February 2022

Family Law Week

NEWS

New government support package to help more disabled people into work

On 29 December 2021, the Department for Work and Pensions announced a new package of support to help thousands more disabled people into work.

Minister for Disabled People, Chloe Smith, announced various measures in support of the plan, including:

- 15 Jobcentre Plus sites trialling a framework of best practice to become more autism-friendly, in partnership with the National Autistic Society.
- 26,000 work coaches at Jobcentres undergoing specialist accessibility training, delivered in partnership with Microsoft, in an effort to assist greater numbers of disabled jobseekers secure employment.

For further details, click here.

Julia Queen, Barrister, Coram Chambers

9/1/22

Updated form for appointing a litigation friend where protected party lacks capacity

The form for appointing a litigation friend if a protected party lacks capacity to conduct family proceedings has been updated. Known as the 'Litigation friend checklist', this is the first update to the form since it was published in April 2014.

The local council can complete the form in the event the protected party does not have a solicitor.

For a link to the updated checklist, click here.

Julia Queen, Barrister, Coram Chambers

9/1/22

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Update to litigation friend referral form for Children Act public law cases

The form for solicitors to provide additional information about a protected party in the event the Official Solicitor is asked to be a litigation friend has been updated.

Since first publication in March 2015, the form has undergone several updates, the last being two years ago in December 2019.

For a link to the new updated form, **click here**.

Julia Queen, Barrister, **Coram Chambers**

9/1/2022

Commission on Young Lives report published

The Commission on Young Lives report chaired by former Children's Commissioner for England, Anne Longfield, was published in December 2021.

The report examines the relationship between being in or in need of care and the risk of exploitation. It also looks within the care system at system failures, shortcomings and how these are being tackled.

In her opening remarks, the former Children's Commissioner describes the "ongoing epidemic of drug-running, grooming and serious youth violence in England", acknowledging that "harmful criminal exploitation is now an ever-present reality of some childhoods". Anne Longfield described the recent government statistics that 13,000 children in England have been identified by social services in the last year as being involved with gangs, as just "the tip of the iceberg".

For more details about the report, **click here**.

Julia Queen, Barrister, **Coram Chambers**

9/1/2022

Record amount of child maintenance payments collected

On 14 December 2021, the Department for Work and Pensions announced new figures in relation to the Child Maintenance Service ("CMS"). Notably, in the 12 months to September 2021, the record-breaking figure of £1 billion of child maintenance payments was collected and arranged.

The figures also revealed that nearly 800,000 children are now covered by a child maintenance arrangement. The DWP described the CMS as a 'vital part of tackling poverty and helping to level up opportunity for children whose parents have separated, ensuring they get the best start in life'. Consequences for parents who do not pay were toughened in 2019, including by taking money directly from bank accounts and warnings of prison sentences. Sanctions applications can also be made to confiscate passports and seize driving licenses from non-paying parents.

The DWP Lords Minister and Minister for Women Baroness Stedman-Scott said:

> "We are securing significant sums for children who might otherwise have gone without, in turn helping to lift 120,000 children out of poverty every year. Whether parents use as a go-between or as an enforcer when money isn't being handed over, this service is changing the lives of children around the country."

For further information and statistics, **click here**.

Julia Queen, Barrister, **Coram Chambers**

9/1/22

Guidance given on e-bundles in the Family Court and Family Division

The President of the Family Division has provided **guidance on the use of e-bundles in the Family Court and Family Division**.

This guidance supplements the general guidance on electronic bundles for all courts that had been previously issued by the Senior Presiding Judge, President of the Family Division and the Judge-in-charge of Live Services on 29 November 2021.

In particular, the new e-bundle guidance reiterates that in family proceedings:

- An e-bundle may only exceed the default limit of 350 pages provided by PD27A Para. 5.1 with the court's permission.
- In all family proceedings except for public law children proceedings, bundle pagination must start at page 1 for the first page and follow sequentially to the last page of the bundle to ensure the pagination matches the PDF numbering. Any additional pages to be included after transmitting the bundle to the Judge should be added at the end of the bundle and paginated accordingly. Bundles for public law children hearings are temporarily suspended from using this system and should instead continue to be prepared in accordance with PD 27A Para. 4.2 in which each section of a bundle should be separately paginated.
- Instead of producing a core documents e-bundle, a better method for identifying key documents is to mark them in the index with an asterisk, or to link them in a separate hyperlinked list of essential reading.

A working group for e-bundles is due to meet in January 2022, after which further updates will be provided.

For the Family Court and Family Division e-bundle guidance, **click here**.

Julia Queen, Barrister, **Coram Chambers**

9/1/2022

Home Office decides not to adopt a data firewall for migrant victims of domestic abuse

The Domestic Abuse Commissioner has said the decision of the Home Office not to put in place a data-sharing firewall between the police and immigration enforcement is "extremely disappointing".

The Commissioner's report, '**Safety Before Status**', had found that migrant victims fear reporting domestic abuse to the police due to their belief that their details will be passed to immigration enforcement. The report recommended that the Home Office implement a firewall to prevent the transfer of information between the police and immigration enforcement to encourage victims to come forward without fear of deportation.

However, on 5th January 2022 the Home Office published a Policy Paper responding to the report and confirmed that they will not be implementing such a firewall. Whilst the Home Office acknowledged that 'the fear of immigration action being taken can make victims more reluctant to seek help', the Home Office concluded that instead of a firewall an '*Immigration Enforcement Migrant Victims Protocol*' will instead be implemented.

In an online post, the Domestic Abuse Commissioner commented:

> "The decision by the Home Office not to adopt a Firewall is extremely disappointing and will mean that migrant victims of domestic abuse are unable to safely report perpetrators for fear of deportation. In many cases victims may feel forced to stay with perpetrators who will never be brought to justice. The measures outlined in the protocol announced by the Home Office on December 16th do not go far enough to address the fear that information will be shared with immigration enforcement, which prevents many victims and survivors from reporting domestic abuse."

For the government Policy Paper response to the Commissioner's 'Safety Before Status' report, **click here**. For the Domestic Abuse Commissioner's response, **click here**.

Julia Queen, Barrister, **Coram Chambers**

9/1/2022

National review into safeguarding agencies aware of Arthur Labinjo-Hughes

The government has launched a major review into the circumstances leading up to the murder of Arthur Labinjo-Hughes.

On a local level, an urgent Joint Targeted Area Inspection will take place of all the safeguarding agencies in Solihull tasked with protecting children at risk of abuse and neglect. This inspection will be led jointly by Ofsted, the Care Quality Commission, HM Inspectorate of Constabulary and Fire and Rescue Service and HM Inspectorate of Probation.

A separate independent national review, led by the National Child Safeguarding Practice Review Panel, will identify lessons that must be learnt from Arthur's tragic case for the benefit of other children across the country.

The timescale for publication of the national review is yet to be agreed.

For more information, **click here**.

Julia Queen, Barrister, **Coram Chambers**

9/1/2022

Six-year anniversary of criminalisation of coercive control

The 29th December 2021 marked the six-year anniversary of the Serious Crime Act 2015 in which coercive and controlling behaviour was established as a criminal offence.

The head of policy, campaigns and public affairs at Women's Aid, Isabelle Younane, said:

> "Coercive control is at the heart of almost all domestic abuse, yet only a small minority of survivors who experience it see justice."

Commenting on events in 2021, Isabelle Younane said:

> "The murders of Sarah Everard in March and Sabina Nessa in September, and countless more throughout the year, have shone a light on shocking incidents of male violence, but we must draw attention to the 'hidden' patterns of abusive behaviour that happen behind closed doors."

Statistics published by Women's Aid indicated that prosecutions for coercive behaviour remain 'disappointingly low'. In England and Wales, between April 2020 and March 2021, there were only 1,403 defendants prosecuted for controlling and coercive behaviour despite 33,954 offences of coercive control being recorded by the police in the year ending March 2021. In the year ending December 2020, out of 374 perpetrators convicted for controlling and coercive behaviour in England and Wales, 364 were male (97%).

On the sixth anniversary of the Serious Crime Act 2015, **Women's Aid** urged police forces and public services to take up training to better understand coercive control, such as the **College of Policing Domestic Abuse Matters Change Programme**.

For more information, **click here**.

Julia Queen, Barrister, **Coram Chambers**

9/1/22

Review of the Standard Family Orders (SFOs) announced

On 14 January 2022 Mr Justice Mostyn made the following announcement with the endorsement of the President of the Family Division.

> "The drafting of the money SFOs was completed in 2017 and the children SFOs in 2018. There have been some amendments since then in each sector, but they have largely remained as they were first drafted. In the ensuing years they have become almost universally used in both money and children cases; very few problems have been identified.
>
> But if this success is to continue the SFOs need to be kept up to date in a world of continuously changing events and developments. The Covid pandemic, Brexit, the increased use of electronic working methods, as well as developments in the substantive law, have all contributed changes that need to be reflected in the SFOs.
>
> For these reasons I am today announcing that all the SFOs will be reviewed in the next few months with a view to my issuing updated volumes of both money and children orders by the Summer of this year. I have asked HHJ Kambiz Moradifar and HHJ Edward Hess to lead on the money orders. They have each formed a team of judges and practitioners to carry out this review.
>
> We want to hear from practitioners, judges or anybody else as soon as possible with comments on any relevant matters. It may be an area where a new order or paragraph should be created or a suggested change to an existing paragraph or order, or anything else relevant to this exercise. Comments may be general or specific. All are welcome.
>
> If you would like to make a comment could you please email it to **pfd.office@judiciary.uk** with subject header 'SFO Review' by 28 February 2022."

16/1/22

Researchers appointed for report into domestic abuse victims with no access to public funds

The Domestic Abuse Commissioner has announced the appointment of researchers at the London School of Economics and Political Science, commissioned to produce a report on support for victims and survivors of domestic abuse who have no recourse to public funds (NRPF) in summer 2022.

The research will be conducted over six months from January to June 2022 and will provide an estimate of the number of victims and survivors of domestic abuse in the UK who have NRPF, a condition which prevents people from accessing housing benefit and other public funds due to their immigration status.

The Domestic Abuse Commissioner's recent report ***Safety Before Status*** found the NRPF condition means many migrant victims and survivors of domestic abuse are unable to access safe accommodation such as refuge and are often forced to stay with their abuser or face homelessness and destitution if they flee.

The Home Office has accepted the Domestic Abuse Commissioner's recommendation to extend support to all victims and survivors of domestic abuse, regardless of their immigration status. This research will set out how the Home Office can make this a reality following the conclusion of the Support for Migrant Victims Pilot on 31st March.

Alongside an estimate of the number of victims and survivors of domestic abuse subject to NRPF, the research will provide an estimate of the cost of extending accommodation, subsistence, and specialist holistic support to those who need it. The research will also provide a cost benefit analysis of improving the availability of this support.

The research will be led by Dr Kath Scanlon, Deputy Director and Research Fellow at LSE London, supported by Professor Christine Whitehead, Deputy Director of LSE London, Bert Provan, Senior Policy Fellow at LSE, Ria Ivandic, Research Associate at LSE who specialises in domestic abuse, and Fanny Blanc, Policy Officer at LSE.

The London School of Economics will also work in partnership with the Oxford Migration Observatory, who provide analysis of immigration and migration issues affecting the United Kingdom.

To read Safety Before Status, **click here**.

16/1/22

Marriage and Civil Partnership (Minimum Age) Bill completes committee stage

The Public Bill Committee completed its work in respect of the Marriage and Civil Partnership (Minimum Age) Bill on

12 January 2022 and has reported the Bill without amendments to the House of Commons.

The Bill, sponsored by Pauline Latham, would increase the minimum age for marriage and civil partnership from sixteen to eighteen.

The Bill is now due to have its report stage and third reading on Friday, 25 February 2022. Amendments can be made to the Bill at Report Stage.

For the Bill, as introduced, **click here**

16/1/22

Commons Justice Committee examines transparency in family court system

The House of Commons Justice Committee has continued its inquiry into open justice with two evidence sessions on 11 January focusing on family courts, transparency and court reporting.~

In the opening session, the Committee explored the findings and conclusions of the report *Confidence and Confidentiality: Transparency in the Family Courts* with the President of the Family Division, Sir Andrew McFarlane. It examined how the culture and processes of Family Court can better support transparency while ensuring the interests of the child are protected. It also considered how key recommendations, such as improving media access to Family Court proceedings, might be implemented in practice.

In the second session the Committee questioned John Battle, Chair of the Media Lawyers Association, and Dr Natalie Byrom, Director of Research at The Legal Education Foundation, about the challenges of securing open justice in a changing media environment. It considered too how accessibility can be improved, both in terms of facilitating court reporting and ensuring availability of data and court judgments.

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

For more information concerning the Committee's inquiry into open justice, **click here**.

For the minutes of the first meeting of the Transparency Implementation Group, chaired by the President of the Family Division and held on 15 December 2021, **click here**.

14/1/22

Lead Judge for Private Family Law appointed

The President of the Family Division has announced that Mrs Justice Knowles has been appointed to the role of Lead Judge for Private Family Law, with effect from 1 January 2022.

She replaces Mr Justice Cobb following his recent appointment as the Lead Reform Judge.

The President is grateful to Mr Justice Cobb for his leadership and hard work, and wishes him and Mrs Justice Knowles all the best in their new roles.

14/1/22

Family Mediation Week 17 to 21 January

Family Mediation Week 2022, organised by the Family Mediation Council (FMC), runs from 17 to 21 January.

FMC sees Family Mediation Week an opportunity to raise awareness of family mediation and of the benefits it can bring to separating families. The aim is to let more people know about the benefits of family mediation and encourage separating couples to think about family mediation as a way of helping them take control, make decisions together and build a positive future for their family.

Over the course of the week, FMC will be presenting webinars, publishing resources, information, blog posts, engaging in social media activity and issuing news stories to local, regional and national media explaining the benefits of mediation. FMC is hosting events for members of the public, lawyers, other professionals working with separating families and for mediators.

For the full programme of events, **click here**.

For events for the public, **click here**

For events for lawyers, **click here**.

For events for other professionals working with families, **click here**.

For events for mediators, **click here**.

14/1/22

Divorcing couples continue to ignore pensions, Which? finds

Only 15 per cent of divorcing couples include pensions in their financial settlement, according to a survey of Which? members carried out in November 2021.

Which? Magazine notes that pensions are usually the single biggest asset for divorcing couples and make up 42 per cent of total household wealth, according to the Office for National Statistics. Nevertheless, though pension sharing orders were introduced by the Welfare Reform and Pensions Act 1999, few seem to take advantage of them. Of the 453 people surveyed by Which? 58 per cent said that

pensions were not discussed during their divorce proceedings.

