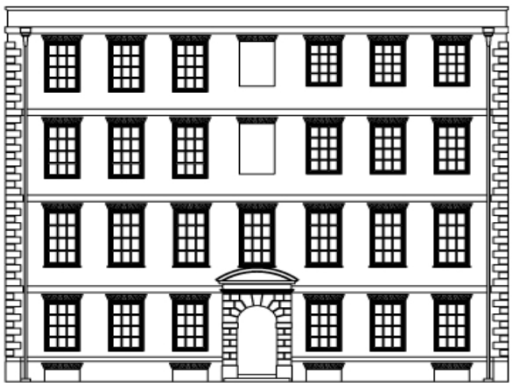

New Court Chambers

NEWSLETTER

Spring 2023 No. 18

MESSAGE FROM THE HEADS OF CHAMBERS

It is a great pleasure to introduce this, our 18th New Court Newsletter.

Since the last addition, we are delighted to have welcomed George, Grace, and Michael as new members of chambers.

George, a spirited adversary over many years, has crossed over to this side of the profession. Grace and Michael, having excelled in pupillage, accepted offers of tenancy late last year.

We are very pleased to welcome our 3 pupils; Carolina, Gabriella and Emma, who as you read on, you will see have contributed so well to this newsletter. Having nearly completed their first 6 months with us, the pupils will be 'on their feet' just the other side of Easter.

After 4 years as Editor, Jemimah hands over this task Grace and Michael. Many thanks to our outgoing and incoming editors.

We hope you enjoy this newsletter. Feel free to provide any feedback, I'm sure the editors will be delighted.

Chris and Giles

MESSAGE FROM YOUR EDITORS

I have had the pleasure of editing this newsletter for the past 4 Years. We have faced the pandemic and lockdown as well as numerous changes in the legal landscape and the way we run our cases during that time and I hope that this regular (ish!) newsletter has assisted in navigating some of those changes as well as keeping you all up to date with the goings on at New Court.

Now is the time to pass the baton on to the very capable Grace and Michael and I look forward to reading their take on this New Court staple!

- Jemimah

With a focus on case law updates, we hope we can assist those practising in family law stay up to date with changes and challenges in practice.

For this edition, we have put a spotlight on our three excellent pupil barristers: Carolina Bax, Gabriella Slater, and Emma Vincent. All three have written pieces for this newsletter and are due to start on their feet in April 2023.

- Michael & Grace

Re S (A Child) and Re W (A Child) (s.20 Accommodation) [2023] EWCA Civ 1

GABRIELLA SLATER

The appeals concerned the interplay between care orders which have been made pursuant to s.31 Children Act 1989 ("CA 1989") and the voluntary accommodation of children in need under s.20 CA 1989. The issue is whether, and in what circumstances, with the threshold criteria having been established and there being in place an agreed care plan, the court should decline to make a care order and instead make no order in accordance with the 'no order' principle [s.1(5) CA 1989].

Background

S (aged 9) and W (aged 15) were placed and settled in long term placements provided by two separate local authorities. S was living in a residential unit and W in foster care. The threshold criteria for the making of a care order was satisfied by way of both children being beyond parental control. The placements and care plans were supported by the children's parents. In both cases, at first instance, the judge had decided that it was in the child's best interests to be the subject of a care order.

The appellants appealed the care orders on the basis that it was appropriate for local authorities to accommodate the children long-term under s.20. It was common ground that case law to date has focused on s.20 accommodation as a short-term or temporary solution for children rather than a long-term basis.

Comparison of Section 31 Care Orders and Section 20 Accommodation Orders

S. 31 orders were described as being 'the more draconian order and more interventionist.' The Court was in agreement with this description stating that 'not only does a local authority acquire parental responsibility pursuant to s.33(3)(a) CA 1989 when a care order is made, but also under s.33(3)(b)(i) CA 1989 the local authority may 'determine to extend which a parent may meet his or her parental responsibility for the child in question.' [38]

By contrast, a s.20 accommodation order 'facilitates partnership and where it is functioning well under an agreed care plan, not only is the making of a care order not necessary, but it is disproportionate'. [38]

The court consider Lady Hale's judgment in Williams & Another v London Borough of Hackney [2018] UKSC 37, [2018] AC 421. Lady Hale recognised the emphasis in Part III of CA 1989 on partnership between parents and local authorities in making decision about children. She highlighted that any attempt to restrict the use of s.20 runs the risk both of undermining the partnership element and of encroaching on a parent's right to exercise parental responsibility in any way they see fit to promote the welfare of their child.

