

4 PAPER BUILDINGS

4PB Private Client Conference 2017:

**CONTEMPORARY ISSUES IN
INTERNATIONAL AND DOMESTIC
FAMILY LAW**

TANGLED WEBS:

**Mental Health and Vulnerability, Media
Intrusion and Money**

5 CPD – BTM/CHLS

29th June 2017



4 Paper Buildings

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Section 1

4 Paper Buildings: About Us

About 4PB

4PB has a distinguished history as a leading set of specialist family law barristers providing practical, expert legal advice, and including effective and assured advocacy, in all practice areas of family law. Our size, practice range, reputation and expertise are unrivalled and mark us out as unique amongst our competitors.

We are:

- A historic London chambers housing 76 expert family barristers
- Steeped in Inns of Court legal tradition with cutting-edge knowledge and technology
- Recommended as leaders in our field by the main legal directories, Chambers & Partners and The Legal 500

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

- Divorce
- Civil partnership dissolution
- Finances and property on divorce or civil partnership dissolution
- Children's arrangements after parents separate
- Children proceedings involving a Local Authority
- Child abduction and wrongful retention
- International family law
- Agreements
- Cohabitants' claims (trusts of land cases)
- Financial arrangements for children
- Domestic abuse
- Assisted conception and reproduction
- Publicity
- Inquests

What people say about 4PB:

Chambers & Partners 2017

A powerhouse of family law that offers unparalleled depth in all public and private law children-related issues, both international and domestic. The set further has a growing matrimonial finance practice, and its members service high net worth clients in complex disputes concerning large assets.

Client service: "The clerks are incredibly user-friendly; they're great for solicitors, they're flexible, they're reasonable on fees, and they're prepared to adapt. They know their barristers really well." The senior clerk is Michael Reeves.

The Legal 500 - 2016

"4 Paper Buildings is 'a go-to chambers; whether it is Children Act, TOLATA, family finance or international children work, the expert barristers are all equally friendly, helpful and highly skilled advocates, leaving you confident you are in good hands when you have someone from this set on your team'. The clerking is also rated as 'second to none'; 'every clerk provides a service that evidences good leadership and personal commitment to the cases in chambers', and 'if barristers become unavailable, they work tirelessly to free up alternative counsel'. 'One of the best clerks in London', senior clerk Michael Reeves is 'an absolute asset to chambers, who consistently exceeds expectations' and 'is straight-talking, understands matters from a commercial perspective and has shown excellent management in driving chambers forward'. First junior Paul Hennessy also 'stands out for his understated charm and outstanding efficiency'.

"At 4 Paper Buildings, 'the entire chambers has an element of confidence and class about it, never better epitomised than through the leadership' of Alex Verdan QC. The set continues to dominate the market with six members appearing in *Re J (a child)* in the Court of Appeal and seven members appearing in *Re B* in the Supreme Court."

"4 Paper Buildings provides 'a splendid service', and 'goes above and beyond to ensure the best possible outcome'. Counsel were involved in *Ramadani v Ramadani*, a Slovenian divorce case now being heard in the English High Court. The general trend of internationalisation of divorce and financial remedy work is at the forefront of many members' practices."

4 Paper Buildings won The Legal 500 Family Law Set of the Year in 2017

- [Click here](#) to see more of our recommendations and awards
- [Click here](#) for information on 4PB's standards, policies and procedures
- To view our contractual terms and conditions [click here](#)
- [Click here](#) for chambers' news



Section 2

Conference Scenario

TANGLED WEBS – FACTUAL SCENARIO

4PB's Annual Family Law Seminar 2017 will follow the story of the breakdown of the relationship of **TNT** and **Row L**. Covering international and private law, media issues, vulnerable witnesses, personality disorders and financial remedies for unmarried parents the 4PB team will be joined by medical and media experts to explore these topics.

The Family

TNT (Anthony Trieste) is a rap artist and film star of world renown.

Row L (Rowena Lipstadt) is a former model and charity worker.

In 2003 they had a brief relationship whilst they were both married to others. As a result a child was conceived – **Leppard** (born 1.4.2004). She was born during the currency of **Row L's** marriage to **Ronald Martini** and her husband was registered as **Leppard's** father. The marriage ended shortly afterwards and they were divorced in New York in 2005. As part of the divorce a custody order was made in New York granting physical custody of **Leppard** to **Row L** and visitation rights to **Ronald**. The New York order stated that the courts of New York would retain jurisdiction for all purposes over **Leppard**. At the time **Row L** had said she intended to move to live in Dubai. However in 2008 **Ronald** discovered **Leppard** was not his daughter and has had nothing to do with her since.

In 2005 **TNT** and **Row L** started living together in New York. **TNT** has always treated **Leppard** as his child. In 2008 they separated and **TNT** brought proceedings in New York in respect of **Leppard**. During these proceedings DNA tests confirmed he was her father and an order was made as a result of which he was declared to be her father. The Birth Register was never formally amended. The NYC proceedings were under a sealed docket. **Row L** and **Leppard** then moved to live in Dubai (with the permission of the court) and remained there until 2013. During a child visitation in 2013 **TNT** and **Row L** rekindled their relationship and she became pregnant. She returned to New York in Jan 2014 and gave birth to **Messi** in March 2014. **TNT** was registered as his father. The family lived together until they relocated to London in spring 2015 and **Leppard** started at Hampstead School. A house was purchased in **TNT's** sole name but **Row L** spent very substantial sums of her own money renovating and extending it and furnishing it with an extensive art collection.

The relationship has been dogged with difficulties. **TNT** has had a number of affairs. **Row L** has struggled with psychological problems. **TNT** has moved out of the family home at various times. **Leppard** says **Row L** has been violent to her and emotionally abusive. In March 2017 **Leppard** called the police alleging that **Row L** had thrown a phone at her, slapped her and pulled her hair. **Row L** was arrested but for reasons which remain unclear was never charged or cautioned. There is some suspicion surrounding the reasons for this. The press were somehow made aware of the incident and wrote to **Row L** saying they intended to publish a story. She instructed media

lawyers who responded on her behalf saying it was false and they would seek an injunction and damages if any publication was made. The Press backed off.

Leppard has now moved to **TNT's** alternative home (a large house held in the name of a BVI company). She refuses to see **Row L** and has alleged that her mother has been physically and emotionally abusive for many years. **TNT** says he believes that **Row L** is 'sick in the head' and from what he has been told by a friendly psycho—counsellor that he believes she has a narcissistic personality disorder as she ticks all the boxes

Row L has now taken **Messi** to live in Manchester and says she wishes to return to live in New York. She says she has no money after spending it all on the renovations and art. She says she cannot afford English lawyers. She alleges that they agreed to move here only for 2 years and that **TNT** is now wrongfully retaining **Leppard** in England. She says **TNT** has undermined her with **Leppard** and is alienating her. She has issued proceedings in the New York Court seeking an order for return and the NY court on an ex parte application ordered her return. Fortunately the order was made on a day when the Press were not in court and so far almost no reporting has taken place. The court may or may not be closed to the press in future.

TNT, Row L and **Leppard** have all tweeted about how they are missing each other and are sad. **TNT** and **Row L** have not gone so far as to say they have separated and are in conflict over their children.

What they want

TNT wants

- (a) To secure the return of **Messi** from Manchester *to live with him*
- (b) To secure orders in respect of **Leppard** that she lives with him.
- (c) To oppose **Row L's** application in NY and for **Leppard's** return to the USA.

Row L wants

- (a) To bring child abduction or other proceedings to get **Leppard** back to the USA
- (b) If she cannot succeed with this to secure an order in the English court that **Leppard** and **Messi** live with her in the USA.
- (c) To secure capital and income for her to house **Messi** and **Leppard**.
- (d) To remove **TNT's** PR for **Leppard** and **Messi**.

Leppard wants to have her own representation and to give evidence about what her mother has done to her *and where she wants to live*.

The Press want to report everything.

#4PBConf2017

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Section 3

Conference Programme

4PB ANNUAL CONFERENCE 2017 PROGRAMME

10am	Welcome Alex Verdan QC
10.10am	Arbitration Catherine Wood QC
10.30am	Jurisdictional Issues in Children Cases David Williams QC, Teertha Gupta QC, Henry Setright QC & Jacqueline Renton
11.10am	COFFEE BREAK
11.30am	Funding Litigation Chris Hames QC & Katie Wood
11.50am	Private Law Issues Kate Branigan QC and Sam King
12.20pm	Intractable Contact and Mental Health Issues Dr Mark Berelowitz
12.55pm	Round up
1pm	LUNCH
2pm	Charity - Action Against Abduction: 'Clever Never Goes'
2.10pm	Children giving evidence in private law matters and vulnerability Cyrus Larizadeh QC & Joanne Porter
2.45pm	Media Issues: Stop Press! Adam Wolanski & Greg Callus, 5 Raymond Buildings
3.30pm	TEA BREAK
3.45pm	Schedule 1 & TOLATA claims: Unmarried Money, to Have and to Keep Charles Hale QC, Julia Townend & Pippa Sanger
4.30pm	Key Note Address Mr Justice Alistair MacDonald
5pm	Q & A and panel discussion
5.15pm	Close of Seminar – Drinks reception

#4PBConf2017

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Section 4

Arbitration

Catherine Wood QC

IFLA

Institute of Family Law Arbitrators

A Guide to the Family Law Arbitration Scheme

An Introductory Guide for Family Arbitrators,
Judges and Professional Referrers

Third edition

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Introduction

Welcome to the Guide to the Institute of Family Law Arbitrators' (IFLA) Family Law Arbitration Scheme ('the Scheme'): An Introductory Guide for Family Arbitrators, Judges and Professional Referrers ("the Guide").

This second edition of the Guide includes an introduction to both financial remedy arbitration and children arbitration. It is intended to provide an introduction to the Scheme for family law arbitrators, judges and professional referrers.

The Guide contains two sections. The first, Family Arbitration in a Nutshell, sets out a working definition of family arbitration, and briefly defines its history and benefits as a means of resolving family law disputes. The second, IFLA Scheme: Family Arbitration Process, provides a step-by-step guide to the family arbitration process, and details the legal framework on which the Scheme is built.

For further information on the Scheme, including that relating to the structure of IFLA, qualification and training, please consult the IFLA website www.ifla.org.uk. The Scheme Rules can be found at ifla.org.uk/resources-for-practitioners/.

IFLA is grateful to Suzanne Kingston and Jonathan Tecks whose financial remedy and children family law arbitration course materials have been invaluable in the preparation of the guide. They have been supported recently by Janet Bazley QC who has also provided input to the course materials and the training.

Family arbitration in a nutshell

1. Definition

Family arbitration is a form of private dispute resolution in which the parties enter into an agreement under which they appoint a suitably qualified person (an “arbitrator”) to adjudicate a dispute and make an award. It can be used to resolve financial disputes and disputes concerning children.

Family arbitration is thus akin to court proceedings in that a family arbitrator will produce a decision after hearing the evidence and each party’s case. In financial cases the decision is called an **award** and in children cases it is called a **determination**.

The Scheme’s authority derives from the Arbitration Act 1996, the Rules, and the agreement to arbitrate. Form ARB1FS is used in financial cases and Form ARB1CS is used in children cases (see 3.8 – 3.14.)

Family arbitration is distinct from mediation in that a decision on the substance of the dispute between the parties may be imposed by the family arbitrator or arbitral tribunal. It is therefore binding upon the parties to the dispute.

Mediation can take place in parallel with an on-going family arbitration: sometimes a family arbitrator may consider mediation would benefit a couple and he may suggest this. Conversely, mediators may recommend family arbitration if it seems clear that a dispute, or one aspect of it, cannot settle in mediation.

2. Background

Arbitration is widely used in commercial disputes. In England and Wales, the domestic framework is provided by the Arbitration Act 1996 ('the Act'). The Act has a number of distinctive features, but is broadly comparable to arbitration legislation and regulation in other European states and the US, and to the United Nations Commission on International Trade Law (UNCITRAL) 'Model Law' which has provided the basis for regulation of arbitration in Scotland and many other parts of the world. International enforcement of arbitration awards is also available under the New York Convention 1958.

The Act seeks to draw an appropriate balance between allowing parties freedom to determine the procedure for resolution of their dispute, while at the same time maintaining adequate supervision by the courts. In particular, the provisions of the Act are designed to ensure that the arbitration is founded on genuine agreement, and that the procedure is fair and impartial.

In family proceedings the jurisdiction of the court cannot be ousted, but there are a growing number of cases in which the High Court has shown its support for arbitration awards being incorporated into court orders.

Following the introduction of the financial remedy arbitration scheme interest grew as to the possibility of resolving children disputes under the IFLA scheme. After wide and extensive consultation, the IFLA rules have been amended to permit specified children disputes to be included in the Scheme.

3. Benefits of family arbitration

The court process can be a daunting, complicated and expensive experience. It can increase conflict and confrontation during an already distressing period. Family arbitration provides a real alternative. Key benefits are:

3.1 Speed of the process

Family arbitration is likely to take significantly less time than contested court proceedings.

3.2 Choice of arbitrator

The parties themselves, guided by their lawyers (if they are represented), select the person they wish to arbitrate their dispute. If the parties are unable to agree, the arbitrator can be selected by IFLA.

3.3 A specialist arbitrator

In court proceedings, there is no guarantee that the appointed judge will have specialist knowledge or experience in resolving disputes concerning children nor be conversant with the often highly complex financial arrangements the parties are seeking to unravel. A family arbitrator is an experienced family lawyer who specializes in financial and/or children disputes. The arbitrator is as competent as a judge would be to fairly and efficiently resolve the dispute and will be selected by the parties themselves or appointed by IFLA at the parties' request.

3.4 Control of the procedure

The parties 'own' the procedure to a far greater extent than is possible with court proceedings. Together with the arbitrator, the parties are able to tailor the process to their own needs, and decide whether the process is document only, conducted via telephone, or by face-to-face meetings. The issues may be determined all at once or sequentially at specified intervals of time to permit negotiation and settlement of other issues in the interim. By the same token the parties can, by agreement, appoint relevant and appropriate experts to assist in the determination of

the dispute.

3.5 Issues to be arbitrated

The parties may decide to appoint a family arbitrator for one or more specific issues. Unlike Court proceedings, there is no need to undergo compulsory mediation information and assessment meetings (MIAMs) before starting arbitration. Furthermore, if the arbitrator is appointed to determine a single issue the **award** or **determination** can include all of the other issues already agreed between the parties to ensure that the parties achieve an outcome which is binding.

3.6 Confidentiality

The family arbitration process is completely private and confidential (subject to the usual exceptions in relation to safeguarding and protection from harm or where there is an over-riding obligation in law to disclose). Meetings take place at a venue of the parties' choice, and there is no possibility of media obtaining access. Papers are held securely in the family arbitrator's office.

3.7 Arbitrator's availability

The appointed family arbitrator alone will deal with the dispute from start to finish. A number of advantages flow from consistency of tribunal:

- i. The family arbitrator is engaged by the parties with the specific task of resolving their dispute.
- ii. The family arbitrator will be available to deal promptly with applications for directions and other issues as they arise in the course of proceedings.
- iii. Meetings can be listed at short notice to suit all participants' diaries including business or family commitments and at their preferred venue.

3.8 Keeping the lawyers

If the parties have instructed lawyers, they are able to and normally will retain them throughout the family arbitration process for advice, preparatory work and representation at meetings.

3.9 Defusing landmines

Family arbitration can be fashioned to obtain a speedy and economical determination of preliminary issues of law or fact or both, thus increasing the likelihood of resolution of the dispute.

3.10 Integration with the court

A court may refer a matter to arbitration or be involved if necessary during the arbitration process to exercise a power not available to an arbitrator, such as granting an injunction.

3.11 Cost savings

The ability to streamline the procedure may well (and in the majority of cases should) lead to significant cost savings.

3.12 Finality

The judiciary have made it clear in the recent authorities of *S v S* and *DB v DLJ*¹ that not only will the Courts approve IFLA arbitral awards, they will also uphold them.

¹ [2014] EWHC 7 (Fam) & [2016] EWHC 324 (Fam)

4. 4. Costs of family arbitration

In family arbitration there are four main types of cost:

- 4.1** The family arbitrator's fees and expenses. The family arbitrator and the parties will agree the arbitrator's fees at the beginning of the family arbitration. The usual arrangement will be for each of the parties to bear the family arbitrator's fees and expenses in equal shares.
- 4.2** Venue hire and similar costs. There may be costs involved in hiring a venue for any meetings scheduled as part of the process, or for other similar costs such as the hiring of transcribers. These costs will usually be borne equally.
- 4.3** Legal costs. These are the costs incurred by each party in engaging lawyers to prepare for and represent them in family arbitration. The usual arrangement will be for each party to bear its own legal costs, and not to make any payment towards each other's legal costs.
- 4.4** Experts' fees. These costs will usually be borne equally.

The family arbitration process

5. The IFLA scheme

The Scheme was launched in February 2012 and is a collaboration between Resolution, the Family Law Bar Association (FLBA), the Chartered Institute of Arbitrators (CI Arb) and the Centre for Child and Family Law Reform (sponsored by The City Law School, City University London). In 2016 the revised IFLA rules were published which enable specified children disputes to be resolved by arbitration.

The Scheme utilises arbitration procedures well established in the commercial and family arenas – for example, the statutory family arbitration schemes that are in force in Australia and certain provinces of Canada. The Scheme falls into two distinct categories: financial remedy disputes and children disputes.

5.1 Financial Disputes.

The Scheme can be used for the following financial disputes:

- a. Marriage and its breakdown (including financial provision on divorce, judicial separation or nullity).
- b. Civil partnership and its breakdown.
- c. Co-habitation and its termination.
- d. Parenting or those sharing parental responsibility.
- e. Provision for dependents from a deceased's estate under the Inheritance (Provision for Family and Dependents) Act 1975.
- f. S. 17 of the Married Women's Property Act 1882.
- g. Part II of the Matrimonial Causes Act 1973.
- h. S. 2 of the Inheritance (Provision for Family and Dependents) Act 1975.

- i. Part III of the Matrimonial and Family Proceedings Act 1984 (financial relief after overseas divorce) and the Civil Partnership Act 2004 (Sch. 5, or Sch. 7, Pt. 1, para. 2: financial relief after overseas dissolution).
- j. Schedule 1 to the Children Act 1989.
- k. Trusts of Land and Appointment of Trustees Act 1996.
- l. Other civil partnership equivalents where corresponding legislative provision has been made.

5.2 Children Disputes.

The Scheme can be used for the following disputes concerning children:

- a. Where and with whom children shall live.
- b. The time spent with each parents.
- c. Arrangements concerning the children's upbringing.
- d. Relocation of children within England and Wales.

5.3 The Scheme does not apply to questions concerning:

- a. The liberty of individuals.
- b. The status either of individuals or of their relationship.
- c. Bankruptcy or insolvency.
- d. Any person or organisation not a party to the arbitration, unless that person or organisation agrees in writing.
- e. The international relocation of children.
- f. Child protection proceedings.

5.4 Further information on the Scheme can be found on the IFLA website www.ifla.org.uk by navigating through the tabs at the top

of the webpage, you can:

- a.** Search for a family arbitrator, including background information on each.
- b.** Learn more about family arbitration (including FAQs).
- c.** Read about IFLA, including qualification for family arbitrators.
- d.** Access the Scheme Rules.
- e.** Access the Forms ARB1FS and ARB1CS.

6. Step-by-step guide to the process

6.1 Preparatory steps

- a.** The parties wish to resolve their financial or child-related differences arising in the context of separation or divorce without resorting to court. The parties may have tried mediation, which has broken down or they may simply prefer arbitration. It is recommended that the parties take legal advice on the implications and consequences of family arbitration.
- b.** The parties, with the assistance of their lawyers if they have legal representation, search for a family arbitrator and establish his or her terms and availability. Each party is free to contact family arbitrators without obligation, provided that the other side is copied into all communications. This helps to preserve the arbitrator's impartiality. Some family arbitrators will offer a free introductory meeting. The parties will need to ensure that their chosen arbitrator is qualified to hear their dispute; some arbitrators will only be able to hear financial disputes, some only children and some will be able to hear both types of dispute.

6.2 The Application

- a.** The parties submit to the IFLA Administrator a Form ARB1FS (in the case of financial disputes) or Form ARB1CS (in the case of children disputes) signed by both parties in which they describe and define the scope of the dispute they agree to arbitrate.
- b.** The preferred way to submit an ARB1FS or ARB1CS is by email to info@ifla.org.uk. Alternatively, it can be submitted by post to IFLA, PO Box 302, Orpington, Kent BR6 8QX.
- c.** In their Forms ARB1FS or ARB1CS the parties expressly agree to be bound by the family arbitrator's written decision subject to:
 - i.** any right of appeal or other available challenge;

- ii. any changes which the court making that order may require if the subject matter of the award requires it to be embodied in a court order;
 - iii. in the case of an award of continuing payments any future award or order varying the award.
- d. The parties also expressly declare and agree that:
 - i. they have read and will abide by the Rules; and
 - ii. that they understand their obligation to comply with the decisions, directions and orders of the family arbitrator; and
 - iii. when required to do so they will make full and complete disclosure relating to financial circumstances.
 - iv. in the case of a children arbitration, that they will make full and complete disclosure in relation to any safeguarding concerns
- e. Given the above, it is critical that the obligations upon the parties contained in the Forms ARB1FS and ARB1CS are fully and clearly explained to them by their respective lawyers before they sign up for the process. It will be the practice of some family arbitrators to reinforce this by speaking to the parties together and in person, before the Form ARB1FS or ARB1CS is signed so as to be satisfied that they fully appreciate and accept those obligations and their binding nature.
- f. In children arbitrations the parties will need to confirm and the arbitrator will need to be assured that there are no safeguarding issues which may require the intervention of statutory authorities in the dispute.
- g. By the Forms ARB1FS and ARB1CS the parties seek the appointment of their nominated family arbitrator (or they may request IFLA to select a family arbitrator from its panel). In the case where a family arbitrator has been nominated on the Form ARB1FS or ARB1CS but is unable or unwilling to accept

the appointment, the parties will have the option of nominating another family arbitrator.

