, c. 6½ years earlier [44].

Procedural Footnote

Mostyn J highlights that several case management orders in these proceedings were recorded as being made in the High Court. This was despite the application being (correctly) issued in the Family Court, and no order providing for the transfer to the High Court pursuant to r.29.17 [48, 49].

Mostyn J notes that he is highlighting this matter 'wearily'. He described it was 'remarkable' that almost 7 years after the creation of the Family Court there remains a 'seemingly ineradicable belief' that if a case deserves to be heard by a High Court judge then it has to be transferred to, or commenced in, the high Court itself [50].

Mostyn J reminds us of the President's Guidance: Jurisdiction of the Family Court (published 28 February 2018), which painstakingly explained how High Court judges routinely sit in the Family Court to hear complex cases [50].

Mostyn J concluded that only matters in Schedule A or B to that President's Guidance have to be heard in the High Court, and this case was not one of them. He made clear that he had heard this case in the Family Court [52].

Case Summary by **Bethany Scarsbrook**, Barrister, **St John's Chambers**

Derhalli v Derhalli [2021] EWCA Civ 112

The husband was the sole legal and beneficial owner of the former matrimonial home ('the property'). A consent order provided for the property to be sold but did not express whether the wife could live in the property until the sale completed, or whether the husband could evict her or make her pay rent or damages for use and occupation whilst she remained living there.

In possession proceedings, the declaration of the first instance judge (HHJ Gerald) in favour of the husband was set aside and a fresh declaration made by Fancourt J allowing the wife to occupy the property until it was sold, paying all the outgoings related to the property but not paying occupation rent. Males LJ gave permission for a second appeal.

The issue on the second appeal was, "whether the judge erred in deciding that the reasonable reader, having all the background knowledge which was available to the parties, would have concluded that it was the intention of these parties that the wife would be permitted to remain living in the matrimonial home, rent free, until it was sold. If she was not, then the husband would succeed in his claim for damages." [3]

Background

After acrimonious financial remedy proceedings, a complex and lengthy consent order set out various agreements and undertakings in respect to the property. It was ordered that the property be sold and, following the sale, the husband was to make two lump sum payments to the wife.

The property was put on the market in June 2016, three months before the consent order was made, and the wife took responsibility for all the outgoings. Both parties expected a rapid sale near to the asking price of around £7 million. However, the high-end property market stalled following the outcome of the Brexit referendum. The property did not sell until March 2019 and for a sum of £5.9 million. The wife and the adult children lived at the property until it was sold. The order had made no provision as to occupation of the property pending its sale, although the wife had agreed to remove the protective notices registered against the property in her favour.

Judgment

King LJ, in her leading judgment, considered that disputes related to the interpretation of financial remedy orders should be put before the specialist Financial Remedy Court or a Family Division High Court Judge, under the powers of the Matrimonial Causes Act 1973. The husband should have applied to the Family Court to enforce or to vary the order rather than to bring possession proceedings in the County Court [23].

Regardless, King LJ affirmed that the County Court had the jurisdiction to determine the application. The judgement of Fancourt J was described as "unimpeachable" and applied the law correctly [67]. King LJ advised parties "to be specific as to the precise terms under which a party remains in occupation of a matrimonial home pending sale" [68].

All three judges agreed that the appeal should be dismissed. However, Asplin LJ and Arnold LJ left open the propriety of bringing a claim for possession in the County Court.

Case Summary by **Dr Sara Hunton**, Barrister, **Field Court Chambers**

Lancashire CC v G (No 4)(Continuing Unavailability of Regulated Placement) 2021 EWHC 244 (Fam)

Background

This is the fourth judgment in these proceedings, following eleven hearings before the Family Division of the High Court. Mr Justice MacDonald was at pains to emphasise the infinite damage the lack of appropriate placements was doing to G's welfare and (secondarily) at great expense to the public purse. The Judge stated that he is "increasingly worried that, absent a suitable placement being found, it will be the sad responsibility of this court to deliver a judgment that records with respect to G a greater tragedy still." As with the previous judgments in this case, the Judge ensured a copy of the judgment was sent to the Children's Commissioner for England, the Secretary of State for Education, the Minister for Education, and others.

