4 PAPER BUILDINGS

4PB Private Client Conference 2016:

CONTEMPORARY ISSUES IN INTERNATIONAL AND DOMESTIC FAMILY LAW

5 CPD – BTM/CHLS

23RD JUNE 2016

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Section 1

4 Paper Buildings: About Us

Four Paper Buildings

WE ARE:

- The UK's largest chambers of family law barristers, with 75 tenants including 17 Silks
- Recommended by the leading legal directories
- Instructed by the country's premier family law practitioners
- Regularly involved in landmark developments in family law and family justice

WE PROVIDE:

- Expert, practical legal advice in all areas of family law
- Powerful and effective court advocacy
- Out-of-court family dispute resolution services

AREAS OF EXPERTISE:

4PB is a leading chambers for advice and advocacy in all areas of family law, with barristers appearing before every level of court, nationally and internationally, and in leading cases in each area of family law and court of protection.

Chambers undertakes work in:

- Financial Remedies after divorce, separation, dissolution or death;
- Children: Private Law (children's arrangements)
- Children: Public Law (care and adoption)
- International children law
- Applications in the Court of Protection

4 Paper Buildings is consistently ranked as a leading family set of barristers' chambers, with currently 30 members recommended in the legal directories as leaders in all areas of family law. Chambers and its members are regularly nominated and win awards for excellence in providing legal services.

WHAT THE LEGAL DIRECTORIES SAY:

'A clear example of how excellence breeds excellence'. 'It offers market-leading depth and expertise in all aspects of children law, and also commendable experience in financial matters'. **Chambers & Partners 2016**

'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'. **Chambers & Partners 2015**

'A fantastic set with brilliant barristers at all levels', 4 Paper Buildings is well placed to serve international family finance clients. Clerks Michael Reeves and Paul Hennessey 'provide a brilliant service'. **Legal 500 2015**

4 Paper Buildings, Temple, London, EC4Y 7EX
T 0207 427 5200 **F** 020 7353 4979 **DX** LDE 1035 **E** clerks@4pb.com **W** 4pb.com

Section 2

Conference Scenario

4PB Private Client Seminar 23rd June
THE BETTE-RHIN FAMILY

This is the international family *The Bette-Rhin's*, whose turbulent family life will be the focus of our contemporary analysis of domestic and international family law.

While many of the facts may seem familiar to you they are not based upon real clients. Any coincidence to anyone of your current cases is entirely intentional. The law is as at the 23 June 2016 – If the UK leaves the EU, we might have to think again…

The Family

- Gerhard Rhin: Husband/Father: French national, scion of family of French industrialists. Currently CEO of start-up business providing software security applications to banking industry. IPO proposed in 2017.
- Lydia Bette: Wife/Mother. Professor of Islamic Art History at London University. French - Moroccan
- Esme Bette-Rhin: 15 year old daughter. Mature and articulate.
- Rudolph Bette-Rhin: 7 year old son; loves his football.

The Background

Gerhard and Lydia met 20 years ago whilst studying at the Sorbonne. They married in 1998 in Paris. They opted for a separation of property regime. In 2000 they moved to London when Gerhard's family took over a UK based computing firm in Cambridge. Gerhard became CEO. Lydia became a lecturer at UL. Esme and Rudolph were born in England in 2001 and 2009 respectively.

From 2002-2006 Lydia and Esme lived largely in Morocco whilst Lydia's sister was diagnosed with and subsequently died of cancer. They returned to London and Paris frequently. In 2006 they returned to London. Lydia retains strong links with Morocco as her elderly mother and father and brother live there. Her father is a senior civil servant and her brother a lawyer.

Whilst Lydia and Esme were in Morocco Gerhard spent much of his time in Paris and whilst there had an affair. He purchased a run-down former brothel in his sole name which he converted into apartments. It is now worth £1.5million. He owns a substantial shareholding in the family business all of which he owned prior to the marriage.

In 2006 the family resumed life together in London. A house was purchased in Wandsworth, London which is now worth £5million. It is also in Gerhard's sole name. Lydia has no real property in her name and very limited savings. The children have been educated privately. Since about 2012 Gerhard has had "a problem", with alcohol. The marriage has been deteriorating. Lydia has started an affair with a friend of her brother who is a junior member of the judiciary in Morocco.

In 2014 Gerhard left the family business and with 2 colleagues commenced a start-up business. He lived on the dividends from the shareholding whilst he sought to develop the business.

In June 2015 Gerhard discovered the affair.

In July 2015 Gerhard started divorce proceedings in Paris. He has however done nothing to progress it. Gerhard has cut off all financial support for Lydia. Gerhard's dividend income is £150,000 pa. The start-up business has taken off and he is taking a salary of £150,000 and a bonus but he hasn't yet disclosed how much. He and his partners discussed the possibility an IPO in 2017. He has, with all the stress, been drinking heavily. His partners are deeply concerned with his general performance.

In February 2016 Lydia, frustrated (and advised), started divorce proceedings in England. Lydia's salary as Professor of Islamic Art is £38,000. (Whether the funding for her post continues if there is a *Brexit* remains to be seen…).

The parties continue to live under the same roof. Esme has spent the last 2 years boarding at a girls school in Paris. Summer vacations have been spent between Morocco and south of France. Easter and Christmases are in London. Rudolph attends Wetherby Prep. He is a talented footballer with some talented friends.

The Incident

After an occasion when Gerhard has consumed two bottles of wine a huge row erupts when Lydia taunts him with her relationship. Rudolph overhears what takes place. Gerhard is arrested by police for breach of the peace. Whilst he is in custody Lydia changes the locks. Gerhard admits himself to a rehabilitation unit for 2 weeks to 'dry out'

Lydia wishes to progress her divorce here in London. She says Gerhard has done nothing to progress matters in Paris. She seeks maintenance and capital provision.

The Children's Arrangements

Lydia will only permit Gerhard to have supervised contact with the children at a centre and has issue an application for a PSO to prevent him removing them from her care or from the UK. She does not have the funds to pursue her applications, however. She maintains the English court has jurisdiction because both parties are habitually resident here. She says the English court also has jurisdiction over the children based on their habitual residence.

Gerhard wishes to pursue his divorce in Paris. On his discharge from rehab he has rented a small flat close to the family home. He wants unsupervised contact. He maintains France is the correct forum for the divorce and he issued on the basis of their nationality.

Costs Funding/LSPO

Lydia issues an application for an LSPO re: divorce and financial remedy and for costs funding provision in relation to the children.

Gerhard opposes it on the basis that she has access to funding either from her family or through litigation loans. He says his family have cut him off and his partners are seeking to oust him from the business. He maintains he has stopped drinking and is no risk to the children. He says he can not pay for her lawyers and his...

Jurisdiction on Divorce

Lydia has issued an application for
(a) A stay of Gerhard's divorce; and
(b) A declaration that the jurisdiction of the French court has not been established; and
(c) An anti-suit injunction.

Jurisdiction over the Children

Gerhard disputes the jurisdiction of the English court. He maintains that Esme is habitually resident in France and that as France has jurisdiction over her it would be more sensible for any dispute over Rudolph to be heard there and that if necessary at Art 15 transfer should take place.

Esme, confident and upset, contacts Cafcass and tells them she wants to be involved. Cafcass contacts the court and the court appoints Cafcass as her FPR 16.4 guardian.

It is likely that the court may need to hear from Esme.

Expert Evidence

The court has ordered hair strand testing and a psychiatric report on Gerhard.

The hair strand tests for the last 3 months come back (surprisingly) negative.
The psychiatric report concludes Gerhard has begun the process of rehabilitation but remains at clear risk.

Relocation

Lydia has obtained a position at the University of Rabat. She wishes to move on in her life and wants now to re-marry.

Esme wishes to go to live with her mother in Rabat if that is where she is going. She has been promised her own riding stables. She wants to give evidence. She does not much mind where Rudolph goes.

Lydia wishes to call 7 witnesses from Morocco who she maintains are all crucial to her case on relocation. Rudolph wishes to remain in London.

International Finance

The French divorce has now been finalised and a decree granted. The French court awarded Lydia no capital on the basis of the Separation of Property Agreement.

She has been awarded maintenance of £6,000 (per annum) according to the French maintenance system. The French court considered only Gerhard's using income figures from just prior to separation, which was before his company took off, and it excluded the dividends from his family company on the basis that the company is pre-marital.

Lydia wishes to pursue an application for financial remedies under Part III MFPA including further maintenance on the basis that the formula applied by the French court is unfair and not enough.

Reciprocal Enforcement and Protective Measures

A UK based expert is instructed to report on the steps that can be taken to make an order of the English court enforceable in Morocco. The expert concludes that registration should be *simple and straightforward*… The father contacts a Moroccan lawyer *(on the ground)* who strongly disagrees with the expert and refers to delays in the court system and the risks to enforcement.

Gerhard seeks further reassurances from Lydia over and above any court registration.

Costs

After a 7 day hearing the court concludes that

(i) Permission to relocate permanently should be granted re Esme but that most of M's evidence was irrelevant;

(ii) Permission to relocate re Rudolph be refused but he have extensive contact in Morocco;

(iii) That the expert was *no expert at all* and had fundamentally misunderstood the nature of the Moroccan family law system.

Both parties apply for their costs. Gerhard applies for 40% of his costs of the children hearing. Both apply for a third party costs order against the expert.

Later the court grants Lydia permission to make the application under Part III MFPA which Gerhard tried unsuccessfully to set aside. Lydia applies for her costs of the MFPA.

Addendum – International Finance.

Passive and Active Growth.

Consider a slightly different scenario:

Gerhard set up his business with a colleague, Louis, as 50:50 owners some 6 years before he met Lydia. He invested £1 million of his own and his family's capital into the business. A SJE accountant has calculated that at the time of cohabitation his shares in the business index-linked to today would be worth £4 million.

At about the same time as he met Lydia, H's business colleague left the business, but retained his shares, and since then Gerhard has been CEO of the Company, earning a good salary. The Company has just floated and his shares which he still retains are now worth about £100 million.

Lydia's needs on a clean break would properly be met for £8 million but she claims that on a *Jones v Jones* basis she should be entitled to an equal share of what was built up together, namely £48 million. Gerhard says that she be entitled to nothing beyond a needs based award as all his shares were pre-owned and that by way of analogy Louis's wife who he met at about the same time as Gerhard met Lydia would have no entitlement to any of his shares.

Section 3

Conference Programme

4PB Private Client Conference 2016: CONTEMPORARY ISSUES IN INTERNATIONAL AND DOMESTIC FAMILY LAW

PROGRAMME

9.30am: Registration and Coffee

10.00am: Introduction: Alex Verdan QC, Head of Chambers 4PB

10.10am: Legal Services Payment Order and costs funding applications for finance and children fights. Charles Hale QC, Harry Nosworthy and Indu Kumar.

10.35am: Divorce: Forum issues
Rex Howling QC, James Copley and Rhiannon Lloyd

11.00am: Coffee

11.20am: The jurisdiction over children; The habitual residence see-saw and the child's state of mind; interviewing the child.
Teertha Gupta QC and Michael Gration
Joined by guests, Mike Hinchliffe and Angela Adams, Cafcass Legal and High Court Team.

12.00 Addiction and abuse – the science of testing, psychiatric issues and outcomes.
Alison Grief QC, Justine Johnston, Ceri White and Rachel Chisholm
Joined by guests, Dr Mike McPhillips, Consultant Psychiatrist
John Wicks, Director, Cansford Laboratories

12.45pm: Plenary session

1.00pm: LUNCH

2.00pm Break out groups:

- Relocation: the holistic evaluation and children giving evidence.
  Alex Verdan QC, Joy Brereton and Barbara Mills;
- International finance issues: Part III MFPA applications and the EU Maintenance Regulation.
  Jonathan Cohen QC, Francesca Dowse, Henry Clayton

3.20pm: Tea

3.40pm: Reciprocal Enforcement of children orders and protective measures
Henry Setright QC, Michael Gration and Michael Edwards

4.15pm: Costs: financial remedies, children and third party orders.
Charles Hale QC, Nick Fairbank, Katie Wood

4.45pm: Key Note address: Lady Justice Eleanor King

5.00pm: Final plenary session and close of conference, followed by a drinks reception

Wifi Code: GlaziersHallWIFI Password: event123 Twitter hashtag #4PBCon2016

Section 4

Legal Services Payment Order and cost funding applications for finance and children fights

Charles Hale QC, Harry Nosworthy, Indu Kumar

Legal Services Payment Orders & Cost Funding For Adults and Children

Introduction

1. Before 1 April 2013, the provision for cost allowance orders, were a matter if common law, and interpreted as a form of maintenance for the payment of legal services (***A v A [2001] 1 FLR 377***, ***TL v ML and others [2005] EWHC 2860*** and ***Currey v Currey (No 2) [2007] 1 FLR 946***).

2. As a result of sections 49 to 51 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012), the rules were codified in statute by inserting new sections 22ZA and 22ZB into the Matrimonial Causes Act 1973 (MCA 1973) and creating legal services payment orders (LSPO).

3. Section 22ZA of the MCA 1973 is as follows:

22ZA Orders for payment in respect of legal services

(1) In proceedings for divorce, nullity of marriage or judicial separation, the court may make an order or orders requiring one party to the marriage to pay to the other ("the applicant") an amount for the purpose of enabling the applicant to obtain legal services for the purposes of the proceedings.

(2) The court may also make such an order or orders in proceedings under this Part for financial relief in connection with proceedings for divorce, nullity of marriage or judicial separation.

(3) The court must not make an order under this section unless it is satisfied that, without the amount, the applicant would not reasonably be able to obtain appropriate legal services for the purposes of the proceedings or any part of the proceedings.

(4) For the purposes of subsection (3), the court must be satisfied, in particular, that—

(a) the applicant is not reasonably able to secure a loan to pay for the services, and

(b) the applicant is unlikely to be able to obtain the services by granting a charge over any assets recovered in the proceedings.

(5) An order under this section may be made for the purpose of enabling the applicant to obtain legal services of a specified description, including legal services provided in a specified period or for the purposes of a specified part of the proceedings.

(6) An order under this section may—

(a) provide for the payment of all or part of the amount by instalments of specified amounts, and

(b) require the instalments to be secured to the satisfaction of the court.

(7) An order under this section may direct that payment of all or part of the amount is to be deferred.

(8) The court may at any time in the proceedings vary an order made under this section if it considers that there has been a material change of circumstances since the order was made.

(9) For the purposes of the assessment of costs in the proceedings, the applicant's costs are to be treated as reduced by any amount paid to the applicant pursuant to an order under this section for the purposes of those proceedings.

(10) In this section "legal services", in relation to proceedings, means the following types of services—

(a) providing advice as to how the law applies in the particular circumstances,

(b) providing advice and assistance in relation to the proceedings,

(c) providing other advice and assistance in relation to the settlement or other resolution of the dispute that is the subject of the proceedings, and
(d) providing advice and assistance in relation to the enforcement of decisions in the proceedings or as part of the settlement or resolution of the dispute,
and they include, in particular, advice and assistance in the form of representation and any form of dispute resolution, including mediation.

(11) In subsections (5) and (6) "specified" means specified in the order concerned.

What is the scope of S 22ZA?

4. Costs allowances have been a matter of common law (referred to specifically in FPR PD28A, para 4.6). Parliament has now (via amendments introduced by LASPOA 2012) both defined and restricted judicial discretion in two critical areas (costs and financial provision), but only under the MCA 1973 and the parallel provisions of the Civil Partnership Act (CPA 2004).

5. The availability of orders for payment for legal services are interim orders and are therefore dependent on the continuation of the main suit for divorce or dissolution of a civil partnership. (an order for maintenance pending suit and legal service payment orders could be made even when the divorce jurisdiction is subject to challenge *Moses-Taiga v Taiga* **[2006] 1 FLR 1074**).

6. S.22ZA and 22ZB of the MCA 1973 provide that court can make an LSPO having considered a number of specifics statutory criteria.

7. The provisions extend to proceedings for "financial relief" in relation to divorce, nullity or judicial separation. "Financial relief", as a term, is not defined in MCA 1973, which still uses "ancillary relief" however one assumes this is directly referable to financial remedy proceedings under the MCA 1973 and also the CPA 2004.

How to apply for an LSPO?

8. An LSPO is a financial order and therefore the procedure for applying for such an order at the start of proceedings is governed by Part 9 of the Family Procedure Rules 2010.

9. If an application for an LSPO is made during the course of proceedings, an application should be made under Part 18 of the Family Procedure Rules 2010, as this is an interim order and therefore FPR 9.7 applies.

What must the applicant demonstrate on an application for an LSPO?

10. The applicant must demonstrate the following in accordance with Sections 22ZA (3) and (4):

    a. **The applicant would not reasonably be able to obtain appropriate legal services for the proceedings without an order.** This does not necessarily mean that there is a requirement to demonstrate that the applicant cannot obtain public funding that would allow representation at the appropriate level of expertise.

    b. **The applicant must demonstrate that they are not reasonably able to secure a loan to pay for legal services.** In accordance with ***TL v ML and Others (Ancillary Relief: Claim Against Assets of Extended Family) [2005] EWHC 2860 (Fam)*** the previous practice was to provide 2 negative letters from potential lenders of repute (see paragraph 129 of Mostyn J's judgment).

    …128. Thorpe LJ speaks of the power only being exercised in "exceptional cases". I would be surprised if he intended by that remark to impose the need to demonstrate anything beyond the requirements that he had previously mentioned, namely, that the applicant (1) had no assets, and (2) could not raise a litigation loan, and (3) could not persuade her solicitors to enter into a Sears Tooth v Payne Hicks Beach charge. The combination of those three factors would, to my mind, make the case exceptional.

129. The second and third requirements make the Applicant prove a negative in each instance. ***In order to prove the inability to raise a litigation loan I would have thought that production of correspondence between her solicitors and at least two banks eliciting a negative response would suffice.*** *A simple statement from her solicitors stating that they were not prepared to enter into a Sears Tooth v Payne Hicks Beach charge should ordinarily deal with the third requirement.*

BN v MA [2013] EWHC 4250 (Fam) is a more recent example where the applicant wife in that matter did not satisfy the requirement of being unable to secure a loan. The applicant had received loan offers however these were at a high rate of interest. The respondent husband conceded in that case that he would have to discharge the interest on these loans if the applicant's financial remedies application was found to be successful. See paragraph 37 of Mostyn J's judgment:

…37. In considering the more general matters, Parliament requires me under s. 22ZB(1)(c) to have regard to the subject matter of the proceedings, including the matters in issue in them. That reflects paragraph 21 of Currey, where Lord Justice Wilson (as he then was) said the subject matter of the proceedings will surely always be relevant. In this case, the wife has received offers from litigation loan suppliers at, it must be said, a fairly steep rate of interest, to borrow from one £400,000, and from another, £250,000, although in each instance the interest may be rolled up. The husband accepts, through Mr. Molyneux, that if the wife's claim is found to have merit, and the wife has as a result incurred unnecessary interest on these litigation loans, then the husband will have to discharge that interest. I mention that in order, really, to do no more than state the obvious. But in such circumstances where these loans are available, and where the interest can be rolled up, the wife does not satisfy the first criterion as specified in s.

22ZA(4)(a). I take the view that she can reasonably secure a loan to pay for the services.

c. **The applicant is unlikely to be able to obtain legal services by granting a charge over any assets recovered in the proceedings**. This aspect of the statute appears to suggest that where an applicant is able to grant a charge over property, then this would not be unreasonable.

What types of legal services are offered?

11. Under S.22ZA (10) of the MCA 1973 the types of legal services referred to are as follows:

    a. providing advice as to how the law applies in the particular circumstances;

    b. providing advice and assistance in relation to the proceedings;

    c. providing other advice and assistance in relation to the settlement or other resolution of the dispute that is the subject of the proceedings; and

    d. providing advice and assistance in relation to the enforcement of decisions in the proceedings or as part of the settlement or resolution of the dispute.

    And they include, in particular, advice and assistance in the form of representation and any form of dispute resolution, including mediation.

What is the duration for payments?

12. In accordance with sections 22ZA (5) and (6) the court may restrict the legal representation available to a party by defining for what "part of the

proceedings" (as per (s 22ZA(5)) an applicant will be able to secure funding and also the amount.

13. Judges and parties will need to define the scope of the services to be covered within the terms of s 22ZA(10). Traditionally this has been up to and including the FDR. Knowledge that the order may conclude at an FDR may be a reasonable encouragement to settle. It should be noted that a judge at the FDR should not hear an application to vary or extend a legal costs order under FPR 9.17(2).

14. Pursuant to S22ZA(8) the court can vary the order at any time in the proceedings if transpires that there has been a material change since the order was made.

How are LSPOs payable?

15. LSPOs are payable in one of 2 ways:

    a. In instalments (under s.22ZA (6) MCA 1973)

    b. Via a lump sum payment and this can be via an interim order for sale in accordance with s 24A (1) MCA 1973. See ***BR v VT*** **[2015] EWHC 2727 (Fam)** where Mostyn J confirms an interim order for sale "under section 24A cannot be made during the pendency of the proceedings, save as an adjunct to a legal services payment order."

An assessment of costs?

16. Under S. 22ZA(9) MCA 1973, where an order for costs is made in favour of the applicant, her award will be reduced by an amount paid to her under a costs allowance order.

What is the statutory criteria to which the court must have regard?

17. This is set out under S. 22ZB of the MCA 1973:

22ZB Matters to which court is to have regard in deciding how to exercise power under section 22ZA

When considering whether to make or vary an order under section 22ZA, the court must have regard to:

(a) the income, earning capacity, property and other financial resources which each of the applicant and the paying party has or is likely to have in the foreseeable future,

(b) the financial needs, obligations and responsibilities which each of the applicant and the paying party has or is likely to have in the foreseeable future,

(c) the subject matter of the proceedings, including the matters in issue in them,

(d) whether the paying party is legally represented in the proceedings,

(e) any steps taken by the applicant to avoid all or part of the proceedings, whether by proposing or considering mediation or otherwise,

(f) the applicant's conduct in relation to the proceedings,

(g) any amount owed by the applicant to the paying party in respect of costs in the proceedings or other proceedings to which both the applicant and the paying party are or were party, and

(h) the effect of the order or variation on the paying party.

(2) In subsection (1)(a) "earning capacity", in relation to the applicant or the paying party, includes any increase in earning capacity which, in the opinion of the court, it would be reasonable to expect the applicant or the paying party to take steps to acquire.

(3) For the purposes of subsection (1)(h), the court must have regard, in particular, to whether the making or variation of the order is likely to—

(a) cause undue hardship to the paying party, or

(b) prevent the paying party from obtaining legal services for the purposes of the proceedings.

(4) The Lord Chancellor may by order amend this section by adding to, omitting or varying the matters mentioned in subsections (1) to (3).

(5) An order under subsection (4) must be made by statutory instrument.

(6) A statutory instrument containing an order under subsection (4) may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

(7) In this section "legal services" has the same meaning as in section 22ZA.

18. S22ZB replaces the discretionary remedies for costs allowances under s. 22. The statute very much reiterates the principles outlined by the Court of Appeal in ***Currey v Currey (No 2) [2006] EWCA Civ 1338***. This was confirmed by Moylan J in ***AM v SS [2013] EWHC 4380 (Fam)***:

21. When determining whether to make an order under Section 22ZA, in my view I should also have regard to the overriding objective, which is set out in Rule 1.1 of Family Procedure Rules 2010. It states that the Rules are a new procedural code with the overriding objective of enabling the court to deal with the cases justly. It provides that dealing with a case justly includes, so far as is practicable, (b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues, (c) ensuring that the parties are on an equal footing, and (d) saving expense.

22. I have been referred to a number of authorities but I only propose to refer, briefly, to ***Currey v Currey No 2*** *[2006] EWCA Civ 1338, [2007] 1 FLR 946. Although this decision addresses the law prior to the amendment of the*

Matrimonial Causes Act 1973 in my view, as submitted by Mr Webster, it still assists the court when determining whether to exercise its power under Section 22ZA. I quote from para. 21 of the judgment of Lord Justice Wilson (as he then was):

'Although in making a costs allowance the court has a discretion, I cannot imagine that it would be reasonable to exercise it unless the Applicant had thus duly demonstrated that she could not reasonably procure legal advice and representation by any other means. That I venture to suggest is, in effect and as a matter of common sense, a necessary condition of making an allowance. But I certainly do not consider that it will always be a sufficient condition. No doubt the Applicant's due demonstration will incline, often very strongly, towards the making of an allowance but at this stage other factors may well come into play which will no doubt on occasions lead the court to decline to make it notwithstanding the demonstration. The subject matter of the proceedings will surely always be relevant and in so far as it can safely be assessed at so early a juncture the reasonableness of the Applicant's stance in the proceedings will also be relevant. So also will a variety of other features.'

23. The other authority to which I propose to refer, also briefly, is a decision of Mr Justice Mostyn, then sitting as a deputy, namely ***TL v ML*** *[2205] EWHC 2860 (Fam), [2006] 1 FLR 1263. He referred, when determining an application for maintenance pending suit, to the principles which he considered should be applied, and I quote from the headnote:*

'(5) ... Where the affidavit or Form E disclosure by the payer is obviously deficient the court should not hesitate to make robust assumptions about his ability to pay. The court is not confined to the mere say-so of the payer as to the extent of his income or resources. In such a situation the court should err in favour of the payee. Where the paying party has historically been supported through the bounty of an outsider and where the payer is asserting that the bounty had been curtailed but where the

position of the outsider is ambiguous or unclear then the court is justified in assuming that the third party will continue to supply the bounty, at least until the final trial.'

Cost funding outside of the MCA 1973

19. Cost allowances remain available at common law in a range of proceedings such as schedule 1 Children Act 1989, Matrimonial and Family Proceedings Act 1984 Pt III, Domestic Proceedings and Magistrates' Courts Act 1978 and the Inheritance (Provision for Family and Dependants) Act 1975.

20. There appears to be no fetter in law on the discretion of the court to make such orders, subject to the statutory checklists and 'necessary modifications.'

