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In this summer edition of our family team newsletter, Emma Greenhalgh and Joanne Oakes consider some recent authorities in public law proceedings. Kate Pye-Jones and Holly Platt consider some recent authorities in private law proceedings. They have purposefully selected cases where the issues discussed and the guidance provided relate to practical matters which arise in everyday practice. We hope that you find the information useful and that we all continue to enjoy the warmer weather and balmy days (present, at least at the time of writing!).

Public Law Update

by Emma Greenhalgh and Joanne Oakes

Non-accidental injury and the wider canvas

In both authorities that we draw your attention to, appeals were granted following findings of inflicted injuries. A successful theme within the grounds for appeal is the first instance court's failure to consider the wider canvas. A linear approach to medical evidence was adopted in both cases. There was a failure in both first instance decisions to weigh into the balance all of the aspects of the wider canvas which would have undermined findings of non-accidental injury. Following closer scrutiny by the Court of Appeal the decisions were overturned.

Re W (a child) (inflicted injury) (delay) (2024) EWCA Civ 418 is an example of the Court of Appeal permitting an appeal in a single-issue case. The parents were found by the Circuit Judge to have inflicted tibial fractures to their (then) 10-month-old daughter. King LJ at paragraph 27 noted that case has some evidential features which the judge at first instance failed to put into the evidential picture: W was a baby with increased bone fragility; A research paper demonstrated a 23% increased risk of fracture in well young children who had been prescribed Omeprazole; W at 10 months old had sustained a highly unusual accidental fracture of the femur following a low fall from a sofa; the index injuries were fractures to the tibias known as 'trampoline fractures' and there was evidence of W jumping vigorously in her Jumparoo; it was possible the fractures were so called 'silent fractures;' the parents were exemplary parents who had given exceptional care to W; they had given consistent and genuine accounts; the grandparents did all they could to assist the court and did not observe pain or distress during the fracture window.

The Judge at first instance placed significant reliance on the medical evidence. He accepted strands of medical concern in isolation and concluded that (i) W's prematurity (ii) feeding issues and (iii) use of Omeprazole did not increase W's bone fragility. King LJ commented that the Judge had failed to consider the cumulative effect of various strands of possible causes of bone fragility combined with the accidental femur injury. Moreover, The Court of Appeal noted that 'the parents' evidence is of utmost importance and the medical evidence is only one component of the evidential jigsaw.' Furthermore, that at first instance the court failed to summarise the parents' evidence thus there was no understanding of the evidence given nor assessment of their credibility.

The appeal court found the s31(2) Children Act 1989 criteria were not made out and consequently discharged the interim care order and discontinued the proceedings.

Case Link: https://www.bailii.org/ew/cases/EWCA/Civ/2024/418.html

In A (A child) (Fact-finding: head injury) (2024) EWCA Civ 327 parents successfully appealed a first instance decision that their child A, sustained a non-

accidental head injury when she was a baby. The finding made was that the injury was inflicted by either A's mother or father. A who was a 2-year-old child had suffered bleeding to her brain as a result of a ruptured cortical bridging vein. When her injuries manifested themselves in the early hours of the morning, A's parents sought medical assistance promptly by calling 999. She was taken to hospital, underwent surgery and made a full recovery. The appeal succeeded on various grounds, the focus below being the Judge's treatment of the totality of the evidence in the context of the medical picture.

It is a fair acknowledgement that the medical evidence in this case was complex and wide ranging. Delivering the leading judgment Lord Justice Baker at paragraph 38 onwards notes the findings made which illicit aspects of the medical evidence which pointed to an inflicted injury. The Court of Appeal noted that in finding that injury was traumatic and abusive in nature based on the medical evidence, the Judge at first instance had failed to do so without assessing the parents' denials. Baker LJ agreed with the appellants that this amount to a 'linear approach.'

Baker LJ highlighted the case of Re T (Children) (2004) EWCA CIV 558 and the comments of Dame Elizabeth Butler Sloss: 'evidence cannot be evaluated and assessed in separate compartments. A Judge in these difficult cases has to have regard to the relevance of each piece of evidence to the other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put by the local authority has made the appropriate standard of proof'. He went on at paragraph 43 to observe:

> *In this case, the medical evidence pointed to the injury having been sustained in a traumatic event. But before reaching a conclusion on that point – and even more importantly, before finding that the injury was inflicted abusively – it was incumbent on the judge to consider the totality of the evidence, including, as Mr Tillyard submitted, the wider canvas evidence relating to these parents and how likely it was that they would injure their child, how possible it would have been for either parent to have injured the child under the circumstances without the other knowing, and the overall credibility of the parents and their account of what had happened.*

Instead, she found that, on the basis of the expert evidence, the injury occurred as a result of a traumatic event and that it was abusive.

Thirdly, the judge's treatment of the possibility that the injury was sustained accidentally was unsatisfactory. She only considered the possibility of an accident after expressing her conclusion that the injury was abusive and when she was considering whether she could identify the perpetrator. In the original draft of paragraphs 116 and 117, the judge raised the possibility that "there may have been an accident" without expressing a conclusion. In the final, track changed, version, she excluded undisclosed accident on the balance of probabilities, on the basis that "a parent who injured a child accidentally or came upon a child who had had an accidental fall, would, on the balance of probabilities, acknowledge what had happened rather than continue to lie." No basis for this assertion was advanced. Then a few paragraphs later, when considering submissions about the timing of the injury, she reiterated the possibility the event may have been an accident.

Fourthly, there is a flaw in the judge's treatment of the issue of timing. In paragraph 122, she briefly summarised the parents' case that the child collapsed during a five-minute period when the mother was downstairs and the father woke up, went to the bathroom, and, on returning, picked up the child. The judge discounted this point by making several speculative observations ("the event may have been an accident that took moments only"; the father "could have slept through something that happened just before he woke"; "the scream of pain may not have coincided with the impact but [may] have been a reaction to the pain caused by the pressure of the developing haemorrhage"; while the mother was downstairs, "did she boil a kettle?"; did she sit at her computer "to fill the time or because that is her seat?"; "five minutes may have been a very optimistic estimate"). She concluded by saying: "since at least one of them has not told me what happened I cannot found a conclusion about what happened on their evidence about timing." This was putting the cart before the horse. She ought not to have reached a conclusion that one or both of the parents had withheld information

without considering all of the evidence, including their evidence about timing.

The Court of Appeal unanimously allowed the appeal. The case was remitted to the Presiding Judge who in turn considered whether a fact-finding hearing was necessary. This is discussed in more detail below.

Case Link: https://www.bailii.org/ew/cases/EWCA/Civ/2024/327.html

A final noteworthy similarity in both cases was the Court of Appeal's comments on delay. In both cases there were delays in the delivery of judgments and/or the proceedings generally. Unsurprisingly, observations were made regarding the false economy of delaying to deliver judgment.

Whether to hold a finding of fact hearing

In **A County Council v L & Ors (2024) EWFC 120** Mrs Justice Judd considers the central question of whether the results of a potential finding of fact investigation would impact the future care plans for child A. The question arose following an application by the local authority to withdraw the proceedings arising off the back of successful appeal by the parents in A (a child) above.

The authority acknowledged that was no other evidence of the parents being dishonest nor that they would inflict injury on their child. This case fell into the well-known category of being 'a single issue case.' Following the successful appeal of the Circuit Judge at first instance's decision, Judd J was faced with determining whether to re-visit the fact-finding exercise. The local authority supported by the children's Guardian were of the view that irrespective of the outcome, the time had come for A to be rehabilitated to her parents' care. Both professional parties indicated that even if a new finding of fact hearing yielded a result that A's injury was caused by one or both her parents non-accidentally, the plan for rehabilitation would remain the same. Mrs Justice Judd drew upon a recent Court of Appeal Judgement which references some settled principles arising from commonly more referenced authorities. Judd J said as follows:

The Court of Appeal has very recently handed down judgment in Re P and E (Care Proceedings: Whether to Hold Fact Finding Hearing) [2024] EWCA Civ 403. In that case, Baker LJ confirmed that the principles to be applied are those set out by McFarlane J (as he then was) in Oxfordshire County Council v DP, RS, and BS [2005] EWHC 1593 (Fam). In Re H-D-H (Children) [2021] EWCA Civ 1192 the Court of Appeal has emphasised that the decision to be made is always fact-specific, and therefore whilst other first instance decisions may provide a useful illustration as to what has happened in other cases, in coming to a decision it is the statement of principles as summarised in the cases above that I must turn to when considering my decision.

At paragraph 22 of H-D-H, Peter Jackson LJ stated as follows:

"The factors identified in Oxfordshire should therefore be approached flexibly in the light of the overriding objective in order to do justice efficiently in the individual case….For example:

i) *When considering the welfare of the child, the significance to the individual child of knowing the truth can be considered, as can the effect on the child's welfare of an allegation being investigated or not.*

ii) *The likely cost to public funds can extend to the expenditure of court resources and their diversion from other cases.*

iii) *The time that the investigation will take allows the court to take account of the nature of the evidence. For example, an incident that has been recorded electronically may be swifter to prove than one that relies on contested witness evidence or circumstantial argument.*

iv) *The evidential result may relate not only to the case before the court but also to other existing or likely future cases in which a finding one way or the other is likely to be of importance. The public interest in the identification of perpetrators of child abuse can also be considered.*

v) *The relevance of the potential result of the investigation to the future care plans for the child should be seen in the light of the s. 31(3B) obligation on the court to consider the impact of harm on the child and the way in which his or her resulting needs are to be met.*

vi) *The impact of any fact finding process upon the other parties can also take account of the opportunity costs for the local authority, even if it is the party seeking the investigation, in terms of resources and professional time that might be devoted to other children.*

vii) *The prospects of a fair trial may also encompass the advantages of a trial now over a trial at a possibly distant and unpredictable future date.*

viii) *The justice of the case gives the court the opportunity to stand back and ensure that all matters relevant to the overriding objective have been taken into account. One such matter is whether the contested allegation may be investigated within criminal proceedings. Another is the extent of any gulf between the factual basis for the court's decision with or without a fact-finding hearing. The level of seriousness of the disputed allegation may inform this assessment. As I have said, the court must ask itself whether its process will do justice to the reality of the case.*

These are not always easy decisions and the factors typically do not all point the same way: most decisions will have their downsides. However, the court should be able to make its ruling quite concisely by referring to the main factors that bear on the individual case, and identifying where the balance falls and why. The reasoned case management choice of a judge who approaches the law correctly and takes all relevant factors into account will be upheld on appeal unless it has been shown that something has gone badly wrong with the balancing exercise."

