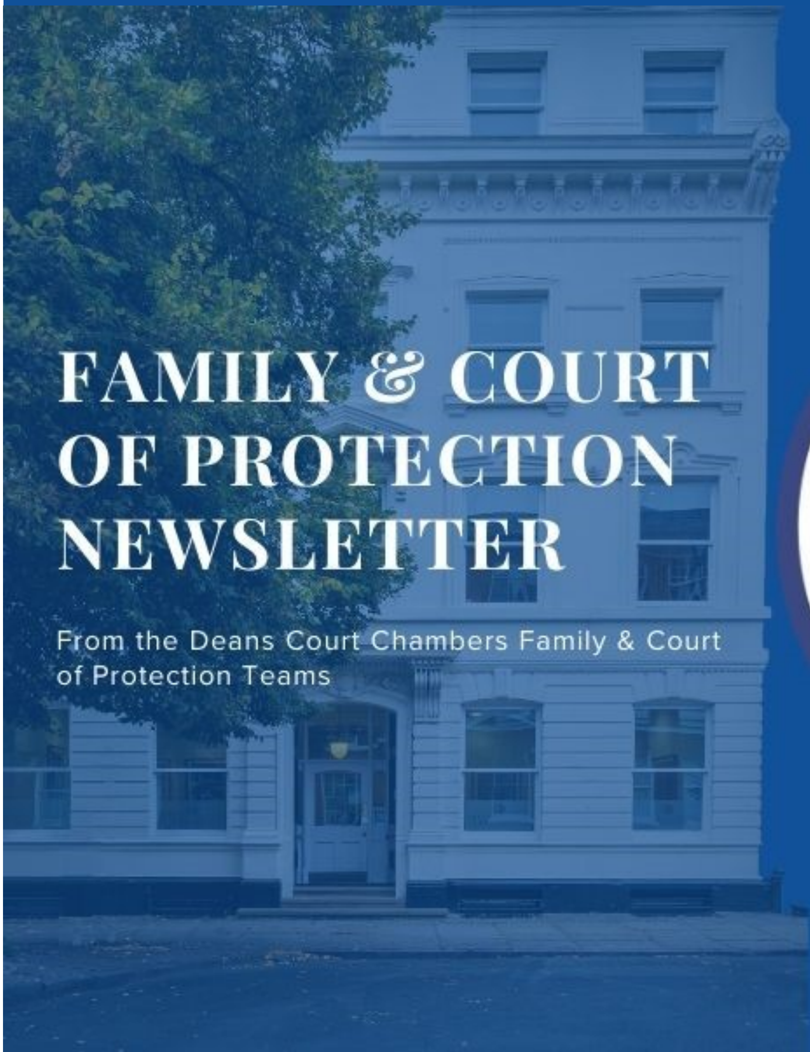
DEANS COURT
CHAMBERS



Winter Edition 2023

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EDITORIAL

By Michael Jones KC

Season's greetings to all. I am, as ever, completely stoked to bring you the DC Family and COP Team Christmas newsletter. This edition is as festive as ever, with articles from Jack, Molly, Liam and my very own, now standard, children law update. In the COP dimension, Jack is examining tenancy agreements for those lacking capacity, whilst in the area of money work, Liam is concentrating on all things financial (finance being an area in which I am completely clueless- a good example of this being (i) the state of my tax returns, and (ii) me spending over £120 on a replica light-sabre from HMV in Preston recently…..). Added to these are two further brilliant pieces of work, in which Molly provides us with an article concerning the topical issue of revocation of placement orders, whilst Katie contributes a invaluable analysis of the current legal provisions relating to post-adoption contact.

As it is rapidly approaching Christmas, the law firm/chambers part season is in full swing and it is genuinely great to see so many of our solicitor and barrister colleagues out and about, especially after a number of years of Covid restrictions and the impact that had upon socialising.

Meanwhile, in the legal sphere, things seem to be progressing rapidly in the 'new PLO' environment. Court resources are as stretched as ever and there have been a number of new judicial appointments, which is always welcome from the perspective of all of us practitioners. The sense I get in Manchester and Lancashire is that everyone is still determined to work together in order to try to get the best possible results for children; the camaraderie in our area always makes me smile and I do think we are really lucky to have such a great group of solicitors and barristers locally.

Hopefully all of us from the DC team will see you all out and about over the busy Christmas period, but if we don't then we all wish you the very best for the new year (2024!!).

Now, to kick off the Christmas gaming season, I bring you this year's festive edition of 'What the Jackson?!?', the ever popular game that for some reason, I haven't yet received a complaint about from the Court of Appeal office (yet….). You know the drill, simply match is lordship's dicta to the case name and inbox me the answers. Winner, selected at random, gets a big box of Miniature Heroes.

Good Luck...

What the Jackson?!?

1'On evidential matters, the usual position applies. The party seeking a factual finding will bear the burden of proving it, again to the civil standard. So, it will typically be for an applicant parent to show how much their situation has changed since the placement order was made, and for opposing respondents to make good their case about what a change of plan would mean for the children. Moreover, although the substantive principles surrounding adoption are constant as between applications for placement orders and applications for revocation, the evidential picture will not usually be the same. Overall, the evidence before the court at a revocation hearing will differ in quantity and focus (but not quality) from the evidence that was given in the care and placement proceedings. That is because the court has already made its findings about events preceding the placement order, so that subsequent evidence will be more closely focused on events since then and, crucially, on the future.'

2. 'In overview, the court was concerned at this rehearing to determine the local authority's case about the causation of a sequence of head injuries to an infant. The first and last troubling injuries were particularly serious. As the judge identified, the accounts given by the parents were of central importance. In his first judgment, he made a positive finding that the skull fractures were the result of an improbable accident. However, the improbability was displaced by his positive assessment of the parents' character and credibility.'

'3. In my judgment, neither the fact that a jury has reached a verdict on criminal charges that is inconsistent with earlier findings in care proceedings nor the simple fact (if it be true) that the evidence heard by the jury was different from, or more comprehensive than, that adduced before the judge in the family proceedings is sufficient by itself to justify the conclusion that the findings in the family proceedings were wrong so as to require an appellate court to overturn the findings. It may, however, be sufficient to justify a reopening of all or part of the fact-finding hearing. I shall return to this point of the end of this judgment'.

Cases

A) T and J (Children) [2020] EWCA Civ 1344

B) N (Children: Revocation of Placement Orders) [2023] EWCA Civ 1352

C) S (Children: Findings of Fact) [2023] EWCA Civ 1113

Good luck…..

DEANS COURT CHAMBERS

PLACEMENT ORDERS: A RARE SIGHTING

By Molly Gill

Introduction

The recent Court of Appeal judgment in *Re N (Children: Revocation of Placement Orders*) [2023] EWCA Civ 1352 puts a spotlight on applications for the revocation of placement orders. Applications seeking *permission to apply* for the revocation of placement orders are common, yet they often fall short of passing the two-stage test necessary to then move onto substantively challenging the placement order remaining in force. It is rare to come across reported appeal cases of this type, so let's take a moment to refresh our knowledge on placement orders using this case. After all, applications don't necessarily stop when care and placement orders are made.

What are the facts?

In December 2021, placement orders were made for two children, and potential adopters were identified in October 2022 and subsequently introduced to the children. Following the introduction, the children maintained regular contact with the prospective adopters. In March 2023, the mother applied for leave to apply to revoke the placement order. When the application for leave to apply was heard in May 2023, it was unopposed as the mother had demonstrated significant positive changes in her life over the past two and a half years. The court ordered an assessment to evaluate the mother's changes, her current circumstances, as well as the children's circumstances and an analysis of their welfare.

In June 2023, the mother's assessment was negative and the mother made a Part 25 application for an Independent Social Worker to undertake a new assessment. The application was heard in July during a Pre-Trial Review, where it was opposed from both the local authority and the Children's Guardian and was refused by the court.

At the substantive hearing in August, to determine whether the placement order should be revoked, the mother accepted that she was not able to immediately care for the children. While she did not assert that the court could definitively approve the children's return to her in the future, she argued the possibility warranted a further new assessment. She renewed her application for an Independent Social Worker and invited the Court to either revoke the placement order or adjourn for a new assessment.

The Recorder, now HHJ Newport, was tasked with a welfare determination: whether the prospects of a return to the mother's care justified abandoning a two-year plan of adoption. The Recorder placed considerable weight on the changes the mother made but found that they had not brought her to a point where she could meet her two children's needs. The Recorder concluded that revoking the placement orders would not be in the children's best interests, dismissing the mother's application for revocation and her application for an Independendent Social Worker. The mother appealed, and Lord Justice Peter Jackson upheld the Recorder's decision.

What is the legal framework?