- h. Where the parties, whether represented or not, wish to use the family arbitration process but either cannot or have not agreed on a family arbitrator and have requested on their Form ARB1FS or ARB1CS that a family arbitrator be nominated, and the parties and/or their representatives agree that IFLA should make the nomination, the Nomination Protocol is to be followed. In both cases, the IFLA Administrator will forward the Form ARB1FS to the nominated family arbitrator, inviting him or her to become the appointed family arbitrator.
- i. The Nomination Protocol sets out the criteria to be applied to the nomination of a family arbitrator. The criteria will be applied strictly in the following order unless the parties have specific requirements which they have set out on the Forms ARB1FS and ARB1CS. The criteria are as follows:
 - i. the family arbitrator whose geographical location (as indicated on his/her website entry) is closest to the location of the parties (or the parties' legal representative of the parties);
 - ii. the parties' wishes as to qualifications, experience or other attributes of the family arbitrator;
 - iii. the number of appointments received to date (i.e. to ensure that where no specific requirements have been requested by the parties or their representatives one family arbitrator is not receiving more family arbitration nominations than another).

The Nomination Protocol is available from IFLA on request from info@ifla.org.uk

6.3 Accepting the arbitration

- a. The family arbitrator contacts the parties seeking their agreement to the terms of the appointment. All correspondence between the family arbitrator and one party must be copied to the other party.

- b. On agreeing terms, the family arbitrator sends to the parties a formal letter of acceptance, whereupon the family arbitration is deemed to have commenced.

6.4 The family arbitration process

- a. The family arbitration process will depend on the nature of the parties' dispute and their preferences, and that of the arbitrator, as to procedure. It may be a document-only procedure, or be conducted by telephone and/or face-to-face meetings.
- b. The Rules describe two primary types of procedure: a "general procedure", and an "alternative procedure". Unless the parties have decided in advance which procedure will apply, the family arbitrator will generally conduct a case management conference, either by telephone or in person, at the start of the family arbitration, when these issues can be discussed and he or she will make a decision.
- c. During the course of the family arbitration any further procedural decisions will be taken by the family arbitrator after consultation with both parties. Agreement on procedural matters reached between the parties will require the family arbitrator's consent. The family arbitrator has the widest possible discretion to adopt procedures to suit the circumstances of the case.
- d. If there is to be a final meeting it will take place at a date and time agreed between the parties and the family arbitrator.
- e. The family arbitrator's fees must be settled prior to receipt of the award, as requested by the family arbitrator.
- f. The family arbitrator's decision must be committed to writing and delivered promptly. The decision will include written reasons and a formal award.

6.5 The court

- a. The parties have the right to appeal to court on a point of law (unless the parties have agreed to exclude this right). The

parties can also invite the court to set aside the award if there has been a serious irregularity which has resulted or may result in substantial injustice.

- b.** In a financial remedy and children family arbitration there will normally be a requirement to convert the award into a court order.
- c.** In a children family arbitration, consideration needs to be given to the no order principle and whether therefore an order is necessary.
- d.** Once a court order has been made it may then be enforced in the usual way.
- e.** If the family arbitration involves a purely civil claim (for example, under TOLATA 1996) then the parties may apply to court for permission to enforce the award as though it were itself a court judgment or order.

6.6 And Finally

The Rules allow that in certain circumstances the family arbitrator may terminate the family arbitration before it has been concluded, or the parties may agree to do so.

It is a distinguishing feature of the process that family arbitration and the award are confidential, and disclosure is permitted only in prescribed circumstances. Media are not admitted to any meetings.

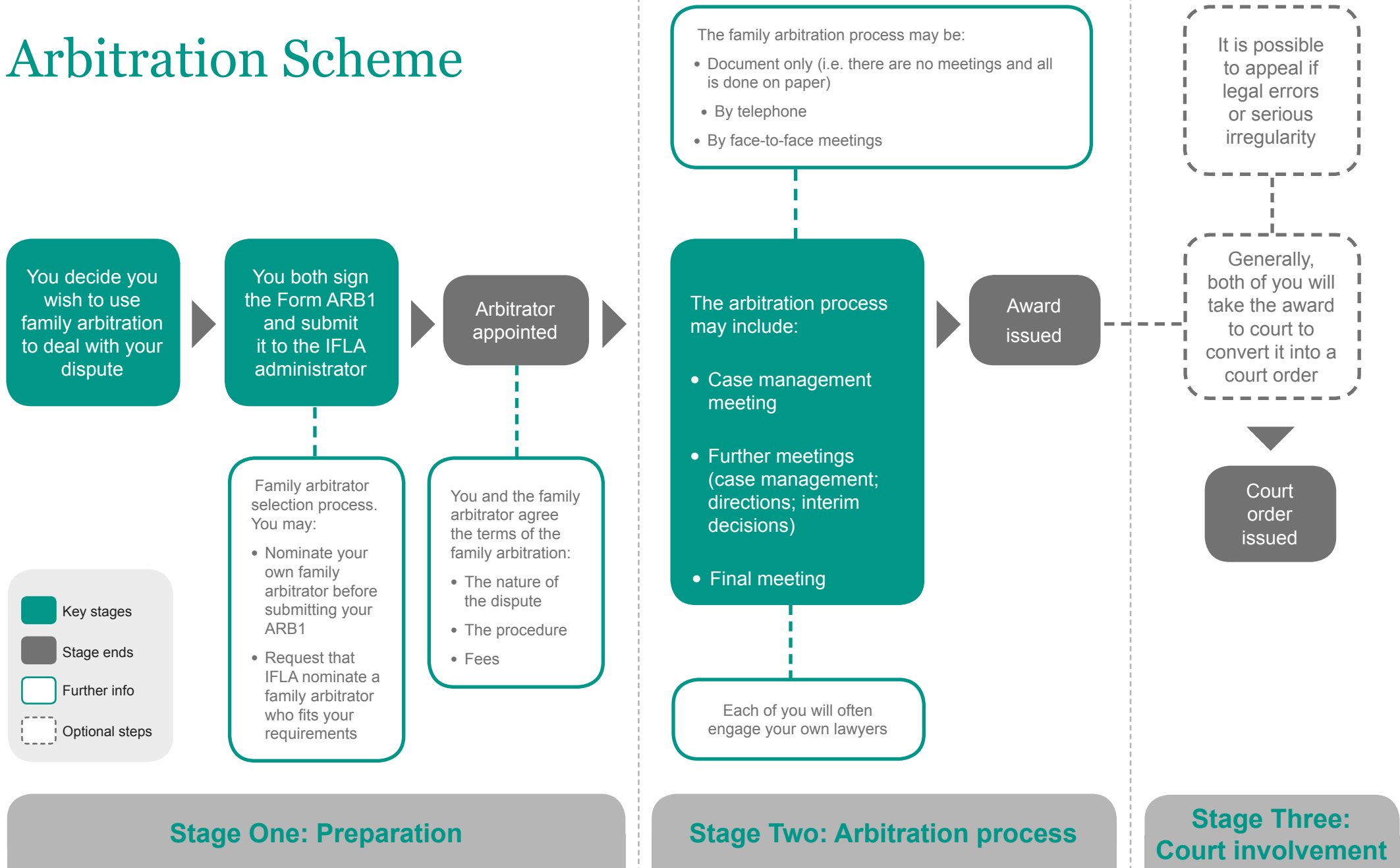
7. Legal framework

- 7.1** The Arbitration Act 1996 contains both 'mandatory' and 'non-mandatory' provisions. The mandatory provisions are fundamental and immutable provisions which the parties may not agree to exclude, replace or modify. The non-mandatory provisions may be modified or excluded by agreement of the parties.
- 7.2** Disputes under the Scheme are arbitrated on the basis of a pyramidal hierarchy. The Scheme provides for disputes to be arbitrated in accordance with Part I of the Act; and regulated, beneath the Act, by the Rules to the extent that they exclude, replace or modify the non-mandatory provisions of the Act; and then within the Rules by any procedural or other provisions agreed between the parties, to the extent that such agreement excludes, replaces or modifies the non-mandatory provisions of the Act or the Rules.
- 7.3** The key provisions of the Act are set out at s.1, s.33 and s.40.
- 7.4** Beneath the mandatory provisions of the Act, important aspects of the Scheme are fleshed out both by the Rules and the Forms ARB1FS and ARB1CS.
- 7.5** The Rules contain one mandatory requirement, that the substance of the dispute is to be arbitrated in accordance with the law of England and Wales.
- 7.6** Subject to this mandatory requirement and those of the Act the parties retain substantial powers to regulate the process. The Scheme establishes what is in effect a pre-selected set of rules for the application of the non-mandatory provisions, so as to form a self-contained code for family arbitrations of financial disputes: but even these remain subject in some instances to variation by the parties.
- 7.7** In agreeing to the Scheme Rules (which the parties do explicitly in the ARB1FS and ARB1CS) the parties agree that during the arbitration they will not commence an application to the court nor continue any subsisting application relating to the same subject matter. The only exception to this is an application made in connection with and in support of the arbitration or to seek relief

that is not available in the arbitration. As no arbitrator has any powers of enforcement, provision is made in the Act for the parties to apply for court orders in support of the arbitration, such as a witness summons or, if need be, an injunction pending resolution of disputed issues.

Family Law

Arbitration Scheme



FAMILY LAW ARBITRATION CHILDREN SCHEME

ARBITRATION RULES 2016

(1st EDITION REVISED, EFFECTIVE 1 NOVEMBER 2016)

Safety and welfare of children

The safety and welfare of children is of the utmost importance to the Family Law Arbitration Children Scheme. Measures providing for safeguarding appear at Article 17 (below) and in the Form ARB1CS and Safeguarding Questionnaire which has to be completed by the parties. These steps are intended to ensure that matters accepted for arbitration are suitable for that process, and that the child(ren) concerned will be safe from harm.

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Article 1 – Introductory

- 1.1 The Family Law Arbitration Children Scheme ('the Children Scheme') is a scheme under which disputes concerning the exercise of parental responsibility and other private law issues about the welfare of children may be resolved by the determination of an arbitrator.
- 1.2 The Children Scheme is administered and run by the Institute of Family Law Arbitrators Limited ('IFLA'), a company limited by guarantee whose members are the Chartered Institute of Arbitrators ('CIArb'), Resolution and the Family Law Bar Association ('FLBA').
- 1.3 Disputes referred to the Children Scheme will be determined by arbitration in accordance with:
 - (a) the provisions of the Arbitration Act 1996 ('the Act') both mandatory and non-mandatory;
 - (b) these Rules, to the extent that they exclude, replace or modify the non-mandatory provisions of the Act; and
 - (c) the agreement of the parties, to the extent that that excludes, replaces or modifies the non-mandatory provisions of the Act or these Rules; except that the parties may not agree to exclude, replace or modify Art.3 (Applicable Law).
- 1.4 The parties may not amend or modify these Rules or any procedure under them after the appointment of an arbitrator unless the arbitrator agrees to such amendment or modification; and may in any event neither amend nor modify Art.3 (Applicable Law) nor agree to exclude the right of any party to appeal to the court on a question of law (section 69).
- 1.5 Expressions used in these Rules which are also used in the Act have the same meaning as they do in the Act, except that in these Rules 'determine' and 'determination' have an equivalent meaning to 'award' in the Act; and any reference to a section number means the section of the Act so numbered, unless otherwise indicated.

Article 2 – Scope of the Children Scheme

- 2.1 Save as provided by Art.2.2 below, the Children Scheme covers issues between parents (or other persons holding parental responsibility or with a sufficient interest in the child's welfare) which relate to the exercise of parental responsibility or the present or future welfare of the child concerned (including the child's upbringing, present or future living arrangements, contact and education) and extends but is not limited to matters which could be the subject of an application to the Family Court under section 8 of the Children Act 1989.
- 2.2 The following disputes and issues are not within the scope of the Children Scheme:-
 - (a) any application under the inherent jurisdiction for the return of a child to England and Wales ('this jurisdiction') from a country which is not a signatory

to the 1980 Hague Convention on the Civil Aspects of International Child Abduction ('the 1980 Hague Convention');

- (b) any application for a child's summary return to this or another jurisdiction under the 1980 Hague Convention;
- (c) any application for permanent or temporary removal of a child from this jurisdiction;
- (d) any application for the court 'to examine the question of custody of the child' under Art.11(7) of Council Regulation (EC) No 2201/2003 after an order of a foreign court on non-return to this jurisdiction made pursuant to Art.13 of the 1980 Hague Convention;
- (e) any application for cross-border access within the scope of Art.41 of the said Council Regulation which, if a judgment, would require a court to issue an Annex III Certificate;
- (f) any dispute relating to the authorisation of life-changing or life-threatening medical treatment or the progress of such treatment;
- (g) any case where a party lacks capacity under the Mental Capacity Act 2005;
- (h) any case where any person with parental responsibility for the child or who seeks to be a party to an arbitration under the Children Scheme is a minor; and any case where any person with parental responsibility for the child is not a party to the arbitration;
- (i) any case where the child concerned has party status in existing proceedings relating to the same or similar issues, or should in the opinion of the arbitrator be separately represented in the arbitration.

Article 3 – Applicable law

- 3.1 The arbitrator will determine the substance of the dispute only in accordance with the law of England and Wales. The arbitrator may have regard to, and admit evidence of, the law of another country insofar as, and in the same way as, a Judge exercising the jurisdiction of the High Court would do so.
- 3.2 When determining any question relating to the upbringing of a child, the welfare of the child shall be the arbitrator's paramount consideration and in considering welfare the arbitrator shall have regard in particular to the welfare checklist set out in section 1(3) of the Children Act 1989.

Article 4 – Starting the arbitration

- 4.1.1 The parties may refer a dispute to arbitration under the Children Scheme by making an agreement to arbitrate in Form ARB1CS, signed by both parties or their legal representatives, and submitting it to IFLA.
- 4.1.2 Form ARB1CS and the Safeguarding Questionnaire shall be in the form of Annex 1 to these Rules.

- 4.2 IFLA has established the IFLA Children Panel of arbitrators ('the Children Panel') comprising Members of the Chartered Institute of Arbitrators who are experienced family law professionals with particular expertise in children matters and who have received specific training in the determination of family disputes relating to children by means of arbitration.
- 4.3.1 The parties may agree to nominate a particular arbitrator from the Children Panel; and may, if they are agreed, approach a particular arbitrator directly. Any arbitrator directly approached must refer the approach to IFLA before accepting appointment in order to facilitate the completion of Form ARB1CS and the Safeguarding Questionnaires before the arbitration commences. IFLA will offer the appointment to the agreed arbitrator. If the appointment is not accepted by their first choice of arbitrator the parties may, if they agree, make a second or subsequent choice. Otherwise, it will be offered to another member of the Children Panel chosen by IFLA in accordance with paragraph 4.3.3 below.
- 4.3.2 Alternatively, the parties may agree on a shortlist of arbitrators from the Children Panel any one of whom would be acceptable to them, and may ask IFLA to select one of the arbitrators on the shortlist without reference to any criteria. In this case, IFLA will offer the appointment to one of the shortlisted arbitrators chosen at random. If the appointment is not accepted by the first choice of arbitrator, IFLA will offer the appointment to a second or subsequent shortlisted arbitrator, similarly chosen at random. If none of the shortlisted arbitrators accepts the appointment, IFLA will inform the parties and invite them to submit further agreed names.
- 4.3.3 In all other cases (including if so requested by the parties) IFLA will offer the appointment to a sole arbitrator from the Children Panel whom it considers appropriate having regard to the nature of the dispute; any preferences expressed by the parties as to the qualifications, areas of experience, expertise or other attributes of the arbitrator; any preference expressed by the parties as to the geographical location of the arbitration; and any other relevant circumstances.
- 4.4 If, after considering Form ARB1CS, the Safeguarding Questionnaires and any representations from the parties, either IFLA or the arbitrator considers that the dispute is not suitable for arbitration under the Children Scheme, the parties will be so advised and their reference of the matter to the Children Scheme will be treated as withdrawn.
- 4.5 The arbitration will be regarded as commenced when the arbitrator communicates to the parties his or her acceptance of the appointment.
- 4.6 Except as provided in Art. 4.7, a party to an arbitration under the Children Scheme may be represented in the proceedings by a lawyer or other person chosen by him; or, if a party is acting in person, may receive the advice and assistance of a McKenzie Friend.
- 4.7 If at any time the arbitrator forms the view that the participation of a non-lawyer representative or the assistance given by a McKenzie Friend unreasonably impedes or is likely to impede the conduct of the arbitral proceedings or the administration of justice, the arbitrator may direct that the relevant party should not continue to be so represented or assisted, as the case may be, and will state the reasons in writing.

Article 5 – Arbitrator’s appointment

- 5.1 Before accepting the appointment or as soon as the relevant facts are known, the arbitrator will disclose to the parties any actual or potential conflict of interest or any matter that might give rise to justifiable doubts as to his or her impartiality.
- 5.2 In the event of such disclosure, the parties or either of them (as appropriate) may waive any objection to the arbitrator continuing to act, in which case the arbitrator may commence or continue with the arbitration. If an objection is maintained, the arbitrator will decide whether to continue to act, subject to any agreement by the parties to revoke his or her authority or intervention by the court.
- 5.3 After accepting appointment, the arbitrator may not subsequently act in relation to the same dispute in a different capacity.
- 5.4 If the arbitrator ceases to hold office through revocation of his or her authority, removal by the court, resignation or death, or is otherwise unable, or refuses, to act, and either party or the existing arbitrator so requests, IFLA may appoint a replacement arbitrator from the Children Panel.
- 5.5 The replacement arbitrator may determine whether and if so to what extent previous proceedings shall stand.

Article 6 – Communications between the parties, the arbitrator and IFLA

- 6.1 Any communication between the arbitrator and either party will be copied to the other party.
- 6.2 Unless agreed by the parties, the arbitrator will designate one party as the lead party. For the purposes of the Act, the lead party will equate to a claimant, but will be formally referred to in the arbitration as the 'Applicant'. The other party will equate to a respondent, and will be formally referred to in the arbitration as the 'Respondent'.
- 6.3 The arbitrator will not discuss any aspect of the dispute or of the arbitration with either party or their legal representatives in the absence of the other party or their legal representatives, unless such communication is solely for the purpose of making administrative arrangements.
- 6.4 Neither IFLA, the CI Arb, Resolution nor the FLBA will be required to enter into any correspondence concerning the arbitration or its outcome.

Article 7 – Powers of the arbitrator

- 7.1 The arbitrator will have all the powers given to an arbitrator by the Act including those contained in section 35 (consolidation of proceedings and concurrent hearings); and section 39 (provisional orders), but limited as provided by Art.7.2.
- 7.2 In relation to substantive relief of an interim or final character, the arbitrator will have the power to make orders or determinations to the same extent and in the same or similar form as would a Judge exercising the jurisdiction of the High Court. (For the avoidance of doubt, the arbitrator's power does not extend to interim injunctions; committal; or jurisdiction over non-parties without their agreement).

- 7.3 If the arbitrator at any stage prior to determination of the issues considers that the dispute is no longer suitable for arbitration under the Children Scheme on welfare or other grounds the arbitrator will have the power to terminate the proceedings (see Arts.15.2(b) and 17.2).

Article 8 – Powers of the arbitrator concerning procedure

- 8.1 The arbitrator will decide all procedural and evidential matters (including, but not limited to, those referred to in section 34(2)), subject to the right of the parties to agree any matter (if necessary, with the concurrence of the arbitrator (see Art.1.4)).
- 8.2.1 In accordance with section 37 (power to appoint experts), the arbitrator may appoint experts to report on specific issues.
- 8.2.2 The arbitrator may limit the number of expert witnesses to be called by any party or may direct that no expert is to be called on any issue or issues or that expert evidence may be called only with the permission of the arbitrator.
- 8.2.3 Where the parties propose the instruction as an expert of an independent social worker to ascertain the wishes and feelings of a child or otherwise to advise on welfare issues and to report, such instruction will be subject to the confirmation and approval of the arbitrator who will decide the identity of the independent social worker if the parties cannot agree.
- 8.2.4 The arbitrator may of his or her own motion appoint as an expert an independent social worker of appropriate expertise and standing to ascertain the wishes and feelings of a child or otherwise to advise on welfare issues and to report if the arbitrator considers that such evidence will assist in determining the issues. Such an appointment may be made irrespective of whether or not the parties agree.
- 8.3 The arbitrator may not meet with the child concerned at any stage of the proceedings including any meeting with the child to discuss or explain the determination or its implementation.
- 8.4 Further and/or in particular, the arbitrator will have the power to:
- (a) direct a party to produce information, documents or other materials in a specified manner and/or within a specified time;
 - (b) give directions in relation to any documents or other materials as to which any question arises in the proceedings, and which are owned by or are in the possession or control of a party to the proceedings for the inspection, photographing, valuation, preservation, custody or detention of the property by the tribunal, an expert or a party.
- 8.5 If, without showing sufficient cause, a party fails to comply with his or her obligations under section 40 (general duty of parties) or with these Rules, or is in default as set out in section 41(4) (failure to attend a hearing or make submissions), then, after giving that party due notice, the arbitrator may continue the proceedings in the absence of that party or without any written evidence or submissions on their behalf and may make a determination on the basis of the evidence before the arbitrator.

- 8.6 The parties agree that if one of them fails to comply with a peremptory order made by the arbitrator and another party wishes to apply to the court for an order requiring compliance under section 42 (enforcement of peremptory orders of tribunal), the powers of the court under that section are available.

Article 9 - Form of procedure

- 9.1 The parties are free to agree as to the form of procedure (if necessary, with the concurrence of the arbitrator (see Art.1.4)) and, in particular, to adopt a documents-only procedure or some other simplified or expedited procedure.
- 9.2 If there is no such agreement, the arbitrator will have the widest possible discretion to adopt procedures suitable to the circumstances of the particular case in accordance with section 33 (general duty of the tribunal).

Article 10 – General procedure

- 10.1 Generally, on commencement of the arbitration, the arbitrator will invite the parties to make submissions setting out briefly their respective views as to the nature of the dispute, the issues, the outcome they seek, what form of procedure should be adopted, the timetable and any other relevant matters.
- 10.2 If appropriate, the arbitrator may convene a preliminary meeting, telephone conference or other suitable forum for the exchange of a summary of each party's position on the matters set out in Art.10.1.
- 10.3 Within a reasonable time of ascertaining the parties' views but in any event not more than 14 days, the arbitrator will give such directions as appear appropriate and set a timetable for the procedural steps in the arbitration, including (but not limited to) the following:
- (a) written statements of case;
 - (b) disclosure and production of documents as between the parties;
 - (c) the exchange of witness statements;
 - (d) the number and type of expert witnesses, exchange of their reports and meetings between them;
 - (e) arrangements for any meeting or hearing and the procedures to be adopted at these events;
 - (f) time limits to be imposed on oral submissions or the examination of witnesses, or any other procedure for controlling the length of hearings.
- 10.4 The arbitrator may at any time direct any of the following to be delivered in writing:
- (a) submissions on behalf of any party;
 - (b) questions to be put to any witness;

- (c) answers by any witness to specific questions.

