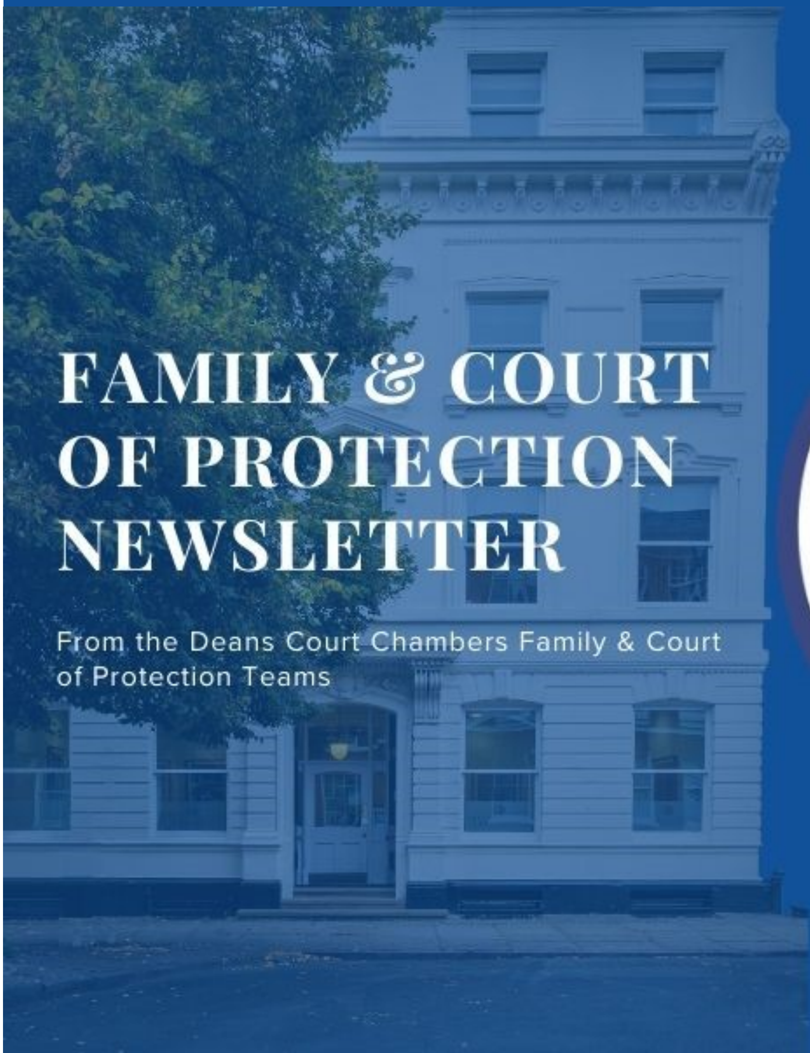
DEANS COURT
CHAMBERS



Autumn Edition 2023

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EDITORIAL

By Michael Jones KC

Welcome to the Deans Court Family and COP team Autumn newsletter. As we prepare for the depressing weather associated with the winter months, the selection of intellectual goodies contained within this edition of the newsletter will no doubt act as a mood enhancer for many of you (a healthy alternative to nicotine and alcohol products). We can offer you an array of top articles, including Joanna Moody providing us with an insightful and really useful approach to how the thorny issue of care orders with children placed at home should properly be approached, and Kate Akerman giving a much needed topical update on the issue of children separately instructing solicitors. Added to that is the COP update, provided by the ever developing academic brain of Jack Barber, our new pupil specialising in COP work and a true rising star. Claire Athis-Schofield has then provided us with another topical and illuminating financial remedies update. Last but (hopefully) not least in the eyes of the reader, is my now standard children law update, which will touch upon several of the areas covered by other articles as part of what I have intended as a comprehensive analysis of recent case law. I hope you enjoy all of the articles, I found all of the contributions by the team for this season's newsletter to be particularly awesome.

The wind of change sweeps the family law landscape, with a now very clear approach being advocated in relation to children placed at home under care orders, and a timely report from the Public Law Working Group in relation to supervision orders. These issues are touched upon in the various articles herewith, but all of us practising in the family arena are becoming increasingly aware of the imperative need to follow the guidance we are provided with from on high and in particular, to attempt to reduce the issues that must be litigated in cases, to what is absolutely necessary. I see the wind of change as being a positive thing in many respects and time will tell what impact the various recommendations of the Public Law Working Group will have.

In the meantime, there have been a lot of fun events taking place on and off circuit, I for one am going to FLBA national conference this month, whilst the recent Cumbria Family Justice Conference was I understand, a great success. Myself and all of the DC team are looking forward to seeing our other counsel and solicitor colleagues and friends at other events over the winter months.

On a more fun note, I am of course going to invite you all to partake in the ever popular (and now officially trademarked) game of 'What the Jackson?!?'. As always, answers need to be sent to me directly via email, with the title being '*WTJ? Answers Autumn 2023*'. This game continues to perplex and stimulate the greatest legal minds in the country; one lucky person who answers all of the questions correctly will selected at random (names pulled out of a flat cap) win a box of over-priced confectionary (this time Celebrations). As always, the rules are simple, just match the quotation from his lordship to the correct neutral citation of the judgment it is taken from.

Good luck….

What the Jackson?!?

‘Where there is any doubt about consent, it will be a matter for the court to judge, giving consideration to all the circumstances. One relevant factor is likely to be the means by which consent has been expressed. Because of the profound consequences of the underlying choice, it is normal for there to be a degree of formality. This is reflected in the preference in FPR 13(11) for consent to be in writing, using Form 101A and with the parental order reporter as witness. Even then, consent can be withdrawn at any stage before the order is made. This degree of formality is not mandatory but its absence should put the court on its guard to ensure that the proffered consent is valid. In the present case, the disputed consent was given orally in the face of the court and via CVP. In that unusual situation, a sharp eye had to be kept on the possibility that the court process might of itself be exerting pressure to the extent that any stated consent was devalued.’

‘In the present case there was a wholesale failure to follow a number of these principles. There was a delay in interviewing, while K remained with carers who believed that she had been abused. The pre-ABE visit was not noted at the time, and the record that was then made was of little value, particularly as the conversation was said to have been approached in the same way as the later interviews. Such indications as K may have given at interview were in response to blatantly leading or forced-choice questions from the officer and even from the intermediary. The overall impression is not of an exercise seeking to understand what if anything K wanted to say, but rather of an attempt to persuade her to repeat something she had already said.’

‘First, it is understandable that the judge directed himself with reference to the persuasive authority of Re G, but it led him to frame the ultimate test as being whether there had been a deliberate exercise of choice by CP. For the reason given in paragraph 45(10) above, that narrowing of the statutory test was an error of law. As a result, he was distracted from considering whether consent on CP's part could be inferred from all the circumstances and whether what he described as acquiescence was not in truth consent that had not been expressly stated: see paragraphs 45(3) and (8).’

Judgment Citations;

Re S (Children: Parentage and Jurisdiction) [2023] EWCA Civ 897

Re S (A Child: Findings of Fact) [2023] EWCA Civ 346

Re C (Surrogacy: Consent) (Rev1) [2023] EWCA Civ 16

Good luck…..

DEANS COURT CHAMBERS

RE C (CHILD: ABILITY TO INSTRUCT SOLICITOR) [2023] EWCA CIV 889

By Kate Akerman

The lyrics from If Only You Would Listen, one of the songs belted out by the talented school children in Andrew Lloyd Webber's School of Rock came to mind when I read this case in the summer holidays. No doubt our esteemed Editor would have immediately called to mind something much more high-brow!

So many children in the work we do as family practitioners have a lot to say and do not feel listened to. The Court and practitioners strive to allow children to feel heard. The Children Act requires the Judge when making decisions about welfare to have regard to the wishes and feelings of the child. Judges will meet children although not for the purpose of obtaining the views of the child. Decisions are made that cannot always give precedence to the views of the child. Often, children acknowledge that and will tacitly allow their Children's Guardian to make recommendations for them. But sometimes, the child himself wishes to have his views known – views which diverge from those of his Guardian - and to put his case through his own solicitor. The judgment of the Court of Appeal in Re C addresses the question of when and in what circumstances a child may instruct his or her own solicitor. It also raises issues about meetings between children and judges. It's a "go-to" case for those practitioners who regularly act on behalf of children, whether in private or public law proceedings; paragraphs 43-71 provide a succinct and digestible summary of the relevant legal provisions.

Background to the case

The case concerned two children, A, a boy now aged 14, and B, a girl aged 13 who had been the subject of private law proceedings. They had been exposed to conflict in their parents' relationship. The children remained in the mother's care although their relationship with her was deteriorating. In 2020, the local authority issued care proceedings seeking to protect the children from that conflict and from the father's behaviour which was seriously alienating them from their mother.

Consultant Psychiatrist, Dr Malcolm Bourne, was instructed as an expert witness and he was very clearly of the view that the father's need for the children to idolise him and disparage the mother was damaging to the children's emotional health. A (then aged 12) presented as someone who talks in an over-adult fashion overtly or unconsciously parroting his father's beliefs and words.

By November 2021, placement at home was untenable and the children moved to separate foster placements where they remain. Dr Bourne was asked to assess whether A, whose views fundamentally differed from the guardian, was competent to instruct his own solicitor. His advice was powerful:

"Whereas I acknowledge and agree that there is bound to be some degree of influence over a child by a parent, I also believe that in this situation, the degree of influence over A by his father is extreme and damaging. The papers that I have read describe the potential for the child to be 'parroting' a parent's beliefs/words, and to act as their mouthpiece. In my opinion, this situation is more insidious and far-reaching than that as A has absorbed a belief system of his father's; it is most damagingly connected with his mother, whom he describes above as having a 'great hatred' of. …

I think that A understands well enough the 'facts' of the process of litigation including the function of the lawyer, judge and Guardian and his role with those. I do not believe that A has a good appreciation of the potential consequences of his involvement in litigation. He essentially saw no risk of difficulty or emotional harm from hearing about, for example, his family members, in the court environment, or reading about them - he said he had asked for my report, for instance.

Whereas I appreciate that instructing his own solicitor would not necessarily mean he would have unfettered access to reports and papers, his lack of such understanding is of concern in the key issue for this report. …

In conclusion then, I would say that the majority of the areas under consideration outlined above lead to a view that A is not competent to instruct his own solicitor. The main arguments 'for' his doing so are his overall intelligence and his strength of feelings about this. However, I would say that his strength of feeling is at least in part based on false beliefs or premises. So although there is something of a balanced answer, I would say that the overall answer is that A is very probably not competent to instruct his own solicitor, on around a 90:10 balance."

After a contested final hearing in late 2021, the judge made Final Care Orders approving plans for the children to remain in foster care, with support by way of individual and family therapy. To that end, father was forbidden from contacting the children for 3 months. Rehabilitation to the mother remained a possibility. The Judge made a raft of findings condemning the father's inability to separate his own needs from those of the children, his total lack of insight into the harm caused by his alienating behaviour to the children, and his lack of respect for court orders. The court was clear that the children knew far more about the proceedings than was healthy for them. The court accepted unhesitatingly the views of Dr Bourne as to A's competency to instruct a solicitor, as he lacked the emotional maturity to do so.

Sadly, within a matter of months, there was further litigation - a discharge application by the mother, prompted by father's unauthorised contact with the children which thereby delayed therapy. Father followed suit with his own discharge application. The father had a spell in custody when he breached the non-molestation order. He published a book entitled Monstrous, Corrupt and Criminal Family Court, with its Social and Health Services, which contained significant personal information about the children, the case and professionals including foster-carers. Injunctions were granted by the High Court and Amazon removed the book from sale.

