AUTUMN FAMILY LAW SEMINAR

7 November 2019 from 5.45pm to 7.30pm

The Atkins Building, 4 Gray's Inn Place, London WC1R 5DX

Chair: Clive Redley

PROGRAMME

Registration and welcoming drinks from 5.15pm, followed by food and drinks in chambers

PUBLIC LAW UPDATE

Ann May

THRESHOLD

Re S & H-S (Children) [2018] EWCA 1981 Fam

The mother appealed against a care order made in December 2017 on the basis that the threshold was not met. The appeal was dismissed and the Court of Appeal gave guidance on setting out the court findings on threshold:

- where threshold is at issue, it is good practice to set out in one to two carefully structured paragraphs of the judgment the court's threshold findings, identifying whether the child is suffering or is likely to suffer significant harm, the category of harm and the basic findings as to causation;

- when making a finding of harm, it is important to identify whether it is 'significant' harm or simply ‘harm;

- a finding that a child 'has suffered significant harm' is not relevant for s.31, which looks to 'is suffering or is likely to suffer' significant harm at the relevant date;

- where findings have been made in previous proceedings, a judgment in subsequent proceedings should refer to any relevant earlier findings and identify if any are specifically relied on in support of threshold in the later proceedings at the relevant date;

- after judgment at the end of a hearing, there is a duty on counsel for the local authority and the child together with the judge to ensure that any findings as to threshold are clear; and

- the order that records the making of a care order should include in it, or have annexed to it, a clear statement of the basis upon which the s.31 threshold criteria has been established.

FACT-FINDING

R (Children) [2018] EWCA Civ 198

The father appealed against findings of a fact-finding hearing that he had “used unreasonable force and unlawfully killed the mother” having been acquitted in criminal proceedings. The Court of Appeal considered the extent to which the family court should import elements of criminal law into a fact-finding hearing in childcare proceedings and whether the limited time afforded to F's legal team to prepare the case amounted to unfairness within the terms of Art 6 ECHR.

McFarlane LJ concluded:

i. Criminal law concepts should not be applied in family hearings. The purpose of the family tribunal is not to establish guilt or innocence but to establish the facts in as far

as they are relevant to inform welfare decisions regarding the children. It may be important for the children to know whether the surviving parent's actions were reasonable, as well as the potential for future harm to them (whether physical, emotional or psychological) if that parent continued to be involved in their care. It will often be necessary to have a fact-finding to determine those matters, but the language used to phrase the facts sought and the judgment should avoid direct reference to criminal law concepts or principles such as “unreasonable force”, “loss of control” or “self-defence”.

ii. The late disclosure of important documents that went to the heart of the fact finding process and the way the case had been put, when drawn together with the issue at i) above, meant that there had not been a sufficiently fair trial and a re-trial was ordered.

Gloster LJ disagreed with McFarlane LJ on whether it was likely to be necessary to determine whether the surviving parent's actions had been reasonable, or that this was information the children may need to know in circumstances where the parent had been acquitted after a full criminal trial and, if it were necessary, she questioned how a family tribunal would decide whether the surviving parent's actions had been reasonable or not without regard to, or applying criminal law concepts

Re F (A Child) (Fact-Finding Appeal) [2019] EWCA Civ 1244

In this successful appeal, the findings that a father caused petechial haemorrhages to the child were set aside. The experts did not support a finding of an inflicted injury, but the treating doctor did. The court found that the trial judge appeared to have misstated the evidence of the treating doctor as to the probable cause of the injuries, with the effect that the judge's conclusion as to the likely mechanism was unsupported by the evidence.

The court confirmed that a judge may make a finding based on the evidence of a treating clinician in preference to that of an expert but, in this case, the judge did not engage sufficiently with the evidence that did not support her findings. It was not clear from the judgment why the judge discounted evidence that pointed against inflicted injuries or how these features were outweighed by other evidence.

The appeal was allowed and the judgment set aside, but the court was not in a position to determine that the local authority’s case had no sufficient prospect of being established to justify dismissing proceedings, so permitted the local authority to pursue a rehearing if they chose to do so.

Moylan LJ made some observations about the difference between treating professionals and experts and the manner in which s.13 and Part 25 should be applied, but avoided giving general guidance, suggesting that this would benefit from broader consideration by the President's Working Group on Expert Witnesses.

It would not support the proper and expeditious determination of cases if unnecessary or disproportionate obstacles were placed in the way of expert medical evidence being available to the court, so a treating professional who is also an expert will in some cases be able to give expert evidence without all or even any of the requirements of Part 25 being applied but “this requires broader analysis than can be undertaken in a single decision”.

Re G-P (A Child) [2019] EWCA Civ 56

This appeal by a childminder against findings that she caused very serious injuries to a child, including head injuries, was rejected by the Court of Appeal, which found the judge had not erred in making the findings.

Re Y and E (Children) (Sexual Abuse Allegations) [2019] EWCA Civ 206

This is another unsuccessful appeal concerning sexual abuse based on the deficiencies in the ABE interview of the subject child. Baker LJ gave the lead judgment and found that there were a number of significant breaches in the three ABE interviews and that the judge, at first instance, should have considered the deficiencies in those interviews. However, having considered the deficiencies, he decided they were not so serious to render them of no evidential value, noting that questioning was largely appropriate with no leading questions and that the child had given 12 accounts, including "experiential detail" of ejaculation that was "so striking it could only have come from direct experience".

The Court of Appeal noted that the advocates at first instance had failed to cite the specific principles of law relevant to sexual abuse cases meaning specifically: Devon CC v EB and others [2013] EWHC 968 (Fam); Re W, Re F [2015] EWCA Civ 1300; Re E (A Child) [2016] EWCA Civ 473; and AS v TH and others [2016] EWHAC 532 (Fam). The latter includes extensive analysis as to the management of allegations of sexual abuse, provided by MacDonald J.

LA v A Mother and others [2019] EWCA Civ 799

The Court of Appeal found in favour of a local authority and remitted a case for rehearing where the lower court had found the mother had caused rib fractures by overlaying while co-sleeping with her baby and accepted the father's late admission that he tore the child's frenulum by rough handling while feeding.

It found that the judge had failed to consider the totality of the evidence and to assess the evidence in the light of the father's admission, and had looked at each injury separately without looking at each of them in the context of the other injuries and the evidence.

Re P (A Child) [2019] EWCA Civ 1346

This is a successful appeal against findings in care proceedings of rape and coercive control, in which I appeared for the intervenor. His admissions to his GP of smacking the subject child and kicking the child's mother had led to local authority involvement. The couple separated and the intervenor wanted nothing further to do with the mother or child. As the case progressed, the mother made the new allegations against the intervenor, claiming to have been under his control (on the intervenor's case to escape responsibility for her parental failings and remaining in squalid home conditions).

Following a delay in completion of a kinship assessment, the local authority applied to adjourn the final hearing but proposed keeping the original final hearing as a separate fact fining hearing. The appeal was allowed on the basis of the court's failure to consider all the relevant evidence leading to a flawed credibility assessment. The findings of rape and financial control were set aside and the threshold document amended accordingly without need for a rehearing.

The Court of Appeal criticised the judge's decision to hold a fact-finding hearing given the facts of the case (the judge having decided to do so because the intervenor's admissions

"did not satisfy the mother") and set out the well-established law as summarised by McFarlane J (as he was then) in A County Council v DP [2005] EWHC 1593 (Fam) that the court has a discretion to hold a fact finding when it is "right and necessary to do so" on the facts of each individual case and:

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

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

b) the time that the investigation will take;

c) the likely cost to public funds;

d) the evidential result;

e) the necessity or otherwise of the investigation;

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

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

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

i) the justice of the case."

The relevant case law is:

Re G (A Minor) (Care Proceedings) [1994] 2 FLR 69 [Wall J]

Stockport Metropolitan BC v D [1995] 1 FLR 873 [Thorpe J]

Re B (Agreed Findings of Fact) [1998] 2 FLR 968 [Butler-Sloss & Thorpe LJJ]

Re M (Threshold Criteria: Parental Concessions) [1999] 2 FLR 728 [Butler-Sloss LJ and Wall J]

Re D (A Child) (9 August 2000) [Schiemann, Thorpe and Mummery LJJ]

FAILURE TO PROTECT

Re L-W (Children) [2019] EWCA Civ 159

A mother ('M') was held to have failed to protect her four-year old daughter (L). M also had twins with a new partner. The evening after L stayed with her father on 14 January 2018, M noticed a lump on her head and bruises on her face and body. Despite attempts by her partner to dissuade her, M took L to the doctor on 15 January. L claimed her injuries had been inflicted by her stepmother. However, L was known to tell lies. The local authority started care proceedings, identifying all four adults as possible perpetrators. M separated from her partner before the final hearing. The judge found that L's injuries had been inflicted by M's partner and that M "knew or ought to have known that the bruising would be inflicted and failed to protect L". This was because M had (a) failed to ask the partner what happened

on the day L returned from the contact visit; (b) failed to listen to L's maternal grandmother who, after the incident, said that L was frightened of the partner; (c) allowed the partner to return to the family home following a verbal altercation over a mark on L's neck several months earlier; (d) stayed in a relationship with the partner, despite being aware that several years earlier he had attacked the father with a bat and had been involved in a fight with another man.

At the appeal, the local authority accepted that factors (a) and (b) would be insufficient to show that M had closed her mind to her partner's potential culpability. Those factors post-dated the incident. In relation to (c), the mark in question had been caused by eczema. The finding, therefore, could not be based on her partner previously injuring L and so was presumably linked to his verbal loss of temper. That left only (d), which focused on the partner's involvement in fights outside of the home. There was no history of domestic violence within the home. The Court of Appeal held it could not be right to say that a woman who failed to separate from a partner who had been violent to adults outside the home was failing to protect her children.

King LJ emphasised the seriousness of such findings in and warned that any court "should be alter to the danger of such a finding becoming a 'bolt on' to the central issue of perpetration or falling into the trap of assuming too easily that if person was living in the same household as a perpetrator, such a finding is almost inevitable".

Re G-L-T (Children) [2019] EWCA Civ 717

The mother was found to have inflicted very serious injuries on the child and the court found that father failed protect the child by not informing the medical professionals that the child had ceased suffering from seizures or sleep apnoea, leading to the child having unnecessary treatment.

Peter Jackson LJ reiterated the established position that the appeal court would only rarely contemplate reversing findings of fact made by a judge who had the benefit of seeing and observing witnesses. In such rare cases, the appeal court would require the finding to have been made without evidence to support it, or to have been based on a misunderstanding of the evidence, or to have been one that no reasonable judge could have made, following Re B (A Child) (Care Proceedings: Appeal) [2013] UKSC 33.

However, the court held that the judge had fallen into the trap identified in Re L-W above (King LJ being involved in both). Black LJ then said: "I repeat my exhortation for courts and local authorities to approach allegations of failure to protect with assiduous care and to keep at the forefront of their collective minds that this is a threshold finding that may have important consequences for subsequent assessments and decisions."

UNCERTAIN PERPETRATOR

Re B (Children: Uncertain Perpetrator) [2019] EWCA Civ 57

The case concerned three girls who had contracted gonorrhoea, the youngest of whom was five. The children lived with their parents in shared accommodation. The parents tested negative. No allegations were made and genital examination was normal. The mother denied that sexual abuse could have taken place and suggested that the infection had come from a toilet seat in the home.

The expert advised that "it is difficult to establish with any degree of certainty the exact source and causal link of the children's gonorrhoea but sexual mode of transmission is more

likely", and that it was "very unlikely" to be transmitted from a toilet seat. The court found that sexual abuse had happened and that the father was in the pool of possible perpetrators along with other unnamed individuals who lived in the home. Peter Jackson in the Court of Appeal provides a review of the relevant case law and summarises the principles:

i. The decision to place the person in the pool is not a conventional finding. The person in the pool is not a perpetrator but a possible perpetrator.

ii. There is no such thing as a pool of one. The concept of the "pool" of perpetrators is seeking to strike a fair balance between individual rights and child protection and there is no room for a finding of fact on the basis of "real possibility", still less on the basis of suspicion.

iii. Where there are a number of people who might have caused the harm, it is for the local authority to show that in relation to each of them there is a real possibility that they did. No one can be placed into the pool unless that has been shown. This is why it is always misleading to refer to "exclusion from the pool".

iv. A change of language might be appropriate. The court should first consider whether there is a "list" of people who had the opportunity to cause the injury. It should then consider whether it could identify the actual perpetrator on the balance of probability and should seek, but not strain, to do so. Only if it cannot identify the perpetrator to the civil standard of proof should it go on to ask in respect of those on the list: "Is there a likelihood or real possibility that A or B or C was the perpetrator or a perpetrator of the inflicted injuries?" Only if there is, should A or B or C be placed into the 'pool'.

v. The pool of perpetrators relates to "carers". That was extended to include non-parent carers (Lancashire). It was "somewhat widened" (North Yorkshire) to include people with access to the child who might have caused injury. It was never "anyone who had even a fleeting contact with the child in circumstances where there was the opportunity to cause injuries".

vi. The pool of perpetrators does not "extend to harm caused by someone outside the home or family unless it would have been reasonable to expect a parent to have prevented it: S-B [40]."

vii. It must be shown that there genuinely is a pool of perpetrators and not just a pool of one by default.

viii. For the court to "assess the likelihood of harm having been caused by A or B or C, it needs as much information as possible about each of them in order to make the decision about which if any of them should be placed in the pool.

ix. "As part of the court's normal case-management responsibilities it should at the outset of proceedings of this kind ensure (i) that a list of possible perpetrators is created, and (ii) that directions are given for the local authority to gather (either itself or through other agencies) all relevant information about and from those individuals, and (iii) that those against whom allegations are made are given the opportunity to be heard.

x. "Where there is an imbalance of information about some individuals in comparison to others, the court may need to take 'particular care' to ensure that the imbalance does not distort the assessment of the possibilities."

