4 PAPER BUILDINGS

PUBLIC LAW SEMINAR

3 CPD – BTM/CHLS

12th March 2015

CHAIR

John Tughan QC

SPEAKERS:

Alison Grief QC
Sam King
Dorothea Gartland
Andrew Powell
Michael Edwards

4 Paper Buildings

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Section 1

4 Paper Buildings: About Us

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About Us

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We are:

- An historic London chambers housing 73 expert family barristers
- Steeped in Inns of Court legal tradition with cutting-edge knowledge and technology
- Recommended as leaders in our field by the main legal directories, Chambers & Partners and The Legal 500

We offer advice, representation and dispute resolution services in all areas of family law:

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- Finances and property on divorce or civil partnership dissolution
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- Child abduction and wrongful retention
- International family law
- Agreements
- Cohabitants' claims (trusts of land cases)
- Financial arrangements for children
- Domestic abuse
- Assisted conception and reproduction
- Publicity
- Inquests

What people say about 4PB:

Chambers & Partners 2015
4 Paper Buildings is a renowned set of chambers dealing with the most complex children law proceedings. Both private and public law matters are accounted for, and members are expert in everything from paternity disputes to international abduction, parental authority, and serious injury to children cases.

Members of the public, local authorities and solicitors all beat a path to its door in order to avail themselves of the superior representation on offer here.

The set also has four experienced silks and a number of juniors who handle financial work. They have been involved in leading recent cases, including Young v Young.

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The Legal 500 - 2014
4 Paper Buildings is 'one of the best family law sets', and one of the few chambers in London that has real strength in depth in children law

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4 Paper Buildings is 'the leading children law set' providing a 'first-rate service' and 'an exceptional group of experienced, thoughtful and intelligent barristers'.

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4 Paper Buildings won The Legal 500 Family Law Set of the Year in 2014

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Section 2

Seminar Timetable

Timetable

1.30-2pm: Registration

2 -2.10pm: Chair's Introduction: John Tughan QC

2.10-2.50pm: Public Law Update - (Andrew Powell)

2.50-3.30pm: International Issues in public law proceedings (Michael Edwards)

3.30 -4pm: Tea –break

4.00- 4.45pm: Re B-S : Emperor's New Clothes (Sam King)

4.45-5.30pm: Mock Trial (John Tughan QC, Alison Grief QC & Dorothea Gartland)

5.30pm: Close of seminar and drinks reception

Section 3

Public Law Update

Andrew Powell

PUBLIC LAW UPDATE

Bundles and the case of: Re L (Procedure: Bundles: Translation) [2015] EWFC 15

1. This case has become something of a *cause célèbre* amongst family law practitioners and has also attracted headlines in national newspapers.

2. Public law proceedings were issued by Warwickshire County Council. The father of the eldest child was Slovenian and resident in Slovenia at the time of the proceedings. The father did not speak or read English, Slovene being his native language.

3. The father had not been afforded an opportunity to read the documents. At an earlier hearing, in November 2014, a District Judge made an order for the translation of a schedule of documents that amounted to 591 pages. At the cost of £38 per page, the total cost was in excess of £23,000. The LAA, refused the application for prior authority.

4. The President considered the refusal of the LAA to grant legal aid. The President invited the parties to return with a bundle under 350 pages and after reviewing its contents held that only 51 pages needed to be translated. The President agreed with the LAA that the father could be informed of the important substance of the case in other materials through his solicitor providing a summary of no more than 30 pages.

5. The President observed:

"As long ago as 2008, in *Re X and Y (Bundles)* [2008] EWHC 2058 (Fam), [2008] 2 FLR 2053, over eight years after the promulgation of the original bundles Practice Direction in March 2000, I expressed myself in strong terms. I said (para 2), that:

> "Th[e] continuing failure by the professions to comply with their obligations is simply unacceptable. Enough is enough. Eight years of default are enough. Eight years are surely long enough for even the most casual practitioner to have learned to do better."

I added (para 7) that:

> "there is, and can be, absolutely no excuse for [practitioners] not being completely familiar with the Practice Direction and its contents and complying meticulously with its requirements".

Yet here we are, more than six years on, and almost *fifteen years* after the original Practice Direction, continuing to experience, and experience far too frequently, serious default in complying with the requirements of PD27A."[1]

(emphasis in original)

6. His lordship later observed:

"More recently, Mostyn J, in *J v J* [2014] EWHC 3654 (Fam), and then Holman J, in *Seagrove v Sullivan* [2014] EWHC 4110 (Fam), have been driven to express themselves in justifiably strong terms. Having complained that "routinely the profession pays no attention to" PD27A, Mostyn J suggested (para 52) that the remedy might be:

> "to set up a special court before which delinquents will be summoned to explain themselves in open court, just as delinquent practitioners in the Administrative Court are summoned before the President of the Queen's Bench Division pursuant to the decision in *R (on the application of Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070 (Admin). Perhaps such a court would regularly consider whether to disallow fees pursuant to CPR 44.11(1)(b) and/or section 51(6) Senior Courts Act 1981."

Holman J adopted another technique (paras 52-55):

> "52 … There has been wholesale breach of the practice direction … I propose to deal with it, in this case, as follows. Except for the two skeleton arguments and the chronology, every single piece of paper that has so far been lodged will be taken away from this courtroom now …
>
> 53 I will adjourn this case now until 10.30 tomorrow morning. At 10.30 tomorrow morning, unless by then the parties have reached an overall settlement of this case, they must attend with one, single, composite bundle, containing not more than 300 pages as the President's direction requires. I say 300, for I am excluding and retaining the two existing skeleton arguments, which … extend to about 50 pages …
>
> 54 If the parties cannot agree as to the contents of the documents bundle, then each side can select 150 pages of their own choosing, thereby making the total of 300 …
>
> 55 I wish to emphasise as strongly as I can by this judgment … that the President's practice direction … mean[s] what [it] say[s] and must be adhered to. There is no more room at all for courts being resigned or fatalistic when the sort of thing that has happened in this case happens again. As Mostyn J said in *J v J* at paragraph 52, it is no use the court continuing feebly to issue empty threats. There is only one effective sanction, and that

[1] Per Munby P in *Re L (Procedure: Bundles: Translation)* [2015] EWFC 15 at para 9

> is what I propose to apply. The whole lot must be taken away and we start again."

I need to take this opportunity to address other examples where experience shows that requirements of PD27A are routinely ignored. I emphasise that the list which follows is not exhaustive.

PD27A requires the preparation and lodging of a "bundle". PD27A, by design, does not refer to and does not acknowledge the concept of a "core bundle". The use of so-called "core" bundles was condemned by Mostyn J in *J v J*, in a passage (para 51) with which I entirely agree:

> "I also deprecate a practice of circumvention of which I have become aware. That is for the lawyers for both sides to agree a single "core" bundle and, in addition, an archive of many volumes of expensively prepared secondary or background material. This archive is then brought to trial in the confident belief and expectation that the trial judge will grant permission pursuant to PD27A para 5.1 at the final hearing itself to use documents from the archive. This is no better than the old regime which the new prescription was designed to stamp out. Para 5.1 expects that a direction for permission to use more than one bundle is obtained before, not at, the final hearing. It is possible, of course, that, unexpectedly, further documents may be need to be deployed at the final hearing; but the starting point, and the usual finishing point must be that all the relevant documents should be in the single bundle. To describe the single bundle as the "core" bundle suggests that there will inevitably be other documents in further bundles outlying the core. That is the wrong approach. There should only be one single bundle unless prior permission to use more than one has been obtained."

A judge, exercising the power conferred by para 5.1, may of course, in an appropriate case, direct that there is to be a single "core" bundle accompanied by other bundles arranged in accordance with directions given by the judge. But unless a judge has specifically directed, using the expression, that there is to be a "core bundle", the expression is not to be used: the obligation on the parties is to prepare a PD27A-compliant "bundle"."[2]

7. Further observations were made in respect of witness bundles. The President opined that the practice of lodging a witness bundle must stop where not necessary:

"From now on, counter-staff at court offices will be instructed to refuse to accept witness bundles, unless a judge has specifically directed that they are to be lodged, and to require whoever is trying to lodge them to take them away. If witness bundles are sent by post, or by DX or delivered by couriers who refuse to take them away, they will, unless a judge has specifically directed that they are to be lodged, be destroyed without any prior

[2] Per Munby P in *Re L* at paras 11-13

warning necessarily being given. They will *not* be delivered to the judge and will *not* be taken into the courtroom by court staff."[3] (emphasis in original)

And that in respect of expert reports:

"There is, in my judgment, no reason why case management judges should not, if appropriate, specify the maximum length of a skeleton argument, a witness statement, a local authority's assessment, an expert's report or, indeed, any other document prepared for the proceedings which will be included in the bundle. I would encourage judges to do so. Too many documents are still too long, often far too long, not least having regard to the 350 page bundle limit."[4]

8. Saliently, the President concluded that:

"This endemic failure of the professions to comply with PD27A must end, and it must end now. *Fifteen years* of default are enough. From now on:

i) Defaulters can have no complaint if they are exposed, and they should expect to be exposed, to public condemnation in judgments in which they are named.
ii) Defaulters may find themselves exposed to financial penalties of the kind referred to by Mostyn J in *J v J*.
iii) Defaulters may find themselves exposed to the sanction meted out by Holman J in *Seagrove v Sullivan*."[5]

9. The denouement to *Re L* was that the President whittled down the essential papers that should be translated down to 51 (at a cost just under £2,000)

10. So we have all been warned.

11. A copy of PD27A is annexed to this handout.

Care proceedings: how not to do it - Re A (A Child) [2015] EWFC 11

12. Like *Re* L, this is another of Munby P's recent cases that has attracted widespread attention amongst lawyers and the national press. Here in *Re A*, the President outlines the fundamental principles that must be adopted by a local authority in care cases.

[3] *Ibid* at para 19
[4] *Ibid* at para 22
[5] *Ibid* at para 23

13. The child, A, was born whilst the mother was serving a term of imprisonment. The mother was no longer in a relationship with the father but supported his application for primary care. Assessments of the father and the paternal grandmother were completed 8 months after the child was born. The local authority care plan was adoption.

14. The President refused the LA's application for care and placement orders and placed the child with the father. The President found that the local authority's final care plan was built on inadequate foundations. The President observed:

"The first fundamentally important point relates to the matter of fact-finding and proof. I emphasise, as I have already said, that it is for the local authority to prove, on a balance of probabilities, the facts upon which it seeks to rely. I draw attention to what, in *Re A (A Child)* (No 2) [2011] EWCA Civ 12, [2011] 1 FCR 141, para 26, I described as:

> "the elementary proposition that findings of fact must be based on evidence (including inferences that can properly be drawn from the evidence) and not on suspicion or speculation."

.... Hearsay evidence is, of course, admissible in family proceedings. But, and as the present case so vividly demonstrates, a local authority which is unwilling or unable to produce the witnesses who can speak of such matters first-hand, may find itself in great, or indeed insuperable, difficulties if a parent not merely puts the matter in issue but goes into the witness-box to deny it."[6]

15. The President took issue in respect of how the allegations the local authority sought were pleaded:

> "The schedule of findings in the present case contains, as we shall see, allegations in relation to the father that "he appears to have" lied or colluded, that various people have "stated" or "reported" things, and that "there is an allegation….
>
> ….What do the words "he appears to have lied" or "X reports that he did Y" mean? More important, where does it take one? The relevant allegation is not that "he appears to have lied" or "X reports"; the relevant allegation, if there is evidence to support it, is surely that "he lied" or "he did Y".".[7]

16. The thrust of the President's concern here was that all too often, local authority's pursue cases on weak and unsubstantiated evidence, improperly pleaded- building the case on

[6] Per Munby P in Re A (A Child) [2015] EWFC 11 at para 8-9
[7] Per Munby P in *Re A* at para 10

"inadequate foundations". It is a simple and fundamental principle: the facts must relate to why the child has (or is likely) to suffer significant harm.

17. The third fundamental point, the President observed was even more crucial: namely the "wise and powerful" words of Hedley J in *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050, para 50:

> "society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done."

18. The President went on to endorse the observations of HHJ Jack in *North East Lincolnshire Council v G &* L [2014] EWFC B192, where HHJ Jack opined:

> "I deplore any form of domestic violence and I deplore parents who care for children when they are significantly under the influence of drink. But so far as Mr and Mrs C are concerned there is no evidence that I am aware of that any domestic violence between them or any drinking has had an adverse effect on any children who were in their care at the time when it took place. The reality is that in this country there must be tens of thousands of children who are cared for in homes where there is a degree of domestic violence (now very widely defined) and where parents on occasion drink more than they should, I am not condoning that for a moment, but the courts are not in the business of social engineering. The courts are not in the business of providing children with perfect homes. If we took into care and placed for adoption every child whose parents had had a domestic spat and every child whose parents on occasion had drunk too much then the care system would be overwhelmed and there would not be enough adoptive parents. So we have to have a degree of realism about prospective carers who come before the courts."
> (emphasis added)

19. A further issue which gave rise to concern for the President was the lack of detailed analysis. The President opined that the local authority had failed to link the facts it relied

upon with the assertion that the child was at risk of suffering neglect and that therefore adoption was the appropriate outcome it sought.

20. What attracted national headlines was part of the local authority case that the father's former membership to the political organisation, the English Defence League (EDL), rendered him an immoral or inappropriate father. During the hearing, the local authority abandoned that part of its case, however the President had this to say about it:

> "The mere fact, if fact it be, that the father was a member, probably only for a short time, of the EDL is neither here nor there, whatever one may think of its beliefs and policies. It is concerning to see the local authority again harping on about the allegedly "immoral" aspects of the father's behaviour. I refer again to what was said in *re B*, both by Lord Wilson of Culworth JSC and by Baroness Hale of Richmond JSC. Membership of an extremist group such as the EDL is not, without more, any basis for care proceedings" [8]

21. The President departed from the view of the local authority and the guardian giving the following reasons:

    i. The LA had failed to prove the factual underpinning of its case;
    ii. The work of the SW was seriously flawed;
    iii. The LA was too willing to believe the worst of the father;
    iv. LA failed to link the facts it relied upon with assertions that the child was at risk;
    v. LA and the G did not sufficiently reappraise the case once it was established father was no longer in a relationship with the mother

22. In summary, the message from *Re A* is a clear one: local authorities need to have proper evidence to prove their case. However it serves as an interesting case to juxtapose with *Re L* and the furore over bundles: at the one end of the scale the message is "no more than 350 pages" -v- "you must prove your case – with evidence to support your case". Whether there will be any fallout is yet to be seen.

