DEANS COURT CHAMBERS

FAMILY & COURT OF PROTECTION NEWSLETTER

Winter 2020

From the Deans Court Chambers Family & Court of Protection Teams

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IN THIS EDITION…

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Editorial

By Julia Cheetham QC

Welcome to the winter edition of the Newsletter. When we launched the newsletter we had no idea what an extraordinary year this would turn out to be. We have all had to adapt quickly to new ways of working without seeing our friends or colleagues face to face and in many areas of the circuit we have been in the highest form of lock down for most of the year. It is extraordinary that despite these turbulent times family law and the law affecting those who do not have capacity continues to develop and adapt to the current circumstances.

During this period we have produced a series of CPD accredited seminars in addition to the newsletter, these are available on our website and cover a range of topics. Jack Harrison also organised our hugely successful family mooting competition for students which we hope to make an annual event, the ability and sheer hard work of those who took part was remarkable.

In this newsletter Adrian Francis analyses the very important decision of ***R (on the application of Maughan) v HM Senior Coroner for Oxfordshire)*** **[2020] UKSC 46** a judgment only delivered on 13 November 2020 but one which changes the legal landscape for inquests involving the death of a person by suicide or unlawful killing. The alteration of the standard of proof is likely to increase the significance of inquests involving the state and any Article 2 investigation.

Sir Andrew MacFarlane released his November 2020 'View from the President's Chamber' on 18 November 2020 and considered as part of that document the current situation in relation to private law cases. The somewhat shocking statistic taken from the report ***What about me? Reframing support for families following parental separation*** undertaken by the Family Solutions Group (a sub group of the Private Law Working Group) and published on 12 November 2020 is that 40% of separating parents look to the Family Court as the first port of call for the resolution of their problems in relation to their children. Prudence Beaumont takes us through the jurisprudence of Section 91(14) and questions whether it could be used as an effective tool in private law cases where there are risks to parents and/or children.

Cases where there is an application to re-open findings pose particular legal difficulties and Toby Craddock has written a detailed and timely guide. The number of applications to re-open findings cases seems to be growing, it has been postulated that this may be due to the pressure of bringing cases to trial within a 26 week timetable and perhaps we will see a further increase in such cases as a result of the difficulties with current working arrangements.

As usual Michael Jones packs a hugely useful public law update into his article covering the recent most important cases and in particular how the court will approach issues of contact to children in care as set out in ***DS (Contact with Children in Care: Covid19)*** **[2020] EWCA Civ 1031** and the appropriate tests for the joinder of interveners.

Claire Athis Schofield considers what may turn out to be a seismic shift in the way that financial disputes are dealt with in her article. The Court of Appeal judgment in ***Haley v Haley*** **[2020] EWCA Civ 1369** may pave the way for greater use of arbitration in financial remedy cases at a time when the courts are beginning to wrestle with the back log of cases caused by the COVID-19 crisis. Claire's article is required reading for all who undertake this type of work.

The changes which we have seen in 2020 in family law and the Court of Protection are likely to continue apace next year. In the Spring we will bring you a newsletter which will look at the impact of our exit from the European Union. In the meantime I hope that you find the newsletter a helpful and enjoyable read.

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Coronial Law Update – Maughan

By Adrian Francis

The Supreme Court has recently handed down judgment in this highly important case to local authorities. The primary issue to be determined in this matter was whether the applicable standard of proof in inquest proceedings in the case of suicide, was on the balance of probabilities (i.e. the civil standard) or beyond reasonable doubt (the criminal standard). Prior to the determination of this matter the civil standard of proof applied to all conclusions in the Coroner's Court except for suicide and unlawful killing. Both of which required to be proved to the higher criminal standard of proof i.e. beyond all reasonable doubt.

The facts of the case were that James Maughan, the appellant's brother, was a prisoner held in HMP Bullingdon. On 11 July 2016, James Maughan was found hanging in his cell. He was pronounced dead shortly afterwards. At the subsequent inquest into his death, the Senior Coroner invited the jury to consider a narrative verdict to the effect that James Maughan committed suicide on the balance of probabilities. The jury returned a narrative conclusion finding that it was more likely than not that James Maughan had committed suicide.

The appellant began judicial review proceedings challenging the jury's determination and arguing that the Senior Coroner erred in law in instructing the jury to apply the civil standard of proof when considering whether the deceased had killed himself. The Divisional Court dismissed the application for judicial review, concluding that the standard of proof in all suicide conclusions is the civil standard. The appellant appealed that decision to the Court of Appeal, which upheld the Divisional Court's judgment. The appellant again appealed to the Supreme Court.

The Supreme Court held that the civil standard of proof will now apply to all inquests in respect of all conclusions including suicide and unlawful killing. Local Authorities are likely to be particularly affected by this at inquests. As previously where other interested persons in particular bereaved families would have advocated for conclusions of neglect, they are now likely to seek a conclusion of unlawful killing. The tests for neglect and unlawful killing are similar as set out below:

Neglect – Is a gross failure to provide basic medical attention that more than minimally, negligibly or trivially contributes to a person's death.

Unlawful killing - Gross negligence manslaughter - is described as a gross breach of duty that contributes significantly to the person's death.

Unlawful killing - Corporate Manslaughter - is described as a breach of duty by an organisation in the way it's activities are managed or organised that causes or contributes to the person's death.

Prior to the Supreme Court's judgment in Maughan whilst submissions in respect of a rider of neglect were relatively common. Submissions as to unlawful deaths were in the Coroner's Courts quite rare. This is now likely to change as bereaved families seek a conclusion of unlawful killing. Inquests whilst being inquisitorial in nature at least in theory are in practice often adversarial. Further they are likely to become even more so now with interested persons more than ever seeking to apportion blame onto the other parties. Care providers and local authorities are also more likely to be represented given the risk of a conclusion of unlawful killing. Care providers are often represented with funding from their insurers and the frequency of such representation will only increase.

There are now clearly increased risks to local authorities when being made an interested person at inquests. With the lower civil standard of proof

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now applying to conclusions of unlawful killing these conclusions will be more likely and frequent which could then result in a follow on criminal investigation.

Families are also more likely than ever to be represented at inquests as the legal costs of bereaved families attending an inquest are now also recoverable in a follow on personal injury claim. As in the recent case of Greater Manchester Fire Service v Veevers, HHJ Pearce in judgment, noted that inquest costs were recoverable if they were incidental to the claim, and that the central issue here was whether the defendant had admitted liability or showed a willingness to satisfy the claim. If the position was not one of 'unqualified admission' then a costs judge was entitled to find inquest costs recoverable.

Local Authority Receives Adverse Finding by the Local Government Social Care Ombudsman for splitting up a couple who had been together for 59 years

An adverse finding by the Local Government & Social Care Ombudsman (Reference 18 015 872) has been made against the Royal Borough of Windsor and Maidenhead for splitting up a couple after 59 years together following the wife's discharge to a care home from hospital.

