New Court News

In this issue...

London Legal Walk 2018

The 2018 London Legal Walk is fast approaching and once again New Court will be pounding the streets with thousands of other lawyers in support of legal advice centres. We would love to beat last year's total of £1640. If you would like to sponsor us please visit http://bit.do/newcourtlondonlegal

New Court Blog

newcourtchambers.com/blog

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 12

Spring has sprung, though we trust there is no further sting in the tail of winter. As daylight extends it is a good time to pause for breath as we reflect on a challenging few months.

The relentless demands our practice asks of us puts significant pressure on us all and it is with credit to all concerned that we continue to maintain high standards and work in close collaboration with clients and colleagues alike.

New Court has undergone an early 'Spring Clean' with redecoration giving us a fresh look. New telephones and a new number has provided challenges but an exciting leap into modern technology. This will continue with New Court's commitment to work to a paperless system. This ties neatly in with the impending changes to Data Protection – an area in which we will all need to work closely to support one another. As ever, we are grateful to the contributors to this 12th edition and Rob's excellent editing and publishing skills, which keeps us on track.

We hope you enjoy the read. Big shout out for Sam Wallace, running the London Marathon for HASTE, a fantastic inspiring charity. Sponsorship is most welcome with details on page 2.

Best wishes,

Chris & Giles

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New Court News

by Robert Wilkinson

Stephanie Hine in Court of Appeal - *Re AB [2018]*

Stephanie Hine recently appeared in the case of *Re AB* [2018] EWFC 3, led by Alex Verdan QC, where the President issued guidance in care proceedings relating to a child with a life limiting condition. The court identified jurisdictional and procedural issues to be considered before embarking upon care proceedings against "otherwise unimpeachable" parents in disputes about the appropriate medical treatment and support of, in this case, a profoundly neurologically disabled child.

Kyri Lefteri - Re L [2018] (full citation pending)

Kyri Lefteri recently appeared in the case of Re L [2018] before HHJ Rowe QC (sitting as a section 9 Judge), which concerned an application made by the Local Authority to vaccinate the child for normal childhood immunisation against the wishes of the mother. The Learned Judge analysed the previous limited authorities on this issue and provided further guidance, which we will update on our website once published.

Welcome to Jemimah Hendrick

Chambers is delighted that Jemimah Hendrick has accepted an offer of tenancy following successful completion of her pupillage in October 2017. Jemimah was called to the Bar in 2009 and worked as a High Court Judge's clerk to two judges within the Family Division. Jemimah now practices in all areas of family law including public and private law children, financial relief and TOLATA. Jemimah also undertakes COP work.

Christmas Party 2017

It seems a long time ago now, but we were once again delighted to welcome friends and colleagues to our annual Christmas party at the end of November, this year taking place at the Pepys pub overlooking the Thames by the Millennium Bridge. We look forward to seeing you all again in just a few months for the Summer party.

London Marathon 2018

Our very own Sam Wallace is running this year's London Marathon in support of HASTE (Help African Schools to Educate), a charity providing educational materials, electricity, staffing and equipment to educational projects in Africa. If you would like to support Sam's efforts and sponsor him, please visit http://bit.do/samwallace.

New Pupils

We are pleased to welcome Sam Prout and Meredith Major who recently commenced their pupillages in chambers where they will experience the full gamut of chambers' work. Sam will be on his feet in April 2018 and Meredith in July 2018. We wish them both the very best of luck.

Anna Hefford

Congratulations to Anna Hefford and her partner James on the birth of their son Horatio, born on 28 October 2017, weighing 8lbs 1.5oz. Mum says he's very chatty, signalling a possible career at the Bar!

Private Law Children Update

by Alyssa Howard

In this private children law update I will consider recent decisions which deal with the following issues:

- The role of the Family Courts in contact cases involving issues of discrimination and human rights;
- The re-iteration of the principles the Court must follow and the duty of the Court regarding the promotion of contact between a child and a parent;
- The severance of contact between a parent and a child;
- The duty of professionals in complex private children cases;
- Guidance on cases involving allegations of domestic violence and the cross-examination of an alleged victim by an alleged perpetrator

Re M (Children) [2017] EWCA Civ 2164

This is a widely reported case in which the Court of Appeal overturned Jackson J's (as he then was) decision to order only indirect contact between a transgender father (F) and her children, who were members of an ultra-orthodox Jewish community.