Facts

Proceedings under the inherent jurisdiction of the High Court were commenced in respect of G in August 2020. G was 16 when the proceedings began. Lancashire County Council ("LCC") applied for an order authorising the deprivation of G's liberty and for secure accommodation pursuant to s.25 CA 1989. In August 2020, no placements (either secure placements or a regulated non-secure placement) were available for G anywhere in the UK. That situation remained at the time of this hearing, the main difference being that LCC now agreed with the Children's Guardian ("CG") that a non-secure regulated placement with therapeutic input was more appropriate for G than secure accommodation.

Since the first hearing G had been living at what the judge described as "a sub-optimal unregulated placement that all parties recognise is not equipped fully to meet her acute and complex emotional and behavioural needs". This followed the breakdown of her foster placement in January 2020, after which G had been admitted to hospital twenty times and written nine letters expressing suicidal ideation. Her behaviour deteriorated after each court hearing.

Since the last hearing, G's behaviour had continued to deteriorate. She had repeatedly swallowed a number of metal objects (including screws and drawing pins), had lost around 9lbs, and had continued to attempt to take her life.

LCC's change of position to supporting a non-secure regulated placement was a result of the numerous assessments G had undergone. These led to consideration of whether G could be admitted for treatment in hospital pursuant to s.3 of the Mental Health Act 1983. However, it was agreed between the professionals that the detention of G in hospital was not appropriate because of the risk of unplanned discharge leading to there being no suitable placement for her. Dr Harper, a clinical psychologist, made several recommendations regarding a regulated non-secure placement where therapeutic input can be provided to meet G's welfare needs (see paragraph 17).

Law

The Judge referred to his first judgment in these proceedings, in which he set out the law the court must apply when deciding whether to authorise the restriction of a child's liberty under the inherent jurisdiction of the High Court (see ***Lancashire CC v G (Unavailability of Secure Accommodation)* [2020] EWHC 2828 (Fam)**, paras 35 – 48). The Judge summarised this as follows: the court must be satisfied the placement for which authorisation is sought constitutes a deprivation of liberty ("DOL") for the purposes of Art 5 of the ECHR and the order being sought is in the child's best interests (paragraph 21).

MacDonald J found it "advantageous" the LA and CG were now "ad idem on the nature of the regulated placement that will best meet G's welfare needs". Nonetheless, "the central problem of acute lack of regulated placements remains" and "despite the local authority having continued its diligent search, there are no regulated non-secure placements in the jurisdiction available and able to take G." Sadly, G's therapeutic intervention is unable to begin until she is in a settled, long term placement.

Conclusion

The Judge expressed in stark terms his dismay and frustration at the position G was in. Faced only with choosing between not authorising the DOL at G's current placement (which would lead to her being discharged into the community, which was not in her best interests) and authorising the DOL at the sub-optimal placement, he considered he was "disabled from" applying the "lodestar that is the paramount nature of G's best interests" by "an ongoing and acute lack of appropriate welfare provision for a constituency of the country's most needy, most vulnerable children." He observed that this could result in tragedy for G and effectively called on Parliament and government to act (see paragraph [35]). He noted that previous responses from Vicky Ford MP and Ofsted had "not resulted in any appreciable improvement in G's situation."

Case Summary by **Anna Dannreuther**, Barrister, **Field Court Chambers**

AG v VD [2021] EWFC 9

Background

The relationship was one of only 8 years and the parties had no children from their union (although each had offspring from previous marriages, the youngest being W's daughter, 17 years old). H was 56 and W was 51 at the time of the judgment. W sought to make a sharing claim, seeking a transfer of the matrimonial home and a lump sum of £3.8m (para 126). H argued that the court in Russia, where the parties divorced and where financial proceedings first took place, made a fair and reasonable award (para 6). He offered to forego all repayments due to him but only if his offer of W retaining her half of the home, and nothing more, was accepted (para 127).

There was significant analysis about when the relationship ended (paras 26-38) – in 2014 or 2017. The court concluded the latter, placing reliance on the fact that H and W had, even in the beginning of their relationship, lived separate lives in distant locations and this continued. The judge allowed but ultimately dismissed evidence that indicated that the relationship ended in 2015, obtained from W's previous solicitors, who had issued divorce proceedings in England in 2017 (para 26-29) which were later dismissed by consent (para 40). The court also noted the affectionate nature of the couples' messages, photographs, evidence that they shared a bedroom, and the monthly allowances paid by H to W's parents until March 2018 and to W until July 2017.