NEW EVIDENCE AND REQUESTS FOR CLARIFICATION OF JUDGMENTS

I (Children) [2019] EWCA Civ 898

A 15-week-old baby had suffered two unexplained skull fractures. With reference to the right-sided fracture the court said:

“133. In my judgment all this set the context for a sudden loss of control resulting in an injury to A inflicted or caused by an anxious, stressed mother. Alternatively, and there is some evidence for this from M herself in her police interview and in the children's reported conversations in the car [that] she left A unattended and was downstairs at the time.”

In respect of the left-hand side fracture, the judge found that it was an older injury but not caused at birth, and occurred while A was in the mother's care.

The appeal was based on the court having made no clear finding. On granting permission, Moylan LJ directed that clarification was sought, which clarified that the court had found that the M had caused the injuries.

The appeal was based on six grounds. Two were not pursued and all but one of the remaining grounds were refused. All parties agreed that the remaining ground must be allowed, notwithstanding the clarification, and the Court of Appeal agreed. The ground was that: “In reaching the conclusion that there are two potential explanations for the injury, the learned judge has failed to make a determination of facts.”

To determine what order to make, the Court of Appeal had to examine the events following the handing down of the judgment. First, an older sibling told the social worker that he had been left alone with the baby and was worried that he had caused the injury, raising the possibility of negligent care rather than inflicted injury. Secondly, the mother prepared a new statement providing this completely different explanation for the injury, which was sent to the judge with an application for permission for it to be admitted before the judgment was handed down. This was refused.

The mother argued that the appeal could be dealt with simply by substituting a finding that the right-sided facture is “unexplained”. The local authority argued that a retrial was necessary to enable a "fair and comprehensive assessment of the mother as a future carer for the children” and was also “inevitable from the point that the mother admitted that she had concealed the truth as to what had occurred on 27 May 2018”.

The Court of Appeal agreed with the local authority, that on the unusual facts of this case, a retrial was necessary and went on to consider two areas of concern: the extent of clarification of the judgment requested on behalf of the mother; and the filing of the mother's statement between receipt of the draft judgment and handing down of the judgment.

King LJ considered para 4.6 of the Family Procedure Rules 2010 PD30A[1], Munby LJ’s practice note[2] and case law relating to clarification requests, identifying that the question is

[1] "4.6 Where a party's advocate considers that there is a material omission from a judgment of the lower court or, where the decision is made by a lay justice or justices, the written reasons for the decision of the lower court (including inadequate reasoning for the lower court's decision), the advocate should before the drawing of the order give the lower court which made the decision the opportunity of considering whether there is an omission and should not immediately use the omissions as grounds for an application to appeal."

“where one draws the line between a reasonable and appropriate request for amplification of the type identified by Munby LJ in the Practice Note, which request will properly be an example of the rare occasions where it is appropriate to go beyond typographical and factual errors in order to clarify issues in a judgment, as against a request which goes beyond the Practice Note and seeks to reargue the case” or “as in this case seek to water down the judge’s judgment”.

King LJ identified that requests for extensive clarification, going well beyond the perimeters identified in the authorities, have become commonplace in both children and financial remedy cases in the Family Court, and is “not conducive to the interests of justice”.

The Court of Appeal then endorsed the observation by Mostyn J in the financial remedy case *WM v HM* [2017] EWFD 25, (with the proviso that the term "material omission" in paragraph 4.6 of the FPR 2010 “is taken to embrace the totality of the matters included in paragraph 16 of Munby LJ’s Practice Note, in Re A*”.*

Mostyn J said:

> "39. Finally, I would observe that the demands by [counsel] for correction and amplification of the draft judgment went far beyond what is permissible, and amounted to blatant attempts to reargue points which I had already rejected. This practice is becoming commonplace and should be stopped in its tracks in the interests of efficiency and the conservation of the resources of the court. Suggested corrections should be confined to typographical or plain numerical errors, or to obvious mistakes of fact. Requests for amplification should be strictly confined to claimed "material omissions" within the terms of FPR PD 30A para 4.6."

Unfortunately, the Court of Appeal did not consider it necessary or appropriate to identify any “bright line” or to provide guidelines as to the limits of appropriate clarifications, saying only that “receiving a judge's draft judgment is not an ‘invitation to treat’, or an opportunity to critique the judgment, or to enter into negotiations with the judge as to the outcome, or to reargue the case in an attempt to water down unpalatable findings. Requests for clarification should not be routine and should only be made in accordance with the Practice Note which I repeat is: ‘to raise with the judge and draw to his attention any material omission in the judgment, any genuine query or ambiguity which arises on the judgment, and any perceived lack of reasons or other perceived deficiency in the judge's reasoning process.’”

In respect of the process when new potentially relevant evidence is brought to the attention of a party, King LJ did give clear guidance: first, they must inform and provide the evidence to all the other parties and any statements subsequently drafted upon which that party wishes to rely must be served on all the parties but should not be sent to the judge without the parties consent in writing. If the party wishes to make an application that the judge delays the handing down of judgment in order to consider whether there should be further evidence, proper notice should be given to both the judge and the parties so the judge may hold a directions’ hearing and to hear submissions from all sides. The judge will use his or her case management powers to determine what, if any, steps should be taken to consider the fresh evidence. However, the court was clear that such an outcome is by no means inevitable, and “indeed might be regarded as unlikely, where an alleged perpetrating parent files a statement by which they completely change their story between receipt of a draft judgment and the handing down of the same judgment”.

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[2] Practice Note of Munby LJ relating to family proceedings in *Re A and another (Children) (Judgment: Adequacy of Reasoning)* [2012] 1 WLR 595

LA DUTIES TO NOTIFY FAMILY MEMBERS OF CARE PROCEEDINGS

Re C (A child) **[2018] EWHC 3332 (Fam)**

A 14-year-old mother relinquished her baby at birth and did not want the father or his family to be informed of C's birth as she feared her privacy would be lost, the father would be violent to his family would harass her. The local authority brought care proceedings two and a half months after the baby's birth. The local authority was criticised for the delay and its failure to follow established procedure for relinquished babies, finding that the parents' age did not justify a departure from this procedure, given the mother had the mental capacity to make decisions about her child's future and to litigate, and the court's paramount concern was for the child. The court held that it was not appropriate to inform the father of the birth, taking into account the mother's age, her fear of what father may do, the likelihood of her education being terminated and the risk of her becoming socially isolated if the birth became known. Permission was given to the local authority to withdraw proceedings and to issue an application under Part 19 of the Family Procedure Rules 2010 for the invoking of the inherent jurisdiction of the court.

Re H (Care and Adoption: Assessment of wider family) [2019] EWFC 10

Cobb J considered whether the local authority has a duty to notify wider family members of the existence of care proceedings, and to assess them if the parents do not put them forward or specifically do not want them to be involved. The case involved a five-month-old baby (H) and parents who had substance misuse problems, having already had two children removed. They were seeking to care for the child. Some family members knew of the baby's existence; some did not. The father did not want his family burdened with the knowledge of the birth of another baby who they were not in a position to care for. The local authority applied under Part 19 of the Family Procedure Rules 2010 for guidance about whether the local authority "can and should notify the father's wider family of the existence of H an, as appropriate, elicit their view as to plans for H's future, and if relevant assess them as carers".

The court conducted a 'reasonably wide review of stature, guidance and case law' then granted the local authority's application, allowing the father an opportunity to tell his family first with support of the social worker but if he chooses not to, the court authorised the local authority to do so. The court's reasons are summarised below:

i. There is no statutory duty on the local authority or children' but 'the ethos of the CA 1989 is plainly supportive of wider family involvement in the child's life, save where that outcome is not consistent with their welfare'.

ii. H had no Article 8 ECHR Convention right to assert has there was no "the real existence in practice of close personal ties" between H and his grandparents or wider family. H has no Convention right to assert.

iii. While recent appellate case law offers clear guidance on the route by a court or adoption agency should reach a decision to place a child for adoption in the face of parental opposition ([30]-[32]), it offers no clear steer on this particular issue.

iv. Consequently, the court, and/or the local authority or adoption agency, is enabled to exercise its broad judgment on the facts of each individual case, taking into account all of the family circumstances, but attaching primacy to the welfare of the subject child.

Cobb J provides guidance about what matters should be borne in mind when exercising that broad discretion:

'I would suggest that the following be borne in mind. There will be cases (if, for instance, there is a history of domestic or family abuse) where it would be unsafe to the child or the parent for the wider family to be involved in the life of the child, or even made aware of the existence of the child. There will be cases where cultural or religious considerations may materially impact on the issue of disclosure. There will be further cases where the mental health or well-being of the parent or parents may be imperilled if disclosure were to be ordered, and this may weigh heavy in the evaluation. But in exercising judgment – whether that be by the local authority, adoption agency or court – I am clear that the wider family should not simply be ignored on the say-so of a parent. Generally, the ability and/or willingness of the wider family to provide the child with a secure environment in which to grow (section 1(4)(f)(ii) ACA 2002) should be carefully scrutinised, and the *option itself* should be "fully explored" (see [28]). The approach taken by Sumner J in the Birmingham case more than a decade ago, to the effect that "cogent and compelling" grounds should exist before the court could endorse an arrangement for the despatch of public law proceedings while the wider family remained ignorant of the existence of the child (see [29] above), remains, in my judgment, sound. This approach is in keeping with the key principles of the CA 1989 and the ACA 2002 that children are generally best looked after within their own family, save where that outcome is not consistent with their welfare, and that a care order on a plan for adoption is appropriate only where no other course is possible in the child's interests (see Re B (A child) *and* Re B-S).'

And confirms that the "there should normally be wide consultation with, and consideration of, the extended family; and that should only be dispensed with after due and careful consideration", per Holman J in *Z County Council v R* [2001].

"As I said in *Re RA*, and again above, a high level of justification is required before the court can sanction adoption as an outcome for a child particularly where this follows contested process. Even in an uncontested process a thorough 'analysis' of the options is necessary (Re JL & AO at [32]); while 'analysis' is different from 'assessment' (a sufficient 'analysis' may be performed even though the natural family are unaware of the process (Re RA at [34]))" [55].

Cobb J went on to conduct a very thorough analysis of all the relevant fact of the case. He emphasised that all the "relinquished' baby cases" where the court was prepared to offer discreet and confidential arrangements for the adoption of a child, emphasised the exceptionality of such arrangements; in those cases, the court is only ever likely to authorise the withholding of information in order to give effect to a clear and reasoned request by a parent to have nothing to do with the child, usually from the moment of birth.

CARE ORDERS IN RESPECT OF 17-YEAR OLDS

Re Q (Child: Interim Care Order: Jurisdiction) [2019] EWHC 512 (Fam)

The court determined that the amendment to the Children Act 1989 under s.14 of the Children and Families Act 2014 (dispensing with the need to renew ICOs every four weeks, after an initial order expired) did not change the law to allow that an ICO or ISO can last beyond a child's 17's birthday (or 16 if married). The intention of the 2014 amendments was solely to reduce the administrative burden of renewing interim orders. The court went on to say that there may be a purpose in the proceedings continuing, even though the court cannot make public law orders, as for instance whether the threshold is met may be relevant to local authority decision making.

26 WEEKS AND PROPOTIONALITY

Re P (A Child) [2018] EWCA Civ 1483

The mother successfully appealed a refusal to allow an adjournment of applications for care and placement orders in respect of her new-born baby to demonstrate real change, despite a history of alcoholism since 2009 and a previous relapse. Her first child died of Sudden Infant Death Syndrome in September 2014. Her second was removed from her care but rehabilitated to her care under a supervision order after the mother had made good progress in her treatment but started drinking again. She was arrested while pregnant for assaulting a taxi driver, which led to the local authority's involvement and making applications for care orders in respect of the second child and the new baby. ICOs were made placing the older child with her paternal grandmother and the new baby in foster care. No support was offered to the mother by the local authority as the care plan for the baby was adoption, but she engaged with the AA and had worn a SCRAM bracelet proving she had remained sober and her contact with the bay was good and a psychiatric assessment indicated that she had begun to develop insight into her addiction and its effects on her children. Her application for an adjournment was refused and case. The Court of Appeal found that the first instance judge had placed too much weight on historic lies told by the mother when concluding that there was a real risk of relapse and that the mother was not being able to be open and honest with professionals and had given sufficient weight to the genuine progress made and the baby's young age (seven months), the evidence that she was able to make good attachments, and the fact that the length of adjournment the mother had sought was one in which she could demonstrate real change.

P-S(Children) [2018] EWCA Civ 1407

The local authority successfully appealed a decision by the lower court to make care orders instead of SG orders, as had been agreed between all parties, on the grounds of unfairness and being wrong in law. The lower court had made the care order on the basis that the children had not lived with the SGs and that the order would be of short duration to test the placements before applications were later made for SGOs (the 26-week time-limit had already been exceeded). The Association of Lawyers for Children intervened in the appeal.

The Court of Appeal concluded that adjourning the hearing was likely to have been appropriate in this case, making it clear that the "the concept of a short term order is flawed" as there is no mechanism for a care order to be discharged on the happening of a fixed event or otherwise to be limited in time. The exercise of parental responsibility by a local authority cannot be constrained once a full care order is made other than on public law principles of unlawfulness, unreasonableness and irrationality.