For more information, **click here**.

16/1/22

Notice from the Financial Remedies Court

Mr Justice Mostyn and His Honour Judge Hess have issued the following Notice with the authority of the President of the Family Division.

> "In its report ***The Financial Remedies Court – The Way Forward (September 2021)***, the Farquhar Committee made an important recommendation at paras 4.14 and 4.15. It proposed that either the existing FRC Good Practice Protocol should be modified in terms of style and content, or it should be replaced with a Statement of Efficient Conduct of Financial Hearings at every level below the High Court, similar to the existing High Court Statement of 1 February 2016.
>
> The report went on to make a number of recommendations for procedural enhancements to be included in a FRC Efficiency Statement or in a revision to the Protocol.
>
> It was decided by the FRC leadership to take forward as soon as possible those proposals which did not require changes to the Family Procedure Rules or Practice Directions. Accordingly, a draft Statement on the Efficient Conduct of Financial Remedy Hearings proceeding in the Financial Remedies Court below High Court Judge level ('the FRC Efficiency Statement') was prepared and placed before stakeholders for consultation. A list of the respondents to the consultation is set out below [the Notice].
>
> The draft FRC Efficiency Statement was modelled in terms of structure, language and content on the existing High Court Statement. That High Court Statement is now nearly six years' old and is generally considered to have stood the test of time well.
>
> We are grateful for the consultation responses which were plainly the product of much hard work. There were some differences between the views of the Farquhar Committee and those of the consultation respondents.
>
> In devising the final version of the FRC Efficiency Statement we have given full consideration to the views of respondents, while at the same time endeavouring to reflect the recommendations of the Farquhar Committee and the principles in the High Court Statement.
>
> The resultant FRC Efficiency Statement in its approved final form is attached to this Notice.
>
> We are grateful to the FLBA for drafting templates for the composite case summary and the composite schedule of assets and income, both of which have been adopted and incorporated in this FRC Efficiency Statement. Soft copies of those templates are attached to this Notice.
>
> Much material previously in the Good Practice Protocol is now found in the FRC Statement. Therefore, the Protocol has been substantially abridged and renamed the FRC Primary Principles. It is attached to this Notice.
>
> Also attached to this Notice is the revised Lead Judge Job Description.
>
> The FRC Efficiency Statement, the FRC Primary Principles and the revised Lead Judge Job Description take effect forthwith."

There are attached to the Notice the following documents:

- FRC Efficiency Statement dated 11 January 2022 (PDF format)
- Template ES1: Composite Case Summary (Word format)
- Template ES2: Composite asset and income schedule (PDF and Excel Formats) – NB: A very small error in the Excel file of Template ES2 was identified. The sub-total in cell F110 (applicant's sub-total of husband's non-pension assets) omitted the addition of cell F83 (applicant's case of husband's chattels). This has now been corrected. Practitioners and litigants should ensure that they use the corrected Excel file which is named Template_ES2_(corrected).xlsx. The previous version of the Excel file (Template_ES2.xlsx) should be discarded.
- FRC Primary Principles dated 11 January 2022 (PDF format)
- Revised Lead Judge Job Description dated 11 January 2022 (PDF format)

For those documents and a list of respondents to the consultation, **click here**.

16/1/22

House of Commons Library briefing released regarding the High Income Child Benefit Charge

The High Income Child Benefit Charge ('HICBC'), introduced in 2013, is a system by which Child Benefit can be 'clawed back' by the government from families where the

highest earner has an income in excess of £50,000. In families where the highest earner has an income of over £60,000, the Child Benefit can be withdrawn completely.

On 19 January 2022 the House of Commons Library published a briefing report into the HICBC, which covers 'Failure to notify' penalties and recent case law relating to backdated assessments amongst many other topics.

For the briefing report, click here.

Julia Queen, Barrister, Coram Chambers

19.01.2022

Prosecutions for Child Sexual Abuse have more than halved in 4 years

According to research carried out by the NSPCC, prosecutions and convictions for Child Sexual Abuse have fallen dramatically in the last four years. Information received via Freedom of Information requests indicated that whilst in 2016/17 there were 6,394 prosecutions, by 2020/21 that number had more than halved to 3,025. Convictions also dropped by 45% from 4,751 to 2,595 over the same period.

An additional concern is that the time taken for cases to reach court and finish trial have increased by 4 months in the last 3 years. The average time in 2020 for proceedings to conclude was 1 year and 10 months.

Anna Edmundson, NSPCC Head of Policy and Public Affairs, said:

> "Young victims of abuse have often lived through unimaginable trauma but many want to share their evidence with a court and prevent perpetrators from causing further harm.
>
> These figures show young witnesses are being denied this opportunity and those who do go to court experience long delays and inadequate support which risks retraumatising them further.
>
> This is utterly unacceptable. We call on Dominic Raab to review and reverse the decline in prosecutions and convictions, use the Victims' Law to tackle the delays affecting child sexual abuse cases going through court and provide much better support for young witnesses and victims."

For more information and statistics, click here.

Julia Queen, Barrister, Coram Chambers

19.01.2022

Ministry of Justice proposes amendments to Police, Crime, Sentencing and Courts Bill with aim of keeping women safer

On 04 January 2022 the Ministry of Justice announced further measures to be added to the Police, Crime, Sentencing and Courts Bill with the specific target of keeping women and girls safer.

One such proposal is increasing the time for victims of domestic abuse to report incidents of common assault or battery against them. Currently, any prosecution must commence within six months of the offence occurring. The proposal is that this would change to any prosecution having to commence within six months of the date the incident is formally reported to the police, with an overall time limit of two years from the date of the offence to bring a prosecution.

Further proposals include:

- The taking of non-consensual photographs or video recordings of breastfeeding mothers becoming a specific offence punishable by up to two years in prison
- Ending the halfway release of offenders sentenced to between four and seven years in prison for serious sexual offences. This would force offenders to spend two-thirds of their sentence in prison.

The Domestic Abuse Commissioner, Nicole Jacobs, said:

> "I strongly welcome the additions made to the PCSC Bill today, which allow victims of domestic abuse more time to report to the police.
>
> It is important that all domestic abuse victims have the time and opportunity to report to the police. This is especially important following Covid restrictions, when many victims faced additional challenges to seeking help and reporting domestic abuse.
>
> I want to see increased prosecutions for domestic abuse, and hope to see that as these measures remove another barrier to bringing perpetrators to justice."

For further information as to the government's proposed amendments, click here.

Julia Queen, Barrister, Coram Chambers

04.01.2022

Amendment of the Family Proceedings Fees Order 2008

There have been slight amendments to the Family Proceedings Fees Order 2008 to reflect changes in

terminology resulting from the Divorce, Dissolution and Separation Act 2020. References to a "decree of divorce" and "decree of nullity" are substituted with the terms "divorce order" and "nullity of marriage order".

For further information, **click here**.

Julia Queen, Barrister, **Coram Chambers**

17.01.2022

Family mediation scheme boosted with an addition £1.3 million

On 16 January 2022 the Ministry of Justice announced a boost to the landmark **family mediation scheme** with an additional £1.3 million. This funding triples the investment into the scheme, ran by the Family Medication Council.

The purpose of the scheme, set up by the Ministry of Justice, is to reduce the number of family disputes ending up in the family courts. Since the start of the scheme, 4400 vouchers worth £500 have been provided to families to help pay for mediation services. The scheme boasts a 77 percent rate of cases to date reaching full or partial agreements without resorting to court intervention.

Deputy Prime Minister, Lord Chancellor and Secretary of State for Justice, Dominic Raab said:

> "I want to see children and their parents spared the stress and conflict of the courtroom as much as possible, and I'm delighted that thousands more will now have the opportunity to resolve their disputes in less combative way.
>
> At the same time, it will free up vital capacity in the family courts to ensure the system can recover quickly from the pandemic."

For more information about the government family mediation scheme **click here**.

Julia Queen, Barrister, **Coram Chambers**

16.01.2022

Ofsted report indicates a third of care leavers feel they left care too early

According to a nationwide survey undertaken by Ofsted, more than a third of care leavers felt that they left care too early.

Ofsted's report, titled **'Ready or not: care leavers' views of preparing to leave care'**, was published on 19 January 2022. Ofsted carried out an online survey of children in care (aged 16 to 17) and care leavers (no age limit) to explore the planning and preparation that happened before leaving care as well as the help that they received on leaving care.

Research indicated that many care leavers found that their move out of care happened 'abruptly' and that they were 'not ready' for all the sudden changes that followed. Even when care leavers felt they did leave care at the right time, not all felt they had the required skills to live independently such as how to shop, cook or manage money. Many felt 'alone' and 'isolated' upon leaving care and did not know where to get help and support. One in 10 care leavers 'never felt safe' when they first left care.

Edwina Grant OBE, Chair of the ADCS Health, Care and Additional Needs Policy Committee said:

> "Preparing young people to leave care and equipping them with the skills they need to live on their own and navigate adulthood, such as how to cook, budget and access support, is crucial. Many young people who leave care are successfully supported into independent adult lives, unfortunately however, this is not always the case. As the report notes, some care leavers surveyed left care earlier than was right for them, many felt isolated and didn't know where to turn for support. Worries about finances were common. "Is this good enough for my own child?" is the test and all local authorities are committed to this. Council tax exemptions and the creation of specific apprenticeships are just some examples of the different ways councils are supporting their care leavers. However, there is more to do, across local and national government, to achieve the best outcomes for every child in and young person leaving care, especially for those who would benefit from support for much longer than the current cut-off age. The children we care for deserve nothing less."

For Ofsted's 'Ready or not' report, **click here**.

For the response by ACDS, **click here**.

Julia Queen, Barrister, **Coram Chambers**

19.01.2022

Child Safeguarding Practice Review Panel: terms of reference

The Department for Education has published correspondence between the Secretary of State for Education and the Chair of the independent Child Safeguarding Practice Review Panel setting out the terms of reference for the national review into safeguarding children with disabilities and complex health needs in residential settings.

The panel's letter announces a national child safeguarding practice review into safeguarding children with disabilities and complex health needs in residential settings.

It also gives further details about the review including:

- terms of reference

- details of panel members carrying it out
- timescales.

The Secretary of State for Education's letter welcomes the terms of reference for the review.

For the correspondence, click here.

29/1/22

Judicial Review and Courts Bill: Progress of the Bill

The House of Commons Library has published a paper summarising the amendments made to the Judicial Review and Courts Bill in Committee and the main issues that were debated.

The Bill would reform rules affecting judicial reviews and bring in changes to the court system. It was considered by a Public Bill Committee over 11 sittings between 2 and 18 November 2021 and is due to have its Commons report stage on 25 January 2022.

For the paper, click here. To follow progress of the Bill, click here.

28/1/22

Civil Jurisdiction and Judgments (2005 Hague Convention and 2007 Hague Convention) (Amendment) Regulations 2022

The United Kingdom has participated in the Convention on Choice of Court Agreements concluded on 30th June 2005 at The Hague ("the 2005 Hague Convention"), and the Convention on the International Recovery of Child Support and other forms of Family Maintenance concluded on 23 November 2007 at The Hague ("the 2007 Hague Convention"), since 2015 and 2014 respectively by virtue of the United Kingdom's membership of the EU.

In September 2020 the United Kingdom took the necessary steps to join the two Conventions as an independent party as part of its preparation for leaving the EU. This included depositing the necessary instruments of accession and ratification with the depositary. Parliamentary scrutiny of these Conventions prior to accession and ratification took place under the Constitutional Reform and Governance Act 2010 during November and December 2018, which included the text of the declarations and reservation the United Kingdom intended to make. The Private International Law (Implementation of Agreements) Act 2020 implemented the Conventions in the United Kingdom by amending the Civil Jurisdiction and Judgments Act 1982. The Government indicated during the passage of the 2020 Act that it intended to use the power in section 2 of the Act to amend the Civil Jurisdiction and Judgments Act 1982 to ensure the text of the reservations and declarations were available for reference purposes.

These Regulations make those amendments to the Civil Jurisdiction and Judgments Act 1982 so that the United Kingdom's reservations and declarations to the 2005 Hague Convention and 2007 Hague Conventions appear as new Schedules to that Act.

For the 2022 regulations, click here. For the Civil Jurisdiction and Judgments Act 1982, click here.

29/1/22

10,000 people have received one-to-one legal support as result of Litigants in Person Grant

A new report from the Ministry of Justice provides an interim update on progress made by the Legal Support for Litigants in Person Grant.

In April 2020, the Access to Justice Foundation and Ministry of Justice (MOJ) launched the Legal Support for Litigants in Person (LSLIP) Grant, a 2-year programme funding a range of earlier intervention services for litigants in person. LSLIP is funding 11 grant projects across England and Wales that deliver advice on a national, regional and local scale, to litigants in person at different stages of their problem within several areas of civil and family law. Partnership working and earlier intervention is at the core of all these activities, to achieve improved outcomes for clients.

This interim report draws together the data and evidence collected so far. Its key findings are:

- LSLIP grantees have provided a range of legal advice, practical support and procedural information to thousands of people across England and Wales with civil and family problems. The grants have enabled around 10,000 people to receive one-to-one personalised support on their civil and family problems, and significantly higher volumes to access public legal information and guidance.
- Most advice provided by local and regional grantees has been initial generalist advice (68 per cent of advice) on family, employment and housing problems (nearly 75 per cent of problems). However substantial volumes of casework and pre-court advice has been provided.
- Broadly speaking, local and regional grantees appear to be reaching a similar cohort of users to other advice services. Most clients are female (62 per cent), between 25 and 55 (65 per cent), and white (91 per cent). At least a quarter of clients have a disability, but there is evidence to suggest this is an underestimation and that a high volume of clients have poor physical and mental health alongside other indicators of vulnerability.
- Partnership working has been key to LSLIP and the enhanced support available for litigants in person.

Formalising referral pathways between services and sharing specialist resources have enabled organisations to expand advice across wider geographical areas and areas of law, to provide a more holistic service that can address the entirety of a client's problem.

- Early evidence suggests that the advice and support provided is improving client outcomes, including increasing client understanding of how to resolve their problem and increasing client confidence to take action promptly. This is helping to resolve problems at an earlier stage, before they reach court or tribunal.

Further data will be collected throughout the lifetime of LSLIP and these trends will be reported on in the final evaluation.

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

28/1/22

Record numbers of women enter their 30s child-free

Record numbers of women are reaching the age of 30 child-free, according to new figures from the Office for National Statistics.