The finding follows a clear and complete failure in care planning by the local authority. The local authority in this instance failed to give due consideration to the couple remaining in the family home with the assistance of live in carers and decided to split the couple up by placing the wife in care. The finding shows the importance of local authorities always being required to consider the least restrictive option in terms of a person's care setting. Clearly if a person can return home with a package of care then this is less restrictive than any placement in a care home, and hence is likely to be in the person's best interests. Local authorities can of course when funding a person's care take account of their resources when deciding on the level of any package of care they are to commission.

When Supported Living results in a Deprivation of Liberty?

In the recently decided case of **AB (deprivation of liberty) [2020] EWCOP 39** the Court had to determine whether P who resides in supported living was being deprived of her liberty. The court ruled that she was.

The facts of the case were that P lives in a flat in supported living where there is always support available at any time of the day and night. P is broadly at liberty to do as she pleases within her own flat. She is free to leave the accommodation but she is always seen by a member of the supervisory staff simply because of the nature of the property. P is required to reside at that property and thus if she fails to return the police would be notified. There is extensive support available but P is free to choose whether to take up the support on offer or not. Whilst P is able to choose whether to accept care and leave her supported living flat to access the community. P was it was held deprived of her liberty. Sir Mark Hedley held at paragraph 13 of his judgment that:

"In the end, and only after very careful consideration, I have come to the conclusion that these arrangements do indeed amount to a deprivation of liberty. The question of supervision and control must be viewed in the context of the prescribed condition of residence. Thus whilst she may be free to leave the property as she chooses, she is always subject to state control requiring her return should she be otherwise unwilling to do so. The fact that she generally willingly returns does not of itself negate this point. Again whilst the supervision of her coming and going is not intrusive, it is the fact that all her movements are known and noted. Moreover, while she is free to do as she pleases in the community, there will inevitably be some obligation to restrain or control those movements should they become seriously detrimental to her welfare. That control could lawfully be implemented without recourse to the Court."

Local Authorities should accordingly until such time as the Liberty Protection Safeguards are implemented in April 2022 continue to make applications to the Court of Protection to authorise

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any such deprivation of liberty in supported living by way of the streamlined Re X procedure.

Care Home Visitors

Whilst a great many care home residents have been deprived of family contact during the pandemic. The position is now clear that care home visits can take place and not just for end of life residents as previous guidance has suggested. Visits to care home residents can take place even in Tier 3 areas in England as long as care homes have completed a risk assessment for the resident. The environment in the care home must of course be suitable for visits and a visiting area should be available within the care home. In reality this may mean visits taking place in visiting pods in the garden or specially designed areas within the home but visits should be taking place.

The Vice President of the Court of Protection Hayden J has recently emphasised in an open letter dated 15 October 2020 the importance of such visits taking place.

Paragraph 5 of Schedule 1 of *The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High)(England) Regulations 2020* provides the lawful authority for care home visits to take place as is set out below:

Exceptions in relation to indoor gatherings

5.—(1) These are the exceptions relating only to indoor gatherings.

Exception 1: visiting a dying person

(2) Exception 1 is that the person concerned ("P") is visiting a person whom P reasonably believes is dying ("D"), and P is—

(a)a member of D's household,

(b)a close family member of D,

(c)a friend of D.

Exception 2: visiting persons receiving treatment etc

(3) Exception 2 is that the person concerned ("P") is visiting a person ("V") receiving treatment in a hospital or staying in a hospice or care home, or is accompanying V to a medical appointment and P is—

(a)a member of V's household,

(b)a close family member of V, or

(c)a friend of V.

Exception 3: informal childcare

(4) Exception 3 is that the gathering is reasonably for the purposes of informal childcare provided by a member of a household to a member of their linked childcare household (see paragraph 8)

Stop Press

The Vice President Hayden J's very recent judgment in the Michelle Davies Wigan case in relation to contact in care homes has become available in the last few days and is available here.

In brief Hayden J confirms that in person contact should currently be taking place in care homes in accordance with the statutory regulations and in a Covid secure way i.e. visiting pods, window contact etc. There should be no blanket policies by care homes & local authorities preventing contact and instead bespoke care planning is required.

The judgment is very clear and the extract below is important in summing up the present situation:

The strength of the obligation to protect the rights of the individual, particularly the vulnerable and mentally incapacitated, is not in any way diminished by the pandemic health crisis; it is, if anything, enhanced.

Adrian Francis

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Assessing Risk of Harm to Children and Parents in Private Law Cases: Could Section 91(14) be used more effectively?

By Prudence Beaumont

1. Assessing Risk of Harm to Children and Parents in Private Law Cases

In June 2020, the Ministry of Justice published: *Assessing Risk of Harm to Children and Parents in Private Law Cases*. One of the areas considered by the report was 'the challenges relating to the application of the Practice Directions and section 91(14) orders'

The report gathered evidence through questionnaires from a number of sources. Predominately the evidence considered information from lay parties (mainly mothers) with direct experience of the family justice system[1]. Those individuals were self-selecting and there was no wider consideration of the case papers and therefore no objective analysis undertaken as to how the court reached its decision and whether the determination mirrored stated experience of the individual. A more limited amount of evidence was gathered from professionals working within the family justice system.

2. Domestic Abuse

Defining domestic abuse

There has been a significant cultural evolution in the understanding of domestic abuse over the last 20 years. This development can be charted through consideration of Practice Direction 12J and relevant case law. A useful starting point is the guidance detailed in *Re L, V, M, H (Contact: Domestic Violence)* [2001] Fam 260 which saw a "*heightened awareness of the consequences of exposure to domestic violence"* and an acknowledgement that there had been a "*tendency for courts not to tackle allegations."*

PD12J was originally introduced in 2008 and outlined the approach to be taken in child arrangement cases where domestic abuse is an issue. It has been updated twice, once in 2014 and once in 2017. The updates provided guidance regarding the application of PD12J including clarity in relation to the conduct of finding of fact hearings and changed the terminology from domestic violence to domestic abuse.

Section 76 of the Serious Crime Act 2015 created a new criminal offence of Controlling or Coercive Behaviour in an Intimate or Family Relationship. This offence came into force on 29 December 2015.

Identifying domestic abuse

Practitioners will likely have experience of their own clients not truly recognising the signs of domestic abuse, particularly as events taken in isolation may not appear abusive in and of themselves. There is often a need to demonstrate a pattern of behaviour, which can be difficult to encapsulate within a Scott Schedule

There is certainly a widening social understanding of domestic abuse. It is often useful to look to popular culture as a measure of wider public understanding. It was as recently as 2016 that *The Archers* ran a storyline about domestic abuse in the relationship of Helen and Rob Titchener. The public understanding of domestic abuse is still not well established.