21. The range of costs for funding proceedings and applicable principles were considered by Mostyn J in ***Rubin v Rubin*** **[2014] EWHC 611 (Fam)**. At paragraph [13] he sets out the principles, which are applicable to Legal Service Payment Orders and their non-statutory cousins:

    i) When considering the overall merits of the application for a LSPO the court is required to have regard to all the matters mentioned in s22ZB(1) – (3).

    ii) Without derogating from that requirement, the ability of the respondent to pay should be judged by reference to the principles summarised in ***TL v ML.***

    iii) Where the claim for substantive relief appears doubtful, whether by virtue of a challenge to the jurisdiction, or otherwise having regard to

its subject matter, the court should judge the application with caution. The more doubtful it is, the more cautious it should be.

iv) The court cannot make an order unless it is satisfied that without the payment the applicant would not reasonably be able to obtain appropriate legal services for the proceedings. Therefore, the exercise essentially looks to the future. It is important that the jurisdiction is not used to outflank or supplant the powers and principles governing an award of costs in CPR Part 44. It is not a surrogate inter partes costs jurisdiction. Thus a LSPO should only be awarded to cover historic unpaid costs where the court is satisfied that without such a payment the applicant will not reasonably be able to obtain in the future appropriate legal services for the proceedings.

v) In determining whether the applicant can reasonably obtain funding from another source the court would be unlikely to expect her to sell or charge her home or to deplete a modest fund of savings. This aspect is however highly fact-specific. If the home is of such a value that it appears likely that it will be sold at the conclusion of the proceedings then it may well be reasonable to expect the applicant to charge her interest in it.

vi) Evidence of refusals by two commercial lenders of repute will normally dispose of any issue under s22ZA(4)(a) whether a litigation loan is or is not available.

vii) In determining under s22ZA(4)(b) whether a Sears Tooth arrangement can be entered into a statement of refusal by the applicant's solicitors should normally answer the question.

viii) If a litigation loan is offered at a very high rate of interest it would be unlikely to be reasonable to expect the applicant to take it unless the respondent offered an undertaking to meet that interest, if the court later considered it just so to order.

ix) The order should normally contain an undertaking by the applicant that she will repay to the respondent such part of the amount ordered if, and to the extent that, the court is of the opinion, when considering costs at the conclusion of the proceedings, that she ought to do so. If such an undertaking is refused the court will want to think twice before making the order.

x) The court should make clear in its ruling or judgment which of the legal services mentioned in s22ZA(10) the payment is for; it is not however necessary to spell this out in the order. A LSPO may be made for the purposes, in particular, of advice and assistance in the form of representation and any form of dispute resolution, including mediation. Thus the power may be exercised before any financial remedy proceedings have been commenced in order to finance any form of alternative dispute resolution, which plainly would include arbitration proceedings.

xi) Generally speaking, the court should not fund the applicant beyond the FDR, but the court should readily grant a hearing date for further funding to be fixed shortly after the FDR. This is a better course than ordering a sum for the whole proceedings of which part is deferred under s22ZA(7). The court will be better placed to assess accurately the true costs of taking the matter to trial after a failed FDR when the final hearing is relatively imminent, and the issues to be tried are more clearly defined.

xii) When ordering costs funding for a specified period, monthly instalments are to be preferred to a single lump sum payment. It is true that a single payment avoids anxiety on the part of the applicant as to whether the monthly sums will actually be paid as well as the annoyance inflicted on the respondent in having to make monthly payments. However, monthly payments more accurately reflects what would happen if the applicant were paying her lawyers from her own

resources, and very likely will mirror the position of the respondent. If both sets of lawyers are having their fees met monthly this puts them on an equal footing both in the conduct of the case and in any dialogue about settlement. Further, monthly payments are more readily susceptible to variation under s22ZA(8) should circumstances change.

xiii) If the application for a LSPO seeks an award including the costs of that very application the court should bear in mind s22ZA(9) whereby a party's bill of costs in assessment proceedings is treated as reduced by the amount of any LSPO made in his or her favour. Thus, if an LSPO is made in an amount which includes the anticipated costs of that very application for the LSPO, then an order for the costs of that application will not bite save to the extent that the actual costs of the application may exceed such part of the LSPO as is referable thereto.

xiv) A LSPO is designated as an interim order and is to be made under the Part 18 procedure (see FPR rule 9.7(1)(da) and (2)). 14 days' notice must be given (see FPR rule 18.8(b)(i) and PD9A para 12.1). The application must be supported by written evidence (see FPR rule 18.8(2) and PD9A para 12.2). That evidence must not only address the matters in s22ZB(1)-(3) but must include a detailed estimate of the costs both incurred and to be incurred. If the application seeks a hearing sooner than 14 days from the date of issue of the application pursuant to FPR rule 18.8(4) then the written evidence in support must explain why it is fair and just that the time should be abridged.

22. The court has been able to award cost funding in Schedule 1 cases by interpreting the statutory language 'for the benefit of the child' widely enough to encompass an order for a lump sum and periodical payments (*CK v KM* **[2011] 1 FLR 208**).

23. This has given parents the ability to argue for funding in section 8 Children Act 1989 proceedings on the basis that the court has a duty to investigate the best interests of the child. In ***CF v KM*** Charles J stated:

> 36. *Generally in my judgment, the investigatory element of s. 8 proceedings founds the conclusion that a provision directed to funding some or all of the costs of a parent can be for the benefit of the child because it would promote the result that the court is fully informed as to all relevant factors and view.*

24. In such instances there are likely to be practical difficulties in securing an undertaking for the repayment of the cost funding order where the payee has no means to make such repayment and does not receive any financial award.

25. In ***MG v JF*** **[2015] EWHC 564 (Fam)** Mostyn J was concerned with private law children proceedings, where a father, who was the only realistic source of costs funding, was ordered to pay 80 per cent of the costs incurred by a mother and her same-sex partner, who were of very limited means, in instructing legal and non-legal professionals.

26. Mostyn J made clear that it was it was impossible for Mother and her partner to be expected to represent themselves, having regard to the factual and legal issues at large. Such a course would mean that there was a gross inequality of arms and arguably a violation of their rights under ECHR art.6 and art.8 and under the Charter of Fundamental Rights of the European Union art.47.

27. Mostyn J did not identify the statutory source of the remedy, nor that the parents must attempt to obtain legal aid funding, as it would not be available. He said 'it can be said that in the field of private children law the principle of individual justice has had to be sacrificed on the altar of the public debt.'

28. The availability of legal service orders in Hague Convention cases is yet to be adjudicated on. However, in ***Kinderis v Kinderis*** **[2013] EWHC 4139 (Fam),** Holman J identified the acute difficulty where a mother who does not speak English is incapable to presenting her case, and there is not equality of arms as required by Article 6 ECHR, and there is an unfairness to mother and child. In ***Rubin***, Mostyn J described 'the very difficult territory where the merits of each side can be clearly seen', and had to be left for a decision when such an issue actually arises

29. In ***Wyatt v Vince*** *[2015] 1 FLR 972*, Lord Wilson explained at paragraph [42] how a legal services order and funding allowance payment should be dealt with in the event of a successful appeal arising out of the main proceedings to which it related.

30. The wife had already owed her solicitors about £88,000 for an application in which her ultimate recovery was likely to be modest, and therefore the court found it was unreasonable to consider that they would continue to act for her on that basis against an evidently litigious husband. The costs allowance order would be restored and the repayment order set aside.

31. However, Lord Wilson made clear that the Court of Appeal had been entitled to order repayment. If an order for payment in respect of legal

services had been wrongly made, the appellate court had to have jurisdiction to order that sums paid under it be repaid, *A v A* considered.

Charles Hale QC

Harry Nosworthy

Indu Kumar

Bette v Rhin

Schedules of Mrs Bette's Legal Costs

Estimated future costs up to and including FDA hearing

Verdan & Reeves LLP

Advice and case preparation for application for LSPO (including 7.5 hours consultation

Partner (17 hours at £400 per hour)

£6,800

Associate (18 hours at £200 per hour)

£3,600

Trainee (20 hours at £100 per hour)

£2,000

Preparation of FDA documents (including estimated 12 hour consultation)

Partner (22 hours at £400 per hour)

£8,800

Associate (19 hours at £200 per hour)

£3,800

Trainee (25 hours at £100 per hour)

£2,500

Devesh Bapat (therapeutic support worker)

Attendance at court and consultations (20 hours)

£5,000

Disbursements £510

Roland Garros & Associes

Advice in respect of proceedings in France

£5,000

Total £38,010

Counsel (leading)

Reading, conference & written advice (5 hours) on application for LSPO

£5,000

Attendance at court

£5,000

Counsel (Junior)

Reading, conference, preparation for and attendance at FDA hearing

£2,000

Total £12,000

Estimated costs up to and including FDA inclusive of VAT at 20%

£105,624

Bette v Rhin

Schedules of Mrs Bette's Legal Costs

Estimated future costs up to and including final hearing in section 8 CA proceedings

Verdan & Reeves LLP

Advice and case preparation for section 8 application

Partner (40 hours at £400 per hour)

£16,000

Associate (50 hours at £200 per hour)

£10,000

Trainee (30 hours at £100 per hour)

£3,000

Preparation of final statement

Partner (20 hours at £400 per hour)

£10,000

Associate (40 hours at £200 per hour)

£8,000

Trainee (30 hours at £100 per hour)

£3,000

Letter of instruction to ISW & psychiatrist

Associate (10 hours at £200 per hour

£2,000

Reviewing and perusal of reports

Partner (5 hours at £400 per hour) £2,000

Associate (20 hours at £200 per hour)

£4,000

Arranging hair strand testing

Trainee (2 hours at £100 per hour)

£200

Attendance at final hearing

Partner (40 hours at £400 per hour)

£16,000

Associate (40 hours at £200 per hour)

£8,000

Trainee (40 hours at £100 per hour)

£4,000

Counsel (Leading) – conference and attendance at final hearing

£30,000

Counsel (Junior) – conference and attendance at final hearing

£15,000

TOTAL

Estimated costs up to and including final hearing inclusive of VAT at 20%

£148,840

Estimated costs up to and including FDA hearing inclusive of VAT at 20%

£105,624

GRAND TOTAL £254,464

Section 5

Divorce: Forum Issues

Rex Howling QC, James Copley and Rhiannon Lloyd

Divorce: Forum Issues

Rex Howling QC, James Copley
and Rhiannon Lloyd

Requirements Before A Petition Can Be Issued in England and Wales

- Married for 12 months; and
- One of the 5 divorce grounds satisfied; and
- Both spouses habitually resident ["HR"] in jurisdiction; or
- Both spouses were last HR here and one of them still lives in the jurisdiction; or
- The other spouse HR in jurisdiction; or
- Petitioner was HR for 12 months before issue and remains HR; or
- HR here for 6 months and domiciled in jurisdiction; or
- Both spouses domiciled here.

Article 16 of Council Regulation (EC) No 2201/2003 of 27/11/2003 [BIIR]: 1

"A court shall be deemed to be seised—

(a) At the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the applicant has not subsequently failed to take the steps he was required to take to have service effected on the respondent; or"

Article 16 of Council Regulation (EC) No 2201/2003 of 27/11/2003 [BIIR]: 2

"(b) If the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the applicant has not subsequently failed to take the steps he was required to take to have the document lodged with the court."

Article 19 (1)

"1. Where proceedings relating to divorce, legal separation or marriage annulment between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.."

Article 19 (2)

"2. Where proceedings relating to parental responsibility relating to the same child and involving the same cause of action are brought before courts of different Member States, the court second seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established."

Article 19 (3)

"3. Where the jurisdiction of the court first seised is established, the court second seised shall decline jurisdiction in favour of that court. In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised."

A v B (Case C-489/14) Eu:C:2015:654 [2016] 1 FLR 31 [06/10/15] Part 1

- French couple married in France, agreed to a regime of separate property;
- 3 children born whilst living in UK;
- 2010 H initiated proceedings in France for judicial separation, W issued petition in UK 2 months later but FD declined jurisdiction;
- The French Court made a non-conciliation order which expired at midnight on 16/06/14;

A v B (Case C-489/14) Eu:C:2015:654 [2016] 1 FLR 31 Part 2

- 13/06/14 W issued petition in Bury St Edmunds having attempted to get the petition issued at midnight on 16/06/14;
- H issued second petition in France at 0820 local time on 17/06/14;
- Case considered by Mostyn J in S v S (Brussels II Revised: Art 19 (1) and (3): Reference to CJEU) [2014] EWHC 3613 (Fam), [2015] 2 FLR 364 [20/10/14];
- CJEU held that English Court seized.

A v B (Case C-184/14) EU:C:2015:479, [2015] 2 FLR 637 [16/07/15]

- Italian couple living in UK where they had two children;
- H issued proceedings in Italy seeking a declaration of separation and shared custody of the children, who would live with W;
- W challenged jurisdiction of Italian courts re issues of PR;
- Italian court held that it had "divorce jurisdiction" but not PR jurisdiction or maintenance regulation jurisdiction re the children. Upheld by CJEU.

Peng v Chai [2015] EWCA Civ 1312 [18/12/15] [Part 1]

- Very wealthy, elderly Malayan couple with close connections with UK, where W lived with an adult disabled child. H ran his business empire from Malaya;
- Complex litigation history in both jurisdictions;
- Competing arguments over jurisdiction which did not rule out either jurisdiction;
- Macur LJ held at para 25 that;- "It is difficult to envisage a case, other than in cases of fraud, blatant disregard for due process or where similar proceedings are already well advanced in one jurisdiction, where an abuse of process argument to stay proceedings in another valid jurisdiction would succeed."

Peng v Chai [2015] EWCA Civ 1312 [Part 2]

- And at para 30, quoting from Tan v Choy [2014] EWCA Civ 251,[2015] 1 FLR 492:-

" Many cases in this court (including *Pacific International Sports Clubs Limited v Surkis at [23] and [60]) have emphasised the limited grounds on which a judge's conclusion on whether or not to grant a stay in jurisdictional cases can be challenged. Effectively, it can only be challenged if the judge has erred in applying the law, failed to take account of a relevant factor, taken an irrelevant factor into account or has reached a conclusion that is irrational or plainly wrong."*

Peng v Chai [2015] EWCA Civ 1312 [Part 3]

- Macur J went on to quote further from the same case:-

"39. As Lord Goff of Chieveley pointed out in the De Dampierre case at 107 C-D, there are two conditions that have to be fulfilled before a court can grant a stay pursuant to section 5(6) and paragraph 9 of Schedule 1 of the DMPA 1973. First there have to be proceedings in respect of the marriage that exist in another jurisdiction, although it does not matter whether they were started before or after the English proceedings. Secondly, the balance of fairness (including convenience) has to be such that it is appropriate for the proceedings in the foreign jurisdiction to be first disposed of, which means that there must be an assessment by the English court of that balance. Only if both those pre-requisites are fulfilled will the English court, if it thinks fit, order a stay of the English proceedings."

Section 5 (6) of the Domicile and Matrimonial Proceedings Act 1973

" Schedule 1 to this Act shall have effect as to the cases in which matrimonial proceedings in England and Wales are to be, or may be, stayed by the court where there are concurrent proceedings elsewhere in respect of the same marriage, and as to the other matters dealt with in that Schedule; but nothing in the Schedule

(a) Requires or authorises a stay of proceedings which are pending when this section comes into force; or

(b) Prejudices any power to stay proceedings which is exercisable by the court apart from the Schedule."

Domicile and Matrimonial Proceedings Act 1973 Sch 1 Para 6: Obligatory Stays

"(1) Where before the beginning of the trial or first trial in any proceedings for divorce which are continuing in the court it appears to the court on the application of a party to the marriage—

(a) That in respect of the same marriage proceedings for divorce or nullity of marriage are continuing in a related jurisdiction; and

(b) That the parties to the marriage have resided together after its celebration; and

(c) That the place where they resided together when the proceedings in the court were begun or, if they did not then reside together, where they last resided together before those proceedings were begun, is in that jurisdiction; and

(d) That either of the said parties was habitually resident in that jurisdiction throughout the year ending with the date on which they last resided together before the date on which the proceedings in the court were begun,

It shall be the duty of the court, subject to paragraph 10(2) below, to order that the proceedings in the court be stayed."

Domicile and Matrimonial Proceedings Act 1973 Sch 1 Para 6: Discretionary Stays

"(1) Where before the beginning of the trial or first trial in any matrimonial proceedings, other than proceedings governed by the Council Regulation, which are continuing in the court it appears to the court—

(a) That any proceedings in respect of the marriage in question, or capable of affecting its validity or subsistence, are continuing in another jurisdiction; and

(b) That the balance of fairness (including convenience) as between the parties to the marriage is such that it is appropriate for the proceedings in that jurisdiction to be disposed of before further steps are taken in the proceedings in the court or in those proceedings so far as they consist of a particular kind of matrimonial proceedings, the court may then, if it thinks fit, order that the proceedings in the court be stayed or, as the case may be, that those proceedings be stayed so far as they consist of proceedings of that kind.

(2) In considering the balance of fairness and convenience for the purposes of sub-paragraph (1)(b) above, the court shall have regard to all factors appearing to be relevant, including the convenience of witnesses and any delay or expense which may result from the proceedings being stayed, or not being stayed."

E v E [2015] EWHC 3742 (Fam): Moylan J [04/12/15]

- French couple, with limited resources, living in UK. wife "forum shopping";
- H issued the French equivalent of a petition, an assignation en divorce, on 5 or 12/05/15;
- W issued a petition here on 21/05/15;
- W attempted to argue, based on her interpretation of A v B, that the Judge could "suspend" rather than dismiss the petition.
- Moylan J held at para 39 that:-"*All that A v B decides, in my view, is (i) that the issue of when a court is seised is not affected by Art.19 or by the existence of other proceedings in another Member State at the date or time of the court being seised and (ii) that, if proceedings before a court first seised expire after another court is seised, the criteria for lis pendens are no longer fulfilled. The latter conclusion is because the lis pendens provisions*

MH v MH [2015] IEHC 771 Abbott J [02/12/15]

- Irish couple both issued divorce proceedings:
- W sends a petition to Bury St Edmunds by DX were it is date stamped 07/09/15. No time included;
- H's solicitor issues in person in Dublin on 07/09/15 at 1430;
- Having heard submissions and read affidavits from court staff at Bury St Edmunds, Abbott J concluded that the petition had been received by them, ie lodged, by about 1030 on 07/09/15. On this basis, he declined jurisdiction as the English court was "first seized".

Conclusions

- A v B makes it plain that a petition lodged in advance of a judicial deadline can establish jurisdiction;
- Article 19 is being and will be interpreted strictly;
- Peng v Chai re-establishes the principle that a first instance decision on jurisdiction is hard to appeal. It also deals with non EU issues as well. We may need to revisit these rules in earnest after tonight's count;
- Jurisdictional cases are highly facts specific; and
- If in doubt, get in there early!

S v S [2014] EWHC 3613

- First instance case referred by Mostyn J to the CJEU which resulted in the CJEU ruling reported as *A v B* (Case C-489/14) EU:C:2015:654 [2016] 1 FLR 31
- Mostyn J was evidently not impressed that H had done nothing in 30 months to progress his French judicial separation proceedings He viewed the case as a:

  …sorry tale of manoeuvring in the face of the seemingly inflexible jurisdiction rules…

  …in relation to divorce cases the anomalous situation arises that there are no powers, in contrast to civil claims and children claims, to achieve a transfer to a court which is better placed to hear the case or otherwise is a more convenient forum…

S v S [2014] EWHC 3613 cont.

- It was argued that:

  …where a litigant does not, in a bona fide way, pursue a suit by which he seises the court of his choice, then it cannot be said, or ought not to be said, for the purposes of Article 19(3) that the jurisdiction of the court first seised is "established"…

  …any other interpretation would enable people in divorce proceedings to file the equivalent of the notorious Italian torpedo…

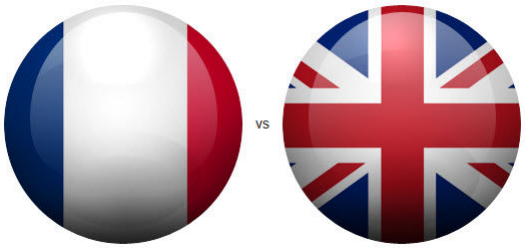
S v S [2014] EWHC 3613 cont.

- Mostyn J made his first ever referral to the CJEU. One question was
- *…does "established" import that the applicant in the first proceedings must take steps to progress the first proceedings with due diligence and expedition to a resolution of the dispute…*
- The CJEU, applying earlier cases decided under Brussels I, held that:

  "…in order for the jurisdiction of the court first seised to be established within the meaning of Art 19(1) of that Regulation, it is sufficient that the court first seised has not declined jurisdiction of its own motion and that none of the parties has contested that jurisdiction before or up to the time at which a position is adopted which is regarded in national law as being the first defence on the substance submitted before that court."

Divorce: Forum Issues

The Bette-Rhin Family



Brussels IIR: Article 3

- Both the courts of England & Wales and the courts of France potentially have jurisdiction
- Gerhard's French proceedings on basis of joint nationality: Art 3(1)(b)
- Lydia's English Petition on grounds of habitual residence: Art 3(1)(a) indent 1, 2, 3 or 5

Brussels IIR: divorce jurisdiction

- Lydia's divorce proceedings must be stayed until the jurisdiction of the French court is established
- Lydia's divorce proceedings must be dismissed when the jurisdiction of the French court is established
- Notice that parties are encouraged to be the first to commence proceedings to achieve first seised status, rather than to resolve matters by negotiation/mediation.

Brussels IIR: divorce jurisdiction

- Can Gehard's delay affect the question of jurisdiction?
- *S v S* [2014] EWHC 3613 (the case referred to the CJEU which resulted in *A v B* (Case C-489/14) EU:C:2015:654 [2016] 1 FLR 31
- H had done nothing in 30 months to progress his French judicial separation proceedings

Brussels IIR: divorce jurisdiction

- Mostyn J was not impressed with H's delay: he made his first ever referral to the CJEU

…does "established" import that the applicant in the first proceedings must take steps to progress the first proceedings with due diligence and expedition to a resolution of the dispute…

- CJEU decided delay not relevant

Brussels IIR: divorce jurisdiction

- CJEU reaffirmed the strict mechanistic nature of the jurisdictional rules in *A v B*
- The question of any lack of diligence on the part of H was not relevant.
- Lydia cannot challenge the jurisdiction of the French court in England
- Lydia's Petition must be dismissed

Brussels IIR: divorce jurisdiction

- BIIR rules as to divorce jurisdiction are rigid and inflexible
- First introduced in 2001 in Brussels II
- Before BII courts of England and Wales had divorce jurisdiction if either party had their domicile here or had been habitually residence here for 1 year
- Coupled with forums conveniens power to stay
- The system appeared to work tolerably well

Brussels IIR: divorce jurisdiction

- BII was EU initiative proposed by the Germans
- Negotiated between 1992 and 1998
- The *lis pendens* rule mirrored the rules in civil cases under the Brussels Convention 1968
- UK government consultation prompted almost universal opposition to the *lis pendens* rule for divorce cases

Brussels IIR: divorce jurisdiction

- Rules as to divorce jurisdiction are now novel
- More flexible rules have always applied in matters of parental responsibility
- Jurisdictional rules for civil claims have now been made more flexible (Brussels I has been replaced by the Judgments Regulation No.1215/2012, often referred to as Brussels I recast)
- Now divorce jurisdiction stands alone in having these rigid and inflexible rules

Brussels IIR: divorce jurisdiction

France and England united

Section 6

The jurisdiction over children;

The habitual residence see-saw and the child's state of mind: Interviewing the Child

Teertha Gupta QC and Michael Gration

Joined by guests:

Mike Hinchliffe and Angela Adams

Cafcass Legal and High Cout Team

Developments In Jurisdictional Arguments and

The Relevance of the Voice of The Child

- The knock out blow
- A summary dismissal
- Not a strike out but same effect:
- Munby P in the recent case of Re D [2016] EWHC 504 (Fam) repeating his dicta in Re C below (and enclosed)
- *"I can now jump forward to four more recent cases in the Court of Appeal: Re C (Family Proceedings: Case Management) [2012] EWCA Civ 1489, [2013] 1 FLR 1089; Re B (A Child) [2012] EWCA Civ 1545; Re TG (Care Proceedings: Case Management: Expert Evidence) [2013] EWCA Civ 5, [2013] 1 FLR 1250, paras 27-28, where the relevant passages from the two earlier cases are set out; and Re Q (A Child) [2015] EWCA Civ 991. The relevant principles are to be found in Re C, paras 14-15:*
- Re C Munby
    - *"14 … these are not ordinary civil proceedings, they are family proceedings, where it is fundamental that the judge has an essentially inquisitorial role, his duty being to further the welfare of the children which is, by statute, his paramount consideration. It has long been recognised – and authority need not be quoted for this proposition – that for this reason a judge exercising the family jurisdiction has a much broader discretion than he would in the civil jurisdiction to determine the way in which an application … should be pursued. In an appropriate case he can summarily dismiss the application as being, if not groundless, lacking enough merit to justify pursuing the matter. He may determine that the matter is one to be dealt with on the basis of written evidence and oral submissions without the need for oral evidence. He may … decide to hear the evidence of the applicant and then take stock of where the matter stands at the end of the evidence.*
- Re C Munby
-

- *15 The judge in such a situation will always be concerned to ask himself: is there some solid reason in the interests of the children why I should embark upon, or, having embarked upon, why I should continue exploring the matters which one or other of the parents seeks to raise. If there is or may be solid advantage to the children in doing so, then the inquiry will proceed, albeit it may be on the basis of submissions rather than oral evidence. But if the judge is satisfied that no advantage to the children is going to be obtained by continuing the investigation further, then it is perfectly within his case management powers and the proper exercises of his discretion so to decide and to determine that the proceedings should go no further."*

❖ Exploration of Routes to jurisdiction
❖ Habitual residence- more later article 8 of BII bis and FLA 1986
❖ Physical presence FLA 1986 and Article 13 BII bis
❖ Parens patriae- Re A- a British passport Article 14 BII bis other recent examples
❖ Prorogation (private client nomination):
❖ The Potemkin clause

AND UPON the parties:

⊡ expressly and unequivocally accepting that the English High Court has primary and exclusive jurisdiction over all matters of parental responsibility and welfare issues concerning the children herein and
⊡ agreeing that it is in the best interests of the children for the English High Court to make all decisions concerning their welfare.
⊡ Permission is granted to the Mother to remove the child permanently from the jurisdiction to live in the jurisdiction of .....

❖ Routes to jurisdiction
❖ Common law
❖ FLA 1986 s2(1) connection with matrimonial/civil partnership proceedings
❖ Article 15 BIIr
❖ HRA 1998 articles 2-5? Does the inherent jurisdiction exists to assist children and vulnerable adults wherever they may. In the matter of M (Children) [2015]

EWHC 1433 (Fam) President's decision and London Borough of Redbridge v SNA [2015] EWHC 2140 (Fam)

- Habitual residence
- A moving away from parental intention- dynamic case law- the child is now centre stage in the debate.
- **RE A [2013] UKSC 60**
- **Re KL [2013] UKSC 75**
- **Re LC [2014] UKSC 1**
- **Re KP [2014] EWCA 554 & [2014] EWHC 3964**
- **In re M and others (Children) (Abduction: Child's Objections) [2015] EWCA Civ 26, [2016] Fam 1**,
- **In re D (A Child) (International Recognition) [2016] EWCA Civ 12**
- **Ciccone v Ritchie (No 1) [2016] EWHC 608 (Fam)**
- **Re B (A child) 2016 UKSC 4**
- The sympathy of the Court
- The workload. The seniority of judge. Approach to jurisdiction arguments generally
- The overriding objective:
- **1.1.**—(1) These rules are a new procedural code with the overriding objective of enabling the
- court to deal with cases justly, having regard to any welfare issues involved…
- (a) ensuring that it is dealt with expeditiously and fairly;
- (b) dealing with the case in ways which are proportionate to the nature, importance and
- complexity of the issues;
- (c) ensuring that the parties are on an equal footing;
- (d) saving expense; and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases… duty to manage cases
- The sympathy of the court
- The child and her views and representation.

- The state of her mind and the strength of her wishes and feelings all have a bearing now on habitual residence.
- Party status for the child is becoming a regular feature in child abduction cases. NB Munby P's recent dicta last week in Re F :
- Re F [2016] EWCA Civ 546
- One of the drivers for this is the point which this court emphasised in *In re KP (A Child) (Abduction: Rights of Custody)* [2014] EWCA Civ 554, [2014] 1 WLR 4326, paras 53, 56, namely, that a meeting between the child and the judge is "an opportunity: (i) for the judge to hear what the child may wish to say; and (ii) for the child to hear the judge explain the nature of the process;" that the "purpose of the meeting is not to obtain evidence and the judge should not, therefore, probe or seek to test whatever it is that the child wishes to say;" and that if "the child volunteers evidence that would or might be relevant to the outcome of the proceedings, the judge should report back to the parties and determine whether, and if so how, that evidence should be adduced."
- Re F Munby P
- The corollary of this is that, quite apart from all the other drivers for change, there are likely for this reason alone to be more cases in future than hitherto where the child either gives evidence, without being joined as a party, or is joined as a party.
- *NB In re W (Children) (Family Proceedings: Evidence)* [2010] UKSC 12, [2010] 1 WLR 701, holding that there is no longer a presumption, or even a starting point, against children giving evidence in family proceedings.

