DEANS COURT CHAMBERS

FAMILY & COURT OF PROTECTION NEWSLETTER

Summer 2021

From the Deans Court Chambers Family & Court of Protection Teams

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IN THIS EDITION…

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Summer 2021 Newsletter Introduction

By Julia Cheetham QC

As I write this introduction the Prime Minister has moved the date for the lifting of lockdown from the tantalising close 21 June 2021 to a date in July. We must all hold on again until we can welcome you back into chambers but it will be wonderful to see you when we can. In the meantime Adrian Francis has written a fascinating summary of the principles in play in various cases in the Court of Protection involving those who lack capacity to consent to receiving the COVID19 vaccination. Each decision involves different circumstances and a careful balancing of various factors not limited to the health benefits of being vaccinated. Adrian discusses the careful and sensitive decision of Mr Justice Hayden in **SS v London Borough of Richmond Upon Thames & Anor [2021] EWCOP 31**. A family member had suggested that the 86 year old dementia patient could be told that her beloved but long deceased father wished her to have the injection. Mr Justice Hayden refused to allow this ruse to be used because, although suggested with the best of intentions, it did not do justice to P whose dignity required that the view which she was likely to have were she capacitous was respected.

Michael Jones provides us with his usual brilliant round up of recent children's cases with a more than usual emphasis on the judgments of Mr Justice Peter Jackson. the cases which he has chosen demonstrate that the pandemic has done nothing to slow important developments in all areas. In particular the must read of **H-N And Others (Children) (Domestic Abuse: Finding of Fact Hearings) (Rev 2) [2021] EWCA Civ 448** which represents a sea change in the approach of the court to cases where there is alleged domestic abuse. No doubt Michael will be updating us further as to the aftermath of the judgment in the next edition of the Newsletter.

Kate Akerman provides us with a fascinating examination of the most recent developments in cases involving transgender children in particular issues relating to consent to puberty blocking hormones and the role which parents play in the consent process. These are difficult and sensitive cases where, as Kate points out, professional views can be so polarised as to make it difficult for those involved to obtain objective advice as to the risks, benefits and consequences involved in such treatment. Kate's article will be invaluable to anybody seeking to understand the issues which can arise in such cases.

Our thanks go to Jack Harrison who organised our essay competition for students and aspiring barristers. Congratulations to Merlene George, Jessica Macaulay, Rhian Friedeberg-Steward and Bryn Auger for their fantastic entries. It is both humbling and inspiring to see their achievements and we are proud to include them in this edition. I am certain that you will find each of their essays extremely useful.

Finally, Claire Athis and Liam Kelly grapple with the complex question of whether the current pandemic constitutes a *Barder* event in financial relief proceedings. They undertake a detailed analysis of **HW v WW [2021] EWFC B20** a case where the husband relied on an alleged severe reduction in the value of the shares in the family company as a result of the pandemic. Their commentary on the case is a master class and I am certain will be returned to again and again by everyone who is advising clients in the aftermath of the current crisis.

I hope that you enjoy the current edition. As ever the historical archive of previous articles is on our website. Please stay safe and I look forward to seeing you in person soon.

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Court of Protection Update - Vaccinations & Choice of location of a birth

By Adrian Francis

With the pandemic at last seemingly drawing to a conclusion and restrictions being eased due to the successful roll out of the NHS vaccination programme. Controversies as to whether the benefits of being vaccinated outweigh the risks continue in certain instances.

The Court of Protection has recently had to grapple with the issue of whether it is in a person's best interests to receive the vaccine on a number of occasions.

SD v Royal Borough of Kensington And Chelsea [2021] EWCOP 14

In the recently decided case of SD v Royal Borough of Kensington And Chelsea [2021] EWCOP 14. P's daughter sought a declaration that it would not be lawful or in P's best interests to administer her mother with a vaccine against Covid-19, or indeed, any other vaccine, on the basis that to do so would be contrary both to P's best interests and to what the daughter contended would be her wishes.

The facts of the case being that P resided in a care home and had done for the last decade. All the other residents and staff at the care home had received the Covid-19 vaccine. P's daughter was however of the view that her mother should not receive it because of the daughter's concerns about the speed at which the vaccine had been developed and approved. The court therefore had to determine whether it was in P's best interests to receive the vaccine or not. The court held that the risk to P's life and health, if she were not to receive the vaccine, was high and accordingly it was in her best interests to receive it.

CR, Re [2021] EWCOP 19

In CR, Re [2021] EWCOP 19 which was the first case of this kind in the North West region. The court had to determine whether it was in the best interests of CR to have a vaccination against Covid 19. The proceedings were brought as a medical treatment matter by the applicant local NHS CCG.

The facts of the case being that CR is 31 years old and had been diagnosed with a lifelong severe learning disability, autism and epilepsy and was also very overweight. The professionals involved in CR's care all shared the opinion that it is in his best interests to have the vaccination. P's father opposed the application for several reasons including the speed with which it had been developed and approved. He also agreed that at least in part his concerns were linked to the now discredited theories proposed by Dr Andrew Wakefield as regards the link between autism and the MMR vaccine, and which he still believed were accurate. The matter came before His Honour Judge Butler who held that:

3.8. I accept that CR is not elderly, and therefore the same level of risk does not exist for him, but the evidence is still that such a risk exists (and which is why he is categorised as being in a clinically vulnerable group) and the consequences of infection are also still high, and engage his rights pursuant to Article 2 of the ECHR ('Everyone's right to life shall be protected by law'). CR, of course, has the same rights as everybody else who has capacity. So, notwithstanding that CR has the advantage of youth on his side, in my judgment CR still faces a real and significant risk to his safety if the vaccination is not administered. For the avoidance of doubt this applies to both doses. I am also reminded by Mr Wenban-Smith that 'There is a very strong presumption in favour of taking all steps to prolong life, and save in exceptional circumstances …. The best interests of the patient will normally require such steps to be taken. In the case of doubt, that doubt has to be resolved in favour of the preservation of life' (Munby J R (Burke) v GMC [2004] EWHC 1879 (Admin) and which was approved in the Court of Appeal).

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3.9. The views of SR (and which are apparently shared by his mother and twin brother) are genuinely held. He spoke to me at Court with conviction and with great clarity. I have no doubt whatsoever that his objections are founded on a love for CR and a wish to ensure that he comes to no harm as a result of another vaccination and until there is greater clarity in terms of medical science. His objections were not intrinsically illogical. They were certainly not deliberately obstructive. They were made upon the basis as to what he regards as being in the best interests of CR. That concern for his son does him credit, in my view.

The court held that it was in CR's best interests to receive the vaccine and granted the relief sought by the applicant NHS CCG. The court did not however authorise any physical intervention to administer the vaccine.

SS v London Borough of Richmond Upon Thames & Anor [2021] EWCOP 31

It is not a foregone conclusion that the court will always determine that it is in P's best interests to receive the vaccine. In the matter of SS v London Borough of Richmond Upon Thames & Anor [2021] EWCOP 31 the Vice President Hayden J had to decide if P should be given the Covid-19 vaccine against her will.

The facts of the case being that P is an 86 year old with a diagnosis of dementia who objected to her current placement in a care home. The degree of P's diagnosis is acute and advance with P being of the delusional view that she resided with her parents and had a job. P had no recollection of the property she owned and was objecting vehemently against being vaccinated.

The court determined that it was not in P's best interests to be vaccinated against her will and rejected the suggestion of a family member to trick P into thinking her long dead father wanted her to receive the vaccination as per §32 of the Vice President's judgment as below:

> *32. I would add to the identified options above, TB's suggestion that SS be told that her father (now long dead, though very much alive in her mind) has requested that she take the vaccination, in the hope that this will cause her to comply. This involves feeding into a delusional belief system. Whilst that may occasionally have been necessary in negotiating routine day to day challenges, it risks, in this context, compromising all involved. It requires there to be a collusion to trick SS into complying with a vaccination which, on balance, it seems unlikely she would have wanted whilst capacitous and certainly does not want at this point. It is an artifice of a different magnitude and complexion to those earlier more mundane negotiations. It becomes disrespectful to her, not merely as the woman she once was but to the one she is now. Though undoubtedly a well-intentioned suggestion, it risks compromising her dignity and suborning her autonomy. It cannot, in my judgement, be in her best interests. I entirely understand TB's instinctive view that such means might justify the end, given the protection that the vaccine would afford SS. I hope he does not read my reasoning above as, in any way, intended to be a criticism of him. It most certainly is not.*

Capacity and choice of location of a birth

Another recent judgment of note in the Court of Protection is the complex case of A NHS Foundation Trust v An Expectant Mother [2021] EWCOP 33. In this case the court had to determine the best interests of an expectant mother with severe agoraphobia who did not have capacity to make decisions about the location of the birth of her unborn child.

The case came before Holman J who firstly agreed in terms of capacity with the expert witnesses and the Official Solicitor that P lacks capacity to make decisions about the location of the birth as her *"agoraphobia is so overwhelming that it exerts a significant effect on her ability to weigh matters in the balance if the activity in point entails her leaving her home".* Holman J then went onto to determine P's best interests and held that P should be admitted to hospital for a planned delivery. The rationale for this being that P may refuse to leave home during the birth.

