April 2022

Family Law Week

NEWS

Amendments to terminology in standard orders in divorce proceedings

On 02 March 2022 Mr Justice Mostyn, with the authority of the President of the Family Division, announced amendments to several standard orders relating to divorce proceedings.

Following the coming into force of the Divorce Dissolution and Separation Act 2020 on 06 April 2022, a 'petition' for divorce becomes an 'application, a 'decree nisi' becomes a 'conditional divorce order' and a 'decree absolute' a 'final divorce order'.

For the standard orders as amended with the new terminology, **click here**.

Julia Queen, Barrister, **Coram Chambers**

02.03.2022

Bradford Children's Services to be placed into Trust

The Education Secretary, Nadhim Zahawi, has decided to place Bradford Children's Services into a Trust following recommendations made by the Bradford Children's Services Commissioner.

This move was voluntarily agreed by leaders at Bradford Council in recognition of the challenges the local authority has faced since its rating of inadequate by Ofsted in 2018. The Bradford Children's Services Commissioner, Steve Walker, was appointed in September 2021 to conduct a 3-month review of the Children's Services department. His recent **report** dated 09 February 2022 to the Education Secretary concluded that the council 'lacked the capacity and capability to improve services at pace on its own and recommended an alternative delivery model to support improvement in services and outcomes for vulnerable children in Bradford's care'.

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Law Week Limited
Greengate House
87 Pickwick Road
Corsham
SN13 9BY

Tel : 0870 145 3935

A new independent non-executive commissioner will be appointed to lead the council through the transition period whilst the new trust is established. The trust will work closely with council leaders, but will remain operationally independent.

Education Secretary Nadhim Zahawi said:

> "Keeping vulnerable children safe from harm is non-negotiable. Where a council is not meeting its duty to do this, we will take action to protect children and put their needs first.
>
> It's clear from the recommendations made by the Commissioner in Bradford that the council needs support to improve and so I'm pleased that Bradford council have agreed to establish a new trust that will bring positive change for the council and independent oversight that drives improvements.
>
> This is an important moment for children and families in Bradford, and for social worker and other professionals who want to create meaningful and effective relationships with them. These professionals take highly complex decisions each day to protect children, and I am grateful for the effort that goes into each one."

For the Education Secretary's comments, **click here**.

For the report of the Bradford Children's Services Commissioner, **click here**.

Julia Queen, Barrister, **Coram Chambers**

05.03.2022

Further £160m to be invested into government's National Adoption Strategy

On 03 March 2022 the Department for Education announced a new investment of £160m over three years into the government's National Adoption Strategy, launched in 2021.

The aim of the strategy is to decrease the length of time children spend waiting in care for a permanent adoptive family to be found. This includes better training for 'front line staff' in adoption agencies, improving the process for approving prospective adoptive families and funding targeted recruitment campaigns. Since the plan was introduced last summer, figures have indicated that the number of adoptions taking place has risen; as the number of families approved to adopt has risen from 1,930 in September 2020 to 2,370 by September 2021.

The strategy not only facilitates the adoption process but also provides additional support to adoptive families such as cognitive therapy, family support sessions and activities to help children recover from early-life traumas and assist them in settling into their new families and homes.

The Education Secretary, Nadhim Zahawi, said:

> "The importance of a loving, stable family cannot be overstated, no matter what shape it takes. Family are crucial in giving children the warmth, background and opportunities they need to succeed in life.
>
> We launched our National Adoption Strategy last summer, and I'm really encouraged to see it is already having a meaningful impact on the adoption system across the country, as waiting times for children in care reduce and they find the loving homes they need.
>
> Whether it's through investing in adoption and our expanded Family Hub network, or looking into the findings from the upcoming Care Review, it is my mission to make sure that family stays at the heart of our policy."

For the government's announcement, **click here**.

Julia Queen, Barrister, **Coram Chambers**

05.03.2022

National Audit Office reveals significant arrears in Child Maintenance System

The Child Maintenance System ('the CMS'), which falls within the remit of the Department for Work and Pensions, has recently been audited by the National Audit Office to consider whether it achieves value for money for the taxpayer. **The National Audit Office's report** revealed serious failures in the collection of payments to support separated parents in caring for their children.

The Child Maintenance System is used by 18% of separated families to assist in their financial arrangements. There are two processes offered by the CMS - 'Direct Pay' and 'Collect and Pay'. 'Direct Pay' is a system by which the CMS calculates the maintenance due but the parents are responsible for transferring the money between themselves. The 'Collect and Pay' system not only calculates the maintenance due but goes one step further and arranges the transfer of the money between the parents. A fee of 20% is charged to the paying parent for this service and the receiving parent is charged 4% of the amount collected.

In the UK, around 270,000 children are covered by Collect and Pay arrangements. However, the audit report revealed that £440 million is owed to separated parents who use the 'Collect and Pay' system as of October 2021.

Gareth Davies, head of the National Audit Office said:

> "Many separated parents are still left without the maintenance payments they are due. Welfare and child maintenance rules need to align much better to support government's wider objectives of addressing poverty and helping people into work."

Victoria Benson, Chief Executive of Gingerbread, a national charity for single parent families **said**:

> "While we certainly welcome the NAO's report, it clearly shows that the Child Maintenance Service isn't working for single parents. The report highlights systemic failings that mean children are going without – we already know too many single parent families are living in poverty. Perhaps most telling is the simple acceptance of the fact that, short of writing debts off, there is no way for Government to avoid maintenance arrears rising to £1bn by 2031. This clearly shows that there are fundamental flaws in the CMS that need to be tackled.
>
> "Worryingly, the report reveals the number of families with no child maintenance arrangement in place has almost doubled since the CMS was established, and this is affecting children in some of the poorest families and those experiencing higher levels of conflict. This raises a red flag that the CMS is failing to reach many of those families it should be protecting the most.
>
> "It's clear that urgent changes need to be made to ensure the child maintenance system is fit for purpose and works for those who need to use it. Without reform more single parent families will experience poverty and more children will be exposed to ongoing disadvantage. Single parents and their children should be supported to thrive because of their family make up – not in spite of it."

For the National Audit Office report, **click here**.

Julia Queen, Barrister, **Coram Chambers**

05.03.2022

One month to go before introduction of no-fault divorce

On 06 April 2022 the Divorce, Dissolution and Separation Act 2020 will come into force. Described as 'the biggest reform of divorce laws in half a century', the Ministry of Justice has released an **Information Pack** setting out key information as to the amendments and new court forms to be used.

Amongst various changes, the most anticipated change is the introduction of 'no-fault divorce'. This change means:

- The requirement to provide evidence of 'conduct' or 'separation' facts is removed and replaced with a requirement to provide a 'statement of irretrievable breakdown' of the marriage or civil partnership.
- The ability to defend the decision to divorce or end the civil partnership is removed.
- For the first time, joint applications for divorce, dissolution and separation are permitted.

There are also important changes to the terms and language used in the process of divorce. The terms 'Decree Nisi' and 'Decree Absolute' will be no more, instead becoming 'Conditional Order' and 'Final Order' respectively. The 'Petitioner' will also now be known as the 'Applicant'.

The timescales for the process of divorce will also be altered. A new minimum overall timeframe of six months (26 weeks) has been introduced between the date the court first issues the application for divorce and when a final order can be made.

For the Ministry of Justice information pack, **click here**.

Julia Queen, Barrister, **Coram Chambers**

03.03.2022

Nightingale Courts extended to support recovery in justice system

The Ministry of Justice has announced a list of 30 Nightingale Courts which are to remain in action until March 2023. Whilst the majority of the Nightingale Courts are used as Crown court rooms for criminal matters, Nightingale Courts for family law matters are remaining open in Telford, Birmingham and Fleetwood. Negotiations are also ongoing to secure a new two-courtroom venue in London to replace the Nightingale Court at Monument.

The Justice Minister, James Cartlidge, said:

> "Nightingale Courts continue to be a valuable weapon in the fight against the pandemic's unprecedented impact on our courts providing temporary extra capacity.
>
> Combined with other measures – such as removing the cap on Crown Court sitting days, more use of remote hearings, and increasing magistrate sentencing powers – we are beginning to see the backlog drop so victims can get the speedier justice they deserve."

For the announcement, **click here**.

Julia Queen, Barrister, **Coram Chambers**

07.03.2022

Mr Justice Peel appointed as National Lead Judge of Financial Remedies Court

The President of the Family Division has announced that Mr Justice Peel will take over from Mostyn J as the National Lead Judge of the Financial Remedies Court and Judge-in-Charge of Standard Family Orders.

Mr Justice Peel takes over the roles from 26 April 2022 for a four-year term.

For the Court and Tribunals Judiciary announcement, **click here**.

Julia Queen, Barrister, **Coram Chambers**

12.03.2022

Cafcass trials new child arrangements pilot scheme

The Ministry of Justice, in partnership with Cafcass, has announced a new pilot scheme to take place in family courts in North Wales and Dorset. One main aim of the pilot is to help separated families to agree arrangements for their children, rather than engage in acrimonious litigation. The pilot scheme also claims to 'boost' the voice of the child at every stage of the process, ensuring that the child is listened to and their views taken into account when decisions are made about their futures.

Another key aim of the pilot scheme is to better support victims of domestic abuse. The pilot scheme improves information sharing between different agencies such as the police and local authorities and allows Judges to review the background of the case from the gathered information before a hearing even takes place. Judges will then be able to request more documentation as they consider necessary. The purpose of this aspect of the pilot is to avoid the background and circumstances of the case being debated in the courtroom, which is thought to 'exacerbate conflict' between parents. The intention is also to spare victims of domestic abuse the trauma of having to 'unnecessarily repeat their experiences.'

Justice Minister Lord Wolfson QC said:

> "This government is doing everything we can to protect victims, make them feel safer, and give them greater confidence in the justice system.
>
> These pilots will help ensure victims of domestic abuse aren't further traumatised by the court process and that better decisions are made about their and their children's lives.
>
> This, alongside our landmark Domestic Abuse Act, will ensure that victims are loudly heard and fully supported."

For the full announcement and further details about the pilot scheme, **click here**.

For Cafcass' response to the announcement of the pilot scheme, **click here**.

Julia Queen, Barrister, **Coram Chambers**

08.03.2022

LGBT+ Adoption and Fostering Week 2022

From 07 March 2022 to 13 March 2022, various organisations have been celebrating LGBT+ Adoption and Fostering Week 2022 to raise the profile of adoption and fostering with prospective parents who are LGBT+.

Various organisations are continuing to run informative sessions throughout March 2022. CoramBAAF Adoption and Fostering Academy is offering a programme of courses aimed at social work managers, practitioners and childcare professionals addressing issues of diversity and inclusion and Adopt London is running a series of 'Meet the Adopter' sessions and 'Virtual Information Sessions' throughout the month.

For more information about the diversity and inclusion practitioner courses, **click here**.

Julia Queen, Barrister, **Coram Chambers**

12.03.2022

Women's Aid responds to Human Rights Act reform consultation

Women's Aid has published a briefing note setting out its concerns in relation to proposals set out in the government's consultation on reform to the Human Rights Act.

The Ministry of Justice's consultation process, titled 'Human Rights Act Reform: A Modern Bill of Rights', closed on 08 March 2022. Women's Aid has raised concerns that some of the government proposals for reform would have a significant impact on women and children who have experienced domestic abuse. Women's Aid particularly raised concerns that many of the findings of the Independent Human Rights Act Review ('IHRAR') do not appear to have been considered by the government and that many of the government's proposals are in direct opposition to the IHRAR's recommendations.

For the Women's Aid briefing note, **click here**.

Julia Queen, Barrister, **Coram Chambers**

08.03.22

CMA raises concerns as to dysfunctional market for children's social care placements

In March 2021 the Competition and Markets Authority (CMA) launched a study into children's social care and the placements available to children. There are currently over 100,000 looked-after children in the UK with the current annual cost of social care being approximately £5.7 billion in England, £680 million in Scotland and £350 million in Wales.

The final report as to the CMA's findings was published on 10 March 2022. It found that there is a shortage of placements both in foster care and in children's homes, which results in local authorities often having to pay high prices to secure a placement. The profits made by some private providers of children's homes were higher than the CMA expected, which indicated that local authorities may be paying more than they need to, particularly in respect of fostering services.

The CMA has recommended that the UK government develops national and regional organisations that could support local authorities with their responsibilities in finding placements for children. The CMA also raised concern as to the 'financial resilience' of some private providers of children's homes, some of which have high levels of debt which could impact upon the care provided to the children within their placements.

Andrea Coscelli, Chief Executive of the CMA, said:

> "The UK has sleepwalked into a dysfunctional children's social care market. This has left local authorities hamstrung in their efforts to find suitable and affordable placements in children's homes or foster care.
>
> We have also identified issues with the financial stability of children's home providers. It is important to manage the risk of children's homes providers going bust and local authorities having to pick up the pieces.
>
> Local authorities cannot be left to face these challenges alone. There are several areas where national governments should make changes to address issues in the sector, including new financial oversight of providers and the development of new bodies to support local authorities with commissioning. With children's social care currently being reviewed across the UK we want to see our recommendations reflected in any changes to policy."

For the CMA's press release, **click here**.

Julia Queen, Barrister, **Coram Chambers**

10.03.2022

Outdoor civil weddings and civil partnerships made permanent

Outdoor weddings at licensed venues in England and Wales will be legalised permanently after the change received overwhelming support from the public, faith groups and the wedding industry.

It will mean that marrying couples will continue to have greater choice in how they celebrate their wedding. Temporary legislation allowing outdoor civil weddings and partnerships for the first time has been in place since last summer.

A government consultation found that 96 per cent of respondents backed making this change permanent, while 93 per cent supported extending it to religious weddings. Ministers have laid the **Marriages and Civil Partnerships (Approved Premises) (Amendment) Regulations 2022** which legalises outdoor civil weddings and partnerships indefinitely. Reforms to religious ceremonies will be made in due course after the consultation found every major faith group supported the move.

Prior to last summer, civil ceremonies at a licensed wedding venue had to take place indoors or within a permanent outdoor structure, such as a bandstand.

Couples can now have the whole ceremony outside in the venue's grounds – providing them with greater flexibility and choice, as well as boosting the recovery of the wedding sector which saw many ceremonies postponed during the pandemic.