Background

F had been rejected from the North Manchester Charedi community due to being transgender. She originally brought an application for direct contact with her 5 children in 2015. The matter came for Final Hearing in 2017 was heard over 5 days. There was extensive evidence from Rabbis, the community and other organisations, such as the Anna Freud Centre. In his judgment, Mr. Justice Peter Jackson was highly critical of the community's viewpoint and indeed set out 15 compelling reasons in favour of an order for direct contact. However, he ultimately concluded that due to the harm caused by the likely ostracism the children would face by the community, that there could be no direct contact between them and F. This was despite recognition of the clear harm that would be caused to the children by denying them their inalienable right to a relationship with the Father. *(J v B (Ultra-Orthodox Judaism: Transgender) [2017] EWFC 4)*

F's appeal

F's appeal succeeded on all three grounds, which are quoted verbatim in the judgment at [40]:

1) In his careful survey of the wide constellation of cultural and religious concerns, the judge ultimately lost sight of the paramountcy principle.
2) The judge failed to evaluate why indirect contact and the giving of narratives to the children about their father's transgender status was in the children's best interest and direct contact was not.
3) The judge failed to exhaust the court's powers to attempt to make direct contact work.

Judgment

Munby P gave the leading judgment which set out the following two core principles:

Promotion of contact – the Court gave consideration to the principles which must be taken into account when considering contact disputes, as set out in *Re C (Direct Contact: Suspension) [2011] EWCA Civ 521*. The State, and therefore the judge, has a positive duty to reconstitute the relationship between parent and child and attempt to promote contact. All alternatives must be contemplated and grappled before abandoning hope of achieving contact. An order for no direct contact is a last resort and the attempt to promote contact should not be abandoned until it is clear that the child will not benefit from continuing the attempt.

"An order for no direct contact is a last resort"

Judicial Reasonable Parent - this is the function of a judge sitting in the Family Court, as laid out at [60]. The judge must consider the child's welfare by the standards of reasonable men and women in the current day, bearing in mind that the reasonable person is *'receptive to change, broadminded, tolerant, easy-going and slow to condemn.' (Re G (Residence: Same-Sex Partner) [2006] EWCA Civ 372*. Today's society is a plural one in which a family takes many forms.

The Court also addressed *The Equality Act 2010 and Articles 14 and 9 of the European Convention on Human Rights*. In the course of the first hearing, the Court had heard some evidence which suggested that the children's ultra-orthodox school had behaved or would in practice behave unlawfully by discriminating against the children due to F's status as a transgender parent. Jackson J referred the judgment to the Minister of State for School Standards at the Department of Education, in order for them to determine whether or not any action was required regarding the school's stance, but expressed a view that this was not a matter which the Family Court were able to control.

Munby P elucidated the Court's duties under HRA 1998 as a public body and gave guidance for the High Court when it reconsiders the matter in due course:

i) The court as a public body has a duty to comply with ECHR rights, which includes Article 14. Transgender status is protected by Article 14 and due to the subject matter of the application falling within the ambit of Article 8 right to family life, Article 14 could be engaged without having to demonstrate a breach of Article 8. The Court must [115]: *'scrutinise with care the suggested justification for the apparent discrimination which the father faces on the ground of her transgender status, not least to ensure that the court itself does not breach its duty under section 6 of the HRA'.*

ii) In cases where Article 9 is applicable and engaged, there can be a restriction imposed pursuant to Article 9(2) where the religious views and practices of the community are not compatible with the views of a democratic society. Per *Re G (Children) Religious Upbringing: Education) {2012] EWCA Civ 1233* there is a limit to religious freedom where it involves physical or psychological harm. Citing religious belief as a motivation does not make discrimination lawful. The Court of Appeal doubted that the actions of the community in excluding the children could be considered to be a manifestation of those beliefs for the purposes of Article 9, with a view to Strasbourg jurisprudence.

iii) Where there is action by a school which is unlawful, then the Court should not have made it a factor against ordering direct contact [97]. Although The Equality Act 2010 cannot apply to 'the community' as a single entity, it can apply to schools.

iv) The Court of Appeal compared the powers of the court in complex cases where religion is not in play, such as those involving alienation. The court in those circumstances are robust in defending the child's best interests and their relationship with the non-resident parent, in some cases making orders for a transfer of residence or issuing public law proceedings with a view to taking the children into care. The Court of Appeal queried at [66]: *'Is the approach, should the approach be, any different merely because religious belief, practice or observance is in play? The answer in essence must be: No.'*

Comment

The Court of Appeal in *Re M* gives clear guidance on how the court should manage discrimination when assessing welfare. It also reiterates the key principles and the frankly muscular approach a Court should take in resolving difficult contact disputes. Rightly, the Court of Appeal regarded the outcome in this matter to '*have profound significance for the law in general and family law in particular.'* [5]. It has been remitted to the High Court for re-consideration.