In addition, the judge should have reflected on the fact that if the local authority did not, in due course, apply to discharge the care orders themselves, the proposed special guardians would have had to do so and therefore to satisfy the test for leave to make that application most likely without the benefit of legal aid.

Issues of fairness to the prospective special guardians was considered concluding that it was wrong not to have made appropriate provision for the grandparents to obtain effective access to justice at the final hearing, leaving them "on the side-lines at the final hearing, without party status, without documents, without advice and was unfair in more than one respect". This meant that "part of their case was assumed to be incomplete when it could have been tested".

The court concluded that "the residual power in the court to consider making a special guardianship order of its own motion in s.14A(6)(b) of the Act should not be the normal or default process as it tends to avoid the protections in the statutory scheme (under ss.14 and 10) and good planning by the local authority and the court, which will include identifying the status of the prospective special guardians, how they will achieve effective access to justice and such case management directions as will provide fairness to all parties by notice of the proceedings, the disclosure of evidence and the ability to take advice".

The Court of Appeal identified that the solution would have been *"*either to direct that an application for an SGO be made so that case management directions on that application relating to party status, disclosure and time for advice could be made or for case management directions to be made that otherwise secured the same procedural protections".

As this was not done in this case, at the final hearing "the grandparents did not know what was happening, did not have the evidence upon which the court was making a decision, were unable to take advice and in the event, in my judgment, did not have effective access to justice. That was not in the interests of the children. The procedure was accordingly unfair."

Where a prospective special guardian is identified late in the day the court must apply the principles in Re S and ask 'is the proposed special guardian a 'runner'. This appraisal must be "evidence based, with a solid foundation, not driven by sentiment or… hope". However, *"*it need not necessarily be too lengthy or too searching at this stage; what is sometimes referred to as a viability assessment or something similar may well suffice. If the proposed special guardian is ruled out at this stage, then so be it. If not, the judge will need to consider carefully what further steps need to be taken, in all the circumstances of the particular case, before the court can be satisfied that the proposed SGO should indeed be made."

Then the court must turn its mind to "what further assessment, addressing which issues, is necessary to enable the judge to come to a properly informed conclusion? How long will the necessary assessment take – something on which the professional opinion of the proposed assessor is likely to be of crucial importance? If the child has never lived with, or has only a tenuous relationship with, the proposed special guardian, what steps need to be taken and over what period to test the proposed placement? These are some of the questions the judge may need to have answered; no doubt there will be others."

"If the answer to these questions demonstrates that the process cannot be completed justly, fairly and in a manner compatible with the child's welfare within 26 weeks, then time must be extended. There can be – there must be – no question of abbreviating what is necessary in terms of fair process, and necessary to achieve the proper evaluation and furthering of the child's welfare."

The President concluded that there is a real need for authoritative guidance to sit alongside the statutory materials. He invited the Family Justice Council (FJC) to undertake the investigation of what form any guidance should take.

Since then, Interim Guidance on Special Guardianship Orders has been issued by the FJC, which recognises that in cases where more time is necessary to assess the relationship between the child/ren and the carer(s), an extension beyond 26 weeks will be readily justified under s.32(5) and s. 32(7).

Sir Andrew McFarlane has since invited debate in a recent '"View from the President's Chambers" on the issue of extending the 26 weeks deadline where final orders are being

considered to return children home or place with new kinship carers family at an early stage of the arrangement being in place, referring to anecdotal accounts of there being a relatively high incidence of a breakdown in these arrangements.

WHERE THE COURT AND LA DISAGREE ABOUT A FINAL CARE PLAN

Re T-S (Children) [2019] EWCA Civ 742

The case involved three siblings. The local authority sought care orders with a plan for foster care for the older two children (aged eight and five at the final hearing) and a placement order for the youngest (aged just under two years old). The CG and ISW recommended adoption for the middle child (J) and the court agreed with them. The judge made an ICO in November and asked the local authority to reconsider its care plan. The local authority refused. The matter came back in December 2018 but did not proceed, as may have been expected, with the judge reconsidering J's welfare in light of the ADM's statement and either accepting the local authority's position and making a final order or once again adjourning with an invitation to the local authority to reconsider its plan further as at the start of the hearing, the local authority sought permission to appeal the November decision. The judge granted permission on the basis that the case had reached an impasse and an appeal was the only way of breaking the deadlock. Though permission was for the November hearing, the Court of Appeal heard submissions in respect of both hearings. McFarlane P gave the lead judgment and provided a comprehensive review of the legal context.

The President endorsed the approach taken in Re: T [2018] EWCA Civ 650 "when the focus is upon the care plan after the proceedings have concluded, there is a need for mutual respect and engagement between the court and the local authority" and referred to the key authority, Re S and W [2007] EWCA Civ 232.

The Court of Appeal held that the court was wrong to conduct the December hearing as it did, and that it was premature to hold that there was an impasse between the court and the local authority before he had evaluated the ADM's statement and the local authority's application to appeal was pre-emptive; the hearing should have run its course. The local authority's appeal was granted but the local authority's grounds were all rejected. The matter was remitted for rehearing.

POST-ADOPTIVE CONTACT

Re B (A Child) (Post-adoption contact) [2019] EWCA Civ 29

Permission to appeal a refusal to make a contact order following the making of care and placement orders was allowed on the ground of a compelling reason for the grant of permission being the implementation of s.51A of the Children Act, which had been inserted by the Children 2014, and recent research about post-adoption contact.

The Court of Appeal (McFarlane LJ, King LJ and Coulson LJ) summarises the pre-s.51A law and states that it is "a given" that any social worker or guardian advising the court about contact, "will ensure that they are fully aware of current research and its potential impact upon welfare issues in each particular case".

The court confirmed that the law continues to be as set out in Re R [2005] EWCA Civ 1128 and that "save for there being extremely unusual circumstances, no order will be made to compel adopters to accept current arrangements with which they do not agree".

However, post-adoptive contact is now considered under s.26 and s.51A of the ACA 2002 not, as before, 2014, s.8 of the Children Act 1989. The ACA 2002 welfare provisions therefore apply and the court is concerned with the child's welfare throughout his life.

Although the court may "set a tone" for future contact, and there may be some justification for considering direct contact, the ultimate decision will be for the adopters and it will be extremely unusual for the court to impose arrangements against the adopters' wishes.

SECURE ACCOMODATION AND DEPRIVATION OF LIBERTY

Re D (A Child) [2019] UKSC 42

The Supreme Court has now decided that parental responsibility does not extend to allow parents to consent to their 16- or 17 year-old child, who lack capacity to make their own decisions, being deprived of their liberty by the state, which is a violation of the child's human rights, and confirming that the comparison to determine whether the regime amounts to a deprivation of liberty is with a non-disabled child of the same age, as previously stated in Re D (A Child) [2017] EWCA Civ 1695 and confirmed in A-F (Children)(No 1) [2018] EWHC 138 (Fam).

I provide a summary of that judgment below and then go on to consider the other recent cases in respect of the court's inherent jurisdiction and s.25 relevant to law and procedure.

In Re D (A Child) [2019] UKSC 42, the Supreme Court considered whether parents are able to consent to the deprivation of liberty of a 16- or 17-year-old child, within the meaning of Article 5 of the European Convention of Human Rights (ECHR), where the child lacks the mental capacity to make decisions about his care and residence.

When D was 14, he was living and attending school in a locked hospital unit under constant supervision. The hospital trust applied to the High Court for a declaration that it was lawful for it to deprive D of his liberty in this way. Mr Justice Keehan, held that D was so deprived but that it was a proper exercise of parental responsibility for the parents to consent to his constant supervision and control while he was under 16. By the age of 16, he had been discharged from hospital and moved to a residential unit but remained under constant supervision. On his 16th birthday, the local authority applied to the Court of Protection for a declaration that the consent of D's parents meant that he was not deprived of his liberty at the placement. Keehan J held that his parents could no longer consent to what would otherwise be a deprivation of liberty once D had reached 16, and that the provisions of the Mental Capacity Act 2005 (MCA) now applied. He authorised the placement and a subsequent transfer to another similar placement as being in D's best interests. When D reached the age of 18 his deprivation of liberty could be authorised under the deprivation of liberty safeguards in the MCA.

The Court of Appeal had allowed the local authority's appeal on the ground that parents could consent to what would otherwise be a deprivation of liberty of a 16 or 17-year-old child who lacked the capacity to decide for himself but this was over-turned by the Supreme Court by a majority of three to two (Carnwath LJ and Lloyd-Jones LJ dissenting).

Hale LJ gave the main judgment, considering the inter-relationship between the concept of parental responsibility as defined by the Children Act 1989, the common law and other relevant statutory provisions, and the obligation of the State to protect the human rights of children under the ECHR.

Hale LJ concluded that Article 5 protects children who lack the capacity to make decisions. Human rights are about the relationship between private persons and the state, and D's deprivation of liberty in the placements was attributable to the state [46]. There is no scope for the operation of parental responsibility to authorise what would otherwise be a violation of a fundamental human right of a child by the state [49].

Where a mentally disabled child is subject to a level of control beyond that which is normal for a non-disabled child of his age, the child has been confined within the meaning of Article 5(1) of the Convention. The parent of a 16- or 17-year-old cannot give substituted consent on behalf of the child so as to take the confinement outside of the scope of Article 5(1). It was not within the scope of parental responsibility for D's parents to consent to a placement that deprived him of his liberty.

The MCA does not override other common law and statutory provisions relating to 16- and 17-year-old children (although it does indicate an appreciation of the different needs of this age group).

Black LJ gave an additional judgment stating that she would hold that as a matter of common law, parental responsibility for a child of 16 or 17 does not extend to authorising a confinement of the child in circumstances amounting to a deprivation of liberty whereas Hale LJ preferred not to express a concluded view about the extent of parental responsibility where the state is not involved, but agreed this reinforced the conclusion reached under the ECHR

Carnwath LJ, dissenting, would have agreed with the Court of Appeal that nothing in the MCA detracts from the common law principle of parental responsibility in respect of 16 and 17-year-olds [145]. He further considered that the case law of the European Court of Human Rights on Article 5 recognises that the proper exercise of parental responsibility can include consent to confinement of a child such as D [155]. Lloyd-Jones LJ agreed with Carnwath LJ's dissenting judgment.

T (A Child) [2018] EWCA Civ 2136

Munby P determined that the High Court was able to make declarations under the inherent jurisdiction permitting the accommodation of a child in a secure unit (akin to a statutory secure accommodation order under s.25 of the CA 1989) and that although a lack of valid consent may be relevant to determining whether a persons is deprived of their liberty, it is not a pre-requisite for making either an order under s.25 or exercising the inherent jurisdiction.

A-F (Children) (No 1) [2018] EWHC 138 (Fam)

Where the placement of a child involves such a "confinement" as amounts to a deprivation of liberty, but it is not in secure accommodation within the meaning of s.25 Children Act 1989, judicial sanction can only be provided by the High Court in the exercise of the inherent jurisdiction, or in some circumstances if the child has reached the age of 16, by the Court of Protection.

Munby P reviewed the law relating to the application of the Storck test[3] for a deprivation of liberty to children confirming that the law is as stated in obiter in Re D (A Child) [2017] EWCA Civ 1695:

[3] Storck v Germany [2005] 43 EHRR 6 identifies three necessary elements for deprivation of liberty: -
(i)The objective element of a person's confinement to a certain limited place for a not negligible length of time
(ii)The subjective element that the person has not validly consented to the confinement. A person may give valid consent only if he or she has capacity to do so
(iii)The confinement must be imputable to the State

i. the situation of the young or very young does not involve a “confinement” for the purposes of component (a), meaning that such a child living with foster carers in their home is not deprived of his or her liberty.

ii. As the typical 15-year-old is not “free to leave” home, that part of the “acid test” will not answer the question of whether they are ‘confined’; rather the question of whether the child is under “complete supervision and control”, is likely to be the central issue.

iii. One has to proceed on a case-by-case basis, having regard to the actual circumstances of the child and comparing them with the notional circumstances of the typical child of the same “age”, “station”, “familial background” and “relative maturity” who is “free from disability”. The comparison is not with a “typical” child of the same age who is subject to a care order. A “rule of thumb” suggests:

(a) a child aged 10, even if under pretty constant supervision, is unlikely to be “confined”;

(b) a child aged 11, if under constant supervision, may, in contrast be so “confined”, though the court should be astute to avoid coming too readily to such a conclusion and

(c) once a child who is under constant supervision has reached the age of 12, the court will more readily come to that conclusion.

But all must depend upon the circumstances of the particular case and upon the identification by the judge in the particular case of the attributes of the relevant comparator.