Teertha Gupta QC

Habitual Residence: A seA(-saw) change

Michael Gration

The importance of habitual residence

- Jurisdiction pursuant to:
  - Brussels iia
  - The 1996 hague convention
  - The family law act 1986
- The operation of the 1980 hague convention

Recent decisions on habitual residence

- A v A and another (Children: Habitual Residence) (Reunite International Child Abduction Centre and others intervening) [2013] UKSC 60, [2014] AC 1 ('A v A').
- In re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening) [2013] UKSC 75, [2014] AC 1017 ("Re KL");

Recent decisions on habitual residence (cont.)

- In re LC (Children) (Reunite International Child Abduction Centre intervening) [2014] UKSC 1, [2014] AC 1038 ("Re LC");
- In re R (Children) (Reunite International Child Abduction Centre and others intervening) [2015] UKSC 35, [2016] AC 76 ("Re R"); and
- Re B (A child) (Habitual Residence: Inherent Jurisdiction) [2016] UKSC 4, [2016] 2 WLR 557 ("Re B").

- A v A was a case concerning the removal of children from England to Pakistan that had been brought pursuant to the inherent jurisdiction of the High Court;
- Re KL was a 1980 Hague Convention case, but the question as to the child's habitual residence arose in circumstances where the removal (which was from the USA to England) had been undertaken pursuant to a court order that was later overturned on appeal;
- Re LC involved determination of the impact of an older (in the terms of the judgment, 'adolescent') child's state of mind upon their own habitual residence;

- In Re R the Supreme Court considered the impact upon a child's habitual residence of a temporary move of settled duration (in that case from France to Scotland for an agreed period of 12 months); and

- Re B focussed upon the proper approach to the loss and subsequent re-acquisition of habitual residence, and particularly whether, if properly interpreted, the various authorities in relation to habitual residence permit of a period of time for which a child will have no habitual residence.

What might now be described as the 'previous approach'

- Baroness Hale in A v A:

i. *All are agreed that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents.*

ii. ***It was the purpose of the 1986 Act to adopt a concept which was the same as that adopted in the Hague and European Conventions. The Regulation must also be interpreted consistently with those Conventions.***

iii. *The test adopted by the European Court is "the place which reflects some degree of integration by the child in a social and family environment" in the country concerned. This depends upon numerous factors, including the reasons for the family's stay in the country in question.*

iv. It is now unlikely that that test would produce any different results from that hitherto adopted in the English courts under the 1986 Act and the Hague Child Abduction Convention.

v. In my view, the test adopted by the European Court is preferable to that earlier adopted by the English courts, being focussed on the situation of the child, with the purposes and intentions of the parents being merely one of the relevant factors. The test derived from R v Barnet London Borough Council, ex p Shah should be abandoned when deciding the habitual residence of a child.

vi. The social and family environment of an infant or young child is shared with those (whether parents or others) upon whom he 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.

vii. 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.

viii. As the Advocate General pointed out in para AG45 and the court confirmed in para 43 of Proceedings brought by A, it is possible that a child may have no country of habitual residence at a particular point in time."

… and the recent sea change

- The Majority judgment in Re B is of real significance, and can be read as a significant departure from the previous law:
  - It is comparatively recent, certainly it is the most recent authoritative statement as to the proper approach to determination of a child's habitual residence;
  - It focuses upon the loss and subsequent acquisition of habitual residence, and the factors to be taken into account;

- The majority judgment involves particular focus upon the 'transfer' of habitual residence;
- It was held that it would be highly unlikely (or, to use the term adopted in certain parts of the judgment, exceptional) for a child to have no habitual residence; AND
- In that regard it is very different in its approach to the earlier authorities on habitual residence, and even to the decision of the supreme court in a v a, as followed in the subsequent cases mentioned previously

The decision

- First, the effect of Recital 12 to the Brussels II Regulation is that, where the interpretation of the concept of habitual residence can reasonably follow two paths, the courts should follow the path perceived better to serve the interests of children.
- Second, the CJEU has indorsed the view that, although it is conceivable that a child may have no habitual residence, this will only be in exceptional cases.

- the modern concept of a child's habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be left without a habitual residence; the concept operates in the expectation that, when a child gains a new habitual residence, he or she loses their old one. Lord Brandon's observation in In Re J should no longer be regarded as correct.

  •See para. 45:
  "I conclude that the modern concept of a child's habitual residence operates in such a way as to make it highly unlikely, albeit conceivable, that a child will be in the limbo in which the courts below have placed B. The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. Simple analogies are best: consider a see-saw. As, probably quite quickly, he puts down those first roots which represent the requisite degree of integration in the environment of the new state, up will probably come the child's roots in that of the old state to the point at which he achieves the requisite de-integration (or, better, disengagement) from it."

A mill pond? Or a turbulent crossing?

A mill pond? Or a turbulent crossing?

- Re B might be the first recognition in the recent supreme court cases that 'habitual residence' is more than a factual description of a state of affairs, but that it is a legal test denoting connection so as to enable a determination to be made about the appropriate court to take decisions concerning a child
- Alternatively, it might be said to have reintroduced a 'gloss' overlaying the essentially factual nature of the habitual residence enquiry, and so to have undone the positive steps taken in the judgment in A v A

- It is, however, undoubtedly true that 'habitual residence' in the context in which it is used in the instruments set out above it intended to demonstrate a child's connection to the courts of a particular country, on the basis that it is in that child's best interests for decisions to be taken by those courts
- Accordingly, it is correct that it is in a child's interests to have an habitual residence
- On that basis, Lord Wilson's logic is difficult to fault.

Section 7

Addiction and abuse – the science of testing, psychiatric issues and outcomes.

Alison Grief QC, Ceri White and Rachel Chisholm

Joined by Guests:
Dr Mike McPhillips, Consultant Psyhiatrist
John Wicks, Director, Cansford Laboratories

Addiction and Abuse:

The Science of Testing, Psychiatric Issues and Outcomes

Introduction

1. The Child Commissioner's report *'Silent Voices: supporting children and young people affected by parental alcohol misuse 2012*[1] makes for concerning reading:
    a. The size of the problem - the number of children who are affected by/living with parental alcohol misuse - is largely unknown. However, estimates suggest parental alcohol misuse is far more prevalent than parental drug misuse and there is a need for greater emphasis on parental alcohol misuse as distinct from other substance misuse;
    b. Different levels of consumption (not just parents who are dependent drinkers) and particular styles of drinking (such as binge drinking) may affect children and it cannot be assumed that higher levels of consumption equates to greater harm;
    c. Children living with parental alcohol misuse come to the attention of services later than children living with parental drug misuse. Boys are less likely than girls to seek help and are more likely to come to the attention of services with regards to their presenting behaviour, for example through Youth Offending Services, than for the harm they are experiencing;
    d. Parental alcohol/substance misuse is strongly correlated with family conflict, and with domestic violence and abuse. This poses a risk to children of immediate significant harm and of longer-term negative consequences, which is magnified where both issues co-exist. However, there is a need for further research with children in these situations, and for a greater understanding of the role of gender where such issues co-exist.

[1] http://www.childrenscommissioner.gov.uk/sites/default/files/publications/FINAL_OCC_Report_Silent_Voices_Parental_Alcohol_Misuse_FULL_REPORT_Sept_2012_0.pdf

2. A large scale adult psychiatric morbidity survey was undertaken and published in 2007. The observations are worthy of note: *'in 2007 a quarter (24.2%) of adults were hazardous drinkers, as indicated by an AUDIT score of 8 or more. Men were twice as likely as women to be hazardous drinkers (33.2%of men, 15.7%of women). Younger men and women were more likely to be hazardous drinkers than older adults, though the pattern by age varied with sex. In men, hazardous drinking was most common between the ages of 25 and 34 (46.0%), whereas in women it was most common between the ages of 16 and 24 (32.0%). For both men and women, hazardous drinking became less likely with increasing age, with the smallest proportions found in adults aged 75 or more (16.6%of men, 6.4%of women).'*[2]

3. Within the family courts, the concern is the impact that the parental substance or alcohol misuse has on their ability to meet the child's needs. The methods of testing and the court's approach to test results is explored below.

Testing for Substance Misuse: What are the Options?

4. The following tests are used to identify drug and alcohol abuse:

    a. **Finger nail testing:** This test is used to test for drug misuse. Drugs are distributed via the blood supply to the nail cells and the nail bed. As the nail grows in thickness, it creates layers of drug history. It is possible to detect substance misuse for up to a month using finger nail testing;

    b. **Breathalyzer:** The results of the tests will only show whether alcohol has been consumed in the hours leading up to the test;

    c. **Urine testing:** This testing is used for testing for opioids and illicit drugs however the accuracy of the testing can be impacted by health complaints and there is a limited timescale for obtaining results. The

[2]2007 survey: The Adult Psychiatric Morbidity Survey (APMS): http://www.hscic.gov.uk/catalogue/PUB02931/adul-psyc-morb-res-hou-sur-eng-2007-rep.pdf). Updated survey due 2016.

period of time that the test can detect the presence of a substance depends on the substance tested for.

d. **Blood testing:** The detection period can be up to 3 weeks after consumption although it can be increased by larger consumption or longer periods of binge drinking leading up to the test. The test works by looking at the proteins in the blood produced by the liver (the liver function test 'LFT') and whether there is any increase or variation in the biomarker, carbohydrate deficit transferrin (CDT). If both the proteins and the biomarker are present then the test indicates a moderate to heavy amounts of alcohol. However, false positives or false negatives can occur as a result of health concerns such as hepatitis, liver disease which are not alcohol related.

e. **SCRAM Bracelet[3]:** this is a 'transdermal' monitoring of alcohol use. It is a fitted ankle bracelet which monitors the level of alcohol consumption 24/7. It is an expensive method of testing.

Hair strand testing

5. The most common method used by the courts to determine whether there has been drug use or chronic excessive alcohol consumption is hair strand testing.

6. Chronic excessive alcohol consumption is defined by the World Health Organisation as drinking more than 60g of alcohol on average per day.[4]

7. The Society of Hair Strand Testing says the following about testing for chronic excessive alcohol consumption[5] [para10-11]:

> *The use of specific diagnostic biomarkers for chronic excessive alcohol consumption, ethyl glucuronide (EtG) and fatty acid ethyl esters (FAEEs), have been investigated in various matrices including hair. The identification of*

[3] For a more detailed review of testing methods and transdermal monitoring see 'Alcohol Testing- What Are The Options?' http://www.familylawweek.co.uk/site.aspx?i=ed118874

[4] http://www.who.int/publications/cra/chapters/volume1/0959-1108.pdf

[5] http://soht.org/index.php/statements/9-nicht-kategorisiert/85-statement-2011

either EtG or FAEEs in hair, at concentrations above established cut-offs, is acceptable for assessing chronic alcohol consumption, however, the identification of both markers is encouraged. EtG and FAEEs are affected by cosmetic treatments, however, their incorporation into hair is not affected by hair pigmentation. The role of contamination from cosmetics should be considered when interpreting the presence of alcohol biomarkers in hair.

8. Hair strand test results should be treated as part of the whole evidential picture and comes with the following warnings:

    a. It cannot tell you if there has been moderate or social consumption or abstinence, only whether there has been chronic excessive alcohol consumption (whether the level of drinking is above the cut off point);

    b. It cannot tell you about timing of the consumption or whether it is binge or occasional drinking.

The Court's Approach to Hair Strand Testing?

9. In *Richmond London Borough Council v B, W, B and CB*[6], Mr Justice Moylan considered the validity of hair testing when determining whether a parent had consumed alcohol and if so, to what extent.

10. The court gave guidance as to the evidential approach to be taken by the courts when considering test results [para 22]:
    a. When used, hair tests should only be used as part of the wider evidential picture because of the risks of false positives.
    b. Because of the respective strengths and weaknesses of the each of the tests (EtG and FAEE's), if hair testing is to be undertaken, both tests should be used.
    c. The results produced by the tests should only be used for determining whether or not they are consistent with excessive alcohol consumption by use of the cut off levels;

[6] [2010] EWHC 2903 (Fam), [2011] 1 FLR 1345

d. The peer agreed cut off level for both tests are for the proximal 3cm segment of hair;
e. The witnesses agreed that when tests demonstrate levels above the cut off level, the result can be said to be 'consistent' with excessive consumption over the relevant period. A test showing a lower level than the cut off is 'consistent' with abstinence/social drinking;
f. There is no peer agreed cut off level between abstinence and social drinking.

11. The court reminded practitioners to follow the mandatory guidance set out in Part 25 of the FPR 2010 when seeking to instruct an expert to carry out hair strand testing. An understanding of these provisions is essential when making an application for hair strand testing as emphasised by the Court of Appeal in *Re C (A Child) (Procedural Requirements of a Part 25 Application)*[7]:

'Section 13 of the Children and Families Act 2014 and part 25 of the FPR now lay down firm statutory and procedural rules that must be applied in respect of expert evidence in family proceedings. It is the duty of all family law practitioners and the courts to learn, mark and digest these provisions and ensure that they are applied rigorously.'

12. The issue of reliability of hair strand testing was revisited in *Bristol City Council v A and A, and SB and CB, and Concateno and Trimega (interveners)*[8], and the court reiterated the following:

a. The science is now well-established and not controversial;

b. A positive identification of a drug at a quantity above the cut-off level is reliable as evidence that the donor has been exposed to the drug in question;

[7] [2015] EWCA Civ 539

[8] [2012] EWHC 2548 (Fam)

c. Sequential testing of sections is a good guide to the pattern of use revealed;

d. The quantity of drug in any given section is not proof of the quantity actually used in that period but is a good guide to the relative level of use (low, medium, high) over time.

Errors in Test Results

13. Although the science is well-established, it is not infallible. The court, the parties' representatives and the experts need to be vigilant as to potential errors as they can have the gravest of consequences. The court was faced with such a problem in *X Local Authority v Trimega Laboratories,*[9] in which a mother underwent regular blood alcohol testing which revealed that she had been abstinent. However, just before a final hearing, Trimega reported a test result indicating the mother was at the cut-off point between social and excessive drinking. The consequences were that the local authority changed its plan to adoption. Trimega then discovered that a clerical error had been made and the correct result showed continued improvement by the mother.

14. The court made a wasted costs order against Trimega as a result of the unnecessary hearings that had had to take place. The court however did not consider the error to have amounted to a 'flagrant reckless disregard' of the company's duties to the court but was rather a human error.

15. The court emphasised, in an open judgment, the importance of close scrutiny of expert evidence and the necessity to consider all of the surrounding circumstances in a case where the interpretation of the test results was so important and influential.

16. In *Re T (Care Proceedings: Drug Testing)*[10], the court stated that if a test result was to be challenged, the challenge had to be made immediately, to give opportunity for the laboratory to reappraise it before opportunity was lost. The

[9] [2013] EWCC 6 (Fam)

[10] [2012] EWHC 4081 (Fam) para 11

responsibility of that rested squarely on the solicitor for the party challenging the result of analysis. If challenge was not immediate, the opportunity was lost.

17. In the recent case of *Re R (A Child)* 16 June 2016 (full transcript awaited), the Court of Appeal remitted a decision to remove a child from her mother's care as a result of her drug use for a full rehearing after new expert evidence came to light about the hair strand test result. The Court of Appeal held that it was impossible for the trial judge to revisit the issue of the hair strand test in a vacuum given its central importance to issues of the mother's substance use and association with drug dealers in the past. Although the issue of the expert evidence relating to hair strand testing was important, the Court of Appeal stated that the judge should be able to resist any attempt to expand the matter to a wholesale debate about hair strand testing in order to secure a decision for the child.

Alison Grief QC
Justine Johnston
Ceri White
Rachel Chisholm

Curriculum Vitae

Doctor MIKE MCPHILLIPS

Consultant Psychiatrist

2, Lower Sloane Street,
London SW1W 8BJ

Tel: +44 207 245 1199
Fax: +44 207 245 1221
Email: mike@drmikemcphillips.com

Age:	54 years
Qualifications:	BA (Cantab), Medical Sciences MB BS (London) Member of The Royal College of Physicians Fellow of The Royal College of Psychiatrists Accredited UK Specialist in General Adult Psychiatry and Addictions Psychiatry
Current Appointment:	Nightingale Hospital, London The Lister Hospital, London
Clinical Experience:	NHS Consultant Psychiatrist, Kensington Chelsea and Westminster Mental Health Trust, London Liaison Psychiatrist, Cromwell Hospital, London Lead Consultant for Addictions Treatment Programme, Priory Hospital Roehampton, London Medical Director, The Causeway Retreat, a private Addictions Treatment Programme, Essex Visiting Consultant, Capio Nightingale Hospital, a private General Adult Psychiatric Hospital in London
Medicolegal Experience:	I have worked in a Court Diversion Scheme for mentally disordered offenders at Horseferry Road Magistrates Court in London. I have extensive experience of the legal problems surrounding substance misuse and other addictions and compulsive behaviour, including theft, crimes of violence, driving offences, divorce proceedings, Childrenôs Act proceedings, and the assessment of mental capacity. I have prepared hundreds of court reports over the last fifteen years and I have given evidence in Magistrateôs Courts, the High Court, the Family Court, The Criminal Courts and Employment Tribunals. I have special expertise in the assessment and treatment of addictive disorders, including assessing urine and hair test results. I have published clinical research on the epidemiology of substance misuse and on the use of laboratory tests to confirm or refute substance misuse. I currently prepare 10-20 legal reports per year. I accept instructions for the defence, the prosecution and joint instructions.

Education

1981-1984	Emmanuel College, Cambridge, England.
1984-1987	Charing Cross and Westminster Medical School, London, England.
1994-1997	Lecturer, Imperial College Medical School, London, England

Qualifications

BA (Cambridge University, England).

MB BS (London University, England).

Member of The Royal College of Physicians, UK.

Fellow of the Royal College of Psychiatrists, UK.

Postgraduate Training

1987-1990	Medical Rotation in Central and West London, General Medicine, Emergency Medicine, Cardiology, Oncology, Intensive Care and Transplant Medicine.
1990-1993	Charing Cross Psychiatric Training Rotation, London
1994-1995	MRC Research Fellow, Imperial College Medical School, London
1995-1997	Lecturer and Honorary Senior Registrar, Imperial College Medical School, London
1997-2002	Consultant Psychiatrist, Riverside Substance Misuse Service, Kensington, Chelsea and Westminster, London
	Medical Advisor, Liaison Psychiatry, The Cromwell Hospital, Cromwell Rd, London.
2002-2007	Consultant Psychiatrist, Lead Clinician Priory Lodge Programme, Priory Hospital Roehampton, London.
2007- 2009	Medical Director, The Causeway Retreat, Osea Island, Essex.
2009-	Visiting Consultant, The Lister Hospital, Chelsea Bridge Road, London
	Visiting Consultant, The Capio Nightingale Hospital, Lisson Grove, London

Previous Consultant Posts Held

NHS Consultant, Kensington and Chelsea, 1998-2003
I was a full-time NHS Consultant at the Chelsea and Westminster Hospital, an NHS teaching hospital in Central London. I ran Substance Misuse Services for Riverside Mental Health Trust, then the UKôs largest Substance Misuse Service. I gained extensive experience of the assessment, detoxification and treatment of clients with a full range of substance misuse disorders. I ran a methadone and diamorphine clinic, an alcohol detoxification clinic and inpatient detoxification beds.

Medical Adviser, The Cromwell Hospital, Kensington, 1998-2003.
The unit specialised in the treatment of depression, anxiety and psychiatric conditions relating to medical illnesses. I was Liaison psychiatrist to the Cromwell Hospital.

Staff Consultant Psychiatrist, Priory Hospital Roehampton, 2003-2007
Between 2003 and 2007, I ran the Addictions Treatment Programme at the Priory Hospital Roehampton, a large private general psychiatric hospital in London. The ATP treats substance misuse and dependency and compulsive behaviours such as gambling, shopping and eating in addition to comorbid psychiatric disorders such as bipolar disorder, psychosis, obsessive compulsive disorders, stress and phobias. The ATP at the Priory Hospital Roehampton operates according to a traditional 12 Step Minnesota Model programme, supported by General Psychiatric treatment for psychosis, mood disorders, food disorders and anxiety disorders.

Medical Director, The Causeway Retreat, Essex, 2007-2009
Between 2007 and 2009, I was the Medical Director at the Causeway Retreat, an exclusive private therapeutic retreat based on a 330-acre private island in Essex, England. The Causeway Retreat treated a broad range of stress-related and psychological conditions in an atmosphere of considerable tranquillity and comfort. The Causeway Retreat treated addictive and compulsive behaviours according to an abstinence model, using a modified 12 Step treatment programme, but also offered alternatives such as cognitive behavioural therapy, massage, nutritional advice, fitness programmes, meditation, physiotherapy and yoga instruction.

Visiting Consultant Nightingale Hospital, 2009-present
The Nightingale Hospital is a 50-bed Adult psychiatric Hospital in Marylebone, London NW1. The Nightingale treats substance misuse and dependency and compulsive behaviours such as gambling, shopping and eating in addition to comorbid psychiatric disorders such as bipolar disorder, psychosis, obsessive compulsive disorders, stress and phobias.

Private Practice
My private inpatient and outpatient practice includes approximately fifty per cent addictions and comorbid psychiatric conditions and fifty per cent general psychiatric conditions such as psychosis, bipolar disorder, depression, anxiety, phobias, post-traumatic stress disorder and obsessive compulsive disorder.

I have an international clientele and I have professional links with clinics all over the UK, as well as treatment centres and doctors in Ireland, Switzerland, North America, the Middle East, India, Pakistan, South Africa and Australia.

I see private outpatients every weekday at my consulting room in Lower Sloane Street, Knightsbridge, London.

Specialist Training

Adult Psychiatry

Substance Misuse Psychiatry

Professional Revalidation and Continuing Professional Development

Current registration with the General Medical Council, UK.

Currently registered for CPD with the Royal College of Psychiatrists.

Current Membership of a Peer Development Programme.

Currently registered for Revalidation with the General Medical Council, UK.

Published Research

McPhillips, MA, and Moscovich, DG, (1992) Lithium and Capgrasô Syndrome, (letter). *British Journal of Psychiatry*: 160, 574.

McPhillips, MA, and Spence SA, (1993) Emergency work at an inner London hospital, a review of 626 cases, *Psychiatric Bulletin* 17: (2), 84-86.

Ramsay, N. and **McPhillips, MA** (1993) Training and supervision of psychiatrists in the administration of electroconvulsive therapy, *Psychiatric Bulletin* 17: (12) 716-718.

Fullerton, FM, **McPhillips, MA,** Edelman, K, and Riccio, M. (1994) Acute pancreatitis in association with Clozapine. *New Trends in Experimental and Clinical Psychiatry*: Vol. X, 3, 149-151.

Spence, SA and **McPhillips, MA,** (1995) Personality disorder and Police Section 136 in Westminster: A retrospective analysis of 65 cases over six months. *Medicine, Science and Law*, 35:1, 48-52.

Barnes, TRE, and **McPhillips, MA** (1995) Are primary negative symptoms treatable? *European Neuropsychopharmacology*, 5 (3): 186.
Barnes, TRE and **McPhillips, MA** (1995) How to distinguish between the neuroleptic-induced deficit syndrome, depression and disease-related negative symptoms in schizophrenia. *International Clinical Psychopharmacology* 10: Suppl. 3, 115-121.

McEvedy, CJB, and **McPhillips, MA** (1995) Decriminalisation of cannabis (letter). *Lancet*, 346 899 1709.

McPhillips, MA, Kelly, FJ, Barnes, TRE, Duke, P, Gene Cos, N, Clark K (1997) Comorbid substance abuse among people with schizophrenia in the community: A study comparing self-report with analysis of hair and urine. *Schizophrenia Research* 24:25 (2): 141-8.

Barnes, TRE and **McPhillips, MA** (1998) Novel antipsychotics, extrapyramidal side effects and tardive dyskinesia. *International Clinical Psychopharmacology* 13 (4): 49-57.

McPhillips, MA, Strang, JC and Barnes, TRE (1998) Hair Analysis: New laboratory ability to screen for substance misuse *British Journal of Psychiatry* 173: 287-90.

Duke, PJ, Pantelis, C, **McPhillips, MA** & Barnes, TRE (2001) Substance misuse among patients with schizophrenia in the community: a census study. *British Journal of Psychiatry*, Dec;179:509-13.

Paterson, S, Cordero, R, **McPhillips, MA,** Carman, S. (2003) Interindividual dose/concentration relationship for methadone in hair. *Journal of Analytic Toxicology* Jan-Feb;27(1):20-3.

Bowden-Jones, H., **McPhillips, MA.,** Rogers, R., et al (2005) Risk-taking on tests sensitive to ventromedial prefrontal cortex dysfunction predicts early relapse in alcohol dependency: a pilot study. *Journal of Neuropsychiatry and Clinical Neurosciences, 17, 417 –420.*

H. Bowden-Jones, **M.A McPhillips** and E. M. Joyce (2006) Neurobehavioural characteristics and relapse in addiction. *The British Journal of Psychiatry* (2006) 188: 494.

Other Published Work and Media Work

I have made numerous television and radio appearances speaking on subjects relating to substance misuse and adult psychiatry.

I regularly give postgraduate and public lectures on the same subjects.

I have written numerous articles for the public, in newspapers, magazines and book on the same subjects.

Further details are given on my website, www.drmikemcphillips.com

Section 8

Relocation:
the holistic evaluation and children giving evidence.

Alex Verdan QC, Barbara Mills & Joy Brereton

Relocation and the Voice of the Child

The voice of the child in private family proceedings

1. The principle of hearing the voice of the child has long been established in international law and subsequently observed and applied in English domestic jurisprudence. Article 12 of the United Nations Convention on the Rights of the Child (UNCRC) provides that:

> "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

2. In English domestic law the primary legislative provision relating to the voice of the child is contained in section 1(3)(a) of Children Act 1989 which places an obligation upon the court to have regard to the "ascertainable wishes and feelings of the child concerned (considered in light of his age and understanding)".

3. The Family Procedure Rules 2010 ('FPR 2010'), Practice Direction 12B ('PD12B') paragraph 4.2-4.4 further provides that:

> "4.2 - Children and young people should be at the centre of all decision-making. This accords with the Family Justice Young People's Board Charter
>
> 4.3 - The child or young person should feel that their needs, wishes and feelings have been considered in the arrangements which are made for them.
>
> 4.4 - Children should be involved, to the extent which is appropriate given their age and level of understanding, in making the arrangements which affect them. This is just as relevant where:
>
> (1) the parties are making arrangements between themselves (which may be

recorded in a Parenting Plan),

as when:

(2) arrangements are made in the context of dispute resolution outside away from the court,

and/or

(3) the court is required to make a decision about the arrangements for the child.

4. In ***Re D (A Child) (Abduction: Custody Rights)*** **[2006] UKHL 51, [2007] 1 AC 619, [2007] 1 FLR 961** Baroness Hale stated the general importance of children participating in proceedings that affect them at [57]:

> "… there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents view".

5. The need to ascertain and take into account the wishes and feelings of the child, in the context of private law disputes, has been recognised in ***Mabon v Mabon*** **[2005] EWCA Civ 634**. The case concerned a trial judge's refusal to grant separate representation to three children aged 17, 15 and 13. In allowing the appeal and ordering separate representation of the three children, the court stressed the growing autonomy and rights of children, emphasising that where a child has sufficient understanding of the issues involved, the court should recognise the child's procedural right to be involved in the decision making process. As Thorpe LJ put it:

> "In my judgment the Rule is sufficiently widely framed to meet our obligations to comply with both Article 12 of the United Nations Convention and Article 8 of the ECHR, providing that judges correctly focus on the sufficiency of the child's understanding and, in measuring that sufficiency, reflect the extent to which, in the 21st Century, there is a keener appreciation of the autonomy of the child and the child's consequential right to participate in decision making processes that fundamentally affect his family life."