Dr Bourne was asked to look again at A's competence to instruct a solicitor directly. In September 2022 he said:

"… A already and still talks as if he has excessive responsibility for his own outcomes, again something I believe that he has absorbed and been encouraged to think because of the way his father talks to him.

I believe therefore that there is a very high risk of emotional damage to A if he does instruct his own solicitor yet the outcome is still not what he wants. He will feel even more responsible for this, and potentially for anything his father is upset or angry about. A believes that his own solicitor will represent his views more 'purely' (my word) than a Guardian would and therefore that the outcome of the case is more likely to be agreeable to him. I believe that A is mistaken to think this; this in itself is not surprising in his situation, but I believe this compounds the possible damage just described as it then fuels A's consequent feelings of getting it wrong.

In conclusion then, I would still say that the majority of the areas under consideration outlined above lead to a view that A is not competent to instruct his own solicitor. The main arguments 'for' his doing so remain his overall intelligence and his strength of feelings about this, even if that is in part based on false beliefs or premises. But the origins of those beliefs very much reflect the lack of independence of thought that A has been able, or allowed, to develop. The argument against his having sufficient independence to instruct, and the harm done through assigning him that level of authority and responsibility, is in my opinion very strong, and therefore means that A is not competent to instruct his own solicitor."

Dr Anthony James completed a psychiatric risk assessment of A. He described A as a young 14-year-old who, although giving the impression possibly of being older, is actually quite immature; a child close to and influenced by the views of his father, and a child who would be best supported at school by focusing on normalcy, ie by making clear to him that there is a world outside of the court process etc.

In March 2023, the judge met A at his request and in the company of his solicitor and foster carer. The meeting lasted 1 hour and 25 minutes. A told the Judge he wanted to see court documents, complained about his mother blaming her for him being in foster care, and criticised the professionals involved. He said he would not engage in therapy. There was an interesting exchange as follows:

"J – Are you glad you came to see me or has it not been good? You can be honest. I won't mind.

A - I am not sure what has been clarified.

J – For me, it's always better to see somebody if they want to see me. I am not taking evidence but there will be bits of what you have said to me that will stick with me. I will certainly remember how tall you are and how mature you are. I know that families and lives are not frozen in time. Things happen and things move on. It does not stand still. I hope that there is less of a whirlwind and that it is easier to find a way through. It's a bit like being in a sandstorm. If you are in a sandstorm, you can't see where you are going. Where we have got to now is better than where you were before. But it's not simple. It's important that your voice is heard. It has been helpful for me to see you. It is not necessary that I see every child. I don't need to see every single child. But I think it helps me.

A – To continue your analogy about a sandstorm, I want to give you goggles and a compass.

J – You really are mature. That's very clever."

A few weeks later in April 2023, the father sent an email to the parties complaining bitterly about the dishonest and criminal family system. An hour later, A submitted his own lengthy complaint, describing the system as "sick" and "criminal" and how everyone had got everything wrong, and demanding separate representation.

A note of A's meeting with the judge, together with A's complaint, was sent to Dr Bourne. The expert was not for moving on the issue of litigation capacity [para 23].

The solicitor for the children made an application for separate representation of A. The application acknowledged the views of the experts but prayed in aid A's engagement with the judge at the above meeting and the way in which A understood the proceedings, had articulated pertinent questions, and listened to the answers. On 24th May 2023, the judge heard the application which she granted, concluding, inter alia, that she found A to be mature, to some extent reflective, and intelligent, and that the risk of harm is higher were he not afforded separate representation.

The Appeal

The mother, supported by the Local Authority, sought, and was granted permission to appeal this case management decision. They argued that the judge:

had been distracted by her meeting with A which improperly fed into the forensic process, and she improperly formed her own assessment of A's competence.

had placed insufficient weight upon the clear conclusions of Dr Bourne.

had given insufficient consideration to the extent to which A had been alienated by the father and the impact of this on the child's sufficiency of understanding.

The father interpreted the judge's response to the meeting with A as a U-turn, a lightbulb moment where the judge realised that A was speaking freely for himself, a position which provided further evidence if any were needed as to the father's complete black of insight.

The Children's Guardian argued that:

it would be to create an artificiality if the judge were to cast out her impressions of A from the meeting, which chimed with those of the solicitor.

the judge was right to conclude that A would be more likely to blame others if he did not achieve the outcome he wants if he is unable to instruct his own solicitor.

the logical and perverse consequence of the mother's argument is that A would end up being represented by a Children's Guardian throughout his minority unless he changed his views.

The risk of harm to A's welfare by the case management decision could be mitigated by restricting access to the court documents and not allowing him to be in court throughout hearings.

The Law

As to children instructing solicitors, Jackson LJ takes the reader through the relevant international and domestic provisions:

the United Nations Convention on the Rights of the Child 1989 which has been ratified by the UK although not incorporated into domestic law. Article 12 essentially provides for children who are capable to be able to provide their views and have the opportunity to be heard.

Section 41(1) of the Children Act 1989 requires the Court to appoint a guardian in specified proceedings (eg. care or discharge proceedings) unless satisfied it is not necessary to do so in order to safeguard the child. (NB. If the Court joins the child to non-specified proceedings – typically private law proceedings – FPR r 16.4 requires the Court to appoint a guardian for the child).

Part 16 of the FPR and PD16A govern the representation of children in family proceedings.

Section 1(3)(a) of the Children Act imposes a duty on the court to have particular regard to the wishes and feelings of the child. FPR 16.20(3) imposes the same duty on the guardian.

FPR 16.29 concerns the question of who instructs the child's solicitor – ie. the children's guardian, and by r16.29(1) the solicitor must conduct the proceedings in accordance with the instructions of the guardian.

However, r16.29(2) provides for the scenario whereby the solicitor for the child considers that the child wishes to give instructions which conflict with those of the guardian and the child is able to give such instructions. In these circumstances, the case is conducted in accordance with the child's instructions. The child and solicitor then 'separate' from the guardian who usually continues without legal representation.

Such a solicitor will be a member of the Law Society Children's Panel and they make the decision as to capacity. Usually, expert advice is not necessary. However, this was not a usual case and the child's solicitor, quite properly in the view of the appeal court, made an application so that the matter could be considered by the court, which has the ultimate right to decide whether a child has the ability to instruct a solicitor: Re CT (A Minor) (Wardship - Representation) [1993] 3 WLR. 602, [1993] 2 FLR 278 at 614F.

Surveying the relevant caselaw and rules, Jackson LJ states:

The question for the child's solicitor or (as the case may be) the court is Does this child have the ability to instruct a solicitor in the particular circumstances of the case, having regard to their understanding?

The assessment will be based on a broad consideration of all relevant factors and any opinions from solicitors and experts. The guidance given by Black LJ (as she then was) in Re W (A Child) (Care Proceedings: Child's Representation) Practice Note [2016] EWCA Civ 1051, [2017] 1 WLR 1027 bears repeating:

"Understanding can be affected by all sorts of things, including the age of the child, his or her intelligence, his or her emotional and/or psychological and/or psychiatric and/or physical state, language ability, influence etc. The child will obviously need to comprehend enough of what the case is about (without being expected to display too sophisticated an understanding) and must have the capacity to give his or her own coherent instructions, without being more than usually inconsistent." …

The assessment will be case-specific. It will not be driven by welfare factors, or by a theoretical comparison between protection and autonomy, but by a practical assessment of the child's understanding in the particular context of the case. There are no presumptions and care will be taken not to over-value any particular feature. The consequence of a sound assessment will be that the child's rights and interests are respected and preserved."

Of particular relevance to the facts of this case, Black LJ supra observed:

Caution needs to be exercised before allowing a conclusion that a child was the parents' mouthpiece to deny an older child her own solicitor on the basis that she lacks understanding.

There are difficulties in teasing out whether a child's view is whole or in part the child's independent view or the product of influence.

That a child's view might be misguided does not equate to a lack of sufficient understanding.

There is a danger in becoming embroiled in satellite litigation about the child's understanding, where that is a contentious matter in the main proceedings.

Take account of the risks of the child taking part (or not) in the litigation but do not elevate this to an assessment of welfare.

As to children meeting judges:

The purpose is for the child to meet the judge, not for the judge to meet the child.

The purpose and format fall under the 2010 FJC Council Guidelines for Judges Meeting Children who are Subject to Family Proceedings. Judges should give close consideration to the numbered guidelines. https://www.judiciary.uk/wp-content/uploads/JCO/Documents/FJC/voc/Guidelines_+Judges_seeing_+Children.pdf

Meeting children can be one way of helping them to feel more involved in and connected with the proceedings.

The meeting is not for the purpose of gathering evidence.

It should help the child to understand that it is the Judge who makes the decision, and that the outcome is never the responsibility of the child.

A meeting may also benefit the judge and other family members: it does not change the evidence, but it may illuminate certain aspects of it.

The Decision

Lord Justice Peter Jackson gives the lead judgment, allowing the appeal, discharging the order permitting A to instruct his own solicitor and remitting the case to the first instance judge. The Court concluded that the case management decision was wrong in the "distinctive circumstances" of the case.

What led the judge, who had otherwise dealt with the litigation impeccably, to fall into error? In short, it was her response to the meeting she had with A. And there were 3 errors:

The judge made her own assessment of A's ability to instruct that went way beyond the permissible use of such a meeting. This was an assessment which went to the heart of the decision, and to make matters worse, she did not disclose to the parties what she was minded to do, and so no-one had the opportunity to divert her.

The rationale for her assessment was not sustainable. The judge was impressed by A's use of analogy and language – the goggles and compass to navigate the sandstorm. Further thought would have shown that that was a vivid sign of A's lack of understanding. What A was suggesting was that it was the judge – not he - who needed the compass and goggles, thereby rejecting her assessment of what had gone wrong in the family. To allow A the right to instruct his own solicitor would simply make matters worse, for it gives further armoury to the father and son's campaign to perpetuate a damaging narrative.

The judge concluded that A was very mature and very insightful – totally at odds with the evidence from Dr Bourne and Dr James, and without giving a reason for rejecting their evidence (particularly in circumstances where she had previously unhesitatingly accepted Dr Bourne's assessment).

The judge was distracted by the general observations about exercising caution before depriving older intelligent children of their own representation, leading her to overlook how extreme and effective the father's abuse had so far been. A had not previously had his own solicitor, and nor was this a case as is commonly encountered where a child has formed an unwise view of their own, even if it might be coloured by adult influence.

Kate Akerman

Deans Court Chambers

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CHILDREN AT HOME UNDER CARE ORDERS

By Joanna Moody

Introduction

The very recent Court of Appeal judgment in Re JW (Child at Home under Care Order) [2023] EWCA Civ 944 is an important judgment with which all practitioners in public law should familiarise themselves. In summary it calls into question the necessity and proportionality of making final care orders when the final care plan is one of placement with the child's parents, and instead places greater emphasis on final supervision orders particularly where the level of monitoring and support is the same regardless of the type of order.

Sir Andrew MacFarlane P. in Re JW gives a helpful and detailed description of the differences between a care order and supervision order, and whilst we often use them in our day to day practices it is helpful at this stage to stop and consider the unique nature of these orders, before considering how their usage is about to change.

Care Orders

Sections 33(3) and (4) of the Children Act 1989 provide:

(3) While a care order is in force with respect to a child, the local authority designated by the order shall—

(a) have parental responsibility for the child; and

(b) have the power (subject to the following provisions of this section) to determine the extent to which

(i) a parent, guardian or special guardian of the child; or

(ii) a person who by virtue of section 4A has parental responsibility for the child, may meet his parental responsibility for him.