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The court also considered the issue of using reasonable force and restraint which Holman J subsequently approved as being in P's best interests if required to transport P to hospital. The Official Solicitor opposed the use of force and restraint as per §31 of the court's judgment:

> *31. Having very anxiously weighed and considered all the factors in this case, I am, on balance, satisfied, albeit in disagreement with the Official Solicitor, that it will be in the overall best interests of this mother if - if the necessity for it arises on the day - some trained and professional force and restraint are used to transport her to hospital, and I will so declare. The declaration will incorporate the final "care plan for delivery" of the baby, which has been amended by me and counsel during the course of the hearing. An official transcript will be made as soon as possible of this judgment, and an anonymised version of the care plan and the order will be annexed to it*

It later transpired that P the expectant mother went into labour at home and gave birth in hospital where fortunately no restraint was required.

Adrian Francis

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Public and Private Law Update (Children)

By Michael Jones

Now we are (at last) gradually coming out of lockdown and can now drink and cavort in and indoor setting (legally), I have little doubt that the Manchester and Lancashire legal community will desperately want to use up some of their spare time reading a legal update……. if you have read this far it suggests either (i) you have too much time on your hands, (ii) you have realised you haven't read any updating case law in months, or (iii) you are (like myself) far too interested in mundane legal points. So without further ado, here is this season's public law children update.

Re M (Special Guardianship Order: Leave To Apply To Discharge) (Rev 1) [2021] EWCA Civ 442 is a very interesting read (no really) as it clarifies the legal test for the granting of leave to apply to discharge an SGO. The judgement considers the test for the granting of leave, which turned on the construction of s.14D(5) of the Children Act 1989. The appeal also considered the circumstances in which an application for a Child Arrangements Order could be summarily dismissed. The facts involved a mother's application to discharge an SGO that had been made in favour of her son, C's, maternal grandmother and her partner. The mother also applied for a CAO providing for C to spend time with her. The judge at first instance refused leave and dismissed the application for contact. It was notable that the mother had, from a cursory reading of the judgment, demonstrated some notable improvements in her mental health, which was one of the central issues that lead to her having been previously deemed unable to care for C.

S.14D(5) requires a '*significant change in circumstances since the making of the SGO*' in order for leave to apply to discharge to be granted. The Court of Appeal had to consider the correct interpretation of s.14D(5), with the lead judgment being given by Peter Jackson LJ (I know, another Peter Jackson LJ judgment in one of my articles- I am a self-confessed fan boy). His Lordship agreed that the 2 stage test set out in the *Warwickshire* case should be applied, ie that (i) a change in circumstances is necessary but not sufficient for leave to be granted and (ii) if there has been a change in circumstances, the court has to make an evaluation in which the welfare of the child and the prospects of success should both be weighed;

'*In Re G (Special Guardianship Order) [2020] EWCA Civ 300 at [13]), it was said that, when considering an application for leave to apply to discharge an SGO, the court should follow the two-stage approach applicable to applications for leave to revoke a placement order set out in M v Warwickshire County Council [2007] EWCA Civ 1084 at [29]. That case established that a change in circumstances is necessary but not sufficient for leave to be granted and that, if there has been a change in circumstances, the court has to make an evaluation in which the welfare of the child and the prospects of success should both be weighed.*

A question arises as to correct interpretation of s 14D (5), which provides that leave may not be granted to a parent unless there has been a significant change of circumstances since the making of the SGO. That was considered by Ward LJ and Wilson LJ in Re G (above) in a somewhat unusual situation. A judge had refused to grant leave to apply to discharge a SGO. He accepted that there had been change, but not that it had been significant change, and he applied the checklist of factors in s. 10 (9) of the 1989 Act, which ostensibly relates only to an application for leave to apply for a s. 8 order. Before the appeal was heard, the parties agreed that leave should be granted and the appeal was allowed by consent. Because of the legal issues, Wilson LJ gave a judgment, with which Ward LJ agreed. It was prefaced in this way:

"1. … The remarks which I will make in this short judgment must be considered in the light of the

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absence of adversarial argument; but possibly they will be of some use to family judges and practitioners on an interim basis pending a more satisfactory examination, at whatever level of court, of the issues raised."

and later:

"14. I suggest that, until the emergence of more robust jurisprudence in relation to the proper approach to the determination of applications for leave to apply for the discharge (or variation) of special guardianship orders, the approach should be that commended in the Warwickshire case."

I agree that the two-stage approach taken in Warwickshire is the appropriate structure for a decision about granting leave under s. 14D (5).'

In relation to the first stage, the Court considered whether the word 'significant' added anything. The conclusion reached was as follows;

'*Rather than being an error of drafting, it is coherent with the statutory scheme for the drafter to have set out to buttress an SGO from challenge by requiring any change in circumstances to be significant. There is no reason why the test should be the same across SGOs, placement orders and adoption orders. An application relating to an SGO is an attempt to disturb what is intended to be a long-term status, while the other applications concern impermanent situations were a child has not yet been placed or adopted, as the case may be. Moreover, the drafting of the two Acts shows that the word 'significant' has real meaning in this area of the law. In the welfare checklists in s. 1 of both Acts, the reference is to harm, while in the threshold condition in the 1989 Act it is to significant harm. In our context, the fact that change is not described as significant does not mean (pace Wilson LJ) that it is insignificant. As a matter of ordinary language, change can be described as significant or insignificant, or it can just be described as change. The absence of an adjective does not imply the presence of its opposite – a person who is not described as happy cannot be assumed to be unhappy.*

I therefore conclude that the requirement under s. 14D (5) for a change in circumstances to be significant means what it says and, to this extent only, I would not follow the provisional reasoning in Re G. If more is needed, 'significant' in the context of the s. 31 threshold condition means 'considerable, noteworthy or important', according to the dictionary definition cited in the Guidance when the 1989 Act first came into force (The Children Act 1989: Guidance and Regulations (Volume 1, Court Orders) (HMSO 1991)), as approved by Baroness Hale in Re B (Care Proceedings: Appeal) [2013] UKSC 33at [185]. As Ms Cabeza says, it does not mean trivial or unimportant, and neither does it mean exceptional, immense, or insurmountable.'

So 'significant' can be considered to mean 'considerable, noteworthy, or important', but does not mean 'exceptional, immense or insurmountable'.

In relation to the second stage of the test, Peter Jackson LJ was satisfied that what broadly had to be shown was a 'real prospect' of success, applying the *Warwickshire* judgment. The greater the prospect of success, the more cogent the welfare arguments must be if leave is to be refused.

In relation to contact, the Court concluded that a parent has an unfettered right to apply for contact with a child who is subject to an SGO. The judge at first instance was wrong to summarily dismiss the mother's application as there was insufficient evidence available to reach a conclusion on the issue. As for the refusal of leave, the appeal was allowed for numerous reasons, including the judge 'speculating' that the granting of leave may lead to placement breakdown in the absence of evidence, and reaching conclusions in relation to the mother's mental health without 'deeper assessment'.

Also of interest on the subject of special guardianship is **F & G, Re (Discharge of Special Guardianship Order)** [2021] EWCA Civ 622, in which the Court of Appeal confirms that the care order and a special guardianship order can co-exist, albeit there would be a limited category of cases in which it would be appropriate for the two

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orders to run alongside each other (n.b the SGO would need to be made first on the basis that the making of an SGO itself, discharges any care order already in place by virtue of s.91(5A).

In the private law domain, **H-N And Others (Children) (Domestic Abuse: Finding of Fact Hearings) (Rev 2)** [2021] EWCA Civ 448 has received a large amount of attention for understandable reasons. It considers four conjoined appeals in relation to the interpretation of PD12J and the circumstances in which finding of fact hearings are necessary in cases where there are allegations of parental domestic abuse. The judgment is required reading and is particularly lengthy, however in order to satisfy those who do not have time to read a 50 odd page COA judgement, the headlines are as follows;

In relation to the interpretation of PD12J, the proper approach to decide if a fact finding hearing is necessary is;

i) The first stage is to consider the nature of the allegations and the extent to which it is likely to be relevant in deciding whether to make a child arrangements order and if so in what terms (PD12J.5).

ii) In deciding whether to have a finding of fact hearing the court should have in mind its purpose (PD12J.16) which is, in broad terms, to provide a basis of assessment of risk and therefore the impact of the alleged abuse on the child or children.

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

iv) Under PD12J.17 (h) the court has to consider whether a separate fact-finding hearing is 'necessary and proportionate'. The court and the parties should have in mind as part of its analysis both the overriding objective and the President's Guidance as set out in 'The Road Ahead'.

In relation to Scott Schedules, the Court saw force in the criticisms made that these schedules list specific factual incidents and therefore detract away from what may be a pattern of coercive and controlling behaviour that is likely to have a cumulative impact upon its victims. It also noted the danger in limiting allegations to be tried and thereby having the effect of reducing the Court's vantage point of the quality of the alleged perpetrator's behaviours as a whole and, importantly, removing consideration of whether there was a pattern of coercive and controlling behavour;

'The process before this court has undoubtedly confirmed the need to move away from using Scott Schedules. This court is plainly not an appropriate vehicle to do more than describe the options suggested by the parties in their submissions during the course of the hearing. It will be for others, outside the crucible of an individual case or appeal, to develop these suggestions into new guidance or rule changes. In practice that work is likely, in the first instance, to be done through the Private Law Working Group together with The Harm Panel's implementation group whose final recommendations may in turn lead to changes to the FPR or in the issuing of fresh guidance through the medium of a Practice Direction.'