The Court went on to consider the case of Worcestershire County Council v AA [2019] EWHC 1855 (Fam) where Keehan J suggested a non-exhaustive list of examples of cases in which it may be appropriate for the local authority to accommodate a child under s.20 without making an application under s.31 CA 1989 for a care order (at [12]). Whilst the examples listed in that case do not align exactly with the facts of either Re W nor Re S, it is worth noting that the common thread is the need by parents who are not at fault, to secure longer term support and services by way of accommodation, without the need for s.31 orders, in circumstances where they will work in partnership with the local authority.

The court also considered in the matter of H-W (Children) [2022] UKSC 1451 where Dame Keegan considered an appeal concerning the proportionality of care orders. Dame Keegan noted that a care order should only be granted if it is the least interventionist order possible. Otherwise, it will constitute a disproportionate interference with the child and their parents' Article 8 rights.

King LJ finally considered the 2021 report of the President's Public Law Working Group ("PLWG") and its Best Practice Guidance on s.20 accommodation. The report recommends that there should be no time limits on s.20 accommodation however, where possible, the purpose and duration of any s.20 accommodation should be agreed at the outset and regularly reviewed.

King LJ concluded: 'the statute is unambiguous; there is no time limit on the length of a section 20 order. Rather, the guidance goes to the proper use of section 20 orders by building on and fleshing out, the observations of Baroness Hale in Williams v Hackney LBC. For my part, I can see no inhibition on a s.20 order being made in appropriate circumstances for a longer period of accommodation provided that proper consideration is given to the purpose of the accommodation and that the regular mandatory reviews are carried out.' [62]. In light of this, King LJ decided that further judicial guidance on the proper use of s.20 would be of little benefit.

The Appeals

The Court of Appeal allowed both appeals and ordered that the children remain in their current long-term placements provided by the respective local authorities under s.20.

In respect of Re S, the court concluded that the judge at first instance had erred in his assessment of the risk presented by the father to the stability of S and to his placement. The court found that granting a care order was not a proportionate response to an unsubstantiated risk that the child's father might disrupt the placement by revoking his consent to s.20.

In respect of Re W, the court found that the judge at first instance had erred in believing that s.20 accommodation could only be a short-term measure, which in turn, had disproportionately weighted her analysis in favour of a care order. The judge, whilst referring to the no order principle in her judgement, did not refer to the welfare checklist. Had she done so, it may be that a more detailed analysis of the welfare benefits for and against the making of a care order would have been in sharper focus. Further, that in any case it would be disproportionate to make a care order primarily to grant the local authority parental responsibility as a means of setting boundaries and challenging behaviour should it arise in the future.

King LJ concluded that these two cases must be viewed in context: that they are in relation to children who are settled in long-term placements, which are meeting their respective needs, in circumstances where both the placements and the accompanying care plans are supported by the parents.

43 Years of Return Orders under the 1980 Hague Convention: an update on defending return orders under the terms of Article 12(b) and Article 13(2)

GRACE ROBERTSON

The 1980 Hague Convention acts to protect children having been wrongfully removed or retained outside of their habitual residence jurisdiction and establishes procedures to ensure the prompt return of abducted children to that State of their habitual residence. Having been in force now for over 40 years, Hague Convention proceedings remain common place in the High Court and concerns for children's private and public law practitioner's alike. Return orders too, as was the Hague Convention's intention, remain notoriously difficult for the removing parent to defend. Arguing such a defence remains a feature in family practioners' workload. This article sets out two cases so far in 2023, which may further assist in understanding where the acceptable bar of the desperate and endangered parent, sits against the welfare impact of a child's sudden and unplanned move from their home.

AO V LA [2023] EWHC 83 (Fam)

Background

A son (11) and daughter (8) were taken from Ireland to England by their mother (M) in August 2022, prior to the parents' final hearing in respect of private children proceedings. M accepted that the removal was wrongful within the terms of the 1980 and 1996 Hague Conventions It was not disputed that the children were habitually resident in Ireland and that Ireland would be the jurisdiction to consider the long term welfare decisions of the children. M sought to oppose the order for the return of the children forthwith to Ireland. M relied on Article 13(1)(b) (grave risk of harm) and Article 13(2) as a defence (children's objections).