The clearest example of the Court failing to approach domestic abuse correctly is the recent Court of Appeal case of *JH v MF* [2020] EWHC 86 (Fam) appealing the decision of HHJ Tolson QC.

A finding of fact hearing concerning sexual abuse allegations presents an extremely worrying

[1] *The vast majority (87%) were from individuals with personal experience of private law children proceedings– mainly mothers and their families – and 10% were from individuals with professional/practical experience in family courts. The remaining 3% (32 submissions) were from organisations.* (Page 17-19)

approach to domestic abuse allegations, a complete disregard for PD12J and a failure to acknowledge the realities of domestically abusive relationships. Mrs Justice Russell makes it plain that she regarded the analysis of the judge to be fundamentally flawed, at para 33: "*the judge's approach towards the issue of consent is manifestly at odds with current jurisprudence, concomitant sexual behaviour, and what is currently acceptable socio-sexual conduct."*

3. Section 91(14)

There is limited guidance within the statute regarding the application of section 91(14), save for the following:

'*On disposing of any application for an order under this Act, the court may (whether or not it makes any other order in response to the application) order that no application for an order under this Act of any specified kind may be made with respect to the child concerned by any person named in the order without leave of the court'.*

Case Law

The following cases are likely to be of assistance, the focus is on more recent case law. It is not an exhaustive list.

***Re P (A Minor) (Residence Order: Child's welfare)* [2000] Fam 15**

The starting point is *Re P (A Minor) (Residence Order: Child's welfare)* [2000] Fam 15. There is a common view that applications pursuant to section 91(14) require a history of unreasonable applications. This is a common feature, but it is not a pre-requisite. As Butler-Sloss LJ highlights '*contrast the language [of section 91(14)] with s 42 of the Supreme Court Act 1981, which requires the Attorney General to show that the litigant has habitually and without reasonable ground instituted vexations proceedings before the court can impose any restriction.'* No such requirement is present in s 91 (14) and '*such an omission, is, no doubt, intentional and designed to give the court a wide discretion'*

***Re P & N (Section 91(14): Application for Permission to Apply: Appeal)* [2019] EWHC 421**

This case concerns an appeal relating to private law proceedings involving two boys, aged 8 and 6, who lived with the mother. Following a finding of fact hearing in January 2015, the district judge determined that the boys should have no contact with the father. A matter of months later, the father made a further application for contact. The application was dismissed and a section 91(14) order was granted for a period of 3 years.

The father made several further applications for permission to apply for a section 8 order. The application was heard by HHJ Plunkett without formal notice to mother or the solicitor for the child. The judge granted the father's application. Mother sought permission to appeal.

Williams J granted mother permission to appeal and Cobb J heard the appeal. Cobb J determined that the approach of HHJ Plunket was seriously unjust for procedural irregularity and wrong. The appeal was allowed and the matter was remitted for hearing before Keehan J (as FDLJ for the Midlands Circuit).

The relevant law and correct approach to determining permission to apply for a section 8 order where a section 91(14) order has been granted is set out at paragraphs 8-19.

***SZ v DG & Ors* [2020] EWHC 881 (Fam)**

High Court case heard by Mostyn J. Father applied for an order for contact in respect of his son, ED. Father required the leave of the court as in January 2015 when making final orders disposing of substantive proceedings, Mostyn J imposed a leave requirement pursuant to the terms of section 91(14) until ED's 14th birthday (June 2026).

In the substantive proceedings reported as *D (A Child)* [2014] EWHC 3388 (Fam) – the Court found the father 'to be guilty of truly bestial conduct…offences of the utmost seriousness

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involving the gross abuse and exploitation of women and girls.'

The rationale for the section 91(14) order in 2015 is so that '*stability of the placement with the special guardians can be guaranteed, or at least, if not guaranteed, assured so far as is possible'* and that any such application would be put on the same footing as an application to discharge the special guardianship order itself.

The father's application for permission to seek contact was based on the return of the younger 3 children to his care, although he recognised the limitations of his case and only sought indirect contact with ED. The father's application for permission under section 91(14) was opposed by ED's Special Guardians.

The Court determines that the change in the father's circumstances were relatively recent and untested and whilst there was some weight in the argument that cultural understanding is the child's best interests, the Court refused the father's applications on the basis "I *place particular weight on the risk of disruption and on the views of the special guardians. I consider that the negative matters outlined in the Czech psychiatric/psychological report outweigh the positives. In the light of that I am not satisfied that the applicant would make a positive contribution to the well-being of ED.'*

***C1 and C2 (Child Arrangements)* [2019] EWHC B15 (Fam); *Re C3 and C4 (Child Arrangements)* [2019] EWHC B14 (Fam)**

The cases concerned one father and four children. C1, C3 and C4 were the father's biological children. C2 is the sibling of C1 and lived with the father when he was in a relationship with the mother of C1 and C2. The two judgments should be read together.

In *Re C1 and C2,* the father seeks direct contact with both children and the mother had applied for a s 91(14) order. Keehan J ordered indirect contact only and granted a s 91(14) order.

The father had made repeated applications with respect to C3 and C4 following a finding of fact hearing at which he was found to have shaken C4 when he was aged 1. A s 91(14) order had been granted in relation to those proceedings.

The impact of the proceedings on the mother and her difficulty in giving evidence is noted. The judge conducts the XX on behalf of the father and takes a robust approach to unnecessary questions, the father submits 738 questions many of which the judge considers to be '*abusive and no forensic value.'*

The conduct of the father in the proceedings appears to have been considered to be of particular relevance. Keehan J comments '*I have never witnessed such prolonged and appallingly bad behaviour in court before'* as the father is described as attempting to intimidate professional witnesses. The father's conduct in court served to reinforce the evidence of the mother regarding the intimidatory coercive nature of the father's behaviour and the Court comments that his appalling conduct in the Hight Court requires '*one only has to consider how he would behave outside the confines of this court in the community and in his dealings with the mother and others.'*

This results in the Court determining that: *'there is a real risk of harm to the mother from the father of both physical harm, but in many ways worse still, emotional and psychological harm'* and making a section 91(14) order for a period of 2 years.