6. Most recently, in ***Re D (A Child) (International Recognition)*** **[2016] EWCA Civ 12**, concerning the recognition and enforcement of a foreign order, the Court of Appeal considered whether the opportunity for the child to be heard amounted to a fundamental principle of procedure under Article 23(b) of the Council Regulation (EC) No. 2201/2003 (Brussels II Revised Regulation 2003). In the leading judgment, at para 40, Lord Justice Ryder held:

> "Far from section 1(3)(a) CA 1989 being merely a checklist factor that is designed to ensure comprehensive evaluation of a welfare question, it is plainly an example of domestic legislation giving force to a fundamental principle of procedure."

7. In ***K v K (Children: Permanent Removal from Jurisdiction)*** **[2011] EWCA Civ 793**, at [141], Black LJ held that in relocation cases, the only principle to be applied in consideration of the application is the paramountcy principle:

> "The first point that is quite clear is that, as I have said already, the principle — the *only* authentic principle — that runs through the entire line of relocation authorities is that the welfare of the child is the court's paramount consideration. Everything that is considered by the court in reaching its determination is put into the balance with a view to measuring its impact on the child."

8. Thorpe LJ held at [87] that "the only principle of law enunciated in ***Payne v Payne*** **[2001] EWCA Civ 166** is that the welfare of the child is paramount; all the rest is guidance." At [57], he determined that in applications where a parent applies to remove a child from the jurisdiction, "[t]he judge should rather exercise his discretion to grant or refuse by applying the statutory checklist in s 1(3) of the CA 1989."

9. In ***Re C (Internal Relocation)*** **[2015] EWCA 1305**, Black LJ at [51] confirmed that there is no distinction between cases involving the relocation of a child within the jurisdiction and those where a parent seeks to relocate with a child to another jurisdiction:

> *"There is no doubt that it is the welfare principle in section 1(1) of the [Children Act 1989] which dictates the result in internal relocation cases, just as it is now acknowledged that it does in external relocation cases… I would not interpret the cases as imposing a supplementary requirement of exceptionality in internal relocation cases."*

10. One of the principle reasons for reforming the test in ***Payne v Payne*** **[2001] EWCA Civ 166** was, according to Ryder LJ, "the absence of any emphasis on the child's wishes and feelings or to take the question one step back, the child's participation in the decision making process" (***Re F (A Child)***

(International Relocation Cases) **[2015] EWCA Civ 882**).

11. Consequently, the voice of the child, as provided for in section 1(3)(a) of the Children Act 1989 forms one of the principle considerations of the court in relocation, as it is a fundamental element of the welfare based decision.

How is the child's voice heard?

12. The FPR 2010 PD12B, paragraph 4.5 provides for how the child should be involved in the making of arrangements that affect them:

> "If an application for a court order has been issued, the judge may want to know the child's view. This may be communicated to the judge in one of a number of ways:
>
> (1) By a Cafcass officer (in Wales, a Welsh Family Proceedings Officer (WFPO)) providing a report to the court which sets out the child's wishes and feelings;
>
> (2) By the child being encouraged (by the Cafcass officer or WFPO, or a parent or relative) to write a letter to the court;
>
> (3) In the limited circumstances described in paragraph 18 below, by the child being a party to the proceedings;
>
> and/or:
>
> (4) By the judge meeting with the child, in accordance with approved Guidance (currently the FJC Guidelines for Judges Meeting Children subject to Family Proceedings (April 2010))."

Welfare reports

13. A welfare report may be requested by a court considering any question with respect to a child under the Children Act 1989, pursuant to section 7(1) of that Act, which provides as follows:

> "(1) A court considering any question with respect to a child under this Act may—
>
> (a) ask an officer of the Service; or
>
> (b) ask a local authority to arrange for—
>
> (i) an officer of the authority; or
>
> (ii) such other person (other than an officer of the Service) as the authority considers appropriate,
>
> to report to the court on such matters relating to the welfare of that child as are required to be dealt with in the report."

14. The FPR 2010, rule 16.33(4) provides that:

> "(4) The officer, when carrying out duties in relation to proceedings under the 1989 Act, must have regard to the principle set out in section 1(2) and the matters set out in section 1(3)(a) to (f) of that Act as if for the word "court" in that section there were substituted the words "children and family reporter" or "welfare officer" as the case may be."

15. Consequently in the preparation of the welfare report, the Cafcass officer must have regard to the ascertainable wishes and feelings of the child (considered in light of the child's age and understanding) pursuant to section 1(3)(a) of the Children Act 1989.

16. The FPR 2010 PD12B, paragraph 14.13 offers guidance on whether the court should direct the Cafcass officer to prepare a report that presents the wishes and feelings of the child to the court:

> "(a) In line with the Family Justice Young People's Board Charter, children and young people should be at the centre of all proceedings.
>
> (b) The child or young person should feel that their needs, wishes and feelings have been considered in the court process

(c) Each decision should be assessed on its impact on the child.

(d) The court must consider the wishes and feelings of the child, ascertainable so far as is possible in light of the child's age and understanding and circumstances. Specifically, the Court should ask:

(i) Is the child aware of the proceedings?

(ii) Are the wishes and feelings of the child available, and/or to be ascertained (if at all)?

(iii) How is the child to be involved in the proceedings, and if so, how; for example, should they meet the judge/lay justices? Should they be encouraged to write to the court, or have their views reported by Cafcass/CAFCASS Cymru or by a local authority?

(iv) Who will inform the child of the outcome of the case, where appropriate?"

17. Ultimately, what the child has to say may be relevant not only as to the child's wishes and feelings, but also as to important facts derived from the child, which are relevant to the court's determinations. The value of the child's opportunity to be heard and any evidence he may adduce will have to be balanced against the impact, upon the child's welfare, of his involvement in the proceedings.

18. In the preparation of the welfare report, the child's voice is expressed in the context of their wider home environment. The Cafcass officer may consider it necessary to, and often does, provide the judge with a full picture of the family, investigate many sources and interview many people, including grandparents and other relatives, teachers, doctors and the children themselves. Paragraph 2.24 of the Cafcass Operating Framework states that a Cafcass officer will determine who needs to be interviewed in the exercise of their duties: https://www.cafcass.gov.uk/media/212819/cafcass_operating_framework.pdf

19. In ***Re R (A Minor) (Court Welfare Report)*** **[1993] Fam Law 722**, the court emphasised the duty of the Cafcass officer authoring the welfare report to see all relevant parties to the proceedings and, whenever possible, to see the child with each of those parties. Further, in ***Re W (A Minor) (Custody)*** **[1983] 4 FLR 492 at 501B**, the court held that the Cafcass officer should get to know the child in the home and observe the relationships between the adults and the child to inform the report. Indeed, the Cafcass officer should assess the

relationships within their natural environment **(*Re P (A Minor) (Inadequate Welfare Report)* [1996] 2 FCR 285; *Re P (Welfare Officer: Duties)* [1996] Fam Law 664**).

20. The child's voice in an application for permission to relocate may therefore be presented to the court, in the context of the child's family and home environment, through a Cafcass officer in their preparation of a welfare report.

Writing a letter to the judge

21. In ***Re S (Relocation: Interests of Siblings)* [2011] EWCA Civ 454**, the father sought permission to relocate his two sons, aged 16 and 12, to his home country of Canada. The mother, from whom the father had been separated for 4 years and who had been the children's primary carer since the separation, objected to their removal. They trial judge granted the father permission to remove the children based on the strength of their views expressed in a letter written by the eldest boy and signed by both expressing their reasons for wanting to move to Canada and also based on a meeting the judge held with the eldest child in which he found him to be wholeheartedly committed to going to Canada. The younger child did not meet with the judge and his views were taken to have been expressed in the 'joint' letter.

Separate representation of the child

22. In private law proceedings a child may conduct proceedings without a children's guardian or litigation friend in certain types of proceedings.

23. The FPR 2010 r.16.6(3) provides that a child may conduct proceedings without a children's guardian or litigation friend:

> "…subject to the child obtaining the court's permission or a solicitor
>
> (a) considers that the child is able, having regard to the child's understanding to give instructions in relation to the proceedings; and
> (b) has accepted instructions from that child to act for the child in the proceedings and, if the proceedings have begun, the solicitor is already acting".

24. The representation of children by a children's guardian in private family law proceedings is governed by Part 16 of the FPR 2010, Chapter 7 (rr. 16.22 – 16.28) and Part 4 of the FPR 2010 PD16A.

25. Rule 16.4(1) of the FPR 2010 provides for the appointment of a children's guardian:

> "(1) Without prejudice to rule 8.42 or 16.6, the court must appoint a children's guardian for a child who is the subject of proceedings, which are not proceedings of a type referred to in rule 16.3(1), if—
>
> (a) the child is an applicant in the proceedings;
>
> (b) a provision in these rules provides for the child to be a party to the proceedings; or
>
> (c) the court has made the child a party in accordance with rule 16.2."

26. Rule 16.2(1) of the FPR 2010 governs when a child can be made a party to the proceedings:

> "(1) The court may make a child a party to proceedings if it considers it is in the best interests of the child to do so."

27. In the determination of whether to grant separate representation to the child, the FPR 2010 PD16A, paragraph 7.3 states that "[t]he court's primary consideration will be the best interests of the child."

28. The FPR 2010 PD16A offers further guidance on when a child should be made a party to private law proceedings and therefore when a rule 16.4 children's guardian should be appointed:

> "7.1 Making the child a party to the proceedings is a step that will be taken only in cases which involve an issue of significant difficulty and consequently will occur in only a minority of cases. Before taking the decision to make the child a party, consideration should be given to whether an alternative route might be preferable, such as asking an officer of the Service or a Welsh family proceedings officer to carry out further work or by making a referral to social services or, possibly, by obtaining expert evidence.
>
> 7.2 The decision to make the child a party will always be exclusively that of the court, made in the light of the facts and circumstances of the particular case. The following are offered, solely by way of guidance, as circumstances which may justify the making of such an order –
>
> (a) where an officer of the Service or Welsh family proceedings officer has notified the court that in the opinion of that officer the child should be made a party;

(b) where the child has a standpoint or interest which is inconsistent with or incapable of being represented by any of the adult parties;
(c) where there is an intractable dispute over residence or contact, including where all contact has ceased, or where there is irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute;
(d) where the views and wishes of the child cannot be adequately met by a report to the court;
(e) where an older child is opposing a proposed course of action;
(f) where there are complex medical or mental health issues to be determined or there are other unusually complex issues that necessitate separate representation of the child;
(g) where there are international complications outside child abduction, in particular where it may be necessary for there to be discussions with overseas authorities or a foreign court;
(h) where there are serious allegations of physical, sexual or other abuse in relation to the child or there are allegations of domestic violence not capable of being resolved with the help of an officer of the Service or Welsh family proceedings officer;
(i) where the proceedings concern more than one child and the welfare of the children is in conflict or one child is in a particularly disadvantaged position;
(j) where there is a contested issue about scientific testing."

29. It is usually the case in private law proceedings that a child's interests can be safeguarded by the preparation of a welfare report, therefore an appointment of a children's guardian is made only in complex cases.

30. The FPR 2010 PD16A paragraph 7.3 states that the courts must take into account the impact of delay in giving a child party status and appointing a guardian:

> "It must be recognised that separate representation of the child may result in a delay in the resolution of the proceedings. When deciding whether to direct that a child be made a party, the court will take into account the risk of delay or other facts adverse to the welfare of the child. The court's primary consideration will be the best interests of the child."

31. *Paragraph 7.7 of the FPR PD16A further provides that:*

> *"*A children's guardian who is an officer of the Service or a Welsh family proceedings officer has, in addition, the duties set out in Part 3 of this

Practice Direction and must exercise those duties as set out in that Part."

32. *Consequently, a Cafcass officer appointed as a r. 16.4 children's guardian has the same duties as a r. 16.3 public law children's guardian.* Paragraph 6.1 of the FPR 2010 PD16A states:

> "6.1 The children's guardian must make such investigations as are necessary to carry out the children's guardian's duties and must, in particular –
>
> (a) contact or seek to interview such persons as the children's guardian thinks appropriate or as the court directs; and
>
> (b) obtain such professional assistance as is available which the children's guardian thinks appropriate or which the court directs be obtained."

33. The people whom the guardian may interview include the child and their family, professionals involved in the care of the child, including education and healthcare professionals, as well as professional agencies, such as the police and social services.

34. Paragraphs 6.6-6.8 of the FPR 2010 PD16A set out the r. 16.3 children's guardian's duty to provide advice to the court, which, pursuant to paragraph 7.7 applies to r. 16.4 guardians:

> "6.6 The children's guardian must advise the court on the following matters –
>
> (a) whether the child is of sufficient understanding for any purpose including the child's refusal to submit to a medical or psychiatric examination or other assessment that the court has the power to require, direct or order;
>
> (b) the wishes of the child in respect of any matter relevant to the proceedings including that child's attendance at court;
>
> (c) the appropriate forum for the proceedings;
>
> (d) the appropriate timing of the proceedings or any part of them;
>
> (e) the options available to it in respect of the child and the suitability of each such option including what order should be made in determining the application; and
>
> (f) any other matter on which the court seeks advice or on which the children's guardian considers that the court should be informed.

> 6.7 The advice given under paragraph 6.6 may, subject to any direction of the court, be given orally or in writing. If the advice is given orally, a note of it must be taken by the court or the court officer.
>
> 6.8 The children's guardian must –
>
> > (a) unless the court directs otherwise, file a written report advising on the interests of the child in accordance with the timetable set by the court"

35. In this way, the rule 16.4 guardian will present the voice of the child to the court through an oral or written report, including an account of their wishes and feelings and, if relevant, of their maturity to express a view.

36. Ways of obtaining the wishes and feeling of children, including by separate representation in relation to relocation were considered in ***Re W (Leave to Remove)* [2008] EWCA Civ 538**. The family was Swedish but had lived in England for some 15 years. The mother applied for leave to remove the children to Sweden. The Cafcass officer reported that the children were broadly supportive of such a move but urged caution in evaluating their views, recommending that they remained in England. The judge refused leave to remove. The Court of Appeal said that the judge should have given greater weight to the wishes and feelings of the children and, at [56] Wilson LJ said that there had been a strong argument for separate representation of the children in light of the fact that the Cafcass officer's recommendation conflicted with the children's views.

Child meeting the judge

37. Judges are seeing children far more frequently in family proceedings. In ***Re W* [2008] 3 FLR 1170**, Thorpe LJ recorded:

> "The participation of children in private law Children Act proceedings is a matter of particular topical concern. The Family Justice Council has created a sub-committee, 'The Voice of the Child', to advise government and to stimulate professional debate as to the way forward. As a generalisation it can be said that the committee is strongly in favour of judges seeing children much more frequently than has been our convention." [33]

38. Two years later the following guidelines were published in April 2010: 'Guidelines for Judges Meeting Children who are subject to Family Proceedings April 2010' [2010] 2 FLR 1872 ('the Guidelines')**.**

39. In the Preamble to the Guidelines it states:

- "In England and Wales in most cases a child's needs, wishes and feelings are brought to the court in written form by a Cafcass officer. Nothing in this guidance document is intended to replace or undermine that responsibility.
- It is Cafcass practice to discuss with a child in a manner appropriate to their developmental understanding whether their participation in the process includes a wish to meet the Judge. If the child does not wish to meet the Judge discussions can centre on other ways of enabling the child to feel a part of the process. If the child wishes to meet the Judge, that wish should be conveyed to the Judge where appropriate.
- The primary purpose of the meeting is to benefit the child. However, it may also benefit the Judge and other family members."

40. The Guidelines provide as follows:

"1. The judge is entitled to expect the lawyer for the child and/or the Cafcass officer:

(i) to advise whether the child wishes to meet the Judge;
(ii) if so, to explain from the child's perspective, the purpose of the meeting;
(iii) to advise whether it accords with the welfare interests of the child for such a meeting take place; and
(iv) to identify the purpose of the proposed meeting as perceived by the child's professional representative/s.

2. The other parties shall be entitled to make representations as to any proposed meeting with the Judge before the Judge decides whether or not it shall take place.

3. In deciding whether or not a meeting shall take place and, if so, in what circumstances, the child's chronological age is relevant but not determinative. Some children of 7 or even younger have a clear understanding of their circumstances and very clear views which they may wish to express.

4. If the child wishes to meet the judge but the judge decides that a meeting would be inappropriate, the judge should consider providing a brief explanation in writing for the child.

5. If a judge decides to meet a child, it is a matter for the discretion of the judge, having considered representations from the parties –

(i) the purpose and proposed content of the meeting;

(ii) at what stage during the proceedings, or after they have concluded, the meeting should take place;

(iii) where the meeting will take place;

(iv) who will bring the child to the meeting;

(v) who will prepare the child for the meeting (this should usually be the Cafcass officer);

(vi) who shall attend during the meeting – although a Judge should never see a child alone;

(vii) by whom a minute of the meeting shall be taken, how that minute is to be approved by the Judge, and how it is to be communicated to the other parties.

It cannot be stressed too often that the child's meeting with the judge is not for the purpose of gathering evidence. That is the responsibility of the Cafcass officer. The purpose is to enable the child to gain some understanding of what is going on, and to be reassured that the judge has understood him/her.

6. If the meeting takes place prior to the conclusion of the proceedings–

(i) The judge should explain to the child at an early stage that a judge cannot hold secrets. What is said by the child will, other than in exceptional circumstances, be communicated to his/her parents and other parties.

(ii) The judge should also explain that decisions in the case are the responsibility of the judge, who will have to weigh a number of factors, and that the outcome is never the responsibility of the child.

(iii) The judge should discuss with the child how his or her decisions will be communicated to the child.

(iv) The parties or their representatives shall have the opportunity to respond to the content of the meeting, whether by way of oral evidence or submissions.

41. In ***AJ v JJ*** **[2012] 1 FCR 161 [2011] EWCA Civ 1448**, it was argued that the Guidelines did not apply to proceedings brought under international family instruments such as The Hague 1980 Convention, Thorpe LJ dismissed this and said at [38]: "The Practice Note should be taken to apply to all proceedings in which the decision of the court will have a significant impact on the future life of the child."

42. Whether a judge meets with a child is entirely a matter for the discretion of the judge after hearing submissions from the parties. Judges are increasingly finding themselves meeting with children, especially when specific requests are made through their solicitor or a Cafcass officer.

43. Where a meeting takes place it is an opportunity for the judge to hear what the child may wish to say and for the child to hear the judge explain the nature of the process and, in particular, why, despite hearing what the child may say, the court's order may direct a different outcome (***JPC v SLW and SMW (Abduction)*** **[2007] EWHC 1349 (Fam), [2007] 2 FLR 900**, at para [47]; ***Re L v H*** **[2009] EWHC 3074 (Fam), [2010] 1 FLR 1229**, at para [45]; ***Re J(Abduction: Children's Objections)*** **[2011] EWCA Civ 1448, [2012] 1 FLR 457**, at paras [31]–[40])

44. The Guidelines make clear that the meeting is primarily for the benefit of the child, not for the purpose of gathering evidence, which is usually the remit of the Cafcass officer. In ***Re KP (Abduction: Child's Objections)*** **[2014] EWCA Civ 554 [2014] 2 FLR 660** Lord Justice Moore-Bick gave the following guidance in cases involving a judge meeting with the child at [56]:

> "(i) During that part of any meeting between a young person and a judge in which the judge is listening to the child's point of view and hearing what they have to say, the judge's role should be largely that of a passive recipient of whatever communication the young person wishes to transmit.
>
> (ii) The purpose of the meeting is not to obtain evidence and the judge should not, therefore, probe or seek to test whatever it is that the child wishes to say. The meeting is primarily for the benefit of the child, rather than for the benefit of the forensic process by providing additional evidence to the judge. As the *Guidelines* state, the task of gathering evidence is for the specialist Cafcass officers who have, as Mr Gupta submits, developed an expertise in this field.
>
> (iii) A meeting, such as in the present case, taking place prior to the judge deciding upon the central issues should be for the dual purposes of allowing the judge to hear what the young person may wish to volunteer and for the young person to hear the judge explain the nature of the court process. Whilst not wishing to be prescriptive, and whilst acknowledging that the encounter will proceed at the pace of the child, which will vary from case to case, it is difficult to envisage circumstances in which such a meeting would last for more than 20 minutes or so.
>
> (iv) If the child volunteers evidence that would or might be relevant to the outcome of the proceedings, the judge should report back to the parties and determine whether, and if so how, that evidence should be adduced."

45. In ***Re F (A Child) (International Relocation Cases)*** **[2015] EWCA Civ 882**, the father successfully appealed an order allowing the mother to permanently

remove the parties' 12 year old daughter to Germany. The father was Jewish and the mother converted to Judaism before reverting to Roman Catholicism following the parties' separation. There was an issue as to what the child's wishes and feelings were in relation to her own faiths and beliefs. To this end, the child expressed a wish to meet with the judge and a meeting subsequently took place. A note of that meeting was provided to the court.

46. In ***Re S (Relocation: Interests of Siblings)*** **[2011] EWCA Civ 454**, an older sibling aged 16 expressed unequivocal support to the father's application for permission to relocate his two sons, aged 16 and 12, to Canada. Such support was expressed in letter, but also in a meeting with the trial judge.

International child abduction – a comparative approach?

47. In applications for the summary return of a child brought under the 1980 Hague Convention or pursuant to the court's inherent jurisdiction, the proceedings are summary in nature and do not permit a substantive welfare evaluation, which will be undertaken upon the child's return or subsequent to the conclusion of the proceedings.

48. Despite not undertaking a substantive welfare based analysis in abduction cases, the courts have become increasingly concerned about the participation of the child in the proceedings. The court's greater awareness of the voice of the child in the field of abduction can be used to inform how the child is heard in relocation cases including:

    i) When to hear the child
    ii) When to grant separate representation to a child
    iii) Age, maturity and the weight of a child's views
    iv) How to reconcile competing views of siblings

When to hear the child?

49. In ***Re S (A Child) (Abduction: Hearing the Child)*** **[2014] EWCA Civ 1557**, it was held that the High Court, exercising its inherent jurisdiction in abduction cases, had an obligation in principle to consider whether and how to hear the child concerned [28]. The court noted that it could not be argued that, where a child was of an age and understanding to be heard, the child's voice was, of itself, irrelevant to welfare or that it could be assumed that the child's parents would be an appropriate vehicle to articulate the child's voice or to provide effective access to justice for the child [27].

50. In all applications for the summary return under the inherent jurisdiction, the court is now considering whether and how to hear the child concerned. This evidently mirrors the position in relocation cases, where the welfare checklist demands that the court (including the allocated Cafcass officer) consider the ascertainable wishes and feelings of the child, through the various mechanisms available, as part of its substantive welfare analysis.

Separate representation

51. In abduction proceedings, due to their summary nature, the child will rarely be joined as a party. In ***Re D (Abduction: Rights of Custody*** **[2007] 1 FLR 961, HL**, Baroness Hale stated at **[60]** that:

> "The most common method is therefore an interview with a Cafcass officer, who is not only skilled and experienced in talking with children but also, if practicing in the High Court, aware of the limited compass within which the child's views are relevant in Hague Convention cases. In most cases, this should be enough. In others, and especially where the child has asked to see the judge, it may also be necessary for the judge to hear the child. Only in a few cases will full scale legal representation be necessary. But whenever it seems likely that the child's views and interests may not be properly presented to the court, and in particular where there are legal arguments which the adult parties are not putting forward, then the child should be separately represented." (See also ***Re M and Another (Children)(Abduction: Rights of Custody)*** **[2008] AC 1288**)

52. The court, however, has expressed concern that the most common method of hearing the voice of the child by the process of reporting does not allow a child to actively engage in proceedings. A reporting officer may not be able to elicit a child's views through questioning and will not be able to give the child's response to evidence and submissions as they are presented (***Re C (Abduction: Separate Representation of Children)*** **[2008] 2 FLR 6)**.

53. As acknowledged in the field of private children law, party status can allow the child to emerge from the proceedings with the knowledge that his or her position has been independently represented and advanced to the judge. In ***Mabon v Mabon*** **[2005] 2 FLR 1011** at [29], Thorpe LJ considered that denying the child such an opportunity to participate may have welfare implications:

> "In testing the sufficiency of a child's understanding, I would not say that welfare has no place. If direct participation would pose an obvious risk of harm to the child, arising out of the nature of the continuing proceedings and, if the child is incapable of comprehending that risk,

then the judge is entitled to find that sufficient understanding has not been demonstrated. But judges have to be equally alive to the risk of emotional harm that might arise from denying the child knowledge of and participation in the continuing proceedings."

54. Most recently, in ***Ciccone v Ritchie* (No 1) [2016] EWHC 608 (Fam)**, a 15 year old was joined as a party to proceedings under the Hague Convention 1980, having attended mediation represented by a solicitor prior to proceedings being issued. It was held that confining this child to a passive role in the proceedings would be detrimental to him given the nature and extent of his involvement in the proceedings, and because he had a distinct view, which he wished to argue positively.

55. Ultimately, in deciding whether to grant separate representation of the child, the court will balance the benefits of representation for the child against the adverse effect of exposing the child to the parental conflict at court. In ***Ciccone v Ritchie* (No 1) [2016] EWHC 608 (Fam)**, MacDonald J noted at [56]:

> "The court must not, of course, have regard simply to the age of a child in deciding whether the child's best interests are met by being separately represented. The court has to, and does, balance against the benefits of representation the adverse effect of allowing the child to descend into the arena."

56. Given the paramountcy principle that governs relocation cases, coupled with the 'best interests' test of granting separate representation, pursuant to the FPR 2010, r.16.21(1), the court will be required to undertake a similar balancing exercise to that required of the court in abduction proceedings when considering whether a child should acquire party status.

Age, maturity and the weight of the child's views

57. A child's views should be considered by the court, but that does not mean that they will necessarily be upheld. In ***Re* W *(Abduction: Child's Objections)* [2010] 2 FLR 1165**, Wilson U noted that:

> "over the last 30 years the need to take decisions about much younger children not necessarily in accordance with their wishes but at any rate in the light of their wishes has taken hold"

58. The 1980 Hague Convention does not lay down any minimum age before a child's objections to a return can be taken into account. Presumably, when the 1980 Hague Convention was first drafted it was envisaged that the child's objections defence

would be applied restrictively and confined to cases where mature adolescents were expressing forceful objections.

59. In ***Re W (Abduction: Child's Objections)*** **[2010] 2 FLR 1165**, however, the Court of Appeal upheld Black J's decision at first instance to take account of the view of a child who was aged 5 years 11 months when interviewed by Cafcass and 6 years and 1 month at the date of the decision. There is no reported authority in which the views of a younger child have been taken into account for the purposes of the child's objections defence.

60. ***Re W (Abduction: Child's Objections)*** **[2010] 2 FLR 1165** does not mean that the views of every 6 year old will be taken into account. Each case will be fact specific. In cases involving very young children the court will need to give careful consideration to the independent evidence about the child's degree of maturity.

61. In ***Re F (Relocation)*** **[2012] EWCA Civ 1364**, the father unsuccessfully appealed an order granting permission to the mother to relocate with their 7 year old child to Spain. In relation to the child's wishes and feelings, the trial judge was recorded to have observed:

> 'The ascertainable wishes and feeling of the child concerned in the light of his age and understanding. He is an intelligent boy who is functioning at a higher level than his chronological age but not a very much higher level. I am dealing with an 8–9 year old. Given what he said to the welfare CAFCASS Officer I think he would enjoy returning to Spain in some ways and seeing his grandparents and so on and also having some likely reduced time at school. But I am also of the view that he would be content if he was to live here. His wishes and feeling don't help me very much."