Article 11 – Applications for directions as to procedural or evidential matters

- 11.1 The arbitrator may direct a time limit for making or responding to applications for directions as to procedural or evidential matters.
- 11.2 Any application by a party for directions as to procedural or evidential matters will be accompanied by such evidence and/or submissions as the applicant may consider appropriate or as the arbitrator may direct.
- 11.3 A party responding to such an application will have a reasonable opportunity to consider and agree the order or directions proposed.
- 11.4 Any agreement shall be communicated to the arbitrator promptly and will be subject to the arbitrator's concurrence if necessary (see Art. 1.4).
- 11.5 Unless the arbitrator convenes a meeting, telephone conference or other forum for exchange of views, any response to the application will be followed by an opportunity for the party applying to comment on that response; and the arbitrator shall give directions within a reasonable time after receiving the applicant's comments.

Article 12 – Alternative procedure

- 12.1 In any case where it is appropriate, the parties may agree or the arbitrator may decide to adopt the procedure set out in this Article.
- 12.2 The parties may at any stage agree (with the concurrence of the arbitrator) or the arbitrator may direct any variation or addition to the following steps and/or timetable. In particular, the arbitrator may at any stage allow time for the parties to consider their positions and pursue negotiations with a view to arriving at an amicable settlement (see, also, Arts.18.1 and 18.2).
- 12.3 Within 14 days of the arbitrator communicating to the parties his or her acceptance of the appointment, each party will complete and send to the other party a sworn statement setting out their case, a brief outline of the facts upon which they rely and the outcome that they seek, together with such further evidence or information as the arbitrator may direct.
- 12.4 Within 14 days of receipt of the other party's statement, each party may send to the arbitrator and to the other party a questionnaire raising questions and/or requesting information and/or documents.
- 12.5 Within 7 days of receipt of a questionnaire, a party may send to the arbitrator and to the other party reasoned objections to answering any of the questions together with a submission as to whether a preliminary meeting is required.
- 12.6 In the absence of any such objection, the party in receipt of the questionnaire shall within 14 days provide succinct answers and/or documents.
- 12.7 In the event of such objection, the arbitrator will consider and decide in writing whether and to what extent the request should be answered together with a time limit or, alternatively, convene a meeting between the parties face-to-face or in such other form as he or she may decide to be the most appropriate having regard to convenience

and costs and may require short written submissions in support of each party's position.

- 12.8. 14 days after exchange of statements or, in the event that questionnaires have been served and allowed, within a reasonable time of receipt from both parties of the responses thereto, the arbitrator may convene a further meeting to review progress, address outstanding issues and consider what further directions are necessary, if he or she deems it appropriate having regard to costs and the avoidance of delay.
- 12.9 If he or she considers it appropriate having regard to the scope of the dispute between the parties, the arbitrator will give detailed directions for all further procedural steps in the arbitration including (but not limited to) the following:
- (a) the drawing up of a list of issues and/or a schedule of points of agreement or disagreement;
 - (b) written submissions;
 - (c) arrangements for any meeting or hearing and the procedures to be adopted at these events;
 - (d) time limits to be imposed on oral submissions or the examination of witnesses, or any other procedure for controlling the length of hearings.

Article 13 – The arbitrator’s determination

- 13.1 The arbitrator will deliver a determination within a reasonable time after the conclusion of the proceedings or the relevant part of the proceedings.
- 13.2 Any determination will be in writing, will state the seat of the arbitration, will be dated and signed by the arbitrator, and, unless it merely records a full agreement the parties have reached during the course of the proceedings, will contain sufficient reasons to show why the arbitrator has reached the decisions it contains.
- 13.3 Once a determination has been made, it will be final and binding on the parties, subject only to the following:
- (a) any challenge to the determination by any available arbitral process of appeal or review or in accordance with the provisions of Part 1 of the Act;
 - (b) insofar as the subject matter of the determination requires it to be embodied in a court order (see Art.13.4), any changes which the court making that order may require;
 - (c) any subsequent determination superseding the determination; or any changes to the determination or subsequent order superseding the determination which the Family Court considers ought to be made in the exercise of its statutory and/or inherent jurisdiction whether under the Children Act 1989 or otherwise.
- 13.4 If and so far as the subject matter of the determination makes it necessary, the parties will apply to an appropriate court for an order in the same or similar terms as the determination or the relevant part of the determination or to assist or enable its implementation and will take all reasonably necessary steps to see that such an order is made. In this context, 'an appropriate court' means the Family Court or such other

court in England and Wales which has jurisdiction to make a substantive order in the same or similar terms as the determination.

- 13.5 Where the terms of the determination require any party to give an undertaking, the determination shall not take effect unless and until a suitable form of undertaking has been lodged with and accepted by an appropriate court.
- 13.6 The arbitrator may refuse to deliver the determination to the parties except upon full payment of his or her fees or expenses. Subject to this entitlement, the arbitrator will send a copy of the determination to each party or their legal representatives.

Article 14 – Costs

- 14.1 In this Article any reference to costs is a reference to the costs of the arbitration as defined in section 59 (costs of the arbitration) including the fees and expenses of IFLA and the fees of any expert, unless otherwise stated.
- 14.2 The arbitrator may require the parties to pay his or her fees and expenses accrued during the course of the arbitration at such interim stages as may be agreed with the parties or, in the absence of agreement, at reasonable intervals.
- 14.3 The arbitrator may order either party to provide security for the arbitrator's fees and expenses and the fees and expenses of IFLA.
- 14.4 Unless otherwise agreed by the parties, the arbitrator will make a determination allocating costs as between the parties in accordance with the following general principles:
- (a) the parties will bear the arbitrator's fees and expenses, the costs of any expert and the fees and expenses of IFLA in equal shares;
 - (b) there will be no order or determination requiring one party to pay the legal or other costs of another party.

These principles are subject to the arbitrator's overriding discretion set out in Arts.14.5 and 14.6.

- 14.5 Where it is appropriate to do so because of the conduct of a party in relation to the arbitration (whether before or during it), the arbitrator may at any stage order that party:
- (a) to bear a larger than equal share, and up to the full amount, of the arbitrator's fees and expenses and the fees and expenses of IFLA;
 - (b) to pay the legal or other costs of another party;
- and may make a determination accordingly.
- 14.6 In deciding whether, and if so, how to exercise the discretion set out in Art.14.5, the arbitrator will have regard to the following:
- (a) the principles applied by the courts in relation to cases concerning child welfare;
 - (b) any failure by a party to comply with these Rules or any order or directions which the arbitrator considers relevant;

- (c) any open offer to settle made by a party;
 - (d) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
 - (e) the manner in which a party has pursued or responded to a claim or a particular allegation or issue;
 - (f) any other aspect of a party's conduct in relation to the arbitration which the arbitrator considers relevant;
 - (g) the financial effect on the parties of any costs order or determination.
- 14.7 Unless the parties agree otherwise, no offer to settle which is not an open offer to settle shall be admissible at any stage of the arbitration.
- 14.8 These rules as to costs will not apply to applications made to the court where costs fall to be determined by the court.

Article 15 – Conclusion of the arbitration

- 15.1 The agreement to arbitrate will be discharged (and any current arbitration will terminate) if:
- (a) a party to the arbitration agreement dies; or
 - (b) a party to the arbitration agreement lacks, or loses, capacity (within the meaning of the Mental Capacity Act 2005).
- 15.2 The arbitration will be terminated:
- (a) if the arbitrator considers that the dispute is not suitable for arbitration under the Children Scheme and terminates the proceedings;
 - (b) if the arbitrator at any time after the commencement of the arbitration considers that the dispute is no longer suitable for arbitration under the Children Scheme on welfare or other grounds (see Arts.7.3 and 17.2);
 - (c) if and insofar as a court entertains concurrent legal proceedings and declines to stay them in favour of arbitration;
 - (d) if the parties settle the dispute and, in accordance with section 51 (settlement), the arbitrator terminates the proceedings;
 - (e) if the parties agree in writing to discontinue the arbitration and notify the arbitrator accordingly;
 - (f) on the arbitrator making a final determination dealing with all the issues, subject to any entitlement of the parties to challenge the determination by any available arbitral process of appeal or review or in accordance with the provisions of Part 1 of the Act.

Article 16 – Confidentiality

- 16.1 The general principle is that the arbitration and its outcome are confidential, except insofar as disclosure may be necessary:
- (a) to challenge, implement, enforce or vary a determination, or in relation to applications to the court;
 - (b) in the performance under Art.17 of an arbitrator's duty to convey information relating to the welfare of the child to any appropriate local authority or government agency, or in the exercise of an arbitrator's choice to inform IFLA of a decision to decline an appointment or to terminate an arbitration; or
 - (c) as may otherwise be compelled by law.
- 16.2.1 All documents, statements, information and other materials disclosed by a party to the arbitration will be held by any other party and their legal representatives in confidence and used solely for the purpose of the arbitration unless otherwise agreed by the disclosing party; or if required to be disclosed to any appropriate protection/safeguarding authority; or as may otherwise be compelled by law; or as may be provided for by a direction given by the arbitrator under Art.16.2.2 below.
- 16.2.2 Upon application by a party to the arbitration, the arbitrator may direct that any document, statement, information or other material disclosed in the arbitration by any party may be disclosed to any person mentioned in Art.16.2.3 below (the person and purpose of disclosure being identified in the direction), upon that person agreeing in writing to confine their use of the disclosure to the terms of the direction.
- 16.2.3 The arbitrator may permit disclosure under Art.16.2.2 above to a professional acting in furtherance of the protection of children; or to any other person to whom disclosure is necessary, for one or more of the following purposes:
- (a) to enable that person to provide expert or other evidence for the purposes of the arbitration or related legal proceedings;
 - (b) to enable a party to the arbitration, by confidential discussion, to obtain support, advice (whether legal or other professional) or assistance in the conduct of the arbitration or related legal proceedings;
 - (c) to enable a party to the arbitration to make and pursue a complaint against a person or body concerned in the arbitration;
 - (d) to make and pursue a complaint regarding the law, policy or procedure relating to arbitration as it concerns children.
- 16.3 Any transcript of the proceedings will be provided to all parties and to the arbitrator. It will similarly be confidential and used solely for the purpose of the arbitration, implementation or enforcement of any determination or applications to the court unless otherwise agreed by the parties, or if it forms part of any necessary disclosure to any appropriate protection/safeguarding authority, or as may otherwise be compelled by law, or as directed by the arbitrator under Art.16.2.2 above.
- 16.4 The arbitrator will not be called as a witness by any party either to testify or to produce any documents or materials received or generated during the course of the proceedings in relation to any aspect of the arbitration unless with the agreement of the arbitrator, or in connection with any necessary disclosure to any appropriate protection/safeguarding authority, or as may otherwise be compelled by law.

Article 17 – Disclosure of issues relating to safeguarding and welfare

- 17.1.1 Prior to the formal commencement of the arbitration each party shall have a duty:
- (a) to provide accurate information regarding safeguarding and protection from harm in their Form ARB1CS and Safeguarding Questionnaire;
 - (b) to obtain a Basic Disclosure from Disclosure Scotland and promptly send it to the arbitrator and to every other party;
 - (c) to send to the arbitrator and to every other party any relevant letter or report prepared by CAFCASS or any local authority children's services department or similar agency in relation to the welfare or safeguarding of any child who is the subject of the proposed arbitration.
- 17.1.2 Prior to the formal commencement of the arbitration and at every stage of the process each party shall have a continuing duty to disclose fully and completely to the arbitrator and to every other party any fact, matter or document in their knowledge, possession or control which is or appears to be relevant to the physical or emotional safety of any other party or to the safeguarding or welfare of any child the subject of the proceedings, or to a decision by the arbitrator under Art.17.2.1. Such disclosure shall include (but not be limited to) any criminal conviction, caution or involvement (concerning any child) with children's services in respect of any party or any person with whom the child is likely to have contact.
- 17.2.1 If at any time prior to or during the arbitration but prior to communication of the determination to the parties the arbitrator (whether as a result of information received or by reason of behaviour on the part of either party) forms the view that there are reasonable grounds to believe that there may be a risk to the physical or emotional safety of any party or to the safeguarding or welfare of any child, it is the arbitrator's duty to consider whether the arbitration may safely continue.
- 17.2.2 If in such a case the arbitrator concludes that the dispute is no longer suitable for arbitration under the Children Scheme then he or she must inform the parties in writing of that decision and of its grounds, and will terminate the proceedings (see Arts.7.3 and 15.2(b)). The arbitrator may also inform IFLA of a decision to decline an appointment or to terminate an arbitration on safeguarding or welfare grounds.
- 17.3.1 If at any time during the arbitration but prior to communication of the determination to the parties the arbitrator becomes aware of any matters which lead him or her reasonably to apprehend that a child or any party has suffered or is likely to suffer significant harm by reason of the actual or likely future behaviour of any party, it is the arbitrator's duty to communicate his or her concerns as soon as possible to the relevant local authority or appropriate government agency.
- 17.3.2 In such a case the arbitrator shall be entitled, if he or she considers it appropriate, to communicate such concerns to the relevant local authority or appropriate government agency without prior intimation to any party of an intention so to do.

Article 18 – General

- 18.1 At relevant stages of the arbitration, the arbitrator may encourage the parties to consider using an alternative dispute resolution procedure other than arbitration, such as mediation, negotiation or early neutral evaluation, in relation to the dispute or a particular aspect of the dispute.
- 18.2 If the parties agree to use an alternative dispute resolution procedure such as mediation, negotiation or early neutral evaluation, then the arbitrator will facilitate its use and may, if appropriate, stay the arbitration or a particular aspect of the arbitration for an appropriate period of time for that purpose.
- 18.3 In the event that the dispute is settled (following a mediation or otherwise), the parties will inform the arbitrator promptly and section 51 (settlement) will apply. Fees and expenses accrued due to the arbitrator by that stage will remain payable.
- 18.4 In the event that an arbitrator under the Children Scheme is at the same time conducting a parallel financial arbitration under the IFLA Financial Scheme which involves one or more of the same parties, then in the event of any conflict between the two Scheme Rules, the arbitrator shall have sole discretion to decide which will prevail. For the avoidance of doubt, subject to the discretion of the arbitrator, all evidence adduced and all reports and documents disclosed in each arbitration shall stand as evidence in the other.
- 18.5 The parties will inform the arbitrator promptly of any proposed application to the court and will provide him or her with copies of all documentation intended to be used in any such application.
- 18.6 IFLA, the CI Arb, Resolution and the FLBA, their employees and agents will not be liable:
- (a) for anything done or omitted in the actual or purported appointment or nomination of an arbitrator, unless the act or omission is shown to have been in bad faith;
 - (b) by reason of having appointed or nominated an arbitrator, for anything done or omitted by the arbitrator (or his employees or agents) in the discharge or purported discharge of his functions as an arbitrator;
 - (c) for any consequences if, for whatever reason, the arbitral process does not result in a determination or, where necessary, a court order embodying a determination by which the matters to be determined are resolved.

FAMILY LAW ARBITRATION CHILDREN SCHEME

FORM ARB1CS – 2016 EDITION REVISED

APPLICATION FOR FAMILY ARBITRATION, CHILDREN SCHEME

1. We, the parties to this application, whose details are set out below, apply to the Institute of Family Law Arbitrators Limited for the nomination and appointment of a sole arbitrator from the IFLA Children Panel ('the Children Panel') to resolve the dispute referred to at paragraph 3 below by arbitration in accordance with the Arbitration Act 1996 ('the Act') and the Rules of the Family Law Arbitration Children Scheme ('the Children Scheme'). We confirm that all the persons who have parental responsibility for the child(ren) concerned are parties to this arbitration.

Applicant's name	
Address	
Telephone	
Mobile	
Email	
Fax	
Represented by*	
Address	
Telephone	
Mobile	
Email	
Fax	

And:

Respondent's name	
Address	
Telephone	

Mobile	
Email	
Fax	
Represented by*	
Address	
Telephone	
Mobile	
Email	
Fax	

*Delete as applicable.

Add, if necessary, the names of other parties on a separate sheet.

2. The child(ren) concerned is/are:

Please insert names and dates of birth and relationship of each child to the parties and whether (as regards each party) they have parental responsibility. Please also state the current location of each child.

.....

3. The dispute concerns the following issue(s):

(Set these out on a separate sheet if preferred, but as concisely as possible.)

.....

Please complete EITHER paragraph **4(a)** OR **4(b)** OR paragraph **5** below:

4(a) We wish to nominate the following member of the Children Panel for appointment in this matter:

(This paragraph applies if the parties agree that they would like the matter to be referred to a particular arbitrator and / or have approached a particular arbitrator directly. The appointment will be offered to the nominated arbitrator. If the appointment is not accepted by their first choice of arbitrator the parties may, if they agree, make a second or subsequent choice. Otherwise, it will be offered to another suitable member of the Children Panel in accordance with paragraph 5 below.)

.....

4(b) We wish the Institute of Family Law Arbitrators Limited to select one of the members of the Children Panel from the agreed shortlist below for appointment in this matter:

(This paragraph applies if the parties have agreed on a shortlist of arbitrators from the Children Panel any one of whom would be acceptable to them, and wishes IFLA to select one of the arbitrators on the shortlist without reference to any criteria. In this case, IFLA will offer the appointment to one of the shortlisted arbitrators chosen at random. If the appointment is not accepted by the first choice of arbitrator, IFLA will offer the appointment to a second or subsequent shortlisted arbitrator, similarly chosen at random. If none of the shortlisted arbitrators accepts the appointment, IFLA will inform the parties and invite them to submit further agreed names.)

.....

.....

.....

5. We wish the Institute of Family Law Arbitrators Limited to nominate a member of the Children Panel for appointment in this matter.

(This paragraph applies if the parties have not identified a particular arbitrator to whom they wish the matter to be referred. Please set out below the nature of the dispute (insofar as it is not apparent from paragraph 3 above). Please also set out below any preferences as to the arbitrator's qualifications, areas of experience, expertise and / or any other attributes; or as to the geographical location of the arbitration; and any other relevant circumstances.)

.....

.....

.....

6. **If any court proceedings are current in relation to the child(ren), or your marriage or relationship, please identify the nature of the proceedings, in which court they are taking place and what stage they have reached. (Please attach copies of any relevant documents and court orders.)**

.....

.....

.....

7. **Please carefully read paragraphs 8.3(a)-(d) below and provide with this Form:**

- **a Basic Disclosure from Disclosure Scotland in relation to each party;**
- **a Safeguarding Questionnaire (as attached to this Form) completed and signed by each party, together with any relevant documentation;**
- **any relevant letter or report prepared by CAFCASS or any local authority children’s services department or similar agency in relation to the safeguarding or welfare of the child(ren) concerned (if there is one).**

8. **We confirm the following:**

8.1 We have been advised about and understand the nature and implications of this agreement to arbitrate;

8.2 Once the arbitration has started, we will not commence court proceedings or continue existing court proceedings in relation to the same subject matter (and will apply for or consent to a stay of any existing court proceedings, as necessary), unless it is appropriate to make an application to the court arising out of or in connection with the arbitration, or some relief is required that would not be available in the arbitration;

8.3 **We have read the current edition of the Rules of the Children Scheme (‘the Rules’) and will abide by them. In particular, we understand our obligations:**

- (a) **to provide accurate information regarding safeguarding in this Form and in the attached Safeguarding Questionnaire;**
- (b) **before the arbitration starts, to obtain a Basic Disclosure from Disclosure Scotland and promptly send it to the arbitrator and to every other party;**

- (c) **to send to the arbitrator and to every other party any relevant letter or report prepared by CAFCASS or any local authority children's services department or similar agency in relation to the welfare or safeguarding of the child(ren) concerned.**
 - (d) **before the arbitration starts and at every stage of the process (as a continuing duty) to disclose fully and completely to the arbitrator and to every other party any fact, matter or document in our knowledge, possession or control which is or appears to be relevant to the physical or emotional safety of any party or to the safeguarding or welfare of any child the subject of the proceedings, or to a decision by the arbitrator whether to terminate the arbitration under Art.17.2.1. Such disclosure shall include (but not be limited to) any criminal conviction, caution or involvement (concerning any child) with children's services in respect of any party or any person with whom the child is likely to have contact;**
 - (e) **at all stages of the process, to comply with the decisions, directions and orders of the arbitrator;**
- 8.4 We understand and agree that any determination of the arbitrator appointed to determine this dispute will be final and binding on us, subject to the following:
- (a) any challenge to the determination by any available arbitral process of appeal or review or in accordance with the provisions of Part 1 of the Act;
 - (b) insofar as the subject matter of the determination requires it to be embodied in a court order (see 8.5 below), any changes which the court making that order may require;
 - (c) any subsequent determination superseding the determination; or any changes to the determination or subsequent order superseding the determination which the Family Court considers ought to be made in the exercise of its statutory and/or inherent jurisdiction whether under the Children Act, 1989 or otherwise.
- 8.5 If and so far as the subject matter of the determination makes it necessary, we will apply to an appropriate court for an order in the same or similar terms as the determination or the relevant part of the determination. (In this context, 'an appropriate court' means a court which has jurisdiction to make a substantive order in the same or similar terms as the determination.) We understand that the court has a discretion as to whether, and in what terms, to make an order and we will take all reasonably necessary steps to see that such an order is made;
- 8.6 We understand and agree that although the Rules provide for each party, generally, to bear an equal share of the arbitrator's fees and expenses (see Art.14.4(a)), if any party fails to pay their share, then the arbitrator may initially

require payment of the full amount from any other party, leaving it to them to recover from the defaulting party;

- 8.7 We agree to the arbitration of this dispute in accordance with the Rules of the Children Scheme.

IMPORTANT

Parties should be aware that:

- **By signing this form they are entering into a binding agreement to arbitrate (within the meaning of s.6 of the Arbitration Act 1996).**
- **After signing, neither party may avoid arbitration (unless they both agree to do so). Either party may rely on the arbitration agreement to seek a stay of court proceedings commenced by the other.**
- **Arbitration is a process whose outcome is generally final. There are very limited bases for raising a challenge or appeal, and it is only in exceptional circumstances that a court will exercise its own discretion in substitution for the determination.**

Signed.....
(Applicant *or* Applicant's legal representative, for and on behalf of Applicant)

Dated.....

Signed.....
(Respondent *or* Respondent's legal representative, for and on behalf of Respondent)

Dated.....