Jurisdiction

H was from Ukraine, living in Moscow when he met W in 2008. W was living in St Petersburg but by mid-2009 she had moved to Moscow to live with H (paras 9-12). In early 2010, they visited England and took steps to obtain a visa for W to live there. Neither party had any connection with England nor spoke the language (para 13). In August 2010, the parties married in St Petersburg and bought a flat in London (para 14). W and her daughter lived in London since then.

H initiated divorce proceedings in Russia in December 2017 and the marriage was dissolved in Russia in March 2018 (paras 40-41). H issued an application for financial relief in Russia in September 2018 and those were heard in July 2019, which took no account of assets held in entities not owned by the parties and concluded inter alia that the London matrimonial home and shares in a company which held a Majorcan property were to be divided 50/50 and making no continuing provision for maintenance to W or her daughter (para 44).

The court referred to Part III of the Matrimonial and Family Proceedings Act 1984 and case law including ***Agbaje v Agbaje*** **[2010] UKSC 13** and ***Zimina v Zimin*** **[2017] EWCA Civ 1429**, which set out principles that apply to "the alleviation of the adverse consequences of ***no, or no adequate, financial provision*** being made by a foreign court in a situation where there were ***substantial connections*** with England" emphasis added (para 48).

The court therefore considered the connection which the parties had respectively to England and to Russia, noting that W has lived in London and nowhere else during the last decade and had not visited Russia since 2015. It also considered that the effect of the Russian order was to give W one half of the value of the matrimonial home (i.e. about £2.5m) from which she would be expected to repay one half of the proceeds of sale of the villa (approx. £1.5m) so as to leave her with just £1m to house herself and her daughter and to live off and if H's appeal in Russia to recover £1.3m plus penalties for a sum loaned to W were to succeed, W and her daughter would be left with nothing either to live in or to live off (para 56).

The court concluded that there was a "substantial connection with England", greater than with Russia and the Russian order did not provide adequately for the needs of W and her 17-year-old daughter. Despite H arguing that it was a Russian case and that the English court should not interfere, the court disagreed and deemed it appropriate for an order to be made by the English court (para 57).

The Trust and Foundation

H contended that he gifted the majority of his wealth to his son, but the court rejected that contention (paras 92-93), setting out the background and its analysis as follows:

- By late 2010, a trust company had control over 16 of H's companies. The trust also acted as director of a private foundation set up in 2011, which made monies available to H (para 15).

- In 2011, H also H authorised his son to give instructions to the trust "on my behalf until such time as I have communicated otherwise in writing", but H accepted to the court that despite that authorisation, H remained the ultimate beneficial owner of assets placed within the foundation (para 77).

- H accepted that he will never have to repay the £13.4 million he had drawn down as loans from a company within the foundation between 2012-November 2020 (para 83). The court treated these monies as distributions (not loans) in part because the funds were used to purchase the properties set out in the section below (paras 86-87).

- Although H argued that in 2015, he transferred the beneficial interest in the entities within the trust to his son, the court found that there was no document produced that vested H's interest in the foundation in any other person (para 80). This was the court's conclusion, despite correspondence from the trust describing H's son as the "only discretionary beneficiary". The court's analysis was based in part on events in 2012, when H's son did not question H's intention to transfer all his interest in the foundation assets to W, demonstrating H's control (para 81) and on the use of the words "strictly speaking" by the managing director of the trust, to describe the control held by the foundation's board.

Having found that H was the beneficial owner of the Foundation and has access to its assets, the court accepted the lower value of £13m, whilst suspecting that it was actually worth some £17-19m.

Other ventures

Contrary to H's assertions, the court found that H had an interest in a German construction business (that H claimed was controlled by his son with advice from H). The court based its conclusions in part on the "raft of correspondence" showing H's involvement, and significant decision-making about agreements with contractors, financial models, negotiations with co-partners and employees etc (paras 96-97). But the court found the value that is owned by H not sufficient to make a difference to the outcome of the case (para 101).

