New Court News

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New Court Blog

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The New Court Blog is regularly updated with the latest family law and COP news. To visit our blog go to newcourtchambers.com/blog

New Court News: Issue 16

A very warm welcome to all readers of this latest edition of our newsletter.

When I wrote the last foreword, we had just cancelled our summer party and I was hinting at the Christmas 'do' being bigger and better than ever. Sadly, we are still waiting for that party.

Spring seems to be with us and that coupled with the vaccine rollout, must give some optimism for a brighter 2021.

In her article, Kiran explores the legal implications of mass vaccination; clearly topical.

Sam Prout has been busy, writing 2 articles; care proceedings post-Brexit and contact in Covid times. Well worth a read.

ADR may be one way of dealing with the growing backlog of cases and Elissa updates us in this area.

Adoption, as ever, poses the ultimate care plan for the Family Court and Kezia's update will be of assistance in this regard.

We haven't abandoned the party idea; we will all need to come together, let our hair down and laugh when this is over.

For now, take care, stay safe and enjoy the newsletter, expertly edited by Jemimah.

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New Court News

by Jemimah Hendrick

Chambers

As we move into 2021 and the hope that one day in the not too distant future we may be able to meet you all again in person we want to just remind you that Chambers is here to help in anyway it can in these continuingly difficult times.

The clerks, whilst not in Chambers currently, are still readily available on clerks@newcourtchambers.com or 0207 583 5123.
For Out of Hours applications please ring the normal number and it will provide you with information on how to access someone for an Out of Hours application. Members of Chambers are experienced at undertaking these.

Chambers and Partners/ Legal 500

Chambers is delighted to once again be ranked in both the Legal 500 and Chambers and Partners and to have more members than ever listed individually in Chambers and Partners. Chambers is said of the members that the 'Barristers here are well versed in highly sensitive matters involving non-accidental injury, child death, sexual abuse, FGM, fictitious illness and child trafficking. They are also equipped to handle TOLATA, Schedule 1 and parental alienation cases. Clients include highly vulnerable individuals, as well as parents, guardians and local authorities'

Huge congratulations to
Giles Bain - An experienced lawyer who does not take bad points, he is likeable and a good communicator" "His style of advocacy is interesting as he is quite subtle but the message gets home. He really knows what he is talking about."
Christopher Poole, A strong advocate who is calm and persuasive when dealing with highly charged situations." "A very able family practitioner who can turn his hand to anything.
Andrew Shaw, "A star of the future. " "His advocacy is excellent and advances the case strongly in the best interests of the children involved. He is a very talented advocate whom judges thoroughly depend on."
Sam Wallace He is like a swan in the way he glides through a case, proving as cool as a cucumber." "He is a pleasure to work with because he is dedicated, he responds to clients brilliantly and he works so hard.
Sally Jackson, Extremely sensible, hard-working and well prepared, she shows excellent judgement both in conference and at court." "Sally is incredibly quick to pick up information and identifies all the main points in a case
Kyri Lefteri His professionalism, the quality of his research and his advocacy skills all impress." "He approaches his cases with vigour even when appearing in front of the most difficult judges
Philippa Jenkins Intellectually rigorous, she gives a high standard of advice and always gives you a heads-up if she notices a problem. She is straight with clients in an appropriate fashion
Laura Harrington Responsive, sensible, calm, and able to come up with solutions. She has a great manner with social workers and clients, and engages well with other parties in difficult situations

Pupil News

Chambers welcomed Meena Fakhri at the end of 2020 as a 3rd six pupil and Samuel Marks as a 1st 6 pupil in January 2021. We welcome both and wish them the best of luck in the months ahead.

New Tenants

Chambers was delighted that Kiran Channa and Katelyn Gottschling accepted tenancy in October 2020. Both have fit in to the ethos of Chambers and are building successful practices in all areas of chambers expertise.

Moot

Chambers has been involved in judging a number of moots over the last few months – all virtual of course. Practicing their judicial skills Christopher Poole, Sam Wallace, Philippa Jenkins, Jemimah Hendrick have judged a moots for Bristol University, which was 3 rounds concluding on 8 February 2021. Also members judged the Damian Norris Memorial Moot at the University of Law on 18 November 2020.

Pupillage fairs

In these strange times, one thing remained consistent and that was the Bar Council pupillage fair. Chambers took part in the first virtual pupillage fair on the 17 October 2020. This was a very successful event and Christopher Poole, Sam Wallace, Saiqa Chaudhry, Wing Chan, Raisa Saley, Jemimah Hendrick, Samuel Prout, Niamh Daly and Katelyn Gottschling all enjoyed meeting prospective pupils and answering their questions.
Members have also taken part in a virtual fair run by BPP.