The court gave guidance on matters of procedure:

i. An application to the court should be made where the circumstances in which the child is, or will be, living constitute, at least arguably (taking a realistic rather than a fanciful view), a DOL.

ii. There is no need for the court to make an order specifically authorising each element of the circumstances constituting the “confinement”. It is sufficient if the order (a) authorises the child's DOL at placement X, as described (generally) in some document to which the order is cross-referenced, and if appropriate (b) authorises (without the need to be more specific) medication and the use of restraint.

iii. The key elements of an Article 5 compliant process are in summary:

(a) if a substantive order (interim or final) is to be made authorising a DOL, there must be an oral hearing in the Family Division (though this can be before a section 9 judge). A substantive order must not be made on paper, but directions can be given on paper;

(b) the child must be a party to the proceedings and have a guardian who will no doubt wish to see the child in placement unless there is a very good child welfare reason to the contrary or that has already taken place. The child, if of an age to express wishes and feelings, should be permitted to do so to the judge in person if that is what the child wants; and

(c) a 'bulk application' is not lawful, though in appropriate circumstances where there

is significant evidential overlap there is no reason why a number of separate cases should not be heard together or in sequence on the same day before one judge.

iv. The evidence in support of the substantive application (interim or final) should address the following matters and include:

a) the nature of the regime in which it is proposed to place the child, identifying and describing those salient features which it is said do or may involve “confinement”;

(b) the child's circumstances, identifying and describing those aspects of the child's situation which it is said require that the child be placed as proposed and be subjected to the proposed regime and, where possible, the future prognosis;

(c) why it is said that the proposed placement and regime are necessary and proportionate in meeting the child's welfare needs and that no less restrictive regime will do; and

(d) the views of the child, the parents and the IRO, the most recent care plan, the minutes of the most recent LAC or other statutory review and any recent reports in relation to the child's physical and/or mental health.

v. Whether and to what extent new evidence will need to be obtained depends upon the extent to which the existing evidence covers the various matters referred to above, how up to date the existing evidence is and the extent to which there have been any significant changes since. The evidence from the guardian will typically focus on the “confinement” and DOL issues. Unless there has been a very significant change in the child's circumstances, the application under the inherent jurisdiction should not be an occasion for re-opening the wider welfare issues previously determined in the care proceedings.

vi. While not excluding evidence on a child's competency to consent to a “confinement” from a local authority social worker who feels properly qualified to express an opinion, it is plainly undesirable that the only evidence on the point comes from an employee of the local authority responsible for the “confinement”. If the child is said to have the capacity to give a valid consent, there would normally be evidence from a child and adolescent psychologist or psychiatrist.

vii. If when care proceedings are issued there is a real likelihood that authorisation for a DOL may be required, the proceedings should be issued in the Family Court but be allocated, if at all possible, to a CJ who is also a s.9 judge. If the issue arises in care proceedings allocated to a judge who is not a s.9 judge, but it has become apparent that there is a real likelihood that authorisation for a DOL may be required, steps should be taken if at all possible and without delaying the proceedings, to reallocate the proceedings (or at least the final hearing) to a CJ who is also a s.9 judge. The care proceedings will remain the Family Court and must not be transferred to the High Court. The s.9 CJ conducting the two sets of proceedings (care proceedings and inherent jurisdiction proceedings) can do so sitting simultaneously in both courts. If this is not possible steps should be taken to arrange a separate hearing in front of a s.9 judge as soon as possible (if at all possible, within days at most) after the final hearing of the care proceedings. There should be evidence on the matters set out in the process and procedure section above, which should also be in the care plan. Where the proceedings have been concluded for some time, the process will be as set out within the process and procedure section above.

viii. Continuing review is crucial to the continued lawfulness of any “confinement”:

(a) regularly by the LA as part of its normal processes;

(b) by a judge at least once every 12 months but must be brought back before the judge before this if there has been any significant change (deterioration or improvement) in the child's condition or if it is proposed to move the child to a different placement;

(c) the child must be a party to the review and have a guardian;

(d) if there has been no significant change of circumstances, the review can take place on the papers, though the Judge can direct an oral hearing. Directions can be given at the conclusion of the previous hearing as to the form of the next review; and

(e) generally, it is preferable for the proceedings to be concluded at the end of the final hearing and thereafter at the end of each review, rather than being kept open, meaning the LA will have to issue a fresh application for each review.

A-F (Children)(No2) [2018] EWHC 2129(Fam)

In this judgment, Sir James Munby reviewed relevant developments since the previous hearing and considered the position for the child who was already 16 at the time of the final order or who will have their 16th birthday during the currency of the order.

He authorised the continued deprivation of the children’s liberty for a further 12 months and concluded that as the court made final care orders so the Family Court has a continuing role and there was no reason to think the children's welfare will be better safeguarded within the Court of Protection, so the cases should not be transferred. He reasoned that the local authority's Children's Social Care (LAC) teams, are “much more familiar with practice and procedure in the Family Court and the Family Division than with practice and procedure in the Court of Protection”, and the children’s guardians will be able to continue exercising that role so long as the cases remain within the Family Court and the Family Division; whereas it is doubtful whether they would be able to act as litigation friends in the Court of Protection and finally it may be easier to ensure judicial continuity if there is no transfer.

The court provided draft orders to be used in these cases:

i. Directions on issue [16].

ii. The order following first hearing [17.

iii. The order following final hearing [18]. In doing so, he acknowledged that the question of whether these are to be “formally promulgated as additions to the Compendium” was a matter for Sir Andrew McFarlane, as President of the Family Division.

A suggested form of social work statement template for use in such cases [15] was provided and that CAFCASS use “appropriately short and focused” position statements and invited the Family Procedure Rule Committee to consider adding an additional box to the C110A asking if the proposed care plan, or likely long-term care plan, for the child(ren) involve a possible deprivation of the child(ren)'s liberty.

Salford CC v M (Deprivation of Liberty in Scotland) [2019] EWHC 1510

The case concerned a13-year-old girl ('M') who presented with significant challenging behaviours including aggression and sexualised behaviour, and who would regularly go missing from home and school and was considered a victim of child sexual exploitation.

She was placed in a residential unit under an ICO but continued to abscond and was exploited by older men. She was moved to a placement in Scotland on 8 September 2018.

On 4 October 2018, HHJ Butler gave the local authority permission to invoke the inherent jurisdiction and made an interim declaration authorising the deprivation of M's liberty at her placement [16]. The local authority failed to bring to the attention of the court until 23 April 2019 legal advice it had received on 8 November 2018 from Scottish solicitors to the effect that there is no method by which a child's liberty can be lawfully deprived in the jurisdiction of Scotland in a placement that is not approved by the Scottish Ministers.

The case then came before Mr Justice MacDonald who undertook a review of the evidence presented by an expert in Scottish law and summarised the applicable law on deprivation of liberty and cross border secure placements in Scotland

He found that M's movement were significantly restricted and she was closely supervised for the vast majority of the day. As a result, he found this was continuous supervision or control amounting to confinement to a certain limited place for a not negligible period of time, satisfying the Storck criteria and the regime did act to deprive her of her liberty for the purposes of Art 5 of the ECHR.

He adjourned the proceedings so the local authority could petition the Inner House of the Court of Session in Scotland for an order finding and declaring that the measures ordered by the High Court in respect of M should be recognised and enforceable in Scotland as if they had been made by the Court of Session and that, in the circumstances and the interim declaration authorising the deprivation of M's liberty should be continued pending the determination of petition in Scotland, finding that the local authority's proposed petition was sufficiently arguable to justify the adjournment, despite the expert's pessimistic legal opinion of the likelihood of success.

He noted this was something that had not been considered in previous case law such as Cumbria Country Council and others, Re Children X, J, L and Y, and it was in M's interest, and other children in similar situations, for the matter to be clarified. In the interim, he found that on the balance of convenience favoured continuation of the interim orders authorising M's deprivation pending the petition by the local authority

He then identified that the Family Court Practice was in error about the ratio of various cases concerning this area confirming that:

i. X (A Child) and Y (A Child) is not authority for the bare proposition that a child can be placed in a placement in Scotland not approved as secure accommodation by the Scottish Ministers pursuant to an order authorising the deprivation of the child's liberty made pursuant to the inherent jurisdiction of the English High Court. Rather, it is authority for the proposition that, while the English court has power to make such an order, unless the Inner House of the Court of Session in Scotland agrees to invoke the *nobile officium*[4] in respect of such a course of action, such placement may be without

[4] the equitable discretion of the Court of Sessions to afford relief in cases where none is possible at law.

legal authority in Scotland.

ii. The ratio of Cumbria Country Council and Ors, Re Children X, J, L and Y is not that any orders made under the inherent jurisdiction of the English High Court authorising the deprivation of liberty of a child in a placement in Scotland not approved as secure accommodation by the Scottish Ministers will be recognised under the *nobile officium* jurisdiction; rather, pending full argument, the Court of Session is able, in an appropriate case, to grant interim orders under the *nobile officium*.

iii. Nor is Cumbria Country Council and Ors, Re Children X, J, L and Y authority for the proposition that whenever a child is placed in accommodation in Scotland pursuant to an order made under the inherent jurisdiction of the High Court an application can and must be made for a 'mirror order' to regularise the legal status of such a placement in Scotland. This may be the ultimate outcome of the local authority's petition to the Inner House of the Court of Session in this case. However, as matters stand, the question of whether a Scottish court will invoke the *nobile officium* in circumstances where the placement of a child in Scotland amounts to a deprivation of her liberty for the purposes of Art 5 of the ECHR, which deprivation of liberty has been authorised by an order made under the inherent jurisdiction of the High Court, in placement which is not approved by the Scottish Ministers for the provision of secure accommodation of children for the purposes of the relevant Scottish legislation, is one that remains undecided.

M (A Child) (Secure Accommodation) 2018 EWCA Civ 2707

This was an unsuccessful appeal by a 15-year-old girl (almost 16) against a secure accommodation order. Peter Jackson LJ used the opportunity to review the case law and provide guidance as to the interpretation of the statute.

"Absconding" means something more than a trivial disobedient absence, it may connote an element of escape from an imposed regime and should be given its ordinary meaning.

The "paramountcy" principle does not apply, but the local authority must consider the child's welfare when deciding whether to exercise the permission to place in secure accommodation (NB: by extension, this must also be applied when reviewing the placement).

Any order must be necessary and proportionate but it remains a moot point whether the proportionality check is "inbuilt" within the stringent s.25 criteria or should be considered separately. However, the Court of Appeal refers to T (A Child) [2018] EWCA (Civ) 2136 at paragraph 16, where Sir Andrew McFarlane P noted that where the qualifying criteria are met the ambit for the exercise of discretion (if it is possible at all) is limited, and states clearly that proportionality must not become "a surrogate for a general welfare assessment".

THE CONTINUING ROLE OF WARDSHIP

Re A (Wardship: 17-year olds in 20 accommodation) [2018 EWHC 1121])

The case concerned a 17-year-old boy who had been caught up in gangs and drug-dealing. His mother was in Africa and played no part in the proceedings. His relationship with his father had broken down and it was unclear whether he had PR and even if he had whether he was willing to exercise it. As well as the child's own behaviour being beyond parental control, he was considered to be in serious danger as a result of giving a detailed statement to the police and could have been called as a witness. Mr Justice Williams reviewed the relevant case law and decided that, in the absence of a "pushy" parent, wardship was

necessary so that the prosecuting agencies know that A is a ward of court, that the court expects to be informed of decisions taken in relation to A and to be satisfied that the agencies have complied with all their relevant statutory obligations when taking any decisions of that nature. The court did not think it was fair to put the role of the proactive or pushy parent on the social worker (in the context of the local authority not having PR) and that it should be the court in the unique circumstances of this case. The court also ordered that the local authority should not disclose any further information about the child to the police, saying that "if the police want further information, they will have to make an application for it".

TRANSPARENCY

Re R (A Child) Reporting Restrictions) [2019] EWCA 482 Civ

Members of the media appealed against reporting restrictions made by the lower court. By the time of the appeal hearing all parties were agreed that the appeal should be allowed on the basis of procedural irregularity. A fresh reporting restriction order was drafted. The grounds were, first that the judge gave no reasons for his failure to refer to the existing Court of Appeal judgment in this case, second, he failed to consider the existing case-law in relation to transparency in the family court and the determination of issues which may or not restrict reporting and finally, he failed to undertake the necessary balancing exercise between Article 8 and Article 10 of the European Convention on Human Rights, which must be undertaken in any case such as this.

The President expressed sympathy for both judges faced with these applications and the journalists involved given that there is no detailed guidance for how such applications are to be determine. Since then, the President has announced he intends to set up a Transparency Review with the aim of considering whether the current degree of openness should be extended rather than reduced.

PRIVATE LAW UPDATE

By Geraldine More O'Ferrall

There are recent cases on reopening fact-finding decisions, the role of Cafcass in respect of non-subject children, s9.1(14) CA 1989, special guardianship/CAO, communications with the court pre and post judgment, informing a child of his paternity and the inherent and statutory jurisdiction to make declarations. In addition, there is a new Cafcass Framework for Implacable Hostility/Alienation cases and the Domestic Abuse Bill is on course to be passed in the next session of Parliament.

Statistics

- In January 2019, there were 3,636 new cases received by Cafcass, 3.6 per cent or 127 more cases than in January 2018, the third highest on record.
- Between April 2018 and Jan 2019, there were 36,560 private law applications – a rise of 3.8 per cent and 1,353 more cases than during the previous year.

RE-OPENING FINDINGS OF FACT

Re E (Re-opening Findings of Fact)[2019]EWCA Civ 1447

A care case, but the principles apply to private law fact finding decisions. A 10-month old suffered cigarette burns, which were found to be either deliberately or culpably negligently caused by the mother. Final care orders were made in August 2018. In October 2018, a forensic burns expert, instructed by the police, found that the mother's explanation of accidental injury was plausible. After some delays, including funding difficulties, the mother's notice of appeal was filed in May 2019.

Peter Jackson LJ gave the lead judgment and considered appeals, including applications to admit further evidence (Ladd v Marshall) and applications to the first instance court. There is a need for principled flexibility in cases concerning children and the decision to relitigate past findings. The likelihood of a different finding is key. The trial judge can revisit findings of fact in ongoing proceedings. Peter Jackson LJ stated that s.31F(6)MFPA 1984 gives the family court (but not the High Court) the power to reconsider findings of fact within proceedings or at any time thereafter. In general, an application to the trial court is encouraged, see Part 18 FPR 2010, although there may be circumstances where an appeal is more appropriate. The decision of the Supreme Court in Re L and B (Children)[2013]UKSC 8, as considered by Macur J in Re G [2014] EWCA Civ 1365, that a challenge to findings after an order is sealed must be to the appeal court was distinguished on the basis that the case involved the judge changing his or her mind, not where the court is asked to take account of further evidence.