F v H (and other) [2017] EWHC 3358 (Fam)

This was another knotty case in which the High Court on appeal set aside an order for direct (supervised) contact between the

Mother and child. There was a long history of emotional abuse on the part of the Mother, who had also previously abducted the child to Israel. The Court here too considers the making of orders for no direct contact. The full background, as set out in the judgment of Russell J, makes for some quite distressing reading.

Background

This was a longstanding and protracted matter in which F had originally made an application under s8 CA 1989 in 2013 to spend time with the subject child (B) who was then only a few months old. The Mother was entirely and determinedly hostile to contact. In the course of proceedings she also made repeated and baseless allegations that the Father had sexually abused the child. M submitted B to numerous intimate medical examinations and other intrusive investigations.

"Re M...reiterates the key principles and the frankly muscular approach a Court should take in resolving difficult contact disputes."

In 2015, the Mother unlawfully abducted B to Israel. The Court ordered B's immediate return and she thereafter lived with F at a confidential address. B was made a child in need and directions were made repeatedly that M be psychiatrically assessed. It was made clear that no contact could take place until M was assessed and engaged in appropriate treatment. Contact did not take place for 2 years. M failed to comply with the court's directions and F was also forced to apply for injunctive relief due to M rummaging through his rubbish bins at his property and following B and her carer at a distance.

Eventually a psychiatric assessment was carried out on M by a Dr Oyebode. The Court found this assessment however to be 'completely flawed' as the expert had only familiarised himself with papers given directly to him by M and had not read the Court papers or previous judgments.
In 2017 when B was 4, she was joined to the proceedings and a Guardian appointed. The Guardian, again having only read a limited selection of the papers, including the *flawed* report of Dr. Oyebode, recommended that she supervise some direct contact between B and M. An order was made for fortnightly supervised contact which was largely based on the oral submissions made on behalf of the Guardian.

Judgment

Russell J allowed F's appeal and set aside the order for direct contact, emphasising:

i) As per *J-M (Child)[2014] EWCA Civ 434* contact between a parent and child should only be terminated in **exceptional circumstances**. This was a case that met that high threshold. It was a precondition to any contact being reinstated that the Mother would be assessed and commence appropriate treatment. The judge was wrong to *'try out'* contact based on the Guardian's recommendations, who was not a professional qualified to make an assessment of M's mental state or B's emotional resilience. The judge should not have reversed her previous decisions on what amounted to *'flimsy evidence'*.

ii) The focus as whether or not there should be contact, should as per *ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 [2011] 2 AC 166* be focussed on the best interests and welfare of the child herself, not on the Mother.

iii) Professionals involved in Children Act 1989 proceedings, particularly those which are complex, should fully inform themselves about the case before offering any recommendations to the Court.

Comment

Russell J rightly admonishes the professionals involved in this case. Her main targets for criticism are the Guardian and the expert psychiatrist who failed to familiarise themselves with the case prior to making recommendations. However, there is also criticism made of the solicitor for the child at [44] for acting solely on the instructions of the Guardian and failing *'to include any separate analysis of the child's position in her position statement.'* This breeds some level of confusion as to the responsibility of the child's solicitor, particularly given that the child in this case was only 4 and a half years old. It is difficult to imagine a scenario, unless there is a serious and fundamental disagreement about analysis, that a solicitor for the child can go against the instructions of her professional client when her lay client is unable to give instructions due to her age.