For the announcement, **click here**. For the legislation, **click here**. For the consultation outcome, **click here**.

17.03.22

'Cyberflashing' to become a criminal offence

'Cyberflashing' will become a new criminal offence with perpetrators facing up to two years behind bars under new laws to be introduced by the Government.

The practice typically involves offenders sending an unsolicited sexual image to people via social media or dating apps, but can also be over data sharing services such as Bluetooth and Airdrop. In some instances, a preview of the photo can appear on a person's device – meaning that even if the transfer is rejected victims are forced into seeing the image.

Research by Professor Jessica Ringrose from 2020 found that 76 percent of girls aged 12-18 had been sent unsolicited nude images of boys or men.

Ministers have confirmed that laws banning this behaviour will be included in the Government's Online Safety Bill alongside wide-ranging reforms to keep people safe on the internet.

The new offence will ensure cyberflashing is captured clearly by the criminal law – giving the police and Crown Prosecution Service greater ability to bring more perpetrators to justice. It follows similar recent action to criminalise upskirting and breastfeeding voyeurism with the Government determined to protect people, particularly women and girls, from these emerging crimes.

It follows a Law Commission review 'Modernising Communications Offences' which recommended that a new offence should be created.

Alongside the new cyberflashing offence, the Government has previously committed to creating three other new criminal offences through this Bill, tackling a wide range of harmful private and public online communication. These include sending abusive emails, social media posts and WhatsApp messages, as well as 'pile-on' harassment where many people target abuse at an individual such as in website comment sections.

The Online Safety Bill will also put more legal responsibility on social media platforms, search engines and other

websites or apps which host user-generated content to tackle a range of illegal and harmful content on their services.

For the Law Commission report, **click here**.

17.03.22

Divorce, Dissolution and Separation Act 2020 (Commencement) Regulations 2022

These Regulations bring into force on the 6th April 2022 those provisions of the Divorce, Dissolution and Separation Act 2020 which are not already into force.

Sections 6(2) to (7), 7 to 9 came into force on Royal Assent.

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

19.03.22

Forthcoming changes to Child Maintenance Service announced

The government is planning to make changes in secondary legislation relating to child maintenance, as parliamentary time allows, to bring into force changes to:

- include unearned income in child maintenance calculations
- extinguish small volumes of very low value debt (£6.99 and under) where the maintenance calculation has ended but there remains an outstanding debt, and the value of the debt is substantially less than the cost of collecting it
- extinguish arrears where child maintenance has been deducted from a parent's earnings and their employer has gone into administration, and the outstanding arrears can no longer be recovered.

The announcement follows publication of the government's response to the submissions to the consultation **Child Maintenance: modernising and improving our service**.

The new powers being introduced will also expand the list of companies and organisations required to provide information to the Child Maintenance Service (CMS) which will help the service trace the paying parent, calculate maintenance and enforce arrears more effectively.

To make it easier for companies to respond quickly and securely, the process is now being simplified so information can be passed on by secure digital means instead of compulsory in-person visits from CMS inspectors.

For the announcement, **click here**. For the government response to the consultation submissions, **click here**.

15.03.22

Children deprived of their family environment due to the armed conflict in Ukraine: Hague Convention information note

The Permanent Bureau of the HCCH, noting the situation currently unfolding in Ukraine, has published an **Information Note** on the subject of Children deprived of their family environment due to the armed conflict in Ukraine: Cross-border protection and intercountry adoption.

In an international armed conflict, many children become separated from their families, losing the critical protection families provide, and finding themselves without basic necessities such as shelter, food and water, as well as without access to education. Many children are forced to leave their homes and their country or may be moved to a safe place. In such situations, the primary concern for these children should be their safety as they are displaced or moved across borders.

The **HCCH 1993 Adoption Convention** and **HCCH 1996 Child Protection Convention** provide an important framework for the protection for children in such emergency situations. In case of an armed conflict however, the focus should be on child protection measures other than adoption; the 1996 Child Protection Convention – and not the 1993 Adoption Convention – is therefore better suited to protect these children in such situations. In an emergency situation such as an armed conflict, the risks of illicit practices in intercountry adoption are greater as it can be very difficult or impossible to ensure that adoptions are carried out in line with the guarantees and procedures of the 1993 Adoption Convention, as well as domestic legislation.

In light of the above, in a situation of armed conflict:

- The conflict should not be used as a justification for expediting intercountry adoptions, or for circumventing or disregarding international standards and essential safeguards for safe adoption.
- Adoption procedures should be prohibited from taking place.

Furthermore, even if Ukraine is not a Party to the 1993 Adoption Convention, all receiving States should apply its standards and safeguards when cooperating with Ukraine, including during a situation of armed conflict.

For additional information on the application of the 1993 Adoption and 1996 Child Protection Conventions during the armed conflict in Ukraine, please refer to the Information Note, for which, **click here**.

19.03.22

Liaison between the courts and British Embassies and High Commissions: Guidance from the President of the Family Division

The President of the Family Division has issued guidance regarding liaison between courts in England and Wales and British Embassies and High Commissions abroad.

This guidance replaces the previous version dated April 2016.

For the guidance, **click here**.

15.03.22

Legal Aid means test review launched

The Ministry of Justice has launched a review of the means test for legal aid as part of the Legal Support Action Plan.

Chapters 1 and 2 of the consultation document summarise the existing legal aid means tests and lay out the overarching approach to legal aid eligibility. Chapters 3, 4 and 5 detail the proposals in relation to civil legal aid. Chapters 6 and 7 detail the proposals in relation to criminal legal aid. Chapter 8 outlines the proposals for implementation and monitoring.

The ministerial foreword states:

> "We want to do even more to support victims of domestic abuse – for whom legal proceedings can be both traumatic and costly. Under our plans, domestic abuse victims applying for a protective order or other proceedings would benefit from the more generous means test for civil legal aid. And any disputed assets – including property – will not be included in a means assessment. This is much fairer for domestic abuse victims who are contesting a property and who cannot use their equity in that property to fund the legal proceedings."

It is proposed to amend the means test so that where a domestic abuse victim has temporarily left their home but intends to return in the near future, or once it is safe to do so, the equity disregard should be applied. This will ensure victims are not penalised for fleeing their home to secure their safety.

For details of the consultation, which closes on 7 June 2022, and the consultation document itself, **click here**.

20.03.22

Amendments to standard orders: Message from Mr Justice Mostyn

On 14 March 2022 Mr Justice Mostyn made the following announcement:

> I make this announcement with the authority of the President.
>
> Today, the Guidance from the President's Office "Liaison between Courts in England and Wales and British Embassies and High Commissions Abroad" has been issued.
>
> It has been placed on the judiciary website: **click here to read it.**
>
> The Guidance appends specimen clauses which may be included in orders to be made in those cases where a child has been wrongfully removed to or retained in a foreign country and where, among other matters, assistance is sought from the authorities of that country and/or, via the Foreign, Commonwealth and Development Office in London, from the relevant British Embassies, High Commissions or Consulates in it.
>
> At my request the group considering amendments to the Standard Family Orders Volume 2 chaired by HHJ Moradifar has undertaken an urgent review of the relevant orders and has drafted amendments which reflect the terms of the Guidance and the specimen clauses.
>
> The revised orders are:
>
> Order 13.20: Abduction – Wardship Directions Order (Without Notice)
>
> Order 13.21: Abduction – Wardship Directions Order (on Notice)
>
> Order 13.22: Abduction – Wardship Directions Order (Without Notice – Pakistan Protocol)
>
> Order 13.23: Abduction – Wardship Directions Order (on Notice – Pakistan Protocol)
>
> If the case involves the wrongful removal of a child to, or retention of a child in, Pakistan then, as before, Orders 13.22 and 13.23 should be used. In all other cases Orders 13.20 and 13.21 should be used.
>
> The revised orders are attached to this announcement and take effect immediately. Also attached is a zip file of Volume 2 of the standard orders in their up-to-date form.
>
> All further amendments will await the full review of the standard orders, the work on which is now underway, the consultation period having concluded on 28 February 2022.
>
> For the attached orders, **click here**.

17.03.22

Child Maintenance Service guide published

The Department for Work and Pensions has published a guide explaining how to set up or manage a child maintenance arrangement, including what to do if a parent does not pay, how to contact the Child Maintenance Service, and signing in to one's account.

For the guide, **click here**.

25.03.22

Committee on Experts in the Family Justice System newsletter published

The Committee on Experts in the Family Justice System has published a newsletter providing news on the activities of the FJC Committee.

The newsletter covers progress in relation to:

- Supporting and sustaining change
- Medical colleges and professional bodies
- Commissioners and NHS Trust
- Payment
- Court process and treatment of experts
- Training.

For the newsletter, **click here**.

25.03.22

Ending physical punishment in Wales

On 21 March 2022 physically punishing children became illegal in Wales. The change in law gives children the same protection from assault as adults. It makes the law clearer and easier for children, parents, professionals and the public to understand.

Physical punishment has been illegal in schools, children's homes, local authority foster care homes and childcare settings for some time.

Anyone who physically punishes a child will be breaking the law, risks being arrested or charged with assault and may get a criminal record as for any criminal offence.

For an oral statement in the Assembly of Wales concerning the ban, **click here**.

25.03.22

Ongoing legacy of historic adoption practices revealed in evidence published by Parliamentary Committee

The Joint Committee on Human Rights has published the first tranche of written evidence it has received as part of its inquiry into the adoption of children of unmarried women between 1949 and 1976. The submissions include a large number of personal testimonies from mothers who were separated from their children, and people who were separated from their mothers as babies.

The testimonies reveal the societal and institutional pressures that led to unmarried mothers feeling they had no choice but for their baby to be adopted, and in many cases being given no option at all. They reveal a pervasive sense of shame and judgement towards unmarried mothers that led to pregnant women and girls being hidden or sent away and an air of secrecy for many years afterwards. This extended to the standard of treatment experienced during and after the birth, and has left a lasting impact. People who were adopted described the legacy of not knowing their family history, particularly for health issues.

A central aim of the inquiry is to listen to those affected by adoption practices during this time. As part of this the Joint Committee is holding a round-table event where members of the public can relate their experiences. For further information about how to take part, **click here**.

For the published written evidence can be found on the Committee's website, **click here**. For excerpts of the submissions giving an overview of some the key issues raised, **click here**.

25.03.22

Staffordshire council to think again about care leaver's complaint

Staffordshire County Council has agreed to reconsider whether to investigate a woman's complaint about her time as a child in its care, following an investigation by the Local Government and Social Care Ombudsman.

The woman became a looked after child for a short time as a teenager in 2011, when she could no longer live with her parents. She stayed with two sets of foster parents before moving back with her mother. Some time after returning to her mother's care, she again called on the council for help when she was 15, pregnant and her parents did not want to support her.

In late 2020, now 24 years old, the woman complained to the council about the support she received while in its care. She believed she had missed out on support she should have been entitled to as a formerly looked after child with a baby, including a care leaver's grant.

When she asked Staffordshire County Council to investigate her concerns, it said it could not investigate as too much time had passed. Despite this the council did attempt to answer some of her questions outside the statutory complaints process.

The Ombudsman's investigation found the council followed the statutory guidance too rigidly and failed to take into account the advice to consider people's complaints on a case-by-case basis.

In this case the council had records it could and did refer to when answering some of the young woman's questions about her time in care and should have done more to consider whether it could investigate her complaint.

For the Ombudsman's report, **click here** and then click on the link at the top right of the page opened.

25.03.22

Top 10 children's care providers made £300m profits, says Observer

The 10 largest providers of children's social care placements made more than £300m in profits last year, according to research seen and reported by the Observer. Profits among the top 20 providers of care home and fostering places now amount to 20 per cent of their income.

The report follows publication earlier this month of a report by the Competition and Markets Authority in which it expressed concerns about financial stability of private children's home providers and high profits in the sector.

For the Observer report, **click here**. For the CMA report, **click here**.

27/3/22

Financial Remedy Update, March 2022

Rose-Marie Drury and Sue Brookes, Principle Associates at Mills & Reeve LLP consider the most important news and case law relating to financial remedies and divorce during February 2022.

As usual, the update is divided into two sections.

A. News

The Ministry of Justice has published an information pack and draft court forms before the Divorce, Dissolution and Separation Act 2020 (DDSA 2020) comes into effect on 6 April 2022

The information pack outlines the reforms to divorce law introduced by the DDSA 2020. The pack also sets out important dates and deadlines in the lead-up to 6 April 2022 when a new paper and digital application process will operate for solicitors and litigants in person. The pack provides practical guidance about the new law and application process.

Important dates and deadlines:

- Proceedings issued on or before 5 April 2022 will continue to progress under the existing law, whether submitted digitally or on paper. These applications will not be impacted by the commencement of the DDSA 2020. Applications submitted under the existing law that are not issued by 6 April 2022 will be returned to the applicant, who will need to complete an application under the new law. To ensure applications under the existing law are issued in time:

- The court must receive all paper applications by 4.00 pm on 31 March 2022.

- All digital applications must be submitted online no later than 4.00 pm on 31 March 2022. The digital system will not allow applications to be submitted after this time and will not accept new applications until 10.00 am on 6 April 2022 under the new law.

- Urgent applications will continue to be accepted and issued where possible, if received by post or email, before 4.00 pm on 5 April 2022. If submitting an urgent application by email, practitioners should use the following address: onlineDFRjurisdiction@justice.gov.uk. This email address will be unmonitored after 4.00 pm on 5 April 2022.

- Applications should be completed as early as possible before the relevant deadline to ensure they are issued in time.

Family Procedure Rule Committee: publication of approved minutes of meeting on 6 December 2021

The agenda and approved minutes of the Family Procedure Rule Committee (FPRC) meeting on 6 December 2021 have been published. Points of interest include:

- Proposed new Practice Direction (PD) 3B will cover the prohibition on an abuser cross-examining a victim of domestic abuse in person in family proceedings (section 65, Domestic Abuse Act 2021). The MoJ will launch a consultation on the new measures and the proposals for statutory guidance to accompany the proposed measures.

- The International Family Working Group (IFWG) is working on implementing the judgment in *Re G (A Child)* [2021] UKSC 9 via Practice Guidance on Case Management in International Child Abduction Cases. The IFWG recommended that PD 12F should be amended to insert a reference to the Practice Guidance once it has been finalised.

