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NEWS

New figures indicate an average of 669 child protection referrals were made by the police a day in 2020/2021

On 01 February 2022, the NSPCC released new statistics as to the number of referrals from the Police in England and Wales to social services in 2020/2021.

The key figures are:

- Police in England and Wales made an average of 669 child protection referrals to social services a day in 2020/2021.
- Police made almost 245,000 referrals to social services for domestic abuse in 2020/2021.
- There were almost a quarter of a million referrals in 2020/2021, representing an 8% increase on the previous year.
- The NSPCC helpline also saw a record number of calls in relation to domestic abuse in 2020/2021.

For the statistics released by the NSPCC, click here.

Julia Queen, Barrister, Coram Chambers

01.02.2022

Cross border DOLS placements in Scotland are 'not in any way' an ideal situation for children says SASW

On 02 February 2022 the Scottish Association of Social Workers ("SASW") responded to the Scottish government's policy position paper published in January regarding cross-border placements of children.

The police paper arose out of an increasingly common situation in which residential care services in Scotland are

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receiving cross-border placements of children subject to High Court DOLS orders. These DOLS orders allow a child to be deprived of their liberty in a residential care setting.

Currently, DOLS orders are not automatically recognised under Scots law. This means that following the making of the DOLS order in the High Court, the placing local authority needs to petition the Court of Session in Scotland to get recognition for the order just made. Without the Court of Session's approval, any restriction on a child's liberty whilst in a placement in Scotland risks unlawfully infringing upon the child's rights under Article 5 of the European Convention on Human Rights.

The Scottish government considered that the current process for recognition of DOLS orders by the Court of Session cannot be sustained. It places a burden upon the applicants and on the courts when resources could be better directed elsewhere. The Scottish government therefore intends to lay draft regulations before the Scottish Parliament in Spring 2022 as a short-term, interim step to remove the requirement for an English local authority to petition the Court of Session.

The SASW responded to this proposal:

> "Whilst SASW does not support cross-border placements as a standard practice, the measures proposed by Scottish Government are a short-term interim step in a problem that needs a longer-term solution.
>
> Clearly the key element is that there are not enough placements available for children in their countries of origin. We understand that around 20 children were placed in Scottish secure accommodation last year. Whilst this doesn't appear a big number, it is a significant number of the placements available in Scotland and so has a knock-on effect for children from Scotland, leaving them vulnerable to either not getting the support they need or being placed further away from their communities."

For the Scottish government policy position paper, **click here**.

For the SASW response, **click here**.

Julia Queen, Barrister, **Coram Chambers**

02.02.2022

Statistics show number of divorces in 2021 fell 4.5% compared to the previous year.

On 02 February 2022, the Office for National Statistics released its annual divorce statistics for 2020, derived from information obtained from HM Courts and Tribunals Service. Of note, the overall number of divorces in 2020 was 103,592, a decrease of 4.5% compared with 2019.

It is difficult to know how much effect the coronavirus pandemic had on divorce figures during 2020, as some courts were forced to temporarily suspend operations for a period of time during the course of the year. The ONS considered that this may have impacted 'both the number and timelines of divorces granted during 2020'.

Further figures of note include:

- In 2020, there were 1,154 divorces among same-sex couples, increasing by 40.4% from 2019.
- Unreasonable behaviour was the most common reason for wives petitioning for divorce among opposite-sex couples in 2020, accounting for 47.4% of petitions; for husbands, the most common reason for divorces was a two-year separation, accounting for 34.7% of divorces followed by 33.8% for unreasonable behaviour.
- For same-sex divorces, unreasonable behaviour was the most common reason for divorce in 2020 for both female and male couples; unreasonable behaviour accounted for 55.2% of female divorces and 57.0% of male divorces.
- In 2020, the average (median) duration of marriage at the time of divorce was 11.9 years for opposite-sex couples, a decrease from 12.4 years in 2019.
- For same-sex divorces in 2020, the average (median) duration of marriage at the time of divorce was 4.7 years for female couples and 5.4 years for male couples; divorces among same-sex couples have only been possible since 2015 following the introduction of same-sex marriages in March 2014.

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

Julia Queen, Barrister, **Coram Chambers**

07.02.2022

Publication of humanist marriage ceremony briefing paper

The government has published a briefing paper regarding humanist marriage ceremonies in England and Wales. Currently, it is not possible to have a legally binding humanist, or other non-religious belief, marriage in England and Wales. However, such a marriage is recognised in Scotland and Northern Ireland.

The Law Commission is currently conducting a wider consultation, due in July 2022, on reform of the law in England and Wales relating to how and where marriages can take place. The government has said it will decide how to proceed following the publication of the Law Commission's recommendations.

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

Julia Queen, Barrister, **Coram Chambers**

03.02.2022

Updated ABE interview guidance published

The Ministry of Justice, in conjunction with the National Police Chiefs' Council, has published the latest update to guidance on interviewing victims and witnesses and using special measures. 'Achieving Best Evidence' was first published in 2002, with subsequent revisions in 2007 and 2011.

Victoria Atkins MP, Minister of State for Justice, said:

> "The purpose of this guidance is to assist those responsible for conducting video-recorded interviews with vulnerable, intimidated and significant witnesses, as well as those tasked with preparing and supporting witnesses during the criminal justice process. The guidance incorporates best practice from local areas and the expertise of practitioners, charities and voluntary groups who support victims and witnesses at a local level."

For the updated ABE guidance, click here.

Julia Queen, Barrister, **Coram Chambers**

06.02.2022

Department for Education proposes registration requirement for children not in school

This week the Department for Education announced that it would be taking steps to legislate to introduce a registration requirement for children educated outside of school. This proposal followed the Children Not in School ('CNIS') consultation, as part of which wider views were obtained as to whether or not a local authority administered CNIS register should be introduced. The thought behind this was to improve the ability of local authorities to undertake their safeguarding and educational responsibilities related to children who do not attend mainstream education institutions.

Baroness Barran MBE, Parliamentary Under Secretary of State for the School System, said:

"The reasons that parents may have for educating their children at home will vary. For some this will be due to personal circumstances or learning needs, for example mental health, caring responsibilities or special educational needs. For others this may be due to ideological or philosophical views which that they feel would be better promoted through education at home. Whatever the reason, home education works best when it is a positive choice in which the child's education is the primary driver for the decision.

However, feedback from local authorities suggests that not all children educated at home are being educated properly or having their needs met. With local authorities also reporting increasing numbers of children being home educated, particularly during the Covid-19 pandemic, for reasons other than a commitment to home education, there is a greater need for local authorities to be able to identify these children to assure themselves about the education being provided."

In response to the proposal, Gail Tolley, Chair of the ADCS educational Achievement Policy Committee said:

> "ADCS welcomes the creation of a register of home educated children. We have long raised with government the need for a register that gives us a full understanding of the number of children being home educated, locally and nationally. Whilst a register in and of itself will not keep children safe, it will help to establish exactly how many children are being educated other than at school and assist with the identification of children who are vulnerable to harm.
>
> "Education is a fundamental right for all children and we recognise that parents have the right to educate their children at home. However, we urge the government to go further and provide local authorities with the powers to see both the child and their place of learning. Without this we cannot know that all home educated children are receiving a suitable education in a safe and appropriate learning environment.
>
> "We await further detail on what will be included in the register and the level of funding provided to local authorities to meet their duty to support all home educated families in their area. ADCS is clear that any new duties must be fully funded and reflect the size of this cohort. Recent ADCS surveys have highlighted the rapid growth in the number of children being home educated over recent years and this has only been exacerbated by the pandemic."

For the Department for Education consultation response, **click here**.

For the ADCS response, **click here**.

Julia Queen, Barrister, **Coram Chambers**

04.02.2022

Supreme Court: Judicial Assistant recruitment campaign for September 2022

The Supreme Court of the United Kingdom invites applications for Judicial Assistants to support the work of the Justices. Applications are invited for up to eleven temporary posts, assisting the Justices of the Supreme Court (who also sit in the Judicial Committee of the Privy Council) by carrying out research in connection with appeals and summarising applications for permission to appeal.

Fixed term contracts will start on Monday 12 September 2022 and finish on Friday 28 July 2023.

For full details and to apply, **click here**.

13.02.2022

Announcement for the Family Transparency Implementation Group

The PFD is pleased to announce that the Financial Remedies Court Transparency Group, will become the fifth sub group of the Family Transparency Implementation Group (TIG). This group will be chaired by HHJ Stuart Farquhar and will report to the main TIG.

Full terms of reference and membership will be announced in due course. The scope of this group will look beyond the previously conducted consultation, and it is anticipated that further consultation(s) will be undertaken. Updates on the progress of this group will be published.

13.02.2022

Human Rights Act reform: Parliamentary committee inquiries continue

On 8 February 2022 the House of Commons Justice Committee questioned former Supreme Court Justice Lord Carnwath, human rights barrister Kirsty Brimelow QC and leading academics in the second of two sessions examining proposals to reform the UK's Human Rights Act. To watch the session, **click here**. For more details of the Committee's inquiry, **click here**.