(4) The authority may not exercise the power in subsection (3)(b) unless they are satisfied that it is necessary to do so in order to safeguard or promote the child's welfare.

Supervision orders

Section 35 of Children Act 1989 provides

(1) While a supervision order is in force it shall be the duty of the supervisor: (a) to advise, assist and befriend the supervised child;

(b) to take such steps as are reasonably necessary to give effect to the order; and

(c) where:

(i) the order is not wholly complied with; or

(ii) the supervisor considers that the order may no longer be necessary, to consider whether or not to apply to the court for its variation or discharge.

(2) Parts I and II of Schedule 3 make further provision with respect to supervision orders.

It is a trite point that the main difference between a care order and supervision order is that under a supervision order a child is not 'looked after', the local authority does not share parental responsibility and cannot direct those with parental responsibility on how to use it. It is often pointed out that final care orders also have the added advantage of independent oversight through an IRO.

Having set out the differences between the two orders, it is important to the understanding of the judgment in Re JW to summarise the relevant Public Law Working Group recommendations leading up to the Court of Appeal's judgment, and its endorsement of those recommendations.

Public Law Working Group (PLWG) Reports

The Public Law Working Group report dated March 2021 is a lengthy document which requires reading in full. However, for the purposes of this article the following paragraphs from the report are relevant (note my emphasis in bold for ease of reference)

158.There is an increased/significant regional variation in the number of children returning home under a full care order, which is of very real concern. There is as yet a lack of clarity as to why, in some areas, this practice is so common and elsewhere so rare. There is a risk that the making of a care order at home provides false assurances to partner agencies because the local authority is neither involved in, nor has a thorough oversight of, the child's day-to-day care.

159. The making of a care order should not be used as a vehicle to achieve the provision of support and services after the conclusion of proceedings. Unless a final care order is necessary for the protection of the child, an alternative means/route should be made available to provide this support and these services without the need to make a care order. This will include clarity as to the legal status of the child following the proceedings, in terms of whether they will be the subject of a child protection plan, or treated as a child in need, with accompanying reviews and services. In Wales, the current statutory guidance is set out in para 116 of the Code to Part 6 of the SSW-b(W)A 2014.

160. The making instead of a supervision order to support reunification of the family may be appropriate. However, there are many concerning issues regarding their use. They have the highest (20%) risk of breakdown and return to court for further care proceedings within five years and there are widespread professional concerns that supervision orders "lack teeth" as well as significant regional variation in their use and variability in the provision of support services.

161. A final care order should also not be used as a method prematurely to end proceedings within 26 weeks artificially to alleviate concerns that the children will be at continuing risk of harm. Any such order should only be made where the local authority can demonstrate that the assessment of any carer of a looked after child meets the criteria of the Care Planning Placement and Care Reviews (Wales) Regulations 2015 or the Care Planning, Placement and Case Review (England) Regulations 2010. This provides that any such placement has to be approved by a senior nominated officer, and can only be approved if, in all the circumstances, and taking into account the services to be provided by the responsible authority, the placement will safeguard and promote the child's welfare and meet their needs.

162. The making of a final care order must be a necessary and proportionate interference in the life of the family. A care order has a very intrusive effect of state intervention, with ongoing mandatory statutory interference not only in the lives of the parents, but in the life of the child, who will have the status in law as a looked-after child and all that goes with this. It can only be justified if it is necessary and proportionate to the risk of harm to the child. Where such an order is made there will be a real prospect of further litigation in the future, because the responsible local authority should regularly review whether the care of the child is such that the order is no longer necessary, and if so an application to discharge the order should be made. In an appropriate case, consideration should be given to the making of a supervision order.'

And at Appendix F:

34. The making of a care order on the basis of a plan for the child to remain in the care of her parents/carers is a different matter. There should be exceptional reasons for a court to make a care order on the basis of such a plan.

35. If the making of a care order is intended to be used [as] a vehicle for the provision of support and services, that is wrong. A means/route should be devised to provide these necessary support and services without the need to make a care order. Consideration should be given to the making of a supervision order, which may be an appropriate order to support the reunification of the family.

36. The risks of significant harm to the child are either adjudged to be such that the child should be removed from the care of her parents/carers or some lesser legal order and regime is required. Any placement with parents under an interim or final order should be evidenced to comply with the statutory regulations for placement at home.

37. It should be considered to be rare in the extreme that the risks of significant harm to the child are judged to be sufficient to merit the making of a care order but, nevertheless, the risks can be managed with a care order being made in favour of the local authority with the child remaining in the care of the parents/ carers. A care order represents a serious intervention by the state in the life of the child and in the lives of the parents in terms of their respective ECHR, article 8 rights. This can only be justified if it is necessary and proportionate to the risks of harm of the child.'

As practitioners we are well familiar with the phrase 'necessary and proportionate', but the language used by the Working Group in its report is striking; there will need to be 'exceptional reasons' and it will be 'rare in the extreme' for final care orders to be made when children are placed at home

It is likely that there will be a seismic shift away from the making of final care orders at home. Our friends in the South are already familiar with the notion that final care orders at home are something of a rarity. However, moving away from care orders at home does raise the question as to the alternative? The simple answer is to ensure that final supervision orders have 'teeth'. Supervision orders have sometimes been dismissed by those representing parents or children as being ineffective or 'toothless'; it was considered that they did not provide any reassurances that the local authority will in fact put in place the necessary support, or, as the writer has experienced, a belief held that a supervision order will 'just be sat on some social worker's desk for 12 months!'

The Public Law Working Group report dated April 2023 'Recommendations to achieve best practice in the child protection and family justice systems: Supervision Orders' makes various recommendations which are designed to give supervision orders 'teeth'. Again it is recommended that the Report be read in full as this article cannot do it justice.

The best practice guidance within that report introduces 6 core best practice principles to be followed and applied when final supervision orders are proposed or may be made. The core principles are:

Partnership with children and families – trusting supportive relationships between children, families and social workers are key. They are central to the plan and plans should be drawn up in partnership. Significant adults from the family and friends' network should also be involved and therefore Family Group Conferences will continue to have an important role to play.

Multi-disciplinary and multi-agency working – the supervision support plan should be drawn up in liaison with various agencies such as health, education, CAMHS, substance misuse agencies, and where necessary, the police

A clear, tailored plan – the supervision support plan needs to clearly set out what support will be put in place for that particular family and how it will aim to reduce the risk factors. It needs to be tailored towards the risk factors in that case or any findings made by the court in respect of the family. What needs to happen to address those risks should be clear and specific. Expectations on both sides should be clear. A supervision order plan in PDF format is set out at Annex A to the Report.

Resource clarity – any funding for support or services must have been agreed prior to the finalisation of the proceedings

Formal, robust review – final care orders are overseen by IROs. There should also be independent oversight of a supervision plan either through an IRO or social work manager independent of the case. Some local authorities are already implementing their own independent review process for final supervision orders. The plan must be regularly reviewed as the risks and needs of the family will change over the course of the 12 months.

Accountability – parents ought to know about the detail of the plan, the outcome of the reviews, and the approach by the local authority to be taken if there are concerns about the progress of the plan.

JW (Child at Home under Care Order) [2023] EWCA Civ 944

In Re JW, the judge at first instance had made a final care order on the basis of the children remaining with their mother. The threshold was based on that fact that the father posed a sexual risk and there were concerns as to the mother's ability to understand and accept that. A final care order had been proposed by the local authority and supported by the children's guardian

The parents appealed to the Court of Appeal and the appeal was allowed. A supervision order was made instead and the local authority was directed to file a supervision support plan.

Sir Andrew McFarlane P observed that the decision of the first instance judge had taken place before the PLWG had filed its April 2023 report.

Within his judgment the President formally endorsed the recommendations of the PLWG and summarised them as follows (again my emphasis):

a) a care order should not be used solely as a vehicle to achieve the provision of support and services after the conclusion of proceedings;

b) a care order on the basis that the child will be living at home should only be made when there are exceptional reasons for doing so. It should be rare in the extreme that the risks of significant harm to a child are judged to be sufficient to merit the making of a care order but, nevertheless, as risks that can be managed with the child remaining in the care of parents;

c) unless, in an exceptional case, a care order is necessary for the protection of the child, some other means of providing support and services must be used;

d) where a child is to be placed at home, the making of a supervision order to support reunification may be proportionate;

e) where a supervision order is being considered, the best practice guidance in the PLWG April 2023 report must be applied. In particular the court should require the local authority to have a Supervision Support Plan in place.

The risks in Re JW were slow burning and the plan for monitoring and support would be the same under a care order or supervision order. Furthermore the judge's refusal to extend the proceedings further, as an alternative means, was considered to be justified.

Conclusion

In the author's experience the impact of Re JW is already feeding through to final decisions being made within the Family Courts. Practitioners must carefully consider whether care orders are indeed necessary and proportionate or whether a detailed and robust supervision plan affording the same level of support and monitoring will sufficiently safeguard the child.

Joanna Moody

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DEANS COURT CHAMBERS

CHILDREN LAW UPDATE

By Michael Jones KC

Obviously, this article is the one that all readers have been eagerly anticipating. I ask you, what could be more fun than taking time out of your already busy day to read a public law update? The obvious question is nothing (save for base jumping, sky diving, hele-skiing and eating Frosties whilst watching The Lincoln Lawyer on Netflix). I am going to kick this update off with the proverbial 'hot potato' of children placed at home under the auspices of full care orders, which has now been dealt with by the Court of Appeal in JW (Child at home under care order) [2023] EWCA Civ 944. Within the judgment, the President refers to the Public Law Working Group report and endorsed its recommendations. The report concluded as follows;

'Care order with child at home

158. There is an increased/significant regional variation in the number of children returning home under a full care order, which is of very real concern. There is as yet a lack of clarity as to why, in some areas, this practice is so common and elsewhere so rare. There is a risk that the making of a care order at home provides false assurances to partner agencies because the local authority is neither involved in, nor has a thorough

oversight of, the child's day-to-day care.

159. The making of a care order should not be used as a vehicle to achieve the provision of support and services after the conclusion of proceedings. Unless a final care order is necessary for the protection of the child, an alternative means/route should be made available to provide this support and these services without the need to make a care order. This will include clarity as to the legal status of the child following the proceedings, in terms of whether they will be the subject of a child protection plan, or treated as a child in need, with accompanying reviews and services. In Wales, the current statutory guidance is set out in para 116 of the Code to Part 6 of the SSW-b(W)A 2014.

160. The making instead of a supervision order to support reunification of the family may be appropriate. However, there are many concerning issues regarding their use. They have the highest (20%) risk of breakdown and return to court for further care proceedings within five years and there are widespread professional concerns that supervision orders "lack teeth" as well as significant regional variation in their use and variability in the provision of support services.

161. A final care order should also not be used as a method prematurely to end proceedings within 26 weeks artificially to alleviate concerns that the children will be at continuing risk of harm. Any such order should only be made where the local authority can demonstrate that the assessment of any carer of a looked after child meets the criteria *of the Care Planning Placement and Care Reviews (Wales) Regulations 2015 or the Care Planning, Placement and Case Review (England) Regulations 2010. This provides that any such placement has to be approved by a senior nominated officer, and can only be approved if, in all the circumstances, and taking into account the services to be provided by the responsible authority, the placement will safeguard and promote the child's welfare and meet their needs.*

162. The making of a final care order must be a necessary and proportionate interference in the life of the family. A care order has a very intrusive effect of state intervention, with ongoing mandatory statutory interference not only in the lives of the parents, but in the life of the child, who will have the status in law as a looked-after child and all that goes with this. It can only be justified if it is necessary and proportionate to the risk of harm to the child. Where such an order is made there will be a real prospect of further litigation in the future, because the responsible local authority should regularly review whether the care of the child is such that the order is no longer necessary, and if so an application to discharge the order should be made. In an appropriate case, consideration should be given to the making of a supervision order.'

