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The Review

CHANGING FAMILY LAW FOR CHANGING FAMILIES

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Disability: members share their experiences
Re H-N provides wide-ranging guidance on domestic abuse
Transgender and puberty blockers: how the courts respond
Wellbeing: a personal perspective
Analysis of *Hasan v Ul-Hasan (dec'd)*; *Potanina v Potanin*; *Derhalli v Derhalli*; *ND v GD*

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Cover image: Cris McCurley of Ben Hoare Bell receives the Legal Aid Lawyer of the Year Award 2021. We catch up with Cris on page 13.

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Mandation Day

Juliet Harvey *National Chair*

It is time to sign up to MyHMCTS – and please keep Resolution informed of any teething problems

Big change is ahead as HMCTS finally mandates the use of the online divorce service from 13 September 2021. It means the paper D8 form will no longer be accepted for the majority of divorce applications. The only exceptions are for civil partnerships, judicial separation and nullity cases, which are all still required to be processed via the paper route.

I strongly encourage firms and members to be ready for the change and sign up to MyHMCTS in good time before September and to familiarise yourself and your team with the system and the slightly different processes that exist on the platform. HMCTS have provided instructions, guides and videos which we have been sharing in the weekly members e-bulletin and on our website. If you haven't signed up yet, please follow these steps:

- Check that your firm is not already signed up to MyHMCTS (your family department may already be signed up or firms with probate departments may already have accounts). If your firm is using MyHMCTS, request username and password from your administrator.

"HMCTS have provided instructions, guides and videos which we have been sharing in the weekly members e-bulletin and on our website."

- If your firm has not signed up, please register for the service as soon as possible. Your firm needs to nominate an administrator to set up and manage the account.

- To register, firms must have an active fee account (also known as Payment by Account, or PBA). Registering for an account is easy and accounts are usually confirmed within three working days. If you have any questions about setting up an account, please email: *MyHMCTSsupport@justice.gov.uk*

- Once an account has been created, the administrator will be able to manage the account, add additional users and manage permissions.

You can find all the appropriate links to set up your MyHMCTS account and access onboarding guidance on this Resolution webpage: *www.resolution.org.uk/news/mandate-divorce/*. Please also watch out for any banner notifications on MyHMCTS, as these are used to alert users to delays or issues on the platforms. If, having worked through the guides, you require any further support, HMCTS is available to support you. Please contact: *HMCTSFinancialRemedy@justice.gov.uk*

As the National Chair of Resolution, I regularly meet with senior HMCTS officials, where I raise issues members are facing. I would be grateful if you could let me know of any persistent difficulties you experience when using the online divorce service or the financial remedy platforms. More feedback means I can report issues and get fixes to them, which will benefit all of our members as well as your clients. This will also assist HMCTS when building the platform for the new divorce process from April 2022. Please email me at: *chair@resolution.org.uk*

Resolution Awards

This year Resolution is building on our established John Cornwell Award by introducing three new categories to celebrate the rich and varied contributions our members make to create a better family justice system for all. The categories for the Resolution Awards 2021 are:

- **The John Cornwell Award** – recognising an individual or group who has made an outstanding contribution to the field of family justice.

- **YRes Rising Star Award** – for the YRes member who has demonstrated their potential as a future leader in family justice.

- **Working in Collaboration Award** – recognising members who have made a difference to families by working together with other professionals, sharing expertise in innovative ways.

- **The Resilience Award** – for going above and beyond to support staff and clients through the challenges of the pandemic.

Entries are open until 10 September and I'd urge you all to nominate your family justice champions. It seems appropriate that, after 18 months of stress, struggle and challenge, we celebrate the achievements of members who have continued to champion our Code of Practice in the darkest of times. Winners will be announced on Friday 22 October at Resolution's Family Practice Conference 2021. Complete your nominations online at: *www.resolution.org.uk/enter-the-resolution-awards-2021/*

The future of family practice

Talking of the Family Practice Conference 2021, which will take place from 19-22 October, predominantly online, we have invited proposals from anyone who would like to run a workshop on a particular issue.

Resolution is keen to encourage first-time speakers and we hope to ensure that a diverse range of voices are heard and different experiences reflected.

As ever, we will keep you informed of the developing programme by email and on the website. On that note, you will see on the back cover of this issue that the national conference package is available online, and I would encourage members to look at the huge range of topics covered.

chair@resolution.org.uk

Could legal aid reform be on MPs' agenda?

Colin Jones *Chief Executive*

The much-anticipated House of Commons Justice Select Committee report on the *Future of Legal Aid* has warned that the system is in urgent need of reform to ensure the most vulnerable people have access to justice. We couldn't agree more. The LASPO reforms of 2013 eliminated legal aid for the vast majority of family cases, with the result that we now have a legal aid framework where firms are not supported to provide early legal advice – a crucial component for preventing family problems from escalating. The LASPO reforms were a key driver in why Resolution launched the Affordable Advice project, in partnership with Advicenow. It provides an avenue for some of those people to access legal advice and support through what can be a complex and daunting system.

So, it is somewhat heartening to see MPs are finally on the same page as us agreeing that the provision of early legal advice can help make the court work much more effectively, for both our members and their clients. The Justice Select Committee praised the MoJ's recent Family Mediation Voucher Scheme, welcoming it as a positive step to help separating parents, and said that if early legal advice was available alongside mediation, more couples would seek this option successfully. As I mentioned in a previous column, the voucher scheme is a welcome initiative to help separating families, but much, much more action is needed.

Notably, the Future of Legal Aid report considers our proposals for a "family law credit", originally outlined in our 2015 Manifesto for Family Law, as a possible model for widening access to early advice. Separating families would be offered an initial meeting with a family lawyer to help them gather the evidence they need in order to access legal aid, or to discuss their options, ensuring a more cohesive and constructive approach from the start of proceedings.

"It is somewhat heartening to see MPs are finally on the same page as us agreeing that the provision of early legal advice can help make the court work much more effectively."

There's much more to digest from the 80-page report, which our Legal Aid Committee will evaluate. I'd like to thank that Committee for preparing Resolution's submission, with particular thanks to its co-chair, Elspeth Thomson, for giving high-value and compelling evidence to the Justice Select Committee and making sure Resolution continues to influence important policy makers.

colin.jones@resolution.co.uk

"Running flat out up on a down escalator"

Sophia Raja *Adler Family Law Solicitors LLP*

The Nuffield report on changing court demographics makes fascinating reading. It proves, for example, that the court are now dealing with more challenging and complicated cases

I am optimistically cautious about light at the end of the tunnel of lockdown living, so it is a good time to pause and take stock in relation to where we find ourselves in this new world of family practice during a pandemic.

The Nuffield Family Justice Observatory Report, "Uncovering private family law: Who's coming to court in England" was published earlier this year, and offers an opportunity to put our minds to private children law practice. The report seeks to profile families in private law proceedings, their pathways and outcomes, and makes some recommendations on how to improve the process.

The start of the pandemic saw a reduction in private children law applications. I felt this reduction as many Resolution readers must also have done. There was a pause whilst most clients waited for normality to return. Many hearings were adjourned in the now misconceived belief this may be a short-term arrangement. It was quickly evident however that we were in the new normal. We all therefore pressed ahead into the unknown of home working, paperless files and virtual hearings.

The applications began to increase and the report reveals that by November 2020 there was an all-time high of private law applications. This is not surprising news. Like many of the readers of this article this period of living in lockdown has been extremely busy – busier than I would have ever anticipated when entering the pandemic. Sir Andrew McFarlane describes the current private law court process as "running flat out up on a down escalator", which is a sentiment we can all relate to.

Despite the increase in our personal workloads the report reveals that usage of the courts is low when taking into consideration all families with dependent children. It is estimated that only 2% of families with dependent children separate every year. We do not know if the number of separating families is increasing or decreasing. According to the report, however, less than 0.75% of families with dependent children make private law applications every year. This confirms that the majority of separating parents do not involve the courts and come to arrangements themselves. Whether all parties are happy with the arrangements or whether those arrangements are in the best interests of the children involved is an unknown. That, however, may be an issue for another report. We can only focus on the families within the realm of the courts as it is only those families for whom the report was able to access some data.

Despite the rate of involvement in private children court proceedings being extremely low, there are twice as many private law cases than public law cases each year. Just being aware of the delays between hearings being listed, it is evident the courts are struggling with the sheer volume of applications. The demand, however, is not just the volume of applications but also in relation to the needs of the court user, which I will go on to consider.

A system which was already under strain has been exacerbated by the impact of the pandemic. The question increasingly therefore is how will the courts and Cafcass deal with the demand? It is therefore essential to be able to better understand the needs and circumstances of the court user to address this question.

So who are these individuals seeking the assistance of the court and what does this report reveal of their circumstances?

In relation to the applicant, 90% of all applications are made by separated parents. The remainder are made by grandparents or other family members. The father tends to be the applicant in the majority of applications and he also tends to be the non-resident parent – in almost 70% of applications.

Applicants tend to be in their late 20s and early 30s. Only a third of fathers and only a quarter of mothers are over 40. This may be as a result of older parents being less likely to have young dependent children. We may see a shift in this

over the coming years, as the average age for having a child is increasing. It will be interesting to see if this impacts on the type of private law applications the court deals with.

Applications by parents under the age of 25 have decreased over the years. In 2010/2011 some 11% of fathers and 21% of mothers were under 25. However, in 2019/2020 only 5% of fathers and 9% of mothers were in this age group. It is unclear if younger parents are deterred from making applications due to the expense of bringing them to court or if individuals are having children at an older age and therefore are within proceedings at an older age.

The report reveals a clear link between deprivation and private law applications. In 2019/2020 nearly a third of mothers and fathers involved within proceedings lived in the most deprived quintile. Just over half lived in the two most deprived quintile. This is a concerning statistic which requires further investigation.

A further valuation of regional variations is also required. The report reveals that there are a higher number of applications in the North East, North West, Yorkshire and Humber regions. There are a lower number of applications in London and the South East.

What about the types of applications?

The report reveals a reduction in child arrangement applications, which accounted for 69% of applications in 2010/2011 yet only 52% of applications in 2019/2020. Obviously these still remain the majority of applications, but there has been a shift. The majority of applications made by fathers still tend to be in relation to child arrangements, but less than half of applicant mothers are making them. Instead there has been an increase in applications for specific issue orders, prohibited steps orders and enforcement applications. This means the court is now dealing with more challenging and complex cases.

The applications are, furthermore, not just fresh applications. Approximately a quarter over the past three years have been returning matters. It is estimated that two thirds of such cases return within two years. This implies that there are increasing difficulties in making contact arrangements work. It should, however, be noted that serial or chronic repeat returnees are extremely rare at only 3%.

The introduction of the Child Arrangements Programme resulted in the reduction of review hearings. We all recall the bad old days when a child could spent several years being subject to court proceedings with various adjournments and review hearings. It was evident this could not be in the best interest of the child concerned. We are now in the new age of shorter proceedings where possible. In principle, shorter proceedings with finality at an earlier stage for children would seem to be the preferable option. There has not, however, been an evaluation of this change. It is therefore unclear if moving to shorter proceedings is counterproductive as there has been an increase in cases returning to court. Do families come to arrangements without a proper assessment of the best options? Are children being left for long periods with arrangements which are not working? There is clearly much more work to be done to understand the return of cases within private law proceedings.

"There has been an increase in applications for specific issue orders, prohibited steps orders and enforcement applications. This means the court is now dealing with more challenging and complex cases."

There has been a substantial reduction in applications for parental responsibility from 13% in 2010/2011 to only 2% in 2019/2020. This appears to be the impact of s111 of the Adoption and Children Act 2002, which resulted in unmarried fathers gaining parental responsibility by being named on the child's birth certificate.

What about access to justice?

With the introduction of LASPO there was a concern that access to legal recourse would be removed from the toolkit for many families. The report, however, reveals that LASPO may have caused a pause but applications have continued to rise since 2007/2008. The unfortunate but not unexpected legacy of LASPO is that the majority of applicants now are litigants in person, resulting in a justice gap.

This has brought new challenge for courts. The court process has been largely developed on the assumption of legal representation. The language and process is not set up for ease of use by a litigant in person. The short timeframes for court hearings presume there will be two experienced advocates who will succinctly put the agreed and disputed issues before the judge. There is a concern that the decrease in availability of legal advice itself may be resulting in the increase in applications and the complexity of issues before the court. The judge is now left to manage the minefield of emotions between separated parents whilst trying to assess welfare needs and legal issues.

Let's not forget the children involved within the proceedings.

The majority of applications concern children who are living with their mothers at the time of the applications. In nearly 80% of cases the child is aged between 1 and 9 years. There are only a very small number of applications which involve infants. There are equal number of boys and girls involved in litigation and there is no evidence that a child's gender influences litigation. Proceedings concern a single child in two-thirds of all applications. Only a quarter of cases involve two siblings and only 1 in 10 cases involve applications where there are three or more siblings.

The above raises concerns as to the vulnerability of young children involved in proceedings. It is difficult and often impossible to establish the wishes and feelings of young children. The presence of siblings is a protective factor when dealing with the separation of parents. That the majority of children involved in proceedings do not have access to sibling support emphasises the importance of external support. As we are aware, Child and Adolescent Mental Health Services (CAMHS) being extremely under-resourced means they are only dealing with the most high-priority children and, even then, their waiting lists can leave a child waiting months before support is available. Other availability of support is a postcode lottery and often depends on what may be available via the child's school, if anything is at all. The cost of specialist support in many cases is unaffordable for families involved. In my experience the court process itself has little involvement in considering whether the child concerned has access to any appropriate support service.

If not court?

Mediation and alternative dispute resolution have been encouraged for many years in an attempt to divert applicants away from the courts. Statistics, however, reveal that take up of mediation has reduced since LASPO. This means that despite popular public belief, solicitors were successful in minimising client costs and legal aid spending by assisting clients in reaching a resolution through other means where possible.

With a rise in litigants in person and the emphasis on alternative dispute resolution, there is a concern that settlement is encouraged at the expense of investigation, which is at times required to ensure the child arrangements being put in place are safe and in the best interests of the children concerned.

There is robust evidence that parental conflict that is fragmented and poorly resolved leads to multiple negative outcomes for children. So, what have we learned?

Well, we need to give greater consideration to the impact of deprivation and whether it is hindering access to justice. We need to establish if younger parents are unable to access the court system and if yes, why? Why are there a greater number of applications in northern regions and do the issues vary according to regions? How can the increasing number of litigants in person be supported and are there recurring themes in returning applications? Furthermore, we need to ensure the children within the process are appropriately supported.

It is evident the system we have is not working. The task is therefore to understand what the issues are and how we improve them. The report is an important start in bringing to light some initial data. It unsurprisingly concludes that what we require is an improved source of data collection as a more in-depth review is required of the pre-court needs and vulnerabilities of individuals involved within proceedings.

The interplay of factors such as domestic abuse, conflict and child protection issues also needs to be considered. One recommendation is for Cafcass to maximise use of its database by also recording the child's living arrangements at the time of the application, whether there have been any allegations of domestic violence, and whether there are any other safeguarding concerns.

The report is therefore a start, an initial snapshot of what we are dealing with. But it only scratches the surface and we now require more substantive data to start thinking about the complex issues of how the system can be improved, because at present it is creaking at the seams. In the meantime, we will continue to run flat out up on that down escalator.

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Enter the Resolution Awards

Could you be one of our champions of family justice? We have launched new Awards for 2021, sponsored by Iceberg Client Credit. Three new categories, alongside the established John Cornwell Award, recognise the wide-ranging contributions our members make to family justice. You can self-nominate or put another member forward, and Awards are open to both individuals and groups.

The categories for 2021

- **The John Cornwell Award** – recognising an individual or group who has made an outstanding contribution to the field of family justice
- **YRes Rising Star Award** – for the YRes member who has demonstrated their potential as a future leader in family justice
- **Working in Collaboration Award** – recognising members who have made a difference to families by working together with other professionals, sharing expertise in innovative ways
- **The Resilience Award** – for going above and beyond to support staff and clients through the challenges of the pandemic

Nominations close 12 noon, Friday 10 September, with the winners announced at the Family Practice Conference on Friday 22 October.

Perspectives from members who have a disability

Collated by Yanoulla Kakoulli *(Stowe Family Law LLP)* and Alison Bull *(Mills & Reeve LLP) for Resolution's Equality, Diversity and Inclusion Committee*

The ED&I Committee is working hard on a number of projects. These cast a spotlight on various aspects of ED&I: the privileges that many of us as members have, as well as the additional challenges that many others of us have to manage, at times battle with, and at other times are able to celebrate. These additional challenges and privileges of course reflect those of the general public – our clients that we all do our best to assist in our professional lives.

One of the areas that a sub-group of the Resolution ED&I committee is focusing on is how to better support members who have a disability, and to inform other members about issues that members and clients with a disability may be facing, and how we may assist members and clients. We would like to invite:

i) any members who have a disability,

ii) any members who are interested in assisting or collaborating with Resolution initiatives to support members who have a disability, and

iii) any members who would like to be allies for members who have a disability to get in touch (see the box at the end for details of how to do so).

We plan to consult with a wider cross-section of the membership about what Resolution and this committee can do to assist those of us who have a disability. The committee has discussed various initiatives, and before selecting any for implementation, we should like to engage with more of you, our members, to identify your priorities.

We are mindful that the term "disability" covers a huge range of different challenges that many of us face, from physical disability – both visible and invisible to others – mental health disability, and neuro-diverse intellectual and learning disabilities. We are mindful also that each individual's experience is unique. It is therefore a challenge to endeavour to represent the diverse challenges that individuals may face.

We thought we should start by sharing with you some perspectives of some of our members. We are hugely grateful to the members who have shared their thoughts and experiences and we would love to hear from more of you with your stories!

Contribution from Abigail Pearse

Associate at Mills & Reeve LLP

Please set out what your experience is with disability?

I have a chronic (and invisible) condition called postural orthostatic tachycardia syndrome. In summary, this means that my autonomic nervous system responds abnormally to ordinary daily activities, including standing up! I have had this condition for six years, though I only received a diagnosis last year, and I anticipate having the condition for the rest of my life given that there is no known cure.

How has it impacted you?

My condition has impacted me in a whole host of ways and it has been challenging learning the limits of what my body can do, and accepting those limits. My symptoms fluctuate on a daily (if not, hourly) basis and it means that I never know exactly how I am going to feel. This has been overwhelming at points, and has meant that I have had to learn to deal with a variety of debilitating symptoms (including light-headedness, abnormal increases in my heart rate, intolerance for exercise and heat, nausea and fatigue) as best as I can. It is not all negative though as my condition has also taught me compassion (for myself and others), strength and gratitude for the small things.

What have you done to overcome any hurdles?

I have talked openly about my condition with others, including blogging, to not only educate and help myself, but also to help others in the chronic illness community online. I have accepted that there is absolutely zero shame in taking medication and have approached different management options with varying degrees of acceptance and positivity. Though it took me a long time to truly accept my limitations, I now find joy in the things that I can do. If I manage a really long walk, for example, I will be filled with pride for the rest of the day and that is a really awesome feeling. Therapy has also been a really brilliant way of processing how I feel about my condition and learning coping mechanisms to deal with the harder days.