On 9 February 2022 the Parliamentary Joint Committee on Human Rights continued its own inquiry into proposed reforms of the Human Rights Act by taking evidence from Schona Jolly QC, Caoilfhionn Gallagher QC, Elizabeth Prochaska and Professor Conor Gearty, Professor of Human Rights Law, London School of Economics. For more details of the Committee's inquiry, **click here**.

13.02.2022

Civil Procedure (Amendment) Rules 2022

The Civil Procedure (Amendment) Rules 2022, which come into force on 6 April 2022, make a raft of amendments to the Civil Procedure Rules 1998, reflecting (amongst other changes) current work to simplify and condense the Rules in respect, for example, to acknowledgement of service and default judgment. For a brief summary of the changes, **click here**. For the Amendment Rules themselves, **click here**. For the 1998 Rules, **click here**.

13.02.2022

Financial Remedies Court: Form D81

The **new Form D81** (Statement of information for a consent order in relation to a financial remedy) has been published by the Government's assets publishing service. Pursuant to FPR r. 5.1(1) and PD 5A para 1.1 and tables 1 and 2, the new form is to be used immediately. However, the FRC will continue to accept consent orders accompanied by the old form provided that the old form has been signed no later than Friday, 18 February 2022.

13.02.2022

5,500 children in care who could be with their families: CFAB

There are 5,500 children who are currently in care that could be with their families if local authorities explored the possibility of placing them with families abroad. The figure is revealed in **research published by Children and Families Across Borders** (CFAB).

In August 2021, CFAB sent Freedom of Information (FOI) requests to 211 UK local authorities to gather data on the number of Looked After Children (LAC) who had family members abroad explored as potential carers. The resulting report highlights the concern of CFAB that many LAC are being denied their right to family and the need for greater monitoring and guidance to ensure that support for overseas placements is on par with what a child would receive in the UK.

The data uncovered by CFAB revealed both the low rates of international placements and data recording.

Overall, the charity is encouraged to see that more children in care are having potential family carers abroad explored. However, it is worrying that the number of local authorities exploring family abroad has dropped. It seems that those local authorities considering overseas care are doing so more regularly. Although the number of children who were actually placed with family abroad was lower than the previous FOI request in 2019, by 7 per cent. The pandemic is likely to account for this.

Whilst there are some positive improvements from individual local authorities, the overall picture still shows a significant need for more exploration of family abroad as potential carers for LAC, with current placement numbers shocking low. In 2019?there?were over 104,000 LAC, with 42 of these children being placed in international placements,?representing only?.04 per cent. CFAB estimates that there are at least 18,500 children in care with family members abroad in England and Wales. If this is the best option for them, using a conservative placement rate of 30 per cent, there are 5,500 children that are currently in care that could be with their families.

For more information, **click here**. For the report, **click here**. For a response from the Association of Directors of Children's Services, **click here**.

13.02.2022

High Court hears children in care discrimination claim

The High Court has been told that the Secretary of State for Education, Nadhim Zahawi, has irrationally discriminated against children in care aged 16 and 17 by making secondary legislation which protects only children aged 15 and under. Lawyers acting for a small children's rights charity, Article 39, argued that the change to the law disproportionately impacts boys and children from black, Asian and minority ethnic communities, and that young people's views and experiences were not properly considered by the government before it introduced the legislation, described as irrational and discriminatory.

Following mounting concerns about the safety and well-being of children in care who live in properties that do not have any carers and are not registered or inspected by Ofsted, the Department for Education introduced secondary legislation requiring local authorities to always place children in care in settings which are regulated and provide care – but this only applies if the child is aged 15 or younger. Accommodation where children do not receive any day-to-day care will remain available for teenagers in care aged 16 and 17 and includes shared houses, hostels, foyers and supported lodgings.

Gavin Williamson, who was the Education Secretary responsible for last year's legal change, said at the time that he could not "imagine a circumstance in which a child under the age of 16 should be placed in a setting that does not provide care".

Article 39 told the court that the evidence the government had before it categorically showed that children in care aged 16 and 17 are just as vulnerable as those aged 15 and under, and they also require care where they live. Twenty-two children in care aged 16 and 17 died while living in properties without adult carers between 2018 and 2020. The majority (66 per cent) of children in care have suffered abuse or neglect.

Article 39's evidence to the court includes safeguarding concerns raised in respect of children in care living in properties where they do not receive care or consistent adult supervision. Information shared with the charity by UK News Media shows safeguarding alerts relating to at least 763 children looked after by 42 local authorities in England between January 2019 and December 2020. Where children's ages were given, the majority were aged 16 and 17. Twenty-one local authorities gave breakdowns of the individual concerns raised – of 789 separate safeguarding concerns, a quarter (24 per cent) related to sexual abuse and child sexual exploitation; 22 per cent to physical abuse; and 16 per cent to emotional abuse.

For an article on the Article 39 website, giving full details of the legal action, **click here**. For the DfE's original announcement of the legislation, **click here**. For the DfE's response to the consultation exercise, explaining its decision, **click here**.

13.02.2022

Number of applications to deprive children of their liberty in unregulated placements rises by 462% in three years

The use of a 'last resort' measure by the High Court which allows it to deprive children of their liberty in unregulated settings – including caravans and holiday lets – when a place cannot be found for them elsewhere, has increased by 462 per cent over three years.

The figures come from research carried out by Nuffield Family Justice Observatory and published alongside a new analysis of data relating to children's secure accommodation orders in partnership with the Family Justice Data Partnership.

Children in England and Wales can be deprived of their liberty for welfare (risks to their safety), youth justice or mental health reasons, and placed in secure children's homes, young offender institutions, secure training centres or mental health in-patient wards. When a place for a child cannot be found in any of these settings – either because their needs are deemed too challenging, or because there aren't enough beds available – the High Court can use the powers under its inherent jurisdiction to deprive the child of their liberty in an unregulated placement.

In 2020, just one in two children referred for a place in a secure children's home for welfare reasons were found one (420 referrals vs 209 placements).

According to new data analysis in an evidence review published by Nuffield Family Justice Observatory, in the three years to 2020/21 the number of applications made to the High Court to deprive children of their liberty under the inherent jurisdiction increased from 108 to 579 per year (an increase of 462 per cent). In 2020/21 these applications outnumbered applications under s.25 of the Children Act 1989 (for places in secure children's homes) for the first time.

The Nuffield Family Justice Observatory states that, unlike children held in other settings, children deprived of their liberty under the inherent jurisdiction don't appear in published administrative data or records. This is a major cause for concern as there is no public record of where they are placed, what restrictions are placed on their liberty, or their outcomes.

The evidence review also highlighted that there are marked similarities in the early life experiences and needs of children deprived of their liberty for welfare and youth justice reasons. Children entering both welfare and youth justice secure settings are likely to have experienced trauma and disadvantage from early childhood, and these experiences are likely to lead to difficulties and risks arising from mental health problems, such as challenging and offending behaviours, substance misuse, self-harm, educational needs, and risk of sexual and criminal exploitation.

For more information, **click here**.

13.02.2022

Domestic abuse victims and housing

The Department for Levelling Up, Housing and Communities **has announced**:

- A further £125 million in funding so that English councils can ensure that safe accommodation spaces, such as refuges and shelters, are able to provide victims with vital support services including healthcare, social workers and benefits.

- A consultation which will consider removing Local Connection Tests for abuse victims, which can stop victims from applying for social housing if they do not have a connection to a local area.

- A second consultation which will consider whether and how to change current rules that make it difficult for victims to remove their perpetrators from joint tenancies, with the consequence that victims either feel forced to stay in their home or are at risk of being made homeless by their abuser.

Consultation on local connection requirements for social housing for victims of domestic abuse

The DLUHC is seeking views on:

- Proposals to introduce regulations to enable victims of domestic abuse who need to move to another local authority district to qualify for an allocation of social housing in the new area; and

- How local authorities are making use of the existing legislation and guidance to support victims of domestic abuse who wish to move within and across local authority boundaries.

During the passage of the Domestic Abuse Act 2021 concerns were raised relating to local connection tests for domestic abuse victims who apply for social housing. **The consultation** closes on **10 May 2022**.

Consultation on the impacts of joint tenancies on victims of domestic abuse

The DLUHC is seeking views on the impacts of the law on joint tenancies on victims of domestic abuse in the social rented sector. It is interested in whether:

- Perpetrators are using their ability to end a joint tenancy to threaten the victim with homelessness;

- Victims feel trapped in their joint tenancy with the perpetrator;

- The current guidance for social landlords is sufficient to support victims in joint tenancies; and

- The law on transferring joint tenancies is functioning successfully for victims.