COMMUNICATIONS WITH THE COURT PRE- AND POST-JUDGMENT

Re I (Children) [2019] EWCA Civ 898

The Court of Appeal provided guidance on clarification of judgments and admission of fresh evidence in the context of a NAI case. At paras 25-32, King LJ surveyed the authorities and law on clarification. At paras 42-45 King LJ concluded:

i. Fresh evidence should never be confused with or regarded as part of the clarification process

ii. As soon as fresh and potentially relevant evidence is brought to the attention of a party it is their duty to inform and provide the evidence to all the other parties in the case. Any statements should be served but not sent to the judge without express written consent.
iii. If a party seeks to delay judgment for the court to consider admission of further evidence proper notice should be given to the judge and parties to allow for a direction hearing and submissions from all parties.
iv. The judge will decide using his or her case management powers what if any steps are necessary to consider the fresh evidence.

SPEND TIME WITH PROVISIONS – SHOULD THERE BE AN ORDER OR RECITAL?

X v Y [2019] EWHC 1713

Financial remedy and CA 1989 proceedings. The trial judge made child arrangement provision by agreement but declined to make an order in respect of the arrangements. Theis J gave permission to appeal HHJ Tolson's order on this ground alone.

ORDERS SUSPENDING RIGHT TO APPLY: S.91(14) CA 1989 – PROCEDURE NOT FOLLOWED

Re N (Children) [2019] EWCA Civ 903

A case involving two children, ongoing for some five years. A direction hearing was listed. The father did not attend, but filed a position statement. The judge heard evidence from the Guardian and mother and indicated that he would make a two-year s.91(14) order giving F liberty to apply within four weeks. The father, who was in person, made an application to vary within the time limit but the application was listed almost four months after the hearing. The judge dismissed the application. The father appealed both orders. On appeal it was held that none of the fundamental requirements set out in Re T (A Child) (Suspension of Contact) [2015] EWCA Civ 719 for the making of a s.91(14) CA 1989 order was satisfied. These provide:

- "50. Given the significant implications of this statutory intrusion into a party's ordinary ability to access justice, it is imperative that the court is satisfied that the parties affected:

i. Are fully aware that the court is seised of an application, and is considering making such an order.

ii. Understand the meaning and effect of such an order.

iii. Have full knowledge of the evidential basis on which such an order is sought.

iv. Have a proper opportunity to make representations in relation to the making of such an order; this may of course mean adjourning the application for it to be made in writing and on notice.

- 51. These fundamental requirements obtain whether the parties are legal represented or not. It is, we suggest, even more critical that these requirements are observed when the party affected is unrepresented."

The summary dismissal of the father's application was also plainly wrong. The two hearings together infringed the father's right to a fair hearing. The matter was remitted to a further hearing.

CAFCASS ROLE IN RESPECT OF NON-SUBJECT CHILDREN

A County Council v Children and Family Court Advisory and Support Service (Cafcass) [2019] EWHC 2369 (Fam)

In a case where a child not related to the subject children had made allegations against the father, the court held that it had no power to appoint Cafcass to work with and advise upon a non-subject, non-party child. Keehan J considered that a Guardian appointed to represent a child in public or private law proceedings may be required to advise the court on the subject child's relationship with a non-subject child (eg a step-sibling) could report on and give advice about matters concerning a non-subject sibling, such as whether that child should give evidence. The objective and focus of the enquiries must be establishing the best interests of the subject child.

DISCLOSURE OF PATERNITY

AB v CD v C [2019] EWHC 1695 (Fam)

A boy believed his stepfather to be his father. The identity of the biological father (X) was not known to the court or to the stepfather. The stepfather sought that the mother be ordered to disclose the identity of X so that the child could be told. The stepfather had issued numerous actions against the mother upon discovering the position as to paternity. X was completely unaware of the proceedings. The court was concerned as to the motivation for the stepfather's actions.

The court considered the issue of notifying X of the case as extremely sensitive as X's response would impact on what the child should be told. The child was at an age where he should be told as soon as possible to avoid the risk that he would hear rumours about his paternity. The judge drafted a letter with counsel's comments to be sent to X raising a number of questions. The matter was relisted for five to six weeks' time to await X's response. A "spend time with" and PR order were granted to AB in the interim.

SPECIAL GUARDIANSHIP ORDERS – FURTHER GUIDANCE

Re W-P (Children) [2019] EWCA Civ 1120

A mother appealed the making of SGOs in respect to her two sons aged 9 and 10 in favour of their paternal grandparents, challenging the threshold findings and arguing that a CAO would be the more proportionate order. The court found that threshold findings had not been summarised in the judgment as recommended in Re S & HS (Children) [2018] EWCA Civ 1282. In respect of the "finely balanced" decision to make SGOs, the court was of the view that the judicial analysis was somewhat thin.

The court cited Re S (A Child) EWCA Civ 54 with approval, in particular:

- "47. Certain other points arise from the statutory scheme:

i. The carefully constructed statutory regime (notice to the local authority, leave requirements in certain cases, the role of the court, and the report from the local authority – even where the order is made by the court of its own motion) demonstrates

the care which is required before making a special guardianship order, and that it is only appropriate if, in the particular circumstances of the particular case, it is best fitted to meet the needs of the child or children concerned.

ii. There is nothing in the statutory provisions themselves that limits the making of a special guardianship order or an adoption order in any given circumstances. The statute itself is silent on the circumstances in which a special guardianship order is likely to be appropriate, and there is no presumption contained within the statute that a special guardianship order is preferable to an adoption order in any particular category of case. Each case must be decided on its particular facts; and each case will involve the careful application of a judicial discretion to those facts.

iii. The key question which the court will be obliged to ask itself in every case in which the question of adoption as opposed to special guardianship arises will be: which order will better serve the welfare interests of this particular child?

- 48. The special nature of the jurisdiction also has implications for the approach of the courts:

i. … it is incumbent on judges to give full reasons and to explain their decisions with care…

- 49. …it is a material feature of the special guardianship regime that it is "less intrusive" than adoption.. it involves a less fundamental interference with existing legal relationships.. in come cases, the fact that the welfare objective can be achieved with less disruption to the family relationships can properly be regarded as helping to tip the balance."

The court confirmed that these considerations also applied when the court is considering whether to make an SGO or CAO.

INHERENT JURISDICTION AND DECLARATIONS

Power v Vidal [2019] EWHC 2101 (Fam)

An original decree absolute of divorce was lost/destroyed by the court. The respondent provided a certified copy. The court noted that the inherent declaratory jurisdiction of the court had been confirmed by Sir James Munby P in Egeneonu v Egeneonu [2017] 2 FLR 1181, and there was a further statutory jurisdiction in s19 Senior Courts Act 1981, which provides at s.19(2)(a), as did its predecessors, that "there shall be exercisable by the High Court all such other jurisdiction as was exercisable by it immediately before the commencement of this Act". Declarations were made that the respondent's copy of the DA was an accurate copy of the original, and that the marriage was dissolved on the relevant date. The court ordered the declaration to be recorded and filed in accordance with the rules (which had not been followed in respect of the original DA).

REVOCATION OF AN ADOPTION ORDER

ZH v HS & Ors (Application to Revoke Adoption Order [2019] EWHC 2190 (Fam)

Theis J exercised her inherent jurisdiction to revoke an adoption of a now four-year- old girl by the paternal aunt and uncle which took place in 2016. The adoption application had

involved the wholesale failure of the local authority to undertake the necessary enquiries required by PD14C. The revised procedure for non-agency placements was set out in a postscript to the judgment for the benefit of other local authorities. The adoption process was replete with errors and omissions as set out in the judgment. In this case adoption was a disproportionate order for what was required.

NEW GUIDANCE ON PARENTAL ALIENATION – THE CHILD IMPACT ASSESSMENT FRAMEWORK

(With thanks to Gayle Bisbey)

Parental Alienation involves cases where a child is resisting or refusing time with a parent/carer post separation.

There are a number of potential causes for this:

- **Appropriate justified rejection**, for example where the child has been harmed by the parent or is frightened of them because of domestic abuse or other harmful parenting, such as neglect and substance misuse.

- **Affinity/alignment,** where a child does not have negative feelings for the other parent but prefers spending time with one parent. Alignment between a parent may develop before, during, or after separation or because of naturally occurring preferences because of the other parent's non- existent, interrupted, or minimal involvement, inexperience, or poor parenting (which does not reach the level of abuse or neglect)

- **Attachment** – Age or gender appropriate reactions for resisting time with a parent fir attachment reasons, including separation anxiety.

- **Parental Alienation**.

- **Harmful conflict** – conflict of any level, which is detrimental to the child's wellbeing, conflict can vary in nature, intensity and impact. The following behaviours or features are commonly accepted as being indicative of harmful conflict:

  i. High degree of anger or mistrust

  ii. Verbal abuse

  iii. On-going difficulties in communication and cooperation

  iv. Loss of focus on the child

  v. Lengthy proceedings or repeat litigation

Parental Alienation is defined under the guidance as:

- **Alienation:** When a child's resistance or hostility towards one parent is not justified and is the result of psychological manipulation by the other parent.

- **Active alienating behaviour**: Intermittent, intentional words or actions aimed at either undermine the child's relationship with the other parent as a result of hurt or anger or emotional vulnerability. They may feel genuinely concerned for the child in

the care of the other parent, but these concerns are unfounded.

- **Persistent alienating behaviour**: Persistently acting in a way to hurt the other parent and destroy their relationship with the child, rarely showing empathy, self-control or insight and taking on an obsessive quality.

Both men and women can demonstrate alienating behaviours, while it can be demonstrated solely by one parent, it is often a combination of a child and adult behaviours and attitudes, with both parents playing a role, that lead to the child rejecting or resisting spending time with one parents.

Indicators include a parent:

i. Bad mouthing or belittling the other

ii. Limiting contact

iii. Forbidding discussion about them

iv. Creating the impression that the other parent dislikes or does not lobe the child

v. Additionally spurning, terrorising, isolating, corrupting or exploiting, and denying emotional responsiveness. These tactics can foster a belief that the alienated parent is dangerous or unworthy

How is it dealt with?

- First, identify risk – “emotional harm”

- Assess whether it is safe and in the interests of the child to have contact with both parents.

- Take into account the risk factors, evidence based assessments, diversity issues, and the child’s resilience and vulnerabilities.

Domestic Abuse Bill, published January 2019

i. Introduces a Statutory Definition of domestic abuse

ii. Promotes awareness of domestic abuse

iii. Aims to protect and support – to enhance the safety of victims and the support they receive

iv. Establishes the office of a domestic abuse commissioner

v. A new regime of Domestic abuse protection notices and orders (DAPOs) to be made and enforced by the family courts where the application is not brought by the police)

vi. Prohibits perpetrators of domestic and other forms of abuse from cross-examining their victims in person in the family court. In such cases the family court has the power to appoint a legal representative to conduct the cross-examination on the persons behalf

vii. Creates a statutory presumption that complainants of an offence involving behaviour that amounts to domestic abuse are eligible for special measures in criminal courts

viii. Domestic abuse offenders to be subject to polygraph testing as a condition of licence

ix. Also provides for local authorities being required to grand a new secure tenancy to a social tenant when that tenancy is being granted following domestic abuse (and the person previously had/has a secure lifetime or assured tenancy)

The Bill received a second reading in the House of Commons on 2 October 2019. The Government has confirmed that the Bill will be carried over into the next parliamentary session.

FINANCIAL REMEDIES CASE UPDATE

By Seema Kansal

JURISDICTION FOR FINANCIAL REMEDIES APPLICATION

AJ v DM [2019] EWHC 702 (Fam)

The husband was Irish and the wife was English. They both took Australian citizenship and met in Australia, where they married in 2015. They moved to England in 2016, where they had a child. After negotiations with his new employer and discussions with the wife, the husband was offered a job in St Lucia. He moved there in January 2017 and the wife and child joined him in March 2017. They surrendered their lease on their English property and lived in an apartment in St Lucia with a car and nanny. The job was for three years with a likely extension to five. In April 2018, the wife went to England with the child for a holiday. While there, she initiated divorce proceedings. Her divorce petition stated that the English court had jurisdiction because none of the provisions of Regulation 2201/2003 Article 3 applied so that residual jurisdiction was provided by Article 7. She later sought financial remedy orders, and an application to invoke the wardship jurisdiction and for a child arrangements order. The husband sought the child's summary return to St Lucia. The wife returned to St Lucia and applied for leave to remove the child to England. The husband initiated an application for financial relief in the Australian courts. He had undertaken to pay the wife's legal costs in England, St Lucia and Australia.

The wife applied to amend her divorce petition to plead that the court had the legal power to deal with her application pursuant to Article3(1)(a) on the basis that the parties were last habitually resident in England and she resided there. She argued that her habitual residence changed to England on the day she decided to stay there and begin divorce proceedings.

The court found that it was plain on the facts that the parties were not last habitually resident in England. They were last habitually resident in St Lucia. She could not satisfy the provisions of Article3(1)(a) (see paras 24-25 of the judgment).- Her application to amend the divorce petition failed.

The wife's relocation to England was not pre-planned and purposeful. It was a change of mind during a holiday. The wife was not habitually resident in England when she started divorce proceedings and the new ground proposed by the amended petition could not be made out and was not allowed. There was no jurisdictional basis for the making of a maintenance order. The financial remedies could be decided within the Australian proceedings.