62. In ***Re Z (Relocation)*** **[2012] EWHC 139 (Fam)**, the court granted the mother permission to relocate with her 6 year old daughter to Australia. In reaching his judgment, Pauffley J determined that the child's wishes and feelings about relocating were balanced and she was undecided about whether she wanted to move to Australia:

> "Now I turn to consider other welfare factors including, quite obviously, Z's ascertainable wishes and feelings judged in the light of her age and understanding. She is just a little over 6 years old and, as Ms Vivian's report makes clear, was not able to confirm which parent she wished to live with. Z is undecided about moving to Australia, offering what Ms Vivian considered to be entirely age appropriate and understandable views about wanting to go as well as not. She worries 'a bit' about not seeing her Dad if she moves to Australia and will miss her best friend L. The mother has provided reassurance that they will travel back to England to visit and for contact and has been positive about encouraging Z's friends and father to visit Australia. Z seemed confident, according to Ms Vivian, that her mother would be true to her word."

63. It is evident from the jurisprudence in relocation cases that children aged as young as 6 are presenting their wishes and feelings to the court, often through a welfare report prepared by Cafcass. Contrary to the impact such views might have in abduction cases where they raise objections, in relocation cases, it is unlikely that the child will have sufficient maturity at such a young age to express a view that is determinative. Each case will be fact specific and dependent upon the maturity and the strength of the views of the child.

Competing views of siblings

64. There are occasions where the court will be confronted with a case in which one child supports or is so young as to be indifferent to a relocation and the other sibling strongly objects. Similarly, in applications for summary return under the Hague Convention 1980, one child can have relevant objections to a return and another sibling child either does not object or is too young or immature for his views to be taken into account.

65. The authorities dealing with the approach that should be adopted in such cases are not easy to reconcile. In some cases the court has started from the proposition that there is no defence to the application in respect of the non-objecting, young, or immature child and therefore the objections of the older child should be overruled. ***Zaffino v Zaffino (Abduction: Child's Views)*** **[2006] 1 FLR 410**, for example, was a case involving six children aged between 5 and 14, four of whom had been wrongfully removed by the mother from Canada to England. Of the four children, the older two objected to returning to Canada but the younger two were too young to express a valid objection and no defence was raised in relation to them. Munby J (as he then was) ordered the return of the younger two children but upheld the objections of their older siblings. The Court of Appeal overturned Munby J's decision, holding that the discretion should have been exercised so as to avoid splitting the siblings (See also ***Re HB (Abduction: Children's Objections)*** **[1997) 1 FLR 392**).

66. In other cases, the court has first considered the objections of the older child and determined that they should be upheld. It has then gone on to find under Article 13(b) of the 1980 Hague Convention that it would be intolerable for the younger child to be separated from the older sibling. In ***Re T (Abduction: Child's Objections*** **to** ***Return)*** **[2000) 2 FLR 192**, the Court of Appeal was dealing with two children aged 11 and 6, the older of whom objected to returning to Spain. The court considered first the objections of the older child and decided that she should not be returned. In relation to the younger child, they held that in view of his exceptionally close relationship to his sister, it would create an 'intolerable situation' if he were to be returned without her. On that basis they allowed an appeal against an order for the return of both children (See also ***Re J (Abduction: Child's Objections*** **to** ***Return)*** **[2004] 2 FLR 64**).

67. In relocation cases, the court has recognised the importance of not splitting up the sibling unit. In ***Re F (Internal Relocation)*** **[2010] EWCA Civ 1428, [2011] 1 FLR 1382**, the mother sought permission to move with all four of her children from their home in the north-east of England to one of the Orkney isles. An independent social worker reported that the daughter, aged 11, was enthusiastic about the proposed move; that the eldest boy, aged 14, was at best ambivalent about it, and that both the middle boy, aged 12, who suffered from a mild autistic disorder and dyspraxia, and the youngest boy, aged 9, were opposed to it. The 12-year old had gone so far as to say that he would not move. The Court of Appeal held that the trial judge was correct to find that firstly the move would have caused the children huge emotional strain and harm by virtue of their conflicting interests and secondly, to have consequently refused the application.

68. In his judgment, Wilson LJ stated that the most weight must be placed on the wishes and feelings of the most vulnerable of the children:

> "Of course when mature, intelligent children have conflicting views, it is as impossible for the court as it is for parents to accommodate all of them. But regard had to be paid to the strength of views articulated not only by R in favour of the move but also by T against it; it had to be paid to the mature ambivalence rather movingly articulated by A; and it had to be paid, in my view in particular, to the views of G. In the light of his particular needs for support, stability, routine and paternal contact, his views, expressed with such vehemence to Ms Bailey, were in my view even more in need of consideration than those of the others." [35]

69. In ***Re S (Relocation: Interests of Siblings)*** **[2011] EWCA Civ 454**, after permission was given to the father to relocate his two sons, aged 16 and 12, to his home country of Canada, the eldest child left for Canada of his own accord, took up residence with his paternal aunt, and commenced school, stating that he had no intention of returning. The mother appealed in relation to the youngest child. On appeal, it was held that the judge had fallen into error in not considering the welfare interests of the children individually in light of their different ages, stages of development and the nature of their needs:

> "I propose to focus upon the error of principle or method … namely the judge's treatment of the two boys as a unit when, bearing in mind their differing ages, it was of high importance to distinguish and consider separately their individual needs and welfare interests including the need to consider separately and distinguish the weight to be accorded to their respective wishes and feelings." [56]

70. Sir Mark Potter held that in balancing the interests of the children, priority should have been given to the welfare interests of the younger child who was still at a tender age, in secure surroundings where there had been no compelling reason to uproot him. Unlike the elder boy, he lacked the

maturity to make up his own mind and was of an age when the care, support and influence of his mother as primary carer were still the major factors in his life. In contrast, the 16 year old was able to form and express his own views; even if the application had been refused he would have been able to move to Canada to attend university in 18 months' time.

71. The jurisprudence suggests that it is generally in the best interests of the siblings to remain together. Further, each sibling's wishes and feelings, together with their needs, must be considered individually and then weighed against those of the other siblings, where other welfare factors, including a child's vulnerabilities, may affect the balancing of the sibling's interests if they are in opposition to one another.

Alex Verdan QC
Barbara Mills
Joy Brereton

Relocation
and the Voice of the Child

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Relocation
and the Voice of the Child

Relocation and the Voice of the Child

- The voice of the child in private family law proceedings
- The voice of the child and the reformed test in relocation cases
- How is the child heard in relocation cases
- Relocation and international child abduction – a comparative approach

The Voice of the Child in Private Family Law Proceedings

Legislation ensuring the child's right to be heard:

- United Nations Convention on the Rights of the Child (UNCRC)
- Children Act 1989 (CA 1989)
- Family Procedure Rules 2010 (FPR 2010)

The Voice of the Child in Private Family Law Proceedings

Article 12 of the UNCRC provides:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

The Voice of the Child in Private Family Law Proceedings

Section 1(3)(a) of CA 1989 places an obligation upon the court to have regard to the "ascertainable wishes and feelings of the child concerned (considered in light of his age and understanding)".

The Voice of the Child in Private Family Law Proceedings

The **FPR 2010, Practice Direction 12B**, **paragraph 4.2-4.44** provides:

"4.2 - Children and young people should be at the centre of all decision-making. This accords with the Family Justice Young People's Board Charter

4.3 - The child or young person should feel that their needs, wishes and feelings have been considered in the arrangements which are made for them."

…

The Voice of the Child in Private Family Law Proceedings

….

4.4 - Children should be involved, to the extent which is appropriate given their age and level of understanding, in making the arrangements which affect them. This is just as relevant where:

(1) the parties are making arrangements between themselves (which may be recorded in a Parenting Plan),

as when:

(2) arrangements are made in the context of dispute resolution outside away from the court,

and/or

(3) the court is required to make a decision about the arrangements for the child."

.

The Voice of the Child in Private Family Law Proceedings

***Re D (A Child) (Abduction: Custody Rights)* [2006] UKHL 51, [2007] 1 AC 619, [2007] 1 FLR 961**, per Baroness Hale

"… there is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents view". [57]

The Voice of the Child in Private Family Law Proceedings

***Mabon v Mabon* [2005] EWCA Civ 634** , per Thorpe LJ

"In my judgment the Rule is sufficiently widely framed to meet our obligations to comply with both Article 12 of the United Nations Convention and Article 8 of the ECHR, providing that judges correctly focus on the sufficiency of the child's understanding and, in measuring that sufficiency, reflect the extent to which, in the 21st Century, there is a keener appreciation of the autonomy of the child and the child's consequential right to participate in decision making processes that fundamentally affect his family life." [26]

The Voice of the Child in Private Family Law Proceedings

***Re D (A Child) (International Recognition)* [2016] EWCA Civ 12** , per Ryder LJ

"Far from section 1(3)(a) CA 1989 being merely a checklist factor that is designed to ensure comprehensive evaluation of a welfare question, it is plainly an example of domestic legislation giving force to a fundamental principle of procedure." [40]

The Voice of the Child in Relocation

***K v K (Children: Permanent Removal from Jurisdiction)* [2011] EWCA Civ 793**, per Black LJ

"The first point that is quite clear is that, as I have said already, the principle — the *only* authentic principle — that runs through the entire line of relocation authorities is that the welfare of the child is the court's paramount consideration. Everything that is considered by the court in reaching its determination is put into the balance with a view to measuring its impact on the child." [141]

The Voice of the Child in Relocation

***K v K (Children: Permanent Removal from Jurisdiction)* [2011] EWCA Civ 793**, per Thorpe LJ

"the only principle of law enunciated in ***Payne v Payne* [2001] EWCA Civ 166** is that the welfare of the child is paramount; all the rest is guidance." [87]

in applications where a parent applies to remove a child from the jurisdiction, "[t]he judge should rather exercise his discretion to grant or refuse by applying the statutory checklist in s 1(3) of the CA 1989." [57]

The Voice of the Child in Relocation

***Re C (Internal Relocation)* [2015] EWCA 1305**, per Black LJ

"There is no doubt that it is the welfare principle in section 1(1) of the [Children Act 1989] which dictates the result in internal relocation cases, just as it is now acknowledged that it does in external relocation cases… I would not interpret the cases as imposing a supplementary requirement of exceptionality in internal relocation cases." [51]

The Voice of the Child in Relocation

***Re F (A Child) (International Relocation Cases)* [2015] EWCA Civ 882**, per Ryder LJ

One of the principle reasons for reforming the test in ***Payne v Payne* [2001] EWCA Civ 166** was "the absence of any emphasis on the child's wishes and feelings or to take the question one step back, the child's participation in the decision making process" [18].

The Voice of the Child in Relocation

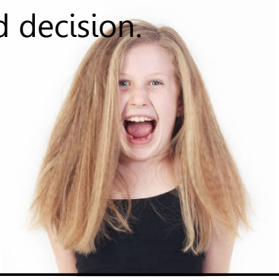
***K v K (Children: Permanent Removal from Jurisdiction)* [2011] EWCA Civ 793**

"[t]he judge should rather exercise his discretion to grant or refuse by applying the statutory checklist in s 1(3) of the CA 1989." [57]

The Voice of the Child in Relocation

***K v K (Children: Permanent Removal from Jurisdiction)* [2011] EWCA Civ 793**

•The voice of the child, as provided for in section 1(3)(a) of the Children Act 1989, forms one of the principle considerations of the court in relocation, as it is a fundamental element of the welfare based decision.



How is the child's voice heard?

The **FPR 2010 PD12B, pararaph 4.5** provides:

> "If an application for a court order has been issued, the judge may want to know the child's view. This may be communicated to the Judge in one of a number of ways:
>
> (1) By a Cafcass officer (in Wales, a Welsh Family Proceedings Officer (WFPO)) providing a **report to the court** which sets out the child's wishes and feelings;
>
> (2) By the child being encouraged (by the Cafcass officer or WFPO, or a parent or relative) to write a **letter to the court**;
>
> …

How is the child's voice heard?

How is the child's voice heard?

…
(3) In the limited circumstances described in paragraph 18 below, by the **child being a party** to the proceedings;

and/or:

(4) By the **judge meeting with the child**, in accordance with approved Guidance (currently the FJC Guidelines for Judges Meeting Children subject to Family Proceedings (April 2010)).”

How is the child's voice heard?

Welfare reports

How is the child's voice heard?

Welfare reports

A welfare report may be requested by a court considering any question with respect to a child under the Children Act 1989, pursuant to **section 7(1) CA 1989**, which provides as follows:

"(1) A court considering any question with respect to a child under this Act may—

(a) ask an officer of the Service; or

(b) ask a local authority to arrange for—

(i) an officer of the authority; or

(ii) such other person (other than an officer of the Service) as the authority considers appropriate, to report to the court on such matters relating to the welfare of that child as are required to be dealt with in the report."

How is the child's voice heard?

Welfare reports and the child's wishes and feelings

The **FPR 2010 PD12B, paragraph 14.13** offers guidance on whether the court should direct the Cafcass officer to prepare a report that presents the wishes and feelings of the child to the court:

> "(a) In line with the Family Justice Young People's Board Charter, children and young people should be at the centre of all proceedings.
>
> (b) The child or young person should feel that their needs, wishes and feelings have been considered in the court process
>
> (c) Each decision should be assessed on its impact on the child.
>
> …

How is the child's voice heard?

Welfare reports and the child's wishes and feelings

…

> (d) The court must consider the wishes and feelings of the child, ascertainable so far as is possible in light of the child's age and understanding and circumstances. Specifically, the Court should ask:
>
> (i) Is the child aware of the proceedings?
>
> (ii) Are the wishes and feelings of the child available, and/or to be ascertained (if at all)?
>
> (iii) How is the child to be involved in the proceedings, and if so, how; for example, should they meet the judge/lay justices? Should they be encouraged to write to the court, or have their views reported by Cafcass/CAFCASS Cymru or by a local authority?
>
> (iv) Who will inform the child of the outcome of the case, where appropriate?"

How is the child's voice heard?

Welfare reports – assessment of the child

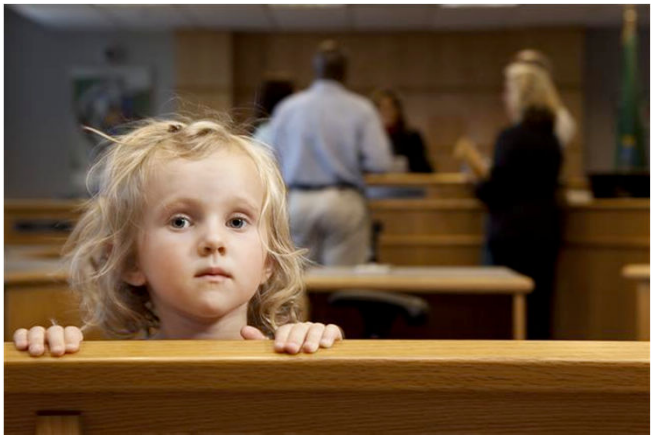
In ***Re R (A Minor) (Court Welfare Report)*** **[1993] Fam Law 722**, the court emphasised the duty of the Cafcass officer authoring the welfare report to see all relevant parties to the proceedings and, whenever possible, to see the child with each of those parties.

In ***Re W (A Minor) (Custody)*** **[1983] 4 FLR 492 at 501B**, the court held that the Cafcass officer should get to know the child in the home and observe the relationships between the adults and the child to inform the report.

The Cafcass officer should assess the relationships within their natural environment **(*Re P (A Minor) (Inadequate Welfare Report)* [1996] 2 FCR 285; *Re P (Welfare Officer: Duties)* [1996] Fam Law 664**).

How is the child's voice heard?

Separate representation



How is the child's voice heard?

Separate representation without a children's guardian

The **FPR 2010, rule 16.6(3)** provides that a child may conduct proceedings without a children's guardian or litigation friend:

> "…subject to the child obtaining the court's permission or a solicitor
>
> (a) considers that the child is able, having regard to the child's understanding to give instructions in relation to the proceedings; and
> (b) has accepted instructions from that child to act for the child in the proceedings and, if the proceedings have begun, the solicitor is already acting".

How is the child's voice heard?

Separate representation – appointing a children's guardian

The **FPR 2010, rule 16.4(1)** provides for the appointment of a children's guardian:

> "(1) Without prejudice to rule 8.42 or 16.6, the court must appoint a children's guardian for a child who is the subject of proceedings, which are not proceedings of a type referred to in rule 16.3(1), if—
>
> (a) the child is an applicant in the proceedings;
>
> (b) a provision in these rules provides for the child to be a party to the proceedings; or
>
> (c) the court has made the child a party in accordance with rule 16.2."

How is the child's voice heard?

Separate representation – The 'best interests' test

The **FPR 2010, rule 16.2(1)** governs when a child can be made a party to the proceedings:

> "(1) The court may make a child a party to proceedings if it considers it is in the **best interests** of the child to do so."

How is the child's voice heard?

Separate representation – when will a child become a party?

The **FPR 2010 PD16A, paragraphs 7.1-7.2** offer further guidance on when a child should be made a party to private law proceedings and therefore when a rule 16.4 children's guardian should be appointed:

> "7.1 Making the child a party to the proceedings is a step that will be taken only in cases which involve an issue of significant difficulty and consequently will occur in only a minority of cases. Before taking the decision to make the child a party, consideration should be given to whether an alternative route might be preferable, such as asking an officer of the Service or a Welsh family proceedings officer to carry out further work or by making a referral to social services or, possibly, by obtaining expert evidence.
>
> …

How is the child's voice heard?

Separate representation – when will a child become a party?

"7.2 The decision to make the child a party will always be exclusively that of the court, made in the light of the facts and circumstances of the particular case. The following are offered, solely by way of guidance, as circumstances which may justify the making of such an order –

(a) where an officer of the Service or Welsh family proceedings officer has notified the court that in the opinion of that officer the child should be made a party;

(b) where the child has a standpoint or interest which is inconsistent with or incapable of being represented by any of the adult parties;

(c) where there is an intractable dispute over residence or contact, including where all contact has ceased, or where there is irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute;

…

How is the child's voice heard?

Separate representation – when will a child become a party?

…

(d) where the views and wishes of the child cannot be adequately met by a report to the court;

(e) where an older child is opposing a proposed course of action;

(f) where there are complex medical or mental health issues to be determined or there are other unusually complex issues that necessitate separate representation of the child;

(g) where there are international complications outside child abduction, in particular where it may be necessary for there to be discussions with overseas authorities or a foreign court;

How is the child's voice heard?

Separate representation – when will a child become a party?

...

(h) where there are serious allegations of physical, sexual or other abuse in relation to the child or there are allegations of domestic violence not capable of being resolved with the help of an officer of the Service or Welsh family proceedings officer;

(i) where the proceedings concern more than one child and the welfare of the children is in conflict or one child is in a particularly disadvantaged position;

(j) where there is a contested issue about scientific testing."

How is the child's voice heard?

Separate representation – when will a child become a party?

The **FPR 2010 PD16A paragraph 7.3** states that the courts must take into account the impact of delay in giving a child party status and appointing a guardian:

> "It must be recognised that separate representation of the child may result in a delay in the resolution of the proceedings. When deciding whether to direct that a child be made a party, the court will take into account the risk of delay or other facts adverse to the welfare of the child. The court's primary consideration will be the best interests of the child."

How is the child's voice heard?

Separate representation – when will a child become a party?

***Re W (Leave to Remove)* [2008] EWCA Civ 538**

The family was Swedish but had lived in England for some 15 years. The mother applied for leave to remove the children to Sweden. The Cafcass officer reported that the children were broadly supportive of such a move but urged caution in evaluating their views, recommending that they remained in England. The judge refused leave to remove.

The Court of Appeal said that the judge should have given greater weight to the wishes and feelings of the children and, at [56] Wilson LJ said that there had been a strong argument for separate representation of the children in light of the fact that the Cafcass officer's recommendation conflicted with the children's views.

How is the child's voice heard?

Separate representation – duties of the children's guardian

The **FPR PD16A, paragraph 7.7** provides that:

"A children's guardian who is an officer of the Service or a Welsh family proceedings officer has, in addition, the duties set out in Part 3 of this Practice Direction and must exercise those duties as set out in that Part."

Consequently, a Cafcass officer appointed as a r. 16.4 children's guardian has the same duties as a r. 16.3 public law children's guardian.

How is the child's voice heard?

Separate representation – duties of the children's guardian

The **FPR 2010 PD16A, paragraph 6.1 (Part 3)** states:

> "6.1 The children's guardian must make such investigations as are necessary to carry out the children's guardian's duties and must, in particular –
>
> (a) contact or seek to interview such persons as the children's guardian thinks appropriate or as the court directs; and
>
> (b) obtain such professional assistance as is available which the children's guardian thinks appropriate or which the court directs be obtained."

How is the child's voice heard?

Separate representation – duties of the children's guardian

The **FPR 2010 PD16A, paragraphs 6.6-6.8 (Part 3)** set out the r. 16.3 children's guardian's duty to provide advice to the court:

> "6.6 The children's guardian must advise the court on the following matters –
>
> (a) whether the child is of sufficient understanding for any purpose including the child's refusal to submit to a medical or psychiatric examination or other assessment that the court has the power to require, direct or order;
>
> (b) the wishes of the child in respect of any matter relevant to the proceedings including that child's attendance at court;
>
> (c) the appropriate forum for the proceedings;
>
> …

How is the child's voice heard?

Separate representation – duties of the children's guardian

The **FPR 2010 PD16A, paragraphs 6.6-6.8 (Part 3)** set out the r. 16.3 children's guardian's duty to provide advice to the court:

> ...
> (d) the appropriate timing of the proceedings or any part of them;
> (e) the options available to it in respect of the child and the suitability of each such option including what order should be made in determining the application; and
> (f) any other matter on which the court seeks advice or on which the children's guardian considers that the court should be informed."

How is the child's voice heard?

Separate representation – duties of the children's guardian

The **FPR 2010 PD16A, paragraphs 6.6-6.8 (Part 3)** set out the r. 16.3 children's guardian's duty to provide advice to the court:

> "6.7 The advice given under paragraph 6.6 may, subject to any direction of the court, be given orally or in writing. If the advice is given orally, a note of it must be taken by the court or the court officer.
>
> 6.8 The children's guardian must –
> (a) unless the court directs otherwise, file a written report advising on the interests of the child in accordance with the timetable set by the court"

How is the child's voice heard?

Child meeting the judge

How is the child's voice heard?

Child meeting the judge

***Re W* [2008] 3 FLR 1170**

"The participation of children in private law Children Act proceedings is a matter of particular topical concern. The Family Justice Council has created a sub-committee, 'The Voice of the Child', to advise government and to stimulate professional debate as to the way forward. As a generalisation it can be said that the committee is strongly in favour of judges seeing children much more frequently than has been our convention." [33]

How is the child's voice heard?

Child meeting the judge

'Guidelines for Judges Meeting Children who are subject to Family Proceedings April 2010' [2010] 2 FLR 1872

In the Preamble to the Guidelines it states:

- "In England and Wales in most cases a child's needs, wishes and feelings are brought to the court in written form by a Cafcass officer. Nothing in this guidance document is intended to replace or undermine that responsibility.
- It is Cafcass practice to discuss with a child in a manner appropriate to their developmental understanding whether their participation in the process includes a wish to meet the Judge. If the child does not wish to meet the Judge discussions can centre on other ways of enabling the child to feel a part of the process. If the child wishes to meet the Judge, that wish should be conveyed to the Judge where appropriate.
- The primary purpose of the meeting is to benefit the child. However, it may also benefit the Judge and other family members."

How is the child's voice heard?

Child meeting the judge

'Guidelines for Judges Meeting Children who are subject to Family Proceedings April 2010' [2010] 2 FLR 1872

The Guidelines provide as follows:

- "1. The judge is entitled to expect the lawyer for the child and/or the Cafcass officer:

(i)to advise whether the child wishes to meet the Judge;

(ii)if so, to explain from the child's perspective, the purpose of the meeting;

(iii)to advise whether it accords with the welfare interests of the child for such a meeting take place; and

(iv)to identify the purpose of the proposed meeting as perceived by the child's professional representative/s. 2. The other parties shall be entitled to make representations as to any proposed meeting with the Judge before the Judge decides whether or not it shall take place.

How is the child's voice heard?

Child meeting the judge

'Guidelines for Judges Meeting Children who are subject to Family Proceedings April 2010' [2010] 2 FLR 1872

2. The other parties shall be entitled to make representations as to any proposed meeting with the Judge before the Judge decides whether or not it shall take place.

3. In deciding whether or not a meeting shall take place and, if so, in what circumstances, the child's chronological age is relevant but not determinative. Some children of 7 or even younger have a clear understanding of their circumstances and very clear views which they may wish to express.

4. If the child wishes to meet the judge but the judge decides that a meeting would be inappropriate, the judge should consider providing a brief explanation in writing for the child.

How is the child's voice heard?

Child meeting the judge

'Guidelines for Judges Meeting Children who are subject to Family Proceedings April 2010' [2010] 2 FLR 1872

5. If a judge decides to meet a child, it is a matter for the discretion of the judge, having considered representations from the parties –

(i) the purpose and proposed content of the meeting;

(ii) at what stage during the proceedings, or after they have concluded, the meeting should take place;

(iii) where the meeting will take place;

(iv) who will bring the child to the meeting;

(v) who will prepare the child for the meeting

(vi) who shall attend during the meeting – although a Judge should never see a child alone;

(vii) by whom a minute of the meeting shall be taken, how that minute is to be approved by the Judge, and how it is to be communicated to the other parties.

How is the child's voice heard?

Child meeting the judge

'Guidelines for Judges Meeting Children who are subject to Family Proceedings April 2010' [2010] 2 FLR 1872

"…It cannot be stressed too often that the child's meeting with the judge is not for the purpose of gathering evidence. That is the responsibility of the Cafcass officer. The purpose is to enable the child to gain some understanding of what is going on, and to be reassured that the judge has understood him/her."

How is the child's voice heard?

Child meeting the judge

'Guidelines for Judges Meeting Children who are subject to Family Proceedings April 2010' [2010] 2 FLR 1872

"6. If the meeting takes place prior to the conclusion of the proceedings–

(i) The judge should explain to the child at an early stage that a judge cannot hold secrets. What is said by the child will, other than in exceptional circumstances, be communicated to his/her parents and other parties.

(ii) The judge should also explain that decisions in the case are the responsibility of the judge, who will have to weigh a number of factors, and that the outcome is never the responsibility of the child.

(iii) The judge should discuss with the child how his or her decisions will be communicated to the child.

(iv) The parties or their representatives shall have the opportunity to respond to the content of the meeting, whether by way of oral evidence or submissions."

How is the child's voice heard?

Child meeting the judge

***AJ v JJ* [2012] 1 FCR 161 [2011] EWCA Civ 1448**

"The Practice Note should be taken to apply to all proceedings in which the decision of the court will have a significant impact on the future life of the child." [38]

How is the child's voice heard?

Child meeting the judge

•Where a meeting takes place it is an opportunity for the judge to hear what the child may wish to say and for the child to hear the judge explain the nature of the process and, in particular, why, despite hearing what the child may say, the court's order may direct a different outcome (***JPC v SLW and SMW (Abduction)* [2007] EWHC 1349 (Fam), [2007] 2 FLR 900**, at para [47]; ***Re L v H* [2009] EWHC 3074 (Fam), [2010] 1 FLR 1229**, at para [45]; ***Re J(Abduction: Children's Objections)* [2011] EWCA Civ 1448, [2012] 1 FLR 457**, at [31]–[40])

How is the child's voice heard?

Child meeting the judge

•The Guidelines make clear that the meeting is primarily for the benefit of the child, not for the purpose of gathering evidence, which is usually the remit of the Cafcass officer. In ***Re KP (Abduction: Child's Objections)*** **[2014] EWCA Civ 554 [2014] 2 FLR 660** Lord Justice Moore-Bick gave the following guidance in cases involving a judge meeting with the child at [56]:

> "(i) During that part of any meeting between a young person and a judge in which the judge is listening to the child's point of view and hearing what they have to say, the judge's role should be largely that of a passive recipient of whatever communication the young person wishes to transmit.