Mrs Justice Judd then went onto evaluate the features of A's case weighing into the balance various factors including: A's best interests lie in having a safe and secure home with her parents; the likely delay in fixing a new finding of fact hearing and the cost to the public purse; the evidential result of a fresh fixture is unknown; there being no evidence which would suggest either of A's parents has a temper or a pre-disposition to lose control; the parents' care of A is good and the significant passage of time since the precipitating event to issue care proceedings – two years. Judd J observed in the balance that there are many occasions where children are rehabilitated home following adverse findings being made and having an understanding of risk means agencies are better informed.

In all of the circumstances Judd J agreed with the parties that it was not in the interests of justice to hold another fact-finding hearing. The time had come for A to return home (with various support in place) and permission was given to withdraw the proceedings.

Case Link: https://caselaw.nationalarchives.gov.uk/ewfc/2024/120

Re J (Care Plan for Adoption) [2024] EWCA Civ 265

Final hearing where the care plan is adoption, and no placement application has been made:

Case Link: https://www.bailii.org/ew/cases/EWCA/Civ/2024/265.html

This is an interesting case that draws our attention to where the local authority is stating that their plan is one of adoption but they have not yet filed and served their placement application.

Background and orders made

The background to this matter was succinctly summarised by Baker, LJ as follows:

1) *J has four older siblings. Children's services have been involved with the family for over a decade because of allegations of child neglect, physical abuse, and the adults' drug abuse. In January 2023, when the mother was pregnant with J, the local authority started care proceedings in respect of her four older children after an allegation that the mother had assaulted one of the children in the street. A psychologist's assessment and a parenting assessment by the local authority each concluded that the parents could not safely care for any of the children.*

2) *Immediately after J's birth in July 2023, the local authority initiated proceedings and the baby was made subject to an interim care order and, on discharge from hospital, placed in foster care. The initial social work statement in the proceedings proposed that there should be a further parenting assessment to consider whether the parents could care for J on his own. In the event, however, no further assessment was carried out. We were told that, at a case management hearing before HH Judge Kushner in August 2023, the judge indicated that no further assessment was necessary. In the following weeks, hair strand toxicology tests were carried out on the parents which in the mother's case detected opiates and cocaine but not other drugs. According to the local authority, the parents' attendance at contact visits with J was erratic.*

3) *The proceedings in respect of J were listed for final hearing alongside those relating to the older children. At a case management hearing on 5 October, the judge abridged the time estimate for the final hearing to one day. The local authority filed final care plans in accordance with its obligations under section 31A of the Children Act 1989. In the case of the four older children, the plan was for long-term foster placements but, in the case of J, "for him to achieve permanency through adoption".*

4) *The local authority's intention was for an application for a placement order in respect of J to be considered at the final hearing of the care proceedings. An application for a placement order was prepared but at the date of the final hearing it had not been filed, apparently because the local authority did not have a copy of J's birth certificate and without it was unable to upload the application onto the online portal.*

5) *At the conclusion of the final hearing on 2 and 3 November 2023, the judge made care orders in respect of all five children and gave directions for the listing of the placement order application in respect of J later that month. An application on behalf of the mother for permission to appeal in respect of the order relating to J was refused by the judge.*

The recital to the final care order read as follows:

> *"AND UPON the Court concluding proceedings in respect of the child by endorsing the Local Authority's care plan for J to be placed outside of his family and making a final Care Order in favour of the Local Authority and listing the matter for a placement order hearing."*

In her judgment, the judge set out the issue relating to J at paragraph 27 and then went on to clarify:

> *"I think I have got to bite the bullet, frankly. It is not something– if I am wrong, then I am wrong, and somebody else will tell me. I am going to make the care order and I stand by what I say in terms of, essentially, the care plan which I approve is one of a permanent placement outside*

the family, I will hear the placement application and it is at that point that I will consider all the matters under both the Children Act checklist and indeed the Adoption Act checklist and consider the issue of consent. So there is further opportunity for the parents to make submissions at that particular point, or to argue that there should be–you know, all the arguments that you can make in that respect. I am not going to go through what they can and cannot do, it is the full spectrum, and I will consider it at that particular point. But, of course, I have given a judgment in the care proceedings, and that stands and is available for appeal if that is what is wanted, but will also inform various decisions going forward whatever they are."

The appeal

The matter was appealed and Baker LJ recorded the five grounds of appeal as follows:

"19. …

1) *The judge was wrong to make a final care order in circumstances where the court did not have a complete care plan before it to underpin the final care order that it made.*

2) *The judge erred in her welfare and proportionality evaluation which was flawed and unfair because the judge adopted a linear, as opposed to holistic, approach, whereby the mother's case and the other options available were argued, considered and evaluated under the Children Act only, and not on the basis of the heightened test for adoption (that 'nothing else will do') as summarised by Baroness Hale in Re B (A Child) (Care Proceedings: Threshold Criteria) UKSC 33.*

3) *The judge failed properly to consider the mother's case that (a) it was wrong to proceed in the absence of a placement order application and (b) there was not sufficient evidence for a final care order to be made where there had been no assessment of the parents' capacity to care for J alone.*

4) *The manner in which the judge expressed herself in her judgment was unfair to the parents.*

5) *The judge's decision was unjust because of serious procedural or other irregularities in the proceedings. Her conduct of the case and behaviour towards the parties and counsel was unreasonable and bordered on the oppressive.*

Baker LJ gave a helpful summary of the relevant law (not repeated here) and stated in terms of consideration of the care plan:

"31. … Where an application is made on which a care order might be made, section 31A of the 1989 Act requires a local authority to prepare a care plan for the future care of the child. Following amendments to the 1989 Act introduced by the Children and Families Act 2014, the degree to which the court is required to scrutinise the care plan is limited. Section 31(3A) and (3B) provide as follows (so far as relevant to this appeal):

"(3A) A court deciding whether to make a care order

(a) is required to consider the permanence provisions of the section 31 plan for the child concerned …

(3B) For the purposes of subsection (3A), the permanence provisions of a section 31A plan are

(a) such of the plan's provisions setting out the long-term plan for the upbringing of the child concerned as provide for any of the following:

(i) the child to live with any parent of the child's or with any member of, of any friend of, the child's family;

(ii) adoption;

(iii) long-term care not within sub-paragraph (i) or (ii);

(b) such of the plan's provisions as set out any of the following:

(i) the impact on the child concerned of any harm that he or she suffered or was likely to suffer;

(ii) the current and future needs of the child (including needs arising out of that impact);

(iii) the way in which the long-term plan for the upbringing of the child would meet those current and future needs.""

Baker LJ concluded as follows:

> *"42. In fairness to the judge, her instinct at the end of her judgment was to make an interim care order but in subsequent submissions she was persuaded to take a different course. She was understandably anxious to bring the proceedings to an end as soon as possible. She did not have the benefit of the legal analysis put before us by leading counsel, nor the time for reflection available to this Court but not to hard-pressed judges sitting at first instance. But the regrettable fact is that she made an order which was not open to her in law and which must therefore be set aside."*

The appeal was allowed on grounds one and two.

In respect of ground three the mother was open to renew her application for independent assessment at the case management hearing.

In respect of grounds 4 and 5 Baker LJ made the following observation:

> *45. I propose to say nothing about the other grounds of appeal, save for the following brief observations about ground five. Ms Reynolds was plainly in a difficult position. The judge was faced with an extremely heavy list and presented with submissions which she found unattractive. There were some robust exchanges in which the judge said things which, on reflection, she might conclude could have been expressed differently. We have not heard a recording of the hearing so have not heard the tone in which the judge addressed counsel nor confirmed counsel's assertion that the judge banged the desk. It is difficult to envisage circumstances in which it is ever appropriate for a judge to bang the desk. But reading the transcript as a whole, I did not consider that the judge conducted the hearing unfairly or in a way which led to an unjust outcome, save for the errors identified in grounds one and two on the basis of which I would allow this appeal.*

This is an important reminder as to the care planning process. The care plan must be a properly reasoned decision and in no circumstances should a local authority run a final hearing for a placement order when the application has not yet been made.

Re YM (Care Proceedings) (Clarification of Reasons) [2024] EWCA Civ 71

Clarification of reasons – what is appropriate?

Case Link: https://www.bailii.org/ew/cases/EWCA/Civ/2024/71.html

This case raises important guidance in respect of what is appropriate when requesting clarification and when this may go too far as to 'bamboozle' the judge.