Re EF (Flawed placement application) [2015] EWFC B21

[8] Per Munby P in *Re A* at para 71

23. This case is worth mentioning, albeit briefly. Here, HHJ Wildblood QC, the Designated Family Judge for Avon, North Somerset and Gloucestershire, refused a local authority application for a placement order in respect of a child aged 4 ½.

24. There had been a string of procedural flaws and a significant period of delay (almost 2 ½ years). The placement hearing before the judge at the start of March 2015 was the fifth listed final hearing, following a series of adjournments, owing to the inadequacy of the local authority's final evidence which failed to weigh the pros and cons of the competing options available for the child (rehabilitation to father, adoption or LTFC). There had also been non-compliance with court orders by the local authority, including not assessing the father, which the judge characterised as being "contemptuous". Judge Wildblood observed:

> "I cannot have any confidence at all that the authority would operate appropriately under a placement order in relation to *this child; I* have never said that before in a judgment about any authority. The guardian shares my lack of confidence" [9]
> (Emphasis in original)

25. In respect of the law, the Judge formulated one single sentence of principle:

> "Nature, law and common sense require that it be recognised that the best place for a child to live is with her natural family, unless, exceptionally, proven and proportionate necessity demands otherwise."[10]

26. The judge concluded that he did not consider that the child's welfare required that she be placed for adoption and the application for a placement order was dismissed, leaving the child in foster care with ongoing contact with her birth family.

DNA Testing: X & Another v Z (Children) & another [2015] EWCA Civ 34

27. This was an appeal from the President of the Family Division to the Court of Appeal.

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[9] Per HHJ Wildblood QC in *Re EF (Flawed placement application)* [2015] EWFC B21 at para 3

[10] *Ibid* at para 108

28. Public law proceedings were instituted in respect of children, where the mother had been murdered by X, who was the children's psychological father, but also purported to be the children's biological father.

29. X refused to undergo DNA paternity testing and the guardian applied for disclosure of the two sets of DNA tests that were in the police's possession following the criminal proceedings. The President held DNA obtained under Part V of PACE was only for criminal enforcement purposes but DNA under Part II of PACE could be disclosed.

30. X and the Commissioner of the Metropolitan Police successfully appealed the judgment of the President on the ground that:
    (1) The true construction of Part II of PACE did actually prohibit use for other than criminal law enforcement; and

    (2) The operation of S6 HRA 1998 excluded any judicial discretion to order disclosure other than for those purposes.

31. Lord Dyson, the Master of the Rolls, giving the main judgment observed:

> "I conclude, therefore, that upon its true construction section 22 does not permit the police to retain and use biometric material seized under section 19 for any other purpose than criminal law enforcement. For the reasons I have given, I reach this conclusion on the construction issue by applying a purposive domestic law approach to statutory interpretation; alternatively, by interpreting the provisions in accordance with section 3 of the HRA in a way which is compatible with article 8 of the Convention.
> It is, therefore, no answer to this appeal to say (as the President accepted) that the order for disclosure can be made because it is unnecessary for the Guardian's purposes to compare the Part II material with the Part V sample obtained from X. If, as I have held, the Commissioner has no statutory power to retain and use the Part II sample except for the purposes of criminal law enforcement, he cannot disclose it for another unconnected purpose and the court cannot require him to disclose it for such a purpose. Even if it were true that the Guardian did not intend to use the material (or a copy of it) for any such other purpose, that would be irrelevant."[11]

[11] Per Lord Dyson in X & Another v Z (Children) & Another [2015] EWCA Civ 34 at paras 46-47

Damages & section 20 accommodation: Northamptonshire County Council v AS and Others [2015] EWHC 199

32. A 15 day old child was accommodated by the local authority in January 2013, however the local authority failed throughout the course of proceedings to comply with various procedures, causing harmful delay to the child. It was not clear whether the mother, whose native language was Latvian, had the s20 agreement translated to get properly, thereby questioning its validity. The actual application for a care order was not made until May 2013.

33. The matter was transferred to Keehan J, who sought an explanation from the director of Children's Services as to the local authority's conduct in these proceeding, which, *inter alia*, included the child having no fewer than 8 different social workers. Keehan J observed:

> "I cannot begin to understand why an inexperienced social worker who was not familiar with care proceedings was allocated as a social worker for a 15 day old baby. I do not understand why it took until August to provide her with support or why senior managers did not intervene in this case. It is wholly inexcusable for a local authority to take three months to decide to issue care proceedings in respect of a very young baby and then a further five months to issue care proceedings. The fact that the parents are Latvian and that close family members lived abroad, provides no explanation less still an excuse for the extraordinary delay in this case.
>
> I appreciate that social services' departments have difficulties recruiting and retaining social workers but it is deeply worrying that over the course of these proceedings DS has been allocated no less than eight different social workers. It is evident to me that neither the social workers, nor the senior managers at Northampton Children's Services Department had DS's welfare best interests at the forefront of their minds. Worse still they did nothing to promote them. Their chaotic approach to this young baby's care and future life was dismal."[12]

34. Keehan J found the explanations put forward by the service manager to be inadequate and that they attempted to defend "the wholly indefensible." The mother issued a claim for damages in respect of breaches to Articles 6 and 8 of her Convention rights. Accepting liability, the local authority agreed to may the child £12,000 in damages, £4,000 to the mother and £1,00 to the maternal grandparents.

[12] Per Keehan J in Northamptonshire County Council v AS and Others [2015] EWHC 199 at para 13-14

35. This judgment serves as yet another example of how and when s20 accommodation should be deployed by local authorities. Keehan J concluded that:

> "The use of the provisions of s.20 Children Act 1989 to accommodate was, in my judgment, seriously abused by the local authority in this case. I cannot conceive of circumstances where it would be appropriate to use those provisions to remove a very young baby from the care of its mother, save in the most exceptional of circumstances and where the removal is intended to be for a matter of days at most."[13]

Child sexual exploitation:

London Borough of Barking & Dagenham v SS [2014] EWHC 4436 (Fam)

36. The subject child was a 15 years old girl trafficked to London for sexual and financial exploitation. She was placed in foster care but repeatedly absconded, on two occasions she was found with the man who had trafficked her.

37. After balancing the advantages and disadvantages of secure accommodation Hayden J held the local authority application for a secure accommodation order was not proportionate [para.19]. The child had been exploited and should not be deprived of her liberty [para.18 and 26].

38. Hayden J had this to say about secure accommodation orders:

> "It scarcely needs to be said that restricting the liberty of a child is an extremely serious step, especially where the child has not committed any criminal offence, nor is alleged to have committed any criminal offence. It is for this reason that the process is tightly regulated by the Children Act 1989 in the way I have set out, but also in the Children (Secure Accommodation) Regulations 1991 and the Children (Secure Accommodation No.2) Regulations 1991. The use of s.25 will very rarely be appropriate and it must always remain a measure of last resort. By this I mean not merely that the conventional options for a child in care must have been exhausted but so too must the 'unconventional', i.e. the creative alternative packages of support that resourceful social workers can devise when given time, space and, of course, finances to do so. Nor should the fact that a particular type of placement may not have worked well for the child in the past mean that it should not be tried again. Locking a child up (I make no apology for the bluntness of the language, for that is how these young people see it and, ultimately,

[13] *Ibid* Per Keehan J at para 36

that is what is involved) is corrosive of a young persons spirit. It sends a subliminal and unintended message that the child has done wrong which all too often will compound his problems rather than form part of a solution."[14]

39. The local authority was ordered to file a statement on educational provisions [para.28] and serve the man with whom the child had been in contact, with an injunction requiring him to telephone the local authority or police if the child contacted him again [para.27].

40. The overarching message that can be taken from this judgment is that applications for secure accommodation orders must be thought through properly and only used as a last resort.

Birmingham City Council v Sarfraz Riaz and Others [2014] EWHC 4247 (Fam)

41. In this case Keehan J used the inherent jurisdiction to impose injunctions against a group of men who were found to be involved in child sexual exploitation.

42. The 17 year old had been made the subject of a secure accommodation order in October 2014 to protect her. No further action was taken in respect of criminal proceeding against the men, the police being of the view that there was no realistic prospect of conviction.

43. Keehan J made final orders against each of the men, concluding that the orders sought were proportionate, unambiguous, enforceable and necessary in the circumstances. The injunctive relief that was sought extensive and wide reaching (see the judgment for the full terms of the order), but included provision for the defendants not to:

e. approach any female, under the age of 18 years, not previously associated with him on a public highway, common land, wasteland, parkland, playing field, public transport stop/station

h. incite or encourage any other male to seek any form of contact with AB

[14] Per Hayden J in *London Borough of Barking & Dagenham v SS* [2014] EWHC 4436 (Fam) at para 15

i. cause, permit or allow AB or other female previously unknown to him and who may be under the age of 18 years to enter into or remain in any private motor car or taxi in which he is driving or travelling as a passenger.
And is bound by such order until 18th August 2015.

44. Reporting restrictions were lifted, identifying the men. Had the men been convicted, the child would have been afforded lifelong anonymity under the Sexual Offences Act 2003. However, Keehan J adjourned the issue as to whether there should be lifelong anonymity, to be determined before the child's 18th birthday.

45. Concluding his judgment, Keehan J commended the local authority legal team for the approach that had been adopted. His lordship observed:

"I wish to commend Birmingham City Council for the bold and innovative approach it has taken in this case. All too often in such cases the only action taken by the authorities, where there is insufficient evidence to mount a prosecution, is in respect of the victim. They are invariably taken into care or, in more extreme cases, they are placed in secure accommodation as was the case with AB. Whilst that action is taken in the best interests and to protect the young victim, it strikes me as wrong and unfair that no action is taken against the perpetrators of child sexual exploitation.

These injunctive orders will protect AB and other vulnerable young females.

I wish to commend the solicitors who have led the local authority's internal legal team, in the preparation for and pursuit of these proceedings. A team of leading counsel and two junior counsel were instructed by the local authority so as to ensure that at any hearing of these applications at least one of the team was available to appear for the council and were thus fully familiar with the case and the orders which had previously been made."[15]

46. At a time when child sexual exploitation is firmly in the public consciousness, we should probably expect to see further examples of local authorities taking protective steps to protect vulnerable children at risk of child sex exploitation. We can certainly expect a further judgment in this matter as to the issue of whether the child should be afforded lifelong anonymity.

[15] Per Keehan J in *Birmingham City Council v Sarfraz Riaz and Others* [2014] EWHC 4247 (Fam) at para 158-160

Expert assessments - when is it necessary? LB of Tower Hamlets v D and Others [2014] EWHC 3901 (Fam)

47. The mother was taken from England and married in Somalia aged 13 or 14 having her first child aged 15 years old. After the youngest sibling aged 4 months old died of neglect by the mother who faced criminal proceedings, care proceedings were commenced in respect of a 4 and 2 year old. The mother claimed the father was physically abusive and she had returned to England with the assistance of the British Embassy. The court considered whether the local authority should conduct assessments of the father living in Somaliland.

48. Hayden J, having considered the local authority's thorough investigations for sending a social worker to Somaliland, held:
    (a) While every opportunity should be made to assess a birth parent there are times when the other obstacles make it necessary to consider other options [para.6];
    (b) It was inappropriate to authorise a social worker or any British national to be sent to Somaliland [para.34]. While an independent social worker speaking both languages might be at lower risk, the father would still require an interpreter which would draw attention to their circumstances and heighten the risk to the SW [para.31]; and
    (c) Invited the local authority to consider all other avenues such as the father applying for a visa to England whereupon he would likely be assessed [para.39].

FGM - In the matter of B and G (Children) (No 2) [2015] EWFC 3

49. The case concerned the central issue of whether a child had been subjected to female genital mutilation.

50. The parents denied subjecting the child to FGM. Three experts were called and the court assessed their expertise and reliability which varied. Professor Creighton did not examine the child firsthand but her evidence was considered informed on the greatest experience, measured and consistent. In contrast Dr Share and Dr Momoh who examined the child lacked experience and were inconsistent with their report and evidence.

51. The President held that the local authority could not establish that the child had suffered FGM

In obiter the President held:

(i) Lack of medical experts in this field but one must carefully select the most experienced and reliable of these.

(ii) The WHO classification of FGM should be used.

(iii) Whoever conducts the examination should use a colopscope, make detailed notes and use diagrams wherever possible to record exactly what is observed, express their opinion with reference to evidence and explain the diagnosis clearly.

52. The President concluded that FGM of any form will suffice to establish threshold (para 73). Saliently, the President concluded that:

> "I add a final observation. Plainly, given the nature of the evil, prevention is infinitely better than 'cure'. Local authorities need to be pro-active and vigilant in taking appropriate protective measures to prevent girls being subjected to FGM. And, as I have already said, the court must not hesitate to use every weapon in its protective arsenal if faced with a case of actual or anticipated FGM. An important tool which lies readily to hand for use by local authorities is that provided by section 100 of the 1989 Act. The inherent jurisdiction, as well as all the other jurisdictions of the High Court and the Family Court, must be as vigorously mobilised in the prevention of FGM as they have hitherto been in relation to forced marriage. Given what we now know is the distressingly great prevalence of FGM in this country even today, some thirty years after FGM was first criminalised, it is sobering to reflect that this is not merely the first care case where FGM has featured but also, I suspect, if not the first one of only a handful of FGM cases that have yet found their way to the family courts. The courts alone, whether the family courts or the criminal courts, cannot eradicate this great evil but they have an important role to play and a very much greater role than they have hitherto been able to play."[16]

53. The message in this case is clear. Local authorities must be "proactive and vigilant", but should be cautions not to jump "too readily" that proven FGM will result in adoption. Being proactive will of course require a multi-agency approach in such cases.

[16] Per Munby P in the matter *of B and G (Children) (No 2)* [2015] EWFC 3 at para 78

Legal aid

54. There have been a number of cases that have been before the President concerning the absence of legal aid in public law proceedings. They are depressing reading to say the least.