Bridging the Bar Scheme

Chambers is pleased to have signed up to the Bridging the Bar flagship mini-pupillage scheme. This has been set up to increase equal access to opportunity with an aim to making the Barmore diverse and more reflective of today's society.

Talk on diversity

Saiqa Chaudhry and Kiran Channa sat on a panel discussion at Birstol University about inclusivity and diversity at the Bar. New Court is determined to improve access to the Bar and considers this needs to start at an early point in potential barrister's careers.

Seminars

Whilst we may not be able to come and deliver seminars in person Chambers has made the most of all of the available virtual platforms and are delivering seminars on a range of topics. One example is the family law seminar that Machins solicitors kindly arranged. A range of topics were covered bv Andrew Shaw. Kvri Lefteri. Jemimah Hendrick, Amelia Evans and Niamh Daly. If this is something that you are interested in Chambers providing please do contact the clerks

Training was also held in July for the London Borough of Hammersmith and Fulham on DOLs.

If your training has been cancelled please do now get in touch with the clerks to rearrange and we will now undertake it remotely.

Baby news

Chambers continues to expand with many congratulations to Kathryn Blair, Wing Chan and Sabrina Pollack on the latest additions to the New Court family!

Published article

Samuel Prout had an article published in the April 2020 version of Lexis Nexis's Family Law Journal. The article was entitled 'None of their business: disclosure and withholding information in cases involving children' – it is definitely worth a read!

Life at the Family Bar

A panel discussion took place at Bristol University on life at the Family Bar. Raisa Saley took part in this discussion and it is hoped that students found it useful when considering what areas of law they would like to go into.

Book Published

Chambers offeres its congratulation to Niamh Daly who has co-authored a book with Josh Hitchens entitled Forced Marriage Law and Practice. This book has been published by Bloomsbuy Professional and will lbe available in March 2021. This book covers the practical treatment of the law and practice in this field and provides an awareness of the remedies avaible.. The book is available for pre-order using this link https://www.bloomsburyprofessional.com/uk/forced-marriage-law-and-practice-9781526515964/

Reported Cases

by Jemimah Hendrick

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

Kayleigh Long was led by Penny Howe QC in the Court of Appeal. They were successful in opposing an appeal by the mother on behalf of an intervenor for the reopening of findings of fact. The full judgment can be found here T and J (Children) [2020] EWCA Civ 1344 (20 October 2020) (bailii.org)

Re R (Children: Control of Court Documents) [2021] EWCA Civ 162

Andrew Shaw led Samuel Prout in the Court of Appeal. The Court considered an appeal by a serving prisoner (a convicted sexual abuser) who sought to overturn a Family Court decision that he was not allowed to keep papers from care proceedings in his prison. Andrew and Sam represented the children throughout proceedings and opposed the appeal. The Court of Appeal decided against the appellant.

London Borough of Souhtwark and A Family [2020] EWHC 3117 (Fam)

Lesley Samuels QC led Giles Bain and Niamh Daly before Sir Mark Hedley. This was the third fact-finding hearing; it having gone twice previously to the Court of Appeal. The Court found that the local authority had not established threshold and the proceedings were dismissed.

Local Authority v Mother, Father, Lucy and Belinda [2020] EWHC 2801 (Fam)

Christopher Poole represented the mother in this matter before Lieven J. This was a welfare hearing following a fact find which found that Lucy's older brother did not commit suicide but died at the hands of either his father, mother or older brother. Ultimately the judge decided that Lucy should be placed in the care of her sister Belinda.

Contact with looked after children – a cut-out and keep refresher

By Samuel Prout

In what we hope will be our last newsletter article mentioning the impact of Sars-Cov-2, here is a cut-out-and-keep refresher for contact with looked after children.

Children become looked after in a variety of ways. Local authorities have a duty to accommodate children in need (section 20 Children Act 1989) and those who are the subjects of care orders (interim or final, the duty is section 22A Children Act 1989).

Here are the key authorities on contact with those children:

1. Contact between parent and child is a fundamental aspect of Article 8 ECHR(the right to respect for private and family life). This right continues to bite beyond a child's removal by the state or accommodation in state care.

2. The state must fairly balance the child's interests with those of the parent, and the child's best interests will generally dictate that its ties with its birth family must be maintained (see Strand Lobben and others -v- Norway, 30 November 2017 (37283/13), reported [2020] 1 FLR 297, para.202-213). Contact is a key component of that family tie.