Also contrary to H's assertions, the court found it likely that H retained an interest in three companies with Russian projects, despite H having transferred them to his son when H left Russia in 2014. But the court had no basis upon which to put a figure (para 103).

Properties and assets

The court considered only two of the many properties:

- the matrimonial home (in joint names), on which the court heard expert evidence and calculated the net of costs of sale figure to be "about £5.14m" (£2.57m each), which the court based on per square foot values of other properties; and

- the property in Cyprus valued at £687,000, which the court determined to be H's asset, having rejected H's claim that it was held on trust for his son (finding unconvincing the explanation that it was to help the son obtain a Cypriot passport, when he had already obtained one as his father's dependent).

W's net assets came in at £2.66m and H's net assets (exclusive of the foundation and business assets) were £3.087m.

The court noted other realisable assets held by W, including a Rolex watch, a ring, and valuable handbag and jewellery collections, but did not think W's needs should be met in that way. Instead, the court felt comforted that if W did not live within the provided budget, she would have those as resources (para 118).

Needs and budgets

The court concluded that a proper sum for W's housing was £3.4m, bearing in mind that £3m was the purchase price of the previous matrimonial home (paras 132).

The judge determined W's needs would require £100,000 per year, a capital sum on Duxbury tables of £2.06m. The court calculated this would require a lump sum of £320k, as well as the transfer of the matrimonial home (para 137).

Conclusions

In rejecting W's claim for sharing, the court had concluded the majority of H's wealth was earned before 2010 and insofar as it was created afterwards was largely done on the back of investment made before 2010 (para 61). The court determined

that although H did earn income and made profits during the marriage, a large amount was spent by H and W on property in London, Majorca, and Cyprus (para 69).

The judge noted that H's disclosure had been poor but concluded that a significant but unquantifiable amount of the current value of all his projects would be found to originate from previous projects (paras 64-65). The court was satisfied that H has business interests and access to assets which he had not disclosed, but the judge noted that a court's inferences would need to have a proper factual substratum and this court did not have that (para 125).

Early on in proceedings, the judge refused an application for a SJE accountants' report on marital acquest, and at that time made it clear that it the eventual award was very likely to be one based on needs (paras 63 and 145). The judge criticised both parties several times for litigation conduct, calling it "self-indulgent) (para 145) and noting they had spent £2.1m on costs and "deluged the court with material far in excess of what is permitted either by rules for good practice or orders of the court" (para 8). Similarly, the judge noted that both parties had spent large amounts of money, regarding W's "expenditure and use of funds as irresponsible" but noting that "bad investment decisions are not solely taken by W" (paras 112-113). The court rejected H's request to add back a significant element of the money that W had received and spent from the Majorca property sale, noting a court must be "very cautious before adding back money which is no longer available" when making a needs-based award (para 112).

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

G (Abduction Consent discretion) [2021] EWCA Civ 139

The trial judge had found that the father had consented to the mother bringing the children to England from Romania, but nevertheless exercised his discretion to make a return order. His decision on habitual residence was upheld, as were his findings on consent.

The Court usefully summed up the principles to be applied when consent is raised [25]. The Court then added the principle that:

> "The giving or withdrawing of consent by a remaining parent must have been made known by words and/or conduct to the removing parent. A consent or withdrawal of consent of which a removing parent is unaware cannot be effective."

This was particularly crucial in this case, where the father had appeared to consent through his words and actions, but took steps indicating a change of mind prior to the removal. He did not inform the mother of any alleged revocation of his consent, or the steps taken. The Court justified this principle on the basis of the natural reading of the word 'permission', but more so on the practicalities and the arbitrary consequences that would arise if one parent could decide it wanted to revoke consent but not notify the other, removing parent. The father's challenge to the findings on consent was therefore not successful in preventing the appeal's success.