Summary of the Background

The background was summarised by Baker LJ, as follows:

> *11. For the purposes of the appeal, the facts can be summarised briefly. Y's parents met in 2019 and are in their late twenties. Both parents have cognitive difficulties and as a result have been assisted by intermediaries during these proceedings. As I said at the end of the hearing, this Court is grateful to the intermediaries for the work they have done in this difficult and sensitive case.*
>
> *12. On 10 September 2021, Y was born by Caesarean section after the mother experienced difficulties during labour. Following discharge from hospital, Y and his parents lived with the maternal grandparents until early October 2021, when they moved into a one-bedroom flat. Although the mother and the grandmother have had a fractious relationship in the past, the grandmother provided considerable support with childcare, especially when Y and his parents were living in her home. By contrast, the father provided relatively little direct parenting support. It was the mother's evidence that there was only one brief occasion, lasting about twenty minutes, when she left Y in the father's sole care. There were other occasions when he looked after Y while she was in the flat.*
>
> *13. It was the mother's evidence that on 3 October 2021, when Y was aged three and a half weeks, she noticed marks on his left forearm and right elbow. She sent photographs of the marks to the maternal grandmother. At that time, the marks were not brought to the attention of any medical professionals.*
>
> *14. On 4 November 2021, the mother observed further extensive bruising to Y's right forearm. She again sent photographs of the bruising to the grandmother who advised her to contact the GP. The mother contacted the surgery about a rash on Y's arm, chest and head. The GP advised the mother to take Y to hospital. The mother did not follow this advice. According to the maternal grandmother, the mother told her that she made this decision after talking to the father. In the subsequent proceedings, the father described an incident in which he thought the bruises had been sustained accidentally while he was holding Y as he was standing up from a chair.*
>
> *15. On 24 November 2021, ZZ, a work colleague of the father, stayed overnight at the family home. According to the parents, he was the only person to have stayed with the parents following Y's birth and had visited the family on only one earlier occasion. In the proceedings there was extensive evidence about what happened that evening, which as summarised below the judge set out in her judgment.*
>
> *16. On the following day, 25 November, Y was taken to hospital by the mother who complained that he was unable to move his right leg. He was observed to have bruising on his back. Radiological examination revealed that he had sustained a fracture of the right tibial metaphysis along with soft tissue swelling, which medical evidence indicated was likely caused by excessive shearing force such as yanking or pulling of the limb (described in the medical reports as a "bucket handle fracture"), and fractures to his left posterior 6th rib in the lateral aspect and to his lateral 12th rib, both said to have been caused by compression/squeezing or a direct blow.*
>
> *17. The hospital staff contacted the local authority children's services and, following his discharge from hospital on 9 December 2021,*

Y was placed into foster care pursuant to an agreement between the local authority and his parents under s.20 of the Children Act 1989. The police started an investigation in the course of which they interviewed the parents, maternal grandmother, and ZZ.

18. On 5 January 2022, the local authority started care proceedings and Y was made subject of an interim care order on 18 January. Case management directions were given for a fact-finding hearing, including permission to instruct a number of medical expert witnesses. In addition to the parents and the child, the maternal grandparents were joined as respondents and separately represented and ZZ was joined as an intervenor. The local authority prepared a detailed schedule setting out twenty-four findings which it invited the judge to make. In short, they sought findings that:

(1) the fractures and bruises identified on admission to hospital, and the bruises and abrasions shown on the photographs taken on 3 October and 4 November, were inflicted by one (or more) of the following: the mother, the father, the maternal grandmother, the maternal grandfather or, in the case of the injuries seen on admission to hospital, ZZ;

(2) all of the injuries were the consequence of the application of excessive and inappropriate force;

(3) in the event that the injuries were not caused by the mother and/or the father, they failed to protect Y and both failed to seek timely medical attention for the injuries, and

(4) as a consequence, the threshold criteria under s.31(2) of the Children Act 1989 were satisfied.

19. A fact-finding hearing was initially listed in October 2022 – eleven months after the child was admitted to hospital – but was adjourned at the pretrial review when the father successfully applied to instruct an expert to undertake genetic testing. The hearing eventually took place over fourteen days between April and July 2023. Nine witnesses gave oral evidence. The hearing was delayed by the requirement to allow regular breaks in the hearing in accordance with the established practice in cases where one or more of the parties is assisted by an intermediary. By the end of the hearing, the local authority was no longer seeking findings against the grandparents or ZZ.

20. On 31 July 2023, the judge delivered an oral judgment in which she found that all of the injuries had been inflicted by the father. In the order made at the conclusion of the hearing, the judge listed the case for a further case management hearing on 4 September 2023 and for final hearing over nine days in January 2024. The purpose of the hearing in September was stated to be for formal handing down of the judgment, consideration of any requests for clarification and applications for permission to appeal, and general timetabling. Amongst other case management directions, the judge directed the local authority to apply by 7 August for a transcript of the judgment, the cost to be borne equally by the local authority and the five respondents. It was recorded that the transcript would be amended to include a section on the law which the judge had omitted.

21. I set out the subsequent events in more detail below. At this stage, suffice it to say that initial requests for clarification were submitted during August to which the judge declined to respond until the transcript was produced, save to confirm that she had made three findings which the local authority pointed out had been omitted from the judgment, in particular a finding about the mother's failure to seek medical advice for Y. In the event, the local authority did not apply for the transcript as directed and the hearing on 4 September was adjourned.

22. On 6 October, the parties received a written version of the judgment, based on a transcript of the judgment delivered orally but omitting some parts and introducing others, including the section on the law and details of the finding of failure to protect.

23. At a case management hearing on 12 October, the parties sought additional clarification of the judgment. On 19 October, the judge delivered a supplemental judgment in response to those requests.

24. At a further case management hearing on 7 November 2023, the father, supported by the local authority and guardian, sought yet further clarification of the judgment. The judge responded to those requests the same day. On 9 November, an application by the local authority for permission to appeal was refused. The judge extended time for filing a notice of appeal to this Court to 14 November.

25. On 29 November 2023, the local authority filed a notice of appeal out of time against the judge's findings and seeking a rehearing. On 7 December, I extended time for filing the appeal notice, granted permission to appeal and stayed the proceedings pending determination of the appeal. On 13 December, I varied the terms of the stay to permit a hearing about Y's interim placement to go ahead. At a hearing on 14 December, all parties agreed that Y should move to live with his maternal grandparents under the interim care order.

As can be seen by the background there was more than one request for clarification. Baker LJ identified good and bad practice within the parties' 'litany of requests and responses':

"The local authority was right to point out that the judge had not dealt with the issue of failure to protect. It was also plainly right to inquire whether the judge had found that the mother was covering up for the father as a sentence in the oral judgment to the effect that she was not covering up was removed from the written version. But a number of the other requests were inappropriate. The email sent on behalf of the mother on 11 October identifying certain aspects of the evidence and inviting the judge to reconsider her findings was a glaring example of using the process to reargue the case. The final request on behalf of the father took the whole process to another level. It sought findings that had not been raised previously, made fresh submissions in support of those findings, relied on additional evidence filed by the father, and warned that, if the judge declined to make the clarifications sought, an application would be made for permission to appeal.

Overall, the scale of this clarification exercise was wholly unreasonable… I am sure that counsel were not intending to "bamboozle" the judge (to use Coulson LJ's word) by their repeated requests but she would certainly be forgiven for feeling bamboozled. In some instances, counsel were plainly trying to lead the judge to refine her judgment so that her ultimate findings were closer to the outcome favoured by their client."

Appeal

The question for the Court of Appeal, according to Baker LJ, was *'whether at the end of this chaotic process the integrity of the judgment has been fatally undermined'*.

Baker LJ summarised the appeal to be *'based principally on perceived differences and inconsistencies in the judge's reasoning between the original judgment and the responses to requests for clarification'*. In oral submissions the local authority acknowledged that it had not been minded to appeal following the delivery of the judgment but had been obliged to do so following the clarifications and the fact-finding needed to be reheard by a different judge as *'the judge's ultimate analysis did not reflect the evidence and failed to provide an accurate basis on which assessments could safely be conducted to enable decisions to be made about the child's future and the parents' role in his care'*.

The local authority put forward five grounds of appeal.

1) *The finding that all the injuries suffered by Y were the consequence of a 'lack of care' by the father was not supported by the expert medical opinion.*

2) *The medical records and expert evidence did not support the court's finding that the parents would have been unaware that Y had suffered significant injuries.*

3) *The finding that the father had not intended to cause injury to Y was incompatible with the weight that the court had attached to previous threats of harm made by the father to Y, which the judge relied upon in concluding that the father had caused all of the injuries.*

4) *The judge failed to sufficiently consider whether the father could have caused each injury suffered by Y, determining the issue of perpetration on*

grounds of propensity rather than opportunity, and failing to have sufficient regard to the absence of opportunity to cause injury without being detected by the mother.

5) *The finding that the mother was unaware that the father had injured Y on the evening of 24 November 2021 and had therefore not colluded with the father to blame ZZ for the leg fracture supported by the expert medical opinion, as to how Y would have reacted following this injury, or by the evidence provided by his parents.*

The appeal was ultimately unsuccessful however, the most important aspect of this case was the guidance given by Baker LJ regarding clarification as follows:

90. Finally I return to the vexed issue of requests for clarification. It may be, as Ms Fottrell suggested during the appeal hearing, that it takes time for the messages from reported cases in this Court to get through. But, if I may adopt the words of Sir Nicholas Wall P quoted above, it is high time they did. This case illustrates that the procedure is still being misused. I would therefore draw the following lessons to be learned from this case, in the context of other cases which have involved similar examples of the practice being misused:

(1) A judgment does not need to address every point that has arisen in the case. The court should only be asked to address any omission, ambiguity or deficiency in the reasoning in the judgment if it is material to the decisions that have to be taken in the proceedings. In care proceedings, the decisions are whether the threshold criteria for making orders under s.31(2) are satisfied and, if so, what orders should be made to meet the child's welfare needs.