"It is difficult to imagine a scenario, unless there is a serious and fundamental disagreement about analysis, that a solicitor for the child can go against the instructions of her professional client when her lay client is unable to give instructions due to her age"

Re J (Children: Contact Orders Procedure) [2018] EWCA Civ 115

In a further appeal involving an order for indirect contact only between the Father and the youngest child (with any contact being ruled out entirely between F and the eldest two siblings), the Court of Appeal gave guidance about the approach in cases involving allegations of domestic violence:

i) The observations of Hayden J in *A (A Minor: Fact Finding; Unrepresented Party) [2017] EWHC 1195 (Fam),* in which he made clear it was inconsistent with his judicial oath to allow alleged perpetrators to cross-examine alleged victims, *'deserve wide publication.'*

ii) A judge currently has two options regarding the cross-examination of alleged victims at trial when the Respondent is unrepresented. It may be undertaken by the Respondent themselves with the assistance of a MacKenzie friend (a MacKenzie friend would very rarely be permitted to

assist orally) or by the judge. The preferable option is the latter.

iii) The Courts must apply FPR Practice Direction 12J in domestic abuse cases.

iv) There is a presumption in favour of maintaining contact (s2(a) Children Act 1989) and a positive duty on judges to *'grapple'* with all available options regarding contact.

v) The Court of Appeal endorsed the recent judgments in *Re M* (above), *Re CB (International Relocation: Domestic Abuse: Child Arrangements) [2017] EWFC 39* and *Re D (Appeal: Failure of Case Management) [2017] 3 FCR 451* in their emphasis on the obligation of the courts to strive to achieve contact.

Comment

The Prisons and Courts Bill which proposed extending a ban on cross examination of alleged victims of domestic violence by their alleged perpetrators in the family courts came before Parliament in February 2017 but fell following the dissolution of Parliament in May 2017 prior to last year's general election. The Court in *Re J* expressed its hopes that the Bill will be revived soon.

Conclusion

Although the amendments to the Children Act 1989, as introduced by the Children and Families Act 2014, set out the presumption that, unless the contrary is shown, involvement of a parent in the life of a child would further the child's welfare, that presumption is subject to the requirement that the parent concerned might be involved in the child's life in a way that did not put the child at risk of suffering harm.

Russell J makes plain in *F v H (and other)* that the judge at first instance was wrong to *'experiment'* with reintroducing contact in a case with a background of emotional abuse. Simultaneously, however, the Court is bound by the principles in *Re C [2011]*, namely to *'exhaust all options'* for re-establishing contact. This was clearly re-emphasised by the Court of Appeal in *Re M* (above) and as per *Re J*, it is also applicable to cases involving domestic violence. This serves to illustrate how finely balanced cases can be where there are orders for no direct contact and how the Court must indeed *'grapple'* with such decisions.

Note

Practitioners will know the invaluable assistance professionals can provide in private children cases where the establishment or the continuation of contact is fraught with difficulty. Many may be aware that Cafcass will soon be launching new private law pilots such as the four session intervention 'Positive Parenting Programme' for high conflict disputes.

As highlighted in a recent article in Family Law Week, a lesser known programme in complex private children disputes is the use of Child Contact Intervention plans. Bold Moves (www.boldmoves.co.uk) are an example of a provider of this service used by Cafcass in Bedfordshire and Hertfordshire.

Financial Dispute Resolution Hearings on trial

by Meredith Major

First incorporated into the rules of the court in 2000, Financial Dispute Resolution hearings (FDRs) have become the fulcrum around which financial remedy proceedings are resolved. With proposals to introduce the procedure into chancery proceedings having been made in the last few years, particularly those arising out of familial relationships, this article examines the advantages and disadvantages of FDRs and suggests some improvements which could be made.

Starting with the positives, FDRs provide a unique opportunity for settlement. With everyone in one place at one time, using their best endeavours to reach an agreement, focus is given to the real issues in dispute. Solicitors' correspondence may have been moving in ever decreasing circles but attendance at court for the FDR sets aside a whole day to cut to the heart of the case and grapple with the big issues preventing settlement.
If one of these big issues requires consideration of a legal point or a disagreement as to the correct application of the law, then the judge's indication can be invaluable. With guidance as to whether the case is suitable for a clean break, for example, parties can have a large part of the uncertainty as to the likely outcome at trial resolved to a considerable extent. Of course, the indication does not represent a ruling but an authoritative indication from an expert judge, communicated directly to the parties, can carry enough weight to effectively remove a major source of disagreement.

Related to this is the opportunity for a judge to offer a reality check to parties who come into the FDR with wildly unrealistic expectations, despite the advice they may have been given to the contrary. A firm, sometimes forthright, expression of judicial opinion to an otherwise obstinate litigant may be the only thing capable of dislodging such an expectation despite the previous best efforts of their legal representatives.