During the passage of the Domestic Abuse Act 2021, concerns were raised over the current rules on joint tenancies, which mean that victims of domestic abuse who are in a joint tenancy with their abuser can be vulnerable to the threat of being made homeless by their abuser. Should the victim want to stay in the family home, there is currently no straightforward means to remove the abuser from the tenancy and remove the risk of homelessness.

The DLUHC is gathering evidence from victims, landlords, the legal profession, advisory services and other organisations and individuals associated with the domestic abuse sector with an understanding of the issues impacting victims in joint social housing tenancies.

The consultation closes on **10 May 2022**.

For the announcement of these measures, including comment by the Domestic Abuse Commissioner, **click here**. For the consultation document on local connection requirements, **click here**. For the consultation document on joint tenancies, **click here**.

15.02.2022

Research Briefing published regarding the calculations for Child Maintenance

The House of Commons Library have published a Research Briefing explaining how the Child Maintenance Service calculates the amount of maintenance payable under the 2012 statutory scheme. Amongst other topics, the document summarises the five rates of payments and answers FAQs on calculating income.

For the Research Briefing, **click here**.

Julia Queen, Barrister, **Coram Chambers**

19.02.2022

64% of social workers have reported concerns about families being able to provide food for children

The campaign group 'Food is Care', supported by the Social Workers Union Campaign Fund, has published new figures following a survey sent out to social workers regarding food poverty in the UK from December 2021 to January 2022.

Of the social workers interviewed:

- 64% reported concerns about families being able to provide food for children

- 84% said the vulnerable children and families they work with rely on food banks

- Only 6% felt they had sufficient training to deal with the issue.

John McGowan, General Secretary of the Social Workers Union, commented, "Independent foodbanks continue to pick up the pieces yet again as more and more people struggle to pay the bills. There needs to be a realisation that

we cannot continue to provide an emergency response to a long-term crisis."

For the survey results, **click here**.

Julia Queen, Barrister, **Coram Chambers**

15.02.2022

1 in 10 children in care has an unresolved immigration or nationality issue

On Friday 18 February 2022 Coram Children's Legal Centre and the South London Refugee Association published new research indicating that in England, at least 1 in 10 children in care has an unresolved immigration or nationality issue.

The joint report, '**Taking Care: How local authorities can best address immigration issues of children in care**' detailed how despite children growing up in the care system having legal rights to immigration status or citizenship, without the necessary paperwork to prove these rights their opportunities in later life can be curtailed. Steps such as setting up a bank account, applying to university, obtaining a driving licence, voting or applying for jobs are complicated by unresolved immigration issues.

Dr Carol Homden CBE, chief executive of Coram, said: "Children who are taken into care in England need their corporate parents to look out for them in every way, including sorting out their immigration status, citizenship and passport. In immigration and nationality law as with so many other areas, early intervention and a proactive approach can change the course of children's lives, providing permanence and the chance to thrive."

The report also argues that resolving these immigration issues early for children in care is not only best for the child, but more cost effective for the local authority. Whilst a citizenship application for a child costs £1,012, waiting until after the young person leaves care can cost as much as £130,000 in Home Office fees and support with living.

Coram Children's Legal Centre is working with local authorities to address this issue, asking them to sign a pledge to:

- identify all looked-after children and care leavers with immigration and nationality issues;
- connect looked-after children and care leavers with good quality legal support as soon as possible;
- take a proactive and informed role in supporting looked after children and care leavers through any immigration applications and appeals;
- enable those who are eligible to apply for permanent status and British citizenship.

For the report, **click here**.

Julia Queen, Barrister, **Coram Chambers**

19.02.2022

New Standard Orders templates released

On 18 February 2022 Mr Justice Mostyn released new **Standard Family Order templates**.

In particular, a new template for non-final hearing DOLS orders has been published, including updated content and terminology reflecting recent relevant guidance and case law.

A consultation process is ongoing under the leadership of HHJ Moradifar to review all Volume 2 orders. Any comments regarding orders are welcomed before the consultation closes on 28 February 2022.

For the announcement and links to the most up to date versions of Standard Family Order templates, **click here**.

Julia Queen, Barrister, **Coram Chambers**

19.02.2022

President's guidance on e-bundles for public law children proceedings

In late December 2021, the President of the Family Division provided guidance on the use of e-bundles in the Family Court and Family Division (for an earlier article in relation to this guidance, click here). Amongst the general guidance, a specific exemption was made for bundles for public law children hearings with regards to pagination. Whilst for all other family proceedings, bundle pagination is required to 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, this was not required in public law children proceedings.

Following the meeting of the working group for e-bundles in January 2022, the President issued a Memorandum on 18 February 2022 setting out further guidance with specific regard to the issue of public law children bundles. The working group had carried out considerable research with numerous local authorities as to the practical feasibility and cost implications of changing the way in which bundles are paginated to the sequential numbering system.

The President has accepted the recommendation of the working group to further extend the temporary suspension on sequential pagination of bundles in public law children proceedings. This means that until 01 January 2023 at the earliest, the current practice in care proceedings of paginating bundles, i.e. that each section of the bundle has its own sequential numbering, shall continue. However, the President reiterated that this suspension is temporary and that in time public law children proceedings should have identical standards for pagination to all other family proceedings.

For the President's Memorandum, **click here**.

Julia Queen, Barrister, **Coram Chambers**

19.02.2022

Family Justice Council: applications invited from Family Silks and Magistrates

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

Two vacancies have arisen on the Family Justice Council for a Silk and Magistrate member.

Candidates should have the following:

Silk Member:

- Substantial experience as a practising senior barrister (Silk) specialising in family work.

Magistrate Member:

- Substantial experience as a Magistrate, preferably as a Family Court Chairman, in the Family Proceedings Court or Family Court.
- Good knowledge and understanding of the family justice system both nationally and locally.
- Ability to develop a good working relationship with the local Designated Family Judge and the Local Family Justice Board and develop and maintain a link with the Magistrate's Association Family Court Committee.

You will be able to produce evidence of working, through interdisciplinary consensus, to deliver timely and improved outcomes for families and children who are involved with the family justice system. You will have experience as a team player and be able to prepare for and attend meetings of the Family Justice Council.

The Council meets four times a year and much of its work is done through its working groups. The post is for three years and is offered without remuneration. Reasonable travelling and other expenses are payable.

Applications must be submitted by 12 noon on **Friday 18 March 2022**. Interviews are scheduled to take place at the **beginning of April**. All interviews will be by MS Teams.

For an information pack, **click here**.

22/2/22

Nuffield Family Justice Observatory publishes strategy for 2022-26

Nuffield Family Justice Observatory (Nuffield FJO) has published its strategy for 2022 to 2026. It says:

> "During our first three years we have talked to children and families, professionals working in and with the court, government, academics and more. Together with the published evidence, these conversations paint a picture of systems and services under immense pressure. The family justice system, designed to act in a child's best interests, is not always effective in doing so."

For the strategy, **click here**. For Nuffield FJO's five goals for that period, **click here**.

27.02.2022

'No stone left unturned' to transform rape case handling, says Director of Public Prosecutions

'Leaving no stone unturned' to transform the way rape prosecutions are handled is key to helping more victims see justice, the Director of Public Prosecutions has said.

Publishing a **progress update** on its five-year blueprint to reverse falling rape prosecutions, the Crown Prosecution Service (CPS) has set out the actions taken in the last 18 months. These include overhauling working relationships with partners across the criminal justice system, progressing recruitment, stepping up training and focusing on victim support.

The Director of Public Prosecutions, Max Hill QC, said:

> "Without doubt there is a crisis of public trust in how the criminal justice system is responding to violence against women and girls. We want to secure justice in every possible rape case, which means significantly increasing the number we bring to court, year on year.
>
> "We have looked at every aspect of our work - leaving no stone unturned - to understand and address the reasons behind the stark drop in the numbers. We are beginning to see results, with the proportion of rape cases we charge steadily increasing, but there is a long way to go.
>
> "If we are to build confidence that we are taking the right steps, and that all rape victims and suspects are treated fairly, we must be transparent about every aspect of our practice

and our decision-making. Leading this transformation will need sustained focus but we are working as never before to get this right."

The report highlights three main areas of activity:

- improving the support given to victims, and recognising the trauma they experience;
- supporting our prosecutors and expanding the size of our specialist units so that they are properly resourced to respond to these challenging and complex cases; and
- better collaboration with the police from the very start of an investigation, taking an offender-centric approach to case-building.

It charts the progress made since the CPS strategy on Rape and Serious Sexual Offences – RASSO 2025 – was published in July 2020. A major focus of this work has been on improving collaboration, including Operation Soteria, an ambitious programme of work to transform how the CPS and police handle rape investigations and prosecutions, centring on the conduct of the suspect as opposed to the victim. It looks at all stages of the case and will be the foundation, following evaluation, of a new operating model for CPS Areas. New approaches are being trialled in five CPS Areas and their corresponding police forces, including:

- closer partnership on investigations: testing several methods of providing early advice to the police, to improve the number, timeliness and quality of police referrals so that more rape cases go before the courts;
- action plan monitoring: making sure that all action plans set by the CPS are reasonable, proportionate, and help build strong cases;
- No Further Action (NFA) scrutiny: increasing scrutiny of decisions not to charge, with police, local stakeholders and CPS jointly looking at cases;
- supporting victims: enhancing communication with victims and increasing engagement with Independent Sexual Violence Advisers; and
- supporting our people: joint learning with police and prosecutors.