(2) When making a request for clarification of any perceived omission, ambiguity or deficiency in the reasoning in the judgment, counsel should therefore identify why the clarification is material to the decisions that have to be taken in the proceedings.

(3) Counsel should never use a request for clarification as an opportunity to re-argue the case, reiterate submissions, or invite the judge to reconsider the findings.

(4) Requests for clarification should not be sent in separately by the parties but rather in a single document compiled by one of the advocates. If necessary, there should be an advocates meeting to compile the document. Save in exceptional circumstances, there should never be repeated requests for clarification.

(5) Judges should only respond to requests for clarification that are material to the decisions that have to be taken in the proceedings.

91. The purpose of the process of clarifications is to head off unnecessary appeals. In a number of recent cases, the misuse of the process has had the opposite effect. I hope that hereafter counsel will confine requests to matters which are material to the proceedings and that judges will deal robustly with requests that exceed what is permissible.

We must not misuse the process!

West Northamptonshire Council v KA & Ors [2024] EWHC 79 (Fam)

Intermediaries – when should they be used?

Case Link: https://www.bailii.org/ew/cases/EWHC/Fam/2024/79.html

This is the case that has been referred to many times over the course of the last few weeks and is the current 'hot topic'. The case is an interesting read and this article concentrates on the guidance rather than the facts of the case.

The guidance

Mrs Justice Lieven provided helpful guidance in respect of the use of intermediaries as in this particular case a 5 day final hearing was adjourned due to the intermediary's non-attendance. The wasted costs application was found to have no merit as the intermediary had a legitimate explanation for her non-attendance. Her Ladyship summarised the position as follows:

> *41. 'The position in respect of the appointment, qualification and duties of intermediaries in the family justice system is not clearly set out either in the Family Procedure Rules ("FPR") or in any Practice Direction. FPR r3A.1 defines an intermediary as follows:*
>
> > *"… [I]ntermediary means a person whose function is to –*
> >
> > *a. communicate questions put to a witness or party;*
> >
> > *b. communicate to any person asking such questions the answers given by the witness or party in reply to them; and*
> >
> > *c. explain such questions or answers so far as is necessary to enable them to be understood by the witness or party or by the person asking such questions…"*
>
> *42. There is no further guidance on their appointment or role. However, in the criminal justice system the Criminal Practice Directions 2015 gave detailed consideration to the appointment of intermediaries, including steps to assist defendants in their effective participation in the proceedings.*
>
> *43. This background is referred to extensively in R v Thomas (Dean) [2020] EWCA Crim 117 . In that case the Court of Appeal gave detailed consideration to the appointment of intermediaries and how they should be used. Although there are obvious and important differences between Family Court cases and those involving criminal charges, the reasons for the appointment of intermediaries and their function in assisting those with communication difficulties facing important litigation, are essentially the same. Intermediaries are appointed, whether in criminal or family cases, to ensure that the individual in question can participate in the proceedings so that their fair trial rights are protected. Therefore, the guidance of the Court of Appeal in R v Thomas (Dean) is in my view applicable to the consideration of the same issues in the family justice system, albeit the Court will need to have close regard to the nature of the case and the evidence that the individual needs to engage with.*
>
> *44. At [36] to [42] the Court of Appeal went through the relevant considerations for the appointment of an intermediary, and the alternative strategies that might be adopted, to ensure that a defendant's ability to properly engage in proceedings and Article 6 rights were protected.*

Furthermore, the following guidance was given:

> *45. The following principles can be extracted from this passage:*
>
> *a. It will be "exceptionally rare" for an order for an intermediary to be appointed for a whole trial. Intermediaries are not to be appointed on a "just in case" basis. Thomas [36]. This is notable because in the family justice system it appears to be common for intermediaries to be appointed for the whole trial. However, it is clear from this passage that a judge appointing an intermediary*

should consider very carefully whether a whole trial order is justified, and not make such an order simply because they are asked to do so.

b. The judge must give careful consideration not merely to the circumstances of the individual but also to the facts and issues in the case, Thomas [36];

c. Intermediaries should only be appointed if there are "compelling" reasons to do so, Thomas [37]. An intermediary should not be appointed simply because the process "would be improved"; R v Cox at [29];

d. In determining whether to appoint an intermediary the Judge must have regard to whether there are other adaptations which will sufficiently meet the need to ensure that the defendant can effectively participate in the trial, Thomas [37];

e. The application must be considered carefully and with sensitivity, but the recommendation by an expert for an intermediary is not determinative. The decision is always one for the judge, Thomas [38];

f. If every effort has been made to identify an intermediary but none has been found, it would be unusual (indeed it is suggested very unusual) for a case to be adjourned because of the lack of an intermediary, Cox [30];

g. At [21] in Cox the Court of Appeal set out some steps that can be taken to assist the individual to ensure effective participation where no intermediary is appointed. These include having breaks in the evidence, and importantly ensuring that "evidence is adduced in very shortly phrased questions" and witnesses are asked to give their "answers in short sentences". This was emphasised by the Court of Appeal in R v Rashid (Yahya).'

'it is the role of the judge to consider whether the appointment of an intermediary is justified. It may often be the case that all the parties support the appointment, because it will make the hearing easier, but that is not the test the judge needs to apply.'

It is therefore ultimately a matter of judicial discretion as to the extent to which an intermediary is required for the proceedings and furthermore, as Lieven J notes, *'Advocates must adapt to the witness, not the other way round". A critical aspect of this is for cross-examination to be in short focused questions without long and complicated preambles and the use of complex language. Equally, it is for the lawyers to explain the process to their clients outside court, in language that they are likely to understand.'*

Private Law Update

by Kate Pye-Jones and Holly Platt

QLRs: when are they appointed and what happens if none are available?

Section 65 of the Domestic Abuse Act 2021 inserted Part 4B into the Matrimonial and Family Proceedings Act 1984 (MFPA). It establishes a new statutory scheme for the automatic prohibition of alleged perpetrators of abuse from cross-examining their alleged victims, and vice versa, as well as giving courts a discretion to prevent cross-examination when certain criteria are satisfied.

In summary, a party is automatically prohibited from cross-examining a witness if:

a) A 'specified offence'[1] between a perpetrator/alleged perpetrator and a victim/alleged victim has resulted in a conviction, caution or charge **(s31R MFPA);**

b) A protective injunction is in force between them.[2] This includes non-molestation and occupation orders; **(s31S MFPA);**

c) There is 'specified evidence'[3] of domestic abuse between them **(s31Q MFPA).**

If the automatic provisions are not satisfied, the court also has a discretion to prohibit a party from cross-examining a witness if it appears to the court that the quality of the evidence would likely be diminished if conducted by the party in person ("quality condition") or the cross-examination would cause significant distress ("distress condition") AND, in either case, it is in the interests of justice to prohibit the same **(s31U MFPA).** Section 31U(5) MFPA sets out the matters to which the court must have regard when determining if the quality or significant distress conditions are met.

Where a party is prohibited from cross-examining a witness, the question of whether the court should appoint a QLR comes into play. Where a party is prevented from cross-examining a witness, the court must sequentially consider **(s31 WMFPA):**

a) Is there a satisfactory alternative means for the witness to be cross-examined or of obtaining the evidence the witness might have given under cross-examination?

b) If not, the court must invite the prohibited party to appoint their own legal representative by a certain date/time. However, in many cases this will not be affordable or the prohibited party chooses not to do so;

c) If that is the case, the court must consider whether it is in the interests of justice for the prohibited party to be represented by a court appointed QLR to cross-examine the witness.

The current predicament, however, is that although the court may have determined that a court appointed QLR is required and it has directed the appointment of the same, no such representative can be found.

Sir Andrew McFarlane, the President of the Family Division, handed down the leading judgment of **Re Z [2024]** in which he considered what should be done in these circumstances.

A full read of the judgment is recommended but, in summary, McFarlane P gave the following guidance:

a) At the hearing where a QLR is appointed, the court should also direct a further directions hearing within 28 days if no QLR can be found. HMCTS should also be directed to provide a summary of the difficulties encountered.

b) At the return hearing when a QLR has not been located, in deciding what to do next, the court will likely need to consider the following (non-exhaustive) options:

- A further adjournment to find a QLR;

1 see the Civil and Family Proceedings 2022, SI 2022/68, Regulation 1 and Schedule 1 ("The 2022 Regulations").

2 see the 2022 Regulations, Regulation 2 and Schedule 2.

3 see the 2022 Regulations, Regulation 4 and Schedule 3.

- An adjournment to allow one or more parties to instruct legal representation;
- Reviewing the need for the vulnerable party to give oral evidence and be cross-examined. This will include reviewing the need for a finding of fact hearing;
- Considering if there are any other alternative means of avoiding in person cross-examination between the relevant parties;
- The court asking questions in place of the in-person party.

c) Although PD3AB paragraph 5.3 seems to suggest that the court cannot conduct the questioning, McFarlane P states that the practice direction guidance is not black letter law and when there is no alternative, fairness, proportionality and the need to avoid undue delay may mean the court has no alternative to ask the questions.

d) If the court conducts the questioning, achieving fairness is key. The court must be open with the parties as to the process and explain that it will be asking 'questions' as opposed to 'cross-examination'.