Other Useful Cases

The following cases may also be of interest:

- *Re C-D (A Child)* [2020] EWCA Civ 501 – Lewison LJ and Moylan LJ. Dismisses the appeal. Reminds that *Re P* is to be used with 'great care' but it is clear that that the circumstances in which a child's welfare will justify the making of such an order are many and varied. They are not confined to cases of repeated and unreasonable applications.
- *N (Children)* [2019] EWCA Civ 903 – Jackson LJ & Baker LJ appeal of Hayden J. Judge proceeded in the absence of the F and made a s 91 (14) without clear notice to the father. The CoA determined: '*the two hearings together represent an unwarranted infringement of the father's right to a fair hearing'*

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- *Re S (Permission to Seek Relief)* [2006] EWCA 1190 1 FLR - conditions cannot be applied to section 91(14) but can advise what issues the party subject to it should address if they want to successfully apply to permission in the future

4. Findings and Recommendations of the Report

Repeat applications and using the court process as abuse

The report identifies that section 91(14) is the key provision to prevent repeated unmeritorious applications in child arrangement cases. Unfortunately, even when perpetrators of abuse are 'barred' from making further applications, the process of applying for leave to apply can also be used as a tool of abuse. However, it is observed that if all applications for leave to apply in cases where a section 91(14) order is in place required a response from the other party, then abusers would be provided with a legally sanctioned tool for continuing abuse, the very thing that section 91(14) is designed to prevent.

Section 91(14): an ineffective remedy?

The difficulty in identifying the effectiveness of section 91(14) is that it is rarely used. A survey of 143 magistrates by the Magistrates Association found that 90% said that such orders were rarely or never made[2]. Indeed, many of the professionals consulted for the report had limited professional experience of the use of section 91(14) orders. This raises the obvious question as to whether the provision is not been utilised as often as it could be?

Recommendations of the Report

In relation to section 91(14), the report comments as follows:

"the panel notes that the provisions of the children act 1989 are non-prescriptive, but the sub-section has been interpreted in case law from Re P [1999] to apply only in exceptional circumstances. In order to enable section 91(14) to protect children and adult victims more effectively from harm, the panel recommends that measures be included in the Domestic Abuse Bill to reverse the 'exceptionality' requirement for a section 91(14) order laid down most clearly in Re P (Section 91(14) Guidelines) [1999]. These measures should amend, replace or supplement section 91(14) in an Article 6 compliant way to ensure that the following policy objectives are clearly and explicitly provided for in statute:

- *that section 91(14) orders may be made where it is in the best interests of the child to make such an order;*
- *that section 91(14) orders may be made where the court concludes that the bringing or prolonging of proceedings constitutes domestic abuse against the other parent;*
- *that it is not necessary to demonstrate repeated applications before the court could properly make such an order;*
- *that the court may make such an order of its own motion;*
- *that leave to apply for a child arrangements order following the imposition of a section 91(14) order should only be granted where the applicant provides evidence to show that circumstances since the imposition of the order have materially changed, and where the grant of leave would not create a risk of harm to the child or the other parent."*

3. Conclusion

The recommendations will likely raise some questions regarding ensuring a fair hearing for all and the impact of the recommendations on private law proceedings and whether it would likely result in a better outcome for children or not. The paramountcy principle may mean that in ensuring children's welfare we have tended to overlook the welfare of parents. It may be that in doing so, children are harmed in more subtle ways than has previously been acknowledged by the courts.

Prudence Beaumont

[2] P.125 of the report

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Pause, Stop, Rewind: Re-Opening Findings of Fact

By Toby Craddock

Last month, the Court of Appeal handed down a decision in the case of *Re CTD*.[1] Lord Justice Peter Jackson consolidated and simplified the three-stage approach, which was originally endorsed by the Former President, Sir James Munby, in the case of *Re Z (Children) (Care Proceedings: Review of Findings)*.[2]

The three-stage approach is designed to assist the Court to identify whether findings of fact should be re-visited, re-litigated and re-heard.

The Three-Stage Approach

The three stages of the Court's decision-making process can be summarised as follows:

1. The Court asks whether the applicant has shown that there are solid grounds for believing that the previous findings require revisiting.

2. If that hurdle is overcome, the Court decides how the rehearing is to be conducted.

3. The Court rehears the matter and determines the issues.

Stage One: Do previous findings require revisiting?

The common law doctrine of res judicata does not automatically apply to Children Act proceedings but Jackson LJ is quick to point out that "[any] decision to allow past findings to be relitigated must be a reasoned one".[3]

The reasons often deployed by the Family Court are contained in Lady Hale's leading judgment from *Re B (Children Act Proceedings: Issue Estoppel)*.[4] In short, consideration must be given to whether reopening the case will serve the child's best interests, whether the findings will have a material impact on the current proceedings and whether there are solid grounds for believing the rehearing will result in a different finding as "mere speculation and hope are not enough."[5]

The considerations for the Court are not exhaustive. Jackson LJ observed in the latter case of *Re E (Children: Reopening Findings of Fact)* that the Court should also determine whether the challenged finding "is likely to make a significant legal or practical difference to the arrangements that are to be made for these or other children".[6]

Stage Two: How is the rehearing to be conducted?

Depending on the facts of the case the Court may be invited to rehear the finding of fact exercise in its entirety. On the other hand, swathes of the evidence can be left undisturbed, as the Court embarks upon hearing only one aspect of the case. Take, for example, a case involving allegations of non-accidental injury where updating medical evidence requires the Court to revisit findings. In those circumstances it would be unlikely for the Court to take evidence from lay witnesses all over again. To illustrate this point Jackson LJ reminds practitioners that a rehearing should not be "a free-for-all".[7]

If the first and second stages are conducted methodically, then the Court "[will] provide important protection against unmeritorious attempts to relitigate settled findings while allowing cases that genuinely require reconsideration to be identified and revisited in a proportionate way that uses the resources of the court sensibly and is fair to all the parties."[8]

[1] *Re CTD (A Child: Rehearing)* [2020] EWCA Civ 1316.
[2] *Re Z (Children) (Care Proceedings: Review of Findings)* [2014] EWFC 9.
[3] *Re CTD (A Child: Rehearing)* [2020] EWCA Civ 1316 at §3 (Jackson LJ).
[4] *Re B (Children Act Proceedings: Issue Estoppel) [1997] Fam* 117 at §128 onwards (Hale LJ).
[5] *Re ZZ & Ors (Children)* [2014] EWFC 9 at §33 (Munby P).
[6] Re E (Children: Reopening Findings of Fact) [2019] EWCA Civ 1447 at §34 (Jackson LJ).
[7] *Re CTD (A Child: Rehearing)* [2020] EWCA Civ 1316 at §5 (Jackson LJ).
[8] Ibid, §6 (Jackson LJ).

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Stage Three: A rehearing, a review or an appeal?

A rehearing is precisely that. A clean slate where the issues to be determined are determined without "[giving] presumptive weight to earlier findings" and "where findings stand unless they are shown to be wrong."[9]

The legal burden of proof remains with the applicant once the respondent has discharged the evidential burden at Stage One i.e. once they have demonstrated the rehearing should proceed.

"Accordingly, the simple position is that when it carries out a rehearing the court looks at all the evidence afresh and reaches its own conclusions, requiring the party seeking the relevant findings to prove them to the civil standard in the normal way."[10]

The Facts of *Re CTD*

The original care proceedings concluded in August 2015 and concerned four children. At first instance, the Court found that a family friend, AO, had caused a number of serious injuries to the youngest child, C, who was then under 2 years old.