The Court then moved to conduct a review of the case law on discretion, particularly in consent cases. The position was summarised as follows:

> "42.To sum up, the exercise of the discretion under the Convention is acutely case-specific within a framework of policy and welfare considerations. In reaching a decision, the court will consider the weight to be attached to all relevant factors, including: the desirability of a swift restorative return of abducted children; the benefits of decisions about children being made in their home country; comity between member states; deterrence of abduction generally; the reasons why the court has a discretion in the individual case; and considerations relating to the child's welfare.
>
> 43.In a consent case, the better view is that the weight to be given to the policy considerations of counteracting wrongful removal and deterring abduction may be relatively slight, while the weight to be attached to home-based decision-making and comity will depend critically on the facts of the case and the view that the court takes of the effect of a summary return on the child's welfare."

The Court found that, in the present case, the judge had made an error in his approach by attaching significant weight to 'Convention considerations' pointing towards return such as comity, home-based decision-making, respect for judicial processes, and the swift return of abducted children, to the extent that he then looked to see whether pressing compelling welfare considerations overrode them. The Court found that the trial judge had given "predominant" weight to policy considerations without explaining why he had done so in this particular case. The Court addressed the considerations either way, and found that this was a case where the child-centred welfare considerations greatly outweighed the policy considerations, and therefore it interfered with the judge's exercise of his discretion and allowed the mother's appeal.

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

WX v HX (Treatment of Matrimonial and Non-Matrimonial Property) [2021] EWHC 241 (Fam)

This case concerned an application by the wife, WX, for a financial remedy order against her husband, HX. Their two adult daughters acted as intervenors, as they were partial beneficiaries of trusts that were being considered as part of the estate. The wealth available for distribution was somewhere between £50 million (on HX's case) and £60 million (on WX's case). There was an additional sum of approximately US$50 million held in an offshore trust, for which the children were the principal beneficiaries and which was initially included in WX's claim; however, she later accepted that those funds were no longer "resources" to which HX had access and they were therefore excluded from the dispositive powers of the court.

HX offered to transfer to WX his 50% interest in a jointly owned family home in London which had an agreed gross (mortgage-free) value of £13.75 million, therefore leaving each party with roughly half of their combined wealth (on his £50 million estimate). WX sought the family home and an additional cash sum of £10 million, to be paid from HX's personal offshore assets. Her proposal was made on the basis that her non-matrimonial inherited wealth of approximately £14 million net, which was managed by HX during the marriage, was ring-fenced and should be retained intact by her at the conclusion of the proceedings.

As a preliminary point, Mrs Justice Roberts held that she was proceeding on the valuation date identified in an earlier case management order and would not allow the husband to rely updated valuations [38]. She then went on to consider the computation of the various assets [94; 145], and to establish which assets fell into the rubric of pre-marital/non-matrimonial assets. In respect of the latter, the Judge set out the established principles in relation to sharing in the context of matrimonial and non-matrimonial property [113-116] and held that WX's non-matrimonial property had throughout the marriage been preserved as her own separate property and had not acquired a matrimonial character, either in whole or in part, as a result of HX's activities as investment manager. Mrs Justice Roberts rejected the submission that HX's contribution operated to "matrimonialise" WX's separate property, noting that both HX and WX made "an equal and significant contribution to their marriage" [141].

Having categorised the assets and computed their value, the Judge held that HX's needs were met in full and therefore WX should be entitled to the full value of her share in the matrimonial assets, namely the house in London and a lump sum of £6,362,445, to be paid offshore to limit the tax liabilities [162]. The chattels were divided according to a previous agreement and both parties shared equally the responsibility for providing a pension to their housekeeper and any associated employment tax liability. The order made achieved a "clean break" for both parties.

Case Summary by **Bianca Jackson**, Barrister, **Coram Chambers**

R (Children: Control of Court Documents) [2021] EWCA Civ 162

This appeal flowed from a decision made by the trial Judge not to allow the appellant ("R") to have a physical copy of his judgment or the written submissions presented to the court following a fact – finding hearing, at the conclusion of which he was found to be a "*predatory paedophile*" who had raped one of the subject children who was also his sister. Instead, the trial Judge granted permission for R to be provided with a summary of the court's findings and a redacted version of the judgment from which explicit sexual references were to be removed.

By the time of that judgment being delivered, R was also serving a lengthy prison sentence for a number of offences including sexual offences against a child and the distribution of pornographic images, including images of the sexual assault he had committed.