55. In *Re D (a child) [2014]* EWFC 39, the case concerned a child whom the local authority wished to place for adoption. The parents did not qualify for legal aid. The President observed:

> "Thus far the State has simply washed its hands of the problem, leaving the solution to the problem which the State itself has created – for the State has brought the proceedings but declined all responsibility for ensuring that the parents are able to participate effectively in the proceedings it has brought – to the goodwill, the charity, of the legal profession. This is, it might be thought, both unprincipled and unconscionable. Why should the State leave it to private individuals to ensure that the State is not in breach of the State's – the United Kingdom's – obligations under the Convention? As Baker J said in the passage I have already quoted, "It is unfair that legal representation in these vital cases is only available if the lawyers agree to work for nothing."[17]

56. The President considered the role of the Family Court in such circumstances:

> "It is no part of the function of the Family Court or the Family Division to pass judgment on the appropriateness and wisdom of the arrangements that Parliament (or Ministers acting in accordance with powers conferred by Parliament) choose to make in relation to legal aid. The legality, rationality and, where relevant, the proportionality of the scheme, if properly the subject of judicial scrutiny, are primarily the responsibility of the Administrative Court. It is, however, the responsibility – indeed, the duty – of the judges in the Family Court and the Family Division to ensure that proceedings before them are conducted justly and in a manner compliant with the requirements of Articles 6 and 8 of the Convention. That, after all, is what Parliament determined when it enacted section 6 of the Human Rights Act 1998, declaring, subject only to section 6(2),

[17] Per Munby P in *Re D (a child)* [2014] EWFC 39 at para 31

that it is "unlawful" for a court to act in a way which is incompatible with Articles 6 and 8."[18]

57. It is clear that there is visible angst amongst the upper echelons of the judiciary concerning cases where the court is being invited to make the most draconian orders. In such cases where parents are unrepresented, the interference with Articles 6 and 8 of the ECHR is overwhelmingly disproportionate.

58. A similar theme followed in *Re K and H (Children: Unrepresented Father: Cross-Examination of Child)* [2015] EWFC 1, a private law case before HHJ Bellamy sitting as a deputy high court judge. The subject children made allegations of sexual abuse against the father. The father did not qualify for legal aid and could not afford to instruct a solicitor privately. One child was due to give evidence at the fact finding hearing. Leave was given for the Lord Chancellor to intervene as to the issue of whether the MoJ should pay for the father to be represented, thereby avoiding the father cross examining the alleged victim.

59. The judge determined that it was not appropriate to appoint a guardian to cross examine the alleged victim. The judge ruled that in those circumstances, the most appropriate route was to order the MoJ to pay for the father's legal costs. HHJ Bellamy identified the following principles:

"(a) It is the first duty of judges sitting in the Family Court to ensure that proceedings are conducted fairly (FPR 2010 rule 1.1). Failure to do so may lead to the court itself acting unlawfully (s.6(1) of the Human Rights Act 1998).

(b) Where a party is unrepresented (whether because legal aid is not available or by choice) and is 'unable to examine or cross-examine a witness effectively' the court has a duty to assist that party (s.31G(6) of the Matrimonial and Family Proceedings Act 1984). This requires the court 'to put, or cause to be put' questions to a witness.

(c) The court will itself put questions to a witness if it is satisfied that it is 'necessary and appropriate' to do so. It will not normally be appropriate to do so when the case involves issues which are grave and/or forensically complex.

[18] *Ibid* at para 26

(d) Where the court is satisfied that it is not 'appropriate' for the judge to put questions to an alleged victim, the court must arrange for (cause) a legal representative to be appointed to put those questions.

(e) The court may direct that the costs of the legal representative be borne by HMCTS.

(f) The court may nominate the legal representative who is to be appointed to undertake that task.

(g) The extent of the work to be undertaken by a legal representative so appointed should be made clear at the outset and should be proportionate.

(h) In those limited cases where legal aid is still available in private law Children Act proceedings there is a detailed regulatory framework governing the calculation of costs payable to (claimable by) a solicitor for undertaking such work. The fees payable by the Legal Aid Agency are less than a solicitor might charge a privately paying client for doing the same work. That has always been so. I can see no cogent argument for suggesting that a legal representative appointed by the court should be entitled to a higher rate of remuneration than if that work were undertaken under the legal aid scheme."[19]

60. It is almost inevitable that following this judgment, we should expect to see further orders from the Family Court ordering the MoJ to pay for legal presentation to deal with sensitive issues such as the ones in *Re K and H*. Watch this space.

Andrew Powell

4 Paper Buildings

March 2015

[19] Per HHJ Bellamy in *Re K and H (Children: Unrepresented Father: Cross-Examination of Child)* [2015] EWFC 1 at para 74

PRACTICE DIRECTION 27A – FAMILY PROCEEDINGS: COURT BUNDLES (UNIVERSAL PRACTICE TO BE APPLIED IN THE HIGH COURT AND FAMILY COURT)

See also Part 27, Practice Direction 27B, Practice Direction 27C

PRACTICE DIRECTION 27A – FAMILY PROCEEDINGS: COURT BUNDLES (UNIVERSAL PRACTICE TO BE APPLIED IN THE HIGH COURT AND FAMILY COURT)

This Practice Direction supplements FPR Part 27

Contents of this Practice Direction

1.1

The President of the Family Division has issued this practice direction to achieve consistency across the country in the Family Court and the Family Division of the High Court in the preparation of court bundles and in respect of other related matters.

Application of the practice direction

2.1

Except as specified in paragraph 2.4, and subject to specific directions given in any particular case, the following practice applies to –

(a) all hearings before a judge sitting in the Family Division of the High Court wherever the court may be sitting; and
(b) all hearings in the Family Court.

2.2

'Hearing' includes all appearances before the court, whether with or without notice to other parties and whether for directions or for substantive relief.

2.3

This practice direction applies whether a bundle is being lodged for the first time or is being re-lodged for a further hearing (see paragraph 9.2).

2.4

This practice direction does not apply to the hearing of any urgent application if and to the extent that it is impossible to comply with it.

Responsibility for the preparation of the bundle

3.1

A bundle for the use of the court at the hearing shall be provided by the party in the position of applicant at the hearing (or, if there are cross-applications, by the party whose application was first in time) or, if that person is a litigant in person, by the first listed respondent who is not a litigant in person. Where all the parties are litigants in person none of them shall, unless the court otherwise directs, be obliged to provide a bundle, but any bundle which they choose to lodge must be prepared and lodged so as to comply with this practice direction.

3.2

The party preparing the bundle shall paginate it using Arabic numbering throughout. If possible the contents of the bundle shall be agreed by all parties.

Contents of the bundle

4.1

The bundle shall contain copies of only those documents which are relevant to the hearing and which it is necessary for the court to read or which will actually be referred to during the hearing. In particular, copies of the following classes of documents must not be included in the bundle unless specifically directed by the court –
(a) correspondence (including letters of instruction to experts);
(b) medical records (including hospital, GP and health visitor records);
(c) bank and credit card statements and other financial records;
(d) notes of contact visits;
(e) foster carer logs;
(f) social services files (with the exception of any assessment being relied on by any of the parties);
(g) police disclosure.

This does not prevent the inclusion in the bundle of specific documents which it is necessary for the court to read or which will actually be referred to during the hearing.

4.2

The documents in the bundle shall be arranged in chronological order from the front of the bundle, paginated individually and consecutively (starting with page 1 and using Arabic numbering throughout), indexed and divided into separate sections (each section being separately paginated) as follows –

(a) preliminary documents (see paragraph 4.3) and any other case management documents required by any other practice direction;

(b) applications and orders;

(c) statements and affidavits (which must be dated in the top right corner of the front page) but without exhibiting or duplicating documents referred to in para 4.1;

(d) care plans (where appropriate);

(e) experts' reports and other reports (including those of a guardian, children's guardian or litigation friend); and

(f) other documents, divided into further sections as may be appropriate.

All statements, affidavits, care plans, experts' reports and other reports included in the bundle must be copies of originals which have been signed and dated.

4.3

At the commencement of the bundle there shall be inserted the following documents (the preliminary documents) –

(a) an up to date case summary of the background to the hearing confined to those matters which are relevant to the hearing and the management of the case and limited, if practicable, to four A4 pages;

(b) a statement of the issue or issues to be determined (1) at that hearing and (2) at the final hearing;

(c) a position statement by each party including a summary of the order or directions sought by that party (1) at that hearing and (2) at the final hearing;

(d) an up to date chronology, if it is a final hearing or if the summary under (i) is insufficient;

(e) skeleton arguments, if appropriate;

(f) a list of essential reading for that hearing; and

(g) the time estimate (see paragraph 10.1).

Copies of all authorities relied on must be contained in a separate composite bundle agreed between the advocates.

4.4

Each of the preliminary documents shall be as short and succinct as possible and shall state on the front page immediately below the heading the date when it was prepared and the date of the hearing for which it was prepared. Where proceedings relating to a child are being heard by magistrates the summary of the background shall be prepared in anonymised form, omitting the names and identifying information of every person referred to other than the parties' legal representatives, and stating the number of pages contained in the bundle. Identifying information can be contained in all other preliminary documents.

4.5

The summary of the background, statement of issues, chronology, position statement and any skeleton arguments shall be cross-referenced to the relevant pages of the bundle.

4.6

The summary of the background, statement of issues, chronology and reading list shall in the case of a final hearing, and shall so far as practicable in the case of any other hearing, each consist of a single document in a form agreed by all parties. Where the parties disagree as to the content the fact of their disagreement and their differing contentions shall be set out at the appropriate places in the document.

4.7

Where the nature of the hearing is such that a complete bundle of all documents is unnecessary, the bundle (which need not be repaginated) may comprise only those documents necessary for the hearing, but –

(a) the summary of the background must commence with a statement that the bundle is limited or incomplete; and

(b) the bundle shall if reasonably practicable be in a form agreed by all parties.

4.8

Where the bundle is re-lodged in accordance with paragraph 9.2, before it is re-lodged –

(a) the bundle shall be updated as appropriate; and

(b) all superseded documents (and in particular all outdated summaries, statements of issues, chronologies, skeleton arguments and similar documents) shall be removed from the bundle.

Back to top

Format of the bundle

5.1

Unless the court has specifically directed otherwise, being satisfied that such direction is necessary to enable the proceedings to be disposed of justly, the bundle shall be contained in one A4 size ring binder or lever arch file limited to no more than 350 sheets of A4 paper and 350 sides of text.

5.2

All documents in the bundle shall (a) be copied on one side of paper only, unless the court has specifically directed otherwise, and (b) be typed or printed in a font no smaller than 12 point and with 1½ or double spacing.

5.3

The ring binder or lever arch file shall have clearly marked on the front and the spine –

(a) the title and number of the case;

(b) the place where the case has been listed;

(c) the hearing date and time;

(d) if known, the name of the judge hearing the case; and

(e) where in accordance with a direction of the court there is more than one ring binder or lever arch file, a distinguishing letter (A, B, C etc).

Timetable for preparing and lodging the bundle

6.1

The party preparing the bundle shall, whether or not the bundle has been agreed, provide a paginated index to all other parties not less than 4 working days before the hearing.

6.2

Where counsel is to be instructed at any hearing, a paginated bundle shall (if not already in counsel's possession) be delivered to counsel by the person instructing that counsel not less than 3 working days before the hearing.

6.3

The bundle (with the exception of the preliminary documents if and insofar as they are not then available) shall be lodged with the court not less than 2 working days before the hearing, or at such other time as may be specified by the court.

6.4

The preliminary documents shall be lodged with the court no later than 11 am on the day before the hearing and, where the hearing is before a judge of the High Court and the name of the judge is known, shall (with the exception of the authorities, which are to be lodged in hard copy and not sent by email) at the same time be sent by email to the judge's clerk.

Lodging the bundle

7.1

The bundle shall be lodged at the appropriate office. If the bundle is lodged in the wrong place the court may –

(a) treat the bundle as having not been lodged; and

(b) take the steps referred to in paragraph 12.

7.2

Unless the court has given some other direction as to where the bundle in any particular case is to be lodged (for example a direction that the bundle is to be lodged with the judge's clerk) the bundle shall be lodged –

(a) for hearings at the RCJ, in the office of the Clerk of the Rules, 1st Mezzanine (Rm 1M), Queen's Building, Royal Courts of Justice, Strand, London WC2A 2LL (DX 44450 Strand);

(b) for hearings at any other place, at such place as may be designated by the designated family judge responsible for that place and in default of any such designation at the court office for the place where the hearing is to take place.

7.3

Any bundle sent to the court by post, DX or courier shall be clearly addressed to the appropriate office and shall show the date and place of the hearing on the outside of any packaging as well as on the bundle itself.

7.4

Unless the court has given some other direction or paragraph 7.5 applies only one copy of the bundle shall be lodged with the court but the party who is responsible for lodging the bundle shall bring to court at each hearing at which oral evidence may be called a copy of the bundle for use by the witnesses.

7.5

In the case of a hearing listed before a bench of magistrates four copies of the bundle shall be lodged with the court.

7.6

In the case of hearings at the RCJ or at any other place where the designated family judge responsible for that place has directed that this paragraph shall apply, parties shall –

(a) if the bundle or preliminary documents are delivered personally, ensure that they obtain a receipt from the clerk accepting it or them; and

(b) if the bundle or preliminary documents are sent by post or DX, ensure that they obtain proof of posting or despatch.

The receipt (or proof of posting or despatch, as the case may be) shall be brought to court on the day of the hearing and must be produced to the court if requested. If the receipt (or proof of posting or despatch) cannot be produced to the court the judge may: (a) treat the bundle as having not been lodged; and (b) take the steps referred to in paragraph 12.

Lodging the bundle – additional requirements for Family Division or Family Court cases being heard at the RCJ

8.1

Bundles or preliminary documents delivered after 11 am on the day before the hearing may not be accepted by the Clerk of the Rules and if not shall be delivered

(a) in a case where the hearing is before a judge of the High Court, directly to the clerk of the judge hearing the case;

(b) in a case where the hearing is before any other judge, to such place as may be specified by the Clerk of the Rules.

8.2

Upon learning before which judge a hearing is to take place, the clerk to counsel, or other advocate, representing the party in the position of applicant shall no later than 3 pm the day before the hearing –

(a) in a case where the hearing is before a judge of the High Court, telephone the clerk of the judge hearing the case;

(b) in a case where the hearing is before any other judge email the Clerk of the Rules at RCJ.familyhighcourt@hmcts.gsi.gov.uk;

to ascertain whether the judge has received the bundle (including the preliminary documents) and, if not, shall organise prompt delivery by the applicant's solicitor.

