May 2022

Family Law Week

NEWS

Government consultation open for changes to SEND system

On 29 March 2022 the government published its review into the special educational needs and disabilities (SEND) and alternative provision (AP) system in England as part of its commitment to improving outcomes for children and young people with SEND and in AP.

The 'SEND review' was commissioned to better understand the challenges facing children and young people with SEND. Despite reforms having been made to the SEND system in 2014, parents had been reporting difficulty and delay in accessing support for their children. The Covid-19 pandemic has also disproportionately impacted children and young people with SEND and exacerbated the already existing challenges within the system.

Following the review, the government has published a green paper, launching a consultation process and seeking feedback as to proposals to reform the system. Views are welcomed from children and young people, parents and carers, those who work within the SEND sector and local and national system leaders.

In the Ministerial foreword to the review, Nadhim Zahawi, Secretary of State for Education, and Sajid Javid, Secretary of State for Health and Social Care, commented:

> "This green paper sets out proposals to ensure that every child and young person has their needs identified quickly and met more consistently, with support determined by their needs, not by where they live. Our proposals respond to the need to restore families' trust and confidence in an inclusive education system with excellent mainstream provision that puts children and young people first; and the need to create a system that is financially sustainable and built for long-term success. We know that there are places where this is already the case, and we want to make this a reality across the whole country.
>
> We are proposing to establish a single national SEND and alternative provision system that sets clear standards for the provision that children and young people should expect to receive, and the processes

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that should be in place to access it, no matter what their need or where they live. We are setting out proposals for strengthened accountabilities and investment that will help to deliver real change for children, young people and their families.

Creating a single national system that has high aspirations and ambitions for children and young people with SEND and those in alternative provision, which is financially sustainable, is not a straightforward task. However, the reward for getting this right is huge: children and young people supported to succeed and thrive for generations to come."

In response to the Review and the green paper, Charlotte Ramsden, President of the ACDS, commented:

"The paper rightly acknowledges that the current SEND system is not working for many children. The 2014 reforms were ambitious, rightly raising expectations and extending support up to 25 years, but they have not delivered the intended outcomes. Despite record levels of spending there is growing frustration and dissatisfaction with how the reforms are working on the ground. The support and services children with additional needs receive has a huge impact on them and their families, all stakeholders must work together, in partnership with parents, so that collectively we are better able to meet the needs of children and young people now and help prepare them for an independent adult life in the future. So, supporting a successful transition to adulthood must be a key feature of the new national standards.

"Many aspects of the green paper are to be welcomed including those focussing on strengthening collaboration and accountability across all partners in the system and clarifying their roles and responsibilities, creating a less adversarial, more child centred system based on children's needs and inclusion. Improving the experiences and outcomes of children and young people with SEND is a joint endeavour and so we welcome the strengthened role and commitments of health partners as outlined."

For the SEND Review, **click here**.

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

Julia Queen, Barrister, **Coram Chambers**

02.04.2022

Government launches Tackling Domestic Abuse Plan

On 30 March 2022 the government launched a new 'Tackling Domestic Abuse Plan,' closely aligned with its Tackling Violence Against Women and Girls Strategy.

The plan includes a raft of measures, as can be seen here, including the following:

- Options for creating a new register for domestic abusers which could require perpetrators to take actions such as reporting to the police when changing address or opening a bank account with a new partner.
- Increasing electronic tagging to a further 3,500 individuals who have left prison and who pose a risk to women and girls
- Making it easier to access information on a partner's or ex-partner's previous abusive or violent offending
- Doubling the funding for the National Domestic Abuse Helpline.

Home Secretary Priti Patel commented:

"Domestic abuse is a devastating crime that ruins lives and tackling it is an important part of this government's Beating Crime Plan. For far too long the focus has been on what the victim might have done differently, rather than on the behaviour of the perpetrators themselves.

This must now change. My Domestic Abuse Plan focuses on taking the onus off victims and making it easier for them to access the help and support they need, while taking tough action against perpetrators."

For the Home Office announcement, **click here**.

Julia Queen, Barrister, **Coram Chambers**

02.04.2022

Family Court statistics from October – December 2021 published

This week the latest quarterly family court statistics were published by the Ministry of Justice covering the period of October to December 2021.

Some statistics of note included the following:

- The average time for a care or supervision case to reach first disposal was 47 weeks in October to December 2021, **up** 5 weeks compared to the same quarter in 2020. 23% of cases were disposed of within 26 weeks - **down** 4 percentage points compared to the same period in 2020.
- The mean average time from petition to decree nisi was 25 weeks, and decree absolute was 53 weeks - **down** 5 weeks and 2 weeks respectively when compared to the equivalent quarter in 2020. The median time to decree nisi and decree absolute was 11 and 28 weeks respectively.
- The number of domestic violence remedy order applications **decreased** by 4% compared to the equivalent quarter in 2020, while the number of orders made **decreased** by 12% over the same period.

- There were 1,687 applications relating to deprivation of liberty in October to December 2021, **up** 24% on the equivalent quarter in 2020. Orders **were similar** to the same period last year.

For the full statistics and analysis, **click here**.

Julia Queen, Barrister, **Coram Chambers**

31.03.2022

Statistics published regarding outcomes for children in need 2020 to 2021

The Department for Education has published national statistics relating to 'Outcomes for children in need, including children looked after by local authorities, in England: 2020 to 2021'.

Some of the key statistics included:

- Pupils in all social care groups were over twice as likely to have a special educational need (SEN) than the overall pupil population. For all children in need (CIN), almost half had a special educational need compared to 16% of the overall pupil population.

- Over half of all CIN were eligible for free school meals. This compares to 21% of the overall pupil population.

- Children in the social care groups perform less well than their peers across all key stage 4 measures (with the overall pupil average attainment 8 score being 50.9). Children with SEN have been recorded to have lower average attainment compared to the overall population. As such, the higher prevalence of SEN amongst looked after children (CLA) and children in need in part explains the difference in attainment compared to the overall pupil population.

- As is the case for the overall pupil population, for most of the key social care groups, Asian or Asian British pupils (including Chinese children) have the highest average Attainment 8 scores. The exception to this is CLA for at least 12 months, where Black, African, Caribbean or Black British have the highest average score.

- The percentage of persistent absentees for CLA for at least 12 months was 12% in the Autumn 2020 term, which was lower than the percentage for the overall pupil population (13%). However, as with overall absence, this percentage was higher for the other key social care groups.

- One in 10 pupils in 2020/21 have been a child in need in the last 6 years.

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

Julia Queen, Barrister, **Coram Chambers**

03.04.2022

Research report published considering improvements to supervision orders and care orders at home

On 31 March 2022 the Department for Education published a qualitative study into parental perspectives of supervision orders and care orders at home. The study, titled "Supporting families after care proceedings: supervision orders and beyond," carried out by Professor Judith Harwin and Lancaster University, interviewed parents who had raised their families post-care proceedings under a supervision order or care order.

The report made recommendations, based on the parents' views, as to how the experiences for families and children living with these orders could be improved at all stages of the process; starting from pre-proceedings and ending with implementation of the order at home.

Amongst many findings, as set out **here**, the report found that the relationship between parents and the social workers was a 'key determinant' of parents' experience of the supervision order. It was also found that parents who had experienced domestic abuse reported that support from children's services was 'limited to referral to courses on co-parenting and the Freedom Project.'

This study had been funded by the Department for Education to inform recommendations for the first review of supervision orders since the Children Act 1989, which is due to be published later in 2022.

For the report, **click here**.

Julia Queen, Barrister, **Coram Chambers**

03.03.2022

No-fault divorce comes into force

The Divorce, Dissolution and Separation Act 2020 came fully into force on 6 April 2022. The measures introduced by the Act include:

- Replacing the requirement to evidence either a conduct or separation 'fact' with the provision of a statement of irretrievable breakdown of the marriage (for the first time, couples can opt to make this a joint statement).

- Removing the possibility of disputing the decision to divorce, as a statement will be conclusive evidence that the marriage has irretrievably broken down, except on limited technical grounds.

- Introducing a new minimum period of 20 weeks from the start of proceedings to a conditional order of divorce being made, allowing greater opportunity for couples to agree practical arrangements for the future where reconciliation is not possible and divorce is inevitable.

- Simplifying the language of divorce to make it more understandable. This includes replacing the terms 'decree nisi', 'decree absolute' and 'petitioner', with 'conditional order', 'final order' and 'applicant'.

Resolution has hailed the reforming legislation saying that "this historic change will mean the end of the blame game for divorcing couples".

For the amended Family Procedure Rules, **click here**. For the 2020 Act, **click here**. For Government guidance for the public, **click here**. For a brief guide to procedure, **click here**.

10.04.2022

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

The Marriage and Civil Partnership (Minimum Age) Bill reached committee stage in the House of Lords on 7 April 2022.

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

"The anticipated effect of this change on the common law will also mean that any marriages which take place overseas, or in Scotland or Northern Ireland, involving under 18s where one of the parties is domiciled in England and Wales, will not be legally recognised in England and Wales. This change to recognition will also apply to civil partnerships. However, no changes were suggested to the Bill so the Bill goes directly to third reading. This procedure is known as "order of commitment discharged".

The third reading of the Bill takes place on?26 April, when final amendments can be made.

For the Bill, **click here**. For the Explanatory Notes, **click here**. For a House of Commons Library briefing on the Bill, **click here**. To follow progress of the Bill, as brought from the House of Commons, **click here**.

08.04.2022

Same-sex marriage in the UK's Overseas Territories

In March 2022, the UK Privy Council ruled the constitutions of the Cayman Islands and Bermuda (two Overseas Territories) do not provide the right for same-sex marriage, with the choice instead with their local assemblies.

While the first same-sex marriages took place in the UK in 2014, the Territories have their own constitutions and laws. The rulings do not affect other protections in place for LGBT+ people.

The House of Commons Library has published a briefing explaining the background to the judgments, the situation in other UK Overseas Territories (OTs), and what the next steps might be.

For the briefing, **click here**.

08.04.2022

MIAMS decreased by 17 per cent in the last quarter

Mediation Information and Assessment Meeting (MIAMs) decreased by 17 per cent between October and December 2021 compared to the previous year and currently stand at around a third of pre-LASPO levels. Family mediation starts decreased by 20 per cent and total outcomes decreased by 13 per cent, of which 61 per cent were successful agreements, and are now sitting at over half of pre-LASPO levels. The figures are included in the **latest quarterly legal aid statistics** released by the Ministry of Justice.