Amanda Sharfman, of the Centre for Ageing and Demography at the Office for National Statistics, commented:

> "We continue to see a delay in childbearing, with women born in 1990 becoming the first cohort where half of the women remain childless by their 30th birthday. Levels of childlessness by age 30 have been steadily rising since a low of 18% for women born in 1941. Lower levels of fertility in those currently in their 20s indicate that this trend is likely to continue.
>
> "The average number of children born to a woman has been below two for women born since the late 1950s. While two child families are still the most common, women who have recently completed their childbearing are more likely than their mothers' generation to have only one child or none at all."

The official figures show that women in England and Wales born in 1975 who completed their childbearing years in 2020, had on average 1.92 children, no change from those born in 1974 but a lower average compared with the 2.08 for their mothers' generation (assumed to be born in 1949).

Two child families remain the most common family size (37 per cent), however this is a decrease in the proportion of those having two children compared with their mothers' generation born in 1949 (44 per cent).

Of women aged 45 years and born in 1975 who had completed their childbearing years in 2020, 18 per cent were childless, with 17 per cent having only one child, both of which are increases compared with their mothers' generation (both 13 per cent).

The most common age for women born in 1975 to give birth was 31 years, an increase compared with 22 years for their mothers' generation born in 1949.

Half of women (50 per cent) born in 1990 (the most recent cohort to reach age 30 years) remained childless by their 30th birthday; this is the first cohort where half remain childless by 30 years of age.

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

28/1/22

Domestic Abuse Act 2021 (Commencement No. 3) Regulations 2022

These Regulations are the third commencement regulations made under the **Domestic Abuse Act 2021**.

They bring into force section 3 (so far as not already in force) on 31st January 2022. Section 3 of the Act makes provision in relation to children as victims of domestic abuse, as follows:

> '**Children as victims of domestic abuse**
>
> (1) This section applies where behaviour of a person ("A") towards another person ("B") is domestic abuse.
>
> (2) Any reference in this Act to a victim of domestic abuse includes a reference to a child who—
>
> (a) sees or hears, or experiences the effects of, the abuse, and
>
> (b) is related to A or B.
>
> (3) A child is related to a person for the purposes of subsection (2) if—
>
> (a) the person is a parent of, or has parental responsibility for, the child, or
>
> (b) the child and the person are relatives.
>
> (4) In this section—
>
> "child" means a person under the age of 18 years;
>
> "parental responsibility" has the same meaning as in the Children Act 1989 (see section 3 of that Act);
>
> "relative" has the meaning given by section 63(1) of the Family Law Act 1996.'

For the Domestic Abuse Act 2021, click here. For the Domestic Abuse Act 2021 (Commencement No. 3) Regulations 2022, click here.

29/1/22

Parliamentary inquiry to examine access to legal support for kinship carers

The All Party Parliamentary Group on Kinship Care has launched an inquiry into access to legal aid for kinship carers and potential kinship carers.

Currently, many grandparents, brothers, sisters and other relatives or friends are not able to access free, independent legal advice and representation when considering taking on the care of a child who cannot safely remain with their parents.

Research published in 2020 by the **Parliamentary Taskforce on Kinship Care** found that:

- Three quarters of kinship carers feel they don't have enough information about legal options to make an informed decision when taking on care of their kinship child.
- Nearly one in three kinship carers (30 per cent) felt that their kinship child was not subject to the right legal order for their needs.
- 58 per cent incurred legal costs and four in ten of those received no financial help with this.
- Many carers accrue substantial private debt in order to secure a legal order for a child and give them a safe home.

The Legal Aid Sentencing and Punishment of Offenders Act 2012 removed virtually all private family law issues from the scope of legal aid.

In public law care proceedings, if a kinship carer is joined as a party to proceedings, they can apply for legal aid to be represented in the proceedings. However, many kinship carers are not parties to the proceedings, or do not have access to early legal advice to know that this is an option. Children's services departments may make some funding available for prospective kinship carers to obtain legal advice but this varies and is most often very limited, 'one-off' advice.

In February 2019, the **Ministry of Justice committed to extend the scope of legal aid to cover special guardianship orders** (SGOs) in private law – by Autumn 2019. The APPG notes that almost three years have now passed and this commitment is yet to be delivered.

The pandemic has since had a huge impact and pressure on the Family Court has never been greater. The average time for a care proceedings case to conclude is currently 45 weeks – the highest since 2012, and far beyond the 26-week time limit. As well as the impact of Covid-19, the scenario of an unrepresented carer arising late in the day is also a common reason for delays.

Andrew Gwynne MP, Chair of the APPG and a special guardian, said:

"Kinship carers are being asked to step in to avoid a child from remaining in, or entering into, the care system. By doing so they are providing a safe and loving home for a child in their family network.

> "Yet they are often then left having to navigate a complex legal system and make huge decisions for their family without access to free, independent legal advice. Many end up in substantial debt as a result. And almost a third feel they do not have the right legal order for their child which has a significant impact on the support they can then access.
>
> "The Ministry of Justice made some welcome commitments in 2019 but three years on progress has stalled. Our APPG's inquiry will be examining this issue further, including the impact on families and the wider children's social care and family justice system."

The inquiry will be seeking oral and written evidence from kinship carers, legal practitioners and others.

For more information, **click here**.

30/1/22

The Child Maintenance Service must improve, says Gingerbread

The All-Party Parliamentary Group (APPG) on Single Parent Families has met to discuss how the Child Maintenance Service must be improved for the benefit of children of single parent families across the country.

The event, titled 'Making the Child Maintenance Service Work for Single Parent Families,' was chaired by Rupa Huq MP with speakers Victoria Benson, CEO of Gingerbread and Dr Nicola Sharp-Jeffs, CEO of Surviving Economic Abuse, as well as Gemma and Yael, two single parents who shared their first-hand experiences of the CMS. APPG Vice-Chair Rosie Duffield MP, Stephen Timms MP, Philip Davies MP, Sally-Ann Hart MP and Peter Bottomley MP were also in attendance and joined the discussion.

In December 2021, it was revealed that since the formation of the Child Maintenance Service (CMS) in 2012, there has been over £435.9 million in unpaid child maintenance owed through its Collect and Pay service.

Having heard from many single parents about their frustrating experiences with the CMS, Gingerbread propose the following improvements:

- The CMS should make better use of its enforcement powers.
- Fairer Child Maintenance Service (CMS) charges should be introduced.
- Customer service and case management at CMS needs to be improved.
- The DWP must be more open about the data it shares about the CMS so that the system is transparent and open to scrutiny.
- The service must be better attuned to the needs of domestic abuse survivors.

For more details, **click here**. To watch the event, **click here**.

28/1/22

Parliamentary Committee investigates proposals to reform the Human Rights Act

The Parliamentary Joint Committee on Human Rights has held the opening session of a new inquiry into the Government's proposals to reform the Human Rights Act. It took evidence from witnesses, including former Justice of the Supreme Court Lord Mance and academic experts in constitutional law and human rights, Professor Alison Young, Professor Adam Tomkins, and Dr Helene Tyrell.

In December, the Government launched a **consultation into proposals to reform the Human Rights Act.** The proposals include replacing the Human Rights Act with a Bill of Rights, reducing both the role played by the case law of the European Court of Human Rights and the ability of the domestic courts to ensure that legislation is read compatibly with our rights. The Government has stated they want to place greater emphasis on protecting freedom of speech, enshrine the right to trial by jury and prevent abuses of the justice system. The Government argues that such reforms would make it easier to deport foreign criminals and cement Parliament's position as the ultimate decision maker on UK laws.??

In this opening session, the Committee explored the implications of the proposed reforms, focusing on the potential change in the relationship between domestic courts, Parliament and the government. It also heard evidence on how the Government's proposals would alter the relationship between UK courts and the European Courts of Human Rights.

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

31/1/22

Children: Public Law Update (Winter 2022)

John Tughan QC of 4PB considers recent judgments that public law child lawyers need to know about.

I hope that everyone has had a happy and peaceful holiday season.

In this update I will consider the following issues from recent decisions:

- Finely balanced appeals and the function of the Court of Appeal
- Costs orders against intermediaries/third parties
- Whether to order separate fact-finding hearings
- The approach to the issue of Covid vaccinations
- Children with disabilities and s31 CA 1989.

Finely balanced appeals and the function of the Court of Appeal

The case of ***H-W (Children: Proportionality)*** **[2021] EWCA Civ 1451** is interesting for the treatment the Court of Appeal gave to the judicial reasoning of the Court below as well as the function of the Court of Appeal. Peter Jackson LJ gave the lead judgment but was in the minority in terms of the outcome of the appeal. It was an appeal by the mother of the children from care orders with a plan for removal of the children into foster care.

The background over many years and throughout the mother's life was of sexual abuse and gross neglect, leading Peter Jackson LJ to note that his compressed background of the history does not reflect the volume of information across decades in relation to this family.

The first ground of appeal was that the expert risk assessment was permeated by a number of unproven, and in some case mistaken, facts. That, it was said, offends the distinction drawn by the law between facts and concerns. Peter Jackson LJ held that there was nothing in this argument:

> "In the administration of justice, the court acts only on proven facts, but it is not entitled to insist on other professional disciplines taking the same approach. A psychiatric assessment may be based on information of all kinds, and not merely on matters that are more probably true than not. Provided there is clarity about what the position is, the court is able to make its own assessment of the weight that can be given to the opinion. That is what the Judge did in cautioning himself about the limited aspects of Dr Freedman's advice that were based on error or contentious information. There is nothing unusual about that and this ground of appeal can in my view be set to one side."

This was clearly a difficult case with an enormous history. Peter Jackson LJ concluded that the judge was wrong. The judgment did not sufficiently balance the advantages and disadvantages of the children being removed. It did not consider the continuation of the non-molestation order and other protective provisions in order to ameliorate the risk of sexual abuse posed by A.

Laing LJ and Lewison LJ did not agree that the judge was wrong. Whilst they had some criticisms of the judgment, the judge had clearly decided the issue of the mother's ability to safely care for the children and to learn sufficient skills into the future.

Laing LJ found that she too shared the misgivings as to the outcome. However, ultimately the role of the appeal court was stated in this way:

> "In a case like this, there is a temptation for an appellate court to wish to reflect, in its decision, its unease about, or disagreement with, the decision of the fact-finder, particularly when a case is as finely balanced as this case is. But it is precisely in the very hard cases that the appellate court must take the greatest care to resist that temptation. There is no identifiable error of law in the approach of the Judge. He has been immersed in this case for a long time. I do not think that it could be suggested that there is any aspect of this case which was not present in his mind when he delivered his ex tempore judgment, even if he has not mentioned every point expressly, or analysed the case in the same way as another judge might have done."

Lewison LJ cited Lord Wilson in ***Re B (A Child) (Care Proceedings: Threshold Criteria)*** **[2013] UKSC 33**:

> "The function of the family judge in a child case transcends the need to decide issues of fact; and so his (or her) advantage over the appellate court transcends the conventional advantage of the fact-finder who has seen and heard the witnesses of fact. In a child case the judge develops a face-to-face, bench-to-witness-box, acquaintanceship with each of the candidates for the care of the child. Throughout their evidence his function is to ask himself not just "is this true?" or "is this sincere?" but "what does this evidence tell me about any future parenting of the child by this witness?" and, in a public law case, when always hoping to be able to answer his question negatively, to ask "are the local authority's concerns about the future parenting of the child by this witness justified?" The function demands a high degree of wisdom on the part of the family judge; focussed training; and the allowance to him by the justice system of time to reflect and to choose the optimum expression of the reasons for his decision. But the corollary is the difficulty of mounting a successful appeal against a judge's decision about the future arrangements for a child."

Lewison LJ continued:

> "…As I read the judgment, the judge was particularly impressed by the fact that less intrusive interventions had been in place for many years, with little sign of success. M had undertaken courses but was not able to put into practice what she had learned. Contrary to M's evidence he considered that she still had a blind spot for A….
>
> …In cases which are marginal it is, in my judgment, all the more important to trust to the wisdom and discretion of an experienced family judge, particularly one who has been immersed in the evidence, not only in relation to the welfare decision but also the prior fact-finding decision. I agree that the judge's decision to leave F at home is questionable, but that is not the subject of any appeal before us.
>
> Although Lord Neuberger's dissection of the concept of "wrong" in *Re B* at [93] has perhaps been overtaken by events (see *R (Z) v Hackney London Borough Council* to which Peter Jackson LJ has referred), I find myself in the uncomfortable position of reviewing a decision which I cannot say was right or wrong. In that situation Lord Neuberger considered that the appeal should be dismissed."

Costs orders against intermediaries/third parties

In ***A Local Authority v Mother & Ors*** **[2021] EWHC 2794 (Fam)** Lieven J ordered costs against an intermediary in care proceedings.

The original intermediary was DM. DM had been instructed to assist the father. As a result of a diary clash and two days before the hearing was due to commence, DM wrote:

> "…I have a network of intermediaries where we have been overwhelmed with demand for services….
>
> However I have asked MH to stand in for me. MH has acted as intermediary for XX numerous times and comes with the experience of special educational needs. She is competent and available and is able to serve for the durations of the listing…. I will completely handle the hand-over."

At the trial it became apparent that MH had not seen the pre-agreed questions for the father, had no knowledge of the relevant advocates toolkits, and had read neither the cognitive assessment nor the intermediary assessment. On

investigation it became apparent that MH was an English teacher who supports people in a capacity she described as a "life coach". Her experience as an intermediary spanned two weeks.

The judge adjourned the hearing. The parties to the care proceedings sought costs against DM and MH. The costs issue was transferred to the High Court. The two intermediaries appeared before Lieven J (in person).

Lieven J summarised the relevant provisions and case law including s.51 of the Senior Courts Act 1981 and the FPR r46.2:

> "Section 51(3) of the SCA provides:
>
> > "51(3) The court shall have full power to determine by whom and to what extent the costs are to be paid."

The ability to make a costs order against an expert was considered and confirmed by Keehan J in ***Re ABCDEF* [2019] EWHC 406 (Fam)** . That case concerned an expert whose palpable defaults had led to the need to adjourn a trial. Keehan J made an order for the costs that had been wasted by the adjournment to be paid by the expert. The facts of the case are different, and Keehan J's decision turned on the expert's failure to comply with court orders. However, the principle that a third party, who is not a funder but who is involved in court processes, can be subject to a costs order is established.

There is no doubt that the Court has the power to make an order against a third party if the requirements of s.51 are met. In ***Dymocks Franchise System v Todd (Costs)* [2004] UKPC 39**, the Privy Council considered the principles applicable for making a third party costs order. Many of those principles are irrelevant because they relate to costs orders against funders. At [25] the Privy Council said:

> "(1) Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against."