Section 24(1) of the Adoption and Children Act 2002 ("ACA 2002") enables the court to revoke a placement order on the application of 'any person'. However, subsection (2) introduces a condition: a parent and any other person (except for the child and the local authority) need the court's permission to apply, and the child should not be 'placed' for adoption already. In this article, I will discuss it from a parent's perspective.

The first stage of the two-stage test for permission for leave to apply is seen at section 24(3): is the court satisfied that there has been a change in circumstances since the placement order was made? The change of the circumstances does not have to be significant but it must be of a nature and degree sufficient to open the door to consideration of whether leave to apply should be given (see: Re P (*Adoption: Leave Provisions) [2007] 2 FLR 1069* which was within this year upheld as the correct principle in M (*A Child: Leave to Oppose Adoption) [2023] EWCA Civ 404*). A change does not have to be unexpected and unforeseen (Re M as above).

If the answer to the first stage of the test is 'yes', the second stage is, should leave to apply be granted? The question for the Court is whether in all of the circumstances, taking into account the parent's ultimate prospects of success in securing a revocation of the placement order and the child's interests, leave should be given? (*NS-H v Kingston upon Hull City Council and MC [2008] 2 FLR 918*). An application for leave to apply is not covered by section 1(7) of the Adoption and Children Act 2002. Therefore, the child's welfare is relevant but not paramount (*M v Warwickshire County Council [2008] 1 FLR 1093*).

If permission to apply to revoke a placement order is granted, then the decision becomes a welfare decision. Section 1 of the ACA 2002 will apply, which encompasses the paramountcy and no delay principle and the welfare checklist – which are the same principles to make the placement order in the first place. The court's task is to carry out a welfare assessment and evaluation of whether it is in the child's interests for the placement order to be revoked or to continue. In order to do this the court must compare each realistic option for the child. The burden of proof is on the person seeking to revoke the placement order and it is the civil standard of proof.

What do we learn from this case?

The key takeaway from this case is that the process isn't a re-run of the public law proceedings, as finding about events which led to the making of a placement order have already been made. The focus of the hearing is for the parent to show that their life has changed since the placement order was made and the respondent local authority and the children's guardian will have to show what a change of the adoptive plan would mean for the child. It is important to narrow down what is the child's current situation? What has happened since the placement order was made? What are the parent's current circumstances? Are the changes enough to satisfy the court that the placement order should be revoked? What are the competing options for the child? Which option is in the child's best interests?

A key message from this decision is that the evidence before the Court at a revocation hearing will differ in quantity and focus but not quality from the evidence that was given in the proceedings that led to the making of a placement order. The decision to revoke a placement order is just as serious a decision as it was to make one in the first place.

In conclusion, a plan for adoption takes serious and careful deliberation to sever legal ties between a parent and a child. It cannot be undone lightly particularly in the face of a child who need certainty about their future.

Molly Gill

Deans Court Chambers

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CHILDREN LAW UPDATE

By Michael Jones KC

I will kick this update off with some really useful guidance provided by Arbuthnot J in A Health Board v AZ & Ors (Termination of Childhood Pregnancy : Guidance) (Rev3) [2023] EWHC 2517 (Fam). This case involved a 11 year old girl, AZ, who had become pregnant as a result of being raped by a 14 year old whom she met on the internet. The Health Board issue an application for declarations that a termination of AZ's pregnancy was in her best interests and that it was in her best interests for tissue to be taken from her placenta for the purposes of forensic testing in a criminal investigation. AZ was assessed by both the social worker and Guardian as being competent and after being allowed time to consider the risks and benefits to AZ of a termination, her parents agreed that a termination would be in AZ's best interests.

In concluding that the making of both declarations sought was in AZ's best interests, Arbuthnot J provided the following, invaluable, guidance in how to approach applications of this nature, which will often be urgent due to the timescales involved.

"Any applicant in such a case is reminded to consider Part 12 of the Family Procedure Rules concerning proceedings relating to children and Practice Direction 12E where the approach to urgent business is considered. PD12E 3.1 sets out guidance for children subject to medical treatment, nothing I say below is meant to contradict that practice direction.

Where a termination of a pregnancy is contemplated in respect of a child who lacks Gillick competence, an application to the Family Division ought to be made as soon as practicable first if there is any doubt first as to what is in her best interests or second as to her or her parents' consent for her to undergo a termination: see An NHS Trust and D [2003] EWHC 2793 (Fam).

Where, as was initially the situation in the case of A, it appears that there is a divergence of views, consideration should be given to an application at an early stage, even if the application is subsequently withdrawn: Re AB [2019] EWCA Civ 1215.

Where a termination of pregnancy is contemplated in respect of a child, the applicant should make an early referral to the other relevant statutory bodies, including the relevant local authority, the relevant Integrated Care Board in England or the relevant Local Health Board in Wales, depending on the applicant, to consider whether the child meets the criteria to receive support.

Any application to the High Court should include the following:

a. Written evidence from two registered medical practitioners who are able to address the requirements of section 1 of the Abortion Act 1967, preferably from two obstetricians;

b. Written evidence from a child and adolescent psychologist or psychiatrist who has met with the child to provide evidence on her Gillick competence to consent to any decisions regarding termination. It would be preferable for this evidence to have been obtained in the absence of the child's mother and father.

c. A full best interests analysis by one of the two obstetricians. The focus of this analysis ought to be on the subject child and not on the foetus, consistent with the case law in Vo v France(2005) 10 EHRR 12 at [81-82]; Paton v British Pregnancy Advisory Service [1979] QB 276; Paton v United Kingdom (1980) 3EHRR 408. The analysis ought to include:

i. all options available.

ii. a summary of the risks and benefits of each option;

iii. the preferred option and the reason why it is preferred;

iv. the applicant's position on any other consequential orders sought such as:

1. sterilisation;

2. contraception; or

3. the retaining of any placenta tissue for the purposes of forensic investigation.

d. A care plan addressing the detailed logistics of the proposed treatment and the support that will be offered to the child prior to, during and following any sanctioned treatment. This support is to include mental health support where appropriate.

Should there be more than one agency involved with the child, a multi-agency meeting should take place to enable all relevant agencies to contribute to the care plan referred to at d. above. Where possible, this should take place within ten working days of any application first being contemplated.

The application ought to stress the urgency with which a directions appointment is sought, the nature of the application which gives rise to the urgency and the up-to-date gestation timetable.

The application should highlight the need for an urgent direction to join the child as a party, so the child is represented at the first directions hearing.

An application for a declaration which will permit an organ of the State to carry out a termination on a non-competent child should be regarded as a medical treatment issue of the utmost urgency.

The urgency is likely to arise from a number of factors:

a. First, due to the requirements of the Abortion Act 1967, it would not be lawful for the court to sanction the termination after twenty-four weeks gestation in accordance with section 1(a), unless it was satisfied that the higher threshold of section 1 (b) was met, namely that termination was "necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman".

b. Second, a more gestationally advanced foetus would be larger in size. If surgical termination is undertaken this becomes procedurally more complex to perform and can increase the risk of complications such as retained products of conception. If medical termination is undertaken advancing gestation would lead to increase in pain experienced and a greater likelihood of bleeding and psychological morbidity from witnessing the delivery of a more physically developed and recognisable foetus.

c. Thirdly, as time passes, the likelihood of finding a clinician with the relevant experience willing to perform the termination would decrease, which may result in further logistical difficulties in conveying the child to a different locality in order to affect the procedure.

Upon making the application, in accordance with the practice within care proceedings the applicant shall give notice to CAFCASS/CAFCASS Cymru *that an application is pending and that a guardian may need to be allocated imminently.*

The directions appointment should be listed within at least 48 hours of the application before a judge of the Family Division. At the time of the directions appointment, counsel instructed for the applicant would need to provide the court with the most accurate gestation timetable, including the date at which the child will be at 24 weeks gestation and her expected delivery date.

If the child remains unrepresented at the directions appointment, the court will consider a brief (1 hour) adjournment to enable the applicant to contact CAFCASS so that a duty guardian can represent the child at that hearing. Every attempt should be made to ensure that the child is represented at all hearings.

At the directions appointment, the court would be required to consider:

a. whether any of the evidence set out in the guidance above at paragraph 48 above is absent or requires clarification;

b. whether the joinder of any other statutory body is required, such as the relevant local authority, the relevant Integrated Care Board in England or the relevant Local Health Board in Wales (depending on the applicant);

c. the formal appointment of the Children's Guardian and directions for their analysis to be prepared in advance of any final hearing; and

d. provision for the parents to prepare statements.

The matter ought to be listed before a judge of the Family Division at the first available opportunity for a final hearing, no more than seven days later, with sufficient time to ensure that any outstanding evidence is obtained.