Argument

M argued she could not return to Ireland as she had relinquished her housing and had no financial capacity to support herself and the children if she returned. M further relied on the Cafcass report which she submitted recorded her children objecting to returning to Ireland and that both held an appropriate degree of maturity. M further raised that no protective measures, including contact only between solicitors and maintenance to be paid by F to M would not be sufficient enough to have her consider returning to Ireland.

Discussion

Mostyn J collated the provisions of Article b) as an 'intolerable peril'. He went on to state that the court must be satisfied that 'there is a "grave risk" of the child having to endure an intolerable peril' [37].

In assessing the reality of the grave risk to the children, Mostyn J made the following evaluation: *'All of the supposed grave risk of intolerable peril is a result of the mother's unlawful and wrongful conduct. It would be a remarkable example of the triumph of injustice over justice, of wrong over right, if a mother could clandestinely relinquish her housing, pluck the*

children out of school, remove them to England in breach of a court order and then state that she will not accompany if they are returned, thereby enabling her to present them to this court as prospectively abandoned, homeless, unschooled and destitute with the result that a return order is refused on that basis.' [78]

Mostyn J went on to consider the approach to take when assessing the child's objections to returning, dismissing previously held distinctions between a child's 'wish or preference'. It was noted by the court that the children's views 'have been influenced' by their mother and this was a factor in not finding M's defence made out. However, overriding this, Mostyn J indicated that *'irrespective of whether their wishes have been the subject of influence by their mother, I cannot see how, on the facts of this case, where the conduct of the mother has been so blatant, the wishes of the children could deflect the court from making the decision which justice cries out to be made'* [90].

Use

This case highlights three things for the practitioner. Firstly, that the 'grave risk' pled as a defence should not be in any way attributable to the parent who has wrongly removed the child. Secondly, an objection on the part of the children will likely not be viewed as genuine in the event the removing parent's views are evident within the

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the language of the children. Thirdly, the over-arching principle of justice will prevail and be a final consideration for the court when examining whether to use their discretion in making an order for return even if this be against the children's views. In general, this case emphasises the difficulties for practitioners arguing to defend a relocation of children if this is done contrary to the terms of the Hague Convention 1980.

Re: S (A Child) (Abduction: Article 13(b): Mental Health) [2023] EWCA Civ 208

Background

Arburthnot J ordered the summary return of the parties' son, S, (6) to Australia, deciding that the mother (M) had not proved an exception under Article 13(b) was established. M's older child, A, (9) had come with M and S to England. The father was the parent of S, but not A.

M has a history of chronic mental health issues which had been exacerbated by the discovery that F had had a lengthy affair with her closest friend. In April 2020 M *'self-harmed and attempted to take her own life and was admitted to hospital for psychiatric treatment. She remained in hospital for five weeks.'* [14].

Throughout the hearing, expert evidence was heard from Dr Ratnam, psychiatrist. Dr Ratnam stated that a return to Australia would 'in all likelihood' impact adversely on M's mental health. He went on to raise that *'if it was decided that the mother were to return to Australia it is very important that measures are put in before she goes from a mental health perspective to try and prevent deterioration to such an extent.'*

Defences

M argued allegations of physical abuse of herself and the children; that she had been subjected to a coercive and controlling relationship by F; that the return to Australia would damage her mental health; and that S would be impacted by being separated from A.

Judgment

Arburthnot J considered the arguments separately and found Article 13(b) was not made out. Emphasis was put on the safeguards proposed by F to include M's to have professional support in Australia for her mental health. Aburthnot J then concluded that article 13(b) was not established because: 'Taking the risk of harm at its highest the protective measures put forward by the father will be sufficient to mitigate if not eliminate the risk of harm from the mother's mental health' [77]

Appeal

M argued that the analysis of the safeguards was flawed taking into account the evidence from Dr Ratnam. She further sought for the application for the return order to be dismissed.

Discussions

LJ Moylan outlined that Arburthnot J had recorded Dr Ratnam as having said that M's mental health 'could' deteriorate rather than it 'in all likelihood' deteriorating. Further, Dr Ratnam's emphasis that the measures were required prior to M returning to Australia appeared to not have been stressed in the judgement. This had led the judgment at first instance to conclude that the safeguards of F assisting M in securing mental health provision in Australia were sufficient.