Please provide any top tips for others to assist

Please be understanding, open-minded and don't make any assumptions about someone's health – if you take one look at me, you will see a "healthy" young woman. The difficulty with invisible illnesses is that often people

➤

make assumptions and/or are unaware that someone might need some extra support. My top tip is to look out for indicators/aids such as walking sticks, medical alert bracelets or badges, or a sunflower lanyard (which indicates that a person has a hidden disability and may need additional support). Please be particularly conscious when using public transport – for many years I found myself becoming very anxious on trains given that I cannot usually stand up for prolonged periods of time without getting symptomatic and this was always made a lot harder when people refused to give me a seat, or worse, called me out for sitting in the disabled seats. Kindness and empathy go a long way!

"If I had a visually impaired candidate looking for a training contract, would I consider them… of course. The reality is if they have gone through university, graduated with a good degree and passed the LPC they can do the job." – Yvonne Cordwell

Contribution from Yvonne Cordwell
Senior Partner at Stephens Son & Pope

Please set out what your experience is with disability?
I am registered blind.

How has it impacted you?
I could give you a list of things I can't do, such as not seeing a client's face; not see if someone is talking to me; not driving. Things that I think if you are sighted you take for granted.

I could say that going for job interviews can always be "amusing" when the interviewer asks "You do of course have a full driving licence", then the room falls silent and papers are shuffled when I say no because I am registered blind as per my CV. Perhaps not surprisingly I did not get offered the job; but there again would I have taken it if I had… probably not… who would want to work for someone who doesn't read a document? Or when someone starts to look me up and down to see if they can work out my disability when I ask about access… clearly, I am not in a wheelchair so why is she asking about access? And if you are puzzled, access can simply mean signage, font style, lighting contrasts, colours – it is not necessarily a ramp.

I knew, unlike my colleagues from university who were heading off to the bright lights of the City and the huge pay packets, I was not interested. I like a work/life balance. Equally, even a huge provincial practice where targets are the driving force did not appeal. I recognise I will take a little longer to do some things, and I will probably be tired by 4-4.30, so there is no point just sitting in my office looking busy because everyone is expected to work till 6 just so it looks good.

I trained as a mediator in 1999. I did worry about whether I would be able to do it… all the talk about eye contact and body language. However, although I still do not see the parties' faces in mediation, there is certainly a sense of how everyone is feeling. I have been told I am empathic… possibly… but I am just used to getting my information through sound and other clues, so it just a skill. Sighted people rely on what they see and are often very unobservant.

The invention of video calls and remote working is a nightmare. Imagine having a mediation via telephone… only the sound. No visual clues and no whizzy gizmo to help out. So Covid has put my mediation practice on hold… possibly indefinitely.

What have you done to overcome any hurdles?
I recognise I am an anomaly: I am with the same firm I had my training contract with and am now the senior partner. For me this means I have been able to mould my environment around me, so I can ask someone to read something to me or do something which a sighted person could do quicker/easier. This makes me very lucky.

Fortunately, with the adoption of computers by the rest of you, life has been made less complicated. Scanned documents have replaced those smudgy illegible faxes and copy documents which I frequently rejected on the basis that they were not legible. Equally, the adoption of emails and therefore documents being sent as word attachments makes it possible to use screen reading software. I could say it is nice to see everyone "catch up" with tech, I was taking my laptop and printer to court in the mid 1990s and by then I had been using computers since the late 1980s!

I have found that clients, if they ask, are content with a simple explanation, but to my knowledge it has not put clients off.

Please provide any top tips for others to assist
Professional bodies are perhaps not so helpful. Articles and reviews are often in formats that make them hard to access and I have not really found any in an audio format which I thought would have been good for everyone who travels to work. Websites are often very whizzy, with drop-down menus that you have to hover over and will disappear if the cursor is not on the right place, or are pretty fonts, colours or layouts which may look lovely but are not that accessible.

If I had a visually impaired candidate looking for a training contract, would I consider them… of course. The reality is if they have gone through university, graduated with a good degree and passed the LPC they can do the job. Yes, they may need specialist software – which of course is government-funded so no cost to the firm, but basically, they need a chance. I have been very lucky, there are a lot of others out there that have never been given that

opportunity. I remember seeing an advert – I cannot recall which charity it was from, but the strapline was along the lines of "my biggest disability is your attitude". We are just like you… we are all very different.

Contribution from Yanoulla Kakoulli
Senior Solicitor at Stowe Family Law LLP

What is your experience of disability?
My experience is working with clients who have a disability.

Overcoming hurdles
My main objective is to ensure that communication between my client and me is clear and that every client, no matter what their needs, receives an excellent service and one suited to their needs. Therefore, I need to ensure that I take into account every individual client's personal circumstances, including whether they have a disability and, if so, the form and extent of that disability. I am always mindful that many physical disabilities are hidden, as are most mental health disabilities. Some clients may have a neurological condition and have to experience others assuming that they are under the influence of drugs or alcohol. Others may have a drug or alcohol dependency. A client's personal circumstances will dictate how and where I provide them with advice and take their instructions.

For example, for some clients it is essential that my letters are in a language which is easy to understand and avoid legal jargon. I have had clients where it is easier for them to read letters where the font is large due to difficulties with their sight, and others where a different colour font and an off-white colour background helps (eg if they are dyslexic). Some clients who have particular challenges with reading (or for whom English is not their first language) may need written communications kept to a minimum and need someone else to receive those communications and help go through them before the client can sign terms of business, for example. Also, accompanying written advice with a meeting to give a client the opportunity to hear the advice verbally has often been very helpful and may be essential; or it may be necessary to visit some clients in their home if appropriate to do so.

Setting enough time aside for meetings is also extremely important when trying to ensure access to the best service. Time is needed so I can fully appreciate their instructions, they have fully understood my advice, and they have had the opportunity to ask questions about anything. On the other hand, if clients find it difficult to concentrate, or can/should not be physically still for too long, then meeting more often and for shorter, manageable chunks of time may be appropriate.

Top tips
Be open from the very beginning and ask what needs your client has. Normalise the question, so they feel able to respond openly. For example, acknowledge that different clients prefer you to communicate in different ways and have all sorts of different needs, and ask what is the best way to communicate with them, and whether there is anything you or your firm can do to make the process easier for them. This may include better times to get in contact. For example, I have clients who have gone through trauma and suffer from heightened anxiety as a result.

"Be open from the very beginning and ask what needs your client has. Normalise the question, so they feel able to respond openly."
– Yanoulla Kakoulli

Many of our clients will be very distressed, whether or not they have the additional challenge of a disability. Usually, I will avoid sending emails at the end of the day or just before the weekend so that they have an opportunity to talk through with me anything that is particularly stressful. Also, where the other party is aggressive, instead of sending the correspondence directly I may paraphrase the correspondence for my client and request their instructions to avoid the distress of having to read that particular correspondence. Think about the best way of communicating with your client, and how best to support them at this very difficult time.

There are also many helpful resources out there we can use, including Resolution's Good Practice Guides for family practitioners working with clients, communication, correspondence, working with vulnerable clients and others for particular circumstances.

Impact on me
My experience of working with those who have a disability has made me aware that it is so important to listen and ask open questions of all clients so as to be knowledgeable and conscious of a person's particular situation, including whether they have a disability, and if so how to meet their additional needs, if you want to give them access to the best service possible.

We hope you have found this article interesting and thought-provoking – and our thanks to those members who have shared their thoughts and experiences. Please do get in touch if you feel able to share your stories and if you would be interested in helping the sub-group of the ED&I committee to better support those of us who have a disability.

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Contact Resolution...

If you would like to respond to any of the issues above, volunteer to be an ED&I "ally", or contribute in any way, please contact *info@resolution.org.uk*

Wellbeing for family practitioners: a personal perspective

Louisa Whitney *LKW Family Mediation*

Cultural and systemic change are needed in family dispute resolution workplaces if we are to tackle the wellbeing crisis

The recent survey from Resolution on practitioner wellbeing was sobering reading for anyone who works with those going through a separation. It has prompted many discussions about how wellbeing can be improved and I am heartened to hear the discussion of changes centres around systemic change rather than changes of a more lip-service element.

I wanted to share my personal story. Why might I want to tell you this? Well, firstly because I can. I can because I no longer think that what happened to me was my fault and I no longer feel shame that I was unable to cope. I am also able to because running my own mediation practice means that there is no comeback on me from anyone who might think that sharing such stories is not in keeping with firm ethos. I hope that sharing it helps others to know that they are not alone.

Towards the end of 2001 I landed a job as a paralegal in the family department of a high street legal firm. I was jubilant and so excited. I was also relieved because I had wanted to be a solicitor since I was 12 years old and despite applying for 100 training contracts (yes I counted them) I had not been successful. I did not know it then, but the idea that I was not good enough had very firmly embedded itself and deep down I saw this as the last chance to make it into my chosen career. I didn't know what the other path was but it had a large failure sign on it. I worked hard and I enjoyed learning. I enjoyed living in London, seeing friends and being independent, but by 2003 I was flagging. I felt overwhelmed by managing the work and managing life and it never occurred to me that I might be able to say "no I can't do that" or "I can do that but not until next week". No one told me that I could, and in my head starting to refuse to do things you were asked to was likely to result in a fast track pass to the failure path.

I cried a lot when I wasn't at work (occasionally in the toilet at work, but as there was only one ladies loo you couldn't really be in that for long). Often I drank too much wine in the evenings to try to numb out how I felt about stuff. The next day I inevitably felt hungover and so ended up eating junk food so I also put on weight. Yet more stuff to feel like I was failing at. I felt panicky a lot of the time and walking into work and seeing a full desk of files after a day or two off made me want to walk back out again.

I was extremely fortunate in that I had good support around me. The difficulty was that I didn't feel I could say anything at work in case they decided I couldn't manage the job and fast-tracked me to the failure path. But I did have a rather lovely boyfriend (now my husband of 16 years!) who didn't know anything about mental health issues but on the way back from a week away in France he did very gently say to me that whilst it was natural to feel a bit sad to be leaving a good holiday, sobbing profusely in the car probably wasn't OK and perhaps things weren't right. I opened up to my parents and they were really supportive. I'd worried about this as having invested quite a lot in my university degree and LPC I'd assumed they'd tell me to just make a success of the career and stop being daft. My dad actually told me one day that if I wasn't well enough to go to work I shouldn't go, and that was a significant moment. The idea that you didn't have to be physically sick to not be able to go to work – you could be mentally unwell too.

One day when I just felt tired and drained and that I couldn't do it any more I didn't go in. I stayed at home and I went to the doctor. He could not have been more lovely and supportive and talked to me about mental health issues and stress. He prescribed anti-depressants to help me climb back up, signed me off work for two weeks and told me to make a further appointment for two weeks' time. I rested, I actually went to the gym and I cleaned out some cupboards. I also, crucially, started seeing a counsellor. She helped me to understand that it was OK to have personal boundaries and to say no to things. She also helped me to understand that I was not a failure at all. I started to see that I was still me in a difficult space and that the feelings I had were a part of anxiety and depression.

Work were also helpful. The office manager rang me and we had a chat, and the solicitor I worked closely with reached out to me privately to support me. When I came back to work there were no files on my desk at all and I will forever appreciate that. Going back to work is really only step one of the recovery, and I had to work out how to develop health habits with boundaries. There is much stigma and concern around anti-depressants in some quarters but for me they enabled me to be OK enough to make changes in my life that once embedded enabled me to not need them any more (six months later). I also had to understand my limits and that it was vital to take care of myself. I consider this self-care to be a lifelong journey: to learn how to work in a way that allows you to do your job; and still personally thrive. I still forget my limits and push a boundary because I want to help. The crucial difference now is that I know when I need to be careful. I talk about a stress scale of 0 to 10. Zero is totally zen with no stress and 10 is you're about to blow or collapse. I didn't know there was really a problem until I was 8. Now I know if I'm getting near 5 I need to take action. Taking action when you're on 8 is essentially like fighting the fire that is already lit and not preventing the spark.

I know I'm not the only one this has happened to. I've spoken to so many practitioners that feel they are burnt out, pressured and many who have left the profession prematurely for a variety of reasons. The talk of systemic change is right, but I also think we need to have a conversation about the culture around this and that's the last piece of this article.

"I had to understand my limits and that it was vital to take care of myself. Self-care is a lifelong journey: to learn how to work in a way that allows you to do your job; and still personally thrive."

The rucksack of resilience

I've seen a lot of talk during my 20+ years as a family practitioner that's along the lines of those that are tough enough make it. I see it now talking about mediators and have heard many experienced practitioners essentially say that those mediators that really want it will make it even in the face of huge challenges around managing a mediation practice and trying to get work. There appears to be this idea that if you can just have that rucksack with 100kg

(or whatever the magic number is) of resilience or toughness in it then you'll make it. Firstly, this does not account for the fact that many people are facing huge personal challenges and simply managing to work is a success in itself. Secondly, this attitude perpetuates the myth that if you falter you have somehow failed. Every single person on this planet has their limit of what they can cope with and whilst that limit is different for everyone, if you reach that limit you will struggle – regardless of how tough/resilient/super powered you think you are. Struggling with your mental health is a sign of how overloaded you are, not how weak you are.

"If you are talking to colleagues about pulling an all-nighter and having had three double espressos before 9am as though you should have a certificate, then you are perpetuating the idea that this behaviour is acceptable, normal and something that others should embrace."

The high-five on three hours' sleep and four double espressos

"I was up until 3am doing this work last night…"

"I haven't had a day off in months/years…"

"Weekend? What's a weekend?"

"Super busy! I don't have time to eat lunch. And you?"

I've heard all of the above multiple times in the last 20 years and – let's not kid ourselves here – the last few years too. We absolutely should talk about the pressures of work and where that impinges on the work/life balance. But the conversation we have around this is very important. Talking openly about workloads and how everyone is coping is a great thing to do in departmental meetings provided the emphasis is on genuinely supporting staff. I hope all my PPC consultees get the sense that I ask about how they are and what their general workloads are like rather than purely focusing on their mediation work.

If you are talking to colleagues about pulling an all-nighter and having had three double espressos before 9am as though you should have a certificate, or a banner up in your office, then you are perpetuating the idea that this behaviour is acceptable, normal and something that they should embrace if they want career progression. In fact I'd go further and say that if you are saying these things – especially to more junior colleagues – WITHOUT making it clear that you are not OK with it then you are normalising this idea that you don't need personal boundaries with work and that it's not only OK, but accepted, that you give so much to work.

We need to be prepared to be vulnerable – or at least human

We deal with some tough stuff in our work. I can still remember cases from 17-18 years ago that stab at my heart and will keep me awake for at least another half an hour if I think about them in the middle of the night. There's one it took me a long time to talk to anyone about and I rarely mention it for fear of traumatising other people. We have to get better at speaking up about when stuff gets to us and to do that we need a culture around us that facilitates and normalises that. PPCs for mediators and family law supervision for lawyers is all good stuff but the change starts in all firms, in all practices and it starts with talking about what we're finding hard. Whether that's a particular case, a way of working or a particular problem with your work-life balance, there is such a value in being able to offload to those who understand.

I see the dark humour that still exists about clients and their problems and this coping mechanism of trying to bat away the feelings and ignore the pull of feeling vulnerable and out of your depth. I see lawyers who moan about client's difficulties, frustrated that they are not more able to manage their own emotions more. I see practitioners who are so up to their limits in their own stress they have little or no empathy for their clients' problems. We are not robots and the power of human connection is so important. Some of the most powerful mediations I have facilitated are where there is nothing anyone can say to make something better. My clients are brave enough to explain their grief and to put it in the room, and we all simply witness it and acknowledge it and they know that it touches me too. As humans we are hard-wired to connect with each other and resisting this human-to-human connection because you fear it will overload you is surely a sign that the way you're working is not working for you.

I'm not suggesting you cry with clients and embrace them but a little empathy for the difficult situations in which clients find themselves following a separation is a very powerful thing. Not feeling able to provide this because you are up to your own limits is something that needs to be addressed.

These are three cultural elements that I believe require changes in the way we look at the world. They don't require funding or specialist help. They require an understanding that practitioners can become emotionally overloaded and an acknowledgement that this is affecting a large part of our industry; and it requires a willingness to learn and grow and to change attitudes. It requires an openness to acknowledge your own demons too. That's scary stuff but together important changes could be made. This is all of our responsibilities.

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The Review *catches up with… **Cris McCurley** of Ben Hoare Bell, who won the Family Award at this year's Legal Aid Lawyer of the Year Awards, which Resolution was proud to sponsor. Cris is an expert in forced marriage, honour-based violence and FGM cases, and is described as the "go-to" solicitor for multiple charities supporting victims of domestic abuse. Resolution would also like to commend the runners up: Novlet Levy and Oliver Conway*

Congratulations on the award. What does it mean to you personally and professionally?

It means so much because of being nominated by my peers. The Legal Aid community is small and we rely so much on each other for support. It has come at a time when I really needed a boost, as well. It has been such a difficult time during the pandemic with working from home, virtual hearings, not to mention the massive increase in demand for domestic abuse work in all areas. I can't think of a time in my professional life (and I have always specialised in working with the most vulnerable in our society, who have been abused as women or children) when our clients have been at such a high-level emotional and practical need of support from us, and from all other parts of the women's sector.

Working with such an unusually high level of raw emotion has been extremely stressful, and our more junior colleagues have found it particularly hard, so we have had to support them with the work, too.

Getting this award has been a significant highlight for me during this period. I love the LAPG, and I think all Legal Aid lawyers are heroes.

What is the most rewarding part of your role as a Legal Aid lawyer? What is the most challenging part?

As I have got more experienced the cases that I have now are at the complex end of the spectrum. For some, it can literally mean life and death, particularly as I work mostly with high-risk women and children from Black, Asian and migrant communities. They are most often incredibly vulnerable.

I have been lucky enough to be able to take part in some of the changes that have been made in domestic abuse work by giving evidence to bills committee, to the MOJ expert panel, lobbying, writing articles and drafting questions for justice question time in the Commons. I've also raised the lack of support and provision for victims of abuse at the UN. I have got so much out of that process which has allowed me to feel that I am able to influence future access to justice, as opposed to just feeling powerless in the process.

If I had not had the opportunity to try to make things better, I would have felt very hopeless about the future of social justice and Legal Aid.

How has LASPO affected your business? Have you found alternative ways of funding cases?

As above, I have looked for creative ways to take part in the process of making things better in terms of Legal Aid and access to justice, as has Ben Hoare Bell LLP as a practice. We have as a firm taken part in judicial reviews to challenge Legal Aid policy for the better, and I was a witness in the Rights of Women case in the Court of Appeal regarding Legal Aid for victims of abuse. I am proud of what we have done as a practice to influence policy for the better. Rather than just roll over and accept the changes, we have done everything in our power to positively influence policy decisions. I think that has fostered a spirit of purpose and achievement in the practice. I can't see that changing. I feel we have risen to the challenges.