In circumstances where the court is satisfied that it is in the best interest of the child to undergo the proposed termination, it is advisable to make a declaration, instead of relying on any consent of the parents, to act as the substituted consent of the child, where the court has reasonable grounds to believe that either the parent's past exercise of parental responsibility has been called into question or there has been a history of changed positions which would cast doubt on the ability of the procedure to take place in accordance with the envisaged timetable."

H (Children: Placement Orders) [2023] EWCA Civ 1245 does not contain any new developments of law, but I have included this case because I found it interesting from a welfare perspective (n.b. I have not just included this because it is a Peter Jackson LJ judgment….. honest). The case involved 3 children, a 1 year old girl, G, and two elder boys. The boys had lived in foster care since 2021 and placements had been made at the end of that year. The local authority subsequently issued case proceedings in relation to G almost immediately after her birth. The risk issues identified related primarily to the mother's relationships and her criminal activities. Ultimately, the local authority concluded that the progress made by the mother was just about sufficient in order to allow for G to remain in her care, whilst the mother herself had issued an application to revoke the placement order in relation to the boys. The Guardian however did not support G remaining in her mother's care, whilst neither the local authority nor the guardian supported the rehabilitation of the boys to the mother's care (the boys by this point had been in foster care for some time and were awaiting adoption). The Court at first instance revoked the placement orders in relation to the boys and permitted G to continue to reside with her mother under the auspices of a supervision order. The Guardian appealed. The Court of Appeal dismissed the appeal relating to G, so that she remained in the care of her mother under the supervision order, but allowed the appeal against the revocation of the placement orders relating to the boys.

This case was not straightforward and evidently required a very detailed and bespoke welfare analysis in relation to each of the children; the boys were a very separate issue to that of G. A point that Peter Jackson LJ identified was that the Judge had not fully considered the issue of safety planning and what would practically happen to the boys following revocation of the placement orders;

‘At the same time, the boys, who urgently need a permanent family that can give them skilled parenting, have been kept waiting for what now amounts to 2½ years. They had said goodbye to their birth family and been prepared for adoption. That plan could only sensibly be sacrificed in favour of a plan for rehabilitation if the evidence showed that success could be predicted with a high degree of confidence.

This required a careful analysis of what might happen next if the mother's application succeeded. The Guardian advised (see paragraph 21 above) that any rehabilitation of the boys would need to be very carefully, gradually and comprehensively tested before there could be real confidence in the likely success of rehabilitation and the sustainability of arrangements. The advice seems self-evident and the judge does not appear to have demurred. In practice, a revocation of the placement orders would set in train a sequence of events along these lines*:*

1. The local authority would have to accept that it should defer to the court and take steps to reverse its care plan. It would have to draw up a complex rehabilitation plan based on the circumstances of the boys, of G, of B, of the fathers, and pivotally of the mother, someone the judge had found will not be easy to work with under a supervision order, or even be honest.

2. The adopters who had been matched with the boys would probably be lost.

3. The boys would have to be supported to understand the changed plan, and the fact it could not happen straight away, and adapt to the reintroduction of contact.

4. The mother's care of G would have to be carefully monitored for a perceptible period.

5. The effect of B's return would have to be similarly monitored.

6. The position of the fathers would have to be monitored.

7. The local authority would at some point have to decide whether the boys could safely be returned, and if so how.

8. If the decision was negative, more litigation would be likely. The mother might seek to discharge the care orders. The local authority might apply for placement orders. The two sets of proceedings about the children have already lasted for over two years, and a third set is unlikely to be short.

9. If the decision was positive, reunification would hopefully succeed, but it might break down at some indeterminate point, in which case the boys would return to foster care and adoption may or may not be an option.’

I really like the way that Peter Jackson LJ breaks this down in such a simple and logical way; his lordship makes clear that the Judge should have looked forward and considered the practical implications and impact upon the boys that revocation of the placement orders would have. If the Judge had done so, there could have only been one sensible conclusion, as his lordship identified;

‘The amount of delay and uncertainty inherent in this programme is so obvious that the judge was bound to confront it squarely before preferring it to a plan for adoption that could be put into effect immediately. The boys' situation is a glaring example of the general principle, enshrined in section 1(2) of the Children Act 1989, that any delay in determin-

ing a question with respect to the upbringing of a child is likely to prejudice the welfare of the child. At paragraph 36, the judge pinned his decision on an assessment of the prospect of the mother as being able to care for the boys within a reasonable time frame. He found the prospect to be good, and he concluded that there was no reason why the boys should not return on three assumptions: that G continues to thrive, that the mother continues to function after B returns, and that there is no violence around the children. However, the judge was bound to question whether a care plan that was without professional support and was so dependent on delay and uncertainty for its success was a realistic final care plan at all. Had he done so, he would in my view have been driven to conclude that the prospect of a successful reunification of the boys was no more than speculative in the light of the evidence as a whole. As it was, a care plan along those lines would effectively delegate a final decision about rehabilitation to the local authority and contain the obvious possibility of further litigation and delay.

The second difference between G and the boys relates to the nature of the respective risk assessments. The judge made the point that, as the children would all be living in the same home, the risks would be similar. He reiterated that, although different considerations applied to the boys and G, he could not see that the long-term concerns in respect of G could permit her to remain at home but somehow rule out the mother as a carer for the boys. Even ignoring issues of overload and each child's special needs, I cannot uphold this line of reasoning. The risks within the home may have been similar, but the consequences for the children were not. In contrast to G, these boys have a fast-narrowing window for adoption. Delay would derail that long-standing plan for an indefinite period with uncertain consequences, while a failed attempt at rehabilitation might quite possibly deprive them of a family of their own altogether. The judge alluded to this at paragraph 9, but this critical element of the risk assessment did not find its place in his ultimate assessment. Instead, the decision appears to have been unduly influenced by a perception that it would be unusual for older children to be adopted while a younger child remains at home. Whether or not that is so, the risk assessment had to relate to the actual situations of these children and to address the consequences, here amounting to harm, that might come to them as a result of the abandonment of the plan for adoption. Again, had the judge approached matters in this way, he would in my view have been bound to conclude that the foreseeable consequences were so contrary to the boys' welfare that the plan could not to be embarked upon and that the mother's application must be dismissed.'

I think this judgment emphasises and reminds us of the imperative need to treat each subject child separately from a welfare perspective, to analyse the issue of risk to each individual child that is part of a sibling group, and also to look forward to the potential welfare impact upon each of the children should a certain course of action or care plan be followed.

Next up- *EY (Fact-Finding Hearing)* [2023] EWCA Civ 1241. This is an appeal from a judgment at first instance where threshold was found not to be crossed and the local authority's application for a care order dismissed. The case concerned one child aged 14, E, who lived with her father and elder sister (who had turned 18 during the proceedings). The background history involved E making statements of a sexual nature to professionals, whilst the local authority asserted that in effect, she had been exposed to poor levels of parental supervision, neglect, and sexualised behaviours. A psychologist was instructed to assess E and her father, with that assessment concluding that the father displayed a limitation in thinking about and understanding the needs of the children and their own psychological and emotional experiences, and that E would remain at risk in the community should her underlying vulnerabilities not be addressed. The psychologist was not called to give oral evidence at the final hearing, however the local authority relied on the psychologist's conclusions. The Judge ultimately criticised the psychological assessment and found threshold not to have been established.

A number of grounds of appeal were advanced, including that the Judge had fallen into error by misconstruing the unchallenged report of the psychologist and by failing to give it sufficient weight. The father opposed the appeal, in particular, in relation to the fact that the psychologist's evidence was not challenged in cross examination, it was argued on behalf of the father that this was an approach counsel was entitled to take, citing *Griffiths v TUI (UK) Ltd [2021]* EWCA Civ 1442, [2022] 1 WLR. In that case, Asplin LJ (with whom Nugee LJ agreed) said (at paragraph 65):

"I can see nothing which is inherently unfair in seeking to challenge expert evidence in closing submissions. It may be a high risk strategy to choose neither to adduce contrary evidence nor to seek to cross-examine the expert but there is nothing impermissible about it…. As long as the expert's veracity is not challenged, a party may reserve its criticisms of a report until closing submissions if it chooses to do so."

That case was however, subsequently appealed to the Supreme Court, with the judgment awaited(at the time of writing), albeit the point was not critical for the purposes of the appeal in this case, for the reasons articulated by Baker J;

'Fortunately, the point which divided this Court in Griffiths v Tui does not seem to me to be central to the present appeal. Whatever may be the obligations on a party who seeks to challenge the conclusions of an expert, the judge is not obliged to accept those conclusions. As Nugee LJ observed in Griffiths v Tui (at paragraph 81:

"As a matter of basic principle it is the function of trial judges to evaluate all the evidence before them in reaching their conclusions on the factual issues. That includes deciding what weight should be given to the evidence. I see nothing in the authorities that suggests that that obligation to assess the evidence falls away if it is "uncontroverted"; uncontroverted evidence still has to be assessed to see what assistance can be derived from it, viewed in the context of the circumstances of the case as a whole. Uncontroverted evidence may be compelling, but it may not be: it may be inherently weak or unhelpful or of little weight for other reasons."