- The Enforcement Working Group proposed a new standard directions order for general enforcement applications to be piloted for a year from the end of May 2022. The FPRC agreed this could take place subject to fine tuning of the order.

- Work is underway on an online portal for adoption applications. The service should be live from early 2022, initially for placement order applications with other types of applications being added over time.

- A working group has been established to consider the judgment in *H v R* [2021] EWHC 1943 (Fam)

- The Committee discussed the relationship between guidance notes and the FPR, and in particular linking content on the FPR online with the President's guidance and how best to progress this.

A new version of Form D81: statement of information for a consent order in relation to a financial remedy was issued on 3 February 2022.

A new version of Form D81: statement of information for a consent order in relation to a financial remedy, was issued on 3 February 2022 for immediate use. The old version of the form will continue to be accepted where signed no later than 18 February 2022.

New Financial Remedies Court efficiency statement issued

The Financial Remedies Court national lead judge, Mostyn J, and the deputy national lead judge, HHJ Hess, 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 now substantially abridged) and a revised lead judge job description have also been issued.

Advisory notice on correct use of Composite Asset Schedule ES2 in financial remedy proceedings

The Financial Remedies Court (FRC) has endorsed an advisory notice prepared by the FLBA on the correct use of the ES2 (Composite Asset Schedule) in financial remedy proceedings. The note clarifies that the parties do not need to agree the values for assets, liabilities and incomes in the ES2. The column for assets and liabilities held by each party (or held jointly) is divided in half, so each party can set out the values they ascribe. Each party must set out their "side" of all three columns. Both sides of the columns should be completed, even where the values are agreed. Other points:

- Where the figures for an item are different (save for values less than £50 apart), the parties must highlight the competing values in yellow. Different sub-totals do not need to be highlighted.

- Liabilities or overdrawn bank accounts should be entered as negative numbers. All numbers should be recorded in sterling, even if the parties cannot agree the exchange rate.

- The parties can add calculation boxes to calculate total combined resources, if they consider this helpful. Those calculations should show the combined total of the values asserted by each party.
- Where there is a dispute about whether an asset exists, or whether it should be included, it should be recorded. The party disputing its inclusion should leave a blank cell for the asset's value and the competing adjacent cells must be highlighted in yellow to highlight the dispute.
- Where it is asserted that one or both of the parties has a beneficial interest in an asset legally owned by a third party, that asset must be recorded. The party denying the beneficial interest should leave the value cells blank, with the adjacent cells highlighted yellow to highlight the dispute.
- For joint assets, the entire asset must be recorded in the "joint" column. The asserted beneficial interests in joint assets must not be recorded and apportioning the value across the parties' columns is not acceptable.
- It is best practice for the ES2 to travel between the parties or their solicitors when any updating disclosure is served, so the ES2 can be updated before any court hearings.

Review of standard family orders announced

On 18 January 2022, Mostyn J announced a review of the standard family orders. He has invited practitioners, judges and other interested parties to provide comments on any relevant matters by 28 February 2022. Mostyn J intends to issue updated volumes of the financial remedy and children SFOs by summer 2022. HHJ Edward Hess will lead the review of the financial remedy SFOs and HHJ Kambiz Moradifar will lead the review of the children SFOs.

First hearings in the Family Division at the Royal Courts of Justice to be in-person

The President of the Family Division, Sir Andrew McFarlane, has announced via family lawyer organisations that where an application is issued in the Family Division after 1 March 2022, first hearings at the Royal Courts of Justice will be attended hearings as opposed to remote. The court will consider any individual requests made in an individual case for any change in the format of the hearing, having regard to the interests of justice.

Fifth sub-group of the Family Transparency Implementation Group (TIG) announced

The President has announced that the Financial Remedies Court Transparency Group, will become the fifth sub-group of the TIG. The 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 sub-group will look beyond the previously conducted consultation, and it is anticipated that further consultations will be undertaken. This is in addition to the existing four TIG sub-groups which were announced by the President in January 2022.

New secular laws come into force in Abu Dhabi

In a bid to make the United Arab Emirates more attractive to outsiders to live and work, new secular laws have been introduced in Abu Dhabi. The legal reforms affect both arrangements for children, divorce, and finance laws. There is now permission for personal status procedures such as divorces, inheritance, and marriage to take place for the first time in the country outside of the religious codes.

B. Cases

Collardeau-Fuchs v Fuchs [2022] EWFC 6

H was 62 and W was 46. The parties had begun cohabiting in 2008/2010, married in 2012 and separated in 2020. There were two children of the family ages 3 and 6. During the marriage the parties enjoyed an extremely high standard of living with properties around the world, a significant number of staff and they spent time travelling often by private plane or first-class staying in high-end accommodation at a significant cost.

Prior to the parties' marriage they entered into a Pre-Nuptial Agreement (PNA) in New York. H's net worth was said to be $1.064 billion and W's $4.471 million. Following their marriage, they executed a Modification Agreement (MA) in New York 2014 which increased the financial provision made to W pursuant to the PNA.

H sought for W to be held to the terms of the PNA and MA and issued Form A and an application for notice to show cause. He accepted that pending the determination of whether those agreements should be upheld he would need to provide interim financial support to W.

H provided financial disclosure by way of a schedule of assets showing his net assets were c. £1.245 billion. His schedule of expenditure for the family was £4.775 million for the year 2019 and £5.965 million for the year 2020. He calculated that the W would receive £23.5 million under the PNA and MA as well as the benefit of living at the parties' West London property for 18 years rent-free. W's core objection to being held to the agreements was that it would not permit her to remain living at the parties' West London property until the youngest child of the family was age 21 as she would be unable to fund the costs of living of that property whereas the PNA and MA had been based upon her being to live there.

W applied for MPS seeking the sum of £350,000 pcm on the basis she would take over responsibility for paying overheads of the various homes and staff salaries. The sum sought by W included £130,000 for her discretionary expenditure which was calculated approximately 60% of the parties' expenditure in 2020 plus a sum for the children.

H's open offer was to pay W £31,000 pcm together with agreed overheads, school fees/nursery extras and W's legal fees.

The matter came before Mostyn J for determination of W's MPS application.

Mostyn J found that given the marriage had been in difficulty by the end of 2019 and the parties' had separated in March 2020 the appropriate year to determine the marital standard of living was 2019 as the higher figure for 2020 did not represent the marital standard of living. Mostyn J took the headline figure supplied by H of £900,697 of global annual living costs without making deductions for items such as insurance, charity donations and furniture as H had failed to particularise those sums. He deducted H's payments to his dependants which left £441,558. He considered it fair to attribute 50% to each party. Added to that was discretionary expenditure which again he attributed 50% to each party and expenditure on the children attributed to W. The total figure for W's expenditure was £380,622 per annum or £31,719 pcm.

Dealing with holiday H had supplied a schedule of travel and holidays incurred by W and the children totalling £475,000 in 2019 (or £39,583 pcm). Mostyn J considered it fair to give W the same sum to meet her holidays on an interim basis. He therefore awarded W MPS including child maintenance in the sum of £71,300 pcm in addition to the costs which H had undertook to meet directly.

P v Q [2022] EWFC B9

W was age 48. H was age 45. The parties had cohabited since 2005 and married in 2006. There were two children of the family age 11 and 10. The parties lived in London as a family before moving to Germany in 2016. In 2016 they also set up and developed an energy business of their own based in Germany which was later sold to Y Ltd in which both parties held shares. In 2019 the parties' separated and W issued financial proceedings in 2020.

The matter came before HHJ Hess at a final hearing.

Amongst the issues in dispute between the parties at the final hearing was whether or not sums provided to the parties by their respective parents were hard or soft debts.

In 2004 W had received €30,000 from her father to fund an MBA. A contemporaneous document recorded it was an interest free loan and a date for repayment was not set. W was to repay the loan back at her own discretion. No demand was made for repayment and the liability did not appear in W's Form E or her narrative statement.

In 2010 during the course of the marriage H's mother had advanced £150,000 to each of her children to assist them with their respective housing costs. No documentation was drawn up contemporaneously or later to record the terms of the advance. In June 2020 after separation H paid his mother the sum of £150,000 and asserted it was in repayment of the loan.

HHJ Hess found both sums were soft debts. He did not include W's loan from her father on the balance sheet and attributed back the £150,000 paid to H's mother to H's side of the balance sheet. Having reviewed the relevant authorities he derived the following principles to deal with the status of loans:

> 1) Once a judge has decided a contractually binding obligation to a third party exists the court may consider whether the obligation is hard or soft. If it is a soft obligation the judge may decide as an exercise of discretion to leave it out of the schedule of assets.
>
> 2) There are a wide variety of circumstances which cause an obligation or loan to be classified as hard or soft.

3) A common feature is that the analysis targets whether or not it is likely that the obligation will be enforced.

4) Features which fall for consideration include:

Hard obligations: i) obligations to a finance company, ii) terms of the obligation have the feel of a normal commercial arrangement, iii) the obligation arises out of a written agreement, iv) there is a written demands for payment/threat of litigation/actual litigation or intervention in financial remedy proceedings, v) there has not been a delay in enforcing the obligation, vi) the amount of money is such it would be less likely for a creditor to waive the obligation in full or part.

Soft obligations: i) the obligation is to a friend or family member with whom the debtor remains on good terms and is unlikely to want the debtor to suffer hardship, ii) the obligation arose informally and the terms of the obligation do not have the feel of a normal commercial arrangements, iii) there has been no written demand for payment despite the due date having passed, iv) there has been a delay in enforcing the obligation, v) the amount of money is such that it would be more likely for the creditor to be likely to waive the obligation either wholly or in part – albeit the amount is not necessarily decisive.

5) It Is for a judge to determine looking at all the factors what appropriate determination to make.

Having found that the parties net assets comprised of c. £871,000 in the family home in London, £2.337m in the Wife's sole name (including her shares in Y Ltd), £2.402m in H's sole name and pensions (of which the majority was in H's sole name) HHJ ordered that a division of the assets which broadly achieved equality as follows:

1) The family home in London be transferred to W. W would commit to obtain the release of H's name from the joint mortgage within the next two years failing which the property would be sold and W would retain the net proceeds of sale.

2) H would use his best endeavours to take over the rental property in Germany and W would transfer the rights in the deposit to him.

3) W to transfer 20,000 of her shares in Y Ltd to H. This left W with 117,610 shares.

4) 50% pensions sharing order of H's spension.

5) An immediate clean break.

Although H was left with a significant number of shares in Y Ltd which were not readily tradeable and could only be sold during a specific liquidity event HHJ Hess considered that a departure from equality was not justified to take into account risk and illiquidity. In particular he noted that W was also heavily reliant on the share price of Y Ltd, H had deliberately chosen not to seek a sale and equal division of the net proceeds of sale of the family home in London, H took an optimistic view of the future of Y Ltd which, as CEO of the UK arm, he was in a position to make a better estimate than most. Y Ltd had enjoyed substantial foreign investment which was presumably inspired by an optimistic assessment of the future and a transfer of shares from W to H would trigger an immediate tax liability for W whilst some of H's tax liability would remain latent.

CW v CH [2022] EWFC B1

H was a Nigerian national. W was a Nigerian national and also held US citizenship. The parties married in 1994 in Nigeria. There were two children of the marriage X (age 26) who lived in the USA and Y (age 13) who had attended boarding school in England since 2019.

The parties' separated in 2014 when W and the children moved out of the FMH in Nigeria into rented accommodation. W issued divorce proceedings in Nigeria in October 2016 which she subsequently withdrew in January 2017. in September 2018 the parties signed a deed of separation. W then issued a second divorce petition in Nigeria in February 2019. In September 2019 the terms of the parties' deed of separation were incorporated into a financial order and decree absolute was granted in December 2019.

In October 2020 W moved to England into a property which H owned in his sole name. In December 2020 W issued an application under the Matrimonial Family Proceedings Act (MFPA) 1984 Part III seeking leave to pursue an application for financial relief following a foreign divorce. W was granted leave on an ex parte basis. In August 2021 H's application as to whether W's Part III application had been validly issued prior to 31 December 2020 was heard. HHJ Hughes QC determined it had been and permitted W's Part III application to proceed.

W issued applications for interim periodical payments seeking £9,755 pcm and a costs allowance for legal fees of £196,270 which included £111,910 of costs incurred but unpaid.

H contested the court's jurisdiction to deal with the interim applications arguing W had not passed the threshold for leave and that her application was devoid of merit and so no substantive relief should be granted. W argued that H could not challenge the grant of leave as he had not applied for a set aside and the court should not consider the merits of her substantive application when dealing with an interim application.

Recorder Allen QC found that although the first order granting W leave in December 2020 was expressed to be made in the 'distinctive circumstances' of the imminent change in jurisdictional requirements leave had been granted. The question of whether leave was granted or not was binary. Whilst W sought to argue it was relevant H had not applied to set aside the leave the court could not draw an inference from this.

Recorder Allen QC went onto express the interim view there was some basis to suggest the court may ultimately conclude that i) W's application was the kind which was not the purpose for which Part III was enacted given the limited English connections , W's right to apply for financial relief under foreign law and the award in the foreign country, ii) in the event that W wished to challenge the Nigerian order on Edgar grounds she should apply to set aside the order in Nigeria and iii) W should apply for any increase in maintenance in Nigeria. However, those interim views, on which no specific findings were made, did not prevent the court from exercising its powers to make an interim order. The correct approach was to judge W's applications with a degree of caution.

Recorder Allen QC ordered H to pay £5,300 pcm in interim maintenance backdated to October 2021. He balanced H's ability to meet the figures sought, the very high standard of living enjoyed during the marriage, the fact that the expenditure was almost all discretionary items and his concerns about the overall merits of W's application to reduce the figures that were disputed by H by 50%.

On the basis he was satisfied that W had a need she could not meet form her own resources, she was not reasonably able to obtain a loan and a Sears Tooth arrangement was not feasible he ordered H to pay £84,000 for her future costs and refused a claim to discharge her incurred but unpaid costs. W's costs to the first inter partes hearing totalled £240,971 which were disproportionate. He found W had chosen to incur the costs when there was some doubt as to the merits of her claim and her solicitors had assumed this risk. There was no evidence to say W's solicitors would down tools. Her solicitors had been paid £170,000 of the costs to date and at this stage her unpaid costs where not a liability that H should be required to meet.