3. For all 'looked after' children:
   a. Section 22(3) Children Act 1989:
   It shall be the duty of a local authority looking after any child—

(a) to safeguard and promote his welfare; and
(b) […]

   b. Schedule 2 Children Act 1989:

(15) Where a child is being looked after by a local authority, the authority shall, unless it is not reasonably practicable or consistent with his welfare, endeavour to promote contact between the child and—

(a) his parents;
(b) any person who is not a parent of his but who has parental responsibility for him; and
(c) any relative, friend or other person connected with him

4. For children 'in care' (ie. the subjects of care orders):

   a. Section 34 Children Act 1989:

(1) Where a child is in the care of a local authority, the authority shall (subject to the provisions of this section and their duty under section 22(3)(a)) […] allow the child reasonable contact with—
(a) his parents
(b) any guardian or special guardian of his;
(ba) any person who by virtue of section 4A has parental responsibility for him;
(c) where there was a child arrangements order in force with respect to the child immediately before the care order

was made, any person named in the child arrangements order as a person with whom the child was to live; and
(d) where, immediately before the care order was made, a person had care of the child by virtue of an order made in the exercise of the High Court's inherent jurisdiction with respect to children, that person.

The emphasis of the duty under section 34 Children Act 1989 is to allow 'reasonable' contact between a child and its family

5. Worth remembering - always - the duty on local authorities to try to reunite families if and where possible. See for example:

a. "*Accordingly, in the case of imposition of public care restricting family life, a positive duty lies on the authorities to take measures to facilitate family reunification as soon as reasonably feasible*" (K.O. and V.M. -v- Norway, 19 November 2019 (64808/16) see para.60);

b. In our domestic legislation a local authority has a duty to place all looked after children with their parent(s) (or someone who shares PR, or someone who was named in a 'lives with' order) if that is not inconsistent with the child's welfare or impracticable (section 22C Children Act 1989);

c. The chance of reunification in the future should not be frustrated by unreasonably limited or low frequency contact now (e.g. K.O. and V.M., above, para.69).

The local authority may refuse what would otherwise be reasonable contact with a child in care where it is not reasonable practicable to hold the contact or where contact would be inconsistent with the child's welfare. Many practitioners will be familiar with this:

a. If the local authority wishes to refuse contact between a child and its parent (or other person with PR, or named in a lives-with order) then it must seek an order under section 34 Children Act 1989.

b. But the local authority may unilaterally refuse what would otherwise be reasonable contact for up to 7 days where it is satisfied that refusal is necessary and where it makes the decision urgently (section 34(6) Children Act 1989);

The emphasis of the duty under section 34 Children Act 1989 is to allow 'reasonable' contact between a child and its family. It is ultimately up to the local authority to assess what is reasonable, and many parents (and some children) may disagree with the local authority's assessment. If they do disagree then the burden falls on the aggrieved person to seek a remedy.

For children in care that remedy will usually be an application under section 34 Children Act 1989:

a. For the child the applications is made under section 34(2) Children Act 1989;

b. For a parent it is section 34(3) Children Act 1989; and

c. Other individuals may also apply under section 34(3) Children Act 1989 if the court gives them permission. Grandparents or siblings will normally follow this route (unless they have PR or were previously named in a lives-with order, when it is as for a parent);

d. A court may also make an order of its own motion (when making a care order or in proceedings concerning a child in care: section 34(5) Children Act 1989).

On any application under section 34 Children Act 1989 (to refuse or order contact) the court's paramount consideration is the child's welfare, by reference to the welfare checklist and the 'no order' principle (thanks to sections 1(1), 1(3), 1(4), and 1(5) Children Act 1989).

Unless section 34 is engaged, the Family Court has limited scope to challenge the appropriateness of a local authority's decision about what is 'reasonable' contact. This can become a problem after proceedings have ended (when family members are no longer represented) or where children are looked after under section 20. In those circumstances other public law remedies may be available for the family member or child (the key option being judicial review).

> *Unless section 34 is engaged, the Family Court has limited scope to challenge the appropriateness of a local authority's decision about what is 'reasonable' contact*

The coronavirus pandemic

In its typical style, the sars-cov-2 virus has trampled all over our expectations of what is 'reasonable'. It came for the local authority's duty on both limbs:

a. What is practicable: Public health restrictions made - at times - supervised/supported contact impossible (let alone impracticable); and

b. What is in the child's best interests: The risk of contracting COVID-19 or infecting family members runs contrary to the child's physical needs and poses a risk of harm to child, family, and professionals.

As we have adjusted to the pandemic local authorities have found decreasing sympathy for the circumstances they find themselves in. The following must be borne in mind:

a. None of the legislation or guidance issued in the pandemic changes the fundamental obligations / rights / remedies set out above;

b. A court considering what is reasonable for a child in care should be given basic information about:

    i. The child's situation;
    ii. The local authority's current or available resources; and
    iii. The current applicable government guidance.

c. If that information is not before the court then an adjournment may be required and the local authority required to provide evidence covering those areas.