As I read Bean LJ's dissenting judgment (in particular at paragraph 94), he was not disagreeing with that proposition.

This echoes the well-established principle in children's cases in the family court emphasised by Charles J in *County Council v K D & L* at paragraphs 39:

"It is important to remember (1) that the roles of the court and the expert are distinct and (2) it is the court that is in the position to weigh up the expert evidence against its findings on the other evidence."

This in turn is an aspect of the wider principle articulated by Dame Elizabeth Butler-Sloss P in *Re T (Children)* at paragraph 33:

"…evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases has to have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof."

The judge was not obliged to accept Dr Timberlake's evidence simply on the basis that he had not *been required to attend for cross-examination. On the contrary, he was obliged to evaluate Dr Timberlake's opinion in the context of the totality of the evidence. This aspect of the first ground of appeal therefore fails.'*

This is why I found this case particularly interesting, because the Court of Appeal was satisfied and effectively confirmed that a Judge does not need to hear oral challenge to an expert in order to disregard their conclusions, albeit if they do depart from the views of the expert, there needs to be a proper justification for doing so, i.e. evaluating the expert evidence in the context of the entirety of the evidential canvas. The appeal was successful for other reasons, namely the fact that the Judge's analysis of the psychologist's report and the assertion that the expert had gone beyond the remit of his instruction (the Court of Appeal was not persuaded that the criticism of the psychologist in this respect was made out);

'The judge's dismissal of this conclusion is troubling, partly because he did not really explain why he reached that decision but also because it seems to have been substantially influenced by his erroneous view that Dr Timberlake's analysis was tainted because it was based on matters which the local authority had failed to prove.'

The Court of Appeal also identified fatal flaws in the Judge's evaluation of the evidence;

'In short, there were substantial flaws in the judge's evaluation, in particular his disregard of some of the findings as "historic" and his failure to evaluate the findings in the context of Dr Timberlake's analysis and conclusions. In those circumstances, I conclude that this case falls within the category of appeals where this Court is compelled to interfere with a judge's evaluation of the evidence. For these reasons, I would also allow the appeal on ground two'

The matter was accordingly remitted for re-hearing before a different tribunal.

Next up, what I consider to be a really important judgment on the issue of jurisdiction, London Borough of *Hackney v P & Ors (Re Jurisdiction: 1996 Hague Child Protection Convention)* [2023] EWCA Civ 1213. Moylan LJ summarised the issue in this appeal as follows;

'The principal issue raised by this appeal is the date by reference to which the court determines whether it has jurisdiction based on a child's habitual residence, pursuant to the provisions of Article 5 of the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children ("the 1996 Convention"). Is it the date of the hearing or is it the date on which the proceedings were issued? This question has divided the judges of the Family Division, as outlined further below. A secondary issue is the extent of the court's jurisdiction to make orders under Part IV of the Children Act 1989 ("the CA 1989") if a child is present, but not habitually resident, in England and Wales nor any other Contracting State to the 1996 Convention.'

The background facts are fairly extensive and the appeal follows the decision of MacDonald J when he determined that the relevant date was that of the hearing in question, not the date upon which proceedings were instigated. The full judgment really demands a careful reading but for those of you who are not as keen as me (or just too lazy to read a massive COA judgment), the headlines are as follows (helpfully provided by Moylan LJ at paragraph 125);

(i) the 1996 Convention applies to proceedings for an order under Part IV of the CA 1989;

(ii) the court must determine the issue of jurisdiction at the outset of proceedings by reference to the date on which the proceedings were commenced;

(iii) jurisdiction under the 1996 Convention can be lost during the course of proceedings, if it was

based on habitual residence and the child has ceased to be habitually resident in England and Wales. Accordingly, the court must be satisfied that it retains jurisdiction at the final hearing;

(iv) jurisdiction is acquired under Article 5 from the date on which a child becomes habitually resident in England and Wales; the effect of this on existing proceedings will depend on the circumstances of the case;

(v) the court in England and Wales will likely have jurisdiction to make interim orders under Part IV under Article 11 when the child is habitually resident in a Contracting State;

(vi) the court in England and Wales will likely have jurisdiction to make interim orders under Part IV under Article 11 and will also have substantive jurisdiction based on a child's presence here when the child is habitually resident in a non-Contracting State.

So, in essence, we are back to the position we were in under BIIA where the relevant date to determine habitual residence is the date upon which the proceedings were instigated. It is also useful to note that in a situation where a child is habitually resident in a non-contracting state, the English court can still acquire jurisdiction on the basis of physical presence, pursuant to the provisions of the FLA 1986.

I am also going to give a mention Hayden J's judgment in Lancashire County Council v M & Ors [2023] EWHC 3097 (Fam), firstly because it raises an interesting point in relation to propensity, secondly because I was in it and wish to engage in shameless self-promotion. The case involved an infant death, with the real issue of controversy being a previous posterior rib fracture, which the experts (and the Court) found had been inflicted; the potential 'pool' incorporated both parents. The cause of death had been conceded by the parents to be overlay, hence this issue of cause of death was not litigated. There was a history of domestic abuse between the parents, with the father having previously been convicted of offences perpetrated against the mother. One of the things I like about Hayden J is that he recognises how serious domestic abuse is; my own view (others may disagree) is that in society in general, there is a failure to realise just how significant a threat to life (as well as to a person's physical safety and mental health) domestic abuse actually is. Hayden J made the following observations;

'On 20th May 2021, F was convicted of an offence of Battery. He accepted in the witness box that the facts of that offence were primarily based on his 'strangulation' of M. He received a 12-week suspended prison sentence for this offence. F also accepted that the two further allegations of strangulation made by M in the Non-Molestation application are true. Explicitly, therefore, he has accepted three separate incidents of strangulation of M. The Criminal courts have come to understand the significance of this particular type of offending. The Stand Up to Domestic Abuse (SUTDA) survey into the effects of non-fatal strangulation (NFS) made the argument that it should be become a stand-alone offence.

Section 70 Domestic Abuse Act 2021 (DA Act 2021) introduced the offences of non-fatal strangulation and non-fatal suffocation. Schedule 2, paragraph 4 DA Act 2021 introduced the offence of racially or religiously aggravated non-fatal strangulation or non-fatal suffocation. The offences came into force on 7th June 2022 and are not retrospective. The summary report on data collected from SUTDA survey emphasised the following:

"Intimate Partner Homicide (IPH) has a strong relationship to domestic abuse and coercive control and international research has established that there are certain characteristics of domestic abuse or what are called 'high risk markers' that are especially strongly associated with future homicide and

serious harm. Any kind of strangulation is one of the strongest markers. Research has shown that this increases the risk of homicide by eight times. This is not simply because NFS could 'accidentally' end as homicide, but because people who use strangulation are more dangerous."

The impact on victims also needs to be fully understood:

"NFS is also associated with severe trauma in its victims and is in fact experienced as a real threat to life. Victims of it report not only that it is incredibly painful, but it is also an experience of potential death. Perpetrators of NFS very often have this as their motivation. It is a particularly traumatic, and because of this an effective, way to exert the ultimate control and leave the victim in no doubt that their life has been threatened. It would be a mistake to think that NFS is a spontaneous and angry assault, it is more likely to be a controlled and determined threat."

These offences are triable either way. A person found guilty is liable on summary conviction to imprisonment for a term not exceeding 12 months, or a fine, or both and on conviction on indictment to imprisonment for a term not exceeding 5 years or to a fine, or both. In *R. v Cook* [2023] EWCA Crim 452 , the Court of Appeal set out the approach to sentencing in strangulation cases.

This authority is clear that, in light of the conduct inherent in the offence, a custodial sentence will be appropriate, save for in exceptional circumstances. This should ordinarily be one of immediate custody, with a starting point of 18 months imprisonment. The Court identified the following, non-exhaustive, factors which will increase the starting point:

i. history of previous violence (the significance of the history will be greater when the previous violence has involved strangulation);

ii. presence of a child or children;

iii. attack carried out in the victim's home;

iv. sustained or repeated strangulation;

v. use of a ligature or equivalent;

vi. abuse of power;

vii. offender under influence of drink or drugs;

viii. offence on licence;

ix. vulnerable victim;

x. steps taken to prevent the victim reporting an incident; and

xi. steps taken to prevent the victim obtaining assistance.

I have made reference to these provisions because I consider that they require to be far more widely known and understood by family law practitioners. I am also signalling the extent to which I consider M to be vulnerable in this relationship. I regard her as being in danger.'

