May 2011

Family Law Week

NEWS

Stop CSA Charges campaign gathers momentum

Eighteen groups and individuals have written to The Times, calling on the Government to reconsider its plans to charge for access to the child support service and to levy further charges on child maintenance paid by the collection service.

The letter said:

> 'Sir, The Government is consulting on plans to charge parents in need of child maintenance for using its child support service. Not only will they face an application charge of £100 (£50 if on benefit), but any child maintenance paid via the collection service will be reduced by ongoing charges of up to 12 per cent. With a week to go before the consultation deadline, we urge the Government to think again about its charging proposals.
>
> 'While we support the Government's wish to develop more support services to assist separated parents to co-operate, penalising vulnerable parents when their ex-partners do not contribute satisfactorily to their children's maintenance does not resolve the issue of the reluctant parent, nor does it encourage them to make regular and consistent payments. It just exacerbates the child's disadvantage and increases the vulnerability of those left directly caring for their children.
>
> 'For the sake of the children concerned, the Government must reconsider.'

Signatories:
The Right Rev Tim Stevens Bishop of Leicester; The Right Rev Nicholas Steward Reade, Bishop of Blackburn; Reg Bailey, Mothers' Union; Bob Reitemeier, The Children's Society; Fiona Weir, Gingerbread; Dr Katherine Rake, Family and Parenting Institute; Anne Marie Carrie Chief Executive, Barnardos; Alan Bean & Martha Cover, Co-Chairs, Association of Lawyers for Children; Linda Lee, President, The Law Society; Paul Ennals, Chief Executive, NCB; Gillian Guy, Chief Executive, Citizens Advice; Helen Dent, Chief Executive, Family Action; Alison Garnham, Chief Executive, Child Poverty Action Group; Satwat Rehman, Chief Executive, One Parent Families Scotland; David Allison, Chair, Resolution; Stephen Cobb, QC, Chairman, Family Law Bar Association; Philip Moor, QC; Amy Watson, Co-ordinator, Womens' Budget Group

Children's Commissioner recommends new research on children's and young people's views of child protection to Munro

The Office of the Children's Commissioner has released a report, called 'Don't make assumptions: Children's and young people's views of the child protection system and messages for change' in which children and young people talk about their experience of the child protection system. The research, commissioned from the University of East Anglia, has been provided to Professor Eileen Munro as further evidence for her major review of child protection.
Key recommendations for government are:

* Good skills in communicating with children, based on detailed knowledge of child development, are needed in order to form meaningful relationships with

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children. Child development and child-centred communication skills should therefore be a key focus of social work training and continuing professional development.

* Guidance on good practice needs to be easily accessible and its importance to the quality of practice and professional development promoted.

* Local authorities should have a forum where children who are receiving services but are not in care can contribute their views of the child protection process and have an impact on practice and service development.

Commenting on the report Maggie Atkinson, Children's Commissioner for England, said:

> "Children in receipt of child protection services are amongst the most vulnerable in our society. Three key findings emerged from this research. These are that:
>
> * Children develop their own ways of dealing with their worries and these need to be understood;
> * Their relationship with their social worker is fundamental and assists them to participate in the child protection process;
> * And social workers need to be aware of the impact of the child protection system itself on children as well as the risk of harm from the abuse which brought them into the system.
>
> "Listening to children's views is fundamental to ensuring that their rights to protection, support and participation under the UN Convention on the Rights of the Child are fully realised.
>
> "The children and young people who shared their own experiences with us have allowed us to provide a real insight for everyone trying to improve child protection services. We now have a duty to ensure that we do our part by making sure that policy makers, service providers and professionals listen to their concerns and act upon them."
>
> "You've got to trust [the social worker] and she's got to trust you. Otherwise there's no point" said one child.

Lead author of the report Jeanette Cossar, of the Centre for Research on the Child and Family at UEA, said:

> "There has been little research into children's views of the child protection system, so this is a distinctive and important perspective.
>
> "These are young people who are incredibly vulnerable, but they are not passive and we need to engage with them. We should be listening to what they say and actively working with them to ensure the system acknowledges their views and supports their needs."

John Kemmis, Chief Executive of Voice, said:

> "We welcome this research. If we want services and processes that protect children to be truly child centred, it is critical that we listen to and learn from those children and young people who have experience of the system. We would urge the Government to consider the recommendations in their review of the child protection system."

Children's views are still not being heard, says Children's Rights Director

Children's Rights Director, Dr Roger Morgan, has published the third annual Children's care monitor report, giving children's assessment of social care in England in 2010. Of the 1,123 children who responded just over half (53%) of children who are in care or live away from home have a say in what happens to them. When they are able to voice their views, only 51% said it made a difference to decisions made about their lives, with 15% of children saying that their opinions did not make a difference.

The Children's care monitor report is a unique annual report of the views of children who are in care or living away from home. It looks at issues that children see as important which they want to be checked every year including: keeping safe, bullying, having a say in what happens, making complaints and suggestions, education, and care planning for people being looked after in care.

Law Society issues new practice note on Family Mediation Information Assessment Meetings

The Law Society has issued a new practice note in anticipation of the implementation on the 6th April of FPR Practice Direction 3A and its accompanying pre-application protocol for Family Mediation Information Assessment Meetings (MIAMs).

Under the protocol, all potential applicants, before making their application for a court order in relevant family proceedings will be expected, unless exempted, to have considered alternative means of resolving their disputes. Respondents will also be expected to attend a MIAM to consider dispute resolution options, if invited by a mediator to do so.

Supreme Court abolishes immunity of expert witnesses from civil action

The Supreme Court by a majority (Lord Hope and Lady Hale dissenting) has held that the immunity from suit for breach of duty (whether in contract or in negligence) that expert witnesses have enjoyed in relation to their participation in legal proceedings should be abolished.

In Jones v Kaney [2011] UKSC 13, the appellant challenged the rule that an expert witness enjoyed immunity from any form of civil action arising from the evidence he or she gave in the course of proceedings.

The appellant had been hit by a car in March 2001 and suffered physical and psychiatric consequences. He consulted solicitors with a view to bringing a claim for personal injury, and they instructed the respondent, a clinical psychologist, to prepare a report on his psychiatric injuries for the purposes of the litigation. She reported that the appellant was suffering from post traumatic stress disorder (PTSD). Proceedings were issued and liability was admitted, so that the only remaining issue was the amount of damages. The appellant was examined by a consultant psychiatrist instructed

by the defendant driver, who expressed the view that the appellant was exaggerating his symptoms. The district judge ordered the two experts to hold discussions and to prepare a joint statement to assist the court at the trial. It is the appellant's case that the respondent carried out this task negligently, and thereby signed a joint statement which wrongly recorded that she agreed that the appellant had not suffered PTSD and that she had found the appellant to be deceitful in his reporting. This was so damaging to his claim for damages that he felt constrained to settle it for a significantly lower sum than he might otherwise have been able to achieve. The appellant accordingly issued proceedings for negligence against the respondent.

The Supreme Court by a majority (Lord Hope and Lady Hale dissenting) allowed the appeal.

The reasons for the decision of the majority (Lord Phillips, who gave the lead judgment, Lord Brown, Lord Collins, Lord Kerr and Lord Dyson) were as follows:

* Witness immunity dates back over 400 years, long before the development of the modern law of negligence and the practice of forensic experts to offer services to litigants for reward [11]. It originally took the form of absolute privilege against defamation claims but was extended to all forms of suit [12]. It overlapped with the wider immunity formerly enjoyed by an advocate from negligence claims by his own client, before that immunity was abolished by the House of Lords in 2001 on the ground that it could no longer be justified [13].

* The general rule was that every wrong should have a remedy and that any exception to this rule must be justified as being necessary in the public interest and kept under review [51][88][113]. The primary rationale for the immunity was a concern that an expert witness might be reluctant to give evidence contrary to his client's interest, in breach of his duty to the court, if there was a risk that this might lead his client to sue him [41]. In common with advocates, however, there was no conflict between the duty that the expert had to provide services to his client with reasonable skill and care, and the duty he owed to the court. The evidence did not suggest that the immunity was necessary to secure an adequate supply of expert witnesses [54] [117]. The removal of immunity for advocates had not diminished their readiness to perform their duty, nor had there been a proliferation of vexatious claims or multiplicity of actions [57-60][85].

* For these reasons the majority concluded that no justification had been shown for continuing to hold expert witnesses immune from suit for breach of duty in relation to the evidence they give in court or for the views they express in anticipation of court proceedings [61]. This decision did not affect the continued enjoyment by expert witnesses of absolute privilege from claims in defamation [62], nor did it undermine the longstanding immunity of other witnesses in respect of litigation [125].

Lord Hope and Lady Hale, dissenting, disagreed with the majority's approach of reviewing the justification for the immunity. The rule was longstanding and its application to claims beyond defamation in respect of evidence given by any witness was confirmed by the House of Lords in Watson v M'Ewen [1905] AC 480 [141]. The question therefore was whether an exception to this rule could be justified [161][176]. The main concern arising from the decision of the majority was the effect on disappointed litigants liable to commence worthless but time-consuming claims against their experts [165][188]. The lack of a secure principled basis for removing the immunity, of a clear dividing line between what was to be affected by the removal and what was not, and of reliable evidence to indicate what the effects might be,
suggested that the wiser course was to leave any reform, if needed, to Parliament [173][189].

Summary provided by Supreme Court

Expert witness groups have expressed concern that experts may be deterred from giving evidence, especially in child abuse cases where there has been a diminishing number of medical experts available in recent years.

James Badenoch QC, chairman of the Expert Witness Institute, said:

> "The worry is that expert witnesses will be frightened off by their concerns about being sued. Child protection cases give rise to the greatest concern. Children being maltreated crucially depend on doctors being willing to stand up and give evidence, and this will be another disincentive for those people to be willing to lend their learning."

Is Sir Nicholas Wilson about to be appointed to the Supreme Court?

There has been speculation reported in the press and in blogs that Sir Nicholas Wilson and Jonathan Sumption QC are about to be appointed to the Supreme Court. In the case of Jonathan Sumption the appointment would be direct from the Bar.

There has not yet been an official announcement by 10 Downing Street but the appointments are due to be made soon. The Supreme Court had advertised two vacancies: one arising from the retirement of Lord Saville and the second in anticipation of that of Lord Collins who is required to retire in May 2011 (on reaching the age of 70).

Sir Nicholas is 65 years old. He was called to the Bar in 1967 and was awarded silk in 1978. In 1993 he became a High Court Judge in the Family Division and was appointed to the Court of Appeal in 2005.

Golubovich award of £2.8 million after 18 month marriage upheld by Court of Appeal

Elena Golubovich, 27, a fashion student, and Ilva Golubovich, 26, an international financier, married in 2007 and had a daughter in 2008. The marriage broke down in 2009 and the wife filed her divorce petition in London in February 2009, which was set down for trial in August 2009. The husband, preferring a Russian divorce and ancillary relief proceedings, brought proceedings there in April 2009 but did not seek to stay the English proceedings.

The wife had the Russian divorce invalidated by the High Court but that decision was overturned by the Court of Appeal last July.

In the Court of Appeal, hearing the husband's appeal against the award of £2.85 million to the wife under the

Matrimonial and Family Proceedings Act 1984, Lord Justice Thorpe, Lord Justice Etherton and Mrs Justice Baron, upheld the award.

New mediation rules flawed but a step in the right direction, says Resolution

New rules on mediation for separating couples that came into force on Wednesday, 6 April have been broadly welcomed by Resolution. However, the family law association says that they contain worrying flaws because the Government has acted in indecent haste.

Under the changes, first announced in February, couples must first attend a meeting with a mediator to learn about mediation before either can make an application to court.

David Allison, Chair of Resolution, said:

> "Mediation is a hugely valuable option for some separating couples, so increased awareness of it as a non-court option is good news. But the Government has rushed headlong into these changes in an unplanned way, which has led to some worrying flaws.
>
> "Anyone can set themselves up as a mediator and the lack of a guarantee of the quality of mediators could leave some couples who lack a solicitor's advice ending up in the hands of unregulated or untrained, rogue mediators. There may also be a shortage of properly trained mediators given the new demand."

Resolution says that other non-court options, including collaborative law, parenting information programmes and solicitor negotiation, should all form part of any information session on non-court options.

A survey conducted at Resolution's national conference last weekend revealed that family lawyers were unanimous that the reforms didn't go far enough and that separating families should be able to access information about all the different ways they can resolve their differences not just mediation.

> "Mediation is not suitable in all cases, and the best option will depend on individual circumstances. We should also remember that for some couples court is the right option, including when there is domestic abuse, intimidation or an imbalance of financial power. Mediation is a voluntary process and separating couples must both be willing to try it for it to have a chance of being successful," said David Allison.

The changes also come against the background of potential cuts to legal aid, which Resolution fears could create devastating consequences for families and children, and spiraling costs for taxpayers. Under these cuts, mediation will be the only legal aid funded option for separating families, even though it is not always appropriate.

> "The Government's rushed changes to family law seem motivated by a desire to steer people away from professional legal advice. This is misguided, because a good solicitor will always discuss mediation and other non-court approaches with clients – which is one reason why 90 per cent of parents currently settle out of court," said David Allison.

Directors of Children's Services must be champions for children and families, says new President of ADCS

Directors of Children's Services in local authorities have a key role to play in ensuring that the needs and voices of children are not lost in the structural changes to education and health, the incoming president of the Association of Directors of Children's Services (ADCS) has said.

Matt Dunkley was speaking at the reception to mark his inauguration as ADCS President, attended by Children's minister Sarah Teather and representatives of local authorities and voluntary sector organisations.

He identified the risk of an increasingly fragmented system of providers of services for children and the need for local authorities to act as champions for children and families as they navigate this complex system as challenges for his presidential year.

He said:

> "More providers means more diversity, but also the possible creation of more gaps for the vulnerable to fall through – it is our responsibility not to let that happen. Articulating that role in respect of school provision and school improvement; changes to the health service; of SEN services and in respect of child protection will be the focus of my presidential year. In the face of a rapidly changing landscape it is our responsibility to make sure the needs of all children and young people are understood and met and their voice is heard in these changes."

Outlining the challenges faced by directors of children's services, Mr Dunkley emphasised the extent of reform and turbulence in almost every aspect of services for children as both a challenge for those managing staff and services with an uncertain future and as an opportunity in the longer term to redesign services around local need and individual circumstances.

Mr Dunkley also called for greater freedom and flexibility in how local authorities provide services for children in order to make the most of this opportunity.

> "DCSs would like the professional freedoms and respect offered to social workers and teachers in order to be able to support these staff as they explore their new freedom in a local context. You can't create learning organisations from Whitehall, nor should each Director be left to work out the answers to these challenges alone. That is why ADCS is committed to developing a robust model of sector?led improvement that will help us to help each other as we try to sustain and improve service quality and to maintain partnerships and multi?agency approaches in tough times."

Eliassen abduction case: Supreme Court grants permission to appeal

The Supreme Court is to hear the appeal against the Court of Appeal's decision in *Eliassen and Baldock v Eliassen and others* [2011] EWCA Civ 361. Permission to appeal has been granted by the Supreme Court to the mother and the hearing will begin in the week commencing the 23rd May 2011.

In *Eliassen*, the Court of Appeal considered the recent decision of the European Court of Human Rights in *Neulinger and Shuruk v. Switzerland* (Application 41615/07) which had "caused a considerable stir amongst practitioners in the field of international family law". Reunite and the AIRE Centre intervened in the case and were represented in the appeal.

The primary issue was whether a defence under Article 13(b) of the Hague Convention requires the court to conduct a full welfare enquiry.

Thorpe LJ reviewed the Strasbourg jurisprudence and in particular *Maumousseau, Raban, and Van den Berg*. In the judgment of the court, it was important that the four decisions should be considered together, and that when so doing there is "little support" for the contention that the decision in *Neulinger* requires the court to adopt a different approach in the application of the Convention defences, and of Article 13(b) in particular. It was clear that *Neulinger* did not introduce any revision of the principles in *Maumousseau*. A radical departure from those principles risked jeopardising the aims and objectives of the Convention.

Accordingly, the appeals were dismissed.

Use of Hair Testing in Family Cases defended at international SoHT meeting

At the recent annual meeting of the Society of Hair Testing (SoHT) held in Chamonix, the recent criticism of hair strand testing was discussed by society members. The meeting heard of accusations in the media that the tests were not sufficiently robust to support family law cases where the welfare of a child might be in the balance. There has, of course, also been judicial scrutiny concerning these tests, in particular by Moylan J in *LB of Richmond v B & W & B & CB* [2010] EWHC 2903 (Fam). See also Henry Lamb's article: Hair Strand Testing for Alcohol: hair today, gone tomorrow?

Julie Evans, the senior Forensic Toxicologist at ROAR Forensics, advised the audience of how poor interpretative skills have caused immense consternation in the UK and how improvements can be made.