That finding was considered by Mr. Justice MacDonald at a rehearing in 2019. MacDonald J confirmed the finding that the last injury, a spiral fracture to the femur, had been caused by AO, but he amended the findings in relation to four earlier bony injuries and substituted a 'pool finding' that those injuries had either been caused by C's father or by AO.

The Appeal

C's father did not appeal the decision of MacDonald J – but AO did.

AO appealed on the basis that the assessment of the evidence at the rehearing was incorrectly approached as in later proceedings MacDonald J had found that C's parents had sexually and physically abused C and her siblings at and before the time C sustained these injuries. That evidence had not been available to the first-instance judge at the time of the original finding of fact exercise.

MacDonald J described the approach he adopted at the rehearing in 2019 as follows:

"In considering whether to amend the findings made by Her Honour Judge Hughes, the task of the court is not to re-try the issue in toto but rather to consider whether the findings should be the subject of amendment considering the new information. The forensic focus therefore, must be on that new information evaluated in the context of the evidence previously before the court."

Considering this self-direction does not reflect the need for the Court to look at all the evidence afresh, it should come as little surprise that AO was granted permission to appeal. The grounds of appeal were as follows:

1. The judge adopted a standard of review in relation to the earlier findings that gave excessive weight to the judgment of the trial judge and insufficient weight to the evidence which had caused him to reopen the findings made by her.
2. The judge adopted a standard of review in relation to the earlier [finding] that was incorrect in so far as it led him to a conclusion that was not supported by any of, and was contradicted by, some of the evidence.
3. In adopting the incorrect standard of review the judge reversed the standard of proof, requiring the applicant/appellant to demonstrate that the original findings were wrong rather than requiring the local authority to prove them.

Comment

Jackson LJ was satisfied that MacDonald J's self-direction did not reflect the need to reconsider all of the evidence but his findings were not set aside or substituted by the Court of Appeal in the absence of any "error of substance."

As Jackson LJ puts it: "[MacDonald J] fully reheard the case and factored in all of the evidence when reaching his conclusions. He did not privilege the previous findings or discriminate against the later evidence. He did not reverse the burden of proof."[11]

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Jackson LJ concludes: "In the end, this was a case where the revelations about the parents' behaviour were so striking that the court rightly undertook a thorough rehearing of its earlier findings. Having done so, it might have reversed those findings, but its reasoned analysis of the evidence instead led it to amend them."[12]

All care practitioners should keep the authority of *Re CTD* firmly in mind. The first thirteen paragraphs are a succinct statement of settled legal principle, and the outcome of the appeal demonstrates the wide discretion afforded to the tribunal at the rehearing. AO did not diminish their culpability as a result of the rehearing before MacDonald J or the appeal before the Jackson LJ. So, what is left? A rehearing of the rehearing? Watch this space.

Toby Craddock

[8] Ibid, §6 (Jackson LJ).
[9] Ibid, §8 (Jackson LJ).
[10] Ibid, §13 (Jackson LJ).
[11] Ibid, §27 (Jackson LJ).
[12] Ibid, §30 (Jackson LJ).

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Public Law Children: A Case Law Update

By Michael Jones

Once again as winter sets in we have reached that point where an update of recent case law in the area of care/pubic law children work is (hopefully) welcome by all. Since lockdown there have been numerous cases in relation to remote hearings and various versions of what has now become very detailed and helpful guidance. In an attempt to move away from the depressing picture of lockdown, I am going to focus on some other areas in this update.

The first topic is something which I have had numerous issues with in the past; local authorities placing looked after children in temporary accommodation in Scotland. The issue was addressed in ***Salford CC v M (Deprivation of liberty in Scotland)*** **[2019] EWHC 1510 (Fam)**, albeit the recently reported decision of Cobb J in ***Re H Interim Care Scottish Residential Placement*** **[2020] EWHC 2780 (Fam)**, deals with the issue of placement in more detail, with the Salford case focussing more on the deprivation of liberty angle. The facts of Re H are not so important, rather it is the legal ramifications that I find so interesting. The salient facts were that a young man with behavioural difficulties, H, was placed in a temporary residential placement in Scotland by a North East local authority. H was a looked after child and became subject to an interim care order around 12 months after his initial accommodation pursuant to s.20. The question for Cobb J was in effect, the legal basis upon which a looked after child can be placed in Scotland under the auspices of an interim care order.

Cobb J found that paragraph 19 of Schedule 2 (arrangements to assist children to live abroad), did not apply as the placement was temporary in nature; H was not moving to 'live' in Scotland;

> *'So when is paragraph 19 of Schedule 2 CA 1989 actively engaged? In my judgment, this statutory provision is engaged only when an English local authority is making arrangements, as the statute specifically provides, for the child to 'live' abroad; that is to say, for a proposed long-term or permanent arrangement for a child's future outside of the jurisdiction. It is not engaged in my judgment where the proposal of the English local authority is to place a child temporarily, or in the interim or short term, outside of England and Wales.'*

The local authority could however, properly rely on the provisions of s.37(7)/(8) of the CA 1989 in order to place a child subject to an ICO, anywhere in the UK, albeit the Court would need to scrutinise the care plan given the fact that the child is subject to an ICO;

> *'South Tyneside Council could place Henry, a child who is the subject of an interim care order (section 38 CA 1989), anywhere in the United Kingdom without seeking a specific free-standing order of the English court giving its formal approval. It was, and is, entitled to do so by reliance on the provisions of section 33(7)/(8). However, before making any interim care order, a court would need – as it would in any public law case – to scrutinise the care plan. In a case such as this, the court will want to ensure very specific compliance (inter alia) with the requirements of the 2010 Regulations. If satisfied with such compliance, and of the view that the plan for placement in residential care in Scotland meets the needs of the child, it would be appropriate for the order placing the child in the interim care of the authority to be endorsed with the explicit acknowledgement and approval of the plan to place the child across the border in Scotland; (see in particular [35], [37], [49], and [51] above).'*

It is therefore essential that any placing authority

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complies fully with the 2010 Regulations (the *Care Planning, Placement and Case Review (England) Regulations 2010*). A looked after child who is not subject to an ICO or care order, can be lawfully placed elsewhere in the UK provided the regulatory process is followed correctly;

> *'Thus, it will be clear that there is nothing in the primary or secondary legislation which prevents a local authority from placing a child which it is 'looking after' (accommodating) under section 20 CA 1989 outside of England (i.e. within Scotland) or even outside the UK. On my reading of the legislation (and no party in the instant case demurs), this can be done without recourse to the court, provided that the local authority has complied with its multiple duties under Part III CA 1989 (specifically section 22), is satisfied that this is the most appropriate placement for the child, has complied with the placement plan requirements under Regulation 9 of the 2010 Regulations and has complied with the detailed consultation and approval provisions of Regulation 11 of the 2010 Regulations.'*