McFarlane P also endorsed the advice of Hayden J in **PS v BP [2018]** on the topic of Judges asking questions on behalf of a party:

i) *Once it becomes clear to the court that it is required to hear a case "put" to a key factual witness where the allegations are serious and intimate and where the witnesses are themselves the accused and accuser, a "Ground Rules Hearing" (GRH) will always be necessary;*

ii) *The GRH should, in most cases, be conducted prior to the hearing of the factual dispute;*

iii) *Judicial continuity between the GRH and the substantive hearing is to be regarded as essential;*

iv) *It must be borne in mind throughout that the accuser bears the burden of establishing the truth of the allegations. The investigative process in the court room, however painful, must ensure fairness to both sides. The Judge must remind himself, at all stages, that this obligation may not be compromised in response to a witnesses' distress;*

v) *[overtaken by MFPA 1984, Part 4B];*

vi) *[overtaken by MFPA 1984, Part 4B];*

vii) *Where the factual conclusions are likely to have an impact on the arrangements for and welfare of a child or children, the court should consider joining the child as a party and securing representation. Where that is achieved, the child's advocate may be best placed to undertake the cross-examination. (see M and F & Ors. [2018] EWHC 1720 Fam; Re: S (wardship) (Guidance in cases of stranded spouses) [2011] 1 FLR 319);*

viii) *If the court has decided that cross-examination will not be permitted by the accused and there is no other available advocate to undertake it, it should require questions to be reduced to writing. It will assist the process, in most cases, if 'Grounds of Cross-Examination' are identified under specific headings;*

ix) *A Judge should never feel constrained to put every question the lay party seeks to ask. In this exercise the Judge will simply have to evaluate relevance and proportionality;*

x) *Cross-examination is inherently dynamic. For it to have forensic rigour the Judge will inevitably have to craft and hone questions that respond to the answers given. The process can never become formulaic;*

xi) *It must always be borne in mind that in the overarching framework of Children Act proceedings, the central philosophy is investigative. Even though fact finding hearings, of the nature contemplated here, have a highly adversarial complexion to them the same principle applies. Thus, it may be perfectly possible, without compromising fairness to either side, for the Judge to conduct the questioning in an open and less adversarial style than that deployed in a conventional cross-examination undertaken by a party's advocate.'*

Finally, McFarlane P finished by offering practical points for the courts to consider either when appointing a QLR or when preparing to put questions itself:

a) *Whilst there is value in the QLR attending court for the ground rules hearing so that they may meet the party on whose behalf they will be asking questions, where this is impractical, and where holding the hearing remotely means that a QLR*

who could not otherwise act can be appointed, it should be acceptable for the QLR to attend the ground rules hearing remotely;

b) *The default position for the full hearing should be for the QLR to be in attendance at court, rather than joining remotely, as the overall effectiveness and fairness of the process is likely to be diminished if they are not in the courtroom;*

c) *In all cases (whether there is a QLR or not) at the ground rules hearing, or earlier, the court should direct that the prohibited party should submit a clear statement shortly stating the allegations, facts or findings that they seek to establish;*

d) *In all cases, the prohibited party should be required to file a written list of the questions that they wish to have asked prior to the main hearing. The list should go to the QLR, or to the court if there is no QLR, but not to the witness or other parties. This process should not prevent the prohibited party from identifying additional questions that may arise during the hearing;*

The lack of available QLRs is likely to remain an issue for the foreseeable future and so the President's judgment is of great assistance for practitioners and judges when dealing with this issue. A link to the standard order templates which deal with QLRs is available **here** should you be required to draft an order dealing with the appointment or termination of QLRs.

H & Anor v S & Anor [2024] EWHC 730 (Fam)

Helpful guidance when dealing with an uncooperative litigant in person

Case Link: https://caselaw.nationalarchives.gov.uk/ewhc/fam/2024/730?query=%5B2024%5D+EWHC+730

Background

This case concerned an application by the child's fathers to relocate to a country in Europe and to vary a child arrangements order previously made by Ms Justice Russell. The mother opposed their application and filed a cross application for a transfer of residence. Mrs Justice Morgan granted the applications of the fathers and refused the mother's application for a change of residence. The judgment provides a helpful summary of the law relating to international relocation at paragraphs 25 to 36.

However, the judgment is cited for its assistance when dealing with an uncooperative party. Although the case is not of binding authority, it provides a helpful framework of the factors to be considered when dealing with a party seeking to unreasonably delay the proceedings.

On day 2 of the final hearing, about 40 minutes before the hearing was due to start, the mother emailed the court clerk essentially seeking for the proceedings to be adjourned. The court was already part way through the evidence. The mother expressed the difficulty and disadvantage she felt as a litigant in person, which included having insufficient time to prepare. The mother did not attend day 2 of the final hearing and failed to attend for the remainder of the hearing. After conducting a balancing exercise of the relevant factors, Morgan J refused the mother's application.

To understand the proceedings before Morgan J, it is helpful to consider some of the case history. Sadly, this was the second set of proceedings involving the child and Morgan J sets out the key aspects emerging from the judgment of Russell J within the first set of proceedings at paragraph 5. Essentially, the child was conceived by home insemination with the aim of a same-sex couple having a child assisted by a friend and this was something agreed by all parties at the time conception took place. The court found that the intention agreed between the parties at the time of conception was that the fathers would be parents to the child and the mother would play an active but subsidiary role. The court rejected the mother's case that it had been agreed she would parent the child with father "H" and father "B" would have no other role in the child's life other than as "H's" boyfriend. The court found that the mother had deliberately misled the fathers so as to conceive an additional child for herself. The court found that the mother was unable to put the child's interests first and was unable to meet her emotional needs at the time of the judgment or in the long term. The court determined that the child should live with the fathers and have supervised time with the mother, albeit it was expected this would progress to being unsupervised. Within those proceedings, the court referred to the mother's attempts to impose her will on the court and manage the proceedings at that hearing.

The decision

Paragraphs 18 to 24 of the judgment set out in detail Morgan J's decision for refusing the mother's application. Morgan J rejected the mother's submission that she had had inadequate time to prepare. In doing so she noted:

a) The case had been listed for a significant period of time. Although some documentation had been filed in close proximity to the hearing (namely final statements of parents and the report of the children's guardian), the mother was aware of the substance of the fathers case;

b) The mother had in fact herself been slow to file her own evidence in respect of the fathers application and also in setting out the basis upon which she sought a change of residence. Paragraphs 18 and 19 of the judgment detail the mother's multiple breaches of court orders, including failing to file witness statements (with penal notices attached) and to attend court hearings (including a hearing which was due to consider her application for Russell J to recuse herself);

c) The mother had done much to seek to try and frustrate the smooth process of the hearing

and the case management associated with it. Paragraph 19 of the judgment notes that the mother sought to appeal the case management orders of 21 December and to vacate both a further case management hearing on 4th March 2024 and the final hearing. Permission was refused on all grounds.

Morgan J noted that the child was 10 years old, she was aware that decisions were being made about where she should live and she was anxious about the fact her mother had applied for a change of residence. Morgan J was clear that the child's best interests and need for a decision to be made now outweighed the unconscionable delay that would be caused by one party electing not to continue to participate at a late stage in the proceedings.

The court recognised that the mother's Article 6 rights were engaged but stated that the fact she was without representation did not breach those rights. The court commented, having seen the mother cross-examine one of the fathers on day one of the final hearing, that she was an articulate, able and intelligent woman. Morgan J noted that fairness did not just apply to the mother but to all parties. Morgan J was satisfied that sufficient regard had been given to ensure that the mother had been given the opportunity to meaningfully participate in the hearing. For example, the mother had been sent a note of the applicable law in advance of the hearing so as to give her sufficient time to digest the same. In addition, the court had adjusted the witness template to give the mother the greatest share of time to reflect the fact it was harder for her to formulate questions. Morgan J concluded that the balance of fairness tipped decisively in favour of continuing notwithstanding that the mother was no longer participating.

Observations

- Paragraphs 18 to 24 set out the relevant factors Morgan J considered, balanced and analysed before refusing the mother's application to adjourn proceedings. It provides a helpful starting point and framework for practitioners when drafting/making submissions on the issue of a LIP seeking to unreasonably delay the proceedings.

Re O (Appeal; Duty to Consider Fact-Find) [2024] EWHC 839 (Fam)

The case serves as a reminder that where a party is vulnerable, there is a mandatory obligation on the court to apply the guidance detailed in Practice Direction 12J, Part 3 FPR 2010 and Practice Direction 3AA

Case Link: https://caselaw.nationalarchives.gov.uk/ewhc/fam/2024/839?query=%5B2024%5D+EWHC+839

Background

The case concerned an appeal by the mother against a Child Arrangements Order concerning two children, who were 12 and 9 years old. The children lived with their mother and the younger child had supervised contact with the father; the older child declined to have contact. During the proceedings, the mother made allegations of domestic abuse against the father, including allegations of coercive control, and the father accepted that he had threatened to slit the mother's throat in front of the children. The mother filed a schedule of allegations and at the FHDRA before the Lay Magistrates, it was held that a fact-find was not necessary in light of the father's admission. At a Family Law Act 1996 (FLA) hearing three months later, a District Judge listed a fact-finding hearing, but this was limited to the context in which the father had stated "*I will slit your throat*". Against that background, the mother produced a second schedule of allegations which included the same allegations considered by the Lay Bench. She did so without prior permission of the court. At the FLA fact-find hearing before a District Judge, the mother, who was represented, did not seek any findings against the father over and above the admission. A way forward in relation to contact was agreed and no appeal was made against that order or the Lay Bench's decision not to list a fact-find.