It was argued on R's behalf that he had "*an absolute right to access the papers in the case*" and that the court lacked the power to deny him access to those papers once the proceedings came to an end, his role as an intervener having come to an end upon the conclusion of the fact – finding hearing.

In refusing R's request, the trial Judge said the following by way of clarification at [18] of his judgment: "*In any care proceedings, there is obviously a legitimate public interest in protecting the children, including from the details of what has occurred with them becoming widely known or shared. Of course, in this case [the children] have a right to privacy arising from their Article 8 rights; and I am satisfied that their Article 3 rights may also be engaged if the contents of the full fact finding judgment were to be released and to be shared for sexual gratification. I consider that that would amount to degrading treatment.*"

The trial Judge also went on to discount other arguments put forward on R's behalf in attempt to bolster the request, including the suggestion that R's cognitive difficulties meant that he required a copy of the full judgment to enable him to "fully understand it", that he would need this in the event he sought to appeal the decision, that he might need to present the judgment to the Parole Board in due course and already had various documents in his possession which related to his criminal proceedings. None of these were deemed to outweigh the other considerations which had prompted the Judge's decision to refuse to allow him to be provided with the documents sought, including the risk that he could use them for

his own continued gratification given the references they contained to the sexual acts of which he had been found guilty and / or to disseminate them to other paedophiles.

R appealed this decision on two grounds, namely:

> 1. The court was wrong in holding that it had the power or jurisdiction to prohibit the disclosure of the full fact-finding judgment and/or the written submissions of each party to R and/or to prohibit his solicitors from disclosing a copy of the full judgment and/or submissions to him.
>
> 2. In the event it is held that the court does have the power to make the orders, the decisions were wrong in that; -
>
> > a. The Judge gave too much weight to the perceived risks of unlawful dissemination of the material by R in circumstances where there was scant evidence that R had disseminated or attempted to disseminate highly sensitive and/or sexually explicit material which is in his possession (in custody) from the criminal proceedings and,
> >
> > b. The Judge gave too little weight to R's right and/or future need to have access to the material to inform any further judicial or quasi-judicial process concerning him, whether in family proceedings or relating to his status as a serving prisoner.
>
> The leading judgment in the appeal was delivered by Lord Justice Peter Jackson ("The Judge") who made it plain that he had granted permission on the basis of the second limb only as doing so provided an opportunity to consider the court's powers where issues arise regarding the disclosure of sensitive material. He also emphasised the distinction between cases relating to withholding documents where a court deems this necessary and achievable without denying access to a fair trial, and this case in which what was proposed was "*controlling the physical possession of documents from an individual, though not from his lawyers*" [20]

He noted that when reaching his decision, the trial Judge had applied the rigorous considerations more typically applied when considering whether to withhold documents in full and having done so, had "…*conducted a conspicuously careful balancing exercise*" before concluding that "…*his conclusion was not only beyond criticism but, in my view, sound*." He also deemed what was permitted to be provided to R sufficient to ensure that he had "everything he needs to understand the Judge's decision". [22] The appeal was refused accordingly.

The Judge also went on to make some further points of note that should be borne in mind for anyone facing a similar situation including that:

> a) Issues of this kind are likely to only arise in "the gravest of cases" and that reference should be made to the analysis of Baroness Hale in ***Re A (A Child) (Family Proceedings: Disclosure of Information)*** **[2012] UKSC 60**; [2012] 2 AC 66, at [31 – 32] which deals with the questions to be considered when it is argued that a subject's rights under Article 3 have been contravened. [24]
>
> b) A person does not "own" documents such as a position statement or written submissions filed on their behalf "*any more than he owns counsel's oral submissions to the cour*t." [25]
>
> c) It cannot be argued that a court's power to make decisions with respect to documents filed during the course of proceedings comes to an end when the proceedings conclude as is demonstrated by the fact that there are rules, such as rule 12.75 and PD12G, which will clearly have an impact beyond the lifetime of the proceedings to which the decision relates. [26]
>
> d) A lawyer's overriding duty is always to the court and not the client such that where they are not permitted by the court to release a document, or parts thereof, to a client they are released from their otherwise competing duty to them.

Case Summary by **Lucinda Wicks**, Barrister, **Coram Chambers**