MIAMs, family mediation starts, and outcomes decreased significantly following the Covid-19 restrictions in March 2020. Since, volumes and expenditure had rapidly increased to levels temporarily exceeding 2019 figures. However, in the latest quarter, MIAMs have dropped by 4 per cent compared to October to December 2019. Family mediation starts decreased by 11 per cent while outcomes continue to exceed pre-pandemic figures (up 2 per cent).

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

10.04.2022

Ombudsmen release joint guidance to tackle common mistakes in aftercare of mental health in-patients

The Parliamentary and Health Service Ombudsman (PHSO) and the Local Government and Social Care Ombudsman (LGSCO) have released new guidance to tackle common and repeated mistakes seen in the aftercare of patients receiving support under the Mental Health Act.

PHSO and LGSCO work together on complaints that involve both health and social care bodies. The guidance brings together common themes seen in their joint investigation work. It includes practical recommendations for councils and Clinical Commissioning Groups (CCGs) to make improvements and avoid the mistakes of others. From July 2022 Integrated Care Boards will replace CCGs, for better joined up health care. This guidance will support practitioners in delivering a continuity of care during this transition.

Councils and CCGs have a joint responsibility to provide or arrange free aftercare for adults, young people, and children until they are satisfied the person no longer needs it. These responsibilities are set out in the Mental Health Act Code of Practice. They aim to reduce the risk of worsening the person's mental health condition and reduce the risk of needing further hospital admission.

Through a series of case studies, the guidance draws attention to recurring mistakes seen in the joint investigation work of PHSO and LGSCO when there are misunderstandings between a council and CCG about their collective responsibilities; these include:

- care planning for patients
- funding for aftercare
- accommodation needs
- ending mental health aftercare.

For the guidance, **click here** and follow the link at the top right of the page opened.

08.04.2022

Supporting male victims of crimes considered violence against women and girls

The Home Office has published a document setting out the government's position on and work to support male victims of crimes considered violence against women and girls. The document updates and replaces the first Male Victims Position Statement, published in 2019, and reiterates the government's commitment to ensuring that male victims of crimes which disproportionately affect women and girls are supported.

As with the **Tackling Domestic Abuse Plan** , it draws on responses to the Tackling Violence Against Women and Girls Call for Evidence, relevant data, and a comprehensive literature review.

For the document, **click here**.

08.04.2022

Domestic abuse: separate and single-sex service providers

The Equalities and Human Rights Commission has published a guide on the Equality Act sex and gender reassignment provisions. The guide is for service providers (ie anyone who provides goods, facilities or services to the public) who are looking to establish and operate a separate or single-sex service.

The guide covers (and gives examples, including in respect of the provision of domestic abuse support services, for) the exceptions in the Equality Act which allow services to be provided, or a policy to be applied: only to one sex, separately to people of each sex, or differently to people of each sex.

For the guide, **click here**.

08.04.2022

Domestic abuse: CPS revises guidance to 'challenge damaging myths and stereotypes'

The Crown Prosecution Service has stated that the notion there is a typical victim of domestic abuse is wrong, damaging and can prevent sufferers coming forward.

The CPS has published revised legal guidance on prosecuting these crimes in order to tackle misleading myths and stereotypes. The guidance encourages prosecutors and investigators to focus on the behaviour of the defendant by taking what has been described as an 'offender-centric' approach. This involves police studying the actions of the suspect before, during and after the alleged offence, with prosecutors advising on additional reasonable lines of enquiry, such as digital evidence, CCTV footage and witness statements.

For the CPS's announcement, **click here**. For the guidance, **click here**. To respond to the consultation, **click here**.

08.04.2022

Practising certificate renewal deadline extended

The Bar Council has acknowledged technical difficulties which are affecting access to the MyBar and Direct Access Portal. Due to the ongoing issues, the Bar Council have extended the deadline for renewing practising certificates under the annual Authorisation to Practise arrangements until the end of May 2022.

Any barrister who currently holds a practising certificate but has not yet been able to renew it will be authorised to continue practising until the new deadline.

For the Bar Council announcement, **click here**.

Julia Queen, Barrister, **Coram Chambers**

25.04.2022

Ofsted research published into matching of children to children's home places

Ofsted has recently published research and analysis into the matching of children to available placements in children's homes. Ofsted had identified that not much was known, particularly on a qualitative basis, about why children enter

children's homes and therefore conducted a study to better understand how children are matched to placements and to what extent the child's wishes and feelings are considered in the decision-making process.

Ofsted identified that whilst local authorities in England have a 'sufficiency duty' to ensure as far as reasonably practicable that there is sufficient accommodation within their area to meet the needs of children in care, there is an 'uneven distribution' of children's homes across the country and a well-known lack of suitable accommodation.

Some of the key findings showed:

- the current placement was the first time ever in care for almost one fifth of the children
- residential care was part of the intended care plan for just over half of the children
- foster care was part of the original care plan for just over one third of the children
- two thirds of the children entered a children's home because of some form of interruption in their previous care: foster placement breakdown (41%), children's home breakdown (15%) or family breakdown (12%)
- the move to a children's home was planned for almost four fifths of the children; that is, all the necessary preparations were made in advance
- the move to a children's home was an emergency move for one fifth of the children; that is, events either at home or in another care placement meant that urgent action had to be taken that resulted in the child entering the children's home
- around three quarters of the children were judged – by the inspector and registered manager – to be well matched to the home

Ofsted intends to publish a further report later in 2022 as to what services children's homes are able to provide and what needs they are able to meet.

For the Ofsted research and analysis, **click here**.

Julia Queen, Barrister, **Coram Chambers**

25.04.2022

NSPCC referred almost 62 children a day to agencies last year

The NSPCC has published new **data** regarding the usage of their NSPCC Helpline from 2021 to 2022. The data indicates that the Helpline made referrals to agencies such as children's services and the police in relation to 22,505 children in the past year, averaging at 62 children per day. These referrals related to concerns about abuse and neglect.

Further data also released indicated that of the 22,505 referrals made to police or children's services:

- 8,389 related to concerns of neglect
- 6,441 related to physical abuse
- 4,418 related to emotional abuse
- 3,013 relation to sexual abuse
- and 244 for sexual abuse online.

Notably, over 66% of cases referred to children's services and the police were in relation to children aged nine and under.

The NSPCC Helpline is a free, confidential helpline that anyone can contact if they have concerns about a child's safety or wellbeing. The contact number is 0808 800 5000 and operates between 8am-10pm Monday to Friday and 9am-6pm at the weekends. There is also an email address, **help@nspcc.org.uk**.

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

Julia Queen, Barrister, **Coram Chambers**

25.04.2022

Analysis of Online Safety Bill ahead of second reading

The NSPCC has published a report, ***Time to Act,*** analysing the impact of the Online Safety Bill in ensuring the safety of children online.

The Online Safety Bill is due its second reading in the House of Commons on 19 April 2022. The first draft was published in May 2021 and has since undergone significant changes. The aim of the Bill is to ensure the internet is a safer place for everyone in the UK, especially children. However, the NSPCC has raised various ways in which the proposals could be more child-centred and ensure that child sexual abuse online is tackled effectively.

In its Time to Act report, the NSPCC sets out its 'six tests' that the Online Safety Bill must meet to ensure it delivers for children and secures the government's ambition to make Britain the safest place in the world for a child to go online. The analysis indicates that a number of crucial areas of the legislation would benefit from further improvements.

For the government Online Safety Bill factsheet, **click here**.

For the NSPCC *Time to Act* report, **click here**.

Julia Queen, Barrister, **Coram Chambers**

25.04.2022

87% of adults reporting increasing in cost of living according to ONS statistics

The Office for National Statistics ('ONS') has published an analysis of how different groups in the population have been affected by an increase in the cost of their living. In the most recent **Opinions and Lifestyle Survey data from 16 March to 27 March 2022**, 87% of adults reported their cost of living had increased. The most common reasons given for this were increases in the price of food shopping, gas or electricity bills and the price of fuel.

Some key points of the data indicated:

- Of adults currently paying off a mortgage and/or loan, or rent, or shared ownership, 30% reported that it was very or somewhat difficult to afford housing costs, and 3% claimed to be behind on rent or mortgage payments, in March 2022 (16 to 27 March 2022).

- Among all adults, 17% reported borrowing more money or using more credit than they did a year ago, in March 2022 (16 to 27 March 2022).

- Among all adults, 43% reported that they would not be able to save money in the next 12 months, in March 2022 (16 to 27 March 2022); this is the highest this percentage has been since this question was first asked in March 2020 (27 March to 6 April 2020).

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

Julia Queen, Barrister, **Coram Chambers**

25.04.2022

Court judgments now available on National Archives website

The Ministry of Justice has announced that the National Archives is to provide a free service publishing online all new court and tribunal decisions from superior courts of records, including the Supreme Court, Court of Appeal, High Court and Upper Tribunals. The judgments can be found on the National Archives 'Find Case Law' website, **found here**.

Practitioners will no doubt be aware that this service has been to date provided by the charity, Bailii. Judgments will continue to be published on Bailii through a licensing agreement with the National Archives.

The Ministry of Justice intends to work with the National Archives in the coming years to expand coverage of what is published online to include judgments from the lower courts and tribunals.

Justice Minister, James Cartlidge, said:

> "As we continue to build a justice system that works for all, the National Archive's new service is a vital step towards better transparency. It will ensure court judgments are easily accessible to anyone who needs them.
>
> Our first official Government record of judgments is a modern one-stop-shop that will benefit everyone, from lawyers and judges to academics, journalists and members of the public."

For the National Archives 'Find Case Law' website, **click here**.

For the Ministry of Justice announcement, **click here**.

Julia Queen, Barrister, **Coram Chambers**

25.04.2022

Financial Remedy Update, April 2022



Stephanie Hawthorn, Abigail Pearse and Victoria Potts, associates, and Holly Morrison-Carter, trainee, at Mills & Reeve LLP consider the most important news and case law relating to financial remedies and divorce during March 2022.

As usual, the update is divided into two sections.