Hayden J identified the father as being the perpetrator of the rib fracture, and in doing so considered the issue of the father's general propensity for violent behaviours;

'For many years, the judgment of Wall J (as he then was) in CB and JB (Care Proceedings: Guidelines) [1998] EWHC Fam 2000, has stood as a citadel, guiding the approach to the admission of evidence, likely to be relevant in establishing contested identified facts (i.e., 'fact finding hearings'). Some of that judgment's footings have crumbled, a little, over the years. The "ex hypothesi" assumption that "capacity to parent children" can only commence after a clear factual substratum has been identified in a 'split hearing', no longer carries with quite the same emphasis. Wall J also identified, as part of the "lessons to be learned", how the Court should approach evidence of 'propensity'. He stated:

"(v) Evidence of propensity or a psychiatric or psychological assessment of one of the parties is un-

likely to be of any assistance in resolving a purely factual issue (my emphasis). There will in any event be before the court evidence from the local authority and the parents relating to the history of the case and the backgrounds of each of the parents. A psychologist or psychiatrist instructed to undertake an assessment of a parent for the first stage of a split hearing is unlikely to have a complete knowledge of the facts.

Wall J went on to say:

(vi) Furthermore, such a witness may, as here, express opinions as to propensity or as to responsibility for a child's injuries which are both prejudicial and wrong. The assessment of adult credibility as to the responsibility for a child's injuries (often the critical factual issue) remains the function of the judge. In my judgment, therefore, a psychiatric or psychological assessment of the parties should not be permitted at the first stage of a split trial unless the particular facts of the case demonstrate that such evidence is or is likely to be directly relevant to the factual issue to be tried.

It is important to emphasise that Wall J went no further than saying that propensity evidence was "unlikely" to be of any assistance in resolving a purely factual issue, he did not exclude it. Too frequently, the dicta in Re CB and JB (supra) have been interpreted as a complete prohibition on reliance on propensity evidence in fact-finding hearings. This is a misconstruction. Propensity evidence has a long-established place in the criminal law of England and Wales. Indeed, the criminal law has moved towards greater admissibility of propensity evidence in the years following Wall J's judgment. In *R. v Hanson* [2005] EWCA Crim 824, the Vice President, Rose LJ observed:

[7] Where propensity to commit the offence is relied upon there are thus essentially three questions to be considered:

1. Does the history of conviction(s) establish a propensity to commit offences of the kind charged?

2. Does that propensity make it more likely that the defendant committed the offence charged?

3. Is it unjust to rely on the conviction(s) of the same description or category; and, in any event, will the proceedings be unfair if they are admitted?

Rose LJ went on to analyse the scope of admissibility:

[8] In referring to offences of the same description or category, section 103(2) is not exhaustive of the types of conviction which might be relied upon to show evidence of propensity to commit offences of the kind charged. Nor, however, is it necessarily sufficient, in order to show such propensity, that a conviction should be of the same description or category as that charged.

[9] There is no minimum number of events necessary to demonstrate such a propensity. The fewer the number of convictions the weaker is likely to be the evidence of propensity. A single previous conviction for an offence of the same description or category will often not show propensity. But it may do so where, for example, it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged (compare DPP v P [1991] 2 AC 447 at 460E to 461A). Child sexual abuse or fire setting are comparatively clear examples of such unusual behaviour but we attempt no exhaustive list. Circumstances demonstrating probative force are not confined to those sharing striking similarity. So, a single conviction for shoplifting, will not, without more, be admissible to show propensity to steal. But if the modus operandi has significant features shared by the offence charged it may show propensity.

The Supreme Court considered the circumstances in which propensity evidence might be established in *R v Mitchell* [2016] UKSC 55. Lord Kerr addressed the issue thus:

"Propensity - the correct question/what requires to be proved?

39. A distinction must be recognised between, on the one hand, proof of a propensity and, on the other, the individual underlying facts said to establish that a propensity exists. In a case where there are several incidents which are relied on by the prosecution to show a propensity on the part of the defendant, is it necessary to prove beyond reasonable doubt that each incident happened in precisely the way that it is alleged to have occurred? Must the facts of each individual incident be considered by the jury in isolation from each other? In my view, the answer to both these questions is "No".

43. The proper issue for the jury on the question of propensity… is whether they are sure that the propensity has been proved. … That does not mean that in cases where there are several instances of misconduct, all tending to show a propensity, the jury has to be convinced of the truth and accuracy of all aspects of each of those. The jury is entitled to - and should - consider the evidence about propensity in the round. There are two interrelated reasons for this. First the improbability of a number of similar incidents alleged against a defendant being false is a consideration which should naturally inform a jury's deliberations on whether propensity has been proved. Secondly, obvious similarities in various incidents may constitute mutual corroboration of those incidents. Each incident may thus inform another. The question … is whether, overall, propensity has been proved.

44. … the jury should be directed that, if they are to take propensity into account, they should be sure that it has been proved. This does not require that each individual item of evidence said to show propensity must be proved beyond reasonable doubt. It means that all the material touching on the issue should be considered with a view to reaching a conclusion as to whether they are sure that the existence of a propensity has been established."

I refer to the judgments above not to suggest that the approach set out in the criminal jurisdiction is to be imported, in an identical manner, into the fact-finding process in family proceedings in precisely the same way (plainly, they cannot be), but merely to demonstrate that which I consider to be an essentially self-obvious proposition i.e., that if propensity evidence is potentially admissible in criminal law proceedings, it would be entirely illogical to exclude it from consideration in investigative proceedings in the family court. Moreover, and with the greatest diffidence and respect for Wall J, the starting point for consideration of the relevance of such evidence should not be hampered or distorted by a presumption that such evidence is "unlikely" to be of assistance. It will depend on the facts of the individual case.

Propensity evidence is, primarily but not exclusively, a criminal law construct which, in simple terms, adopts the reasonable proposition that where an individual has been proved to have behaved in a particular way in the past, it is more likely that they might behave in that same way again. The evidential framework, governing admissibility of propensity evidence, in a criminal trial, predicated on the criminal standard of proof, is very different from that in an essentially investigative process in family proceedings. In the Family Court, the Judge will, invariably, be scrutinising a broad evidential landscape. Where the lodestar for the Court's approach is the paramountcy of the child's welfare, a very wide category of evidence will fall for consideration. This will include hearsay evidence, be it first or second hand, in documentary format or in oral evidence. It will also include expert opinion evidence. The standard of proof is, of course, the civil standard, requiring facts to be proved on the balance of probabilities. As Lord Brandon of Oakbrook said in *The*

Popi M, Rhesa Shipping Co SA v Edmunds, Rhesa Shipping Co SA v Fenton Insurance Co Ltd [1985] 1 WLFR 948; 956, this is a test to "be applied with common sense". Lady Hale makes the same point in *Re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)*[2008] UKHL 35;

"[31] My Lords, if the judiciary in this country regularly found themselves in this state of mind, our civil and family justice systems would rapidly grind to a halt. In this country we do not require documentary proof. We rely heavily on oral evidence, especially from those who were present when the alleged events took place. Day after day, up and down the country, on issues large and small, judges are making up their minds whom to believe. They are guided by many things, including the inherent probabilities, any contemporaneous documentation or records, any circumstantial evidence tending to support one account rather than the other, and their overall impression of the characters and motivations of the witnesses. The task is a difficult one. It must be performed without prejudice and preconceived ideas. But it is the task which we are paid to perform to the best of our ability.

[32] In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking a judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof."

All of this applies with equal rigour to the obligation upon the Judge to identify not only harm that may have been sustained by a child but the likely perpetrator of that harm. The exercise is a parallel one and, for the reasons that Lady Hale has identified in the passage above, the obligation on the Judge every bit as exacting. There will, inevitably, be cases where the identity of the perpetrator will be uncertain. Paradigmatically, injuries to a child occur in the hands of a parent or carer. Section 31(2) of the Children Act 1989 requires the court to focus not only on the significant harm sustained by the child but on its attributability. Inevitably, within the home environment, there are unlikely to be witnesses. The investigative process must track down ascertainable facts from the broadest canvas available and, where possible, draw such inferences as those facts will support. It is frequently a difficult task, but it is not one that can be shirked. The danger in failing to confront it is that an innocent individual may be tainted by a finding that has a direct impact, both on her and on the child. A finding which leaves a parent in a pool of potential perpetrators is likely to adversely influence the nature and extent of the contact arrangements or indeed, on where and with whom the child will live in the future. Of course, the imperative of child protection must not generate a reason to burden unsatisfactory evidence with a greater weight than it can legitimately support. That would create injustice to all, not least the subject children, but neither does it absolve the Judge of the responsibility to confront the findings that the evidence properly establishes. The same obligation for forensic rigour applies to the lawyers….