How is the child's voice heard?

Child meeting the judge

> (ii) The purpose of the meeting is not to obtain evidence and the judge should not, therefore, probe or seek to test whatever it is that the child wishes to say. The meeting is primarily for the benefit of the child, rather than for the benefit of the forensic process by providing additional evidence to the judge. As the *Guidelines* state, the task of gathering evidence is for the specialist Cafcass officers who have, as Mr Gupta submits, developed an expertise in this field.
>
> (iii) A meeting, such as in the present case, taking place prior to the judge deciding upon the central issues should be for the dual purposes of allowing the judge to hear what the young person may wish to volunteer and for the young person to hear the judge explain the nature of the court process. Whilst not wishing to be prescriptive, and whilst acknowledging that the encounter will proceed at the pace of the child, which will vary from case to case, it is difficult to envisage circumstances in which such a meeting would last for more than 20 minutes or so.
>
> (iv) If the child volunteers evidence that would or might be relevant to the outcome of the proceedings, the judge should report back to the parties and determine whether, and if so how, that evidence should be adduced."

How is the child's voice heard?

Child meeting the judge

•In ***Re F (A Child) (International Relocation Cases)*** **[2015] EWCA Civ 882**, the father successfully appealed an order allowing the mother to permanently remove the parties' 12 year old daughter to Germany. The father was Jewish and the mother converted to Judaism before reverting to Roman Catholicism following the parties' separation. There was an issue as to what the child's wishes and feelings were in relation to her own faiths and beliefs. To this end, the child expressed a wish to meet with the judge and a meeting subsequently took place. A note of that meeting was provided to the court.

How is the child's voice heard?

Child meeting the judge

•In ***Re S (Relocation: Interests of Siblings)*** **[2011] EWCA Civ 454**, an older sibling aged 16 expressed unequivocal support to the father's application for permission to relocate his two sons, aged 16 and 12, to Canada. Such support was expressed in letter, but also in a meeting with the trial judge.

International Child Abduction: A comparative approach?

Despite not undertaking a substantive welfare based analysis in abduction cases, the courts have become increasingly concerned about the participation of the child in the proceedings. The court's greater awareness of the voice of the child in the field of abduction can be used to inform how the child is heard in relocation cases including:

- When to hear the child
- When to grant separate representation to a child
- Age, maturity and the weight of a child's views
- How to reconcile competing views of siblings

International children law: When to hear the child?

In ***Re S (A Child) (Abduction: Hearing the Child)*** **[2014] EWCA Civ 1557**, it was held that the High Court, exercising its inherent jurisdiction in abduction cases, had an obligation in principle to consider whether and how to hear the child concerned [28].

The court noted that it could not be argued that, where a child was of an age and understanding to be heard, the child's voice was, of itself, irrelevant to welfare or that it could be assumed that the child's parents would be an appropriate vehicle to articulate the child's voice or to provide effective access to justice for the child [27].

International children law: When will the court direct separate representation?

In abduction proceedings, due to their summary nature, the child will rarely be joined as a party. In ***Re D (Abduction: Rights of Custody*** **[2007] 1 FLR 961, HL**, Baroness Hale stated at **[60]** that:

"The most common method is therefore an interview with a Cafcass officer, who is not only skilled and experienced in talking with children but also, if practicing in the High Court, aware of the limited compass within which the child's views are relevant in Hague Convention cases. In most cases, this should be enough. In others, and especially where the child has asked to see the judge, it may also be necessary for the judge to hear the child. **Only in a few cases will full scale legal representation be necessary. But whenever it seems likely that the child's views and interests may not be properly presented to the court, and in particular where there are legal arguments which the adult parties are not putting forward, then the child should be separately represented.**"

Relocation: When will the court direct separate representation?

Re W (Leave to Remove) **[2008] EWCA Civ 538**

Wilson LJ said that there had been a strong argument for separate representation of the children in light of the fact that the Cafcass officer's recommendation conflicted with the children's views.

Separate representation: Engagement of the child

The court has expressed concern that the most common method of hearing the voice of the child by the process of reporting does not allow a child to actively engage in proceedings. A reporting officer may not be able to elicit a child's views through questioning and will not be able to give the child's response to evidence and submissions as they are presented (***Re C (Abduction: Separate Representation of Children)* [2008] 2 FLR 6**).

Separate representation: Engagement of the child vs Emotional harm

***Mabon v Mabon* [2005] 2 FLR 1011** per Thorpe LJ

"In testing the sufficiency of a child's understanding, I would not say that welfare has no place. If direct participation would pose an obvious risk of harm to the child, arising out of the nature of the continuing proceedings and, if the child is incapable of comprehending that risk, then the judge is entitled to find that sufficient understanding has not been demonstrated. But judges have to be equally alive to the risk of emotional harm that might arise from denying the child knowledge of and participation in the continuing proceedings." [29]

Separate representation:
Engagement of the child vs Emotional harm

Ciccone v Ritchie **(No 1) [2016] EWHC 608 (Fam)** per MacDonald J:

"The court must not, of course, have regard simply to the age of a child in deciding whether the child's best interests are met by being separately represented. The court has to, and does, balance against the benefits of representation the adverse effect of allowing the child to descend into the arena." [56]

Age, maturity and the weight of the child's views:
The court's approach to the voice of young children

Re W (Abduction: Child's Objections) **[2010] 2 FLR 1165** per Wilson J:

"over the last 30 years the need to take decisions about much younger children not necessarily in accordance with their wishes but at any rate in the light of their wishes has taken hold". [17]

Age, maturity and the weight of the child's views: The court's approach to the voice of young children

***Re W (Abduction: Child's Objections)* [2010] 2 FLR 1165**

- Court of Appeal upheld Black J's decision at first instance to take account of the view of a child who was aged **5 years 11 months** when interviewed by Cafcass and 6 years and 1 month at the date of the decision.

- There is no reported authority in which the views of a younger child have been taken into account for the purposes of the child's objections defence.

Age, maturity and the weight of the child's views: The court's approach to the voice of young children

***Re F (Relocation)* [2012] EWCA Civ 1364**

"The ascertainable wishes and feeling of the child concerned in the light of his age and understanding. He is an intelligent boy who is functioning at a higher level than his chronological age but not a very much higher level. I am dealing with an 8–9 year old. Given what he said to the welfare CAFCASS Officer I think he would enjoy returning to Spain in some ways and seeing his grandparents and so on and also having some likely reduced time at school. But I am also of the view that he would be content if he was to live here. His wishes and feeling don't help me very much."

Age, maturity and the weight of the child's views: The court's approach to the voice of young children

Re Z (Relocation) **[2012] EWHC 139 (Fam)** per Pauffley J:

"Now I turn to consider other welfare factors including, quite obviously, Z's ascertainable wishes and feelings judged in the light of her age and understanding. She is just a little over 6 years old and, as Ms Vivian's report makes clear, was not able to confirm which parent she wished to live with. Z is undecided about moving to Australia, offering what Ms Vivian considered to be entirely age appropriate and understandable views about wanting to go as well as not. She worries 'a bit' about not seeing her Dad if she moves to Australia and will miss her best friend L. The mother has provided reassurance that they will travel back to England to visit and for contact and has been positive about encouraging Z's friends and father to visit Australia. Z seemed confident, according to Ms Vivian, that her mother would be true to her word." [68]

International child abduction: Competing Views of Siblings

Zaffino v Zaffino (Abduction: Child's Views) **[2006] 1 FLR 410**

A case involving six children aged between 5 and 14, four of whom had been wrongfully removed by the mother from Canada to England. Of the four children, the older two objected to returning to Canada but the younger two were too young to express a valid objection and no defence was raised in relation to them. Munby J (as he then was) ordered the return of the younger two children but upheld the objections of their older siblings. The Court of Appeal overturned Munby J's decision, holding that the discretion should have been exercised so as to avoid splitting the siblings

International child abduction: Competing Views of Siblings

In ***Re T (Abduction: Child's Objections* to *Return)* [2000) 2 FLR 192**, the Court of Appeal was dealing with two children aged 11 and 6, the older of whom objected to returning to Spain. The court considered first the objections of the older child and decided that she should not be returned. In relation to the younger child, they held that in view of his exceptionally close relationship to his sister, it would create an 'intolerable situation' under Article 13(b) of the 1980 Hague Convention if he were to be returned without her. On that basis they allowed an appeal against an order for the return of both children

Relocation: Competing Views of Siblings

***Re F (Internal Relocation)* [2010] EWCA Civ 1428, [2011] 1 FLR 1382**

"Of course when mature, intelligent children have conflicting views, it is as impossible for the court as it is for parents to accommodate all of them. But regard had to be paid to the strength of views articulated not only by R in favour of the move but also by T against it; it had to be paid to the mature ambivalence rather movingly articulated by A; and it had to be paid, in my view in particular, to the views of G. In the light of his particular needs for support, stability, routine and paternal contact, his views, expressed with such vehemence to Ms Bailey, were in my view even more in need of consideration than those of the others." [35]

Four Paper Buildings

Relocation: Competing Views of Siblings

Re S (Relocation: Interests of Siblings) **[2011] EWCA Civ 454**

"I propose to focus upon the error of principle or method … namely the judge's treatment of the two boys as a unit when, bearing in mind their differing ages, it was of high importance to distinguish and consider separately their individual needs and welfare interests including the need to consider separately and distinguish the weight to be accorded to their respective wishes and feelings." [56]

Section 9

International Finance Issues:
Part III MFPA Applications and the EU Maintenance Regulation

Jonathan Cohen QC, Francesca Dowse and Henry Clayton

MFPA 1984 Part III: *Applications and Updates 2016*

Francesca Dowse

Cayman Islands

Four Paper Buildings

View – Last Seminar 4 years ago

Four Paper Buildings

Part III hurdles

JURISDICTION

↓

LEAVE TO APPLY FILTER (EX P)

↓

SUBSTANTIVE PROCEEDINGS

JURISDICTION

- That the foreign divorce, judicial separation or annulment is recognised as valid in England and Wales; AND
- The applicant has not remarried; AND
- That the applicant has jurisdiction to issue in England and Wales

- Either of the parties must be domiciled in England and Wales either on the date of the application for leave under Part III or on the date when the divorce in the foreign country took effect; OR
- Either of the parties must have been habitually resident in England and Wales throughout the year preceding either the date of the application for leave or the date when the foreign divorce took effect; OR
- Either or both of the parties had at the date of the application for leave a beneficial interest in a dwelling-house in England or Wales which was at some time during the marriage used as a matrimonial home of the parties [caution here*].

LEAVE TO APPLY – WITHOUT NOTICE FILTER

- The Court will need to decide under s.16 whether, in all the circumstances of the case, it would be appropriate for a financial order to be made by an English court
- Leave will only be granted if the Court considers that there is a substantial ground (S.13)

The Part III threshold

Lord Collins said in Agbaje v Agbaje [2010] UKSC 13 at [33]:

*"***In the present context the principal object of the filter mechanism is to prevent wholly unmeritorious claims being pursued to oppress or blackmail a former spouse ….The threshold is not high** …"

n.b. That is why the application is made ex parte

SETTING ASIDE LEAVE

Lord Collins said in *Agbaje* at [33]:

> *"In an application under s.13,* ***unless it is clear that the respondent can deliver a knock-out blow****, the court should use its case management powers to adjourn an application to set aside to be heard with the substantive application."*

Knock-out blow
Ali v Liston

SUBSTANTIVE AWARD

- S.18 incorporates the MCA 1973 s.25 factors
- The Supreme Court in *Agbaje* made it clear that Part III contains **no express reference to hardship, injustice or exceptionality** and these were not conditions for the making of an award, although the presence of hardship or injustice **might** made it appropriate for an order to be made, and affect the nature of relief awarded (para 61).

Top-up?

- The Supreme Court in Agbaje was clear that the aim of the Court should not be simply to 'top up' the foreign award so that it is in line with an English award (para 65).
- However, that did not mean the English Courts should limit themselves to the minimum required to overcome injustice (para 64).
- Coleridge J's award of 39% to take into account the Nigerian 'flavour' of the case was upheld

Case law update – 2015 onwards

- *MA v SK* [2015] EWHC 887 (Fam) Moor J

– finding H was the beneficial owner of the company which held **one of** the FMHs in London;

–dealt with on a 'needs light' basis, but not the Radmacher level of 'predicament of real need' because of the Saudi element;

- W got £10.5million out of assumed wealth of £287.5million (which included a Duxbury fund)

- *Z v Z and Others* [2016] EWHC 911 (Fam) (Roberts J) - Does a qualifying post-nuptial agreement preclude a 'second bite of the cherry'?

- Divorce in foreign jurisdiction party A obtains best possible settlement against party B. Settlement is by way of post-nuptial agreement expressed 'in full and final settlement' against B "**in all countries of the world"**. Can A bring a claim under Part III?

- Russian parties married in Moscow in 1997. Moved to London 2004.

- At para [90] Roberts J concluded that:

  '*Even if the terms of the agreement were fair in the light of the then prevailing circumstances, that fact, of itself, is* ***not necessarily a bar*** *to an effective Part III claim provided that the English court considers it 'appropriate' in all the circumstances to make an order.'*

- The dichotomy is obvious.

Al-Juffali property

- *Al-Juffali v Estrada & Another* [2016] EWCA Civ 176 – H appeals dismissal by Hayden J to strike out W's claim. H age 61 from a large Saudi family. W age 59 from USA and lived here since 1988, 1C age 13;

- Married in 2001 in Dubai, lived here and separated in 2013. In April 2014 H formally appointed by the Governor-General of St Lucia as "**Ambassador and Permanent Representative**" of St Lucia to the International Maritime Organisation ("**IMO**") in the UK.

- H had contended before Hayden J that he was entitled to diplomatic immunity. Application to strike out dismissed:

  1) H was not entitled in principle to immunity because he had not discharged any functions as a Permanent Representative, his appointment being an **'artificial construct**' designed to defeat the jurisdiction of the court";
  2) H was permanently resident in the UK, any immunity therefore only extending to his official functions.

- The Court of Appeal considered international and domestic law and determined that it was wrong to hold that in principle diplomatic immunity could not shield a husband from a wife's Part III MFPA 1984 claim.

- However H's permanent residence in the UK precluded H from availing himself of such protection from W's financial claims;

- Permission to appeal to the Supreme Court was refused – substantive claim to be heard.

Asking for provision for handbags £58,000pa
Taking average £2000 per bag =
24 bags per year or nearly one every 2 weeks

- *De Renee v Galbraith- Marten* 2016 EWCA Civ 537 (Black LJ) – Refusal of permission to appeal the dismissal of the wife's application;
- Married in Australia in 2006. Lived in England until 2008 W left UK and returned to Australia with C (baby). Divorce and financial proceedings in Australia where agreed consent orders for spousal maintenance, child maintenance and capital division;
- 2011 W applies in Australia to set aside orders based on duress et al. All dismissed in 2015;

- W issued without notice application in this jurisdiction and permission hearing before Parker J who **lists for on notice *inter partes*** and refuses W permission. W appeals;

- Black LJ refuses permission to appeal the decision:

  1) "*Therefore, it must be the case that the Judge can jump straight to a with notice hearing if that appears to be appropriate in the circumstances of the case*."

2) While W alleged new material, Parker J view that Australian court found this groundless and Black LJ found no justification for fresh proceedings here;

3) W argued that Parker J had failed to realise the dissimilarity between Australian law and English law, as regards the approval of consent orders, and failed to recognise that the Australian law had permitted inadequate financial provision. Black LJ found there was no evidence agreements in Australia were unfair – recourse was there.

Back to SHOPPING!

Leave you with the burning questions:

1) "Are courts in England and Wales too willing to open the door to wealthy international litigants seeking a 'top up' after divorce?" and give the most generous awards?

2) Do people shop for the most favourable jurisdiction?

3) How many reported decisions do we see where permission is rejected?

Maintenance Regulation Update

1. There are two main parts to the Maintenance Regulation (Council Regulation EC No.4/2009) [also referred to as the 'ECMR']:
    a. Part II – which addresses jurisdiction and lis pendens;
    b. Part IV – which addresses recognition, enforceability and enforcement of decisions.

2. As a result of the European Communities Act 1972, by operation of EU law the Maintenance Regulation is directly effective in EU Member States. It came into force on 18 June 2011. For decisions prior to that date, the relevant instrument was Brussels I (which contained many of the equivalent provisions).

The elephant in the room: Brexit

3. What happens if we leave the European Union? Does all of this become academic?

4. In fact the Lugano Convention contains very similar provisions (note it also covers Switzerland at present where the ECMR does not).

JURISDICTION AND PROROGATION

5. Article 3 addresses which court has jurisdiction under the Regulation:

> *General provisions*
>
> *In matters relating to maintenance obligations in Member States, jurisdiction shall lie with:*
> *(a) The court for the place where the defendant is habitually resident, or*
> *(b) The court for the place where the creditor is habitually resident, or*
> *(c) The court which, according to its own law, has jurisdiction to entertain*

proceedings concerning the status of a person if the matter is relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality[11] of one of the parties, or

(d) The court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings.

6. The court first seised will take precedence (discussed further below).

7. Article 4 gives the parties the option to choose which court will have jurisdiction (prorogue):

Choice of court

1. The parties may agree that the following court or courts of a Member State shall have jurisdiction to settle any disputes in matters relating to a maintenance obligation which have arisen or may arise between them:

(a) A court or the courts of a Member State in which one of the parties is habitually resident;

(b) A court or the court of a Member State in which one of the parties had the nationality;

(c) In the case of maintenance obligations between spouses and former spouses:

(i) The court which has jurisdiction to settle their dispute in matrimonial matters; or

(ii) A court or the courts of the Member State which was the Member State of the spouses' last common habitual residence for a period of a least one year

The conditions referred to in points (a), (b) or (c) have to be met at the time the choice of court agreement is concluded or at the time the court is seised.

[11] Domicile in the case of UK and Ireland

> *The jurisdiction conferred by agreement shall be exclusive unless the parties have agreed otherwise.*
> 2. *A choice of court agreement shall be in writing….*
> 3. *This Article shall not apply to a dispute relating to a maintenance obligation to a child under the age of 18.*
> 4. *[Application to Lugano Convention countries outside the EU]*

SEISIN AND RELATED ACTIONS (mandatory and discretionary stays)

8. The term *seisin* derives from the medieval French concept of possession: the court which is in possession of the litigation.

9. In the modern day, seisin in the context of maintenance is governed by Article 9 of the ECMR and its consequences are set out in Articles 12 (Mandatory stays) and 13 (Discretionary stays):

> *Article 12*
> *Lis pendens*
> *1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.*
> *2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.*

10. Lis pendens may also apply while the decision to accept or decline jurisdiction is being appealed (*EA v AP* [2013] EWHC 2344, Parker J).

11. However, whether another court is already seised is determined at the date of adjudication rather than the date of issue. In A v B C-489/14 (CJEU), a Brussels IIA case (in which the writer appeared as junior counsel), the European court

decided that an English petition issued during French judicial separation proceedings became first in time when the latter expired without any decree being made. Charlotte Bradley (who was also at the hearing in Luxembourg) has written a much more detailed article on the issues raised.

12. Be careful about what the court is actually seised with: in *Re V (European Maintenance Regulation)* [2016] EWHC 668 (Fam) it was held that a writ of divorce in Scotland did not implicitly include a claim for financial provision, therefore Parker J found that W's subsequent English Form A was first in time – and there was no reason why divorce should not proceed in one jurisdiction and maintenance in another.

13. In another recent case, *TJB v RJB* [2016] EWHC 1171 (Fam), W had tried to enforce a final order against H's assets in Switzerland. H sought a declaration that the English court remained seised under the Lugano convention because of the ongoing periodical payments. This was a creative attempt by H to avoid enforcement but, understandably, Holman J was having none of it.

> *Article 13*
>
> ***Related actions***
>
> *1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.*
>
> *2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.*
>
> *3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.*

14. In *Traversa v Freddi* [2011] 2 FLR 272 Thorpe LJ said at [34] in the context of the equivalent provision in Brussels I:

> "*If caught by article 28* [the equivalent discretionary stay provision] *any decision as to whether or not there should be a discretionary stay is better left to the trial judge*".

15. How long does lis pendens last? Until the end of the proceedings: *Dicey, Morris & Collins, The Conflicts of Laws* (15th Ed. 2012) in relation to article 27 of Brussels I (which is analogous to article 12 of the Maintenance Regulation) says:

> *"Article 27 of the Regulation and of the Lugano Convention requires that the action be still pending in the court first seised when the proceedings are commenced in the court second seised. So, if the proceedings in the first court had terminated by judgment and are no longer pending or if they have been discontinued or if they have been struck out on forum conveniens grounds on the relevant date, article 27 will be inapplicable."*

16. This was also discussed in *AA v BB* [2014] EWHC 4210 (Fam) in which Charles Hale QC led the writer.

ENFORCEABILITY

17. Article 17 provides as follows:

> *Abolition of exequatur*
>
> *1. A decision given in a Member State bound by the 2007 Hague Protocol shall be recognised in another Member State without any special procedure being required and without any possibility of opposing its recognition.*

2.	*A decision given in a Member State bound by the 2007 Hague Protocol which is enforceable in that State shall be enforceable in another Member State without the need for a declaration of enforceability.*

18. The states bound by the 2007 Hague Protocol may be required to apply the law of another Member State to their determinations on maintenance. The UK is not a signatory to the protocol, but most other EU states are so it is likely that the decision of another Member State will be enforceable in the UK with no right of review.

19. The only right of review is provided by Article 18 where the debtor was not served or was prevented from taking part by force majeure or other extraordinary circumstances. However, that review takes place in the original Member State (not England and Wales).

20. Where the maintenance decision was made in a Member State not bound by the Hague Protocol (e.g. Denmark) then Article 24 provides that its recognition may also be refused on grounds of public policy or irreconcilability with an earlier dispute between the same parties.

21. Article 42 provides: "*Under no circumstances may a decision given in a Member State be reviewed as to its substance in the Member State in which recognition, enforceability or enforcement is sought.*"

22. The *Jenard* report (OJEC 79/C 59/01) refers (in the context of the 1968 Brussels convention, one of the 2009 Regulation's predecessors) to recognition '*conferring on judgments the authority and effectiveness accorded to them in the state in which they were given'* (also cited in the ECJ case *Hoffman v Krieg* [1988] ECR 645)

Practical applications

23. Points to watch out for:
    a. If a client comes seeking financial provision but has or may already have an order in another EU state, it might not be necessary to start substantive proceedings and the expensive disclosure process that goes with it.
    b. Where seeking to use Part III as a method of enforcing a foreign order, it may be that the Maintenance Regulation is a better tool.
    c. Maintenance in European law is a much wider concept than under UK law (see *Van den Boogard v Laumen* [C-220/95]) – in effect, it means any part of an award based on needs (so an order for transfer of the matrimonial home could be categorised as 'maintenance').
    d. It may be that an EU Maintenance Judgment can simply be treated as though it was handed down by our courts as suggested by the Jenard report and the ECJ (though that is not without controversy, as discussed below).

Procedure (and its controversy)

24. Article 41 provides:

> *Proceedings and conditions for enforcement*
>
> *1. Subject to the provisions of this Regulation, the procedure for the enforcement of decisions given in another Member State shall be governed by the law of the Member State of enforcement. A decision given in a Member State which is enforceable in the Member State of enforcement shall be enforced there under the same conditions as a decision given in that Member State of enforcement.*

25. In *EDG v RR* [2014] EWHC 816 (Fam) Mostyn J held that the effect of articles

such as this in the Regulation was to allow the applicant to enforce another Member State's maintenance judgment directly, without going through the Central Authority. His Lordship held that there has been an accidental omission providing for such a route in Article 55 which provides that "An application under this Chapter shall be made through the Central Authority of the Member State in which the applicant resides." (What if the applicant has moved to England and Wales since the Maintenance decision was made?)

26. In *AB v JJB* [2015] EWHC 192 (Fam) Sir Peter Singer decided that an application under Article 56 of the Regulation to modify a maintenance order made in another Member State had to be pursued via the Central Authorities and could not be made directly to the court of the respondent's habitual residence. That was a slightly different point in that there was a substantive issue.

27. In *MS v PS* [2016] EWHC 88 (Fam) Roberts J made a referral to the CJEU on this question as to whether enforcement applications can be made directly (despite Mostyn J's earlier decision). The outcome is awaited with interest.

28. It is worth noting that the purpose of the Regulation is plainly to make it easier for maintenance creditors to assert their rights (a 'protective regime' as per Parker J in *EA v AP* [2013] EWHC 2344). Also, see preamble (9) – decisions should be enforceable 'without further formality' – what is a requirement to apply through the Central Authority if not 'further formality'?

29. This point merits further clarification from on high. There is no guarantee that the CJEU will actually address the reference question in a meaningful way. Even if they are against requiring such a route that does not mean that Member States are prohibited from providing this option. There is no obvious disadvantage in allowing the applicant/creditor the choice between FPR rule 33.3 or the Central Authority.

30. Potential problems with the Central Authority include:

a. Delay;
b. Lack of input from the maintenance creditor;
c. Inability to address the issue as part of other applications;
d. Ineffectiveness.

RECOGNITION: THE *AGBAJE* QUESTION

31. In *Ramadani v Ramadani* [2015] EWCA Civ 1138 the writer appeared as junior to Charles Hale QC for the respondent to the appeal. The appellant was asking the Court to decide whether a matrimonial award, with an element of maintenance, in another EU state automatically precludes the court of England and Wales from making an award under Part III which amounts to maintenance (in its wider European sense).

32. At the root of this debate is a comment by Lord Collins in the case of *Agbaje v Agbaje* [2010] UKSC 13 (a Nigerian case and therefore very much *obiter*) at [55]. The equivalent EU provision at the time of that case was Brussels I which has now been superseded by the Maintenance Regulation. The comment was as follows:

"*But, although the point does not arise on this appeal, a warning note must be struck about the position with regard to States to which the Council Regulation (EC) 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('the Brussels I Regulation') applies. The effect of sections 15(2) and 28(4) of the 1984 Act is that the jurisdictional provisions of Part III and Part IV respectively are subject to the Brussels I Regulation (and the Lugano Convention). Those sections do not address the question whether a judgment in a Brussels I Regulation State making financial provision on divorce (or refusing to make such provision) would be entitled to recognition so as to prevent an award under Part III...*"

33. In practice, a prior maintenance award in another EU country would not

prevent financial provision outside of the scope of the Regulation – which does not apply to property rights arising out of a matrimonial relationship (ie. claims for sharing of marital wealth). Both Munby LJ at [63] and Thorpe LJ at [35] made that clear in *Traversa v Freddi* [2011] EWCA Civ 81 when they agreed that, '*an order which contains an element of maintenance does not fix jurisdiction in relation to all financial issues*'.

34. So the question remains, what does it "fix"?

35. The argument against Lord Collins' dictum is as follows. If Parliament had intended something as sweeping as removing the jurisdiction to make maintenance awards under Part III where the original divorce and financial proceedings were in the EU, it would have said so. After all, it is a typical feature of Part III cases that there will have been a financial award in the state which pronounced the divorce (and this is expressly provided for by s.16(e) as a matter for our courts to take into account whether England and Wales is an appropriate venue at all).

36. A plain argument for Part III remaining unaffected by the Maintenance Regulation lies in the rationale of this particular EU legislation, as stated in the preamble at (9):

> *"A maintenance creditor should be able to obtain easily, in a Member State, a decision which will be automatically enforceable in another Member State without further formalities."*

37. There is no sense in the preamble or any of the commentaries or reports that the Regulation was intended to be used as a shield by maintenance debtors. Although the *Jenard* report (OJEC 79/C 59/01) refers to recognition '*conferring on judgments the authority and effectiveness accorded to them in the state in which they were given'* (also cited in the ECJ case *Hoffman v Krieg* [1988] ECR 645) it is clear that this was said in the context of enforcement not jurisdiction.