The matter was listed for a final hearing in respect of the child arrangements before Recorder Peacock. At the pre-trial review in advance of the final hearing, protective measures were granted for the mother however no specific directions were given as to what measures would be in place at the final hearing. At the final hearing, neither advocate for the parents raised the issue of protective measures with the Recorder. The Recorder himself did not ascertain whether the mother was vulnerable nor ensure that there were participatory directions in force to assist her to give her best evidence. He also failed to address or apply Part 3 FPR 2010 and PD3AA. Recorder Peacock did not consider the issue of whether to make findings of fact in relation to the coercive and controlling behaviours alleged by the mother and instead relied upon the previous decision of the Lay Bench, the fact the decision of the Lay Bench was not appealed and that the mother had not made any subsequent application to revisit the need for a fact-find hearing:

> *"9. The proceedings for the non-molestation order concluded in November 2022 on the basis of undertakings given by the father with the non-molestation order being discharged. Earlier in the Children Act proceedings the mother made allegations of domestic abuse against the father and set out a series of allegations in a schedule, pursuant to an order of the court. The court decided that it would be disproportionate to carry out any fact-finding hearing. The father, although he initially denied the threat that was made, subsequently admitted it and the court found that, given the father's admission and the nature of the other allegations in the mother's schedule, which were, I think it is fair to say, less serious than the threat, it will be disproportionate to hold a fact-finding hearing.*
>
> *10. The mother in her evidence has made plain her unhappiness with that decision and I think described that as the point where these proceedings went wrong, but no application has been made by Ms Pascoe for me to revisit that decision. And even if it had been, I may well have needed some persuasion that it was open for me to do so when the court's order on the issue had not been appealed.*
>
> *11. As a result, I proceed on the basis of the admitted allegation only. There has been some argument about the context of that remark with the father saying that the remark has to be seen*

in its context, and the mother saying that the father is seeking to minimise what has been said. I decided not to listen to an audio recording of part of the conversation that led to that remark. In the bundle before me is a fairly full transcript which I have considered, and it makes for deeply unhappy reading.

18. The mother says that the difficulties are also as a result of the father's abusive behaviour which had taken place prior to that threat. As I said, the court has decided that no fact finding should take place and I cannot proceed on the basis that there was any such abusive behaviour. But what I can proceed on the basis of, and which both parties are agreed about, is that the relationship had become increasingly toxic prior to the final breakdown."

Recorder Peacock went on the make a Child Arrangements Order stipulating that the younger child's contact with his father should move to unsupervised contact in the community and progress to ultimately overnight staying contact which would increase in duration over time.

Grounds of appeal

The mother sought permission to appeal the decision on 5 grounds:

1) **Ground 1:** It was a procedural irregularity not to hold a 'ground rules' hearing prior to the final hearing.

2) **Ground 2:** The judge was wrong in failing to implement participatory directions and to ensure that during the hearing the parties did not see each other to assist the mother, a vulnerable party and victim to give her best evidence pursuant to the Domestic Abuse Act 2021 and Part 3 FPR 2010 and PD3AA.

3) **Ground 3:** The judge failed to specifically address Part 3 FPR 2010 and PD3AA, which includes an obligation on the court to consider mother's vulnerabilities and how she could be assisted to give her best evidence.

4) **Ground 4:** The judge was wrong in failing to determine the mother's wider allegations of domestic abuse and coercive and controlling behaviour which were relevant to the welfare decisions for the children.

5) **Ground 5**: The judge was wrong in making child arrangements orders without applying PD12J given the father's admission that he threatened to slit the mother's throat in front of the children and mother's wider allegations of domestic abuse and coercive and controlling behaviour.

Decision

Interestingly in this case, the father accepted that Grounds 1–3 of the appeal were made out. Ground 5 was also accepted by the father in part, namely that the judge was wrong in making child arrangements order without applying PD12J given the father's admission. The basis of the father's acceptance, with which Henke J agreed, was as follows:

a) *Given the admission of domestic abuse by the Respondent, the court ought to have applied paragraphs 35 to 37 of PD12J considering child arrangements in cases where the court is satisfied that such harm has occurred:*

b) *The court should ensure that any order for contact will not expose the child to an unmanageable risk of harm and will be in the best interests of the child.*

c) *The court should apply the individual matters in the welfare checklist set out in s.1(3) of the Children Act 1989 with reference to the harm that has occurred, and any expert risk assessment obtained.*

d) *In particular, the court should consider any harm which the child, and the parent with whom the child is living, is at risk of suffering if a child arrangements order is made.*

e) *The court should make an order for contact only if it is satisfied that the physical and emotional safety of the child and the parent with whom the child is living can, as far as possible, be secured before, during and after contact.*

f) *The court should consider, inter alia, whether the parent is motivated by a desire to promote the best interests of the child or is using the process to continue a form of abuse against the other parent and the capacity of the parents to appreciate the effect of past abuse and the potential for future abuse.*

g) *Whilst the Recorder at paragraphs 43–46 of the transcript refers to the law, it is not apparent that the Recorder considered the specific paragraphs 35 to 37 of PD12J.*

h) *President of the Family Division, Sir Andrew McFarlane makes clear at paragraph 28 of H-N and Others (children) (domestic abuse: findings of fact hearings) [2021] EWCA Civ 448 that:*

> *"PD12J is and remains, fit for the purpose for which it was designed namely 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. As was also recognised by The Harm Panel, we are satisfied that the structure properly reflects modern concepts and understanding of domestic abuse. The challenge relates to the proper implementation of PD12J".*

In delivering her judgment, Henke J set out the relevant law regarding domestic abuse at paragraphs 12–19. Henke J reiterated that there is a mandatory duty on the court, even if the same is not raised by any party or legal representative, to a) ascertain if a party/witness is vulnerable and b) to ensure there are participatory directions in force to assist that person to give their best evidence. The trial Judge failed to address Part 3 FPR 2010 and PD3AA in circumstances where he should. This omission was wrong and/or a serious procedural irregularity.

The remaining issues for Henke J to determine concerned the entirety of Ground 4 and the part of Ground 5 which related to the mother's wider allegations of domestic abuse and coercive and controlling behaviour.

Henke J determined that the Recorder should have considered the issue of whether to make findings of fact in relation to the coercive and controlling behaviours alleged by the mother and should not have relied upon the prior determination either within the non-molestation order proceedings or by the Lay Bench. The issue of determination of the allegations was clearly a matter in issue before him and although the mother had not made an application to reconsider the need for a fact find, this did not absolve his obligation to consider, and keep under review, whether a fact-find was necessary to resolve the allegations in this case. In failing to consider the need for a fact-find, the Recorder got himself in difficultly as despite stating he could not determine the allegations, he proceeded to label the relationship as toxic, which implies blame on both sides and is thus an implicit determination of the facts.

Henke J determined that the Recorder erred by failing to consider whether the nature and extent of the allegations, if proved, would be relevant to any issue before the court, pursuant to PD12J(17)(g). Ground 4 and the remainder of Ground 5 were made out in so far as the Recorder should have considered whether there should have been a fact-find. Henke J did not go as far as to say that there should have been a fact-find and remitted the father's application for a re-hearing before a Circuit Judge.

Observations

- The case serves as a reminder that domestic abuse must be considered at all stages of proceedings.
- There is an obligation on the court to consider the issue of vulnerability as soon as possible after the start of proceedings and until their resolution. This mandatory obligation exists independently of any obligation on the parties and their representatives.
- Where a party is vulnerable, there is a mandatory obligation on the court to apply the guidance detailed in Practice Direction 12J, Part 3 FPR 2010 and Practice Direction 3AA. This includes an obligation to list a ground rules hearing prior to a hearing at which evidence is to be heard.
- The court has a duty to keep the need for a finding of fact hearing under continuous review; it is not sufficient to reply upon a previous decision of the court that the same is not necessary.

T (Children: Non-Disclosure) [2024] EWCA Civ 241

Court of Appeal summarises the questions a court should ask itself when asked to authorise non-disclosure in the interests of a child

Case Link: https://caselaw.nationalarchives.gov.uk/ewca/civ/2024/241?query=2024+EWCA+CIV+241

Background

The court was concerned with an appeal from an order made by Francis J permitting relevant evidence to be withheld from the father (F). The parties were engaged in previous proceedings in June 2023, in which HHJ Roberts made a final live with order in the mother's (M) favour and reduced the time the children (aged 12 and 8) spent with F to four (from six) nights per fortnight and a visit in the intervening week. Within those proceedings HHJ Roberts found F's behaviour had been very unreasonable in ways that were harmful to M and had a negative effect on the children. HHJ Roberts found that F's behaviour could be properly described as coercive and controlling. He needed to be consulted about everything and tended to make mountains out of molehills. His interpretation of co-parenting was not reasonable and the court had no confidence that he would willingly change his approach.

Following the October 2023 half-term, the younger child, T, began to show acute distress. M stopped contact in November 2023. On 7 December 2023, M made a without notice application supported by two witness statements. In her first statement, M referred to the fact that some of T's behaviour was accompanied by statements about self-harm and suicide. In her second statement, M exhibited a report, dated 8 November 2023, from a mental health nurse which described an initial assessment of T at school the previous day. The report stated that T had asked that the information he had disclosed should not be shared with F. The author said that the report should not be passed on without a formal request through the NHS Trust and it was felt that sharing it could cause an increased risk of harm from F towards T and of harm from T towards himself. HHJ Roberts made an order suspending F's contact and gave permission for M not to serve her second statement on F.