….In CB and JB, Wall J was considering one facet of propensity evidence, namely, an identified predisposition to behave in a particular way, predicated on psychiatric or psychological assessment, as opposed to ascertainable facts or reasonable inferences. The danger inherent in such evidence is now entirely recognised. As Wall J made clear, this opinion evidence, might easily be both prejudicial and wrong. Moreover, it trespasses on the function

of the Judge in the assessment of adult credibility as to the responsibility for a child's injuries. This is, of course, entirely different from evaluating propensity generated by evidence of established behaviour.'

I found this analysis fascinating and, I must say, I agree with his lordship; how can a Court ignore a parent's propensity towards violence in the context of investigating how a child has been injured by one of their carers? His Lordship concluded that;

'Paradigmatically, a squeezing injury to a baby's chest is an expression of parental frustration and loss of control. There is here an established pattern of F becoming violent and losing control. This is exacerbated with drug and alcohol consumption, which, as I have stated, the evidence establishes as being used in excess at the relevant time. Also, M and F were living in much more confined circumstances, arising from F's injury. Both, I note, had identified their respective needs for privacy and space. The changed situation compromised this. I have concluded that F was behaving, as M asserted in her application, violently and personally out of control. I emphasise that all these are ascertainable facts from which reasonable inferences can be drawn. They also establish a propensity for F to lose control, in an extreme way, and to become violent. By contrast, there is no such evidence relating to M's behaviour. Cumulatively, for the reasons that I have identified throughout this judgment, I consider the evidence points markedly towards F as most likely to have caused R's fractured fourth posterior rib. On the balance of probabilities, I find that he did.'

That brings to a close my seasonal update, obviously I hope this proves of some use to my readers, but if reading this was a complete waste of 20 minutes of your life, then….. sorry!

Wishing you all the very best for the new year.

Michael Jones KC

Deans Court Chambers

DEANS COURT CHAMBERS

BEST PRACTICE IN RELATION TO POST ADOPTION CONTACT

By Katie Lynch

Introduction

In September of this year the Public Law Working Group published their recommendations for best practice in respect of adoption. The report indicates that the approach towards contact between children and their birth parents post-adoption could change radically in the future.

Recommendations

The report recommends a shift away from the standard letterbox contact and towards all parties, including the courts, social workers, and guardians actively considering different options for contact, including face to face contact where safe for the children involved.

Sir Andrew McFarlane, President of the Family Division supports the proposals and has reiterated the importance of this change in approach in his recent speech (The Mayflower Lecture 2023, Adapting Adoption to the Modern World, 9th November 2023). He recommends that the courts should be agreeing a "bespoke plan" for contact "well before" a child is placed for adoption and that it is the responsibility of the court to establish the "basis and structure" of a child's contact with their birth family post adoption and that this can include extended family members. Parents are not the only family members that should be considered.

The report does not stray away from the position that "it will only be in an extremely unusual case that a court will make an order stipulating contact arrangement to which the adopters do not agree" confirmed in *Re B (A Child) (Post Adoption Contact)* [2019] EWCA Civ 29 [59], however they do not consider that this will impede the implementation of the recommendations. The guidance puts heavy emphasis on training and support for prospective adopters and birth parents, both before and after the adoption, to help them understand the benefits of post-adoption contact [para 54, 56]. The report and the President in his speech outline the hope that this greater understanding and support will lead to the vast majority of those involved consenting to the contact. Nevertheless, this may put off some prospective adopters, but the President is of the view in his speech that this should not prevent the recommended approach from being adopted as "the court's focus is solely on the best interests of the child, not on those of potential future adopters".

Current Position

Currently, contact post-adoption for children and their birth families is extremely limited, with letterbox contact being the usual choice. The report is critical of this [para 35, 63] as is the President. In his speech, the President outlines that it can often only be sent to the mother, rarely to siblings, and the model appears to be built on the "fear of contact… destabilising the placement" which goes against the research into the benefits of contact. Adopted children will usually have no other contact with their birth parents and extended families throughout the rest of their minority. There is also currently no duty on the courts to promote contact for adopted children with their birth families. There is a route for birth parents and other related parties to seek contact once a child has been adopted, through s51A ACA 2002 but this is very rarely used, according to the report [para 34].

Reasons for the Recommendations

The report includes its reasons for the recommended changes; that "openness and transparency" around an adoptee's birth family have been shown to be beneficial to the adopted child, the negative effects of sibling loss, and the evidence that contact with birth families can make placements more secure as adopted children are more able to accept their placements [para 47]. Additionally, in his speech, the President has raised his own concerns that, in the modern age, curious children can find their birth families online and reach out to them themselves, which could cause tensions and possibly the breakdown of the placement. There is also the concern that children are reaching out to parents that could cause them harm, or have done in the past. By having contact in place that is more substantial than letterbox contact, adoptive children may not feel that they have to seek out answers themselves and the contact can be properly managed and take place safely.

Implementation

To begin implementing the recommended approach, the report states that the birth family should be made aware of the support available to them "as soon as adoption is identified as a possible outcome," so they can engage with and understand the process, hopefully leading to a more successful outcome for the child if adoption is pursued [para 56]. Potential adopters should also be trained in the benefits of contact with birth families for adopted children [para 54]. Support workers, guardians, and local authorities should all be trained and aware of the benefits of open adoption and additional contact options [para 55] so that these alternatives can be considered early in proceedings. The report also recommends that Courts should be considering using s26 ACA 2002, where suitable, to set up contact for a child and their birth family to ensure that contact can continue after a placement order is made. The aim of this recommendation is that it will "set the tone" for how contact should continue after the adoption order is made. S51A ACA 2002 could then be used to facilitate reviews of that contact and ensure that it can change alongside the needs of the child [para 63].

Conclusion

The Public Law Working Group has made it clear that they believe that Letterbox contact and nothing more is no longer suitable for the modern age, and a new approach is needed to keep adoption sustainable as an option for children. In the future, if these recommendations are implemented, adoption could look very different, with direct contact with birth families being considered as an option where safe and adoptive parents being trained on the benefits of this from the outset of the process. Despite all of the recommendations in the report, the PLWG is very clear that any decisions relating to contact post-adoption should be made on a case-by-case basis [para 38].

The full Public Law Working Group report can be found here and, following the now closed consultation period, a final report and implementation plan will be published in early 2024.

Katie Lynch

Deans Court Chambers

DEANS COURT CHAMBERS

CASE NOTE: Y V Z [2023] EWFC 205

By Liam Kelly

Background

H and W divorced in 2013 following a 14 year marriage. H had maintained a successful career working in business finance. At the time of the initial proceedings in 2013, H was still owed significant sums from his previous employment with C Partners funds, and in 2014 began working at D Group.

In 2015, by consent, the parties agreed *inter alia*:

- All capital, including future capital received by C Partners funds, would be shared equally and held in a joint account requiring both parties to agree the release of funds.
- Spousal periodical payments on a joint lives basis, namely £35,000 per annum (CPI linked) and 20% of H's "additional renumeration" capped at £40,000 per annum with a time bar of 6 years.
- Child periodical payments of £15,000 per annum (CPI linked) per child per annum until the children respectively cease tertiary education.
- H to pay the children's school fees.

In 2016, W issued an application pursuant to Schedule 1 seeking additional financial support for the children. Slow progress was made and on 17 May 2018 DJ Duddridge found W lacked litigation capacity and invited the OS to act as litigation friend. W failed to release the necessary funds to meet the OS's fees, and the application was adjourned generally with liberty to restore on 11 October 2018.

H lost his job with D Group in June 2019, following a fraud scandal. Whilst H was not directly implicated, he had struggled to gain meaningful employment since resulting in H having to borrow significantly from family members to meet his needs. H had also suffered from mental health difficulties.

In February 2020, H applied for a variation/ discharge of the various periodical payments owing to his change in financial circumstances.

The Proceedings

The FDA was initially delayed owing to the Covid Pandemic and listed on 1 September 2020. W subsequently applied for an adjournment of 10 months owing to her ill health, with the FDA finally taking place on 26 April 2021, W having been unable to connect remotely at a hearing in January 2021.

The mechanism used to distribute capital in respect of C Partners funds broke down and H issued applications in March and August 2021 to approve the release of funds from a jointly held account. When the matter came before DDJ Butler in April 2021, W had failed to produce a Form E and sought a further adjournment of 8 months again owing to ill health. The Court suspended the payment of periodical payments, directed a statement from W and listed the matter on 24 February 2022 to reconsider the both parties applications. W subsequently sought permission to appeal, and a hearing was listed on 26 October 2022 following substantial correspondence between W and the Court. At the hearing, where both parties were represented by counsel, the Court accepted W once again lacked litigation capacity and appointed Dr X as her litigation friend, who had accompanied her at the hearing, subject to the usual undertakings as to costs (FPR 2010 r15.4). Accordingly, HHJ Hess made directions for W to produce a Form E and provide disclosure by 13 January 2023, and listed an FDA on 27 January 2023 reserved to himself, holding over the appeal which had yet to be determined.