Although there was a great deal of case law in relation to the causal link between the third-party default and the costs incurred, in this case the issue of causation was obvious. It was also held that the role of intermediaries was "not particularly clear" under Part 3A.1 FPR. However, that absence of clarity was neither here nor there as the real issue was the misrepresentation by DM and not the lack of guidance or any default by the court or parties. DM had asserted that MH was a competent and experienced intermediary and she was not. He had acted inappropriately in putting forward MH. The s51 Senior Courts Act test of exceptionality was met and a costs order was appropriate in relation to the wasted costs.

Whether to order separate fact-finding hearings

In ***Lincolnshire County Council v CB & Ors* [2021] EWHC 2813 (Fam)** Lieven J was considering the listing of a hearing in care proceedings. The local authority and guardian sought a five-day final hearing while the parents sought a separate 20-day fact-finding hearing.

XE was 11 years of age when he died. The threshold allegations went "way beyond" XE's death and extended to drug use by the parents, emotional harm and failing to meet the needs of the children including via a lack of supervision, domestic abuse and neglect. XE had cerebral palsy, could not walk, move, hold his body weight and was non-verbal.

There was no dispute that XE died from drowning in the bath. The issue on the parental evidence was described by Lieven J in this way:

> "It is apparent from this account that there are only two areas of factual dispute between the parents: what precisely DE said to the Mother in the kitchen before he went out, and who left the taps on. The police have now decided not to charge either parent with murder or manslaughter, but a decision has not yet been made as to whether they will be charged with drug related offences."

The issue of XE's death was live and before the court. The local authority and guardian argued that it could be determined in a five-day composite final hearing and the parents argued for a 20-day fact-finding hearing with multiple witnesses.

In setting out the approach of the court, Lieven J recorded that there was a broad discretion in relation to case management decisions. The starting point was rule 1.1 of the FPR. The Court of Appeal in ***Re H-D-H (Children)* [2021] EWCA Civ 1192**, [2021] 4 WLR 106 had recently confirmed the continued applicability of the principles set out by Mr Justice McFarlane (as he then was) in ***A County Council v DP* [2005] EWHC 1593 (Fam)**, [2005] 2 FLR 1031, in particular

"24. The authorities make it plain that, amongst other factors, the following are likely to be relevant and need to be borne in mind before deciding whether or not to conduct a particular fact finding exercise:

a) The interests of the child (which are relevant but not paramount);

b) The time that the investigation will take;

c) The likely cost to public funds;

d) The evidential result;

e) The necessity or otherwise of the investigation;

f) The relevance of the potential result of the investigation to the future care plans for the child;

g) The impact of any fact finding process upon the other parties;

h) The prospects of a fair trial on the issue;

i) The justice of the case.

25. I am well familiar with the concept of 'necessity', arising as it does from ECHR Art 8 and, indeed, from the pre Human Rights Act 1998 case law to which I have been referred. It is rightly at the core of Mr Tolson's submissions in this case and, without overtly labouring the issue by including substantial descriptive text in this judgment, it is at the forefront of my consideration of the point. Amongst the pertinent questions are: Is there a pressing need for such a hearing? Is the proposed fact finding hearing solely, as Mr Tolson puts it, 'to seek findings against the father on criminal matters for their own sake?' Is the process, which will be costly and time consuming, with potentially serious consequences for the father if it goes against him, proportionate to any identified need?"

Lieven J held that in the present case delay in planning for the children was a particularly weighty factor. The welfare of the children was not paramount in this consideration. The impact on court resources and other cases is a relevant consideration but the true question is whether a fact-finding hearing was necessary:

"As the President of the Family Division set out in The Road Ahead (**both 2020** and **Addendum in 2021**), in current circumstances the Family Courts do not have the resources to undertake hearings which do not meet the test of strict necessity. It is therefore essential that this test is properly applied, with appropriate scrutiny by the Court, even if the parties themselves do not argue against a fact finding hearing. The Court must be careful to ensure that there is a proportionate and effective use of court time. It is well known that the family justice system has come under very severe pressure during the Covid pandemic. Delays in the hearing of cases have become very much more lengthy and only through more rigorous case management will the delays be materially reduced.

The outcome in the present case is in my view clear cut. The factual dispute between the parents in relation to XE's death is a very narrow one, namely what DE said in the kitchen to the Mother and who left the taps on. Only the parents were witnesses to these two events, save possibly for A, and none of the other witnesses who the parents seek to call can give direct evidence on the matters in dispute. There is body worn camera footage and recordings of the 999 calls so the Judge will have the direct, and thus best, evidence of the Mother and DE's immediate responses at the time of the incident."

The approach to the issue of Covid vaccinations

In ***Re C (Looked After Child) (Covid-19 Vaccination)*** **[2021] EWHC 2993 (Fam)** Poole J followed ***Re H (Parental Responsibility: Vaccination)*** **[2020] EWCA Civ 664**.

The same principles applied to the Covid-19 and winter 'flu vaccinations. In the absence of specific evidence contra-indicating routine vaccinations the decision was not a "grave" one and a local authority can consent to such vaccinations pursuant to s33(3)(b) CA 1989.

Children with disabilities and s31 CA 1989

In ***Re W*** **[2021] EWHC 2844 (Fam)** Hayden J repeated the well established problems of applying the principles of child protection pursuant to Part IV CA 1989 to children with disabilities, and said this:

> "It is important to emphasise that the provision "*not being what it would be reasonable to expect a parent to give*" is not to be regarded as an abstract or hypothetical test but must be evaluated by reference to the circumstances the parent is confronting i.e. what would it be reasonable to expect of a parent in these particular circumstances, recognising that in a challenging situation many of us may behave in a way which might not objectively be viewed as reasonable. The test is not to be construed in a vacuum nor applied judgementally by reference to some gold standard of parenting which few (if any) could achieve. On the contrary, it contemplates a range of behaviour, incorporating inevitable human frailty. The reasonableness of the care given requires to be evaluated strictly by reference to the particular circumstances and the individual child."

07/01/2022

How can parents prioritise children during their separation?

Swati Somaiya, partner and specialist family, collaborative and mediation lawyer at Excello Law, welcomes publication of Resolution's Parenting through Separation and extols its wisdom for parents and lawyers alike.

New research commissioned by the family justice organisation Resolution has uncovered the struggles experienced by separated parents, particularly during the coronavirus pandemic. The research shows that two-thirds of separated parents said they lacked help or advice about how to put their children first when they split from their partner. One-third of separated or divorced parents said they found it harder to keep child contact arrangements in place when pandemic restrictions such as lockdowns were in effect. Nearly three in 10 said that they have felt more stress and tension in their relationship with their ex-partner since the pandemic began.

The latest official figures show that in England and Wales, during the last 12 months alone, almost 90,000 children were involved in private law applications, which are legal processes to determine matters such as whom the child lives with. This is the highest figure ever recorded and it represents an increase of over 6 per cent on the previous year. These statistics provide clear evidence to support the reports that the pandemic was driving an increase in relationship breakdown as early as December 2020. As the pandemic wears on into 2022, so does the stress which it is placing on families and relationships.

With nearly a quarter of a million people getting divorced in the UK each year, the need for information and support for those affected is clear. However, separating parents have reported a distinct absence of guidance in this area. It is therefore a welcome development to see the publication of a balanced, informative and well-researched new guide from Resolution, Parenting Through Separation, which aims to fill that gap. This sets out information and advice on how to best manage parenting through separation and divorce, with a clear focus on reducing conflict between parents, to the benefit of children. It offers practical tips on ways to help ensure that family break-up has as little impact on children as possible.

The research clearly underlines the need for better resources and supports for separating parents, and their children. Parents reported a range of behavioural impacts that separation had on their children – one in 10 said their children showed violent outbursts and one in seven said their children displayed anti-social behaviour since the parents broke up.

A quarter of parents said their children showed a loss of confidence while a similar proportion said their children had suffered from depression due to family breakdown. Nearly two-fifths of parents surveyed said they turned to friends and family for advice during their separation. A third of parents engaged a solicitor or legal professional and most of them reported that doing so was an effective method in helping to get them the advice they needed.

Resolution was founded in 1982 by a group of family lawyers who felt that a non-confrontational approach to family law issues would produce better outcomes for families. Resolution has since expanded its membership beyond the legal profession and the organisation has now become "a group of family justice professionals (lawyers, mediators, therapists and coaches) from around the country" which works "with families and individuals to resolve issues in a constructive way." The interdisciplinary nature of Resolution reflects the multifarious effects which separation and divorce can have on families. There are few other areas of law which impact not only the clients, but their children and their extended families and communities in so many ways. The impacts of a separation are certainly financial and legal, but they are also emotional and psychological. This is why, for lawyers and clients alike, a broader sense of perspective, and a collaborative approach, are ideal when approaching separation and divorce.

The importance of minimising conflict in separation, and prioritising the needs of children, are consistent themes which run through the guide. However, it begins by exploring the emotional impact of separation, and the fact that at least one partner often must navigate their way through the five stages of grief before reaching acceptance of the new realities that separation brings. The guide says that "Coming to terms with losing someone who you thought you would be with forever, is one of the most difficult journeys a parent can take". It also suggests that it may be advisable to seek assistance from a therapist or divorce coach to help navigate through the five stages of grief at the loss of a marriage, namely: denial, anger, bargaining, depression and acceptance.

Of course, the primary aim of therapy is to help the person directly affected. However, achieving acceptance also helps all others involved including, ultimately, the children affected by the separation. After all, as the guide notes, "Who wants to agree with the practicalities of legal issues and more importantly organising the children when they are devastated, angry and confused by loss? It can turn otherwise rational, clear-thinking parents into what appear to be belligerent, stubborn, unreasonable people." This is an important insight which many family law practitioners share, and it is wisdom often gained through the bitter experience of seeing how unhelpful negative emotional states can be when attempting to agree a positive outcome in a family law dispute. In order for a collaborative approach to succeed, reasonable decision-making and clear thinking are required to achieve a mutually acceptable outcome.

Nobody expects a client to achieve a superhuman level of emotional equanimity in such fraught and difficult circumstances. However, it can be profoundly helpful to retain an awareness to dampen the impact of the inevitable negative emotions that will be stirred during the separation process. The guide is realistic in this regard. It asks rhetorically, "Is it possible to separate without conflict?" before answering, succinctly, "The short answer is 'no'. When any significant personal relationship ends there will usually be some conflict. Be realistic, aim to manage your side of the conflict, rather than to eradicate it." One of the guide's strengths is its wealth of such grounded and realistic advice, which it provides in straightforward terms.

It explains to separating parents, with admirable clarity, that "you are becoming co-parents." It notes that "Once you have separated, the difference in roles and parenting styles is often amplified and this can be a reason why arguments occur when you are trying to organise a routine for your children. Learning to be co-parents is a new journey. It is not always easy and, like learning anything new, you won't always get it right the first time. It is important to remember that everyone is adjusting to a new way of living. Try to be patient during this transition."

It asks parents to consider important practical questions such as, in the short term, how to achieve good handovers and how best to manage birthdays and Christmas, while also putting the entire endeavour in a wider perspective, by asking parents to ask themselves, "What do I want my children to be saying about this in 10 years' time?"

Parents are also invited to consider longer term issues such as "important transitions, changing schools, university, graduation, weddings etc." while focusing on remaining civil to each other and assuring parents that, over time, "things will settle down".

It is made clear that communication between co-parents is crucial to achieving positive outcomes. The guide reminds parents that "family separation leads to a great deal of domestic, parental, social and financial reorganisation. You will need to have many conversations with your co-parent and with your children as life is reorganised. Sometimes it can feel overwhelmingly challenging to have these conversations, particularly early on in your separation journey." Parents are advised to "keep in mind that you and your former partner/co-parent are likely to be in a different place on your emotional recovery journey which will play a large part in how easy or difficult it feels to talk". Practical advice is given, and it is suggested that parents consider using a mediator or counsellor to assist with establishing good communication.

The focus of the guide on the needs of children is welcome. It devotes no fewer than 10 pages to advice on communicating with children around the time of the separation. The guide has a particular emphasis on listening to children, "Because it's the one thing they tell professionals that their parents don't do very well" and because listening tells children that their parents are emotionally available, and that they matter. Skills for listening to children are also set out for parents to reflect upon.

Importantly, the guide lists how children of different age groups might react to their parents separating. For example, children aged under 5 may be "Complaining of mysterious pains and being in distress" or "not sleeping well". Those aged 6 to 8 years may feel "lost, rejected, guilty". A child aged between 9 and 12 may start behaving more like an adult or might start taking sides between the parents. Teenage children might start becoming more distant, or they could start having discipline problems at home or school. Amidst the turmoil of a separation, it may be useful for parents to be reminded of these red flags, in terms of children's behaviour, so as to facilitate early intervention and to help alleviate children's distress.

The guide also mentions the importance of extended family to children. It says that "Even if you do not regard your child's relationship with their extended family members as particularly close, it has generally been shown that children benefit from being encouraged to maintain links with their extended family – it is important that these precious and unique links are not permitted to suffer just because the relationship between the child's parents has broken down."

The child-focused approach inherent in the guide is again evident in this section, where it says clearly that "It could be that maintaining relationships with extended family will require a degree of selflessness on your part, often eating into your

'time' with the child/ren. Just remember, the importance of the extended family relationships to your children does not lessen because you have separated. These relationships for your children and the support that extended family provide can be hidden or taken for granted until it is removed, and this can have a very negative result for children. Grandparents and other wider family members can play understated roles as confidants and influencers, encouraging children to develop an understanding of respectful relationships. "

The guide explores common disputes which arise between separating parents, and also invites parents to consider the potential impact of changes to the co-parenting relationship – such as when one parent moves house or begins a new relationship.

Perhaps the most inspiring section is that which asks parents to imagine what a successful, post-separation, co-parenting relationship really looks like. This gives parents something to aim for. By implication, it also gives them something to avoid, since few separating parents relish the thought of decades of conflict lying in wait for them.

In answer to the question, "How could things look if we get this right?" the guide says, "When co-parenting works well, it means your child is held in a safe parental bubble and can grow up with a good attitude towards relationships. A good co-parenting relationship can really enhance a child's life."

It says that the key signs that a co-parenting relationship is working well are that:

- Your child transitions relatively easily from one house to the next.
- Your child is able to talk freely about their other parent in front of you without feeling judged.
- Your child is able to call you when they want even if they are with their other parent.
- Your child is able to move their things between houses, because they are confident that they are their things and they have ownership of them.
- Your child knows what is happening on important days and times of the year like Christmas and is not made to choose between parents.
- You can both go to parents evenings and school shows and other significant events together and easily.

This focus on creating a positive vision for the future runs through the guide. This approach should help parents to develop a shared vision of the sort of future they want. Once that is in place, the necessity to agree on important matters, and to treat each other with civility become seen as obvious preconditions for the desired outcome.