Please send your completed form, preferably by email, to info@ifla.org.uk, or it can be sent by post to IFLA, PO Box 302, Orpington, Kent BR6 8QX.

Note that by submitting this Form, the parties consent to the processing by IFLA (and/or by Resolution, on IFLA's behalf) of the information and personal data provided in it and in associated documentation for the purposes of this Children Scheme arbitration. This includes retaining and storing the information and personal data for as long as is necessary in connection with this agreement. It may also be retained for research, training and statistical purposes in connection with family arbitration, but on the understanding that if so used, any information or details about individuals will have been removed so that they cannot be personally identified.

FAMILY LAW ARBITRATION CHILDREN SCHEME

FORM ARB1CS SAFEGUARDING QUESTIONNAIRE

Each party should complete and individually sign a copy of this Safeguarding Questionnaire.
(Please make further copies as necessary.)

Name

Applicant / Respondent / Other Party

1. Have there been any court proceedings in relation to the child(ren), or your marriage or relationship, other than as mentioned in paragraph 6 of Form ARB1CS?

Yes / No

(If 'Yes', please identify the nature of the proceedings, in which court they took place and the outcome. Please attach copies of any relevant documents and court orders.)

.....

.....

.....

2. Has a child protection plan been put in place by a local authority in relation to the child(ren), or have a local authority's children's services been involved in any way?

Yes / No, or not to my knowledge

(If 'Yes', please provide details and say whether the local authority's involvement is continuing.)

.....

.....

.....

3. Have you, or any person with whom the child(ren) is/are likely to have contact ever been convicted of an offence concerning a child, or ever been cautioned or investigated in that connection?

Yes / No

(If 'Yes', please provide full details.)

.....

.....

.....

4. Do you have any concerns that the child(ren) has/have experienced, or is/are at risk of experiencing, harm of any the following kinds from any person with whom the child(ren) is/are likely to have contact?

- | | |
|-------------------------------------|----------|
| • Any form of domestic violence | Yes / No |
| • Child abduction | Yes / No |
| • Child abuse | Yes / No |
| • Drugs, alcohol or substance abuse | Yes / No |
| • Other safety or welfare concerns | Yes / No |

(If 'Yes' to any of the above, please provide full details of your concerns.)

.....

.....

.....

I confirm that the information I have provided in response to this Safeguarding Questionnaire is true and complete to the best of my knowledge and belief.

Signed

Dated

02 JUN 2017

Innovative new international family law arbitration scheme announced

Today (2 June 2017) at the [AFCC Annual Conference](#) in Boston, USA, Prof. Patrick Parkinson and David Hodson, two of the world's leading international family lawyers, have announced an innovative new scheme to help international families.

The scheme is called 'The International Family Law Arbitration Scheme' (IFLAS). It will avoid long and expensive forum litigation and will help couples work out where any family differences should be resolved by ascertaining with which country they have the closest connection.

The Scheme will go live on Monday 4 September 2017 at the [16th Australian Family Law Conference](#) in Fiji to an international gathering of family lawyers and arbitrators, along with the launch of its interactive website.

[David Hodson](#), co-founder of the Scheme, explained:

'This new initiative is exciting for two reasons. By using arbitration, with an arbitrator from a country with which neither couple have any connection, using a worldwide common law and closest connection criteria, a couple can more quickly, more cheaply and more satisfactorily resolve differences.'

Secondly it is fairer. Currently when a couple have connections with more than one country there can be a dispute about which country will resolve any differences. This forum dispute is decided in, and by the law of, one of the two countries. This is perceived as an unfair advantage to one of the parties. Some countries around the world are perceived as more likely to say that proceedings should be in their country. This scheme produces a mutually satisfactory outcome.'

IFLAS will use arbitration, which is an out-of-court resolution system, sometimes known as private judging. Arbitrators are trained to adjudicate and resolve disputes. Many will be retired or part-time judges. All IFLAS arbitrators will be experienced lawyers used to dealing with international family law disputes.

Among the benefits of arbitration are that the parties can choose their own preferred arbitrator as appropriate for their dispute, have it undertaken very quickly, have flexibility in the way the matter

is conducted (including use of technology instead of actual hearings), with a less adversarial approach and with the significant benefit of complete privacy and confidentiality. A number of countries now use arbitration in family matters.

The criteria is which country has the closest connection with the couple and the family. This is similar to the law used in many countries around the world. The arbitrator would consider all of the circumstances and the various connections. The arbitrators have the benefit of research of a leading international family law firm on the forum laws across many countries in respect of closest connection.

Patrick Parkinson co-founder of the Scheme commented:

'The use of an arbitrator from a third country is a key part of the Scheme. At the moment, forum disputes are heavily skewed to whichever party is able to manoeuvre the forum dispute to be heard in their country. Having a third country arbitrator is like having an umpire in a sports event who is not from either of the competing countries. This is impossible under any national justice system, but for the first time is possible with IFLAS.'

The Scheme will start up the arbitration, including arranging an arbitrator as required. It will result in an arbitration decision. The parties would agree not to pursue any other court proceedings pending resolution of the arbitration and to abide by the outcome. It is anticipated that national court schemes will adjourn proceedings while the forum arbitration is underway.

Crucial to the scheme is an online questionnaire, which parties can access on the IFLAS website, intended to elicit all the relevant facts for forum dispute. Drawn up by leading practitioners, it will help the arbitrator resolve the closest connection. By using digital technology to enhance the arbitration process, it will be quicker, cheaper and more open and transparent than current justice systems.

IFLAS has already attracted a number of senior lawyers, including retired and part-time judges, who are willing to be arbitrators under the Scheme and is open for others who would be interested.



Section 5

Jurisdictional Issues in Children Cases

**David Williams QC, Henry Setright QC, Teertha Gupta QC &
Jacqueline Renton**

Jurisdiction in Children Cases

Habitual Residence

1. The gold standard determining jurisdiction is habitual residence. The definition and test derived from article 8 of Brussels II Revised Regulation 2003 and has been further defined in the Quintet of cases in the Supreme Court, as well as some recent jurisprudence from the Court of Appeal. The definition of habitual residence applies whether the other country concerned is a signatory to the Brussels II Revised Regulation 2003, the 1996 Hague Convention or is a country outside either of these schemes.
2. The Quintet of cases is as follows:-

(1) Re A (Jurisdiction: Return of Child) [2013] UKSC 60

3. In the UK Supreme Court, the court upheld the appeal of the appellant mother and ordered a return of the fourth child. In this case at first instance, Parker J ordered the return of the parties' four children from Pakistan to England. The elder three children had resided in England until October 2009 when the mother took them to Pakistan for a holiday. After a period of time, the mother's stay in Pakistan became involuntary and during her involuntary stay in Pakistan she gave birth to the fourth child. The mother managed to escape from Pakistan in 2011 and travelled back to England, leaving all four children in Pakistan. The father issued custody proceedings in Pakistan but these proceedings were not served on the mother. In the English High Court, the mother obtained a without notice order for the immediate return of the children under the wardship jurisdiction and was also granted a freezing injunction in respect of the father's properties in England. After various hearings, the proceedings came before Mrs Justice Parker. At that hearing, the mother and seven members of the paternal family were represented. The court heard evidence from the mother and made clear findings in support of a return. Accordingly, the court reiterated the return order in respect of all four children.
4. This order was then appealed by the paternal family to the Court of Appeal on various, including that the judge was wrong in law to determine that the fourth child was habitually resident in England. In considering this ground, Thorpe LJ found that the case of **B v H (Habitual Residence: Wardship) [2002] 1 FLR 388** was rightly decided by Mr Justice Charles. **B v H** allows the court to determine that a child can be habitually resident in a state in which the child has never been physically present. Thorpe LJ felt that habitual residence, in the absence of physical presence, should be reserved to exceptional cases but still accepted that

this was a legal possibility. **B v H** is the only decision in this jurisdiction involving a child who was deemed to have acquired at birth the habitual residence of his custodial parents even if the child had never set foot in the state deemed to be his habitual residence. However, Rimer and Patten LJ disagreed with Thorpe LJ's habitual residence analysis regarding the fourth child and stated that physical presence was an essential ingredient of habitual residence and that accordingly the decision of **B v H** was wrong and this led to Parker J's decision in respect of the fourth child being overturned. Importantly, none of the Lord Justices thought that the habitual residence analysis would have been different if the ECJ, not domestic jurisprudence, was applied at first instance. It is also important to note that all of the judges accepted that the elder three children's habitual residence could not be shifted by the unilateral action of one parent.

5. In the UK Supreme Court, the appeal only dealt with the fourth child who had never set foot in England and Wales. The court considered whether or not the fourth child could be said to be habitually resident in England and Wales, and in the alternative whether the *parens patriae* (nationality) jurisdiction existed and could be exercised in relation to the fourth child. Baroness Hale (who gave the lead judgment) made clear that the question as to whether or not physical presence was a requisite ingredient of habitual residence was a question which would have to be determined by the CJEU, if necessary. In this case, a referral to the CJEU was not necessary as Baroness Hale went on to make clear that there was a *parens patriae* jurisdiction that existed in relation to the fourth child, who was of dual British and Pakistani nationality. The case was consequentially remitted to Parker J for her to determine whether or not to exercise the jurisdiction (which she then did.)
6. The key points from Baroness Hale's judgment (for the majority) in relation to habitual residence are as follows:-
 - The return order made by Parker J was not an order under s.1 of FLA 1986 and therefore was not covered by the jurisdictional prohibition in s.2 of FLA 1986. The return order was an order made within BIR; and an order relating to parental responsibility. The BIR schema applies in this case, even though one of the states involved (Pakistan) was (and is) not a signatory to BIR. This extends the jurisprudence of the Supreme Court set down in **Re I (A Child) (Contact Application: Jurisdiction) [2009] 1 FLR 361**;
 - The 'rule' that one parent cannot change a child's habitual resident unilaterally without the consent of the other parent (on the basis that both parents have

Parental Responsibility for the child) is not seen in EU jurisprudence – whether this ‘rule’ is right may require fuller consideration in another case;

- ECJ case law on the issue of habitual residence to date – **Re A (Case C – 523/07) [2010] Fam 42** and **Mercredi v Chaffe (Case C-497/10 PPU) [2012] Fam 22** – has not addressed the issue before the SC as to whether physical presence is a necessary ingredient of habitual residence. It is clear that a person does not have to be physically present in a state at all times to retain habitual residence in the state. In both ECJ judgments (**Mercredi v Chaffe** and **Re A**) physical presence is a phrase that is mentioned in the analysis of habitual residence. Baroness Hale erred on the side of saying that physical presence is a necessary ingredient of habitual residence, but ultimately decided that this ruling would not be *acte clair*. If this issue needed to be resolved for the purposes of this case, then a PPU would need to be made to the ECJ.
- Prior to this case, there had been a debate for some time as to whether the test to be applied in EC cases was the same as the test to be applied in non-EC cases – see: **Re A (Area of Freedom, Security and Justice) (C-523/07) [2009] 2 FLR 1** and **Mercredi v Chaffe (Case C-497/10) [2011] 1 FLR 1293** vs. **R v Barnet Borough Council ex parte Shah [1983] 2 AC 309**. The debate was somewhat shut down by the analysis of Sir Peter Singer in **DL v EL (Hague Abduction Convention – Effect of Reversal of Return Order on Appeal) [2012] EWHC 49 (Fam)**, which was later endorsed by the Court of Appeal in that case and then by all parties in this case. Baroness Hale made clear that it was not strictly necessary to resolve the date as to which test applies given that the Supreme Court was only dealing with habitual residence under BIIR (EC test), albeit there had been a consensus at the bar that the tests were now the same in light of **DL v EL [2012]**, but that if there was a difference in the tests, the test to be adopted was the EC test.
- It is important to err away from an over legalisation of the test. Prior to this case, it had been widely accepted that to allow one parent to change the habitual residence of a child would be a ‘charter for abduction’. Not necessarily so, says Baroness Hale, due to, for example, as article 10 of BIIR which allows for the retention of jurisdiction in a child’s former state of habitual residence. The European approach to habitual residence which focuses on the child’s situation is preferable to the earlier approach adopted by English courts from **ex parte Shah [1983]** onwards – the intention of parents is only one relevant factor (not the most important factor). The reasoning in **ex parte Shah [1983]** should no longer be used.

- Habitual residence can technically be acquired in one day – the length of time depends on the facts of the case. No minimum period of time is required before it can be said that habitual residence is acquired.
7. Lord Hughes (for the minority) took the view that he could decide the issue of habitual residence. He stated that habitual residence is a question of fact and that a legal rule that physical presence is a necessary prerequisite for habitual residence is not appropriate and should not overlay what is a factual enquiry. When assessing habitual residence, a factual enquiry as to a child's integration into the family unit should be undertaken. If current physical presence is not essential for habitual residence, then habitual residence can also exist without physical presence, especially where physical presence has not occurred as the result of an unexpected *force majeure*.

(2) Re KL (Abduction: Habitual Residence: Inherent Jurisdiction) [2013] UKSC 75.

8. In this case, the UK Supreme Court upheld the appeal of the appellant father ordered the return of a child, aged 7 to Texas, USA, but under the court's inherent jurisdiction not the Hague Convention 1980. The UK Supreme Court accepted that the child was habitually resident in England and Wales at the relevant time.
9. The courts at first instance and in the Court of Appeal had refused to order the child's return. The case was unusual on its facts – the child had been brought to this jurisdiction by the respondent mother pursuant to an order of the USA Hague court. Subsequent to the child's return, the USA appeal court then overturned that order and ordered the child's return. By the time the appeal court had made its decision, the child had been living in this jurisdiction for 11 months. The respondent mother argued that the return order was moot as the child had already left the USA. The mother's case was very similar to the case of **Chafin v Chafin (Case no. 11-1347)** (and was not consolidated with that appeal) heard by the US Supreme Court.
10. As regards habitual residence, the UK Supreme Court stated the following:-
- The definition of habitual residence should be determined by ECJ case law and that the same test should apply to Hague Convention 1980 proceedings as to other international children law proceedings. Habitual residence is a "*question of fact which should not be glossed with legal concepts which*

*would produce a different result from that which the factual inquiry would produce”: see **ZA [2012]**;*

- The rule that a young child in the sole custody of a parent will generally have the same habitual residence as that parent is a helpful generalisation of fact, but not a proposition of law;
- Parental intent is a component of habitual residence but not the sole defining feature. As regards paternal intent, the important consideration is the reasons for the child leaving one state and going to stay in another state;
- A child does not remain habitually resident in State A as a matter of law if State A has permitted the child to leave and live in State B, even if that order granting permission is subject to an appeal. To say otherwise would be to place a legal gloss on habitual residence.

(3) Re LC (Reunite: International Child Abduction Centre Intervening) [2014] UKSC 1

11. In this case, the UK Supreme Court upheld the appeal of the appellant father and eldest child of the family, T aged 13 years old, and as a consequence determined that the issue of the children’s habitual residence had to be remitted for determination by the High Court. There were four children of the family, aged 13, 11, 9 and nearly 15 at the time of the Supreme Court hearing. The mother had applied at first instance for the summary return of all four children to Spain. The children had been in Spain since July 2012 and then returned in Christmas 2012 for a holiday with the father who then did not bring them back to Spain as he stated that the children did not wish to return.
12. At first instance, Cobb J ordered the summary return of all four children. That order was appealed successfully by the father in the Court of Appeal.
13. The Court of Appeal determined that Cobb J was wrong to exercise his discretion in favour of a return of T having found that T objected to returning to Spain, pursuant to article 13(b) of Hague Convention 1980. Further, as a result of their decisions in respect of T, the Court of Appeal accepted that the case would have to be remitted to the High Court for consideration as to whether or not it would be intolerable to separate T from her siblings (the younger siblings’ appeal grounds having been unsuccessful and Cobb J having not dealt specifically with

this issue at trial). The Court of Appeal rejected the ground of appeal in respect of habitual residence, pursuant to article 3 of Hague Convention 1980.

14. Subsequent to the appellate decision, the mother made clear that she was going to pursue her application for the return of all four children to Spain in the Spanish courts, pursuant to articles 11(6)-(8) of BIIR. This application was possible as a result of the English courts having only refused to return the children under article 13 of Hague Convention 1980. As a consequence, the only way of stopping this application was for the father, T and her siblings to appeal the habitual residence decision to the Supreme Court as a finding that T and her siblings were always habitually resident in England and Wales under article 3 of Hague Convention 1980 which would prevent the mother pursuing an articles 11(6)-(8) of BIIR application.

15. Lord Wilson (for the majority) stated that:

- In some unusual cases a child may be said to have a different habitual residence from that of his / her parents with whom he / she has travelled with from State A to State B. The requirement of integration creates room for such a concept;
- The idea that a young child could have a different habitual residence from that of his / her parents is not possible. However, where a child is older, specifically where a child is an adolescent or should be treated as an adolescent as she / he has the maturity of an adolescent, and perhaps where a child's residence in a new state has been for a short duration, the integration enquiry must look at more than just surface features of a child's life in the new state. There is no reason to fail even to consider the child's state of mind during his / her period of residence in the new state. Accordingly, in principle the state of mind of an adolescent child during their residence in a state may affect whether that period of residence can be deemed habitual;
- The issue as to habitual residence should be remitted for the High Court to consider; it was not right to accede to father's and T's application to substitute Cobb J's decision with a conclusion that T remained habitually resident in England and Wales at the time of her retention by the father. The issue as to habitual residence for the younger three children was also remitted for fresh consideration.

18. Baroness Hale (for the minority) stated that:

- Habitual residence is a question of fact. In relation to all three older children, the question is the quality of their residence. Some factors that need to be assessed when looking at the quality of their residence are objective, and some also are subjective. A child's state of mind – their reasons for being in a state and his/her perception of their situation when in that state – are relevant and feed into the ultimate question as to whether or not a child has achieved a sufficient degree of integration into a social and family environment for his / her period of residence to be termed 'habitual';
- The court should not overlay the factual enquiry with a general rule that the perceptions of younger children are irrelevant to the habitual residence analysis. The age of the child is though relevant to the factual questions being asked. The habitual residence analysis is child-centered – the court must analyse the child's degree of integration. The environment of an infant is his / her family environment and is therefore governed by the person with whom he / she lives, but once a child goes to school his / her social world widens and more actors need to be taken into account. Where parents are separated, children may also have two homes and so integration needs to be analysed in this context as well;
- When analysing habitual residence, the reasons as to why someone has left State A and gone to State B are relevant. There is, for instance, a difference between a pre-planned and carefully organised relocation, and movement from State A to State B in ambiguous circumstances or for a temporary purpose;
- It is not for parents to determine purely their child's state of habitual residence, but the intentions of parents, and the impact of those intentions on a child are relevant to the factual question of where a child is habitually resident;
- Although tempting to conclude that the children all remained habitually resident in England and Wales at the relevant time, in the interests of justice the case should be remitted as there may be other evidence that needs to be put before the court in respect of this issue;
- The case was unusual, and in a case such as this the perception of the child is at least as important as that of the adult in arriving at the correct answer as regards integration. This point accords with the general increasing recognition of children as people with a part to play in their own lives, rather than as passive recipients of their parents' decisions.

(4) AR v RN (Habitual Residence) [2015] UKSC 35

19. In this case, the UK Supreme Court dismissed the father's appeal against the decision of the Extra Division of the Inner House of the Court of Session that the parties' children were habitually resident in Scotland by the time the father commenced Hague Convention 1980 proceedings to secure their summary return to France. As a consequence, the children were not returned to France.
20. The first instance court in Scotland – the Outer House of the Court of Session – determined that the children had remained habitually resident in France at the time that the Hague Convention 1980 proceedings were commenced. This assessment was based on treating a shared parental intention to move permanently to Scotland as an essential element in any alteration of the children's habitual residence from Scotland to France.
21. On appeal, the Extra Division of the Inner House of the Court of Session concluded that the children had become habitually resident in Scotland. The children had a life in Scotland of a necessary quality for their stability. Their home was in Scotland. Their social life, and predominantly their family life, was also in Scotland.
22. The UK Supreme Court upheld the decision of the Extra Division of the Inner House of the Court of Session making clear that this as a conclusion that the court was entitled to reach on the evidence in the case. In doing so, the court reiterated the following in relation to habitual residence:-
 - Parental intention in relation to the issue of habitual residence is a relevant factor, not the relevant factor. Attention was drawn to the Supreme Court's recent authorities in respect of habitual residence: **Re A (Jurisdiction: Return of Child) [2013] UKSC 60**; **In the matter of KL (A Child) [2013] UKSC 75** and **In the Matter of LC (Children) (No 2) [2013] UKSC 221**;
 - The Court of Appeal was right to conclude in **In Re H (Children) (Reunite International Child Abduction Centre Intervening) [2014] EWCA Civ 1101** that there is no 'rule' that one parent cannot unilaterally change the habitual residence of a child. In **Re H [2014]**, the Court of Appeal made clear that the aforementioned 'rule' should be consigned to history in light of earlier Supreme Court decisions of **In the matter of A (Children) [2013] UKSC 60**; **In the matter of KL (A Child) [2013] UKSC 75** and **In the Matter of LC (Children) (No 2) [2013] UKSC 221**. It is clear from **In the matter of A**

[2013] that there was a general inclination to encumber the factual conceit of habitual residence with supplementary rules provided that an approach can be found which prevents a parent undermining Hague Convention 1980 and jurisdictional provisions under BIR. A factual enquiry, tailored to the circumstances of the case, was the appropriate course of action.

(5) Re B (A Child) (Habitual Residence: Inherent Jurisdiction) [2016] UKSC 4.

23. In this case, the UK Supreme Court upheld the appeal of the appellant mother and ordered the child's return from Pakistan. The case concerned a child (7) conceived through fertility treatment. The parties were 2 women who were previously in a same-sex relationship from 2004 - 2011. In preparation for the child's conception, the biological mother ("the respondent") attended pre-treatment counselling with the non-biological mother ("the appellant".) After the child's birth in April 2008, the women lived together and co-parented the child, but they never became civil partners. The respondent undertook most of B's care, but the appellant also played a significant role in the child's life, but never applied for Parental Responsibility in respect of the child.