Case Law Update

J & K v L (Schedule 1: older children) [2021] EWFC B104 (30 December 2021)

This case involved an application by the mother under Schedule 1 of the Children Act 1989, this application was the latest of many. The mother (aged 57) (hereinafter referred to as 'M') and the father (aged 50) (hereinafter referred to as 'F') began their relationship in 1999. Their cohabiting relationship was intermittent, but there were two children of the family, N (now aged 20) and K (now aged 18). M was the children's primary carer - the children did not have a relationship with F. F had another relationship with a woman, 'P', around the same time as his relationship with M. F had two children with P, aged 20 and 17. Consensual financial support was agreed between F and P - there was an amicable relationship.

In deciding the current appeal, HHJ Hess made clear that the principal task at hand is to find a fair result for the children.

The history of the case is summarised very briefly below to the extent that it is helpful, but in summary, this case involved ongoing and bitterly contested proceedings that caused anguish and upset for both parties and their children.

1. 2001 Proceedings

Court proceedings were first commenced in 2001 whilst M was living in rented accommodation. It was agreed that a property would be purchased for the parties' youngest child (N). DJ Black approved a consent order which obliged the F to pay M £110,000 to enable her to purchase a property (to be held on trust for the F), as well as child periodical payments of £1,300 per month for N.

The lump sum payment was not paid and the requirement to pay capital was later discharged. M has since remained in rented accommodation.

2. 2004 Proceedings

The parties' briefly reconciled, conceiving K. However, shortly after K's birth, M commenced further proceedings. After 22 interim hearings, a decision was made by DJ Berry, recorded in an order dated 16 January 2006. To M's disappointment , the judge ordered child periodical payments of £27,500 per annum (i.e. £1,145.83 per calendar month per child), but dismissed her application for further capital and a school fees order. M was ordered to pay F costs assessed at £60,000, not to be enforced without leave of the court. To date costs are unpaid.

3. The first 2006 proceedings

M sought to appeal DJ Berry's decision and after 6 interim hearings, the appeal was dismissed and M was ordered to pay F costs of £20,000, not to be enforced without leave of the court.

4. The second 2006 proceedings

A day after the first 2006 proceedings, M applied for a school fees order - placing the children in fee-paying schools pre-emptively. Following 6 bitterly contested interim hearings, HHJ Kaye QC held that F's obligation to pay school fees was limited to a period between 2006 to Summer 2009, thereafter to be discharged.

5. The 2011 proceedings

In January 2011, M applied for an increase in child periodical payments and further capital provision. A consent order was approved obliging F to pay £30,736 per annum by way of child maintenance (in effect, an RPI increase on the 2006 order) until each child respectively turned 17 years old or ceased full-time secondary education, whichever date is later. F was also ordered to pay a lump sum of £5,000 to enable the M to purchase a car for the benefit of the children. No costs were ordered. M undertook not to issue any further Schedule 1 application for five years.

6. The 2018 proceedings

M issued a further application under Schedule 1, to vary the 2011 order and for further lump sums for the benefit of N and K. Within these proceedings, there had been 22 interim hearings. In 2019, M issued an application for interim periodical payments for N on basis the 2011 order had come to an end given N finished her secondary education.

On 19 August 2019, DDJ Willbourne dismissed this application on its merits, because N's secured A-Level results were insufficient to gain her a place at her university of choice and on the basis that there was *no jurisdiction* to make an order as N was now an adult. This order was targeted at M's interim application, made after N was 18, not the main application, which was made before N turned 18. M did not pursue any further remedy for N on the main application. It was suggested in the judgment that N herself could pursue a revival application under paragraphs 6(5) and (6) of Schedule 1 should she wish to do so.

M appealed this decision, which was dismissed on 29 May 2020, with M ordered to pay F's costs of the appeal, to be assessed on an indemnity basis. The appeal was dismissed on the basis that the court did not have jurisdiction to hear an application for the benefit of N made by M. Permission to appeal was denied by King LJ on 20 October 2020 on a 'totally without merit basis'.

After a four day hearing to deal with M's main application (on 17 - 20 November 2020), HHJ O'Dwyer adjourned the case on the promise of presenting a reserved written judgment. Unfortunately, due to a period of illness, the written judgment was not forthcoming. In May 2021, M's legal team raised concern that K's 18th birthday was fast approaching and the H would seek to rely on the same jurisdiction arguments (*i.e. that the court will not have power to make any orders on M's application, but K can bring a claim in her own right*) if an order was not in place ahead of K's birthday. It was then subsequently agreed at a directions hearing on 28 September 2021 that HHJ Hess would determine matters by reference to the audio tapes / documentation from the November 2020 hearing, written submissions to follow from both Counsel and by joining an anticipated application by K.

Conclusions

Though acknowledging that there is a prohibition on a parent making a new application for a Schedule 1 order on behalf of an adult child where the child is already 18 at the time of the application, HHJ Hess concluded that a variation order does not fall within the meaning of 'further order' as provided for in paragraph 1(5)(a) of Schedule 1 of the Children Act 1989.

Paragraphs 1(3) and 1(4) provide that a variation application (as opposed to a new application, e.g. after an earlier order has expired) can be pursued at any point. HHJ's view is that such an order (made when a child is under 18) can continue from the child turning 18 to them ceasing to satisfy one of the relevant extension conditions. Any other decision would produce an absurd result.

The extension conditions in Schedule 1 justifying financial support for children beyond them being minors are that:

- the child is or will be receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not they are or will be in gainful employment; or
- special circumstances are present justifying the making of an order.

HHJ Hess concluded that he did have jurisdiction to hear M's variation application (from the 2018 proceedings) in relation to K and he could vary the periodical payments order made for the benefit of K in 2011. He could vary the order back to

the date of the application (i.e. 28 August 2018, though he chose not to do so in this case) and forwards to the date K ceases to satisfy the relevant extension conditions. The order can be varied on an application by M or on an application by K. Ultimately, an order made before a child is 18 can require transfer of property or payment of a lump sum to take place after the child is 18.

HHJ Hess also commented that he has the power to award lump sums for K's benefit on M's application. Orders for money (by way of periodical payments or lump sum) can be paid directly to K or to M for K's benefit. K was held to meet the relevant extension conditions on the basis that she is likely to, on the balance of probabilities, attend tertiary education in some form or another from September 2022 (after her gap year) and therefore will be 'receiving instruction at an educational establishment'. HHJ Hess' Order is to continue until K ceases tertiary education up to first degree level (*including a foundation course*). The periodical payments ordered were to be paid in the first instance directly to M each month, but upon commencement of K's tertiary education, 50% is to be paid to M for the benefit of K and 50% directly to K.

Such rules and principles would also apply in relation to N, but in this case no remedies were pursued by M for the benefit of N at the hearing in November 2020 or subsequently.

It would be wrong to exclude M's right to seek orders that she was entitled to at the time of the application as a result of effluxion of time, particularly where such effluxion is no fault of her own. In making his order, HHJ Hess considered all evidence presented as to what M reasonably needs to care for K and what K reasonably needs for her own use and in light of the available resources to each the M and F.

WC v HC (Financial Remedies Agreements) [2022] EWFC 22 (22 March 2022)

This matter relates to a wife's (W) financial remedy application. In establishing an appropriate financial division of assets, Peel J gave consideration to (a) the weight to be attached to a Pre-Marital Agreement, (b) the weight to be attached to a Post-Marital Agreement and (c) issues of potential inheritance and wider family wealth.

The parties, who lived a 'very affluent' lifestyle (which was largely funded by the husband's (H) father), begun cohabiting in 2002/2003 and married in September 2004. They separated in 2019. There are two children of the marriage who lived in Switzerland with both parents from 2010 until 2017, and then relocated to England for their schooling from 2017 onwards. Prior to marriage, a pre-nuptial Agreement was signed, followed by a supplemental agreement concerning child maintenance and a further two Swiss agreements which mirrored the English pre-marital agreement. The agreement made sliding scale provision for the W in the event of divorce up until 1 September 2014. The agreement was silent as to provision beyond that date. W alleged within these proceedings that she signed the agreement as a result of undue pressure, this was disputed by H.

It was agreed in 2017 that the children would attend school in England, with the intention being that W and the children would live in England, with the expectation that they would spend time visiting the F who was to remain based in Switzerland. In June 2017, H proposed the idea of a Post-Marital Agreement (PNA). W was opposed to this from the outset, but H had told W that she could not move with the children to England without a PNA.

Lawyers were instructed and a PNA was drawn up in August 2017 after two months of negotiation. W was entitled to approximately 56% of the combined net assets (excluding H's prospective inheritance) under the terms of the agreement.

Mirror agreements were drafted in Switzerland and were due to be signed on 29 August 2017. The same day, W's GP certified that W was showing 'true mental distress' which was 'unconducive to calm decision making'. W made clear she would not sign the English document without seeing the Swiss documents. W also made clear that she did not intend to renegotiate the English post-nuptial agreement and that she would take steps to sign it, but she never did.

W did not sign the document and messages to her friend set out that she was feeling 'powerless, blackmailed and abused'. W's solicitors approved the agreement on 22 August 2017. Peel J noted that the document, to which W had approved in written correspondence, recorded that each party entered into it of their 'own free will and without undue influence or duress'. There was no inequality of bargaining power, W's solicitor signed the agreement and did not assert it was conducted under undue pressure.

At no time was it raised that W was under undue pressure (albeit she would have been under some pressure), nor that she thought the terms were unfair, her concern seemed to be the fact that she had not had sight of mirror Swiss documents. Both parties were under some pressure as W wanted to move to London, and H was concerned about the impact of the children and W relocating from Switzerland. However, Peel J concluded W was not subject to undue pressure or duress.

Peele J concluded that each case is fact specific. Ordinarily, an agreement takes effect when both parties sign. In this case, the agreement stated it would come into force on the date that the last party signed. Parties may in some cases agree in correspondence that an agreement has been reached, and signatures are not required. In this case, it was held to be unreasonable for the post-nuptial agreement to bind W in a Radmacher sense, absent her signature, when it expressly took effect on both parties signing. It was one of the circumstances of the case to be taken into account when considering the

section 25 factors and its terms were relevant, but not determinative. The PNA was not 'vitiated or tainted by undue pressure or duress'.

Peel J's award provided the W with approximately 60% of the present total net assets, which amounted to £7.45m. This went beyond what was provided for within the PNA to meet W's needs judged against all relevant factors.

Importantly, Peel J gave a detailed set of introductory comments which began with him stating that W's statement "crossed the line, and descended into a number of personal, and prejudicial matters" directed at the husband, but which were not relevant to the issues being dealt with. Peel J unequivocally said that it is erroneous to think that it will assist one's case to paint an unfavourable picture of the other party by describing them in 'pejorative terms'.