The other theme running throughout the guide is the focus on putting the welfare of the children first. This is a positive approach to take, of itself, since children are the most vulnerable people affected by separation. Yet it is also positive since this way of thinking prompts parents to take a more collaborative approach. Parents will want the best for their children. Being reminded that a positive and collaborative approach will achieve a better outcome for their children can therefore prompt them to become more motivated to find agreement and reduce conflict – for the kids' sake.

While the guide is specifically aimed at separating parents, it contains a wealth of wisdom for lawyers and other professionals involved in advising separating parents. Above all, the guide helps to underline the principle that all those involved in advising parents on separation and divorce should emphasise the importance of resolving differences amicably, while helping parents to fully consider the impact of their decisions on their children.

12/01/2022

Financial Remedy Update, January 2022

Stephanie Hawthorn and **Abigail Pearse**, associates, and **Rob Jackson**, trainee solicitor, at **Mills & Reeve LLP** consider the most important news and case law relating to financial remedies and divorce during December 2021.

Case Law Update

Her Royal Highness Haya Bint Al Hussein v His Highness Mohammed Bin Rashid Al Maktoum [2021] EWFC 94

This case, widely discussed in the press, involved various applications by Her Royal Highness Haya Bint Al Hussein ("HRH") against His Highness Mohammed Bin Rashid Al Maktoum ("HH"), the Vice President and Prime Minister of the United Arab Emirates, the Minister of Defence and the Ruler of the Emirate of Dubai.

In short, there were 3 applications before the Court (although only the first two were actively pursued):

- Application under Schedule 1 of the Children Act 1989 in respect of financial provision for the couple's 2 children.
- Application pursuant to Part III of the Matrimonial and Family proceedings Act 1984 for financial provision following an overseas divorce- limited in scope to costs of security for herself and her children.
- Application pursuant to the Married Women's Property Act 1882 for declarations as to the ownership of jewellery, horses, etc. This application was seeking financial recompense for the loss of these items, rather than the items themselves.

The parties married in 2004 and had two children, aged 13 and 9 at the time the applications were heard.

The parties divorced under Sharia law in 2019 and the marriage breakdown was acrimonious. Following separation, HRH travelled to England with the children and was living in her home near Kensington Palace, purchased for £87,500,000. It was found that HRH and the children would be habitually resident in England.

A previous fact-finding hearing had taken place, where several serious findings were made against HH, including regarding the abduction of two of his other children.

HRH had received no financial support for the children following the parties' separation and was utilising her own resources (aside from a £1 million sum paid by HH for the children's education). There were however claims that HRH had withdrawn significant sums from accounts in the names of the children on her return to England and HH considered some of the money to have been used inappropriately. HRH accepted that she owed money to the children, but she denied any misuse of the funds.

The President of the Family Division heard an application for security for costs and dispensed with the need for financial disclosure, given HH accepted his wealth was sufficient to meet any reasonable order. An interim order of £439,000 per month was made, which was subsequently increased to £470,000 per month.

A further order for legal services funding of £2 million was later made by Mr Justice Moor, who heard the financial applications, together with an order that HH pay education and medical costs. An application by HRH for security for costs and for disclosure was adjourned.

A significant feature of HRH's budget was the cost of security for herself, and the children and various budgets and counter-budgets were drawn up by the parties, covering current costs and future costs. The President had previously noted the exceptional feature of the case to be that it was HH who posed the main risk, and it was he who was challenging the quantum.

Mr Justice Moor had previously ordered HH to put in place a bank guarantee in the sum of £95 million, failing which he would be ordered to provide a schedule of all his assets valued at £15 million or over anywhere in the world in which he had a chargeable interest. A further £1 million was ordered relating to HRH's legal costs, with provision made for all her future costs to be met in full.

Following the initial PTR there were allegations that the phones of HRH and her team were hacked and reasonable evidence of the same was found by the President at a further fact-finding hearing. Additional money to be spent on security was found to be reasonable and the interim award was increased to £596,833 per month, together with an additional sum to meet urgent capital expenditure. HRH's legal services funding was increased to £1.4 million per month by consent.

Further awards were subsequently made in relation to interim provision (including £900,000 to fund two armoured vehicles), given delays in the mater as the hacking judgment was awaited. However, HRH's application for financial disclosure from HH was dismissed, together with an application for increased security provision.

The final hacking judgment was delivered on 5 May 2021, finding that on the civil standard of proof all six phones were infiltrated by Pegasus software (from the Israeli based group, NSO). HH was the probable originator of the hacking, with it being found that no other person came close as a likely perpetrator.

It was also determined that HH did not have immunity from civil jurisdiction in relation to HRH's claim pursuant to Part III and the inherent jurisdiction of the High Court. Permission to appeal was refused.

At a further interim hearing, Mr Just Moor found that HRH could make an application under Part III, on the grounds that she had a more than sufficient connection with the country and no conditions were imposed on the grant of leave.

At a final Pre-Trial Review, conditions were placed on the cross-examination of HRH as she was declared to be a vulnerable witness and a further legal services funding order was made by consent in the sum of £1,133,333 per month for October, November and December 2021.

Parties' Positions

HRH's position was that she wished for payments for the children's security to last throughout their lives and wished for capitalisation of a fund in respect of this (together with further capitalised lump sums in respect of all maintenance claims and for her items not returned). Indeed, she did not feel that HH, as the payer, could be the ultimate employer of her security operatives, which would be the case if periodical payments were ordered.

For her general expenditure, she was being forced to liquidate assets and wished for various items to be returned to her (albeit she sought a declaration regarding horses that there was a common understanding that they were hers, with an order of £75 million sought for compensation).

She sought to also remind the Court of the hacking judgment, and she said that the psychological impact on her of this situation had been "overwhelming". The ultimate amount sought in her open proposal was more than £1,000,000,000.

HH's position was that he had no hacked material in his possession - albeit the finding of fact to the contrary. He continued to be concerned by HRH withdrawing funds from the children's accounts. He sought there to be a secured periodical payments order, due to HRH's misuse of funds (including, some payments made to blackmailers and to her brother).

HH did not accept that clothing was to be returned to HRH and said he knew nothing about her jewellery. He accepted that he would send various items back to the UK but made the point that HRH's valuations were arbitrary. He disputed the ownership of the horses.

HH ultimately felt that HRH's claim for capitalisation was a disguised claim for herself, under the guise of a claim for the children.

Held

The court had jurisdiction to make an order under Part III and it was appropriate for it to do so - HRH and the children were based in England, she could not make a claim in Dubai, and she was not making substantive applications for herself (aside from her security costs, in relation to her chattels and in relation to legal fees).

The opulent standard of living of the parties was considered and HRH's budget was scrutinised.

Mr Justice Moor recognised that the court could permit a personal allowance for a caring parent in assessing the quantum of periodical payment orders, although normal convention is that these are not capitalised.

Also, under Part III, when a court decides to exercise its powers, the overwhelming weight of authority is against capitalising payments, although there is jurisdiction to do so.

Mr Justice Moor accepted that HRH and the children required "water-tight security to ensure their continued safety and security in this country". It was noted that the magnetic feature of the matter was that it is the payer himself who is the main threat, thus it would be "intolerable" for HRH to be dependent on ongoing provision. She was entitled to know her security budget is written in stone.

It was found that there is a risk to the children, almost which was certain to persist until they attain independence (as they may reconcile with their father) and risk to HRH for the remainder of her life. Therefore, the security budget was capitalised for HRH and the children until they reached independence, with a continuing order for periodical payments in place that will not terminate on their attaining their majority or completing their education, which could thus be terminated should circumstances change.

Mr Justice Moor did not consider, on the evidence, that HRH's conduct was such that it would be inequitable to disregard.

Mr Justice Moor determined that the children's general maintenance however should not be capitalised. HH should have a continuing financial responsibility for his children and the court was satisfied he would make any payments ordered. An irrevocable bank guarantee from HSBC would cover any concerns about payment.

Thus, the award was structured as follows (per page 42 of the judgment):

- A capitalised payment to HRH to cover her security needs for herself for life and for the children during their dependency, to include during tertiary education.
- A lump sum to compensate HRH for the chattels she lost because of the ending of the marriage and to deal with other aspects, such as the costs of the litigation.
- A secured periodical payments order to cover the general maintenance of the children to the completion of their tertiary education and to continue thereafter to cover their security needs as adults, irrespective of the death of HH, secured by bank guarantee from HSBC, backdated, at least in part, to the date of the Schedule 1 application.
- An education fund in the sum of £3.04 million, administered by independent accountants.

It was considered unnecessary to make an award to cover future legal fees, as provision was being made for security. Any further litigation costs could be met using legal services funding orders.

Austin v Haynes [2021] EWCA Civ 1919

Background

Following their separation, Mother ("M") applied for financial provision under Schedule 1 of the Children Act 1989. A consent order was made requiring Father ("F") to make a housing fund of £2.75m available to M and their children to purchase a new home, together with payment of a lump sum of £200,000, and payments to fund outgoings and a nanny.

F failed to provide this housing fund, and thus enforcement proceedings were commenced using a Form D11 (general application notice), as opposed to using a D50K (notice of application for enforcement).

A passport notice was made in May 2021, at which point F had failed to pay the lump sums totalling £100,000, was in arrears of maintenance and had not paid some of the costs ordered. His passport was later released to him, but he failed to re-lodge it with M's solicitors.

In July 2021, HHJ Oliver made an interim charging order against F's interest in the property, for the £2.75m housing fund, together with £203,000 in costs.

The original order was varied to give F a deadline by which to make the housing fund available (as no compliance date was previously given). A further passport order was made, and HHJ Oliver deemed M's application to be made in form D50K.

F appealed.

Grounds of appeal

The grounds of appeal were set out by Moylan LJ as follows:

- **Procedural Impropriety:** That the Judge had discussed the matter with M's barrister, failing to inform F's representative, who only became aware of such discussions on the day of the hearing. The Judge was also wrong to deem the application made on D50K.
- **Right to a fair hearing:** The Judge had been wrong to make orders on M's application without notice to F and without F being able to file evidence in response.
- **Charing Order:** An interim charging order should not have been made without a properly constituted application and it was wrong to find that F had an interest in the property.
- **Variation:** The Judge was wrong to vary the order without notice to F and without permitting evidence in response.
- **Passport Seizure Order:** The Judge was wrong to make a passport order, when the mischief for which the order was originally sought had expired and failed to give adequate reasons for the order.

Judgment

It was held that ultimately the Judge had adequately explained the reasons for making his order. They were not complex orders, indeed the housing fund was given a specific date for compliance because without this it would not be enforceable.

The ex-parte discussions were held to have lasted for no longer than 2 minutes and M's counsel duly informed F's counsel of what had been said. Any concerns of procedural impropriety were not raised at the hearing in July – thus the ground was totally without merit. so Moylan LJ stressed the importance of ensuring accuracy of matters asserted in documents provided to court

Regarding the use of a D11, as opposed to a D50K, the Judge was plainly entitled to remedy the error under the Family Procedure Rules, if it was an error at all. Again, the point was without merit.

It was not correct to say that F had not had the opportunity to file evidence. The only order made regarding M's application was regarding the interim charging order and F should have realised the Judge might well make such an order (as it was F who had been arguing that M's application for judgment summons should be dismissed, on which he was successful). The issue of enforcement was "squarely before the court" and "the parties would have had to be ready to deal with any matter relevant to enforcement whether that was being sought by means of a judgment summons or by means of a general application for enforcement."

With regards to the charging order being made without notice, and thus impacting F's right to a fair hearing, Moylan LJ found that the Judge was plainly entitled to make an interim charging order on the basis it was treated as being made without notice to F (per Rule 40 of the FPR). The order states that F "has a beneficial interest," but that this point would fall to be considered at a further hearing in respect of the charging order itself.

A general application for enforcement was before the court, and so it could not be said that there was not a properly constituted application.

F had argued that the interim charging order should not have included amounts that fell due after the date of the application. Moylan LJ again found no merit in F's submission – there is no FPR provision limiting the specific enforcement order to the amount(s) due at the date of the application under Rule 33. Moylan LJ described as comparison how maintenance arrears often continue to accrue after the date of an enforcement application and there is no bar to the court including these sums in an order.

Moylan LJ also rejected the argument raised during the proceedings suggesting that a court can only order a settlement of property over a property that already exists. This went in the face of established case law. Moylan LJ clarified that the power in Schedule 1 of the Children Act allows settlement "of property", not "a property". Money is property. The court therefore had power to view the 'housing fund' as a lump sum order or a settlement of property order.

Counsel for F sought to raise the point that there was no power to vary the order, as the provision of the housing fund was contained in recitals rather than the body of the order itself. This was dismissed - Moylan LJ clarified that it is accepted law that provisions in a financial order, expressed as undertakings or agreed provisions in recitals can be enforced as orders (provided the court has power to order the provision concerned).

Finally, regarding the passport order, the judge made the order to ensure F's presence in the jurisdiction on the date of the hearing to deal with the interim charging order. As Moylan LJ said, "this was not a mischief which had expired." The Judge was entitled to conclude that the interests of justice required a further passport order.

F's appeal was duly dismissed.

***S v S* [2021] EWFC B71**

Facts

Husband and Wife married in 1973 and had three children together, all now adults. They separated in 2018 and Husband left the family home.

In 1980, the Husband had commenced a relationship with another woman ("Miss K") and had a further 2 children, also now adults. He kept his other family a secret from Wife until 2004, although they continued to live together for a further 14 years prior to separation. When the Husband left the family home, he moved in with Miss K.

The parties adopted traditional roles during their marriage and the Husband was successful in his business affairs for a period, prior to his limited company being placed in voluntary liquidation in 2011. He also ran a property portfolio.

Husband had set up a partnership with Miss K, and the value of the partnership was introduced into another limited company (held in a director's loan account for Husband and Miss K), with Husband becoming a shareholder and director. Conflicting evidence was given by Husband as to his involvement in this business.

Various arguments were made regarding the valuation of assets, the contents of a safe, and evidence was also given regarding who lived at the family home.

Several allegations (totalling 33) were made by the Wife against the Husband concerning financial misconduct, none of which were made out. There were also arguments about the legitimacy of Husband's debts and Husband's income position.

Held

Husband's debts were found to be genuine, and it was found that there was "considerable potential" for Husband to make a profit on his property portfolio (should he choose to retain it) and potentially to be paid out of the limited company if he were to make a valuable contribution to the business.

HHJ Booth ultimately made a decision regarding the distribution of the assets between the parties, allowing Wife the opportunity to remain in the family home (albeit noting she would have to sell if the cost of running it proved beyond her). Husband retained the rental properties, which he could sell to re-house himself or the Judge noted he "had the business acumen to run them at a profit".