We have also had to look at niche practice areas such as with my work, which has meant training up on and becoming a panel member for international child abduction and contact, which is invariably High Court work and better paid. I would say that the work is more stressful but much more satisfying and interesting than having to constantly worry about survival. I won't say we haven't had to look very carefully at the services we are able to provide however, and due to very strict supervision requirements and low remuneration, we have had to give up our community care contract.

Where do you see Legal Aid heading in the next few years?

I am worried, and think we will have to look at alternative funding options. The impact of Brexit and the pandemic have left me unsure that we can expect much give in terms of rates of pay from the current government. We will continue to be activists for positive change, however.

What does Resolution membership mean to you?

It is vitally important both as a support and a code of conduct. As a member of the Domestic Abuse Committee I have found support and friendship from fellow committee members, and this has been invaluable, especially over the past 18 months. We have worked well as a team on the big issues such as the LAA reviews, the Domestic Abuse Act and the Harm Report. They are a great team and I love being a part of it.

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DR for litigators: what you need to know and why

Anthony Raumann *Barrett & Co*

Karin Walker's conference webinar ran through the wide variety of DR options now available and set out their respective merits

For those who are yet to explore Resolution's National Conference archive, Karin Walker's webinar is a wake-up call for family legal practitioners who are steeped in adversarial approaches to litigation. The Covid 19 lockdown restrictions have applied to court procedures since March 2020 and have led to considerable delays in hearings and administration due to shortages of staff and judges – partly through ill health. The situation has also adversely impacted the welfare of legal advisers and clients, who have been suffering from heightened stress.

Dispute resolution (DR) processes can be tailored to suit clients' needs (including choice of adjudicator and third-party specialists) and offer flexible, time-saving and cost-effective alternatives to court litigation in most cases involving family finances or contact and residence arrangements for children (except for those involving allegations of violence or complicated technical issues).

"The key to success is trust and openness between the parties and a less competitive and combative approach between family lawyers."

Family lawyers should find that the application of holistic skills and techniques, applied by DR practitioners, will help them and their clients to focus on constructive solutions, including compromises, which result in lasting agreements. The key to success is trust and openness between the parties and a less competitive and combative approach between family lawyers, which merely serves to stoke the fire of litigation with client funds. Clients are also becoming more aware of and increasingly critical about the standard and range of services offered by family law firms. It is therefore in the interest of practitioners to give full advice about DR options and preferably offer such services, as this approach will lower the incidence of complaints about their advice.

Mediation

Karin Walker provided a helpful résumé of each of the DR schemes, the most familiar of which is mediation. Mediators are impartial third parties and intermediaries who cannot make decisions but can assist couples or family members to reach agreements about issues concerning separation, divorce, property/finance and children issues, through planned meetings.

Mediation Information and Assessment Meetings act as filters for the suitability of cases for resolution through the mediation process rather than through court litigation. It is a voluntary process and as such people should not be forced into mediation. Family practitioners should, however, advise their clients about the advantages of mediation if it is relevant to the circumstances. Family issues can be resolved at reduced costs through constructive negotiations. Solicitors/legal advisers can advise clients about the legal merits and viability of proposals and agreements reached in mediation. Karin warned however that mediation can be undermined by couples taking entrenched positions. Solicitors should encourage clients to be realistic about the scope of any agreement which can be reached through negotiations within mediation.

Further flexibility is afforded through hybrid mediation where the mediator can hold confidences of each party but remains non-partisan. This can help the mediator steer the couples towards a solution and is useful for individuals who cannot afford court litigation.

Arbitration

Arbitration offers a "mirror" alternative to court litigation with the advantage that the parties can select a legal specialist of their choice, including a barrister or judge, to adjudicate their case at an agreed venue. Following the decision of the Court of Appeal in the case of *Haley v Haley* [2020] ECWA Civ 1369, disputed awards made by arbitrators in family law cases may be subject to the same right of appeal as wrong or unfair decisions made by judges at first instance. The decision will encourage practitioners to use arbitration as a cost-effective, faster, and less

stressful alternative to court proceedings – particularly in cases involving family financial disputes as there is no duplication of disclosure. As a cautionary note however, this option may be less suited to issues involving children as one parent may try to stall negotiations as a means of wearing down the other party and with the net result that the children's sense of stability is further destabilised. Karin referred delegates to the IFLA (Institute of Family Law Arbitrators) website for more information about the operation and rules of arbitration.

Early neutral evaluation/private FDRs

Early neutral evaluation (ENE) procedures are especially useful in breaking impasses where there are complicated issues and arguments presented by both parties. Private family dispute resolution hearings fall within the ENE category of DR options. The procedures are the same as court Financial Dispute Resolution Hearings and a seasoned barrister or judge can be selected (see the IFLA website) to evaluate legal submissions (on a without prejudice basis) and assess the likely outcome of the issues if the case was to be heard at a final court hearing. The option is only suited to cases where the parties are keen and willing to contain the costs of increased litigation by following the evaluator's decision, as the evaluator has no authority to make directions.

Collaborative law practice

A new version of the Resolution Participation Agreement is available for clients who wish to settle family disputes through negotiations conducted by collaborative lawyers via a framework of "four way" meetings. Both lawyers will prepare reports in order to focus the parties' minds on factors which are central to determination of issues, and the parties may instruct neutral specialists – family consultants, financial experts or legal counsel – to provide specialist input. The difference between this and standard family lawyers' negotiations is that collaborative lawyers focus on achieving the best outcome for a family rather than for an individual client. It requires good faith and trust between the collaborative lawyers and between the clients, and if the process does not work because one client acts in bad faith or an agreement cannot be reached, both solicitors will withdraw their services and new solicitors will be instructed by both clients.

"The Certainty Project is a new hybrid arbitration model in which each party appoints a panel solicitor who adopts a non-confrontational approach and is available to provide advice to the client as required."

The Certainty Project

This is a new hybrid arbitration model in which each party appoints a panel solicitor who adopts a non- confrontational approach and is available to provide advice to the client as required. The parties sign an arbitration agreement and agree to be bound by the arbitration process. They will select an arbitrator who will case manage the procedure from the outset, including filing of Form Es in financial cases and appointment of specialists to prepare reports. Parties are referred to mediation and the couple enter into facilitated discussions, and if these are partially resolved within the timeframe allocated, and an agreement is reached, an arbitrator will make an award, which the solicitors will draft in the form of an order to be sealed by the court. Any remaining matters will be determined by the arbitrator; the process may take between four to six months. The project ensures certainty of personnel, timing, costs and duration and if this is successful, it may form the basis of a viable alternative structure to court litigation.

The advantage of the DR process is that clients can mix and match those schemes which best suit their needs in order to remove the stress, mutual distrust and delays, which are now increasing in court litigation. The Certainty Project is a positive step and it will be interesting to see what lessons are drawn from its success by lawyers, clients and the judiciary.

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Early Help for Parents Course – now free to members

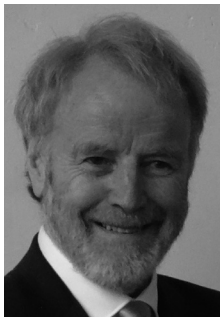
We have relaunched this introductory online course to accompany our new Parenting through Separation Guide. It's now freely available to members, thanks to our partnership with OurFamilyWizard.

This course shows how, using resources such as Resolution's guide for parents, it is possible to help clients take control and set a child-focused agenda for the way in which the arrangements for their children are made.

The course will equip you right from the start of your client relationships, with everything you need to offer the best support for separating families. From communicating effectively, to understanding the challenges your clients and their children may be facing.

Access the course at *learn.resolution.org.uk/*

Emails and "quasi-evidence": thoughts for life after (or alongside) Covid



David Burrows *DB Family Law*

With the pandemic increasing the number of emails sent directly to judges, it is crucial to remember the rules and principles that apply in this area

Online work may be with us for some time – which way the prime minister jumps on the next lock-down will (may?) explain a little. What is likely is that some case management work will continue to be done distantly; but what is certain is that the changed nature of emails will be with us for the foreseeable future. It is this last point to which this note is addressed.

Modern cases see the frequent sending of emails directly to judges. It was impossible to imagine this even 10 years ago. It was developing pre-Covid. Carefully prepared and restrained emails from lawyers may assist case management. But if emails go beyond routine case management – for example, if emails contain argument with the judge (before or after judgment), or what by any standard is evidence or "quasi-evidence" (see Fraser J, below) – then serious questions arise.

For example, to say things to a judge which in reality are evidence is objectionable in law. It is contrary to basic principles of justice and to proceedings rules generally (whether the Family Procedure Rules 2010 or otherwise). For example:

1. **Statement of truth** – any evidence which a party files, from whatever source, must be verified by a statement of truth. The person who states must be available for cross-examination.

2. **Truth** – material and evidence produced by solicitors must be true. If it is shown not to be, that is a serious regulatory matter.

3. **Hearsay evidence** – rules on hearsay evidence in family proceedings are more relaxed than in civil proceedings generally; but an attempt should generally be made to seek permission if hearsay evidence is sought to be relied on (r23.2 FPR 2010).

4. **Open justice** – as Fraser J explains in *Beattie Passive Norse* (below), to seek to communicate privately with a judge in the case belies the basic common law open justice principle; and this applies whether a case is heard in private or in open court.

"Carefully prepared and restrained emails from lawyers may assist case management. But if emails go beyond routine case management then serious questions arise."

What is to be done?

In *Beattie Passive Norse Ltd & anor v Canham Consulting Ltd* [2021] EWHC 1116 (TCC) (30 April 2021) Fraser J considered "open justice" and solicitors' attempts to contact the judge directly. The case concerned a dispute in which developers were claiming damages from builders for the cost of part demolition of a site which, it was said, had been negligently put up originally by the builders.

Part of Fraser J's judgment included that he had heard certain evidence on 3 and 4 March 2021. He continued, concerning this:

> "[20] … On 5 March 2021, a non-sitting day, a letter was sent from the claimants' solicitors directly to the court, addressed to me as the trial judge. In that

> letter, there was a lengthy explanation to the court addressing certain points that had been made by Mr Higgins [counsel for the defendants] in his earlier cross-examination of Mr Hersey and Mr Gawthorpe [witnesses for the claimants], together with argument in respect of those points…. This document seemed to be part submission, part quasi-evidence, and part explanation."

Fraser J continued:

> "[21] Such a letter should not have been sent to the court. It was necessary to explain to the parties that I intended simply to ignore it, save and in so far as its contents may be repeated in closing submissions…."

Beattie Passive Norse: open justice and adducing evidence

Fraser J's central point related to the common law question of open justice and the way – in an open justice system – evidence is adduced before the court:

> [21] Trials are conducted in open court. Open justice is a very important principle. Evidence is what is contained in witness statements, attested to by a witness, and either agreed by the parties or spoken orally in the witness box. Submissions are usually made at the beginning and the end of trials, and sometimes during the evidence, depending upon events…. no application was made to call further factual evidence. For what it is worth, it is difficult to see what could have justified such an application in any event.

This raises two issues critical to the common law. First is the issue of open justice. Secondly, evidence, which has been dealt with above.

Beattie Passive Norse was heard in open court. What then was the concern of Fraser J? It relates to the same question which was articulated by Lords Simon and Scarman in their joint speech in the House of Lords in *Harman v Secretary of State for the Home Department* [1983] 1 AC 280, [1982] 2 WLR 338: how does a jurisdiction, which is one of open justice, deal with documents which only the judge and the parties – perhaps, in reality, only their advocates – have read?

This subject is the other side of the coin of press permission to see court documents (which was at issue in *Harman*): if letters from solicitors or other secret material is being sent to a judge, a trial cannot be open. The press cannot properly attend, still less understand, what is going on.

In *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2013] QB 618 (3 April 2012), Toulson LJ reviewed the earlier jurisprudence. In a judgment later approved fully by the Supreme Court in *Cape Intermediate Holdings Ltd v Dring (Asbestos Victims Support Groups Forum UK)* [2019] UKSC 38, [2019] 3 WLR 429 (29 July 2019) the Court of Appeal ordered release of papers in an extradition case to *The Guardian* (and see Lord Bingham in *SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498 at 511-512: the starting-point was Lords Simon and Scarman in *Harman v Home Office*).

Prevention of abuse by solicitors

And the solicitor who persists in putting information before the judge? What can be done if this goes beyond questions which the judge can fairly regard as part of case management?

"If letters from solicitors or other secret material is being sent to a judge, a trial cannot be open. The press cannot properly attend, still less understand, what is going on."

Suppose what the solicitor is saying is evidence, especially if it is contentious or actually untrue. Many clients will feel it is not enough for the judge just to say: I will put that point, email, contentious statement, etc out of my mind. The client will consider the seed is sown and the damage is done.

First thoughts include:

1. The court has a duty to regulate solicitors who are officers of the court. If a judge knows that a solicitor is filing what amounts to evidence which contains hearsay or is said to be – or palpably is – untrue, then the court can make an order on its own initiative against the solicitor backed by a penal notice, to prevent continuance.

2. Emails should only be sent to judges where a response to a question is asked for by the judge (some judges may have to exercise some restraint there). Otherwise, communication with the court can be to the court office.

3. No one – solicitors or otherwise – should send to a judge what amounts to evidence (save where asked by a judge); and if it is untruthful, solicitors and barristers must expect to be reported to their regulatory bodies.

4. Documents which go beyond routine case management matters should be released to the press or others on normal open justice principles.

If distance hearings are to continue – and there are surely many advantages in this – and if judges are to communicate with parties by email, then new rules or a practice direction setting out the limits of this may be necessary. This note will be sent to the Family Proceedings Rules Committee to see if they have any views.

@dbfamilylaw

Trans rights in family law: is the law evolving too slowly?

Vikkie Chetcuti *Burgess Mee*

Two recent cases have seen the courts grapple with difficult issues concerning puberty blockers

As we all know, family law is an area that continues to evolve, although it is often criticised for not doing so fast enough to keep up with modern families. In particular, the family courts in England and Wales have been criticised in their treatment of the transgender community, and two recent decisions are explored below.

The case of *Bell & Anor v The Tavistock and Portman NHS Foundation Trust* [2020] EWHC 2374 involved the Tavistock and Portman Gender Identity Development Service ("GIDS") and their referrals of children under 16 and young people under 18 with gender dysphoria to NHS Trusts for the prescription of puberty blockers.

The case was brought by Keira Bell, who was a former GIDS patient, and the mother ("Mrs A") of a 15-year-old autistic child who was on the GIDS waitlist. Ms Bell had transitioned while she was a patient of GIDS, but later de-transitioned as an adult. Mrs A's concern was theoretical in nature as her child would not have passed the GIDS criteria for the prescription of puberty blockers.

Ms Bell and Mrs A argued that those under the age of 18 should not be referred for puberty blockers because they are not competent to consent to such treatment. They further argued that puberty blockers had life-changing significance and almost always led those who received them down a path towards further irreversible treatment. GIDS argued against this, stating that those who had the treatment were capable of giving consent and that their procedures and policies ensured that if a child did not have sufficient understanding and intelligence to comprehend the nature of the treatment, they would not proceed with it.

"Ms Bell and Mrs A argued that puberty blockers had life-changing significance and almost always led those who received them down a path towards further irreversible treatment."

The court did not consider the advantages or disadvantages of prescribing puberty blockers. The legal issues for the court to consider concerned identifying circumstances where a child could be held to be competent to give valid consent. The court considered that it was highly unlikely that a child aged 13 or under would be able to give consent to the administration of puberty blockers. It also placed doubt on whether a child aged 15 or 16 would be able to sufficiently understand the long-term risks and consequences of such treatment. Even in children aged 16 and over, where the legal position is that there is a statutory presumption that they have the ability to consent to medical treatment, the court recognised that clinicians may wish to obtain authorisation from the court before starting puberty blocking treatment. However, no firm decision was made in respect of the latter two age groups.

Following the decision, the NHS made amendments to its standard contract with GIDS, including the provision that any child under 16 should not be referred for puberty blockers without the court's authorisation. It also asked that reviews be conducted into children who were already having treatment, to assess whether they needed the court's authorisation to continue.

The outcome of the case has disappointed the transgender community who fear that denying young people access to puberty blockers (which help them avoid undergoing puberty, thus making transition easier) will result in devastating consequences for young trans people. On the other hand, the judgment has been welcomed by those who believe that children should not be making life-changing decisions before they have the requisite maturity to understand the irreversible consequences. The judgment is currently the subject of an appeal, due to be heard this month.

Following the above case is the decision in *AB v CD & ors* [2021] EWHC 741, which also concerned puberty blockers and their prescription to a 15-year-old with gender dysphoria. She was born a male but came out as transgender at the age of 10 and had transitioned in all aspects of her life (including legal paperwork and changing her name by deed poll). She had provided consent to the treatment prior to the outcome of *Bell & anor*. The application was made by her mother, who wished to consent to the prescription of puberty blockers on her behalf.

The court dealt with two questions:

1. Did the parents retain the legal ability to consent to the treatment?

2. Does the administration of puberty blockers fall into a "special category" of medical treatment by which either:

    a) an application must be made to the court before they can be prescribed?

    b) as a matter of good practice an application should be made to the court?

As to the first question, the court concluded that whether the child was *Gillick* competent or not, their parents could consent to the treatment on their behalf (unless they were seeking to override the decision of the child). There is no set definition of *Gillick* competency, but several factors will be considered including, amongst others, the child's age, maturity and mental capacity and their understanding of the issue and risks.

In respect of the second question, the court considered that there were two sub-issues, being the existence and/or scope of any "special category" and whether puberty blockers should fall within such a category. Having considered the case law, the court found that such a category of medical treatment would be very limited, and the prescription of puberty blockers did not fall into it. As an example, the only special category case in which the court could identify a requirement to come to court was a case involving the non-therapeutic sterilisation of an 11-year-old child (*Re D (A minor) (Wardship: Sterilisation)* [1976] 1 All ER 326). It further noted that, in all other contexts, the court has not imposed such a requirement (including where the parental decision would lead to the child's life ending). Where the court's approval has been required, that has been because of clinical disagreement, possible alternative treatment or if the decision is, in the opinion of the clinicians, finely balanced.

In this case, the court found that the parents had fully considered the matter and come to a careful and informed decision. As a matter of principle, the factors in *Bell & anor* "do not justify removing the parental right to consent". The court did have concerns about the division of clinical and ethical views, which had become highly polarised, and the possibility of children with gender dysphoria putting pressure on their parents to consent to the treatment on their behalf. However, it found that the first was a matter for the regulatory bodies (ie NHS England) and the second is something that clinicians are "likely to be fully alive to". If the clinicians are concerned that such pressure is being placed on the parents, the case should be brought to court.