Randhawa v Randhawa (Divorce: Decree Absolute, Set Aside, Forgery) [2022] EWFC B7 (26 January 2022)

The wife (W) applied to set aside a decree absolute granted in April 2010 on the alleged grounds that:

- she had not been given any notice of the proceedings;
- she had not signed the acknowledgement of service which had allowed the suit to proceed undefended; and
- the signature on the acknowledgement of service, which purported to be hers, was a forgery.

The husband (H) had subsequently remarried in 2011 and he and his new wife had a child who had been born in September 2010.

W accepted that she and H were separated, and that she had heard rumours of H being involved with another woman, but she claimed they had remained very much married and they attended family functions as husband and wife. She had then petitioned for judicial separation in December 2019.

It was agreed that, if the judge found serious procedural irregularities in the petition for divorce and the process that was followed, in particular lack of service, the divorce must be set aside. However, H denied W's allegations and argued that W knew about his new relationship and that they had kept their divorce secret for cultural reasons and to protect the children they had together.

His Honour Judge Moradifar noted that, in family cases, the person alleging the disputed fact must prove it on the balance of probabilities. He also noted specifically that the *Lucas* direction in criminal proceedings applies equally to family cases and a judge should not rely on a conclusion that an individual has lied on a material issue as proof of guilt. As per McFarlane LJ in Re ***H-C (Children)*** **[2016] EWCA Civ 136**, if there is clear evidence one way or another, there will be no need to address a witness's credibility. Where the tribunal looks to find support for their own view, it must caution itself against relying too much on a finding of a propensity to dishonesty and, equally, a propensity to honesty will not always equate with a witness's reliability on a particular issue.

A forensic document examiner concluded there was very strong evidence that the signature had not been written by W, but there was no clear evidence that H had forged her signature.

The judge heard evidence in relation to the breakdown of their relationship, W's knowledge of H's remarriage and various property transactions in respect of which there were also significant disputes from both parties and their adult children. Evidence was also given by Mr Aqbal Lall a practising solicitor who had been involved in advising W on a property transaction, W's brother in law who had been married to W's late sister, a mortgage advisor and a financial planning consultant. The evidence highlighted some very concerning conduct on behalf of both parties.

The judge concluded that H was a man who would take any necessary steps to achieve his ends and, where any steps fell foul of the law or morality, he would deny any misconduct unless left without any option but to admit it.

The judge also concluded that W's evidence was very worrying and at times she had seriously lacked a legal and moral compass, including her involvement in the marriage between her own brother and sister. The judge had to weigh this into the balance when considering her evidence. It was clear both parties had little regard for the law.

The judge concluded with reference to the totality of evidence before him that the signature on the acknowledgement of service was forged by or on behalf of H and that W had no notice of the divorce proceedings. The decree absolute was therefore set aside.

Bailey v Bailey (Committal) [2022] EWFC 5 (Mr Justice Peel) 4 February 2022

Peel J had to consider the committal application by the wife (W) against the husband (H) for alleged breaches of a financial remedy order made in April 2021 and a passport order made in May 2021.

W had also brought a committal application against the second and third respondents for alleged breaches of the financial remedy order.

W was represented on a pro-bono basis. H was represented with public funding, as was his statutory right, but H was not in attendance at the hearing, despite having been ordered to attend, and was understood to be in Portugal.

The second and third respondents were not represented and did not attend. Peel J considered if he should proceed with a committal application in their absence and concluded he should because they had been given ample notice of the hearing and they had chosen not to participate. They had not sought an adjournment or given any reason for not engaging in the proceedings. Weighing the gravity of the applications, the judge was comfortably satisfied that it was fair and just to proceed in their absence.

It was argued on behalf of H that, as per *Hollington v Hewthorn* [1943] KB 587, the original judgment was not admissible within this application because findings of fact made by earlier tribunals constitute opinion evidence and findings made to the civil standard in family proceedings cannot carry probative value when determining a contempt application to the criminal standard.

The judge had already read the original judgment before this issue had been raised. However, considering the relevant case law, he concluded that the argument was not well-founded. How else could the court make sense of the original order? Such an approach would have implications for both enforcement and variation applications, which cannot be right, and there is no clear authority for such an argument. *Hollington v Hewthorn* is therefore not authority to prevent the judgment in earlier proceedings between the same parties being admitted in evidence for the purpose of a contempt application arising out of the earlier judgment. Both the evidence given and the judgement in the earlier proceedings are admissible in subsequent and related criminal proceedings between the same parties. It will be a matter for the judge conducting the committal proceedings to determine what weight to attach to it. In this case Peel J would take into account the original judgment.

The onus of proof remained with W and the criminal standard of proof applied. There is no burden on the defendant. W must prove a deliberate disobedience to the order and the accused must have known the terms of the order and have acted or failed to act in breach of the order, knowing the facts which made the conduct a breach. It is not enough to suspect recalcitrance. If committed, the contemnor can apply to purge the contempt.

H argued that he had not been served with the passport order. The judge heard from one of the police officers who had served it and the Tipstaff. He noted that H had declined not to be cross-examined, which was his right but which had a knock-on effect on H's written evidence and that it enabled the judge to draw adverse inferences from his silence. Peel J accepted the evidence of the police officer and the Tipstaff unreservedly and concluded the order had been properly served.

Peel J was satisfied to the criminal standard that H had breached some but not all of the original order and that he had breached some but not all of the passport order. He was also satisfied to the criminal standard that the second and third respondents had breached their obligations under the original order.

Peel J then gave H and his lawyers some time to file mitigation, which had been submitted to him. Peel J considered those arguments but concluded that a 12 month custodial sentence for H was justified, subject to any application by H to purge his contempt. H also order 4 months imprisonment for the second and third respondent suspended for 28 days to give them the opportunity to remedy the breaches.

Loggie v Loggie [2022] EWFC 2 (Mostyn J) 27 January 2022

Mostyn J considered an application by the wife (W) on D11 that the husband (H) indemnify her for the sum of £65,603.65 owed to her former solicitors.

The parties were in their ninth year of litigation. Back in 2014, Mostyn J had given permission for an SJE accountant to value H's business, with the costs being split equally between the parties. The order did not limit the level of fees to be incurred by the SJE.

The SJE had initially quoted £60,000 plus VAT prior to starting the work, but the eventual costs were substantially higher.

In 2016, Mostyn J ordered that the SJE's fees be suspended until the conclusion of W's application for financial remedies.

The final order, made in 2017, provided for several properties to be sold and that any unpaid SJE fees plus interest should be paid from the proceeds of sale.

The properties had been sold but the fees had not been cleared.

W had applied to enforce the order and the enforcement application was compromised by written agreement between the parties, followed by a further variation order made by Mostyn in March 2019.

The total invoices raised by the SJE were £212,407.20. Out of those fees, H said he had paid approximately £147,000 and the balance remained outstanding until W's solicitors cleared the bill on W's behalf in August 2021. W's solicitors wanted to be paid by W, which had led W to make the application. W accepted that she had the funds to pay the solicitors herself, if she was required to do so.

Mostyn J was satisfied that he could order the indemnity for the reasons he gave in *CH v EWH (Power to Order Indemnity)* [2018] 1 FLR 495.

The written agreement reached in March 2019 had included provision for H to pay the outstanding sum due to the accountant and to fully indemnify W against it. The subsequent variation order made by Mostyn J did not include such a provision but Mostyn J now considered that to be an oversight by himself. There was no good reason why he should not make the order sought by W to give effect to that agreed provision. He was effectively correcting the March 2019 order under the Slip Rule.

H would need to identify a cogent reason why he should not be held to the terms of the March 2019 agreement and he had failed to provide one. Vague assertions about the pandemic were not enough. H was therefore ordered to pay the requested sum directly to W, with the expectation that she would then repay her solicitors. H would also be responsible for any further interest sought by the SJE.

Mostyn J adds that the moral of this unhappy tale is that parties must ask the court to place a cap on the expert's costs prior to their instruction, pursuant to FPR 25(12)(5). If circumstances change, it will then be open to the expert to apply for the order imposing the ap to be varied under FPR r4.1(6).

Finally, W had also referred in her statement to a wish for a further variation of the March 2019 order, but the judge refused to consider that without an application on Form A and the requisite issuing fee.

07.03.2022

A Brief Guide to the New No Fault Divorce Rules and Procedure

Teena Dhanota-Jones, Partner, **Portner**, sets out the procedure for divorce from 6 April 2022.

Teena Dhanota-Jones would like to acknowledge the assistance of David Hodson in the preparation of this article.

The Divorce Dissolution and Separation Act 2020 received royal assent on 25 June 2020 and the relevant sections in relation to no fault divorce come into force on 6 April 2022.

The rules are set out in the **Family Procedure (Amendment) Rules 2022**.

It is important to note that the existing divorce/dissolution procedure can be used until 31 March 2022, thereafter you must issue using the new procedure, but you cannot do this until 6 April 2022. There is therefore a period from 1st to 5th April (inclusive) where you cannot issue divorce/dissolution proceedings.

The grounds

The divorce/dissolution application needs only to detail that there has been an irretrievable breakdown in the marriage. There is no longer a need to particularise the facts by citing adultery, unreasonable behaviour, or periods of separation.

Who can issue?

A joint application or a sole application can be submitted to the court. The subsequent orders can be applied for either individually or jointly.

The new rules set out new terminology

Pre – 6 April 2022	From 6 April 2022
Petitioner	Applicant
Divorce petition	Application
Decree Nisi	Conditional order
Decree absolute	Divorce order
Defended proceedings	Disputed proceedings

The timetable

Day 1: File divorce/dissolution application online.

28 days: From the date of issue of the application, the court will serve the respondent or both parties (if this is a joint application) via email. If the applicant wants to deal with service, it is anticipated that service should be undertaken within 28 days from the date of issue of the application, albeit the rules do not specify the time for service. The desired requirement submitted by family lawyers for the applicant to give a period of notice to the respondent was not included in the legislation.

14 days: From the date of service of the application time tofile acknowledgement of service, or

35 days: From date of service time to file answer.

20 weeks: From the date of issue of the application, provided the acknowledgement of service was served within 18 weeks from the date of issue the applicant can apply for the conditional order. If the acknowledgement of service was served later than 18 weeks from the date of issue of the application, the time to apply is no earlier than 14 days after the acknowledgement of service should have been filed.

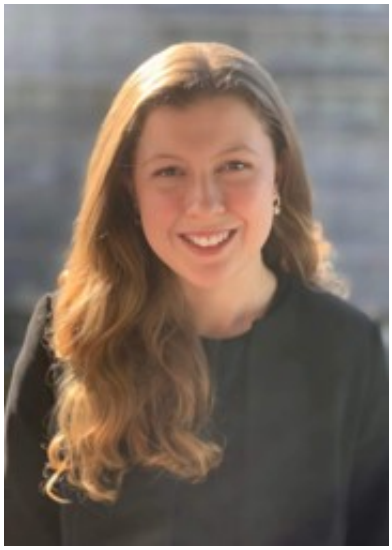
6 weeks: After the date of the conditional order both parties or one party can apply for the divorce order. If the application is made by one party that party must give 14 days' notice of their intention to apply.

Costs

Ordinarily costs orders would have been pursued if the petitioner issued on the grounds of unreasonable behaviour or adultery. Strangely, claiming costs under the new procedure does not appear to be addressed. It certainly would be an unusual case for cost orders to be pursued rather than agreed under the no fault regime. The Nuffield Foundation considered this issue in their report on 27 July 2021.

04.03.2022

Financial Provision for Adult Children: What Constitutes a 'Special Circumstance' under Schedule One after *UD v DN* [2021] EWCA Civ 1947, [2021] 1 WLR 595



Zoe Harrison, pupil barrister at **One King's Bench Walk**, explores Moylan LJ's judgment and its focus on the importance of dependence.

Very few Schedule 1 cases have made it to the Court of Appeal since *Re P (Child: Financial Provision)* [2003] EWCA Civ 837, [2003] 6 WLUK 616 making the decision in ***UD v DN* [2021] EWCA Civ 1947**, [2021] 1 WLR 595 of even greater significance and interest to family practitioners specialising in this area. One of the most important aspects of the case concerned the limited circumstances in which the court may legitimately make financial provision for children with the intention of benefitting them after they have reached the age of 18. This article explores the lessons we learn from the Court of Appeal judgment in *UD v DN* on what the court will consider to constitute a 'special circumstance' justifying an award under Schedule 1, benefitting a child into their adulthood.

Legal framework

Paragraph 1 of Schedule 1 to the Children Act 1989 makes provision for orders benefitting children (i.e. under the age of 18) and is the most common route through which orders are made under Schedule 1. There are express limitations on the duration of periodical payments made under Paragraph 1. Put simply, an order for periodical payments made under Paragraph 1 which commenced before the child turned 18 may continue after that child's 18th birthday, but only if he or she is still in education/training, or if there are special circumstances.

Paragraph 2 provides that the court may make an order "on an application by a person who has reached the age of 18" for i) periodical payments and/or ii) a lump sum, provided that the person benefitting from the order (i.e. the 'adult child') is i) undergoing training or education (usually to first degree level), or ii) there are special circumstances which justify the making of an order. Again put simply, provision can be made for an 'adult child' – one who issues the application himself/herself – under Paragraph 2 if the adult child is still in education/training, or if there are special circumstances.

Of course if a court makes an outright capital provision to a minor child, the benefit of that order will extend beyond the child's 18th birthday. There are no express restrictions in the legislation itself that limit the powers of the court to make a capital order, though there is a long line of authority (starting with *Chamberlain v Chamberlain* [1973] 1 WLR 1557) which makes clear that the power of the court to make capital provision benefitting children into adulthood (beyond the completion of their education/training), is limited to 'special' or 'exceptional' circumstances. Thus, capital provision can be made for a child under the age of 18, the benefit of which will extend into the child's adulthood, where there are 'special circumstances.'