(See Re D-S (Contact with children in care: COVID 19) [2020] EWCA Civ 1031)

At the introduction of the Tier 4 restrictions (December 2019) and the stay at home lockdown (January 2021) there was a degree of anxiety that local authorities may not be able to continue to lawfully offer contact. That anxiety was not supported in the legislation, which continues to allow for contact (and for individuals to travel for the purposes of contact). The following exceptions are highlighted:

People may leave their homes (or form gatherings):

a. for contact between, parents and a child where the child does not live in the same household as their parents or one of their parents;

b. for contact between siblings where they do not live in the same household and one or more of them is a child looked after by a local authority (or a child in care);

c. for prospective adopters (including their household) to meet a child or children who may be placed with them;

d. for various educational and childcare arrangements (too numerous to recite here);

e. to place children, or facilitating children being placed, in the care of another person by social services, whether on a temporary or permanent basis.

(See para.2(13) and para.6(18), Schedule 3A, the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020)

These exceptions remain in force at the time of writing. The key message is that the existence of the coronavirus should not prevent contact from being arranged in accordance with the usual principles of reasonableness, practicability, and the child's best interests.

Members of chambers routinely advise clients on contact matters (in public and private law, before-, during-, and after-proceedings). We have recently been advising local authorities and private individuals on the impact of coronavirus on their contact expectations. If you would like to know more please contact the clerks on 0203 582 7123.

Vaccination: Key Legal Principles

By Kiran Channa

Given the scientific development of the novel Covid-19 vaccine, it is only a matter of time before an application comes before the family court asking the court to consider whether a parent can be forced to vaccinate their child against Covid-19. The court's power over whether they can force a parent to vaccinate their child has always been a controversial topic with cases appearing in both the private and public law sphere.

The case of *M v H (Private Law Vaccination)* [2020] EWFC 93 most recently considered the law in relation to whether the court can force a parent to vaccinate their child. In this case, MacDonald J considered the role of the court in authorising the administration of vaccinations to two children. The judgment considered the application of the principles set out in *Re H (A Child: Parental Responsibility: Vaccination)* [2020] EWCA Civ 664 in private law disputes, the use of expert evidence and the approach to proportionality under Article 8. The father had applied for a specific issue order requiring two children aged 6 and 4 to be vaccinated in accordance with the NHS vaccination schedule. The mother opposed the application. The father's application initially concerned the MMR vaccine, however ahead of the hearing the question before the court widened to include each of the childhood vaccines that are currently included on the NHS vaccination schedule, the vaccinations that may be required in relation to future travel abroad by the children and vaccination against Covid-19.

MacDonald J declined to make orders in respect of possible future travel, on the basis that the court had no information regarding when and to where such future travel by one or both of the children will take place and was therefore unwilling to make an order that may or may not be required at some point in the future.

MacDonald J was also unwilling to make a specific issue order in relation to the Covid-19 vaccine. He stressed that his unwillingness to make an order in relation to the vaccine was in no way a reflection of the court's views or opinions on the vaccine. However, it was simply felt that any decision made by the court at this stage would be premature:

> [4] *"I wish to make abundantly clear to anyone reading this judgment that my decision to defer reaching a conclusion regarding the administration to the children of the vaccine against the coronavirus that causes Covid-19 does not signal any doubt on the part of this court regarding the probity or efficacy of that vaccine."*

However, MacDonald J did go onto say that it would be *very* difficult to foresee a situation in which a vaccination against Covid-19, approved for use in children, would not be endorsed by the court as being in the child's best interests.

Macdonald J then went on to consider the application before the court in relation to the NHS vaccination schedule.

In private law cases, when both parents have parental responsibility, one parent does not have priority over the other in the exercise of parental responsibility (Section 2(7) Children Act 1989). The Court of Appeal in *Re H (A Child: Parental Responsibility: Vaccination)* set out that therefore when there is a dispute regarding vaccination between parents, both of whom have parental responsibility, that dispute should still continue to be a matter which must be brought to court.