In order to reach a roughly equal outcome, it was ordered that the Husband was to pay the Wife a lump sum of £125,000.

Important to this case is that Husband and Wife had spent over £600,000 between them on their divorce, fighting over the financial consequences of it and on an injunction application regarding Husband leaving the family home. This was stated to be a "tragedy" by HHJ Booth. Without spending this money, they would both have been in a "significantly better financial position."

Criticism was levelled at both parties for the conduct of the litigation, including Wife making all her allegations without evidence (based on her mistrust of the Husband) and Husband telling different people different things.
HHJ concluded: "neither party has won... both have lost substantially by getting themselves into debt through their legal fees." No order for costs was made as "both are to blame for the scale of the costs incurred and each must take the consequences."

HH v Secretary of State for Work and Pensions and ASP (CSM) (Child support - calculation of income) [2021] UKUT 280 (AAC)

Facts

The case concerned a Father's appeal against the amount of child maintenance payable in respect of his daughter to the Mother (the resident parent).

The Father has been notified that he was to pay £147.70 per week from 1 October 2017 ("the effective date"). This was based on information from HMRC relating to the 2015/2016 tax year, showing his income as £135,849 - historic income.

However, the Father's income on the effective date was significantly lower than that in the 2015/2016 tax year, as he had resigned his position and pursued his own management consultancy business via a limited company.

As the difference was greater than 25%, the amount was re-calculated to £9.50 per week from the effective date. The Mother appealed, alleging non-disclosure of income and that his newly disclosed income (£8,163.96 per annum) was inconsistent with his lifestyle.

That appeal was allowed, with it being held that the Father's gross income should be regarded as £30,603 per annum, with a variation made on the grounds of diversion of income, so that a further £51,413 of income would be taken into account.

The figure of £30,603 was on the grounds that the tax return for 2016/2017 showed income from his former employer of £22,542.74 and a director's salary of £8059.95.

The Father appealed.

Held

The appeal was successful and the case was remitted back to the First Tier Tribunal.

As noted in the judgment, the Child Support Maintenance Calculation Regulations 2012, S.I. 2012/2677 ("the 2012 Regulations") indicate that the gross weekly income of a non-resident parent may be determined by looking at either historic or current income.

It was correct for the calculation to be on the basis of his current income, under regulations 37 to 42 of the 2012 Regulations. These make reference to current income "as an employee or office holder" but do not include express provision about the period to be considered, albeit Regulation 37(1) references "a weekly amount at the effective date". This was held to suggest that the starting point as far as employment income is concerned, is the employment or office the non-resident parent was in on that date. This would suggest that only the Father's director's salary could be considered as employment income.

Regulation 39 also supported the view that the rationale of the 2012 Regulations "is that current income is income from sources which are ongoing at the effective date."

There was thus no basis for considering income that a non-resident parent has received for employment that ended in the previous tax year and the matter was remitted back to the First Tier Tribunal.

LS v PS [2021] EWHC 3508 (Fam)

Facts

Q, a litigation funder, who was an intervenor in ongoing financial remedy proceedings, applied to set aside a consent order that had been made. The wife took out a litigation loan from Q to fund her legal expenses during the proceedings, creating a significant debt in the context of the parties' assets, which stood at nearly £1 million (including interest that had accrued) at the time of Q's application. Q possessed some privileged material (including without prejudice offers generated for a private FDR).

The parties' marriage broke down in 2016. Following a four-day final hearing, at which the wife was legally represented, the wife was awarded £3 million on the basis of 'her future needs' - to meet both her future housing and income needs, and any other liabilities that had been accrued. The husband's resources were assessed as £9 million.

The husband indicated his intention to appeal the award. There were also ongoing Children Act 1989 proceedings, in which a live with order was made in the husband's favour. In December 2018, the wife approached Q for funding. The wife conceded to the husband's appeal going ahead and the matter returned to court for new disclosure. At this stage, the wife had three separate loan agreements with Q (for a total of £630,000 debt). The parties' reached an agreement at a private FDR in February 2021, a sealed consent order was provided in March 2021. The wife was initially represented at the private FDR, funded by the husband as she had maximised the funding provided by Q, but she became a litigant in person at a later stage due to a conflict of interest arising amongst her legal team.

Q then issued a set aside application for the consent order and the hearing of this application is to take place in March 2022. Q argued that the settlement arrived at was structured deliberately to leave the wife with insufficient assets / no entitlement to sufficient property or liquid funds to repay the debt owed to Q.

In summary, the settlement arrived at, as recorded in the consent order, was as follows:

- The family home (worth approximately £1.8 million) was to be transferred into the husband's name;
- Via a life interest trust, the husband was to provide the wife with £1 million, to allow wife to rehouse and remain living in the property for the remainder of her life, irrespective of whether she cohabited or remarried another;
- The wife's maintenance claims were to be dismissed; and
- The husband agreed not to pursue child maintenance from the wife.

The wife, who earnt approximately £30,000 per annum, did not have the financial means to repay her debt to Q under the proposed settlement, which she informed the company after the FDR.

Q immediately contacted the husband's legal team and the court making clear that it wished to be joined to the proceedings. Q informed the wife that the settlement put her in breach of her loan agreement. On that same day, the husband's legal team sent the draft consent order to the s.9 judge allocated to the case via his chambers. The judge was not told that Q objected to the order, nor was Q told that the judge had been sent the draft. Also, the D81 sent to the judge wrongly recorded the wife's income as £31,000 per month, as opposed to per year, and it did not disclose the husband's trust interests. The D81 therefore wrongly painted a joint net asset base of approximately £590,000, with liquid assets of approximately £412,000.

Q's joinder application was granted on the same day (18 February 2021). Correspondence between Q and the husband's team continued, but Q was still not told about the informal request made of the judge to approve the consent order. The judge emailed his clerk on 2 March 2021 to confirm the draft order could be approved as signed. The order then made its way back to the Family Office in the RCJ. Q made a further application that the order should not be granted until it had the chance to make representations to the court. However, the consent order was approved and then sealed on 16 March 2021. However, on 17 March 2021, a temporary stay was imposed on the consent order and Q was provided with the correspondence with the judge's chambers and the husband's legal team. A freezing injunction was also ordered to prevent the parties' from dealing with the former family home and their other property in Israel.

Q alleged that the omission of not telling the judge about its joinder application and dispute to the draft order was deliberate and a failure of the ongoing duty of disclosure that both parties' owed to Q (in its capacity as an existing party in the proceedings). Q felt that its case had been effectively bypassed given it was a legitimate creditor and that the wife had no clear way to satisfy her debt. Q argued that it suffered fraud as a creditor and as a result the consent order should not have been approved without Q being heard on the issue first.

Q already had access to a selection of financial disclosure that was generated during the financial remedy proceedings, as well as some of the privileged material that was generated for the purposes of the private FDR.

The present application was based on Q's request to use the confidential material in the set aside proceedings to help prove its case for relief contrary to ss 423 to 425 Insolvency Act 1986. The husband sought to rely on the without prejudice privilege that attached to all FDR hearings.

Held

Mrs Justice Roberts ruled that the privileged material will remain subject to the FDR privilege, as mandated by para 6.2 of PD9A. She concluded that the court would have ample evidence as it already had a wealth of material available to it, without the privileged material, to form a view as to whether the order should be set aside. When deciding whether to go against FDR privilege, the court have to balance crucial competing policy considerations.

The judge agreed (even though it was not an issue in the proceedings) that the joinder of the litigation funder was appropriate.

As the use of litigation funders, as well as private FDR's, grow in popularity, it is to be seen whether cases such as this will occur more and more. In a footnote, the judge also hinted that the rules themselves might require another look, saying that "given the important of litigation funding to the system, the Family Procedure Rules Committee may wish to consider whether the potential issues raised by this case require some reconsideration of the 'absolute bar' in the interpretation of para 6.2 of PD9A."

DN v UD [2021] EWCA Civ 1947

Facts

The parties' relationship commenced in 1996 and ended in approximately 2017/2018. The parties had three children (ages 22, 19 and 14, referred to in the judgment as DD, TD and GD respectively). The father also had three children from a previous relationship, SD (aged 33) and ED (aged 20).

The mother and three children moved from Russia to the UK in 2010. They lived in the FMH, valued at approximately £10 million. The father made plans for DD's financial future, giving him £607,000 to purchase a property in London.

The mother issued Schedule 1 proceedings in 2018 (at this stage the children were age 20, 17 and 12). Amongst other things, the order required the father to settle the London family home and its contents in a trust for the benefit of TD and GD (who were aged 19 and 14 by this point). The trust commenced upon establishment of the trust and ended on the first to occur of various events, including GD turning 18, or 6 months after GD completed full-time tertiary education. The father was granted leave to appeal in relation to this settlement of property order that was made in favour of TD and GD.

The issues before the court in this appeal were as follows:

- Ground (1) - whether the court had the power to make an order, on an application by a parent, under Schedule 1, in a case where the child, the subject of the application, had turned 18 between the date of the application and the date of the proposed order;

- Ground (2) –whether the court had the power to make a property transfer order, or a lump sum order, to or for the benefit of a person who would be aged over 18 when it took effect or when it would be paid; and

- Ground (3) – whether the judge, in the circumstances of the case, had been wrong to make an order providing the children a deferred, absolute interest in the family home (when the children would be adults upon receipt of such capital provision).

Held

In relation to the first ground of appeal, in considering the novel point raised, the Court of Appeal confirmed that the court had power to make orders under Schedule 1 to or for the benefit of a relevant child over the age of 18, if the application was issued before that child attained the age of 18. To reiterate, the court has jurisdiction to make Schedule 1 orders if the child is under 18 at the date of the application. There is nothing in the statutory scheme to indicate that the financial provision must stop when the child is 18.

Moylan LJ commented that it would be very surprising if the court did not have the jurisdiction to make an order providing capital provision that provided a benefit to or for a child when they were an adult where there were special circumstances justifying it, such as a disability.

It was made clear that the order made by the judge was a settlement of property order, and not as suggested by the husband, a transfer of property order. The order took effect when it was made, even if the children's interest in the family home would only realise at the end of the trust period.

An interesting point made was that such a decision was consistent with the purpose of the statutory scheme to remove the distinction between the rights available to children of married parents and those available to children of unmarried parents (as per Hale J in *J v C*).

Finally, the third ground of appeal directly challenged the judge's decision made at first instance. Financial provision ordered in favour of an adult child who is not in education or special training is limited to special or exceptional circumstances which create a financial need. In this case, it was held that there were no special or exceptional circumstances that would justify the decision made in favour of TD and GD. The trial judge noted concern that the father would not provide equal financial support for the younger children that had been made for the oldest child as a form of exerting control and manipulating them, this was based on general observations made as to the long-term effects on the children of the previous abuse by their father over them in the family home. It was held in the Court of Appeal that this 'vulnerability' to manipulation that the father might have sought to exert over the adult children was insufficient to show financial need and did not fall within the scope of special or exceptional circumstances justifying the capital award made. There was also no evidence to confirm the children would be at risk of control or manipulation from their father.

On this basis, given the circumstances of the case, the capital provision made for the benefit of TD and GD was not justified and therefore had to be set aside

L v L [2021] 10 WLUK 588

Facts

This case concerned whether the husband (aged 52), referred to as Mr L in the judgment, should be able to retain greater wealth than the wife, referred to as Mrs L (aged 45), on the basis that the commercial property business, established in 1963 by the husband's father, which generated the family's wealth, was acquired by the husband from his father before the parties had even met. The husband became a director of the business in 1994, acquiring a 38.94% shareholding. A trust was established by the husband's father in 1997 that appointed further shares to the husband.

The parties have three children: twins (aged 18), one of whom has a disability, and an 11 year old. They began cohabiting in 2000, married in 2002 and separated in 2019. The family home, where the wife continues to live, has equity of £3.5 million. The husband borrowed (and would need to subsequently repay) £2.7 million from the business to buy a home for himself.

The business, valued at £49 million net, generated an annual net profit of £3.2 million. In 2016, prior to the parties' separation, the shareholdings were restructured to mitigate inheritance tax and provide financial security for the children. The new arrangements took effect in 2018. The value of the business was frozen in 2018 and at this stage the husband held 57% of the voting shares. A company was created to hold shares equally for the parties (with each party's shares valued at £11.93 million each). The balance of the ownership was transferred to vehicles to hold on behalf of the children. The parties retained a fixed interest in the business. The balance and any profit or growth generated after 2018 belonged to the children. Instead of drawing a salary from the business, which continued to rely on his skill, the husband took dividends to fund the family's outgoings. Any dividend on the parties' shares diminished the value of their fund totalling £23 million.

The wife had no 'effective' earning capacity and had responsibilities towards the youngest child for many years to come. Comparatively the husband could draw a seven-figure salary from the business if he decided to pay himself a salary.

In 2000, the husband's shareholding was valued at £3.3 million. However, on the facts of this case, the restructure was critical, and the wife had no proper understanding of what was done, though she likely understood why it was done in terms of preserving wealth for their children. The parties retained a fixed amount of wealth and had given away the dynamic part of the business. For computation purposes, any deduction representing the value of the business in 2000 should fall on the children's share consistent with the dynastic nature of arrangements and the children having the benefit of the husband's father's contribution reflected in the dynamic part of the business.

The wife wished to sever all ties with the business, and this was possible as the company was able to buy back her shares.

Held

His Honour Judge Booth ordered an equal division of the parties' wealth (made up in their respective homes and shareholdings) on the basis that on the facts, an unequal division would create an unfair outcome. This outcome is unusual given the husband's pre-marital contributions to the business. The restructuring of the family business was crucial in considering computation of wealth. The business dynamics were relevant to the process of distribution of assets in these proceedings.

HHJ Booth noted that the husband could have fixed the ownership of the parties' wealth other than in equal shares during the restructuring process, but he did not do so, and the wife agreed to this approach. The fair outcome therefore was to allow both parties to retain their equal shares of that wealth as they embarked on 'independent living.' The holding company would be able to purchase the wife's shares in the business to achieve a clean break between the parties.

It was held that it was appropriate for the husband to vote himself dividends to repay the debt incurred in purchasing his house using business funds. It was noted that such a method (borrowing from the business and repaying via dividends) was utilised by the husband during the marriage to finance the parties' lifestyle. An equal division of what is then left is the fairest outcome in this case.

Finally, the husband prevented the wife from using joint funds to discharge her litigation costs. This could be deemed to be litigation misconduct as arguably it was for the wife to decide how she chose to spend her share of the joint funds. This meant that the wife had to take out a litigation loan, which carried a high interest rate, to fund her legal fees. HHJ Booth ordered that the wife was entitled to be put back into the position she would have been in had she not had to borrow via a litigation loan.