24. In December 2011, the relationship between the parties broke down acrimoniously and the respondent left the family home. Over the next two years, the respondent progressively reduced the level of the appellant's time with the child. In February 2014, the respondent took the child to live permanently in Pakistan, without the appellant's knowledge or consent. Although the appellant did not consent to it, the child's removal to Pakistan was technically lawful as the appellant did not have Parental Responsibility for the child at the time of the removal. On 13 February 2014, the appellant issued proceedings under the Children Act 1989 in this jurisdiction for shared residence to, or contact with, the child. At the stage of issuing, the appellant was aware that the respondent had removed the child from the home, but was unaware that she had taken the child abroad. On 6 June 2014, the appellant learned that the respondent had taken the child to Pakistan, and accordingly the appellant also applied for orders that the child be made a ward of court and returned to England and Wales.

25. At first instance, Hogg J dismissed the appellant's applications on the basis that the courts of England and Wales had no jurisdiction in respect of the child as immediately upon the child's departure from England and Wales, the child had lost her habitual residence in England and Wales and so article 8 of BIR did not apply at the time that the appellant issued her proceedings on 13 February 2014.

26. The appellant appealed and the Court of Appeal dismissed her appeal. The Court of Appeal concluded, inter alia, that Hogg J was entitled to make the findings she so did in respect of habitual residence.

27. The appellant further appealed, and the UK Supreme Court allowed her appeal, concluding that Hogg J's finding in respect of habitual residence should be overturned. The court determined that the English court had jurisdiction to make orders concerning a child who had been taken by her biological mother to live in Pakistan as a consequence of the child having retained her habitual residence in England and Wales at the time that the child's non-biological mother issued proceedings in England and Wales in respect of the child.

28. Lord Wilson (for the majority) gave clear and helpful guidance in respect of the issue of habitual residence:-

- The English concept of habitual residence should be governed by the criterion established in European jurisprudence as set out in **A v A (Children: Habitual Residence)** [2013] UKSC 60; [2014] AC 1: namely, that there be some degree of integration by the child in a social and family environment;
- 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 this child. The concept operates in the expectation that, when a child gains a new habitual residence, he loses his old one. The court adopted the analogy of a sea-saw: as the child puts down roots in the new country (integration), the roots he had in the country where he was

previously habitually resident will come up (de-integrating or disengagement);

- The deeper the child's integration in the old state, probably the less fast will be his achievement of the requisite degree of integration in the new state;
- The greater the amount of adult pre-planning of the move, including pre-arrangements for the child's day-to-day life in the new state, probably the faster his achievement will be of that requisite degree of integration in the new state;
- Were all the central members of the child's life in the old state to have moved with him, probably the faster will be his achievement of the requisite degree of integration in the new state. Conversely, were any of them to have remained behind and thus to represent for him a continuing link with the old state, probably the less fast his achievement will be of the requisite degree of integration in the new state.
- Parental intention, as outlined in *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, is only one relevant factor in assessing the degree of integration by the child in a social and family environment.

29. As regards the *parens patriae* jurisdiction, the court did not go on to consider whether Hogg J was entitled to decline to exercise this jurisdiction in respect of the child as a result of its judgment on habitual residence. However, the court did make clear that the *parens patriae* jurisdiction should not only be exercised in cases at "*the extreme end of the spectrum.*"

Forum non conveniens

30. In respect of countries under the umbrella of BIIa or the 1996 Hague Convention the appropriate forum will be governed by a combination of
- (a) *Lis pendens* and
 - (b) The transfer provisions.

There is no residual role for 'forum conveniens' in such cases.

31. However for countries not sheltered by that umbrella the principle remains valid. *Forum non conveniens* is a phrase whereby courts may refuse to take jurisdiction over matters where there is a more appropriate forum available to the parties and therefore **where the court decides to stay proceedings because that there is a more suitable forum for the case to be tried.** This is relevant in cases where the other country is outside the ambit of a bilateral or multilateral treaty, e.g. 1996 Hague Convention or Brussels II revised. One expects such arguments to be implied more in the post Brexit era unless some type of legislation is brought in mirroring it and/1996 catches all European cases. There will be incoming cases from Hague 1996 countries where for example 1996 Hague is regarded as inapposite for some technical reason and in that scenario, *the forum non conveniens argument* may well come to the fore.

Case Law Background:

32. The decision of *Spiliada Maritime Corp v Cansulax Ltd The Spiliada* [1987] 1 AC 460, [1986] 3 WLR 972, [1986] 3 All ER 843, [1987] 1 Lloyd's Rep 1, HL (19 November 1986)

Lord Goff of Chieveley:

"In cases where jurisdiction has been founded as of right, i.e. where in this country the defendant has been served with proceedings within the jurisdiction, the defendant may now apply to the court to exercise its discretion to stay the proceedings on the ground which is usually called *forum non conveniens*. That principle has for long been recognised in Scots law; but it has only been recognised comparatively recently in this country. In *The Abidin Paver* [1984] A.C. 398, 411, Lord Diplock stated that, on this point, English law and Scots law may now be regarded as indistinguishable. It is proper therefore to regard the classic statement of Lord Kinneir in *Sim v. Robinow* 1892 19 R. 665 as expressing the principle now applicable in both jurisdictions. He said, at p. 668:

"... the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice."

For earlier statements of the principle, in similar terms, see Longworth v. Hope 1865 3 M. 1049, 1053, per Lord President McNeill, and Clements v. Macaulay 1866 4 M. 583, 592, per Lord Justice-Clerk Inglis; and for a later statement, also in similar terms, see Societe du Gaz de Paris v. Societe Anonyme de Navigation "Les Armateurs Francais," 1926 SC (HL) 13 at p. 22, per Lord Sumner.

I feel bound to say that I doubt whether the Latin tag *forum non conveniens* is apt to describe this principle. For the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction. However the Latin tag (sometimes expressed as *forum non conveniens* and sometimes as *forum conveniens*) is so widely used to describe the principle, not only in England and Scotland, but in other Commonwealth jurisdictions and in the United States, that it is probably sensible to retain it. But it is most important not to allow it to mislead us into thinking that the question at issue is one of "mere practical convenience." Such a suggestion was emphatically rejected by Lord Kinnear in Sim v. Robinow 1892 19 R. 65 at p. 668, and by Lord Dunedin, Lord Shaw of Dumferline and Lord Sumner in Societe du Gaz case 1926 SC (HL) 13 at pp. 18, 19, and 22 respectively. Lord Dunedin said (at p. 18), with reference to the expressions *forum non competens* and *forum non conveniens*:

"In my view, 'competent' is just as bad a translation for 'competens' as 'convenient' is for 'conveniens.' The proper translation for these Latin words, so far as this plea is concerned, is 'appropriate.'"

Lord Sumner (at p. 22) referred to a phrase used by Lord Cowan in Clements v. Macaulay 1866 4 M. 583, 594, viz. "more convenient and preferable for securing the ends of justice,"

In my opinion, having regard to the authorities (including in particular the Scottish authorities), the law can at present be summarised as follows.

(1) The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

(2) As Lord Kinneir's formulation of the principle indicates, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay (see, e.g., the *Société du Gaz* case, 1926 S.C.(H.L.) 13, 21, per Lord Sumner; and Anton, *Private International Law* (1967) p. 150). It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is *prima facie* the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country (see (f), below).

(3) The question being whether there is some other forum which is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact that the plaintiff has, *ex hypothesi*, founded jurisdiction as of right in accordance with the law of this country, of itself gives the plaintiff an advantage in the sense that the English court will not lightly disturb jurisdiction so established. Such indeed appears to be the law in the United States, where "the court hesitates to disturb the plaintiff's choice of forum and will not do so unless the balance of factors is strongly in favor of the defendant,"; see Scoles and Hay, *Conflict of Laws* (1982), p. 366, and cases there cited; and also in Canada, where it has been stated (see Castel, *Conflict*

of Laws (1974), p. 282) that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." This is strong language. However, the United States and Canada are both federal states; and, where the choice is between competing jurisdictions within a federal state, it is readily understandable that a strong preference should be given to the forum chosen by the plaintiff upon which jurisdiction has been conferred by the constitution of the country which includes both alternative jurisdictions.

(4) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in MacShannon's case [1978] A.C. 795, 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense." Having regard to the anxiety expressed in your Lordships' House in the *Société du Gaz* case, 1926 SC (HL) 13 concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in *The Abidin Daver* [1984] A.C. 398, 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see *Crédit Chimique v. James Scott Engineering Group Ltd.*, 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business.

(5) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily

refuse a stay; see, e.g., the decision of the Court of Appeal in European Asian Bank A.G. v. Punjab and Sind Bank [1981] 2 Lloyd's Rep. 651. It is difficult to imagine circumstances when, in such a case, a stay may be granted.

(6) If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this enquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction; see the The Abidin Daver [1984] 1 A.C. 398, 411, per Lord Diplock, a passage which now makes plain that, on this enquiry, the burden of proof shifts to the plaintiff. How far other advantages to the plaintiff in proceeding in this country may be relevant in this connection, I shall have to consider at a later stage.

CJEU/ECJ:

33. *Owusu v Jackson and Others* Case C-281/

¹The case concerned a serious accident in Jamaica. Mr Owusu, the claimant, a British national domiciled in the United Kingdom, suffered serious injuries in Mammee Bay, Jamaica, when he struck his head when swimming against a submerged sandbank.

Mr Jackson, the first defendant, who was also domiciled in the United Kingdom, had let the holiday villa to Mr Owusu. Mr Owusu sued the first defendant in the English

¹ Taken from <http://hsfnotes.com/litigation/2005/03/24/court-jurisdiction-stay-proceedings-favour-non-contracting-state/>

courts for breach of an implied term that the private beach where the accident occurred would be reasonably safe or free from hidden dangers.

Mr Owusu also sued in the same action several Jamaican companies who owned, occupied or licensed the use of the beach. The action alleged a failure to warn swimmers of the hazard constituted by the submerged sandbank and also that the defendants had failed to heed a similar earlier accident.

ECJ's judgment

The ECJ first rejected an argument put forward by the defendants and the United Kingdom government (and which had formed the basis of the Court of Appeal decision in the *Harrods Buenos Aires* case) that the domicile rules in Article 2 of the Brussels Convention (since replaced, with no material differences in this respect, by the Brussels Regulation) had no application because the claimant and one of the defendants were domiciled in the United Kingdom and the other defendants were domiciled in a non-Contracting State (rather than in another Contracting State). Article 2 provides: "Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State..."

The court held that Article 2 was not subject to a condition that there should be a legal relationship involving a number of Contracting States, although for the Convention to apply at all, the existence of an international element was required (as it did in this case).

The court then went on to hold that the *forum non conveniens* doctrine was incompatible with the Brussels Convention for the following reasons:

- Article 2 is mandatory in nature and can only be derogated from in ways expressly provided for by the Convention.
- No exception on the basis of *forum non conveniens* was provided for in the Convention, even though the doctrine was discussed when Denmark, Ireland and the United Kingdom acceded.

- Legal certainty would not be fully guaranteed and the predictability of the rules of jurisdiction would be undermined.
- A defendant is generally better placed to conduct his defence before the courts of his domicile and would be unable reasonably to foresee before which other court he might be sued.
- Where a foreign court may be a more appropriate forum, it is for the claimant to establish that he will not be able to obtain justice before that court, or that the foreign court has in fact no jurisdiction or the claimant does not in practice have access to effective justice from that court, all of this irrespective of the cost entailed by the bringing of a fresh action before a court of another state and the prolongation of the procedural time limits.
- Forum non conveniens is recognised in only a limited number of Contracting States, so would affect the uniform application of the rules of jurisdiction in Contracting States.

The defendants emphasised the negative consequences which would result in practice from the exclusion of the doctrine of *forum non conveniens*. These consequences included:

- The expense of English proceedings.
- The difficulties in recovering costs if the claimant's action was dismissed.
- The logistical difficulties resulting from geographical distance.
- The need to assess the merits of the case according to Jamaican standards.
- The enforceability in Jamaica of a default judgment and the impossibility of enforcing cross claims against the other defendants.

The court considered that "genuine as these difficulties may be" they were not such as to call into question the mandatory nature of the fundamental rule of jurisdiction contained in Article 2 of the Convention.

The result of this decision is that the claimant is entitled to bring the proceedings in England, even though England had no connection with the accident and Jamaica appears to be a more suitable forum for the trial.

The court declined to answer a second question referred to it, namely whether the application of *forum non conveniens* is ruled out in all circumstances. As this was not dealt with, this leaves open the possibility of the doctrine of forum non conveniens still having application in certain circumstances. In particular, where the parties have expressly chosen the jurisdiction of a non-Contracting State, where other proceedings are or have been pending in the other state, or the subject matter of the dispute is such that a Contracting State would, in those circumstances, have taken exclusive jurisdiction, e.g. certain disputes relating to land situated in that country.

34. Therefore the concept of non-forum conveniens is still alive with non-contracting states but forward wind 2 years, when we are no longer bound by the ECJ: forum non conveniens and the dicta set out in *Spilada* will surely be useful more regularly in international children cases.

35. Declining jurisdiction in favour of proceedings in third states

“...Whether or not the European regime is extended to third-state defendants it is important, following the decision in *Owusu*, to clarify the rules for declining jurisdiction in favour of proceedings in third states in cases where jurisdiction is conferred by the regime. Procedural efficiency and justice argue for harmonisation in this area, rather than remitting the question to national law.... [NB].....the 2005 Hague Convention on Choice of Court Agreements². When in force in Member States the Convention will require national courts to decline jurisdiction in favour of any agreement to the exclusive jurisdiction of a third-state which is also a Contracting State. It will also require national courts to exercise jurisdiction pursuant to a jurisdiction agreement notwithstanding the existence of parallel proceedings in a third state. But it extends only to bilateral, exclusive jurisdiction agreements in favour of Contracting States. Independent rules applicable in all other

² <https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf> &

<https://www.hcch.net/en/instruments/conventions/status-table/?cid=98>

cases remain necessary. Such rules should not, however, replicate those of the Convention without qualification. The Convention assumes reciprocity between Contracting States. The safeguards indicated above are required in cases not involving Contracting States.³

[NB DE DAMPIERRE v DE DAMPIERRE [1987] 2 FLR 300]

and

36. *Peng v Chai* [2015] EWCA Civ 1312 [2017] 1 FLR 318 (FLR summary)

The wife petitioned for divorce in England in 2013. In proceedings in Malaysia, initiated by the husband, the court adopted the approach in *Spiliada Maritime Corp v Cansulax Ltd The Spiliada* and held that Malaysia was irrefutably the most appropriate forum to determine the divorce and litigate the ancillary issues of maintenance and property division. However, on appeal the court followed the approach in *Voth v Manildra Flour Mills Pty Ltd* and found that Malaysia was not a clearly inappropriate forum. The husband's application to stay the wife's divorce petition was refused and the judge held that the Malaysian appeal court's decision that Malaysia was clearly not an inappropriate forum did not thereby render England an inappropriate forum. He appealed on the basis that the Malaysian courts had determined that Malaysia was the proper forum for the divorce litigation, the wife's proceedings in this jurisdiction were an abuse of process, and that the judge should have stayed the wife's proceedings pursuant s 5(6) and Sch 1, para 9 to the Domicile and Matrimonial Proceedings Act 1973. He sought a stay of the proceedings and repayment of the monies paid to the wife in respect of maintenance and legal costs.

Held – dismissing the appeal –

(1) There was no issue estoppel on the question of forum conveniens. The differential in the tests applied in Malaysia and in England was distinct and

³ Taken from <https://www.publications.parliament.uk/pa/ld200809/ldselect/lddeucom/148/09061005.htm>

consequently the issue actually to be determined was different. The decision reached by the Malaysian Court of Appeal that the wife had failed to establish that Malaysia was so inappropriate a forum so as to render continuation of proceedings oppressive and vexatious did not equate to Malaysia being the more appropriate forum. Consequently, the *Voth* test specifically admitted the possibility that the issue that was determined in favour of the husband in Malaysia was capable of producing exactly the same determination in favour of the wife in the English court, albeit that the factual context was the same. It was not possible to read the Malaysian Court of Appeal decision implicitly to assert supremacy over all matters relating to the marriage. To the contrary, it recognised that there was an outstanding application to be determined by the English courts relating to jurisdiction; that was whether the wife could establish residence or domicile as necessary in order to found jurisdiction in the English courts (see para [20]).

(2) The alleged abuse of process arguments were tantamount to seeking to establish that Malaysia was clearly or distinctly more appropriate than the English forum. The husband failed to persuade the court that the decision below on the issue of the wife's alleged abuse of process was wrong (see paras [26], [27]).

(3) The Court of Appeal in *Butler v Butler* [1997] 2 FLR 311 articulated the test for staying proceedings in a slightly different fashion from the House of Lords in *de Dampierre v de Dampierre* [1987] 2 FLR 300 but it was consistent with the ratio. In applying the approach in *Butler*, which he saw as the most recent authoritative pronouncement, the judge below applied the gloss derived from *de Dampierre*. It followed that his approach was unimpeachable (see para [32]).

(4) The husband had failed to show that there was a greater connection with Malaysia than with England. On that basis the judge below was entitled to find against the husband's application for a stay whether he applied the 'clearly and distinctly more appropriate' test or the simple 'balance of fairness' test (see para [37]).

An example in a child case where forum non conveniens was argued:

37. *Re K (A CHILD) (NO 3)* (FORUM CONVENIENS) [2015] EWHC 2192 (Fam) (FLR summary)

Roberts J

30 June 2015

Jurisdiction – Forum conveniens – Wardship – Child wrongfully retained in Singapore – Failure to comply with return order – Both parents resident in UK for foreseeable future – Whether Singapore was the more appropriate forum

The, now 2-year-old, child was placed in the care of the paternal grandparents in Singapore for a few months while the mother completed her studies at university in the UK. The mother and the father agreed that after she had taken her exams they would collect the child from Singapore and return to the UK. After the mother completed her exams, the father purchased tickets for the mother and father to travel to Singapore and tickets for all three of them to return to the UK. However, upon their arrival in Singapore, the mother was served with divorce and custody proceedings issued by the father in the High Court of Singapore. He also informed the mother that he had resigned from his job in the UK and had taken up a new position in Singapore. The mother issued proceedings in the English court resulting in orders for the father to surrender his passport, making the child a ward of court and ordering the child's return to this jurisdiction. The mother returned to the UK to find that the locks had been changed at the matrimonial home and that she could no longer access her joint bank account. When the matter came back before the English court, the child was found to be habitually resident in this jurisdiction and a return order with an attached penal notice was made. Despite numerous attempts to enforce the order, the child remained in Singapore in the care of the paternal grandparents and the father claimed he was powerless in the face of their opposition to the child's return. They had initiated proceedings in Singapore in respect of their continuing care of the child. In 2014, the mother illegally entered Singapore and removed the child from the grandparents' care but she was soon arrested and was incarcerated for 10 weeks before being deported to the UK. It remained unclear whether she would be able now to re-enter the jurisdiction of Singapore. The father

applied for a stay of the proceedings on the basis that Singapore was the more appropriate forum in which to make decisions on the child's future care. Both parents advanced their cases on the basis that they would remain in the UK for the foreseeable future. The father was currently on bail awaiting trial for offences of rape and violence perpetrated against the mother during their marriage. If convicted, he was likely to receive a significant custodial sentence. The mother was in receipt of a public funding certificate in the proceedings but the father was reliant on the financial assistance of friends and family. The paternal grandparents had been made parties to the proceedings but had declined to participate.

Held – dismissing the father's application for a stay of the wardship proceedings –

(1) It was not possible to say that the Singapore court was clearly the more appropriate forum applying the principles set out in *Spiliada Maritime Corp v Cansulex Ltd*. It could not be ignored that the mother had established the jurisdiction of the English court as of right in the context of the wardship proceedings. Notwithstanding that Singapore was plainly a competent jurisdiction, it was not the competent jurisdiction in which the case might be tried more suitably for the interests of all the parties and the ends of justice in this case (see para [107]).

(2) It was fundamental to a fair outcome in the proceedings that both the mother and father were able to participate in legal proceedings relating to the future arrangements for their only child. Of principal and magnetic importance was the presence of the parents in this jurisdiction; the fact that each was likely to remain

resident in this jurisdiction for at least the next few months; and the significant issue of the mother's ability, or rather inability, to re-enter Singapore and conduct proceedings in that jurisdiction in circumstances where she had neither immigration clearance nor the means to support her travel to and from that jurisdiction, nor legal representation in the Singapore courts (see paras [86], [106]).

(3) If that conclusion was wrong there were no circumstances in the case which would persuade the court that there were special circumstances which required a stay to be imposed on the wardship proceedings in this jurisdiction. In light of the fact that the courts in Singapore would be astute to investigate and prioritise the child's interests in any further proceedings which may be listed in those courts, there was no particular juridical advantage for either of the mother or the father in terms

of an objective assessment of the quality of justice and fairness of outcome which would no doubt be the cornerstone which informed the outcome in either jurisdiction (see para [109]).

(4) Although the father had no public funding certificate for the English wardship proceedings, whereas the mother had that benefit, the evidence demonstrated that he

had access to resources which had enabled him to instruct a lawyer throughout the course of his parents' proceedings in Singapore. The principal concern was the mother's ability to participate in the proceedings in Singapore in the same manner in which she (and the father) could participate in the ongoing English proceedings. The absence of public funding for the father's participation in the wardship proceedings, given that he had been able to fund his lawyers thus far through the generosity of friends and family, was insufficient to tip the balance away from those proceedings remaining in this jurisdiction to their natural conclusion (see para [111]).

38. In a US case, especially with a bit of international judicial cooperation, there is no reason why a *forum non conveniens* argument cannot be raised.

Enforcement of Foreign Orders under the Inherent Jurisdiction and use of the inherent jurisdiction summary return orders in 1980 Hague Convention cases

39. As with all other cases identifying the regimes which apply is crucial. Does BIIa apply as between the countries. 1996 Hague Convention? 1980 Hague Convention? None of them? The powers available to the English court are dictated by the existence or absence of reciprocal obligations contained within those instruments. In any case where a child is present in England and her 'return' is sought to another country the application can be made under the inherent jurisdiction of the High Court – this could be to enforce an order made by that court or for summary return. This includes cases where the other country is a member of the 1980 Hague Convention – although as will be seen below the circumstances in which this might be appropriate are likely to be limited.