The issue of jurisdiction relating to habitual residence in the proceedings under the Children Act 1989 Sch.1 was much harder as the wife and child had been in England for three months by the time of issue. Her application under that Act was stayed

Some principles re-affirmed re habitual residence:

- Where someone was relocating, there was nothing to prevent the acquisition of a new habitual residence contemporaneously with the loss of one's previous habitual residence, *Tan v Choy [2014] EWCA Civ 251, [2015] 1 FLR 492, [2014] 3 WLUK 492* followed, *M v M [2007] EWHC 2047 (Fam), [2007] 2 FLR 1018, [2007] 9 WLUK 7* applied.

- The greater the amount of pre-planning and pre-arrangement for life in the new state, the faster habitual residence would be acquired, *A v A (Children) (Habitual Residence) [2013] UKSC 60, [2014] AC 1, [2013] 9 WLUK 141* and *B (A Child) (Habitual Residence: Inherent Jurisdiction), Re [2016] UKSC 4, [2016] A.C. 606, [2016] 2 WLUK 103* followed.

NON-DISCLOSURE

Moher v Moher [2019] EWCA Civ 1482

The H was 53 and W 45. It was an 11-year marriage to the point of separation. They had three dependent children. The W worked part time and looked after the home. Since they separated, she has obtained better employment. W said that H had assets of £1.7 million. A clean break was considered necessary due to the H's assault and harassment of the W [he was convicted]. There was a lack of adherence by H to court orders and a failure to provide adequate disclosure. W sought £1.5 million and H proposed W should receive £960,000. The judge essentially accepted the wife's case as to the effect of the husband's failure to provide proper disclosure and rejected the husband's case that he had provided the court with "a true picture of his finances" and of his current difficulties. The order provided that it is "with effect from Decree Absolute". The husband was ordered to pay the wife "a lump sum of £1.4 million by 4.00pm on 25th May 2018". It was additionally provided that, if the husband failed to pay all or any part of the lump sum by that date, interest would accrue at the judgment debt rate.

The husband was ordered to pay the wife maintenance pending suit until decree absolute and thereafter periodical payments at the rate of £22,000 pa until the *later* of "the grant of a get" or "the payment in full of the lump sum together with any interest accrued thereon".

An order was also made under s.10A of the Matrimonial Causes Act 1973 (the 1973 Act) prohibiting the husband from applying for decree absolute until a declaration had been filed by the parties that they had taken such steps as were required to dissolve the marriage by means of a G

The H appealed the order arguing that there was no evaluation of the H financial resources nor a reasoned explanation for the lump sum award to W of £1.4 million. The thrust of the argument on appeal was that a J is required to evaluate the scale of the undisclosed wealth by providing a figure or a bracket of figures [NG v SG (Appeal: Non Disclosure) [2012] 1 FLR 1211, in particular [16(iii)], in which Mostyn J said: "If the court concludes that funds have been hidden then it should attempt a realistic and reasonable quantification of those funds, even in the broadest terms."

The core issue was whether, in the event of non-disclosure by a party, the court had to give a precise figure or bracket for the undisclosed wealth before making a financial remedies order. The authorities pointed away from any such obligation, *F v F (Divorce: Insolvency: Annulment of Bankruptcy Order) [1994] 1 FLR 359, [1993] 10 WLUK 156* applied, *Baker v Baker [1995] 2 FLR 829, [1995] 4 WLUK 160* and *Behzadi v Behzadi [2008] EWCA Civ 1070, [2009] 2 FLR 649, [2008] 10 WLUK 159* followed.

To propose that the court should attempt quantification of non-disclosed resources did not mean that it was obliged to do so, even when the evidence was insufficient to support such an exercise, *NG v SG (Appeal: Non Disclosure) [2011] EWHC 3270 (Fam), [2012] 1 FLR 1211, [2011] 12 WLUK 318* applied.

To impose such a requirement on the court in all cases of non-disclosure would be contrary to the overriding objective and was likely to impede its task of achieving a fair outcome. Instead, the court's approach should be:

- To seek to determine the extent of the financial resources of the non-disclosing party, as required by s.25.

- To draw such adverse inferences as were justified, having regard to the nature and extent of the party's failure to engage properly with the proceedings; however, that did not extend to conducting a disproportionate enquiry or engaging in speculation, *Petrodel Resources Ltd v Prest [2013] UKSC 34, [2013] 2 AC 415, [2013] 6 WLUK 283* followed.

- That there was no requirement to make a specific determination as to either a figure or a bracket, *Behzadi* followed.

- When appropriate, to infer that resources were sufficient or were such that the proposed award represented a fair outcome, *Al-Khatib v Masry [2002] EWHC 108 (Fam), [2002] 1 FLR 1053, [2002] 1 WLUK 655*, *Ben Hashem v Ali Shayif [2008] EWHC 2380 (Fam), [2009] 1 FLR 115, [2008] 9 WLUK 355* and *NG v SG* applied.

That approach reflected the need for the court to ensure that the non-discloser did not obtain a better outcome than that which would have been ordered if they had complied with their disclosure obligations (see paras 3, 65, 67, 70, 72-73, 77, 79-82, 84-91 of the judgment).

A financial remedies judgment should contain an evaluation of the parties' resources and a reasoned explanation of the award by reference to each of the s.25 factors. That was not only to demonstrate that the judge had had regard to those factors, but also to enable the parties to understand the conclusions underpinning the ultimate award. Even in non-disclosure cases, the judge should provide a schedule of the parties' visible assets and should clearly set out how the award had been calculated (paras 113-114, 116).

PERIODICAL PAYMENTS

O'Dwyer v O'Dwyer [2019] EWHC

The husband and wife had married in 1988 and had four grown-up children. The husband was 62 and the wife was 60. The husband ran a successful business as a McDonald's franchise and the family had enjoyed a good standard of living. At the financial remedies hearing, the parties agreed a schedule of assets that included the net value of the business (after CGT, capital expenditure to improve the appearance of the restaurants etc) was £2.409 million and resulted in a capital distribution of some £3 million to each party. The judge also found that the income of nearly £1 million a year produced by the business was the product of matrimonial endeavour and that therefore the earning capacity of the business was matrimonial property to which the sharing principle applied. He ordered the husband to pay periodical payments of £150,000 per year until the death of either party, the wife's remarriage, or the husband's 66th birthday.

The husband appealed against a periodical payments order imposed on him following divorce proceedings with his wife. The Court of Appeal had not given judgment in *Waggott* at the time that the present case was determined, and so it had not been available to the judge at first instance.

The appeal was allowed. The judge had erred in applying the sharing principle to the income produced by the husband's business. Following *Waggott v Waggott [2018] EWCA Civ 727,*

[2019] 2 WLR 297, [2018] 4 WLUK 81, it was clear that an earning capacity was not matrimonial property: it resulted in the generation of property after the marriage.

Except for rare compensation cases, an award of periodical payments had to be based on properly analysed arithmetic reflecting need, albeit that the judge still had a significant margin of discretion as to how generously the concept of need should be interpreted.

Reasonable needs of the wife: the judge had also erred in concluding that his approach to earning capacity being matrimonial property led to a true determination of the reasonable needs of the wife. Rather, his task had been to assess the reasonable needs of the wife and then to assess whether the capital provided to her was sufficient. He should not have moved on to consider an award of periodical payments unless he found that the capital remaining in her hands, after providing for her reasonable housing and other assessed capital needs, was insufficient to provide for her income needs (para 26).

In particular, judges should consider: (a) the recipient's needs; (b) the income that the recipient's capital would generate; and (c) whether the recipient's capital should be amortised and, if so, from what date.

The correct figure for periodical payments to be made by the husband was £68,000 per annum (paras 36-42, 45-46).

There is a judicial obligation to analyse the budgets that the parties put forward and this must be in the judgement.

This hearing had been listed for only a day, causing further delay, and he stressed that there is a general duty on counsel and solicitors to inform the court if a time estimate is plainly incorrect.

ENFORCEMENT

Akhmedova v Akhmedov [2019] EWHC

The wife had obtained an order for the husband to pay her £453 million in matrimonial proceedings, but attempts to enforce the award failed. The husband owned a yacht worth approximately €250 million, which was moored in Dubai. After the marriage ended, he arranged for ownership of the yacht to be passed between various companies he owned and, in breach of a freezing order against those companies, the yacht was transferred to the sixth respondent. In an earlier decision, the court ordered that the wife was the legal and beneficial owner of the yacht with immediate effect. It also found that the sixth respondent was the husband's alter ego and ordered it to transfer the yacht into the wife's name, or pay US$487 million in default of transfer. The sixth respondent failed to comply. An injunction was then granted to prevent it from disposing, dealing or diminishing the value of its assets, including the yacht, pending further order. The yacht was under arrest in Dubai, but the wife's application in Dubai for recognition of the English court orders was rejected. Her appeal against that decision was pending. She also commenced proceedings in the Marshall Islands, where the yacht was registered, to re-register it in her own name, and had obtained injunctive relief in Liechtenstein against the sixth respondent. However, before that injunction could be served the wife was required to provide CHR five million, which she could not afford. An appeal against that monetary requirement was pending.

The application: an application for injunctive relief relating to a Liechtenstein establishment.

Knowles J's judgment granting a wife, Ms Akhmedova ('W') mandatory and prohibitory injunctions against one of the ciphers/alter-egos of her husband, Mr Akhmetov: "Straight" (the 6th respondent in the substantive proceedings). The judge also granted W's application to name the *de facto* directors of Straight in a penal notice for enforcement purposes.

The judgment contains in-depth analysis of the rules on service overseas and the application of penal notices on directors of corporate bodies.

The court could not avoid compliance by simply refusing to engage and the court should take whatever steps it could to make the earlier orders effective. As a result, the application was treated as being on full notice.

RULE 9.17(2) – INTERPRETATION

Shokrollah-Babaee v Shokrollah-Babaee [2019] EWHC 2135 (Fam)

In the course of the financial remedy and subsequent enforcement proceedings there had been at least 15 hearings and W and H had spent more than £2.2 million on costs. On the second day of the hearing, during H's evidence in chief, H that Holman J had in fact conducted the FDR in December 2017. Holman J immediately stopped the Husband's evidence to consider this issue.

Holman J was clear that while he had no recollection of the FDR, had he been aware that he had conducted the FDR he would not have commenced the hearing. Both W and H urged that Holman J should continue the hearing. H argued that using the overriding objective rule 9.17(2) Family Procedure Rules (FPR) 2010 could and should be interpreted to permit this on the basis both parties sought for Holman J to continue the case, the hearing was well under way and costs had been incurred.

Rule 9.17(2) states: "The judge hearing the FDR appointment must have no further involvement with the application, other than to conduct any further FDR appointment or to make a consent order or a further directions order."

The matter came before Holman J in July 2019 for a final hearing of enforcement proceedings by W, with a cross-application by H to vary the substantive financial remedy order. Holman J considered the use of "must" in rule 9.17(2) meant that it was mandatory and excluded discretion. While noting that "application" was not defined in rule 9.17(2), rule 9.1 FPR 2010, he stated: "The rules in this part apply to an application for a financial remedy." Financial remedy was defined in rule 2.3 FPR 2010 as including a "financial order" that included a variation order. Holman J concluded, therefore, that a judge who heard privileged matters at an FDR could not hear subsequent applications in the case, including enforcement applications.

Holman J further considered the authority of *Myerson v Myerson*. While noting that the case did not deal with issues of enforcement or variation and so was *obiter* on the issue, he was persuaded by Thorpe LJ's clear indication that issues of enforcement and variation could not be listed before the FDR judge. While there had been some discussion of the issue of waiver in Myerson that was again *obiter*, the comments were in the context of subsidiary issues rather than conflicted and polarised issues such as an enforcement and variation application. Holman J concluded that if there were to be any suggestion that the waiver were permitted, it should be written into the FPR. Holman J ordered the matter be listed afresh before another judge for hearing.

VARIATION OF PERIODICAL PAYMENTS

Joy v Joy [2019] EWHC 2152 (Fam)

The Husband was age 60 and the Wife 53. The parties had cohabited from 2003, married in 2006 and separated in 2011. The parties had three children, aged 13, 12 and eight. Divorce

proceedings were protracted as a result of H denying the jurisdiction of the courts of England and Wales. At the conclusion of the final hearing in 2015, Sir Peter Singer had adjourned W's capital claims and ordered H to pay periodical payments of £120,000 per annum and £334,263 towards W's costs.

Three months after the 2015 order was finalised, H applied to vary the periodical payments. In a judgment dated 11 August 2017 Sir Peter Singer declined to vary the order. W's capital claims were restored for hearing. Following the death of Sir Peter, the matter was allocated to Cohen J.

By the time of the hearing, W's financial position was dire. There were very substantial arrears of maintenance, H had not paid the costs order and she had significant debts. H argued that W's capital claims should be dismissed. He argued that there was no evidence the trust would provide him with any money, a continued adjournment offended the clean break principle and the overriding objective - an adjournment - was against the body of authority on the adjournment of claims and was contrary to the European Convention on Human Rights (ECHR).

Cohen J was satisfied that the authorities to which he was referred by H did not deal with an expectation of inheritance or of a bonus or gratuity. He found that against the factual background dismissing W's capital claims was a matter of last resort. He was not so pessimistic about the future ability or likelihood of H receiving funds to take that step. He therefore adjourned W's capital claims on the basis that they were to be dismissed unless an application to restore them was made by 31 July 2022. Cohen J ordered H to provide financial disclosure to W on an ongoing basis to enable her to form a view as to whether or not to restore her claim.