The President concluded that;

'*The present situation, in which the law is applied in a markedly different manner in two halves of England and Wales, cannot continue. There needs to be a common approach throughout England and throughout Wales. What that common approach should be has been determined through consultation and discussion by the multidisciplinary membership of the PLWG. The recommendations at paragraphs 158 to 162, and the Best Practice Guidance at paragraphs 34 to 37, of the PLWG March 2021 report, and Appendix C of the April 2023 report on supervision orders, which have already had extra-curial endorsement, I now formally endorse in a judgment of this court. They must be applied in all cases. The approach taken by the PLWG is no more than the logical development of the earlier caselaw, once account is taken of the need for proportionality and once it is understood that, following Re DE, there are only procedural differences between the power of removal where there is a care order or where there is none. As Hale J/LJ made plain, it has never been the case that a care order should be used as a means to ensure that a local authority meets the duties that it has with respect to children in need in its area, nor should it be used to influence the deployment of resources.*

The President then went on the summarise the PLWG's recommendations and guidance as follows;

a) a care order should not be used solely as a vehicle to achieve the provision of support and services after the conclusion of proceedings;

b) a care order on the basis that the child will be living at home should only be made when there are exceptional reasons for doing so. It should be rare in the extreme that the risks of significant harm to a child are judged to be sufficient to merit the making of a care order but, nevertheless, as risks that can be managed with the child remaining in the care of parents;

c) unless, in an exceptional case, a care order is necessary for the protection of the child, some other means of providing support and services must be used;

d) where a child is to be placed at home, the *making of a supervision order to support reunification may be proportionate;*

e) where a supervision order is being considered, the best practice guidance in the PLWG April 2023 report must be applied. In particular the court should require the local authority to have a Supervision Support Plan in place.

The Court of Appeal has accordingly made clear that the approach set out above must now be uniformly applied by the Family Court and also stressed the importance of adhering to the PLWG recommendations. The judgment essentially gives real 'teeth' to the PLWG's report and its conclusions.

Whilst we are on the subject of the PLWG, its report in relation to supervision orders has also recently been published. Needless to say that it is required reading. A summary of the recommendations of the report are as follows;

Each local authority's children's services department implements the BPG.

Supervision orders are only made when all of the matters set out in the supervision order template within the BPG have been considered and addressed.

Each children's services department adopts and completes the self-audit questions within the BPG in respect of every supervision order made in its favour.

Each children's services department considers developing good practice tools to embed the BPG (e.g., Essex Children's Social Care's 'thinking tool').

In light of the report and recommendations of the Independent Care Review commissioned by HM Government, HM Government to commit to provide the necessary resources to local authorities to enable them to adopt and implement the BPG to the fullest and most effective extent possible.

The PLWG also made four additional proposals for long-term change along the following lines;

Amending the Children Act 1989 to provide a statutory basis for supervision support plans (akin to s 31A, CA 1989 in respect of care plans).

Placing local authorities under a statutory duty to provide support and services under a supervision order.

Amending statutory guidance to reflect the recommendations in this report and the BPG.

HM Government undertaking or funding an external body to identify all supervision orders made by the Family Court to support family reunification and collect data on (a) the supervision plan at the end of proceedings, (b) the implementation of the plan during the life of the supervision order and (c) change of placement or return to court for the children and their parents up to two years after the end of the supervision order.

I really cannot stress enough how important it is to read the report in full and its annexes. I have to say that I view the proposed changes to the legislative provisions as welcome and probably long overdue.

Re P (A Child: Fair Hearing) [2023] EWCA Civ 215 is an interesting judgment from the Court of Appeal. This is a case in which during the final hearing within care proceedings, the mother's solicitor and counsel had to withdraw mid-way through her evidence (the mother was a vulnerable party and had the assistance of a lay advocate). The mother applied for an adjournment which was refused, with the Court ultimately making care and placement orders. I found the judgment of particular interest as within it, Peter Jackson LJ sets out the legal principles which governed the decision to refuse an adjournment, namely those relating to a fair hearing having been facilitated;

'The question of whether proceedings should be adjourned can arise at different stages in proceedings and for a variety of reasons. When it does, the authorities contain a range of propositions:

1*) The court must strike a fair balance, having regard to all the interests at stake, and not merely the interests of one party. In a case involving children, their interests (though not paramount) must be considered, as must the effects of delay. Re B and T at [21];*

Re L at [9]; Re G-B at [52] and [54]

2) There can be more than one right answer to this evaluative exercise; the question is whether the decision was a fair one, not whether it was "the" fair one.

Terluk at [19]

3) These are classic case management decisions, and as such an appeal court will be slow to interfere.

Re TG (A Child) [2013] EWCA Civ 5 at [24-38]

4) However, the question on appeal is not whether the decision lay within the broad band of judicial discretion but whether, in the judgement of the appeal court, it was unfair in the circumstances identified by the judge.

Terluk [18]; Solanki at [32-34]; Re A at [43]

5) The assessment of what is fair is a fact-sensitive one, and not one to be judged by the mechanistic application of any particular check-list.

Re G-B at [49]; Bilta at [30]

6) The starting point is the common law principle of natural justice, reflected in the overriding objective, which ensures compliance with the requirements of Article 6 ECHR. In this area, domestic and Convention requirements march hand in hand.

Re B and T at [28]; Re A at [26-28]

7) The question is whether the proceedings as a whole are fair. It is not appropriate to extract a part of the process and view it in isolation.

Re B and T at [21]; Re G-B at [50]

8) The right of access to a court is not absolute and any limitation will only be incompatible with Article 6 where it impairs the very essence of the right and where it does not pursue a legitimate aim in a proportionate manner.

P, C and S at [90]

9) However, Article 6 contains certain minimum requirements. An obvious example is the right and ability of those concerned in the proceedings to put their case effectively. The appearance of fairness is also important and the seriousness of what is at stake will be relevant.

Re B and T at [22]; P, C and S at [91]; Re A at [30-31]

10) The principle of equality of arms under Article 6 and the overriding objective do not require all parties to be legally represented.

Re B and T at [23]; P, C and S at [90]; Re G-B at [53]

11) When considering whether to adjourn, the court will be cautious before taking account of the strength or weakness of a party's case, *mindful that forensic fortunes may change at trial, but the realistic consequences of any lack of representation may be considered.*

Re A at [29]; Re G-B at [51]

12) Fairness may be achieved by the manner in which the court hearing is conducted.

Re G-B at [55]

I emphasise that these propositions are a selection and not a checklist, still less an exhaustive one. The essential touchstone is fairness and the weight to be given to any individual proposition or other relevant factor must be a matter for the judgement of the court in the case before it.'

The Court of Appeal dismissed the appeal, concluding that the first instance Court had properly applied the correct legal principles in refusing an adjournment;

'In the first place, the events of 24/25 October 2022 must be placed in context. The question of whether C could safely live with her parents had been the subject of particularly exhaustive consideration throughout the proceedings. All that information was captured in the written evidence. The father had legal advice and representation throughout the period and the mother had legal advice and representation for all but a day and a half. Up to that point she had been able to present her case in an effective manner by making statements, by her accounts being extensively recorded in a wide range of professional assessments, and by her having given almost all of her oral evidence. That is not to minimise the unsatisfactory position she was placed in at the end of the hearing, but to put it into perspective.

Next, it is relevant to consider the extent to which the loss of representation placed the mother at an actual disadvantage, as opposed to a notional one. Here, given the overall complexion of the case, I do not consider that the mother was deprived of any significant further opportunity to urge her case on the court. The significant psychiatric and psychological evidence was unchallenged. Critical evidence had been given by the independent social worker. The essential issue for the court concerned the reliability of the written record of the parents' situation. That was a factual question in respect of which the mother's representatives, had they remained or been replaced, could have made little impact by means of questions to the father or the Guardian, whose advice about welfare was almost entirely predicated on the court's findings of fact, or by closing submissions. The weight of the written record and the absence of any favourable professional opinion would have hampered any advocate. Mr Day was unable to make good his submission that there might have been forensic opportunities for an advocate to distinguish the mother's position from that of the father. He fell back on the possibility that new lawyers might have advised the mother to abandon her case and separate from him. However, by that stage this was fanciful. Even if such advice was given, the mother would not have accepted it and it would in any case have been too late. For better or worse she had remained with the father and any chance to separate from him was probably lost in March 2022. They presented as a couple throughout the trial and indeed at the hearing of the appeal. Taking all these matters into account, I therefore accept that the impact on the mother's case (as opposed to the mother personally, as to which I am sympathetic) was limited, and I take that to be what the Recorder meant. She need not have relied on the concrete quality of the mother's closing sub-

missions as a further indicator of lack of insight, but that was only one of several examples that were independently available.

Third, the predicament in which the mother was placed was mitigated by the presence of the father's lawyers, presenting broadly the same case, and her own lay advocate, and by the assistance given to her by the Recorder.

The court was also bound to take into account the weight to be attached to the rights and interests of others. Most particularly, the presumption that delay was prejudicial to the child sounded loudly in this case. C had been waiting all her life for her future to be decided and the proceedings were already overrunning at double the statutory maximum. If the case was adjourned it would take several months before a decision emerged, incidentally entailing considerable expense and burdens on witnesses and the court. The parents had understandably found the proceedings difficult and did not want to start again, whatever they now say. The Recorder was therefore right to give weight to the serious disadvantages of an adjournment.

I acknowledge that the withdrawal of the mother's lawyers was concerning to the father, but it is impossible to accept his submission that it led to unfairness to him. As the Recorder's judgment shows (see paragraph 12 above), his behaviour in the witness box was of a piece with his earlier behaviour, and with many other recorded observations.'

The next case of interest that I am going to draw your attention to and tediously quote from, is a great judgment from Peter Jackson LJ (who else?) in Re C (Child: Ability to Instruct Solicitor) [2023] EWCA Civ 889. In this case, previous care proceedings had concluded with A, a 14 year old boy, being made subject to a care order when aged 12 in 2021. The judge within the care proceedings accepted the expert analysis that A did not have capacity to separately instruct his own solicitor (A's views departed substantially from those of his Guardian). One of the central concerns was the impact that A's father's views had upon A; i.e. the extent to which A's expressed wishes and feelings were genuine and free from parental influence. The father subsequently issued an application to discharge the care order, which came before the same Judge. The previous expert was re-instructed to consider A's competence to instruct a solicitor directly. The conclusion to this assessment was that A was not competent to do so. The Judge then conducted a meeting with A for 1 hour and 25 minutes;

'It is unnecessary to refer at length to the discussion, and I only note these matters. The judge made clear that she was not taking evidence from A. His first question was about seeing court documents, saying that he knew he would be able to see documents in the future. He related his complaints against his mother and asserted that she had manipulated him into foster care. He said that he despised the psychologist Ms Gill and that she had manipulated the case. Dr Bourne, Ms Gill and the independent social worker had simply agreed with the social worker without making their own assessments. A asserted that he was very mature as a result of the court case and the judge responded that he seemed very mature to her. A said that his therapist had been useless and that he didn't want to talk to anyone associated with Ms Gill. Urged by the judge to take advantage of the opportunity of therapy, A said that he didn't see the point and would not see his mother if he

was not allowed to see his father. He said that he would be asking for another change of social worker.