Whilst *Re H (A Child: Parental Responsibility)* was in the context of public law proceedings, Macdonald J upheld the key principles set out in *Re H (A Child: Parental Responsibility)* in relation to private law disputes. The key principles, as set out at paragraph 40, are as follows:

1. *It cannot be doubted that it is both reasonable and responsible parental behaviour to arrange for a child to be vaccinated in accordance with the Public Health Guidelines but there is at present no legal requirement in this jurisdiction for a child to be vaccinated.*
2. *Although vaccinations are not compulsory, scientific evidence now establishes that it is generally in the best interests of otherwise healthy children to be vaccinated, the current established medical view being that the routine vaccination of infants is in the best interests of those children and for the public good.*
3. *All the evidence presently available supports the Public Health England the advice and guidance that unequivocally recommends a range of vaccinations as being in the interests of both children and society as a whole.*
4. *The specific immunisations which are recommended for children by Public Health England are set out in the routine immunisation schedule which is found in the Green Book: Immunisation against infectious disease, published in 2013 and updated since.*
5. *The evidence base with respect to MMR overwhelmingly identifies the benefits to a child of being vaccinated as part of the public health initiative to drive down the incidence of serious childhood and other diseases.*
6. *The clarity regarding the evidence base with respect to MMR and the other vaccinations that are habitually given to children should serve to bring to an end the approach whereby an order is made for the instruction of an expert to report on the intrinsic safety and or efficacy of vaccinations as being necessary to assist the court to resolve the proceedings pursuant to FPR Part 25, save where a child has an unusual medical history and consideration is required as to whether the child's own circumstances throw up any contra-indications.*
7. *Subject to any credible development in medical science or peer reviewed research to the opposite effect, the proper approach to be taken by a court where there is a disagreement as to whether the child should be vaccinated is that the benefit in vaccinating a child in accordance with Public Health England guidance can be taken to outweigh the long-recognised and identified side effects.*
8. *Parental views regarding immunisation must always be taken into account but the matter is not to be determined by the strength of the parental view unless the view has a real bearing on the child's welfare.*
9. *This approach to the medical issues does not act to narrow the broad scope of the welfare analysis that is engaged when considering the best interests of the child with respect to the question of vaccination.*

In relation to public law cases, *Re H (A Child: Parental Responsibility)* also established that the Local Authority can make the decision to vaccinate a child in its care of its own volition pursuant to Section 33 of the Children Act 1989, if they consider it to be in the best interests of the child. The court rejected an approach requiring an application pursuant to the inherent jurisdiction on the basis that such an application is neither

necessary nor appropriate in the context of medical evidence, the limited resources of Local Authorities and the pressure upon the family courts. This broadens the Local Authorities powers in relation to vaccinating children in their care and passes the burden onto parents to resist vaccination.

In *M v H (Private Law Vaccination)*, Macdonald J did not depart from the court's previous stance on vaccinations and was satisfied that it was in the best interests of both children to make a specific issue order requiring each of the children to be given each of the vaccines that are currently specified on the NHS vaccination schedule.

Macdonald J set out that there was no credible development in medical science or new peer reviewed research before the court demonstrating to the required standard a significant concern for the efficacy and/or safety of any of the vaccines currently listed on the NHS vaccination schedule. In this case, the mother had relied on anti-vaccination material from various online sources. The material relied on by the mother included a newspaper article, a fact sheet, a flyer and a list of articles, none of which were considered by the court to be evidence of a credible development in medical science. Macdonald J adopted Sedley LJ's characterisation, in *Re C (Welfare of Child: Immunisation)* [2003] 2 FLR 1095, of this type of evidence as 'junk science'. Macdonald J was clear that this evidence does not and cannot be capable of demonstrating significant concern for the safety of any vaccines currently listed on the NHS vaccination schedule. If a parent wishes to restrict their child from being vaccinated, it will therefore be imperative that cogent, objective medical evidence is placed before the court demonstrating a genuine contra-indication for the administration of one or all of the routine vaccinations. Any opposition without this evidence is likely to fail. Any expert evidence should therefore ordinarily be limited to a case where a child has an unusual medical history and to consideration of whether his or her own circumstances throw up any contra-indications.

The mother also argued that a specific issue order requiring the vaccination of the children would breach their right to respect for private and family life under Article 8 of the ECHR. Macdonald J referenced *Re K (Forced Marriage: Passport Order)* [2020] EWCA Civ 190 where the President endorsed the approach to proportionality in relation to convention rights in *Bank Mellat v HM Treasury (No 2)* [2013] 3 WLR 179. Macdonald J rejected the mother's argument and was satisfied that the objective of the vaccination, namely, to protect the children and the population more widely from the spread of diseases, justified the limitation of the Article 8 rights. He further stated that no less intrusive measure, such as dietary requirements as suggested by the mother, would be satisfactory. Macdonald J was therefore satisfied that the specific issue order requiring vaccination struck a fair balance between the rights of the children and the interests of the community

The court must therefore take into account the parent's views regarding vaccination, however regardless of how vehemently those views are expressed, the court will only place weight on them based on their substance. Therefore, despite the mother's objections, the judge was unable to attach formative weight to her oppositions.