Ultimately, section 25 statements should not be used as an opportunity for one party to personally attack the other using rhetoric or argument, they should contain evidence. Judges will base their decisions on the relevant evidence provided.

Peel J made clear that court orders, practice directions and statements of efficient conduct are there to be complied with - they should not be ignored. He was critical of the fact that W's statement, which on the face of it was within the 20 page limit, actually went beyond it given the smaller font and spacing used (which actually meant the document was about 27 pages compressed into 20), making it 33% longer than the H's statement. He made clear that there is a limit on the length of a statement for a reason, it should help to focus the parties' minds on relevant evidence and encourage a level playing field, the length restriction should not be ignored.

Finally, Peel J was critical of what he referred to as the H's 'eleventh hour spreadsheet' which provided an analysis of family expenditure during the parties' marriage and since separation, based on financial disclosure that has been in H's possession for many months. Such an exercise, if to be relied upon, should be provided well in advance of the final hearing (ideally before the PTR or final directions hearing) to enable proper case management and consideration of the issues raised.

A (Schedule 1, Overspend, Costs Clawback) (Rev1) [2022] EWFC 21 (03 March 2022)

This matter relates to a mother (M) and father (F) who are parents of a child, A, born in 2020. M and F had a friendly relationship for several years before A was conceived in 2019, although their sexual relationship was a short one. F plays no part in A's life.

In 2020, M applied to court for financial provision for A. Prior to the final hearing that took place before Recorder Chandler QC in February 2022, M and F agreed that F would pay the following to M for the benefit of A:

1. A housing fund of £1.35m to purchase a new property to be occupied by M and A until A attains 18 or completes full-time education, at which point the property will be sold and the proceeds returned to F;

2. A lump sum of £75,000 to furnish the property;

3. Child maintenance of £96,000 per annum (£8,000 per month);

4. Finance on M's current car and on a four-yearly basis, additional sums of £45,000 less the trade-in value of M's existing car;

5. The cost of A's education at nursery and private school including two school trips per year; and

6. The cost of installation of a standard electric gate at the new property.

However, M's position was that F should also pay additional sums for A's benefit, including a lump sum to clear M's liabilities of £316,133 in total (including £150,600 of legal fees) and additional periodical payments to enable M to employ a nanny.

F's case was that:

1. M's personal debt increased because of reckless and irresponsible overspending;

2. M's legal costs, which exceeded the projected budget, have been incurred because:

    a. M chose to be represented by leading counsel at every hearing, whereas F has been represented by junior counsel; and

    b. M pursued a largely unsuccessful appeal against an interim maintenance order that was made.

Despite those objections, F openly proposed that he would pay £139,815 comprising two lump sums (on the basis that one of the lump sums was offset by the agreed child maintenance of £8,000 per month).

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

CASES

Mohammed bin Rashid al-Maktoum v Princess Haya [2022] EWFC 16

A total of 15 substantive judgments had already been published, with great media attention given that this case was 'highly unusual', involving the children of internationally known parents, one of whom is the Head of Government of a 'prominent and powerful State'.

The President decided that the full judgment should be published, with some redaction. The key issue here was the publication of a welfare judgment concerning two clearly identified and publicly known children. Therefore the principles and themes developed in the recent Transparency Review did not have any direct resonance to the present unusual circumstances. The court had to find a 'bespoke' solution by considering the particular facts and the individual needs of the two children balanced against the now firmly – and rightly - entrenched position in favour of anonymity for children in family proceedings.

Initially, the mother argued that the welfare judgment, in common with each preceding judgment should be published in full. The father and Children's Guardian preferred publication to be restricted to a summary of the key elements of the decision. All agreed that in light of the degree of publicity already given to these proceedings, at least some form of summary of the welfare decision should be published.

Following submissions in February 2022 the Children's Guardian changed her position in light of a further statement from the mother and meeting with the children. The father did not actively oppose the Guardian's revised position to publish a full judgment with redactions but did urge the court to consider that both the children's and the public interest was better served by the publication of a 'coherent and accessible summary'.

The President found this a difficult decision. He had not written the welfare judgment with a view to future publication but rather to reflect the need to express his concluded views frankly and in detail so that the parents and in due course the children, could understand the court's reasoning. He noted that it was 'highly unusual' for the court to publish a welfare judgment when the identity of the children was fully and widely known and that none of the legal teams had been able to identify any such previous publication in such circumstances. This issue took on even greater significance knowing that the family are public figures in their own right in Dubai and elsewhere.

The parties sought to rely upon the recent transparency review '*Confidence and Confidentiality: Transparency in the Family Courts*' 29th October 2021 but the President was clear that this Report was 'wholly irrelevant' to the issue that currently fell for determination. The Report was clear that greater openness in Family Court Proceedings is not to be at the expense of the children and family concerned. In the unusual circumstances of the present case, the President was required to provide a 'bespoke' solution, informed by the specific facts of the case and the needs of the children.

The overall legal context to determine publication of judgments in family cases was held to now be well settled and not controversial, relying on the need to strike a balance between competing ECHR rights and the statutory limits on identifying children. This case did not fit the 'paradigm' of a publicity application which usually focuses on Article 10 rights to free expression. Here the arguments in support of publication were geared towards the rights of the children and their mother to have their 'story' accurately available for public scrutiny to avoid the father being able to promote a false narrative. In particular, as the father was not being afforded direct contact with the children and his exercise of parental responsibility had been limited, it was important that third parties knew not to share information with him about the children that might put them at risk. The mother noted that the father had already been attempting to push a false narrative via social media that he had been reunited with his son.

The President noted that the Court of Appeal had recently in ***Griffiths v Tickle*** **[2021] EWCA Civ 1882** upheld a decision to publish findings of fact against Mr Griffiths, in part upon the established right of an individual to 'tell their story'. The Children's Guardian in this case had also concluded that publication was in the welfare interests of the child.

In the present case the Children's Guardian found the decision was 'finely balanced' but had decided in favour of publication on the basis of the wishes and feelings of the children and the mother's own views. The court gave considerable weight to the mother's statement, which was not challenged. This had to be balanced against the firmly entrenched default position in favour of confidentiality. Little weight was placed on the fact that previous judgments had been published; the welfare judgment was in a separate category and requires a bespoke evaluation.

Case summary by **Sarah Phillimore** , Barrister, **St John's Chambers**

WC v HC [2022] EWFC 22

The judgment contains an overview of the law relating to division of assets generally (paragraph 21), pre-and post-marital agreements (paragraph 22), inter-vivos gifts from family (paragraph 23), and inheritance (paragraph 24).

The pre-marital agreement was entered into about three weeks before the marriage, at the behest of H's father. Peel J found that although both parties were under pressure from H's father to enter into the agreement, the pressure was not undue, and there was no reason to ignore the agreement.

The post-marital agreement specified that "this Agreement shall come into force on the date upon which the last of [H] and [W] signed the Agreement". W had agreed to its terms in correspondence, but ultimately declined to sign it. Peel J held; '*I am satisfied therefore that it is not a formally arrived at agreement in the Radmacher sense … I decline to find that it binds W unless she can demonstrate it operates unfairly. But nor am I willing simply to discard and ignore it, as W submits.*' The agreement was a factor to be taken into account in considering all of the circumstances.

There had been a breakdown in the relationship between H, his sisters, and their father. Peel J was not satisfied that he could take the prospect of support from H's father into account in any meaningful way. H's father could be regarded as a 'safety net' only.

Similarly, in respect of inheritance, although Peel J found that on balance, it was more likely that H would, at some point, receive a significant inheritance:

- 'Such inheritance would be entirely non-matrimonial, received long after separation;
- It has always been understood by the parties, as recorded in the two agreements, that future inheritances should be excluded from claims by the other party;
- In terms of foreseeability of resource, it may be several years away, and is unlikely to be of immediate assistance to H. At best, it gives me confidence that H will not want for money in the long term.'

The award gave W 60% of the assets, with H additionally making a high financial commitment to the children.

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

Re B (Adequacy of Reasons) [2022] EWCA Civ 407

Background (§1-5)

The care proceedings concerned E, the youngest of the mother's five children. Her first child, C, was the product of an abusive relationship. The parents (M and F) met in 2009 and had four further children together. Findings were made in 2013 that C had been assaulted at the age of six, causing bruising, by either M, F or a Mr K. C and the parents' first two children were found to be suffering/at risk of suffering neglect and physical and emotional harm and were all placed for adoption. The parents' fourth child, born subsequently, was also removed and placed for adoption following proceedings in 2016 when the parents' situation was considered essentially the same and they had not accepted the reasons for the removal of the older children.

After E's birth in August 2020, care proceedings were brought based on the previous findings, F's cannabis use and impulsivity and M's dependant personality, together with their failure to accept the previous concerns. On the guardian's recommendation there was a residential assessment, which concluded in December 2020 that the parents had not been honest about their involvement with Mr K and that despite substantial support they did not recognise their poor parenting skills, or take responsibility for their behaviour, and therefore they could not keep K safe.

A psychologist assessed the parents and found that there were ongoing risks. They would need six months' therapeutic input and there was no guarantee of success. They needed to show evidence of sustained change.

In January 2021 E was placed in foster care pending the final hearing.

The hearing (§6-8)

The final hearing took place in November 2021 before Recorder Sanghera. The psychologist and authors of the residential assessment gave evidence, having had no involvement with the family since December 2020. The psychologist accepted that the parents had made some changes and said that if the court found that they had made the necessary, sustained changes he would support further assessment.

The appeal (§9-11)

The parents argued that the judge did not sufficiently analyse the evidence and that his welfare analysis was legally wrong in that he conducted a linear analysis and discounted the parents on the basis of the CA 1989 welfare checklist before then considering the option of adoption by reference to the ACA 2002 expanded checklist.

Threshold (§12-18)

The CA was concerned that the judgment did not sufficiently identify the basis on which the s31 threshold was crossed.