Removing and re-lodging the bundle

9.1

Unless either the court wishes to retain the bundle or specific alternative arrangements have been agreed with the court, the party responsible for the bundle shall, following completion of the hearing, retrieve the bundle from the court immediately or, if that is not practicable, collect it from the court within 5 working days. Bundles which are not collected in due time are liable to be destroyed without further notice.

9.2

The bundle shall be re-lodged for the next and any further hearings in accordance with the provisions of this practice direction and in a form which complies with para 4.7.

Time estimates

10.1

In every case a time estimate (which shall be inserted at the front of the bundle) shall be prepared which shall so far as practicable be agreed by all parties and shall –

(a) specify separately: (i) the time estimated to be required for judicial pre-reading; and (ii) the time required for hearing all evidence and submissions; and (iii) the time estimated to be required for preparing and delivering judgment;

(b) be prepared on the basis that before they give evidence all witnesses will have read all relevant filed statements and reports; and

(c) take appropriate account of any additional time likely to be incurred by the use of interpreters or intermediaries.

10.2

Once a case has been listed, any change in time estimates shall be notified immediately by telephone (and then immediately confirmed in writing) –

(a) in the case of hearings in the RCJ, to the Clerk of the Rules; and

(b) in the case of hearings elsewhere, to the relevant listing officer.

Taking cases out of the list

11.1

As soon as it becomes known that a hearing will no longer be effective, whether as a result of the parties reaching agreement or for any other reason, the parties and their representatives shall immediately notify the court by telephone and email which shall be confirmed by letter. The letter, which shall wherever possible be a joint letter sent on behalf of all parties with their signatures applied or appended, shall include –

(a) a short background summary of the case;

(b) the written consent of each party who consents and, where a party does not consent, details of the steps which have been taken to obtain that party's consent and, where known, an explanation of why that consent has not been given;

(c) a draft of the order being sought; and

(d) enough information to enable the court to decide (i) whether to take the case out of the list and (ii) whether to make the proposed order.

Penalties for failure to comply with the practice direction

12.1

Failure to comply with any part of this practice direction may result in the judge removing the case from the list or putting the case further back in the list and may also result in a ‘wasted costs’ order or some other adverse costs order.

Commencement of the practice direction and application of other practice directions

13.1

Subject to paragraph 13.2 this practice direction shall have effect from 22 April 2014.

13.2

Sub-paragraphs (a)–(c) and (e)–(g) of paragraph 4.1 and paragraphs 5.1 and 5.3(e) shall have effect from 31 July 2014. In the meantime paragraphs 5.1 and 5.3(e) shall have effect as if –

(a) paragraph 5.1 read “The bundle shall be contained in one or more A4 size ring binders or lever arch files (each lever arch file being limited to no more than 350 pages).”; and

(b) in paragraph 5.3(e) the words “in accordance with a direction of the court” were omitted.

14.1

This practice direction should where appropriate be read in conjunction with the Public Law Outline 2014 (PD12A) and the Child Arrangements Programme 2014 (PD12B). In particular, nothing in this practice direction is to be read as removing or altering any obligation to comply with the requirements of the Public Law Outline 2014 and the Child Arrangements Programme 2014.

This Practice Direction is issued –

(a) in relation to family proceedings, by the President of the Family Division, as the nominee of the Lord Chief Justice, with the agreement of the Lord Chancellor; and

(b) to the extent that it applies to proceedings to which section 5 of the Civil Procedure Act 1997 applies, by the Master of the Rolls as the nominee of the Lord Chief Justice, with the agreement of the Lord Chancellor.

Section 4

International Issues in Public Law Proceedings

Michael Edwards

INTERNATIONAL PUBLIC LAW PROCEEDINGS

Introduction

1. The term international covers a range of issues which arise in the public law arena: child trafficking, abduction from care, placements abroad, forced marriage. International public law cases are on the increase. The courts in these cases have to grapple with a complex jurisdictional framework, which can quickly derail the proceedings and any hope of abiding by the 26 week rule.

2. The starting point in international cases – whether in public or private law – is the question of jurisdiction. This is based primarily on the child's habitual residence, but can also be founded, amongst other criteria, on presence. There have been a number of important developments in respect of habitual residence, which are set out below.

3. The framework for international child protection cases is not dealt with by two international instruments:

    a. The Brussels II Revised Regulation; and
    b. The 1996 Hague Convention on the Protection of Children.

4. These instruments govern how international public law proceedings are now dealt with by the English courts. Set out below are the key provisions from each and some guidance on how they should be applied in public law proceedings.

Habitual Residence

5. Article 8(1) of Council Regulation (EC) 2201/2003 (Brussels II Revised) provides as follows:

> *Article 8*
>
> *General Jurisdiction*

1. *The courts of a Member State shall have jurisdiction in matters of parental responsibility over a child who is habitually resident in that Member State at the time the court is seised.*

6. Article 8(1) applies whether or not the other country involved is an EU Member State.

7. The fundamental importance of habitual residence explains why we now see on the CMO pro-formas the heading 'Jurisdiction', which is routinely completed by writing: '*the English court has jurisdiction based on the child's habitual residence*'.

8. But what does habitual residence actually mean and how is it determined by the courts?

9. This question has caused the courts significant difficulty in recent years. It has involved no less than three trips to the Court of Justice of the European Union and, in 2013 alone, three cases before the UK Supreme Court. The references for those cases are:

Proceedings brought by A (Area of Freedom, Security and Justice) (C523/07) [2009] 2 FLR 1
Mercredi v Chaffe Case C-497/10 [2011] 1 FLR 1293.
In the matter of A (Children) [2013] UKSC 60
In the matter of KL (A Child) [2013] UKSC 75
In the matter of LC (Children) [2014] UKSC 1

10. The Supreme Court, in the trilogy of cases set out above, swept away the previous case law on habitual residence and effectively imported the earlier European decisions into English law. The central principles on habitual residence, to be applied in all cases, are now as follows:

a. Habitual residence is a question of fact, and not a legal concept (In the matter of A, para.54(i)).

b. It is highly desirable for the same test for habitual residence to be adopted in all contexts (A, para.35).

c. The child's habitual residence is **"***the place which reflects some degree of integration by the child in a social and family environment' in the country concerned", which "depends upon numerous factors,*

including the reasons for the family's stay in the country in question" (A, para.54(iii), KL para.18 & 19 and LC para.30). The court should consider, the duration, regularity, conditions and reasons for the stay on the territory of a member state and the family's move to that state, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that state (A, para.80(v)).

d. Although the English translation of *Mercredi v Chaffe* uses the word 'permanence', this is **not** a requirement to establish habitual residence (A para.51).

e. The social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he/she is dependent. Hence it is necessary to assess the integration of that person or persons in the social and family environment of the country concerned (A, para.54(vi), KL para.20 and LC para.35&36)

f. "*where the child is older, in particular one who is an adolescent or who should be treated as an adolescent because she (or he) has the maturity of an adolescent … the inquiry into her integration in the new environment must encompass more than the surface features of her life there*". "*What can occasionally be relevant to whether an older child shares her parent's habitual residence is her state of mind during the period of her residence with that parent.*" (LC para.37)

g. The essentially factual and individual nature of the inquiry should not be glossed with legal concepts which would produce a different result from that which the factual inquiry would produce (A, para.54(vii)).

h. "*it is clear that parental intent does play a part in establishing or changing the habitual residence of a child: not parental intent in relation to habitual residence as a legal concept, but parental intent in relation to the reasons for a child's leaving one country and going to stay in another.*" (KL, §23)

Brussels II Revised

11. The Brussels II Revised Regulation governs all matters of parental responsibility arising between EU Member States, other than Denmark. A number of its provisions also apply whether or not the other country involved is an EU Member State – importantly Articles

8 and 13 have universal application. The starting point remains the same in all cases: where is the child habitually resident? This question is determined at the time the court is seised (Article 16, Brussels II Revised), in other words the full question to ask at the outset is this: where was the child habitually resident at the time that the application for a care or supervision order was lodged with the court?

12. The are two possible scenarios:

    A. The English court has jurisdiction based on habitual residence;

    B. The child is habitually resident in another state - the English court has no substantive jurisdiction.

13. The English court will then have a number of different options which flow from its initial decision on habitual residence. These options, in each scenario, are set out below.

Scenario A: the English court has jurisdiction

i. Make substantive orders

14. The English court in this scenario can proceed to make any orders that are in the child's best interests, provided that that the threshold for making public law orders has been crossed.

15. However, there are requirements which must be met under Brussles II Revised when considering an international placement in another Member State.

16. Article 56 Brussels II Revised applies where the court contemplates placing the child abroad in another Member State. It needs to be read, and followed, carefully wherever such a placement is considered:

Article 56

Placement of a child in another Member State

1. *Where a court having jurisdiction under Articles 8 to 15 contemplates the placement of a child in institutional care or with a foster family and where such placement is to take place in another Member State,* ***it shall first consult the central authority or other authority having jurisdiction in the latter State*** *where public authority intervention in that Member State is required for domestic cases of child placement.*

2. *The judgment on placement referred to in paragraph 1 may be made in the requesting State* ***only if the competent authority of the requested State has consented to the placement****.*

3. *The procedures for consultation or consent referred to in paragraphs 1 and 2 shall be governed by the national law of the requested State.*

4. *Where the authority having jurisdiction under Articles 8 to 15 decides to place the child in a foster family, and where such placement is to take place in another Member State and where no public authority intervention is required in the latter Member State for domestic cases of child placement, it shall so inform the central authority or other authority having jurisdiction in the latter State.*
   [my emphasis]

17. The key requirements under Article 56 are therefore:
    a. To consult the central authority or social services department about the proposed placement; and
    b. To obtain their consent.

18. These are strict requirements and will prevent a placement abroad if they are not followed.

19. In ***Re AB (BIIR: Care Proceedings)*** [2013] 1 FLR 168, the Court of Appeal gave useful guidance on the scope of Article 56:

> ***[5]*** *Our present concern is with paras (1) and (2) only. These give no Member State an entitlement to call for the placement of a child within its jurisdiction. Nor, therefore, do they eliminate or*

constrict the domestic court's ordinary obligation to make its own judgment of where the child's best interests lie. The sole purpose and effect of Art 56(1) and (2) are to require a court which is considering placing a child in institutional or foster care in another Member State to consult any authority responsible for child placements in that Member State and not to decide on any such placement without that authority's consent. In short, it is to ensure that children at risk are not sent into a transnational void.

ii. Article 15 transfer

20. The alternative option available to the English courts is to transfer jurisdiction to the courts of another Member State.

21. Article 15 has fundamental importance in every care case with a European dimension. In ***Re E (Brussels II Revised: Vienna Convention: Reporting Restrictions)*** **[2014] 2 FLR 151**, the President effectively issued a practice note within his judgment on Article 15:

> ***[35]*** *It is highly desirable, and from now on good practice will require, that in any care or other public law case with a European dimension the court should set out quite explicitly, both in its judgment and in its order:*
>
> *i. the basis upon which, in accordance with the relevant provisions of BIIR, it is, as the case may be, either accepting or rejecting jurisdiction;*
>
> *ii. the basis upon which, in accordance with Art 15, it either has or, as the case may be, has not decided to exercise its powers under Art 15.*
>
> ***[36]*** *This will both demonstrate that the court has actually addressed issues which, one fears, in the past may sometimes have gone unnoticed, and also identify, so there is no room for argument, the precise basis upon which the court has proceeded. Both points, as it seems to me, are vital. Judges must be astute to raise these points even if they have been overlooked by the parties. And where Art 17 applies it is the responsibility of the judge to ensure that the appropriate declaration is made.*

22. The key requirements before making an Article 15 transfer are:

    a. The child has a particular connection with the Member State;

b. Another court would be better placed to hear the case; and
c. Transfer is in the best interests of the child

[**Art.15(1)**].

23. The circumstances in which a child will be considered to have a substantial connection to another Member State are if that Member State:

a. Has become the habitual residence of the child after the English court was seised; or
b. Is the former habitual residence of the child; or
c. Is the place of the child's nationality; or
d. Is the habitual residence of a holder of parental responsibility; or
e. Is the place where property of the child is located and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

[**Art.15(3)**]

24. Provided that one of the above criteria apply, and another court would be better placed to hear the case, and it is in the child's best interests, an Article 15 transfer can be made. It should be remembered that this is **discretionary**. There is no requirement that the proceedings are transferred, even if all of the criteria are met.

25. Once these requirements have been established, the next question is how to initiate the Article 15 procedure. Article 15 can be raised:

a. On an application by one of the parties; or
b. On the court's own motion; or
c. On an application by the courts of another Member State with which the child has a particular connection.

[**Art.15(2)**].

26. A transfer under (b) or (c) above will only be granted where it is accepted by at least one of the parties [**Art.15(2)**].

27. Article 15(5) provides for the decision on jurisdiction following an Article 15 request to be made within **six weeks** where this is in the best interests of the child '*due to the specific*

circumstances of the case.' It is difficult to imagine a scenario in public law proceedings in which delay will benefit the child. Any Article 15 request should make reference to Article 15(5) and the need for a decision within six weeks.

28. It should be remembered, finally, that the courts which it is proposed should take jurisdiction under Article 15 do not have to accept the transfer.

29. For a recent example of the application of Article 15, and of the very different positions taken by the Court of Appeal (Ryder LJ, Munby ewca P) and the High Court (Mostyn J), see: ***Nottingham City Council v LM*** **[2014] EWCA Civ 152**.

Scenario B: the English court has no jurisdiction

i. Articles 13 and 20

30. The combined effect of Articles 13 and 20 Brussels II Revised allows the English courts to take interim protective measures in respect of the child, even where that child is habitually resident in another Member State.

31. Article 13 creates a jurisdiction based on the child's presence:

> *Article 13*
>
> *Jurisdiction based on the child's presence*
>
> 1. *Where a child's habitual residence cannot be established and jurisdiction cannot be determined on the basis of Article 12, the courts of the Member State where the child is present shall have jurisdiction.*
>
> 2. *Paragraph 1 shall also apply to refugee children or children internationally displaced because of disturbances occurring in their country.*

32. Article 20 covers interim protective measures. It applies in 'urgent cases' which, in practice, are likely to occur where the child is present in a local authority's area, but there has not yet been a determination of the child's habitual residence.