I refer to two more matters surrounding this meeting. The first is that, shortly before A met the judge, Ms Gaff told him that B had taken part in an important family event the week before, involving the mother but without the father or A being aware. A referred to this when meeting the judge. The other matter concerns this exchange:

"J – Are you glad you came to see me or has it not been good? You can be honest. I won't mind.

A - I am not sure what has been clarified.

J – For me, it's always better to see somebody if they want to see me. I am not taking evidence but there will be bits of what you have said to me that will stick with me. I will certainly remember how tall you are and how mature you are. I know that families and lives are not frozen in time. Things happen and things move on. It does not stand still. I hope that there is less of a whirlwind and that it is easier to find a way through. It's a bit like being in a sandstorm. If you are in a sandstorm, you can't see where you are going. Where we have got to now is better than where you were before. But it's not simple. It's important that your voice is heard. It has been helpful for me to see you. It is not necessary that I see every child. I don't need to see every single child. But I think it helps me.

A – To continue your analogy about a sandstorm, I want to give you goggles and a compass.

J – You really are mature. That's very clever.'

A note of the meeting was sent to the expert, whose views in relation to A's capacity remained unaltered. Notwithstanding this, A's solicitor invited the Court to direct separate representation for A, based on her assessment of A's level of understanding. The Judge allowed this application and gave an ex-tempore judgment, permitting A to instruct his own solicitor. The mother appealed this decision.

Peter Jackson LJ handily summarises the central legal points relating to separate instruction of solicitors by a child;

'*The United Nations Convention on the Rights of the Child 1989 has been ratified by the United Kingdom and although it is not incorporated into domestic law, is reflected in our legislation and practices. Article 12 provides:*

"1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

Section 41(1) Children Act 1989 provides that the court shall appoint a guardian for a child who is subject to specified proceedings, which include applications to make or revoke a care order, unless satisfied that it is not necessary to do so in order to safeguard the child's interests. That is what occurred in this case, both in 2020 when the care proceedings began and in 2022 when the discharge applications were made.

The rules governing the representation of children in family proceedings are found in Part 16 of the Family Procedure Rules 2010 ('the FPR') and PD16A. As noted by Baker LJ in Re Z (Interim Care Order) [2020] EWCA Civ 1755, [2021] 2 FLR 830, they are far from straightforward. Under PD16A 6.2, the guardian must appoint a solicitor for the child unless one has already been appointed.

The Children Act 1989 of course provides by s. 1(3)(a) that the court must have particular regard to the wishes and feelings of the child, and by FPR 16.20(3) this duty also falls upon the guardian.

FPR 16.29 concerns the question of who instructs the child's solicitor:

"(1) Subject to paragraphs (2) and (4), a solicitor appointed –

(a) under section 41(3) of the 1989 Act; or

(b) by the children's guardian in accordance with the Practice Direction 16A,

must represent the child in accordance with instructions received from the children's guardian.

(2) If a solicitor appointed as mentioned in paragraph (1) considers, having taken into account the matters referred to in paragraph (3), that the child –

(a) wishes to give instructions which conflict with those of the children's guardian; and

(b) is able, having regard to the child's understanding, to give such instructions on the child's own behalf,

the solicitor must conduct the proceedings in accordance with instructions received from the child.

(3) The matters the solicitor must take into account for the purposes of paragraph (2) are –

(a) the views of the children's guardian; and

(b) any direction given by the court to the children's guardian concerning the part to be taken by the children's guardian in the proceedings.

…"

Rule 16.29(1) accordingly provides that the solicitor must conduct the proceedings in accordance with instructions received from the guardian, whose role is to act on behalf of the child with the duty of safeguarding the child's interests having regard to the principles set out in the welfare checklist: FPR 16.20(1) and (3). The guardian must also advise the court of the wishes of the child in respect of any matter relevant to the proceedings, including the child's attendance at court: PD16A 6.6(b).

However, where the solicitor considers, having taken into account the guardian's views and any direction given by the court, that the child (a) wishes to give instructions which conflict with those of the guardian and (b) is able, having regard to the child's understanding, to give instructions on his or her own behalf, the solicitor must conduct the proceedings in accordance with instructions received from the child: rule 16.29(2) and (3). In such a case the guardian will continue to carry out their duties, usually without legal representation.

A solicitor acting for a child in family proceedings will be a member of the Law Society's Children's Panel, an accreditation signifying experience and expertise in representing children. The judgement about whether a child has the ability to instruct is quintessentially a matter for the solicitor in the unique circumstances of the case and expert advice will not always, or even usual-

ly, be necessary. However, this was not a usual case, as Ms Gaff recognised. She did not simply start to take instructions from A under rule 16.29, but sensibly issued an application so that the matter could be decided by the court, which has the ultimate right to decide whether a child has the ability to instruct a solicitor: Re CT (A Minor) (Wardship - Representation) [1993] 3 WLR. 602, [1993] 2 FLR 278 at 614F.'

His lordship then went on to consider a number of further authorities including Mabon v Mabon, and Re W (A Child) (Care Proceedings: Child's Representation) Practice Note [2016] EWCA Civ 1051. Peter Jackson LJ also referred to the Guidelines for Judges Meeting Children who are Subject to Family Proceedings, issued by the Family Justice Council and Sir Nicholas Wall P in April 2010. His lordship noted that;

'In my view, these decisions show that the Guidance remains a workable framework; indeed applications to this court for permission to appeal arising from meetings between children and judges are rare. It encourages judges, in appropriate circumstances, to meet children as one way of helping them to feel more involved in and connected with proceedings that affect them in important ways. It makes clear that the judge decides whether, when and how a meeting will take place: these decisions are very much a matter for the discretion of the individual judge in the individual case. It emphatically stresses that the meeting is not for the purpose of gathering evidence. Another critical feature is that a meeting should help the child to understand that it is the judge (and no one else) who is responsible for the decisions in the case and that the outcome is never the responsibility of the child.'

The Court allowed the appeal, noting that the Judge had taken a different view to the expert instructed, and asking itself how the Judge had reached the opposite conclusion to the expert;

'How, then, did the judge come to reach the opposite conclusion? The answer clearly lies in her response (and that of Ms Gaff) to the meeting with A. As to that, there were in my view three errors of approach.

First, it was the judge's role to adjudicate, not to assess, but she made her own assessment of A's ability to instruct in a manner that went well beyond the permissible use of a meeting of this kind. As in Re KP and Re AH (and in contrast to Re N-A), the assessment went to the heart of the resulting decision. The problem was compounded by the judge not expressly disclosing to the parties the reliance she was planning to place on her own view, so that they were deprived of the opportunity to alert her to how questionable that would be.

Second, and more substantively, the reasons given by the judge for her assessment are not sustainable. This can most conveniently be illustrated by reference to the judge's image of the sandstorm, where A's response ("To continue your analogy about a sandstorm, I want to give you goggles and a compass.") obviously made an impression. Further thought would have shown that it was in fact a vivid sign of A's lack of understanding. His proposal that it is the judge, and not he himself, who needs goggles and a compass encapsulates his lack of insight and his blanket rejection of her assessment of what has happened in this family. In the same key, the father submitted to us that the judge had made a U-turn and that she now realised that A speaks for himself. Both father and son are under the same delusion about the cause of the problems and the opportunity for A to instruct his own solicitor gives him a powerful ex-

tra dimension within which to perpetuate this damaging narrative, oblivious to the harm that he might be causing himself.

Third, the judge described A as very mature and very insightful, while the evidence from two psychiatrists was that he is emotionally immature and lacking insight. Since September 2021, Dr Bourne had repeatedly advised that A has 'absorbed' his father's damaging belief system and that this was more insidious and far-reaching than mere 'parroting'. The judge nevertheless preferred her personal assessment that A has "his own clear views". She rightly directed herself that experts advise and judges decide, and she referred to Dr Bourne's opinion, but she gave no reason for rejecting it, as required by Re B (Care: Expert Witnesses) [1996] 1 FLR 667; Re D (A Child) [2010] EWCA Civ 1000. This was all the more necessary when she had whole-heartedly accepted his advice the year before.

I consider that the judge was distracted by general observations about exercising caution before depriving intelligent older children of their own representation, and that it led her to overlook how extreme and effective the father's abuse has so far been. This is not a case where A had his own solicitor in the previous proceedings, as in Re W. Nor is it a case where a child has formed an unwise view of their own, even if it might be coloured by adult influence. Instead, these children have been the victim of severe alienation of a kind that should have led the judge to firmly reject the application for A to be allowed to instruct a solicitor directly, for all the reasons she gave when making these care orders.

I am sure that (as the judge said) A will feel frustrated by not having his voice heard in the way that he wants. The father has, without concern, predicted that the mother will face more resistance and opposition. It would however be naïve to expect that A or his father will be satisfied by any outcome they do not want, and the prospect of A, who has clearly show his interest in gaining access to the court papers, being satisfied with limited disclosure is unlikely.

In parting from the case, I again recall the pressured circumstances in which the judge was taking her decision. There has been no complaint about the quality of what was after all an ex tempore judgment given after hours. I also recognise that she had balanced submissions from the guardian and his experienced solicitor, but their footing was no stronger than hers. It is always a professional challenge to represent an older child whose wishes conflict with a guardian's assessment, but it was not suggested to the judge or to us that the situation was untenable, any more than it had been during the previous proceedings.'

So again, the Court of Appeal as reiterated the importance of Judges keeping within the parameters of the guidelines when meeting and speaking to children. In terms of considering a child's capacity to instruct a solicitor, it is essential to do so applying the relevant principles set out within the authorities and in this case, the Judge erred in allowing her own experience of speaking to the subject child during a meeting with him, impact upon her overall assessment of is capacity to separately instruct a solicitor.

Next up is A Local Authority v X & Ors (Need for Finding of Fact Hearing) [2023] EWFC 121, which draws together the various authorities relating to the issue of the circumstances in which it is necessary and proportionate for the Court to engage upon a fact finding hearing. This case neglect of Z, and that it was neither necessary nor proportionate to engage upon an enquiry in relation to C's death, even if, taken at its highest, the post-mortem report provided evidence that the local authority could rely on in seeking findings against Z's mother and sister in this respect;

'In these circumstances, to adjourn these proceedings to await the post mortem report, and thereafter to await the local authority's decision on whether to plead C's death as an element of its threshold, would result in Z having to wait for a further unknown period of time before the local authority is even in a position to formulate its final threshold document. I accept the submission of Mr Jones and Ms Moody that if one factors in the likelihood of the police wishing to undertake further interviews before disclosure of the report should the post mortem implicate the adults in C's death and thereafter time for the local authority to decide whether to seek findings and formulate a threshold, the court is looking at a delay of at least a number of months. As set out above, the court is required by law to have regard to the principle that delay is inimical to Z's welfare and, pursuant to s.32 (3) of the Children Act 1989, to have particular regard to the impact the timetable for the proceedings will have on the welfare of the child to whom the application relates and on the conduct of the proceedings. Approving a timetable that waited for the post mortem report before determining the question of whether a fact finding hearing on the causation of C's death is necessary would, I am satisfied, expose Z to further and indeterminate delay, which would be plainly inimical to his welfare.