Of particular note, the Court of Appeal warned against taking each ground of the defence in isolation, citing the recent case of Re B (Children) [2022] 3 WLR 1315: [70] *The authorities make clear that the court is evaluating whether there is a grave risk based on the allegations relied on by the taking parent as a whole, not individually. There may, of course, be distinct strands which have to be analysed separately but the court must not overlook the need to consider the cumulative effect of those allegations for the purpose of evaluating the nature and level of any grave risk(s) that might potentially be established as well as the protective measures available to address such risk(s)."*

It was stressed that this was particularly the case when assessing the separation of S and A as it was clear this would have a direct impact on M's mental health and therefore some cumulative analysis was required.

The appeal was allowed and the father's application under the 1980 Convention was dismissed.

Use

It is firstly significant the emphasis which the Court of Appeal placed on the evidence from expert psychiatrist Dr Ratnam and laterally how proving that the removing parents' mental health would be likely to deteriorate before returning was essential for the success of M's defence. The need for M to recommence medication and attend therapy to 'stabilise' her mental health before returning was pivotal in dismissing the return order and sits somewhat uncomfortably with the prospect that this delay and risk of harm factor may to some extent be attributable to M's own decision not to engage in such treatment herself once back in the UK.

It is further important to note the continued emphasis on the need for grounds set out in support of an exception to be considered separately as necessary but interconnections and causations between them also be evaluated to consider the collaborative impact in whether taken together could surmount the 'grave risk' requirement to establish the defence.

Finally, it is significant perhaps in its absence, that the allegations of serious physical abuse against the father in respect of his treatment of both M and the children were considered relatively briefly. It is clear that consideration of the likelihood of repeated abuse is deemed by the court to be mitigated effectively by the parents' separation. However, in the context of different cultures, backgrounds and contact arrangements across the World it is perhaps surprising that such a defence seems to succeed so rarely in reported cases when the risk of a vulnerable person returning to an abusive relationship is heightened by returning the removing parent into the other parent's immediate circle.

Hudson v Hathway [2022] EWCA Civ 1648 – detrimental reliance and common intention constructive trusts

EMMA VINCENT

Since the House of Lord and Supreme Court cases of Stack v Dowden [2007] UKHL 17, [2007] 2 AC 432 and Jones v Kernott [2011] UKSC 53, [2012] 1 AC 776, there has been a degree of uncertainty regarding the need to demonstrate detrimental reliance in a claim concerning a constructive trust arising from the parties' common intention. In this case, the Court of Appeal provides important clarity on this issue through a detailed and useful discussion of the authorities pre and post Stack v Dowden and Jones v Kernott.

Neither case required the court to directly address detrimental reliance, but the lack of explicit reference was interpreted by some as indicating a shift in the necessity of detrimental reliance. Indeed, such an interpretation was adopted by Kerr J upon Mr Hudson's first appeal in this matter. However, the Court of Appeal resolved any potential confusion by confirming the long-standing need to show detrimental reliance in a case concerning common intention constructive trusts.

BACKGROUND

In 1990, Ms Jayne Hathway and Mr Lee Hudson started a relationship. They never married and in 2009 Mr Hudson left Ms Hathway for another woman. During their relationship, Ms Hathway and Mr Hudson purchased Picnic House. The parties bought the property in 2007 in joint names with the assistance of a mortgage, though there was no declaration of trust. After the end of their relationship, Ms Hathway remained in Picnic House with the parties' two children, though both Ms Hathway and Mr Hudson continued paying towards the mortgage.

In 2011, Picnic House was damaged by an oil spill from a neighbouring property, severely impacting the parties' ability to sell the house. This prompted a sporadic course of email correspondence between Ms Hathway and Mr Hudson regarding financial arrangements. In 2013 the parties came to an agreement, with Mr Hudson writing on 30 July: *" ...which leaves the house, a bad asset which is preventing all of us [from]...moving on with our lives... You know what, I want none of the proceeds of that either. Take it. Buy yourself somewhere you can afford to live..."*

The email was signed "Lee".

On 12 August 2013, Ms Hathway replied: "...your suggestion, as I understand it, is you get sole ownership of your shares and pension, I get the equity from the house, the house contents, savings and income from endowments...".
On 9 September 2013, Mr Hudson confirmed via email:

"Yes that's right...under this arrangement, I've no interest whatsoever in the house, so whilst I will continue to contribute, I won't do so forever...".

Again, the email ended with "Lee".

Mr Hudson continued contributing to the mortgage until January 2015. Ms Hathway then took over the payments, while remaining in the house with the children.

In October 2019, nearly five years later, Mr Hudson issued his claim under CPR Part 8 and the Trusts of Land and Appointment of Trustees Act 1996, seeking the sale of the house with the proceeds to be divided equally.