Discussion of the judgment (§19-51)

Failure to engage with the oral evidence (§19-32)

- The judge relied very heavily on the written evidence of the psychologist although he did set out some aspects of his oral evidence;
- He barely mentioned the oral evidence of the residential assessors;
- The evidence of the social worker and guardian are described in a single paragraph for each;
- There is little mention of the parents' oral evidence or the general case put forward on their behalf, which is summarised in a single sentence;
- The various changes which the parents relied on are mentioned briefly in the account of the psychologist's evidence but are not factored into the judge's analysis even though the social worker and guardian made some significant concessions in respect of those changes;
- In response to a request by counsel for clarification following judgment the judge responded that he had covered all matters that were material to his decision.
- The issue of whether the parents had made sufficient change, such that the risks to E had diminished, was the key issue yet barely engaged with in the judgment.

Accordingly the judge's analysis was compromised and his risk assessment was undermined by failure to take into account positive changes as well as negative factors.

Should the welfare decision have been taken under CA 1989 or ACA 2002?(§33-42)

- The court had two realistic options before it, either rehabilitation of E with her parents or adoption.
- The judge should have analysed both options with reference to the ACA 2002 checklist.
- Even if the judge had been right to start by analysing the pros and cons of returning E to the parents under the CA 1989 (which he wasn't), he should still have had regard to the LA's permanence plan, which was adoption.
- Where there is an application for a placement order, that becomes the primary application and it is both unnecessary and wrong to consider the care application on its own before then turning to the placement order application.
- It is right however, when a court concludes that a child should be placed for adoption, to make a care order as well as the placement order, albeit the care order will be "dormant" unless the placement order is subsequently revoked.

A linear analysis?(§43-51)

- The judge considered the option of placing E with the parents and discounted it before then moving on to the placement application and considering adoption as against a "straw man" option of long term fostering.
- He was wrong, having identified placement with the parents as a realistic option, to make a preliminary ruling which ruled it out before considering others.
- It was not open to the court to prune the options in that way and to avoid a holistic evaluation of all the realistic options.

Conclusion

The case was sent back to the Family Court for rehearing on the basis that the outcome was unjust because of a serious procedural irregularity; no comment was made about the merits or demerits of the local authority's applications. At §59 Lord Justice Peter Jackson, having emphasised the importance of every judgment having an appropriate structure, set out the requirements of every good judgment:

> (1) state the background facts
>
> (2) identify the issue(s) that must be decided
>
> (3) articulate the legal test(s) that must be applied
>
> (4) note the key features of the written and oral evidence, bearing in mind that a judgment is not a summing-up in which every possibly relevant piece of evidence must be mentioned
>
> (5) record each party's core case on the issues
>
> (6) make findings of fact about any disputed matters that are significant for the decision
>
> (7) evaluate the evidence as a whole, making clear why more or less weight is to be given to key features relied on by the parties
>
> (8) give the court's decision, explaining why one outcome has been selected in preference to other possible outcomes.

Peter Jackson LJ went on to stress that the evaluation and explanation, while coming last, are the critical elements of any judgment.

In cases where a placement order is sought, the following sequence of questions must be addressed:

> (1) Are the threshold conditions under s.31(2) CA 1989 satisfied, and if so, in what specific respects?
>
> (2) What are the realistic options for the child's future?
>
> (3) Evaluating the whole of the evidence by reference to the checklist under s.1(4) ACA 2002, what are the advantages and disadvantages of each realistic option?
>
> (4) Treating the child's welfare as paramount and comparing each option against the other, is the court driven to the conclusion that a placement order is the only order that can meet the child's immediate and lifelong welfare needs?

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

Goddard-Watts v Goddard-Watts [2022] EWHC 711 (Fam)

In 2010 a District Judge made a final order by consent in financial remedy proceedings. W received the former matrimonial home and £4m (payable in instalments) representing 40-45% of the disclosed assets. H retained his interest in his business. That order was set aside by Moor J on the basis of non-disclosure by the husband of trust assets which had not been disclosed: ***KG v LG (Appeal out of time; Material non-disclosure)* [2015] EWFC 64**. The matter was reheard by Moylan J who decide to build on the previous award rather than start from scratch: ***Goddard-Watts v Goddard-Watts* [2016] EWHC 3000 (Fam)**. He awarded W a further £6.2m representing about 50% of the undisclosed assets. The house and business were found to be a previously valued.

There was then a second application to set aside for material non-disclosure because the husband was aware at the time that judgment was about to be handed down of potential interest in the shares in his business. Holman J therefore set aside the judgment of Moylan J and directed a further rehearing: [2020] 1 FLR 885, [2019] EWHC 3367 (Fam). In doing so he urged as he had repeatedly done that the parties seek to compromise "so that the vortex of profligate spending and mutual destruction finally ends".

Thus the second rehearing came before Sir Jonathan Cohen.

The judge having rehearsed the history, considered that he did not have to review whether Moylan J's approach was correct because the order had been set aside and he therefore had a discretion to start afresh or adopt a more limited approach: *Kingdon v Kingdon* [2011] 1 FLR 1409 (see also ***Sharland v Sharland* [2015] UKSC 60**, [2015] 2 FLR 1367 para 43).

The wife's assets had been reduced by buying flats in London for each of the adult children and gifts to family members. The judge did not criticise her for doing so but did not reduce her capital accordingly.

Both H and W spent much more than their income. The W increased her claims from £3m plus costs to £13.4m plus costs. H offered not to seek costs if W withdrew her claims.

The judge decided to apply a *Kingdon* approach as it was a single issue case. His starting point was to consider the effect of the non-disclosed assets, not the value of the other disclosed assets. He notes that if the H's disclosed business had gone bust, he could not have revisited the W's claims. He was not trading with her funds she had not been exposed to risk. [para 73].

The judge rejected the W's claim that she might have sought transfer of the shares in 2009/2010 if she had known the value. The W had never been involved in the business or sought involvement. She had never sought to be a shareholder. The relationship was so bad that it was inconceivable that it would have been agreed [para 74].

In applying s25, the judge gave significant weight to the fact that since 2010 W had borne the burden of supporting the children in a way that was not expected. He reduced her needs budget as the cost of her own mother's care home and the money she sought to pay for her children's holidays (£30000 pa) and the recurrent costs on her home which she would be selling. Considering the Duxbury Tables he concluded that she needed a further £1.1m to fund her needs. He refused a sum to in effect pay for past costs saying:

> "If W incurs costs which are far in excess of what costs orders (two of them on an indemnity basis) have produced, that is a matter for her. As I have approached this case on a needs basis, this argument turns out in any event to be sterile.".

Sir Jonathan Cohen at the conclusion of his judgment noted that the parties had spent on costs more on this round of litigation than the sum awarded (W:824k per Form H1: H:737k per Form H). He considered this was bound to raise difficulties in dealing with the costs applications but his judgement does not reveal how this was resolved.

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

P v Q (Financial Remedies) [2022] EWFC B9

Background

W (48) and H (45) met as students. The parties began cohabiting in 2005 and married in 2006. They had 2 children: T aged 11 and U aged 10.

They purchased a property in London in joint names in 2010 before moving to Germany in 2016, at which time the London property was rented out.

Also at this time, they set up an energy business: "XGmbH". This was very successful and in September 2019 was sold to a larger energy company: "Y Ltd".

Both parties acquired shares in Y Ltd and were employed by the company: H as CEO of German business (based in Germany) and W as Chief Product Officer (which required her to spend time in England and Germany).

Unfortunately, around the same time the company was sold, the marriage began to break down.

Initially the parties had a "nesting" type arrangement whereby the children stayed in the family home in Germany and the parties came and went. W then lost her job with Y Ltd and enrolled on an MSc course at LSE. As a result, H became the primary carer for the children in Germany while W was living at the former family home in London.

Assets

The total asset pot was c.£6m. Notable assets were the parties' respective shares in Y Ltd, the family home in London and H's pension.

There were a number of disputes relating to transactions between the parties and members of their own family.

> (a) **H's transfer to sister** - H had given his sister £25,000. W originally said this should be added back into the schedule but having heard H's explanation she withdrew this assertion.
>
> (b) **H's transfer to father** - W also said something similar was done by H in respect of his father and that he was holding money for H. W did not accept his explanation about this but the judge did.
>
> (c) **H's asserted repayment to mother** - H's mother gave £150,000 to each of her 3 children in 2010. No documents were drawn up in relation to this, there was no evidence of tax planning and no demand was ever made for the sums. In June 2020, H repaid that sum to his mother without any demand from her and

without any reference to W. H argued that this sum should not appear on the asset schedule as the money had now gone. W asserted this was a manipulative device to remove the sum from the schedule. The evidence before the court was that one of H's sisters had returned £30,000-£40,000 of the sums given to her. her. In evidence, H's mother said she would not pursue the debts by way of litigation and would simply rearrange her will to reflect any child who had not made a repayment had already received the benefit of that sum.

(d) **W's asserted liability to father –** In October 2004, W's father had given her €30,000 to study an MBA. There was a contemporaneous document describing the payment as an 'interest free loan" for which "*a date for repayment has not been set*" and the arrangement includes the term that " *as long as the father does not demand any extraordinary urgent repayment, the daughter will repay the loan back at her own discretion*." W made no mention of this liability until 12 January 2022 (it was not mentioned in her Form E and narrative statement). W's explanation for this was that she had forgotten about it until going through old documents and speaking to her father recently.

Gifts vs loans

The judge considered whether the advances should be considered gifts or loans. As a general principle, for the advance of money to be a gift there must be evidence of an intention to give - the *animus donandi*. In this case, neither party had been able to show this about transactions (c) and (d) and the judge concluded that the transactions were loans which could, in theory, be enforced.

Hard vs soft liabilities

The judge considered authorities dealing with hard vs soft debts, something he described as being an "elusive topic to nail down." [19(ix)]. The judge summarised the principles arising from the authorities as follows:

a) Once a judge has decided that a contractually binding obligation to a third party exists, the court may properly wish to go on to consider whether the obligation is in the category of a hard or soft obligation – the former automatically forming part of the computation, the latter involving an element of discretion.

b) There is not a hard or fast test as to when an obligation will be considered hard or soft and the authorities reveal a wide variety of circumstances which cause a particular obligation or loan to fall on one side or other of the line.

c) The analysis undertaken targets whether or not it is likely in reality that the obligation will be enforced.

d) There is not an exhaustive list of the factors that may make an obligation hard or soft.

e) Factors which on their own or in combination point towards the conclusion that an obligation is soft include: (1) the fact that it is an obligation to a finance company; (2) that the terms of the obligation have the feel of a normal commercial arrangement; (3) that the obligation arises out of a written agreement; (4) that there is a written demand for payment, a threat of litigation or actual litigation or actual or consequent intervention in the financial remedies proceedings; (5) that there has not been a delay in enforcing the obligation; and (6) that the amount of money is such that it would be less likely for a creditor to be likely to waive the obligation either wholly or partly.

f) Factors which may on their own or in combination point towards the conclusion that an obligation is soft include: (1) it is an obligation to a friend or family member with whom the debtor remains on good terms and who is unlikely to want the debtor to suffer hardship; (2) the obligation arose informally and the terms of the obligation do not have the feel of a normal commercial arrangement; (3) there has been no written demand for payment despite the due date having passed; (4) there has been a delay in enforcing the obligation; or (5) 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 partly, albeit that the amount of money involved is not necessarily decisive, and there are examples in the authorities of large amounts of money being treated as being soft obligations.

g) It may be that there are some factors in a particular case which fall on one side of the line and other factors which fall on the other. It is for the judge to determine, looking at all of these factors and maybe other matters, the appropriate determinations to make in a particular case in the promotion of a fair outcome.