Having reviewed the cases in some detail, Mrs Evans told the meeting that failure to adhere to existing SoHT guidelines and poor interpretation of results were responsible for the problems and for the justified media interest. She said that a cautious approach to drugs in hair testing evidence needs to be adopted by the courts, especially in borderline cases where the welfare of children is in the balance. On the heels of this media attention, there would, she believed, be understandable misgivings on the overall effectiveness of this technique to help to prove or disprove an alcohol and/or drugs history that could result in the technique being abandoned altogether. However, in her view, this would not best serve the civil justice system. She believed that, as with any scientific analytical process, its effectiveness was totally reliant upon the accuracy of sample collection, analysis and, most importantly, accurate interpretation of the analytical findings within the context of the case and any relevant peer guidelines.

Mrs Evans stressed that Drugs in Hair Testing can provide useful evidence when undertaken and carefully considered by trained and experienced scientists. She sought to reassure the legal profession that the recent criticisms highlighted in the media were not indicative of a general trend.

Government consults on registration of civil partnerships on religious premises

The Government Equalities Office has issued a consultation document in respect of the proposed permission enabling the registration of civil partnerships on religious premises.

In February the Government announced its commitment to enabling civil partnerships to be registered on the religious premises of those faith groups who wished to host them. This would be done by implementing section 202 of the Equality Act 2010. This provision removes the legal prohibition on civil partnerships being registered on religious premises, enables regulations to be made setting out the arrangements for these premises to be approved by the local authority and clarifies that there is no obligation on faith groups to have civil partnership registrations on their premises.

Civil partnerships on religious premises: a consultation sets out detailed proposals for this voluntary measure. The proposals are designed to enable faith groups to opt in, respect the different decision-making structures of different faith groups, minimise the risk of successful legal challenges and be straightforward for local authorities to operate. The law will make clear that faith groups are not obliged to host civil partnerships. It would also be unlawful for a civil partnership to be registered on religious premises that had not been approved for the purpose by the local authority. That approval will be given only with the approval of the faith group concerned.

The Government proposes a two stage process for enabling civil partnerships to be registered on particular religious premises. First the faith group concerned will have to consent to this and the consultation document sets out how this could happen. Then the local authority in whose area the premises is located will have to approve the premises and the consultation document sets out what conditions should apply to the approval. The registration of civil partnerships would remain secular, despite taking place on religious premises, but a religious service could be held to mark the registration.

The Government believes that the consultation will be of particular

* Faith groups including religions, denominations and individual independent religious congregations
* Lesbian, gay and bisexual (LGB) organisations, LGB individuals and their families and friends

* Local authorities, including registrars and other relevant local authority employees

* Owners and managers of buildings approved for civil marriages and civil partnerships.

Comments from other interested parties are also welcome.

More fathers jailed over child support, reports The Independent on Sunday

The Independent on Sunday reports that at least 50 parents are expected to serve sentences for non-payment of child maintenance owed to the Child Maintenance and Enforcement Commission in the last financial year, double the number of three years ago.

According to the newspaper, growing numbers of fathers are being sent to prison for missed child maintenance payments, prompting complaints that the sentences are disproportionate and undermine any chance of fathers supporting their children.

Craig Pickering, of Families Need Fathers, said:

> "How can a father or mother care and provide for their children if they are stuck in prison? It is imperative that child maintenance is seen in the context of looking after the child's best interests in every way. A parent is more than a walking wallet."

March 2011 sees the most ever care applications for a single month

March 2011 saw the highest ever number of care applications recorded in an individual month, with 882 applications.

During 2010-11, Cafcass received a total of 9,127 new applications. This figure is 3.5% higher when compared to the previous year. Care application demand for all months in the current year have been the highest ever recorded by Cafcass for the individual months except June and December 2010.

High Court hears claim that aspects of Adoption and Children Act 2002 are incompatible with ECHR

The High Court has heard the case of *R (DL & ML) v London Borough of Newham*, to consider a claim that parts of the Adoption & Children Act 2002 are incompatible with the human rights of parents who want to adopt children.

In this case the claimant parents, represented by Bhattia Best Solicitors, had been approved as prospective adopters following assessments, and a child was placed with them with a view to possible adoption in April 2009. The child was then two and a half years old.

In June 2010 the couple decided to make the necessary application to court for an adoption order, which the local authority then supported. Had the parents been able to make the application to court immediately there would have been a number of safeguards for the parents within the court procedures. However, the parents say that they were unable to submit the application to court because the local authority failed to supply to them necessary supporting documents.

In August 2010, following a brief interaction between a social worker and the child, then 4 years old, a mention of smacking was made and, despite the parents' denials, the local authority ended the placement. The parents were unable to make their adoption application to the court until 3 days after the local authority had ended the placement. That application to the court was too late, and the Act does not give the court jurisdiction to review the local authority's decision.

It is understood that subsequent investigations and enquiries have supported the parents, but the local authority has refused to review or reverse its decision to remove the child.

Under the Act, no protection or redress is provided to parents with whom the courts have placed a child with a view to possible later adoption, when a local authority subsequently decides to remove a child, before the court has been asked to decide whether or not an adoption order should be made.

At the beginning of April Mr Justice Charles heard the case. The Secretary of State for Education, took part in the hearing as an intervener. The court has been asked to decide whether the terms of the Act are incompatible with the parents' rights under Articles 6 and 8 of the European Convention.

Judgment has been reserved. Family Law Week will publish it in due course provided that the court's permission is forthcoming.

Cafcass secures third 'good' rating from Ofsted

Ofsted inspectors have praised the Ofsted team in Cheshire and Merseyside for its "outstanding" progress in ensuring that vulnerable children get the help they need, with all cases "allocated promptly". They cited the "highly effective steps" Cafcass has taken to improve including the introduction of an early intervention team to provide "timely risk assessed safeguarding information about children and families to courts." Inspectors also praised the use of proportionate working which, "ensures that cases are allocated resources efficiently in relation to the assessed safeguarding needs of each case." Ofsted concluded that "the improvements achieved ensure that service delivery is efficient and effective and the safeguarding needs of children and young people are assessed at the earliest opportunity."

Overall, the progress in the area was rated as "good". This is the third such rating Cafcass has recently received, following inspections in Tyneside and Derbyshire and Nottinghamshire.

The report coincides with the publication of national care application figures which show that care demand in 2010-11 was 3.5% higher than the previous year's record figures with 9,127 new applications, compared to 8,826 in 2009-10.

Cafcass says that despite the continued increase in demand only three out of 12,792 care cases were unallocated at the end of March 2011, a 99% decrease in unallocated cases over the year. At the same time, reliance on duty allocations has fallen nearly 80% with only 223 care cases allocated on a duty basis, compared to the 12,566 cases currently allocated to children's guardians.

New project launched to protect rights of refugee children

A new initiative, called The Refugee Children's Rights Project (RCRP), has been undertaken by lawyers at the Children's Legal Centre and Islington Law Centre, and funded by The Diana, Princess of Wales Memorial Fund. The RCRP will use strategic litigation to ensure children's rights are upheld not just to UK standards, but to international standards as well.

Syd Bolton, co-director of the partnership based at the Children's Legal Centre said:

> "A significant number of people in the immigration system are children – some unaccompanied, and some with their families. In 2008, the UK finally accepted that the United Nations Convention on the Rights of the Child (also known as the Children's Convention) should be applied to children subject to immigration control – but we know from what the courts have been saying that the UK Border Agency has not yet fully taken this on board in the way it carries out its work.
>
> "Sadly, since the UK fully ratified this treaty, standards have still not gone up. Children are still receiving inadequate decisions that do not address their needs, or the serious risks they face, and are being given short-term permission to stay rather than being recognised as refugees. If the UKBA applied the standards set out in the Children's Convention to its asylum processes many more children would be protected and enabled to get on with their lives. Our new project aims to make the best interests of children the most important consideration in these processes."

As well as taking on litigation, the RCRP will also work as an advisory service for legal and policy practitioners and will help to build legal networks for lawyers who want to develop litigation based on the Children's Convention.

Baljeet Sandhu, co-director of the partnership based at Islington Law Centre said:

"Significant cuts in legal aid have placed a strain on the resources and capacity of legal practitioners representing children and young people seeking protection in the UK. As a result refugee children, often separated from their families, struggle to get the legal representation they need. Many of these children come from countries that are known to be areas of war and conflict, where human rights abuses are widespread.

"By helping legal practitioners, building up strategic partnerships and taking test cases or intervening in cases, the RCRP will help to make the most of the limited resources available for people working in this field, and ultimately, will help as many children and young people as possible to ensure that they are afforded the rights they are entitled to by law."

Study of serious case reviews stresses the importance of hearing the child's voice

Ofsted has published The voice of the child: learning lessons from serious case reviews. This is Ofsted's fifth report evaluating serious case reviews and considers 67 carried out between 1 April and 30 September 2010. The cases involved 93 children, 39 of whom died.

The report has a single theme: the importance of hearing the voice of the child. It provides an in-depth exploration of this key issue. It draws out practical implications and lessons for practitioners and Local Safeguarding Children Boards.

There are five main messages with regard to the voice of the child. Ofsted says that in too many cases:

* the child was not seen frequently enough by the professionals involved, or was not asked about their views and feelings
* agencies did not listen to adults who tried to speak on behalf of the child and who had important information to contribute
* parents and carers prevented professionals from seeing and listening to the child
* practitioners focused too much on the needs of the parents, especially on vulnerable parents, and overlooked the implications for the child
* agencies did not interpret their findings well enough to protect the child.

The report explores each of these themes and sets out practice implications in respect of each. They are as follows.

Seeing and hearing the child
Practitioners should:

* use direct observation of babies and young children by a range of people and make sense of these observations in relation to risk factors
* see children and young people in places that meet their needs – for example, in places that are familiar to them
* see children and young people away from their carers
* ensure that the assessment of the needs of disabled children identifies and includes needs relating to protection.

Listening to adults who speak on behalf of the child
Practitioners should routinely involve fathers and other male figures in the family in assessing risk and in gathering all the information needed to make an assessment

Local Safeguarding Children Boards should consider how they can better engage the general public in safeguarding children.

Being alert to parents and carers who prevent access to the child
Practitioners should:

* consider the implications of risk to children where they have concerns for their own personal safety
* ensure that respect for family privacy is not at the expense of safeguarding children.

Local Safeguarding Children Boards should consider how children who are home educated can receive the same safeguards as their peers.

Focusing on the child rather than the needs of parents and carers
Practitioners should:

* recognise the specific needs of children and young people who have a caring responsibility for their parents
* always consider the implications of any domestic abuse for unborn children

* be alert to how acute awareness of the needs of parents can mask children's needs.

Interpreting what children say in order to protect them
Practitioners should:

* ensure that actions take account of children and young people's views
* recognise behaviour as a means of communication
* understand and respond to behavioural indicators of abuse
* sensitively balance children's and young people's views with safeguarding their welfare.

Court of Appeal reiterates the importance of *Payne v Payne* in leave to remove cases

In the Court of Appeal case of *W (Children)* EWCA Civ 345, the President of the Family Division, Sir Nicholas Wall, made clear his view that undue prominence had been accorded to his own words in the case of *Re D (Children)* [2010] EWCA Civ 50, in which he had appeared to support criticism of *Payne v Payne* [2001] EWCA Civ 166. He resiled from this and confirmed that *Payne v Payne* should continue to be followed.

Elias LJ noted that there is much debate within family law circles as to whether the judgment in Payne v Payne gives appropriate weight to the value of contact with the non-resident parent when assessing a child's best interests. However, he confirmed that, until Parliament or the Supreme Court dictates otherwise, it was binding.

The appeal was allowed and permission given to the mother to relocate.

The case concerned an appeal by the mother of two children, aged 12 and 8 at the time of the hearing. The mother, who had cared for the children solely for the majority of their lives, had applied for permission to relocate to Australia where her family lived. The father, who had lived near to the children, had not however had regular contact and had never applied for such or for parental responsibility. The judge hearing the case, despite (i) hearing from a CAFCASS officer who recommended that relocation was in line with the children's wishes and should be permitted, (ii) considering that the mother's plans were well thought-out and well-intentioned, and (iii) finding that a decision against relocation would be devastating for the mother, did not permit relocation. He stated that the children's relationship with their father, which had developed through the course of the proceedings by way of interim orders specifically designed to build a relationship which might be able to withstand the children's move to Australia, needed to continue to grow and develop.

The President, hearing the appeal, considered at length the provisions concerning appeals in *G v G* [1985] 1 WLR 647, and the provisions of Payne v Payne. He stated that two points flowed from *G v G* – the first being that the court was conducting a balancing exercise, and that he could only interfere with a first instance judgment if he was satisfied that the judge had committed a sufficient error in the balancing exercise to vitiate his exercise of discretion; the second being that how he or any other member of the court would have decided the case is immaterial.

He concluded that the judge had erred such that his conclusion was plainly wrong. The judge, he said, had failed to give enough weight to the mother's welfare in his consideration of what was in the children's welfare, failed to make reference to statements from the mother's health visitor and GP, failed to consider the loss to the children of their relationship with the mother's side of the family, and failed to consider that the court could make orders about indirect contact.

The trial judge was also criticised for having failed to make findings on essential disputed facts (a criticism not made by the other two judges), and for failing to specifically consider all of the criteria listed by Dame Butler-Sloss in *Payne v Payne*.

Young ancillary relief case adjourned amid accusations of hidden assets

The High Court hearing between Michelle and Scott Young, the property financier, has been adjourned by Mostyn J until October in the hope that the couple might be able to come to agreement.

Michelle Young who is seeking ancillary relief from her former husband has accused him of hiding substantial assets in offshore accounts whilst he claims to be £28m in debt and supported by the generosity of friends. Mr Young represented himself at the hearing.

In 2009 Mr Young was ordered to pay Mrs Young £27,500 a month in maintenance. Mrs Young says that he has not paid her anything.

Family breakdown at record levels, finds the Centre for Social Justice

The Centre for Social Justice has published a report, History and Family: Setting the Records Straight. A rebuttal to the British Academy pamphlet Happy Families?, suggesting that family breakdown is at record levels.

The report states that births outside marriage are at the highest point for at least 200 years. Cohabitation levels have also risen from under 5% pre-1945 to 90% today.

The inquiry finds that births outside marriage were at low levels throughout the 19th century and stayed flat until the 1960s. But since then they have increased dramatically, from a long-standing baseline of 5 per cent to 45 per cent today.

The report says that research shows that children brought up by lone parents on average do much less well than those brought up by two parents and that cohabiting couples with children are far less stable than married couples with children.

The Centre for Social Justice says that its report refutes claims by some academics and campaigners that there is nothing new about contemporary levels of family breakdown. They have insisted, says the CSJ, that the 1960s were not a break with long established patterns of family life.

However, according to Professor Rebecca Probert of Warwick University and Dr Samantha Callan, the CSJ's senior family researcher, they have examined in detail evidence stretching back to the 18th century which confirms that the sexual revolution of the 1960s did indeed mark a decisive

break with 200 years of conventional family structure.

The report states that:

* The percentage of births outside marriage in the England and Wales hovered around 5 per cent (except during the two world wars) before rising in the 1960s onwards.

* By the late 1970s, this figure was above 10 per cent, by 1991 it was 30 percent and today it is 45 per cent.

* Levels of births outside marriage were the same in the 1950s as the 1750s at around 5 percent.

* Claims that cohabitation levels, as opposed to marriage, were "high" in the early part of the 20th Century are not borne out by the facts. The authors point to research suggesting that in the 1950s and 1960s, only 1-3 per cent of couples cohabited before marriage. Other research puts the pre-1945 level of cohabitation at 4 per cent. Today, nearly 90 per cent of couples live together before getting married.

* Records of unemployment claims from the 1920s point to minimal levels of cohabitation.

Gavin Poole, Executive Director of the CSJ, says:

> "Current high levels of cohabitation are a key factor in the rise in family breakdown in our country and this paper shows that we have not been here before. The CSJ has consistently argued, from the evidence, that marriage and commitment tend to stabilise and strengthen families and cannot be ignored."

Professor Probert and Dr Callan say in their report:

> "It is not our intention to suggest that all marriages in the past were happy and longlasting, nor that there were no examples of successful and stable cohabiting relationships. But the quality of family life should be distinguished from its form.
>
> "The fact that a number of marriages were brutal and fleeting should not obscure the centrality of marriage to family life in previous decades.
>
> "While many Victorian marriages were short-lived because of the untimely death of one of the spouses, this does not mean that the experiences of the survivors were in any way comparable to those undergoing a divorce today.
>
> "Similarly, while one can of course find examples from all historical periods of couples who lived together outside marriage, it does not follow that cohabitation was remotely as common in the past as it is today."

Annual legal aid bill for family breakdown amounts to £645m, says the Telegraph

The Sunday Telegraph reports that it has obtained figures showing that the annual cost of legal advice to divorcing couples, helping parents fight child custody battles, or trying to restrain violent partners, has reached £645m. Of this sum £468m is spent on 'custody disputes'. The cost of all civil legal aid is stated to be £940m.

Serious child abuse reports to NSPCC Helpline at all time high

Calls to the NSPCC Helpline reporting suspected child abuse and neglect have reached record levels, the charity has revealed.