Ms Hathway agreed the house should be sold, but asserted she was entitled to the entirety of the proceeds of sale under a constructive trust following a common intention and agreement between the parties, which she had relied on to her detriment.

At trial, the judge held that Ms Hathway was entitled to 100% of the beneficial interest in Picnic House. Ms Hathway had given up potential claims to Mr Hudson's shares and pension, which both parties believed she had claims to, and this amounted to the necessary detrimental reliance. [30]

On first appeal, Kerr J disagreed that Ms Hathway had to demonstrate she had changed her position or acted to her detriment. Kerr J held this requirement had been revoked by the decisions in Stack v Dowden and Jones v Kernott. Kerr J stated that even if he was wrong on this point, the trial judge was still entitled to conclude as he did.

THE APPEAL

Lord Justice Lewison gave the lead judgment, to which Lady Justice Andrews and Lord Justice Nugee agreed.

Lewison LJ first considered Ms Hathway's application to amend her Notice to address the point that Mr Hudson's emails satisfy the statutory formalities under section 53(1) of the Law of Property Act 1925.

> ***1. The case had not been advanced in this way at trial or on the first appeal, which was a deliberate decision by Ms Hathway. [37]***
> ***2. There would have been further evidence that might have been called at trial had the point been taken. [40]***
> ***3. Mr Hudson had suffered detriment in a broad sense and he might have adopted a different approach to a potential settlement. [41]***

Upon hearing Mr Hudson's objections, it was held that *"the balance of justice comes down in favour of allowing the new point to be taken."* [42]

In concluding that Mr Hudson's emails of 30 July 2013 and 9 September 2013 amounted to a disposal of his interest, Lewison LJ discussed whether an electronic signature in an email is a valid method of authenticating a document.

Paragraphs [56] to [66] of this judgment highlight the substantial case law on this issue, which plainly reveals that *"deliberately subscribing one's name to an email amounts to a signature."* [67]

Nugee LJ agreed that Mr Hudson writing "Lee" was a conventional way to sign off an email, satisfying s.53(1) of the LPA 1925 and meeting the requirement in the authorities to authenticate a document.

Lewison LJ definitively states that as a consequence of those emails, Mr Hudson released his beneficial interest in Picnic House to Ms Hathway and therefore this is sufficient to dispose of Mr Hudson's claim. [68-69]

However, the court emphasises that Mr Hudson was granted permission to appeal a second time to enable the court to address the principle – can a constructive trust arise as a matter of common intention, without the need to show detrimental reliance on that intention?

The subsequent paragraphs within this judgment at [70] to [94] provide a detailed overview of the authorities which developed the need to demonstrate detrimental reliance. Lewison LJ noted the principle arising from Grant v Edwards [1986] Ch 638, that detrimental reliance is necessary for a claimant seeking to establish a beneficial interest.

Following a discussion of the case law since Grant v Edwards, the court addressed the position post Stack v Dowden and Jones v Kernott.

Although detrimental reliance was unchallenged in both cases, Lewison LJ highlights that neither case purports that detrimental reliance is unnecessary; with Lord Walker and Lady Hale in both cases referring to and approving of Grant v Edwards. Simply because the courts were silent on the issue in Stack v Dowden and Jones v Kernott does not mean that one can deduce they sought to do away with the need for detrimental reliance.

Indeed, this is the approach adopted since Stack v Dowden and Jones v Kernott, as Lewison LJ detailed at paragraphs [110] to [128]. The authorities continued to recognise the need to show detrimental reliance, and Lewison LJ referenced his judgment in Curran v Collins [2015] EWCA Civ 404, [2016] 1 FLR 505 at [77], that *"...[t]he need for detrimental reliance on the part of the claimant is an essential feature of this kind of case..."*.

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The Supreme Court's recent decision in Guest v Guest [2002] UKSC 27, [2022] 3 WLR 911 is also highlighted at paragraph [126] as reaffirming the importance of detrimental reliance and the role it plays in establishing common intention constructive trusts.

At paragraphs [129] to [141], Lewison LJ incorporated the opinions contained within the key textbooks, highlighting their agreement with his decision in Curran v Collins. It is undeniable from the extracts of the seven key texts referenced by Lewison LJ that the widely held view is that one must have acted to their detriment following the establishment of a common intention to give rise to a constructive trust.

Lewison LJ concluded that post Stack v Dowden and Jones v Kernott, the long-standing principle of detrimental reliance remains crucial to establishing the enforceability of an agreement or promise in equity. [107] Therefore, Lewison LJ held that Kerr J erred in finding to the contrary.