M v H (Private Law Vaccination) therefore upholds the family courts established view that in the absence of reliable medical evidence in opposition to any vaccination, the court will make an order for a child to be vaccinated.

Barristers urge clients not to go to court…

By Elissa Da Costa Waldman

Many of you will have seen the short video in our June newsletter in which I gave you a whistle stop tour of the various methods of non-dispute resolution that exist as options for our clients in resolving their legal disputes in place of going to court to have them determined. Whilst it was important then to highlight the various alternative means we have to bring disputes to a satisfactory conclusion, it is even more important now, given that it is almost a year since the first lockdown as a result of the pandemic and the fact that we are experiencing our third lockdown, with the continued impact that is having on an already overstretched and under resourced court system.

I often tell parties that the two things required for legal disputes are a strong stomach and deep pockets

While some hearings are taking place remotely, mainly in public law cases involving children, many more cases are not being heard and form part of a huge backlog that was in existence long before the pandemic. Even without a court system in difficulties and a continuing pandemic, there are many advantages to resolving family disputes away from the court arena.

- Expense of going to court
- Delay
- The fact it's a family dispute
- Someone else makes a decision rather than the parties whose lives are being affected

I often tell parties that the two things required for legal disputes are a strong stomach and deep pockets because the usual reasons for trying to resolve any dispute outside court are the saving of costs and wanting to have it resolved sooner rather than later. Consider how much more significant those reasons are in a family dispute where money is perhaps the issue and every penny is really needed for the family rather than being spent on lawyers in a protracted legal dispute. Where the issues are about children, the very fact of delay offends against one of the most important principles of the Children Act 1989.

Furthermore, the fact the dispute is a family one. From the clients' point of view, it is hard enough to cope with the breakdown of their relationship or not seeing their children let alone having to deal with it within the court process, which many find stressful and traumatic and which goes at a pace not of the clients' making.

In addition, decisions are made by a stranger who knows little of the family history and the personalities involved, and which are likely to be found unattractive by both litigants. Mediation, collaboration or attendance at an early neutral evaluation or private FDR can encourage the parties to arrive at their own solutions, which is a much more empowering experience and likely to lead to greater satisfaction, the outcome having been created by the parties themselves with assistance from a mediator, collaboratively or having been provided with an indication at an ENE or private FDR where the private 'judge' has the luxury of a full day dealing with one case as opposed to a 'real' judge dealing with several in the same timeframe.

We at New Court are able to offer all forms of non-court dispute resolution and I am delighted to draw your attention to the 'Non-Court Dispute Resolution' page on our website which explains all the different methods and introduces our team specialising in this work. Please do contact our clerks to arrange any mediations, ENE/Private FDRs or arbitrations.

Opposed Adoption Proceedings

By Kezia Kernighan

Public law practitioners are highly familiar with the law governing applications for leave to oppose adoption orders. **Re B-S (Children) [2013] EWCA Civ 1146** confirms that the two stage test in **Re P (Adoption: Leave Provisions) [2007] EWCA Civ 616** remains applicable. Further case law elaborates on the test.

However, once a parent has satisfied the two stage test and has therefore been granted leave to oppose an adoption order under section 47 Adoption and Children Act 2002 (the Act), the law governing adoption orders is less easily found or summarised in any one case. Below is a summary of the statute and case law governing adoption orders alongside a discussion of what assessments and evidence should be considered in preparation for a contested final adoption hearing.

The legal framework:

If permission to oppose the making of an adoption order is granted, the court can only make an order if it dispenses with parental consent. To do this, the court must be satisfied that the child's welfare requires the consent to be dispensed with, pursuant to section 52(1) of the Act. Moor J, when setting out the law in **The Prospective Adopters v FB and Others [2015] EWHC 297**, confirms that *what is "required" in this context means the connotation of the imperative. It is what is demanded rather than what is merely optional or reasonable or desirable. It is a stringent and demanding test [para 55].* Further, an adoption order is a draconian and extreme order*, only to be made as a last resort when there is no other order compatible with the child's long term welfare [para 56].*

Of course, the court's paramount consideration is the child's welfare throughout his life, pursuant to 1(2) of the Act, having regard to the following matters outlined in the welfare checklist, pursuant to section 1(4):

a) The child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding),
b) The child's particular needs,
c) The likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person,
d) The child's age, sex, background and any of the child's characteristics which the court or agency considers relevant,
e) Any harm (within the meaning of the Children Act 1989 (c.41) which the child has suffered or is at risk of suffering,
f) The relationship which the child has with relatives, with any person who is a prospective adopter with whom the child is placed, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including:
    i. The likelihood of any such relationship continuing and the value to the child of its doing so,
    ii. The ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,

iii. The wishes and feelings of the child's relatives, or of any such person, regarding the child.