Article 20

Provisional, including protective, measures

1. *In urgent cases, the provisions of this Regulation shall not prevent the courts of a Member State from taking such provisional, including protective, measures in respect of persons or assets in that State as may be available under the law of that Member State, even if, under this Regulation, the court of another Member State has jurisdiction as to the substance of the matter.*

2. *The measures referred to in paragraph 1 shall cease to apply when the court of the Member State having jurisdiction under this Regulation as to the substance of the matter has taken the measures it considers appropriate.*

33. The measure must be '**urgent**' and '**provisional'**. Emergency protection orders and interim care and supervision orders fall within this definition. Where Article 20 applies, the provisions in section 38, Children Act 1989 apply in amended form to permit the local authority to apply for an interim care or supervision order in relation to the child for a limited period of time.[20] Any such order will only last until such time as the member state with jurisdiction has taken the measures it considers appropriate.[21] The ordinary requirement for provision of a care plan under CA 1989, s 31(3A) is disapplied in such a case.[22] Such proceedings are however 'specified proceedings' under CA 1989, s 41 for the purposes of representation of the child.[23] In other words, a guardian must be appointed.

34. It is important to note that any interim protective measure (EPO, ICO, ISO) is only enforceable in England and Wales. It does not have effect outside of the jurisdiction, even in another EU Member State: ***Parrucker v Vallés Pérez (No 1)*** **[2012] 1 FLR 903.**

[20] Parental Responsibility and Measures for the Protection of Children (International Obligations) (England and Wales and Northern Ireland) Regulations 2010, SI 2010/1898, reg 5

[21] Ibid, reg 5(2)(d)

[22] Ibid, reg 5(3)

[23] Ibid, reg 5(3)(c).

ii. Article 15(2)(c)

35. Article 15 works both ways: the English court can request that another jurisdiction accepts the proceedings and it can also request that the proceedings be transferred here. This is specifically provided for in Article 15(2)(c).

36. There may be a number of reasons why the English court would make this request, for example one or both of the holders of parental responsibility are based in England, or the child has siblings in this jurisdiction.

iii. Article 17 declaration

37. Under Article 17, a court must make a declaration when it has no jurisdiction. This is a mandatory obligation where the court as no jurisdiction under Brussels II Revised, and where the court of another Member State does have jurisdiction. This is distinct from the Article 13 (presence) scenario as under Article 17 jurisdiction is being exercised elsewhere. The court is under a duty to make this declaration even where it has been overlooked by the parties: ***Re E (Brussels II Revised: Vienna Convention: Reporting Restrictions)***. It goes without saying, however, that the parties should bring it to the court's attention if an Article 17 declaration is required.

1996 Hague Convention on the Protection of Children

38. The 1996 Convention came into force in England and Wales on 1 November 2012. It has the ambitious aim of providing a global system for the protection of children.

39. At the time of writing, there are 41 countries signed up to the 1996 Convention. There are notable absences, including the USA, China and India. The HCCH website provides a full list of signatories.[24]

40. Where Brussels II Revised and the 1996 Convention both apply, Brussels II Revised takes precedence [**Art.61 1996 Convention**]. Where the two states involved are EU

[24] http://www.hcch.net/index_en.php?act=conventions.status&cid=70#nonmem

Member States, and the measure is covered by Brussels II Revised, the 1996 Convention will not apply. The importance of the 1996 Convention therefore lies in those cases involving non-EU states which are signatories to the Convention.

41. Many of its provisions are similar if not identical to Brussels II Revised. The drafters of Brussels II Revised borrowed many of the provisions of the 1996 Convention, which at that stage had been ratified by very few countries. Article 8 (BIIR) is similar to Article 5 (1996); Article 13 (BIIR) is similar to Article 6 (1996) Article 15 (BIIR) is similar to Article 8(1996); and so on.

42. However, the 1996 Convention goes further than Brussels II Revised in providing a framework for cooperation and exchange of information between bodies responsible for child protection. It imposes a number of mandatory and discretionary duties on Central Authorities. The Central Authority for English cases is the International Child Abductions and Contact Unit (ICACU), but given ICACU's limited child protection remit it is likely that the duties will be passed on to children's services departments (the phrase used in the 1996 Convention is 'public bodies or other authorities', which is certainly wide enough to cover children's services departments).

Mandatory duties

43. The 1996 Convention imposes a number of mandatory duties, the most important of which are listed below:

a. **Article 31(c):** to provide assistance in discovering the whereabouts of a child where it appears that the child may be present and in need of protection within the territory of the requested state;

b. **Article 33:** similarly to Article 56 Brussels II Revised, where a competent authority is contemplating the placement of a child abroad it **must** consult with the Central Authority in the requested state where it is proposed that the child be placed. Again, the placement cannot happen without the consent of the requested state;

c. **Article 36:** in any case where the child is exposed to serious danger, the competent authorities of the contracting state must inform the authorities in the country where the child is habitually resident or present of the dangers involved and the measures taken. This duty does not apply where to transmit the information would be likely to place the child's person or property in danger [**Article 37**].

d. **Article 38:** public authorities shall bear their own costs in complying with the above obligations.

Discretionary duties

44. The 1996 Convention also imposes a number of duties which give authorities a discretion about whether they should be applied. The most important of these are:

a. **Article 32:** to provide a report on the situation of the child and consider taking protective measures, on the request of another Contracting State;

b. **Article 34:** where a protective measure is contemplated, the competent authority may request the authority in any other contracting state to communicate information relevant to the protection of the child;

c. **Article 35:** to provide help to facilitate rights of access at the request of another Contracting State. This could be used where one parent lives abroad but comes to England to attend contact sessions. The authority may charge a 'reasonable fee' for this service.

Protective measures in cases of urgency

45. As with Article 20 Brussels II Revised, the 1996 Convention makes provision in Article 11 for the interim protection of children. Articles 11 provide as follows:

Article 11

(1) In all cases of urgency, the authorities of any Contracting State in whose territory the child or property belonging to the child is present have jurisdiction to take any necessary measures of protection.

(2) The measures taken under the preceding paragraph with regard to a child habitually resident in a Contracting State shall lapse as soon as the authorities which have jurisdiction under Articles 5 to 10 have taken the measures required by the situation.

(3) The measures taken under paragraph 1 with regard to a child who is habitually resident in a non-Contracting State shall lapse in each Contracting State as soon as measures required by the situation and taken by the authorities of another State are recognised in the Contracting State in question.

46. Article 11 is broad enough to cover interim protective measures such as interim care and supervision orders. The measure will have effect until the court of jurisdiction puts in place the measures required by the situation. This goes further than Article 20 Brussels II Revised in that it opens the door to such measures having extra-territorial effect. As set out above, the CJEU has determined that interim protective measure made under Article 20 **do not** have extra-territorial effect: ***Parrucker***). The important point to note is that interim measures can be taken in urgent cases. These will continue to apply whether or not the other state is a signatory to the 1996 Convention, in accordance with Article 11. It should be noted, though, that such measures can only be temporary – Article 11 does not cover final care or supervision orders.

Michael Edwards

March 2015

Section 5

Re B-S
Emperor's New Clothes?

Sam King

RE B-S: EMPEROR'S NEW CLOTHES?

1) In **Re B [2013] 1 WLR 1911** in para 198, Lady Hale stated:

> *"It is quite clear that the test for severing the relationship between parent and child is very strict: only in exceptional circumstances and where motivated by* overriding requirements *pertaining to the child's welfare, in short, where nothing else will do."*

2) This was followed by the Judgment in Re B-S (Children) [2013] EWCA Civ 1146. The court said this at pa 44 :

> *"We emphasise the words "global, holistic evaluation". This point is crucial. The judicial task is to evaluate all the options, undertaking a global, holistic and (see* Re G *para 51) multi-faceted evaluation of the child's welfare which takes into account all the negatives and the positives, all the pros and cons, of each option".*

3) In talking of the process required for placement and adoption orders the court said that:

> *"45. ..a process which acknowledges that long-term public care, and in particular adoption contrary to the will of a parent, is 'the most draconian option', yet does not engage with the very detail of that option which renders it 'draconian' cannot be a full or effective process of evaluation. Since the phrase was first coined some years ago, judges now routinely make reference to the 'draconian' nature of permanent separation of parent and child and they frequently do so in the context of reference to 'proportionality'. Such descriptions are, of course, appropriate and correct, but there is a danger that these phrases may inadvertently become little more than formulaic judicial window-dressing if they are not backed up with a substantive consideration of what lies behind them and the impact of that on the individual child's welfare in the particular case before the court. If there was any doubt about the importance of avoiding that danger, such doubt has been firmly swept away by the very clear emphasis in* Re B *on the duty of the court actively to evaluate proportionality in every case."*

4) At para 54

> *"What is required is a balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives and each option is then compared, side by side, against the competing option or options."*

5) The decision was greeted by the profession as game changing. It required the application of rigor and an explicit balancing of weight and counterweight when considering the question of adoption. The case sent out the message that the court needed to focus upon two 'essentials' of good practice; firstly, there must be proper evidence that addresses all the options which are realistically possible and contains an analysis of the arguments for and against each option and secondly, there must be an adequately reasoned judgment. The judge must undertake a global and holistic evaluation of all the circumstances and not approach the issue in a linear fashion.

6) Meanwhile, with dwindling numbers of adoption orders being made, the decision was received with growing anxiety by the government. The data collected by the national Adoption Leadership Board revealed that local authority decisions that children should be adopted fell by 47%, from 1,830 to 960 between September 2013 and June 2014. In the same period, adoption orders fell by 54%, from 1,650 to 750. In that context, there was an attempt to redress the balance with the myth-busting report in which five myths were challenged and two truths put forward. They were :

Myths

1. The legal test for adoption has not changed.

2. To satisfy the courts, *all* alternative options must be considered.

3. If adoption is only appropriate where 'nothing else will do', foster care or special guardianship should be pursued instead.

4. Because it is a last resort, planning for adoption must wait.

5. The 26-week rule applies to placement orders.

Truths

1. High-quality assessment and evidence is essential in all cases.

2. The judgments criticised some cases where the test for granting leave to

oppose the making of an adoption order had been applied too harshly.

7) However, the President too was quick to seek to stem the tide that threatened to engulf the legal landscape when he stated in **Re R (A Child)** *[2014] EWCA Civ 1625* para 44:

"I wish to emphasise, with as much force as possible, that Re B-S was not intended to change and has not changed the law. Where adoption is in the child's *best* interests, local authorities must not shy away from seeking, nor courts from making, care orders with a plan for adoption, placement orders and adoption orders. The fact is that there are occasions when nothing but adoption will do, and it is essential in such cases that a child's welfare should not be compromised by keeping them within their family"

8) At para 60 of the Judgment he stated:

"As Pauffley J said in Re LRP (A Child) (Care Proceedings: Placement Order) [2013] EWHC 3974 (Fam), para 40, "the focus should be upon the sensible and practical possibilities rather than every potential outcome, however far-fetched." And, to the same effect, Baker J in Re HA (A Child) [2013] EWHC 3634 (Fam), para 28:

"rigorous analysis and comparison of the realistic options for the child's future … does not require a court in every case to set out in tabular format the arguments for and against every conceivable option. Such a course would tend to obscure, rather than enlighten, the reasoning process."

"Nothing else will do" does not mean that "everything else" has to be considered."

9) There was also a similar emphasis in the Judgment in the Court of Appeal in Re M-H (Placement Order: Correct Test to Dispense with Consent) [2014] EWCA Civ 1396

> *"[7] The 'correct test' that must be applied in any case in which a court is asked to dispense with a parent's consent to their child being placed for adoption is that statutorily provided by the sections 52 (1) (b) and 1 (4) of the Adoption and Children Act 2002 interpreted in the light of the admonitions of the President in* Re B-S (Children) *[2013] EWCA Civ 1146 which drew upon the judgments of the Supreme Court in* In Re B (A Child) (Care Proceedings: Threshold Criteria) *[2013] UKSC 33 and rehearsed previous jurisprudence on the point. The "message" is clearly laid out in paragraph 22 of Re B-S and needs no repetition here.*

[8] *However, I note that the terminology frequently deployed in arguments to this court and, no doubt to those at first instance, omit a significant element of the test as framed by both the Supreme Court and this court, which qualifies the literal interpretation of "nothing else will do". That is, the orders are to be made "only in exceptional circumstances and where motivated by the overriding requirements pertaining to the child's best interests." (See* In Re B*, paragraph 215). In doing so I make clear that this latter comment is not to seek to undermine the fundamental principle expressed in the judgment, merely to redress the difficulty created by the isolation and oft subsequently suggested interpretation of the words "nothing else will do" to the exclusion of any "overriding" welfare considerations in the particular child's case.*

[9] *It stands to reason that in any contested application there will always be another option to that being sought. In some cases the alternative option will be so imperfect as to merit summary dismissal. In others, the options will be more finely balanced and will call for critical and often anxious scrutiny. However, the fact that there is another credible option worthy of examination will not mean that the test of "nothing else will do" automatically bites.*

[10] *It couldn't possibly. Placement orders are made more often in anticipation of finding adoptive parents than with ones in mind. Plans go awry. Some adoption plans are over ambitious. Inevitably there will be a contingency plan, often for long term fostering. The fact of a contingency plan suggests that 'something else would do at a push', the exact counterpoint of a literal interpretation of "nothing else will do", and it would follow that the application would therefore fail at the outset.*

[11] *The "holistic" balancing exercise of the available options that must be deployed in applications concerning adoption is not so as to undertake a direct comparison of what probably would be best but in order to ascertain whether or not the particular child's welfare demands adoption. In doing so it may well be that some features of one or other option taken in isolation would produce a better outcome in one particular area for the child throughout minority and beyond. It would be intellectually dishonest not to acknowledge the benefits. But this is not to say that finding one or more benefits trumps all and means that it cannot be said that "nothing else will do". All will depend upon the judge's assessment of the whole picture determined by the particular characteristics and needs of the child in question no doubt often informed by the harm which s/he has suffered or been exposed to."*

10) Then, no more than a month later, the Court of Appeal, by way of refinement concluded in **CM v Blackburn with Darwen Borough Council** [2014] EWCA Civ 1479 that a placement order could be made by the court where the final care plan of the local authority proposed that there be a 'twin track' approach in which both adoption and (in this case, after six months) searching for both an adoptive and long term foster placement. The appellant contended that where the contingency plan allowed for long term fostering as an option for the child the local authority could not assert that nothing short of adoption would do. However, in that case (as in many others) there were clear welfare reasons for both of the options to be kept open and concurrent planning to be undertaken for the children. Certainly, it had been accepted in case law in the past that a dual track could be followed by the local authority and endorsed by the court (**Re P (Children) (Placement Orders: Parental Consent) [2008] EWCA Civ 535, [2008] 2 FLR 625 at [137] Re F (A Child) (Appeal from Placement Order) [2013] EWCA Civ 1277)**. That remains unchanged by Re B-S and Re B.