In this case, there is a wide range of evidence beyond the issue of C's death which, on a neutral and objective evaluation, is clearly capable of crossing the threshold criteria pursuant to s.31(2) of the Children Act 1989. Neither parent sought seriously to dispute that proposition. In particular, the evidence currently before the court suggests that Z was exposed over many years to chronic neglect and drug use. Professor Billington is clear that Z has suffered multiple adverse childhood experiences during his early years and has, in consequence, suffered nightmares, sleep difficulties, social communication difficulties, severe toileting difficulties and dental and ophthalmological issues, the evidence being that Z's functioning and the trauma that he has experienced relates primarily to his experiential and environmental circumstances.

As suggested by the President in Re G (which, in contradistinction to this case, concerned injuries sustained by the subject child's sibling), where the court is faced with a significant delay in the provision of the post mortem report but there is a range of evidence prior to death which, if established, would be sufficient for the court to determine both the s 31 threshold and the ultimate welfare decision, it may not be necessary to await the full post-mortem report where the impact on the child's welfare in postponing the process until that report is received may be disproportionate and unacceptable.

In the circumstances I have set out above, I am satisfied that that is the position in this case. Given what I am satisfied would be the adverse impact of Z to further adjourn these proceedings for a wholly indeterminate period to an unknown date, and having regard to range of evidence of neglect prior to C's death which, if established would be sufficient for the court to determine both the s 31 threshold criteria and, for the reasons I will come to below, the ultimate welfare decision for Z, postponing this process until the post mortem report is received would be disproportionate and unacceptable.

This conclusion of course, by definition, requires the court to determine the question of whether it is necessary to conduct a fact finding hearing without the contents of the post mortem report. I am however, satisfied that that does not present an insurmountable difficulty in this case.

I accept the submission that the contents of the post mortem report can be said to be relevant to the determination of the question of whether it is necessary to conduct a fact finding hearing with respect to C's death as part of the examination of the question of evidential outcome. However, given the way post mortems are reported, the range of possible outcomes for the post mortem in respect of C is limited and can be anticipated. As Mr Jones and Ms Moody submit, the post mortem will either be unable to identify a cause of death, will identify a cause of death that does not implicate the mother or the intervener, or will identify a cause of death that does, or is capable of, implicating the mother and/or the intervener. In the first and third of those situations, the local authority may decide to seek findings in respect of C's death. Within this context, I am satisfied that the court can factor the absent post mortem report into its analysis of the question of whether a finding of fact hearing is necessary by assuming for the present purposes that the post mortem report on C will allow the local authority to pursue threshold findings in respect of his death. Within this context, the question I now turn to is whether, assuming that the evidence does allow the local authority to pursue findings in respect of C's death and balancing the factors set out in Oxfordshire, it is necessary to hold a fact finding hearing on that issue.'

This judgment on proportionality really needs to be considered in the context of the re-piloting of the PLO and the 'Road Ahead'. There is an increasing onus upon Judges and practitioners to limit issues that are to be the subject of litigation at a contested hearing, to what is absolutely necessary in order for the Court to make a proper welfare determination. My experience is that the Courts are now, quite rightly, carefully case managing issues and strictly limiting evidence to only what is necessary in order to determine welfare. MacDonald J properly reminds us that in considering the issues of proportionality and necessity, the proper approach is set out in Oxfordshire v DP, as reiterated in Re H-D-H (Children), and that is the approach which the Courts must take. As Baker J noted in Re H-W (Care Proceedings: Further Fact-Finding Hearing) [2023] EWCA Cibv 14, it is the factors set out in Oxfordshire represent the definitive metric against which the question of whether or not a particular fact finding exercise is necessary falls to be determined;

"The decision whether or not to hold a fact-finding hearing is one of the most important case management decisions to be taken in the course of proceedings under Part IV of the Children Act. It is not always a straightforward decision. Care proceedings are quasi-inquisitorial. They are not confined within the tramlines of adversarial pleadings. There is therefore a recurrent danger that they veer off track. In a case with a complex family history, the court will often be encouraged by one party or another to explore an issue that has been unearthed during

the investigation. Judges have to be very careful before acceding to such an application to avoid the unnecessary use of the limited resources available. In deciding whether to hold a fact-finding hearing, it is imperative that they conduct a proportionality analysis by reference to the factors identified in the Oxfordshire case and Re H-D-H."

I am going to finish this update with the case of Re G & H (Leave To Revoke Placement Order) [2023] EWCA Civ 768. This is a case in which care and placement orders were made in relation to two children, following which, the grandmother filed an application for leave to revoke the placement orders, as the local authority had refused to assess her as a carer (this was a matter of days after the care proceedings concluded). The judge did not deem it necessary to join the children as parties to the application, nor to appoint a Guardian, until the application for leave had been determined. The Court subsequently refused leave and provided an ex tempore judgment. The grandmother appealed. The two grounds of appeal put forward were, in summary (1) the hearing was procedurally incorrect because the children's guardian ought to have been joined as a respondent and (2) the decision to refuse leave was wrong.

In relation to ground 1, Baker LJ considered the provisions of the FPR in some detail and identified an issue in relation to the provisions of the Rules regarding the issue of the appointment of a guardian. His lordship concluded as follows;

'……the position under the 2005 Rules seems more logical than under the FPR. On an application for leave to apply to revoke a placement order, a guardian was not appointed unless a party applied for one or the court appointed one of its own initiative. If a party applied for a guardian to be appointed, the court had to appoint one unless it considered that such an appointment was not necessary to safeguard the interests of the child. On a substantive revocation application, the court appointed a guardian unless it considered that such an appointment was not necessary to safeguard the interests of the child. Under the FPR, the court has the power not to appoint a guardian at the substantive hearing if it considers such an appointment to be unnecessary to safeguard the child's interests but is seemingly under a mandatory obligation to appoint a guardian at the leave stage.

This reinforces my feeling that this situation is an unintended consequence of the reforms implemented by the FPR. If my Lady and my Lord agree, I would propose referring this matter to the Family Procedure Rule Committee for review. One solution would be to amend the FPR by providing that applications for leave to apply to revoke a placement order are specified for the purposes of s.41. As set out above, s.41(6)(i) allows for proceedings to be specified by rules of court. A number of additional proceedings under the 1989 Act have been so specified FPR rule 12.27(1). If applications for leave to apply to revoke a placement order were included as "specified proceedings", the court would have the power not to appoint a guardian at the leave stage as it does on the substantive application.

I recognise that the conclusions I have reached may cause some alarm amongst judges dealing with applications for leave to revoke. In practice, I suspect that many judges have been proceeding on the basis adopted by the judge in the present case that the rules allow them not to join the child or appoint a guardian on an application to for leave to apply to revoke a placement or-

a risk that the limited resources of Cafcass, which are in great demand, may be diverted to deal with applications which have no prospect of success.

As set out above, the court's extensive case management powers under rule 4.1(3) include, under subparagraph (o), taking "any other step or make any other order for the purpose of managing the case and furthering the overriding objective." In my judgment, whilst a judge is obliged to join the child to an application for leave to revoke a placement order and to appoint a guardian, it is entirely permissible to direct that the guardian take no substantive step in connection with the application and/or, as rule 18.9(1)(a) permits, to deal with the application without a hearing.

These are, however, powers that should be exercised with caution. Parliament has legislated to allow the issue of whether it is in the interests of a child's welfare throughout his or her life to be adopted to be considered by a court as soon as the local authority is satisfied that the child ought to be placed for adoption: s.22(1)(d) of the 2002 Act. It is at the stage of making the placement order that the court has to consider whether the parents consent to the child being placed for adoption or, if they do not, whether their consent should be dispensed with: s.21(3). But the quid pro quo is that a parent is entitled to seek leave to revoke the placement order if there has been a change of circumstances and the court is satisfied in all the circumstances that leave should be granted. That is consistent with the fundamental principle identified by the European Court of Human Rights in YC v United Kingdom (2012) 55 EHRR 967 (at paragraph 134) that:

"family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the family."

Protection against meritless applications is provided by the imposition of a leave filter. But the court's power to revoke a placement order at any point prior to the child being placed is an important element of the statutory scheme and it is to my mind unsurprising that the rules therefore require the child to be a party.

Furthermore, while many applications for leave to apply to revoke a placement order have no prospect of success, some do. In those circumstances, the guardian will plainly have a role in assisting the court to come to a decision whether to grant leave, particularly when addressing the second stage of the test, if the court finds that there has been a change of circumstances. The local authority is likely to have a position on the application, having obtained the placement order. The children's guardian adds essential balance to the picture presented to the court. In the case of Re JL, cited by Ms Henry, a grandmother who was already successfully looking after two grandchildren as a kinship foster carer, initially decided not to put herself forward to care for their younger sibling, in part because her accommodation was too small. After she moved to a larger property, she applied for leave to apply to revoke the placement order which had been made with respect to the third child and to apply for a special guardianship order. The applications were opposed by the local authority but supported by the guardian representing the child who had been joined to the application. The applications were refused at first instance but allowed on appeal.'

The Court allowed the appeal on ground 1, noting that under the rules, the child was a party should be granted. But the judge did not approach the issue in that way. The appeal on ground 2 was also allowed, on the basis that the Judge had not properly considered the issue of whether there had been a sufficient change in the circumstances which had led to the making of placement orders.

The judgment has therefore clarified the issue relating to appointment of Guardian's in these applications and outlined the issues regarding the current content of the procedural rules and the need for their review by the Family Procedure Rules committee.

Michael Jones KC
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DEANS COURT CHAMBERS

WHO IS THE REAL WINNER?

By Claire Athis Schofield

Lessons to be learned from Mr Ditchfield's recent appeal: Neutral Citation [2023] EWHC 2303 (Fam) and Baili link: https://www.bailii.org/ew/cases/EWHC/Fam/2023/2303.html

Mr Justice Peel's response to Husband's appeal is overwhelmingly supportive of the first instance Judge, Recorder Leslie Samuels KC, disturbing none of his findings and making only very minor tweaks to his final order. However, the published judgment makes for interesting reading because the relatively limited asset schedule contains a list very familiar to Northern Circuit financial remedy practitioners: [family home, rental property, rent account, Husband's business/pension and debts] and its substance addresses with clarity a number of features which appear before our District Judges day in, day out.

The headlines of the case are that the first instance Judge awarded Wife all the equity in both the family home and rental property and the rental account money, leaving Husband with his business and pension, with each responsible for their own debts and Husband responsible for repaying his family. This left Husband with only 38% of the assets [on a clean break basis], all illiquid, and consequently he and his new partner would have to continue renting, despite the fact that one of the parties' two minor children lived mainly with Husband.

Why no mortgage deposit for this Husband?

Mr Ditchfield had aspired to an equal division of the equity within the two family properties [£220,000 in total], based on his equal housing need. Given that he also aspired to retain his business [which even he valued at £92,000], one imagines this Husband may have reasonably anticipated some departure from equality in Wife's favour, however he seems genuinely outraged that the award he received was specifically predicated on him and his new partner remaining in rental accommodation. Peel J makes the point that whilst it is desirable for both parties/parents to attain owner occupied property, it is '*not an iron rule*'. Further, the Judge expected Husband's cohabitee [who earned twice as much as Wife] '*to alleviate in part H's financial needs by making a full contribution to their joint economy*'. Together they had *'ample income to pay for reasonable rented accommodation',* and that was where they would have to remain for now. To add insult to injury [in Husband's view] Recorder Samuels determined that Husband would continue to pay 50% of the FMH mortgage pending sale, another aspect of the award left undisturbed by the Appeal Court, save for the addition of a Section 28(1A) bar.

What to do about the family money?