When considering whether the relationship between the child and the prospective adopters should be considered under section 1(4)(f), McFarlane LJ determined it to be *self-evident that a prospective adopter with whom a child has been placed under a placement for adoption order will automatically be "any other person" within the context of section 1(4)(f)* in **W (A Child) [2016] EWCA 793** [para 38-40].

Further, the court confirmed that there is no right or presumption for a child to be brought up by a member of her natural family in public law adoption cases. McFarlane LJ determined that *the only 'right' is for the arrangements for the child to be determined by affording paramount consideration to her welfare throughout her life (in an adoption case) in a manner which is proportionate and compatible with the need to respect ECHR Art 8 rights which are in engaged.* In this case**,** the Court of Appeal determined that both the Guardian and Independent Social Worker had not afforded due weight to all of the relevant factors and had incorrectly applied a right/ presumption for the child to be brought up by a member of her natural family. Both used *the existence of a viable family placement as a hyperlink to the outcome of the case without taking any…regard to any other factor that might weigh to the contrary arising from A having achieved a full and secure placement* with her prospective adopters [para 70-75].

The case of **Re M'P P [2015] EWCA Civ 584** considered whether two children should be adopted by their foster carer or be placed with a family member with whom they had no relationship with. The appeal raised *the question of the relative weight that is to be attached to the issues of 'status quo' and 'family' when they appear to be in opposition to each other in proceedings relating to a child* [para 47]. In the judgment, McFarlane LJ deemed that the wording used in section 1(4)(f) of the checklist, namely the value of a relationship to a child, is particularly important in the context of attachment theory [para 50].

The judgment in the case of **AB (Contested Adoption) [2019] EWFC B68** provides a useful and concise summary of the law. The facts in that case are seen in many opposed adoption cases. The court is likely to be tasked with considering the progress a parent has made on the one hand with the harm done to a child by removing them from their main carer on the other. The court will need to consider what is proposed by the parent opposing the adoption in terms of a transition back to their care and any delay and upheaval this may cause. The judgment provides a helpful description of the assessments deemed necessary in that case, which may well prove applicable in other adoption cases. Fundamentally, cases will be determined on their facts and the factors most relevant to each case will inevitably differ.

<u>Evidence required in preparing for an opposed adoption hearing</u>:

The necessity of an assessment of the child's attachment to the prospective adopters and the harm they have suffered to date/ may suffer if removed from the prospective adopter's care will depend on the child's age and any individual needs they have. It may be that the allocated social worker's assessment of attachment, contained within the Annex A report and local authority statements, is sufficient in this regard. A statement from the prospective adopters can also speak to this. In any event, consideration of what is required should be considered at the early stage of proceedings after leave is granted.

Consideration should be given as to whether updating parenting/ psychiatric/ psychological assessments are needed. If so, it is likely that the experts who undertook the original assessments within the care proceedings are best placed to assess change.

Local authorities and Guardians must ensure that their evidence outlines all of the realistic options before the court, alongside a proper analysis of their pros and cons.

Care Proceedings: Jurisdiction after leaving the EU
By Samuel Prout

The court's jurisdiction in Part IV CA 1989 proceedings is not so clearly defined as in e.g. s.8 orders (as under ss.1, 2, 3 FLA 1986). The court's jurisdiction in care proceedings comes from international convention. That is now the 1996 Convention On Jurisdiction, Applicable Law, Recognition, Enforcement And Co-Operation In Respect Of Parental Responsibility And Measures For The Protection Of Children ("1996 Hague"). Chapter II is relevant for the jurisdiction of the Family Court in care proceedings. In particular Article 5:

(1) The judicial or administrative authorities of the Contracting State of the habitual residence of the child have jurisdiction to take measures directed to the protection of the child's person or property.

Where is habitual residence?

Whether a child is habitually resident in England is a factual decision for the court.