11) However, in determining the appeal, Ryder LJ in the same spirit as the President stated:

> "Re B *and* Re B-S *[do not]re-draw the statutory landscape. The statutory test has not changed. ...It is unhelpful to add any gloss to that statutory test as the gloss tends to cause the test to be substituted by other words or concepts. The test remains untouched but the court's approach to the evidence needed to satisfy the test and the approach of practitioners to the existing test without doubt needed revision. That can be seen in graphic form in the comments of the President in* Re B-S *at [30]...."*

12) Ryder LJ stated that neither Re B nor Re B-S created a new test or a new presumption.

> *" 'Nothing else will do' involves a process of deductive reasoning. It does not require there to be no other realistic option on the table, even less so no other option or that there is only one possible course for the child. It is not a standard of proof. It is a description of the conclusion of a process of deductive reasoning within which there has been a careful consideration of each of the realistic options that are available on the facts so that there is no other comparable option that will meet the best interests of the child.*

13) So perhaps Re B-S really is no more than a legal case of the emperor's new clothes. No change to the law, but a change to the way that the court conducts the process of deciding between the competing options for the child.

14) In this vein, no sooner have we the pronouncements in Re B-S about the need for some elasticity in the courts approach to the 26 week window at para 49...

> *49. We do not envisage that proper compliance with what we are demanding, which may well impose a more onerous burden on practitioners and judges, will conflict with the requirement, soon to be imposed by statute, that care cases are to be concluded within a maximum of 26 weeks. Critical to the success of the reforms is robust judicial case management from the outset of every care case. Case management judges must be astute to ensure that the directions they give are apt to the task and also to ensure that their directions are complied with. Never is this more important than in cases where the local authority's plan envisages adoption."*
>
> *50. If, despite all, the court does not have the kind of evidence we have identified, and is therefore not properly equipped to decide these issues, then an adjournment must be directed, even if this takes the case over 26 weeks. Where the proposal before the court is for non-consensual adoption, the issues are too grave, the stakes for all are too high, for the outcome to be determined by rigorous adherence to an inflexible timetable and justice thereby potentially denied.*

15) ...Than as if to place another gossamer thin layer of material to adorn the king's naked skin, we had the case of **Re S (A Child) [2014] EWCC B44** with its exposition upon the limited situations in which the 26 week window might be extended:

> *31. In what circumstances may the qualification in section 32(5) apply?*
>
> *32. This is not the occasion for any elaborate discussion of a question which, in the final analysis, can be determined only on a case by case basis. But some preliminary and necessarily tentative observations are appropriate.*
>
> *33. There will, as it seems to me, be three different forensic contexts in which an extension of the 26 week time limit in accordance with section 32(5) may be "necessary":*
>
> > *i) The first is where the case can be identified from the outset, or at least very early on, as one which it may not be possible to resolve justly within 26 weeks. Experience will no doubt identify the kind of cases that may fall within this category. Four examples which readily spring to mind (no doubt others will emerge) are (a) very heavy cases involving the most complex medical evidence where a separate fact finding hearing is*

directed in accordance with ***Re S (Split Hearing) [2014] EWCA Civ 25****, [2014] 2 FLR (forthcoming), para 29, (b) FDAC type cases (see further below), (c) cases with an international element where investigations or assessments have to be carried out abroad and (d) cases where the parent's disabilities require recourse to special assessments or measures (as to which see* ***Re C (A Child) [2014] EWCA Civ 128****, para 34).*

ii) The second is where, despite appropriately robust and vigorous judicial case management, something unexpectedly emerges to change the nature of the proceedings too late in the day to enable the case to be concluded justly within 26 weeks. Examples which come to mind are (a) cases proceeding on allegations of neglect or emotional harm where allegations of sexual abuse subsequently surface, (b) cases which are unexpectedly 'derailed' because of the death, serious illness or imprisonment of the proposed carer, and (c) cases where a realistic alternative family carer emerges late in the day.

iii) The third is where litigation failure on the part of one or more of the parties makes it impossible to complete the case justly within 26 weeks (the type of situation addressed in In re B-S, para 49).

16) In some respects this talk could end there. There may appear to be little more to say on the subject of the test for whether an adoption order should be made and whether it has changed. But, there is no doubt that the emphasis in an average care case has changed and if the majority of practitioners feel it, local authorities are alert to it, judgments are framed by it and the numbers of placement orders and adoptions have fallen accordingly then that seems to suggest that the Courts may not have changed the law but the cases have changed the way the law is applied.

17) There is no doubt that there can be a dynamic impact on outcomes when the calibration of options is explicit and, though there has been a readiness from some local authorities and guardians to distil the analysis of respective pros and cons into a tidy grid, there are cases where the lazy platitudes relied upon and received so readily in the past just will not do. There are others where the local authority will chase down an option within the extended family, even one presented late in the day, where once it might have rejected it, haunted as they are by the spectre of Re B-S.

18) And so some might say it should be. For were we not only recently reminded of the spirit of **Re KD (A Minor Ward) (Termination of Access) [1988] 1 AC 806, [1988] 2**

FLR 139, at 812 and 14 by the President and the prescient words of Lord Templeman when he said this:

> *'The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not in danger. Public authorities cannot improve on nature.'*

19) So it is perhaps timely that post Re B-S we have had the latest iteration of this golden thread in public law proceedings in the case of **Re A (A Child) [2015] EWFC 11** in which the President was moved to observe as follows:

> *"The third fundamental point is the reminder of the "wise and powerful words" of Hedley J in Re L (Care: Threshold Criteria) [2007] 1 FLR 2050, para 50:*
>
> > *"society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done."*
>
> *That approach was endorsed by the Supreme Court in In re B. There are two passages in the judgments of the Justices which develop the point and to which I need to draw particular attention. The first is in the judgment of Lord Wilson of Culworth JSC where he said (para 28):*
>
> *"[Counsel] seeks to develop Hedley J's point. He submits that:*
>
> *'many parents are hypochondriacs, many parents are criminals or benefit cheats, many parents discriminate against ethnic or sexual minorities, many parents support vile political parties or belong to unusual or militant religions. All of these follies are visited upon their children, who may well adopt or "model" them in their own lives but those children could not be removed for those reasons.'*
>
> *I agree with [counsel]'s submission".*

The other is the observation of Baroness Hale of Richmond JSC (para 143):

> *"We are all frail human beings, with our fair share of unattractive character traits, which sometimes manifest themselves in bad behaviours which may be copied by our children. But the State does not and cannot take away the children of all the people who commit crimes, who abuse alcohol or drugs, who suffer from physical or mental illnesses or disabilities, or who espouse antisocial political or religious beliefs."*

"It follows that I also agree with what His Honour Judge Jack said in North East Lincolnshire Council v G & L [2014] EWFC B192, a judgment that attracted some attention even whilst I was hearing this case:

> *"I deplore any form of domestic violence and I deplore parents who care for children when they are significantly under the influence of drink. But so far as Mr and Mrs C are concerned there is no evidence that I am aware of that any domestic violence between them or any drinking has had an adverse effect on any children who were in their care at the time when it took place. The reality is that in this country there must be tens of thousands of children who are cared for in homes where there is a degree of domestic violence (now very widely defined) and where parents on occasion drink more than they should, I am not condoning that for a moment, but the courts are not in the business of social engineering. The courts are not in the business of providing children with perfect homes. If we took into care and placed for adoption every child whose parents had had a domestic spat and every child whose parents on occasion had drunk too much then the care system would be overwhelmed and there would not be enough adoptive parents. So we have to have a degree of realism about prospective carers who come before the courts."*

There is a powerful message in these judgments which needs always to be borne in mind by local authorities, by social workers, by children's guardians and by family judges."

20) So we may interpolate that before ruling out a parent or the wider family members the professionals and the court should guard against too profound an intolerance of a degree of human frailty and imperfection.

21) In addition we have now had the first reported case in which an adoption has successfully been opposed: **A and B v Rotherham Metropolitan Borough Council**

[2014] EWFC 47. The facts of the case were that the child was made subject of care and placement order, which orders were ultimately not opposed by the mother. Throughout the proceeding the mother asserted that her partner was the father of the child. He agreed that this was the case.

22) The adoption application had been issued in January 2014. In March 2014, as the Judge found to be the case the real father found out about the proceedings and he sought to become involved. By the time of the final hearing he accepted that he could not care for the child. However, he did put forward his sister as a possible long term carer for the children. At the contested hearing it was accepted by everyone that if the child's true paternity had been known the care and placement orders would not have been made and the child would be living with the paternal Aunt (who was, by then, the subject of a positive assessment). The Judge was left with a choice between the now positively assessed paternal aunt and adoption. The allocated social worker supported by a child psychologist urged adoption as the only option. The father asked the court to dismiss the application and revoke the placement order then in force, allowing the Local Authority to place the child with the paternal Aunt under the pre-existing care order since those in the Local Authority management hierarchy committed to doing so and such was the Child's Guardian's recommendation.

23) The Judge came to the conclusion that the child's interests throughout his life were best served by no adoption order being made. He did not, as he explains in the judgment, apply the test of 'nothing else will do':

> *14 The legal framework as I have so far described it is agreed by all the advocates in the case, including that I must apply all the relevant parts of section 1 of the Act. In their written skeleton arguments and written final submissions, as well as in their brief oral final submissions, there has been some debate between the advocates as to whether, in applying section 1, I should adopt the approach that I should only make an adoption order if "nothing else will do". This led to some brief examination of the judgments of the Supreme Court in Re B (a child) [2013] UKSC 33, and some later judgments of the Court of Appeal in which that court appears to have been exercised by what the Supreme Court actually meant by what they said in Re B (most recently the judgments delivered by the Court of Appeal only two weeks ago on 18 November 2014 in CM v Blackburn with Darwen Borough Council [2014] EWCA Civ 1479).*

15 In my view that is a debate and territory into which I need not and should not enter. The legal and factual situations in those cases were different. In the present case, the child has already been lawfully and appropriately placed for adoption with A and B for over a year. A range of rights under Article 8 of the ECHR is engaged. There is a continuing legal relationship between the child and his paternal genetic family, with whom he has a father, grandmother, aunts, uncles and a paternal half sibling, but no current psychological relationship. He has never met any of them. (He also has several cousins but they are outside the definition of "relative" in section 144 (1) of the Act.) In this case the child unquestionably also has a private and family life and a home with A and B, and they with him, for which all three of them have the right to respect under Article 8. With so many Article 8 rights engaged and in competition, it does not seem to me to be helpful or necessary in the present case to add a gloss to section 1 of only making an adoption order if "nothing else will do". (Indeed Mr Nicholas Power might have argued on behalf of A and B, but wisely chose not to do so, that there could now be no interference with the Article 8 rights as between A and B and C mutually except if "necessary" within the meaning of Article 8(2).) Rather, I should simply make the welfare of the child throughout his life the paramount consideration; consider and have regard to all the relevant matters listed in section 1(4) and any other relevant matters; and make an adoption order if, but only if, doing so "would be better for the child than not doing so", as section 1(6) requires. If the balance of factors comes down against making an adoption order, then clearly I should not make one. If they are so evenly balanced that it is not possible to say that making an adoption order would be "better" for him than not doing so, then I should not do so. If, however, the balance does come down clearly in favour of making an adoption order, then, in the circumstances of this case, I should make one. I do not propose to add some additional hurdle or test of "nothing else will do".

24) I am not sure that that is right. I am not sure that I really understand the legal or logical basis for the distinction Holman J appears to make. Does the test dilute if the child has been placed within the prospective adopters' family for a long period? Surely that can be evaluated and put on the balance sheet when the court is considering whether "nothing else will do" but adoption?

25) However, the Judgment also reminds us of the role of the court in an adoption application in assessing the options. For in relation to what he described as a painful and harrowing case, Holman J accepted that in looking into the long-term there must be a degree of hypothesising and conjecture. Thus he stated at para 17:

There is one further "legal" matter which it is convenient to mention in this section of this judgment. At times during the hearing, when longer term risks or advantages were being mentioned or considered, Mr Power referred, understandably but somewhat dismissively, to "speculation". Advocates, and also judges, often do dismiss points as speculative or speculation. However, in relation to adoption, the Adoption and Children Act 2002 very clearly does require courts (and adoption agencies) to speculate. It requires, as the overarching duty, that the paramount consideration must be the child's welfare throughout his life. This child is still less than two. He is healthy, and his normal life expectancy may be around a further 80 years. It is probable (but speculative) that he and his half sister, F, and his cousin, G, will outlive all the adults in this case by many years. I am required by statute to take a very long term view, but I cannot gaze into a crystal ball. I can only speculate. More specifically, the court is required by section 1(4) (c) of the Act to have regard to "the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person." Whilst that paragraph requires the court to consider only the "likely" effect, any such consideration involves speculation; and (speaking generally) the further ahead one looks (and one must envisage a whole lifetime) the more speculative such consideration necessarily becomes. My decision in this case <u>does</u> include speculation. That is what Parliament has told me to do.