At an on notice hearing on 12 December 2023, the orders HHJ Roberts had made on 7 December 2023 continued and the issue of disclosure was transferred to the High Court. The matter came before Francis J on 31 January 2024. By late January 2024 T was showing less distress, but he remined emotionally fragile and had not yet been able to return to school. The Guardian recommended a family psychological assessment and that contact should continue to be suspended pending that assessment. In relation to disclosure, the Guardian supported F's request for the withheld material, and M adopted a neutral position.

The hearing before Francis J began with all parties present. He then heard from the representatives for M and the Guardian only and at that point read HHJ Robert's judgment from the previous proceedings. Having done so, Francis J delivered a closed judgment in which he recorded that his initial instinct had been to order disclosure, but that reading the judgment had led him to a different view. His hope had been that F might benefit from seeing the withheld material and reflect on his behaviour, but he now found it more likely than not that F would not act appropriately if disclosure was allowed. He found there was a real risk that F would be unable to control his need to be in charge and allow himself to put his own controlling interests before his son. He had to balance the risk of T becoming worse as a result of disclosure and the risk of harm increasing. He was not prepared to take that risk. It would also be a breach of trust for F to be told about information given by T to the nurse, which led to a real risk that he would not feel listened to and would be less likely to say things that were important to his well-being.

F and his representatives were then re-admitted to the hearing and were informed of the court's decision. Francis J gave counsel for F the opportunity to make submissions, following which he gave an open decision, permitting M to continue to withhold her second statement from F. He gave F permission to

renew his application for disclosure following the family psychological assessment.

The appeal

The grounds of appeal are set out fully at paragraph 14 (1) – (4) and can be summarised as follows:

- The court erred in law by failing to disclosure the material to F given the Guardian and F were in favour of disclosure and M's unopposed position; the case was not finely balanced but was firmly balanced in favour of disclosure.
- The court failed to carry out a correct balancing test in respect of the risk to the children and their Article 8 rights and F's Article 6 rights.
- The court failed to carry out a correct balancing test (proportionality) in respect of the children's Article 8 and F's Article 8 rights. Further, the court failed to consider any appropriate safeguards, including those proposed by the Guardian.
- The court failed to ensure a fair hearing and fair process.

The law

The judgment sets out the relevant law at paragraphs 20 – 21 *(Re D (Minors) (Adoption Reports: Confidentiality)* [1995] 2 FLR 687, Re B *(Disclosure to other Parties)* [2001] FLR 1017 and Re A *(Sexual Abuse: Disclosure)* [2012] UKSC 60).

Paragraph 22 goes on to set out the questions a court should ask itself when considering an application for non-disclosure in the interests of a child:

> *A court that is asked to authorise non-disclosure in the interests of a child should therefore ask itself these questions:*

1) *Is the material relevant to the issues, or can it be excluded as being irrelevant or insufficiently relevant to them?*
2) *Would disclosure of the material involve a real possibility of significant harm to the child and, if so, of what nature and degree of probability?*
3) *Can the feared harm be addressed by measures to reduce its probability or likely impact?*
4) *Taking account of the importance of the material to the issues in the case, what are the overall welfare advantages and disadvantages to the child from disclosure or non-disclosure?*
5) *Where the child's interests point towards non-disclosure, do those interests so compellingly outweigh the rights of the party deprived of disclosure that any non-disclosure is strictly necessary, giving proper weight to the consequences for that party in the particular circumstances?*
6) *Finally, if non-disclosure is appropriate, can it be limited in scope or duration so that the interference with the rights of others and the effect on the administration of justice is not disproportionate to the feared harm?*

Application to this case

The court took the view that Francis J was entitled to be concerned about the risk of harm that might result from F receiving the material, but he did not address the nature or probability of the risk to the children or the measures that might be taken to reduce it [24]. Nor was there an evaluation of the overall advantages and disadvantages to T of disclosure taking place. No consideration was given to the difficulties for T of continued secrecy, or for the court in reaching a workable outcome if the information continued to be withheld [25]. It was unrealistic for Francis J to consider that F could take part in the psychological assessment without disclosure. Francis J referred to F's Article 6 and Article 8 rights, but he did not appear to have given them any weight. He was struck by HHJ Robert's findings about F's self-centredness in relation to two episodes that pre-dated the previous proceedings, but these fell far short of providing a foundation for depriving a parent of information about his child in the midst of a crisis, particularly as it was being said that he had significantly brought it about [26]. Francis J envisaged the issue of disclosure could be revisited after completion of the psychological assessment. He did not assess the impact on the whole family of non-disclosure continuing for what was likely to be several months [27].

The court concluded that Francis J's approach to the issue of disclosure was insufficiently thorough and that his order could not stand [28]. The court observed it was not then necessary to look in detail as to what

occurred at the hearing, but it must be said that where a court excludes a party from part of a hearing it should not reach its ultimate decision without hearing from that party to the greatest practicable extent. F was left in the position of trying to change the judge's mind. A party must be given the opportunity to assist the court before it reaches its decision, not after [28].

The court allowed the appeal and also permitted disclosure of the material to F. The court accepted that there would be an increased risk of emotional, psychological and even serious physical harm to T if F involved himself without restraint in the current delicate situation, however there was no reason to believe that F would breach the order preventing him from having contact pending the expert assessment. In relation to breach of trust, the children need not be told that disclosure had taken place until that could be done with the benefit of expert guidance. The psychological assessment could only take place with the parents being on an equal footing. It was unlikely to be in T's interests to believe that a secret was being held from F indefinitely, and far from helping him, that secret was likely to become more burdensome over time. The court was not therefore satisfied that that the risks could not be managed, or that it was in T's overall welfare interests for the non-disclosure to continue. Finally, there was no compelling reason to override F's rights to have the same information as the other parties [29]. The court therefore permitted disclosure, subject to the conditions set out at paragraph 30.

Observations

- Paragraph 22 of the judgment helpfully and clearly sets out the questions the court should ask itself when considering an application for non-disclosure in the interests of a child, and therefore provides the starting point for practitioners.
- Neither a child nor a mental health practitioner / other professional has a veto on disclosure and the court must give adequate consideration to measures that could be taken to reduce the identified risk. In this case, the risk was managed by way of ordering that the children should not be informed that the material had been disclosed to F prior to advice from the psychologist. Practitioners should carefully consider what measures could be put in place to reduce the risk to enable to disclosure.
- Realistic consideration should be given as to how the court can ultimately reach a workable outcome if the information were to continue to be withheld. If the information would be relevant to any expert assessment the court had determined to be necessary, it is likely to be unrealistic that a party could be properly assessed without receiving disclosure of the relevant information.
- Whilst representatives seeking disclosure may unavoidably be placed at a disadvantage, they must still be given the opportunity to address the court before it reaches its decision, rather than after a closed judgment.

GM & Anor v EB & Anor (Rules of Evidence) [2024] EWHC 288 (Fam)

High Court allows an appeal following one party serving another with a witness statement on the morning of a final hearing

Case Link: https://caselaw.nationalarchives.gov.uk/ewhc/fam/2024/288?query=2024+EWHC+288

Background

The court was concerned with an appeal against the decision of a Circuit Judge at a final hearing on 4 October 2023. The trial judge made an order for indirect contact between the appellants and their grandson, P. The appellants were the paternal grandfather (PGF) and his wife, the paternal step-grandmother. The respondents to the appeal were the mother (M) and the father (F). P was born in December 2017. F was convicted of murder in 2018 and was serving a 22 year minimum term. M was convicted of assisting an offender (F). P had spent regular time with the appellants, including overnight stays, until around March or April 2021, when F made an application to spend time with P. There were a number of sets of proceedings between the parents, including for enforcement, which concluded with an order for direct contact four times per year in prison, facilitated by the paternal grandmother. In July 2022, the appellants applied for permission to apply for a CAO. Their leave application was successful and the matter came before the trial judge on 4 October 2024 for a final hearing. MacDonald J heard the appeal on 5 February 2024 and handed down judgment on 12 February 2024.

Grounds of appeal

Of the 9 grounds of appeal, 2 concerned the fairness of the final hearing and 7 concerned the trial judge's welfare analysis. Ground 1 concerned the trial judge's decision to allow M to rely on a statement, dated 30 September 2023. The court had not given permission for M to file and serve a statement in advance of the final hearing. M had filed, but not served, the statement and the appellants were only provided with a copy shortly before the hearing was due to commence. They were not provided with a copy of the two exhibits attached to the statement. The document did not include a statement of truth. The appellants asserted they were given 20 minutes to consider the statement, following which the final hearing commenced. The appellants were not given the opportunity to file and serve a statement in response to M's statement, which included an allegation that the PGF had provided M with a mobile telephone in order to aid and encourage her to break her bail conditions by way of having telephone contact with F. The PGF denied M's allegation. The trial judge found that the PGF had aided a breach of M's bail conditions and used that finding to inform a wider finding against both appellants of a willingness to lie.

Ground 2 concerned the trial judge's decision to conduct the final hearing without the appellants having been provided with a bundle in accordance with a previous order that the bundle would be prepared by HMCTS and be provided to the parties two days prior to the final hearing.