Enforcement of an order

40. In Re L (A Child) (Custody: Habitual Residence) (Reunite International Child Abduction Centre Intervening) [2013] UKSC 75, [2013] 3 WLR 1597 the Supreme Court held that it had power under the inherent jurisdiction to order the return of

the 7 year old Texan child to Texas, despite a finding that the child had acquired habitual residence in England. The child was the subject of a US custody order that the Father sought to enforce and if unable to establish that the child was habitually resident in the US immediately before the removal (pursuant to Article 3 of the Convention), he pursued his application under Article 18 of the Convention which provides that its provisions on return of children *"do not limit the power of a judicial or administrative authority to order the return of the child at any time."*

41. Baroness Hale in the judgment of the Court states at para 28

"The High Court has power to exercise its inherent jurisdiction in relation to children by virtue of the child's habitual residence or presence here: Family Law Act 1986, sections 2(3) and 3(1). The welfare of the child is the court's paramount consideration: Children Act 1989 section 1(1). But this does not mean that the court is obliged in every case to conduct a full blown welfare based inquiry into where the child should live. Long before the Hague Convention was adopted, the inherent jurisdiction was used to secure the prompt return of a child who had been wrongfully removed from his home country: see In re J (A Child) (Custody Rights: Jurisdiction) [2006] 1 AC 80, paras 26-27, and the cases cited therein. Furthermore, it has long been established that, in the interests of international comity, the existence of an order made by a foreign court of competent jurisdiction is a relevant factor. As the Judicial Committee of the Privy Council put it in the Canadian case of McKee v McKee [1951] AC 352, 364:

"One it is conceded that the Court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow an order made by a foreign court, the consequence cannot be escaped that it must form an independent judgment on the question, though in doing so it will give proper weight to the foreign judgment. What is the proper weight will depend on the circumstances of each case."

See also Rayden 47.559 and the cases cited there.

42. So if a child is habitually resident or present in England and no other court has substantive jurisdiction the court will have jurisdiction pursuant to BIIa or the FLA 1986. That jurisdiction is a paramount welfare jurisdiction and although, as a matter of comity, the English court should be slow to make orders which directly conflict with pre-existing orders made in any friendly foreign state, where no reciprocal enforcement instrument applies the court must apply paramount

welfare: *McKee v McKee* [1951] AC 352, [1951] 1 All ER 942, PC; *J v C* [1970] AC 668; *Re G (a minor) (enforcement of access abroad)* [1993] Fam 216, [1993] 3 All ER 657, CA. This may be in a fairly robust way, as described in *Re J (child returned abroad: Convention rights)* [2005] UKHL 40, [2005] 2 FLR 802 (non-Convention summary return cases) or it may involve a much fuller welfare enquiry akin to that which would be undertaken in a domestic case. All will depend on the circumstances of the individual case.

43. Where the issue is enforcement of an order the court will be looking at

- (a) The process by which it was obtained and
- (b) The welfare merits of the order.

The court may adopt a summary or more extended process in the determination of these issues. The court will have to consider whether and if so how the voice of the child will be heard: *Re S (abduction: hearing the child)* [2015] 2 FLR 588.

Inherent jurisdiction summary return in 1980 Hague Convention cases

44. Whilst the court can consider using a summary return power in a case to which the 1980 Hague Convention applies it does not mean those summary return powers under the inherent jurisdiction can be used to avoid or circumvent a 1980 Hague Convention application with the due process that brings. The Court of Appeal in *Re A (A Child)* [2016] EWCA Civ 572 made very clear that where the 1980 Hague Convention applied it was to be expected that the processes set out therein (including the complementary provisions in BIIa) would be followed. There may be some exceptional circumstances where that would not apply but they are hard to imagine. Whilst *Re A* was very much a BIIa case with all the comity and process implications which attach to that instrument similar arguments can be made in respect of 1996 Hague Convention countries and other countries where the 1980 Hague Convention applies. The UKSC deployed the summary return powers in *Re L* because the 1980 Hague Convention did not apply because habitual residence in the USA was not established. Whilst a summary return could be ordered even where a 1980 Hague Convention application had failed on an Article 13 defence it is hard to see how that would arise as if a return was appropriate that would be the determination under the discretionary exercise.
45. Thus in reality a summary return is only likely to feature in a '1980 Hague Convention case where the court has determined the application and concluded for an Article 3 or 5 reason that the Convention does not apply.
46. Where the issue is simple 'summary return', (there being no order in place) the court will be focusing on the welfare merits and will adopt a summary or more extended process as the circumstances dictate. The starting point of 'a return is likely to be in the interests of the child and a case against return has to be made out' as identified in *Re J (child returned abroad: Convention rights)* [2005] UKHL 40, [2005] 2 FLR 802 is only of limited relevance in a case to which the 1980 Hague Convention prima facie applies.

Anti-Suit (Hemian) Injunctions

47. A court has a jurisdiction to make orders to preserve its own proceedings and where the pursuit of foreign proceedings concerning the **same subject matter** would be oppressive or vexatious.
48. However a court cannot grant an anti-suit injunction in relation to proceedings to be taken within another EU country and where the proceedings are covered by an EU Regulation. Hague Convention proceedings fall within BIIIR: CJEU Opinion

1/13. . Anti-suit injunctions granted in the 'Masri' cases related to proceedings in non-EU and non-Lugano Convention countries. The ECJ confirmed in Turner-v-Grovit (Case C-159/02) [2005] 1 AC 101 that anti-suit injunctions are an interference with a foreign court process and were inconsistent with the mutual trust between legal systems. It amounted to a review of the other courts jurisdiction which is prohibited. Whilst a court can grant protective injunctions ancillary to the main suit this does not in an EU case extend to restraining a party from commencing proceedings. See Dicey and Morris on the equivalent under Brussels I at 12-091. BY analogy the same would apply to a 1996 Hague Convention country.

49. The principles for granting an anti-suit injunction as set out in the 'Airbus Industrie' and 'SNI' cases are not met in any event. In *Airbus Industrie GIE-v-Patel and Others* [1998] 2 All ER 257 the House of Lords considered the jurisdiction for the grant of an "anti-suit injunction". At p.264b Lord Goff confirms the existence of the jurisdiction. He refers at 264c to the case of *SNI Aerospatiale-v-Lee Kui Jal* [1987] AC 871 which sets out the principles upon which such an injunction may be granted. In The SNI case Lord Goff set out the following principles;

- (a) the jurisdiction is to be exercised when the ends of justice require it, 892B,
- (b) when the court makes such an order it is directed not at the court but at the parties proceeding, 892C
- (c) an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, i.e. against whom it will be effective. 892E,
- (d) the jurisdiction is one which must be exercised with caution as it indirectly affects a foreign court, 892E-F
- (e) if the foreign proceedings are vexatious or oppressive then this will be a very important factor. Vexatious and oppressive should not be given a restrictive meaning but must vary with the circumstances of each case. 893F-G
- (f) application of the principle of forum non conveniens by the other country should ensure that the other country will decline jurisdiction where another country is clearly a more natural forum for the proceedings. However where a stay is not granted the English court may intervene where the other party is acting oppressively in pursuing those proceedings, 894F-G,
- (g) developments in the law relating to the principle of forum non conveniens does not displace the principles derived from the injunctions cases, 896D-E,
- (h) the court will generally speaking only restrain foreign proceedings if they are oppressive or vexatious. This presupposes
 - a. that the English court clearly provides the natural forum for the trial of the action, and

- b. since the court is concerned with the ends of justice, an injunction will not be granted if it will deprive the plaintiff of advantages in the foreign jurisdiction of which it would be unjust to deprive him.

50. In cases concerning children their best interests will be a primary but not paramount consideration in determining an anti-suit injunction as jurisdictional issues are not decisions directly affecting the welfare of the child but concern them. [Rayden: para 31.366].

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Section 6

Funding Litigation: international and Domestic Fronts?

Chris Hames QC & Katie Wood

FUNDING LITIGATION

Introduction

1. This aspect of the programme deals with two main areas:
 - I. Row L wants a property to live in for herself and the children in New York, plus an income. She seeks costs funding to pursue:
 - a) A Schedule 1 application;
 - b) Children Act proceedings/any application under the inherent jurisdiction;
 - c) TOLATA proceedings.
 - II. Leppard (d.o.b.01.04.04), now aged 13 years, has instructed lawyers and seeks a costs funding order against both her parents.

Before addressing each in turn, we will set out the basic legal principles.

Schedule 1 & Children Act proceedings (for a CAO): Jurisdiction and 'equality of arms'

2. It is well established that the court has a common law jurisdiction for the making of an order for legal costs funding in respect of both **Schedule 1** and **Section 8** claims.
3. In *CF v KM (Financial Provision for Child: Costs of Legal Proceedings)* [2011] 1 FLR 208, Mr Justice Charles ruled:

"All cases are different, or have different aspects, but in my view it is clear that it is more likely than not that it would benefit the child if the mother was represented in both the s. 8 proceedings and the Schedule 1 proceedings. This accords with the conclusion I reached in M-T v T and the conclusion reached by Moylan J in G v G. In large measure, this view is based on the generally recognised advantages flowing from competent representation, and there being an "equality of arms" in an investigatory as well as in an adversarial process." (para.92)

4. The 'equality of arms' point can apply in section 8 proceedings just as it has been found to warrant a provision for costs in Schedule 1 proceedings (*CF v KM* above, para.36).
5. The jurisdiction for legal costs funding in Schedule 1 cases has developed gradually: *M-T v T* [2007] 2 FLR 925, *G v G (Child Maintenance: Interim Costs Provision)* [2009] EWHC 2080 (Fam), [2010] 2 FLR 1264 and *CF v KM* [2011] 1 FLR 208), and the principles in *Currey v Currey (No 2)* [2006] EWCA Civ 1338, [2007] 1 FLR 946 continue to apply.
6. The "exceptionality" test alluded to in *Moses-Taiga v Taiga* (above) was ruled out by the Court of Appeal in *Currey v Currey (No.2)*. Essentially, the circumstances an applicant must find him/herself in is where s/he:
 - has no liquid assets;
 - cannot raise a litigation loan;
 - cannot persuade their solicitors to enter into a Sears Tooth charge;
 - cannot reasonably procure legal advice and representation by any other means.
7. Moreover, the subject matter of the application will always be relevant, as will be the reasonableness of the applicant's stance in the proceedings.

8. In matrimonial and civil partnership causes, the common law jurisdiction has now been replaced by section **22ZA & 22ZB** of the **MCA 1973**.
9. There remains an obvious "close parallel" between the criteria set out within the common law jurisdiction and section 22ZA.
10. In *Rubin v Rubin* [2014] EWHC 611 (Fam), Mostyn J produced a compendium of **14 principles** relevant to the exercise of judicial discretion:

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 [2005] EWHC 2860 (Fam) [2006] 1 FCR 465 [2006] 1 FLR 1263 at para 124 (iv) and (v), where it was stated

"iv) 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.

v) 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 final trial."

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.

11. In *Rubin*, Mostyn J indicated that, in his view, **the principles would be the same (with some modifications) between the statutory and non-statutory schemes.**

"In my opinion the principles set out in para 13 ought to apply, with the necessary modifications, where an order is sought for costs funding in proceedings under Schedule 1 of the Children Act 1989, the Inheritance (Provision for Family and Dependents) Act 1975 or Part III of the Matrimonial and Family Proceedings Act 1984. Obviously, the first sentence of principle (x) will not apply...." (para.15).

12. More recently, in *MG and JG v JF (Child Maintenance: Costs Allowance)* [2016] 1 FLR 424, Mostyn J said (at para.21):

Distilling the principles in Rubin v Rubin [2014] EWHC 611 (Fam), CF v KM [2011] 1 FLR 208, and Currey v Currey (No 2)[2006] EWCA Civ 1338, [2007] 1 FLR 946 it seems to me that on the facts of this application the following considerations are engaged:

i) The subject matter of the application is centrally relevant, as is the reasonableness of the applicant's stance in the proceedings.

ii) There are generally recognised advantages flowing from competent representation, and from there being an "equality of arms" in an investigatory as well as in an adversarial process.

*iii) 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. A costs allowance 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.*

iv) 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.

13. What about historic unpaid costs? This frequently causes difficulties.

"....We are a small firm and cannot provide interest-free credit at this level, and without security, simply because our client is not able to borrow from any bank or litigation funding provider. It would have been prejudicial to our client for us to have ceased acting, as she would have been extremely unlikely to obtain alternative representation given her outstanding costs" (letter quoted in Re F – below, from M's solicitors)

14. This was a major issue in *Re F (A Child) (Financial Provision: Legal Costs Funding)* [2016] EWHC 1806 (Fam), sub nom **BC v DE (Proceedings under Children Act 1989: Legal Costs Funding)** [2017] 1 FLR 1521.
15. By the time of this interim hearing before Cobb J, dealing with litigation costs funding, the sums claimed in respect of legal costs were:
- (i) Outstanding (i.e. already incurred) costs: £141,269.18
 - (ii) Prospective costs up to final hearing: £154,245
16. The father was a multi-millionaire. He opposed in principle that part of the application for funding which represented historic unpaid legal costs, although he had made a 'global' offer to the mother which permitted her to apportion the funds he was to provide as she wished between historic and prospective costs.
17. Roberts J (at an earlier interim hearing), made an award for both historic and prospective costs for Schedule 1 proceedings and for the historic costs of section 8 welfare proceedings. At a subsequent interim hearing, Roberts J decided to make a further order for prospective costs but adjourned over that part of the application dealing with historic costs, observing that, in any event, the mother will import into her Schedule 1 claims, a six-figure liability for costs which she had incurred, which she did not consider to be "exceptional or unreasonable". Roberts J stated:

"I would intend and expect those costs to be swept up in the context of overall settlement"

18. Having heard full argument on the issue of historic costs, Cobb J found as follows:

- Equality of arms does not mean equality of payments – i.e. there is no pound for pound approach so that costs budgets are matched.
- A level playing field may not be achieved where, on the one side, the solicitor and client are “beholden” to each other by significant debt, whereas on the other there is an abundance of litigation funding.
- A solicitor may feel constrained in taking important steps (e.g. discover/considering ADR)
- Legal service providers, including solicitors and barristers, are not charities, nor are they credit agents. It is neither fair nor reasonable to expect solicitors and the Bar to offer unsecured interest-free credit in order to undertake their work.
- An applicant does not need to show that his/her solicitor has actually “downed tools” or will do before s/he could legitimately make an application for a legal costs funding order where “historic” costs have been incurred. Simply, a clear case would have to be shown that the solicitors are reaching the end of their tolerance.
- There is a solid reason for lawyers not to have a financial interest in the outcome of family law litigation.

19. The case of *Rubin* was distinguished. Mrs Rubin had sought to recover costs incurred where there was not going to be any further litigation about children or money in this jurisdiction. She, therefore, fell foul of principle 4: 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. In other words, they were truly “historic” costs – the proceedings had concluded.

20. Mostyn J had highlighted the danger of an order being made in these circumstances, which was tantamount to usurping the function and principles governing orders for costs: part of what Mrs Rubin was claiming were for the costs of proceedings which had ended with a specific order that there be no order for costs.

Discount for assessment

21. A further issue arises in respect of costs provision both for prospective and historic costs. In principle, legal services provision should reflect, in a broad-brush way, the prospect that any order for costs achieved at the conclusion of the proceedings would be reduced on assessment.
22. Unfortunately, there is no real judicial consistency. In *Re F*, Roberts J at the first interim hearing, discounted historic costs by **30%**: it is not clear whether she had applied a discount to the prospective costs. In the subsequent hearing, she does not appear to have applied any discount for her award of prospective costs.
23. At yet another (previous) interim hearing in *Re F*, Holman J applied a discount of **20%** to prospective costs.
24. In *MF* (supra.), Mostyn J discounted prospective costs by **20%**.
25. Cobb J in *Re F* applied a discount across the board (so both prospective and historic costs) of **15%**. He explained his decision at paragraph 28:

From the costs claimed (whether prospective or outstanding), I propose to make a deduction of 15% to reflect a notional standard basis of assessment; in doing this, I have taken a broad view about whether the costs are reasonably incurred, reasonable

in amount and proportionate to the matters in issue, recognising that any costs which are disproportionate in amount may be disallowed or reduced, even if they were reasonably or necessarily incurred (CPR r 44.3(2)(a) and para 6.2 of PD 44), and on the basis that the court would resolve any doubt in favour of the paying party (CPR r 44.3(2)(b)).

26. In other cases, in the authors' personal experience, judges have declined to apply any discount, instead taking a 'broad-brush' approach to what the payer can afford, what the payee realistically needs and, no doubt, what the payee's solicitors would accept to continue acting.

Questions to ask:

27. Some practical questions to consider:

- What are M's financial resources and income?
- Does she have a proper case to be put before the court?
- Can M reasonably obtain legal costs funding elsewhere?

These should be considered as pre-conditions. If satisfied:

- Does F have the means to pay?
- Do his resources permit a one-off payment or periodical payments, bearing in mind that the latter is usually preferable and fairer.

What to do:

28. Essential preparation considerations:

- An application for a costs allowance in Schedule 1 / CA proceedings should be issued without delay;
- A separate breakdown of Section 8 and Schedule 1 legal costs (i) incurred to date of application; and (ii) prospective schedule of costs (up to FDR/DRA – *see below*) will need to be prepared in support: they need to provide a detailed costs budget of work to be done on documents, in preparation for hearings and (of course) instructing counsel. They will then usually be assessed on a pretty rough and ready basis;
- Obtain rejections of loan applications from two lenders (Novitas is unlikely to lend in CA and Sch1 proceedings absent security).
- Confirm that the solicitors are not prepared to enter into a Sears Tooth Agreement.

29. NOTE – a court is likely to exercise caution in respect of the amount and duration of an order for payment of legal services and thus limit it to DRA/FDR . However, a judge at the FDR hearing should not hear an application to vary/extend a legal costs order under FPR 2010, r 9.17(2). Either the application is made prior to commencing the FDR or, in the alternative, the matter will have to be listed on the first available date. It is prudent at the firsts costs' hearing to seek a hearing date say 14 days after the date fixed for the FDR for costs' issues to be determined leading up to trial.

TOLATA claims and Legal Costs Funding

30. TOLATA claims remain outside the scope of the FPR, but hybrid cases (i.e. TOLATA and Schedule 1 applications) are likely to fall under FPR – see ***Goldstone v Goldstone* [2011] EWCA Civ 39.**

31. There is no jurisdiction to make applications for legal costs provision in TOLATA proceedings – thus tactically an application under Schedule 1 would

have significant advantages if costs' funding was being sought (although note potential difficulties with jurisdiction issues in family courts unconnected to county courts).

32. The principal authority on the joinder of Schedule 1 applications and TOLATA proceedings is **W v W (Joinder of Trusts of Land and Children Act Applications [2003] EWCA Civ 924, [2004] 2 FLR 321** (per Thorpe LJ)

(1) Where there were children and where both parties had an interest in property, prima facie both the Children Act 1989 and the TOLATA would apply. Unless for some special reason it was not desired that the court consider exercising powers under both Acts, the application should be under both Acts, and the exercise of the powers under each Act should, as a matter of sensible management, be considered by the same county court and at the same time as conjoined applications (see paras [5], [27]).

33. However, the existence of a claim or potential claim to a beneficial interest in the property the subject of the TOLATA claim may very well have a bearing on whether the applicant for funding has satisfied all the pre-conditions for a claim.

What if there is a challenge to the jurisdiction or the 'subject matter' of the proceedings?

34. This could arise in a number of situations:

- The validity of the marriage may be in issue;
- The jurisdiction of the court to entertain a petition for divorce is disputed and/or a stay may be being sought;
- Leave to make a Part III claim may be a real issue;
- Paternity is disputed.

35. The 'need for caution' is highlighted at paragraph 14(iii) of Rubin. However, it is often difficult for the payer (who is usually, but not inevitably, the party challenging jurisdiction) to have any award 'discounted' because of the jurisdictional uncertainty.
36. The potential unfairness is most stark could where the challenge is ultimately successful and the payer receives an order for costs against the payee. As the payee is often impecunious, not only will such an award be unenforceable but the undertaking to repay costs funding (pursuant to paragraph 14(ix) of Rubin) is often worthless.
37. In *Moore v Moore* [2009] EWCA Civ 1427 [2010] 1 FLR 1413, the withdrawal of divorce proceedings did not in any way invalidate the previous maintenance pending suit orders. Not only was the payer obliged to pay arrears but it would be "exceptional" for him to accept repayment. There appears no difference in principle with orders for legal services provision. One further issue is that it will be difficult, if not impossible, to recover from payments which have already been made by the payee to the payee's solicitors.
38. Mostyn J in *MET v HAT (Interim Maintenance)* [2013] EWHC 4247 (Fam) [2014] 2 FLR 692 stated "...that I am extremely doubtful that the subject matter of the proceedings has any merit at all, I decline to award any sums by way of a costs allowance in respect of the wife's claims for herself". He was, however, prepared to award maintenance for the children and funding in respect of the costs of securing that maintenance for the children. There was little doubt that the payer was a man of substantial means.
39. However, in *MET v HAT (Interim Maintenance) (No 2)* [2014] EWHC 717 (Fam) [2015] 1 FLR 576, Mostyn J had changed his mind about the 'subject matter' of the proceedings and therefore made costs provision to the wife of resisting the challenge, should the husband contest jurisdiction.

40. There are additional issues for a Part III claim. Interim periodical payments under s.14 of the 1984 Act can only be ordered once leave has been granted. So, it may be that solicitors for an impecunious application will have to take a commercial risk: if leave is granted, there appears no reason in principle why the costs of making a successful application for leave could not be recoverable as historic costs under the principles outlined above.
41. Finally, and for the sake of completeness... there may be situations where there is an issue that because of the Maintenance Regulation, the English court has no jurisdiction to award 'maintenance' for the spouse. This could potentially arise on a sole domicile divorce – see Article 3 of the MR. Arguably, legal services provision could be said not to be 'maintenance' but the issue has, it is believed, yet to be resolved.

Funding for a child to instruct lawyers

42. Subject to 'Gillick' competence and other requirements in FPR 16, there seems no reason in principle why a child should not be able to apply for a funding order against either or both his parents.
43. In the case scenario, we are told that Leppard (aged 13) has instructed lawyers and seeks a costs funding order against both parents.
44. Under FPR 16.2(1), a child can be joined as a party to proceedings if the court considers it in the best interests of the child to do so and PD16A applies. There is a growing acceptance in recent case law of the need to involve children – particularly teenagers of sufficient maturity – in a process which directly impacts on them. As Thorpe LJ said in *Mabon v Mabon* [2005] *EWCA Civ 634* [2005] 2 *FLR* 1011, (para.28):

"...we must, in the case of articulate teenagers, accept that the right to freedom of expression and participation outweighs the paternalistic judgment of welfare".