> *"In* AB v CD & ors*, the court found that the parents had fully considered the matter and come to a careful and informed decision. As a matter of principle, the factors in* Bell & anor *'do not justify removing the parental right to consent'."*

The judgment has provided hope for those who wish to transition as it means that, provided their parents consent to the treatment, an application does not need to be made to the court (which, as we all know, can take considerable time, effort and money). However, there are questions about whether it goes far enough as it means children and young adults with gender dysphoria cannot make the decision to transition with the aid of puberty blockers on their own. Parents of those children can give consent provided it does not conflict with what the child wants, but what happens when it is the other way around – ie what if the child wants to begin using puberty blockers but their parents do not consent to that? The judgment did not provide the answer to that question, and we will most likely have to wait for the outcome of the appeal against *Bell & anor* to see whether any clarity is provided.

It is not known what proportion of the population of England and Wales identify as transgender because there is no robust data that exists to confirm this. The Government Equalities Office estimated that there were approximately 200,000 to 500,000 trans people in the UK. Stonewall, an organisation that provides essential information and support for LGBT+ communities, has estimated that 1% of the population identify as trans (including those who are non-binary). If that is correct, the figure is more likely to be over 600,000. If you recently completed the Census, you will have noticed that it included a question about gender identity and whether respondents identify as the sex they were registered at birth. This will allow us to have a clearer understanding of how large the trans community is.

As more of the population explores their gender identity, we may see that the family courts become increasingly involved in issues relating to the trans community. What is clear is that this is one area of modern family law that will continually evolve, and the courts will be expected to evolve with it. Practitioners will need to ensure they keep up to date with the latest developments and case law in order to advise their clients effectively.

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A patchwork quilt…

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Post-Brexit: navigating the Hague Conventions with Resolution's Guide to International Family Law

As international and post-Brexit issues become ever more important for family practitioners, those who missed this workshop at the National Conference may well wish to seek it out on the members' website. Resolution's International Committee cantered through the key issues: divorce and finances jurisdiction/stays, pre-marital agreements, recognition and enforcement issues, children jurisdiction and international service. The talk was very practical and referred to the hugely helpful Resolution Guide to International Family Law – *resolution.org.uk/guide-to-international-family-law/* – which should be the first port of call for those advising on cases with an international element. The speakers were: Daniel Eames (Michelmores), Amy Rowe (Bindmans), Sarah Lucy Cooper (Thomas More Chambers), Brett Frankle (Withers) and Lauren Deane (Hughes Fowler Carruthers).

If, like me, your head was filled with all things Brexit-end-of-transition at the end of 2020, this session was a useful reset to take stock of where we are now (and going forward) with international cases. Below are a selection of points to share.

Unlike the Brussels regimes, there is no overarching court for the Hague Conference on Private Law. It is a voluntary institution. There are 86 states which are members, but it is open to non-member states to adopt the Conventions. Good to remember, because this is so different to how the European regime operates.

Always check the status tables for the Hague Conventions when advising on an international case. Just because a state is a member, and even if it has **signed** a Convention, it does not mean that the Convention is in force. It may never come into force. **Ratification** is only a small step closer – domestic legislation may not be in place to implement it on the ground. An example given was Gibraltar, which has ratified and legislated for the 1980 Hague Convention (abduction) but not implemented it. It is only once **domestic legislation has been implemented** that a Convention will be in force. Clearly, establishing this is a vital first step before advising an international client. Again, this requires a different mindset to BIIa/the Maintenance Regulation.

There is a heap of useful guidance, including procedural guides for the many Conventions, at *www.hcch.net*

Jurisdiction for maintenance claims is tricky: there are different domestic jurisdiction rules depending on the type of maintenance claim (finances following divorce, variation, failure to maintain or Part III). In particular, s31 of the MCA 1973 is silent on the grounds of jurisdiction for a variation of a financial order in England & Wales. Jurisdiction was, up to 11pm on 31 December 2020, established under Article 3 of the Maintenance Regulation. Since 31 December 2020, there is uncertainty as to how jurisdiction for variation will be determined.

Divorces won't necessarily be automatically recognised in another European jurisdiction.

Where there are connections to (an)other jurisdiction(s), take local advice and take it early – before issuing your divorce. Think about enforcement of any financial order at the outset. You cannot presume to know how another jurisdiction will treat your divorce/finances applications/orders. We are now a third-party state to the EU27.

We may still get to join the Lugano Convention even though the EU Commission has come out against accession. Watch this space and watch out for a re-write of the International Guide as a result!

Chapter 6 of the International Guide is essential reading for anyone advising on marital agreements with an international element. I found this the most useful as it has not been as extensively covered as other family law areas impacted by Brexit. First, couples cannot enter into a binding choice of court agreement (COCA) to determine where they may divorce, although a COCA may be persuasive in a *forum non conveniens* argument. Once divorce jurisdiction is established here, E&W courts will apply English law to determine whether a divorce should be granted.

However, Rome III – which applies in 16 EU Member States – means that where one of those 16 countries may have jurisdiction for a divorce, the parties can choose the law which will be applied to their divorce. Article 5 of Rome III allows parties to designate a law with which they are sufficiently connected. Another factor which may be taken into account in a *forum non conveniens* dispute.

The issue of COCAs for maintenance obligation disputes was covered. Under Reg 5(2)(b) Civil Jurisdiction and Judgments (Civil and Family) (Amendment) (EU Exit) Regs 2020, courts here will recognise COCAs for maintenance agreed before 11pm on 31 December 2020, even if a divorce is issued after that. But, there is no guarantee that this position will be reciprocated for COCAs choosing England & Wales (whether entered into before or after the end of 2020) by EU Member States. Furthermore, there is no COCA provision in either the 2005 Hague Convention on COCAs or the 2007 Hague Maintenance Convention. To ensure that all relevant regulations and protocols and their potential impact(s) are considered, it will be necessary to work closely with any foreign lawyer(s) when advising clients with international connections.

Enforcement of maintenance in international cases is fiendishly complicated, involving a patchwork of regulations, statutes and Conventions, some of which are over 100 years old. The International Guide contains very helpful signposting to those which are relevant to which jurisdiction and for what. Again, it will be vital to review the status tables for the 2007 Hague Maintenance Convention to see if it is in force and whether there are any reservations when advising in an international case.

Article 16 of the 1996 Hague Convention merits a careful read when considering the attribution and extinction of parental responsibility for families moving across international borders.

Lastly, ignore the rules on formal international service at your peril! Notification of proceedings (even with acknowledgement that they have been received) does not constitute good service internationally. We are seen as a very lax jurisdiction when it comes to service. Many jurisdictions do not permit service electronically (and certainly not via social media), by post or personal service. The International Guide has an incredibly practical chapter on effecting good service and the applicable rules for Scotland/Northern Ireland, contracting states to the 1965 Hague Service Convention (which includes all 27 EU Member States), various Commonwealth countries, the Isle of Man, Channel Islands and British overseas territories. As with all things Hague Convention-related, always check the status table for any reservations, declarations and notifications, as these control how service can be effected in the contracting states.

"Enforcement of maintenance in international cases is fiendishly complicated, involving a patchwork of regulations, statutes and Conventions. The International Guide contains very helpful signposting to those which are relevant to which jurisdiction."

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Court of Appeal sets out wide-ranging domestic abuse guidance

Kathryn Cassells *Vaitilingam Kay*

Re H-N & ors *provides a very useful steer on a number of significant issues in children proceedings where allegations of domestic abuse are made*

On 30 March 2021 the Court of Appeal handed down its judgment on four conjoined appeals in relation to fact-finding hearings in private law cases where domestic abuse was raised as an issue. As well as addressing the individual appeals, *Re H-N & ors (Children) (Domestic abuse: Finding of fact hearings)* [2021] EWCA Civ 448 gave more general guidance on domestic violence issues in the Family Court.

Background

Domestic abuse is an all-too-common feature of family law cases. In 2019/2020 there were 55,253 private law applications under the Children Act 1989. It is thought that at least 40% of private law children cases now involve allegations of domestic abuse. These figures do not include applications under the Family Law Act 1996, in which the applicant seeks protection from domestic abuse (though of course there will be instances where these applications are made simultaneously). The family courts therefore hear a very substantial number of cases involving contested allegations of domestic abuse. These conjoined appeals focused primarily on case management decisions in cases involving allegations of domestic violence and the implementation of Practice Direction 12J.

The treatment of domestic abuse within family law cases has garnered a lot of attention in the past few years, with initiatives aimed at reviewing the approach to domestic abuse in private law proceedings already in motion. In June 2020 the Ministry of Justice released an extensive report: Assessing Risk of Harm to Children and Parents in Private Law Children Cases ("The Harm Report"). We have also had the benefit of the President of the Family Division's Private Law Working Group report dated 2 April 2020. The recommendations from these reports are being carried out and the Domestic Abuse Bill (DAB) is still before Parliament.

Our understanding of domestic abuse has evolved over the past few decades. In the 1970s the emphasis was very much on actual bodily harm. It is now, however, understood that the ambit of domestic abuse can be far wider reaching than just physical instances of violence and that it can also take the form of coercive and controlling behaviour. The recent judgment of Mr Justice Hayden in *F v M* [2021] EWFC 4 urged greater prominence to be given to coercive and controlling behaviour in family proceedings.

Given the importance of the issues raised within the appeals, the Court of Appeal permitted the intervention of several interested parties, including Cafcass, Rights of Women, Women's Aid Federation of England, Welsh Women's Aid, Rape Crisis England and Wales, Families Need Fathers, and the Association of Lawyers for Children.

The Court of Appeal took the opportunity to provide guidance about issues commonly arising in the family courts in cases involving allegations of domestic violence, though they made clear from the outset that the guidance was limited to the issues in the conjoined cases.

Practice Direction 12J

It was accepted by the court, the parties and also in the two reports, that PD12J remains fit for the purpose for which it was designed: "to provide the courts with a structure enabling the court first to recognise all forms of domestic abuse and thereafter on how to approach such allegations when made in private law proceedings".

It was noted that the definition of domestic abuse in clause 1 of the DAB differed from that in PD12J, but that the content was substantially the same and that once the DAB became an Act, PD12J would then fall for further review to ensure it complied with the updated law.

Guidance issued by the court

The Court issued specific guidance on the following:

1. Whether there should be a fact-finding hearing
The Court of Appeal suggested that the proper approach to deciding if a fact-finding hearing is necessary is as follows:

i) Consider the nature of the allegations and the extent to which it is relevant in deciding whether to make a child arrangements order, and if so, in what terms.

ii) The court should have in mind the purpose of the fact-finding hearing, which is to provide a basis of the assessment of risk and therefore the impact of the alleged abuse on the child/children.

iii) Careful consideration must be given to PD12J.17 as to whether it is "necessary" to have the fact-finding hearing, including whether there is any other evidence which provides a sufficient factual basis to proceeding and the relevance to the issue before the court if the allegations are proved.

iv) The court also needs to consider whether a separate fact-finding hearing is necessary and proportionate, having an eye also on the overriding objective and the President's Guidance set out in "The Road Ahead".

Cafcass also offers additional support to the court, noting that currently it was not unusual for gatekeeping judges to allocate cases for fact-finding hearings without any social work input beyond the initial safeguarding letter. Cafcass instead suggested that judges should direct that they undertake an enhanced form of safeguarding assessment prior to the case being listed for a second gatekeeping appointment, which would assist in any further listing decision being made on a more informed and child-centred basis.

2. The use of Scott Schedules
The Court endorsed the view that the time has come for a move away from Scott Schedules as a means of identifying issues to be tried by the Family Court, as they are at risk of failing to focus on the wider context and whether there has been a pattern of coercive and controlling behaviour.

The Court did not, however, give any view on what should, if anything, replace Scott Schedules, considering that it was for others to develop the new guidance or rule changes.

3. Approach to controlling and coercive behaviour
The Court was told by some of the parties that coercive and controlling behaviour now makes up the majority of the allegations of domestic abuse.

The Court suggested that the parties should be asked to describe, in either a statement or orally, the overall experience of being in a relationship with the other. The Court also suggested that, where either of them alleged controlling or coercive behaviour, that should be the main issue at any finding of fact hearing, unless there were separate serious factual allegations that the court needed also to look into when addressing the risk of harm (such as sexual violence). This suggestion reflected the consensus that coercive or controlling behaviour can very rarely be particularised in a set of isolated factual incidents.

"The Family Court should avoid analysing evidence of behaviour by the direct application of the criminal law to determine whether an allegation is proved or not proved."

4. The relevance of criminal law concepts
The Court endorsed historic case law on this point and reiterated that criminal concepts are not to be imported into the Family Court. That did not mean that the parties, and judges, should shy away from using words such as "rape" in the manner that those words are used generally in ordinary speech. The key point was that the Family Court should avoid analysing evidence of behaviour by the direct application of the criminal law to determine whether an allegation is proved or not proved, and that it followed that the family judge making a finding on the balance of probabilities is not required to decide whether a criminal offence has been proved to the criminal standard.

Decisions in each of the appeals

In summary, the outcome in each of the appeals was as follows:

***Re B-B*:** The appeal against the making of a consent order granting a father time with his child was allowed. The judge had made a number of wholly inappropriate comments to the mother during the hearing (which was then adjourned, the trial being unable to proceed as listed). In this case, both parties had made allegations against the other. The mother alleged that the father had raped her. The father alleged that the mother was violent and abusive towards him. The judge had told the parties that their problems were entirely of their own making and, while the mother was in tears during the hearing said, "if this goes on the child will be taken into care and adopted". The judge, who was frustrated by the case preparation (none of the essential case management preparations for the hearing had been undertaken), told the parties that they "should have had the riot act read to you months ago" and made repeated reference to the possibility of referring the case to social services. The parties were encouraged to try to reach an agreement, and five months later (at a further hearing before the same judge), an agreement was reached.

The court concluded that the consent order was made in circumstances where there had been procedural irregularity of such seriousness that the appeal must

"It was especially concerning to the Court that the allegations in Re T *regarding the strangulation and the placing of a plastic bag over the mother's head one month later were minimised by the judge."*

be allowed. The case was remitted to a different judge to consider any application for a fact-finding hearing at a directions hearing in the continuing enforcement proceedings brought by the father.

***Re H*:** The appeal against an order made in September 2019 was dismissed. The judge had found an allegation of rape to be not proven and declined to determine allegations of financial and emotional abuse. Following the hearing, orders were made for unsupervised contact to take place between the father and his daughter (H). Whilst the mother did not seek to curtail the time between the father and H, she sought a rehearing of the allegations of both the rape and the controlling and coercive behaviour allegations on the basis that the judge's judgment was flawed. In the intervening time, there were further proceedings between the mother and the father in relation to H. On learning of the proceedings, the London Borough of Hammersmith and Fulham wrote directly to the court to express concern that the contact should not be disrupted as it was an important part of the current Child Protection Plan, in place for H, for contact to continue. Importantly, H reported a positive time with her father to the extent that she had requested overnight contact. The mother's case was not that she wanted to challenge the substantive order, but that she wanted to make sure that H was safe in her father's care.

The Court dismissed the appeal, as it was satisfied that there would be no purpose to considering the merits of the judge's judgment in relation to the allegations made by the mother, as they no longer had any direct relevance to the welfare decisions made in relation to H.

***Re T*:** An appeal against the making of an order for contact was allowed. At trial, the judge did not find allegations of anal rape to have been proved and held that a number of incidents of violence by the father against the mother had been minor (including holding her neck and placing a plastic bag over her head). It was also held that the mother had been aggressive towards the father. The judge, having considered each allegation individually, concluded:

> "While I am satisfied that some of the mother's allegations are true and some of the father's allegations are true and I am satisfied that this was a mutually abusive relationship, I am not satisfied that these represent anything more than the sad and bitter end of a relationship which met neither party's expectations… I am not satisfied that T would be at risk from her father… I am not satisfied that the father is a violent man as portrayed by the mother. It seems to me more likely that he was, occasionally, driven to anger and loss of control in conflicts with the mother in situations where she was verbally and, occasionally, physically abusing him. This is not an excuse and I should not be taken as endorsing any abusive behaviour by either of the parties but, having separated, I cannot see that either poses a threat to the other or to T."

Whilst the Court did not allow the appeal in relation to the finding on anal rape, it did allow the appeal on the basis that the judge had failed to appreciate the significance of the findings she did make. It was especially concerning to the Court that the allegations regarding the strangulation and the placing of a plastic bag over the mother's head one month later were minimised by the judge.

Conclusion

The Court of Appeal judgment was the first in some 20 years to address issues of domestic violence in private law children proceedings.

Although the judgment does not set any new legal precedent, the guidance contained within it provides a very useful steer to practitioners on a number of significant issues in children proceedings where allegations of domestic abuse are made.

There were several issues not addressed in the guidance. For example, no comment was made on interim child arrangements in terms of both the form the interim arrangements should take when allegations are made, and the impact that any agreed child arrangements may have on the necessity of a fact-finding hearing.

The judgment was also silent on the impact that funding issues may have on fact-finding hearings, particularly given the rise of litigants in person in private law children proceedings.

Whilst there is consensus as to the limits of Scott Schedules, we do not yet have fixed guidance as to what should replace them, especially in the context of coercive control cases where there is more likely to be a cumulative pattern of behaviour rather than specific incidents which can be easily distilled into schedule form. It is hoped that the Private Law Working Groups will provide practitioners with a greater steer as to how to put cases of coercive control to the court.

It will also be interesting to see how the courts approach the conflict between the "no delay" principle and ensuring that justice is done to allegations which may span many years of a relationship, and which fall under the ambit of the risk of harm.

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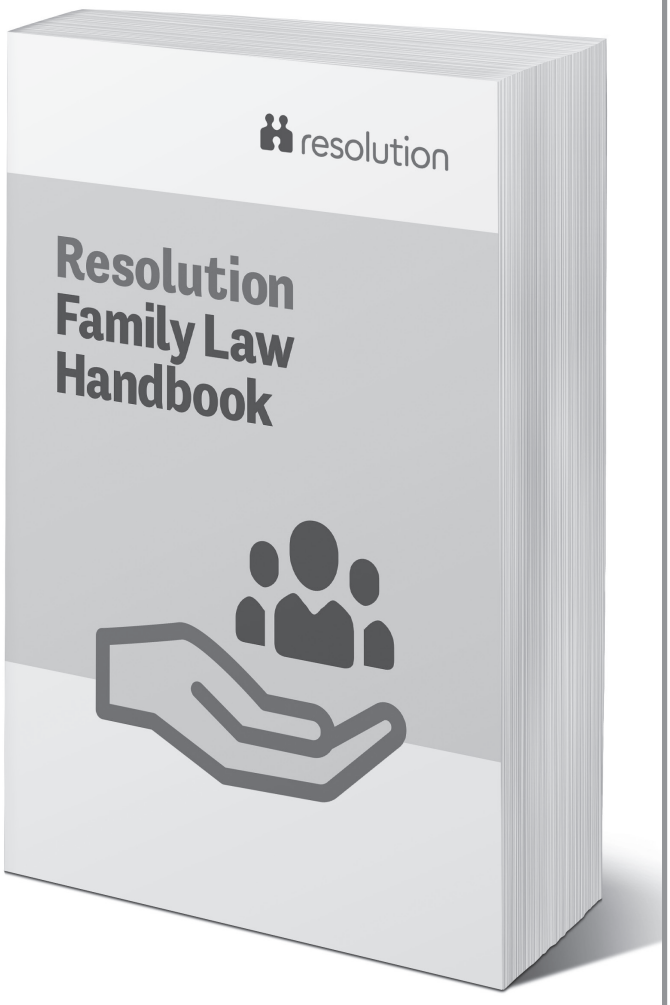

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Financial provision beyond the grave?