In relation to the ICO, this is not recognisable or enforceable in Scotland; conversely, a care order can be transferred to Scotland and recognised as a compulsory supervision order, pursuant to the transitional framework. It appeared possible as a matter of law, for a child's parents to litigate in Scotland in relation to a child placed there by an English authority under an ICO, albeit such matters were limited to the child's immediate protection. Any English authority seeking for recognition/enforcement of an ICO would need to consider petitioning to nobile officium of the Inner House of the Court of Session (and it is not clear whether any such petition would succeed);

'The current interim care order in respect of Henry is not recognised and is not capable of enforcement in Scotland. Happily, at present no party seeks its enforcement, and there appears to be no reason in Scots law for taking any step towards recognition other than for 'legal tidiness'. If any party (particularly the Local Authority) seeks recognition or enforcement, it would be appropriate for that party to petition to the nobile officium of the Inner House of the Court of Session for an order in that court; I suggest that the success of such an application would depend on a range of factors including the specific facts, and the nature of the relief sought; (see in particular [54], and [63]-[72] above). While it appears possible for the parents to litigate in Scotland in relation to Henry on matters strictly limited to his immediate protection (see [70]/[71] above), it is reasonable to assume that, through judicial liaison under the 2018 Judicial Protocol, steps would be taken to avoid concurrent proceedings being held in the two jurisdictions.'

Cobb J did not find that H was deprived of his liberty in his placement, however if he was being, the local authority would again have needed to consider petitioning to nobile officium of the Inner House of the Court of Session as was done in the Salford case;

> *'Henry is not, as a matter of fact, currently deprived of his liberty at Ossian House. If I were to have found that he was/is deprived of his liberty, I would have had to consider whether to make a declaration of lawfulness. Had I done so, the Local Authority would currently be obliged to petition to the nobile officium of the Inner House of the Court of Session as in the case of Salford CC(see in particular [81]-[83] above).'*

Cobb J concluded by noting concerns in relation to the regularity with which children are being placed in unregulated placements due to a lack of adequate provisions in England and Wales (note that a Scottish placement will not be approved pursuant to the English regulatory framework), citing the Children's Commissioner's recently published a report entitled "Unregulated: Children in care living in semi-independent accommodation" (10 September 2020).

Any local authority placing a child in an

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unregulated placement does of course, need to carefully follow the President's guidance in relation to unregulated placements. In respect of placement of a child who is looked after pursuant to s.20 or alternatively subject to an ICO, local authorities are strongly advised to obtain early legal advice, prior to effecting any placement in Scotland. Unfortunately the experience of the writer is that looked after children subject to ICOs are in some cases, being placed in Scottish placements, without the Court being notified. Similarly, local authorities also need to consider the fact that any Court authorised deprivation of liberty is made in relation to a specific placement, and if a local authority seeks to move a child and continue any deprivation of liberty, then the Court will need to be consulted and a further declaration made in relation to any new placement (again, a fact that can sometimes be missed by local authorities).

***Cumbria County Council v T (Discharge of Interveners)* [2020] EWFC 58** is a very fact specific, but interesting judgment from MacDonald J, our regional FDLJ for the North West. The case involved a situation within care proceedings in which the mother was seeking findings of sexual abuse of the subject child, against the father and other individuals she asserted were involved in such abuse. The local authority was not seeking findings of sexual abuse, on the basis that the evidence would not allow for such findings to be made to the requisite standard of proof. Rather, the local authority pleaded threshold on the basis that (i) the mother had developed an unreasonable and false belief that the child was sexually abused by the father, or alternatively, (ii) the mother had deliberately fabricated false allegations of sexual abuse and induced the child to make false allegations of sexual abuse against the father. The father's associates who the mother alleged were involved in the alleged sexual abuse, had been joined as intervenors by the circuit judge previously dealing with the matter; the issue for MaDonald J was whether they should continue to have intervenor status.

MacDonald J provides a helpful and concise summary of the applicable case law relating to individuals being given intervenor status in care proceedings. The Judge also considered the well known principles set out by the now President in ***A County Council v DP and Others* [2015] EWHC 1593**. MacDonald J ruled that all of the intervenors should be discharged, noting in particular the fact that the local authority would be actively putting a case that none of the intervenors were perpetrators of abuse, as would the father;

> *'……the denial by the current intervenors of any inappropriate behaviour with T or any other child is co-terminus with the case of the local authority, and indeed the father. In these particular circumstances, I am satisfied that the rights of each of the intervenors can be sufficiently protected in this case without them having to be maintained as intervenors putting forward individual cases, even in circumstances where the mother seeks to put allegations to them in the witness box. I am reinforced in this view by the fact that, at all times when giving evidence the witnesses will have the protection of s 98 of the Children Act 1989. Any statement or admission made by the witnesses in the course of giving evidence in these proceedings will not be admissible in evidence against that witness or his or her spouse or civil partner in proceedings for a criminal offence other than perjury. Whilst I accept that the protection afforded by s 98 of the Children Act 1989 is not absolute, prior to giving their evidence each of the witnesses can be given the relevant warning by the court. Further, in the unlikely event of an application by the police or CPS for a transcript of the evidence of the relevant witnesses, this court retains a discretion whether to permit the disclosure of such material to the police or CPS. Whilst it would not be appropriate to pre-judge any such application, were such an application to be made, then amongst the factors the court would have to take into account would be the fact that no findings were sought against the witnesses in question before this court, that the conclusions reached by the court regarding the witnesses'*

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> *evidence do not amount to formal findings made by the court on the balance of probabilities and that, in appearing before the court the witnesses were just that, witnesses, and not interveners and represented before the court by a legal team. In addition, during the course of their evidence, the court will, of course, remain vigilant to ensure that the proceedings remain fair for the witnesses who are required to give evidence. In particular, the court can intervene if the counsel for the mother strays into areas of cross examination that are not appropriate having regard to the evidence before the court.'*

This case is very fact specific, but it does raise the interesting point in relation to whether joining individuals who have findings sought against them in care proceedings, is necessary in cases where another parties' case is effectively co-terminus with their case. Clearly every case needs to be treated on its own fact specific basis but this judgment does raise some interesting points in relation to proportionality.

***Re Y (Children in Care: Change of Nationality)* [2020] EWCA Civ 1038** is a case of particular note for local authorities who have children in their care who are not British nationals (a situation the writer has encountered on a number of occasions in certain geographical areas). Problems arise in these circumstances in cases where children who are not British nationals are made subject to care orders; this then raises issues relating to their immigration status and the extent to which an application for British nationalities is necessary. In this case the Court of Appeal considered the extent to which a local authority needs to apply to the Court to change a child's nationality without the consent of a parent; in other words, whether the local authority could use its powers under s.33(3)(b) to override the wishes of a parent. The Court concluded that a change of a child's nationality was a momentous step that required independent judicial scrutiny; in such cases the local authority will need to apply for permission from the High Court to make an application for a change of citizenship.