In relation to the Court's approach to coercive and controlling behaviour, the Court noted that cases must still be heard and with an increased focus on controlling and coercive behaviour as identified earlier in this judgment. It accepted that judges will inevitably be faced with difficult case management decisions as they balance the need for a proper application of PD12J with the damage caused to children by delay;

'As part of that process, we offer the following pointers:

a) PD12J (as its title demonstrates) is focussed upon 'domestic violence and harm' in the context of 'child arrangements and contact orders'; it does not establish a free-standing jurisdiction to determine domestic abuse allegations which are not relevant to the determination of the child welfare issues that are before the court;

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b) PD12J, paragraph 16 is plain that a fact-finding hearing on the issue of domestic abuse should be established when such a hearing is 'necessary' in order to:

i) Provide a factual basis for any welfare report or other assessment;

ii) Provide a basis for an accurate assessment of risk;

iii) Consider any final welfare-based order(s) in relation to child arrangements; or

iv) Consider the need for a domestic abuse-related activity.

c) Where a fact-finding hearing is 'necessary', only those allegations which are 'necessary' to support the above processes should be listed for determination;

d) In every case where domestic abuse is alleged, both parents should be asked to describe in short terms (either in a written statement or orally at a preliminary hearing) the overall experience of being in a relationship with each other.

Where one or both parents assert that a pattern of coercive and/or controlling behaviour existed, and where a fact-finding hearing is necessary in the context of PD12J, paragraph 16, that assertion should be the primary issue for determination at the fact-finding hearing. Any other, more specific, factual allegations should be selected for trial because of their potential probative relevance to the alleged pattern of behaviour, and not otherwise, unless any particular factual allegation is so serious that it justifies determination irrespective of any alleged pattern of coercive and/or controlling behaviour (a likely example being an allegation of rape).'

Finally, the Court cautioned once again, of the need to avoid importing criminal concepts into family law;

'*The primary purpose of criminal law is the prosecution of criminal behaviour and the punishment of offenders by the state. The purpose of family law, in the present context, is to resolve private disputes between parents and other family members, which may include the need to protect the vulnerable and victims of abuse and, where the upbringing of a child is in question, the need to afford paramount consideration to that child's welfare.*

When considering domestic abuse, it will not infrequently be the case that the alleged behaviour will be such that it is capable both of being the subject of prosecution as an offence before the criminal courts and being the focus of consideration in the family courts as justification for the implementation of protective measures. The criminal law has developed a sophisticated and structured approach to the analysis of evidence of behaviour, to enable the criminal court to determine whether the guilt of the alleged offender has been proved to the requisite high standard. This raises the question of the degree to which the Family Court, if at all, should have regard to and deploy criminal law concepts in its own evaluation of the same or similar behaviour in the different context of Family proceedings.'

Re F (A Child : Adjournment) [2021] EWCA Civ 469 involves a successful appeal against the decision to proceed with a listed a 10 final hearing in care proceedings, in circumstances where the mother would be heavily pregnant during the course of the final hearing. Peter Jackson LJ (again, I know!), referred to page 170 of Equal Treatment Bench Book, new edition 2021 with reference to pregnancy, which reads that;

"29. Consideration should always be given to accommodating pregnant women and new and breastfeeding mothers in any proceedings, whether they are parties, witnesses or representatives. This may require sensitive listings, start and finish times, and breaks during the proceedings, sometimes resulting in a case going part-heard.

30. A woman who is heavily pregnant or has just given birth should not be expected to attend a court or tribunal unless she feels able to do so. Although every woman is different, this is likely to apply at least to the month before the birth and at least two months after the birth. This period would be longer if there were complications at birth. Even a

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telephone hearing may be too difficult if the woman is looking after the baby on her own. This may mean that a hearing has to be adjourned."

Whilst this was an appeal against a case management decision, Peter Jackson LJ highlighted the judge's failure to sufficiently grapple with the mother's pregnancy in the context of the overriding objective, the significant nature of the care and placement order applications, and the provisions set out within the Equal Treatment Bench Book;

'Any postponement in this highly overdue case is regrettable, and making arrangements for a hearing in J's case after the birth of the baby will not be easy. Planning for J's future will be further delayed. How significant that will be for him will depend on what the plans are. But, as was said in Re A at [12], in addition to the need for there to be a fair and just process for all parties, there is a separate need, particularly where the plan is for adoption, for a child to be able to know and understand in later years that such a life-changing decision was only made after a thorough, regular and fair hearing. For the reasons I have given, the decision in this case fell outside the range of reasonable ways of proceeding that were open to the court. There was no good reason to require the mother to participate in this important hearing at such an advanced stage of her pregnancy and her application to adjourn the hearing should have been granted.'

Another decision of interest to my readers may be Keehan J's judgment in **YY (Children: Conduct of the Local Authority) [**2021] EWHC 749 (Fam) (the title immediately drew my interest). There are no new statements of law, but the narrative judgment in relation to the conduct of the local authority in this case is fairly jaw dropping. It acts as a serious reminder to local authorities of the parameters of the exercise of its parental responsibility under s.33 of the 1989 Act (among other things).

The Court of Appeal decision in **Re TT (Children)** [2021] EWCA Civ 742 (Jackson LJ again….) has confirmed the legal test that should be applied when considering the discharge of a care order. It clarifies that the approach taken in *GM v Carmarthenshire* is not correct and that the issue of threshold is irrelevant for the purposes of s.39. The correct legal principles to be applied are;

(1) The decision must be made in accordance with s. 1 of the Act, by which the child's welfare is the court's paramount consideration. The welfare evaluation is at large and the relevant factors in the welfare checklist must be considered and given appropriate weight.

(2) Once the welfare evaluation has been carried out, the court will cross-check the outcome to ensure that it will be exercising its powers in such a way that any interference with Convention rights is necessary and proportionate.

(3) The applicant must make out a case for the discharge of the care order by bringing forward evidence to show that this would be in the interests of the child. The findings of fact that underpinned the making of the care order will be relevant to the court's assessment but the weight to be given to them will vary from case to case.

(4) The welfare evaluation is made at the time of the decision. The s. 31(2) threshold, applicable to the making of a care order, is of no relevance to an application for its discharge. The local authority does not have to re-prove the threshold and the applicant does not have to prove that it no longer applies. Any questions of harm and risk of harm form part of the overall welfare evaluation.

Finally, the judgment of our FDLJ in **W and Re Z (EU Settled Status for Looked After Children)** [2021] EWHC 783 (Fam) is also required reading, as it clarifies the obligation on local authorities to apply for immigration statement under the UK's European Union Settlement Scheme in relation to all children who are subject to care orders and interim care orders. The guidance provided in full is as follows;

'I am satisfied that the following points must be borne in mind by local authorities with respect to the question of immigration status under the EUSS for children who are looked after by the local authority, care leavers and children in need:

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i) The deadline for applications to the EUSS is 30 June 2021. The necessary application must be made in a timely manner so as to ensure the relevant deadline is met and to minimise uncertainty for the subject child. It is not acceptable to leave children in a position of 'limbo' with respect to their immigration position.

ii) Reliance should not be placed on the discretion afforded to the Secretary of State for the Home Department to admit late applications after the expiration of the deadline on 30 June 2021 as a reason for failing to act in a timely manner. A late application will result in the child becoming undocumented for a period, with the concomitant impact on access to services and benefits and liability to immigration enforcement. Even a short period undocumented can have an adverse impact on a child or young person.

iii) Issues of immigration status with respect to looked after children must in each case be addressed early as part of any assessment and care plan, including establishing the child's current immigration status and, where necessary, seeking legal advice about appropriate action concerning immigration status having regard to the care plan in respect of the child.

iv) The obligation on local authorities to identify children who are eligible to make an application under the EUSS and provide support to those children is a mandatory one.

v) The obligation on local authorities to identify children who are eligible to make an application under the EUSS and provide support to those children extends beyond those children who are looked after by reason of being the subject of a care order to children who are looked after by reason of being accommodated by a local authority pursuant to s.20 of the Children Act 1989, to children who are the subject of placement orders, care leaves under ss. 23A to 24D of the Children Act 1989 and the Care Leavers (England) Regulations 2010 or Care Leavers (Wales) Regulations 2015 and to any other children in receipt of local authority support, including children in need and children who are lost or abandoned.

vi) With respect to children who are looked after by reason of being accommodated by a local authority pursuant to s.20 of the Children Act 1989, care leaves under ss. 23A to 24D of the Children Act 1989 and the Care Leavers (England) Regulations 2010 or Care Leavers (Wales) Regulations 2015 and any other children in receipt of local authority support, including children in need, the local authority must follow the guidance issued by the Home Office and in particular remain cognisant of the obligation upon it to ensure that those with parental responsibility for the children are aware of the need to make an application to the Scheme, signpost them to the Scheme, explain its importance, offer practical support and monitor closely the progress of any application.