Conclusions on liabilities to family

The judge concluded W's debt to her father was "*very much at the soft end of the scale*" [19(xi)(a)]. It was very unlikely that she would ever be required to make a repayment, notwithstanding the contemporaneous document.

The debt owed by H to his mother fell into the same category. Both H and his mother were content to regard it as an advance on H's inheritance. The judge found that H made the repayment to his mother because he was concerned about W's sharing claim in respect of that sum.

The consequences of these conclusions were that W's debt to her father was not included in the asset schedule and H's repayment to his mother was re-credited to his side of the schedule.

Conclusions on division

Both parties had made offers that represented quite significant departures from equality in their own direction [38].

On the sharing principle, the judge stated:

> "As a starting point in the division of capital after a long marriage it is useful to observe that fairness and equality usually ride hand in hand and that (save when an asset can properly be regarded as non-matrimonial property) the court should be slow to go down the road of identifying and analysing and weighing different contributions made to the marriage." [27]

On either party's proposal, H's wealth would be heavily reliant on the share price of Y Ltd. The judge considered *Wells v Wells* [2002] EWCA Civ 476 and ***Martin v Martin* [2018] EWCA Civ 2866**. He noted that Y Ltd not readily tradable and could only be sold during a specific "liquidity event" – 3 of which having occurred since 2019) [41]. In the context of this case, the following factors were relevant:

> (i) W's wealth was also (albeit to a slightly lesser extent than the husband) heavily reliant on the share price of Y Ltd and the lack of liquidity in sale prospects.
>
> (ii) It was H's deliberate choice not to seek a sale and equal division of the net sale proceeds of the London family home to ameliorate the problem he has (the judge raised this with H's counsel who confirmed H did not seek to put forward a proposal on the basis of the sale of the London home in the event the judge was not with him on his proposed departure from equality).
>
> (iii) The judge formed the impression that H took an optimistic view of the future of Y Ltd.
>
> (iv) A transfer of shares from W to H would trigger an immediate tax liability for W.

The judge therefore made an order as follows:

> (i) Family home in London transferred to W, W committing to obtaining the release of H from the joint mortgage in the next 2 years, failing which the property should be sold and 100% of the proceeds paid to W.
>
> (ii) H to take over the benefits and obligations of the German rental property, W transferring her interest in the deposit and H indemnifying W against any liabilities arising from the property.
>
> (iii) W to transfer 20,000 of her shares in Y Ltd to H.
>
> (iv) A 50% pension sharing order to W against H's pension.
>
> (v) Clean break.

This created a capital division of 50.1% to W and 49.9% to H.

Case summary by **Lucy Bennett** , Barrister, **1GC**

NHS Trust v ST (refusal of Deprivation of Liberty Order) [2022] EWHC 719 (Fam)

This matter concerned a vulnerable 14-year old with highly complex needs which included Autistic Spectrum Disorder and a learning disability. MacDonald J described the case as "shocking".

The NHS Trust responsible for the hospital ward where ST was placed brought an application for a declaration under the inherent jurisdiction to authorise deprivation of ST's liberty. This was despite ST having an allocated social worker from Manchester City Council. At the hearing, the local authority presented alternative placement options but none of these were immediately available and were subject to weeks of assessment.

ST had been presented at hospital on 15 February 2022 by her tearful father who refused to return her to the family home. ST's parents had found it increasingly difficult to manage her challenging behaviours and had resorted to locking her in the dining room. ST's escalating dysregulation had also resulted in her siblings locking themselves in their rooms, impacted the mother's mental health and caused a termination of ST's school placement (where there was 6:1 staff support under an

Education and Health Care Plan). Manchester City Council had been aware of these issues but it was unclear what support, if any, they had provided.

ST's treating Child and Adolescent Psychiatrist had previously advised against admission to hospital (without a medical need) due to the risks of harm to ST and others in the hospital environment. Given the circumstances on 15 February, the NHS Trust stated they had had no choice but to admit her to a general paediatric ward solely as a place of safety. The court noted that the local authority was unable to offer any explanation as to why it had failed to make an application for an interim care order at this point of obvious crisis.

Following ST's admission, the local authority employed a private company to provide two security guards and two carers to supervise ST on a 4:1 basis. Due to the rolling contract, there was a high turn-over of staff, adversely affecting ST. Despite this continuous supervision and control no deprivation of liberty authorisation had been sought from the court for over a month, meaning that the measures taken had likely been unlawful. Interventions included ST being subject to multiple physical restraint holds including on one occasion by five people, inappropriate restraint of her head, being tranquilised/subject to chemical restraint on numerous occasions and being required to walk around the ward in a restraint. On one occasion ST managed to break into a treatment room in which a dying infant was receiving palliative care and had to be restrained in that room by three security guards.

The court declined to make the declaration, MacDonald J stating that he could not in good conscience conclude that the regime was in ST's best interests. He commented on multiple adults restraining ST, their identity changing from day to day under the rolling commercial contract, as well as ST's fear and distress and it being played out in view of members of the public. The placement (a paediatric ward) was unsuited to the task of meeting ST's needs and the court described the current situation as "brutal and abusive" for ST.

Although the placement options were not immediately available, the court was satisfied that the current circumstances were so antithetic to ST's best interests that it would be manifestly wrong to grant the relief sought. It could not be said that the placement on the paediatric ward is keeping ST safe. It was not an exaggeration to say that to grant the relief sought by the Trust in this case would be to grossly pervert the application of best interests principle.

The court made an interim care order, the local authority having now accepted it would issue care proceedings. As a looked after child, there was a clear statutory duty on the local authority to provide accommodation for ST to meet her complex needs and safeguard and promote her welfare. There were also wider ECHR obligations on the local authority under articles 2,3 and 8.

The court declined the request to anonymise the identity of Manchester City Council from the judgment. Neither the local authority nor the NHS Trust had brought the application to seek authorisation for the breach of ST's Art 5 rights in a timely manner. ST had been comprehensively failed. The court anticipated the omissions would be examined further in the context of a claim for damages under the Human Rights Act 1998.

Case summary by **Hannah Gomersall** , Barrister, **Coram Chambers**

C v S [2022] EWHC 800 (Fam)

The case concerned lengthy children proceedings wherein the Appellant father applied for a contact order (in 2013), enforcement of said contact order (in 2014), and a child arrangements order whereby the children would live with him and spend time with the Respondent mother (in 2019). Likewise, the Respondent made an application to relocate with the children to the USA (2014), though this application was dismissed. At the most recent welfare hearing, in 2020, the Judge granted the Appellant's application for the children to move to live with him and spend time with the Respondent.

Subsequently, the Appellant applied for a costs order against the Respondent, which was heard on 29 June 2021. He maintained that the Respondent had acted vexatiously and reprehensibly throughout the proceedings; indeed, the Judge made the following findings against her in the fact-finding exercise:

> "the Respondent repeatedly failed to comply with orders; she gave false evidence in a number of important respects; she was evasive; she was disingenuous; she was misleading at times; she made serious and unsubstantiated allegations of sexual and physical abuse against the father to professionals and in her evidence; she manipulated professionals to undermine the Appellant's case; she misrepresented the evidence of others to give the impression it supported her case; she made allegations which significantly increased the hearing times; she changed the nature of her case and finally she refused mediation" [141].

The Appellant sought costs associated with: the Respondent's application to relocate, the fact-finding that formed part of the 2019 proceedings, and the welfare hearing in 2020. The first instance Judge refused the Appellant's application and the Appellant appealed the same.

The Appellant sought to appeal the decision on four grounds: (i) the Judge erred and/or was wrong to conclude that the Respondent's conduct in the relevant proceedings had been "anything other than unreasonable and/or reprehensible"; (ii) the Judge was wrong to conclude that the Respondent's conduct was neither reprehensible or unreasonable on the basis that many litigants in family proceedings of this kind engage in conduct of a similar nature; (iii) the Judge erred in principle in her approach or was wrong to have considered it necessary that the Respondent's conduct be categorised as "exceptional" before any costs order should be made against her; and/or (iv) the Judge failed to give adequate weight to matters of importance and/or gave too much weight to matters which she ought not to have taken into account or ought to have attached significantly less weight to, such that she arrived at a decision which was outside the generous ambit of her discretion and/or was wrong [3].

In adjudicating the appeal application, Mrs Justice Arbuthnot first set out the law in respect of applications for costs in children law proceedings [111-129] and the overturning of a lower court's exercise of its discretion [130-136]. Thereafter, she addressed each of the hearings for which the Appellant sought costs. With regards to the Respondent's application to relocate, she noted that the order that the Judge made on that occasion was that there should be "no order as to costs," suggesting that the question of costs was considered and refused, and that the matter could not now be re-opened [139-40]. Likewise, the Judge refused the Appellant's submission that the mother acted "unreasonably" in the welfare proceedings in 2021 in seeking for the children to remain in her care, and maintained that the Judge had acted within her discretion.

However, when considering the fact-finding proceedings, Mrs Justice Arbuthnot held that the Respondent had acted reprehensibly and unreasonably in her conduct, and that the first instance Judge was wrong when she found that the Respondent had not done so. As such, the first instance Judge had acted outside the ambit of her discretion.