'Special circumstances' has been understood throughout the case law to be narrowly defined. In *Chamberlain v Chamberlain* Scarman LJ refers, at pp. 1564 H/1565 B, to "*special circumstances* ***which required them to make demands*** *on their parents after the conclusion of their full-time education.*" (emphasis added). Hale J (as she was) summarised in *J v C (Child: Financial Provision)* [1997] 4 WLUK 122, at p155:

> "children are entitled to provision during their dependency and for their education, but they are not entitled to a settlement beyond that, unless there are exceptional circumstances such as a disability, however rich their parents may be." (emphasis added)

This article will explore what constitutes 'special circumstances' for the purposes of financial provision for 'adult children' under Schedule 1, in light of the recent Court of Appeal decision in *UD v DN* [2021] EWCA Civ 1947, [2021] 1 WLR 595. Having outlined the background of the case, the first instance judgment and the appeal judgment, this article will assess (in the context of ascertaining 'special circumstances') the importance of:

1. Focussing on dependency rather than vulnerability;

2. The role of the paying parent's conduct;

3. The effects of the domestic abuse and;

4. The impact of wealth.

UD v DN [2021] EWCA Civ 1947

Background:

The case concerned the appeal of an order of Williams J (dated 7 July 2020) requiring the appellant father (F) to settle a property in trust for the benefit of the parties' two younger children, who at the time were 19 and 14 years old. The trust was to end, essentially, on the first to occur of both children reaching adulthood or completing tertiary fulltime education. At the end of the trust period, 6.5 per cent of the gross sale price or market value of the property would then be held on trust for the benefit of the two children absolutely. Williams J also ordered periodical payments and a lump sum for the purchase of a car.

By way of background, the parties were in a relationship between 1996 and 2017/2018 and had three children (the eldest was 22 at the time of the hearing before Williams J). The family were wealthy (with M and the children living in a c£10 million property in London) and in late 2017 F gave the eldest child £600,000 to buy his own property. M issued Schedule 1 proceedings in February 2018, arguing that outright capital provision should be made for the younger two children. The basis for her argument was that the two younger children should be in the same position as the eldest child in terms of the provision of a first home, and that 'but for F's conduct' and, in response to such conduct, M bringing legal proceedings to obtain protective orders against F, F would have purchased homes for the two younger children. M submitted that there was no requirement for special circumstances, but if there were such a requirement, this was satisfied given the 'level of abuse and trauma suffered by the children.'

Judgment at first instance:

At first instance, Williams J considered the 'net effect' of the line of authorities which dealt with the powers of the courts under Schedule 1 in relation to adult children (Scarman LJ's (as he then was) judgment in *Chamberlain v Chamberlain* [1975] 1 WLR; Hale J's (as she then was) judgment in *J v C (Child: Financial Provision*) [1999] 1 FLR 152; and Munby J's (as he then was) judgment in ***Re N (A Child) Financial Provision: Dependency)*** **[2009] EWHC 11**, [2009] 1 WLR 1621), and concluded that:

> "[85]…Absent special or exceptional circumstances capital orders which provide a benefit beyond minority or the cessation of tertiary education should not be made. It is equally clear that what can amount to special or exceptional circumstances is restricted…
>
> It seems to me that what one is focusing on is the child and whether there is something about this child or this child's situation in particular vis-à-vis that parent that creates a situation which exceptionally (i.e. as an exception to the usual rule) generates a need for the child to be provided with capital which will be of benefit to them as an adult possibly for many years."

Williams J concluded that the two younger children were vulnerable to and potentially dependent on F, arising from the fact that F would seek to use his 'financial muscle' to control them by giving financial ultimatums (specifically by seeking to persuade them to join him and his business in Russia) and that the emotional abuse they had sustained made them

particularly vulnerable to this. He decided that the only way to protect them from F's control and pressure was to give them a degree of financial independence [161-162].

On this basis, Williams J was satisfied that the 'special circumstances' requirement was met, and made the order outlined above.

Court of Appeal judgment:

Moylan LJ made clear on appeal that provision for adult children who are not in education or training is limited to 'special' or 'exceptional' circumstances, and that such circumstances must be 'relating to the children' … 'such as a physical or mental disability, which create a financial need [76]'. He held that there were no such special or exceptional circumstances in this case, and the long-term capital provision must be set aside.

Observations:

Moylan LJ's judgment is helpful in bringing sharp focus to the importance of dependence in ascertaining whether circumstances are 'special' or 'exceptional' for the purposes of financial provision under Schedule 1 for adult children. In assessing the utility and importance of his judgment, I make the following observations:

1. Dependence v vulnerability

Moylan LJ writes:

> "[82] The Judge sought, at [161], to support his decision to award the children an interest in the family home by **interpreting the use of the word "dependency" in the authorities as connoting "some form of vulnerability or need continuing from childhood into adulthood which can be remedied by capital provision**". In my view, this does not support his decision because it is far too broadly expressed a proposition and one which does not accurately reflect the effect of the long line of decisions dating back to Chamberlain v Chamberlain." (emphasis added)

The distinction between vulnerability and dependency is an important one. Whilst vulnerability and dependency are very likely to overlap, they are not one and the same, with the former encompassing a much broader category than the latter. Vulnerability is a broad spectrum on which many people fall, but not everyone with a vulnerability is 'dependent' in the sense of requiring financial support. The parameters of Schedule 1 would potentially be stretched too far if every adult with a vulnerability could make a claim under Schedule 1 against their parents.

Two points can be made in response to this. First, it could be argued that most, if not all vulnerabilities can be ameliorated (if not fully remedied) by capital provision, whether this enables medical care, therapeutic support, housing or other practical support to be funded, and so we risk encountering the same concern about all adults with vulnerabilities having claims against their parents. Second, it could be argued that a vulnerability that can be remedied by capital provision is exactly the same thing as a dependency. This may often be the case, but as the facts in *UD v DN* show us, it is not necessarily and not always the case.

The two younger children in *UD v DN* may have been vulnerable, but they were not dependent (or at least there was no reason to believe they would be once they had completed tertiary education). The abuse they had suffered and their susceptibility to pressure from F did not necessarily make them dependent, in the sense that it didn't prevent them from becoming independent. There was (on the evidence, and as far as we know) nothing preventing them from educating themselves, training, obtaining a job, earning money, and/or establishing a self-sufficient adult life. They did not need to take up their father's offers of money or property to do this. They (very unfortunately) may be vulnerable to his abuse and exert of control, but that did not make them dependent. This is contrasted with adult children with certain disabilities or lack of capacity, which not only makes them vulnerable, but negatively impacts on their ability to have a completely independent life, and therefore renders them dependent on their parents even after their majority.

When considering whether special circumstances exist with regards to adult children, courts should focus on the question of dependency and any need that arises for the particular child in the particular circumstances. Whether that child has a vulnerability (which may or may not be assisted by capital provision) is certainly informative, but it should not be decisive.

2. Role of conduct

In contrast to the Matrimonial Causes Act 1973, conduct of the parties is not a factor included within the statutory checklist under Schedule 1. The case law suggests that 'special' or 'exceptional circumstances' should not include consideration of the conduct of the parent, but rather the circumstances of the child and any need/dependency of that child. The conduct

of a parent is only relevant if it has created circumstances for the child which have led to a dependency (for example physical abuse that has led to a physical disability), but it should not be factored in as a way of punishing a parent through Schedule 1. In *Kiely v Kiely* [1988] 1 FLR 248, Booth J held that special circumstances had to be 'relating to the children' (as opposed to relating to the adult(s)).

In his judgment, Moylan LJ suggests:

> "[80]…the Judge's assessment was not based on the children having a continuing need for financial provision, or on (to quote again from Kiely v Kiely) some circumstance "relating to the children", **but on the father's prospective behaviour.**" (emphasis added)

In defence of the first instance decision, Moylan LJ draws attention to the causal connection made by Williams J between F's prospective behaviour and the children's 'vulnerability', and it is noted that Williams J does not frame his decision as being in any way to punish F. However, references throughout his judgment suggest that Williams J was influenced by his views on F's bad conduct. He writes:

> "[161]… Quite how one comes to terms with your father threatening to slit your throat or your mother's throat and threatening to throw you out of your home I am unsure."

Ultimately, it is the potential threats that F might make, the manipulation he might seek to exercise, and the effects of his past abuse that underpin Williams J's finding of special circumstances, rather than any characteristics or circumstances of the children themselves.

The impact that the influence of conduct may have had on Williams J's decision can be seen by imagining an alternative, hypothetical scenario in which it is not F who has been abusive towards the children, nor F who may seek to make financial ultimatums to control the children, but rather a third party. If we imagine a scenario in which one of the children was previously in a controlling relationship with an abusive partner (a third party) who tried to exert financial control over them, we might query how William J's analysis would be applied. Following his logic, the only way to protect the child would be to provide capital so they could gain financial independence from this partner/third party. In that situation would F have been required to provide a capital lump sum? If the court is not looking at the conduct of the parent, but rather the circumstances and needs of the child, then on William J's analysis, the answer would be yes; there would be special circumstances justifying an order requiring F to provide outright capital. The impact on the child is presumably the same regardless of whether the abuse and financial control comes from F or a third party. It is unclear however whether Williams J would have come to such a conclusion.

Such an outcome would appear to stretch the envisaged bounds and purpose of Schedule 1. The conclusions of the Court of Appeal suggest that Williams J may have placed too much emphasis on F's conduct, rather than focusing on the children's needs.

3. Effects of domestic abuse

As has been discussed, the conduct of the paying parent should not (in and of itself) form part of the assessment of special circumstances. That being said, the effects of domestic abuse on a (adult) child may still have some bearing, and certainly were central to Williams J's decision in *UD v DN*. He wrote:

> "[161]…Long experience in children's cases and the research into the long term effects of abuse on children (see amongst others the report of Drs Sturge and Glaser [2000] Fam Law 615) suggests to me that whilst these children may be able to get on with their lives they are likely to carry the emotional scars in some shape or form for a very long time indeed. This is a product of the abuse that they have been subjected to by the father."

Ultimately, Williams J held that the effects of the domestic abuse were relevant, not because they created an ongoing dependency for the children (and specifically not because they had an ongoing financial need for therapeutic support), but because of their more general vulnerability to F's potential future financial ultimatums. [81]

On appeal, Moylan LJ helpfully explained the extent to which the effects of domestic/parental abuse are relevant:

> "[82]…Whilst I certainly accept the Judge's observation, at [161], about "the long term effects of abuse on children", I do not accept that a judge can derive from that a "vulnerability" or "need" which justifies any specific financial award under Schedule 1."

It is made clear later in the judgment of Moylan LJ that the Court of Appeal was not intending to create an absolute rule that the effects of domestic abuse could never justify a special financial award under Schedule 1, but rather had concluded that no such special circumstances could be established for these children in this case:

> "[83] I make clear that I accept, of course, the emotional and psychological damage caused to children by parental abuse. The harmful effects of such abuse are well established. However, the general observations

> made by the Judge are not sufficient to establish any specific consequences for the children in **this** case which would support the exercise of the powers under Schedule 1 to make a financial award." (emphasis of Moylan LJ)

Moylan LJ commented on the evidence in this case which supported that conclusion, notably the Cafcass report and the lack of medical evidence that the children had any long term mental health or other difficulties that would create an ongoing financial need.

This all suggests that the effects of domestic abuse are only relevant to the extent that they create an ongoing dependency or financial need, for example a physical disability arising from physical violence, or mental health problems because of the abuse. In other words, it is not the source (i.e. the abuse) that is relevant, but rather the effects on the child's dependence and needs.

4. Extent of wealth

Generally speaking, the level of wealth enjoyed by a parent or family should not impact on whether 'special circumstances' exist. As has been outlined, the exceptional circumstances must be those "relating to the children" (*Kiely v Kiely*), "however rich their parents may be" (*J v C*). Williams J himself acknowledged at first instance:

> "[85] Matters relating to changing societal attitudes, the wealth of a parent, or the like will not suffice."

In spite of the above, Williams J's decision at first instance seems to have been heavily influenced by the level of F's wealth. This issue was explored by Moylan LJ on appeal at [78]. In response to submissions from M's counsel (Mr Howard QC) that absent coercive control a man of F's wealth would help the children get on the property ladder, Williams J responded that "*with most of those fathers … in most cases one would expect a father to make that sort of provision. I think the question here is whether he will make that provision without there being some quid pro quo from the children*".

Whilst Williams J framed the 'quid pro quo' and the vulnerability to manipulation as the important factor (and not the wealth itself), his decision ultimately rested on an underlying assumption that a wealthy father should be expected to provide his children with financial assistance in obtaining a first property, which the Court of Appeal did not accept was appropriate to apply.

Moylan LJ considered the Judge's reasoning at first instance which (while not expressly, but by implication) appeared to place weight on the wealth of the father as an 'exceptional circumstance':

> "[79] This was, therefore, not based on the children having any continuing financial need as dependent adult children but, rather, it was inverted, in the sense that the Judge doubted that the father would provide financial support in the way that, he considered, most wealthy fathers would …".

According to the Court of Appeal, while it accepted that many wealthy fathers do make such provision, their choice whether or not to do so is entirely a matter for their discretion, and having rich parents should certainly not constitute special circumstances for the purposes of the statute. Schedule 1 does not exist to enable adults from wealthy families to make financial claims against their wealthy parents for the provision of housing.

Wealth will inevitably be a factor of consideration when making awards for children (under 18) under Schedule 1, as 'income, earning capacity, property and other financial resources' of the parties is a specified factor under paragraph 4(1). The parties' standard(s) of living is also to be factored into the discretionary exercise (*Re P (Child: Financial Provision)* [2003] 2 FLR 865). Whilst these principles are central to the making of standard awards for dependent children under Schedule 1, they do not have a place in establishing exceptional circumstances to justify a special award for adult children. Different rules should not apply to adult children from wealthy families.

Conclusion

The Court of Appeal's judgment in *UD v DN* provides many helpful clarifications as to what may give rise to special circumstances when considering awards for adult children under Schedule 1. It seems that the category continues to be very narrowly drawn, and it remains to be seen in future whether anything other than disability and/or lack of capacity will suffice. The following key lessons can be learned from *UD v DN* when thinking about 'special circumstances':

1. The focus should be on dependency not vulnerability;

2. The conduct of the paying party (in and of itself) has no role to play;

3. The effects of domestic abuse are only relevant to the extent that they have created an ongoing dependency and/or financial need;

4. The level of wealth of the parents will be relevant to quantum once the discretionary exercise has been engaged, but it is not (in and of itself) to be treated as an 'exceptional circumstance' for the purpose of justifying an order being made in respect of an adult child.