Husband's sister had advanced £100,000 to Husband three years prior to separation in order to facilitate the move to the current family home, on the understanding that the previous one would be retained and rented out. She now intervened in these proceedings to pursue a beneficial interest in the rental property [also Husband's case]. Recorder Samuels KC found that Wife knew nothing at all about this money and that Husband had deceived both his wife and his sister at the time of the advance. The Judge was not persuaded that Husband's sister established a beneficial interest in the rental property, instead the £100,000 was a 'soft loan', which would need to be repaid, but not for some time. The learned Recorder determined that Husband should repay this loan and indemnify Wife against the same. This was a point in the appeal which Peel J neatly sidestepped by stating that the issue was not who the loan was attributable to, but rather, given that it was attributed to Husband, was the outcome so unfair as to invite reversal? [Answer: 'No', although notable that in deleting the trial judge's timeframe for Husband to repay his sister Peel J made his only substantive amendment to the final order.]

How valuable was Husband's business?

This Husband was one of many giving evidence at the time of their Final Hearing as to an unhappy recent downturn in business prospects leading to an expected diminution in earnings. At the time of separation Mr Ditchfield had felt confident enough to withdraw £530,000 from his business, and yet he now asserted that he was on the point of losing his main business client, which reduced the value of his business interest [previously £270,000] by two-thirds. He did not convince the Learned Recorder, who found that Husband had *"deliberately reduced his earnings as they appear on paper and drawn down on his capital investment in the businesses with the intention of defeating W's claim".* He also found that Husband's disclosure about the withdrawal from the business was opaque.

Adverse findings cause adversity for Husband:

It was these negative findings about Husband as a witness which undermined his whole appeal case. Mr Justice Peel stated that Husband was the author of his own misfortune:

[From Para 40] *"Ultimately, so it seems to me, the question for this appellate court is whether the split of 62/38 in favour of W, on the basis that H's share is much less readily realisable, is sustainable. In looking at the case in the round, I take the view that H has only himself to blame for the findings made against him. His deficient disclosure, and manipulative litigation conduct, inevitably exposed him to the sort of findings and evaluation undertaken by the judge. All the relevant circumstances fell to be seen through that prism."*

So, was Wife the real winner?

The 62% : 38% division of assets in Wife's favour was on a clean break basis and Peel J notes in passing that her request for a five year term of spousal maintenance [length of marriage 15 years] was declined. More telling is that Wife did not pursue any formal 'add-back' argument in relation to the £530,000 withdrawn by Husband from his business upon separation. She accepted that some of the funds had discharged the FMH mortgage and Husband's rent, but Peel J refers to an amount of 'perhaps £400,000', which Husband had the 'sole benefit of' at a time when Wife was 'financially stranded by Husband'. Given that the total net assets in this case were valued at time of trial at £339,000, from which Wife's net award was £211,000, it is no wonder that Mr Justice Peel found Husband's sole use of these business funds to be *'plainly a relevant factor in this case and, in my judgment, compellingly so'*.

Definitely not…

The judgment states that it would have been unrealistic for Wife to pursue an Add Back as the *'money was simply not there'* and could not be 'recreated' to meet the parties' needs, and of course, this is true. However, as an academic exercise, if the £400,000 found to have been dissipated by the husband over the four year period between separation and trial is notionally *'added back'* to the marital pot, then the real calculation becomes clear: From the 'added back' assets totalling £739,000, Wife's award of £211,000 only represents a 29% share, whereas Husband has spent and/or retained a full 71%. Seemingly, as in so many of our cases: he who takes sometimes wins!

By [Claire Athis Schofield]
Deans Court Chambers

DEANS COURT CHAMBERS

COURT OF PROTECTION LAW UPDATE

By Jack Barber

General Court of Protection Update

Since our last update the Court of Protection has been busy providing a number of interesting judgments. Here I will seek to summarise those which are, to my mind, the most choice.

Starting with Re RK (Capacity; Contact; Inherent Jurisdiction) [2023] EWCOP 37 which is a useful lesson on the limits of the inherent jurisdiction as a tool to compel a person, who has capacity to take action they resist – no matter how well intentioned the attempted use of that tool may be.

R is in her early 30s, is partially sighted, has a full-scale IQ of 60 and has Down's Syndrome (described in the documents before the Court as a 'significant cognitive impairment'). In the 18 months prior to this judgment, Cobb J had previously found that:

R lacks capacity to litigate and to manage her own property and financial affairs;
R has capacity to engage in sexual relations, to make the decision to remain at her current supported living accommodation (referred to as 'Castle Hill' with the service provider being referred to as 'Signia'), and to make decisions about what support she needs on a day-to-day basis within an adequately supported environment.

At this hearing Cobb J was invited by R's family to find that:

R lacks capacity to make decisions about contact with her family;
that R is susceptible to undue influence, and measures need to be put in place to protect her from this;
that R lacks capacity to revoke the LPA created in respect of property and affairs and health and welfare.

In the alternative, should R be found to have capacity, Cobb J was invited to make an order under the inherent jurisdiction with regard to supporting contact between R and her family.

This is a case with a long and fractured history. The breadth of this history is perhaps best exhibited by the fact that R's family were keen for the Court to embark on an extensive fact-finding inquiry and in line with that had presented a 73-page schedule of proposed facts which they suggested required determination. As such, a summary for the purposes of this article must be, in comparison, brief.

R has lived at Castle Hill since 2015. Until 2020 this arrangement went smoothly and R's family and Signia had a relatively good working relationship.

In or about late 2018 or early 2019 R formed a relationship with a male resident at Castle Hill referred to as SA. R was clear that SA made her happy, and Cobb J noted that she 'recognised and responded to the emotional value this relationship brought her'. The family's anguish at that time focused on whether R had capacity to engage in sexual relations with SA.

During the lockdown in 2020 the family wanted R to return home which she did, for a time, before moving back to Castle Hill. Much to her family's dismay R could not be persuaded to return to the family home again.

From there the relationship between the family and Signia broke down entirely. In the documents before the Court numerous reasons and disputes were provided as the reason for that breakdown. The main concerns of R's family were:

the quality of care provided by Signia;

that Signia were financially exploiting R; and

that Signia were having undue influence over R.

The family went as far as making allegations to the police prompting a police visit to R and SA. From this time R ceased contact with her family, including leaving the family WhatsApp group chat and missing all family birthdays. Despite this Cobb J was satisfied that R fundamentally loves her family and wishes to be part of the family.

However, R had been steadfast in expressing her wish to not see her family. The origins of her anger, and belief that her family were controlling her, is not entirely clear. Cobb J suggested it might well lie in the time they applied pressure on her to lose weight.

At the hearing the experts could not agree on whether R lacked capacity. Dr Claudia Camden-Smith was clear that R lacked capacity, Dr Katherine McKay took the opposite view.

Dr McKay's approach was challenged by the family but Cobb J found her assessment and methodology to be thorough and robust. In particular, she had met R on a number of previous occasions which gave her a great advantage. Her summary was as follows:

"She had a good understanding of the nature of the relationships with professionals, family members and others. She was aware that there were people involved in her life who were transient, and paid for their employment, whereas her family and her boyfriend were not. She was very clearly able to consider the positive and negative aspects of having contact with each person. [R] showed an ability to call to mind positive memories of being with her family, as opposed to having purely polarised negative views. Her ambivalence regarding her family was evident (as it had been in my previous report), and she reported feeling loved, and loving her family, and at times missing them, but also feeling controlled and criticised by them. She reported feeling ongoing negative feelings associated with the police being called in the past, which distressed both [R] and her boyfriend (regardless of the 'truth' about who called the police, [R] remains upset about this, in part due to the impact on her boyfriend) … Thus, [R] was assessed as having capacity to make decisions around contact. [R] herself was also able to make suggestions of things that would make her more amenable to having contact with her family, such as doing this on 'Zoom', although her priority in this area was for the cessation of legal proceedings". (Emphasis added by Cobb J).

R also provided a list of issues which, if corrected, would make it more likely for her to want to see her family. Amongst others this included ‘if they stopped court’ and ‘if they let her make her own decisions’. Cobb J gave this list some weight as he considered it goes some way to illustrating R’s ability to use or weigh relevant information.

Cobb J found that the family had not rebutted the presumption that R has capacity.

As to the family’s secondary position, declarations were sought under the inherent jurisdiction to facilitate a supportive framework which would work towards the restoration of contact. Cobb J was critical of the application in that the declarations requested were unhelpfully vague and failed to set out the legal basis on which they could be made. Nevertheless, Cobb J sought to consider them and in doing so took a detailed review of the relevant authorities.

In Re SA (Vulnerable Adult with capacity: Marriage) [2005] EWHC 2942 (Fam) Munby J said it would be unwise and inappropriate for him to define who might fall into the category of persons in respect of whom the inherent jurisdiction could properly apply. At [77] he said:

"…the inherent jurisdiction can be exercised in relation to a vulnerable adult who, even if not incapacitated by mental disorder or mental illness, is, or is reasonably believed to be, either (i) under constraint or (ii) subject to coercion or undue influence or (iii) for some other reason deprived of the capacity to make the relevant decision, or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent."

Cobb J also considered the case of DL v A Local Authority & others [2012] EWCA Civ 253, where the Court of Appeal was keen to emphasise that the inherent jurisdiction is not ‘extensive and all-encompassing’ ([53]):

"…, or one which may threaten the autonomy of every adult in the country. It is … targeted solely at those adults whose ability to make decisions for themselves has been compromised by matters other than those covered by the MCA 2005". (Emphasis by underlining added).
[54] … The jurisdiction… is in part aimed at enhancing or liberating the autonomy of a vulnerable adult whose autonomy has been compromised by a reason other than mental incapacity because they are (to adopt the list in paragraph 77 of Re SA): (a) Under constraint; or (b) Subject to coercion or undue influence; or (c) For some other reason deprived of the capacity to make the relevant decision or disabled from making a free choice, or incapacitated or disabled from giving or expressing a real and genuine consent".

At [65] of that same judgment McFarlane LJ posed a rhetorical question in relation to someone with borderline lack of capacity:

"Where, on a strict mental health appraisal, such an individual does not lack capacity in the terms of the MCA 2005 and therefore falls outside the statutory scheme, but other factors, for example coercion and undue influence, may combine with his borderline capacity to remove his autonomy to make an important decision, why, one may ask, should that individual not be able to access the protection now afforded to adults whose mental capacity puts them on the other side of that borderline?"

Having already reviewed Munby J's considerations of the meanings of 'constraint' and 'coercion or undue influence' at [78] of Re SA, Cobb J found that R was a vulnerable adult, who had a learning disability that made her vulnerable to undue influence. However, in this case Cobb J did not find that Signia had been guilty of undue influence or control or coercion of R. Signia had at times over stated and over promoted R's autonomy but that did not amount to undue influence or control.

Cobb J concluded:

As I mentioned above, in Re SA, Munby J declined to define the categories of person for whom the inherent jurisdiction may be invoked, but it is nonetheless clear from his judgment (and from DL which followed) that those for whom it would apply are those who are under constraint, subject to coercion or undue influence or otherwise (for some other reason) deprived of the capacity to make a relevant decision, or disabled from making a free choice (see above). In my judgment, this has not been R's experience in her placement.

I reject the suggestion by the Applicant that there has been any deliberate attempt at, or actual, alienation of R against her family by members of the Signia staff; I further reject the allegation of 'environmental alienation' – i.e. Signia creating an environment or eco-system in which R is not able to speak positively about her family and/or where all conversation about her family is negative. In my judgment it is likely that, once R's family started making allegations about Signia and the care it was offering R, Signia staff will have found it difficult actively to encourage R to engage with her family; it may well be that R picked up on Signia's sense of unhappiness at being on the receiving end of a wide range of allegations.