At least the last two of these advantages however are significantly affected by factors which are beyond the lawyers' control. Beyond the Family Division and the CFC, FDRs are often heard by judges who are not experts in money work or even family law. A deputy district judge well versed in civil matters may arrive on their first day sitting to be faced with a long list of FDRs. However, learned in the areas of their experience, they are unlikely to be able to give clear, authoritative guidance on points of law or to check the unrealistic expectations of recalcitrant parties. As with any hearing, different judges have different styles, but the greater their experience the more likely they are to quickly assess the atmosphere in the room, skilfully

bring the temperature down and guide the parties towards settlement. With the nationwide roll-out of Financial Remedy Units (FRUs) it is hoped this will improve, but until then these issues remain.

A second issue arises out of this. Cases which reach FDR are necessarily difficult. 84% of couples divorcing do not contest the financial arrangements. Those that enter the adversarial court process at all are already in a minority and thus need expert assistance to resolve a dispute with life-long consequences in the emotional aftermath of a marriage breakdown. A judge who has a list of up to 12 FDRs during a single court day, however skilful or experienced, cannot possibly have the time to deal with cases which are unusually problematic. At the High Court a specialist financial judge will have a whole week booked for FDRs with one FDR listed per day, and sometime over two days. This gives ample time for parties to return to the judge for further indications as the issues narrow. Of course, these resources are not available in the regular Family Court and the legal issues are often less complex; but for the parties, the case, and its ramifications matter far more. In every High Court financial remedy case there are enough resources for everyone to be comfortable, but in regular Family Court cases there is often very little surplus once housing needs have just about been met. Judges need time to hear from advocates, more than once if necessary, and to give an indication as early as possible, rather than parties being stuck waiting until midday or beyond.

These two issues, lack of experienced judges outside the FRU and over-listing, contribute to another major disadvantage with the FDRs as they operate at present: pressure. The FDR is good because it focuses minds but for some, this tips parties into feeling they have no option but to settle, that day, on terms which are not agreeable. Any other agreement, even a phone contract, gives you the option to return tomorrow. A high proportion of family court litigants are vulnerable, they are often emotional and unfamiliar with the process of negotiating about money. With judges telling them that their only other option is a final hearing with an uncertain outcome, costs doubled and greater than the amount they are fighting over, clients can feel extremely pressured into accepting a bad deal because they are told it is the only sensible option.

"This leads into the problem which concerns me the most, a carelessly handled FDR which favours the unreasonable"

This leads into the problem which concerns me the most, a carelessly handled FDR which favours the unreasonable. If the party in a financially stronger position puts in a low offer, following an imprecise indication, the weaker party can be given few other options. If the judge does not push hard against a bullying spouse, the offeror gets away with being unreasonable. Whatever the fairness or otherwise of the offer proposed the other party's lawyers cannot advise spending another huge amount of money on legal fees to final hearing if the amount in dispute is less than that and the offer potentially within the wide band of discretionary outcomes a judge at final hearing could make. As

with any negotiation or mediation if the professionals involved are not attuned to issues of power the court process becomes another mechanism through which it is asserted.

Finally, a point on fairness more generally. Whatever its other faults most parties genuinely expect a fair outcome when they attend court. Of course, if their view of fairness is out of step with the current law they will always be disappointed but for many they accept the basic principles the court will apply. Yet, if the FDR judge's indication is wrong, the cost of going to another judge is prohibitive. Fairness does not simply mean the process or applying the law as it stands, it means doing justice between the parties. Too often that is not achieved, and parties are left feeling aggrieved because a commercial decision has to be taken on costs.

"Fairness does not simply mean the process or applying the law as it stands, it means doing justice between the parties."

It is nearly always in everyone's interests to reach a fair agreement as far before the final hearing as possible. In cases of significant non-disclosure, jurisdictional disputes or those which raise novel points of law this may not be true. For all others, it is, but the pressure of the FDR can create an intolerable burden. Parties need to be advised both by their lawyers and the judge, that there are other options to settling that day. An adjourned FDR, a further private FDR, a round table meeting, arbitration, and further solicitors' correspondence are all options that can allow parties time to think clearly and come to a more considered agreement. Everyone has a duty to save costs, but fairness should not be sacrificed in pursuit of avoiding a final hearing because there is a lack of creativity in considering other options.

The FDR is a valuable tool for achieving settlement but there needs to be improvement in order to protect vulnerable parties and afford time to all litigants to reach sensible, fair and cost-effective outcomes.

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