38. The preamble also states at (25): "*Recognition in a Member State of a decision relating to maintenance obligations has its only object to allow the recovery of the maintenance claim determined in the decision*." Emphasis has been added to the word 'only', but it seems fairly clear that the purpose is not to protect the payer from a Part III claim.

39. It would be curious, if the provisions relating to recognition (which appear much later in the Regulation) were intended to curtail the jurisdiction of the national courts, particularly as nothing is said about this in Article 3 which addresses the basis on which jurisdiction over maintenance can be exercised.

40. On the facts of *Ramadani*, the proposition advanced by Lord Collins would have led to an absurd and unfair result, because Slovenia (the foreign state in that case) cannot, in law, take into account resources outside of its own borders (see the first instance judgment *AA v BB* [2014] EWHC 4210 (Fam)). The consequence would therefore be a maintenance decision binding throughout the European Union but without taking into account resources in other States.

41. Such an interpretation of the Regulation could lead to England and Wales being expected to apply the laws of other Member States to its own domestic legislation. During argument in the Court of Appeal the question was raised: Whether the concept of recognition of the decisions of the other Member States merely means recognising the decision in question and therefore the payer's liability under the law of the Member State in question (e.g. Slovenia), or does it determine the respondent's liability under the laws of England and Wales. As it happened, the Court of Appeal did not need to come to a conclusion on this point.

42. In *Ramadani*, the Court of Appeal held that there was no need to address the argument about recognition because there had been no 'decision' in another

EU state to recognise (the wife had merely withdrawn her maintenance claims in Slovenia and that withdrawal, said the Court, could not on the facts amount to a 'decision').

43. Plainly, the fact that a maintenance award has been made in another EU state will be a matter of significant weight to be taken into account, in accordance with the other circumstances of the case, both when granting leave under Part III to apply and when determining the substantive application. However it is far from clear that the Maintenance Regulation would automatically preclude the court of England and Wales from exercising *jurisdiction.*

44. It is expected that, in the right case, the Court of Appeal will return to this point. Moylan J will revisit this point in the Part III case likely to be reported as *T v T* [citation TBC] (in which Charles Hale QC and the writer have also acted).

Postscript: Brussels I – exclusive jurisdiction

45. In the case of *G v G* [2015] EWHC 2101 (Fam) Bodey J was faced with a TOLATA case in respect of a London property held in joint names (split into flats) in a case where there had been a French divorce and there were ongoing financial proceedings in Poland.

46. One of the issues was whether the English court had exclusive jurisdiction as '*lex situs*' of the property in question under Article 22 of Brussels I. The court concluded that there was exclusive jurisdiction notwithstanding the CJEC case of *Webb v Webb* [1994] QB 696 in which a flat had been purchased in the son's name, using money provided by his father. The latter sought a declaration of trust and order requiring the title to be vested in him. Holding that there was no exclusive jurisdiction, the European Court said at [14]-[15] that it was not sufficient:

> "*that a right in rem in immoveable property be involved in the action, or that the action have a link with immoveable property: the action*

must be based on a right in rem and not a right in personam… the father does not claim that he already enjoys rights directly relating to the property".

47. Whether the property in question is already in joint names is clearly a factor of significance. An action which seeks to *establish and acquire* rights in immoveable property is not the subject of exclusive jurisdiction.

48. It will also be of interest that the Judge considered (at [34]) that the application of Article 5(6) means that there would be jurisdiction based on the domicile of the Trust of Land.

49. These are the sorts of points which may arise in cross-border matrimonial cases where resulting or constructive trusts are asserted (particularly in light of the Supreme Court decision in *Petrodel v Prest*).

Henry Clayton

Passive and Active Growth – A Fading Concept?

1. The concept first achieved notoriety In Rossi [2007] 1FLR 790 where Mr Mostyn QC

said at 24.2

'For the purposes of establishing the matrimonial property in respect of which the yardstick of equality will "forcefully" apply the value of assets brought into the marriage by gift and inheritance ... together with passive economic growth on those assets, should be excluded as non-matrimonial property.'

2. This concept took wing in Jones v Jones [2011] 1 FLR 1723 CA. See at first instance [2009] EWHC 2654 (Fam). It is important to note that the argument in that case was about figures not principles.

3. Jones: H founded a company 10 years before marriage. The marriage endured 10 years. The issue (for these purposes) was the value of the company at time of marriage. The company had been valued as worth £2 million at that time. To what extent should that figure be adjusted to allow for economic growth in the company between the date of marriage and the date of sale as the marriage ended?

4. Wilson LJ said:

"44. The second reason for adjustment is the need to allow for passive economic growth in the company between the date of the marriage and the date of the sale. ....

46. I regard Mr Mostyn's proposition (in Rossi) as helpful..... and accurate. Take a work of art or land with potential for development which a spouse has owned since prior to the marriage and which, without activity on his or her part, has substantially increased in value during it. The court would accept that the increase in its value during the marriage was as much non-matrimonial as its value at the date of the marriage: it would therefore allow for passive growth. Passive growth is to be contrasted with growth as a result of contributions of one sort or another made during the marriage, i.e. of activity, irrespective of whether such is achieved with the assistance of a springboard already in position."

5. This statement has often been followed in other cases but note particularly Arden LJ at 60:

"However, I would query whether what Wilson LJ proposes in his judgment is really passive growth and reject the notion that the only growth that can be taken into account is passive growth. First, as a matter of principle, when valuing the non-

matrimonial assets at the end of a marriage, the court should so far as it can look at what has actually happened and not what might have happened … Secondly, if only passive growth is taken into account the law rewards the spouse who buries her non-matrimonial assets in the ground rather than the spouse who actively manages them. The correct analysis in my judgment, in circumstances such as the present, is that where a spouse has a non-matrimonial asset of the present kind, he is entitled to that element of the company at the end of the day which can fairly be taken to represent the fruits of the non-matrimonial assets that accrue during the marriage, even if the fruits are the product of activity by him or on his behalf."

6. The only thing that Wilson and Arden LJJ and Sir Nicholas Wall P agreed upon is that the result they proposed was fair!

7. The facts in Jones included the following:

(i) Mr Jones was the sole director of his company;

(ii) He held 100% of the shares;

(iii) There were no other assets in Jones beyond the value of the shares.

8. The facts are important in considering application to other cases. How can a PLC have passive growth? It is full of employees working to increase the value of the company and a large range of external investors.

9. Would the Court of Appeal in Jones not have been better to revert to Miller [2006] 1 FLR 1186? In that case the company (New Star) did not even exist at the date of marriage and H joined it several months after the marriage at which time he purchased his shares. In the space of about 3 years, all during the marriage or before trial, the husband acquired his shares and they so increased in value as to be estimated to be worth £15 million at the time of trial.

10. Lord Nicholls at 73:

"An award of £5 million … represents less than one third of the value of the New Star shares and less than one-sixth of the husband's total worth. An award of less than half the value of the shares reflects the amount of work done by the husband on this business project before the marriage."

11. Lord Mance at 173:

"In the present case, Mr Miller already had, at the marriage date, real connections in the form of the Jupiter Funds which he later took to New Star … I would regard these as real contributions brought into the marriage which should on any view be taken into account accordingly."

12. In Robertson [2016] EWHC 613 (Fam) H owned all his shares in ASOS before he ever met W. At about the time of meeting the company floated and his shares were valued at in excess of £1million. Allowing for passive growth that figure was assessed as at trial at £4+ million by the SJE, who applied a combination of the FTSE all-share general retailers index and the retail sales index.

13. During the marriage H sold significant numbers of pre-existing shares and many share options granted during the marriage. The proceeds were reflected in £60 million of assets which H readily accepted should be shared equally. H said that W should have no share of the value of his remaining shares (approx £160 million net) while W said that she should share equally in them after allowing for the £4 million discount.

14. Holman J ruled that the application of Jones would be so unfair to H and so over-generous to W as to be inappropriate. He found that the difference of reasoning within the Court of Appeal in Jones meant that it produced no clear guidance, save that first instance judgments should be short and concise. He allowed W to share equally in one half of the value of the remaining shares (i.e. to the extent of 25% of them).

15. This sort of approach must be right, however arbitrary it may seem. How could it be fair for Mrs Robertson to share equally in all the growth that was not as a result of indexation when, for example, the wife of H's business partner who had left the business would have no claim whatsoever against the partner's shares which had gone up in value to exactly the same extent. Equally, why should W not share at all in the gain made during the marriage? Both extremes strike me as unfair.

16. What happens to the "sleeper", the work of art which H realises may have huge latent value, which he buys before marriage but only becomes valuable after marriage as a result of his efforts in actively researching and promoting the artist? Who profits from the increase in value?

17. Finally a point of tactics: in Robertson we took the view that we were better off addressing a large number of questions pursuant to Part 25 to the SJE, pointing out his failure to give proper credit for pre-marital endeavour and various other perceived errors. These questions were all answered. This worked much better than having oral evidence. By making him commit to paper, he became more amenable to attack in submissions. An approach for other cases?

Jonathan Cohen QC

Section 10

Reciprocal Enforcement of children orders and protective measures.

Henry Setright QC, Michael Gration and Michael Edwards

Reciprocal enforcement of children orders and protective measures

Henry Setright QC
Michael Gration
Michael Edwards

Statement of issues

1. 1996 Hague Convention: recognition and enforcement
2. Traditional safeguards
3. 1980 Hague Convention
4. Transfer of proceedings
5. Priority

The mother offers two key safeguards:

1. To register the order for enforcement in Morocco:
    a. Morocco is a signatory to the 1996 Hague Convention
    b. 'Measures' made in one 1996 state are automatically recognised in all other contracting states: Art.23(1)
    c. Mother will apply for declaration of enforceability: Art.26(2)
    d. Grounds for non-recognition are very narrow: Art.23(2)

The mother offers two key safeguards:

2. The mother will pay a bond into court:
    a. Payment can be made to the Moroccan court
    b. Will provide reassurance that the mother will comply
    a. The bond will cover the first two year period
    b. Half to be returned to mother if no breaches occur in the first year

The father's response – the 1996 Hague:

1. The 1996 Hague Convention is an untested mechanism for the recognition and enforcement of orders before the Moroccan courts.

2. The Moroccan courts have no track record of swift procedures in this context.

3. There is therefore a likelihood of delay in the enforcement of orders, with a consequent lack of protection whilst the process is attempted.

The father's response – general safeguards:

1. No guarantee that the Moroccan courts would accept a bond. The 'measures' to which the Convention applies are clearly defined by Article 3, and may not relate to financial bonds/penalties

2. If the lodging of a bond is voluntary, it is no protection at all.

3. The efficacy of the proposed safeguard is reliant upon the mother acting in good faith, and the father does not believe that she would do so.

Oral argument, the mother – the 1980 Hague Convention, a further safeguard

1. Morocco's accession to the 1980 Hague Convention recently accepted by the UK and the rest of the EU. It will come into force on 1st July 2016.

2. A sign of greater comity between the UK and Morocco. Both are now part of the same 'Hague Convention club'.

3. If the children are separated and Rudolph remains in the UK – the father can rely on the 1980 Hague Convention if the mother retains Rudolph in Morocco.

Oral argument, the father's response - 1980 Hague

1. The 1980 Hague Convention is entirely untested in Morocco, as of now, it has not even come into force.

2. There is, therefore, no information about whether or not it will be the strong and efficient remedy that it can be in other countries.

3. In any event, if the father has to rely on the 1980 Hague Convention, it will be in the context of the mother having wrongfully retained one or both children, which would be harmful in and of itself.

The mother's further submission - the continuation of proceedings/possible transfer

1. Another potential safeguard would be the continuation of proceedings, giving the father a vehicle to seek redress in the future.
2. However, the court has the power to transfer proceedings to Morocco to provide another safeguard.

3. **Article 8:**
   - Transfer to a state '*better placed in the particular case to assess the best interests of the child*
   - Transfer to a state '*with which the child has a substantial connection*'

Father's reply on the law - the continuation of proceedings/possible transfer

1. It is not possible indefinitely to prorogue proceedings before the English courts – see E v B (case c-436/13) - so there can be no safeguard of prorogation in this country.

2. The jurisdiction provisions of the 1996 Hague Convention add a further reason why the English courts could not maintain jurisdiction, in any event.

3. Further, the court cannot maintain the English proceedings, only to transfer them to Morocco – see *West Sussex County Council v H* [2014] EWHC 2550 (Fam)

Conclusion

1. The operation of the 1996 Hague Convention in Morocco remains entirely untested.
2. There are only isolated examples of its successful operation between any of the Contracting States.
3. Morocco provides unique challenges, as a result of the nature of its jurisdiction (it operates to a Code based upon Sharia principles)
4. There continue to be issues in relation to the operation of the 1996 Hague Convention before the English courts, including in relation to its interaction with Brussels IIa

Section 11

Costs: financial remedies, children and third party orders

Charles Hale QC, Nick Fairbank and Katie Wood

Costs in Children Cases

1. The general rule

- The general and usual rule (though not a presumption), remains that of no order as to costs in children cases.
- The Supreme Court has in recent years given authoritative guidance on the issue of costs in children cases in two appeals.
- In ***Re T*** *(care proceedings: serious allegations not proved)* **[2012]** UKSC 36, [2012] 1 WLR 2281 it determined that for the court's discretion to be invoked the court must first determine whether the conduct of the party against whom the order is sought, has been, 'unreasonable' and/or 'reprehensible':

  "[22] For these reasons we have concluded that the general practice of not awarding costs against a party, including a local authority, in the absence of reprehensible behaviour or an unreasonable stance, is one that accords with the ends of justice and which should not be subject to an exception in the case of split hearings."

- In ***Re S*** *(children) (appeal from care and placement orders)* **[2015]** UKSC 20, [2015] 1 WLR 1631 Baroness Hale gave further clarification and explained that the range of potential reasons for ordering costs against a party in a children case was not restricted simply to cases of unreasonableness or reprehensible conduct or stance. The Baroness described other potential factors giving rise to orders for costs as follows:

  '[31] I do not understand that Lord Phillips, giving the judgment of the court in *In re T*, was necessarily intending to rule out the possibility that there might be other circumstances in which an award of costs in care proceedings might be appropriate and just. That would be to ascribe to para 44 of the judgment the force of a statutory provision. Such a rigid rule was unnecessary to the decision in that case and cannot be treated as its *ratio decidendi*.

  [32] On the other hand, it was necessary to the decision in that case that local authorities should not be in any worse position than private parties when it comes to paying the other parties' costs. There is an attraction in regarding local authorities in a different light from private parties, because of their so-called "deep pockets". But, as Lord Phillips observed, at para 34:

  > "Local authorities have limited funds. Their costs in relation to care proceedings are met from their children's services budget. There are many other claims on this budget. … No evidence is needed … to support the proposition that if local authorities are to become liable to pay the costs of those [whom] they properly involve in care proceedings this is going to impact on their finances and the activities to which these are directed. The court can also take judicial notice of the fact that local authorities are financially hard pressed …"

  While it is true that appeals are comparatively rare and their costs comparatively low compared with the costs of care proceedings generally, that is not by itself a good reason for making an exception in their case.

[33] But nor should local authorities be in any better position than private parties to children's proceedings. The object of the exercise is to achieve the best outcome for the child. If the best outcome for the child is to be brought up by her own family, there may be cases where real hardship would be caused if the family had to bear their own costs of achieving that outcome. In other words, the welfare of the child would be put at risk if the family had to bear its own costs. In those circumstances, just as it may be appropriate to order a richer parent who has behaved reasonably in the litigation to pay the costs of the poorer parent with whom the child is to live, it may also be appropriate to order the local authority to pay the costs of the parent with whom the child is to live, if otherwise the child's welfare would be put at risk. (It may be that this is one of the reasons why parents are automatically entitled to public funding in care cases.)'

- The above costs principles are equally applicable to private and public law children cases.
- The court's overriding consideration once the gateway of the usual order is passed, is to consider whether it is just in all the circumstances to make an order for costs. The court may then have regard to all the circumstances of the case including the stage of the proceedings, the manner in which the issues were raised, the conclusions on the issues, the children's welfare (*not* paramount) and the respective financial means of parties.

2. Two Specific Examples

Fact finding/separate hearings

- Costs incurred may be wholly referable to the allegations being considered.
- Thus a ring-fence around that hearing and thus arguably around the costs referable to it *(Re J (costs of fact-finding hearing)* [2009] EWCA Civ 1350, [2010] 1 FLR 1893).
- The mere fact that the hearing is so described is not though of itself to place it into some elevated category where a costs order is more likely than not to be ordered against the losing party. The general discretion of the court remains as do the general principles to be applied, see *Re T* above.

Child abduction proceedings

- In *ECL v DM (CA : costs)* [2005] EWHC 588 (Fam), [2005] 2 FLR 772, Ryder J addressed costs in the light of the issue of Art 26 in Hague Convention abduction proceedings. Ryder J concluded that Art 26 does not prevent a costs order being made where both parties have comparable financial circumstances.
- NB decision made prior to the removal of cost protection in family proceedings.

3. Appeals

- Prior *Re S* applications for costs on appeal in children cases normally *followed the event*.
- That is no longer the case and the principles which apply to first instance decisions, see *Re T* above, apply equally to appeals. Accordingly the burden will be upon the applicant to show that the usual rule of 'no order as to costs' should be displaced.
- Per Baroness Hale in *Re S:*

  '[21] … it can generally be taken for granted that each of the persons appearing before the court has a role to play in helping the court to achieve the best outcome for the child. It would be difficult indeed for a court to decide how to secure that the child has a meaningful relationship with each parent without hearing from them both. It would be difficult indeed for a court to decide the best way of protecting a child from the risk of harm without hearing from her parents and those whose task it is to protect her. That is why parents are compellable witnesses in care proceedings, even when it is alleged that they have committed criminal offences. No-one should be deterred by the risk of having to pay the other side's costs from playing their part in helping the court achieve the right solution.

  [22] It can also generally be assumed that all parties to the case are motivated by concern for the child's welfare.'

- As to the impact of the appeal on the discretionary determination on costs, Baroness Hale said as follows:

  '29. Nor in my view is it a good reason to depart from the general principle that this was an appeal rather than a first instance trial. Once again, the fact that it is an appeal rather than a trial may be relevant to whether or not a party has behaved reasonably in relation to the litigation. As Wall LJ pointed out in *EM v SW* [2009] EWCA Civ 311, (unreported) 23 April 2009, there are differences between trials and appeals. At first instance, "nobody knows what the judge is going to find" (para [23]), whereas on appeal the factual findings are known. Not only that, the judge's reasons are known. Both parties have an opportunity to "take stock" and consider whether they should proceed to advance or resist an appeal and to negotiate on the basis of what they now know. So it may well be that conduct which was reasonable at first instance is no longer reasonable on appeal. But in my view that does not alter the principles to be applied: it merely alters the application of those principles to the circumstances of the case.'

- If an appellant or respondent to an appeal can show generally that the stance adopted on appeal is welfare based and centred upon a best interests argument, it is less likely that an award of costs on appeal will be made.
- NB: On a second appeal to the Court of Appeal, the test for permission is governed by the more stringent test of CPR 52.13:

  '**52.13**

(1) Permission is required from the Court of Appeal for any appeal to that court from a decision of the County Court or the High Court which was itself made on appeal.

(2) The Court of Appeal will not give permission unless it considers that–

(a) the appeal would raise an important point of principle or practice; or

(b) there is some other compelling reason for the Court of Appeal to hear it.'

rarely will an order for costs be appropriate when the parties are seeking to argue principles which may be important to children and their welfare, at large.

4. Non-party and third party costs – exceptional cases and the appropriate test

- CPR Part 46 deals with costs orders against non-parties:

"**46.2** (1) Where the court is considering whether to exercise its power under **section 51 of the Senior Courts Act 1981** (costs are in the discretion of the court) to make a costs order in favour of or against a person who is not a party to proceedings, that person must –

(a) be added as a party to the proceedings for the purposes of costs only; and

(b) be given a reasonable opportunity to attend a hearing at which the court will consider the matter further.

(2) This rule does not apply –

(a) where the court is considering whether to –

(i) make an order against the Lord Chancellor in proceedings in which the Lord Chancellor has provided legal aid to a party to the proceedings;

(ii) make a wasted costs order (as defined in rule 46.8); and

(b) in proceedings to which rule 46.1 applies (pre-commencement disclosure and orders for disclosure against a person who is not a party).'

- The principled foundation for a non-party costs order is, per Morritt LJ in *Globe Equities Ltd v Globe Legal Services Ltd* [1999] BLR 232 ('Globe Equities'):

'Ultimately the test is whether in all the circumstances it is just to exercise the power conferred by subsections (1) and (3) of s 51 Supreme Court Act 1981 (now "Senior Courts Act 1981") to make a non-party to pay the costs off the proceedings…In such cases it will be a matter for judgment and the exercise by the judge of his discretion to decide whether the circumstances relied on are such as to make it just to order some non-party to pay the costs. Thus, as it seems to me, the exceptional case is one to be recognised by comparison with the ordinary run of cases not defined in advance by reference to any further characteristic'

- There remains some debate as to what the appropriate test should be for the making of a third party/non party order. Peter Smith J in *Phillips v Symes (No 2)* [2005] 1 WLR 2043 referred to a s 51 costs order being made against an expert whose 'evidence is given recklessly in flagrant disregard for his duties' (para 96). That set the bar high. Note, however:

  (i) this was the first recorded occasion where the court had made a s 51 costs order against an expert witness;

  (ii) it was made pre- *Meadow v General Medical Council* [2006] EWCA Civ 1390, [2007] QB 462, with the overturning of experts' immunity from suit completely;

  (iii) number of cases since (discussed below) where no such hurdle was imposed;

  (iv) it is important to recognise that the allegation that the expert had acted 'in flagrant disregard' of his duty to the court was made by the applicants for the costs order[5]. It was thus never in issue in that case, and never argued, as the expert's representatives said there was simply immunity from s 51 costs orders, a contention rejected by Peter Smith J;

  (v) In *Jones v Kaney* [2011] UKSC 13, [2011] 2 AC 398, the Supreme Court (by a 5-2 majority) swept away the last of the immunity for expert witnesses, namely immunity from civil suits for the evidence they gave in court (or work closely connected to such evidence).

- Cases since *Phillips* on this issue:.

  (i) *HB v PB, OB and London Borough of Croydon* [2013] EWHC 1956 (Fam), [2013] 5 Costs LR 738 (Cobb J) - application for a non-party costs order against the local authority which had provided a report to the court pursuant to the ChA 1989, s 37. At [39] it was:

  > '*a matter for judgment and exercise by the judge of his discretion to decide whether the circumstances relied on are such as to make it just to order some non-party to pay the costs*.;

  (ii) *A Local Authority v Trimega Laboratories Ltd* [2013] EWCC 6 (Fam), [2014] PNLR 7 - care proceedings brought by a local authority where an issue was the mother's excessive drinking. The forensic laboratory tested the mother's hair for alcohol, and wrongly found a raised CDT (in effect, alcohol) level in her hair.

  NB: Both Cobb J in *HB* and HHJ Williams had *Phillips v Symes* cited to them but neither adopted the 'flagrant disregard of his duties to the court' and/or 'recklessly' test. Indeed, HHJ Williams specifically found there that it did not amount to a 'flagrant disregard' of the expert's duty to the court but nevertheless found that it was an appropriate case for a s 51 costs order to be made against the expert.

  (iii) In *Re Capita Translation and Interpreting Ltd* [2015] EWFC 5 (Fam), Munby P made a s.51 costs order; again, like Cobb J and HHJ Williams he

not apply a test of 'flagrant disregard' of the duty to the court and/or recklessness, despite having *Phillips v Symes* cited to him.

5. Wasted costs orders

- In order to justify a costs order under s 51, the expert must be in breach of his duty to the court. In this regard, although it is a different jurisdiction under the SCA 1981, s 51(6) and (7), rather than s 51(1), the wasted costs jurisdiction over legal representatives is relevant.
- This requires as a pre-requisite, a breach of the legal representative's duty to the court (See *Ridehalgh v Horsefield* [1994] Ch 205, 227D and 232–233 per Sir Thomas Bingham MR).
- 'Negligence' is used in an untechnical sense and will suffice for a wasted costs order against legal representatives. It is suggested unusual if a higher hurdle in relation to costs orders against expert witnesses of 'gross dereliction of duty' or 'flagrant disregard' of their duties was necessary.

Costs Regimes in Financial Remedy Proceedings

Financial remedy costs regime – The 'no order' principle

1. The FPR 2010, r. 28.3(5) provides the 'general rule' of no order for costs in 'financial remedy proceedings':

> *"(5) Subject to paragraph (6), the general rule in financial remedy proceedings is that the court will not make an order requiring one party to pay the costs of another party."*

2. The CPR 1998, rr. 44.2(4) and 44.2(5), which provide the factors for the court's consideration in relation to costs orders in other family proceedings, do not apply to financial remedy proceedings, pursuant to the FPR 2010, r. 28.3(2).

3. In considering whether to depart from the no order for costs principle, the court must have regard to the factors contained in the FPR 2010 rr. 28.3(6) and 28.3(7):

> *"(6) The court may make an order requiring one party to pay the costs of another party at any stage of the proceedings where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (whether before or during them).*
>
> *(7) In deciding what order (if any) to make under paragraph (6), the court must have regard to –*
>
> > *(a) any failure by a party to comply with these rules, any order of the court or any practice direction which the court considers relevant;*
> >
> > *(b) any open offer to settle made by a party;*
> >
> > *(c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*
> >
> > *(d) the manner in which a party has pursued or responded to the application or a particular allegation or issue;*

(e) any other aspect of a party's conduct in relation to proceedings which the court considers relevant; and

(f) the financial effect on the parties of any costs order".

4. Examples of conduct that area likely to provoke the court to depart from the no order principle include:

   i) Unmeritorious applications: Cases in which a party relentlessly pursues an argument which is peripheral, irrelevant or simply bound to fail. This happened in ***M v M*** **[2009] EWHC 1941 (Fam)**, where the wife applied, shortly before the final hearing, for an order that the husband transfer some of his shares in his company, despite his business partner refusing to agree to such a transfer) and in ***GS v K (Costs)*** **[2011] EWHC 2116 (Fam)** in which King J (as she then was) held, when awarding costs against the husband that costs had been wasted because "the husband's approach throughout the entire proceedings has been erroneously focused on his dogmatic belief that the case should be heard in Spain or, if not, that this court should apply Spanish law to the application of the wife for ancillary relief." [35]

   ii) Deliberate non-disclosure, particularly if it is intended to deceive: In ***Kremen v Agrest*** **[2012] EWHC 45 (Fam),** Mostyn J held that the husband had not made a true disclosure of his means but had instead set out to actively mislead. His motivation was a combination of wishing selfishly to protect his fortune for himself, even at the expense of his children, and a desire to inflict the maximum economic harm to the wife. For similar reasons, the Court of Appeal refused to interfere with a costs order in ***Hutchings-Whelan v Hutchings*** **[2012] EWCA Civ 38, CA**.

   iii) Improper tactics: In ***Imerman v Imerman*** **[2010] EWHC 64 (Fam)**, Moylan J awarded costs as a result of information being irregularly obtained from the husband, in part to discourage similar conduct in the course of other financial applications.

Definition of 'financial remedy proceedings'

5. The application of the general rule in r. 28.3(5) depends upon the definition of 'financial remedy proceedings'. The term 'financial remedy proceedings' is distinct from proceedings for a 'financial remedy' in the FPR 2010, r. 2.3(1).