vii) With respect to children who are lost or abandoned for whom there is no one with parental responsibility, the local authority must discharge fully its duties under s.22(3) of the Children Act 1989 in assisting eligible children who are lost or abandoned to secure immigration status under the EUSS.

viii) In respect of each child looked after by reason of being the subject of a care order or who is the subject of a placement order who is also an EU, EEA or Swiss national, a local authority is required to consider whether or not to apply immigration status under the EUSS on behalf of that child or to assist the child to do so and, if necessary, to seek the documentation necessary to make such an application, namely a passport from the child's country of nationality or other acceptable form of national identification. In making applications under the EUSS, the local authority should apply the guidance issued by the Home Office.

ix) The question of whether an application should be made for immigration status under the EUSS for a looked after child who is the subject of a care order is a matter that is properly within the remit of the IRO having regard to the functions of an IRO as set out in s.25B of the Children Act 1989 and Part 8 of the Care Planning, Placement and Case Review (England) Regulations 2010 which includes monitoring the performance by the local authority of its obligations with respect to a looked after child.

x) Ordinarily, in respect of a child for whom it holds parental responsibility under a care order or a

placement order, the local authority will be able to proceed to make the application under the EUSS pursuant to the power conferred upon it by s. 33(3) of the Children Act 1989 or s.25 of the Adoption and Children Act 2002. It is ordinarily neither necessary nor appropriate for a local authority to refer the matter to the High Court where a parent opposes the grant of settled status to a child for whom the local authority holds parental responsibility.

xi) Ordinarily, in respect of a child for whom it holds parental responsibility under a care order or placement order, the local authority will likewise be able to proceed to make an application to renew a child's passport or national identity card pursuant to the powers conferred on it by s.33 of the Children Act 1989 or s.25 of the Adoption and Children Act 2002, subject to being able to fulfil the legal requirements for such an application laid down by the State authority responsible for issuing the passport. It is ordinarily neither necessary nor appropriate for a local authority to refer the matter to the High Court where a parent opposes the issue of a passport or national identity card to a child for whom the local authority holds parental responsibility.

xii) The process under s.33(3) of the Act or s.25 of the Adoption and Children Act 2002 is not however, merely an administrative one. In exercising its statutory power in each case the local authority must satisfy itself that, where the child is looked after by reason of being the subject of a care order, an application for immigration status under the EUSS and, where necessary, an application for a passport or national identity card will safeguard and promote the welfare of the subject child pursuant to s.33(4) of the 1989 Act and, where the child is the subject of a placement order, that an application for immigration status under the EUSS and, where necessary, an application for a passport or national identity card, is in the best interests of the child pursuant to s.1(2) of the Adoption and Children Act 2002.

xiii) The child's wishes and feelings should always be considered. Where of sufficient age and understanding, children should be made aware their entitlement to independent advocacy support and the local authority should facilitate this access where required.

xiv) Whilst parents' views should be obtained and appropriately considered with respect to both applications for immigration status under the EUSS and for the provision or renewal of passports or other national identity documents, those views should not be viewed as determinative unless they have a real bearing on the child's welfare.

xv) In cases where parental opposition or absence mean that the procedural requirements of the State authority responsible for issuing the passport or national identity card include a requirement that the application be supported by a court order then, before issuing an application for such an order, the local authority must first seek to confirm with the Home Office Settlement Resolution Centre whether the any documents that the child already has available are sufficient for the purposes of the EUSS application. Only if they are not, and no other acceptable documents exist, should an application to court under the inherent jurisdiction be contemplated by the local authority.

xvi) There may be a very small number of cases in which proceeding under s.33 of the Children Act 1989 or s.25 of the Adoption and Children Act 2002 with respect to an application for immigration status under the EUSS will not be appropriate. In this context, whilst the vast majority of cases will be suitable to be dealt with under the power conferred by s.33(3) of the 1989 Act or s.25 of the 2002 Act, local authorities must remain alive to the possibility of cases that do, exceptionally, require the intervention of the court.

xvii) Where a parent opposes the course chosen by the local authority pursuant to the power conferred upon it by s.33(3) of the Children Act 1989, and whilst recognising the inherent difficulties for often unrepresented parents for whom English is a second language, it remains open to the parents to make an application to invoke the inherent jurisdiction and may, if necessary, apply for an injunction under s. 8 Human Rights Act 1998 to prevent the applications being made or determined before the matter comes before a court for adjudication.'

In order to allow space for the other articles in this newsletter, I will bring this update to a close. Keep well and stay safe all.

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Something Topical…

By Kate Akerman

1. In our February 2021 video presentation[1], Sasha Watkinson and I talked about the decision of the Divisional Court in the case of *Bell v Tavistock*[2]. *Bell* was concerned with whether and in what circumstances children and young persons under the age of 18 who suffer from Gender Dysphoria can provide informed consent to the prescription of Puberty Blockers (hormone treatment to suppress puberty). The Divisional Court, held, having regard to a number of factors – the poor evidence base for Puberty Blockers, the lack of full and long-term testing, that their use is highly controversial, including within the medical community, and the lifelong and life-changing consequences of the treatment which are in some ways irreversible – that, a child under the age of 16 is very unlikely to be in a position to understand and weigh up those factors so as to provide informed consent. And so, where reliance was being placed on the views of the child, generally-speaking, the matter should be placed before the Court for a best interests decision.

2. The decision in *Bell* is subject to appeal and is due to be heard in June 2021.

3. In the meantime, in *AB v CD & Ors*[3], Mrs Justice Lieven heard an application by parents (*AB* and *CD*) of a child, *XY*, for a declaration that *they* as parents have the ability to consent to the administration Puberty Blockers for their child. The Second Respondent was the Tavistock and Portman NHS Foundation Trust (home to GIDS[4]). The Third Respondent was University College London Hospital NHS Trust ("UCLH")[5].

4. The Court noted that the legal issues were very different from those in *Bell*, in that the question of whether parents could consent to treatment was not considered in that judgment as the practice of the Tavistock and UCLH has been not to proceed with the administration of Puberty Blockers on the basis of parental consent alone.

5. As we noted in our earlier paper, as a consequence of the decision in *Bell*, the Tavistock has suspended puberty blocker treatment for *new* patients. However, in respect of patients *currently* receiving treatment, the Second and Third Respondents have decided that given the extreme distress those patients would experience were the treatment not to continue, then it should continue, provided the parents consent and the child wants the treatment.

6. The facts in this case were uncontentious. *XY* was born male. *XY* had only ever been interested in girls' toys and clothes. She tried to conform to a more male stereotype but became very unhappy. At the age of 10, and after reading a book where a character was transgender, *XY* came out to her parents as transgender. Once she started to go to school as a girl she flourished. She was referred to GIDS. *XY* has fully transitioned socially and has changed her name by deed poll. *XY* started on Puberty Blockers in July 2019 at which time she was assessed as *Gillick* competent to consent.

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[1] Bell v Tavistock Video Presentation
[2] Bell & Anor v The Tavistock and Portman NHS Trust [2020] EWHC 3274 (Admin)
[3] AB v CD & Ors [2021] EWHC 741 (Fam) (26 March 2021)
[4] Gender Identity Service, a multi-disciplinary service commissioned by NHS England in order to provide specialist assessment, consultation and care for children and young people to reduce the distress of a mismatch between their birth-assigned sex and their gender identity, referred to as Gender Dysphoria.
[5] UCLH works with GIDS to provide paediatric and adolescent endocrinology services to treat patients with Gender Dysphoria.

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There is consensus between the clinicians, *XY* and her parents that *XY*, who is now 15, should continue to be prescribed Puberty Blockers.

7. The issues for the Court were formulated as follows:
    a. Do the parents retain the legal ability to consent to the treatment (or does it depend on whether their child is *Gillick* competent or not)?
    b. Does the administration of Puberty Blockers fall into a "special category" of medical treatment by which either:
        i. An application *must* be made to the Court before they can be prescribed?
        ii. As a matter of *good practice* an application should be made to the Court?

8. In answering the first question, the Court considered firstly the fundamental and critical role of parents in their children's lives by a combination of section 2(1) of the Children Act 1989 (parental responsibility), and section 3(1) of the 1989 Act which defines PR "… *rights, duties, powers, responsibilities and authority*…". That role extends to granting consent for medical treatment – "… *a clear incident of parental responsibility arising from the duty to protect the child*…"[6]. Parents can and do make the most serious of all decisions about medical treatment on behalf of their child without recourse to the Courts. Courts will not interfere unless the statutory threshold criteria pursuant to section 31 of the 1989 Act is met, or, in the private law arena, parents cannot agree, or parents feel unable to make a particularly agonising decision themselves.

9. Do parents retain the right to consent to treatment even if the child is *Gillick* competent? The Court concluded in the affirmative: the parents' ability to consent does not disappear once the child achieves *Gillick* competence, because they retain Parental Responsibility and, thereby, a duty to act in the best interests of their child. The child may be unable to consent through being unconscious, or may decline to make a decision to consent, for example. Parents can and, indeed, should then act. That's not to say that the parents can use that right to "trump" the *Gillick* competent child's views. Although a review of *XY*'s *Gillick* competence following the judgment in *Bell* had not yet taken place, *XY* clearly wanted the treatment to continue.