26) Finally, having been rapped on the knuckles by the Court of Appeal Mostyn J came out fighting when he later considered the remitted hearing in **<u>Re D [2014] EWHC 3388</u>**. The Learned Judge heard evidence in relation to the innate benefits of adoption for children and commented thus:

[35]*The proposition of the merits of adoption is advanced almost as a truism but if it is a truism it is interesting to speculate why only three out of 28 European Union countries allow forced or non-consensual adoption. One might ask: why are we so out of step with the rest of Europe? One might have thought if it was obvious that forced adoption was the gold standard the rest of Europe would have hastened to have adopted it. The relevance of this aspect of the case is surely obvious. This case, as I have demonstrated, could very easily have been tried in the Czech Republic. It was a fortuity that it was not. Had it been so tried there the orders sought by the Local Authority could not have been made. I accept, of course, that I must apply the law of England exclusively but in so doing the unique irrevocability of the orders sought has to play a prominent part in my judgment.*

27) There is no doubt that this played on Mostyn J's mind such that in his Judgment he indicated that his first choice was for the child to be placed with the foster carers (subject to them agreeing to be special guardians). If that was not their position, then he

favoured a return to the Czech Republic where the child would be placed in long term foster care. In so determining the Learned Judge stated at paragraph 43 of his Judgment:

> ***43]*** *In principle I consider that foster care in the Czech Republic is a preferable solution to the irrevocability of a care order and placement order although, in my judgment, it is not as preferable as a special guardianship order. My reason is that in this case the ethnicity factor and parental link I regard of critical importance and which must have the capacity of being preserved and should not be irrevocably severed on the facts of this case. I reject the argument made for the Local Authority by Mrs Rowley, and by Mr Veitch for the guardian, that this solution is replete with risks because the Czech court might return ED to his parents. If I might respectfully say so it is a highly chauvinistic, almost neo-colonial sentiment. If the Czech court does return ED to his parents it will be after a full hearing with the child represented by a guardian. Plainly there can be no serious suggestion made that the Czech court would not, in any hearing, properly promote the interests of ED. Only if both of these intermediate choices prove to be impossible will I be satisfied that nothing else will do and in those circumstances I would make on the evidence the care order and placement order.*

28) So, perhaps the Emperor's new clothes may turn out to be a coat of many colours...

Sam King

March 2015

Section 6

Speakers Profiles

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John Tughan QC

"He is focused and tenacious - a real fighter and excellent advocate."
Chambers and Partners

Experience

Year of Call: 1991
Year of Silk: 2015

Education

Campbell College, Belfast
Liverpool University, LLB (Hons) 1990

Profile

John's practice encompasses both private law and public law proceedings relating to children. He is experienced in the most complex cases and he regularly appears in high profile and complex matters. His experience (in both the private and public fields) includes cases involving sexual abuse, the death or injury of a child (including very complex medical evidence), intractable parental disputes, press injunctions, human rights applications, adoption and the inter-relationship with the judicial review jurisdiction. John represents all parties in such cases. He is experienced in lengthy and complex trials.

In private proceedings John is experienced in proceedings with intractable issues, internal and external relocation of children and serious and complex allegations. John is often instructed in the most difficult cases requiring expert inter-personal skills.

John is experienced in media management and applications for press reporting restrictions orders. This experience has included some of the most high profile cases in recent years and has included the “Baby P” litigation and the “Little Ted’s Nursery” scandal. Such issues often include both the national and international media.

John regularly advises local authorities on issues of policy and is often asked to draft such policies within a team of professionals. He enjoys such collaborative work.

John appears in Judicial Review proceedings that include issues of family law. Such issues include local authority policy, educational issues and the inter-relationship between the limits of the Court’s jurisdiction and the role of the local authority.

John has been continuously recommended by Chambers and Partners as a leading junior in the field of children law for a decade.

John does undertake direct access work.

John writes a quarterly updating article for Family Law Week.

Professional Memberships

Family Law Bar Association
Midlands Circuit
Inner Temple

Directories

Deals with both public and private law proceedings, including cases of serious or fatal injury or sexual abuse, or those concerning challenging medical evidence.

Expertise: "He believes in them and will fight for them however hopeless the case seems."

Chambers & Partners 2015

Represents children, parents and local authorities, among others, in complex and high-profile care cases, and enjoys a fine reputation for his work on matters pertaining to death, injury and sexual abuse.

Expertise: "He is focused and tenacious - a real fighter and an excellent advocate."
Chambers & Partners 2014

The "charming and well-prepared" John Tughan is a well-respected specialist in care proceedings and private law matters such as contact and residence.
Chambers & Partners 2013

John Tughan "wastes no time in getting to the gist of the matter," and stands out for his impressive public law children practice. He represents children, parents, interveners and the local authorities in the most complex matters.
Chambers and Partners 2012

John Tughan, meanwhile, is highly regarded for representing local authorities in public children law proceedings.

Chambers and Partners 2011

John Tughan's advocacy is clear, persuasive and direct, and he is well liked in the profession.

Chambers and Partners 2010

John Tughan is described as a "no nonsense barrister" with public and private law proceedings at the heart of his practice.
Chambers and Partners 2009

His "firm but approachable style" and "ability to smooth the waters" has won him a loyal following of many solicitors [Chambers & Partners 2005]. John is described as “excellent in both advocacy and substantive law.”
Chambers & Partners 2008

Practice areas

- Private Law
- Public Law

Dispute resolution

- Early Neutral Evaluator

Direct Access

- Direct Access

Cases

G (A Child) [2015]
[2015] EWCA Civ 119

Re G (A Child) (2015)
[2015] EWCA Civ 119

Re AK and MK (Fact finding: physical injuries) (2013)
[2013] EWHC 3158 (Fam)

Re L [2012]
[2012] EWHC 3069 (Fam)

A Local Authority and C and D and A & B (by their Childrens Guardian)
[2012] EWHC 1975 (Fam)

A Local Authority v C (2011)
[2011] EWHC 231 (Fam)

F and L v A Local Authority and A
[2009] EWHC 140 (Fam), [2009] 2 FLR 1312, Hedley J.

R (on the application of (1) Ainsworth T (2) Thermutis T (3) S v Newham London Borough Council (2008)
[2008] EWHC 2640 (Admin); (2009) 1 FLR 311

Lambeth London Borough Council (applicant) v (1) S (2) C (3) v (4) J (by his children's guardian n) (respondents) & (1) Commissioner of Police of the Metropolis (2) Secretary of State for the Home Department (intervenors) [2007]
1 FLR 152, [2006] EWHC 326 (Fam)

B County Council v R (2007)
[2007] EWHC 2742 (Fam); (2008) 1 FLR 1252

Re L (Special Guardianship: Surname)
2 FLR 50, CA [2007] EWCA Civ 196

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Alison Grief QC

"Has the ability to grasp complex medical evidence and get straight to the issues. Alison is very experienced in complex cases, particularly those involving deaths of children. She is extremely hard-working, thorough and very approachable." Chambers & Partners 2015

Experience

Year of Call: 1990
Year of Silk: 2015

Education

LLB (hons)

Appointments

Deputy Assistant Deputy Coroner Mid Kent and Medway
Deputy Assistant Deputy Coroner Hertfordshire

Recorder 2012

Profile

Alison is a specialist in the law relating to children. Her practice consists of approximately 80% Public Law acting for parents, children's guardians and competent children, local authorities and the Official Solicitor.

She has particular expertise in the following areas:

- infant deaths and near fatal injuries
- Complex injuries, in particular head injuries,
- fabricated/induced illness
- Sexual abuse including inter-familial and inter-generational abuse, incest, internet child pornography, sado-masochism, children who are both victim and abuser
- Running Care proceedings where there are concurrent criminal proceedings for murder/manslaughter/allowing a death/assault/child cruelty and neglect
- Adoption and Special Guardianship
- Judicial Review in relation to children's rights i.e. local authority duties to provide services, education and accommodation
- Private Law Children proceedings in which:-
  - allegations of abuse are raised
  - an expert (including the CAFCASS officer) need detailed cross examination
  - there is an international element

Her skills include:

- instructed by all parties for her forensic skills. Cases frequently run into thousands of pages which include contemporaneous medical records;
- attention to detail and analysis underpin cross examination techniques of experts and lay witnesses alike, and are cited by instructing

solicitors as one of their main reasons for instructing her;
- the capacity to master medical issues underpinned by regular research at the Institute of Child Health Library in order to cross examine experts in relation to their opinions and analysis.
- frequently brought into a case to 'trouble shoot' when it has become unmanageable by others, where the local authority has a conflict within its organisation, or where the children need proactive representation in order to secure the optimal Care Plan for them
- Alison's presentation in court is underpinned by her written work for which she has received particular praise from Mrs Justice Pauffley [extract of judgment available on request].
- Good knowledge of PII and disclosure arguments in relation to concurrent criminal proceedings
- The above is delivered in a straightforward down to earth manner which both lay and professional clients feel comfortable with

Alison has two very young boys and lives out of London. She is the Chairperson of their local Pre-School.

Professional Memberships

Bar Pro Bono Unit
Family Law Bar Association
Association of Lawyers for Children
Lawyers for Liberty
Co-opted member of FLBA sub-committee 2009
Family Mediation Assocation

Directories

Has a broad practice that encompasses complex areas of public and private law children matters, including allegations of physical, emotional and sexual abuse, the death of children and international relocations.

Expertise: "Has the ability to grasp complex medical evidence and get straight to the issues. Alison is very experienced in complex cases, particularly those involving deaths of children. She is extremely hard-working, thorough and very approachable."

Chambers & Partners 2015

Principally focuses on public law disputes and is well versed in all areas of children matters, from deaths and non-accidental injuries to fabricated/induced illness and sexual abuse cases.

Expertise: "Absolutely phenomenal, she's an expert in her field. She makes you feel like you are with a heavy hitter. Watching her perform in court is amazing."

Chambers & Partners 2014

Alison Grief enters the rankings for the first time after receiving strong feedback from the market. She practises exclusively in children law, concentrating in the main on public law cases such as sexual abuse and non-accidental injury. Sources relate that "she works extraordinarily hard on her cases and goes to the nth degree in terms of detail." One esteemed QC labelled her "a silk in the making." Recommended as a leading Family Junior in Chambers and Partners 2013

Practice areas

- Private Law
- Public Law

Dispute resolution

- Mediation
- Early Neutral Evaluator

Direct Access

- Direct Access

Awards

Cases

A Local Authority v DB & Others [2013]
[2013] EWHC 4066 (Fam)

Hertfordshire County Council v H [2013]

[2013] EWHC 4049 (Fam)

A London Borough v A [2012]
[2012] EWHC 2203 (Fam)

Re A (Children) (2012)
[2012] EWCA Civ 1278

A London Borough v M [2012]
awaiting FLR reporting

A Local Authority v S (2009)
[2009] EWHC 2115 (Fam); (2010) 1 FLR 1560

Re B (Children) (2008)
[2008] UKHL 35; (2008) 3 WLR 1 : (2008) 4 All ER 1 : (2008) 2 FLR 141 : (2009) 1 AC 11 : Times, June 12, 2008

Re T (A Child) (2007)
[2007] EWHC 455 (Fam)

Re K (Children) (2004)
[2004] EWCA Civ 1181

A Local Authority V C & & Others (2003)
[2003] EWHC 2206 (Fam)

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Sam King

She has a confident and reassuring manner." "She has a wonderful hands-on approach to cases, and is a joy to work with."
Chambers & Partners - Band 1

Experience
Year of Call: 1990

Education
BA (Cantab)
MA (Law) Selwyn College, Cambridge University
Qualified for admission to the New York Bar 1989

Profile
Sam's main area of practice is in children's law. She is regularly instructed in both private and public law cases. She represents all parties in complex cases involving allegations of sexual abuse or where there are psycho-sexual factors in issue, non-accidental injury, psychiatric ill-health, intractable contact cases and where shared residence is in issue. Sam's practice increasingly reflects her interest in the law relating to surrogacy, reproductive technologies and co-parenting arrangements.

She also appears in leave to remove applications and domestic and international adoption cases and is a member of chambers' international movement of children group. Sam has an interest in forced marriage and the children's law cases which arise in that context.

Sam often gives lectures and seminars to lawyers and other professionals. Her lectures include talks on the subject of evidence gathering in respect of sexual abuse (LexisNexis), recent developments in the area of private law (LexisNexis), adoption and placement orders (4pb and Family Law Week). She has recently given seminars on routes to parenthood under the HFEA 2008 (Resolutions London) and in respect of international adoption and surrogacy.

Professional Memberships
Middle Temple
FLBA

Directories
Tackles a broad range of public and private law children work, including cases involving complex issues of surrogacy, non-accidental injury and the examination of complicated matters of medical evidence.
Expertise: "She has a confident and reassuring manner." "She has a wonderful hands-on approach to cases, and is a joy to work with."
Chambers & Partners - Band 1

Sam King - 'A delight to work with, and a formidable advocate.'
Recommended as a Leading Family Junior in the area of Children Law
Legal 500 2014

Draws much praise for her work in complex care cases, including those matters concerning sexual abuse and parents/children with mental health problems.

Expertise: "Outstanding. She's a brilliant advocate, who is incredibly bright and good at handling clients. She is just your dream counsel."

Chambers & Partners 2014
Ranked in Band 1

Sam King Provides 'clear and focused advice'.
Recommended as a Leading Family Junior in the area of Children Law
Legal 500 2013

The "incisive and pragmatic" Samantha King has a tremendous reputation in children law matters involving care and medical dimensions. Sources suggest that she is a "very accomplished practitioner" who can "make a hopeless case appear to have merit."
Recommended as a Leading Family Junior in Chambers and Partners 2013 (Ranked Band 1)

Sam King, who is ‘pre-eminent in the field of public law’.
Recommended as a Leading Family Junior in The Legal 500 2012

Outstanding performer, Samantha King, who handles a wide range of children matters, both public and private. Sources describe her as a “very smart and impressive advocate who is passionate, experienced and tenacious.”
Recommended as a Leading Family Junior in Chambers and Partners 2012 (Ranked Band 1)

Sam King is ‘outstanding’.
Recommended as a Leading Family Junior in The Legal 500 2011

Samantha Kingrepresents the full range of parties in public children law. She is praised for her “solid understanding of medical detail and her intuitive feel for strategy.”
Recommended as a Leading Family Junior Chambers and Partners **2011** (Ranked Band 1)

Samantha King, who frequently acts for local authorities in care cases.
Recommended as a Leading Family Junior Chambers and Partners **2010**

Sam King is ‘outstanding’, ‘especially in public law’.
Recommended as a Leading Family Junior in The Legal 500 **2010**

Samantha King has been around the block in relation to both private and public law children cases, and is recognised for her exemplary work in care proceedings.
Recommended as a Leading Family Junior in the area of Children - Chambers and Partners **2009**

Chambers and Partners say Sam is “experienced and extremely competent” in child care cases. “Really getting into the papers” and “good with difficult clients,” she also has an interest in international child abduction matters.