45. This was recently echoed by Munby P in the long running matter of *Cambra v Jones* [2014] EWHC 913 (Fam) [2015] 1 FLR 263 where the child (a girl, aged 16) was anxious to participate, the outcome affected her profoundly and where she had a standpoint incapable of being represented by either of the adult parties.
46. Where the application to be joined as a party succeeds, rr.16.4 and 16.6 will dictate whether a child can instruct a solicitor independently or whether s/he must do so through a children's guardian.
47. As regards the instruction of a solicitor *per se*, a child may conduct proceedings without a children's guardian or litigation friend where the following conditions under FPR 16.6(3) are satisfied:
- (a) The child has obtained the permission of the court; or
 - (b) A solicitor –
 - (i) considers that the child is able, having regard to the child's understanding, to give instructions in relation to the proceedings; and
 - (ii) has accepted instructions from that child to act for that child in the proceedings and, if the proceedings have begun, the solicitor is already acting.
48. On any application for a financial remedy, the court may direct that the child be separately represented (FPR, 9.11(2))⁴. Indeed, there has been increasing representation of children in Schedule 1 proceedings since *Morgan v Hill*

⁴ "financial remedy" includes applications under Schedule 1 to the 1989 Act (FPR, r 2.3)

[2006] EWCA Civ 1602 [2007] 1 FLR 1480, closely followed by *Re S (Unmarried Parents: Financial Provisions) [2006] EWCA Civ 479 [2006] 2 FLR 950*. In the latter case, there was "an intense and bitter battle" between the parents, where Thorpe LJ held (at para.17) that:

"It was easy to see how, in such circumstances, the real crux of the case can be lost to view unless there is some advocate there to urge constantly the needs and interests of the child. For that, in the end, is what the award is largely designed to satisfy".

49. Cases, where, for example, there is an issue as to what are the child's and mother's respective needs, it may be of benefit for a child to be separately represented. This could prove advantageous if a mother is to defeat an accusation that she is motivated by her own needs rather than those of the child. However, this strategy could prove high risk: care will be needed to avoid bringing the child into conflict with its' parents.

50. Legal Aid is technically still available for children who are a party to proceedings. However, according to Section 9 of the Legal Aid Agency's '*Guide to Determining Financial Eligibility for Controlled Work & Family Mediation April 2015*', the resources of the child's parent will usually count as the resources of the child, although there is a discretion if this would be "inequitable":

"When assessing the means of a child, the resources of a parent, guardian or other person who is responsible for maintaining him or who usually contributes substantially to the child's maintenance must be taken into account, as well as any assets of the child. There is a discretion not to aggregate assets in this way if it appears inequitable to do so, having regard to all the circumstances including the age and resources of the child and any conflict of interest between the child and the adult(s). For example in consideration of the age and resources of the child, the provider may

determine that it is inequitable to aggregate a child aged 17 years who is estranged from his parents, living separately from them and who is fully financially independent from his parents."

51. Once a child has been joined as a party, and assuming s/he is not eligible for legal aid, any merits based argument about ongoing funding falls away. The issues for consideration are not dissimilar to those considered above, and are likely to be:

- What are M & F's respective financial resources and income?
- Do either of them have the means to pay and, how, if at all, should the child's legal costs be apportioned between them?
- Do their resources permit a one-off payment or periodical payments, again bearing in mind that the latter is usually preferable and fairer.

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June 2017



Section 7

Private Law Issues: The Domestic Landscape

Kate Branigan QC & Sam King

PRIVATE LAW UPDATE

WHAT CAN TNT DO ABOUT ROW L REMOVING MESSI TO MANCHESTER?

Re R (A Child) [2016] EWCA Civ 1016

This appeal concerned one year old H. Parents had met and begun cohabitation in 2013. Whilst parents had been living together family had been based in Kent. In January 2016 the parents separated when Mother left Kent and travelled to live in the North East where her family were living, alleging that the father had been abusive to her. Mother had taken H without the knowledge or consent of F.

Father requested mother to return to Kent and through solicitors indicated his intention to seek a court order for their return. Mother sought and was granted a without notice P.S.O. to prevent H being removed from her care and the proceedings then continued in the North East.

On 5 February 2016 the District Judge had dismissed father's application for an order that mother should return to family home in Kent with H and on 15 March 2016 the circuit judge dismissed father's appeal against that order. Permission for a second appeal was given by King LJ and the International Centre for Family Law, Policy and Practice were permitted to intervene and made submissions to the Court of Appeal in addition to those of mother and father.

At first instance (with both parties in agreement that H should remain in the care of his mother) father argued that

- the mother had taken unfair advantage over him by her unilateral removal of H to the North East
- that he would be prejudiced in the litigation if the mother and H were not to be returned to Kent.
- that H's medical condition should continued to be monitored in Kent

- based upon the decision in Re C (Internal Relocation) [2015] EWCA Civ 1305 the court should take the same approach to the case as would be taken where a child is unilaterally removed abroad, restoring the status quo by returning H home forthwith and allowing the court in Kent to determine the issues between the parties.

District judge was not persuaded and made his decision by applying the welfare principle in section 1(1) Children Act 1989 and having regard to the welfare checklist in the usual way. He particularly considered the disruption to H that the move to the North East had caused, but also commented that if the father's application was granted, that would mean a further move to Kent, and depending on the outcome of the litigation in future, there may be yet another move. He did not consider that H's medical condition required him to be living in Kent. Father's abusive behaviour would need to be looked at by the court in due course.

Father appealed that decision to circuit judge. The argument based on Re C was advanced again and was for a second time rejected, the circuit judge proceeding on the basis that the district judge had been right to determine the applications by the application of the welfare principle. Father also challenged district judge's order on the basis that his welfare analysis was flawed but that argument was also rejected.

Central question for the Court of Appeal was whether the removal of H without the knowledge or consent of his father (which father characterised as an abduction) should be approached in the same way as an international abduction with the court being invited to make an order for summary return of the child to his home in Kent.

Father's argument was that in the light of Re C, a legal issue arose as to the way in which the courts should approach applications by parents in the wake of a unilateral domestic/internal removal of a child from his home, contending that the summary return of a child should be the standard response to domestic abductions for the following reasons:

- neither parent should be entitled to make a substantial change in the child's life without the agreement of the other parent or permission from the court
- it is important also to prevent one parent from stealing a march on the other by "a unilateral approach or flagrant breach of the rules"
- it is important to take into account the disruption caused to the child by an unplanned move and the profound impact that it has on the relationship between the left behind parent and the child
- it would usually be in a child's best interests for the status quo to be restored whilst a decision is made as to the future
- the courts should deprecate abductions and give a strong message to parents that return is the order of the day.
- an internal abduction has the potential interfere with the Art 8 rights of the left behind parent

Court of Appeal rejected the contention that Re C represented a "sea change" in the law requiring a new approach to cases where one parent unilaterally moves a child from their home to another place in England and Wales and were also unable to accept the argument that there is or should be a general principle that summary return to the place where the child was formerly resident should follow upon such a move unless there are good welfare reasons why that should not happen. Held that as in Re C the child's welfare is the paramount consideration in internal relocation cases so it is also in proceedings that result from a unilateral move of the type that took place here. Per Black LJ at [19]:

"Such proceedings will normally be Children Act proceedings. One or the other parent (or both) will be seeking an order under section 8 of the Children Act 1989. By virtue of section 1(1) and section 1(3) of that Act, it is by the application of the welfare principle and the use of the welfare checklist that the outcome is decided. These are the principles that Parliament has decided should determine the case. There is no room for supplementary principles or presumptions devised by the courts and there is a significant amount of jurisprudence which demonstrates that

glosses and sub-tests can distract unhelpfully from the core principles and restrict the ability of the courts to respond flexibly and to achieve what is in the best interests of a child. It is one thing for a presumption or supplementary principle to be dictated in rules or statute (such as section 1(2A) of the Children Act 1989) and another for the courts to add to the law in this way."

Appeal dismissed.

Re C (Internal Relocation) [2015] EWCA Civ 1305, [2017] 1 FLR 103

10 year old child divided her time between mother and father who lived close to each other in London (2 nights per week and alternate week-ends with father). Father applied for an extension of his weekend contact to include Sunday evening and mother applied for a SIO permitting her to relocate to Cumbria. CAFCASS officer felt that it was a finely balanced case with benefits and losses in both relocation and remaining but concluded that it was not in the child's best interests to move to Cumbria because of the impact it would have on the crucial relationship with her father

At first instance the recorder held that the mother's application was genuine and was not motivated by a desire to exclude the father from the child's life, that her plans were well researched and realistic and took into account the child's expressed wishes in favour of relocating. A child arrangements order was made permitting the mother and child to relocate to Cumbria, and providing for contact with the father on alternate weekends and during the week if the father was able to travel to Cumbria in addition to daily telephone, Facetime or Skype contact. The father appealed.

Dismissing the father's appeal the Court of Appeal held that

(1) There could be no doubt that the welfare principle in s 1(1) of the Children Act 1989 dictated the result in both internal and external relocation cases. The application of that test involved a holistic balancing exercise undertaken with the assistance, by analogy, of the welfare checklist, even where it was not statutorily applicable. The exercise was not a linear one and involved balancing all the relevant factors, which may vary hugely from case to case, weighing one against the other,

with the objective of determining which of the available options best met the requirement to afford paramount consideration to the welfare of the child

(2) The authorities could not be interpreted as imposing a supplementary requirement of exceptionality in internal relocation cases. The courts would be resistant to preventing a parent from exercising his or her choice as to where to live in the UK unless the child's welfare required it, but that was not because of a rule that such a move could only be prevented in exceptional cases. It was because the welfare analysis led to that conclusion. Once welfare had been identified as the governing principle in internal relocation cases, there was no reason to differentiate between those cases and external relocation cases.

(3) The approach set out in K v K (Relocation: Shared Care Arrangement) [2011] EWCA Civ 793, [2012] 2 FLR 880, Re F (Relocation) [2012] EWCA Civ 1364, [2013] 1 FLR 645, and Re F (A Child) (International Relocation Cases) [2015] EWCA Civ 882 should apply equally to internal relocation cases. The outcome of that approach would depend entirely on the facts of the individual case [2017] 1 FLR 104

(4) The recorder's approach to his decision was in line with the law. He did not focus solely on Payne v Payne [2001] EWCA Civ 166, [2001] 1 FLR 1052 as the judge did in Re F (A Child) (International Relocation Cases) [2015] EWCA Civ 882, nor did he concentrate only upon the discipline there set out. He referred to the factors identified in Payne, which was perfectly permissible where a judge found it of assistance as part of his marshalling and/or analysis of the evidence before determining what the child's best interests required: K v K, Re F (Relocation), and Re F (A Child). He also paid careful attention to the welfare checklist which he thought provided significant assistance, particularly as this was a finely balanced case. In the light of all the material assembled, he took his decision on the basis of what the child's best interests demanded, as was quite clear from the judgment

(5) The judge was not bound to accept what the CAFCASS officer recommended. He had his own role in the proceedings and he was right that it was ultimately for him to determine what risks there were, just as it was for him to consider all the other elements of the welfare checklist and to determine, based on all the evidence that he received, what was in the child's best interests.

ON WHAT BASIS WILL THE COURT APPROACH THE QUESTION OF RELOCATION TO THE US?

K v K (Relocation: Shared Care Arrangement) [2011] EWCA Civ 793, [2012] 2 FLR 880

Re F (Relocation) [2012] EWCA Civ 1364, [2013] 1 FLR 645

Re F (A Child) (International Relocation Case) [2015] EWCA Civ 882, [2017] 1 FLR 979

Re M (Children: Relocation) [2016] EWCA Civ 1059

Factual background:

Father had home in UK and successful international business career working in the UK, US and Middle East. Working life now took him to Dubai, Jeddah and Moscow where he spent approximately one third of his time.

Mother was a Ukrainian born Russian with joint Russian and British nationality. Living in the UK with the two children of the family (12 and 10) and step-father. Children had been settled in the UK for 10 years and spoke fluent English and Russian.

Extremely acrimonious proceedings on-going for a number of years in which mother was found to have made some 'appalling decisions' in relation to the children's contact with father. Eventually resolved with children spending alternate weekends and extended holiday periods with father.

During application by mother to change the children's schools (having moved to a new home which was too far for the children to commute to their current school) mother was offered a job as Director of Development in Moscow with a proposal that her husband's company would also relocate to Moscow. Father issued cross-application for children to live with him and attend school in London or boarding school in the south of England. At trial mother's position was that even if leave to remove was not granted she would in any event relocate to Moscow with her husband and the children would then live with father in London.

Judge found that the girls should remain with the mother as their primary carer and that they wished to go to Moscow where they would quickly fit in. He considered that, whilst there was no immediate financial "necessity" for the mother and stepfather to relocate to Russia, the mother's job offer was genuine and was the

catalyst to move her business. He found that the step-father had in any event planned to go to Moscow for some time, and that if the mother was forced to remain in the UK that plan would proceed, forcing a de facto separation between them. He held that the welfare of the was paramount but that if the mother was able to pursue legitimate career objectives not inconsistent with the girls' welfare, she should be entitled to pursue them. He indicated that the father's relationship with the girls had to be preserved and that contact could clearly be continued. He concluded that it was in the girls' best interests to relocate to Moscow. He put in place "insurance" in the form of a £600,000 charge on the mother's house as a safeguarding provision to secure appropriate contact for the father.

On appeal the father contended that (1) the judge had attributed too much weight to the mother's relationship with the stepfather and insufficient weight to the relationship with him;

(2) the judge had failed to scrutinise the mother's financial case properly;

(3) the need for an order for security should have weighed heavily against allowing the relocation

Court of Appeal held:

- After a period of uncertainty as to how the so-called guidance in Payne v Payne [2001] EWCA Civ 166 should be applied in relocation cases, the matter had been clarified in K v K (Relocation: Shared Care Arrangement) [2011] EWCA Civ 793, [2012] 2 FLR 880 and re-emphasised in Re F (Relocation) [2012] EWCA Civ 1364, [2013] 1 FLR 645 there was only one principle in relocation cases and that was that the welfare of the child was paramount;
- there was no presumption that the reasonable relocation plans of a primary carer would be facilitated unless there was some compelling reason to the contrary; Payne identified a number of factors which might be relevant in a relocation case, explained their importance to the welfare of the child, and suggested helpful disciplines to ensure that the proper matters were considered in reaching a decision but it did not dictate the outcome of a case

- The judge had not allowed himself to be constrained by the Payne guidance, nor had he approached the case on the basis that, because the stepfather would go to Moscow whatever the outcome of the case, that it led to any sort of a presumption in favour of allowing the mother's application to relocate. He had attributed appropriate weight to the relationship between the mother and step-father, taking account of the evidence that it was very much a positive feature in the girls' lives and that they themselves had a valuable relationship with him, and had throughout his judgment been conscious of the importance of the children's relationship with their father. He had carried out a proper welfare evaluation and had been entitled to conclude that it was in the children's best interests to relocate
- The judge had been right to find that the mother did not have to satisfy the court that it was "necessary" for her to relocate. To do so would put the sort of impermissible gloss on the welfare principle that *K v K* had so carefully dismantled.
- His decision in relation to the highly contentious financial aspects of the case was sustainable. The judge had made the order for security having concluded that the mother would continue to adhere to the extensive contact arrangements. He was thereafter entitled to make the order putting in place such safeguards which might offer comfort to the father, and to act as a deterrent to the mother in the event that she sought to undermine the contact order.

See also Re C-W (A Child)(Contact Overseas) [2015] EWCA Civ 1272; [2017] 1 FLR 131 and

R v R (Jurisdiction: Acquiescence) [2016] EWHC 1339 - guidance from MacDonald J when issuing private law proceedings that have an international element. Particular care required when making urgent without notice application which

- must strictly comply with the guidance in Re S [2001] 1 FLR 308, KY v DD [2011] EWHC 1277 (Fam); [2012] 2 FLR 200 and Re C (Due Process) [2013] EWCA Civ 1412; [2014] 1 FLR 1239
- must have Section 6 of Form C100 fully and accurately completed

Issue of jurisdiction must be addressed at the outset of proceedings and the court must then set out explicitly the basis upon which jurisdiction has been accepted or

rejected. At without notice hearing order should indicate that the decision as to habitual residence is provisional and based on evidence available to the court at that stage.

HOW WILL THE COURT DETERMINE THE APPLICATION TO TERMINATE PARENTAL RESPONSIBILITY?

Re P (Terminating Parental Responsibility) [1995] 1 FLR 1048

CW v SG (Parental Responsibility: Consequential Orders) [2013] EWHC 854 (Fam); [2013] 2 FLR 655

Re A (Termination of Parental Responsibility) [2013] EWHC 2962 (Fam); [2014] 1 FLR 1305

Re A and B (Radicalisation: Restrictions on Parental Responsibility) 2016 EWFC 40

The mother was British; the father was an Egyptian Muslim. They were married in the UK in 2012. The mother alleged that the father had assaulted her numerous times and had threatened to kill her and the eldest child. She also alleged that the father admired Syrian freedom fighters and had exposed the eldest child to violent films. She left with the eldest child in November 2013 and obtained a non-molestation order. The local authority and police were concerned for her and the child's safety and installed a panic button in their home. The younger child was born in May 2014. The father found out where the family were living and breached the order in June 2014. The police found items on him that suggested he was planning to harm the mother and possibly abduct the children. He was sentenced to three years' imprisonment and a 10-year restraining order was imposed. He denied any wrongdoing and made repeated attempts to contact the mother. The mother and children moved to a secret location. The mother applied for a child arrangements order that the children should live with her and have no contact with the father, a prohibited steps order preventing him from accessing their health and education information, a specific issue order that the children's names should be changed, and

an order preventing the father from making any applications without the court's permission until the youngest child reached 16.

Russell J held:

(1) Child arrangements order - The mother's evidence concerning the domestic abuse was accepted. The father's breaches of the non-molestation order had been very serious. He had posed a considerable and serious risk to the mother and children at that time and that risk had not diminished. The presumption that the involvement of each parent in the life of a child would further the child's welfare only applied when that involvement did not put the child at risk of suffering harm. In the instant case, it was clear from the father's past behaviour, his repeated breach of court orders and his total lack of remorse that his involvement in the children's lives would put them at risk of suffering significant harm whatever the level of that involvement. He would use contact to locate and physically harm the mother, exposing the children to physical and emotional harm, or to abduct or try to abduct the children. Even if that was not the case, he would use any and every opportunity to undermine the mother during contact. It would have a profoundly negative effect on her and would seriously undermine the quality of care she could give to the children. The child arrangements order was made as requested.

(2) Prohibited steps and specific issue orders - Changing the children's names and preventing the father from accessing their health and education information would effectively terminate his parental responsibility. However, allowing him access would inevitably lead to him discovering the family's location. Any obligation on a school or GP to share information with him would deeply undermine the mother's ability to settle the children and establish a level of security. Further, changing the children's names was needed to provide extra protection against abduction and was a proportionate response to the risks the father posed - AB v BB [2013] EWHC 227 (Fam) applied.

(3) Section 91(14) order - There was no history of vexatious applications, but further applications would return the family to court and heighten the risk of the father tracking them down. Therefore, a s.91(14) order was made to prevent the father from making any applications without the court's permission until the youngest child reached the age of 16 (paras 157-158).

(4) Radicalisation allegation - Despite seeking a finding of a risk of radicalisation by virtue of the father's beliefs and associations, the mother's counsel's schedule of findings had given no examples of that. It was clear that she had hoped the police disclosure would provide the necessary evidence to pursue it. The result was that the schedule effectively sought to equate Islam with radicalisation. Extremism, or radicalisation, was a sensitive subject and the courts would not accept or tolerate any suggestion that adherents of the Islamic faith, or any other faith, were by their very nature supporters of extremism. Such accusations or allegations could not be relied on without evidence. Where a criminal investigation was involved, it was necessary to wait for disclosure before producing the schedule (paras 117-119, 123).

AND FOR YOUR FURTHER INTEREST.....

BDD v IBG [2007] NZFLR 1

Millet v Clyde [2012] NZFLR 351

Interesting to note the treatment of unilateral internal relocation in New Zealand - previously a matter which would count against a parent when the proceedings came before the court but more recent authority suggests it should simply be seen as one of the circumstances within the board welfare analysis.

JOINDER OF CHILDREN

FPR 2010 R16.2 AND PD16A paras 7.1-7.5

Rule 16.2 - "The court may take a child a party to the proceedings if it considers it is in the best interests of the child to do so"

Re LC (Reunite: International Child Abduction Centre Intervening) [2014] UKSC 1, [2014] 1 FLR 1486

Approach to be adopted to joinder of child - para [45] per Lord Wilson:

"If, and only if, the court considers that it is in the best interests of the child to make her (or him) a party, the door opens upon a discretion to make her so. No doubt it is the sort of discretion, occasionally found in procedural rules, which is more theoretical than real: the nature of the threshold conclusion will almost always drive the exercise of the resultant discretion."

SEEING THE CHILD

Re KP (Abduction: Child's Objections) [2014] EWCA Civ 554; [2014] 2 FLR 660

Listening to children: are we nearly there yet? [2016] Fam Law 320, 326 (Lady Hale)

Are we there yet? (King LJ) [2017] Fam Law 289

Re A and B (Contact)(No. 2) [2013] EWHC 4150 (Fam); [2015] 2 FLR 913

Re A and B (Contact)(No. 4) [2015] EWHC 2839

Re F (Children)(Wrongful Retention: Child's Objections) [2015] EWC Civ 1022

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Section 8

Children giving evidence

Cyrus Larizadeh QC & Joanne Porter

ADVOCACY AND THE VULNERABLE

Introduction

The question as to how vulnerable witnesses should be treated in the family court has recently undergone a lot of scrutiny and debate. For some time now the identification of vulnerable witnesses and how they should be assisted to give their best evidence has been fine-tuned and great progress has been made. On 30 December 2016 Ministry of Justice published a statement by Sir James Munby President of the Family Division. The President commented on 'the pressing need to reform the way in which vulnerable people give evidence in family proceedings'. In his view 'the family justice system lags woefully behind the criminal justice system'. Reform, he says, is 'a matter of priority', for example, to prevent the fact that 'alleged perpetrators are able to cross-examine their alleged victims'.

Consideration is currently being given to draft Practice Direction (PD) 3AA, Vulnerable persons: participation in proceedings and giving evidence, and a consultation on the a "vulnerable witness practice direction" closed on 17th March 2017. The PD 3AA is intended to support a new Part 3A of the Family Procedure Rules 2010. The feedback to the consultation is now being analysed and no decision has yet been reached. The Practice Direction has been developed following the publication in March 2015 of the final report of the 'Judicial Working Group on Vulnerable Witnesses and Children' jointly chaired by Russell J and Hayden J. The consultation and draft Practice Direction can be found at <https://www.gov.uk/government/consultations/vulnerable-witnesses-practice-direction>.