Cohen J took into account that the case had to be seen against its factual background and Sir Peter Singer's previous judgments in the case. In particular:

- The judge found that H settled a trust with a very large sum of money.
- H and his children were the sole beneficiaries of the trust until H was irrevocably excluded in November 2013 after the marriage had broken down. Although the children were not currently beneficiaries they could be restored as beneficiaries and were not excluded. There were no other beneficiaries of the trust.
- The judge found H's evidence to be blatantly dishonest and designed to obscure the past, present and future.
- The judge was confident that in some manner and at some time, which he could only surmise, H would benefit again from the trust.
- W had nothing and was destitute or near to it.
- H, through the assistance of his friends, continued to enjoy a comfortable life.

PRE-NUPTIAL AGREEMENT

Ipekci v McConnell [2019] EWFC 19

The wife was a wealthy American heiress with trust interests worth at least $65 million; the husband was a hotel concierge earning £35,000 a year gross. They were married for 11 years and had two young children. The family home was a comparatively modest property,

in W's name, worth £1.675 million. H had no assets except for a share in a Turkish property worth £50,000. He had £100,000 worth of debt. Before getting wed, the couple had entered into a pre-nuptial agreement.

The agreement had been drafted by W's lawyer and it was stipulated that the laws of the State of New York would govern the agreement irrespective of where either party was living or domiciled. H received "independent" advice from an English lawyer (who had previously acted for W in an earlier divorce) who could not advise on New York law. Owing to the circumstances existing at the time of the separation, the effect of the pre-nuptial agreement was that H got nothing.

This was an application for by H for a needs-based order as the pre-nuptial agreement failed to provide for his reasonable needs.

Mr Justice Mostyn heard evidence that the agreement would be given little weight, if any, in New York thanks to a defect in the agreement. He noted that H had had no legal advice about the effect of New York law, that the lawyer who had advised H had been conflicted and that the agreement simply did not meet any of H's needs. As a result, Mostyn J concluded that it would be wholly unfair to hold him to the pre-nuptial agreement.

Mostyn J went on to find that, on the balance of probabilities, the trustees of a trust that W was the sole beneficiary of, would make funds available to her to satisfy an award. Interestingly, Mostyn J spoke of this not being "judicious encouragement" but a "finding of a future fact"; in cases of this type, he said, the concept of judicious encouragement should be abandoned. Making a needs-based award, Mostyn J ordered W to pay H a lump sum of £1.33 million, which included a Duxbury fund of £445,000 and a housing fund of £750,000. The housing fund was subject to a chargeback of £375,000 enforceable on H's death.

In making the award, the judge took into account that during the marriage the couple had had a fairly high standard of living, H had no savings or pensions, the children should be able to stay with H in a reasonable home and that W would support the children. He concluded that H needed £50,000 a year, and that W should meet the shortfall between that and H's earnings.

Radmacher tells us that a pre-nuptial agreement must meet the parties' "real needs" but doesn't explain what that means. In *Kremen v Agrest*, Mostyn J had interpreted it as "that minimum amount required to keep a spouse from destitution". However, this assumes a valid prenuptial agreement. Where the agreement is fatally flawed, as in this case and in *Kremen* itself, the courts will be more generous and look at the standard of living during the marriage among other things.

LAST OPPORTUNITY TO CHANGE THE JUDGE'S MIND

H v T (judicial change of mind) [2018] EWHC 3962 (Fam)

Following the circulation of a draft judgment but before handing the judgment down, the judge had been asked by the wife to reconsider his conclusions on the ground that there was a significant and material omission in the figures

The judge agreed to re-visit his decision and invited further written submissions from both parties before a further hearing was held. The judgment helpfully sets out the applicable law concerning a judicial change of mind. The essence is that, when a formal judgment has not been handed down (and with due regard being had to L and B (children) [2013] UKSC 8), there is nothing to prevent a judicial change of mind provided there has been a careful reconsideration of the original decision.

FINANCIAL RELIEF

Vilinova v Vilinov & anor [2019] EWHC 1107 (Fam)

The husband (56) and the wife (47) were both Russian, and were married in Russia in1991. The parties had three children, although at time of the final hearing only one was under the age of 18. W moved to England in 2011 to allow their youngest child to go to school as a day boy. During the marriage, H became very wealthy (para 19), although, as he did not engage with proceedings, the extent of his wealth was not known (it was estimated very conservatively at £22 million (para 78)).

H set up "Hinaly" to manage his wealth in 2006 (para 21). He was initially the sole shareholder and sole director, although by 2014 he was neither and the company was owned by a trust (of which the parties' children were beneficiaries). That said, there was evidence of him controlling Hinlay's money as late as 2016 (para 26).

The marriage broke down in 2013 and in 2016 the parties obtained a divorce in Russia. H pressured W into agreeing the terms of the divorce, namely that W retained the family's house in England and her own assets – but nothing else. W received no legal advice, did not know what she was signing and was "set up and ensnared by the husband" (para 34). Thereafter, H remained in Russia with the parties' youngest child and W in England.

In 2013 the parties purchased a property in England. W's case was that this was purchased by H as a gift for her and the children (para 46). However, in early 2013, W signed a loan agreement stating that she owed Hinaly £2 million (para 25). In October 2013, W signed another document confirming the loan agreement, amending the repayment date (para 49). At this point, H was the director of Hinaly.

The case concerned a claim by W against H for financial relief under Part III of the Matrimonial and Family Proceedings Act 1984.

While W accepted that she signed the loan agreements which stated that she owed £2million to Hinaly, her position was that H had told her that the agreement was for tax purposes, the house was a gift and she would never be asked to repay the £2 million (para 46).

Holman J found that both loan agreements were a sham and the £2 million was a gift (para 55). First, he found that signing the second agreement (October 2013) did not impose an additional burden of proof on W as the two agreements were to be considered together (para 50). Secondly, he assumed that Hinaly did provide the money for the purchase, although there was no direct evidence of this (para 51). However, crucially, Holman J accepted W's account of H's representations to her about the loan – that it was a gift. Next, he found that H, as director, *"*had the capacity to make collateral statements and representations*"* (para 52). Further, he found (citing National Westminster Bank Plc v Jones and others *[2001] 1 BCLC*) that Hinaly, via the husband, had no intention of enjoying their rights and enforcing the loan: it was, therefore, a gift. Finally, as W relied on this representation, she shared this intention (para 54).

Consequently, (citing Snook v London and West Riding Investments Limited *[1967] 2 QB 786*) Holman J found that (para 55): "On the basis of the husband's representations and statements, the agreement was intended to give to third parties, such as HMRC, the appearance of creating between the parties legal rights and obligations – viz. a repayable loan – different from the actual legal rights and obligations (if any) which the parties intended to create."

He made a declaration that the loan agreements were a sham and that W was not indebted to Hinaly (para 59), in order to prevent Hinaly from bringing any claim against W in the future (as it had threatened to do) (para 58).

Holman J was satisfied under s.16(2) of the Matrimonial and Family Proceedings Act 1984 that it was appropriate to make an order for financial relief (para 71). In particular, he noted that W would not receive any money from Russian proceedings (para 65), but would have received substantive financial relief had proceedings been carried out properly.

In deciding the size of the award, Holman J addressed the s.25 factors (paras 74-87). He found that H's lack of disclosure meant he could not properly assess his wealth (para 76), but estimated it "very conservatively" at £22 million (para 78). He found W's net assets to be £1,643,00 (para 74). He also found that W's housing needs were already met and her income needs would be met by a Duxbury fund of £1.1 million (para 81).

He then reviewed the law under Part III as set out in Hammoud v Al Zawawi [2019] EWHC 839 (Fam) and noted that: first, a claimant is not limited to a minimum amount required to overcome injustice; secondly, she should not receive more than she would have under English proceedings; thirdly, where connections to England are "very strong" the application could be treated as if it were in English proceedings (para 89).

Holman J therefore determined that the award should be somewhere between the £10 million she would have received under the sharing principle in English proceedings (as there is an element of sharing in Part III proceedings (para 91) and the minimum £1.1 million (para 90). He concluded that £5 million, or 30%, would be appropriate (para 93).

Finally, he made an order than Hinaly and H were jointly and severally liable for £170,000, or 70%, of W's costs (para 99).

Vasilyeva v Shemyakin [2019] EWHC 932 (Fam)

H and W were both of Russian origin. They married in Moscow on 26 April 2002 and spent the majority of their married lives there. They had one daughter, born on 22 January 2005. In 2011, H was arrested on suspicion of fraud against the Bank of Moscow. It was not clear to the English court what were the precise details of the allegations, or even whether H had been charged, convicted in his absence or sentenced. It was common ground, however, that if he were to return to Russia, H would likely be imprisoned. Following H's 2011 arrest, he came to the UK and claimed political asylum, while W and their daughter remained in Moscow until 2014, at which point they were granted visas to live in the UK. There was a dispute as to what extent W had ever lived in London. She divided her time between London, Russia and Tenerife.

Financial remedies proceedings in Russia eventually ended in what appeared to be an agreed order, although there was a lack of certainty on this point. W claimed that the final order left her with £1.64 million of marital assets and H with £1.93 million. Adding in non-marital assets, W claimed to be left with £1.68 million and H with £3.64 million. H claimed, however, that W had received £2.21 million of marital assets to his £1.93 million, and including non-marital assets, W received £3.131 million and the £3.64 million.

W issued her application for leave to issue a claim under Part III MFPA 1984 on 7 December 2018. Williams J was concerned with an application for leave to issue a claim under s.13 Matrimonial and Family Proceedings Act 1984, which would enable the applicant to apply for financial relief in England and Wales following a divorce abroad. The case offers further

guidance on the meaning of ‘substantial ground’, which is the test for granting leave under s.13(1) MPA 1984.

Williams J heard submissions from both parties on the s.16 factors, but expressed concerns that he was being asked to consider matters with a level of detail that was inappropriate for this stage of proceedings, and better left to a full hearing, commenting that there ‘is a danger that one commences the sort of detailed (or rigorous) evaluation that it is intended should take place once leave has been granted’.

The starting point for any consideration of what was meant by ‘substantial” was the judgment of Lord Collins in the leading authority of Agbaje v Agbaje [2010] 1 AC 628, where it was said that “the threshold is not high, but is higher than ‘serious issue to be tried’ or ‘good arguable case’ found in other contexts. It is perhaps best expressed by saying that in this context ‘substantial’ means ‘solid’.” Following Traversa v Freddi [2011] 2 FLR 272, CA, Williams J stated that it was inappropriate to gloss “substantial” as meaning “more than 50%”. Instead, he reminded himself that in interpreting “substantial” he should consider whether or not “there is something which can sensibly be said to amount to more than substantial issues of fact or law that require determination, more than good arguments, that the application raises substantial issues which as a matter of justice require determination, and that the application is not wholly unmeritorious or capable of being determined by knockout blow”.

Williams J concluded that leave should be granted. Although none of W’s arguments may be sufficient on their own to provide a substantial or solid ground, when taken together, Williams J considered that the wife had demonstrated that there was a substantial ground for leave to be granted.

WHERE CRIME AND FAMILY MEET

By Elise Jeremiah and Ravinder Saimbhi

This talk for family lawyers aims to give practical guidance on when family proceedings crossover with crime and how, as family lawyers, you might best navigate this. Families involved in the family and criminal courts are usually represented by different lawyers who, often, will not be familiar with each other. The reality is that it is often the more difficult cases that span the two – and often at the same time.

THE BASICS: JURISDICTIONS

Criminal courts

Run on an adversarial system – it is generally for the prosecution to prove the allegations against the accused to the criminal standard, so that the magistrates/DJ/jury *are sure* of guilt.

There are certain exceptions to this when the burden or standard of proof will shift. For example, if a defendant raises self-defence, the burden of proof remains on the prosecution but, once raised, the prosecution will have to prove that the defendant was NOT so acting. Another example might be in a matter involving possession of a bladed article; the burden of proving that the defendant had a reasonable excuse for having it will shift to the defence to prove that (to the civil standard, on "the balance of probabilities").

There are strict rules in the criminal court around evidence; for example, how and when hearsay evidence can be adduced or how and when information about the character of the accused might be permitted. Evidence will be either read, if it is not contested, or more often, when it is, the witnesses will give their evidence in chief 'live' and then be cross-examined.

The criminal justice system has to guarantee a fair trial to the defendant. The CJS aims to punish crime, protect the public and rehabilitate offenders. The Criminal Procedure Rules (CrimPR) provide the framework within which criminal cases should be conducted. They do not override statute but in exercising any power given to it by legislation or applying any practice direction or interpreting any rule or practice direction the court must seek to further the overriding objective. The CrimPR were introduced in 2005 as a step towards a consolidated criminal code. They are generally updated twice a year and are published with any corresponding Criminal Practice Direction (CrimPD) on the Ministry of Justice website. In the criminal courts, Justice has to be done and seen to be done.

Family courts

By contrast, the family courts operate on a much more inquisitorial basis and the family court will have the welfare of the child as it's paramount consideration.

The family courts sit in private, but the proceedings are fundamentally conducted in the spirit of openness and full disclosure. Within the court – "what happens in the family court, stays in the family court" – and the documents filed in the proceedings are confidential.

There are certainly significantly fewer restrictions on the admissibility of evidence, which is often a huge culture shock to criminal barristers venturing there.

You will all undoubtedly be familiar with family proceedings and when we refer to them, we include proceedings both under the Children Act 1989 and the Family law Act 1996 (domestic violence).