11. In answering the second question, the Court, having reviewed the caselaw, concluded that if a special category of case exists at all for children, it is extremely limited, and should not include as a general rule the provision of Puberty Blockers.

12. In Court of Protection Guidance[7], the circumstances where there should be an application to the Court for a best interests decision in respect of medical treatment include cases where what is contemplated is a proposed treatment of an experimental or innovative nature, and/or one which involves a significant ethical question in an untested or controversial area of medicine. Mrs Justice Lieven recognised it might be argued that these issues apply to the administration of Puberty Blockers for Gender Dysphoria and so principles applicable to adults lacking capacity should be extended to children. Her Ladyship rejected this (although none of the parties actively argued for such an approach which rather hampered the Court's assessment). However, Lieven J did observe that these particularly anxious issues in relation to Puberty Blockers may well justify a very cautious approach by clinicians in individual cases and erring on the side of seeking the Court's authorisation to treatment.

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[6] Per Ward LJ In Re Z (A Minor) (Freedom of Publication) [1997] Fam 1

[7] APPLICATIONS RELATING TO MEDICAL TREATMENT: GUIDANCE AUTHORISED BY THE HONOURABLE MR JUSTICE HAYDEN, THE VICE PRESIDENT OF THE COURT OF PROTECTION [2020] EWCOP 2

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12. The Court acknowledged the existence of a Regulatory Framework within which, it was argued, the clinical decision to prescribe Puberty Blockers is such that this is the more appropriate mechanism for ensuring best practice, rather than placing Puberty Blockers into a special category requiring Court authorisation and removing the power of parents to consent. The Court was reminded of the number of layers to the Regulatory Framework –
    a. NHS England's Service Specification (NHS England being the body which commissions the Tavistock and others to provide services and then sets underpinning terms);
    b. an independent review set up by NHSE, chaired by Dr Hilary Cass and which is intended to report this year[8];
    c. individual regulation of clinicians by their own professional bodies;
    d. regulatory oversight by the Care Quality Commission;
    e. ethical oversight of clinical decision-making;
    f. ability of a clinician to apply to the Court if they are concerned about the treatment being proposed.

13. As to e. and f., the Court gave little weight, given the risk of unanimity of view in this particular clinical field and that neither the Tavistock nor UCLH had ever felt it necessary or appropriate to apply to the Court for the approval of Puberty Blockers to children, even when those children are well below the age of 16.

14. The Court dipped its toe into an argument that to place Puberty Blockers into a special category of treatment requiring Court authorisation would amount to direct discrimination under the Equality Act 2010, would therefore be incapable in law of justification and thus amounting to discrimination under the Human Rights Act 1998. Mrs Justice Lieven drew back, however, noting that any determination would be obiter, and that a very similar argument might be raised in the *Bell* appeal.

16. In conclusion, the Court took particular care to emphasise dicta from the senior judiciary as to the central role which parents must and should play in their children's lives, and that parents will, in the vast majority of cases be the people who know their children best and who are best placed to make decisions about them. There may be certain, fact-specific cases where perhaps a Court should become involved – where the case is finely balanced or there is disagreement between clinicians. But there should be no general rule that Puberty Blockers should be placed in a special category.

17. Finally, the Court raised two areas of concern for consideration by regulatory and oversight bodies. Firstly, the division of clinical and ethical views as to the use of Puberty Blockers for children has become highly polarised. And yet, within the structure of the Tavistock and UCLH, that clinical difference of opinion may not be fully exposed. Parents may struggle to obtain a truly independent second opinion. Secondly, pressure may be placed by children with Gender Dysphoria upon parents, making it very hard for parents to refuse to consent. If clinicians suspect pressure is at play, such a case should be brought to Court.

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[8] the Cass Review

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Financial Remedy Update

By Claire Athis Schofield & Liam Kelly

Given the 'unprecedented' changes wrought on many lay clients' financial situations by the ongoing Covid-19 public health restrictions, we thought it would be useful for readers to have a summary of case law to assist those seeking to vary Final Financial Remedy Orders with reference to the negative impact of the pandemic on their clients' finances.

Applications to vary:

If the final order included periodical payments for the benefit of the children or other party, or a lump sum payable by instalments, then there is a statutory right to apply to vary the order under Section 31 Matrimonial Causes Act, 1973 (S31 MCA). Upon such application, the court will have regard to all the circumstances of the case including "*any change in any of the matters to which the court was required to have regard when making the order to which the application relates*". Thus, clients will be able to explain to the court the impact of Covid 19 upon their financial circumstances and it will be taken into account.

However, that does not mean that the global pandemic will trigger a nominal spousal maintenance order being made substantive. The wife in **AJC v PJP [2021] 1 WLUK 566** was refused such an application with the Judge determining that (in paragraphs 42 and 43 of the Judgment):

"*Misfortune or unexpected developments in life is the nature of life… Sometimes those misfortunes or unexpected developments arise from, compounded or accentuated from, the foundation or circumstance of a past relationship. I could see why in those circumstances there might be a justification for a nominal order being made into a substantive order.... However, where misfortune or unexpected developments have absolutely nothing to do with having been in a married relationship a decade earlier then in my assessment it is in 2021 no longer part of the policy and practice of our family law that one spouse should be responsible for the other.*

Losing a job through the consequences of the virus when one had a job at the time of settlement a decade earlier cannot be ascribed to relationship generated disadvantage or even a loose causal connection… This court is of course sorry to hear of the circumstances of the former wife as it is of everyone who is in financial difficulties as a consequence of this most appalling development in the life of our planet. It is of all events thoroughly unexpected. However, a nominal spousal maintenance order made almost a decade earlier is not the basis for coming back to court to ask for a short-term financial support provision from the paying party who has not paid anything over that period and is quite probably himself facing his own financial difficulties"

Capital orders:

However, S31 MCA does not apply to a capital order (transfer of property or lump sum order); there being no statutory route to vary a capital order; no such opportunity to undermine the finality of litigation between the divorcing parties has been considered appropriate by Parliament.

The circumstances in which final orders within financial remedies proceedings can be altered or set aside are extremely limited (outwith the presence of 'vitiating factors' such as fraud and duress). Would the unexpected financial impact of Covid 19 on one party be considered as a 'Barder' event?

Barder v Barder [1988] AC 20.

In 1985 Mr Barder successfully appealed out of time against the consent order which had transferred his former family home to his wife absolutely. The Barders had two children, and five

weeks after their final order had been perfected, Mrs Barder unlawfully killed both of the children and then committed suicide herself. The only beneficiary of Mrs Barder's estate was her mother, who had no pressing need for the house. Mr Barder's appeal was allowed on the ground that the original order had been made on the fundamental assumption (an implicit assumption - it was not recorded at the time) that Mrs Barder and the children were going to need the former marital home for some years, and that fundamental assumption had been vitiated by subsequent events.

There were further appeals to the highest level. The House of Lords confirmed that Mr Barder's order would be set aside, but made it clear in its judgment that this was not an invitation to open the floodgates to further cases. Arising from this case the very specific concept of a 'Barder event' was born:

- A new event which invalidates the basis, or fundamental assumption, upon which the final order was made
- The supervening event happened shortly after the making of the order (within a few months)
- The application to set aside the order is made promptly
- Set aside will cause no prejudice to third parties who have acquired interests in property in good faith for valuable consideration

As the extremely tragic nature of the facts in Barder may suggest, it is a relatively rare application which succeeds in persuading the court to follow this particular precedent, however, it has been done in the cases listed below:

Critchell v Critchell [2015] EWCA Civ 436

The final order in this case transferred the former family home to Mrs Critchell, but subject to a Mesher order in favour of her husband. Within one month of this order being made, Mr Critchell came into a substantial inheritance and wife argued that this was a 'Barder event'. The court agreed with Mrs Critchell, finding that the husband's future housing need, which had been a fundamental assumption of the final settlement and addressed by the Mesher order, was now met through his inheritance and his charge over the family home was, therefore, extinguished.

Nasim v Nasim [2015] EWHC 2620 (Fam*)*

A final order was made which awarded a 70% share of the value of the family home to Mrs Nasim, partly on the basis of her role as primary carer of the children, aged 13 and 10 years. Six weeks after this final order there was an 'incident' between Mrs Nasim and the older child, which lead to, firstly, the criminal prosecution for assault (and conditional discharge) of the mother and, secondly, the change of the children's residence to live with their father. This was found to be a Barder event, leading to the setting aside of that order with the suggestion that a 50:50 division of the family home would be more appropriate in the new circumstances.

Needs vs Sharing:

Common to both the above successful applications was a factual matrix where, like the original case of *Barder*, needs-based awards were made and then, shortly afterwards, the needs in question had, unexpectedly, disappeared.

What then of sharing-based awards where events subsequent to the final order had radically affected the shares awarded?