The court's approach to locating 'habitual residence' is summarised by Gwynneth Knowles J in Re X (Care Proceedings: Jurisdiction and Fact Finding) [2020] EWHC 2742 (Fam) (paragraphs 57-59). From that decision (and those on which Knowles J relies) these guiding factors are drawn:

i. The habitual residence of a child corresponds to the place which reflects some degree of integration by the child in a social and family environment;
ii. The test is essentially a factual one which should not be overlaid with legal sub-rules or glosses. It must be emphasised that the factual enquiry must be centred throughout on the circumstances of the child's life that is most likely to illuminate his habitual residence;
iii. Its meaning is 'shaped in the light of the best interests of the child, in particular on the criterion of proximity'. Proximity in this context means 'the practical connection between the child and the country concerned';
iv. It is possible for a parent unilaterally to cause a child to change habitual residence by removing the child to another jurisdiction without the consent of the other parent;
v. A child will usually but not necessarily have the same habitual residence as the parent(s) who care for him or her. The younger the child the more likely the proposition, however, this is not to eclipse the fact that the investigation is child focused. It is the child's habitual residence which is in question and, it follows, the child's integration which is under consideration;
vi. Parental intention is relevant to the assessment, but not determinative;
vii. It will be highly unusual for a child to have no habitual residence. Usually a child loses a pre-existing habitual residence at the same time as gaining a new one;
viii. It is the stability of a child's residence as opposed to its permanence which is relevant, though this is qualitative and not quantitative; it is about the integration of the child into the environment rather than a mere measurement of the time a child spends there;

iv. The relevant question is whether a child has achieved some degree of integration in social and family environment; it is not necessary for a child to be fully integrated before becoming habitually resident;
v. The requisite degree of integration can, in certain circumstances, develop quite quickly. It is, for example, possible to acquire a new habitual residence in a single day;
vi. Habitual residence is a question of fact focused upon the situation of the child, with the purposes and intentions of the parents being merely among the relevant factors. Stability of residence is important, not whether it is permanent. There is no requirement that the child should have been resident in the country in question for a particular period of time, let alone that there should be an intention on the part of one or both parents to reside there permanently or indefinitely; and
vii. It is in a child's best interests to have a habitual residence and accordingly it would be highly unlikely - although technically possible - for a child to have no habitual residence. As such, *"if interpretation of the concept of habitual residence can reasonably yield both a conclusion that a child has an habitual residence and, alternatively, a conclusion that he lacks any habitual residence, the court should adopt the former*" (per Lord Wilson, Re B (a child) [2016] UKSC 4, para.42).

[Note: the above have been shortened for clarity out of context.]

A crucial distinction from Knowles J's judgment (and the authorities from which Her Ladyship drew) is that Article 8 of Brussels IIA does not provide the overarching principle for jurisdiction in cases issued from 1 January 2021.[1]

For now there is not a single authority for the post-31 December position in care proceedings.

While decided under a different overarching convention, the operative phrase under Brussels IIr or 1996 Hague is the same: 'habitual residence'. We suggest the approach taken to narrow that down should be no different.

What about urgency or no habitual residence?

Under 1996 Hague in cases of urgency or for children whose habitual residence cannot be established the Family Court has jurisdiction to make decisions (Articles 11 and 6 of Hague respectively).

Similar provisions were adopted into Brussels IIr (as Arts. 20 and 13).

Cautionary notes

Use of 1996 Hague over Brussels IIr raises three potential (hopefully academic) warning flags:

i. Article 5 of 1996 Hague does not explicitly include a clear statement of the 'relevant time' (i.e. when are we looking at the habitual residence - e.g. application date? Today? Yesterday?).
ii. Article 8 Brussels IIr was much clearer: *The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is*

[1] Regs 3 & 8, Jurisdiction and Judgments (Family) (Amendment etc.) (EU Exit) Regulations 2019

habitually resident in that Member State at the time the court is seised. (Defined as the time the application is made, Article 16 Brussels IIr.)

iii. Family Law Act 1986 jurisdictional provisions adopt a similar approach - the "*relevant date*" is the date of the application. **But** FLA 1986 excludes care proceedings from its remit.

iv. We suggest that the court is overwhelmingly likely to adopt the time-of-application approach because there seems no justification not to. But this may be worth remembering in case someone tries to make a big deal.

v. Article 5(2) of 1996 Hague allows jurisdiction to change as a child's habitual residence does so theoretically jurisdiction could shift mid-proceedings. This could not happen under Brussels IIr (see Article 19 BIIr and, e.g., Mercredi v Chaffe 272 [2011] 2 FLR 515, para.67). But:

   a. Article 13 of 1996 Hague require courts to abstain from exercising their jurisdiction on an issue if another state's authorities are already considering something similar; and
   b. It is difficult to think of circumstances in which a child would move during care proceedings unexpectedly without also engaging the abduction / unlawful removal provisions.

vi. More relevant for private law but worth bearing in mind: Brussels IIr allowed jurisdiction to linger in a country for three months after a child lawfully left (for, e.g., varying a child arrangements order if one party hasn't moved). Hague 1996 does not have an equivalent transitionary period.

Which convention am I?

Was your case issued before 11pm on 31 December 2020?

vii. If Yes: Brussels IIr;

viii. If No: 1996 Hague.

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