Last year (April 2010 to March 2011), trained NSPCC counsellors working on the 24-hour freephone service referred 16,385 serious cases to police or social services. This is 37 per cent higher than the previous year and the biggest annual increase in referrals to the Helpline yet recorded. Almost half (46%) of the people who contacted the Helpline last year were reporting concerns so serious they needed to be passed on to the authorities - up from 39 per cent the previous year.

NSPCC says that recent research carried out by the organisation has found that nearly one in five secondary school children in the UK has been severely maltreated during childhood, most commonly through neglect . There are currently around 46,000 children of all ages on a local child protection plan or register.

The NSPCC is calling for a major shift in UK child protection policy towards earlier and more effective intervention in child cruelty cases. This relies on people taking swift action to report any concerns about a child being maltreated.

The biggest increase in referrals last year was for neglect, which jumped 81 per cent to 6,438 cases. Neglect remains the top reason for people contacting the helpline. The charity also referred 4,113 cases of reported physical abuse, 1,520 cases of sexual abuse and 2,932 cases of emotional abuse.

Charity opposes review of fostering regulations

The Fostering Network has joined forces with other voluntary organisations working with children in care to oppose any changes at this time to the new framework for fostering services and regulations on care planning, placement and review.

The Government is conducting a review of all statutory duties placed on local government in England. It has so far identified 1,294 duties on local authorities, mostly arising from legislation, and is consulting on which must be kept and which repealed. The review team at the Department of Communities and Local Government is called the "review of statutory burdens team".

Chief executive of the Fostering Network, Robert Tapsfield, said:

> "The new regulations and statutory guidance on fostering have just come into effect after extensive consultation by the Department for Education with all stakeholders. They must be given time to settle in.
>
> "Wider duties in policy areas such as housing or asylum also affect children in care and the impact of any proposed changes on looked-after children should be carefully considered before any changes are made. Our emphasis is on protecting and promoting the rights and wellbeing of children in care."

High Court judge highlights 'alarming' failures in local authority's procedures

Mr Justice Baker, sitting in *Kent CC v A Mother* [2011] EWHC 402, has highlighted various "alarming" matters that had come to light about the practices and procedures of the local authority in the hope that lessons might be learned in the future. These included the lack of compliance with "Good Practice Guidance on Working with Parents with a Learning Disability"; failure to take steps that might have prevented abuse; "deplorable" breach of duty to comply with statutory obligations as to private fostering arrangements; "incomprehensible" approval of a placement of one of the children; "seriously deficient" record keeping procedures, and "wholly unsatisfactory" disclosure.

The learned judge gave a helpful summary of the legal principles governing local authority disclosure and emphasised the obligations upon the local authority's lawyer. He observed that it was "absolutely essential" for counsel for the local authority to prepare a chronology in cases such as this.

ANALYSIS

Children: Public Law Update (April 2011)

John Tughan, Barrister, of 4 Paper Buildings reviews recent developments in Public Law Children including several as yet unreported cases

In this update on public law issues I will deal with the following areas:

* Post-adoption contact
* Findings of fact issues
* Breach of professional guidance

Post-adoption contact

In *Re B (A Child)* (11th March 2011) (References: LTL 11/3/2011 EXTEMPORE Document No.: Case Law - AC950186) the Court of Appeal were considering an application by a Mother for permission to apply for a contact order to her son who had been adopted. C had a full brother (Z) who was two years younger than him. C had been placed in care and adopted but Z lived with M as her capacity had improved after C's removal. There was no direct contact between M and C after C's placement. M applied for permission to apply for a contact order in respect of C but permission was refused. Some two years later M made the same application but was again refused permission by the same judge. The Court of Appeal held that it was apparent from the submissions that the respondent local authority had made in the application proceedings that it had implicitly conceded that M's suggestion that she and C have direct contact was not without merit but that it would be better explored within the confines of existing post-adoption services rather than explored forensically. Accordingly the real question for the judge was, given the concession that the family situation merited sensitive investigation, on what basis he could refuse M permission. It had to be borne in mind that a grant of permission only got M over the threshold and no more. It was clear that whether M should have contact with C merited investigation and that conclusion was strengthened by the fact that Z, given his relationship to C, had very strong rights under the Convention. Moreover it was apparent that the judge had erred by allowing himself to be overly influenced by a consideration of the first application for permission. Accordingly in the circumstances the judge should have granted M permission.

The Court of Appeal relied upon the implicit concession by the local authority that the Mother's application was "not without merit". That is a low threshold to cross for achieving permission to apply for a contact order in the sensitive circumstances of an established adoptive relationship.

Findings of fact issues

In *Re L-R (Children)* (8th March 2011) (References: LTL 8/3/2011 EXTEMPORE; Document No.: Case Law - AC9601410) the Court of Appeal were considering findings of fact in an alleged case of non-accidental injuries. The appeal was brought on behalf of the child (G), supported by the local authority. The trial judge had found that cuts to the child's head and a burn to his leg were self-inflicted. This was a case of serious emotional disturbance to G as a result of the move of the family from the Ivory Coast to the UK, the cramped living conditions in the UK, the change in surroundings and the language (G did not speak English). In February 2008, when aged eight, G was admitted to hospital where he was found to be suffering from lesions on his trunk, legs and buttocks, and three cuts to his head. He was admitted again four days later with a further six cuts to his head. G was subsequently found to have a burn to his leg caused by a fire started in his bed. The local authority issued care proceedings in respect of D and G, who were placed in interim foster care, and a fact-finding hearing was held to determine who was responsible for G's injuries. It was the local authority's case that any or all of D, M and F had caused G's injuries. They denied that and asserted that his injuries were self-inflicted. The judge heard extensive medical evidence from four experts, the thrust of which was that self-harm was hugely unusual in a male child, particularly one so young, and that self-inflicted cuts to the head were unknown to doctors and unreported in medical literature. It stopped short, however, of concluding that it would have been impossible for G to have injured himself in that way. The judge concluded that M and F were responsible for beating G, but that the cuts and the burn were self-inflicted. G argued that the effect of the medical evidence was so powerful, it disentitled the judge to have found that his injuries were self-inflicted, and that the judge's factual findings in that regard were, accordingly, perverse. The local authority submitted that the judge had erred in failing to attach sufficient weight to G's later interview denying responsibility for the cuts and instead blaming D, and in attaching too great a weight on the evidence of M and F who he had found to be responsible for beating G.

The Court of Appeal emphasised the difficulty for an appellate court reviewing the factual findings of a trial judge who had heard a great deal of oral evidence. This judge had had well in mind the weight of medical opinion contrary to self-harm and had expressed a concise and accurate summary of the medical evidence in his judgment. His finding that it was consistent with both explanations, namely that the injuries were either self-inflicted or inflicted by another person, represented his reminder to himself that the medical experts had not gone so far as to exclude self-harm on G's part. Although they had not encountered such self-harm before, they had not excluded the possibility that the cuts were self-inflicted. The judge had considered that he could make a finding in a positive form, which was, in principle, always more satisfactory than determining merely that an injury had been caused by any one of a pool of possible perpetrators. In those circumstances, he had

been entitled to find that G was the perpetrator of his own cuts and had caused the fire.

(Per Jacob L.J.) Legal proceedings could never bring out the absolute truth of an event and the best that a judge could do in reaching a conclusion was to go by the evidence he had before him. If a judge did that fairly, by taking into account all relevant matters and ignoring irrelevant ones, that was the best that the human system could devise. In the instant case, the judge had weighed the evidence fairly, and whilst the absolute truth could never be known, his conclusion was one he was fully entitled to reach.

The Court of Appeal repeat, in this decision, the approach that a positive finding is more satisfactory than a finding of a pool of perpetrators. The trial judge was faced with medical experts who had never heard of the self infliction of such injuries but could not exclude the possibility. That left the finding of self-infliction open to the court. Jacob LJ reminds us that in a system devised and operated by human beings the absolute truth is not usually available.

The Court of Appeal were faced with another issue flowing from the expert medical evidence in a fact-finding situation in Re M (A Child) [2010] EWCA Civ 1467. E had twice been admitted to hospital within the first four months of his life. The first admission was when he had suffered an acute life-threatening event and the second was when he had sustained extensive bruising. The acute life-threatening event had occurred while E was in the sole care of F and the issue was whether, as asserted by the local authority, it had a non-accidental cause. The bruising, which it was accepted was non-accidental, had occurred while he had been in the care of both M and F, and the local authority's case was that both were possible perpetrators. Having heard evidence from a consultant paediatrician that, in the absence of any other explanation, there was a significant possibility that the life-threatening event was non-accidental, the judge found that it was non-accidental. She identified F as the perpetrator, and went on to identify both him and M as possible perpetrators of the bruising. F appealed against the finding that the life-threatening event was non-accidental and M cross-appealed against her identification as a possible perpetrator of the bruising.

The Court of Appeal held that the finding that F had caused the life-threatening event would stand. The gist of the judge's conclusion was that, according to the medical evidence, the circumstances were "very suspicious", and it was necessary for F to give an account which allayed her suspicions or which, at least, did not augment them. He did not do so. Both the content of his account and the manner in which he gave it augmented those suspicions and that was sufficient to repair the inability of the paediatrician to say that the life-threatening event was, on the balance of probabilities, non-accidental. The judge's conclusion was that while it was unexplained, it was not inexplicable.

However, the finding that M was a possible perpetrator of the bruising would be set aside and replaced with a finding that F was the perpetrator. Before finding that M was a possible perpetrator the judge needed to have found some evidence, beyond the mere fact that she had had joint care of E, casting doubt on the recognised excellence of her care. There was, however, no such evidence. In contrast, the evidence in relation to F was quite otherwise and there was the finding that a matter of weeks before the bruising he had caused E to suffer an acute life-threatening event.

This is an interesting analysis of the correct judicial approach to fact-finding. The judge was entitled to decide for herself whether an injury was indeed non-accidental notwithstanding that the medical expert had not concluded that it was. Further, joint care by the parents was not enough of itself to bring M into the pool of perpetrators.

Breach of professional guidance

In the first decision in this update dealing with the breach of guidelines where that breach impacts on a fact-finding exercise, the Court of Appeal decided the case of *TW v A City Council* [2011] EWCA Civ 17. It was held that a judge in care proceedings had erred in finding that the uncle of the child in question had previously sexually assaulted a four-and-a-half-year-old child. The judge had reached her decision on the basis of an Achieving Best Evidence interview which had not been conducted in accordance with the Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Using Special Measures.

In cases involving ABE interviews it is common, I would suggest, to find breaches of the guidelines. The perfect interview has not yet been conducted. The court recognises this in allowing "a broad margin of latitude" to the interviewer. This case is an example of an interview being fundamentally undermined by the breaches of the guidelines.

The Court of Appeal held that the inadequacies of the ABE interview were "manifest". There was, on the face of the interview, an inadequate establishment of rapport; absolutely no free narrative recall by L; an abundance of leading questions, and no closure. Everything was led by the interviewing officer and nothing was introduced into the interview by L. Even allowing for a broad margin of latitude to anyone conducting such an interview, the departures from the Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Using Special Measures were self-evident and glaring. The guidance made it clear that the interviewer had to keep an open mind and that the object of the exercise was not simply to get the child to repeat on camera what she had said earlier to someone else. Accordingly, no evidential weight could be placed on the interview. Against that background, the judge's assessment that L was a forthright child capable of standing up to and overcoming incompetent interviewing did not stand up to analysis. It was not sufficient for a judge to rely primarily on the fact that a child was able, when being interviewed in a thoroughly unsatisfactory manner and contrary to the guidance, to make a number of inculpatory statements. A clear analysis of all the evidence was required, and the child's interview had to be assessed in that context. The judge, therefore, needed to explain how and why the criminal trial came to the opposite conclusion, and to look carefully at the evidence available in each set of proceedings. Furthermore, there was no reference in her judgment to the substance of the rulings in the criminal trial, and no analysis of the atmosphere in L's house on the evening of the alleged incident. Those matters, combined with the judge's acceptance of the validity of L's ABE interview, were sufficient to vitiate her conclusion that T had sexually touched L.

In *A Local Authority v C* [2011] EWHC 231 (Fam) (11th February 2011) Mrs Justice Theis was also dealing with the breach of published guidelines but in this case it related to the guidance published in March 2008 by the Royal College of Paediatrics and Child Health entitled 'The Physical Signs of Child Sexual Abuse'. As a result of the breaches in that case the court was left with serious gaps in the evidential record. Theis J, following on from the reported decision of Baker J in A London Borough Council v K [2009] EWHC 850 (Fam) made comment for the attention of all practitioners, medical and legal:

"...bearing in mind the experience in this case, I would wish the message to go out loud and clear that compliance with the guidance in terms of written records (including line drawings) of examinations using precise terminology should, in my judgment, be the norm."

Both the Theis J and the Baker J decisions are essential reading for any practitioner dealing with the issues of physical examination for signs of sexual abuse. Both, for different reasons, are salutary reminders of the limits of expert medical evidence and the extent to which the proper recording of such examinations is crucial to any court having to make decisions based on those examinations.

The best place to find the 2008 Royal College Guidance is from the Royal College itself.

Family Procedure Rules 2010: A Guide to Private and Public Law Family Proceedings concerning Children

Clive Redley, Barrister, of Tooks Chambers, a member of the Family Procedure Rule Committee, provides a guide to the new Family Procedure Rules and their application to children applications, both Private Law and Public Law

Introduction

On 6th April the Family Procedure Rules 2010 come into effect .They are a body of rules which will encompass all courts from the Family Proceedings Court to the High Court Family Division and all family proceedings. There will no longer be a need to cross refer between rules such as the Family Proceedings Courts (Children Act1989) Rules 1991 or the County Court Rules 1981.

The Rules are supplemented by Practice Directions issued by the President of the Family Division. The number of each Practice Direction coincides with the Part of the Family Procedure Rules to which it relates, i.e. Part 12 deals with proceedings relating to children (excluding adoption) and Practice Directions 12A to 12P are the accompanying Practice Directions. In some circumstances practitioners will have to pay more attention to the Practice Directions than the particular rule. There is also an extensive suite of forms. The intention of the Family Procedure Rules Committee has been to produce a set of Rules which are both comprehensive and comprehensible to both professionally qualified and lay court users. In effect, the Rules tell you what to do and the Practice Directions how to do it. The Committee will continue to meet after the implementation of the Rules and periodic amendments will be made to correct any errors outlined to it or to improve the effectiveness of the Rules or Practice Directions.

Headline Points for Children Lawyers

* One set of Rules applying to all proceedings concerning children in the family proceedings court, the county court and the High Court
* The introduction of an Overriding Objective to deal with cases justly, having regard to any welfare issues involved
* The Rules provide detailed provisions about the court's general case management powers
* Implementation of the Pre-Application Protocol
* No substantial change to procedures in either Care or Private law children's proceedings
* The harmonisation of appeal procedures for all level of courts, FPC to High Court.
* Transitional arrangements outlined in Part 36 and Practice Direction 36 A.

The Rules

The overriding objective

Those family law practitioners who also practise in non-family law civil proceedings will be familiar with the overriding principle which is fundamental to the Civil Procedure Rules. Likewise the new FPR are subject to an overriding objective

"of enabling the court to deal with cases justly, having regard to the welfare issues involved.
(2) Dealing with a case justly includes, so far as is practicable –

(a) ensuring that it is dealt with expeditiously and fairly;
(b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
(c) ensuring that the parties are on an equal footing;
(d) saving expense; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

Alternative dispute resolution

The provisions of Part 3 and the issue of Alternative Dispute Resolution (ADR) are very important. The court must consider at every stage of the proceedings whether ADR is appropriate and can adjourn the proceedings at any stage in order to enable the parties to engage in ADR. Practice Direction 3A contains the pre-application protocol on Mediation Information and Assessment. This in effect initiates ADR prior to the commencement of proceedings .Whilst the Legal Services Commission has previously tried to make consideration of ADR a pre-requisite of applying for public funding the protocol brings this into courts domain at the pre-proceedings stage. As stated in the PD the rationale is to acknowledge that an adversarial court process is not always best-suited to the resolution of family disputes, particularly private law disputes relating to children.

The Practice Direction sets out best practice to be followed by any person who is considering making an application to court for an order in relevant family proceedings. Relevant family proceedings are defined in Annex B of the PD and include most private law applications except emergency applications and applications for enforcement orders. The Pre¬-Action Protocol itself is set out in Annex A. Applicants will be expected to contact a family mediator to arrange the attendance at an information meeting about mediation or other forms of ADR. In the Protocol this is referred to as a "Mediation Information and Assessment Meeting". The applicant has to provide the mediator with the contact details of the prospective respondent so that that party can also be invited to attend a meeting .The respondent will be invited, if they agree, to either a joint meeting if appropriate or a separate meeting. Paragraph 8 of the Protocol states that if after complying with the Protocol any application is made to the court, the applicant should at the same time file a completed Family Mediation Information and Assessment Form or FM1 confirming attendance at a Mediation Information and Assessment meeting or giving reasons for not having attended such a meeting.