CASES

R (A Child : Asylum And 1980 Hague Convention Application) (Rev1) [2022] EWCA Civ 188

Successful appeal from HC decision of Mrs Justice Roberts ("the Judge") in ***VR and YD and MVR*** **[2021] EWHC 2642 (fam)** which dismissed the father's application under the provisions of the 1980 Hague Child Abduction Convention ("the 1980 Convention") for the summary return of the parties' child, M, to Ukraine and refused disclosure of material from the successful asylum application made on M's behalf

This is a further case (post ***G v G (Secretary of State for the Home Department and others intervening)*** **[2021] 2 WLR 705**) dealing with the situation where either the respondent to an application under the 1980 Convention, and/or a child who is the subject of the application, claim asylum.

M is 12 years old. He was born as a result of a brief relationship between his parents who were both academics with professional backgrounds and Ukrainian citizens. Until mid 2016 M had contact with his father (F) who has parental responsibility. In 2016 M's mother commenced a relationship with a British citizen. They married in mid 2017. In 2018 the mother applied in the Ukrainian court seeking permission to remove M to UK for 7 years to join her husband, having secured a spousal visa. The parents reached an interim agreement in those proceedings allowing M and his mother to travel to UK for 6 months. That agreement was incorporated into a Ukrainian court order. The mother did not return after 6 months. F made an application under the 1980 Convention which was heard by Theis J in May 2019. The mother's Art 13 (b) defence was rejected and whilst accepting that M was articulating an objection to returning, Theis J declined to exercise her discretion on that basis and made a return order.

M and his mother returned to Ukraine but the mother did not, as expected, make a further application there for permission to permanently remove M to the UK. Instead she remained for a time before travelling back to the UK via Lithuania in October 2019. F issued a further 1980 Convention application in March 2020 which resulted in a further return order being made. In August, mother's appeal of that decision was dismissed and her subsequent application to stay the order was also dismissed. Mother made a further application to set aside the return order on 24th August 2020 (dismissed) and another application to stay the order on 9th October 2020 (dismissed). On 26th October 2020 the mother applied for a stay on the basis that M had made an application for asylum. On 30th October 2020 F applied for M's committal for breach. The home office received M's asylum claim (instigated by the mother) on 2nd November 2020. On 22nd January 2021 F made an application for disclosure of M's asylum application. M and the Secretary of State for the Home Department (SSHD) were joined to proceedings. On 28th May 2021 the SSHD granted M asylum. The material from the asylum application was made available to the Judge and the child's guardian

In her judgment, the Judge first addressed the issue of disclosure, dismissing the application although observing that there was "an inconsistency in terms of the totality of the information made available to SSHD" and that placed before the court in relation to the Art 13 (b) defence. The Judge then effectively dealt with the issue of set aside and the determination of the father's substantive application together, concluding at [76], that, because the grant of asylum "operates to prevent the enforcement of an order for summary return", the 1980 Convention proceedings are "without further purpose" and that "there is nothing further for this court to examine"

The Court of Appeal disagreed with these conclusions. A summary cannot do justice to the issues considered in the judgment but the following points may be drawn from it:

- This case and *G v G* address a very small number of cases where the same family are involved in both an asylum claim and an application under the 1980 Convention. Nothing said in either has any wider application.

- Lord Stephen's judgment in *G v G* (para 6) identified the need for the 1951 Refugee Convention and the 1980 Convention to "operate hand in hand" and for practical steps to be taken to co-ordinate both sets of proceedings. Facts in support of an asylum claim would be very likely to be included in any case advanced under Art 13 (b) and vice versa. Practical steps proposed include giving early consideration to whether the asylum documents should be disclosed into the 1980 Convention proceedings applying *Re H (a child) (disclosure of asylum documents)* [2020] EWCA 1001

- The differences in the respective procedures provide good reasons for the court to ensure that an asylum claim and even the grant of asylum do not subvert the fair and proper determination of an application under the 1980 Convention

- In *G v G*, the mother made an asylum claim immediately on arriving in UK. The father's application under the 1980 Convention was issued a month later. The two applications proceeded in parallel. This was the context for the observations made by the Court of Appeal and the Supreme Court. It is also clear, however, that this was expected typically to be what would happen

- There might be circumstances which explain why an asylum claim is not made until later, such as a change in the conditions in the home State or the development of a new risk of persecution. However, absent such an explanation, the court is entitled to expect, and there is an obligation on, a parent to advance their full case in the 1980 Convention proceedings. If this requires some procedural adjustments, then they can be sought by that parent

- The timing of an asylum claim is, potentially, of considerable importance to the application of the principles set out in *G v G*. If this was ignored as a relevant factor, it would open the door to manipulative applications used to seek to subvert the expedited process that is required in the determination of applications under the 1980 Convention.

- The process to be followed on an application to set aside an order under the 1980 Convention is set out in *Re B (a child)* [2021] 1 WLR 517 at para 89: (a) the court will first decide whether to permit any reconsideration; (b) if it does, it will decide the extent of any further evidence; (c) the court will next decide whether to set aside the existing order; (d) if the order is set aside, the court will redetermine the substantive application

- It is also necessary to deal with the circumstances in which the SSHD will or might reconsider the grant of asylum as set out by Hayden J in ***F v M and A* [2017] EWHC 949 (Fam)** and that it is open in principle to the father to judicially review a failure by SSHD to revoke the grant of asylum

- Just as a reasoned decision on an asylum claim will be relevant to the determination if an application for a return order, so a reasoned HC decision on the evidence available to it and tested to an extent by the adversarial process not available in the assessment of an asylum claim could be expected to assist the SSHD

- The fact that the proper determination of an application under the 1980 Convention might enable the left behind parent to request the SSHD to reconsider or review the grant of asylum does not make such a determination or the pursuit of such a determination improper or illegitimate

Appeal allowed. Case remitted for urgent case management hearing to include determination of application to disclose the asylum material

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

L (Fact-Finding Hearing: Fairness) [2022] EWCA Civ 169

Background

The public law proceedings concerned L, aged 2, the youngest of three children born to the same mother (M), with three different fathers, X, Y and Z. The local authority (LA) was involved after an altercation between Y and Z in April 2017, which resulted in Z being convicted of assault. The concerns related to cannabis misuse, anti-social behaviour and domestic abuse in the relationship between M and Z; the LA was concerned that Z was exercising coercive control over the mother. After further incidents the LA started pre-proceedings processes and the older children J and K went to live with their respective fathers.

The LA started care proceedings after an assessment recommended that L should remain at home with M under an interim care order. The private law proceedings about J and K were consolidated with the care proceedings. There were various iterations of the threshold document. The final version included allegations about the relationship between M and Z and about Z's a series of incidents when Z was said to have shouted at M or called her derogatory names and relied on accounts that M had given to police and other professionals.

By the final hearing the LA plan was for L to remain with M and Z subject to a child protection plan; it did not seek a care or supervision order. Z took issue with the threshold document and disputed many of the specific allegations against him. X wanted his own child to remain with him; his position statement for the final hearing made various submissions about the relationship between M and Z including an allegation that in 2020 M had contacted him (X) in the early hours asking to transfer money to him so that Z couldn't access it. This was said to be linked to concerns about Z having gambling problems and acting coercively to M.

The hearing

At the outset the LA, M and Z argued that a fact-finding hearing should not take place. LA said it might struggle to establish threshold as one of the professionals to whom M was said to have made allegations about Z was unavailable and M denied having made those allegations. The Recorder decided to proceed with the hearing, inter alia because it was important for L that there should be a clear factual basis for a child protection plan; alternatively if threshold was not proved she and her parents would be protected from unnecessary professional intervention.

Another of the professionals who had been due to give evidence about what M said to her was also unavailable. Police officers and a housing officer had never been on the witness template despite the mother also disagreeing with their accounts. The allegations in threshold and X's allegation about the money transfer were put to M and Z. M accepted that the conversation and subsequent transfer took place but denied this related to gambling. After hearing the evidence the guardian formed the view that L should be the subject of a supervision order.

The Recorder made findings which went beyond the threshold document. On the basis of the specific findings made he went on to find that Z's behaviour had been coercive and controlling of the mother. He found threshold met and adjourned the case as a proper risk assessment was needed in view of his findings before a welfare decision could be made.

The appeal

Permission was granted on two grounds:

- The Recorder was wrong to make so many findings outside the scope of the threshold document, particularly when the parents were unable to test the evidence of the authors of hearsay reports relied on;
- He was wrong to find threshold made out as there was inadequate linkage between the facts found to L suffering/ likely to suffer significant harm at the relevant date.

The relevant case-law is discussed at §62-69.

Discussion §70-

The following points are made:

- While the findings went beyond what was sought by LA, they were not beyond the "known parameters" of the case.
- Most of the findings were in line with the schedule or an expansion of the findings sought.
- The evidence will almost invariably develop and expand during a contested hearing, particularly when there are several parties seeking to draw out different points from the evidence.
- The significance of a piece of evidence often only becomes apparent during the oral evidence.
- One finding was not in the schedule but was referred to in the LA's evidence and the Recorder was careful not to make findings on aspects of the allegation on which there was a conflict of evidence.

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

IK (A Child), Re (Hague Convention: Evidence Consent) [2022] EWHC 396 (Fam)

M's application sought 7yo Z's return to Russia. Z was born in Russia where his parents lived. The parties separated around 1 year later and Z remained in the primary care of M in Russia but maintained contact with F. In 2019, F relocated to England and has lived in London ever since.

On 24 July 2021, F brought Z from Russia to London, M says this agreement was for a 2-month trip, F says it was for 3 years.

F defended the 1980 Hague Convention application on the basis of consent and/or acquiescence pursuant to Article 13(a). The burden of proving this defence lies on F.

A further issue to be decided was whether Z was habitually resident in Russia at the time of the alleged wrongful retention. The burden of establishing habitual residence in Russia lies on M.

The judge bore in mind the dicta of Mostyn J in ***FE v YE* [2017] EWHC 2165 (Fam), [2018] 2 WLR 200**, para 14:

> "the nature of the relief which is granted under the 1980 Convention is essentially of an interim, procedural nature. It does no more than to return the child to the home country for the courts of that country to determine his or her long-term future. […] 15. It is for this reason that the procedure for a claim under the 1980 Convention is summary. Oral evidence is very much the exception rather than the rule. The available defences must be judged strictly in the context of the objective of the limited relief that is sought. Controversial issues of fact need not be decided."

Mr Justice Peel was 'appalled' at the sheer weight of documentation for what are supposed to be summary proceedings- including 10 narrative statements and numerous exhibits. There was also a Cafcass report on Z's wishes and feelings despite child objections forming no part of F's defence. The judge commented this was becoming more common in Hague Convention cases as was an increasing reliance on oral evidence and suggested updated practice guidance.

The judge heard from 3 witnesses 'somewhat against my better judgment' agreeing with Mostyn J in ***ES v LS* [2021] EWHC 2758 (Fam)** that ordinarily no oral evidence should be given and stated he was confident that had he confined himself to the written evidence, documentation and oral submissions, he would have reached the same conclusion.

Much of the evidence presented by each party consisted of their views as to the respective welfare arrangements in Russia or England, and the parenting capacity of each parent. The judge found his determination was only to be based on the applicable principles of the Hague Convention and welfare matters were for another day.

Consent-The Law

The Article 13(a) defence of consent can be summarised as follows:

1. The removing parent must prove to the civil standard that the remaining parent clearly and unequivocally consented to the removal

2. Consent must be viewed in the context of common-sense realities of family life and not in the context of the law of contract

3. Consent does not have to be in writing- it may be manifested by words and/or inferred from conduct

4. A person may consent with the gravest reservations, that does not render the consent invalid

5. Consent must be real in the sense that it relates to a removal in circumstances that are broadly within the contemplation of both parties

6. Consent that would not have been given but for some material deception or misrepresentation on the part of the removing parent will not be valid

7. Consent must be given before removal and must be operative at the time of removal

8. Consent can be withdrawn at any time before the actual removal

9. The giving or withdrawing of consent by a remaining parent must have been made known by words and/or conduct to the removing parent otherwise it cannot be effective.

If the defence is established, and the gateway to a return order opened, then the discretionary exercise is engaged with the case law stating that it will be an unusual case in which consent having been established, it is nonetheless appropriate to order a return. There are however, cases where a return has been ordered and consent is not a bar to an order for summary return.

The exercise of the discretion under the Convention is acutely case-specific within a framework of policy and welfare considerations. In reaching a decision, the court will consider the weight to be attached to all relevant factors, including: the desirability of a swift restorative return of abducted children; the benefits of decisions about children being made in their home country; comity between member states; deterrence of abduction generally; the reasons why the court has a discretion in the individual case; and considerations relating to the child's welfare.

Acquiescence- The Law

In *Re H* [1998] 1 AC 72 per Lord Browne at 90E-G looks at the actual state of mind of the wronged parent which is a question of fact for the trial judge. There is one exception- where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or will not assert his right to a summary return, justice requires that the wronged parent be held to have acquiesced.

If acquiescence is proved, the same discretionary exercise as in cases of consent applies.

Habitual Residence- The Law

The judge deferred to the summary of law in the relatively recent case of ***Re M (children) (habitual residence: 1980 Hague Child Abduction Convention)* [2020] EWCA Civ 1105**. That habitual resident corresponds to the place which reflects *some degree of integration* by the child in a social and family environment including: duration, nationality, school, language, family and social relationships, stability, as well as all specific circumstances of that child's case. It does not have to be permanent.

In this case, Mr Justice Peel found that M had not consented to Z's removal and F had instead persuaded himself that M agreed to relocation. In fact M had consented to a visit to London during the Summer holidays before returning to Russia.

In a similar vein, M did not subsequently change her mind and agree to F retaining Z in London, nor did she act in such a way as to lead him to so believe.

Therefore, Z arrived in England on 24.07.21 and was wrongfully retained by 31.08.21- a period of around 5 weeks. Mr Justice Peel found Z was clearly habitually resident in Russia at the date of wrongful retention- he is a Russian national who had never travelled to the UK before, M was his primary carer, he had a school place in Russia, his wider family and friends are in Russia. The trip to England was for a temporary visit.

It follows that the Article 3 requirements are established and the Article 13(a) defences fail. Z is to return to Russia and it will be for that jurisdiction to determine welfare arrangements, including contact arrangements and any application by F for Z to live with him in England.