The Court of appeal did remind practitioners that local authorities need to provide certain evidence in these cases, including:

-The provision of clear evidence as to the effect of the proposed plan upon the child, particularly whether a child was to lose his or her original nationality.

-A welfare evaluation considering Article 8.1 of the United Nations Convention on the Rights of the Child (1989), (which notes that nationality is part one a child's identity, which should be respected and preserved)

-A welfare analysis of the disadvantages and benefits that might flow to the children from the loss of their nationality of birth.

-Consideration as to when would be the appropriate time to apply for a change of nationality (for example, when a child is of an age to provide their own views in relation to the same).

In light of the current restrictions imposed on contact, by the Covid-19 pandemic (something which I know many of us are profoundly uncomfortable with; the very idea of young parents having only facetime contact with new born babies goes against everything we have come to believe in), the Court of Appeal decision in ***D-S (Contact With Children In Care: Covid-19)* [2020] EWCA Civ 1031** is of particular interest. The Court was considering an appeal from an application brought by a parent for contact with a child in care. Peter Jackson LJ eloquently summarises the law in this area as follows;

> *'(1) The local authority is under a duty to allow the child reasonable contact with his parents: CA 1989 s.34 (1). It must also endeavour to promote contact between the child and his parents unless it is not reasonably practicable or consistent with his welfare: CA 1989 Sch 2 para. 15 (1).*
>
> *(2) Where an application is made to the court, it may make such an order for contact as it considers appropriate: s.34 (3). When doing so, the child's welfare is its paramount consideration. It must have*

> *regard to the welfare checklist and it must not make any order unless it would be better for the child than making no order at all: CA 1989 s.1 (1), (3) and (5).'*

In the instance of case (1), this is a decision for the local authority, whereas case (2) is one for the Court. In making a decision on this issue, the Court must consider all the information that is requires, and to reach its conclusion giving paramount consideration to a child's best interests;

> *'Once the court has formed its own view, it has a broad discretion as to whether or not to make a contact order. It may well decide, applying the 'no order' principle, not to make an order because its conclusion about what contact is appropriate is broadly equivalent to be contact that is being offered, or, for example, because the making of an order may lead to a loss of flexibility, or because practical considerations make an ideal level of contact unachievable. But the essential point is that the court must reach its own conclusion and ensure that it has the information it needs to do that. It does not defer to the local authority, and the local authority is no more entitled than any other party to the benefit of any doubt.'*

The appeal was allowed on the basis the judge had made a decision without key information in relation to the children's individual circumstances, the local authority's resources and the current government guidance. A point I would make is that in light of this authority, each case should be considered on a case by case basis and a implementation of any 'blanket policy' by a local authority, may well fall foul of basic principles of Administrative Law.

On a final note, although I said I would keep well away from the topic of remote hearings, I did find the judgment of the Court of Appeal in ***Re S (Vulnerable Parent: Intermediary)*** **[2020] EWCA Civ 763** of interest, having myself encountered real difficulties in ensuring vulnerable clients with cognitive functioning issues are able to adequately engage in remote hearings.

I hope this update has been of some use and wish my readers and their families all the best- stay safe.

Michael Jones

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By Claire Athis Schofield

ARBITRATION – COULD THIS BE THE FUTURE OF FINANCIAL REMEDIES POST-LOCKDOWN?

The backlog of cases in the Family Court is growing and despite the relatively rapid uptake of remote technology for FDAs and FDRs, the delay which clients face in waiting for a Final Hearing can seem disproportionate. The President of the Family Division and Head of Family Justice, Sir Andrew MacFarlane, in his most recent 'View from the President's Chambers' chose to highlight one Court of Appeal case in particular which has opened the door to a different route to final determination of our clients' applications. On 23rd October 2020, the Court of Appeal handed down judgment in **Haley v Haley [2020] EWCA Civ 1369** and in doing so deliberately removed a barrier to the wider use of Arbitration as an alternative dispute resolution in financial remedy cases.

Litigation background

Mr and Mrs Haley's final hearing was postponed as a result of judicial unavailability (sound familiar?) and so they agreed to use a family arbitrator instead, who heard their case in private and made an 'Arbitral Award'. In committing to arbitration, the parties had both signed the appropriate form [ARB1 FS] to acknowledge that they both accepted that: '*Arbitration is a process whose outcome is generally final. There are very limited bases for raising a challenge or appeal, and it is only in exceptional circumstances that a court will exercise its own discretion in substitution for the award'*. Mrs Haley looked to have the terms of the Arbitrator's award perfected into a consent order, however, Mr Haley was not satisfied with the Arbitrator's decision and sought to persuade the High Court that the circumstances were exceptional.

Challenging an Arbitral Award

The Family Law Arbitration Financial Scheme operates under the Institute of Family Law Arbitrators (IFLA). The IFLA Scheme's authority derives from the Arbitration Act, 1996. [for more information on the scheme itself go to their website: ifla.org.uk]

The Arbitration Act (AA) provides the following means to challenge an arbitral award:

- The arbitrator 'lacked substantive jurisdiction' (s67 AA).
- There was 'serious irregularity affecting the tribunal, the proceedings or the award' (s68 AA).
- The award was wrong on a question of law (s69 AA).

The test under s69 is applied on the basis of the facts as found by the arbitrator. The party challenging the award requires permission, and must show that the decision on the question of law was 'obviously wrong'.

These limited avenues of challenge reflect the origins of arbitration as a commercial dispute resolution service designed to produce certainty for companies involved in highly technical contract disputes.

The First Appeal (at the High Court)

Deputy High Court Judge Ambrose who heard Mr Haley's initial appeal followed previous High Court decisions handed down by Munby P and Mostyn J in finding that, apart from SS67-69 AA, the only potential to challenge an arbitral award was further to an alleged mistake or supervening event. This contrasts sharply to the right of appeal Mr Haley would have had if his Final Hearing had been heard in the Family Court as originally intended by the couple.

Where there has been a contested financial remedy trial heard in court with a Judge's determination of the issues in dispute and final order handed down, leave to appeal is, of course,

required. However, permission will be given if the appeal judge concludes that there is a real (that is realistic not fanciful) prospect that the appellant can satisfy the appeal court that the order made was: (a) wrong, or (b) unjust because of a serious procedural or other irregularity.