Commencement of proceedings and service

Part 5 deals with the commencement of proceedings and Practice Direction 5A lists the individual forms required for each type of application. The requirements for service are

addressed in Part 6 and by Practice Directions 6A, 6B and 6C. The methods of service are outlined at Rule 6.23 which includes service by electronic mail if this is agreed. Any agreement to accept service by electronic mail must have been agreed in writing by the receiving party to be effective and may be limited by the recipient in respect of the format and size of attached documents (PD 6A paras 4.1-4.4).

Rules applicable to children applications
Practitioners specialising in proceedings which relate to children and their welfare will be primarily concerned with the provisions of Parts 12 and 14.

Part 12 deals with Emergency Protection Orders, Section 8 and Section 31 applications, child abduction application and other Hague Convention applications. Part 14 outlines the procedures in relation to adoption.

Rule 12.4 addresses the issue of persons who it is believed to have foreign parental responsibility and the obligations to make attempts to serve them.

Practice directions 12A and 12B concern Public and Private Law proceedings regarding children and are in essence the Public Law Outline and the Private Law Programme. Thus these two procedural initiatives have been incorporated within the new Rules and are unaffected by the Rules. As far as procedures are concerned there are no substantial changes. The requirements for the service of applications and documents are set out in detail in Practice Direction 12C.

In the relation to the communication of information from proceedings relating to children to a third party, Chapter 7 of Rule 12 replaces the old Family Proceedings Rule 10.20A which itself was repealed in April 2009 and replaced by r.11.1-11.9 .The Rule is supplemented by Practice Direction 12G. This confirms the ability of parties to disclose information from proceedings in certain circumstances without falling foul of the laws as to contempt of court. Examples of such circumstances when there is no need to obtain permission to disclose information are for the purpose of counselling or for disclosing experts' reports to an adoption panel.

The Rules in relation to adoption and placement applications are now found in Part 14 of the Rules and replace the Family Procedure (Adoption) Rules 2005. Details of what needs to be covered in reports on placement and adoption applications are set out in Practice Direction 14C. Similar provisions relating to the disclosure of information as outlined at Chapter 7 of Rule 12 are replicated in relation to adoption proceedings in Rule 14.14 and supplemented by Practice Direction 14E.

Rule 14.10(2) allows the court to give directions as to the way in which consent to a child being placed for adoption or as to the making of a future adoption order can be given if either of the forms (A100 and A103) are not used.

Parties who lack capacity, now known as protected parties, and their representation are dealt with in Part 15 of the Rules. As the Rules apply to all courts it would seem that the family proceedings courts no longer need to transfer matters up to county court level where a party lacks capacity and require the services of the Official Solicitor. In keeping with the philosophy of employing user friendly language, the terms 'next friend' and 'Guardian ad Litem' are no longer used. Protected parties are assisted by a Litigation Friend and the former Guardian ad Litem is now a 'Children's Guardian'.

The representation of children in both Private and Public Law proceedings is now covered by Part 16 and Practice Direction 16A. In non-specified proceedings, therefore most private law cases or cases involving the exercise of the court's inherent jurisdiction, a child can be made a party to proceedings under rule 16.2 .Practice Direction 16A sets out the matters which the court will take into consideration before making a child a party (see PD 16 Part 4 para.7.1). Since Rule 16.2 replaces Family Proceedings Rules rule 9.5 and the new rules are applicable to all courts, there is no longer a need to transfer private law proceedings up to county court level when a child is made a party to the proceedings and a Children's Guardian is appointed. Rule 16.3 provides for the appointment of a Children's Guardian in specified proceedings unless there is a reason not to do so as outlined in Rule16.6 (3).

Statements of Truth
Certain documents as outlined in Part 17 must be verified by a Statement of Truth. The consequence of not including a Statement of Truth in a Statement of case or a witness statement is that a party who adduces it cannot rely upon its contents unless the court allows that party to do so. The form or wording of a Statement of Truth is set out in PD 17 A 2.1 to 2.3.

Conduct of Hearings
In relation to the conduct of hearings Part 22 sets out the powers of the court to control the way in which evidence is given. Rule 22.1 expressly sets this out:

"The court may control the evidence by giving directions as to a)the issues on which it requires evidence; b)the nature of the evidence which it requires to decide those issues; and c)the way in which the evidence is to be placed before the court."

Part 22.2 effectively restricts the giving of oral evidence to final hearings. Witnesses' evidence at interim hearings should be proved by their written evidence. However, this restriction on the use of oral evidence at interim hearings does not apply to secure accommodation applications or interim care and supervision applications (Part 22.2.(2)). Additionally, where an enactment provides for the giving of oral evidence at an interim stage then the rules do not apply. For example, s.45 (7) of the Children Act provides in applications for Emergency Protection Orders for the court to take account of " a) any statement contained in any report made to the court in the course of, or in connection with the hearing or b) any evidence given during the hearing ."

Expert evidence
With the proliferation in the amounts paid to experts from the Civil Public Funding budget the court is given some assistance in trying to stem this increase. Part 25.1 imposes a duty to 'restrict expert evidence to that which is reasonably required to resolve the proceedings.' The prohibition on calling expert evidence without prior permission from the court is reiterated at Part 25.4. Additionally to avoid both the delay in the instruction of the expert and the taking up of too much court hearing time procedures are outlined in the PD as to best practice in applying to instruct an expert. Paragraph 4 outlines what

preliminary enquiries should be made by a party's solicitor of the expert and what confirmations should be obtained from the expert. In Care proceedings this should be done in time for the Case Management Conference and in private proceedings in time for the First Hearing Dispute Resolution Appointment. If the application is to be made the applicant's lawyer shall file, by 11.00 am on the business day before the relevant hearing, a written proposal for the instruction which should include the details set out at paragraph 4.3 of the PD. These include the expert's hourly rate and details of why he or she is to be instructed. Secondly the applicant's lawyer needs to provide at the same time a draft order for directions. If the application is successful then the Letter of Instruction must be prepared (in agreement with all relevant parties), filed and served within 5 business days of the hearing. General guidance is given as to how the letter should be formatted at paragraph 4.5. If there is disagreement as to the content of an expert's letter of instruction, where a single joint expert is to be instructed, Part 25.8(2) allows the court to determine the content on the application of any relevant party so long as the other parties are notified. The court can also limit the amount to be paid to an expert (Part 25.8(5)). If a party does not wish to be liable for the fees of a single joint expert then clarification in the form of a direction is needed; otherwise the relevant parties are jointly and severally liable for the expert's fees and expenses. In order to further assist practitioners when instructing experts, the PD 25A provides suggested questions for letters of instructions for child mental health professionals and paediatricians and also Adult psychiatrists and psychologists. Theses suggested questions are drafted by the Family Justice Council and are set out in an annex to the Practice Direction.

As an added attempt to avoid experts having to give oral evidence at a final hearing and therefore increasing costs, provision is made in Part 25.6 for any party to send written questions to the expert on receipt of his or her report. This must only be for the purpose of clarification, put only once and must be done within 10 days of receiving the expert's report. The court has discretion to direct otherwise, such as the time limit for any written questions to be put. The experts' answers are considered to be part of the original report. Experts can themselves now seek directions from the court for the purpose of assisting them with carrying out their functions. The arrangements for experts' meetings ,if they are necessary are given in paragraph 6.3.The arrangements should be made within 15 days of receipt of the experts report being received, although the meeting does not have to occur within this time scale. The agenda and questions for the meeting should be formulated by the solicitor who will chair the meeting no later than 5 days before the meeting and sent to the attending experts no later than two days before. Following the meeting a Statement of Agreement and Disagreement should be prepared and signed by each of the experts and filed and served within 5 days of the meeting taking place. Whether an expert is needed to give evidence at the Final Hearing should be fully discussed and decided at the Issues Resolution Hearing or some other date specified by the court. Following the Final Hearing the solicitor who instructed any expert called to the hearing shall within 10 days notify the expert of the outcome of the hearing and detail how his or her report was used by the court. If the court directs that there shall be a transcript of any Judgment then the court may also direct that a copy is sent to the expert. In the family proceedings court the direction may be made for written reasons for the courts decision be sent to the expert.

Practice Direction 25A incorporates and supersedes the Practice Direction on Experts in Family Proceedings relating to Children, after the 2010 Rules come into effect. Practitioners are strongly advised to comply with PD 25A when making any application to instruct an expert on behalf of a client.

Appeals

Part 30 and Practice Direction 30A deal with appeals. The Practice Direction comes into effect on the 6th April, the same day as the Rules generally. They set out the routes of appeal: namely that appeals from District Judges in either the family proceedings court or the county court are to a Circuit Judge. However an appeal from a District Judge of the Principal Registry is to a High Court Judge. The general time limit for serving notice of appeal is 21 days. However if the appeal is from the decision of the family proceedings court to make an interim care order under section 38 (1) of the Children Act, then the limit is 7 days (Part 30.4 (3)). In keeping with the effort to use plain language, a party seeks permission, rather than leave, to appeal. It is essential that practitioners who seek to appeal a decision comply with both the Rules set out in Part 30 but more importantly the procedures set out in Practice Direction 30A.

Transitional arrangements

Practice Direction 36A outlines the transitional arrangements .The general scheme is to apply the new Rules to existing proceedings, therefore those commenced before 6th April. Where this is not practicable then the previous applicable rules apply. If in existing proceedings a step has been taken under the old rules any response should also be taken under the old rules. If a step is taken in existing proceedings but occurs after 6th April, then the new rules apply.

Conclusion

The new Rules do not change the substantive law as that was never the intention nor the remit of the Family Procedure Rule Committee. Such change is reserved for Parliament. Therefore, children lawyers, well-versed in the procedures of the Public Law Outline and the Private Law Programme, will continue to follow those schemes unless or until they are themselves amended. The intention was to provide an accessible source for all court users, be they qualified lawyers or litigants in person. The Overriding Objective as outlined in Part 1 is to try and ensure that cases are dealt with 'justly, having regard to any welfare issues involved'. The Rules are designed to assist all parties in achieving that aim. The overriding objective applies to all existing proceedings from the implementation of the rules on 6th April 2011.

Civil Restraint Orders in the Family Courts

Matthew Burman, a pupil barrister at Coram Chambers, considers a new addition to the family procedural code

After years of consultations and policy discussions, the Family Procedure Rules 2010 (FPR 2010) are finally in force. Providing practitioners with a single unified code for the High Court, county courts and magistrates' courts, they represent the most significant change to the family courts for almost twenty years. So far, press coverage of FPR 2010 has mainly focused on the emergence of a whole new raft of forms and the increased emphasis on mediation as a precursor to litigation. However, there is another element of this new code that has been mostly overlooked hitherto – the introduction of the civil restraint order (CRO). Whilst this is not in fact a new remedy in family law, it will be the first time that such a remedy has been incorporated into the rules of procedure for family courts.

This article will seek to:

1. Outline the key characteristics of CROs and their origins;
2. Identify the different types of CRO available;
3. Outline the relevant procedure; and
4. Explore the potential application of CROs in the family courts.

So what is a CRO?

In basic terms, a CRO is an order that stops vexatious litigants from repeatedly making applications that clearly have no merit. The CRO can be traced back to the CPR 1998, which provides the following definition in r2.3(1):

"'civil restraint order' means an order restraining a party –
(a) from making any further applications in current proceedings (a limited civil restraint order);
(b) from issuing certain claims or making certain applications in specified courts (an extended civil restraint order); or
(c) from issuing any claim or making any application in specified courts (a general civil restraint order)."

The very same definition is now given to CROs in FPR 2010 r2.3. Needless to say, the court could never make an order restraining someone from making any application in any court, as this would be entirely incompatible with a person's right to a fair trial under Art 6 of the European Convention on Human Rights (not to mention pretty much every other right protected by that convention!). Nevertheless, the CRO does provide the court with a very powerful remedy when faced with a vexatious litigant and, more particularly, one who has issued a number of unmeritorious applications within a given set of proceedings.

Origins of the CRO

The origins of the CRO can be traced back to the decision of the Court of Appeal in Bhamjee v Forsdick (Practice Note) [2003] EWCA Civ 113. The claimant, Ismail Abdullah Bhamjee had issued numerous unmeritorious claims and applications against, among others, solicitors and barristers who had acted for other parties in other litigation he had brought.

The then Master of the Rolls, Lord Phillips of Worth Matravers referred to "the nuisance which these activities represent for the judges, lawyers and staff of this court", and how "the resources of the courts themselves… require protection". With the arrival of CPR 1998 came a new overriding objective of the court to deal with cases justly, which meant dealing with them expeditiously and allotting them an appropriate share of resources. This objective was, according to Lord Phillips, "thwarted… if litigants bombard the court with hopeless applications".

Lord Phillips therefore provided the following guidance on what to do when faced with an application totally devoid of merit (at para 54):

1. If a court at any level considers that an application or a claim or statement of case is totally devoid of merit it should say so, and this reason should appear on the face of the order.
2. It is desirable that a record should be kept of all such orders both at the court centre at which they were made and on a national basis.
3. Procedural judges should be alert to identify cases in which it may be appropriate for them to use their own initiative to consider whether to strike a claim out under CPR 3.3 as being totally devoid of merit before the proceedings are served on the other party.
4. A judge at any level of court should consider whether to make a civil restraint order if a litigant makes a number of vexatious applications in a single set of proceedings all of which have been dismissed as being totally devoid of merit. Such an order will restrain the litigant from making any further applications in those proceedings without first obtaining the permission of the court. Any application issued without such permission shall stand dismissed without the need for the other party to respond to it.
5. If a litigant exhibits the hallmarks of persistently vexatious behaviour, a judge of the Court of Appeal or the High Court or a designated civil judge (or his appointed deputy) in the county court should consider whether to make an extended civil restraint order against him. This order, which should be made for a period not exceeding two years, will restrain the litigant from instituting proceedings or making applications in the courts identified in the order in or out of or concerning any matters involving or relating to or touching upon or leading to the proceedings in which it is made without the permission of a judge identified in the order. Any application for permission should be made on paper and will be dealt with on paper.
6. If an extended civil restraint order is found not to provide the necessary curb on a litigant's vexatious conduct, a judge of the High Court or a designated civil judge (or his deputy) in the county court should consider whether the time has come to make a general civil restraint order against him. Such an order will have the same effect as an extended civil restraint order except that it will cover all proceedings and all applications in the High Court, or in the identified

county court, as the case may be. It, too, may be made for a period not exceeding two years.

7. If a litigant subject to an extended civil restraint order or a general civil restraint order continues to make applications pursuant to the relevant order which are dismissed as being totally devoid of merit, a High Court judge or a designated civil judge (or his deputy) should consider whether it is appropriate to make any subsequent refusals of permission final. Thereafter any subsequent refusal of permission on the grounds that the application is totally devoid of merit will not be susceptible of appeal unless the judge who refuses permission himself grants permission to appeal.

8. The other party or parties to the litigation may apply for any of these restraint orders, and on such an application the court should make an order that is proportionate to the mischief complained of.

In light of the guidance in *Bhamjee v Forsdick*, specific provision was made for CROs in CPR 1998 in r3.11 and PD3C.

Although CROs have always been available within family proceedings, it is unclear how widely used a remedy this was. Now, however, for the first time, FPR 2010 brings CROs directly into the procedural code for the family courts and with it a very important remedy.

Procedure

The power to make CROs is now set out at FPR 2010, r4.8 and the accompanying Practice Direction, PD4B. Whilst it is not the intention of this article to repeat the words of PD4B verbatim, it is worth noting the following points:

a) There are three types of CRO- limited CROs, extended CROs and general CROs (these are as set out at points 4, 5 and 6 above respectively of Lord Phillips' guidance in Bhamjee);
b) Limited CROs can be made in both the county court and the High Court, but only a High Court judge (not a DJ) can make an extended or general CRO;
c) There must have been at least two applications made "totally without merit" (and thus there will need to be clear recorded findings to this effect) before a limited CRO can be made (see r4.3(7)(a));
d) Limited CROs last for the life of the proceedings in which they are made, unless the court orders otherwise;
e) Extended and general CROs cannot last longer than two years;
f) CROs effectively work like a shield to further vexatious litigation. So, if the respondent contravenes the CRO by trying to make a further unmeritorious application, it will be automatically dismissed without requiring the judge or other parties to do anything further;
g) A person who is subject to a CRO can apply to discharge or amend the order, but only with permission of a judge identified in the order;
h) It is still possible for a respondent to apply for permission to appeal the CRO.

The court can make a CRO either of its own initiative, or on an application. In fact, FPR 2010 states that the court MUST consider making a CRO when it strikes out a statement of case or dismisses an application (including permission to appeal) and it considers the claim is totally without merit (FPR 2010 r4.3(7) and r30.11(5)). It is worth noting that, whilst CPR 1998 sets this out in almost identical terms, CPR 1998 makes reference to 'the court', whilst FPR 2010 limits CROs made on the court's own initiative to the High Court and county court.