OUTCOME

Having determined that the court is required to ask whether there has been detrimental reliance, Lewison LJ turned to consider whether Ms Hathway had established detrimental reliance.

At paragraphs [154] to [158], the cited case law is clear that when assessing detrimental reliance, a narrow approach should not be adopted. Detrimental reliance extends beyond being purely financial or quantifiable and can include the loss of an opportunity to take a different course of action, as made clear by Lord Sumption in Kelly v Fraser [2012] UKPC 25, [2013] 1 AC 450 at [17].

In this matter, Ms Hathway acted to her detriment by giving up the claims she believed she had to Mr Hudson's shares and pension. Lewison LJ explains at paragraph [169], that Ms Hathway's claim would have been that a constructive trust arose over these assets, due to the common understanding between the parties that they were joint as they had accumulated during their relationship. It was not necessary to determine if Ms Hathway would be successful, just that such action was a legal claim. Therefore, Lewison LJ found that Ms Hathway had relied on the agreement between her and Mr Hudson to her detriment.

Mr Hudson's appeal was dismissed.

FAMILY LAWYER'S "TOOLKIT"

- MAINTENANCE PENDING SUIT APPLICATIONS

MICHAEL CONNOR

Split happens: Getting your MPS application right, first time!

We've all been there. The task is critical, time is tight, there is no room for error. Get it right and you're the hero. Get it wrong and you wear the blame. Mistakes, even with minor figures, can lead to disaster.

This is often the situation with maintenance pending suit (MPS) applications where the credibility of the application and figures are crucial to success. This article aims to take matters back to basics and set out some of the key tips and major pitfalls with applications and hearings.

A decision to make an MPS application is often made early on in proceedings, often in the climate of the immediate and stressful financial strains associated with marital breakdown.

The court's power to award maintenance can be found at s 22 of the Matrimonial Causes Act 1973. There is no special law associated with this relief, with matters invariably turning on their own facts. The court will consider the usual s.25 factors, the only difference being that the application will deal with the necessity of the short-term position, rather than the permanent long-term situation.

The leading case is TL v ML, which held the sole criterion in determining applications is 'reasonableness' i.e. fairness. Specific MPS budgets should be prepared, excluding capital or long-term expenditure. The court will not hesitate to make robust assumptions against the payer (erring in favour of the payee) in the face of clearly deficient figures or disclosure (including where the payer has historically relied on third-parties for support, and now asserts, without more, that the support has now been curtailed). In determining fairness, the marital standard of living will be an important factor, though not to strive to replicate that standard.

The application

An application can technically be made at any stage of proceedings, with the Part 18 procedure being used (Form D11, including the draft order). If no Form E has been filed, file a written statement detailing your client's finances and setting out why the order is necessary. The flavour of the application should be on immediate, rather than mid to longer terms needs. The respondent should respond in kind 7 days prior to the hearing.

From a practical standpoint, the application for MPS should incorporate a specific budget (which excludes long term expenditure) for the court to examine. Subsequent authorities have, however, clarified that budgets in simple cases may not require a high degree of critical analysis and may not be required at all where it simply replicates the contents of the Form E (if already filed). Do think carefully about simply adopting the Form E figures, given the court's focus will be on short term needs, which should be in keeping with the standard of living during the marriage. Excessive figures will not be tolerated.

TIP: **Recent case law has clarified that immediate needs, in the context of MPS applications, simply means needs that will arise pending the resolution of the financial dispute between the parties (i.e. not necessarily 'imminent' needs). Immediate needs also does not have to be expenditure that is payable every month. However, caution must be given against accepting your client's expenses at face value or avoiding 'sniff testing' the relative amounts.**

TIP: **Ensure all figures are given (or recalculated) on the same periodical basis (i.e. monthly or fortnightly etc) and averaged where appropriate. Don't forget to be consistent with net or gross figures.**

TRAP: **Be careful not to include amounts for legal costs – these may be claimed through legal service provisions orders (LSPOs).**

As is the case with other interim applications, the 'no order as to costs' principle does not apply, neither does the prohibition against Calderbank letters from being tendered – so be wary of a respondent attempting to protect their position though this mechanism. If costs are pursued as part of the application, a statement of costs should be filed no later than 48 hours prior to the hearing.

THE HEARING

As with any case, preparation for the hearing is crucial. As one can guess, the court will be focussing on what with applicant really needs to be able to pay their reasonable outgoings. On the flip side, the court will ask itself what the respondent can reasonably afford to pay.