These pilots will shortly be expanded to other parts of the country.

The CPS has also published interim fundamental principles on victims accessing pre-trial therapy, ahead of full updated guidance being published later this year.

For the Rape Strategy Update, **click here**. For Pre-Trial Therapy: Fundamental Principles, **click here**.

27.02.2022

Mental capacity and protection of human rights in care examined

The Joint Committee on Human Rights continued its inquiry into the protection of human rights in care settings with a session focusing on capacity, mental health, and human rights concerns for people with dementia, with learning disabilities and autism.

The session investigated how access to adequate care for people with dementia, with learning disabilities or autism can be secured and their human rights protected. This includes how effective measures such as Deprivation of Liberty Safeguards (DoLS) have been in protecting the security and liberty of those who lack capacity to consent. The Committee also looked at concerns relating to the role of the Care Quality Commission (CQC) in monitoring and preventing ill-treatment of care users.

To watch the session, **click here**. For more information about the Committee's inquiry, **click here**.

27.02.2022

Draft guidelines published to help improve practice when the state acts to safeguard a baby at birth

Nuffield Family Justice Observatory (Nuffield FJO) has published draft guidelines to help improve practice when the state acts to safeguard a baby at birth. The guidelines are now being tested for feasibility in sites across England and Wales.

When the state intervenes to safeguard a baby at or close to birth, it is traumatic for birth parents and painful for professionals. When the safeguarding action results in parent and baby separation, this can be a life-changing course of action with many inherent and unresolved ethical and practice dilemmas.

Nuffield FJO says that in such circumstances there is a need for more national guidance for professionals working in children's social care, health services and the courts to ensure best practice. In response to that need, Nuffield FJO has published a draft set of best practice guidelines, developed through a collaborative research study involving professionals and parents in eight local authorities and seven corresponding NHS trusts in England and Wales. Part of Nuffield FJO's Born into Care series, the work has been led by the Centre for Child & Family Justice Research at Lancaster University and the Rees Centre at Oxford University.

The draft guidelines aim to deliver better and more consistent practice. They include a series of aspirational statements for each stage of the parents' journey and provide examples of how these statements can be translated into best practice.

The guidelines consider how to overcome challenges at both a strategic level and in frontline practice. They also include examples of innovations from practice drawn from across England and Wales.

The guidelines are being published and tested for feasibility against a backdrop of a rising number of newborn babies being subject to care proceedings in England and Wales – with numbers more than doubling over the last decade.

The intention is for the guidelines to be used as a basis for developing local area action plans and locality specific guidelines, within the context of national guidance*. Between now and August 2022, the participating local authorities and NHS trusts are working with the team to test the feasibility of the guidelines. Findings from this feasibility study will inform a final version of the guidelines, which will be published later in 2022.

For more details, **click here**. For the draft guidelines themselves, **click here**.

27/2/22

Marriage and Civil Partnership (Minimum Age) Bill receives third reading

The Marriage and Civil Partnership (Minimum Age) Bill received an unopposed third reading in the House of Commons on Friday, 25 February 2020.

The Bill would raise to 18 the minimum age for marriage and civil partnership in England and Wales. The Explanatory Notes state how this might affect marriages and civil partnerships which take place outside of England and Wales:

"The anticipated effect of this change on the common law will also mean that any marriages which take place overseas, or in Scotland or Northern Ireland, involving under 18s where one of the parties is domiciled in England and Wales, will not be legally recognised in England and Wales. This change to recognition will also apply to civil partnerships."

The Bill has been amended to prevent those aged 16 and 17 from England and Wales from being taken to Northern Ireland or Scotland and coerced into marrying there, something Paula Latham, the Bill's sponsor, described as the "Gretna Green exemption".

Justice minister Tom Pursglove assured Ms Latham that there would be "no needless or unnecessary delay" in making the Bill law as soon as possible.

The Bill will now pass to the House of Lords.

For a House of Commons Library briefing paper covering the Bill, published in anticipation of report and third reading, **click here**. To follow progress of the Bill, **click here**. For the House of Commons debate, **click here**.

27.02.2022

Law Commission welcomes new steps to gather financial data on divorce

The Law Commission has welcomed the publication of a **revised version of Form D81** in February 2022. The form is the statement of information about parties' financial circumstances used to support applications for a consent order in financial relief proceedings on divorce. The form helps the court decide if the financial and property arrangements agreed between ex-partners are fair.

In the Law Commission's **Report on Matrimonial Property, Needs and Agreement** it noted the potential benefit of the development of a numerical formula to guide couples on likely financial outcomes on divorce. The report explained that one of the building blocks for developing a formula was the need for empirical data to be gathered "from the ground up" of financial relief provided in divorces. Gathering such data is essential to provide divorcing couples with a realistic expectation of their financial provision, given that reported High Court decisions focus on big-money cases, which bear little resemblance to the vast majority of divorces.

In 2019, the Law Commission joined forces with the Family Remedies Court (FRC) judiciary, led by Mr Justice Mostyn, along with family law academics and officials from the Ministry of Justice and HM Courts and Tribunals Services, with the aim of gathering together the essential details of every case decided finally by the FRC, whether following a hearing or compromise. The revised Form D81 is the culmination of the group's work to date.

The Law Commission said that it is extremely grateful to Mr Justice Mostyn for his leadership of this significant piece of work, which marks a vital step in the data-gathering exercise.

For Form D81, **click here**.

24.02.2022

Financial Remedy Update, February 2022


Sue Brookes, Principle Associate and **Nicola Rowlings**, Professional Support Lawyer, at **Mills & Reeve LLP** consider the most important news and case law relating to financial remedies and divorce during January 2022.

As usual, the update is divided into two parts.

A. News

The Family Proceedings Fees (Amendment) Order 2022

This Order amends the Family Proceedings Fees Order 2008 (S.I. 2008/1054) ("the Fees Order"). Articles 3(2), (3)(a), (8) and (9)(b) amend the Fees Order to reflect changes in terminology resulting from the Divorce, Dissolution and Separation Act 2020.

The Family Procedure (Amendment) Rules 2022

The Family Procedure (Amendment) Rules 2022 amend the Family Procedure Rules 2010. The provisions make necessary changes to existing primary and secondary legislation consequential upon the Divorce, Dissolution and Separation Act 2020.

Divorced women face unstable retirement as pensions left out of settlements

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

Review of the Standard Family Orders announced

Mostyn J has announced that all standard family orders will be reviewed in the next few months with a view to issuing updated volumes of both money and children orders by the summer of 2022. HHJ Kambiz Moradifar will lead on the children orders and HHJ Edward Hess on the money orders.

Family mediation scheme to help thousands more parents

On 16 January 2022, the Ministry of Justice announced that an additional £1.3million will be made available for the family mediation voucher scheme. The extra investment in the initiative means more than £3million has been ploughed into the scheme since its launch in March 2021.

New Efficiency Statement

Mr Justice Mostyn and HHJ Hess, have issued a new statement on the efficient conduct of financial remedy hearings proceeding in the Financial Remedies Court below High Court judge level, following recommendations by the Farquhar Committee. The statement is in addition to that issued in 2016 for High Court judge level cases. Templates for a composite case summary and schedule of assets and income, a document setting out the primary principles of the Financial Remedies Court (previously titled the Good Practice Protocol) and a revised lead judge job description have also been published.

Balancing transparency and confidentiality 'really difficult' says McFarlane P

Greater transparency is necessary for the public to have confidence in the family justice system but balancing openness with confidentiality will be 'really difficult', the President of the Family Division has told MPs today. The full story is in the Law Society Gazette.

B. Cases

Maughan v Wilmot [2021] EWHC 3592 (Fam) (08 October 2021)

This is the latest instalment in a long running case involving what Mostyn J refers to as one of the worst examples of vexatious conduct he has ever encountered.

On 22 October 2019, Mostyn J had imposed a general civil restraint order against Mr Wilmot, who alleged that the various orders which had been made against him, dating back as far as 2001, were without jurisdiction. The Court of Appeal had, in 2013, rejected Mr Wilmot's grounds of appeal and Lloyd LJ had formally certified his claims as being totally without merit. However, Mr Wilmot had continued to persist with his allegations, leading to further hearings before Mostyn J in 2014, 2016, 2018 and 2019, which is when the general civil restraint order had been made.

This latest instalment is an application by Ms Maughan and her solicitor, pursuant to FPR paragraph 4.10, for an extension of the general civil restraint order. FPR paragraph 4.10 gives the court power to extend the duration, if it considers appropriate to do so, for up to another 2 years on any given occasion.