Parties can also apply to the court to make a CRO against another party. To make such an application, one would have to follow the general applications procedure in Part 18, unless the court orders otherwise (FPR 2010, PD4B, paras 5.1-5.2).

Using CROs in family proceedings

CROs have been available as a remedy in family proceedings for some time and so it is therefore somewhat surprising that there are relatively few reported cases that even mention CROs.

What is certainly true is that CROs would not be of much use in Children Act 1989 proceedings, where s.91(14) already provides a similar remedy (PD4B, para1.1 makes this clear). In effect, therefore, this means that the main arena for CROs in the family courts will be ancillary relief (or 'financial remedies' as they are now referred to in FPR 2010).

Currey v Currey (No. 2) [2007] 1 FLR 946 is one example of where a limited CRO was used to good effect (although the case did not turn on the use of CROs per se). In the original ancillary relief proceedings, the wife had been ordered to pay periodical payments at the rate of £48,000 pa, and to make capital provision of £1,070,000, part of which was structured in the form of a £640,000 housing fund for the husband. After a number of years, the housing fund had still not been invested and the husband proceeded to make a number of 'bizarre' applications, 'including claims for damages against the solicitors…representing the wife in the proceedings and claims, purportedly on behalf of the children, for damages against the solicitors who had been representing them'. These claims were struck out by Charles J, who found that the husband had 'persistently issued claims or made applications which were totally without merit'. The CRO made did not preclude the husband from making applications in the present proceedings.

It appears that the purpose of such a CRO was to stop the husband muddying the already muddy waters of litigation, and to stop legal costs spiraling even further out of control (by the time of the appeal, the husband already owed £180,000 to his solicitors).

At this early stage in the life of FPR 2010, one can glean from Currey v Currey (No 2) a potential use of CROs in cases where vexatious applications are being brought to either waste money or, put simply, to make the other party's life more difficult.

Apart from this, over the next few years, we are likely to see more and more litigants in person in the family courts as legal aid in financial remedy cases all but vanishes. This in itself will inevitably slow down the court process. Not only will litigants in person need more time to put their case, but there is also the potential for them to make applications totally without merit, without having had proper legal advice. It is therefore submitted by the author that CROs are a welcome addition to the family procedural code. It is hoped that they will enhance judicial case management powers further at a time when the family courts face a difficult time ahead.

Kernott v Jones - Asking the Right Questions

Rawdon Crozier, barrister at King's Bench & Godolphin Chambers, considers the questions that he hopes the Supreme Court will address in the forthcoming judgment in the Kernott v Jones appeal.

Kernott v Jones [2010] EWCA Civ 578, concerned a "difficult" problem which Wall LJ (as he then was) summarised in the following way at para 6:

> " .... Where; (1) an unmarried couple has acquired residential accommodation in joint names, which by common agreement was held by them beneficially in equal shares as at the date of their separation, and; (2) one party (here the respondent) thereafter; (a) continues to live in the property; and; (b) assumes sole responsibility for its continuing acquisition and maintenance - i.e. not only supports herself and the parties' children but pays the mortgage and all the outgoings (including repairs and improvements) - can the court properly infer an agreement post separation that the parties' beneficial interests in the property alter or (to use the phrase coined by Lord Hoffman in argument in *Stack v Dowden* [2007] UKHL 17. [2007] 2 AC 432) become "ambulatory", thereby enabling the court - as here – to declare that, as at the date of the hearing before the court, the beneficial interests in the property are held other than equally?""

In Kernott v Jones, the parties, who never married, met in 1980 and began cohabiting in a caravan the following year, before buying a house, the subject of the dispute, in 1985. In the course of their relationship they produced two children before parting in 1993. The mother and children remained in the property, with the mother meeting the outgoings post-separation, while the father purchased himself another property in 1996, utilising his share of an endowment policy taken out in connection with the original purchase. In 2008, as a first step towards realising his interest in the original property, which had been purchased in joint names, he severed the joint tenancy. The question arose whether he was beneficially entitled to the beneficial half share, the conveyance into joint names suggested had been the parties' original intent. The judge at first instance inferred the existence of an agreement that the declaration of trust, implicit in the purchase in joint names, had been varied to as to leave the mother sole beneficial owner. Nicholas Strauss QC upheld that decision but the Court of Appeal by a majority (Wall and Rimmer LJJ, Jacob LJ dissenting) reversed it. Wall LJ answered the question he had posed in the following way:

> "57. The critical question is whether or not I can properly infer from the parties' conduct since separation a joint intention that, over time, the 50-50 split would be varied so that the property is currently held 90% by the respondent and 10% by the appellant. Presumably, if the beneficial interests are "ambulatory" and the ambulation continues in the same direction, the appellant's interest in the property will at some point be extinguished.
> "58. This is a point which I have considered anxiously, and at the end of the day I simply cannot infer such an intention from the parties' conduct...."

It should be noted that the judge at first instance, the Deputy High Court Judge and all three members of the Court of Appeal adopted the same approach, the difference in their respective conclusions being accounted for only by their differing views as to the legitimacy of inferring an agreement between the parties.

Getting to the right result in law is as often a matter of formulating the right question as answering that which, at first sight, appears to present itself. Without any knowledge of the circumstances underlying the particular case, beyond those stated in the judgments, of Nicholas Strauss QC and those of the Court of Appeal, it would be wrong to express any view about the way in which Wall LJ's question came to be formulated in the way it was but the Court of Appeal and commentators (see for example Family Law Week "Hang on a Minute! (Or is Kernott the new White?)" by Rebecca Bailey-Harris and John Wilson QC) have tended to assume that it will be the only question that will ever fall to be answered in such circumstances. It is respectfully suggested that that is not the case and, since the appeal from the Court of Appeal's decision in Kernott v Jones is due to be heard by the Supreme Court in May, it might be as well to spell out what one would hope to see addressed in the dicta, lest the myth that this is a one-question issue be inadvertently perpetuated.

Pausing only to observe that in many cohabitee cases, establishing the parties' respective interests will be a necessary precursor to the consideration of the effect of subsequent conduct upon those interests, it is, perhaps, helpful to start by analysing the question Wall LJ actually posed, which can be pared down to the following:

Can the court properly infer an agreement post separation that the parties' beneficial interests in the property altered, enabling the court to declare that the beneficial interests in the property are held other than equally?

So constructed, it should be apparent that that there is a missing step in the reasoning process; the question contains another question:

Is there anything in the circumstances of the case that could modify or restrict the claimant's strict legal rights?

which has been implicitly answered in the following way:

An agreement post-separation is the sole mechanism by which the court could declare that the beneficial interests in the property are held other than equally.

If the existence of the wider question had been recognised would it necessarily have been answered in the same way? The focus would certainly have had to have been widened beyond the cases primarily considered *Stack v Dowden*, *Oxley v Hiscock* [2004] EWCA Civ 546 and *Abbott v Abbott* [2007] UKPC 53 and encompassed a consideration of the various mechanisms which can operate to prevent a party from asserting strict legal or equitable rights - estoppels, trusts arising by implication of law, laches, restitutionary

remedies, potentially even adverse possession, for which there is Commonwealth authority, see *Wills v Wills* [2003] UKPC 84, [2004] 1 P. & C.R. 37; although it would be harder to establish under the Land Registration Act 2002 and would be in conflict with Patel v. Shah [2005] EWCA Civ 157, which provides another alternative mechanism by which strict entitlement might be adjusted (see below).

Before turning to *Patel v Shah*, one has to start with *Frawley v Neill* (1999) Times, April 5, 1999, a case which would have been decided in remaining cohabitee's favour according to the law as formulated by Wall and Rimmer LJJ. As in *Kernott v Jones* there was a property purchased in joint names by cohabitees. They too separated but, in contrast to the couple in Kernott v Jones there was an oral agreement made in early April 1975 in which the departing cohabitee agreed to sell her share of the beneficial joint tenancy in a property for £1,400 to the remaining cohabitee who assumed exclusive possession and paid all the mortgage instalments and other outgoings. No formalities were ever completed to put the agreement into effect, however. When the house was sold a dispute arose about the proceeds of sale and the cohabitee who had remained in occupation at first instance successfully sought specific performance of the oral agreement and a declaration that he was entitled to the bulk of the proceeds of sale (net of the agreed £1,400), a result upheld by the Court of Appeal on two grounds one narrow, one wider. The narrow ground was, applying *Williams v Greatrex* [1957] 1 WLR 31, that the cohabitee who had remained in occupation was already entitled to the bulk of the proceeds of sale as title had passed in equity by virtue of the oral agreement and the assumption of exclusive possession. The wider ground was that the claim to a half share by the cohabitee who had departed was unconscionable in all the circumstances; the agreement between the parties was, at most, one of the circumstances but was not an essential ingredient of the unconscionability.

In Patel v. Shah, the wider basis for the decision in Frawley v Neill was applied by the Court of Appeal in the absence of any agreement between the parties. The case concerned claims for beneficial interests in properties which had been purchased in the names of one or more of the respondents in the course of a joint venture that had required investors in the venture to contribute to any shortfalls in respect of mortgage payments and moneys received. During the property slump in the early Nineties, at which time the mortgaged properties were probably in negative equity, the respondents had continued to make payments towards the properties, while other investors had failed to make any payments towards the shortfalls. When the property market had turned around, the appellants sought to reassert their interests and the judge at first instance found that in all the circumstances, it was unconscionable for them to do so. While there was a good deal of argument concerning the principles of partnership law and the position of trustees as against beneficiaries, in upholding the first instance decision and giving the judgment of the Court, Mummery LJ said, referring to *Frawley v Neill* at paragraph 32:

> " Aldous LJ (with whose judgment Ward and Swinton Thomas LJJ agreed) stated, having discussed instances of the doctrines of laches, acquiescence and estoppel, the following principle:
>
> " In my view, the more modern approach should not require an inquiry as to whether the circumstances can be fitted within the confines of a preconceived formula derived from earlier cases. The inquiry should require a broad approach, directed to ascertaining whether it would in all the circumstances be unconscionable for a party to be permitted to assert his beneficial right. No doubt the circumstances which gave rise to a particular result in decided cases are relevant to the question whether or not it would be conscionable or unconscionable for the relief to be asserted, but each case has to be decided on its facts applying the broad approach."

Before concluding at paragraphs 39 and 40:

> "39 ...Everything was left for the defendants to deal with, including financing shortfalls from their own pockets. The claimants and their predecessors had departed from the commercial arrangements. They had ceased to bear any of the risk or the expense. Such conduct on their part falls within the principle stated in Frawley v Neill, as well as the principle applicable to partnerships enunciated by Lord Lindley.
> 40. The defendants were released from their equitable obligations to the claimants in the circumstances of this case, both as to capital and to income, and in respect of unmortgaged as well as mortgaged properties."

It may well be that, on the facts of Kernott v Jones, consideration of the question "Is there anything in the circumstances of the case that modifies or restricts the strict legal rights as they have been found to be?" would have lead to no different result. It should be noted that of the factual matrix with which the court was working Wall LJ said the following at paragraph 62:

> " If this appellant and this respondent had truly intended that the appellant's beneficial interest in the property should reduce post separation, or if the property was to belong to the respondent when the appellant acquired his own house, they should have so decided and acted accordingly by adjusting their beneficial interests in the property. I cannot spell such an intention out of their actions. *If anything I find equal interests on separation and an agreement by the appellant to defer realisation for a number of years* prior to the severance of the joint tenancy, an action which, in my judgment, crystallises his 50% interest." (my emphasis)

An agreement that the appellant could defer realisation for a number of years might well be sufficient to negative any unconscionability but, even so, might that be overridden by a sufficient passage of time? Would the intervention of a period of negative equity (a facet of Patel v Shah, although not a determinative one) alter the position?

In the majority of cases in which cohabitees have purchased property and parted, leaving one to bear all the future costs, without ever having turned their minds to the legal consequences of that arrangement, the questions the court should seek to answer ought, however, to be wider than the narrow formulation used in Kernott v Jones. It is to be hoped that when it comes to consider the appeal, the Supreme Court looks beyond the confines of that particular case and gives practitioners some general guidance on the broader principles to be applied.

Mesher Orders: you don't always have to say 'yes'

Byron James, Barrister, of 14 Gray's Inn Square considers the utility of Mesher Orders and asks whether they are always as suitable to the parties' needs as might be suggested by the case law.

The reflex response is a proven outcome of behaviour conditioning: "Yesterday I rang a bell as I gave the dog some food; today I rang a bell and the dog salivated, expecting food". The general idea being that one may introduce a stimulus, which ordinarily would not have any typical behavioural response, but, after conditioning, the stimulus then produces an innate reflexive response. Hence the fame and significance of Pavlov's dog. Despite bell ringing being the most well known trigger, it was not the first used. The phenomenon was discovered when Pavlov noticed that the dog would salivate expecting food, not necessarily in the presence of food, but in the presence of the lab technician whose task it was to bring the food. This associative response became repeated with various different stimuli, including bell ringing, to demonstrate that a reflexive response could be conditioned to be triggered, irrespective of the relation of the stimuli to the actual desired outcome.

Conditioned responses represent the mainstay of many a family lawyer's career; the knowledge of, and application thereto, of the accepted norms of the family law world day-in-day out: as one stands in some far flung FPC explaining to a father who has not seen his 4 year old child for three months, solely because of the mother's intransigence, that a contact centre is needed so as to 'rebuild' his relationship with the child, repeating over and over, "that is just how things are done".

The small to medium capital ancillary relief cases are also fertile ground for family law related Pavlovian responses. A common scenario: after a marriage of, say, seven years, there is a house, a wife who does not work at all/only works part time, she has little to no mortgage capacity, there is a child/children, a husband who does work and earns well (say, £40-80k net), there is little other capital of relevance and a smallish mortgage on the property. This scenario, to many a family lawyer, is to ring a bell to Pavlov's dog: whilst the dog salivates expecting food, the family lawyer's conditioned reflexive response is to presume the appropriateness of a Mesher Order.

Pavlov tested whether, once a dog's behaviour has been conditioned, it would stop salivating if the bell kept sounding without food ever being brought. The result was that the dog would salivate less until not at all, and, whilst it is unclear whether the dog returned completely to an unconditioned state, it became clear that the efficacy of the bell became much less where there was little reward. The malleability of the dog then can be contrasted against the rigidity of the family lawyer, the reflexive response seemingly consistent irrespective of the reward: like a child pulling faces in the wind, once adopted, such thinking remains.

The rationale for Mesher Orders comes from the application of the sharing principle, and the desirability of equality, in the context of need: a need for a home for the children. There is limited capital; more specifically, to sell the home would either realise insufficient capital to find somewhere else suitable or would incur the costs of sale just to find somewhere about the same. In certain cases, the deferment of sharing to a time when the need to house children no longer exists is one of the cleverest arguments in family law. It symbiosises sharing and need; it prioritises the children. The cleverness of the principle has seduced many into idolising it as a panacea.

The authorities for endorsing their use are well known. *Elliot v Elliot* [2001] 1 FCR 477 followed the approval of Mesher Orders in *White v White* [2000] UKHL 54, [2001] 1 AC 596 with approval of its own. Here, Thorpe LJ allowed a second appeal involving a Mesher Order, reinstating the original order drafted by the district judge, referring to (para 7):

> "the husband's reasonable entitlement to deploy capital to house himself at the end of a long marriage during which he has worked hard, mainly in the police service, and has contributed his earnings to the building of family capital."

There were three crucial factors in this case: the marriage was 20 years long, the children were 16 and 18 and whilst at the time of the hearing 'the husband's current income [was] not materially greater than the wife's, his earning capacity is potentially far stronger' (para 8). The general rationale for the Mesher Order was that (para 7):

> "The husband has a reasonable and discernible need for his share of the family capital at the earliest time that the needs of the children permit. As soon as the wife's responsibilities as the home-maker for the children reach a point of natural termination, at that point clearly the husband is entitled to his capital share."

The share was determined at 45%, only a slight shift from an equal division. The term of the Mesher Order was only to be for a maximum of 5 years, but possibly just two; the length of the marriage purportedly entitling the husband to a share approaching equality; the minority of the children justified his being denied that share for a short period of time. The discrepancy in earning power was not considered a relevant factor in the capital award. The circuit judge (in the first appeal) had removed the district judge's trigger clause in the Mesher and, instead, simply allowed the wife to remain in the property until remarriage, death, cohabitation or voluntary removal. In doing so he stated:

'To put the wife in a house which she will have to sell or remortgage cannot be right. I see a strong argument for

deleting that clause. The house is not capital but is somewhere for the wife to live.'

To compensate this balancing toward the wife, the circuit judge retained the lack of Mesher but deleted the nominal maintenance order and allowed for a clean break. Thorpe LJ described this as too 'partisan a perspective':

> "If the judge thought that the deletion was justified by the compensatory deletion of the nominal periodical payments order, I think he was plainly wrong. There are instances in which the interrelationship of capital and income orders justifies the increase of a wife's capital share as compensation for the loss of an income claim. I do not think that this was appropriately one."