Santi v Santi [2021] EWHC 388 (QB)

Facts

The parties, who were husband and wife, were engaged in ongoing divorce proceedings. The husband commenced proceedings in the Queen's Bench Division in relation to the alleged misuse by the wife of the husband's confidential information seeking:

- an order to prevent the wife from disclosing information that she had allegedly obtained from the husband in breach of confidence and privacy;
- an order that the wife provided copies of the husband's documents and information that she had allegedly obtained;
- a witness statement setting out exactly what information the wife had obtained, and how and to whom any of the information had been distributed; and
- a forensic imaging order in relation to the wife's computers and devices.

The court did not take the view that there was clear enough justification to grant a forensic imaging order against the wife given the intrusive nature of such orders. The imposition of a forensic imaging order needs to be necessary and proportionate. The application was ultimately dealt with by the wife providing an undertaking that she would: (i) retain intact and not dispose of any of the relevant devices identified, (ii) not disclose or publish any of the husband's private and confidential information, and (iii) to provide any hard copy documents that she had obtained in breach of the husband's confidence and privacy. Costs for the application were reserved until the return date for the interim injunction application.

It was agreed between the parties that these ongoing proceedings ought to be transferred to the Family Division so that the issues at hand could be considered and dealt with as part of the family proceedings.

Nicklin J was tasked with resolving the issue of costs of the interim injunction application.

Parties' positions

On behalf of the husband, it was argued that costs should follow the event and given the husband largely succeeded in obtaining the relief sought, the husband sought an order that the wife was to pay the costs of the interim injunction. An argument was also advanced by the husband's counsel that the application could have been avoided had the wife followed the guidance set out in ***Tchenguiz v Imerman*** **[2011] Fam 116** – the case which sets out the procedure to be followed in matrimonial proceedings where a party obtains confidential documents belonging to their spouse.

On behalf of the wife, it was argued that costs should be reserved to be determined at the end of the matrimonial proceedings on the basis that it is usual that where an interim injunction is granted, the court normally reserves the costs of the application until the substantive issue in the proceedings is dealt with (as per ***Digby v Melford Capital Partners (Holdings) LLP*** **[2020] EWCA Civ 1647**).

The wife's position was argued on the basis that the husband relied on evidence at the initial hearing that was not correct, arguably making the proceedings entirely unnecessary. It was argued that a spouse accessing confidential material is understandable, albeit unlawful, and therefore the wife's culpability was on the lower end of the scale. The argument was also advanced that the wife could not afford to pay the costs being sought.

Held

Nicklin J commented that a person who has credible grounds to believe that another person, including their spouse, has obtained confidential or private information about them, should be entitled to seek the relief of a Court, even if the issues arise in the context of a matrimonial dispute.

Nicklin J rejected the wife's position that the costs of the husband's application should be dealt with by the Family Division in this case and departed from the usual order of reserving the costs. Given the husband was largely successful in his injunction application (as he obtained undertakings from the wife that were not offered before the hearing), Nicklin J held that the husband was entitled to initiate the proceedings and such a step was justified, irrespective of the fact that the remaining issues were to be dealt with in the Family Division. The wife was ordered to pay 60% of the husband's costs of the injunction application. The judge made clear that the wife's inability to pay the sum ordered did not affect the making of such an order, though it may impact upon the required timing of payment (e.g., whether it should be immediate, on account of costs or over an extended period).

News Update

Electronic Court Bundles

New guidance has been given regarding electronic court bundles, designed to ensure a consistent approach among practitioners, to assist the Court.

Key guidance includes:

- Bundles must be in PDF format
- Numbering should not be done by hand
- No pages should be upside down
- The PDF should be bookmarked and indexed, with the index being hyperlinked
- All typed text should be searchable via optical character recognition
- Resolution should not be greater than 300 dpi
- If further pages are to be inserted after the bundle has been sent to the judge, the pages should be added and paginated for the end of the bundle.

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

Remote Hearing Evaluation

On 10 December 2021, HMCTS published *Evaluation of remote hearings during the COVID-19 pandemic*, which assessed the characteristics, experiences and perceptions of court and tribunal users during the pandemic. Underpinning the evaluations were over 8,000 survey responses and 180 interviews.

The Evaluation concluded that, overall, across all jurisdictions and key demographic groups, public users who attended hearings remotely had an equal or better experience with their hearing than those who attended in-person. Judges and other professionals commented that:

- More complex cases and those with potentially life altering outcomes, including custodial sentences and child custody decisions, were less suited to remote hearings.
- Remote hearings worked less well for public users who require an interpreter, and hearings involving users in custody.
- Across remote and in-person court users, a similar proportion felt they received a fair hearing, had confidence in how the court or tribunal handled their case and agreed their case was given an appropriate amount of care and attention.

Other key points to emerge from the Evaluation were:

- Factors influencing the decision to hold a remote hearing included the perceived vulnerability of parties, the likely hearing length and complexity, the severity of the case, the potential seriousness of the outcome, the stated preference of public users and health considerations (pages 38-39).
- The lack of informal out of court conversations with the other party's representative limited lawyers' scope to resolve issues before the hearing (page 16).
- Cloud Video Platform was the most commonly used video platform (pages 30-31). Inconsistent quality of technology and loss of connection were common themes. Challenges with e-bundles were raised (see pages 31-32). Judges and lawyers were more satisfied with training and guidance on the use of video platforms than HMCTS staff (pages 33-37).
- Around half of all respondents said that the stress of remote hearings had had an impact on their health (pages 62-64).

- 78% of lawyers preferred to work from home during the pandemic and 59% said that they would still prefer to do so post-pandemic (pages 28-29).

- Areas for development and improvement were identified (81-83).

Courts to carry on through pandemic

On 9 December 2021, the Judiciary published a message from Lord Burnett of Maldon, the Lord Chief Justice, and Sir Keith Lindblom, the Senior President of Tribunals, following the Prime Minister's announcement on 8 December 2021 that England will move to Plan B of the COVID-19 Response: Autumn and Winter Plan 2021 (Plan B) in response to the Omicron variant.

The message confirmed that "*the work of courts and tribunals will continue as it has done over the course of the pandemic*". The measures being introduced under Plan B mean that hearings should continue to take place in person alongside effective use of video hearings and remote attendance, where that is in the interests of justice.

The LCJ and the Senior President of Tribunals said that "*[t]he coming weeks will bring their difficulties across all jurisdictions both professionally and personally but we have been there before and are equipped to cope*". They are grateful for the efforts of judges, tribunal members, magistrates, the legal profession, HMCTS and Judicial Office staff, and all involved in the justice system over the last two years in support of the administration of justice and sure that this will continue.

Financial Remedy Court Organogram: November 2021

An updated diagram showing the Financial Remedy Court structure can be found by **clicking here** .

Outdoor Weddings and Civil Partnerships

From July 2021, couples have been able to have their civil marriage and civil partnership proceedings outside, in the grounds of buildings such as stately homes and hotels which are approved or become approved for civil ceremonies. This was, as noted by the government, allowed during the Covid-19 pandemic to give couples more choice and to support the wedding and civil partnership sector. The statutory instrument has effect only until 5 April 2022.

A consultation is now underway seeking views to continue this indefinitely and to permit outdoor religious marriage in the grounds of places of worship.

19/01/2022

Blood alcohol testing: how PEth is leading the way

Harriet Challenger, Laboratory Manager (Toxicology) at AlphaBiolabs, breaks down what you need to know about Phosphatidylethanol (PEth) testing and how this – combined with EtG and EtPa hair testing – can give the most conclusive insight into an individual's drinking behaviour.

Blood alcohol testing is one of the most effective ways to measure chronic and excessive alcohol consumption. But there's one test that stands head and shoulders above the rest.

In courts across the UK, blood alcohol testing is an essential part of the evidential picture, providing an insight into an individual's alcohol consumption.

In family cases where the safeguarding of children and vulnerable people is paramount, such tests provide a rich source of information, enabling family law professionals to act on urgent welfare needs.

But when it comes to blood alcohol tests, not all are created equal, with Phosphatidylethanol (PEth) testing providing the most conclusive insight into a person's drinking patterns.

PEth alcohol testing – what makes it so conclusive?

There are four main types of blood alcohol testing that family law professionals should be aware of, all of which can provide a four-week historic overview of alcohol use:

- Phosphatidylethanol (PEth) – a direct biomarker of alcohol, which we will examine in more depth here
- Carbohydrate Deficient Transferrin (CDT)
- Liver Function Test (LFT)
- Mean Corpuscular Volume (MCV)

Unlike CDT, LFT and MCV – all of which are indirect biomarkers of alcohol and whose presence can be affected by pre-existing medical conditions and medications, among other factors – PEth is a direct biomarker of alcohol.

This means that it is only present in the body when alcohol has been consumed. An abnormal phospholipid, it requires ethanol for its production.

PEth production begins as soon as ethanol is consumed and accumulates in the blood with frequent alcohol consumption, giving it a high specificity (48-89 per cent) and sensitivity (88-100 per cent).

Drinking experiments show that PEth can be detected in blood after one to two hours, and for up to 12 days after a single drinking episode. In addition, daily alcohol consumption of more than 60g of ethanol (7.5 units) can clearly be distinguished from lower alcohol consumption. As such, PEth testing can detect chronic and single-drinking episodes.

The wealth of information provided by a PEth test, alongside its conclusiveness, is what makes it the most essential of all blood alcohol tests, enabling us to monitor abstinence, drinking behaviour, or identify relapse – a factor that is especially important when working with families and children affected by alcohol abuse.

PEth analysis is also the only blood alcohol test that can be undertaken during pregnancy or within two months of the birth.

In fact, recognition of the value of PEth testing is on the rise, with sales of such tests having more than doubled year-on-year among the legal profession (*AlphaBiolabs sales data*, 2020-21).

PEth testing vs hair alcohol testing

PEth is second only to the detection of ethyl glucuronide (EtG) and ethyl palmitate (EtPa): a fatty acid ethyl ester (FAEE) in the hair.

Both EtG and EtPa are direct biomarkers of alcohol and give us a highly accurate insight into patterns of drinking, with a three- or six-month overview of usage. Each is absorbed into the hair via different routes, and their levels can assist in assessing excessive alcohol consumption.

EtG is water soluble, produced in the liver and can be impacted by various hair treatments including excessive washing. EtPa is formed in the sebaceous glands from ethanol diffusing from the blood circulation and then deposited into hair primarily from sebum (from the oil glands on the scalp). EtPa (FAEEs) are lipophilic so while not water soluble, its presence can be affected using alcohol-containing hair products such as sprays, gels, and wax.

Because of their respective strengths and weaknesses, both EtG and EtPA tests should be performed, and their findings used to support each other, as shown in ***LB Richmond v B & W & B & CB* [2010] EWHC 2903 (Fam)**, where Mr Justice Moylan gave guidance on the evidential worth of hair strand testing. Within his guidance, it was also stressed that hair strand tests should not be used in isolation to reach evidential conclusions.

By performing these tests in conjunction with PEth and other blood tests, a more holistic conclusion can be drawn as to a person's alcohol use.

Getting the full picture

There is no getting around the fact that blood alcohol testing combined with hair testing provides us with the fullest picture from which to draw conclusions.

Using highly accurate scientific analysis and examining the way in which the body absorbs alcohol, a case can be made to protect those in need – and reunite families where abstinence has been achieved.

31/01/2022

Legal clients can claim 20 per cent off all AlphaBiolabs blood alcohol tests until 28th February 2022 by quoting ***ALC20*** *when placing an order.*

For expert advice and support, call the AlphaBiolabs Customer Services team on 0330 600 1300 or email ***testing@alphabiolabs.com*** *and a member of the legal sales team will be in touch.*

CASES

Re A (a child) [2021] EWHC 3467

F removed A to Switzerland in June 2020 by way of what the Judge found was a "cynically and meticulously planned" abduction "calculated to maximise stress" to M. M's application for A's return under the Hague Convention was dismissed by the Swiss court which found the Article 13b defence (grave risk of harm) established. M's appeal was unsuccessful and she issued these proceedings. F then applied to have these proceedings transferred to Switzerland pursuant to Article 7. That application was dismissed, but caused further delay. In that time there was little evidence that F had made any effort to promote contact or any relationship between M and A.

M's allegations against F were that he was a manipulative and controlling individual who cynically and carefully planned an abduction without any insight into A's needs and for which there was no defence

In resisting M's applications, F relied on evidence from the father (TD) of 2 of M's older children S & Z who lived with TD, in particular the account of how M arranged for the boys (aged 6 & 8) to be circumcised during contact with her. The court found M violated the personal and bodily integrity of the boys and did so in a planned way deliberately concealing her actions from TD and following a period of coercion where she frightened the boys with fears of the 'flames of hell' and the withdrawal of her own affection.

The court found both M and F in their different ways to be unreliable, dishonest and too preoccupied with their own matters to put A's needs first, but clearly found the evidence of TD compelling. F's assertion that he was a victim (similar to TD) of M's bullying and that A's abduction was a last resort to protect A was rejected. The court noted that his actions had deracinated A entirely from M and A's siblings and that F failed to recognise that would cause her lifelong harm. Although not agreeing entirely with the analysis by the child's guardian, for example considering that she had not given sufficient weight to some of M's behaviour, the Judge felt that this did not displace her analysis of the balance of harm, which supported A's return to M.

When balancing the risk of harm to A by her remaining with F or returning to M's care, the court came to the clear conclusion that the greater harm lay with her remaining with F. The involvement of social services with M in the past (in relation to S & Z) had been beneficial to her practical parenting and she remained receptive to working with them in relation to A in the future.

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

S (Vulnerable Party: Fairness of Proceedings) [2022] EWCA Civ 8

Background

The case concerned two children: S (6) and J (5). S's parents were X and Y, and J's mother was A. Over a weekend in January 2020 J spent some time in the care of X and Y, and the balance of time with A. When injuries were discovered on J, those in the pool of possible perpetrators were therefore A, X and Y. Care proceedings had been started in relation to S because her parents were in the pool of possible perpetrators, and A had been joined as an intervenor to those care proceedings. S moved to live with her aunt.

In January and February 2021 a fact-finding hearing took place. Other findings about A's misuse of ketamine were also sought. A argued that findings about her care of J which were not relevant to the care proceedings relating to S should not have been pursued in S's care proceedings, but the court rejected that argument and considered all allegations.