Nicola Rowlings *Mills & Reeve LLP*

Mostyn J has raised the spectre of a Supreme Court reconsideration of financial claims following the death of a party

Mr Justice Mostyn has recently given judgment in an unusual case where the wife had applied under Part III of the Matrimonial and Family Proceedings Act 1984 (MFPA 1984) against her husband, but he died before her substantive application could be dealt with. In *Hasan v Ul-Hasan (dec'd) & anor* [2021] EWHC 1791 (Fam) the question before the court was: did the wife's claims under Part III MFPA 1984 survive the husband's death and could they be continued against his estate? This was the first time the court had had to consider this issue but it is unlikely to be the last, as a Supreme Court ruling could beckon.

Consequences of the death of a party in financial remedy proceedings – a recap

Spouses remain married until *decree absolute* is pronounced. If one party dies at any time up until the pronouncement, the parties are still spouses at the date of death. For inheritance purposes the marriage still exists and no further step in the divorce proceedings can be taken (*Purse v Purse* [1981] Fam 143).

An order for financial provision, property adjustment or pension sharing is not effective and not capable of being enforced until *decree absolute* (ss23(5), 24(3) and 24B(2) Matrimonial Causes Act 1973 (MCA 1973)). So if a party dies at any time up until *decree absolute* is pronounced, the order is not binding on the other (*McMinn v McMinn (Ancillary relief: Death of Party to proceedings)* [2002] EWHC 1194 (Fam)). The surviving spouse may consider making a claim under the Inheritance (Provision for Family and Dependants) Act 1975 (I(PFD)A 1975).

If a party dies after the order has been made, the effect depends on who it is that has died and the nature of the order that has been made. If proceedings have concluded and *decree absolute* has been pronounced, generally the financial order is enforceable where one of the parties dies. However, the death of a party after a financial order is made may constitute a Barder event (an event that invalidates the basis or fundamental assumption on which the order was made) and the survivor could apply to set aside the order.

A claim for a financial order is personal to the parties to the marriage and does not survive death. If either party dies before an application under the MCA 1973 or the Civil Partnership Act 2004 (CPA 2004) for financial remedy has been made or determined, the court's jurisdiction lapses.

Factual background

The facts in *Hasan v Ul-Hasan (dec'd)* are fairly straightforward. The couple had married in 1981 and separated in 2006. The husband had obtained a divorce in Pakistan in 2012. It was the wife's case that during the parties' long marriage significant wealth had been accumulated. In August 2017 she was given leave to bring Part III proceedings and several interlocutory hearings had already taken place, primarily in relation to the husband's disclosure. However, in January 2021 – before the wife's substantive application could be dealt with – the husband died.

Arguments before Mostyn J

The wife argued that the authorities under Part II of the MCA 1973 and under the I(PFD)A 1975, which state that a financial claim made during marriage or following divorce expires with the death of the respondent did not bind the court because they did not relate to Part III MFPA 1984 claims.

However, Mostyn J did not agree with this and concluded that he was indeed bound by the case law under Part II MCA 1973 stating that s17 MFPA 1984 imports all the powers under ss23 and 24 MCA 1973 into Part III claims and s18(3) MFPA 1984 requires the court to exercise those powers in line with s25 MCA 1973.

And, putting it bluntly:

> "[The] jurisprudence unambiguously states that a financial claim made during marriage or following divorce expires with the death of the respondent. In my judgment, this principle applies equally whether the claim proceeds under Part II following a domestic divorce or under Part III following an overseas divorce." (para 6)

So, the wife was left with no recourse against the husband's estate and her application was dismissed. But was that the end of the matter? In a word, no.

Sugden v Sugden [1957]

What is especially interesting about *Hasan v Ul-Hasan* is that despite dismissing the wife's application and acknowledging that he was bound by the existing case law, Mostyn J stated (*obiter*) that the case law was wrong. Much of the judgment discusses this and, in particular, the contrasting approaches of the court to cases where death has occurred shortly before trial (as it did here) and those cases where death occurred shortly after trial (for example, in the well-known case of *Barder v Barder* [1987] 2 FLR 480).

Indeed, the contrast was so stark in Mostyn J's opinion that he considered it raised a point of law of general public importance and that the case was suitable for a leapfrog application for leave to appeal to the Supreme Court. At the time of writing, it is unknown whether either party has made that application.

The over 60-year-old case of *Sugden v Sugden* [1957] P 120 remains a key – and for the moment – binding authority. Here a husband had been ordered to pay child maintenance at the rate of £300 a year until each child turned 21. He died when the children were aged 18 and 14. There were no arrears and the wife sought to make his estate liable to continue to meet those payments in the future, arguing that s1(1) Law Reform (Miscellaneous Provisions) Act 1934 (LR(MP)A 1934) applied so as to make the maintenance continue after his death.

Section 1(1) LR(MP)A 1934 effectively continues a deceased party's "causes of action" existing at the time of death for the benefit of their estate – as well as any causes of action subsisting against them. However, in *Sugden v Sugden* Lord Justice Denning confirmed that a claim for ancillary relief (as it then was) was not a "cause of action" that could subsist post-death unless an effective order had already been made. And when it came to maintenance, arrears of maintenance could be recovered post-death but not future payments.

Why Mostyn J disagrees with *Sugden v Sugden*

Sugden v Sugden has been followed in several subsequent cases, with the courts taking the view that outstanding financial remedy claims cannot be pursued against a deceased spouse's estate. However, whilst finding that he was bound by this decision, Mostyn J said that he disagreed with it. He took the view that a financial remedy claim is a "cause of action" and therefore should survive death – after reviewing the development of s1 LR(MP)A 1934, he concluded that:

> "It is therefore clear to me that Parliament must have regarded a claim for post-divorce ancillary relief as a cause of action for the purposes of s1 of the 1934 Act. Once that has been accepted it can be seen that Parliament specifically decided not to include a claim for post-divorce relief in the list of excluded action." (para 40)

"Whilst finding that he was bound by the Sugden *decision, Mostyn J said that he disagreed with it. He took the view that a financial remedy claim is a 'cause of action' and therefore should survive death."*

While the LR(MP)A 1934 did not define "cause of action", if there was a right which gave rise to a remedy from the court then there was a cause of action (*Letang v Cooper* [1965] 1 QB 232 and *Mercedes-Benz AG v Leiduck* [1996] AC 284). It was difficult to see why a claim for financial remedy was not a cause of action, or why a claim for damages following a personal injury claim was a cause of action when a sharing claim earned over many years and which might be quantified in tens of millions of pounds was not.

Post-death relief had been awarded following applications to set aside financial remedy orders where one party had died shortly after the making of an order. Without question, in those circumstances the court had exercised its discretion under s25 MCA 1973. That approach could only be explained if the right to apply to set aside an order and to seek a full re-hearing was a cause of action under s1 LP(MP)A 1934.

Inconsistency in approach?

It is the analysis of the difference in approach taken to a death of a party in cases where claims have been adjudicated compared to those which have yet to be which will perhaps be of most interest to family lawyers.

Mostyn J points out that:

- on the one hand we have cases such as *D'Este v D'Este* [1973] Fam 55 and *Harb v King Fahd Bin Abdul Aziz (Secretary of State for Constitutional Affairs intervening)* [2005] EWCA Civ 1324 holding that applications under the MCA 1973 can only be made and pursued during the joint lives of the parties to the marriage; but

- on the other hand we have Lord Brandon in *Barder v Barder* going so far as saying that an appeal judge can not only set aside a disposition made by an order but can vary the order – "exercising his own discretion" – in circumstances where one party has died shortly after the order was made. Mostyn J concludes that the only basis on which the appeal court can do this is if it is applying the powers in ss23 and 24 MCA 1973.

In his judgment, Mostyn J comments that there are numerous case law examples illustrating the inconsistency in approach.

- In *Smith v Smith* [1992] Fam 69 a financial remedy order was reconsidered and varied by the Court of Appeal in circumstances where the wife had died six months after the making of the order.

- In *Reid v Reid* [2004] 1 FLR 736 a lump sum was ordered to be paid by the wife (the wife having died two months after the making of the order – the monies in dispute were being held on deposit) which represented a re-adjustment of the division of the net sale proceeds of the former family home.

- In *WA v Executors of the estate of HA & ors* [2015] EWHC 2233 (Fam) the consent order was reconsidered and varied following the husband's death. As a result of the variation the wife, who had been due to pay the husband £17.34m prior to his death, only ended up paying £5m.

These cases, the judge says, could be characterised as partial set asides, pursuant to the court's inherent appeal powers. But that, he goes on, would be a "false presentation". For example, in *WA v Executors of the Estate of HA*:

> "The court arrived at the figure of £5m as being the right amount to be retained by the husband's estate having regard to the husband's need from beyond the grave to support members of his family and to his sharing entitlement. At [69] Moor J stated that 'an award of £5m simply seems right applying the section 25 criteria'. Therefore this was an entirely fresh exercise of the section 25 discretion by the appeal court judge…"

Add into that mix the fact that Barder applications are now made under r9.9A of the Family Procedure Rules 2010, which almost invariably results in the court ordering a full re-hearing where an order has been set aside in whole or in part – a re-hearing where the court applies the powers in ss23 and 24 MCA 1973 and exercises the discretion in s25 MCA 1973 notwithstanding the death of a party. Is there another way of explaining this other than that a "cause of action" subsists and survives death?

Conclusion

Hasan v Ul-Hasan acts as a useful reminder (and a cautionary tale) about the consequences of a party's death on impending, ongoing or concluded financial proceedings. Family lawyers need to ensure that they are advising their clients – especially those in their later years or where there are serious health issues – that the current position is that un-issued and un-determined financial claims will not survive the death of a party. However, it is very much a case of watch this space to see if an appeal is made to the Supreme Court to remedy a situation which Mostyn J has called "illogical, arbitrary and capable of meting out great injustice."

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Leave well enough alone…

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*Leave and set aside applications under Part III MFPA 1984 (*Potanina v Potanin*)*

16 February 1984: Torvill and Dean had just won gold at the Winter Olympics in Sarajevo, and Frankie Goes to Hollywood's "Relax" was continuing its five-week reign at number one. The then Attorney-General Sir Michael Havers was also addressing the Commons as to what would become Part III of the Matrimonial and Family Proceedings Act (MFPA). Summarising the thrust of the relevant part of the Bill at its second reading, he declared:

> [T]he broad objective […] is to empower the courts in England and Wales […] to order financial relief in appropriate cases where a marriage has been terminated outside the British Isles. […] In recent years there has been a small but steady stream of cases coming before the courts which has both highlighted that gap in the law and illustrated the hardship to which it may give rise (Hansard, HC Deb 16 February 1984 vol 54 cc392-467, at 402).

The parties in *Potanina v Potanin* [2021] EWCA Civ 702 had married not very long before, in Russia, in 1983.

Vladimir Potanin (H) is now one of Russia's wealthiest individuals, with an estimated fortune of some $20bn. He appeared at number 68 in Appendix B of the US Department of the Treasury's "Putin list", along with Farkhad Akhmedov, whose position in the list was number four. (See also the long-running and recently settled *Akhmedov* financial remedy and enforcement litigation saga, which involved the largest ever financial remedy award of £453m – *AAZ v BBZ* [2016] EWHC 3234 (Fam) at [134]).

H's ex-wife, Natalia Potanina (W), was originally granted leave (*ex parte*) by Mr Justice Cohen on 25 January 2019 to apply under Part III of the MFPA for financial relief in England and Wales in respect of the parties' divorce, which had been pronounced in Russia on 25 February 2014. Accordingly, a case management hearing was listed for 5 June 2019 as to W's substantive Part III application.

H then applied, pursuant to r18.11 of the Family Procedure Rules 2010 (FPR) to set aside W's grant of leave, and the 5 June 2019 hearing was instead used to give directions in respect of his set aside application, which was subsequently listed for a two-day hearing on 3 and 4 October 2019, with an additional day for judicial reading time. (This was a case management approach "contrary" to that established in the leading authorities – see Lady Justice King's remarks at para 40.)

Ultimately, Cohen J found in favour of H and dismissed W's application for leave in his judgment of 8 November 2019 (*Potanin v Potanina* [2019] EWHC 2956 (Fam)). That decision was reversed by the Court of Appeal in its recent judgment (delivered by King LJ) which is instructive for financial remedy practitioners as to the correct approach regarding both the procedure and law applicable to the leave stage of a Part III application, and to any set aside application in relation to the grant of leave.

Further background

At the time of Cohen J's November judgment, both H and W were aged 58, and their three adult children were 35, 30, and 21.

H claimed (and the Russian court agreed) that the parties' separation took place in 2007. Between 2007 and 2008 H had paid sums totalling c$77.5m to W. W asserted that the separation in fact took place in November 2013.

Between 2014 and 2018 there then ensued a "blizzard" of litigation, with W bringing five different sets of proceedings in Russia (all of which fell to be determined on appeal). The Russian court's ultimate award was said by W to be a sum equivalent to $41.5m. W had additionally issued further proceedings in Cyprus in May 2014, and in the USA, including in New York in February 2014.

Separately in February 2014 W met with a "well-known firm of specialist divorce solicitors in London" ([2019] EWHC 2956 (Fam), at [51]), and in June 2014 obtained a UK investor visa. Later that year she purchased a flat in London for £2.5m, £1.7m of which was met via mortgage.

It is apparent from a quoted section of Cohen J's judgment (in the *ex parte* leave judgment) that at that time the judge understood, from W's documentary evidence, that the London flat had been her principal home since "at least January 2016" ([2021] EWCA Civ 702, at [56]). Separately,

"The crux of W's application for a grant of leave was formulated on the basis that the Russian courts are not empowered to make orders regarding assets that are only beneficially (not legally) owned by a party to the marriage."

the Court of Appeal noted W's "case is that, since the beginning of 2017, London has been her permanent home" (*ibid* at [17]). W's application was therefore made pursuant to s15(1)(b) of the MFPA given her habitual residence.

W's application for leave, and H's application to set aside

The crux of W's application for a grant of leave as to her Part III application was formulated on the basis that:

1. The Russian courts are not empowered to make orders regarding assets that are only beneficially (not legally) owned by a party to the marriage – noting that the bulk of H's wealth is asserted to be owned beneficially by various trusts and corporate vehicles (referred to in the Court of Appeal's judgment as the "lacuna point").

2. Her reasonable needs, in light of the standard of living during the marriage, were not met (*ibid* see [55] and [76]).

Although W's witness statement at the leave stage contained particulars relating to the alleged misapplication by the Russian courts of the relevant law as a result of alleged corruption, these did not form part of her counsel's submissions at the *ex parte* hearing, nor Cohen J's reasoning for his original order granting W leave (see [75]). Likewise it was also noted, in respect of the two matters referred to above, that:

> The undisputed evidence, it would seem, remains that (i) the husband is the beneficial owner of the bulk of his fortune and that (ii) the Russian courts do not recognise beneficial ownership and will deal only with assets held in the names of the divorcing parties… the court needed to have in mind, as part of the decision-making at the set aside hearing, that they were the issues on which the wife had relied at the *ex parte* hearing. [82]

H's application to set aside was instead based on various alleged misrepresentations on W's part at the *ex parte*

hearing to the extent that the judge had been misled. Cohen J categorised what he deemed to be the most significant misrepresentations as follows:

1. "Factual misrepresentation" (involving the extent of child maintenance W had received; an issue regarding W not volunteering that she had met with English solicitors prior to her purchase of the London flat; and the parties' daughter's former presence in England having been short-term rather than long-term).

2. "Misrepresentations as to Russian law/proceedings."

3. "Misrepresentations of English law" [58].

Considering these matters in his set aside judgment of 8 November 2019, the judge concluded that he was "in no doubt that if [he] had had the full picture [on the date of the *ex parte* hearing] [he] would not have granted W leave to make her application" (*ibid* at [59]), going as far as endorsing H's counsel's remark that "if this claim is allowed to proceed then there is effectively no limit to divorce tourism" ([2019] EWHC 2956 (Fam), at [88]).

The appeal

The Court of Appeal nonetheless found that Cohen J's objections at the set aside hearing to the way W had presented her case at the leave hearing were not material to the narrow issue of whether or not H had compelling reasons (or a "knock-out blow") as to the revocation of leave which would have justified a discrete set aside hearing: King LJ opined there were no such compelling reasons. Likewise, a set aside hearing is not akin to a "return date" in injunction proceedings, and if a set aside application contains no compelling reasons or "knock-out blow" (including an "omission of a decisive authority"), then it falls to be heard together with the substantive application at trial ([2021] EWCA Civ 702, at [86]).

W's grounds of appeal included that Cohen J had erred in making significant findings in relation to substantive s16 MFPA factors including W's:

> connection with this country (s16(2)(a)–(c)); the financial benefit she has hitherto received (s16(2)(d)); provision for any children (s16(2)(e)); and her rights to financial relief in any other country (s16(2)(f).

Crucially he did so without the oral evidence that would have been available had H's set aside application been adjourned to the trial.

The basis of Cohen J's set-aside decision was that there had been "material misleading of the court", although there was no finding that this had been deliberate (*ibid* [60], [65]).

The Court of Appeal found that W's failure to disclose the date she sought advice from specialist matrimonial solicitors in London was not material and could not be regarded as material non-disclosure (it being noted that Cohen J was aware W had no connection with England & Wales prior to the marriage's breakdown). W's motivation for coming to England & Wales was understandably deemed to be a matter for evidence – particularly oral and cross-examination, it being noted that "disputed evidence as to motivation cannot be regarded as a knock-out blow" (*ibid* at [71]).

Further, W's statement regarding the parties' daughter's presence in England "played no part in [Cohen J's] analysis of the wife's connection […] the key feature having been that London had been the wife's home for three years" [72].

The judge's complaint about a lack of key documents/translations relating to Russian law at the leave hearing, and his finding at the set aside hearing that there had been a "proper application of the law" by the Russian courts made no difference to W's central argument regarding the lacuna point. Likewise the finding was unsupported by expert evidence.

Although W's statement that her "needs had not been assessed by the Russian court" was "potentially misleading", the failure could not "be regarded as a material representation" [77].

Similarly, in respect of the alleged misrepresentations as to English law, the "fact that [W's] counsel did not specifically highlight paragraphs [70-72] of *Agbaje* in oral argument, when they were quoted in full in his skeleton argument, cannot be said to have misled the judge in any material way" [83].