Practice areas

- Private Law
- Public Law
- International
- Court of Protection

Direct Access

- Direct Access

Cases

Re S (A Child) (Habitual Residence & Child's Objections) (Brazil) (2015)
[2015] EWCA Civ 2

Re D (A Child) (2014)
AC9601784

AVH v (1) SI (2) SIV (By Her Guardian Judith Bennett-Hernandez) (2014)
[2014] EWHC 2938 (Fam)

Re P (Findings of Fact) (2014)
[2014] EWCA Civ 89

IA (A Child) [2013]
[2013] EWHC 2499 (Fam)

M (2013)
2013 EWHC 1901 (Fam)

Hertfordshire County Council v H [2013]
[2013] EWHC 4049 (Fam)

Re C (A Child) [2013]
[2013] EWHC 2413 (Fam)

Re G (A Minor); Re Z (A Minor) [2013] EWHC 134 (Fam)
[2013] EWHC 134 (Fam)

W (A Child) [2012]
[2012] EWCA Civ 1828

T v T (2010)
[2010] EWCA Civ 1366

Re D-R (Adult: Contact) (1999)
(1999) 1 FLR 1161 : Times, February 8, 1999

Re M (A Minor) (Adoption or Residence Order) (1997)
(1998) 1 FLR 570

Re G (Minors) (Interim Care Order) (1993)
(1993) 2 FCR 557 : (1993) Fam Law 672 : Times, August 2, 1993

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Dorothea Gartland

"A safe pair of hands in heavyweight, demanding and complex cases."
Legal 500 2014

Experience
Year of Call: 2004

Education
Cambridge University MA Modern Languages
CPE London Metropolitan
BVC ICSL

Languages
French and German

Appointments
Management committee of GALOP
2013 Independent Adjudicator Legal Aid Agency

Profile
Dorothea specialises in the law relating to children. She is hard working and a committed advocate.

In 2009 Dorothea won the ALC 'Outstanding newcomer in the field of Children Law'.

Professional Memberships
Family Law Bar Association
Association of Lawyers for Children
Inner Temple
Affiliate Member of Resolution

Directories
'A safe pair of hands in heavyweight, demanding and complex cases.' Recommended as a Leading Junior in the area of Child Law
Legal 500 2014

Recommended as a Leading Junior in the area of Child Law
Legal 500 2013

Dorothea Gartland possesses 'considerable intellectual acumen, and is extremely thorough'.
Recommended as a Leading Junior in the area of Child Law in the Legal 500 2012

Practice areas
- Private Law
- Public Law

- International
- Court of Protection

Dispute resolution

- Collaborative Lawyer
- Mediation

Direct Access

- Direct Access

Cases

X (Applicant) v Y (Respondent) & St Bartholomew's Hospital Centre & for reproductive medicine (CRM) (Intervener) & CAFCASS Legal (Advocate to the court) (2015)
[2015] EWFC 13

Re M (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal) [2015]
[2015] EWCA Civ 26

Re MA [2014]
[2014] EWHC 3448 (Fam)

T (Children) [2012]
[2012] UKSC 36

LA v (1) X (2) T (3) R (Respondents) & (1) DJ (2) PJ & SJ (Interveners) (2011)
[2012] 2 FLR 456 : [2012] Fam Law 392; [2011] EWHC 3401 (Fam)

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Andrew Powell

Regularly appears in court on all matters relating to children in the private, public and international sphere. Andrew is a composed, practical and dynamic advocate.

Experience

Year of Call: 2008

Education

University of Manchester (BSocSc Social Anthropology First Class)
University of Leeds (LLM)
BPP Law School (BVC)
Pegasus Scholarship 2013
Bedingfield Scholarship (Gray's Inn) 2007
Mooting Finalist University of Leeds 2006
Consitutional Law Essay Prize (University of Leeds) 2005
The Professor Max Gluckman Prize (University of Manchester - Awarded for Highest First Class Degree)

Profile

Andrew specialises in all areas of family law, with an emphasis on children work. Andrew has appeared on his own in all levels of court including the Court of Appeal. He has been led in the High Court and in the Court of Appeal in public law and child abduction matters. Solicitors and lay clients find that he adopts an approachable and personable style.

In private law matters Andrew accepts instructions across a broad range of cases, including international and internal relocation.

Andrew has a particular interest in the law relating to surrogacy and the Human Fertilisation and Embryology Act 2008 and disputes concerning psychological and biological parenthood. Andrew has represented a wide range of commissioning parents in their application for parental orders following an international surrogacy arrangement.

After receiving a Pegasus Scholarship from Inner Temple, Andrew spent 3 months in 2014, working at a boutique law firm in Los Angeles specialising in fertility and surrogacy law. Since his return from Los Angeles, Andrew has been writing the Surrogacy update for Family Law Week.

In financial remedy proceedings, Andrew represents clients at FDAs, FDRs and final hearings.

In public law matters, Andrew has experience in proceedings involving complex medical evidence. He was led by Kate Branigan QC in the High Court in a 4 week fact finding hearing in a case concerning allegations of non-accidental injuries and fabricated or induced illness (Re IB and EB [2014] EWHC 369 (Fam)). He has appeared in the Crown Court in Public Interest Immunity applications.

Andrew also has experience appearing in the Court of Protection, and is keen to expand his practice in this area of law. In 2013 Andrew was shortlisted for the Young Family Barrister of the year award.

Outside work, Andrew enjoys running and cycling and is a volunteer at the Toynbee Hall Legal Advice Centre. Prior to coming to the Bar he read social anthropology at university obtaining the highest first class degree in his year.

Professional Memberships

Gray's Inn
Family Law Bar Association
Association of Lawyers for Children
South Eastern Circuit
FLBA National committee member (2011-2014)
Associate member of the American Bar Association (Family law section)

Practice areas

- Financial Remedies
- Private Law
- Public Law
- International
- Court of Protection

Direct Access

- Direct Access

Awards

Cases

Re IB and EB 2014
[2014] EWHC 369 (fam)

Re P-M [2013]
[2013] EWHC 2328 (Fam)

Re C (A Child) (2012)
[2012] EWCA Civ 1281

H (A Child) [2012]
[2012] EWCA Civ 913

R v (1) A Local Authority (2) B (3) ABC (By Her Children's Guardian) (2011)
[2011] EWCA Civ 1451

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Michael Edwards

We would like to say thank you, for all your expertise, hard work and the professionalism you put into the conduct of this demanding and involved case and in achieving the successful outcome. Your confidence and calmness has been reassuring and you have been a pleasure to work with.
Local Authority, Senior Solicitor

Experience

Year of Call: 2010

Education

University of Bristol, History (BA Hons) (First Class, placed first in year overall)
Awarded the Gardenhurst Prize, Graham Robertson Scholarship City University, GDL (Distinction)
BPP Law School, BVC (Very Competent) Exhibition Award and
Poland Prize (Inner Temple)

Profile

Michael has a broad practice across the full range of family law. He has appeared in a number of high profile cases in international child abduction, financial remedies, care proceedings and private law. He appears regularly in the High Court and has been led in the Court of Appeal and the Supreme Court.

International:
Michael has a particular specialism in cases with an international element, including child abduction, leave to remove and cases under the Brussels II revised regulation and 1996 Hague Convention. He has appeared in a number of reported cases including:

Re KL (A Child) [2013] [2013] UKSC 75
Supreme Court, representing Reunite with Teertha Gupta QC in their intervention in the Supreme Court.

Re KP (A Child) (2014) [2014] EWCA Civ 554
Court of Appeal, representing the child with Teertha Gupta QC. The Court gave guidance on the circumstances in which a judge should meet with the child in child abduction proceedings.

NN v ZZ & Ors [2013] [2013] EWHC 2261 (Fam)
High Court, Peter Jackson J, Michael represented the paternal aunt and uncle in a 5-day fact finding hearing within ‘stranded spouse’ proceedings.

AB v TB (Temporary Removal to Jordan) [2014] EWHC 4663 (Fam)
Michael successfully represented the father in his application to take his two children on holiday to Jordan, against the respondent’s objections.

Financial remedies:
Michael is developing a strong financial remedies practice, covering the full range of applications including Schedule 1, TOLATA and all applications under the MCA 1973.

In 2014, he was led by Charles Hale QC in a long-running, complex financial remedies case involving allegations of fraud and conspiracy.

Care proceedings:
Michael has been instructed on a number of cases involving the death of a child:

A (Death of a Baby), Re [2011] EWHC 2754 (Fam)
Led by Alison Grief for the local authority in a three-week fact finding hearing before Peter Jackson J. The court made all of the findings sought by the Local Authority, including that the father was responsible for the death of his two-week old son. Michael represented the authority in the father's unsuccessful appeal to the Court of Appeal in A (Children) [2012] EWCA Civ 1278.

A Local Authority v DB & Others [2013] [2013] EWHC 4066 (Fam)

Led by Alison Grief in a two-week 'baby-shaking' case before Keehan J.

Michael is currently instructed with Alex Verdan QC on behalf of a local authority in a case involving the death of a child.

Private law:
Michael appears on behalf of parents and children in private law proceedings. He has appeared in a number of 'intractable hostility' cases and cases in which one parent has made allegations of sexual abuse against the other.

Other experience:
In 2014, Michael was awarded a Pegasus Scholarship from the Inner Temple to work in Sarajevo, Bosnia, for the human rights charity, TRIAL (Track Impunity Always). He spent three months in Sarajevo working on war crimes trials with a particular focus on sexual violence cases.

Prior to coming to the Bar, Michael worked in the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia in The Hague.

Before pupillage, Michael worked for a leading London-based family law firm. He worked as legal assistant Juliet Oury, who chairs the London panel of lawyers who represent prisoners in the Caribbean in their final appeal to the Privy Council. He also worked at the Islington Legal Advice Center, a weekly drop-in service which provides free legal advice to members of the local community.

Michael enjoys watching and playing cricket. He represented the Bar of England and Wales in the Lawyers' Cricket World Cup in Delhi in October 2013.

Professional Memberships
Family Law Bar Association
Inner Temple

Practice areas
- Financial Remedies
- Private Law
- Public Law
- International

Direct Access
- Direct Access

Cases
AB v TB (Temporary Removal to Jordan) [2014]
[2014] EWHC 4663 (Fam)

Re KP (A Child) (2014)
[2014] EWCA Civ 554

A Local Authority v DB & Others [2013]
[2013] EWHC 4066 (Fam)

Re KL (A Child) [2013]
[2013] UKSC 75

Re LC (Children) (2013)
[2013] EWCA Civ 1058

NN v ZZ & Ors [2013]
[2013] EWHC 2261 (Fam)

DL (Appellant) v EL (Respondent) & (1) Reunite International Child Abduction Centre (2) Centre for family law and practice (Interveners) (2013)
[2013] EWCA Civ 865

C (Care: Contact)

[2012] 2 FCR 325; [2011] EWCA Civ 1774

Re C (Children) (2011)
[2011] EWCA Civ 1230

Section 7

Members List

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Barristers

4 Paper Buildings is ‘one of the best family law sets’, and one of the few chambers in London that has real strength in depth in children law as well as family finance work. It is also adept at handling cases with an International dimension, and Court of Protection work, meaning ‘there is a good barrister available for all types of family disputes’.
The Legal 500 2014

Barristers

Alex Verdan QC
Call: 1987 | Silk: 2006
Head of Chambers

Jonathan Cohen QC
Call: 1974 | Silk: 1997

Baroness Scotland QC
Call: 1977 | Silk: 1991

Henry Setright QC
Call: 1979 | Silk: 2001

Marcus Scott-Manderson QC
Call: 1980 | Silk: 2006

Kate Branigan QC
Call: 1985 | Silk: 2006

Jo Delahunty QC
Call: 1986 | Silk: 2006

Michael Sternberg QC
Call: 1975 | Silk: 2008

Catherine Wood QC
Call: 1985 | Silk: 2011

Rex Howling QC
Call: 1991 | Silk: 2011

Teertha Gupta QC
Call: 1990 | Silk: 2012

David Williams QC
Call: 1990 | Silk: 2013

Charles Hale QC
Call: 1992 | Silk: 2014

Christopher Hames QC
Call: 1987 | Silk: 2015

Alison Grief QC
Call: 1990 | Silk: 2015

John Tughan QC
Call: 1991 | Silk: 2015

Brian Jubb
Call: 1971

Amanda Barrington-Smyth
Call: 1972

Robin Barda
Call: 1975

Dermot Main Thompson
Call: 1977

Jane Rayson
Call: 1982

Mark Johnstone
Call: 1984

Elizabeth Coleman
Call: 1985

Alistair G Perkins
Call: 1986

Stephen Lyon
Call: 1987

James Shaw
Call: 1988

Mark Jarman
Call: 1989

Sally Bradley
Call: 1989

Barbara Mills
Call: 1990

Joy Brereton
Call: 1990

Joanne Brown
Call: 1990

Sam King
Call: 1990

David Bedingfield
Call: 1991

Cyrus Larizadeh
Call: 1992

Michael Simon
Call: 1992

Justin Ageros
Call: 1993

Rob Littlewood
Call: 1993

Paul Hepher
Call: 1994

Cliona Papazian
Call: 1994

Judith Murray
Call: 1994

Ruth Kirby
Call: 1994

Sarah Lewis
Call: 1995

Nicholas Fairbank
Call: 1996

James Copley
Call: 1997

Justine Johnston
Call: 1997

Oliver Jones
Call: 1998

Lucy Cheetham
Call: 1999

Hassan Khan
Call: 1999

Cleo Perry
Call: 2000

Harry Gates
Call: 2001

Rebecca Foulkes
Call: 2001

Katie Wood
Call: 2001

Rhiannon Lloyd
Call: 2002

Kate Van Rol
Call: 2002

Ceri White
Call: 2002

Matthew Persson
Call: 2003

Dorothea Gartland
Call: 2004

Francesca Dowse
Call: 2004

Greg Davies
Call: 2005

Samantha Woodham
Call: 2006

Laura Morley
Call: 2006

Nicola Wallace
Call: 2006

Michael Gration
Call: 2007

Jacqueline Renton
Call: 2007

Andrew Powell
Call: 2008

Henry Clayton
Call: 2007

Sophie Connors
Call: 2009

Michael Edwards
Call: 2010

Harry Nosworthy
Call: 2010

Rachel Chisholm
Call: 2010

Jonathan Evans
Call: 2010

Julia Townend
Call: 2011

Zoe Taylor
Call: 2011