Of note, on 17 October 2022, W had managed to receive £575,559 from the jointly held bank account, representing half of the C Partners funds. The bank refused to do the same for H and the funds remained effectively frozen.

Further hearings took place on 27 January 2023 and 16 March 2023 before HHJ Hess, with both parties represented. W subsequently appealed the January order; however, the appeal had not progressed by the time of the October 2023 hearing. In March, HHJ Hess determined he would consider W's application for permission to appeal DDJ Butler's order (April 2021) and F's applications in respect of the jointly held funds at the final hearing. A final hearing was listed on 11 September 2023 for 5 days, which was subsequently vacated following submissions from W's counsel as to his availability and the matter set down for final hearing w/c 23 October 2023.

Upon receiving bundles in early October, W's counsel confirmed he was no longer instructed in the matter. Dr X, W's litigation friend, was aware of the same as early as 17 April 2023, and which had been reaffirmed by counsel's clerk on 20 June 2023. Despites this, Dr X had taken no steps to secure alternative representation or to seek an adjournment. Whilst Dr X had produced evidence that he was suffering from depression and signed off from work, the Court did not consider it provided adequate explanation for his failure to act thus leaving W lacking litigation capacity and without representation. Dr X failed to attend day 1 of the final hearing, and formally applied to be discharged as litigation friend.

Held

Having heard submissions, HHJ Hess determined he could not continue with final hearing, but would instead proceed on an interim basis for the following reasons:

- *There was no identifiable reason to disbelieve the presentation of H's financial position set out within the ES2 prepared by H's legal team thus accepting the position presented by H.*
- *W had substantial wealth, and although it should not be considered in isolation, it is relevant when considering H's obligations to W.*
- *W's income position was unclear having failed to provide disclosure; however, W's capital position gave her the opportunity to accrue income and was relevant to the assessment of "earning capacity" and "resources".*
- *As to the release of the remaining capital from C Fund partners, HHJ Hess determined it would be unfair not to release the funds to H in the interim because:*
  - *H is in substantial debt and has been denied access owing to W's acts and omissions;*
  - *W had already had her share;*
  - *For the funds to effectively remain frozen W would need to make out a prima facie case that in due course she could persuade a court she has a substantial claim for capital against*

which she could enforce against said funds and the court was not persuaded W could and in any event, there were other assets W could enforce against (Swiss property/UK pensions); and

The Court had already delayed determination of H's application to allow W to produce substantive evidence why H should not have access to the funds.

Accordingly, the court, *inter alia*, ordered:

A variation of the spousal periodical payments to a nominal value thereby addressing the 2021 appeal by dismissing DDJ Butler's order

A variation of the child periodical payments backdated to 1 June 2022 to £498.59, adopting a CMS type calculation, to be paid by way of capital from the remaining C Partners funds held in the joint account to account for payment until January 2024. Payments to continue from February 2024 as to £250 per child per month.

A variation of the children's school fees as to 50% of the fees, and to award £27,864.68 as a capital payment to W in respect of arrears to be paid from the C Partners funds held in the joint account.

The balance of the joint account to be released to H after 21 days.

Adjournment all remaining applications generally with liberty to restore. In the case of W only if her representation is secure enough to enable the matter to move forward without delay. In relation to H, if to seek a clean break only if he has allowed W 6 months to secure proper representation.

Discharge of Dr X as W's litigation friend.

To amend the mechanism of payment of any C Partners funds via H's solicitors rather than by the joint bank account which may result in further litigation.

Costs

As to substantive costs, HHJ Hess proposed to leave the substantive matter as to costs to any future final hearing noting H had expended £276,256 during the litigation.

However, H sought wasted costs following the abandonment of the final hearing and referred the Court to FPR 2010 r15 and *Baker v Confiance Limited* [2020] EWCA Civ 112 (which summarises the law as to costs against litigation friends). H submitted the costs should be apportioned equally between W and Dr X.

HHJ Hess emailed Dr X to enable him opportunity respond to the application for costs against him. Whilst Dr X did not attend the hearing on 25 October to determine the application, owing to ill health, he responded the same day by email, the Court determining Dr X had proper opportunity to answer the application against him. Accordingly, the court determined:

The starting point is no order as to costs, however pursuant to FPR 2010 r.28.3(7) the court retains a discretion to award costs; and

Barker v Confiance Limited [2020] EWCA Civ 112 affirms the court can make an order against a litigation friend, whether pursuant to the undertaking or §51 of the Senior Courts Act where in all the circumstances it is just to do so.

Subsequently the Court held Dr X should pay the totality of the costs amounting to £42,128.79 within 14 days having willingly taken the role of litigation friend whilst failing to discharge his duties. That he had been unwell did not excuse or explain his conduct and accordingly he could not escape the consequences.

[Liam Kelly](#)

Deans Court Chambers

DEANS COURT CHAMBERS

PEOPLE WHO ARE INCAPACITOUS AND TENANCY AGREEMENTS

By Jack Barber

Whether by provision of the Care Act 2004 or by the Housing Act 1996, vulnerable adults frequently come to reside in housing owned and run by a local authority (LA), or a subsidiary company of a LA set up for the purpose of managing their housing stock.

A tenant lacking capacity to make decisions in relation to their tenancy agreement often causes significant difficulties for social workers and housing officers, when they fail to comply with elements of their tenancy agreement. For example, a person with a hoarding disorder may have accumulated sufficient items in their property to cause concern for both their own health and others within the building. Alternatively, there may be extensive mould that needs cleaning, or there may be significant damage to the property impacting the tenant's health and the building's integrity.

When the tenant cannot or will not rectify the issues, the LA may need to seek an order under s16(2)(a) of the MCA 2005 with the effect of making a best interests decision on behalf of the tenant, to put arrangements in place to ensure compliance with the relevant terms of the agreement in order to ensure the tenant and building are safe. In almost all cases the tenant's Article 8 rights will be engaged.

When handling these sorts of cases effective early handling of the matter will lead into an easier and less contentious application to the court. The following legal and practical considerations may assist in both handling these cases and when making an application to the Court of Protection.

Collaboration – Wherever an issue arises with a vulnerable tenant the LA should always have in mind the extent to which collaboration with the tenant is possible. If the LA can forge a relationship which allows collaboration, the need for an application to the court is obviated. This will almost always be easier said than done and will need careful thought. Perhaps there is a member of staff that the tenant gets on particularly well with. Is there a time of day which the tenant is best approached? Might the tenant be open to a move to another property which may be more desirable to them, or is there a timeline which the tenant may be more comfortable with?

Whether it is day one of the process or the day before a court hearing, the answer to the question 'what is the most collaborative approach that could still work?' is of utmost importance. The most collaborative approach is likely to be the least intrusive and restrictive; the court will only approve a management plan as in the tenant's best interests, where no other less restrictive or intrusive solution can be found to meet the tenant's best interests.

Ultimately, the management plan may become forced entry with the presence of numerous people including the police. But every reasonable step should be taken to prevent that outcome and the distress it would cause. Courts will be slow to approve such a draconian course of action.

Best Interests – The Court can only approve of a plan if it is in the tenant's best interest: both the end goal is in the tenant's best interest, and the contents of the plan are in their best interest. Best interests decisions must always be made with regard to the matters in section 4 of the MCA which provides:

> *"(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—*
>
> *(a) the person's age or appearance, or*
>
> *(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.*
>
> *(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.*
>
> *(3) He must consider—*
>
> *(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and*
>
> *(b) if it appears likely that he will, when that is likely to be.*
>
> *(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.*
>
> *(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.*
>
> *(6) He must consider, so far as is reasonably ascertainable—*
>
> *(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),*
>
> *(b) the beliefs and values that would be likely to influence his decision if he had capacity, and*
>
> *(c) the other factors that he would be likely to consider if he were able to do so.*
>
> *(7) He must take into account, if it is practicable and appropriate to consult them, the views of—*
>
> *(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,*
>
> *(b) anyone engaged in caring for the person or interested in his welfare,*
>
> *(c) any donee of a lasting power of attorney granted by the person, and*
>
> *(d) any deputy appointed for the person by the court,*
>
> *as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6)."*

Baroness Hale's statements at paragraphs 39 and 45 of the Supreme Court's decision in *Aintree University Hospitals NHS Foundation Trust v James and other* [2013] UKSC 67 are particularly helpful when understanding and considering the way in which best interests decisions should be approached:

> *'The most that can be said, therefore, is that in considering the best interests of this particular patient at this particular time, decision-makers must look at his welfare in the widest sense, not just medical but social and psychological ……. they must try and put themselves in the place of the individual patient and ask what his attitude to the treatment is or would be likely to be; and they must consult others who are looking after him or interested in his welfare, in particular for their view of what his attitude would be.'*
>
> […]
>
> *'The purpose of the best interests test is to consider matters from the patient's point of view. That is not to say that his wishes must prevail, any more than those of a fully capable patient must prevail. We cannot always have what we want. Nor will it always be possible to ascertain what an incapable patient's wishes are. .... But insofar as it is possible to ascertain the patient's wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being.'*