As per ***Ashcroft v Webster*** **[2017] EWHC 887 (Ch)**, under the Civil Procedure Rules there is no presumption of continuance of an expiring civil restraint order and there has to be evidence that an extension is appropriate. The court must take into account all of the circumstances, not just the defendant's current conduct but also that which led to the order being made in the first place. Any conduct after the original order was made must be viewed through the prism of conduct which led to it being made.

Taking into account all of the circumstances, Mostyn J noted this case is, in all respects, outside the norm and no aspect of Mr Wilmot's conduct could be described as reasonable. He had no hesitation in granting the extension for another two years. He also made separate orders in relation to two applications which Mr Wilmot had mounted without the court's permission and, whilst noting permission an order may not be strictly necessary, for completeness he ordered that Ms Maughan's solicitors could come off the court record and, if necessary, they could disclose documents and orders made within these proceedings to their insurers.

Ms Maughan sort costs of £16,301, the vast majority of which related to the solicitors' costs dealing with emails in and out to Mr Wilmot. Mostyn J concluded, with specific reference to the character and disposition of Mr Wilmot, this is a case where costs should be awarded on an indemnity because the claimant can demonstrate a circumstance which takes the case out of the norm. The award was therefore £15,485, i.e. 95% of the costs schedule, with the discount reflecting what would happen if it went to detailed assessment.

CW v CH (MFPA 1984 Part III: Interim Applications) [2022] EWFC B1 (10 January 2022)

The husband and wife were both Nigerian nationals. Following the breakdown of their marriage, they signed a deed of separation in Nigeria which was then turned into a financial order. Decree absolute was made in 2019. A year later, the wife moved to England (to live in a property owned by the husband) and was granted leave to bring an application for financial relief following a foreign divorce under Part III Matrimonial and Family Proceedings Act 1984. In those proceedings, she was seeking £2.765 million for a property in London and £312,000 a year in maintenance. However, she

also sought an order for interim periodical payments (£9,755 a month) and a costs allowance in respect of legal fees (£111,910 towards costs already incurred and c.£84,000 for her future costs).

The husband contested the court's jurisdiction to deal with the interim applications, principally on the basis that he said that the wife had not passed the threshold for leave under s.13 MFPA 1984. Meanwhile, the wife contended that not only was the husband unable to challenge the fact that leave had been granted because he had not applied for a set aside but the court itself was precluded from considering the merits of her substantive application when dealing with an interim application.

Mr Recorder Allen QC concluded that the court was entitled to consider the husband's challenge to the merits of the wife's application and that to suggest otherwise was contrary to natural justice. Turning to the interim applications themselves, Mr Recorder Allen QC was satisfied that the wife had a need that she could not meet from her own resources, was not reasonably able to obtain a loan and that a Sears Tooth arrangement was not feasible. Given the husband could meet the interim claims, an order was made that he pay the wife £5,300 a month in interim maintenance and c.£84,000 for her future costs. However, her claim for a contribution to discharge her incurred but unpaid costs was refused. The wife had already incurred costs of £371,000, of which £198,000 remained unpaid. £240,971 had been incurred prior to the first inter-partes hearing which Mr Recorder Allen QC described as "disproportionate"; he noted that she had chosen to incur those costs despite there being doubts as to the merits of her claim.

04.02.2022

FDR privilege and the risk to litigation funding after LS v PS

James Roberts QC, MCIArb of One King's Bench Walk considers the judgment in LS v PS [2021] EWFC 108 and the possible consequences for litigation funding in family cases.

A recent judgment, ***LS v PS* [2021] EWFC 108**, handed down by Mrs Justice Roberts on 21 December 2021, dealt with various issues surrounding the privilege which attaches to a Financial Dispute Resolution ("FDR") hearing and more particularly a private FDR appointment and the privileged documentation that is generated for these appointments. Within the family proceedings a litigation lender ("Q") is seeking to recover a debt of £1 million, which was originally borrowed by the applicant wife under the terms of various loan agreements, to pay for family law litigation in which she was engaged with the husband.

By virtue of an award made by Mrs Justice Parker in July 2018, the applicant wife within the financial remedy proceedings was to receive a lump sum of £3 million. That capital award was based upon an assessment of her future needs in the light of a finding by the judge that the respondent husband's resources were c.£9 million.

This outcome was appealed by the respondent husband and the case was set for a retrial.

At a private FDR in February 2021, in which the applicant wife was initially represented but became unrepresented during the course of the day, the parties ultimately agreed to an order leaving the applicant wife with no assets of her own, merely a life interest in a property owned by the respondent husband's trust. This consensual arrangement seems to have left her with no way to repay her significant debt to Q and facing inevitable bankruptcy.

Very shortly after the private FDR, Q applied to be, and was, joined to the financial remedy proceedings as an intervenor. Some three weeks after the joinder, the final order in the financial remedy proceedings was sealed. Shortly afterwards it transpired that the respondent husband's solicitor had emailed the allocated s.9 judge directly, with a copy of the draft consent order together with the relevant documentation in support. Nothing appears to have been sent to the court through formal channels. The Family Office at the Royal Courts of Justice was not notified that a draft order had been submitted informally for the judge's approval. No formal application was issued, and no fee paid. Q was not informed that this step had been taken and the s.9 judge was not informed that Q had already been joined as a party for the sole purpose of objecting to the making of a final order. The D81 which was sent to the judge's chambers wrongly stated that the applicant wife was earning £31,000 per month (as opposed to per annum) and made no mention of the trust assets from which housing provision for the applicant wife was to be made.

The sealing of the final order in this way meant that, rather than Q being heard first and the matter dealt with rather more quickly, Q needed to apply to set the order aside. That set aside process is contested by the respondent husband.

It is Q's case that the compromise of the financial remedy proceedings amounted to an act of bankruptcy and a statutory fraud within the meaning of s. 423 of the Insolvency Act 1986. In order to fully evidence its claim, and one imagines, though it is not clear from the report, provide a basis for actual recovery rather than merely set aside, Q was seeking to rely on privileged material from the private FDR (offers, position statements, asset schedules and even the Zoom recording of the meeting). Mrs Justice Roberts felt bound by paragraph 6.2 of PD9A FPR 2010 [1] and did not permit reliance on the privileged material, stating that the court would, in any case, have ample evidence to decide whether or not the order should be set aside, without the need for privileged material to be before the judge dealing with the set aside application.

In discussing paragraph 6.2 of the practice direction Mrs Justice Roberts noted that Sir James Munby in ***V v W*** **[2020] EWFC 84** had reached a similar conclusion (though no fraud had been alleged in that case) in relation to the privileged status of the FDR and the materials deployed within it.

Of interest in relation to the status of private FDRs, the judge saw no good reason for drawing any distinction, for the purposes of paragraph 6.2 of PD9A, between an FDR hearing which takes place before a judge and one which takes place away from the court before an agreed evaluator.

In the final paragraph of the judgment headed "Footnote", Mrs Justice Roberts specifically states that the rules may require revisiting by the Family Procedure Rule Committee for them to consider whether the issues raised by the "absolute bar" (as Sir James Munby described it in *V v W*) on disclosure of FDR material in this case justify the introduction into proceedings of otherwise privileged material.

The judgment acknowledges (as do several other authorities the judge cites) the fact that litigation lenders provide a "valuable function" in achieving the equality of arms that fairness and justice require.

This case throws up some major public policy concerns. If the rules, as drafted, effectively sanction private FDRs as a forum in which not just negotiations are protected but also, as an unintended consequence, potential "skulduggery" such as collusion to fraudulently avoid paying a creditor, or misrepresentation, with no recourse, then it may be fair to say that those businesses who provide legal costs funding in family cases may well consider exiting the market. This could have a devastating impact upon access to justice in the family system. This is against a backdrop of a number of big players in the lending market, such as Quanta Capital, Ratesetter and Novitas, having already pulled out or ceased lending. The role of litigation lenders in the family court, providing access to justice where it might otherwise be out of reach, is well understood. Provisions within a practice direction which serve to provide significant obstacles to proper recovery may very well be considered to be undermining of this important objective. Paragraph 6.2 of PD9A FPR 2010 also puts litigation lenders in the family sphere in a very different position from that of their counterparts in the civil sphere.

If lenders in this field do not pull out of the market altogether, then one can envisage a scenario where, in order to mitigate risk, they may no longer be prepared, for example, to fund FDRs or private FDRs, instead offering funding only for final hearings. Such a situation would be extremely damaging to the FDR process at, and away from, court. It may have a significant impact upon the number of cases coming to trial and the overall costs burden on both sides.

As a wider point, perhaps we need to question what value the seemingly enhanced privilege of FDRs / private FDRs (Sir James Munby's "absolute bar") provided by paragraph 6.2 of PD9A actually has. The exceptions to the without prejudice rule are clear in law, ***Unilever*** being the most widely known (and ***Rose v Rose*** being a well-known illustration in family case), where the public policy of admitting relevant evidence for the purpose of dealing with cases outweighs the public policy of maintaining the privileged status for the purposes of encouraging negotiations and settlements.