It is interesting to note the factors that were not considered: the use each party would make of the capital; the reasonably foreseeable effect that the order would have on both parties; the actual likelihood of the wife being able to come and increase her nominal maintenance claim in future. The last being all the more pertinent following Thorpe LJ's criticism of the amount of litigation that had preceded the appeal (para 12) where his judgment actually invites further litigation whereby the wife's periodical payments 'would become real and not nominal'.

The lack of consideration of such factors is even more surprising given Thorpe LJ's decision in Dorney-Kingdom v Dorney Kingdom [2000] 2 FLR 855. Here, divorce following a 17 year marriage, with children aged 14, 12 and 9 resulted in a district judge awarding the wife an outright transfer of the FMH. The husband had re-housed himself in a home with a not insignificant net equity and therefore had no particular need for the money, save for his argument that his debts provided him with a capital need. In transferring the FMH to the wife the district judge did so (para14):

> "....on the basis that the husband is in the stronger position now and will continue to be so in the future with his successful business, with a home which he has already acquired, with all his pension provision and insurance policies, and even taking into account his liabilities, comparing all that with [the wife's] present and future circumstances, I am satisfied that Wyndham Lodge ought indeed to be transferred outright now to [the wife] …"

The circuit judge adopted this view too (ibid):

> "I cannot really criticise the district judge at all for dealing with the house … as he has done. It goes without saying, partly in doing, that he has protected the position of the children, but that is not the whole answer, because as [the husband] says, a deferment of a charge would not affect the children. But it really seems to me that taking a robust view, as I am sure the district judge did, and looking at the actual potentials that I have touched on at some length, and looking at the capital that is owned, [the district judge] has done the right thing."

Thorpe LJ did not agree with either. It was felt 'necessary' to find a 'clear explanation as to why the husband was stripped of his acquired capital beyond the point that enabled his wife as the primary carer to discharge her responsibility for the children until they achieved independence'. Thorpe LJ stated that he bore in mind (at 16):

> "[the] Mesher order has been criticised in a number of decisions in this court for producing a harsh situation in which the primary carer, having discharged her responsibility to the children, is then left in a position when she is unable to rehouse herself as an independent person, probably at a relatively vulnerable stage of life."

Despite noting this criticism, Thorpe LJ found two rationalisations for both the Mesher Order itself and the calculation of the percentage: the wife's housing needs at the time of sale and compensation to the wife for having to draw on her own resources to maintain the relatively costly property for her and the children's benefit for a decade or so.

Taking these in turn, the exercise of determining the wife's housing need in over ten years time is recorded in just over five lines, not a detailed examination. Instead, it was simply stated the given percentage would equal a figure of £166,000 'in today's money', this being considered sufficient for re-housing at 'some stage in the future'. No regard was had to what is 'reasonably foreseeable', as per the section 25 exercise, it being very difficult to argue that either a property will sell for any particular amount in 10 years' time or that that amount would be capable of purchasing something suitable.

As regards the compensation for drawing 'on her resources', Thorpe LJ found that (at 21):

> "On those figures it will be seen that the disparity of income between the two is no more than the conventional disparity, by which I mean the wife's independent income represents about a third of the joint incomes."

The reality of giving a wife 25% more of an indefinable amount of capital at some stage in the future is odd compensation indeed for requiring her to operate and fund an expensive home on a third of the parties' joint income. The rationale for that is not especially principled. These arguments have, unsurprisingly, been adopted as if they were principled and sensible approaches to take the determination of capital division.

Munby J took a different approach in *B v B (Mesher Order)* [2003] 2 FLR 285, which held that the Wife, who had a young child, should not be subject to a Mesher Order. The facts of the case were not typical. The marriage was very short (1 year) and the child was very young (1 year). The rationale of the decision was that a young mother, whose earning capacity would be consequently adversely affected and whose post-marriage contribution to the marriage of raising such a young child should not be underplayed, would only be unfairly discriminated against if she would be required to relinquish capital at some stage in the future. The problems of the unknown were identified too, with the only eventuality the Court could reasonably foresee being that the husband's ability to recreate the capital lost under the order was real, contrasted against a wife who had no such ability, and, further beyond that, such capital might actually be recreated in relatively short space of time.

It is surprising that the principles from B v B are not more vogue. A young mother's earning capacity is always subject to a wide judicial spectrum of opinion: sometimes expected to work part time until the child is at school when she will work full time; other times expected not to work at all, perhaps until some part time potential employment can be realised. There is no exact application of principle here, rather, just differing personal judicial opinion on whether and when mothers should work; although, clearly, another element of uncertainty. The post-marriage contribution to the marriage of raising the child is something rarely applied in capital terms, being seen typically as more income order related. However, the reality and efficacy of such is really quite potent: it is difficult to think of a contribution more relevant that something directly engaged with the court's first consideration. Finally, crucially and worryingly, the argument that seldom ever works, but frankly, really should, is the uncertainty point. Since when was there ever such mass signing up to the unforeseeable (reasonably or otherwise)? Where is there statutory endorsement of placing (usually one of) the parties in such a vulnerable position? The certainty which Thorpe LJ places upon knowing how much the wife will be getting in over ten years time based only upon what it is equivalent to in today's terms is difficult to rationalise. The relevance in ten years time of what the capital is worth today is quite limited: the important thing being the value that the capital has, i.e. it will only be as good as it can be usefully used for something else.

Two of the main authorities supporting the use of Mesher Orders are therefore either bereft of both clear principle and consideration of the impact upon the parties of such an order (Elliot) or, when reasoning is given, seem lacking in terms of coherent principle and dangerously unconcerned about the uncertain future signed up to (Dorney-Kingdom). This is no better demonstrated than by the 'calculations' used to derive an appropriate percentage. The principles suggested by Thorpe LJ in both cases are often vaguely gone through as if going-through-the-motions, whilst even at the highest point of their rationality it is still impossible to sensible deduce a logical process by which one can find a principled outcome. It is instead simply broad brush: does one start at 50/50, or 60/40 or 66/33?

The criticism of this argument would probably involve the reminder that ancillary relief is rarely about exact formulas, it is about the broad brush application of general principles to specific facts. Whilst that flexibility is on the whole useful, it does little to justify the willingness of so many to sign up clients to an uncertain future in this specific instance, where figures seem to be plucked out of thin air. Either one has a principled reason for providing for a Mesher Order, centred on the need to allow for both to share in the capital, whereby one can reasonably foresee that the capital afforded will meet the needs of one or both parties, bearing in mind the respectively different financial positions that each are (again) reasonably foreseeable to occupy or, surely, one does not have a Mesher Order at all.

There can be few other areas where such risks are taken in such a casual and habitual fashion. Unless one is dealing with a short period of time or a significant sum of money (which might lead one to question the appropriateness of a Mesher Order anyway) it is difficult to envisage it being possible to sensibly rationalise any particular percentage outcome for a client; if one cannot rationalise a percentage, then perhaps no Mesher Order at all would be more appropriate. Remember, you don't always have to say 'yes'.

Fair Outcomes as Common Intentions? The Debate in Kernott v Jones

In advance of the Supreme Court's consideration of *Kernott v Jones*, Dr Robert H. George, Senior Law Tutor, Jesus College, University of Oxford considers the role of fairness in the resolution of Cohabitation Claims disputes. 1

The Supreme Court is shortly to hear the appeal from *Kernott v Jones* [2010] EWCA Civ 578, a case about former cohabitants' property. The key question raised by that case is about when it is appropriate to depart from the presumption of a beneficial joint tenancy, and how the beneficial shares should be quantified when that presumption is rebutted. The crux of the debate is about the role of 'fairness' in answering those questions.

The House of Lords has clearly stated that the judge's job in these cases is not to find 'the result which the court itself considers fair', but is rather to find 'the result which reflects what the parties must, in the light of their conduct, be taken to have intended': *Stack v Dowden* [2007] UKHL 17, para [61]. However, this article suggests that 'fairness' might still have a role in such cases. Cohabitants' financial and other arrangements usually vary over time, and they often view their relationship and their property in terms of contributions (broadly conceived) and sharing. Given these facts, it is reasonable for cohabitants to think about owning property in 'fair shares'. In other words, they have a common intention that the outcome will be fair, and the court can and should give effect to that common intention.

The facts

The facts of *Kernott v Jones* can be stated shortly. Mr Kernott and Ms Jones bought a house together in joint names in 1985. The outgoings on that property (including the mortgage and other bills) were met by Ms Jones, with Mr Kernott contributing to the house by paying money to Ms Jones and doing substantial building work. They had two children before the relationship ended in 1993, whereupon Mr Kernott moved out. Ms Jones continued to pay the mortgage and bills, as she had before, but Mr Kernott no longer provided financial assistance. Indeed, he had almost nothing to do with the property, and focused instead on purchasing a new house with a new partner. This arrangement continued for more than 14 years until, in 2008, Mr Kernott issued a notice of severance. In response, Ms Jones initiated proceedings under TOLATA and, at trial, obtained a declaration that she owned 90% of the house. That decision was upheld by Deputy High Court Judge Nicholas Strauss QC (*Jones v Kernott* [2009] EWHC 1713 (Ch), but a majority of the Court of Appeal (Wall and Rimer LJJ, Jacob LJ dissenting) reversed the decision, holding the property to be owned in equal shares.

Kernott v Jones raises important questions. However, despite some discussion in both the High Court and the Court of Appeal about the role of imputed intentions, it is suggested that this argument may be something of a red herring, masking a more interesting debate about the nature of 'common intentions' in constructive trust cases.

Express and Inferred Intentions

As a starting point, it is worth recalling the conventional understanding of the court's role in common intention constructive trust cases. The starting point is that 'equity follows the law', such that joint legal ownership gives an equitable joint tenancy, and sole legal ownership gives that owner the entire beneficial interest: *Stack v Dowden*, paras [33], [54] and [109].

Kernott was a joint ownership case, and Stack is clear that departing from the presumption of beneficial joint tenancy is 'not a task to be lightly embarked upon': Stack, para [68]. However, where the presumption is rebutted, that is done by 'ascertain[ing] the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it': Stack, para [60]. Baroness Hale's reference here to 'actual, inferred or imputed' intentions was part of the main disagreement between the High Court and the majority of the Court of Appeal.

As to express or inferred intentions, there was broad agreement about the court's role. Rimer LJ explained his position at para [76]:

> 'The key feature of Stack is ... the task that the majority sets for trial judges, namely that of searching for the parties' shared intentions – "actual, inferred or imputed" – with respect the property. Since an inferred intention must also be an actual intention, I presume that Baroness Hale used the word "actual" as a synonym for "express", referring thereby to an intention that the parties had expressly uttered, either orally or in writing. Contested cases in which there is an issue as to whether there has been any such expression of intention are, I suspect, probably relatively rare. The likelihood is that in most contested joint purchase cases the parties will have remained silent as to whether they intended their beneficial shares to be other than joint. In such a case one exercise clearly set by Stack is to investigate whether there is any basis for inferring an intention that their shares were to be of particular proportions (an intention which, from the parties' standpoint, might perhaps more conventionally be regarded as an implied one). In most cases such a quest may well be elusive, because of the parties actually had any such intention, they would have voiced it; and if they did not voice it, that will probably be because they did not have one, with the consequence that there will be no basis for inferring otherwise.'

It is worth noting the limited interpretation of when intentions can be implied. His Lordship's argument seems

to be this: the search is for express or implied intentions; however, if the parties had intentions they would have made them express, and their failure to express any intentions indicates that it is unlikely that there will be evidence from which the court can infer them.

The narrowness of this view may be thought slightly surprising, but Wall LJ makes a similar remark in para [62]:

> 'If this appellant and this respondent had truly intended that the appellant's beneficial interest in the property should reduce post separation, or if the property was to belong to the respondent when the appellant acquired his own house, they should have so decided and acted accordingly by adjusting their beneficial interests in the property. I cannot spell such an intention out of their actions.'

Respectfully, the whole point of implied intentions is that they are not express, and are inevitably to be spelt out of the parties' actions or indirect conversations. Baroness Hale gave a non-exhaustive list of relevant factors which would be used to infer intentions in her judgment in Stack v Dowden (para [69]), few of which involved any verbal discussion at all. The parties' failure to voice their intentions does not mean that there is no basis for inferring those intentions from their actions.

Imputed Common Intentions

It is conventionally thought that 'imputing' an intention means that the court makes up an intention which the parties never actually had. In Pettitt v Pettitt [1970] 1 AC 777 at 804-5, Lord Reid explained imputation as being impermissible in this way:

In reaching a decision the court does not find and, indeed, cannot find that there was some thought in the mind of a person which never was there at all. The court must find out exactly what was done or what said and must then reach conclusion as to what was the legal result. The court does not devise or invent a legal result. Nor is the court influenced by the circumstances that those concerned may never have had occasion to ponder or to decide as to the effect in law of whatever were their deliberate actions. ... Nor is there power to decide what the court thinks that the parties would have agreed had they discussed the possible breakdown down or ending of their relationship. Nor is there power to decide on some general principle of what seems fair and reasonable how property rights are to be re-allocated.

However, the position after Stack is perhaps less clear. 2 In the High Court in *Jones v Kernott*, Deputy Judge Nicholas Strauss QC explained his understanding of the role of imputed intentions in paras [30] and [31] of his judgment:

> 'In my view, what the majority in *Stack* held was only that the court should not override the intentions of the parties, insofar as that appears from what they have said or from their conduct, in favour of what the court itself considers to be fair. They key words used by Baroness Hale are that the court must not "*impose* its own view of what is fair".
>
> To the extent that the intentions of the parties cannot be inferred, the court is free ... to impute a common intention to the parties. Imputing an intention involves ... attributing to the parties an intention which they did not have, or at least did [not] express to each other. The intention is one which the parties "must be taken" to have had. It is difficult to see how this process can work without the court supplying, to the extent that the intention of the parties cannot be deduced from their words or conduct, what the court considers to be fair. In particular, in the present case, if there is evidence of conduct from which it is right to conclude that the parties intended their respective shares to alter following Mr Kernott's departure, but none to indicate how, the only available criterion by which to assess the extent of the alteration is what is objectively fair, and the only available judge of that is the court.' [The Deputy Judge's emphasis.]

Rimer and Wall LJJ disagreed with this approach. Rimer LJ confessed that he did not understand what Baroness Hale meant by the word 'impute' in this context (para [77]):

> 'It is possible that she was using it as a synonym for *inferred* ..., in which case it adds nothing. If not, it is possible that she was suggesting that the facts in any case might enable the court to ascribe to the parties an intention that they neither expressed nor inferentially had: in other words, that the court can invent an intention for them. That, however, appears unlikely, since it is inconsistent with Baroness Hale's repeated reference to the fact that the goal is to find the parties' intentions, which must mean their real intentions. Further, the court could and would presumably only consider so imputing an intention to them if it had drawn a blank in its search for an express or an inferred intention but wanted to impose upon the parties its own assessment of what would be a fair resolution of their differences. But Baroness Hale's rejection of that as an option at paragraph [61] must logically exclude that explanation.' [Rimer LJ's emphasis.]

Any form of imputing was therefore impermissible. Rimer LJ thought that there was no evidence to indicate that the parties had an actual intention to have unequal shares, let alone an intention as to what those shares would be (para [83]) – and evidence of both of those things would be required to rebut the presumption of equity following the law. Avoiding an outcome of equal shares would therefore require imputing an intention to the parties, and the majority judges were clear that that was not allowed.

Fair Outcomes as Common Intentions

This discussion of the meaning and appropriateness of imputing intentions was, perhaps unsurprisingly, the focus of the judgments in Kernott, and it would be helpful for the Supreme Court to resolve these questions. 3 However, it is suggested that this focus may have caused a second strand of the High Court's judgment to be overlooked.

After the discussion of imputation quoted above, Nicholas Strauss QC suggested five reasons why fairness was important in cases like Kernott. Although these reasons were expressed as supporting the Deputy Judge's views on imputing intentions, that may be a misconception – and they in fact reveal something potentially more interesting. The Deputy Judge's second, third and fourth reasons are worth considering in full (paras [33] to [35]):

> 'Second, in many cases ... the parties have not indicated in any way what their respective shares are to be, or how they are to be altered to take account of changing circumstances. In such cases, their actual or subconscious intention may well be that their respective shares, if they cannot reach agreement when circumstances change, should be whatever the court decides is fair in the new circumstances. If one were to ... ask ... "... what is to happen if you split up and one of you remains in [the house], and takes over complete responsibility for it, and the other leaves", many if not most couples would be unable to give a clear answer, because of the wide variety of considerations which might then arise. They might well say that they would try to reach agreement, but if this proved impossible they would leave it to the court to decide what was fair: that is what courts are for.
>
> Third, to say that consideration of what is fair is impermissible suggests that fairness cannot be any part of what the parties intend or are to be taken to have intended. But the court can hardly assume that two parties, who have not fully clarified their intentions as to their respective beneficial interests, either initially or on the breakdown of the relationship, do not intend considerations of fairness to be relevant in determining their eventual interests.
>
> Fourth, if considerations of fairness are to be wholly set aside in such cases, there will be practical difficulty in searching for a result which the parties must in the light of their conduct be taken to have intended ... when there is no evidence as to what they did intend as regards their respective shares. It is difficult to see what intention could then be imputed to the parties other than that each should have his or her fair share in the light of all the circumstances. If that were to be disregarded, there would be no way in many cases of resolving the issue.' [The Deputy Judge's emphasis.]