Cornick v Cornick (No.1) [1994] 2 F.L.R. 530

In Mrs Cornick's proceedings, the district judge had made a lump sum order, giving her 51% of the capital assets. Shortly afterwards Mr Cornick's company shares increased in value enormously, so that wife's lump sum represented only a 20% share. Mrs Cornick sought leave to appeal out of time on the grounds that the increase in the value of the shares was a supervening event which justified the reopening of the case.

However, Mrs Cornick was unsuccessful: in order to qualify as a 'Barder event' the supervening occurrence (that is the rise in the value of the shares) had to be both unforeseen

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and unforeseeable. The court was of the view that parties should not seek to profit by later changes in fortune once they were divorced and their capital divided.

Myerson v Myerson No 2 [2010] 1 W.L.R. 114

The other side of the coin was considered in the Myerson case, in the context of the devastating impact of the 2008 global financial crisis in circumstances most closely aligned with the ongoing financial impact of Covid 19.

At the time of Mr and Mrs Myerson's Financial Dispute Resolution Hearing in March 2008, their assets were valued at £26 million. It was agreed that wife would receive a 43% share (largely in cash) and husband would retain a 57% share (largely in shares in one Company worth, at the time, £2.99 each). A year later, post-crash, Mr Myerson's Company shares were worth only 27.5p each, radically altering the capital division to 14% to husband and 86% to wife. Mr Myerson argued that the forces within the global economy and the collapse in the company's share price constituted a new event which undermined the basis upon which the original consent order was made.

Husband's attempt at a 'Barder event' appeal was dismissed. Although extreme in extent, the court found that the fall in the share price was '*a natural process of price fluctuation'*, and not an unforeseeable event. Essentially Mr Myerson had made a business appraisal and taken a speculative position and the court should not subsequently relieve him of what had turned out to be a bad bargain.

Of note in this case was the fact that the payment of the lump sum to Mrs Myerson was spread over five instalments of which £2.5 million was left to pay, so Mr Myerson was able to invoke the statutory power of variation, which could enable his needs to be met.

Covid 19 Case Law:

The reported cases to date suggest that the Courts are determined to take a similarly restricted view on the impact of Covid as they did about the Global Crash of 2008. There are two cases from which we can draw conclusions:

FRB v DRC (No 3) [2020] EWHC 3696 (Fam)

FRB v DRC (No 3) was not strictly speaking a Barder application as the Husband was applying to vary the quantum of lump sums by instalments and, relying on the Court of Appeal's dicta in Westbury v Sampson [2002] 1 FLR 166, Cohen J noted that the Court had '*a little more latitude… than.. the Barder conditions'* but his reformulated explanation of the Court's discretion was: '*it would be exceptional for the court to vary the quantum of lump sums in circumstances markedly different to those that would justify a Barder variation'.*

Cohen J declined the Wife's invitation to summarily dismiss the Husband's application as an '*obvious attempt to vary a very recent order'*, specifically referencing Covid 19 in his comment that '*this application is set against the background of world events, which give what could be respectability to the argument'*. However, the learned Judge went on to lament the lack of particularised evidence to support the Husband's application for set aside, stating that '*in my judgment it is not proper for the court to accede to H's application to vary the quantum on macro-economic grounds'*. On the generalised position which the Husband put forward (which seemed to be essentially 'I have business interests in hotels and airlines, which have been negatively affected by Covid 19 therefore I want to pay my Wife less'), Cohen J determined the following:

"I have also considered the topsy-turvy financial times in which we now live. The major stock market indices are now at a high level and have rebounded to above their pre-Covid-19 levels. A valuation done today would inevitably be even more speculative than that done in a pre-Covid time. It would almost certainly be overtaken by events in the period before a further hearing in about 9-12 months' time. Most commentators believe that at some stage within the next couple of years the world economy will be back to where it was. It is essential to view H's application in the long term as well as in the short term.

Having read and heard what is said on behalf of

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of H and considered the factors mentioned, I have come to the view that he has not shown a proper basis for reopening the award."

HW v WW [2021] EWFC B20

In *HW v WW [2021] EWFC B20* the Husband had fully particularised his case to the Court, which was heard over two days. Although the Final Order which was subject to the Husband's set aside application also involved payment of lump sums by instalment, which he was seeking to vary downwards, he confirmed that he had '*applied to set aside the Order in its entirety, on the basis that* 'circumstances that were unforeseen and unforeseeable have significantly changed the assumptions upon which the Order was made' *and he* 'cannot now meet the terms of the Order'*. The Husband relies upon the alleged substantial change in the value of shares in the family company and in his ability to pay the lump sums ordered, flowing from the economic impact of the Covid 19 pandemic.*' At last, a true Covid 19 Barder application!

In relation to the foreseeability requirement HHJ Kloss relied on Mostyn J's dicta in *DB v DLJ [2016] EWHC 324 (Fam)* (Paragraph 36):

'*The question is not whether a future event is literally incapable of being imagined. The capacity of homo sapiens to imagine fictive things is vast. The question is posed by the court standing retrospectively in the shoes of the actors and asking itself whether the then future, but by now past, event could reasonably have been predicted*'.

The Original Final Order:

The Husband was the Managing Director of the parties' jointly owned company which was a wholesale distributer of commercial photocopiers, printers and associated computer software. Husband was 53, Wife was 49 and it was a 24 year marriage, with three children of 21, 18 and 12 years of age. The parties had the benefit of an SJE Company valuation at FDR (which took place on 12th March 2020) and their settlement was based on the Wife retaining slightly less than 40% of the marital assets with a clean break once the lump sums were paid (over a period of 2 years) but her assets (FMH, lump sums) were '*copper bottomed'*. The Judge noted that Husband had been wiped out of liquid assets and would have to fund his own housing needs by taking debt, but that he had willingly agreed to this outcome whereby he '*retained the benefit of a business which had a high net value, which was backed up by hard assets including the business property and which was projected to give him a net income of £350,000 pa into the future'*.

The Husband's 'Barder' Application:

The Husband argued that although the Coronavirus pandemic was known about as at the date of the FDR, it was not foreseeable in March 2020 that Covid 19 would develop and endure as it has, or have the impact that it has. The Husband sought to distinguish himself from Mr Myerson stating that

"The impact on the Company, the business community and society as a whole takes the case outside of that of mere price fluctuation. The value of the Company has plummeted and the Husband is unable to pay the lump sums due. It has invalidated the basis upon which the Order was made."

The Husband asserted in his statement in support of his set aside application that the company had suffered from a fall in turnover, lower profits, diminished value and was also facing liquidity issues and a bleak long-term future. He provided draft accounts and a re-valuation of the Company undertaken by the Company accountant as well as data from Infosource, a specialist information company for the copier/printer market, as to the state of the market generally.

However, cross examination of the Husband revealed that a recent application for bank borrowing by the company had been made on the basis of five year forecasts, which had not been disclosed (although they were subsequently provided). HHJ Kloss made the finding that Husband had been '*giving one assessment and prediction to the Court and at the same time a different (and far more positive) assessment to the bank'*. Further factual findings were made that '*despite the fact that the company was*

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said by the Husband to be '*desperate', it has not had to utilise any of the debt facility offered by the bank whilst continuing to pay down capital on the commercial property mortgage*' and '*the Company received a windfall of approximately £150,000 from one of its suppliers, based on sales commission. The Husband had put those funds aside in a Company deposit account…, where they have remained to date, untouched throughout the crisis'*.

The Court's overall assessment of the Husband's evidence was that it '*was left with the general impression that his anger and frustration had lead him to present a picture now which was partial.*'

Wife argued that the financial impact of the Covid 19 pandemic falls within the definition of '*natural processes of price fluctuation'*, submitting that every '*price fluctuation'* has a cause, as was found in the case in Myerson, and that this fluctuation is no different.

The Court's Conclusions:

The Court did not accept the Wife's case, stating that:

"*The Covid 19 pandemic is an extraordinary event, different in nature and scale, to any similar world event in the lifetime of the parties. This is not an issue of market volatility which is periodically experienced, neither is it a national issue with predictable localised causes. It is akin to a war, with tentacles spreading across the world. I therefore find that in principle, the Covid 19 pandemic can open the door to a successful Barder claim."*

However, the Court did not accept this particular Husband's case. It all came down to the issue of foreseeability, the crucial question being: '*as at 12/3/20* (the date of the FDR) *could the Husband reasonably have foreseen a risk that the Covid 19 pandemic might have a significant impact upon the trading position of the Company*? The Court analysed in detail the 'Coronavirus timeline' from the first Covid 19 patients testing positive in the UK on 29th January 2020 to the date of the FDR itself on which day the UK Government announced measures which would '*cause severe disruption across our country for many months'* and France implemented a national lockdown. The Judge put himself in the Husband's shoes, remarking that he was an experienced and successful international businessman, and found that '*Husband agreed to the Order notwithstanding the context and events (*of the Coronavirus timeline*). He did not foresee it, but in all the circumstances I find that the event, as properly defined, was foreseeable. The full extent of the impact plainly wasn't, but that is not required.*'

Having found that the financial impact on the company of Covid 19 was foreseeable, the learned Judge in a 'belt and braces' approach went on to consider, in the event that the Court was wrong about that first issue, whether the scale of the impact was sufficient to meet the Barder threshold in any event.