Wishes and feelings – s4(6) of the MCA makes clear that the tenant's wishes and feelings must be accounted for. This does not mean they are determinative, but they are instructive. Peter Jackson J (as he then was) sated in *Wye Valley Trust v Mr B* [2015] EWCOP 60:

> *'10. Where a patient lacks capacity it is accordingly of great importance to give proper weight to his wishes and feelings and to his beliefs and values ……. once incapacity is established so that a best interests decision must be made, there is no theoretical limit to the weight or lack of weight that should be given to the person's wishes and feelings, beliefs and values. In some cases, the conclusion will be that little weight or no weight can be given; in others, very significant weight will be due.*
>
> *11. This is not an academic issue, but a necessary protection for the rights of people with disabilities. As the Act and the European Convention make clear, a conclusion that a person lacks decision-making capacity is not an "off-switch" for his rights and freedoms. To state the obvious, the wishes and feelings, beliefs and values of people with a mental disability are as important to them as they are to anyone else, and may even be more important. It would therefore be wrong in principle to apply any automatic discount to their point of view.'*

When assessing the tenant's wishes and feelings the following points suggested by Munby J in *ITW v Z. M & various Charities* [2009] EWHC 2525 (Fam) may be important and useful:

> *'a. The degree of P's incapacity, for the nearer to the borderline the more weight must in principle be attached to P's wishes and feelings;*
>
> *b. The strength and consistency of the views being expressed by P;*
>
> *c. The possible impact on P of knowledge that their wishes and feelings are not being given effect to;*
>
> *d. The extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of sensible implementation in the particular cir-*

cumstances; and

e. The extent to which P's wishes and feelings, if given effect to, can properly be accommodated within the court's overall assessment of what is in their best interests.'

Competing needs – Where the tenant is under a care plan the relationships between the tenant and the LA can be confusing for them. It is important to not blur the lines between different roles. The idea that someone wants to compel them to do something they don't want to do is distressing and although their allocated social worker might be able to help, it is important that that relationship is not tainted by association. It is therefore important that housing officers and social workers do not always present themselves as a single team unless that is unavoidable or helpful in the very specific circumstances of that case. Before blurring the lines between the two teams in the minds of the tenant, very careful thought ought to be given.

Experts – Keeping a psychiatrist / psychologist who has met the tenant involved as much as possible within the confines of diaries and resources, can be very beneficial.

Of course, an expert's opinion may be necessary in order to make out that there is an impairment of the mind for the purposes of section 2(1) of the MCA, but they can also be a guide as to what help might be available to the tenant to allow them to collaborate with the LA and they can also give valuable input on what the psychological risks of any management plan are and how they can best be mitigated.

Relevant information and risk – Each case will be fact specific and will need consideration of all relevant information to understand the extent to which the work must be done in order to mitigate the risks. In cases of mould, it might be simple: all the mould needs to be cleaned and any damage repaired. In other cases, such as hoarding cases, it may not be so cut and dry. There is very little case law in this area but in *Re AC and GC (Capacity: Hoarding: Best Interests)* [2022] EWCOP 39 the parties and the court agreed relevant information in relation to P's items and belongings. The information had been initially set out by the expert in his report and is as follows:

- Volume of belongings and impact on use of rooms;
- Safe access and use;
- Creation of hazards;
- Safety of building; and
- Removal and disposal of hazardous levels of belongings.

It may well be that in a case of hoarding, after cooperative work has been done 'the man on the Clapham omnibus' might still consider the property neglected but sufficient items may have been removed so as to provide safe access and use of the most important rooms (i.e. bedroom, kitchen, bathroom), to nullify any hazards (i.e. items on stairways or risk of items falling), to render the building as a whole safe, and to ensure levels of belongings are not hazardous. In those circumstances many would think there is still work to do but the Court is unlikely to declare any more work, by intrusive or restrictive means, is in the tenant's best interests. The process is about making best interests decisions with a sensible risk appraisal in mind, not necessarily avoiding all risk.

Professionals, including judges, should try to prevent themselves from following the draw towards an outcome that is more protective of the person in question or the draw to eliminate all risk for someone we see as vulnerable. Munby J articulated this in *Re MM (An Adult)* 2007 EWHC 2003 (Fam) at para 120:

'The fact is that all life involves risk, and the young, the elderly and the vulnerable, are

exposed to additional risks and to risks they are less well equipped than others to cope with. But just as wise parents resist the temptation to keep their children metaphorically wrapped up in cotton wool, so too we must avoid the temptation always to put the physical health and safety of the elderly and the vulnerable before everything else. Often it will be appropriate to do so, but not always. Physical health and safety can sometimes be brought at too high a price in happiness and emotional welfare. The emphasis must be on sensible risk appraisal, not striving to avoid all risk, whatever the price, but instead seeking a proper balance and being willing to tolerate manageable or acceptable risks as the price appropriately to be paid in order to achieve some other good - in particular to achieve the vital good of the elderly or vulnerable person's happiness. What good is it making someone safer if it merely makes them miserable?'

When looking at all relevant information it is important not to lose sight of the matters in section 4 MCA and in particular the tenant's wishes and feelings.

It is also important that these things are continually kept in mind and reviewed as the situation changes. It is as Munby J stated, a '*sensible risk appraisal',* therefore, as the situation changes and risk increases or decreases it may be necessary to attach more or less weight to the tenant's wishes and feelings.

Management plan – at each stage or phase there should be a carefully drafted plan or procedure as to how issues are to be addressed and moved forward. These should be reviewed regularly and be as specific as possible. What is to be done, when is it to be done, by who is it to be done, who has authority to do what. If we use the example of a hoarding case again some relevant specifics might be:

- How many, or what quantity, of items can remain in each room;
- Will items be removed in stages or all at once;
- Which areas must be completely clear of items i.e. radiators, around the bed, around the bath or toilet.
- Can items be held in storage;
- Which room will be cleared first and when;
- Which rooms will be cleared next and when;
- When will items be removed;
- Who will remove and dispose of items;
- Who will fund the removal;
- Who will fund any storage;
- What categories of items does the LA seek to have removed entirely; and
- Who has the authority to decide what is to be removed on the day;

It is important to remember that management plans do not need to be specific to one event but can be ongoing. The court can and will approve plans that provide for a routine. For example, in hoarding cases the plan will set out how the property is to be returned to a safe condition, how the LA is to monitor the property to ensure it stays in a safe condition, and what is to be done if the state of the property begins to decline.

Contingency and crisis planning – Management plans should have alongside them contingency and crisis plans. What will be done in the event the plan fails and how will the tenant be supported through any distress caused by the plan being implemented. What mental health services are available to the tenant before, during and after? As discussed, an expert may be able to help here.

These do not have to be part of the management plan, and indeed a management plan may be more easily approved by a court without the inclusion of a contingency plan providing for more draconian measures. Any contingency plan can be approved by the court separately but if the Court declines to approve it, it may not hinder the approval of the management plan if kept separately.

Narrative and evidence – When hearing an application, the court needs to hear and understand the history of the case.

In order to ensure the LA's application is successful any statements should give the court a proper and full narrative: What are the circumstances in which the issues arose? How has the LA tried to cooperate with the tenant to manage the issues? What plans were put in place to begin with? Are there copies of these plans? How did they go? What went wrong? Were they officially reviewed? What came of those reviews? What has been communicated to the tenant?

The more restrictive the plan before the court the more the court will need to be satisfied that every other available avenue has been explored. That can only be properly documented for the court in properly detailed narrative statements which put before the court all the information it needs about the history of the issues and the attempts to resolve them.

LAs should consider what evidence they have of the narrative history of the case at the time they make the application. If they cannot evidence having tried less restrictive plans than the one put before the court then they may wish to consider if there ought to be more work done before making an application.

Caution and covert measures - I would end with a small note of caution. It is tempting to consider the use of covert measures. Covert measures will always, by their nature, be intrusive to the tenant's rights, almost always engaging their Article 8 rights and possibly their Article 5 rights; such measures will rarely be approved by the court.

Further, the tenant is likely to have a right to see all the documents in any bundle before the court, and if the tenant were to find out about any covert measures in place or, even the very fact covert measures were suggested, this could be extremely detrimental to their ability to trust professionals. In suggesting covert measures where they are not necessary the LA could damage any trust built up with the professionals currently in place. Professionals that come in later would start with a disadvantage and if the tenant were moved to a residential placement in the future, they would invariably have trust issues with those who worked there.

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Deans Court Chambers


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