When representing the applicant, your first objective will be to show the shortfall between your client's income and their reasonable outgoings. Your second objective will be to demonstrate exactly how the respondent can afford to cover this gap.

Conversely, representing a respondent means you will be attempting to show the applicant has the capacity to earn more, has misrepresented or exaggerated their outgoings, and/or that in any event, your client simply does not have the means to meet any shortfall.

Tip: Regardless of who your client is, it cannot be overstated how important it is to use accurate and full figures, presented with clarity as the application will be argued on paper, with reference to budgets. These figures will be central to your client's credibility and highly persuasive.

The court will be looking at the applicant's immediate needs and will desperately be trying not to prejudge a financial remedies application. Often the orders tend to be on the lower side and cannot cater for interim lump sum payments. What is important is that a fair level is set, having regard to needs and the standard of living to which the parties have been accustomed.

CONCLUSION

In simple cases, it may be preferable to move on to an FDR or final hearing, without worrying about interim relief. However, a proper arrangement (particularly if negotiated) is preferrable to running up debt while proceedings are ongoing.

In this respect, MPS applications remain a handy interim application for short term maintenance to 'tide' a party over, where necessary, until an application for financial provision can be made and put into effect.

As can be seen, however, these applications are not always straightforward and it is crucial to get the application right the first time around. Clear and robust figures will be credible, highly persuasive and often central to success.

Trap: It is vital to ensure no bill or mortgage payment is missed, as this will often damage a party's credit record which may make it difficult to secure finance at a later stage. This problem is often experienced where a contract is in joint names and one-party defaults, without telling the other – remain vigilant!

False dichotomies? Balancing risk of offending and public policy in the Court of Protection

Carolina Bax

The legal framework

The Mental Capacity Act 2005 is designed to protect and empower people who may lack the mental capacity to make their own decisions about their care and treatment. S.1(5) and S.1(6) of the MCA respectively require that any decision made for 'P', the person lacking capacity, must be made in their best interests, and strive to be the least restrictive option. There is no real "risk to the public" component to the MCA - it is a piece of legislation entirely centred on the facilitation of autonomy and decision-making for P. But what happens when an individual lacks capacity and presents a risk to the public?

Autonomy at the cost of others - A Local Authority v JB (Rev1) [2021] UKSC 52

The Supreme Court handed down a landmark judgement in 2021 when Lord Stephens endorsed the Court of Appeal's assertion that *"although the Court of Protection's principal responsibility is towards P, it is part of the wider system of justice which exists to protect society as a whole."*

P was JB, a single man in his 30s diagnosed with ASD and cognitive difficulties. He expressed a strong desire to have a girlfriend, but his care package included various restrictions intended to prevent inappropriate sexual behaviour towards women. The

The local authority applied to the COP seeking declarations as to his capacity, including to consent to sex. Expert evidence concluded JB could understand the 'mechanics' of sex but was unable to understand the concept of consent.

At first instance, Roberts J held it was not necessary for a person to understand the need for their sexual partner's consent, declaring JB had capacity consent to sexual relations. The Court of Appeal disagreed - Baker LJ emphasised that the fundamental decision was whether JB should in fact engage in sexual relations. The declaration that JB had capacity to consent to sexual relations was set aside, and JB appealed to the Supreme Court. His appeal was unanimously dismissed.

Terminology remained at the heart of this case when it reached the Supreme Court. Revisiting the second instance decision, the Court held that "engaging" in sexual relations was preferable, as it "embraces both (i) P's capacity to consent to sexual relations initiated by the other party and (ii) P's capacity to understand that, in relation to sexual relations initiated by P, the other party must be able to consent to sexual relations and must in fact be consenting, and consenting throughout, to the sexual relations." [90]

In assessing what 'relevant information' JB should have, the Court of Appeal had effectively narrowed this down to:

a) the other person having the capacity to consent

b) consent being given before and throughout sexual activity.

One of the submissions made by the Official Solicitor was that this information would fall beyond the scope of the MCA, by inappropriately extending the legislation to protect members of the public. The court rejected this argument citing that this information was relevant in considering 'reasonably foreseeable circumstances' of a decision as those circumstances envisioned could include JB sexually assaulting or raping others.