It is clear that R has recently made free choices, and these are choices which have brought her into contact with her family – i.e., she agreed to take part in the Talking Project; she agreed to a meeting with her family in November (albeit that this did not happen), and agreed again to the café meeting on 9 December 2022.

I view with some sympathy the 'supportive framework' proposals advanced by the parties; indeed in the next section of the judgment I discuss them and actively encourage those with responsibility for R's care closely to consider them. But it is not 'necessary' for me to make orders in relation to them in order to liberate R to make decisions freely, nor is it 'proportionate' ([66] and [76] of DL) that I should. I am conscious of the need to guard against adopting an overly paternalistic attitude to a vulnerable adult who is the subject of the proceedings, and to make orders in (what McFarlane LJ referred to as) the "hinterland" of the MCA 2005 which undermine the very concepts of the MCA 2005 itself.

The Court went on to give a number of observations about R's future care with Signia and indicated that the family's supportive framework plan did have merit and might be successful outside of litigation.

As I said at the outset, this case is a good reminder of the limits of the inherent jurisdiction, but also a warning that one should be wary of confusing a decision those in their life cannot understand with being coerced or lacking capacity. As Cobb J noted at [153]:

“While the Court of Protection is accustomed to making important decisions about an individual's capacity to make decisions, and declarations about their best interests, it is not able to order or declare how people should think, or what they should do to get on better with each other. And that, in large part, is what needs to change in this case for the situation to move on.”

The Second case is Manchester University Hospital NHS Foundation Trust v JS & Others (Schedule 1A Mental Capacity Act 2005) [2023] EWCOP 33, an appeal of a decision of HHJ Burrows decision in [2023] EWCOP 12 before Theis J.

The matter itself was described by HHJ Burrows as ‘an unusual variation on a common theme’. JS is a 17-year-old young woman who has ASD, ADHD, learning disabilities and an attachment disorder. JS had suffered a particularly difficult few weeks with her mental health which included episodes of self-harm, and possible suicide attempts. She had been detained under s136 MHA 1983 on two occasions and s2 MHA 1983 once.

HHJ Burrows was tasked with deciding whether JS was eligible to be deprived of her liberty in the hospital under the MCA or if she was ineligible under Case E of Schedule 1A of the MCA. HHJ Burrows relied on the test as set out by Charles J in GJ v The Foundation Trust, a PCT & Secretary of State for Health [2009] EWHC 2972 (Fam). His conclusion was as follows:

‘102. My conclusion is that [JS] was ineligible to be deprived of her liberty in the Hospital under MCA. She was within the scope of the MHA under Case E. I have concluded for the reasons I have given that she could have been detained and treated under the MHA. I would go further and say that she should have been so detained and treated.’

At [48 - 49] Theis J agreed that the three key questions advanced by the Official Solicitor provide a useful structure to aid practitioners who have to navigate this issue. They are:

Is P a ‘mental health patient’ ?
Is P an ‘objecting’ mental health patient ?
Could P be detained under s3 MHA 1983?

In order for P to be ineligible to be deprived of their liberty under the MCA those questions must be answered thus:

Yes, as authorised by the relevant instrument;
Yes, by objecting to either being a mental health patient or objecting to being given some or all of the mental health treatment;
Yes

Hearing the appeal Theis J upheld the decision at first instance and approved both the test set out by Charles J, as well as Charles J’s analysis of the meaning of the word ‘could’. Charles J having decided that ‘could’ means the decision-maker should ask themselves whether in their view the criteria set by, or the grounds in, s2 or s3 MHA 1983 are met.

Theis J also suggested (at [116]) a practical step for cases where Schedule 1A Case E issues are likely to arise, would be:

"…for evidence to be provided to address that issue, utilising the GJ framework. That would not only assist the court and the parties, but also focus the minds on what needs to be addressed both in terms of any decisions to date under the MHA 1983, the basis of the application in the Court of Protection and addressing the key questions outlined above."

At [117] Theis J endorsed the suggestions put forward by the Secretary of State for Health and Social Care to address situations in which a 'stalemate' has arisen, calling them a 'useful roadmap for the parties to resolve any issues'. Those suggestions were included in the judgment at [118] and are as follows:

(1) The MHA and MCA decision-makers should arrange for discussions between the relevant professionals. They should be undertaken in what Ms Kelly describes as 'the spirit of cooperation and appropriate urgency'. This will ensure the relevant professionals have reviewed and considered relevant evidence and if required further inquiries can be made.

(2) If these discussions do not result in a detention being authorised under the MCA the hospital has a number of choices:

(i) It can seek the person's admission under the MHA 1983 to authorise the deprivation of liberty, including on a short term basis while it seeks to advance the person's discharge;

(ii) It can seek for the person to be detained in an alternative setting, such as a care home, in which Case E has no application, with consideration being given to what can be put in place to support the person in the community under s 117 MHA 1983 and/or Care Act 2014 duties.

(iii) It can stop depriving the person of their liberty if it considers the person should not be detained under MHA 1983, even with the knowledge that the person will not be detained under the MCA 2005.

(iv) If the hospital does not consider that an application for assessment or treatment under MHA 1983 is warranted but does consider it is in the person's best interests to be detained in hospital for treatment of a mental disorder, it should consider carefully its reasons for drawing this distinction. The hospital could apply to the Court of Protection for a determination of whether the person is eligible for detention under the MCA 2005.'

She goes on at [119] to say:

"I can see the sense in the suggestion of an application to the Court of Protection for a determination being a possible route to resolve these issues, but that is not said with any encouragement for such applications to be made unless it is necessary, and only after all other options have been explored. It will be a matter for each individual judge whether such an application is accepted, depending on the particular circumstances of the case."

Theis J then pointed out the fact that for 16 and 17-year-olds there is a concurrent jurisdiction with the Court of Protection. At [123] she provided that the following may provide a guide in those difficult cases:

(1) In any application seeking authorisation to deprive the liberty of a 16 or 17 year old, the applicant should carefully consider whether the application should be made in the Court of Protection and, if not, why not.

(2) If a Schedule 1A Case E issue is likely to arise any evidence filed in support of an application should address that issue, so the relevant evidence is available for the court, thereby reducing any delay.

(3) In the event that the Court of Protection determines that P is ineligible the professionals should urgently liaise in the way outlined above.

The final case is Nottingham University Hospitals NHS Trust v JM & Anor [2023] EWCOP 38 which is a reminder that, as Hayden J puts it at [44] a person without capacity may have their own reality and it 'requires to be respected. It is in this way that the autonomy of the incapacitous is respected' and that 'human dignity is predicated on a universal understanding that human beings possess a unique value which is intrinsic to the human condition'. It is also a reminder that sometimes where P is incapacitous, for the sake of their dignity and unique value, the decision may still be left to P.

JM is a 26-year-old man who, despite being diagnosed with autism at age 5, has received very little support for his mental health. His mother also suffers with her mental health and has been diagnosed with Schizophrenia. Hayden J declined to go into JM's childhood but commented that it had been 'characterised by trauma'.

There was a consensus that JM lacked capacity. The extent and nature of JM's trauma had 'exacerbated the situation' and JM struggled to process his experience.

In January 2021 JM was diagnosed with chronic kidney disease. He requires, as a minimum, 4 3-hour sessions of haemodialysis per week. The clinical consensus was that without such treatment JM would die in 8 – 10 days. JM did not accept this diagnosis and neither did his mother.

The expert was persuaded that though they both held this irrational belief, they held it independently and JM's belief system had not been 'superimposed on him'.

On 19th June 2023, the court made declarations that JM lacks capacity to:

Conduct the proceedings in question;

Make decisions about the medical treatment he receives for chronic kidney disease; and

Make decisions about whether to be accommodated in hospital or in a care home for the purpose of receiving treatment.

On 11th August 2023 JM was found in bed covered in blood from his dialysis line which had been damaged and cut close to the junction point. There was very little doubt that it was JM who cut the line. Upon attendance from paramedics, he adamantly refused to have a replacement line inserted. JM would not accept subsequent attempts from the doctors and nursing staff who, 'have made sensitive, creative and, if I may say so, very patient focused efforts to persuade JM to accept dialysis'.

The question for Hayden J was what steps it was in JM's best interest to take, and it is worth considering this analysis as a whole:

The situation for JM has progressively deteriorated. I remind myself that in early 2023 when JM was clinically stable in hospital, the proceedings were concerned with finding a placement from which he could be encouraged to attend for dialysis three times per week. The situation is plainly now far graver. Restraining JM to reinsert a new dialysis line against his will might in and of itself be justifiable. However, JM's objection is not merely to the reinsertion of the line but to the life sustaining dialysis it would provide. It follows, inevitably, that the restraint required for the reinsertion would be a harbinger for repeated and extensive restraint on a weekly basis and indefinitely. JM's erratic compliance and distorted thinking, now over many months, effectively discounts him, I have been told, from eligibility for a donor organ. Such transplant would need compliance with a fairly rigorous regime of support which is very unlikely to be complied with. Moreover, that too may involve an extensive period of haemodialysis.

JM's belief system in respect of dialysis is so plainly distorted as to manifestly rebut the presumption of capacity, erected by the MCA 2005. However, even though his reasoning is unsound, JM's confidence and belief in his own judgment is well-established and as the chronology of the case has demonstrated, unmoveable. The fact that an individual's views may be misconceived does not, however, deprive him of the right to hold them. To approach this otherwise would particularly discriminate against the incapacitous, as well as more generally. JM's views on dialysis arise from the complex interplay of his psychological functioning and his life experiences. This is no doubt true for all of us but in JM's case, both are disordered. The nature and extent of JM's autism coupled with the extent of trauma that he has endured, serves to disable him from processing his thoughts and experience in an effective way. Nonetheless, JM's own reality, even though it greatly differs from ours, requires to be respected. It is in this way that the autonomy of the incapacitous is respected. That does not mean that their views prevail but it does mean that they must be afforded weight. As I have set out above, "human dignity is predicated on a universal understanding that human beings possess a unique value which is intrinsic to the human condition".

For the reasons which I have set out, I am clear that forced restraint either in the face of JM's expressed opposition or at a time when he is no longer able to resist, would compromise his dignity. By agreement and because Roberts J had previously met with JM on a number of occasions, I spoke with him on a private video link from which the public and lawyers were excluded. The solicitor for the Official Solicitor took a note. With outstanding efficiency, the note was available to the parties within 20 minutes of my concluding the meeting. Judges, I suspect, vary greatly in their approach to meeting with P. Video conferencing platforms have changed the landscape. It seemed to me, ultimately unthinkable, that I should not meet with JM and tell him the important decision I had made. I found him, as has everybody else involved in his care, to be a very pleasant young man. His conversation with me reinforced Dr C's assessment of him. As both Dr F and Dr C have said, JM does not want to die. When I told him of my decision and the fact that he would die, he told me without prompt or question that he did not want to. I formed the impression that he very much wanted to live. Ultimately, all I could do was tell him that the decision was his.

Hayden J closed his judgment with tributes to the doctors and nursing staff who he regarded as exceptional in the compassion they showed for JM. He also paid tribute to JM’s mother stating: ‘Though JM's mother struggles to understand the realities of JM's situation due to her

Those instincts, to my mind, are sound and also require to be factored in to this decision.'

Jack Barber
Pupil Barrister
Deans Court Chambers

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