Were it not for the "absolute bar" embodied in PD9A para 6.2 (and which Mrs Justice Roberts, in her judgment, suggests needs revisiting) the court may well have sanctioned the disclosure of the privileged material sought to be obtained. The issues surrounding the "absolute bar" also extend beyond the specifics of this case. What is brought into sharp focus is the issue of being able to rely upon anything disclosed at the private FDR / FDR. This "absolute bar" could function to make relying upon such a disclosure extremely high risk. For example, if it transpired that any fact relied upon by a party during an FDR were to be untrue, there is, on this construction of paragraph 6.2 of PD9A, no remedy for a party who has placed reliance upon the disclosed untrue fact, since anything said in the FDR context would be inadmissible for all purposes including for the purpose of establishing misrepresentation.

One hopes that Q will have the appetite to seek to appeal this decision; they may not. In any event, no doubt the Family Procedure Rule Committee will consider the issues raised in Mrs Justice Roberts' footnote at the earliest opportunity. It can be seen that the present state of the law as exemplified in this case may have a very serious, and possibly terminal, impact upon the family litigation lending market as a whole. The area is one which is already considered to be more risk laden for lenders than the other areas in which litigation funders are active conventionally. An absolute bar on disclosure of material which would otherwise be allowed in other divisions will only increase the risk. This conflicts with recent judicial comment which has been supportive of lending within family proceedings. The loss of such litigation funding, or its severe curtailment, has the capacity to undermine, in a significant cohort of cases, any talk of "equality of arms" for the more economically vulnerable party.

[1] "In order for the FDR to be effective, parties must approach the occasion openly and without reserve. Non-disclosure of the content of such meetings is vital and is an essential prerequisite for fruitful discussion directed to the settlement of the dispute between the parties. The FDR appointment is an important part of the settlement process. As a consequence of ***Re D (Minors) (Conciliation: Disclosure of Information)*** **[1993] Fam 231**, evidence of anything said or of any admission made in the course of an FDR appointment will not be admissible in evidence, except at the trial of a person for an offence committed at the appointment or in the very exceptional circumstances indicated in ***Re D***."

25.02.2022

CASES

Re B-B (Domestic Abuse Fact-Finding)(Rev 1) [2022] EWHC 108 (Fam)

Approach to the fact-finding exercise

Cobb J commented that the hearing and preparation of the judgment highlighted the following (§6):

1. It is useful to consider the evidence in relation to each form of domestic abuse in "clusters" which makes it easier to see whether patterns of behaviour emerged.

2. Delay in hearing the evidence compromised the quality of the evidence as well as taking its toll on the parties.

3. Flexible arrangements are needed to ensure that participation directions truly meet the needs of the parties and the case.

4. Advocates need to focus on those issues which are necessary to determine; submissions and oral evidence must be cut down to that which the court needs to hear.

5. The evidence of the parties themselves is always likely to be far more valuable than that of third parties; judges must rigorously test what real value additional witnesses will bring.

6. Judicial continuity is important in domestic abuse cases; here it would have enhanced the "efficient and sympathetic management of the process."

7. An abusive relationship is invariably complex in which the abused partner is often "caught up in the whorl of abuse, losing objective sense of what was/is acceptable and unacceptable in a relationship."

The Law

He went on to distil the relevant legal principles at §26:

1. The burden of proof lies throughout on the person making the allegation.

2. In private law cases the court needs to be vigilant to the possibility that a parent may be using their allegations to gain an advantage in the battle between them.

3. It is not for either party to prove a negative.

4. The standard of proof is the balance of probabilities; the law operates a binary system which needs to be applied with common sense.

5. Generally speaking the judge ought to be able to make up their mind about where the truth lies without needing to rely on the burden of proof.

6. The court can have regard to the inherent probabilities of events occurring.

7. Findings must be based on evidence, including inferences properly drawn from evidence, and not on suspicion or speculation.

8. The court must survey the evidence on a wide canvas, considering each piece of evidence in the context of all the other evidence.

9. The parties' evidence is of the utmost importance; the court must form a clear assessment of their credibility and reliability.

10. The court must bear in mind that witnesses may lie for many reasons. (R v Lucas [1981] QB 720)

11. The family court has a completely different function from that of the criminal courts. The fact-finding exercise is to determine what has happened so as to inform the welfare evaluation in respect of the options for the child or children.

12. At all times the court must follow the principles and guidance contained in PD 12J of the Family Procedure Rules 2010.

The parents

The court found the mother to have been naïve, unworldly and vulnerable when she met the father. She was very distressed and genuinely confused about the order of events, possibly because of the intense emotional and possibly psychological turmoil associated with them. Cobb J found many aspects of her evidence credible and made a number of the findings she sought. He also found that she had minimised her use of alcohol and drugs and some aspects of her evidence were motivated by her wish to demonise the father.

In contrast the father was articulate, unemotional and eager to score points to distract the court from assessing his own evidence. His bare denials were unconvincing. He showed minimal empathy for the mother.

Findings

Mother's allegations §61-82:

1. Emotional control/coercion: findings made included father isolating the mother socially and "gaslighting" her by frequent assertions to her and others that she had bi-polar disorder.

2. There was insufficient evidence to make findings of physical abuse. Although no finding was made on mother's allegation that the father and his friends physically falsely imprisoned her, when she was intoxicated and irrational after a barbecue, the father was found to have taken advantage of the mother's vulnerability and manipulated events to his own advantage.

3. Mother claimed father had degraded her by being unfaithful during the relationship. While this allegation was not proved the father was found to be chauvinistic and insensitive in his attitudes to the mother and their relationship; when he had sex with her after they split up, knowing she was desperate to rekindle the relationship, he showed his capacity to prey on the vulnerable.

4. Financial control: father was thoughtless and uncaring about taking money from mother but did not abuse her financially as she alleged. He was however financially irresponsible and lacked moral integrity and empathy for the mother.

5. Sexual abuse: findings made that father forced himself on mother without caring whether she consented, that he initiated rough sex that was probably not consensual and expected to give him oral sex as a treat, knowing that she didn't enjoy it. The judge was not satisfied that mother clearly protested at father's sexual demands at the time.

Father's allegations §83-93

1. Verbal abuse: both parents were verbally abusive to each other and one was not more to blame than the other.

2. Physical abuse: when drunk and in a heightened state of arousal mother was physically abusive and at least once threatened father with a knife. The latter incident was part of an ugly scene and both parents were responsible for their behaviour; it was not illustrative of domestic abuse. Equally father bore some responsibility for the mother's irrational behaviour after the barbecue, having encouraged her to take cocaine.

3. Mother used contact as a form of control but father did not pursue the remedies available to him.

4. Control: mother became paranoid about the relationship and constantly phoned and texted the father in an increasing state of agitation.

Conclusions

The specific incidents alleged were treated not as free-standing events but as part of a wider pattern of alleged abuse. The court was satisfied that there was a power imbalance in the relationship and that father manipulated the mother, was abusive to her in a number of ways and was selfish, patronising and dismissive of her. The father's conduct caused the mother "*severe anxiety, depression and trauma*." Her self-esteem was eroded and she came to believe that the relationship was normal. She "*simply sought to cling to what she knew*."

Case summary by **Gill Honeyman**, Barrister, **Coram Chambers**

Bailey v Bailey (Committal) (Rev1) [2022] EWFC 5

The first respondent submitted that the judgment in the financial remedy proceedings that gave rise to the order he was alleged to have breached was inadmissible in the committal proceedings. He cited *Hollington v Hewthorn* [1943] KB 587 for the propositions that findings of fact by earlier tribunals are inadmissible in subsequent civil proceedings because they constitute opinion evidence, and findings made to the civil standard in financial remedy proceedings cannot carry any probative value when determining a contempt application to the criminal standard, and therefore should be excluded.