THE BASICS: INVESTIGATIONS

The police have a duty to investigate crime, secure evidence and apprehend offenders, as well as myriad other responsibilities. It is their job to collate the evidence that may support allegations made, including:

- taking witness statements;
- in allegations of sexual crime or involving children or vulnerable complainants, ABE "Achieving Best Evidence" video statements will be conducted – and usually these will replace 'live' evidence in chief if the matter goes to trial;
- collecting and preserving any physical evidence;
- interviewing suspects under caution to try to obtain their version of events – either under arrest or more commonly these days, on a voluntary basis. This interview is recorded, either in video or audio format and will usually be transcribed for the court and is commonly referred to as the ROTI;
- having forensic evidence analysed; for example, DNA/fingerprints; and
- presenting a file to the Crown Prosecution Service (CPS) to review and make a decision about whether, and if so, which, charges will be brought.

The CPS bears the duty of prosecuting offenders if there is sufficient evidence to provide a realistic prospect of conviction and it is in the public interest to do so. It is independent and makes its decisions independently of the police and government. The CPS will:

- decide which cases should be prosecuted;
- determine the appropriate charges in more serious or complex cases and will advise the police during the early stages of investigations;
- prepare cases and present them in court; and
- provide information, assistance and support to victims and prosecution witnesses.

Pre-charge issues and delay

Often, it will be allegations or concerns raised about physical harm, emotional harm, neglect, sexual abuse, domestic violence or coercive and controlling behaviour which are made, often in the first instance to teachers, carers, child minders, midwives, health visitors, other family members etc. This will result in police and local authorities becoming involved with the individuals, children and families involved. When the police are called to an incident involving a child, they have a duty to inform the local authority and vice versa, where a referral involves the commission of a crime.

When involved together regarding a referral, there will be a process of joint and individual investigation by each agency. Joint strategy meetings will be held to work out and achieve a joint strategy. From hereon though, the police will focus their efforts on investigating the offences and pursuing the perpetrators, while the local authority will take action, as necessary, to protect children at risk of harm.

The local authority when initiating care proceedings will be required to work wherever possible within a strict timetable of 26 weeks. The issue of contact will be very much a live

one – there is a duty to promote reasonable contact between children and their parents, be this supervised or unsupervised, in a contact centre or in the community.

Unfortunately, criminal investigations, particularly in the current climate, can be subject to huge delays. The CJS is creaking under the weight of itself. Under staffed and under resourced, increasingly complex cases involve huge quantities of telephone material and social media records.

The bail regime has changed since April 2017: under the Policing and Crime Act 2017, a release on bail with conditions is only permitted for a period of 28 days beginning the day after the person's arrest. There are cases where this might be extended to three months, beginning with the person's bail start date on the authority of a senior officer. Any further application for an extension must be made to the magistrate's court, but this is only likely in exceptionally complex cases. The exception rather than the rule: if no charging decision is received by the end of that period, the result is that any bail conditions fall away, and the suspect effectively released under investigation. (RUI'd).

Shockingly, most individuals spoken to by police these days are RUI'd – they may be waiting months, if not years, for a decision and will literally receive a letter in the post, a "postal requisition", giving them a date and time for court. This is not just for "non-serious" matters.

Every criminal solicitor I know has drawers full of matters RUI'd: sexual allegations, violent crime and drugs.

According to information obtained through a FOI request by H&R sols in October 2019, based on responses received by 31 police authorities, the number of suspects on bail has dropped dramatically across the country. In 2016-17, 216,178 people were released on bail. This dropped to 43,923 in 2017-18. In that same period, 193,073 people were RUI'd. It's a scandal.

But the impact directly hits family proceedings where these allegations have been raised and suspects RUI'd. There are no protective bail conditions, no idea of when a decision about criminal proceedings may be made or whether criminal proceedings will even be brought.

These delays may impact on timescales in family proceedings. They will almost certainly impact on decisions being made about contact – a suspect may be RUI'd for years. The uncertainty and stress for accusers and accused is immense.

THE PROCESS: WHEN CHARGES ARE BROUGHT

All criminal cases begin in the magistrate's court. There are three types of matters:

- summary-only matters which can only be heard in the MC (for these, the magistrates can impose a maximum six months' imprisonment or up to 12 months in total for more than one offence);

- ether-way matters, which can be heard at the MC if they accept jurisdiction or the defendant can, if they choose, elect a trial by jury and the matter is sent to the Crown Court; or
- indictable-only matters, which must be sent up to the Crown Court. The process of deciding venue is called "the mode of trial" procedure.

The first hearing in the Crown Court is the Pre-Trial Preparation Hearing (PTPH), generally 28 days after sending. It is also commonly referred to as the "pressure to plead hearing". This is the point at which the defendant will be arraigned and required to enter their plea to the counts on the indictment. (The criminal equivalent of the Scott Schedule.)

There is a digital form, the PTPH form, which must be completed in advance of this hearing and which will seek to manage and anticipate as much as possible at this early stage.

If the CPS decides for any reason not to proceed to trial, it may "offer no evidence" before the arraignment and the matter will be "withdrawn". If the CPS decides not to continue and offers no evidence after arraignment, the judge will probably order that s.17 verdicts be recorded.

S.17 Criminal Justice Act 1967 provides: "Where a defendant arraigned on an indictment or inquisition pleads not guilty and the prosecutor proposes to offer no evidence against him, the court before which the defendant is arraigned may, if it thinks fit, order that a verdict of not guilty shall be recorded without **[**any further steps being taken in the proceedings**]**, and the verdict shall have the same effect as if the defendant had been tried and acquitted on the verdict of a jury **[**or a court**]**."

IF THERE IS TO BE A TRIAL …

If the defendant wishes to plead "not guilty", then a timetable to trial and "stage dates" will be set:

- Stage 1 – 70 days from sending (or 50 for defendant in custody) – is the date by which the prosecution must serve their case.

- Stage 2 – (usually) 28 days after Stage 1 date – is the date by which the defence must serve the defence case statement that sets out the general nature of the defence case.

- Stage 3 – (usually) 28 days after Stage 2 date – the date by which any disclosure issues should be raised by the defence if outstanding.

- Stage 4 (usually) 28 days after Stage 3 date – the date by which the prosecution should have responded to outstanding disclosure requests.

A trial date will be given at this hearing. This will be either a "fixed" date, a "fixed floater" or a "warned list". There may be many, many months before that trial date. And a warned list trial may not "come in" during that warned list window and so it will go off to a new warned list, again, many months away. The timetable may be adjusted/shortened to fit into the timescale available before the trial date.

You will have realised by now why, by the time a family/care case reaches the point of a fact-finding hearing, you may not have all the material or know the outcome of any criminal trial. The trial may still be pending. In some cases, the charging decision might not even have been reached yet.

Sometimes parents will file statements in which they make admissions to certain conduct that assists them in those proceedings or to their contact. The family file, remember, is private. Those statements cannot be introduced into the criminal proceedings and a different statement put forward without any admissions at all.

Acquittals may be as important within family proceedings as convictions, especially in potential private child cases where the father is claiming that DV allegations have been made without any truth in them.

What should I look for?

Once at the Crown Court, the solicitors, barristers, judges and clerks involved in a case are granted access to/invited to access the Digital Case System (DCS), a centralised system

that holds all the information for the trial. It charts the progress of the trial from the first appearance at the Crown Court to the sentencing, and will usually include all the case papers, including (not an exhaustive list!):

i. the initial police summary (the MG5)

ii. the magistrates court sending sheet/BCM form

iii. any basis of plea, if one is tendered

iv. the witness statements

v. the exhibits – including photographs and the ROTI

vi. sketch plans or maps or locus images, where appropriate

vii. egress links to BWV footage or 999 calls

viii. the ABE transcripts

ix. the defence case statement (which sets out the basis of the defence)

x. any skeleton arguments prepared in the case

xi. any agreed facts documents prepared between the parties, usually at or in advance of the trial

xii. any bail applications and decisions

xiii. some CPS and defence correspondence

xiv. the pre-sentence report (PSR) and sentence outcome

Judges and other parties can make comments on the system and there is a private area reserved for the defence, which may contain the unused or sensitive material.

Generally, as family lawyers, receiving information under the police protocol, where it has been invoked, you will receive as much of the above as is available by the time of the request and this disclosure should be ongoing. What you should also receive is all of the unused material, which won't always be uploaded onto the digital file. This is the material that the family court rules will allow to be used freely but which in a criminal court may be more controlled.

Some items you might look out for in police disclosure, in addition to the above, might include:

i. 999 calls and transcripts

ii. CAD (Computer Aided Dispatch records)

iii. Ambulance CAD's

iv. CRIS reports (Crime Reporting Information System); A mine of potential useful information!

v. CAIT logs (Child Abuse Investigation Team records)

vi. SOIT logs (Sexual Offence Investigating Team records)

vii. Statements taken from witnesses but not used in evidence

IF THE TRIAL ENDS IN A CONVICTION…

If convicted, a sentencing hearing will be held either on the day of the conviction or after an adjournment to allow for the preparation of a Pre-Sentence Report (PSR) by the Probation service. It is up to the trial judge's discretion whether to sentence with a PSR. The PSR is in most cases a helpful document as it contains a synopsis of the offence, the defendant's attitude to the offence, the likelihood of re-conviction, the risk to the public and a recommendation on sentence.

OTHER PRACTICAL CONSIDERATIONS

Sentencing

In cases where family law proceedings are running concurrent to criminal proceedings, there will be a stage in the family law proceedings where, if a party is being considered for the long-term care of the child/children and they are due for sentencing, it is important to establish whether that party may end up serving a custodial sentence. At the very least, it is advisable to know the basic facts of the conviction to be able determine the severity and likely consequence. So, for example, during the course of family proceedings, if a party was being concurrently sentenced for possession with intent to supply (PWITS) class A drugs, the judge would wish to know if there was a real risk of imprisonment depending on:

- the circumstances of the conviction, including the quantity and type of the drugs; and
- whether there are previous convictions for the same or similar offences.

An excellent source of information is the Sentencing Guidelines Council website: https://www.sentencingcouncil.org.uk There are now guidelines in place for many offences and this is a useful place to check what the relevant party might be expecting to receive, if convicted or pleading guilty.

Vulnerable witnesses

"Special measures" were adopted in criminal law proceedings by the Youth Justice and Criminal Evidence Act 1999 (YJCEA) and can be introduced if it is successfully argued that the quality of the evidence of the witness would be diminished without them. Special measures are a series of provisions that help vulnerable and intimidated witnesses give their best evidence in court and help to relieve some of the stress associated with giving evidence. They apply to prosecution and defence witnesses, but not to the defendant and are subject to the discretion of the court.

Paragraph 2.20, Part B, of the Code of Practice for Victims of Crime (the Victims' Code) requires prosecutors to give early consideration to making a special measures application to the court, taking into account any views expressed by the victim. A vulnerable or intimidated witness will be eligible for special measures under ss.16 to 33 of the YJCEA. Vulnerable witnesses are defined by s.16 as:

- all child witnesses (under 18 – as amended by s.98(2) Coroners Act 2009 to substitute 17 for 18); and

- any witness whose quality of evidence is likely to be diminished because they:

i. are suffering from a mental disorder (as defined by s.1(2) of the Mental Health Act 1983 and amended into a single definition by s.1(2) of the Mental Health Act 2007;

ii. have a significant impairment of intelligence and social functioning; or

iii. have a physical disability or are suffering from a physical disorder. (While some disabilities are obvious, some are hidden. Witnesses may also have a combination of disabilities. They may not wish to disclose the fact that they have a disability during initial and subsequent needs assessments. Further, we should be aware that the need for special measures may widely vary from one individual to another, for example different witnesses on the autistic spectrum may have very different needs from each other.)

Intimidated witnesses are defined by s.17 YJCEA as those suffering from fear or distress in relation to testifying in the case. Complainants in sexual offences are defined by s.17(4) as automatically falling into this category unless they wish to opt out. Witnesses to certain offences involving guns and knives are similarly defined as automatically falling into this category unless they wish to opt out.

S.101 Coroners and Justice Act 2009 inserted a new s.22A into the YJCEA making special provision for adult complainants in sexual offence trials in the Crown Court. The section provides, on application by a party to the proceedings, for the automatic admissibility of a visual recorded statement as evidence in chief under section 27 of the YJCEA, unless this would not be in the interests of justice or would not maximise the quality of the complainant's evidence.

S.28 of the YJCEA, allowing for pre-recorded cross examination of witnesses, has been piloted and at present is undergoing a second round of more detailed piloting with a view to potential bringing the process into practice across the country in the future.

Being eligible for special measures does not mean that the court will automatically grant them. The court has to satisfy itself that the special measure or combination of special measures is likely to maximise the quality of the witness's evidence before granting an application.

We should all by now be very familiar with the provision for ‘vulnerable witnesses’ and in particular Practice Direction 3AA (updated November 2017) (see www.justice.gov.uk)

www.theadvocatesgateway.org provides practical guidance on vulnerable witnesses and defendants, including a range of toolkits providing general good practice guidance when preparing for trial in cases involving a witness or defendant who is vulnerable or with communication needs. At present, there are 18 toolkits available but two are in the process of review: general principles when questioning witnesses and defendants with a mental disorder; and working with traumatised witnesses, defendants and parties.

In the criminal courts, advocates are required to have completed the vulnerable witness training programme before conducting advocacy involving vulnerable witnesses and although it’s not currently compulsory, many judges now will ask whether trial counsel has done it.

Questioning is a highly tuned practical skill that criminal practitioners have in abundance and these skills transfer well to fact-finding hearings.