In other words, the Deputy Judge is saying that fairness may be relevant because that is what the evidence shows that the parties intended. The court's job in such a case will be to make that assessment of what is fair, based on the whole course of dealing between the two parties.

This approach, despite some indication by the Deputy Judge (and Jacob LJ) to the contrary, does not necessarily involve imputing any intention to the parties: their intentions (usually inferred, but perhaps they could be express) are that the outcome be fair in all the circumstances, and the court is merely adjudicating what is fair. 4 If this is an actual intention that the outcome be fair, then the parties' intentions have not been doctored in any way. The judge is not at liberty to 'override' the parties' intentions with a 'fair' outcome – but if the parties' intentions are that there be a fair outcome (and not anything more specific), is that something which the courts can legitimately use?

Empirical Research

In order to help answer this question, it may be useful to look at some of the research evidence about cohabitants' behaviour in relation to their property. It is clear that cohabitants are a varied and changing group of people. 5 Anne Barlow and colleagues point out that there is widespread misunderstanding about the law regarding cohabitants, with most believing that the law offers them considerably more protection than it does. 6 Couples in intimate relationships do not behave in a 'legally rational' way – even those who knew that they needed to take action to protect their position did not do so. 7

This situation is partly caused by the fact that few cohabitants seek legal advice about their situation, either before starting to cohabit or when they break up. 8 Gillian Douglas and colleagues conducted research with cohabitants who had sought legal advice, and still found that agreements about property ownership were rare, and where they existed tended to be informal. 9 Contrary to the weight given to them by the courts, 10 such agreements were often unhelpful:

> 'far from providing the definitive evidence envisaged, the existence of some form of agreement – albeit informal or unsigned – had as much potential to exacerbate as to clarify issues. For most couples, however, the idea of making an agreement seems never to have occurred to them.' 11

At the same time, this study demonstrates again that couples' financial arrangements are complicated and difficult to use as a basis for conclusions about their intentions. 12 While two thirds of the couples in Douglas et al's sample had separate bank accounts, the authors stress that:

> 'the day to day management of finances showed an entirely different picture, with little correspondence to the formal mode of ownership. Our sample was divided more or less equally between those couples who managed their finances together, and those where one partner had taken on that responsibility.
> ...
>
> We could find no patterns of financial organisation to do justice to the myriad of facets which contribute to a full and meaningful picture of how finances are organised. Furthermore, the ways in which finances are organised are prone ... to change over time. Organisation of finances in partnerships appeared to be based far more on pragmatic and circumstantial factors of an individual and idiosyncratic nature, than on the "type" of relationship, formal modes of ownership or any notion of commitment.' 13

Cohabitants' financial arrangements are rarely static over time. As the authors say, their sample included 'many couples where financial organisation had clearly been of a dynamic nature, changing several times to accommodate new situations'. 14

In a different study, Rosalind Tennant and colleagues discussed cohabitants' ideas of 'fairness', which they point out to be a complex issue which can be addressed from many angles. They discuss several possible lenses through which the 'fairness' of outcomes could be assessed:

1. legal ownership
2. equality of contribution, impact, or outcome
3. needs after cohabitation
4. change in position compared to the start of cohabitation
5. outcomes under cohabitation law
6. outcomes under divorce law. 15

Participants made telling remarks about wanting outcomes which 'recognised the significance of their contribution' and which 'did not disadvantage either party significantly more than the other, suggesting a notion of equality of impact'. 16

Conclusions
Empirical studies tell us a number of important things about cohabitants. The key things, though, are these:

• cohabitants do not understand the law and do not protect themselves even when they do;
• like anyone else, cohabitants' financial affairs are complicated and dynamic;
• cohabitants see themselves as being in committed relationships which are often characterised by ideas of 'fairness' – but fairness is a complex idea, and since each party may have a different idea of what would be fair, court adjudication may be inevitable in the absence of agreement.

Given these facts, it seems entirely unsurprising that cohabitants who are buying property together (or who start to live together in a house being bought by one of them already) do not have clear, express discussions about property division. They think (hope) that it will never matter, and in any case are justified in thinking that circumstances are likely to change during the course of the relationship. In other words, Nicholas Strauss QC was quite right to suggest as a general point that '[cohabitants'] actual or subconscious intention may well be that their respective shares, if they cannot reach agreement when circumstances change, should be whatever the court decides is fair in the new circumstances' (para [33]).

Here, the Deputy Judge makes the point in general. Turning to the specifics, though, the question in each case is: did these cohabitants actually intended a fair outcome? In order for this approach to avoid imputing intentions to the parties, there needs to be evidence from which express or inferred intentions of fair outcomes can be discerned. This is a question for the trial judge.

However, if the evidence shows that these cohabitants' actual intentions (whether express or, more likely, inferred) were that the property should be held in fair shares, those intentions should be given effect by the court. There is no reason in principle not to allow this approach (though it might not sit comfortably with the general aim of avoiding litigation in these cases, 17 which may become increasingly significant as legal aid becomes scarcer). Nothing is imputed under this approach. The court's evident desire to reach a fair outcome in disputes about former cohabitants' property rights can be met by recognising that many cohabitants actually intended that the outcome be fair.

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1 Thanks to Michael Ashdown, Professor Gillian Douglas and the participants at the Socio-Legal Studies Association conference at Sussex University for helpful comments on an earlier draft this paper. The views expressed and any errors are mine alone.

2 S Gardner and K Davidson, 'The Future of Stack v Dowden' [2011] Law Quarterly Review 13

3 Ibid.

4 A purported express trust in shares which were fair would likely be void for uncertainty, but a constructive trust in fair shares ought still to be possible. The factors which Stack v Dowden points to in para [69] (in particular, things like 'the purpose for which the home was acquired' and 'the nature of the parties' relationship') are no more or less certain than 'fairness', prior to court adjudication.

5 A Barlow, S Duncan, G James and A Park, Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century (Hart, 2005), p 65. See also M Maclean and J Eekelaar, 'The Obligations and Expectations of Couples Within Families' (2004) 26 Journal of Social Welfare and Family Law 117.

6 Ibid, pp 28-39.

7 Ibid, pp 95-98. See also Gardner and Davidson, n 2, pp 15-16: 'The context under discussion is one in which people will not normally formulate agreements, but (this is crucial) the very reason for this – the parties' familial trust in one another – also warrants the law's intervention nonetheless.'

8 G Douglas, J Pearce and H Woodward, 'A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown' (2007), online at www.law.cf.ac.uk/research/researchpapers/paper1.html.

9 Ibid, paras [5.5]-[5.7].

10 Goodman v Gallant [1986] Fam 106 (CA); *Stack v Dowden* [2007] UKHL 17, [2007] 1 FLR 1858, [49].

11 G Douglas, J Pearce and H Woodward, n 8, para [5.8].

12 This point was made by several people when considering the 'exceptional' nature of the financial arrangements in Stack: see eg R George 'Stack v Dowden: Do as We Say, Not as We Do?' [2008] Journal of Social Welfare and Family Law 49, pp 54-55.

13 G Douglas, J Pearce and H Woodward, n 8, paras [4.33] and [4.37].

14 Ibid, para [4.29].

15 R Tennant, J Taylor and J Lewis, 'Separating from Cohabitation: Making Arrangements for Finances and Parenting' (DCA Research Series 7/06, 2006), pp 85-86.

16 Ibid, pp 91 and 93.

17 Goodman v Gallant [1986] Fam 106 (CA); Stack v Dowden [2007] UKHL 17, [2007] 1 FLR 1858.

CASES

Eliassen and Baldock v Eliassen and others [2011] EWCA Civ 361

The Court of Appeal considered the recent decision of the European Court of Human Rights in Neulinger and Shuruk v. Switzerland (Application 41615/07) which had "caused a considerable stir amongst practitioners in the field of international family law". Reunite and the AIRE Centre intervened and were represented in the appeal. The primary issue was whether a defence under Article 13(b) of the Hague Convention requires the court to conduct a full welfare enquiry.

Thorpe LJ reviewed the Strasbourg jurisprudence and in particular Maumousseau, Raban, and Van den Berg. In the judgment of the court, it was important that the four decisions should be considered together, and that when so doing there is "little support" for the contention that the decision in Neulinger requires the court to adopt a different approach in the application of the Convention defences, and of Article 13(b) in particular. It was clear that Neulinger did not introduce any revision of the principles in Maumousseau. A radical departure from those principles risked jeopardising the aims and objectives of the Convention.

Accordingly, the appeals were dismissed.
(The Supreme Court has now granted the mother's application for permission to appeal to the Supreme Court, but has refused the application of the half sister for permission to appeal. The appeal is due to be heard during the week commencing 23 May 2011.)

Summary by Stephen Jarmain, barrister, 1 Garden Court Family Law Chambers

ND v KP (Asset freezing) [2011] EWHC 457 (Fam)

On 21st December 2010, pursuant to the inherent jurisdiction of the High Court, the wife sought an ex parte freezing order in respect of the husband's bank accounts in Switzerland. The matter came before Roderic Wood J, sitting as the urgent applications judge. He granted the application and made further freezing orders in respect of property. The order was to last until 9th February 2011 or further order. On 29th December 2010, the wife also obtained a mirror order from the court in Geneva blocking the accounts.

On 10th February 2011, the matter came before Mostyn J. The husband sought, inter alia, to discharge the orders obtained and for an order in personam to discharge the Swiss order.

In his judgment, Mostyn J analysed the relevant case law and sets out the three principles in relation to freezing orders. Firstly, in order for a freeing order to be made, there must be a good case put before the court, supported by objective facts, that there is a likelihood of the movement, dissipation, spiriting away, salting away, squirreling away, making of a disposition or transfer of assets, with the intention of defeating a claim. This is the same whether the application is pursuant to the MCA 1973 or the inherent jurisdiction.

Secondly, insofar as an ex parte application is concerned, reference was made to paragraph 25.3.5 of the White Book. This paragraph sets out that as a matter of principle, no order should be made in civil proceedings without notice to the other side unless there is a very good reason for departing from the general rule that notice must be given. To grant an interim remedy in the form of an injunction without notice "is to grant an exceptional remedy"; see Moat Housing Group-South Limited v Harris [2006] QB 606.

After referring to FZ v SZ and others [2011] 1 FLR 64, Mostyn J sets out that an application for ex parte relief should only be made where there is positive evidence that the giving of notice would lead to irretrievable prejudice being caused to the applicant.

Thirdly, if an applicant seeks to move the court ex parte, then there is a high duty of candour. The jurisprudence of the candour required is analysed and summarised in Arena Corporation v Schroeder [2003] EWHC 1089 (Ch) and is set out by Mostyn J at paragraph 13 of his judgment.

Following examination of the evidence, Mostyn J discharged the order made by Roderic Wood J, concluding that on the material put before the court, there was nothing that brought the case anywhere near the threshold needed to obtain freezing relief. He found that the real motive behind the wife's application was to obtain a freeze over the husband's assets because it would be desirable to keep them preserved until trial. The judge was satisfied that the wife did not comply with her duty of candour to explain everything that should have been explained to the court at the ex parte hearing.

Furthermore, Mostyn J was satisfied that the obtainment and continued existence of the Swiss mirror order was oppressive and vexatious and as such ordered the wife to have it discharged.

Summary by Matthew Stott, Barrister, Field Court Chambers

Hemans V RB Windsor & Maidenhead [2011] EWCA Civ 374

The local authority appealed against an order made on appeal in Oxford County Court in respect of a decision made by the local authority under the homelessness provisions of the Housing Act 2006. Mr. and Mrs. Hemans' (and their daughter "K" aged 5) homelessness had a background involving child protection concerns.

Mr. Hemans was a soldier and after returning from Afghanistan had a form of mental breakdown. After his discharge from the Army, Mr. Hemans' MOD accommodation came to an end and the parties remained in the same area. After a child protection conference, held in the Royal Borough of Windsor & Maidenhead, "K", was made the subject of a child protection plan following concerns about serious issues of abuse. Mrs. Hemans and her daughter were provided with accommodation in the interim following an assessment that they were at risk. Mrs.

Hemans and K were moved to a woman's refuge in Banbury and then accommodated by Oxfordshire County Council.

It was Mrs. Hemans' case that the actions taken by social services to move her and K into temporary accommodation had not been done at her request and therefore she should be able to return to Windsor & Maidenhead because that was where her local connections were. She was aware that her husband had suffered a breakdown because of his time in the army and that he required treatment but in the interim she had to remove herself and K from Mr. Hemans' presence while he still posed a threat to them by way of domestic violence. Mrs. Hemans always wished to reconcile with her husband.

The Social Services plan to reunite the family would be completed after Mr. Hemans completed his counselling courses and had been satisfactorily assessed. Mr. and Mrs. Hemans therefore sought accommodation in Windsor and Maidenhead but had their homelessness application rejected because of the availability of the accommodation in Banbury.

The local authority did not, inter alia, find it relevant as to why Mrs. Hemans and K had left the area. The circuit judge made a declaration of homelessness and the local authority appealed.

The Court of Appeal allowed the local authority's appeal in part and noted that the judge should not have made a declaration of homelessness but should have made an order quashing the review decision of the local authority.

However, before the Court of Appeal hearing, the family were housed in a property in the Windsor area pending the appeal and the declaration of homelessness that had been made. The Court of Appeal noted that (notwithstanding the local authority's partial success on appeal) K had had a very disrupted time, that the family were all now living under the same roof and that K was at school in Windsor. The Court of Appeal encouraged the local authority to carry out any further investigations and enquiries as quickly as possible.

Appeal allowed in part.

Summary by Richard Tambling, barrister, 1 Garden Court

Ambrosiadou v Coward [2011] EWCA Civ 409

The parties had married in 1993 and had a son in 1996. In 1992 they founded a hedge fund management company now worth around $1,200 M. The company had been run from Cyprus since 2005, when the parties moved there to live. Divorce proceedings began in 2009 and in May 2010 the husband brought a petition in Greece concerning contact with the parties' son, and with regard to his schooling and assets, and orders were subsequently made later that month. The husband's solicitors sent some of the papers, including the application notice, to a journalist. Subsequently, in June 2010 the husband disseminated the information much more widely, albeit in redacted form. Unfortunately, the redactions were quite easily penetrated using a fairly readily available piece of software, meaning that the redacted information became widely available.

The wife consequently applied for injunctive relief ex parte which was granted. However, the application was later dismissed by Eady J at the on notice hearing on the basis that he saw no likelihood that the husband would seek to publish the matters he had attempted to redact and had given the court an "assurance" to the effect that any further redaction would be effective. Eady J also considered that the wife had no reasonable expectation of privacy in respect of some of the matters published.

Permission to appeal had been granted by the single judge on the basis that it was arguably not enough to rely on the husband's "assurance" as opposed to a binding undertaking. Subsequently, the husband offered an undertaking not to release any information concerning the child's private affairs or the parties' marriage or personal relationship, despite which the wife pursued her appeal.

There was a preliminary issue as to whether the appeal hearing should be heard in public, given that it might be necessary to refer to the confidential material. The court ruled that the hearing should indeed be made in public so long as steps could be taken to ensure that arguable private information could not be disseminated outside court, and it was therefore ordered that there should be no reporting of the contents of the application notice.

On the substantive appeal the wife contended that much of the information in the published application notice was confidential and infringed her Article 8 rights and those of the child. The Master of the Rolls gave the leading judgment and did not consider that the unredacted material attracted Article 8 protection: just because information relates to a person's personal or family life, it does not automatically receive protection from the court, particularly where the information is trivial.

The redacted matter however was very different in character. The wife and child had a reasonable expectation of privacy in respect of it and Article 8 was accordingly engaged. The court was concerned that without an injunction a third party who obtained an ineptly redacted copy of a document would be able to publish the redacted material, as the Spycatcher principle would not apply. The fact that the interests of a young teenager were engaged reinforced the point.

The appeal was therefore allowed.

Summary by Stephen Jarmain, barrister, 1 Garden Court Family Law Chambers

In the Matter of A and B [2010] EWHC 3824

In October 2007 the mother of A (born in 2005) and B (born in 2006) was killed by the father. In September 2008 the father was convicted of the mother's manslaughter due to her provocation.

Following the mother's death the children were cared for by the father's parents. Local Authority X became involved and undertook an initial assessment. There was difficulty arranging contact with the maternal side of the family. The paternal grandparents applied to the family courts for a

residence order in December 2007. The maternal grandparents were joined as parties to these proceedings. The local authority involvement transferred to Local Authority Y (the LA) (the local authority were there children were now living).