The COP has seen various cases over the years that have raised questions as to what 'relevant information' may amount to in relation to sexual relations. Whilst JB may not have filled a gap in the caselaw, it will act as an important reminder of the risks associated with those deemed to have capacity to engage in sexual relations, whilst lacking an understanding of consent. These risks are likely to lead to the prosecution and even detention of the subject P . S.4 of the MCA makes it clear that 'best interests' does not cover public protection, nor the protection of P from criminal prosecution. Ultimately, this author suggests, concluding that the MCA should go beyond the protection of P to safeguard the general public defies the driving force of the MCA itself: that P should be at the heart of any decision.

DoLS made in the public interest - the case of DY

Judd J recently tackled the issue of risk of harm in considering whether DoLS can provide for public protection in DY v A City Council & Anor [2022] EWCOP 51

DY, a man in his 20s, had a diagnosis of ASD, generalised anxiety disorder, and paedophilia. In 2017 he had pleaded guilty to two offences of sexual assault of a girl aged under 13. He received a 26 month Youth Rehabilitation Order, was listed on the sex offender's register for 5 years concurrent with an Sexual Harm Prevention Order, and was prohibited from having contact with children under 16. Having been assessed as a Category 1 offender, he continued to pose a risk of sexual assault to children. DY was assessed as lacking capacity to make decisions about his residence and care, and moved to a care home, subject to a DoLs authorisation. Whilst at his placement, he was subject to various restrictions, including only being able to access the community if accompanied by male staff.

DY challenged the DoLS authorisation both on the basis that he did not lack capacity and that the best interests requirement was not met. Crucially, he argued that the primary aim of the care plan was to safeguard the public, rather than himself, from any potential harm.

DY's capacity challenge succeeded. Expert evidence analysed DY's diagnoses and their relevance to decision-making, concluding that impulsive decisions regarding further offending did not stem from a lack of capacity.

Having stressed her understanding of the respondent parties' concerns, Judd J concluded that the existing SHPO was in place to manage DY's further offending, and any further offending would be a matter for the criminal justice system. She was clear that "most sexual offenders and risky adults have capacity, and, like DY, are not to be managed by a Deprivation of Liberty within the provisions of the Mental Capacity Act 2005."

DY's argument that his care plan solely protected the public from harm, did not succeed. Whilst Judd J accepted DY did pose a risk to the public, she deemed his offending to also pose a risk to himself, particularly in light of the risk of self-harm that accompanied his behaviours. Crucially, she noted that it was "a false dichotomy" to see DY's protection as mutually exclusive from the protection of the general public; it followed that it was in DY's best interests to not commit further offences or risk further offending.

Mergers and Act decisions?

The question of how to evaluate risk was further explored in the 2022 drafting of the Mental Health Act Reform Bill. An independent review of the Act in 2018 was underpinned by concerns that further attention needed to be given to the needs of people with serious mental illnesses and learning disabilities within the criminal justice system. Prior to the independent review, the wording of Schedule 1 of the Act was sufficiently flexible that any determination for arrangements simply needed to be 'necessary and proportionate'.

Unsurprisingly, this became a core point of debate at the report stage in the House of Lords.

Amendments were proposed to highlight harm to the person as being directly linked to the 'necessity' component. Baroness Beacher emphasised that "the best interests test is clearly set out in the Mental Capacity Act, and that carries forward into the Bill [...] this is the most powerful argument for excluding "risk to others" as a criterion for deprivation of liberty under the Bill."

By March 2022, the draft Code of Practice had not only been amplified in this respect but it had gone as far as anticipating the decision that would then be made in DY, outlining: [16.72] "If the person presents a risk of harm to others, it may still be possible to determine that the arrangements are necessary and proportionate to authorise the arrangements to prevent harm to the cared-for person. Such a determination would only ever be appropriate if, as a result of being a risk to others, the person is also themselves at risk of harm. However, the greater the risk to another person – as opposed to the person themselves – the greater the need to consider other alternative legal frameworks such as the MHA.'

If DY is an example of the difficult exercise the COP may face in assessing others as well as the risk to P, the decision in JB highlights the difficulties that interpreting the Mental Capacity Act can present. Questions have since been raised by practitioners as to whether the Mental Capacity Act alone would provide "a complete capacity-based framework for detention and treatment, taking into account both risk of harm to self, and risk of harm to others", were the Mental Health Act to be repealed altogether. This would mean that DoLs would provide the bedrock for a combined mental health and capacity legislation. With the Mental Health Act 2022 geared to be implemented in a staggered fashion, starting from mid-2024, new and revised components may well provide a much needed and less drastic solution.