A detailed analysis of the financial information before the Court was undertaken, against the backdrop of the finding that the Husband at FDR '*chose for himself the path of greatest personal risk, which was projected to lead to the greatest personal reward'*. HHJ Kloss opined that '*If the business had involved, for example, the supply of PPE/thermometers/home office equipment and had increased in profitability and value, the Wife could not have sought an increase in her award. The gamble was taken by both parties.*' and the Court further noted '*It is axiomatic that if a party chooses pressure and risk, it is a very steep hill to climb to avoid the downside of that risk.*

The Court reminded the parties and practitioners alike (in paragraph 94):

'*The Barder threshold is deliberately set very high. There are sound public policy reasons why the finality of litigation is to be preserved, save in the most exceptional of circumstances. The fact that there has not yet been a tsunami of Covid 19 pandemic Barder applications before the Courts appears to suggest that exceptionality is still holding good, even in these difficult times, although I accept that cases may be in the pipeline and/or other remedies pursued.*'

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Conclusion:

The short time window set by the Barder conditions and the rapid development of the vaccination programme in the UK may mean that there are relatively few cases still 'in the pipeline'. That remains to be seen, but what we can say for now is that it would seem the answer to the question '*Is Covid 19 a Barder Event*? is, at least for the present, '*Not Yet'*.

Claire Athis Schofield
Liam Kelly

Deans Court Family Essay Competition 2021

Introduction

As part of our continued programme of outreach at Deans Court Chambers, the family team ran an essay competition in the early Spring for students and aspiring barristers.

The brief was simple: provide an accessible and insightful précis of a recent reported case concerning either public or private children law, adult relationships or vulnerable adults. We received over 50 entries from people at all stages of education and bar training; Prudence Beaumont and I selected the below as the stand-out winners in their categories, having blind marked all entries in accordance with strict criteria. The prize was a mini-pupillage in Chambers, which we look forward to offering once the COVID-19 restrictions make Court attendance the norm once again.

Congratulations to Merlene, Jessica, Rhian and Bryn. We hope you find their case notes useful.

Jack Harrison

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By Jessica Macaulay. *Jessica completed the bar course in 2017 and has worked at Stephensons Solicitors since 2018, whilst seeking pupillage. She began at Stephensons as a regulatory paralegal, but has since transferred to the family department.*

This case concerned an application made by a father for contact with his two children. This was a re-hearing, following the case coming before the Court of Appeal (reported as R v P [2020] EWCA Civ 1088), allowing evidence of Father's abusive behaviour in a more recent relationship to be admitted.

Mr Justice Hayden made findings of fact against the father. The judgment is lengthy because he quotes paragraphs from various statements and police interviews breaking down different aspects of the controlling behaviour. This included:

- alienation from family and friends;
- quitting university;
- controlling money and food;
- limiting her communications;
- financial exploitation;
- mother's second pregnancy;
- physical restraint; and
- the gratuitous emotional torture of the mother's parents.

Although it makes for an uncomfortable read, it is particularly impactful because of the systematic way he sets out the coercive and controlling behaviour of the father.

Hayden J's findings were damning in respect of the father. Some examples are:

Paragraph 64 – "I have no difficulty in concluding that between December 2013 and September 2017 M was subjected to a brutalising, dehumanising regime, by F which subjugated her and was profoundly corrosive of her autonomy. Further, were I required to make such findings to the criminal standard of proof, I should have no difficulty."

Paragraph 65 – "In his evidence I found F to be histrionic, self-pitying and manipulative. The contrast between MGF's distress in the witness box and that of F could not be starker. MGF cried for his daughter and granddaughters. F wept for himself."

Paragraph 99 – "My assessment of F's credibility is, I hope by this stage in the judgment, pellucidly clear. I find him to be an entirely dishonest witness."

Paragraph 111 – "Similarly, the charges laid against T really require some investigation of the credibility of F. It is an understatement in this case to say that F lacks credibility. He is at times a fantasist."

At paragraphs 103 – 105 Hayden J sets out the different definitions of coercive and controlling behaviour as defined in the FPR and Serious Crime Act. He provides an important comparison of the definitions and states the wording in the FPR is "potentially misleading" by referring to behaviour as "an act". His view is that "behaviour…requires, logically and by definition, more than a single act." Of importance, he clarified that the definition of coercive and controlling behaviour is in line with other areas such as criminal law and hopefully it can be more easily identified moving forwards.

Hayden J highlights that context is everything and the "key to assessing abuse in the context of coercive control is recognising that the significance of individual acts may only be understood properly within the context of wider behaviour." Therefore, single actions that may seem harmless could still amount to coercive behaviour when considering the whole picture. He rejected the father's counsel's submissions referring to his approach as 'overly formulaic' which could 'obfuscate rather than illuminate the behaviour.' In true judicial style he refers to his own previous judgment in A County Council v LW & Anor [2020] EWCOP 50 to support this analysis.

Whilst Hayden J declines to provide any guidance on Scott Schedules, he clearly expresses that they have "such severe limitations in this particular sphere as to render them both ineffective and frequently unsuitable." This will have a significant impact on how similar cases are handled in future, and has been considered more recently in the case of **Re H-N [2021] EWCA Civ 448**.

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By Merlene George. *Merlene aspires to practise as a family law barrister and currently works as a Family Law Case Manager. She also serves as the Vice President of the Middle Temple Young Barristers' Association and as an Elected Member on the Middle Temple Hall Committee.*

The case of **Re O (Judgment: Adequacy of Reasons) [2021] EWCA Civ 149** discussed the circumstances where an advocate must apply for leave to appeal as opposed to seeking further clarification after a judge has given her reasons. The starting point is whether the trial judge has adhered to her judicial obligations when giving reasons for their decision, which are clearly set out in **Re F (Children) [2016] EWCA Civ 546** by Sir James Munby at paragraph 22: "to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable".

In Re O, the Court of Appeal ('COA') found that the trial judge's analysis to be "insufficient and flawed" and allowed the appeal against the finding that the appellant father had sexually abused his daughter. The trial judge had heard evidence at a finding of fact hearing over eight days. He was asked to consider whether the perpetrator of sexual abuse was the mother or the father in relation to the various injuries sustained on several occasions. The judge handed down judgment about 11 weeks after the conclusion of the hearing. He had expressed his apologies for the delay attributing it to the challenges arising as a result of the Covid-19 pandemic, which practitioners are aware of and can reasonably appreciate. COA found that the trial judge's analysis contained gaps and that his reasons for his finding on one particular injury was notably brief.

To consider whether to appeal or request clarification, advocates should consider PD30A 4.6-4.9, Family Procedure Rules 2010. This sets out the procedure when a 'material omission from a judgment of the lower court' arises. First, the advocate should give the lower court an opportunity to consider where there was an omission. However, the omission should not be immediately used as grounds for an application to appeal. Second, submit an application for permission to appeal to the lower court. The lower court must consider:

- Whether there has been a material omission and adjourn, if necessary; and
- Provide additions, if it concludes that there has been a material omission.

If required, submit an application for permission to appeal to the appeal court. The appeal court must consider:

- whether there has been a material omission; and
- may adjourn the application and remit the case to the lower court inviting them to provide additions to the judgment, if it concludes that there has been a material omission.

The Court reminded practitioners of the following important points:

- Firstly, a request for clarification is not an opportunity to re-argue the case.
- Second, where a judge's reasons are so insufficient that it is impossible to understand how she has arrived at her decision, it is more appropriate to apply for permission to appeal. In this case, the judge had considered whether the permission to appeal was a request for clarification. He decided it was not and refused permission.

The key question for the advocate is whether she needs the judgment clarified or whether there are grossly inadequate reasons given for the judgment that it necessitates an appeal. There is a thin line between appearing to be re-arguing a case or seeking clarification and it is dependent on the circumstances of the case and the quality of the reasons. Where a request for clarification is more appropriate and a practitioner chooses to appeal, he risks such an appeal being dismissed and wasted costs being ordered.

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By Rhian Friedeberg-Steward. *Rhian studied History at the University of Oxford, graduating in 2019. Following her degree, she worked as a family law paralegal and assisted on a wide variety of matrimonial finance, children and TOLATA cases. She is currently studying the GDL at City, University of London.*

The recent Court of Appeal case of *Rattan v Kuwad* [2021] EWCA Civ considered applications for Maintenance Pending Suit ('MPS'). An MPS order is an interim maintenance award, made in favour of one of the parties to a divorce, to cover the period between the start of proceedings and the final financial settlement - s.22 Matrimonial Causes Act 1973.

In the present case, an MPS Order had originally been made by a Deputy District Judge ('DDJ') which required the husband of a separating couple to make monthly payments of £2,850 to the wife. The Order was subsequently set aside in the High Court, following an appeal by the husband. The wife then successfully appealed the matter in the Court of Appeal and the court reinstated the relevant provisions of the original Order.

The appeal raised three key issues concerning the approach taken by judges in MPS applications:

1) whether a judge was required to conduct a "critical analysis" of the parties' needs;
2) what constituted "immediate needs", and;
3) whether school fees could be included in an MPS order.