Having found that the threshold for making a costs order was met, Mrs Justice Arbuthnot went on to consider whether the first instance Judge was wrong not to make a costs order. She held that she was and allowed the Appellant's application to appeal on grounds (i), (ii) and (iv) above. In terms of ground (iii), she held that the first instance Judge's use of the word "exceptional" was a slip of the tongue and it was clear that she had applied the correct principles when considering the question of an order of costs against the Respondent. Mrs Justice Arbuthnot went on to make a summary assessment and order that the Respondent pay the Appellant the sum of £37,000, which she considered "a just and reasonable amount" [183].

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

K v K [2022] EWCA Civ 468

Background

The proceedings concerned a girl, now 12, and twin boys of 9. After the parents' separation in August 2017 the father (F) had regular unsupervised contact until logistical issues led to arguments between the parents. In early 2018 the eldest child refused to see F but the twins continued to do so, staying overnight on alternate weekends. There were disagreements over the arrangements leading to WhatsApp exchanges in June 2019 in which F expressed his frustration and threatened to start proceedings. Contact was thereafter restricted by mother (M) to daytime contact. F issued an application for a child arrangements order in December 2019, claiming the urgency of Christmas arrangements as a reason for bypassing a MIAM. M filed a C1A making some minor allegations against F but not objecting to unsupervised contact.

The Cafcass safeguarding letter (SGL) which referred to allegations made by M, including rape and coercive control, said a fact-finding hearing (FFH) should be considered.

At the FHDRA the judge read the SGL as recommending a FFH and decided there should be one. He ordered that F should have supported daytime contact only in the interim. That contact only happened for a few months before the pandemic intervened and the children have not seen F since April 2020.

Findings were made at the FFH; at the final hearing, following a Cafcass report, a final order was made for monthly indirect contact only.

The appeal

This was a second appeal, a CJ having upheld the DJ's findings at the first appeal.

The DJ had fallen into error by not taking a step back and considering the evidence as a whole and by placing undue weight on particular pieces of evidence; the finding that F had raped M was unsafe.

In respect of other allegations the order that recorded the outcome of the FOF contains significant inaccuracies, for example stating that the DJ had found father to have physically abused the children when he had not.

The DJ ought to have considered all the allegations in the context of whether F had displayed coercive control affecting the children after the marriage had ended; the appeal judges were surprised that the judge found controlling behaviour after the split mainly based on the June 2019 WhatsApp messages which were all sent on one day.

General guidance

The following key principles were set out:

- MIAMs should not be bypassed unless there is a genuine reason. The court should, in accordance with FPR part 3 consider at every stage whether non-court dispute resolution is appropriate and should scrutinise the validity of any MIAM exemption claimed. In this case the exemption was not properly claimed, which should have been picked up at or before the FHDRA.

- FHDRAs should be used as intended; their "*essential purpose is as an opportunity for judicially led dispute resolution*." In this case it is possible that matters could have been resolved consensually at the FHDRA, given that M had said in her C1A that she did not object to unsupervised contact.

- The judge considering whether to list a FFH must first identify the child welfare issues to which such fact-finding is relevant, understand the nature of the allegations and consider whether the facts alleged are relevant to the identified welfare issues. Careful consideration must be given to whether a FFH is necessary and proportionate. In this case it was premature to direct one at the FHDRA without a full understanding of the allegations being pursued.

Outcome

As the most serious of the findings are unsafe the case was remitted to a CJ to consider, in the light of the principles set out in ***Re H-N*** and this judgment, whether a fresh FFH is justified. The parties were urged to consider whether compromise is possible in the interests of the children.

The Cafcass s7 report

The CA expressed concern at the way the s7 reporter summarised the DJ's findings, noting significant inaccuracies and underlining the

> "real danger in reducing bespoke, detailed and subtle findings made by a judge to one or two word headline labels, in place of the original detail. The case analysis uses the labels of rape, bullying, manipulation and physical abuse, each of which emits a neon light in an erroneous and unjustified manner."

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

Simon v Simon & Level (Joinder) (Rev1) [2022] EWFC 29

Background

Financial remedy proceedings had been ongoing since 2016. The wife had funded the later part of proceedings through loans from a litigation lender Integro Funding Limited ('Level').

A private FDR on 12 February 2021 took place. By that time, the wife's loans from Level totalled almost £1 million including interest and there was a mechanism for obtaining a further £3 million. At the FDR, the wife entered into an agreement with the husband, in effect compromising all of her financial claims: obtaining the right to reside in a property owned by the husband's trust for the rest of her life but receiving no capital.

After the FDR, the wife's position was apparently communicated to Level. On 15 February 2021, Level wrote to the Court, copying in the wife and the husband's solicitor. Level argued that by agreeing to compromise her claim, the wife was surrendering the entirety of her lump sum, which would prevent her from being able to discharge her obligations under the loan agreement. Level asked to be joined and requested that no order be sealed.

On 17 February 2021, the husband's solicitor wrote to the clerk for the allocated judge Mr Nicholas Cusworth QC sitting as a Deputy High Court Judge, copying the wife but not the Court or Level. The communication attached a consent order reflecting the parties' agreement at the FDR. An accompanying Schedule of Assets included the loan to Level. But the husband's solicitor said nothing to the Court about the letter from Level received two days before. Additionally, Level was not notified that a consent order had been lodged, in spite of its request, sent to the husband's solicitor amongst others, not to seal any orders.

Then, unbeknownst to the parties and Mr Cusworth QC, on 18 February 2021, Level's solicitor wrote to the Court with an ex parte application notice seeking to be joined to the proceedings. The application was put before Mr Justice Newton, who granted permission without notice and without any provision for liberty to apply or a return date.

The wife, the husband and his solicitor were promptly notified of Mr Justice Newton's decision, and on 19 February 2021, the husband's solicitor asked the Court to stay that order while an application was made to set it aside. But the husband's solicitor did not inform Mr Cusworth QC or Mr Cusworth QC's clerk of any of the developments or communications. The husband's solicitor copied only the wife and Level's solicitor on the communication to the Court. Additionally, the husband's solicitor did not mention to the Court or to Level's solicitor the fact that the consent order had been lodged on 17 February 2021.

On 22 February 2021, Mr Justice Newton amended his order, providing liberty to apply and an on notice hearing on the first open date after 11 March 2021. The husband's counsel replied that he was apparently not available until the week of 26 July 2021.

There were further communications from Level's solicitor on 22 and 26 February 2021, with Level asking the parties expressly whether a consent order had been lodged and whether there had been communications with the Court since the FDR on 12 February 2021. The husband's solicitor and the wife both remained silent on these questions. No one updated Mr Cusworth QC or his clerk of anything relating to Level.

On 2 March 2021, the husband's solicitor chased Mr Cusworth QC (through his clerk) on the approval of the draft consent order lodged 17 February 2021. The husband's solicitor did not inform Level this was being done and said nothing to Mr Cusworth QC about Level's involvement. Mr Cusworth QC, unaware of Level's party status or of any of the communications from 19, 22, and 26 February 2021, approved the final consent order that same day.

On 5 March 2021, having received no response to its communications of 22 and 26 February 2021 and not aware of the events of 2 March 2021, Level's solicitor issued a further application notice. On 10 March 2021, that application was put before Mr Justice Holman, who offered an urgent oral hearing. Level's solicitor invited the husband's solicitor and the wife to agree to such a hearing. The husband's solicitor responded, seeking a later hearing, and did not copy the wife on that communication.

On 11 March 2021, the husband's solicitor wrote again, once more not copying in the wife, but indicating to Level for the first time that "the matter has now concluded". Level replied on Friday 12 March 2021, asking whether the husband had "succeeded in attaining an approved consent order". On Monday 15 March 2021, the husband's solicitor responded that it was his understanding that the consent order had already been sealed. The consent order from the FDR on 12 February 2021, lodged on 17 February 2021, was in fact sealed on 16 March 2021.

On 17 March 2021, for the first time, the Court and Level became aware of the full chain of events, after Mr Cusworth QC sent to Mr Justice Holman the communications Mr Cusworth QC had received from the husband's solicitors. Mr Justice Holman ordered a stay of the consent order.

On 23 December 2021, Mrs Justice Roberts handed down a judgment refusing permission to Level to access Without Prejudice material and material from the private FDR hearing in support of their case. It was reported as ***LS v PS* [2021] EWFC 108**. Level appealed that order (which was made on 9 February 2022). Permission to appeal is still awaited but the content of Roberts J's judgment was later endorsed by Mr Cusworth QC in his decision about joinder below.

This hearing

The wife, despite having the actual agreement with Level, appears to have had little to no involvement since the FDR in February 2021, more than a year before this hearing. She wrote very briefly to Mr Cusworth QC in March 2022, to explain that she did not want any part in the proceedings and wished for the consent order to be made. She indicated that she would not pursue financial remedy proceedings if the consent order was set aside and would only ask the court to re-approve the consent order.

This hearing, in March 2022, was originally listed for the on notice application for joinder and for Level's application to set aside the final consent order sealed and stayed in March 2021. Level's application to have the consent order set aside had been staunchly opposed by the husband since March 2021 but was eventually conceded by the husband's counsel in the run-up to this hearing a year later. The hearing was therefore limited to joinder, which remained contentious.

The law

Joinder in financial proceedings is governed by FPR Rule 9.26B "Adding or Removing Parties". The test is whether it is desirable to add the new party either to resolve all matters in dispute or to resolve a single issue involving the new party and an existing party, which is connected to the matters in dispute.

CPR Rule 19.2 (2) is effectively the same as FPR Rule 9.26B (1). Sir Terence Etherton MR in ***Price v Registrar of Companies ('In re Pablo Star Ltd')* [2017] EWCA Civ 1768,** at [51] stated that:

> "The provisions of CPR r 19.2(2) ought… to be given a wide interpretation. The words 'in dispute' ought to be read as 'in issue'. That is consistent with authority that the court's powers to add a party under CPR r19.2 can exist after judgment even though, on a literal approach, there is no longer a matter in dispute: *Dunwoody Sports Marketing v Prescott (Practice Note)* [2007] 1 WLR 2343."

The Decision

Mr Cusworth QC decided that the wife's debt was not entirely independent of these proceedings. He considered that the question was whether it is desirable to resolve the issue between Level and the wife, at the same time that the financial remedy proceedings are concluded.