The appeal's relatively narrow extent and the reasons for its success are concisely put by King LJ at [87] thus:

> It may be that the judge would have refused permission for the wife to issue proceedings had the section 13 leave application been heard *inter partes*, but that is not the issue on appeal. In my judgement the judge's analysis was tainted by the procedure adopted at the set aside hearing which on the one hand was too elaborate and lengthy, but on the other hand led to the making of serious adverse findings against the wife without the benefit of either oral evidence or any expert evidence as to Russian law that either party may have wished to call. The alleged deficits identified by the judge, even where established, cannot for the reasons set out above be said objectively to have either misled the judge or to have been sufficiently material to the issues which informed the grant of leave to amount to a compelling reason to set aside the permission granted at the *ex parte* hearing.

Applicable law and procedure regarding leave and set aside in Part III proceedings

The substantive law in Part III applications regarding the "filter" requirement for leave is set out at s13(1) of the MFPA. The section provides: "the court shall not grant leave unless it considers that there is substantial ground for the making of an application for such an order".

Leave may also be granted subject to conditions (s13(3)).

As King LJ notes in *Potanina* at [34], the test for granting leave and the proper approach to an application to set aside is discussed by Lord Collins in the familiar passage found at para [33] of his judgment in the leading Supreme Court case of *Agbaje v Agbaje* [2010] UKSC 13 (which pre-dates the FPR) and which reads:

> In the present context the principal object of the filter mechanism is to prevent wholly unmeritorious claims being pursued to oppress or blackmail a former spouse. The threshold is not high, but is higher than "serious issue to be tried" or "good arguable case" found in other contexts. It is perhaps best expressed by saying that **in this context "substantial" means "solid"**.
>
> Once a judge has given reasons for deciding at the *ex parte* stage that the threshold has been crossed, the approach to setting aside leave should be the same as the approach to setting aside permission to appeal in the Civil Procedure Rules, where (by contrast with the Family Proceedings Rules) there is an express power to set aside, but which may only be exercised **where there is a compelling reason to do so**: CPR r52.9(2).
>
> In practice in the Court of Appeal the power is only exercised where some decisive authority has been overlooked so that the appeal is bound to fail, or where the court has been misled: *Barings Bank plc v Coopers & Lybrand* [2002] EWCA Civ 1155; *Nathan v Smilovitch* [2007] EWCA Civ 759.
>
> In an application under section 13, unless it is clear that the respondent can deliver a **knock-out blow**, the court should use its case management powers to adjourn an application to set aside to be heard with the substantive application. (Emphasis added).

King LJ notes the further authority *Traversa v Freddi* [2011] EWCA Civ 81 concerning how the *Agbaje* test ought to be applied (*Traversa* was also decided prior to the introduction of the FPR in April 2011). Quoting from the key passages in *Traversa* at [30] and [31], the judge emphasises (in bold) the following dicta:

> It is clear that the section 13 filter is there to exclude plainly unmeritorious cases and, although, in the evaluation of substance, regard must be paid to overall merits, **it does not call for a rigorous evaluation of all the circumstances that would be considered once the application has passed through the filter**.
>
> At the hearing of the section 13 application the judge will of course be conscious of the fact that, once through the filter, the applicant will have to clear a number of fences that the following sections erect. **Unless it is obvious that the applicant will fall at one or more of the fences, his performance at each is better left to the evaluation of the trial judge**.

Reported cases addressing the leave stage in Part III applications make it clear that the consideration of the section 16(2) MFPA factors ought to be brief at the leave stage. The issue is perhaps most succinctly addressed by Williams J in *Vasilyeva v Shemyakin* [2019] EWHC 932 (Fam) (a case that did involve an *inter partes* hearing at the leave stage):

"The test for granting leave and the proper approach to an application to set aside is discussed by Lord Collins at para [33] of his judgment in the leading Supreme Court case of Agbaje v Agbaje *[2010]."*

> Section 16 of the MFPA 1984 along with sections 17 and 18 are directly applicable when the court is adjudicating upon the application and considering whether to make an order. They thus come into play after leave has been granted pursuant to section 13. Of course, an applicant will invariably choose to refer to the section 16 factors and might go further and refer to the section 18 factors to demonstrate that it was likely the court would conclude in the circumstances that it was both appropriate to make an order and identify the sort of order that the court might consider appropriate in all the circumstances by reference to the section 18 MFPA 1984 (and perhaps section 25 MCA 1973) factors. […]
>
> Once one embarks upon this exercise of looking at the section 16 factors and indeed broader considerations there is a danger that one commences the sort of detailed (or rigorous) evaluation that it is intended should take place once leave has been granted. [47-48].

(NB: *Vasilyeva v Shemyakin* is a reported example of a judgment following an *inter partes* hearing for a grant of leave.)

The significance of the authorities pre-dating the FPR as noted above is the evolution of the requirement for the application for leave to be made *ex parte*: the 1991 rules required that the application be made ex parte and made no provision for *inter partes* hearings (see *Potanina* [2021] EWCA Civ 702, at [27]). The original FPR leaned more in the direction of *inter partes* ("the court **may** grant an application made without notice if it appears to the court that there are good reasons for not giving notice" r8.25 FPR 2010, as in force from 6 April 2011 – emphasis added). The current version mandates the application be made *ex parte*, although it does provide for an *inter partes* hearing if the "court considers it appropriate" r8.25 FPR 2010 (as in force from 7 August 2017).

The applicable procedure for applications for leave is set out at Chapter 6 of Part 8 of the FPR (ie rr8.23 to 8.27), which requires proceedings be commenced via the Part 18 procedure.

"The judgment makes it plain that there ought to be 'costs consequences' for an applicant in the event that a grant of leave is successfully set aside, and that those costs should be awarded on the indemnity basis if findings are made that the judge was misled."

Practitioners will note that the current version of the D50E court form[1] on which the application for leave is made remains outdated, still stating at the beginning of the form that "The parties concerned are to attend before a judge": ie the form itself presupposes an *inter partes* hearing, in contradiction to r8.25 FPR, as above. Practitioners will also note the very recent changes to the allocation of Part III proceedings, such that the default allocation is now to district judge level, rather than High Court judge level, as it had been. (See SI 2021 No. 505 (L. 7), The Family Court (Composition and Distribution of Business) (Amendment) Rules 2021). Proceedings must be issued in the Family Court (r5.4(1) FPR 2010).

The *Potanina* judgment provides helpful guidance as to when an *ex parte* hearing may not be appropriate. King LJ (at [31]) takes pains however to stress that an *inter partes* hearing ought still to be conducted on a summary basis:

> In my judgement in a complex case, it is likely to be appropriate for the application to be determined on notice. In referring specifically to complexity I am not being prescriptive and there may well be other circumstances in which an *inter partes* hearing is appropriate but regardless of whether the application is made *ex parte* or *inter partes*, the character of the determination of applications for leave remains essentially summary.

Further, at [32]:

> [R]egardless of whether the application for leave is dealt with at a without notice hearing or *inter partes*, the hearing should be given an "appropriately short listing".

In respect of a successful set aside application of a grant of leave being possible on the basis of the judge who hears an ex parte hearing being misled, the Court of Appeal provides the following helpful summary at [65]:

> An application to set aside leave on the basis that the judge had been misled should include consideration of the following:
>
> i) The more complex the case, the greater the detail that will be required in order to achieve the fair disclosure necessary on any *ex parte* application;
>
> ii) Not every misrepresentation will justify the setting aside of leave. The matters said to be misleading have to be either individually or collectively misleading and sufficiently material to justify setting aside the leave;
>
> iii) The courts are required to keep a sense of proportion. See *AA v BB [(Application to set aside leave)* [2014] EWHC 4210 (Fam)];
>
> iv) If it can be said objectively that the matters alleged did not mislead or are not sufficiently material to the issues informing the grant of leave, then leave will not be set aside.

The risk for practitioners remains the potential in Part III claims for the leave hearing (whether *ex parte* or *inter partes*) to go beyond the *Agbaje* test which requires that the applicant must demonstrate "solid grounds or substantial grounds for the court to be able to say that an order might be made" (*ibid* at [85]).

Other significant points in the Court of Appeal's judgment

Notwithstanding the general rule at r28.3(5) FPR 2010 as to each party bearing their own costs in financial remedy proceedings (which Part III proceedings are – see r28.3(4)(b)(ii)), the judgment makes it plain at [44] that there ought to be "costs consequences" for an applicant in the event that a grant of leave is successfully set aside, and that those costs should be awarded on the indemnity basis if findings are made that the judge was misled.

In respect of the potential "safety net" provided for by s16(3) MFPA and the Maintenance Regulation, which would allow for a Part III application not to be dismissed if to do so would be inconsistent with the Regulation (despite a court finding that it would not be appropriate for an order for financial relief to be made, per section 16(1)), the judgment confirms that although transitional arrangements will apply to any proceedings issued before 11:00 pm on 31 December 2020, such cases will inevitably be growing more scarce.

Finally, King LJ reiterates that Part III proceedings were designed to benefit the full spectrum of prospective applicants and raises the prospect of the Law Commission's possible intervention to consider the complexities and challenges raised in the judgment. It is suspected that practitioners will endorse that suggestion with enthusiasm.

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Footnote:

1) PD5A FPR 2010 (Table 1), and D50E Application for permission to apply for financial relief after an overseas divorce etc (11.14), HMCTS

Needs, capitalisation and the source of wealth

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ND (by her litigation friend KW) v GD *[2021] EWFC 53 saw the court – in circumstances of a party's declining health – assess the appropriateness of a clean break, the factors to taken into account when assessing needs, and the source of the family wealth*

In *ND (by her litigation friend KW) v GD* [2021] EWFC 53 (Mr Justice Peel), the wife was 54 and the husband 59. They were married for 23 years to separation in 2018. There were two children of the marriage, aged 22 and 21. The lifestyle of the parties during the marriage was modest. In 2009 the parties bought their current family home for £320,000. They had little in the way of other assets until the death of H's mother in 2013. H inherited an estate that was worth £3.2m gross at final hearing. The estate was predominantly represented by a valuable property portfolio. Post-inheritance there was not a great surge in family expenditure. Neither party lived in the FMH at the date of final hearing. W lived in a property in H's name and H lived in rented accommodation.

Shortly after separation in November 2018, W was diagnosed with Young Onset Alzheimers. W was endeavouring to maintain her independence but needed assistance from a carer. By March 2020 W was unfit to work or drive. Since March 2021 she received 5 hours a week of professional care to assist with household jobs at a cost of £7,200pa. W wished to remain living independently for as long as she could before contemplating residential care. It was inevitable that W's cognitive decline would require much greater support but what was difficult to predict was the timescale of deterioration, including increased care at home and possible residential care.

The total net assets at final hearing were £2.6m. W received £5,896pa under an income protection plan until 60 and a PIP of £5,907pa. H had an earning capacity of not more than £15,000pa. Whilst H received a rental income from the property portfolio, it risked a double account to include both the full capital value of the property portfolio and to ascribe an additional income to H represented by the rent.

The court read expert evidence from an occupational therapist and heard from an SJE consultant old age psychiatrist and an SJE financial adviser. The financial adviser carried out a number of bespoke calculations and gave oral evidence. His primary task was to calculate on a capitalised basis the sum required by W to meet her needs including as to care (essentially a Duxbury-style exercise) working on income receipts, income needs and life expectancy.

W sought a net sum of £1.2m excluding her pension on a clean break basis. Of that she sought £700,000 by way of a housing fund and £500,000 as an income fund.

H offered W £750,000 on a clean break basis. Of that he proposed a housing fund of £525,000 and an income fund of £225,000. H alternatively offered a joint lives order for periodical payments at £16,216pa based on W's reasonable budgetary needs of £28,000pa less her income from other sources.

Outcome

W's needs were informed by all the circumstances of the case, in particular the length of the marriage, her medical condition and provenance of the wealth. W required a housing fund of £650,000 and an income fund of £300,000. The division of resources was 63/37% in H's favour. On application of the cross check as to fairness such a division was entirely fair and represented an equitable balance between W's needs, the long marriage and the source of the wealth.

The learned judge rejected the alternative proposal of periodical payments. A clean break was desirable to prevent further litigation, the avoidance of which was in the best interests of both parties but particularly W's, whose health was not robust enough to cope with ongoing financial and legal issues. The risk of capitalised maintenance being the incorrect figure cut both ways.

H was found not to have negotiated openly in a reasonable manner. No order was made as to costs. The rationale for such an order was that the order met W's needs after

the payment of legal fees; so H was in reality paying her costs from his assets.

Comment

The judgment contains a wonderfully succinct summary of the law that warrants both reading and re-reading. The summary emphasises that needs are not always causally linked to the marriage on an application of the needs principle. By contrast there would have to be a causal link to the relationship on any rare application of the compensation principle. The source of wealth was also a relevant factor when assessing need – presumably by way of a dampener on a generous assessment.

The learned judge thought that the parties could have used the Capitalise programme to generate precise calculations and that the evidence of the financial adviser did not provide the court with much assistance. The instruction of the expert was consequently not necessary and there was rarely, if ever, a need for an IFA to carry out a Duxbury-style exercise. In the vast majority of cases it was inappropriate to reach beyond the Duxbury tables in At a Glance or the Capitalise programme for a more advanced formula.

The judge expressed his gratefulness to both counsel for having provided an agreed asset schedule and took the opportunity to emphasise that the rules require an asset schedule in single form in the High Court and that absent good reason an asset schedule in single form must be prepared below High Court level. It was recognised that compliance may be burdensome, but that was no excuse and the requirement was necessary in the interests of the proper use of judicial and court time. It is suggested that in order to ensure that the obligation is complied with below High Court level, a specific direction should be sought for the filing of a composite schedule shortly after FDR and perhaps at the same time as post-FDR open offers are prepared.

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A deal's a deal…

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In Derhalli v Derhalli *[2021] unexpected developments in the housing market pending sale of the FMH could not change the fundamentals of an already-agreed consent order*

Derhalli v Derhalli [2021] EWCA Civ 112 is a high-net-worth case concerning an appeal that was brough to the Court of Appeal by the husband in relation to the proper interpretation of a consent order, which was agreed upon by himself and his former wife during their financial remedy proceedings following the breakdown of the marriage.

Background

The parties in this case married in 1989, had two children together and resided in a property purchased in 2004, registered in the husband's sole name. This was the parties' matrimonial home where they resided as a family unit until the breakdown of their marriage in 2014. Apart from the matrimonial home, the parties also had two additional properties, one of which the wife purchased before the marriage to serve as a home for her parents, and another property purchased in 2007 registered in the husband's sole name. The latter was used as their country home.

Though the parties' relationship was no longer subsisting, they continued to negotiate following the pronouncement of the *decree nisi*, in order to reach a compromise in relation to the division of the properties and their finances. The parties had agreed by way of a consent order to sell the former matrimonial home (FMH) and the wife was to receive three lump sums, one of which would be taken from the sale of the FMH. It was also agreed that the husband would keep the country home. The order also provided that the wife would be responsible for future payments of the running costs of the FMH, though there was no provision in relation to the "end date".

The consent order was quite complex and considerably lengthy, detailing every aspect of the sale of the FMH and the division of the parties' finances. Both parties agreed to include a provision in the consent order that they agree for the terms of this order to be full and final, so to avoid any party bringing in a court claim after the conclusion of the parties' divorce. This order was approved by Judge Holman.

Following the agreed order, the parties' *decree absolute* was pronounced on 11 October 2016.

The husband claimed that when the parties were negotiating and coming to terms with the provisions of the consent order, they were quite confident and had no reason to believe that the FMH would not sell promptly. It was valued in excess of £7m and regarded as a "highly desirable property" on the market. As agreed, the wife was to receive a lump sum from the sale proceeds of the home and this would have been enough to purchase a suitable accommodation for herself, without the need to draw from the remaining lump sums, which were to be held offshore. However, on 23 June 2016 the UK voted to leave the EU, and this had considerable impact on the property market in the UK. The matrimonial property had to be significantly reduced in value and it remained on the market until 27 March 2019, when it was sold for the sum of £5.9m. The wife remained in the FMH until this date.

Issues in dispute

A declaration made by HHJ Gerald was set aside and a fresh declaration was made at the first appeal. The judge interpreted the meaning and effect of the order and it was held that the wife was permitted to occupy the FMH and to be responsible for the payment of the outgoings of the property until the sale of the property took effect, but that she was certainly not obligated to pay occupational rent pending sale. The husband disagreed with this interpretation of the consent order, lodging a second appeal on the basis that the judge erred in deciding that it was the intention of the parties that the wife would be permitted to occupy on a rent-free basis until the sale of the home, arguing that no reasonable person having regard to all the background in the case would have thought so.

The husband served a notice on the wife requesting her to vacate the property on two occasions, or to pay rent of £5,000 per week to be able to continue to live in the property until the sale. The wife neither vacated the property nor paid rent, which prompted the husband to initiate proceedings seeking damages for trespass of £600,000.

Was the wife a gratuitous licensee?

The first instance judge held that from the date of the order, the wife was considered as:

> "a gratuitous licensee terminable on reasonable notice whereafter she would be a trespasser liable to pay damages for use and occupation thereof until delivering vacant possession".

However, on the first appeal it was held by QC Glaser that the judge had erred in deciding that the wife was a gratuitous licensee. Instead, it was held that the wife had legal rights in relation to the occupation of the matrimonial home. It was concluded that the wife had the right to occupy the FMH until its sale. The provisions of the order clearly suggest that it was the parties' intention for the wife to remain in occupation until the property was sold, although they anticipated the sale to occur soon after the *decree absolute*. At this stage, the parties could not foresee that the sale would be delayed due to the outcome of the referendum and the stall on the property market.

"The provisions of the order clearly suggest that it was the parties' intention for the wife to remain in occupation until the property was sold, although they anticipated the sale to occur soon after the decree absolute. *The parties could not foresee that the sale would be delayed."*

However, it was not for the court to consider that the property could not sell immediately as anticipated. It was, however, pointed out that the judge at first instance was perhaps influenced by the fact that the wife agreed by way of consent to remove her notices at the Land Registry and that she agreed for the husband to remain with the sole beneficial ownership of the matrimonial property.

What the judge at first instance seemed to have overlooked is that it was agreed for the property to be sold immediately and the proceeds of the sale to be divided between the parties. It was therefore held that the wife's agreement to remove her notices at the Land Registry was simply to facilitate the selling of the property, so that she could receive part of the proceeds of the sale by way of a lump sum from her former husband. This did not indicate that she had given up on any of her rights in relation to occupation, though she agreed to give vacant possession of the property when it is sold. The appeal was hence dismissed.

Lessons of the case

This case sets no precedent, though it serves as a reminder that courts will not consider "bad bargains", hence it is important for the parties to be thoroughly advised of the consequences of entering into a consent order with no room for future variation of the order. It is also important for the parties and their legal representatives to take into account that the market economy, particularly the housing market is inconsistent in this day and age, and many factors could possibly contribute to fluctuations in the value of the property.