The FPR 2010 r. 28.3(4)(b) defines 'financial remedy proceedings' in relation to costs:

> *"(4) In this rule –*
>
> *(a) 'costs' has the same meaning as in rule 44.1(1)(c) of the CPR; and*
>
> *(b) 'financial remedy proceedings' means proceedings for –*
>
> > *(i) a financial order except an order for maintenance pending suit, an order for maintenance pending outcome of proceedings, an interim periodical payments order, an order for payment in respect of legal services* ***or any other form of interim order for the purposes of rule 9.7(1)(a), (b), (c) and (e);*** *"* ***[bold emphasis added]***
> >
> > *"(ii) an order under Part 3 of the 1984 Act;*
> >
> > *(iii) an order under Schedule 7 to the 2004 Act;*
> >
> > *(iv) an order under section 10(2) of the 1973 Act;*
> >
> > *(v) an order under section 48(2) of the 2004 Act."*

6. The FPR 2010, PD 28A, paragraphs 4.1-4.2 further provide:

> *"4.1*
> *Rule 28.3 relates to the court's power to make costs orders in financial remedy proceedings. For the purposes of rule 28.3, 'financial remedy proceedings' are defined in accordance with rule 28.3(4)(b). That definition, which is more limited than the principal definition in rule 2.3(1), includes –*
>
> *(a) an application for a financial order, except –*
>
> > *(i) an order for maintenance pending suit or an order for maintenance pending outcome of proceedings;*
> > *(ii) an interim periodical payments order or any other form of interim order for the purposes of rule 9.7(1)(a),(b),(c) and (e);*
> > *(iii) an order for payment in respect of legal services.*

(b) an application for an order under Part 3 of the Matrimonial and Family Proceedings Act 1984 or Schedule 7 to the Civil Partnership Act 2004; and

(c) an application under section 10(2) of the Matrimonial Causes Act 1973 or section 48(2) of the Civil Partnership Act 2004.

4.2

Accordingly, it should be noted that –

(a) while most interim financial applications are excluded from rule 28.3, the rule does apply to an application for an interim variation order within rule 9.7(1)(d),

(b) rule 28.3 does not apply to an application for any of the following financial remedies –

(i) an order under Schedule 1 to the Children Act 1989;

(ii) an order under section 27 of the Matrimonial Causes Act 1973 or Part 9 of Schedule 5 to the Civil Partnership Act 2004;

(iii) an order under section 35 of the Matrimonial Causes Act 1973 or paragraph 69 of Schedule 5 to the Civil Partnership Act 2004; or

(iv) an order under Part 1 of the Domestic Proceedings and Magistrates' Courts Act 1978 or Schedule 6 to the Civil Partnership Act 2004."

Definition of financial orders

7. The FPR 2010, r. 2.3(1) defines the term 'financial order' for the purposes of the rules generally, which applies to r. 28.3(4)(b)(i):

" 'financial order' means–

(a) an avoidance of disposition order;

(b) an order for maintenance pending suit;

(c) an order for maintenance pending outcome of proceedings;

(d) an order for periodical payments or lump sum provision as mentioned in section 21(1) of the 1973 Act, except an order under section 27(6) of that Act;

(e) an order for periodical payments or lump sum provision as mentioned in paragraph 2(1) of Schedule 5 to the 2004 Act, made under Part 1 of Schedule 5 to that Act;

(f) a property adjustment order;

(g) a variation order;

(h) a pension sharing order;

(i) a pension compensation sharing order; or

(j) an order for payment in respect of legal services

8. The FPR 2010, r. 9.3 further defines an 'avoidance of disposition order', a 'pension sharing order', a 'pension compensation sharing order' and a 'variation order'. It provides:

" 'avoidance of disposition order' means –

(a) in proceedings under the 1973 Act, an order under section 37(2)(b) or (c) of that Act;

(b) in proceedings under the 1984 Act, an order under section 23(2)(b) or 23(3) of that Act;

(c) in proceedings under Schedule 5 to the 2004 Act, an order under paragraph 74(3) or (4); or

(d) in proceedings under Schedule 7 to the 2004 Act, an order under paragraph 15(3) or (4)";

" 'pension sharing order' means –

(a) in proceedings under the 1973 Act, an order making provision under section 24B of that Act;

(b) in proceedings under the 1984 Act, an order under section 17(1)(b) of that Act;

(c) in proceedings under Schedule 5 to the 2004 Act, an order under paragraph 15; or

(d) in proceedings under Schedule 7 to the 2004 Act, an order under paragraph 9(2) or (3) making provision equivalent to an order referred to in paragraph (c)";

"'pension compensation sharing order' means –

(a) in proceedings under the 1973 Act, an order under section 24E of that Act;

(b) in proceedings under the 1984 Act, an order under section 17(1)(c) of that Act;

(c) in proceedings under Schedule 5 to the 2004 Act, an order under paragraph 19A ; and

(d) in proceedings under Schedule7 to the 2004 Act, an order under paragraph 9(2) or (3) making provision equivalent to an order referred to in paragraph (c)";

" 'variation order' means –

(a) in proceedings under the 1973 Act, an order under section 31 of that Act; or

(b) in proceedings under the 2004 Act, an order under Part 11 of Schedule 5 to that Act.".

Definition of interim orders

9. The FPR 2010 r. 9.7(1) sets out the interim orders, which r. 28.3(4)(b)(i) excludes from the general rule of no order as to costs (except r. 9.7(1)(d), see above):

"(1) A party may apply at any stage of the proceedings for –

(a) an order for maintenance pending suit;

(b) an order for maintenance pending outcome of proceedings;

(c) an order for interim periodical payments;

(d) an interim variation order;

(da) an order for payment in respect of legal services; or

(e) ***any other form of interim order.*** *" [bold emphasis added]*

10. Whilst avoidance of disposition orders are defined as a 'financial order' in FPR 2010, r.9.3, they are interim orders in the sense that the purpose of s.37 MCA 1973 and the provisions to the same effect in the CPA 2004 and the MFPA 1984 is to preserve matrimonial assets until a final order can be made distributing them between the parties. They are not, however, expressly mentioned in the list of interim orders which are excluded from FPR r.28.3(4)(b)(i) or in the list of interim orders under r. 9.7(1). Both provisions do, however, use the wording "any other form of interim order", and as avoidance of disposition orders are undoubtedly interim orders, they should be caught by the provision.

11. Other forms of interim order will include interim injunctive relief such as search orders and freezing orders.

'For' not 'in connection with' financial remedy proceedings

12. The wording at FPR 2010, r. 28.3(4)(b) applies the 'no order for costs' principle to proceedings 'for' a financial remedy as defined in that sub paragraph.

13. The courts have held that there is a distinction between the proceedings that are 'in', 'in connection with' or 'for' financial remedy proceedings. In ***Judge v Judge*** **[2009] 1 FLR 1287, CA**, Wilson LJ held that an application to set aside a financial order constituted proceedings 'in connection with' a financial remedy but not 'for' a financial remedy for the purposes of what is now FPR 2010, r. 28.3(4)(b). Wilson LJ gave his reason for construing the rule narrowly:

> "I would have been willing to give the phrase 'ancillary relief proceedings' in r 2.71(4) a wide, purposive construction so as to include proceedings *in connection with* ancillary relief as well as *for* ancillary relief if my view had been that such would better reflect the ruler-makers' purpose. But such is not my view. The general rule in r 2.71(4)(a) is only a concomitant of the modern approach in applications *for* ancillary relief that the sum owed by each party in respect of his own costs will be treated as his liability for the purposes of calculating the substantive award." [51]

14. Wilson LJ held that the application to set aside the previous financial order was not itself a financial remedy, so the no order as to costs starting point did not apply. However, the proceedings were undoubtedly 'family proceedings'

and so the CPR 1998 applied as varied by what is now FPR 2010, r. 28.2(1), so that the starting point was the clean sheet approach [53].

15. In ***Baker v Rowe*** **[2010] 1 FLR 761, CA**, Wilson LJ confirmed the approach in ***Judge v Judge*** and took the opportunity to be more explicit about the reason for the adoption of the rule in financial remedy proceedings that there be no order as to costs. He referred to the consultation paper entitled 'Costs in Ancillary Relief Proceedings and Appeals in Family Proceedings', No CP(L) 29/04, issued in October 2004 by the Department for Constitutional Affairs, citing:

    a. "the destabilising effect that costs can have on financial settlements that have been carefully constructed by the court";
    b. "that running up costs in litigation will serve only to reduce the resources that the parties will have left";
    c. "the principle that, in the absence of litigation misconduct, the normal approach of the court to costs in ancillary relief proceeding should be to treat them as part of the parties' reasonable financial needs and liabilities." [21]

    Therefore, Wilson LJ narrowly interpreted r. 28.3(4)(b), as its purpose is to limit the effect of litigation costs on the financial remedy the court awards, which is specific to proceedings for a financial remedy following divorce or separation.

16. In ***Baker v Rowe***, the court held that a daughter's application to establish beneficial ownership of matrimonial property, within her parents' financial remedy proceedings, would not fall under the general rule of no order as to costs. Ward LJ held:

    > "The orders might well have been made in ancillary relief proceedings but they were not orders for nor even in connection with ancillary relief. The rule must be construed purposively as my Lord explained in ***Judge v Judge***" *[35]*.

17. Consequently, for the no order principle to apply, the parties' application(s) must be 'for' a financial remedy, purposively construed (***Judge v Judge*** at [51] and ***Baker v Rowe*** at [35]).

Financial orders to which the no order for costs principle applies

18. Upon consideration of the FPR 2010 and the statutes to which it refers, the financial orders referred to in the FPR 2010, r. 28.3(4)(b) where the starting point for costs in such applications is *no order* include:

a. final financial orders in the Matrimonial Causes Act 1973 ('MCA 1973'), as defined in s. 21 of the MCA 1973 to include periodical and lump sum payments under s. 23 MCA 1973 and property adjustment orders under s. 24 MCA 1973 (s. 27 MCA 1973 is included in s. 21 MCA 1973, but excluded by the FPR 2010, r.28.3(4)(b)(i)). Orders for sale of property (s.24A MCA 1973), pension sharing orders (s. 24B MCA 1973) and pension compensation orders (s. 24E MCA 1973) are similarly final financial orders;

b. final financial orders in the Civil Partnership Act 2004 ('CPA 2004), which are described at Schedule 5 to the CPA 2004 at Part 1 (periodical and lump sum payments), Part 2 (property adjustment), Part 3 (sale of property), Part 4 (pension sharing) and Part 4A (pension compensation sharing). These are the only final financial orders that can be made on dissolution of a civil partnership;

c. by s. 17 of the Matrimonial and Family Proceedings Act 1984 ('MFPA 1984), final financial orders after an overseas divorce, annulment or judicial separation, which are identical to the orders that can be made under the MCA 1973 at paragraph 13(a);

d. by paragraph 9 of Schedule 7 to the CPA 2004, final financial orders following an overseas dissolution, annulment, or judicial separation of a civil partnership, which are the same as those that can made following a domestic dissolution, annulment, or judicial separation of a civil partnership at paragraph 13(b);

e. by s. 10(2) MCA 1973 and the parallel jurisdiction at s. 48(2) of the CPA 2004 (which provide a procedure for an application for divorce, dissolution, annulment, or judicial separation of a civil partnership on the basis of 2 or 5 years' separation not to be made final until adequate financial arrangements are made) final financial orders as at paragraphs 13(a) and 13(b);

f. variation and interim variation orders under s. 31 MCA 1973 and under Part 11 of Schedule 5 of the CPA 2004. (Please note that the FPR 2010 PD 28A para 4.2(a) and the FPR 2010 r. 28.3(4)(b)(i) state that the no order principle does apply to interim variation orders).

General FPR costs regime - The clean sheet

Background: costs follow the event in civil proceedings

19. The CPR 1998, r. 44.2(2) provides that "if the court decides to make an order about costs the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party". This civil proceedings starting point is commonly called 'costs follow the event'.

The 'clean sheet' costs regime

20. The FPR 2010, r. 28.2(1) excludes the CPR 1998, r. 44.2(2) from application in family proceedings generally:

> *"Subject to the rule 28.3, Part 44 (except rules 44.2(2) and (3) and 44.10(2) and (3)), 46 and 47 and rule 45.8 of the CPR apply to costs in proceedings"*

21. The costs rules in the CPR 1998 which *do not* apply in family proceedings are therefore:
    a. r. 44.2(2) – the general rule that costs follow the event;
    b. r. 44.2(3) – the rule disapplying the rule that costs follow the event to an appeal in the Court of Appeal from the Family Division or from family proceedings generally;
    c. r. 44.10(2) – the rule that where either an order is made on an application without notice, or permission to appeal is granted, and there is no order for costs, then there is deemed to be an order for the applicant's costs in the case;
    d. r. 44.10(3) – the rule allowing any party affected by a deemed order under r. 44.10(2) to apply at any time to vary it;
    e. Part 45 (except for r. 45.8) – Part 45 deals with fixed costs. This part is disapplied as there are no fixed costs in family proceedings, save in relation to enforcement costs which are set out in a table at CPR 1998 r. 45.8.

22. Therefore, the general rule in family proceedings is that there is a 'clean sheet', from which to consider the issue of costs, bearing in mind the factors set out in the CPR 1998, rr. 44.2(4) and 44.2(5), which apply to family proceedings pursuant to the FPR 2010, r. 28.2(1):

> *"(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –*
>
> *(a) the conduct of all the parties;*
>
> *(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and*
>
> *(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.*
>
> *(5) The conduct of the parties includes –*
>
> *(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;*
>
> *(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*
>
> *(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and*
>
> *(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim."*

23. The concept of the 'clean sheet' derives from Wilson LJ in ***Judge v Judge (supra)***, affirmed by Wilson and Ward LJ in ***Baker v Rowe (supra)***. In ***Judge*** the court was proceeding under the old FPR 1991, which by then had incorporated the CPR 1998, Part 44 (in the same terms as the present Part 44, namely that r.44.3(2) is disapplied in family proceedings). Of the wife's appeal on costs Wilson LJ said:

> "[53] Thus there was no 'general rule' in either direction for the judge to apply to his decision. He had before him a ***clean sheet***; but by

> reference to the facts of the case, and in particular, the wife's responsibility for the generation of the costs of a failed application, he remained perfectly entitled to record upon it, as he did, that he would start from the position that the husband was entitled to his costs." (**bold emphasis added**)

Starting point in the 'clean sheet' costs regime

24. In ***Gojkovic v Gojkovic (No 2)*** **[1991] 2 FLR 233**, the Court of Appeal considered the disapplication for family proceedings of the rule that costs follow the event under RSC 1965 Ord 62, a very similar provision to the existing 'clean sheet' rules. Butler-Sloss LJ stated, at 236:

> "…in the Family Division there still remains the necessity for some starting point. That starting point, in my judgment, is that costs prima facie follow the event (see Cumming-Bruce LJ in **Singer (formerly Sharegin) v Sharegin [1984] FLR 114** at [119]) but may be displaced much more easily than, and in circumstances which would not apply in other divisions of the High Court."

25. In ***Solomon v Solomon and Ora*** **[2013] EWCA Civ 1095**, the Court of Appeal affirmed the correctness of the approach to costs adopted by the court in ***Gojkovic (No 2)*** and Ryder LJ observed: "The starting point for what are described as "clean sheet" cases is that costs follow the event." [22]

26. Contrastingly, in ***Baker v Rowe***, Wilson LJ did not begin the exercise of his discretion with a starting point. He assessed the facts and circumstances of the case, reaching a conclusion that would have been similar had he applied the starting point that costs follow the event. At [25], he observed that:

> "the fact that one party had been unsuccessful, and must, therefore, usually be regarded as responsible for the generation of costs, would often be the decisive factor in the exercise of the judge's discretion as to costs".

27. Consequently, from the ***Gojkovic (No 2)*** line of authority, the starting point of the moderated CPR costs regime, as applied in proceedings for a 'financial remedy' under FPR 2010, r.28.2(1) is the "more easily" rebuttable presumption that costs follow the event. This starting point, however, seems to be at odds

with Wilson LJ's formulation of the 'clean sheet' regime in ***Baker v Rowe*** and ***Judge v Judge***, where there is no general rule to award costs in either direction (See ***Judge*** *at* [53]). Ultimately, under the FPR 2010, r. 28.2(1), there remains no rule that costs follow the event, but if a starting point is needed, then the ***Gojkovic (No 2)*** line of authority suggests a way.

When does the 'clean sheet' regime apply?

28. The clean sheet costs regime applies to proceedings for a 'financial remedy' that are not contained within the definition of 'financial remedy proceedings' in the FPR 2010, r. 28.3(4)(b).

29. The FPR 2010, r. 2.3(1) defines proceedings for a 'financial remedy' as follows, some of which fall outside the definition in FPR 2010 r. 28.3(4)(b) (previously set out in para. 7 above, but to recap):

> *" 'financial remedy' means –*
>
> *(a) a financial order;*
>
> *(b) an order under Schedule 1 to the 1989 Act;*
>
> *(c) an order under Part 3 of the 1984 Act except an application under section 13 of the 1984 Act for permission to apply for a financial remedy;*
>
> *(d) an order under Schedule 7 to the 2004 Act except an application under paragraph 4 of Schedule 7 to the 2004 Act for permission to apply for an order under paragraph 9 or 13 of that Schedule;*
>
> *(e) an order under section 27 of the 1973 Act;*
>
> *(f) an order under Part 9 of Schedule 5 to the 2004 Act;*
>
> *(g) an order under section 35 of the 1973 Act;*
>
> *(h) an order under paragraph 69 of Schedule 5 to the 2004 Act;*
>
> *(i) an order under Part 1 of the 1978 Act;*
>
> *(j) an order under Schedule 6 to the 2004 Act;*
>
> *(k) an order under section 10(2) of the 1973 Act; or*
>
> *(l) an order under section 48(2) of the 2004 Act"*

30. Proceedings for a 'financial remedy' which are not financial remedy proceedings for the purposes of the FPR 2010, r. 28.3(4)(b), where the 'clean sheet' principle applies therefore include:

    a. applications under Schedule 1 of the Children Act 1989;
    b. interim applications for:
        i. an order for maintenance pending suit;
        ii. an order for maintenance pending outcome of proceedings;
        iii. an order for interim periodical payments;
        iv. an order for payment in respect of legal services under ss. 22ZA and 22ZB MCA 1973 or paras 38A and 38B of Schedule 5 to CPA 2004; or
        v. any other form of interim order, (except an interim variation order), including, but not limited to:
            1. an avoidance of disposition order under ss. 37(2)(b) and 37(2)(c) MCA 1973, under ss. 23(2)(b) and 23(3) of the MFPA 1984, under paragraph 74(3) or 74(4) of Schedule 5 to the CPA 2004, or under paragraph 15(3) or 15(4) of Schedule 7 to the CPA 2004;
            2. a search order;
            3. a freezing order;
    c. an application for failure to maintain under s. 27 MCA 1973 or under Part 9 of Schedule 5 to the CPA 2004;
    d. an application to vary a maintenance agreement under s. 35 MCA 1973, or under paragraph 69 of Schedule 5 of the CPA 2004
    e. an application under the Domestic Proceedings and Magistrates' Courts Act 1978 and under Schedule 6 to the CPA 2004 (maintenance proceedings in magistrates' courts);
    f. an application to alter a maintenance agreement after the death of one party under s. 36 MCA 1973 or paragraph 73 of Schedule 5 to the CPA 2004;
    g. an application under s. 17 of the Married Women's Property Act 1882 (MWPA 1882) or s. 66 CPA 2004 (question as to property to be decided in summary way);
    h. an application under s. 13 MFPA 1984 or paragraph 4 of Schedule 7 to the CPA 2004 (permission to apply for a financial remedy after overseas proceedings).

31. There are other proceedings within the area of financial remedies that also fall outside the definition in FPR 2010, r.28.3(4)(b), to which the 'clean sheet' costs regime applies, which include:
    a. an appeal against an order made in financial remedy proceedings, under FPR 2010, Part 30 (***H v W (Cap on Wife's Share of Bonus Payments: Costs)*** **[2015] 2 FLR 161**);
    b. an appeal in family proceedings to the Court of Appeal under CPR 1998, Part 52;

c. an application for the transfer of tenancy under s. 53 of and Schedule 7 to the Family Law Act 1996;
d. an application preventing avoidance under s.32L of the Child Support Act 1991;
e. an application for relief from sanctions under FPR 2010, r.4.6 (which diverges from the regime under the CPR 1998, r. 3.9);
f. a preliminary issue application (***KSO v MJO, JMO and PSO* [2009] 1 FLR 1036**, where Munby J (as he then was) applied the 'clean sheet' costs regime to the pre-litigation costs incurred by a third party, prior to being joined to proceedings, to attend an inspection appointment and comply with an order for disclosure [60], [65]);
g. applications to set aside a financial remedy (***Judge v Judge*, *supra***)
h. intervener proceedings, where a person intervenes in financial remedy proceedings (***Baker v Rowe*, *supra***).

ToLATA 1996

32. An application under ToLATA 1996 is for a civil remedy and is therefore not governed by the FPR 2010. In such applications, the full costs regime under Parts 44, 46 and 47 of the CPR 1998 will apply.

Third Parties/Interveners in financial remedy proceedings

33. The no order as to costs principle in proceedings for a financial remedy as defined in r.28.3(4)(b) will not apply to the issue of costs between the interveners, as it has been held that such proceedings are not financial remedy proceedings for the purpose of that rule (***Baker v Rowe*, *supra***).

34. ***Baker v Rowe*** concerned applications by a daughter and son-in-law for rival declarations regarding the beneficial interest in a property, which the parents had bought and which was one of the assets subject to the parents' proceedings for a financial remedy.

35. In his judgment, Wilson LJ noted that it would not be fair for costs to follow the event in relation to an intervenor's application, according to the costs regime in the CPR 1998:

> "Ever since the decision of this court in *Tebbutt v Haynes* [1981] 2 All ER 238, it has been recognised as convenient that a third person who asserts a beneficial interest in property which is the subject of an application for ancillary relief following divorce should either be permitted as an intervener, or ordered as a further respondent, to make his assertion within, and thus as a party to, the application, rather than that the existence or otherwise of his alleged interest be determined in

> separate proceedings in a separate court at a separate time, with the consequential risk of inconsistent decisions. It would be highly unfortunate, as well as unprincipled, if such a person, when joined as an intervener or as a respondent only for convenience, were to find that, even were his assertion successful, a general rule against making any order for costs *inter partes* would operate against him." [23]

36. Nonetheless, Wilson LJ ruled that an application by an intervener could not be interpreted as an application for a financial remedy within what is now FPR 2010 r. 28.3(4)(b):

> "as in *Judge v Judge*, my conclusion is that the general rule in ancillary relief proceedings, set out in Rule 2.71(4)(a) of the Rules of 1991, did not apply to the issue of costs between the daughter and the son-in-law: for the proceedings were not "ancillary relief proceedings" for the purpose of that rule." [24]

37. Ward LJ went further in his exposition, stating that an intervener's application is best defined as an application 'in', as opposed to 'for' financial remedy proceedings:

> "The orders might well have been made in ancillary relief proceedings but they were not orders for nor even in connection with ancillary relief.*" [35]*

38. Wilson LJ consequently held that the no order principle would not apply to an application made by an intervener, but because such an application is made 'in' financial remedy proceedings, the clean sheet costs regime in what is now FPR 2010, r.28.2(1) would apply and not the costs regime under the CPR 1998:

> "Equally, however, the general rule that the unsuccessful party will be ordered to pay the costs of the successful party, set out in Rule 44.3(2)(a) of the Rules of 1998, was also inapplicable: for the proceedings were family proceedings, with the result that, by Rule 10.27(1)(b) of the Rules of 1991, that general rule was disapplied. There is nothing to indicate that the district judge purported to apply the general rule in Rule 44.3(2)(a) but, if and insofar as the circuit judge considered that that general rule was applicable, he was in error. The true position is that, as in *Judge v. Judge*, there was no general rule in either direction for the district judge to apply to his decision and that he therefore had before him a clean sheet." [24]

39. In ***KSO v MJO, JMO and PSO*** **[2009] 1 FLR 1036**, a case preceding ***Baker v Rowe***, Munby J (as he then was) held that the 'no order' principle would not apply to the costs of a third party joined against his will, nor would it apply to the costs that the third party had incurred prior to being joined to the proceedings:

> **"**In my judgment, this is not the kind of case where, a good claim having become academic in the light of changed circumstances, it is appropriate to order that there be no order as to costs. Nor is it the kind of case where the practical difficulty of assessing the intrinsic merits or demerits of the claim similarly propels the court towards the default position of making no order for costs. I have more than adequate material upon which to base an informed view as to the wife's prospects of success against the father-in-law. And that view, I am afraid, is stark and unhesitating: the wife embarked upon, and persisted for far too long in pursuing, a claim that in all probability was always flawed and which never stood any very great prospect of success. She chose to sue the father-in-law. She has failed. Costs should, in principle, follow the event. The father-in-law is in principle entitled to his costs." [65]

40. In ***M v M (Costs)*** **[2013] EWHC 3372 (Fam); [2014] 1 FLR 499**, King J (as she then was) affirmed the court's approach in ***KSO v MJO, JMO and PSO*** and applied ***Baker v Rowe***. King J ordered that a husband, and the companies (of which he was shadow director) that had been joined as respondents in the proceedings, pay costs in respect of a wife's application for a financial remedy after a foreign divorce. In addition, their manipulative and contemptuous conduct was marked by an order for costs on an indemnity basis.

41. Therefore, where third parties intervene or are joined in financial remedy proceedings, their application will be subject to the 'clean sheet' costs regime, pursuant to FPR 2010, r.28.2(1).

Charles Hale QC
Nicholas Fairbank
Katie Wood
Jonathan Rustin (Pupil Barrister)

Section 12

Members List

4 Paper Buildings
Temple, EC4Y 7EX
T: 020 7427 5200
E: clerks@4pb.com
W: 4pb.com

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

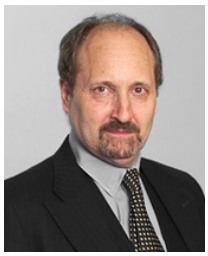
Jonathan Cohen QC
Call: 1974 | Silk: 1997

Kate Branigan QC
Call: 1985 | Silk: 2006

Henry Setright QC
Call: 1979 | Silk: 2001

Marcus Scott-Manderson QC
Call: 1980 | 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

Cyrus Larizadeh QC
Call: 1992 | Silk: 2016

Brian Jubb
Call: 1971

Alistair G Perkins
Call: 1986

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

Stephen Lyon
Call: 1987

James Shaw
Call: 1988

Mark Jarman
Call: 1988

Sally Bradley
Call: 1989

Barbara Mills
Call: 1990

Joy Brereton
Call: 1990

Joanne Brown
Call: 1990

Sam King
Call: 1990

David Bedingfield
Call: 1991

Michael Simon
Call: 1992

Justin Ageros
Call: 1993

Rob Littlewood
Call: 1993

Paul Hepher
Call: 1994

Cliona Papazian
Call: 1994

Justine Johnston
Call: 1997

Judith Murray
Call: 1994

Ruth Kirby
Call: 1994

Sarah Lewis
Call: 1995

Nicholas Fairbank
Call: 1996

James Copley
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

Kate Van Rol
Call: 2002

Katie Wood
Call: 2001

Rhiannon Lloyd
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

Henry Clayton
Call: 2007

Andrew Powell
Call: 2008

Chris Barnes
Call: 2008

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

Indu Kumar
Call: 2012

Door Tenants

Baroness Scotland QC
Call: 1977 | Silk: 1991

Paul Hopkins QC
Call: 1989 | Silk: 2009

Professor Marilyn Freeman PhD
Call: 1986

Elizabeth Couch
Call: 2003

Pupils

Jonathan Rustin
Call: 2013

Julia Queen
Call: 2015

Pippa Sanger
Call: 2015