Peel J reviewed authorities on the rule in *Hollington v Hewthorn* [1943] KB 587 and found that the judgment in the financial remedy proceedings in the instant case was admissible in the subsequent committal proceedings, for the following reasons:

> (1) The court could not make sense of the order from which the committal application sprung without admitting in evidence the judgment which gave rise it.
>
> (2) On the first respondent's case, no judgment in a final hearing conducted according to the civil standard of proof could ever be referred to within subsequent committal proceedings. It would never be open to the court to be referred to the prior judgment upon a subsequent enforcement application of whatever nature. Following the logic through, a substantive judgment including findings as to, for example, periodical payments, could not be before the court upon a variation application under s31 of the Matrimonial Causes Act 1973.
>
> (3) There was no authority before the court where a substantive judgment was ruled inadmissible in a subsequent committal application made in respect of the order springing from that very same judgment, whether in family proceedings or elsewhere in the civil jurisdiction. The brief obiter dicta by Sir James Munby P in *Re L (A child)* [2016] EWCA Civ 173 at 68 such that "it is possible that the rule in *Hollington v F Hewthorn* "might in certain circumstances prevent the use in subsequent proceedings of any findings made by the judge at the first hearing" was not authority for the proposition advanced by the first respondent.
>
> (4) The rule in *Hollington v Hewthorn* is encapsulated in the one sentence of Goddard LJ at 596-597: "A judgment obtained by A against B ought not to be evidence against C".
>
> (5) In all the authorities before the court, the rule had been applied to exclude previous judgments only in cases of separate, distinct proceedings and/or involving different parties. Even then, the authorities demonstrate the earlier decision may be admitted if fairness so requires.
>
> (6) The committal applications before the court were part of enforcement proceedings referable to the financial remedy claims, between the same parties.
>
> (7) *Hollington v Hewthorn* is **not** authority for the proposition that the judgment in earlier proceedings between the same parties cannot be admitted in evidence for the purpose of a contempt application arising out of the earlier judgment, and order made thereon.
>
> (8) The foundation of the rule is the fairness of the subsequent trial.
>
> (9) Evidence presented in the earlier proceedings, and the contents of the judgment from the earlier proceedings are admissible in subsequent committal proceedings flowing from the earlier proceedings, and between the same parties.
>
> (10) The weight to be attached to the earlier proceedings, and judgment, will be a matter for the judge conducting the committal proceedings.
>
> (11) None of the above derogates from long established principle that the applicant must prove the alleged contempt of court to the criminal standard.

The court went on to find the respondents were in breach of various orders, and gave each of them custodial sentences.

Case summary by **Max Lansman**, Barrister, **Field Court Chambers**

Re X, Y and Z (Children-Parental orders- time-limit) [2022] EWHC 198 (Fam)

Background

The applicants are a married couple, TT a British citizen in his 40s and RR a Danish citizen in his 50s. The respondents are Mr and Mrs HH and Mr and Mrs JJ, who are all US citizens. Mrs HH was the surrogate who gave birth to X, a girl, and Y, a boy who are twins, now aged four. Mrs JJ was the surrogate for Z, a girl, who is now two years old.

The applicants, who were resident in Denmark, decided to pursue surrogacy in the USA, attracted by the regulatory framework which provides for legal certainty as to parentage in that jurisdiction at the time of the child's birth. They engaged an established agency and were matched with a married surrogate, HH from Oregon; embryos were created using TT's sperm and eggs from an anonymous donor and two transferred into HH's uterus. The twins were born prematurely and cared for by the applicants while they remained in hospital. A declaratory judgment was obtained in Oregon, recognising the applicants as the twins' legal parents. X and Y hold US citizenship. The applicants returned to Denmark with the twins; they had been advised that the twins were entitled to Danish citizenship through RR's parentage and without raising any difficulty the Danish authorities provided X and Y with Danish passports and confirmed their Danish citizenship.

About a year after the twins were born the applicants decided to have a third child by surrogacy. They used a surrogate, JJ, in California and again TT's sperm and a donor egg was used. TT was present when Z was born at full term. RR joined them with X and Y and the family of five returned to Denmark once Z's US passport had been issued. The applicants were recognised as her parents under Californian law pursuant to a pre-birth order.

When the applicants tried to register Z as a Danish citizen in 2019 they were told that Danish law did not recognise the parentage bestowed on them under Danish law; not only was Z not granted Danish citizenship but that of X and Y was rescinded. The Danish authorities put the applicants on notice that they were considering the deportation of all three children. Fortunately the applicants were able to register the children as British citizens on 16th December 2020 so that they acquired permanent residence in Denmark just before the UK left the EU on 31st December. Subsequently, after a decision in the Danish Family Court, the children's births were re-registered showing TT as their father and the respective surrogates as their mothers.

The applicants had not been aware of the existence of parental orders in this jurisdiction until the issues arose with the Danish authorities. As soon as they realised that they needed to do so, they applied for the orders.

Partly because of the difficulties about the children's residency entitlement and the lack of legal recognition of their parentage, and partly because TT was the victim of a homophobic attack, the applicants relocated to the UK in October 2021, TT thus resuming his domicile of origin.

The parental order reporter produced comprehensive and very positive reports about the applicants and recommended that parental orders be granted.

The s54 criteria

All the criteria were met save for the time limit at s54(3).
The court carefully considered the payments made to the surrogates and considered them to be in line with other such payments in the USA; they were retrospectively authorised.

The time limit

The applications were made well outside the s54(3) time limit and the applicants asked the court to exercise its discretion, relying on the decision of Sir James Munby, President, in ***Re X (A Child) (Surrogacy: Time Limit)*** **[2015] 1 FLR 349**.

The court found that the applicants had acted with integrity throughout. They had been careful and organised and had taken legal advice in the USA about how they could acquire legal parentage in that jurisdiction and had understood that would be recognised elsewhere; crucially they thought it would be recognised in Denmark. It was a reasonable oversight that they had been unaware of the need to seek parental orders in this jurisdiction, given that they were not at that time living in the UK and had not taken legal advice from a UK based solicitor.

The time limit should not be applied as a straitjacket to prevent the court making orders that were plainly in the children's best interests. In approving the parental orders the court had regard to the checklist at s1 of the Adoption and Children Act 2002. Looking at the children's welfare from a lifelong perspective the court was satisfied that each child needed a parental order to give permanence and security to their care arrangements.

Case summary by **Gill Honeyman**, Barrister, **Coram Chambers**

A, B and C (Children: Nesting Arrangement) [2022] EWCA Civ 68

The three subject children (9, 15 and 17) lived with both parents under a "2:2:5:5" nesting pattern, whereby each party would take it in turns to vacate the former family home for periods of two or five days every fortnight, leaving the other parent at home with care of the children.

The allocated first instance judge, Cohen J, had first remarked on the apparent unsuitability (in his view) of this arrangement within financial remedy proceedings in November 2019. In May 2020, the mother applied for a child arrangements order. The status quo continued in the interim.

The mother supported a move towards shared living arrangements between two households. The father supported the continuation of the nesting arrangement. The children's wishes varied in their detail, but each wanted to remain living in the former family home. An independent social worker, instructed as an expert, reported that the current arrangements were not in the children's best interests due chiefly to the ongoing discord between the parents. He believed that continuing the arrangement would adversely affect the children's relationship with their mother in particular and that the father's conduct had been characterised by coercive and controlling behaviour.

The final hearing was adjourned by consent following the ISW's report but one day was used to determine whether the interim arrangements should be varied. Cohen J heard submissions only and directed that the arrangements should change to a week on/week off pattern with increasing amounts of time being spent at the mother's own home on alternate weekends.

The father was granted permission to appeal on three grounds:

> 1. That the interim hearing had been unfair as it had proceeded with only the ISW's report (which was critical of the father) and without statements from the parents or cross-examination of the expert. This ground was rejected. Interim hearings proceeded ordinarily without oral evidence (FPR 22.7) and the father had not applied to cross-examine the expert under FPR 22.8 nor to file a statement of his own. Either direction would undoubtedly have been granted if sought. In any case it was not unusual for important decisions to be made on submissions alone.
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> 2. That the judge was not impartial, based on his earlier comments about the nesting arrangement and having formed a clear view of the father without hearing from him in evidence. The Court noted that the father had not applied for the judge's recusal or raised the issue at all before the hearing and that Cohen J, notwithstanding his earlier scepticism, had previously endorsed the continuation of the arrangement in the interim. In any event the judgment given was balanced, objective and child-focused.
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> 3. That it was wrong to change the arrangements (at least at this stage) and wrong to impose a week on/week off pattern, given the children's contrary wishes in particular. This was an argument about the judge's welfare analysis and specifically the weight he attached to the various relevant factors. As such the father fell well short of the high hurdle on appeal. While the children's wishes were a factor in favour of maintaining the status quo, the judge had considered them carefully and deemed them to be outweighed by other factors.

While a judge should 'be careful about making an interim order under the Children Act which effectively determines a final issue', the court remained required to take any course which was — as here — shown to be necessary in the interests of a child's welfare. It would remain open for further changes, including a reversion to the previous arrangements, to be made at the final hearing.

The appeal was therefore dismissed.

Case summary by **Iain Large**, Barrister, **St John's Chambers**

S (A Child) (1980 Hague Convention Stranding) [2022] EWHC 214 (Fam)

M is a Pakistani national who was living in Portugal with F who was a Portuguese national of Pakistani background. M's status in Portugal had depended on a spousal visa. S was born in September 2020. In November 2020, the father decided to end the marriage. He removed S to England and placed her with his brother (U) and sister-in-law (A). He returned to Portugal. M was removed to Pakistan, escorted by members of paternal family who kept her travel documents and returned them to her damaged so they could not be used to return to Portugal. S had been told by F that once she was in Pakistan S would be returned to her. This did not happen.