Within the private law proceedings a r9.5 Guardian was appointed and a number of s7 reports prepared. In October 2008 (over a year after the mother's death), expert evidence recommended that the LA issue care proceedings as the future of the children could not be properly determined by grieving grandparents in private law proceedings. The LA issued proceedings in December 2008. A number of further expert evidence was commissioned in the public law proceedings.

A final hearing took place in February/March 2010. By this time work had been done with the maternal and paternal families which had reduced the acrimony on both sides. Both maternal and paternal grandparents sought care of the children. The court decided that the children should remain with their paternal grandparents who provided excellent day-to-day care but have extensive contact with their maternal relatives. The court made injunctions (against the father) to support the placement and special guardianship orders to both sets of grandparents to confer parental responsibility on both.

The guidance offered by the court is "intended to provide a framework to avoid compounding the very significant harm which the children involved in such cases have already suffered by poor case management and unnecessary delay".

The guidance includes the following:

• Threshold criteria will be met in cases where one parent has killed the other.
• The LA should give immediate consideration to the issue of care proceedings and, in any event, appoint a social worker to the affected children.
• It is not appropriate to leave the extended family to resolve matters through private law proceedings.
• Once proceedings are issued a guardian should be appointed at the earliest opportunity and the case transferred to the High Court.
• Consideration should be given to joint listing of case management hearings in the family and any concurrent criminal proceedings.
• Professionals involved should seek advice from an appropriate child and family psychiatrist or clinical psychologist.
• The children should be referred for therapeutic help. This should be carefully considered if there are concurrent criminal proceedings where the child may be a witness.
• Each case should be considered on its facts. There is no presumption that the family of the perpetrator are excluded as carers for the children. Adult psychological or psychiatric assessment should be considered when assessing all the circumstances.

Summary by Ayeesha Bhutta, Barrister, of Field Court Chambers

W (Children) [2011] EWCA Civ 345

The parties were never married and did not live together as a couple. They had two children, aged 12 and 8 at the time of the hearing. The mother, who had cared for the children solely for the majority of their lives, had applied for permission to relocate to Australia where her family lived. The father, who had lived near to the children, had not however had regular contact and had never applied for such or for parental responsibility. The judge hearing the case, despite (i) hearing from a CAFCASS officer who recommended that relocation was in line with the children's wishes and should be permitted, (ii) considering that the mother's plans were well thought-out and well-intentioned, and (iii) finding that a decision against relocation would be devastating for the mother, did not permit relocation. He stated that the children's relationship with their father, which had developed through the course of the proceedings by way of interim orders specifically designed to build a relationship which might be able to withstand the children's move to Australia, needed to continue to grow and develop.

The President, hearing the appeal, considered at length the provisions concerning appeals in G v G, and the provisions of Payne v Payne. He stated that two points flowed from G v G – the first being that the court was conducting a balancing exercise, and that he could only interfere with first instance judgment if he was satisfied that the judge had committed a sufficient error in the balancing exercise to vitiate his exercise of discretion; the second being that how he or any other member of the court would have decided the case is immaterial.

He concluded that the judge had erred such that his conclusion was plainly wrong. The judge, he said, had failed to give enough weight to the mother's welfare in his consideration of what was in the children's welfare, failed to make reference to statements from the mother's health visitor and GP, failed to consider the loss to the children of their relationship with the mother's side of the family, and failed to consider that the court could make orders about indirect contact.

The trial judge was also criticised for having failed to make findings on essential disputed facts (a criticism not made by the other two judges), and for failing to specifically consider all of the criteria listed by Dame Butler-Sloss in Payne v Payne.

The President also made clear his view that undue prominence had been accorded to his own words in the case of Re D, in which he had appeared to support criticism of Payne v Payne. He resiled from this and confirmed that Payne v Payne should continue to be followed.

Lloyd LJ agreed that the trial judge had underestimated the adverse effect of a refusal on the mother, and underestimated the importance of the wellbeing of the primary carer. Elias LJ noted that there is much debate within family law circles as to whether the judgment in Payne v Payne gives appropriate weight to the value of contact with the non-resident parent when assessing a child's best interests, but also confirmed that, until Parliament or the Supreme Court dictates otherwise, it was

binding. The appeal was allowed and permission given to the mother to relocate.

Summary by Gillon Cameron, Barrister, 14 Gray's Inn Square

IJ (A Child) [2011] EWHC 921

IJ was born in Ukraine in 2010. There was a surrogacy agreement in place between the applicants and the respondents that while valid under Ukrainian law, was invalid under the domestic law of England and Wales because it involved payment beyond reasonable expenses. However, a Parental Order was made (after investigation in evidence and CAFCASS involvement) and judgment given in open court after judgment was reserved because the judge wished to make (repeat) observations about these types of cases.

Hedley J reiterated the need for those seeking to enter into surrogacy agreements outside this jurisdiction to seek proper legal advice before entering into any agreement as, once again, the advice offered in the host country may have been correct for that country but was not necessarily correct when applying it to this jurisdiction.

In addition, Hedley J was caused to consider whether the Home Office should have notice of an application where a child will become a British Citizen by virtue of the commissioning parents and held that it was not necessary. This was because the Border Agency is intimately involved in immigration procedures for children and such notice would not be necessary.

Cases of this nature, however, should remain in the High Court for the present time.

Summary by Richard Tambling, barrister, 1 Garden Court

A Local Authority v A (No 2) [2011] EWHC 590

In July 2008, a baby (X) suffered an apparent life-threatening event (ALTE) when in the sole care of her mother, who was judged at a fact-finding hearing to have intentionally smothered her. At a hearing in March 2011, the court considered the appropriate long-term care options for X, who had been left with permanent brain injury which would require her to be cared for for the rest of her life.

The father's position was that X's long-term needs were well beyond him as a carer. The mother, who experts agreed posed a serious physical risk to X's future, did not accept that she was responsible for the injuries, but accepted the inevitable consequence of court's findings – that she would not be able to care for X. The father's parents did not seek to be long-term carers either but objected to the local authority's care plan that M's parents should care for X, the relationship between the two sets of grandparents having suffered partly as a result of the maternal grandparents' previous failure to strictly acknowledge what their daughter had done, which had contributed to a number of disputes with social care professionals. The judge described their opposition, however, as formal rather than adversarial. Welfare assessments made clear that the maternal grandparents had excellent parenting skills which were more than adequate to provide for X's special needs, and following almost daily contact with the maternal grandmother, she had developed a secure attachment to her. Their parenting of their own daughter had not been criticised either.

The issues, as described by experts, were whether the maternal grandparents would be able to work positively with the local authority with the complex set of professionals who would be involved in X's life, and whether contact with the paternal side of the family would be satisfactorily maintained.

The experts' evidence was heard concurrently ('hottubbing') and the judge noted the positive consequences for the evidence, which was notable for its coherence and lack of adversarial point scoring.

The experts generally agreed that acknowledgement was not the key issue in a case where X's capabilities were such that she would thrive on the maternal grandparents' emotional warmth but be oblivious to disagreements. There was a need however for a protective alliance with the local authority, who would need to be involved as an external control to the intellectual and emotional understanding of the maternal grandparents.

The judge concluded on balance that the maternal grandparents were capable of working with professionals for the benefit of X and should care for X. One factor of considerable influence was the need for primary attachment figures who would not be subject to the vagaries of impermanence that a professional placement might bring. A care order was made and the local authority's plan to place X with the maternal grandparents was approved.

Summary by Gillon Cameron, Barrister, 14 Gray's Inn Square

Legal Services Commission v F, A & V [2011] EWHC 899

The costs decision arose out of costs orders made by Singer J following lengthy proceedings in the Family Division between a husband and wife in which the wife was a funded party and the husband and the three respondents (who were interveners in the litigation) were non-funded parties. The husband and the respondents were wholly successful in the litigation that was taken up by preliminary issues requiring the intervener's intervention in the ancillary relief application.

Sharp J, noted that the costs incurred in dealing with the preliminary issue were enormous, totalling nearly £2 million with the wife's legal aid costs alone being £945,000 and the Husband's costs were over £210,00. The solicitor/own client costs of the interveners were approximately £612,000, although not all those costs could be recoverable against the LSC.

Before the hearing before the Master took place, the LSC and the interveners agreed that the total amount of recoverable costs assessed on an indemnity basis payable by the LSC,

subject to liability would be £495,000 (about 81 % of the total costs the interveners had incurred). A similar agreement was reached with the husband and that his recoverable costs, subject to liability, would be £185,000. The Master heard how the husband and the interveners would suffer financial hardship if an order for costs in their favour against the LSC were not allowed. The Master rejected the submissions of the LSC, including that he should look at the wealth of the whole family.

On their appeal, the LSC contended that the Master had erred in his determination of what is meant by financial hardship and how to apply the test, that the Master had erred in not considering whether a figure less than the full amount of costs incurred would alleviate any financial hardship and/or in not determining what such figure would be and whether the Master erred in his determination that it would be just and equitable for the costs to be awarded in the case.

Sharp J held that the Master did not apply the wrong test and had applied it correctly because he was entitled to draw the conclusion that he did on the facts before him and the threshold test of financial hardship was met by the interveners. It was further held that the Master had properly considered whether a reduction should be made and therefore his decision to decline to make any reduction should remain. Where it seems to be just and equitable for a non-funded party to recover his or her costs from public funds to the extent they cannot be recovered from the funded party where he or she would otherwise suffer financial hardship, unless there are facts which render that result unjust or inequitable, then as the Master correctly decided, the appellate court could see no reason to conclude otherwise.

Appeal dismissed.

Summary by Richard Tambling, barrister, 1 Garden Court

S (Children) [2011] EWCA Civ 454

The father is Canadian and the mother is a UK citizen. The parties met in Canada in 1990 and married in 1992 and the parties lived in England from 1996. The parties separated in 2006 and B and C remained living with her and had contact with the father.

The mother made an application for a residence order in 2009 and was granted the order (until further order) in 2010. The mother made the application after learning of the Father's plans to move to Canada but the Father had not made an application for leave to remove the children from the jurisdiction. CAFCASS prepared their report on the issues of contact and residence and removal from the jurisdiction.

B made it clear he wished to go to Canada and it appeared C also wished to go to Canada. B and C wrote a letter to the judge expressing their wishes and feelings to go to Canada and B was also seen by the judge on the day of the hearing where his views were made known to the judge. The parties and CAFCASS wished the court to adopt a unitary approach and that the children should not be separated.

After granting the father's application, B left for Canada to live with his aunt but C remained with the father because the father had not been able to let his property in England and remained working in England.

The mother appealed in respect of C. The Court of Appeal held that while they had considerable sympathy for the judge in adopting the "unitary" approach advocated by the parents and apparently supported by the reluctance of the CAFCASS officer to see siblings parted, they considered that he fell into clear error by his failure to recognise that the welfare interests of the children, considered individually, were substantially at odds, rather than in harmony, in the light of their different ages, the stages of their development and the nature of their needs, with the result that the welfare interests of C were wrongly subordinated to the wishes and perceived interests of B.

The Court of Appeal noted that this was a so-called "lifestyle choice" case with the status quo being entirely satisfactory from the point of view of the children's current welfare as also pointed out by CAFCASS. The Court of Appeal went on to state that it was not a case, as in most applications of this kind where the primary carer, almost invariably the mother, had compelling reasons, relating to her health, happiness or employment, to move abroad and that the father was successfully and gainfully employed in this country and able to remain so. It was noted that the father was enthusiastic for reasons which were neither developed nor compelling to move back to Canada, and to take the boys with him at a stage when their education (largely thanks to the mother's interest and influence) was proceeding well.

In conducting the necessary balancing exercise in relation to the combined welfare interests of the boys, the judge essentially adopted a "top down" approach which did not allow for C's views and welfare to be properly considered. C was still at a tender age in secure surroundings, from which there was no compelling reason to uproot him. If the application had been denied then in any event B would have been able to proceed to university in Canada without any disadvantage in 18 months time. The Court of Appeal held that, therefore, had the Judge separately considered the welfare interests of each of the children then he should have been driven to the conclusion that the application should be refused.

In any event B had now left England and the Mother's appeal was only in respect of C. Appeal allowed.

Summary by Richard Tambling, barrister, 1 Garden Court

Kent CC v A Mother [2011] EWHC 402

X (a girl aged 16), Y (a boy aged 15) and Z (a girl aged 7 ½) were the subject of care proceedings that resulted in this lengthy fact finding hearing before Mr Justice Baker. The mother also had two older children (a boy, V, aged 19, and a girl, W, aged 17). She suffered from a learning disability. Following the breakdown of the mother's relationship with the father of V, W, X and Y in 1996, various people and agencies made referrals to the local authority.

In 2002 the mother started a relationship with F and fell pregnant with Z. F also suffers from a learning disability and has other medical difficulties. They had a stormy and

difficult relationship. Numerous referrals to the LA and section 47 investigations followed.

In November 2006, the mother and children were moved into B&B accommodation in another town. DM (a 50 year old single man) befriended them, and the children visited and stayed overnight with DM from January 2007.

The school made referrals to the LA. W made a disclosure of physical abuse and described DM's house as her "one safe place". It was agreed that she should stay there, and a "grossly inadequate" PNC check was made (DM was not asked to produce proof of identity). The outcome of a further section 47 investigation was that W should remain at DM's, and a referral for a private fostering assessment should be made. This was never undertaken. The mother entered into a relationship with IR against whom W subsequently made allegations of sexual abuse but no parties pursued findings. In February 2009 W moved in with her 21 year old boyfriend U. In June 2009 the LA carried out a private fostering assessment of this arrangement and approved the placement.

In July 2009 DM was arrested and fingerprinted, and his real surname and criminal record of sexual offences against children discovered. He pleaded guilty to 26 offences including sexual offences against X, Y and Z and was sentenced to an indefinite period of imprisonment for public protection (to serve a minimum of 7 years) and placed on the sex offenders register.

The LA applied for care orders. On two occasions during the final hearing Baker J was informed that the LA had not disclosed documents. Further undisclosed material was also discovered on the LA computer system.

Baker J considered the threshold criteria satisfied and made the following findings of fact:

• X, Y and Z were sexually abused by DM over a prolonged period.
• Despite being confronted with the evidence, the mother refused until recently to accept that X and Y were abused and still refuses to accept that Z was abused.
• The mother allowed W, X and Y to regularly stay overnight with DM which a reasonable parent would never have allowed.
• Some time before July 2009 X told the mother that she had been sexually abused by DM which the mother refused to believe and failed to tell anyone about until after DM was arrested.
• On occasions F overchastised W, X and Y; once he slapped X across the face and twice he assaulted the mother.
• In June / July 2003 F took the mother, V, X and Y to Birmingham and abandoned them there.
• On 2 June 2004 X alleged that F assaulted her. The mother failed to give proper support to X in pursuing the complaint.
• The mother continued her association with F despite advice from the LA that he posed a risk to her and her children.
• The mother struggled for a number of years to provide a consistent and adequate level of physical care for the children.
• The mother has a chronic inability to control her children.

Baker J also highlighted various "alarming" matters that had come to light about the practices and procedures of the LA in the hope that lessons might be learned in the future. These included the lack of compliance with "Good Practice Guidance on Working with Parents with a Learning Disability"; failure to take steps that might have prevented DM's abuse; "deplorable" breach of duty to comply with statutory obligations as to private fostering arrangements; "incomprehensible" approval of W's placement with U; "seriously deficient" record keeping procedures, and "wholly unsatisfactory" disclosure.

The learned judge gave a helpful summary of the legal principles governing LA disclosure and emphasised the obligations upon the LA lawyer. He observed that it was "absolutely essential" for counsel for the LA to prepare a chronology in cases such as this.

Summary by Victoria Flowers, Barrister, of Field Court Chambers

B (Child) [2011] EWCA Civ 509

The case concerns 2 brothers C aged 8, and Z aged 6. C was the subject of an open adoption. Z continued to be brought up by his mother. There had been no direct contact between mother and C since his placement following unsuccessful applications by the mother in 2007 and 2008.

In 2010, the mother re-applied for permission to bring a contact application which was again refused by the same judge conducting the applications in 2007 and 2008. The mother appealed arguing that the judge was plainly wrong to refuse the grant of permission.

The Court of Appeal, Thorpe LJ giving the lead judgment, held that the trial judge was over-influenced by the previous proceedings. Particular indication of the judge's reliance on history was taken from the fact he not only refused the application for permission but imposed a restriction under s 91(1) against further application within a period of 2 years. Thorpe LJ identifies that the real question for the judge on that day was on what principled basis could the mother be refused permission? The grant of permission does nothing but allow her to cross the threshold. Obviously what ultimately will unfold depends on the preparation and the investigation that would be carried out between the parties. It was in was in the view of Thorpe LJ simply enough to see that there was something that merits investigation. This can be argued by C's mother, and even more forcefully on behalf of Z, who is a full brother, 2 years younger than C, and has a very strong Article 8 right to have a relationship with his brother.

The Court of Appeal unanimously granted the appeal setting aside the order refusing permission. Permission granted under s 10(9). Z joined as a party to the proceedings and Guardian appointed.

Summary by Alfred Procter, barrister, 1 Garden Court

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