Although no one could foresee the impact of the Brexit referendum in relation to the property market, it is nevertheless essential to consider advising clients to agree on adding additional terms in the consent order that clarify their position in the event that the economy

"The judges have rightfully dismissed this appeal on the basis that the proper interpretation of the order was rather obvious. There was nothing in the order to suggest the wife was to vacate the property or to pay rent."

is disrupted and property remains on the market for the unforeseeable future.

The courts have specified in numerous occasions that they "will not inquire into the parties' subjective states of mind" as to what they intended through the terms of the consent order. The court's role is to consider the entire context of the consent order. It is always advisable that the parties' intentions are clearly set out in their agreement, so to leave no room for misinterpretation.

The judges have rightfully dismissed this appeal on the basis that the proper interpretation of the order was rather obvious. There was nothing in the order to suggest the wife was to vacate the property or to pay rent.

The order does not indicate that the husband would require possession of the FMH for his own occupation or for letting it out until it was sold, and had he indicated that he wished to let out the property, the court may have considered that it was his intention throughout to receive rental income until the property is sold. It appears that when he realised that it would take longer than anticipated to sell, only then he sought rental payments from his former wife, after his agreement to the consent order.

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Varying or discharging an attachment of earnings order

Marc Samuels *36 Family*
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AEOs can be powerful tools to ensure payment of maintenance, but the exact rules are rigid and need to be followed carefully

An attachment of earnings order (AEO) is an order requiring a debtor's employer to deduct periodic sums from the debtor's earnings and pay that money into court for onward payment to the creditor.

It is a mechanism typically used to secure payment of maintenance orders and enforcement of maintenance arrears, though it can also apply to lump sum orders – see Para 3 of Schedule 1 to the Attachment of Earnings Act 1971 (AEA 1971). An application for an AEO may be made at the point of making a maintenance order (r39.5 FPR) as well as subsequently, where an order has been breached. An AEO imposes a considerable burden on an employer (ss7 and 15, AEA 1971), most notably the implementation of a system by which the payments are deducted. The obligations do not fall lightly: an employer who fails to comply with an AEO or notify the court of a change to the debtor's employment will commit an offence (s23(2)-(3) AEA 1971).

So, what is the way out for a debtor if an order has been made?

A debtor can apply to the court (s9 AEA 1971) to vary or discharge the AEO if circumstances have changed – for example, if they can no longer afford the payment required under an AEO. The powers conferred by s9(1) can be exercised by the court of its own initiative in the circumstances set out in r39.16 FPR:

- Where it appears to the court that the recipient of the AEO does not employ the debtor (in which case, the court must discharge the order).
- Where the recipient no longer employs the debtor, in which case the AEO will lapse (in such circumstances the court may make consequential variations as it deems fit).

- Where it appears to the court that the related AEO has ceased to have effect, whether by virtue of the terms of the maintenance order or under s27 of the Matrimonial Causes Act 1973 or otherwise (r39.16(4)).

- Where an AEO has been made and the court thereafter makes another order for enforcement for the recovery of payments under the maintenance order, or where there are no further sums payable under the maintenance order (r39.16(5)).

Note that before varying or discharging an AEO of its own initiative, the court must, unless it thinks it unnecessary in the circumstances, give both the debtor and the person on whose application the order was made, an opportunity to be heard on the question of whether the order should be varied or discharged (r39.16(6)) and notice must be given (r39.16(7)). Necessarily these applications are highly fact specific. Where the court decides to vary or discharge the AEO, such order must be served on the parties as well as the employer (r39.13(5)).

Case study: AEOs and the court's powers

The authors represented the defendant in the county court in an enforcement dispute concerning an AEO. Neither of the authors had acted in the preceding divorce or financial remedy proceedings, which had concluded many years ago. When the authors were instructed, the proceedings were on foot and an AEO had already been made against the defendant.

The underlying financial remedy (consent) order required the defendant to pay spousal maintenance at a considerable monthly rate from the date of the order until the occurrence of one of various terminating events. These included the commonplace triggers of death, cohabitation and remarriage, along with a longstop date which had many years yet to run. The order was non-extendable. An historic AEO had been made against the defendant on the basis of alleged arrears of maintenance. The defendant's position at that time was that the claimant had in fact commenced cohabitation (apparently temporarily) which terminated the obligation. In the event, the maintenance obligation continued, and the defendant continued to pay for a significant period of time until it became apparent that the claimant was now again cohabiting with a new partner and was in a committed relationship.

On that basis, the defendant instructed Rayden Solicitors to write to the ex-spouse indicating that the spousal maintenance payments would stop on the ground of cohabitation, which was now plain and presumably undisputed. No reply was received.

Afterwards, the defendant started a new job and was alarmed to be served with a new AEO (again made in the county court), requiring continued payment of maintenance as well as arrears out of monthly earnings. The defendant had not been notified of or served with an application and it appeared that this new AEO had been made without a hearing.

The authors were instructed to apply to discharge the new AEO and seek costs. The claimant attended the hearing that followed and opposed that application. It was argued that cohabitation had not commenced and therefore no triggers under the financial remedy order had been engaged. The dispute therefore apparently fell to one question of fact: was the claimant cohabiting or not?

"Where the court decides to vary or discharge the AEO, such order must be served on the parties as well as the employer (r39.13(5))."

However, the authors advanced a preliminary argument on behalf of the defendant that rendered the factual dispute moot. They argued that the AEO should be discharged and any other orders set aside on jurisdictional grounds: the AEO enforced periodical payments provisions contained in a consent order made in the family court, not the county court. As such, it was highly irregular that the various historic iterations of AEOs (and applications for them) had been made in the county court at all.

This is because s1 of the AEA 1971 states the following:

> 1. Courts with power to attach earnings
>
> (1) The High Court may make an attachment of earnings order to secure payments under a High Court maintenance order.
>
> [(1A) The family court may make an attachment of earnings order to secure payments under a High Court or family court maintenance order.]
>
> (2) [The county court may] make an attachment of earnings order to secure—
>
> (a) . . .
>
> (b) the payment of a judgment debt, other than a debt of less than £5 or such other sum as may be prescribed by [rules of court]; or
>
> (c) payments under an administration order.
>
> (3) A magistrates' court may make an attachment of earnings order to secure—
>
> (a) . . .
>
> (b) . . .
>
> (c) the payment of any sum required to be [paid under regulations under ss23 or 24 of the

"The authors submitted on behalf of the defendant that the county court did not have the statutory power to make the extant AEO (or the preceding orders), and on that basis asked that the orders be set aside and the AEO discharged. The district judge considered this argument and wholly agreed."

> Legal Aid, Sentencing and Punishment of Offenders Act 2012].
>
> (4) . . .
>
> (5) Any power conferred by this Act to make an attachment of earnings order includes a power to make such an order to secure the discharge of liabilities arising before the coming into force of this Act.

The statute identifies the obligations that each court is permitted to secure by way of an AEO. As the obligations in this case were pursuant to a family court maintenance order, the claimant's various applications and the resulting AEOs could only have been properly made in the family court.

The county court may only make AEOs in respect of judgment debts and administration orders, neither of which were relevant to this case (r89 CPR and the note to 89.0.1 of the White Book). Alternatively, the notes to Part 39 of the FPR in the Red Book are clear that that part's scope solely encompasses attachment of earnings applications to enforce maintenance orders.

The authors therefore submitted on behalf of the defendant that the county court did not have the statutory power to make the extant AEO (or the preceding orders), and on that basis asked that the orders be set aside and the AEO discharged.

The district judge considered this argument and wholly agreed, ordering that the AEO be discharged on the basis that it should not have been made (or the underlying applications heard) by the county court. The district judge commented that the jurisdictional basis for making an AEO and the delineation of powers imposed by s1 of the AEA 1971 was overlooked.

On the subject of costs, the district judge ordered that the claimant be responsible for half of the defendant's costs. This was a significant sum for the defendant who had gone to some lengths to try to engage with the claimant without success. The result was particularly important because of the negative repercussions of having to explain the attachment of earnings order to the defendant's new employer.

While it can be said that the claimant could have re-applied in the correct forum (the county court AEO having been discharged), that would involve satisfying the family court that the underlying maintenance provision remained effective. The merits of that application may well be very different from the point in time when the initial AEO application had been made so many years before.

The takeaway is one which was acknowledged by the district judge: though it is certainly rare for an AEO to be made by the county court in respect of a family court maintenance order, they do sometimes arise in error, the court mistakenly using powers that would only properly be deployed in instances of non-payment of judgment debts etc. In this scenario, the court did not have the statutory power to order an AEO. For both civil and family practitioners instructed in this type of enforcement matter it is always worth checking that the proper forum has been used – if it hasn't, many years of litigation can all to easily come to an abrupt end with stinging costs consequences for one or other of the parties.

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Child Inclusive Mediation Awareness and Understanding Day – 13 October 2021 – Online

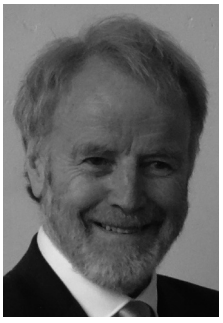
Following the recommendations of the Voice of the Child Dispute Resolution Advisory Group, the FMC and Family Mediation Standards Board have recently approved the new standards for child inclusive mediation. As part of the introduction of the child inclusive mediation model, all mediators who are not trained in the Direct Consultation with Children (DCC) model are required to complete an Awareness and Understanding Day to introduce the outline of – and standards for – child inclusive practice for the future.

This is an interactive day with opportunities to:

- be informed about child inclusive mediation, how to raise this with parents and how this works for children
- consider how to build this into your own practice
- consider and to practice the knowledge and skills required

For more information including if you're not sure which course you need to attend, please see *resolution.org.uk/event/cim-awareness-oct-2021/*

DB's dozen



David Burrows *@dbfamilylaw*

Family case law summaries: May-June 2021

***Re F & G (Discharge of special guardianship order)* [2021] EWCA Civ 622** (30 April 2021) – A care order and a special guardianship order can exist in respect of the same child, if made in that order. A care order discharges an SGO, but not the other way around.

***London Borough of Barnet v AG & ors* [2021] EWHC 1253 (Fam)** (13 May 2021), Fam Div Court (Sir Andrew McFarlane P, Sir Duncan Ousely) – No incompatibility between European Convention and Vienna Convention on Diplomatic Relations over diplomatic immunity, in this case in relation to the treatment by a diplomat and his wife of their children.

***Re TT (Children)* [2021] EWCA Civ 742** (20 May 2021) – Mother's application for discharge of care orders was refused. Mostyn J's decision in *GM v Carmarthenshire County Council* [2018] EWFC 36, [2018] 3 WLR 1126 is incorrect.

***Sparkes v London Pension Funds Authority & anor* [2021] EWHC 1265 (QB)** (14 May 2021), Murray J

(1) Application under r31.17 CPR 1998 (mirror provision: r21.2 FPR 2010) for production of material held by a non-party (NP; a prior owner of land in asbestos claim). Appeal allowed: Master had not understood the claimant's application.

(2) On NP costs: the normal rule (per CPR 46.1) in relation to an application for NP production (r21.2 FPR 2010) is that the NP has its costs. Here, NP deemed unhelpful and should pay the applicant's costs.

***Re JK (A child) (Domestic abuse: Finding of fact hearing)* [2021] EWHC 1367 (Fam)** (21 May 2021), Poole J – In a child arrangements order hearing finding of coercive control following application of principles in *Re H-N & ors (Children) (Domestic abuse: Finding of fact hearings)* [2021] EWCA 448 (Civ).

***Re M (Children: Applications by email)* [2021] EWCA Civ 806** (28 May 2021) – Mother's successful appeal against a judge's case management order in care proceedings, where the judge had only emails – but no evidence – from children's lawyer. Reminder of the rules in Part 18 FPR 2010 for making such applications.

***A v B (Port alert)* [2021] EWHC 1716 (Fam)** (25 June 2021), Mostyn J – Application in wardship not appropriate for port alert: F could/should have applied in the Family Court in existing Children Act 1989 proceedings.

***ND v GD (Financial remedies)* [2021] EWFC 53** (14 June 2021), Peel J – No order for costs, since W's needs were covered after payment of her costs. Contrary to the requirements of r9.27A FPR 2010 and PD28 para 4.4 H had not negotiated openly in a reasonable manner.

***Axnoller Events Ltd v Brake & anor* [2021] EWHC 1706 (Ch)** (23 June 2021), HHJ Paul Matthews as High Court judge – Should the court vary an earlier order (r3.1(7) CPR 1998 – FPR 2010 parallel: r4.1(6)) about whether litigants in person should have a paper bundle provided to them by another represented party's lawyers. No paper bundle.

***Meng v HSBC Bank plc* [2021] EWHC 342 (QB), [2021] 2 WLR 1153** (19 Feb 2021), Fordham J – s7 Bankers Book Evidence Act 1879 only available for accounts in United Kingdom, ie not for accounts outside the jurisdiction.

***Abbasi & anor v Newcastle upon Tyne Hospitals NHS Foundation Trust* [2021] EWHC 1699 (Admin)** (23 June 2021), Sir Andrew McFarlane P – There is inherent jurisdiction to maintain a Reporting Restriction Order to prohibit the naming of clinicians in "end of life" proceedings.

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"In Meng v HSBC Bank plc *[2021] Fordham J found that s7 of the Bankers Book Evidence Act 1879 is only available for accounts in the UK, ie not for accounts outside the jurisdiction."*

Pension implementation issues for family practitioners

Cheryl Bowden *Bowden Financial Management Ltd*

The rules around pension sharing orders are complex and fraught with risk…

I have been dealing with pension and divorce issues for a number of years now and there are a few things that I find come up again and again when looking at the implementation of pension sharing orders (PSOs). I have put together this article to share my experiences and help others gain a better understanding of the process involved in PSO implementation. The accompanying table (see page 42) helps take you through the timeline involved. The items mentioned are not intended to be an exhaustive list – more a sharing of my experiences in the hope it might aid others involved in these areas. So, here we go…

Moving target syndrome

We need to be aware that the valuation used in negotiation will be different to the valuation used by the pension provider for implementation purposes.

The court must carry out its valuation exercise at a date known as the *valuation date*. This is generally not earlier than one year before the date of the petition and not later than the date of the court order. This will be the date of the cash equivalent (CE) used by the court or by the parties in *negotiation only* and can be somewhat irrelevant to what actually happens when a PSO is finally implemented.

What happens after a PSO is made?
There are then a number of terms that we need to be familiar with to understand how the pension benefits, including:

- date the order takes effect
- transfer day
- relevant benefits
- valuation *day* (note – not valuation *date* as above)

Date the order takes effect

A PSO cannot take effect until after the *decree absolute* (*DA*) has been pronounced, or seven days after the end of the time allowed for filing an appeal has elapsed, whichever is the later. As most time limits for filing appeals are 21 days after making the order, it follows that:

- the earliest date on which an order can take effect will usually be 28 days after it is made, subject to the *DA* having been pronounced.

Given that a PSO will not be implemented on the date the order takes effect, what is the significance of this date? It is important for three reasons:

1. The date the order takes effect dictates the *relevant benefits* that will be used as the basis for dividing the pension when implementation takes place – ie if a scheme member makes further contributions to the pension after the order takes effect, this should not be taken into account. This does not, however, exclude increases due to investment returns being added in.

2. When the order is implemented, any alterations made to the member's pension benefits will be backdated to the date on which the order took effect. This can have serious consequences for a pension that is in payment, as the scheme can claw back payments made from the date the order took effect, even though the actual implementation did not take place until months later.

3. If the transferor dies before the order takes effect, the order will be unenforceable.

Implementing a PSO
Implementation of a PSO is not entirely straightforward.

The important point to grasp is that the pension scheme will choose the date when the PSO is implemented and this is therefore out of our control.

The implementation period is a four-month period beginning on the later of:

1. the date the order takes effect (as above); and

2. the first day the pension arrangement receives all the relevant documentation it needs to proceed with the PSO – this does not just relate to the court documents,

but also to any discharge paperwork and the relevant fees having been paid.

In reality, the PSO therefore takes effect from (2) as most schemes have paperwork that needs completing or a fee that needs paying – this is when the four-month clock starts ticking.

Transfer day
The transfer day is defined as the day on which the order takes effect – this is not the day the transfer is actually made, it is the day used to establish the relevant benefits to be valued for implementation purposes.

Relevant benefits
Relevant benefits are defined by reference to the benefits to which the member is entitled immediately before the transfer day. Contributions made after the transfer day will not be taken into account.

Valuation day
This is a day chosen by the scheme for actual implementation purposes and will fall somewhere in the four-month implementation period. On this day, the relevant benefits (ie those accrued up to the date the order took effect) are revalued to take account of market fluctuations (but not additional contributions or salary accrual after the transfer day).

Additional points to note

It is not unusual for the implementation of a PSO to take six months or more from the date of *DA*.

- If your client will be relying on the income from the PSO, see if they can get advice on implementation once pension share has been agreed but before *DA*, if possible. This will save time post-*DA* and ensure the four-month implementation period can start as soon as possible.

- Watch for claw back when sharing pensions in payment.

Death before the PSO takes effect
It is not unusual for the following clause to be written into Consent Orders:

> There shall be provision by way of a pension sharing order in favour of the *[applicant] / [respondent]* in respect of the *[respondent's] / [applicant's]* rights under *[his] / [her]* pension arrangement*[s] [pension name(s)]* in accordance with the annex*[es]* to this order, it being agreed between the parties that in the event that the *[applicant] / [respondent]* non-member spouse predeceases the *[respondent] / [applicant]* member spouse after this order has taken effect but before its implementation the *[respondent] / [applicant]* member spouse shall have the consent of the personal representatives of the *[applicant] / [respondent]* non-member spouse to apply to vary or to set aside the terms of this order under r9.9A FPR 2010, or to appeal out of time against the order under s40A or s40B Matrimonial Causes Act 1973 (as shall in the circumstances be appropriate).

"On valuation day, the relevant benefits (ie those accrued up to the date the order took effect) are revalued to take account of market fluctuations (but not additional contributions or salary accrual after the transfer day."

Why do we do this and who is it designed to protect?
As we have seen above, a PSO cannot take effect until we have a *DA*.

However, what happens if the transferor (the person whose pension is subject to the order) or transferee (the person who is to benefit from the order) dies after the PSO has taken effect, but before the PSO has been fully implemented?

- **Transferor (member) dies**

This situation is regulated by ss28 and 29 of the Welfare Reform and Pensions Act 1999.

Essentially, these sections provide that a pension debit is made at date of death and therefore the *non-member spouse has as enforceable credit*. In an occupational scheme, the enforceable credit arises before the member's rights transform into a death-in-service benefit.

If death occurs before the PSO has taken effect, the order is unenforceable – this is why we generally do not obtain a *DA* until 21 days after the date of the PSO (see the "date the order takes effect" section above).

Conclusion – as long as the order has taken effect, the scheme can continue to make payment.

- **Transferee (non-member spouse) dies**

The scheme rules will determine the outcome here and many schemes will allow for the transferee's estate to benefit from the PSO, although some may allow for the pension to be re-credited to the member.