He ultimately agreed with and quoted from the judgment of Roberts J in these proceedings, handed down on 23 December 2021 and reported as *LS v PS* [2021] EWFC 108. In particular, he repeated Roberts J's conclusions at her paras 70-74 that:

- Level does not stand in the same position as a third-party unsecured creditor (para 70)
- different policy considerations are engaged for a professional corporate lender like Level, which offers bespoke services designed for the specific purposes of enabling a litigant to participate fully and effectively in litigation (para 71)
- the principle of access to litigation funding has been recognised for many years (para 72)
- in family law proceedings, the court has always been astute to ensure that both parties should have access to resources from which they can meet legal fees to ensure equality of arms and a level playing field (para 73)
- the availability of litigation funders such as Level is now recognised specifically by the court in the context of the provisions of s.22ZA of the Matrimonial Causes Act 1973 (para 74)

Mr Cusworth QC therefore endorsed Level's joinder to these proceedings by Mr Justice Newton on 18 February 2021 and concluded that it is desirable that Level they should remain a party so that the clearly connected issues between Level and the wife, and between the wife and the husband, can be fairly and expeditiously resolved.

Case summary by **Lauren Suding**, Barrister, **Field Court Chambers**.

P (Children)(Disclosure) [2022] EWCA Civ 495

The Court of Appeal was concerned with an appeal by a father in private law proceedings. Hayden J had made findings of serious criminality against the father, including rape of the mother [**[2021] EWFC 4**]. Further hearings remain in respect of the father's application for contact and the mother's application to remove his parental responsibility.

After the findings, the father had advanced an argument before Hayden J that although he has the right not to incriminate himself in the further proceedings, he may have to do so, if he is to persuade a court to order contact. He sought an order "that any statements or admissions made by him in the proceedings, in reference to the findings that have been made by the court, will not be disclosed to the police (or by extension, to the CPS)". He argued by removing the prospect of incriminating himself, both parents will have the opportunity for full engagement with the court process. Hayden J had rejected this application on grounds it was pre-emptive as no incriminating statements had yet been made, and it was inappropriate to widen protection in private law proceedings beyond the protection offered in public law proceedings by section 98 Children Act 1989 [**[2021] EWHC 3133 (Fam)**].

The Court of Appeal considered the privilege against self-incrimination [§7], and the principles of disclosure to third parties in family proceedings set out in *Re EC (Disclosure of Material)* [1996] 2 FLR 725, [§17]. The court made clear that the question of admissibility of material in a criminal trial would be for the criminal court [§22]. The judgment describes admissibility in criminal proceedings and the way in which material is treated when coming from family proceedings including the provisions in the Criminal Justice Act 2003 and Police and Criminal Evidence Act 1984, which contains at s 78 the "ultimate safeguard" against evidence being admitted which would, by its admission, render a trial unfair in article 6 terms.

In effect, the father's contention was "that article 6 of the Convention confers a right on a party to family proceedings to admit to having committed any criminal offence without the possibility that the admission might be used either (a) as evidence in criminal proceedings, or (b) as a springboard for investigation. That right, he submits, prohibits the court from disclosing self-incriminating material to the prosecuting authorities" [34]

The court did not accept father's contention he could only take part fairly and in an article 6 compatible way if he was immunised from the possibility of the use in criminal proceedings of admissions or incriminating evidence, with reference to s.1 Children Act 1989 and overriding objective FPR 2010). If true, it would mean s 98 Children Act 1989 is also incompatible with article 6 of the Convention. The Court did not accept that article 6 confers such wide-ranging protection on a private law family litigant [§39], and no supporting authority was provided.

Furthermore, it would be "contrary to the sound administration of justice…risks undermining aspects of the rule of law and giving no weight to the public interest in the conviction of those guilty of serious criminality". The Court concluded there is "nothing unfair" in expecting the father to make his case, and that the existing protections would ensure that the family law proceedings would be, in that respect, fair [§42]. The appeal was dismissed.

Case summary by **Sarah Tyler**, Barrister, **Coram Chambers**.

Griffiths v Tickle & Ors (Re Disclosure by Counsel for Appellant and Application by First Respondent) [2022] EWCA Civ 465

In September 2021, Leading Counsel for the father, Mr Clayton QC, disclosed some of the appeal papers to non-parties without permission from the court ("the Disclosure").

Two issues arose from the Disclosure. Firstly, the propriety of the Disclosure, and secondly, the application by the first respondent to the appeal ("Ms Tickle") for permission to report aspects of a Note about the Disclosure and a witness statement, both provided to the court by Mr Clayton.

The court regarded the Disclosure as a significant breach of the confidentiality regime that exists to safeguard the rights and interests of children in proceedings of this kind. Mr Clayton should have realised that he should not have made such disclosure without the court's permission. The court concluded that there may have been a contempt of court, but that it was not necessary to take any further action given that the harm was limited, the breach was careless and not deliberate, a prompt apology was made, and Mr Clayton would have to bear his own costs.

The court granted Ms Tickle's application. Now that the relevant proceedings had taken place in public and the court had dealt with the issues to which the documents related, there was no longer reason why the relevant documents should not be subject to the ordinary principle of open justice.

The essential legal framework

The court considered Section 12 of the Administration of Justice Act 1960 ("AJA") and the Family Procedure Rules ("FPR"), and summarised the structure of the regime as follows [6-7]:

Children Act proceedings are generally concluded in private, because this is necessary to protect the welfare of the child. Section 12(1) AJA makes provision about the publication of information about such proceedings. This covers the publication of accounts of what has gone on in front of the judge, and documents filed in the proceedings.

Publication of such information may be a contempt of court. Section 12(4) AJA provides that if publication is authorised by rules of court, then it will not be punishable as contempt. Rule 12.75 of the FPR provides for some kinds of communication to be authorised by default. The court can authorise a disclosure that would otherwise be at risk of amounting to a contempt of court.

A disclosure of information that falls within s.12(1) AJA which is not authorised by the FPR or by an order of the court may be a contempt of court.

The facts

On 26 July 2021, Lieven J circulated a draft of her judgment allowing publication of the fact-finding judgment. On 27 July 2021, at a time when the draft judgment was confidential and subject to an embargo, Mr Clayton discussed the case over dinner with a senior solicitor ("the intermediary") with expertise in child care law who was a friend of his wife. Mr Clayton asked the intermediary whether there were any organisations which "*might be interested in intervening on the issue of publication of the judgment from the perspective of the child's right to privacy*" [11]. The intermediary told Mr Clayton about Association of Lawyers for Children ("ALC").

On 30 July 2021, Lieven J's judgment was handed down. Publication of the fact-finding judgment was ordered but a stay was granted pending an application for permission to appeal. On 8 September 2021, permission to appeal was granted. On or around 13 September 2021, Mr Clayton called the intermediary and reminded her of their earlier conversation, told her that permission to appeal had been granted, and asked if she would consider forwarding an email to ALC to see if it might wish to intervene.

On 14 September 2021, Mr Clayton sent the intermediary an unredacted copy of the appellant's skeleton argument seeking permission to appeal, and the order granting permission to appeal.

On 5 October 2021, solicitors for ALC alerted the parties to the appeal that it had received the documentation from a member of ALC, and that they had discovered the member was not a representative of a party in the case and did not have permission to share the documentation. The pleadings had been deleted and not retained in any form. The matter was brought to the court's attention, and the intermediary identified herself as the person who provided the documents to ALC. She offered her unreserved apology for breach of confidence which she said was unintentional and confirmed she had not read the documents herself.

Following this, Mr Clayton provided the court with his Note setting out a chronology, explanation, and apology. Mr Clayton fully accepted responsibility for the issue and said that "*at all times he genuinely believed that he was able to consult a professional legal adviser about these matters*" [18]. In response, Mrs Griffith's solicitors wrote to the court drawing attention to FPR 12.73 and expressing concern about Mr Clayton's actions.

This hearing

The main purpose of the hearing was to determine what if any action should be taken in respect of the Disclosure. No contempt application had been made by a party, so the court on its own initiative had to consider whether to proceed against the defendant in contempt proceedings, as provided for under CPR 81.6(1).

Mr Clayton said that his sole purpose in sending the documents was to allow consideration from an expert professional standpoint whether the case might be suitable for an intervention by ALC to assist on the issue of children's rights and the impact of identification on the internet. The documents were sent with an express request for confidentiality. The Disclosure was made in good faith, in the belief that the limited disclosure of information for this purpose was in the interests of justice and would be permitted. He did not at the time apply his mind to s.12 AJA or the relevant provisions of the FPR, and with hindsight accepted he should have done so.

Counsel for Mr Clayton raised four points for the court to consider. Firstly, the nature and extent of the disclosure. It was not to the public at large or to any section of the public. It was a disclosure in confidence made by a lawyer in the case to family lawyers. Only a limited number of lawyers read the documents, which were deleted once read. Secondly, the purpose of the disclosure was legitimate, and litigation related. Thirdly, Mr Clayton did not intent to interfere with the administration of justice. Fourthly, the Disclosure did not interfere with the administration of justice or threaten to do so.

Conclusion

S.12(1) AJA provides that:-

> "The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except ….
>
> (a) where the proceedings …
>
> (ii) are brought under the Children Act 1989 …".

Whilst there was doubt as to whether the disclosure of the order granting permission to appeal contained information within s.12(1), the skeleton argument plainly did.

It was not argued that s.12(4) of the AJA applied to the Disclosure. The Disclosure was not authorised by rules of court. Nor did the Disclosure fall within the specified categories of FPR 12.73 or 12.75. [28-29]

FPR 12.73(1)(iii) allows disclosure to a "professional legal adviser", but this only extends to someone representing an existing party: see *Re B (A Child) (Disclosure of Evidence in Care Proceedings)* [2012] 1 FLR 142.

FPR 12.75(1)(a) authorises the legal representative of a party to communicate information relating to the proceedings "*to any person where necessary to enable that party … by confidential discussion, to obtain support, advice, or assistance in the conduct of the proceedings.*" This was not considered to apply to a disclosure made in an attempt to procure a supportive intervention from a third party.

A contempt of court "may have been committed" by Mr Clayton when he disclosed the skeleton argument to ALC. Contempt proceedings under CPR 81.6(1) were not considered necessary or proportionate. The court emphasised that notwithstanding this decision, the matter was not trivial, and lawyers involved in cases of this kind have a professional responsibility to inform themselves of the rules and to abide by them. The Court also pointed to the case of ***R (Counsel General for Wales) v The Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 181** in which the Master of the Rolls reiterated that strict adherence to the terms of the embargo on draft judgments is of great importance.

Case summary by **Kate Pearson**, Barrister, **St John's Chambers**