This court 'appeal test' is a markedly less restrictive one than that traditionally associated with an arbitral award. Mostyn J had stated [in **J v B (Family Law Arbitration: Award) [2016] EWHC 324 (Fam)]** that "*an assertion that the (arbitral) award was "wrong" or "unjust" will almost never get off the ground: in such a case the error must be so blatant and extreme that it leaps off the page*.' The underlying reasoning of the High Court for previously restricting the basis of appeal against an arbitral award to one in which an error '*leaps off the page'* was that the parties have agreed as a matter of contract between themselves to accept the Arbitrator's decision and therefore they should be held to that agreement, as if to a consent order.

What did the Court of Appeal say?

The Court of Appeal (which is where Mr Haley went next) did not agree with the High Court's approach. King LJ giving the leading judgment stated that '*The agreement to arbitrate is an agreement that a third party will determine the terms. It is not, at the time the agreement is reached, an agreement to any particular terms'*.

The Court of Appeal considered that the '*increasingly strict'* test with the '*correspondingly increasingly narrow'* basis of challenge after taking a case to family arbitration was incorrect. The judgment in **Haley** provides a significant shift in the law. King LJ found that '*family cases are different from civil cases'*, as any '*enforceable order following family arbitration ultimately derives its authority from the court and not from the arbitration agreement'*

King LJ pointed to the fact that the family court can decline to make an order in the terms of an agreement negotiated by parties in circumstances where there are '*good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement'*, or where '*it would not be fair to hold them to their agreement'* (per Lord Phillips in **Radmacher v Granatino [2010] UKSC 42**). Given this, she said that:

'*It must, in my view, equally follow that where the agreement, albeit contractual, is for a third party to decide the terms that are in dispute, the court can decline to make the order where there are good and substantial grounds for concluding that an injustice will be done if an order is made in the terms of the arbitral award*.'

Therefore, the approach adopted by Sir James Munby and Mostyn J, who had sought to limit challenges to an arbitral award in family cases was criticised.

The Court of Appeal went further, stating that as the orders determining the enforceable legal rights of the parties following divorce, are made under the Matrimonial Causes Act, 1973 (MCA), and not under the AA, there should be no procedural requirement for the potential appellant to first to make an application under the AA, before asking the Family Court to decline to make an order under the MCA 1973 in the terms of the arbitral award.

The new approach

King LJ set out that '*the logical approach by which to determine whether the court should decline to make an order in the terms of the award, is by reference to the appeal procedure and the approach found in the FPR 2010'*.

The first step would be for the prospective appellant to show cause on paper why an order should not be made in the terms of the arbitral award. If the judge considering the matter forms the view that there is a real prospect of them succeeding in demonstrating that the arbitral award is wrong, the matter should be listed for a review hearing. If, however, the court takes the view that the objection made to the award would not pass the permission to appeal test, then '*it can*

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make an order in the terms of the arbitral award without more ado and penalise the reluctant party in costs'.

The correct test

The court will only go on to substitute its own order '*if the judge decides that the arbitrator's award was wrong; not seriously, or obviously wrong, or so wrong that it leaps off the page, but just wrong'*.

The way forward

Within this judgment the Court of Appeal has given some very significant signposting to matrimonial finance practitioners in these unprecedented times. The following quotations for the Judgment are worth considering in detail:

"*There is a common misconception that the use of arbitration as an alternative to the court process in financial remedy cases is the purview only of the rich who seek privacy away from the courts and the eyes of the media. If that was ever the position, it is no more*."

"*It is of the utmost importance that potential users of the arbitration process are not deterred from using it, either because the outcome is not seen as sufficiently certain, or because arbitration is regarded as providing no adequate remedy in circumstances where one of the parties believes there to have been an unjust outcome."*

"*Parties must go into arbitration with their eyes open with the understanding that, all other things being equal, the award made at the end of the process will thereafter be incorporated into a consent order."*

"*It is not necessary for these rare cases* (of an appeal against an arbitral award) *to be put before a High Court judge as a matter of course. They will be allocated to either the specialist circuit judges who hear financial remedy appeals from the district judges sitting in the financial remedies court or to the High Court, whichever is appropriate on the facts of the case*.

Conclusion

At one fell swoop, the Court of Appeal in **Haley** has removed the major disadvantage of the Arbitration process. Before **Haley** it was only possible to contemplate an 'appeal' against an arbitral award if it was 'so wrong it leapt off the page'. When that was added to the notoriously broad discretion inherent in the application of S25 MCA, to Financial Remedy cases, it was enough to deter many clients from considering Arbitration.

Now that the higher bar to appeal has been removed, it may be that many more clients will consider Arbitration. The pointed comments of the President immediately after this Judgment was handed down indicates that we are being encouraged to have this conversation with our clients. Although the Arbitrator's fee must be paid by the parties, there is only one 'Hearing' not (potentially) three, and therefore it is not necessarily a more expensive option overall. More information can be found, including the profiles of Arbitrators who work locally, at ifla.org.uk.

To discuss how the issues raised within this article could impact on your client's case please contact the family clerks to make an appointment for a Conference with one of our matrimonial finance team

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Peter Rothery	1994	
Kate Akerman	1994	
Carolyn Bland	1995	
Iain Simkin	1995	
Jacob Dyer	1995	
David Boyle	1996	
Simon McCann	1996	
Adam Lodge	1996	
Elizabeth Dudley-Jones	1997	
Sophie Cartwright	1998	
Richard Whitehall	1998	
Daniel Paul	1998	
Sasha Watkinson	1998	
Joanna Moody	1998	
Ross Olson	1999	
Pascale Hicks	1999	
Sarah J Booth	1999	
Virginia Hayton	1999	
Elizabeth Morton	1999	
Susan Deas	1999	
Joseph Hart	2000	
Rosalind Emsley-Smith	2001	
Anthony Singh	2001	
Robert McMaster	2001	
Zoe Earnshaw	2001	
Alex Poole	2002	
Alex Taylor	2003	
William Tyler	2003	
Victoria Heyworth	2003	
Rebecca Gregg	2003	
Anna Bentley	2004	
Doug Cooper	2004	
Mark Bradley	2004	
Jonathan Lally	2005	
Michelle Brown	2005	
Victoria Harrison	2006	
James Hogg	2006	
Helen Wilkinson	2007	
Rachel Greenwood	2008	
Michael Jones	2008	
Jonathan King	2009	
Nilufa Khanum	2009	
Junaid Durrani	2009	
James Paterson	2010	
Emily Price	2012	
Matthew Hooper	2012	
Daniel Glover	2013	
Gareth Poole	2014	
Patrick Gilmore	2014	
Harriet Tighe	2014	
Zoe Dawson	2015	
Colette Renton	2015	
Jack Harrison	2015	
Toby Craddock	2015	
Prudence Beaumont	2016	
Zara Poulter	2017	
Claire Athis	2016	
Sonny Flood	2017	
Adrian Francis	2018	
Megan Tollitt	2018	
Niamh Ingham	2018	
Liam Kelly	2019	
Joseph Price	2019	

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