However…

Where the scheme rules do not make provision for this situation, then the pension credit *may be retained by the scheme* and will not be paid out to the beneficiary under a recipient's will or re-credited to the scheme member.

It is for this reason the clause above is written into consent orders.

- It is designed to ensure the pension credit is not simply lost and retained by the scheme.
- It generally protects the member, as it allows them to retain the pension credit.
- If you need to ensure that the estate of the non-member spouse benefits from the PSO, then you need to check the scheme rules and ask what happens if the transferee dies after the order has taken effect but before the PSO is fully implemented. Is there provision within the scheme rules for payment to be made to the non-member's estate?

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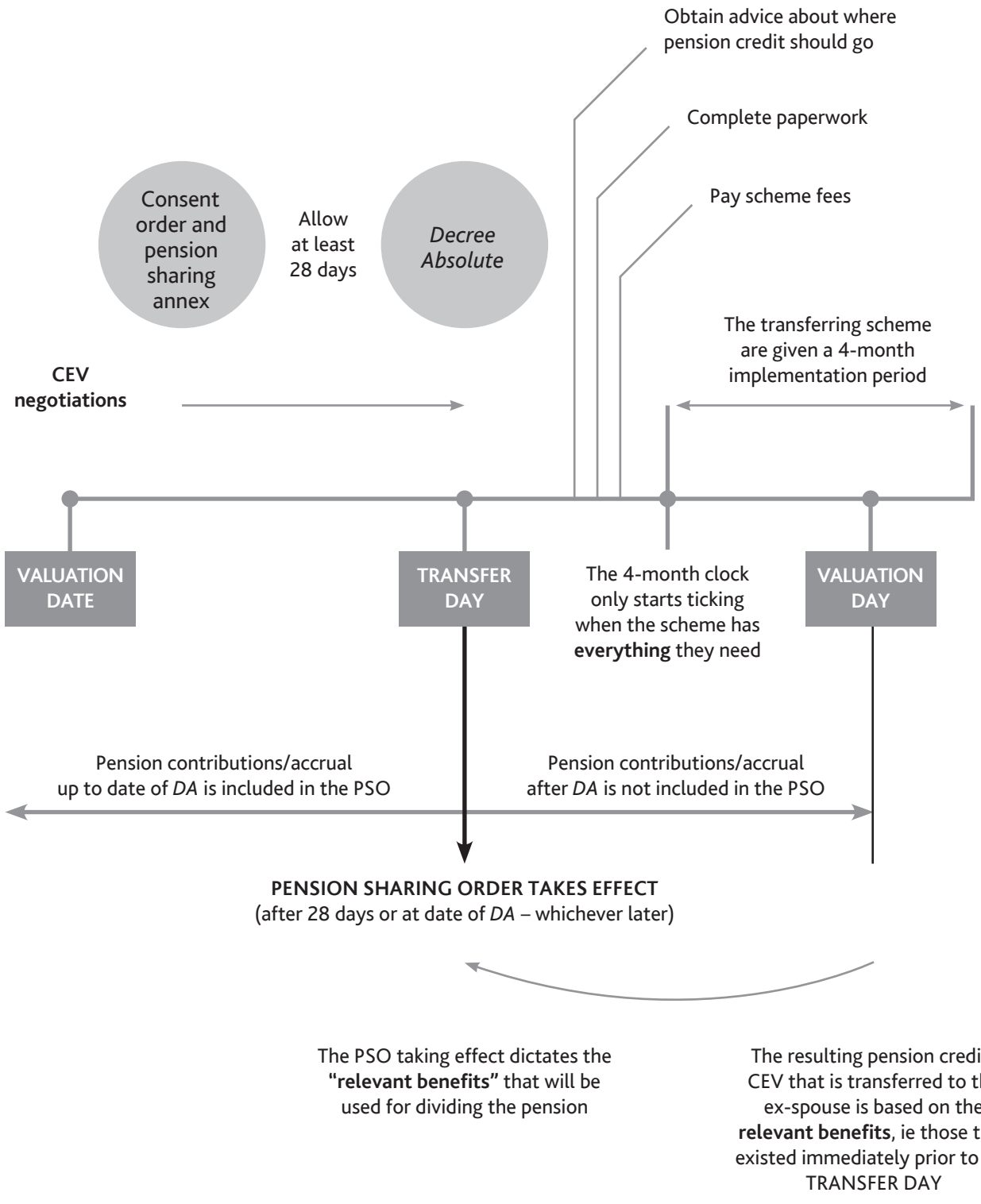
Pension sharing orders: implementation timeline



Can mediators be sued?

Lisa Holden *Family Law and Mediation*

Mediators clearly have a great deal of influence over the structure and conduct of the negotiation process. So what happens if they get it wrong?

Introduced to the UK some 20 years ago, mediation has evolved to become, in part, a regulated branch of the legal profession. Currently only accredited mediators, ie mediators who are accredited with the Law Society or Resolution, can sign court applications to certify that mediation has been attempted. Furthermore, only accredited mediators can conduct legal aid mediation and secure a contract with the Legal Aid Agency to do so.

However, as the term "mediator" is not a protected name in the same way as "solicitor", there are any number of people who can call themselves mediators and open for business offering mediation to the unsuspecting public.

An experience of "bad" mediation can be extremely damaging to clients and can create additional work or lead to applications to court when perhaps "good" mediation could have resolved the issues.

But what redress can a party who has suffered a poor mediation service do? There are unfortunately many examples of unsatisfactory mediation. For example, a mediator falling asleep during negotiations, investing in an asset owned by one of the parties, excessively criticising one party in front of the other, ignoring significant assets in dispute, showing bias or proffering incorrect legal advice.

Obviously, ceasing to take part in the mediation and writing a letter of complaint is a first step. But what if the party feels that real damage has been caused by the mediation experience and they would like financial compensation?

For example, a client attended mediation with his ex-wife to discuss the financial issues. They exchanged financial disclosure. At the first joint meeting, the mediator got out the flip chart and asked what the wife wanted. The mediator wrote the wife's wishes on the flip chart. She then turned to the husband and asked how he was going to make the wife's wishes come true. The mediation broke down and the husband complained of bias, but did not get any apology or refund. He then issues a Form A as the wife refuses to negotiate, believing that she is entitled to have what she wants.

If the husband in this situation sued for breach of contract, would he be successful and, if so, what damages could he hope to receive? Could he prove that the mediator instilled such a belief in the wife that it made litigation a foreseeable consequence which could otherwise have been avoided, or did wife have that belief anyway and nothing would ever have changed her mind?

Therein lies one of the many difficulties in taking legal action against a mediator. In fact, there are any number of obstacles facing a prospective claimant. Mediators do not make decisions for clients, yet have great influence on how the process happens, eg who is in the room, how mediation is conducted, the amount of time given to each party to speak, and agenda setting. Research has shown that, world-wide, there are few if any reported cases of any mediator ever being sued and, of those cases, there are no reported cases of a mediator ever having to pay damages.

Yet, as Oregon Professor Michael Moffitt says in his article "Suing mediators" (*Boston University Law Review*, February 2003):

> "A mediator who engages in egregious behaviour, violates contractual or statutory obligations, or breaches separately articulated duties should enjoy no legal or *de facto* immunity from lawsuits. Simultaneously, courts should favour lawsuits from parties who exercised their judgement in terminating an inadequate mediation. Wise policy and respect for autonomy demand deference both to mediators' subjective judgements and to parties' decisions regarding their continued participation in mediations."

Of note here is the Australian case of *Merigan-James v James*, VC 2006. The parties entered into mediation to discuss division of assets, namely a property and a business. The property was valued by several valuers and a view formed as to the valuation. On that basis, the claimant agreed to have 37.5% of the proceeds of sale of the property, the respondent the remainder, and the business was transferred to the claimant.

The respondent refused to implement the agreement and it later transpired the house was in fact worth some $100,000 less than the figures discussed in mediation. He argued that there had been a mistake of fact and as such the agreement reached at mediation should be set aside. He also felt he had been pressurised into agreeing the terms in order to avoid litigation. The claimant said she felt distressed

during the mediation, which had been conducted the day after her mother's funeral.

The judge disagreed that there had been a common mistake during the process, stating that there was a mistake of opinion, not fact, and upheld the agreement reached. Although referencing the difficult circumstances of the mediation, this did not negate the agreement reached.

There may be examples of non-reported cases of mediators being sued or threatened with legal action that have settled out of court, but it is not possible to reference these. However, with mediation becoming more mainstream, should all mediators have to embrace the same practice with the same accountability for the standards of mediation?

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Black History Month: a call for articles

October 2021 is Black History Month, and *The Review* would be keen to hear perspectives from members.

In the last couple of years Resolution's Equality, Diversity and Inclusion Committee has been bringing ED&I issues to the fore – in training, in publications and in general information awareness-raising. As well as a series of articles on LGBT+ issues, and in this issue a look at how disability affects members and clients, we have seen a range of perspectives in *The Review* on race and religion. Nazia Rashid has written on working during Ramadan (211), Donna Goodsell on being dismissed by a potential employer as someone who "wouldn't be used to her type of client" (210), and Stephen Lue on the "double jeopardy of being gay and black" (210). We would like to thank all members who have contributed to these and related themes, and encourage anyone who would like to share their stories, thoughts or experiences in this magazine to do so.

Contributions for the next issue should be sent to *euan.mackinnon@resolution.org.uk* by 26 September 2021.

More information on Black History Month is available at *www.blackhistorymonth.org.uk*

A warm welcome to our new members

A warm welcome to all Resolution's new members. If readers know any of them, please do get in touch to welcome them. And if there is anyone you think would be a great member, please direct them to *www.resolution.org.uk/membership/*

BERKSHIRE & BUCKINGHAMSHIRE
Océane Hamayon Lesné

CAMBRIDGE & WEST SUFFOLK
Paula Crowhurst
Bianca Jackson
Kimberley Pender

CHESHIRE & NORTH WALES
Caitlin Farr

COVENTRY & WARWICKSHIRE
Marcella King

EAST SUSSEX
Carrie-Anne George
Daniel Netting

ESSEX
Katrinka Beamish
Megan Milburn
Sue Nelson

HERTFORDSHIRE
Maria Luisa Gill
Tania Greenfield
Nneka Keazor
Steven Kingston

KENT
Maxine Powell

LONDON
Wayne Grossman
Akvile Guzaite
Donna Levy

MANCHESTER
Molly Chattaway
Emily Davies
Colin Hornby
Heidi Molloy
Chiara Ozuzu

MERSEYSIDE
Joanne Latham

MILTON KEYNES
Jane Leadbeater

NORFOLK
Diane Fish
Jeremy Woodruff

NORTH EAST
April Elrington
Oskar Konrad Juzaszek
Elizabeth Lugg
David Peel

NORTH WILTSHIRE
Hannah Jenkins
Catharine Young

NOTTINGHAM & EAST MIDLANDS
Charlotte Savage

OXFORD
Kathryn Sleight

SOUTH YORKSHIRE
Sureya Hussain

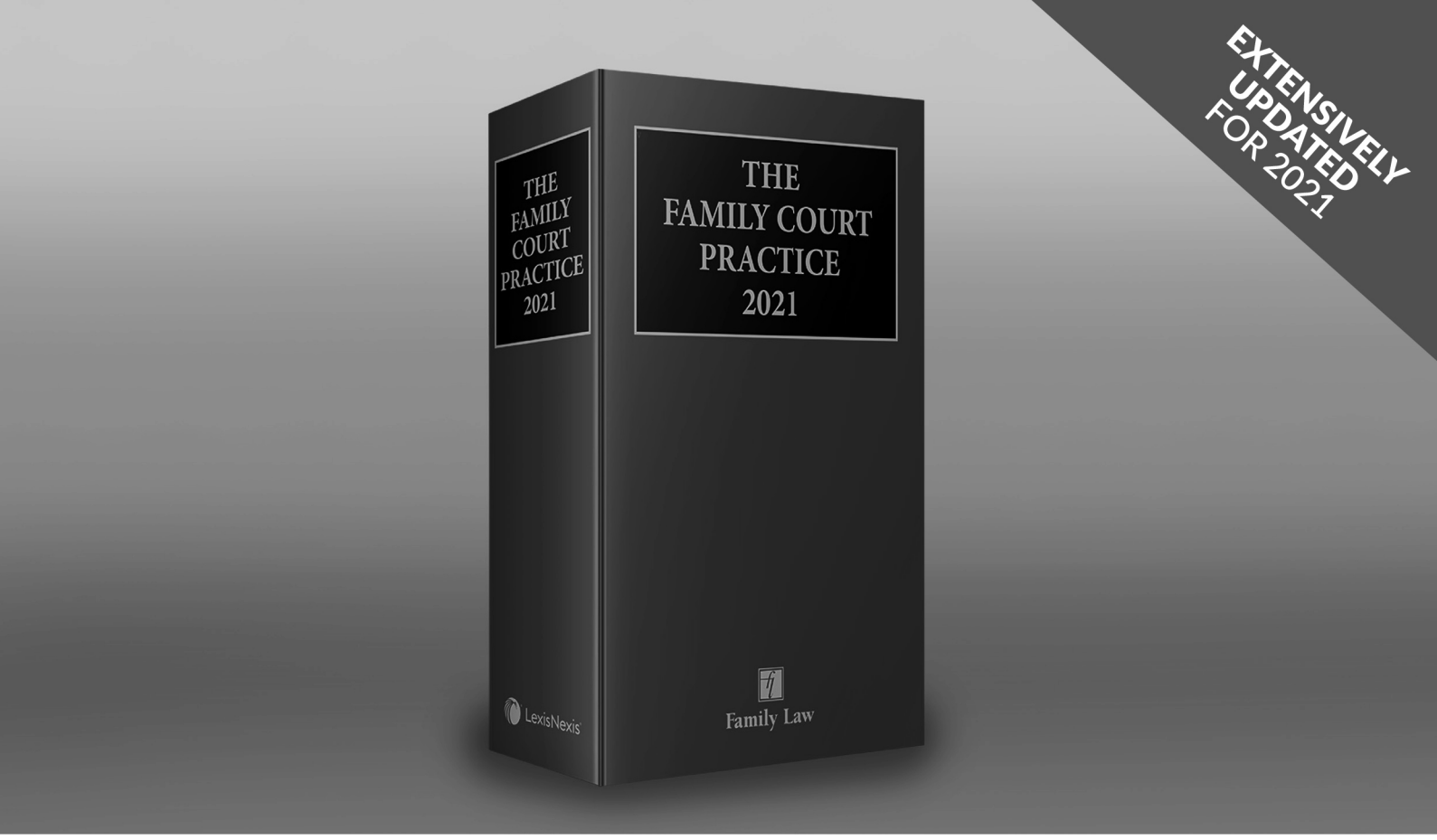
SURREY
Jacob Abbey
Nick Bass
Elizabeth Owen

WEST & NORTH YORKSHIRE
Isabel Kerr

WEST MIDLANDS
Edward Kimpton

WEST SUSSEX
Danielle Chandler-Hesmondhalgh
William Herlihy

Muhammed Osman Erdoğan
Karolina Kaszubska
Supriya McKenna
Melanie Murphy
Megan Rothman
Ben Snedden



The Red Book 2021

The new edition of The Family Court Practice continues to cover the entire range of family business and contains all the essential materials you need to practise in the Family Court.

What's New

- Analysis of the legal position and the practical issues which will arise in all areas of family law, following the UK's final departure from the EU on 31 December 2020
- Detailed commentary and practical guidance on all recent case law and key procedural developments in the areas of divorce, civil partnership, private/public child law, financial provision, enforcement and appeals
- The latest amendments to the Family Procedure and Civil Procedure Rules, including enhanced coverage of the new provisions governing committal in contempt proceedings (FPR 2010, Pt 37/CPR 1998, Pt 81)
- Extensive re-structure of the Practice Guidance contained in Part V of the work
- Enhanced coverage of the international Hague Conventions to which the UK will be a party in our own right (eg 1996 Hague Convention, 2007 Hague Convention on Maintenance, Hague Conventions on Service and Taking of Evidence)

For more information and to order visit: lexisnexis.co.uk/redbook21

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Training News

Visit www.resolution.org.uk/trainingandevents for further details of Resolution training courses, conferences and packs

We bring together a selection of digital resources and learning materials that can be accessed to learn at home

Your wellbeing

Digital resources and talks on the issue of wellbeing for the family practitioner including the Spotlight Series on Wellbeing: *resolution.org.uk/learning-at-home/your-wellbeing*

Get started in DR

Enrol for free for this digital learning package which brings together experience and understanding of the current time and considers how best to get started in dispute resolution practice in family law.

Early help for parents – new guide

You can do our special course on how to support clients set a child-focused agenda. This course is now free of charge for members thanks to sponsorship from OurFamilyWizard.

resolution.org.uk/event/early-help-for-parents

Resolution podcast

New podcast series from Resolution, with guest experts discussing topical issues in family law with hosts Simon Blain and Anita Mehta. Episodes on Brexit, cohabitation law reform, transparency, pensions and domestic abuse at *resolution.org.uk/podcast/*

Becoming a Deputy District Judge within the family jurisdiction

Mrs Justice Theis (High Court Judge and Deputy Chair of the Family Justice Council); Hannah Markham QC (36 Family); Judge Mathu Asokan (JAC Commissioner); Jessica Prandle (JAC Head of Diversity and Engagement); Helen Robson (Caris Robson); Tahmina Rahman (1GC).

resolution.org.uk/video-becoming-a-deputy-district-judge-within-the-family-jurisdiction/

Mediation – practice support

Resolution's suite of resources for mediators. This includes information on the scope of mediation, how you become a mediator, routes for professional development and much more: *resolution.org.uk/mediation*

Hybrid mediation

Since the recent launch, you'll find videos giving you an overview of what hybrid mediation is, how it works and how lawyers are an integral part of the process: *resolution.org.uk/mediation/hybrid*

Collaborative practice – practice support

You'll find resources and sessions presented at the recent Collaborative Practice Forum: *resolution.org.uk/collaborative/*

National Conference 2021 – catch-up package

Engage with all the content at your own pace, with no time limit for accessing recordings, If you missed our recent National Conference, you can now purchase access to all the sessions on-demand through our Catch-up Package. Hosted over five days online, it was our biggest National Conference yet, with 43 sessions including daily plenaries, skills workshops and key updates.

resolution.org.uk/event/national-conference-2021-catchup/

Family Law Handbook

Resolution has recently published its latest edition of the *Family Law Handbook*. In this series, you can find presentations from many of the chapter authors. It includes videos on: divorce, marriage, child support, financial proceedings, children proceedings, cohabitation and costs.

resolution.org.uk/family-law-handbook-authors/

Client relationships – remote working – your questions

Adele Ballantyne, Director of Eleda Consultancy, and Marcie Shaoul, Director of Rolling Stone Coaching, have come together to talk about how to effectively build online relationships with clients. Both sit on Resolution's Parenting After Parting Committee. We want to hear from you. Let us know your experiences with clients during this time and what questions you have. Adele and Marcie will respond to your questions in their next conversation.

resolution.org.uk/client-relationships/questions