In relation to the first and most significant point, the Court of Appeal reaffirmed the principle that judges were entitled to undertake a "broad assessment" when considering the parties' needs and, on that basis, deciding what they considered "reasonable". The Court of Appeal fundamentally disagreed with the High Court, which had set aside the original order on the grounds that the DDJ had failed to undertake a "critical analysis of the wife's needs", involving an assessment of "absolutely everything that is spent [27]". Moylan LJ, giving the unanimous judgement of the Court of Appeal, confirmed that the level of "scrutiny" required in an application for MPS would depend on the facts of each case [33]. Indeed, in some cases (such as the one at hand) a highly detailed analysis would not be necessary to determine a "reasonable" award [48].

The Court also clarified the meaning of "immediate needs", explaining that the term "immediate" referred to meeting parties' needs in the period **until** a full financial settlement has been concluded. The Court of Appeal overturned the High Court's rejection of items including shoes, clothes, TV licenses, car tax and house alarms. It was held that an item which did not feature as a regular monthly outgoing could still constitute an "immediate expenditure need " [49]. As Moylan LJ emphasised, the format of Forms E – which require a record of outgoings by week, month, or year – necessitates a certain degree of averaging.

It was further held that school fees could be included in an MPS Order. The case also established that, depending on the facts of the case, an applicant's Form E can be used as evidence of their income needs for the purposes of their MPS application[1].

In addition, the court determined that, in cases where an application for MPS Order is successfully appealed, the court hearing the case should consider making an alternative order, if appropriate, instead of remitting the matter for reconsideration before another judge.

Whilst the Court of Appeal's decision did not depart radically from the established principles concerning MPS applications, it provides a useful clarification on the degree of assessment required by judges of parties' needs.

The court's endorsement of a broad approach in MPS applications is welcome. As Moylan LJ notes, MPS orders are enormously helpful to spouses and children who are suffering financially in the immediate aftermath of a separation. Where there is a long period of time between the separation and the concluded final settlement, MPS orders are vital. An overly forensic, detailed approach to assessing needs would undermine the very purpose of an MPS order: to provide swiftly interim financial relief to cover "immediate needs". Practically speaking, a detailed approach is also not realistic or appropriate at the early stages of divorce proceedings. As Moylan LJ notes, extensive information as to the parties' needs and means will not yet have been assembled.

This case should also aid in reducing future parties' costs and unnecessary use of Court resources following an appeal. If a successful appeal of an MPS

Order results in the making of an alternative order by the Court, the need for a further hearing is obviated. This should also enable parties to reach a swifter outcome, which, as noted by the Court, is of particular importance in MPS applications.

Rattan v Kuwad joins *TL v ML* in reminding parties that insufficient disclosure on the part of the respondent will not prevent a judge from making a necessary maintenance pending suit. Where disclosure is lacking, the respondent's financial position may simply be inferred[2].

[1] Lexis PSL, 'Procedure for maintenance pending suit'.
[2] 'Maintenance pending suit or pending the outcome of proceedings' *Halsbury's Laws of England*, *Matrimonial and Civil Partnership Law*

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By Bryn Auger. *Bryn is a final year LLB student at Aston University. He commences the BPC at the University of Law in September 2021.*

This case concerned AG, a 69-year-old lady suffering with frontal lobe dementia and whether she required a broad-spectrum set of declarations regarding her capacity from capacity to litigate to capacity to marry.

A hearing had initially taken place several months prior. However, it had to be adjourned following concerns with the expert evidence during cross-examination as to whether AG had satisfied the functional test of capacity. There was no dispute whether AG had satisfied the diagnostic element of the test due to her condition. Dispute arose surrounding the expert's conclusions on how AG's condition affected her ability to understand, use, retain and weigh information to come to decisions. In particular, the parties were concerned with the lack of reasoned explanations as to how the expert reached his decisions, a lack of evidence regarding how AG had been informed of the relevant information inherent in each decision and how AG had been assisted to engage with the expert.

Mr Justice Poole, in his judgment, provided foundational guidance on how expert reports in the Court of Protection should be written:

1. **Thou shall assist not assess:** the expert's report is not a clinical assessment but should seek to assist the court.

2. **Thou shall act as instructed**: read the letter of instruction with great care and attention.

3. **Thou shall consider Section 3**: bear in mind the framework of Section 3 that the judge must base his decision on.

4. **Thou shall not broad brush**: capacity is decision specific. Each decision on capacity must be separately justified.

5. **Thou shall justify**: an expert's opinion must be explained clearly and with reasoned evidence.

6. **Thou shall reassess carefully:** if an expert is going to change his conclusions following reassessment, explain why.

7. **Thou shall not omit exchanges**: if an expert is relying on a particular exchange in interview, it should be written down.

8. **Thou shall engage flexibly**: if P does not engage with the expert, record attempts that were made to assist P to engage.

9. **Thou shall strategise engagement**: if P is not engaging with the expert, he should devise a strategy to facilitate engagement.

10. **Thou shall presume capacity**: never forget that capacity is presumed unless rebutted.

When the case returned in January, Mr Justice Poole commended the new expert report. This was because the expert had evidently taken note of his guidance. The report was clearly set out referring to his instructing Solicitor's detailed instructions, referred to the principles of the Mental Capacity Act that the judge had to consider, included quotations from his interview with AG and explained how he facilitated effective engagement from AG. The expert had additionally considered legal developments when coming to a conclusion as to whether AG satisfied the diagnostic and functional tests for each specific decision the court was asked to consider.

This case serves as a reminder of the expectations in Court of Protection expert reports. For practitioners, it highlights the importance of a detailed letter of instruction that ensures no stone is left unturned. For experts, it highlights the foundations that every expert report should be built off. While never purposefully omitted by any expert, Mr Justice Poole restated the unwritten 'commandments' that must never be forgotten during the course of preparing an expert report in the Court of Protection.

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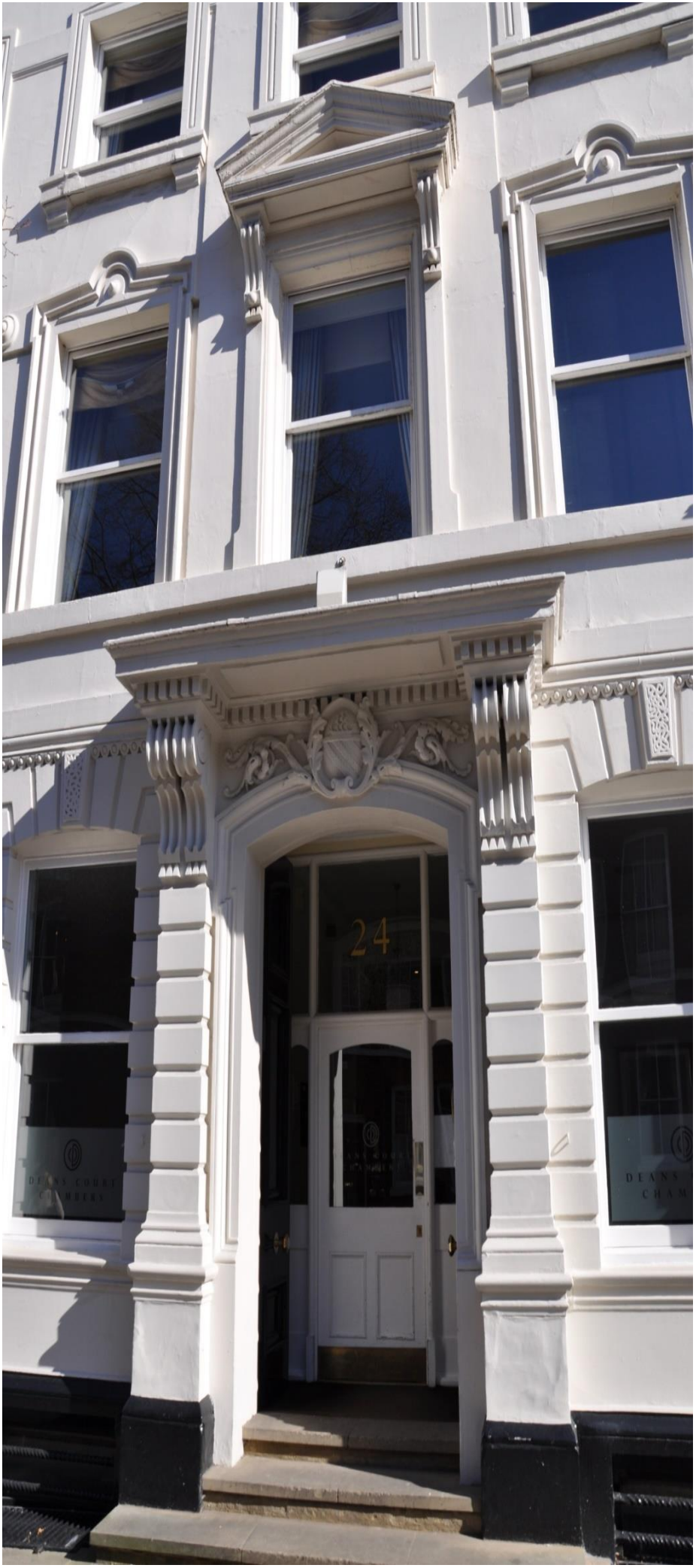

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