Case summary by **Harriet Dudbridge**, Barrister, **St John's Chambers**

MG v GM [2022] EWFC 8

A decision of Mr Justice Peel, determining an application for Maintenance Pending Suit and a Legal Services Payment Order made by a W in circumstances where jurisdiction was disputed and so Forms E had not been exchanged, or required.

Background

H is a citizen of Countries A, B and C, and W is a citizen of Countries B and D. The parties met in 2016, married in London in 2017, and have two children aged 3 and 1 (who are citizens of three Countries, including the United Kingdom). The parties lived in London until February 2021 before moving to Country E, there being a dispute between the parties as to whether this move was temporary or permanent.

The parties' marriage ended in Summer 2021. In June 2021 H applied in Country E for interim measures in respect of the children and possibly, although disputed and unclear on the information before the court in these proceedings, in respect of divorce. In August 2021, W came to the United Kingdom with the children and immediately issued a petition for divorce, asserting that she was domiciled and habitually resident in England. H applied for the return of the children to Country E under the 1980 Hague Convention.

At the time of the hearing before Mr Justice Peel, the court in Country E had declined jurisdiction on the basis that the parties are habitually resident in England (which H confirmed he would appeal), H's Hague Convention application had been dismissed and an application by H for Permission to Appeal that dismissal was refused by the Court of Appeal. Jurisdiction remained in dispute, with a 4 day hearing listed later in the year to resolve this question.

H is a successful and prominent businessman, having run a successful hedge fund until its collapse in 2018 and being actively involved in a number of projects since then. Whether W is a successful businesswoman in her own right was a matter disputed by the parties. Within the certificate of complexity justifying allocation to a High Court Judge, W asserted net assets in excess of £50m and H asserted net assets of £25-50m.

The parties enjoyed a luxurious standard of living during their marriage, the court being satisfied that, prior to separation, W had largely unfettered access to funds from H enabling her to sustain a very high level of expenditure, in the region of £43,000 per month in the 12 months prior to separation. Since separation, H had ceased all financial support for W and the children. Despite the absence of financial support from H, W had continued to spend £72,900 per month on average in the 7 months since their separation, having secured personal loans from friends totalling nearly £500,000.

W's application for interim maintenance was substantial, seeking provision of nearly £1m per annum and almost £900,000 in respect of outstanding and ongoing legal fees designed to cover i) the concluded Hague Convention proceedings, ii) Children Act proceedings, iii) the divorce jurisdictional dispute, and iv) the present application.

The dispute between the parties as to H's wealth was considerable, with W assessing H's wealth at not less than £100m. H contended that his wealth was considerably less, with his only income at that time being a return on investments in the sum of £115,000 per annum. H, like W, asserted reliance upon the support of friends and/or family and claimed impecuniosity. The court was unable to explore fully the various areas of dispute in respect of H's wealth but proceeded to concentrate on the most significant alleged financial resources.

H is the CEO of two special purpose acquisition companies ('SPACs') and has made significant investment in a technology company. W asserted H made a $20m return on that investment in 2021 whereas H contended that he had received nothing from the investment and would not do so before 2025 at the earliest. H invested $2.89m in private lending funds which, on his own case, commit him to providing capital on demand of up to $6.5m for a 5-7 period from 2019. He has investments in SPV's in the USA worth in the region of $8m, owns property in Country A and invested in a condominium in Country C. H evidenced borrowing in December 2021 from 3 individuals totalling £1.77m repayable between June and September

2022, applied to the running costs of one of SPACs of which he is CEO. H owes US Inland Revenue Services $1.112m, subject to a repayment plan at $15,445pcm.

As to a further company, A Ltd, in respect of which there remained a dispute as to W's involvement and remuneration, it was accepted that H invested $1.2m in May 2021 and a further $600,000 in September 2021.

In September 2021, H sold a London property for which he personally received $4.3m, which he invested into business interests. H contended that W was fully aware of this sale, which W denied, and the court rejected. The court did not consider it plausible that W would simply ignore the sale at a time when she was receiving no financial support from H. In addition, the Judge was particularly concerned about an exchange of messages between the parties in November 2021 within which H talked about the property as being one which would be perfect for the family despite it having been sold two months earlier.

Forms E had not been exchanged, nor were they required, and financial disclosure had not been ordered. W nevertheless disclosed a full run of bank and credit card statements which enabled her finances to be analysed in some detail. H, by contrast, provided none, save for a summary balance and a single bank statement.

The Law

The judgment sets out the principles previously identified in ***TL v ML*** **[2005] EWHC 2860** (para 124) as the law applicable to W's application for interim maintenance [para 4] and does similarly to those identified in ***Rubin v Rubin*** **[2014] EWHC 611** (para 13) when setting out the law applicable to the application for legal services funding [para 5]. As relevant to the present case, it was expressly observed that a jurisdictional dispute does not prevent the court from making an interim order, but a cautious approach should be taken both as to whether to make an order at all, and as to quantum.

The court's decision

Although satisfied that the existence of a jurisdictional dispute was relevant, the court did not consider that it weighed too heavily in the circumstances. Notably, habitual residence was found in W's favour within the Hague Convention proceedings and Country E had recently declined jurisdiction. Consequently, W's prospects of success could not be regarded as so remote as to limit the present application by a pessimistic prognosis of the outcome of her suit.

The court noted that interim maintenance applications are almost invariably tried on the basis of submissions, as was the case here. The decision observes that in many, and perhaps most, cases there remains sufficient information available for the court to exercise its jurisdiction with a tolerably accurate assessment of the finances. However, the approach was hampered in the present case by each denying any liquid assets while being accused by the other of having a great deal of wealth.

Mr Justice Peel considered that, in such circumstances, the court must be circumspect, not being afraid to draw adverse inferences if warranted but not to make orders without either i) credible evidence that one or other party is able to access large sums of wealth; or ii) being satisfied that the disclosure by either party is so deficient as to justify, even at this stage, making an award which that party denies is capable of being met. In this exercise the court is most assisted by objectively verifiable facts and contemporaneous documents [para 41].

In making his assessment, the Judge considered the parties' respective approaches to financial disclosure to be highly relevant. Despite the absence of a procedural requirement or order for financial disclosure, the court considered it must have been obvious to H that such documents would be necessary given the nature of his case was an inability to pay anything for W and the children. The Judge went so far as to consider the absence of bank and credit card statements from H extraordinary and, as a consequence, it was more difficult to accept what H said at face value.

It was significant, in the view of the Judge, that the available financial disclosure (from W) demonstrated H's income and resources had fully supported W and the children in an expensive lifestyle with no indication of 'impending financial doom' right up to the point of separation. Similarly, the Judge considered H's conduct in investing millions into various business interests in 2021 as being highly unlikely if knowing that, on his own case, he would not then have any monies left to meet even his own personal needs. These investments included not just capital injections into his own existing businesses and investments, but also fresh investment not related to capital calls or ongoing operational costs. By electing to prioritise these business interests and opportunities over the interests of his family he could not now complain that W brings an interim application for financial support. H also paid €176,000 upfront for 8 months' rent of a property in Country E shortly prior to the parties' separation, which was not viewed as the actions of a man who anticipated cashflow difficulties.

It was, in the view of the court, more than just coincidence that H's claimed liquidity issues were so acute precisely at the point of separation despite no previous reduction in an undiluted ability to spend money. In any event, and despite being sceptical about H's stated liquidity issues, the Judge considered that it was for H to find a way to unlock liquidity, particularly where he invested so much family wealth in his businesses in 2021.

Conversely, the Judge rejected, on an interim evaluation, that W had access to large sums from A Ltd. This was principally due to the lack of any document evidencing that W has or had a legal or beneficial interest in the business, nor any documentation evidencing that she had ever received any money from the business.

Having formed the view that it was appropriate to make an award to W, the Judge then proceeded to quantify that award, both in respect of interim maintenance and legal funding. In so doing, the Judge bore in mind that H also needed to be able to meet his own needs but was satisfied that H was well able to access funds to enable him to do so. The Judge considered W's budged to be grossly exaggerated and observed her expenditure since separation as being irresponsibly excessive. The Judge was satisfied that almost all items of claimed expenditure should be reduced significantly. Being satisfied that it was appropriate to take a broad approach to quantifying W's award, W's claim for MPS was more than halved to circa £400,000pa plus school and nursery fees when payable. The Judge made no award for the period prior to W's application for MPS at a time where she elected to borrow funds rather than make her application and spent, in the court's view, at an excessive level.

The Judge made similarly significant reductions to the sums claimed by W within her application for legal fees in respect of future costs. As to those costs already incurred, any costs referrable to the Hague Convention proceedings were completely discounted, the court being satisfied that there were entirely distinct historic costs incurred prior to the issue of the present application and so irrecoverable. As to the remainder of those costs, they were to be paid by H save that a discount of 30% was applied to reflect a notional standard basis of assessment.

Case summary by **Oliver Riley**, Barrister, **St John's Chambers**

B, R & G (a Child) [2022] EWHC 320 (Fam)

The local authority (supported by the other parties to the care proceedings) argued five grounds in support of the application.

- It would be contrary to G's interests to be identified in the community as a child whose parents are subject to murder charges.
- There is a long term risk of identification given her distinctive name.
- If an adoptive care plan is pursued, the risks associated with publicity may deter prospective adopters from putting themselves forward.
- Life story work may be compromised if she is able to read press coverage about her sibling's death in an uncontrolled manner, and
- As she is one of very few twins in the area she lives in who has experienced the death of a sibling, this enhances the risk of identification.

The application was opposed on behalf of the major media groups on the basis:

- that tragic though they are, the circumstances are not exceptional and to make an order in these circumstances would be contrary to established authority.
- There is a strong imperative to permit full, contemporaneous reporting of the criminal proceedings.
- Without being able to name the defendants and/or the deceased child the trial would be rendered faceless and devoid of human interest.
- *Re S (A Child)* [2005] 1 AC 593, and *Re Trinity Mirror PLC* [2008] QB 770 cited.
- The fact that the provisions of the *Children and Young Persons Act 1933* did not extend to protecting a child in G's position had been considered in *Re S*, where the decision by Parliament to limit the reach of the Act was considered to be significant.
- An injunction in this case would mean that reporting restrictions would be applicable in most similar cases relating to children.

Judd J refused the injunction sought on the basis that the facts were not such that the reporting of the trial would have a sufficiently immediate impact on the child to justify her Article 8 rights taking precedence over the Art 10 rights of others. ***A Local Authority v W* [2005] EWHC 1564 (Fam)**; [2006] 1 FLR1 and ***A County Council v M (Children)* [2012] EWHC 2038 (Fam)**; [2013] 2 FLR 1270 were distinguished. There was no evidence that she is likely to be affected any more than other children who very sadly have to live with the consequences of the actions of their parents. She was bound to find out the circumstances as she grew up and this would need to be managed by those caring for her. There was no particular evidence that the reporting would have an adverse impact on the search for adopters.

An order restraining the publication of details of G's existence as a member of the family was continued, on the basis that in the unlikely event it became material at the trial the order could be revisited.

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

Baker v Baker [2022] EWFC 15

The judge citing ***Rattan v Kuwad* [2021] EWCA Civ 1** and *TL v ML and Others (Ancillary Relief: Claim against Assets of Extended Family)* [2006] 1 FLR 1263 held that:

- the sole dispositive criterion on an application for maintenance pending suit remains 'reasonableness'.
- The purpose of maintenance pending suit is to meet immediate or current needs, and that in assessing those needs an important factor is the marital standard of living.
- the analysis does not have to be undertaken with close numerical exactitude; a broad approach to the assessment of immediate needs is not only acceptable, but is likely to be commonplace.
- Where the affidavit or Form E disclosure by the payer is obviously deficient the court should not hesitate to make robust assumptions about his ability to pay. The court is not confined to the mere say-so of the payer as to the extent of his income or resources (*G v G*, *M v M*). In such a situation the court should err in favour of the payee.

He directed that the husband should exhibit his answers to an affidavit so that if the answers are not true he is exposed to a penalty of 7 years imprisonment for perjury rather than 2 years for contempt for an untrue witness statement.

Mostyn J rejected the husband's claim that he could not afford the wife's claim of $23,000 per month (disclosure just before the hearing having added $6million to his stated fortune).

He rejected the wife's argument that that she could rely on a pre-nuptial agreement at this stage of the proceedings when the husband had not complied with it and she had not enforced it in the USA for 6 years. The relevance of the agreement would remain an issue for the final hearing. He also rejected the wife's argument that she should be able to roll up her investment income into capital because of doubts about enforceability of an award at final hearing. Her income was what it was and should be treated as fully available to meet her needs.

Mostyn J therefore awarded $6,500 pcm rather than $23,000 pcm.

Although the wife recovered much less than she claimed Mostyn J awarded her costs on a standard basis but reduced the costs payable on the standard basis on summary assessment as some of the fees were excessive.

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

RL v Nottinghamshire CC & Anor (Rev1) [2022] EWFC 13

The application

The application for a rehearing asserted the mother's belief that the fracture was caused during a skeletal survey from 11 January 2016 . The application did not mention the possibility of the fracture being a consequence of osteogenesis imperfecta (OI) and was silent on the bruises [4]. It was only in the mother's position statement dated 6 October 2021 that OI was first mentioned. Mother's counsel referred to a letter sent on 27 November 2018 to the maternal grandmother (C's special guardian) from the divisional director at Nottingham University Hospitals which confirmed that no OI tests were undertaken in 2016 as there were no clinical signs warranting them [5]. The possibility that C suffered from OI was the main ground relied upon by mother in this application [6].

Background

A chronology of events is as follows:

- C was born on 6 December 2015 without complications [7].
- Following concerns around an eye infection, C was taken to her GP on a couple of occasions before being admitted to hospital for an operation to remove a cyst from her eye on 8 January 2016 [8-10].
- The following day, a nurse noticed a bruise on C's left cheek. When questioned, the mother and DS said it had been there since C's admission [11].

- An additional bruise to the right cheek was identified at a child protection medical examination the next day [12].
- On 11 January, a skeletal survey further revealed a healing fractured collar bone which appeared to have occurred at, or soon after, C's birth [13].
- C was discharged on 12 January subject to the agreement she would not be left alone with either her mother, DS, or her maternal grandmother [14].
- On 26 January 2016, a chest X-ray on C revealed a healing fracture of the posterior left 7th rib [15].