The circuit judge found that most of J's injuries were accidental, but that some had been inflicted by A. She also found that A had deliberately attempted to establish a finding against X and Y despite knowing she had inflicted those injuries, that A was misusing ketamine at a higher level than she had admitted, and that she had deliberately attempted to avoid this being discovered. Separate proceedings were then issued in relation to J and his older brother, relying on those findings, although the children remained at home under interim supervision orders.

Grounds of appeal

A appealed against the findings in S's proceedings, relying on six grounds:

> (1) Procedural irregularity/unfairness as findings were made beyond those pleaded, and that the findings were made in proceedings not relating to her child, without relevant social work evidence available;
>
> (2) No reasoned judgment was given for departing from the expert's view;
>
> (3) Erring in applying the facts;

(4) Speculating to an impermissible extent;

(5) Making contradictory findings which could not reasonably be explained or justified;

(6) Failing to draw proper adverse inferences from Y's failure to attend to give evidence.

Permission was granted on grounds 2-6, but refused on ground 1.

A little under 2 weeks prior to the appeal hearing, A applied for permission to amend the grounds of appeal, to rely on a new ground based on procedural irregularity/unfairness: in the care proceedings now under way in relation to J, a psychologist had assessed that A might be assisted by an intermediary, and a Communincourt assessment was due to take place: it therefore appeared that A might require special measures/participation directions, and none had been in place during the fact-finding hearing.

Evidence in support of the appeal

A had been the subject of two psychological assessments:

(1) A cognitive assessment which concluded that A did not require special measures, but would benefit from regular breaks to have information explained to her, and to have important information explained more than once. Her understanding should be checked by asking her to explain things back in her own words.

(2) The second psychological assessment concluded that A's strength is perceptual reasoning rather than verbal reasoning and she will need support with written documents. The psychologist questioned if she had dyslexia. A was identified as possibly requiring an advocate or intermediary for formal meetings, interviews and assessments.

A was then assessed by Communincourt, who recommended an intermediary as A had difficulties with:

- Processing long sentences

- Understanding court specific terminology

- Understanding and responding to complex grammatical structures

- Understanding complex vocabulary

- Processing simple verbal information

- Remembering key dates

- Often confusing detail

A had given evidence alone from a room in her solicitor's office during the fact-finding in S's proceedings. Whilst her barrister had had some concerns that A had misunderstood some of the longer, more complex questions, A's legal team had not been concerned that she could not give instructions. Relying on the new psychological evidence, it was submitted that A had hidden cognitive difficulties. Had those cognitive difficulties been known about, special measures should have been put in place prior to the fact-finding.

Decision on appeal

Giving the judgment of the court, Baker LJ allowed the appeal on the revised ground, and remitted the case for directions prior to any re-hearing.

It was acknowledged (at para [42]) that not every failure to comply with FPR Part 3A and PD3AA will lead to a successful appeal: the appellate court must identify:

(1) Has there been a serious procedural or other irregularity; and

(2) If so, whether the decision was unjust as a result of that irregularity

In this case, the judge's assessment of A's character and plausibility were central to the judge's findings, and the new assessments (presumably in particular the fact that A often confuses detail and can struggle to remember key dates) had an "obvious bearing on the demeanour and credibility of the appellant" (para 44). In those circumstances, there were "strong reasons to suspect that A did not have a fair opportunity to present her case", such that A was permitted to amend the grounds of appeal, and the appeal was allowed on the revised ground.

Of interest, although obiter, are the closing comments (paras 48 and 49): Baker LJ noted that S is settled in her family's care, and that the parenting assessment of A was almost completed, such that it might be that a re-hearing was neither proportionate nor in any of the children's best interests. However, the Court of Appeal was not in a position to determine that issue. A particular difficulty was that, whilst this appeal was of course brought by A, it did not relate to A's children. The decision about both sets of proceedings, and whether any re-hearing should take place was to be taken by the local liaison judge.

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

Sheffield City Council v M & Ors [2022] EWHC 128 (Fam)

The Local Authority applied for Forced Marriage Protection Orders for two girls, A and B, who were aged 16 and 13. The girls lived with their Father in England, their Mother lived in Bangladesh. The family were brought to the attention of the Local Authority when the Father purchased one-way tickets to Bangladesh for himself and the girls, and informed A's school that he would be taking the children for a short trip to visit family. After South Yorkshire Police made enquiries, the Local Authority applied without notice to the parents for a FMPO in respect of each child.

The court granted both FMPOs, prohibited the parents from removing the children from the jurisdiction, and ordered that the police retain the children's passports.

In making its application, the Local Authority had relied upon information which was provided to the court and to the Children's Guardian, but not disclosed to the parents, "the closed material". The Father applied for disclosure of the closed material, discharge of the FMPOs and discharge of the passport orders. The Mother did not engage with the proceedings.

The case raises the question of how a respondent's Article 6 rights might be protected upon an application to withhold information from them. All parties agreed that, unusually, a Special Advocate should be appointed to represent the Father's interests in determining the issue of disclosure and then, if necessary, representing the Father at a final hearing.

Poole J's judgment summarises the law relating to FMPOs and applications to withhold information in cases concerning children, focussing in particular on the necessity of accommodating all parties' Article 3, 6 and 8 rights. The judgment quotes Sir Andrew McFarlane in ***Re K (Forced Marriage: Passport Order)* [2020] EWCA Civ 190**, on the need to 'accommodate' rather than 'balance' Article 3 and 8 rights, given the absolute nature of Article 3 rights.

Concluding, Poole J notes that using a Special Advocate in family proceedings is rare and should continue to be rare. At paragraph 20, he gives ten detailed reasons why the appointment was necessary in this case. The following three reasons are perhaps most significant:

- FMPOs, while protecting fundamental rights of the protected person, also have a far-reaching impact on the respondent. Breach of an FMPO is punishable with up to five years' imprisonment (sub paragraph i).

- The closed material was of profound significance to the application, such that there would be insufficient grounds to justify the making of the FMPOs without it. Poole J identified a risk that if the Local Authority were ordered to disclose the material it would instead elect to discontinue the application, and that if the Local Authority were not permitted to rely on the closed material, there would be insufficient basis for the orders. Accordingly, in the Judge's view – and without yet hearing from the Special Advocate – the only way to protect the children was to keep the material closed (sub-paragraphs iv and v).

- The appointment of a Special Advocate would accommodate the Father's Article 6 rights, while also allowing the court to consider the closed material and take measures to protect the rights of the children. Nobody had identified another strategy for protecting the Father's Article 6 rights while also allowing the court to dispose fairly of the application (sub-paragraphs viii and ix).

Finally, Poole J set out a detailed process for the involvement of the Special Advocate in the proceedings, which may provide guidance in future cases.

Case summary by **Savannah Bullen-Manson**, Barrister, **Field Court Chambers**

T v T [2021] EWFC B67

The parties cohabited married in 1995, separated in 2013 and divorced in 2017.

W applied for a financial remedies order on 1 April 2014 and judgment was given following a final hearing, on 30 September 2015. District Judge Thomas made a 40% pension sharing order in relation to H's Company X pension with a CE of £826,125 in favour of W ("the PSO"). On the instructions of the pension fund administrators, the box marked 'external transfer' at paragraph F of the pension sharing annex was marked.

On 11th October 2016 a revaluation of H's Company X pension produced a CE of £1,795,362, and on 8 June 2017, £1,652,012. By 2 August 2021, the pension had a CE of £2,471,833.

In June 2017, the CE for an 'external transfer' of H's pension was reduced from £1,652,012 to £722,138. On 15 July 2017, W applied for a declaration that the PSO applies to the uplift in value of the Company X pension. The court could not have made such a declaration and W ought to have sought for the pension funds to be distributed via 'internal transfer'. Unfortunately, neither W or H's legal teams appreciated that pension providers cannot insist on an external transfer if the pension credit offered is based on a reduced CE. In any case, on 13 April 2018, Company X pension trustees reversed their decision to substantially reduce CEs for the purpose of external transfers.

There is no requirement to tick either box at paragraph F of the pension sharing annex and Family Lawyers would be well advised not to tick either box.

On 21 November 2017 H applied for a variation of the PSO. H's variation application came before HHJ Hess for a final hearing on 8 November 2021. H argued that the PSO was made on the basis of the capital value of the pension to be awarded to W was £330,450, and that the PSO should be varied to reflect that W receive this amount (with an uplift for inflation), i.e. the PSO should be varied from 40% to 17%.

The law:

- A PSO must be specified only in percentage terms and not by reference to a capital sum (*H v H* [2010] 2 FLR 173);
- A PSO applies to the value of the pension, not as contemplated by the judge at final hearing, but at the date the PSO takes effect (usually on pronouncement of decree absolute);
- The power to vary a PSO exists under MCA 1973 s31(2)(g) where the application to vary is made before the PSO takes effect and before decree absolute is pronounced (s 31(4A)(a)). There are no reported cases on such applications;
- The applicable law on variation of other capital orders is relevant: the power to vary, suspend or discharge an order should be used sparingly given the importance of finality in matters of financial provision (*Westbury v Sampson* [2002] 1 FLR 166; ***Birch v Birch* [2017] UKSC 53**);

The legal test: HHJ Hess considered that H's application to vary the PSO downwards should only succeed if "*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*" (Westbury).

Nothing remarkable had changed as to the parties' financial resources, needs or obligations, and the only relevant change was that to the value of the CE of H's pension. HHJ Hess dismissed H's variation application for the following reasons:

> (1) The CE of a defined benefit pension fund is the figure for the sum that would need to be invested to meet the income benefits which the fund is obliged to meet for the remainder of the recipient's life. By suggesting that W should have her entitlements fixed now at the cash sum contemplated in 2015, even if the cash sum is given some inflationary growth, H is ignoring the fact that that cash sum will, as a result of the very changes in market conditions and gilt yields which have driven the increased CE, purchase commensurately lower income benefits than they would have done had the pension credit been transferred in 2016, which would be unfair to W.
>
> (2) Whilst W's overall asset figure is undoubtedly higher as a result of the growth in the CE, H's overall asset figure is even more increased, so no injustice is done to H by not varying the PSO.
>
> (3) It is predominantly H's actions that prevented the PSO becoming effective for over 6 years because he prevented W from applying for decree absolute until December 2017 and in November 2017 applied to vary the PSO, which prevented it from becoming effective (MCA 1973 s31(4A)(b)). H left open the possibility of 'moving target syndrome' more than in most cases.

As H had taken an unreasonable view of the case from the outset and pursued it to the bitter end, failing to negotiate in a reasonable way, a costs order was made for him to pay £100,000 of W's costs totalling £130,487, reduced because if was W's application which initiated re-litigation over the PSO.

Case summary by **Beth Hibbert**, Barrister, **1GC Family Law**

Griffiths v Griffiths (Guidance on Contact Costs) [2022] EWHC 113 (Fam)

Although the proceedings concern a child the parents have been identified following the decision of the Court of Appeal in ***Griffiths v Tickle and others* [2021] EWCA Civ 1882** in which the Court of Appeal upheld the decision of Lieven J to allow identification of the parents in a fact-finding judgement. Mrs Griffiths had established that she had been the victim of domestic abuse including rape, physical assault and coercive and controlling behaviour by Mr Griffiths during their marriage.

The parents separated in 2018. The father was having contact in 2019 by agreement. He applied for an order in June 2019. Contact was ordered in a contact centre. The father was to pay the costs. The father applied to change the arrangements including the costs as he was unemployed, and the mother had an income. In May 2020 it was ordered that the costs should be shared equally. Direct contact was in fact suspended by the effects of lockdown from March 2020 to September 2020, when it resumed. The fact-finding took place in November 2020 before HHJ Williscroft and the mother's allegations were proved. Direct contact stopped in December 2020 because of the 2nd lockdown.

In preparation for the DRA Cafcass reported. It supported the resumption of contact if the centre felt able to protect the child following a risk assessment. The risk assessment by the centre was positive. The DRA which had been delayed took place in front of HHJ Williscroft. She ordered that the direct contact resume at the centre (subject to a risk assessment) on the same terms as to payment and directed a psychological assessment of the father. Indirect (Facetime) contact was to occur weekly. The mother appealed the decision to order the resumption of direct contact, the refusal to stop the indirect contact and the direction that she should pay the costs. Lieven J gave permission to appeal but refused to discharge the indirect contact order pending appeal.

Arbuthnot J identified 3 questions. First whether in principle a court has the power to order that a party pay for contact under section 11(7) of the 1989 Act. Second, whether the Judge was wrong to order direct contact in the particular circumstances of this case and third, whether a victim of abuse should pay the costs of contact for the abuser to have contact with the parties' child.

She rejected the mother's argument that there was no power to order a party to pay the costs of contact. She held that s11(7) Children Act 1989 gives the court the power to make such a direction [Paras 55-57].

In answering the second question the judge concluded [para 83] that the judge had allowed herself insufficient time (it was a 1 hour listing) to properly consider and explain how she had applied the relevant parts of PD12J and in particular relate them to the findings of harm made at the fact-finding [para and the emotional impact on the mother of the arrangements for direct contact [Para 107]. In essence the judge's judgment did not disclose the necessary detailed reasoning which PD12J requires to justify reinstating direct contact at the DRA [paras 103, 110-111]

However, Arbuthnot J rejected the argument that the circuit judge was wrong to allow indirect contact to continue. There was an established relationship between the father and the child and the impact of connecting a Facetime call was different to attending a contact centre. [Para 112].

Although it was argued that as matter of principle a victim of abuse should never be ordered to pay the costs of the child having contact with the abuser and that doing so continued the abuse and coercive control, Arbuthnot J's conclusion on the third question was more pragmatic. Although Arbuthnot J could not envisage a situation where a court would order the victim to share the costs of contact, [para 130], she was wary of giving guidance which might be too narrow to deal justly with the facts in another case. With that caveat she commented at [paras 131-132]

> "131. First, there must be a very strong presumption against a victim of domestic abuse paying for the contact of their child with the abuser.
>
> 132. Second, if, wholly exceptionally, the court has to consider this, the matters a court might want to take into account could include the following:
>
> a. The welfare checklist including the age of the child
>
> b. The factors in PD12J.
>
> c. The nature of the abuse proved or admitted, and the parties' conduct that the court considers relevant
>
> d. The impact of the abuse on the caregiver with consideration as to whether any payment would give rise to financial control
>
> e. The extent of the relationship between the child and the abusive party

f. The nature of the section 8 order made

g. The parties' financial resources

h. The cost of the contact

i. Whether, if the contact is in the best interests of the child, it would take place without a sharing of the costs."

Arbuthnot J set aside the order for direct contact and the mother's obligation to pay for the contact and directed that the issue of direct contact should be reconsidered and then if the issue of costs of any contact is raised the guidance (above) should be applied.

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