The law

The judgment sets out the procedural law (the relevant provisions of Parts 1, 17, 22, 23 of the FPR 2010) and ECtHR case law at paragraphs 52 – 61. At paragraph 62, MacDonald J summarised:

> *Accordingly, fairness demands that a party knows the case being made against them, including the evidence that is to be adduced, and has the ability to answer that case effectively, including time to prepare, the opportunity to adduce their own evidence and the opportunity to challenge the evidence of the other party, in a way that does not place them at a substantial disadvantage compared to that other party. In this regard, in addition to fairness per se, the appearance of fairness will also be important. In considering fairness, the seriousness of what is at stake is a relevant consideration.*

Discussion

MacDonald J concluded that the proceedings taken as a whole could not be considered as fair [73]. Neither the appellants nor M had been directed to file and serve witness statements of the oral evidence on which they intended to rely in relation to any issues of fact to be decided at the final hearing. M filed a statement which did not comply with the relevant provisions of the FPR 2010, which the appellants had been given no notice of prior to the final hearing and had only had limited time to consider on the day, before being required to give evidence and be cross-examined [72]. M's statement included a serious allegation against the PGF and was one that had not previously been raised within the proceedings the appellants were party to. In addition, the trial judge used the finding that the PGF had aided a breach of bail conditions to inform a wider finding of a willingness to lie and a finding that M's perception of the appellants generally was justified, which in turn were used in reaching the central conclusion that it was not in P's best interests to have direct contact with the appellants. The unfairness to the appellants therefore affected the proceedings as a whole [74]. Accordingly, MacDonald J allowed the appeal on Ground 1.

Whilst not strictly necessary given the court's decision in relation to Ground 1, MacDonald J went onto state he was also satisfied that Ground 2 was made out. The absence of the appellants having a court bundle further breached the common law principle of natural justice, as reflected in the Overriding Objective in FPR r. 1.1 and the requirements of Article 6 of the ECHR [76].

Following consideration of Grounds 1 and 2 and the court's decision to allow the appeal, MacDonald J did not consider it necessary to deal with Grounds 3 – 9 which concerned the trial judge's welfare analysis.

Conclusion

MacDonald J concluded with the following at paragraph 78:

> *In concluding, it is important once again to acknowledge the difficult situation that the Judge faced in this case. The Judge was presented with the now ubiquitous difficulty created by litigants who are without the benefit of legal advice and representation sending documents to the court without regard to the requirements of the FPR 2010 or the case management orders made by the court. This situation means, however, that in seeking to achieve fairness it is all the more important that the rules of evidence set out in FPR 2010, including those concerning the filing and serving of witness statements set out in FPR 2010 Part 22, are applied by the court to represented and unrepresented litigants alike.*

MacDonald J remitted the matter for re-hearing. The re-hearing was heard by Lieven J on 1 May 2024 and judgment handed down on 10 May 2024 (see *J & K v M* [2024] EWHC 1156 (Fam) below)).

Observations

- The judgment serves as a useful reminder of the importance of compliance with the rules of evidence set out in the FPR 2010.
- Practitioners are often against litigants in person and the court should apply the rules to both represented and unrepresented litigants alike.
- If faced with a witness statement presented by a litigant in person on the morning of a final hearing which includes significant relevant information, the starting point is the various provisions of the FPR 2010 set out within the judgment. If the court is minded to allow the litigant in person to rely on the statement filed in breach of the rules, fairness is likely to require an adjournment to allow the other party to respond.
- In such circumstances, consideration should be given to seeking wasted costs from the litigant in person.

J & K v M [2024] EWHC 1156 (Fam)

High Court decision refusing paternal grandparents' application for direct contact

Case Link: https://caselaw.nationalarchives.gov.uk/ewhc/fam/2024/1156?query=2024+ewhc+1156

Background

The background is referred to above. By way of additional detail, the applicants had regular (approximately fortnightly) overnight contact with their grandson, A (Lieven J referred to the child as "A"), from birth to the onset of the Covid pandemic in March 2020. All parties agreed that this was a positive time for A and he had a close and loving relationship with the applicants and other paternal family members. Contact re-started in the summer of 2020, although perhaps less regularly, stopped again in the second lockdown and then started again in March / April 2021. F made an application in May 2021. M stopped contact with the applicants in May 2021. M suggested she stopped contact because she was so upset / concerned about what the applicants had said in their statements in support of F's application and her overall concerns about the PGF's behaviour in respect of F and herself.

The evidence

M made a number of allegations in relation to the applicants. Lieven J took the view it was not necessary or proportionate to make findings of fact in respect of them, but stated that they were relevant as to why M opposed contact so strongly, so it was right that the judgment recorded both sides' positions. The allegations and the court's observations are set out at paragraphs 18 – 24 and can be summarised as follows:

- The PGF denied he had discussed creating fraudulent indirect contact with F.
- The PGF denied he had given M a mobile telephone in 2017 to contact F, in breach of her bail conditions.
- The PGF had named a family friend, B, on the C100 as A's godfather. B was a fairly prominent member of the local community. M knew nothing about B allegedly being A's godfather. M was A's sole carer and F was incarcerated prior to A's birth. The PGF said that F had told him that B was A's godfather. The PGF had not asked M about this. Lieven J took the view that the incident showed as a minimum the PGF's lack of respect for M, and failure to understand how upsetting it was for her.
- The PGF had not sent A indirect contact although a previous order had allowed him to do so. The PGF said he did not do so because he did not believe M would pass them on.
- Lieven J formed a very strong impression that under the superficially kindly language, the PGF had as much hostility to the M as she had to him.

In terms of M, the court observed it was obvious that she had found the proceedings immensely draining and upsetting. She made no effort to hide her dislike and trust of the applicants [26]. M said that she had lost all trust in the applicants after they put in evidence in support of F's enforcement application [29]. M said that after A's second visit to F in prison he had started asking questions about F and why he was in prison, and his behaviour at school and at home had become much more difficult. M wanted time and space for A, and herself, to deal with A having contact with F, and learning about and coming to terms with his conviction [32]. M made it clear that she would find trying to support monthly contact with the applicants enormously difficult [33].

Ms Ali of Cafcass had prepared a section 7 report and recommended the reintroduction of contact, progressing to overnight contact a minimum of once per month. Ms Ali felt strongly that for A to understand his identity, particularly that of being a mixed race child with Afro-Caribbean heritage, it was very important that he had a relationship with the applicants. She felt the applicants could provide positive role models with a similar cultural identity [36].

The court was critical of Ms Ali's analysis. Lieven J took the view that Ms Ali's report showed a lack of insight or understanding into M's feelings [37]. Ms Ali had raised suspicions in relation to M's ability to promote A's paternal identity and relationships and suggested that M presented with an unwillingness

to resolve matters and reflect on her behaviour, appearing to be preoccupied in seeking to attribute blame to F and the applicants. Lieven J highlighted F was serving a 22 year prison sentence for murder and took the view it was hardly surprising that M finds it hard to promote A's paternal identity [38]. Lieven J also took the view that Ms Ali's report was deficient in failing to consider the impact on A of forcing his mother to promote monthly contact. M would find this immensely difficult and emotionally distressing, which would impact on A [39].

The law

Paragraphs 40 – 46 of the judgment set out the relevant law and include reference to:

- There is no presumption, as there is for parents, in favour of contact with a grandparent who has obtained leave of the court to apply for a CAO (*Re A (Section 8 Order: Grandparent Application*) [1995] 2 FLR 153) [42].
- A resident parent's hostility to a child's grandparents is not a sufficient reason to prevent contact where other factors weigh in favour of contact (*Re S (Contact: Grandparents*) [1996] 1 FLR 158) [45].

Conclusions

Lieven J observed that in some ways it was quite a difficult balance. A had a positive relationship with the applicants. There was a real benefit to A knowing his wider family including the PGF and his wife, which may be particularly beneficial given they can show A the positive aspect of his Afro-Caribbean heritage [48]. Lieven J observed that "identity" is a somewhat nebulous concept but accepted that as a broad generality having a good relationship with the applicants may help A's sense of identity [49]. However, this was not a case where if A did not have contact with the applicants he would not know about his paternal family; he visits F four times per year in prison, facilitated by his paternal grandmother.

Lieven J found that there were a number of factors that weighed strongly against contact. The PGF did not have much, or any, insight or empathy into M's feelings, he had considerable animosity towards her [50]. The PGF was a strong supporter of his son. Whilst the applicants had offered to give undertakings not to speak to A about F's offences, it was likely they would seek to portray him in a good light and to minimise past behaviour [51]. The PGF's inclusion of B on the C100 was either grossly insensitive or designed to intimidate M. The PGF never bothered to check whether M even knew that B was supposed to be A's grandfather, which showed a lack of respect for M which was striking [53].

The most important factor in not ordering direct contact was the impact that such an order would have on M. M is A's primary carer. She has no trust in the applicants and is vehemently opposed to A spending time with them [55]. Lieven J accepted that M would find supporting contact once per month with the applicants very traumatic [55]. Her upset and unhappiness would undoubtedly then affect A. This was a factor that Ms Ali simply had not considered. Ms Ali had put A's "identity" way above the emotional impact on his primary carer, and the degree to which any 6 year old gets their own emotional stability from that primary carer [56]. Weighing all the factors, Lieven J took the view that that impact on M and, through her, on A, clearly outweighed any benefits to A from contact. It was important to give A and M the space to come to terms with visiting F and the implications of his offending on A. Lieven J made an order for monthly indirect contact by way of letters, cards and presents to A.

Observations

- Often applications by paternal grandparents arise in circumstances where the father is not having contact with the child. The facts of this case are unusual given F was serving a 22 year minimum term and was having contact in prison four times per year. The court's reasoning is however interesting in terms of how much weight was attached to the impact direct contact would have on M. M had previously facilitated regular overnight contact from birth for a number of years and post some of the allegations she made against the applicants.
- The case does include a number of common features of applications made by paternal grandparents, such as the paternal grandparents' support of their son, likely minimisation of past

behaviour, animosity between the grandparents and M, and lack of insight into M's feelings. These are all matters practitioners should be mindful of when advising clients and also when considering the adequacy of section 7 reports.