On 1 February 2016, Nottinghamshire CC (the LA) instituted care proceedings, seeking findings that the following non-accidental injuries had been caused to C by the mother, DS, and the maternal grandmother:

> (i) a bruise to the right cheek 0.5cm in diameter, with horizonal skin abrasion overlying it;
>
> (ii) a bruise to the left cheek 1.5cm in diameter;
>
> (iii) a fracture to the 7th (neck of) posterior left rib inflicted between 31 December 2015 and 11 January 2016; and
>
> (iv) a fracture to the right clavicle on an unknown date nearer to birth.

The pleaded grounds also alleged failure to protect due to failure to report the cause of, or any concerns about, the injuries [17].

At the fact-finding hearing, the Recorder found that either the mother or DS had non-accidentally caused injuries (i)-(iii) [18]. No findings were made in relation to (iv) or the failure to protect. No findings were made against the maternal grandmother [19]. At an IRH on 26 June 2016, a SGO was made in favour of the maternal grandmother, effectively concluding the care proceedings, and that remains in force [21-22].

On 10 August 2021, the mother made the re-hearing application [23] and directions were given by HHJ Reece to prepare for this hearing [24].

The mother then made an application on 21 December 2021 for the instruction as a SJE of a consultant paediatrician to consider the bundles prepared for the fact-finding hearing and the current proceedings and to provide a report addressing various factors as listed at paragraph 25 of the judgment [25].

Legal principles

Mostyn J said how, under the general law, the mother's application would face being barred by issue estoppel, a sub-set of the doctrine res judicata. He noted how the doctrine is a rule of substantive law and not merely a procedural rule, a distinction which he deemed to be of some importance as later in his judgment he referred to a number of family cases which incorrectly assume the doctrine is merely a rule of procedure [27]. Mostyn J expressed how the essential features of issue estoppel are that the issue is the same in the second proceedings, and the parties are identical. If that is the case, then, subject to limited exceptions, the applicant is barred from relitigating the issue [28].

During his analysis of various cases, Mostyn J drew on Jackson LJ's conclusion from ***Re E (Children: Reopening Findings of Fact)* 2019 EWCA Civ 1447**, which was that a challenge at first instance was permissible, albeit that it should be subject to a form of permission filter. This would be the first of three stages, where the court considers whether it will permit any reconsideration of the earlier finding [40]. The test for permission was set out as follows:

> "…whether there is any reason to think that a rehearing of the issue will result in any different finding from that in the earlier trial there must be solid grounds for believing that the earlier findings require revisiting."

Jackson LJ then elaborated this test in ***Re CTD (a Child: Rehearing)* [2020] EWCA Civ 1316**, saying that:

> "… at the first stage the applicant must show that there are solid grounds for believing that a rehearing will result in a different finding. Mere speculation and hope are not enough."

It was Mostyn J's opinion that the above test, when correctly understood, is not materially different to that obtaining under general law. He said how under general law, notwithstanding a bar of issue estoppel, a party can exceptionally challenge an anterior judgment in fresh proceedings at first instance in certain clearly defined circumstances, these being [41]:

> (i) on the grounds that the anterior judgment was fraudulently obtained; and
>
> (ii) on the ground that new facts have emerged which strongly throw into doubt the correctness of the original decision [42].

It therefore seemed to Mostyn J that Jackson LJ's test of "*there must be solid grounds for believing that the earlier findings require revisiting*" ought to be interpreted comfortably with these exceptions if a divergence from the general law is to be averted. This would mean that "*solid grounds*" would normally only be capable of being shown in special circumstances where new evidence had emerged entirely changing the aspect of the case and which could not with reasonable diligence have been ascertained before [43].

Mostyn J said he could not see any reason why the general substantive law of res judicata should not apply to children's cases [45]. He accepted that Jackson LJ's test was binding on him, completely agreeing there should be a stage one form permission filter and that on a rehearing application mere hope and speculation will never be enough to gain permission. He said he was merely suggesting an interpretative reconciliation between the solid grounds test and general law such that solid grounds will normally only be demonstrated where either the fraud or special circumstances exception is satisfied [49].

This case

Applying the reasoning above, Mostyn J found that the application before him, as originally pleaded, did not come anywhere near meeting the standard of "*solid grounds for believing that the original decision required revisiting*". As originally formulated, the only ground advanced was the mother's belief that the fracture was caused by an incorrectly performed skeletal survey, but this aspect had been the subject of a specific finding by the Recorder [50].

With regards to the bruising, Mostyn J mentioned how nothing was said about the bruises in the application as originally pleaded, the first time the bruises ground was mentioned being in the position statement for the hearing on 6 October 2021 [55]. He summarised the bruises ground at paragraph 56. Mostyn J stated that he was not satisfied that there were solid grounds for believing that the earlier findings in relation to the bruises required revisiting, seeing the submissions made as no more than mere hope and speculation [59]. He concluded that the stage one leave test failed in relation to the bruises, regardless of whether the general law test of special circumstances or the more liberal interpretation "solid grounds" was applied [60].

Turning then to the rib fracture, the mother's grounds are summarised at paragraph 61 of the judgment, but Mostyn J stated that counsel for the LA "convincingly rebutted" those grounds in his "extremely well written skeleton", then going on to highlight the relevant points [62]. Counsel for the LA submitted that there was no fresh evidence supplying the necessary solid grounds for believing the finding should be revisited, and that no additional facts had emerged which entirely changed that aspect of the case and which could not, with reasonable diligence, have been ascertained before [63]. Mostyn J ultimately found that the Recorder's primary finding that the rib fracture was not caused at the skeletal survey was unassailable [64].

It was further raised by Mostyn J that there is no care order in respect of C. Her grandmother could have arranged for tests to determine whether C had OI and this was not done. Rather, the mother applied for a paediatrician to undertake a comprehensive examination on C and provide his opinion as to the cause of the relevant injuries and, inferentially, whether that cause was OI. This method of simply hoping something would turn up cannot fit with either the general law or even a most liberal interpretation of Jackson LJ's solid grounds test [65].

Mostyn J also noted that an additional factor in determining whether the case should pass through the stage one filter is the objective of the applicant [66]. While Mostyn J appreciated that the mother may want to expunge the stigma of the adverse finding from a moral viewpoint, this would not be a good reason to undo the finality of these long closed proceedings [66].

The Judge was not satisfied that there were solid grounds for believing that the earlier findings regarding the rib fracture required revisiting, finding that the submissions made in that regard were, again, no more than mere hope and speculation [69]. Once more, Mostyn J concluded that the stage one leave test was failed, regardless of whether the general law test of special circumstances or a more liberal interpretation of "solid grounds" was applied [70].

For those reasons, the mother's application was dismissed [71].

Case summary by **Diana Panizzon-Pineda**, Pupil, **St John's Chambers**

Pennine Care NHS Foundation Trust v Mrs T & Ors (Rev1) [2022] EWHC 515 (Fam)

Amy is described as 'talented, intelligent and a much-loved sister and daughter. She is academically very able, socially popular, considerate of others, kind and has a keen interest in social justice and environmental issues. She has in every imaginable sense a great deal to live for and her whole adult life before her. Yet from about September of 2019, in ways that I will examine further in the course of this judgment, her mental and then her physical health began to decline such that the application before me today under the inherent jurisdiction is to authorise the use of a highly invasive, very unusual

medical procedure so as to attempt to preserve her life and to try to buy time for her to be given – and to have the physical strength to benefit from - treatment and therapy.'

The court described 'two striking features' of the application:

- The medical procedure itself carries with it significant risks; it is out with the experience both of the acute care clinicians involved in her care and of the mental health team looking after her. It is proposed only because the professional view of those proposing it is that there is nothing else to be done which may achieve a positive outcome. Her trajectory is towards death.

- If somehow sufficient time and physical strength could be found to permit it, those treating her were optimistic that there were treatment options which could help her. The application was not therefore about authorisation of palliative care.

Amy lacked capacity to make the decision for herself. 'The mental disorder by which she is afflicted means that whilst she is perfectly well able to receive information and on one level to understand the meaning of it, she is prevented from using or weighing that information so as to make decisions.'

Amy was reported to have been electively mute in recent times, making it difficult for the Guardian to obtain instructions. She was, during the Guardian's visit even when closely supervised showing signs of intense distress and concerted attempts to behave in ways which would cause her physical harm. The Guardian supported the application 'on a v narrow balance', but the issues she had raised in her position statement prompted the filing of helpful up to date evidence which indicated that Amy was showing signs of deterioration and was no longer medically stable.

The parents consented to the plan. The court records that this was not therefore a case where the clinicians and the parents are at loggerheads and the Court intervention is the only way to resolve the impasse. The application was required because of the nature of the treatment proposed.

The court reviews the legal framework that the court must apply in cases concerning the provision of medical treatment to children who are not 'Gillick' competent, noting that it is 'well settled'. Morgan J set out a list of key principles which can be drawn from the authorities, in particular *In Re J (A Minor)(Wardship: Medical Treatment)* [1991] Fam 33, *R (Burke) v The General Medical Council* [2005] EWCA 1003, ***An NHS Trust v MB*** **[2006] 2 FLR 319**, ***Wyatt v Portsmouth NHS Trust*** **[2006] 1 FLR 554**, ***Kirklees Council v RE and others*** **[2015] 1 FLR 1316** and ***Yates and Gard v Great Ormond Street Hospital for Children NHS Foundation Trust*** **[2017] EWCA Civ 410**:

> 'i) The paramount consideration is the best interests of the child. The role of the court when exercising its jurisdiction is to take over the parents' duty to give or withhold consent in the best interests of the child. It is the role and duty of the court to do so and to exercise its own independent and objective judgment;
>
> ii) The starting point is to consider the matter from the assumed point of view of the patient. The court must ask itself what the patient's attitude to treatment is or would be likely to be;
>
> iii) The question for the court is whether, in the best interests of the child patient, a particular decision as to medical treatment should be taken. The term 'best interests' is used in its widest sense, to include every kind of consideration capable of bearing on the decision, this will include, but is not limited to, medical, emotional, sensory and instinctive considerations. The test is not a mathematical one, the court must do the best it can to balance all of the conflicting considerations in a particular case with a view to determining where the final balance lies[…]
>
> iv) In reaching its decision the court is not bound to follow the clinical assessment of the doctors but must form its own view as to the child's best interests;
>
> v) There is a strong presumption in favour of taking all steps to preserve life because the individual human instinct to survive is strong and must be presumed to be strong in the patient. The presumption however is not irrebuttable. It may be outweighed if the pleasures and the quality of life are sufficiently small and the pain and suffering and other burdens are sufficiently great;
>
> vi) Within this context, the court must consider the nature of the medical treatment in question, what it involves and its prospects of success, including the likely outcome for the patient of that treatment;
>
> vii) There will be cases where it is not in the best interests of the child to subject him or her to treatment that will cause increased suffering and produce no commensurate benefit, giving the fullest possible weight to the child's and mankind's desire to survive;
>
> ix) The views and opinions of both the doctors and the parents must be considered. The views of the parents may have particular value in circumstances where they know well their own child. However, the court must also be mindful that the views of the parents may, understandably, be coloured by emotion or sentiment.

> There is no requirement for the court to evaluate the reasonableness of the parents' case before it embarks upon deciding what is in the child's best interests.
>
> x) The views of the child must be considered and be given appropriate weight in light of the child's age and understanding.
>
> […] The task of the court in cases concerning disputes in respect of the medical treatment of children can be summed up by reference to two paragraphs from the speech of Baroness Hale in ***Aintree University Hospital NHS Trust v James*** **[2013] UKSC 67**, namely:
>
> > "[22] Hence the focus is on whether it is in the patient's best interests to give the treatment rather than whether it is in his best interests to withhold or withdraw it. If the treatment is not in his best interests, the court will not be able to give its consent on his behalf and it will follow that it will be lawful to withhold or withdraw it. Indeed, it will follow that it will not be lawful to give it. It also follows that (provided of course they have acted reasonably and without negligence) the clinical team will not be in breach of any duty toward the patient if they withhold or withdraw it."

And

> > "[39] The most that can be said, therefore, is that in considering the best interests of this particular patient at this particular time, decision-makers must look at his welfare in the widest sense, not just medical but social and psychological; they must consider the nature of the medical treatment in question, what it involves and its prospects of success; they must consider what the outcome of that treatment for the patient is likely to be; they must try and put themselves in the place of the individual patient and ask what his attitude towards the treatment is or would be likely to be; and they must consult others who are looking after him or are interested in his welfare, in particular for their view of what his attitude would be."'

(quotation edited for brevity where marked with […])

Noting that the decision did not concern the withdrawal of treatment, Morgan J accepted that the principle of objective best interests was nonetheless applicable to Amy's case given the serious nature of the treatment proposed, and the court would need to be satisfied that Amy's best interests were met in the widest sense so as to justify the treatment proposed.
The evidence was that if time could be bought then prospects of successful treatment of Amy's OCD were good. However, 'put bluntly Amy is starving to death and that the timescales for effective treatment of her mental health whether by pharmacological or other therapy fall beyond the time by which she will have died.'

The trust wished to sedate Amy for 3-7 days, so as to provide physical investigation and treatment and a sustained period of re-feeding. It was then intended that Amy should be returned to continue intensive mental health treatment and treatment to support her physically in that. The risks of this plan were acknowledged to be high.

The evidence of the intensivists who were being asked to carry out this plan was that the risks were such that it could cause significant harm or even death, and there was no evidence base against which to properly assess the risks. They did not oppose the plan but were anxious to ensure the court was aware of the ethical and practical difficulties. In that context, and given the difficulty obtaining Amy's own views, the court considered it was especially important to consider what alternatives there were for Amy in order to make a decision.

Ultimately all those concerned for Amy, including the court, concluded that there was no other option for Amy, because doing nothing would mean her inevitable death.

The judge noted that Amy's infrequent communication was consistent with a wish to live.

Set against that was what 'appears on one view of it to be a steadfast and robust determination to reject all attempts to provide nutrition. This might well be understood as putting into effect a clear intention by an intelligent young woman to end her life by starvation'. However, the judge accepted the evidence that this is not an intention by Amy but is a manifestation of the symptom of her illness.

It was right that the application had been placed before the court in the circumstances and the order was made as sought, approving the plan.

Case summary by **Lucy Reed**, Barrister, **St John's Chambers**