In July 2021 she issued proceedings in the UK under the inherent jurisdiction and Hague Convention for return of S to Portugal or under the inherent jurisdiction for S's placement with her in Pakistan. The judge noted [para 1ii] that the latter

could have been an application for a s8 order: ***Re N (A Child)(Abduction: Children Act or Hague Convention Proceedings) [2020] EWFC 35;*** [2020] 2 FLR 575. S was made a ward of court in September 2021. Video contact between M and S began in July 2021.

F, U and A all opposed the applications. They sought for S to remain with U and A who hoped to adopt S in due course. They raised defences to the Hague Convention application alleging:

(a) That M consented to the removal (Art 13(a))

(b) That there is a grave risk that to return S to Portugal would expose him to physical or psychological harm or otherwise place him in an intolerable situation (Art 13(b)).

Peel J was satisfied [para 11] that PD3AA and PD 12J were engaged, applying In ***Re A (Children: Fact-Finding: Appeal) [2019] EWCA Civ 74***; [2019] 1 FLR 1175. Peel J directed special measures for taking the oral evidence as F, U and A had dispensed with legal representation. Screens were in place to hide the mother from the respondents and the respondents' questions were set out in writing and put to the mother by the judge. He had concluded that although a Hague application it was an appropriate case for oral evidence. Although M had been unable to secure permission to return to live in Portugal. She had, however, secured a visa which enabled to attend the hearing in England.

Having reviewed and summarised the recent case law on Article 13(a) and Article 13(b) and when a discretion not to return might be arise [See paras 16-19] he set out the evidence factual findings at [paras 20-46].

The judge concluded [para 47] that M had been subject to coercive and controlling behaviour and physical abuse during the marriage and when she was removed to Pakistan, where she was in effect abandoned. The F and his family's actions were designed to prevent M having a relationship with S. Their behaviour was described as "unspeakable cruelty". He held that the mother had not consented. He concluded that if the mother was able to return to Portugal the Article 13(b) defence would also fail. It would be engaged if she was not able to return, as the father was not able to look after S.

He considered the case law under Hague on delayed return orders [Para 52] and made a suspended return order (while the mother made a renewed attempt to get a visa to return to Portugal). He directed that S should be made a party to the proceedings and a children's guardian be appointed and statements directed so that the court could consider the welfare of S if M could not return to Portugal. If she did obtain a visa then the inherent jurisdiction proceedings would end. He ordered 3 sessions of unsupervised contact each week and would review the situation on 18 February 2022. The judgement was to be disclosed to Manchester City Council and the Portuguese authorities.

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

Aylward-Davies v Chesterman & Anor [2022] EWFC 4

Ms Aylward-Davies, "Ruth," was born out of wedlock from an affair between a teenage Orthodox Jewish woman ("Constance") and an Irish Catholic man ("Patrick"). Patrick did not wish to marry Constance when she became pregnant and as such, she quickly found another man to marry and stand in as Ruth's father ("Dennis"); abortion was illegal at the time and she could not contemplate giving up the child for adoption. When Ruth was born, Dennis was registered as her father, notwithstanding that he knew that he was not. Ruth was not told the truth until she was 15 years old.

Ruth did not seek out her biological father until adulthood, when she was training to be a psychologist. She spoke to her mother, who gave her Patrick's name, and she located him online; he was based in Ireland. She telephoned him for the first time in 2004 and she later was introduced to his wife and two children, becoming close to them. Sadly, Patrick died in 2008 following major spinal surgery.

The current proceedings concerned Ruth's application for a Declaration of Parentage under s.55A of the Family Law Act 1986, with a view to the Registrar-General for Births and Deaths amending her birth certificate to reflect Patrick as her legal father. Whilst Patrick had died in 2004, the application was only made in 2021, when Constance received confirmation that Dennis was dead; she did not want the application to be made whilst he was still alive as she was concerned it would lead to him finding her and Ruth (he had been an abusive husband). Patrick's widow and his children supported Ruth's application.

In considering her application, Mr Justice Mostyn first dealt with the question of whom the respondents to the application should be. He confirmed that Ruth had been correct to identify Constance and Patrick as the respondents, though the latter technically should have been his estate. The court felt that there should have been consideration of notice of the application being given to a representative of Dennis' estate at an earlier hearing; however, given the specific facts of the case, the court held that "identifying and notifying such a representative would be a protracted process and a pointless exercise" [18].

Mr Justice Mostyn went on to consider the procedure for dealing with the application. Whilst s.55A(1) permits a declaration of parentage application to be issued in either the High Court or the Family Court, he held that Ruth should have made her application to the Family Court pursuant to rule 5.4 of the Family Procedure Rules 2010 ("FPR 2010"). Once

made, the application is governed by Part 8, Chapter 5 of the FPR 2010. The court also took the opportunity to set out those considerations that would have been in play should a member of the press or a legal blogger attended the hearing [26-31].

The court then considered the criteria under s.55A(2) and s.58. In respect of s.58, Mr Justice Mostyn was satisfied on a balance of probabilities that Patrick was Ruth's biological father, notwithstanding the lack of any DNA evidence. Further, he could not see any reason why it would be manifestly contrary to public policy to grant Ruth's application. As such, he made the Declaration of Parentage as sought.

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

Collardeau-Fuchs V Fuchs [2022] EWFC 6

The parties were involved in costly financial proceedings, which were to be adjudicated at a private FDR and were concerned primarily with whether the pre-nuptial agreement and post-nuptial amendments to the pre-nuptial agreement should be upheld. The case in front of the court, however, dealt solely with the preliminary question of the amount of interim maintenance to be paid by the husband to the wife pending the final resolution of the case.

The parties, who enjoyed a very high standard of living when they were married, were significantly far apart in what they regarded as "reasonable" maintenance pending suit: the wife sought £350,000 per month and the husband countered with approximately £31,000 (though both amounts were subject to multiple revisions before the hearing). As such, the parties were £99,000 per month apart, an annual rate of £1,188,000. Though there was a preliminary dispute regarding the husband's alleged failure to meet various costs that he had agreed to previously, this was dealt with by way of undertakings at the commencement of the hearing.

In determining the wife's application, Mr Justice Mostyn reminded himself that the husband must pay to the wife sufficient sums as would meet her "reasonable needs." He held that the term "reasonable needs" must be interpreted in light of the standards enjoyed by the parties during the marriage. Since parties were of considerable means, the wife's "reasonable needs" had to be considered according to the standards of the ultra-rich, rather than what would seem generous by the standards of "ordinary people." The Judge therefore awarded the wife maintenance pending suit, to include maintenance for the children, in the sum of £71,300 per month.

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

B (A Child) [2022] EWFC 7

Background

B (the subject child) is 17. His father died estate in 2013, and under French law a property he owned there passed in equal shares to B and his adult sister. French law required B to accept the succession, although as a minor this would ordinarily be done by his mother making an application to the juge des tutelles. As B is habitually resident in England, the juge des tutelles declined jurisdiction. B's mother therefore applied for a specific issue order authorising her to:

(a) Accept a French inheritance on B's behalf; and

(b) Enter into a valid contract for sale of the French property on B's behalf.

Legal framework

Article 1 of the 1996 Hague Convention on the Protection of Children states that "The objects of the present convention are to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child" (article 1(1)(a), "to determine the law applicable to parental responsibility" (article 1(1)(c)) and "to provide for the recognition and enforcement of such measures of protection in all Contracting States" (article 1(1)(d)). Pursuant to article 3, those measures "may deal in particular with the administration, conservation or disposal of the child's property". The English court had jurisdiction given B's habitual residence (article 5).

Section 3(1) of the Children Act 1989 states that parental responsibility includes the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property. Peel J held that a purposive reading of s3(1) and 3(3) (i.e. including the right to receive or recover, for the benefit of the child, property of whatever description and wherever situated), include a responsibility and duty to take steps to enable the child to receive or recover property in the child's name.

He held that the wording of article 3(g) of the 1996 Hague Convention reinforced the conclusion that, pursuant to CA 1989 s3, parental responsibility includes the sale of property of a child. In English law (see e.g. ***South Down Trustees Ltd. V GH [2018] EWHC 1064 (Ch)***) a sale of property is an aspect of management of property.

Undertaking a welfare analysis, it was in B's interests for the property to be sold: it would realise substantial funds (B's share being worth about €160,000 less sale costs) and at present very little use was being made of the property. B wished to have funds for university and/or purchasing a rental property here. The application was therefore granted.

Procedural points

- Future applications should be made on a C100, supported by a witness statement.
- Anyone else with parental responsibility would be a respondent.
- It is unlikely the child would need to be joined as a party
- Any other person with a legal and/or beneficial interest in the property should be notified of the application and invited to make an application if they wish to be joined (although it is generally unlikely they will need to be joined, as this is not an order for sale, simply enabling a sale to be effected, and any other owner would be able to oppose a sale without joining the proceedings)
- A MIAM exemption should be claimed
- Ordinarily a hearing will be required given the likely one-sided nature of such applications (by way of analogy with infant approval hearings in the civil sphere), although the hearing could ordinarily take place at the first hearing

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