It is essential that consideration is given at the earliest opportunity as to whether a witness would be considered as vulnerable. If a witness is identified as vulnerable, courts and advocates must then consider any special measures that may be necessary and how to prepare for and conduct the cross-examination of the witness to ensure that the witness' best evidence is given.

The importance of specialist advocacy

The importance of the quality and method of the advocacy when dealing with a vulnerable witness cannot be underestimated. In order for the court to be able to determine the matter before it, it must hear the **best evidence** of the parties and witnesses involved. Special measures can only go so far in assisting a witness, and whilst important cannot replace careful and thoughtful preparation and execution of the cross-examination of the witness.

The Inns of Court College of Advocacy have provided invaluable assistance when considering how cross examination should be conducted.

The Advocacy Gateway provides 18 toolkits which include :

- links to source material
- trial transcript questions, with suggestions about how they might be improved
- highlighted examples of good practice and poor practice, and
- lists of references, contributors and reviewers

These toolkits gives advocates access to general good practice guidance when preparing for trial in cases involving a witness or a defendant with communication needs. The tool kits can be at:

<http://www.theadvocatesgateway.org/toolkits>

At the start of each toolkit the importance of the preparation and execution of the advocacy in these matters is reiterated by the following statement:

"Questioning that contravenes principles for obtaining accurate information from a witness by exploiting his or her developmental limitations is not conducive to a fair trial and would contravene the Codes of Conduct".

The Inns of Court College of Advocacy have also rolled out their 'Advocacy and the vulnerable' national training programme. Within their literature is an invaluable list of '20 principles of questioning' dealing with aspects of preparation, conduct and questions.

These principles were created by HHJ Cahill QC, Professor Michael Lamb and Dr. Jacqueline Wheatcroft. It is not an exhaustive list and the cross examination of a vulnerable witnesses is obviously fact specific. The approach taken by advocates should be adjusted according to the facts of the case. Careful consideration should be given to the extent and type of vulnerability in each witness in each case.

The 20 principles of questioning:

Principles for preparation

1. Ground Rules Hearing

Rules arising out of the Ground Rules Hearing must be adhered to by all advocates in the case. It is likely that advocates will be asked to provide a list of questions for each witness and the Judge will see the questions in advance and decide if they are appropriate in style and length. The Rules are vital to the effective cross examination of a vulnerable witness

2. Issues

The identification of the key issues should be undertaken at the earliest opportunity.

An advocate should formulate focused and brief questions and should not ask questions about peripheral issues. Questions should be concise so as to not lengthen the time that a witness has to give evidence unnecessarily.

3. Pre-draft

Advocates should draft the questions in advance. The pre-drafting will help to keep a flow of questions and prevents falling into tried and tested methods of cross-examination. It is the Judge and not the Intermediary who has the final say as to whether a question is permitted. Intermediaries are there to advise and assist, not to make decisions

Principles for conduct

4. Rapport

There is no need to build rapport as a precursor to starting questions. Witnesses must be able to keep a focus on the role of the parties in the process and the questions asked. Do not allow the witness to become side-tracked on irrelevant matters. A Judge is likely to explain to the witness that it is OK if they don't understand or if they don't remember something.

5. Ask. Don't talk

Do not suggest that you will talk to the witness, the witness is expecting to be asked questions by the advocate. It goes without saying that it is essential not to confuse the witness. The witnesses' expectation of what will happen will have prepared them for evidence.

6. Chronology

Keep to a chronological order as jumping around a timeline will confuse the witness. If possible keep the questions to an order which the witness can follow chronologically.

7. Pace

Put questions at a reasonable pace for the witness, in light of their vulnerability. Pauses between the questions are important (at least 6 seconds are recommended) and also allow time for the witness to digest the question. Response times will be slower for the witness and advocates should wait for them to answer. Advice from the intermediary will also be covered in the Ground Rules Hearing and this advice should be followed carefully. The witness needs time to digest the information before answering.

8. No statements

Ask questions do not make statements. A change of intonation in the voice to denote a question is not appropriate for a vulnerable witness, the subtleties may be lost and they may not realise that they can or should answer. This may result in a witness simply agreeing because they think that they should.

9. Signposting

Signposting is important. It helps to keep the witness focused. When moving on to another topic re-signpost for the witness. An advocate should not move from one topic to another without signposting it to avoid misunderstanding.

10. No repetition

Do not be repetitive. The judge has a duty to control questions in accordance with *R v Jonas [2015] EWCA Crim 562*. Over rigorous or repetitive questioning of a child witness must be stopped. The judge must ensure that the witness is treated fairly over all. The witness should not be asked the same question to the same ends by every advocate and issues may be divided between the advocates if appropriate and there is no unfairness caused.

11. Behaviour

An advocates behaviour should be kept in check at all times. A vulnerable witness finds human behaviour hard to read. This can inhibit their performance if behaviour appears to be disapproving or indifferent. It is imperative that advocates do not exhibit rage or irritation in order to maintain the equilibrium in the court room to enable the witness to answer the questions.

12. Distress

An advocate should watch for signs of distress or tiredness. Understanding the vulnerabilities of the particular witness is crucial. Intermediary reports are likely to be

detailed and make recommendations for a specific to the witness. An advocate must be very familiar with the recommendations for each witness to be cross examined.

Principles for questions

13. No "remember" questions

Avoid questions starting with *"do you remember?"*. These questions involve a complex process for some witnesses particularly children. Put the questions into context and use simple direct questions such as:

"did you go to the shops with Mark?"

"When you were five, did you get a cat?"

14. No pronouns

Identify who you are talking about in each question. Use the person's name or the name of the place eg:

"Did you go to the park with auntie Jean?"

"Did you like going into the sweet shop?"

It is essential that the witness knows who and where you are talking about to avoid confusion.

15. Telling someone else

Exercise special care when asking if and what a witness told someone else. Children are likely to be confused if asked if or what they have told someone else. A question such as "do you remember telling your teacher that your hand sore?" – may result in a 'no' response which could mean that they do not remember telling the teacher or their hand was not sore. Split the questions to "was your hand sore?" and then "Did you tell your teacher?".

16. No "why" and "how" questions

Avoid 'why' or 'how' questions. Don't ask why or how something has happened instead as what happened. Vulnerable witnesses can find identifying intention difficult and children can reverse 'why' and 'because' *"I fell over that's why I was running"*

17. No tag questions

A direct question is far better for a vulnerable witness. Judicial guidance has recommended that this form of question should be avoided. Tag questions are suggestive and coercive and unnecessarily complex. Tag questions contain a positive and a negative element for example:

"You wanted to go into the car with uncle Pete, didn't you?"

"You don't like Tommy, do you?"

Instead use:

"Did you go into uncle Pete's car?"

"Did you want to go in the car?"

18. No compound questions

Avoid compound questions. At the best of times a witness will not give reliable answers to compound questions. Answers from a vulnerable witness will be confused and lacking in value for example:

"You and Paul went to upstairs, jumped on the bed and nothing else happened?"

Instead ask:

"Did you and Paul go upstairs?"

"Did you jump on the bed?"

"Did anything else happen?"

19. Direct questions

Ask short and direct questions avoiding complex, tag or compound questions. This ensures the most accurate response from the witness. Direct questions are unlikely to confuse the witness eg:

"Who was with you when you went to the park?"

"Did you fall over at the park?"

"Did you see Sarah in the car?"

20. No leading questions

Start questions with 'what', 'where' 'when' and 'did' etc. This is due to the suggestibility of vulnerable witnesses. A vulnerable witness may have a desire to answer in a way that will please. Leading questions tend to be tag questions or statements turned into questions.

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Cyrus Larizadeh QC

Joanne Porter

20th June 2017

ABE TRANSCRIPT EXTRACT

Police: What did I speak to you about? [*on a previous occasion*]

Max: Daddy.

Police: Daddy, okay. And what did I ask you about daddy? Can you remember?

Max: Blood.

Police: Blood, yes. You've got a very good memory. And what did you tell me? What happened?

Max: Erm, once I had a needle and...

Police: And what?

Max: I can't remember.

Police: You can't remember. Okay, so let's go back on that one. So once, just one time, you are saying, you had a needle. Where did you have a needle?

Max: A long time ago. I saw Simon at the park.

Police: Oh right.

Max: My friend.

Police: Okay.

Max: But he's not my friend now.

Police: Why?

Max: Because he doesn't like me now.

Police: So, you're saying one time...

Max: Yeah.

Police: Daddy.

Max: Yeah.

Police: Injection.

Max: Yeah.

Police: Yeah? Okay. Tell me about that time.

Max: Erm, it was a long, long, long, long, long long, long, long time ago.

Cyrus Larizadeh QC

Police: A long time ago. How old are you?

Max: What?

Police: How old were you when this happened?

Max: Three.

Police: Okay, so you were three.

Max: No, four actually.

Police: Three or four.

Max: Four.

Police: You're four now. When's your birthday?

Max: March. No.

Police: No, your brother's birthday is in March.

Max: August.

Police: August.

Max: I just got confused.

Police: So, you were three or four and your daddy gave you an injection. Where was this?

Max: Erm, when we was about to go home?

Police: Okay. So, where were you before you went home?

Max: At the park.

Police: So, this happened at the park?

Max: Mmm.

Police: Gave you an injection.

Max: Mmm.

Police: At the park.

Max: Mmm.

Police: What park?

Max: No, actually, it was at...mummy and daddy and daddy stayed at home. No, mummy stayed at home.

Police: I'm writing stuff down.

Police: So there's all these people in the park?

Max: Mmm.

Police: But your daddy stayed at home?

Max: No. Mummy.

Police: Mummy stated at home and you were with daddy.

Max: Mmm and Sarah and Joanne was and Jane was.

Police: Okay.

Max: And John was and me and John saw Paul to there.

Police: Yeah. So, when did you have your injection?

Max: Erm, when mummy, erm, went back home.

Police: So, you went back home.

Max: Mmm.

Police: Yeah? And is that when you had your injection?

Max: Yeah.

Police: How did that happen then? Who did it?

Max: Erm, it just happened when I was touching a fence.

Police: It just happened when you were touching a fence?

Max: Yeah.

Police: So, you've been to the park and you went home, yeah? What time did you have your injection?

Max: Erm, I can't remember.

Police: Where were you when it...when you actually had it, where were you?

Max: Look.

Police: Look what I can't see because you're sitting on the floor. Oh, you've got a bruise on your leg. How did you get that?

Max: I can't remember. It was a long, long, long, long, long, long long, long, long time ago.

Cyrus Larizadeh QC

Police: Was it?

Max: Yeah.

Police: Okay. So, when you had your one injection, yeah, with your daddy?

Max: I've got big squares.

Police: Where were you when that happened?

Max: Erm, nearly home.

Police: Nearly home

Max: Yeah.

Police: Okay, so you weren't at home?

Max: No.

Police: So, daddy gave you an injection when you weren't at home.

Max: No, he gave me it when I was at home.

Police: Oh you got home. Right, okay.

Max: Yeah, he was at home.

Police: Was there anybody else at home?

Max: No, only me and m...daddy.

Police: You and daddy.

Max: Mmm.

Police: Okay. And what did he do...how did he inject you?

Max: Erm, he just cut through here. No, through here.

Police: Hold your hand up because we can't see you on the camera.

Max: He cut through here then it didn't hurt and he got it out, then he

Police: Got what out?

Max: What?

Police: Got what out?

Max: Erm, the thing.

Police: The thing. What thing?

Cyrus Larizadeh QC

Max: The needle.

Police: The needle, yeah, go on.

Max: Then he put a new skin on it.

Police: New skin.

Max: To make it better.

Police: And there was nobody else in the house and it was just you and daddy and it was when you were three or four.

Max: Four.

Police: Four, okay. So, definitely four and you're showing me that finger. Show me that finger again. That one. Was it definitely that finger? So, it was that finger on your left hand, yeah, and then you say he cut it. What did he cut it with?

Max: He cut it with scissors.

Police: Scissors, okay. So, he cut your finger with scissors and then he put the injection in there.

Max: Mmmm.

Police: And then what did he do. What happened then?

Max: He put a new skin on it.

Police: New skin, yeah.

Max: Then he, then it was all better.

Police: All better?

Max: Mmm. That's all.

Police: That's all?

Max: Yeah.

Police: What did he do with the blood he took out?

Max: Erm, he put it in a bowl, then tipped it in the sink, then he...that was all.

Police: That was all, yeah?

Max: And once John whacked him with one of Joanne's poles.

Police: You told me that before, yes.

Police: Are you saying that daddy injected you only once?

Max: Yeah.

Police: Are you sure?

Max: Yeah.

Police: Just the once?

Max: Yes.

[Previous interview by different police]

Police: When you spoke to X.

Max: Yeah.

Police: You told him about injections . Can you remember what you told him?

Max: Erm, no.

Police: What do you know about injections?

Max: Er...

Police: Have you had one?

Max: Er,no.

Police: You haven't had an injection?

Max: No. Where's my sticker?

Rebecca Jones is 6 years old. She has made allegations of a sexual nature against George Graham (the school caretaker). She was ABE interviewed and the key evidence is set out in the document attached. The Ground Rules have been approved and are provided in a list. The allegations are denied by George Graham who has summarised his instructions in a Proof. CLQC is the advocate instructed to cross examine her by video link.

REBECCA JONES

ABE

Extract of ABE Interview of Rebecca Jones

Transcript of Witness Interview: Rebecca Jones

DOB 11th January 2009⁴

Chelmsbridge Police Station Vulnerable Witness Suite Persons

present:

DC Gillian Perkins

Jan Jones - Intermediary

15th May 2015

Time started: 16.05 minutes

Time concluded: 16.30 minutes

Length of interview: 25

INTRODUCTION

⁴ Rebecca Jones will be 6 years old for the purposes of the trial

TRUTH AND LIES

Rebecca gave the following account in extract format:

1. I go to school at the Church of England primary school in Broad Street.
2. I also go with Mummy and Daddy to Sunday school.
3. The nice man there called Uncle George is my friend.
4. He sweeps up at Sunday school and piles the chairs up high.
5. He gives us lollipops and sweets if we are good.
6. He says I look pretty.
7. He says he likes my long blonde hair.
8. He lets me help him with the chairs and putting them in the cupboard.
9. I get sweets and lollipops because I am Uncle George's special girl.
10. When I was having a bath with my little brother, I told Mummy that Uncle George has got a lollipop as well.
11. I get my lollipop after I suck his lollipop.
12. My brother has a lollipop.
13. Mummy calls my brother's willy a lollipop.
14. I told her about Uncle George's lollipop.
15. Mummy started crying when I told her this
16. I also told Mummy that Uncle George touched me in my front bum.
17. She asked me about it but I didn't want to talk about it then.

REBECCA JONES

GROUND RULES

Rebecca Jones: Practical Matters

- 64. This witness should be called Becky.
- 65. Wigs and gowns (including tabs) will not be worn.
- 66. Cross examination will last no longer than 20 minutes for this witness.

- 67. This witness will be timetabled at 10 a.m. on the day of her evidence and advocates should ensure there are no delays.
- 68. It may be necessary to take breaks and the intermediary will indicate verbally if a break is required.
- 69. The Crown Prosecution Service will make available age appropriate body maps available for the witness in Court. These may be referred to and the witness must not be asked to refer to her own body.
- 70. This witness may use small figures and furniture if appropriate to show as well as tell.
- 71. The witness may have a small object to touch during evidence.
- 72. A visual time table can be used if required.
- 73. This witness will have a witness supporter from the Young Witness Support Service in the live link room with her.

Questioning Techniques for Rebecca Jones

- 74. Ask questions in a logical chronological sequence.
 - 75. Do not repeat questions.
 - 76. Use the witness's name before questions to enable her to focus.
 - 77. Use headlines in relation to the topics that are being dealt with such "I am going to ask you about... or "I want to talk to you about" ...
-
- 78. Ask short, simple questions starting with words such as what, where and who.
 - 79. This witness may have difficulties with questions beginning with why, when and how.
 - 80. Do not use statements posed as questions.
 - 81. Ask questions containing only one point.

GEORGE GRAHAM

PROOF OF EVIDENCE

6. I have read the witness statement of Rebecca Jones and make the following comments:

(i) I do work at the Sunday school and I do know this child. She is pretty with long blonde hair but I didn't say this to her.

(ii) I accept that I allowed her to help me clear up at the end. This is because sometimes her parents would be late or would go to speak to the other people at the school. I was effectively babysitting her until someone came to take her home.

(iii) I did not ask her to suck my 'lollipop'

(iv) I did not touch her sexually. I never touched her anywhere near her front bum if this means vagina or genital area. The nearest I would get to touching that area was the top of her leg just over the knee. This was because she liked the nursery rhyme Incey Wincey spider. She could not have mistaken this for a sexual touch because it wasn't.

(v) Sometimes I would lift her up to sit on the top chair of a pile of stacked chairs. I would hold her to steady her on her arm or her legs. This was not a heavy hold and she enjoyed this game and would laugh. I did not touch her anywhere else. I might have also tickled her once or twice after I lifted her down. Again this was not in any way sexual.

(vi) I would give her an extra biscuit from the tin for helping but not a lollipop – I would expect her parents would see any lollipops she had at the end of the day.

(vii) I had to tell Rebecca off on one Sunday as she pushed over some chairs I was stacking up. I don't think she liked this.

(viii) This is the only reason I can think of that might make her say this about me. Unless of course someone in Graces' family has put her up to it. I don't know whether she knows them or not but nothing would surprise me.



Section 9

Media Issues:
Stop Press! Media Interest

Greg Callus & Adam Wolanski
5 Raymond Buildings

Media Issues

The Press get wind by unknown means of the fact that a hearing is to take place in which Leppard (aged 13) will give evidence against her mother. She has alleged her mother has been physically and emotionally abusive. She has also disclosed that TNT's best friend Shank-Dope (a well known grime star) and she have been having an intimate relationship. The press wish to report the hearing. Both Row L and Shank-Dope are involved in Youth Charities.

Section 1 of the Judicial Proceedings (Regulation of Reports) Act 1926

Restriction on publication of reports of judicial proceedings.

(1) It shall not be lawful to print or publish, or cause or procure to be printed or published—

(a) in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details being matters or details the publication of which would be calculated to injure public morals;

(b) in relation to any judicial proceedings for dissolution of marriage, for nullity of marriage, or for judicial separation, [or for the dissolution or annulment of a civil partnership or for the separation of civil partners] ¹, any particulars other than the following, that is to say:—

(i) the names, addresses and occupations of the parties and witnesses;

(ii) a concise statement of the charges, defences and counter-charges in support of which evidence has been given;

(iii) submissions on any point of law arising in the course of the proceedings, and the decision of the court thereon;

(iv) the summing-up of the judge and the finding of the jury (if any) and the judgment of the court and observations made by the judge in giving judgment:

Provided that nothing in this part of this subsection shall be held to permit the publication of anything contrary to the provisions of paragraph (a) of this subsection.

(2) If any person acts in contravention of the provisions of this Act, he shall in respect of each offence be liable, on summary conviction, to imprisonment for a term not exceeding four months, or to a fine not exceeding level 5 on the standard scale, or to both such imprisonment and fine:

Provided that no person, other than a proprietor, editor, master printer or publisher, shall be liable to be convicted under this Act.

(3) No prosecution for an offence under this Act shall be commenced in England and Wales by any person without the sanction of the Attorney-General.

(4) Nothing in this section shall apply to the printing of any pleading, transcript or evidence or other document for use in connection with any judicial proceedings or the communication thereof to persons concerned in the proceedings, or to the printing or publishing of any notice or report in pursuance of the directions of the court; or to the printing or publishing of any matter in any separate volume or part

of any bonâfide series of law reports which does not form part of any other publication and consists solely of reports of proceedings in courts of law, or in any publication of a technical character bonâfide intended for circulation among members of the legal or medical professions.

Section 39 of the Children and Young Persons Act 1933

Power to prohibit publication of certain matter

(1) In relation to any proceedings, other than criminal proceedings, in any court, the court may direct that the following may not be included in a publication —

(a) the name, address or school of any child or young person concerned in the proceedings, either as being the person [by or against] ⁷ or in respect of whom the proceedings are taken, or as being a witness therein:

(aa) any particulars calculated to lead to the identification of a child or young person so concerned in the proceedings;

(b) a picture that is or includes a picture of any child or young person so concerned in the proceedings;

except in so far (if at all) as may be permitted by the direction of the court.

(2) Any person who includes matter in a publication in contravention of any such direction shall on summary conviction be liable in respect of each offence to a fine not exceeding level 5 on the standard scale

(3) In this section—

“publication” includes any speech, writing, relevant programme or other communication in whatever form, which is addressed to the public at large or any section of the public (and for this purpose every relevant programme shall be taken to be so addressed), but does not include a document prepared for use in particular legal proceedings;

“relevant programme” means a programme included in a programme service within the meaning of the [Broadcasting Act 1990](#)

Section 12 of the Administration of Justice Act 1960

Publication of information relating to proceedings in private.

(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say—

(a) where the proceedings—

(i) relate to the exercise of the inherent jurisdiction of the High Court with respect to minors;

(ii) are brought under the [Children Act 1989](#) or the [Adoption and Children Act 2002](#); or

(iii) otherwise relate wholly or mainly to the maintenance or upbringing of a minor;

(b) where the proceedings are brought under the [Mental Capacity Act 2005](#), or under any provision of the [Mental Health Act 1983](#) authorising an application or reference to be made to the First-tier Tribunal, the Mental Health Review Tribunal for Wales or the county court;

(c) where the court sits in private for reasons of national security during that part of the proceedings about which the information in question is published;

(d) where the information relates to a secret process, discovery or invention which is in issue in the proceedings;

(e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.

(2) Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.

(3) In this section references to a court include references to a judge and to a tribunal and to any person exercising the functions of a court, a judge or a tribunal; and references to a court sitting in private include references to a court sitting in camera or in chambers.

(4) Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section (and in particular where the publication is not so punishable by reason of being authorised by rules of court).

Section 97 of the Children Act 1989

Privacy for children involved in certain proceedings.

(1) [...]

(2) No person shall publish to the public at large or any section of the public any material which is intended, or likely, to identify—

(a) any child as being involved in any proceedings before the High Court or the family court in which any power under this Act or the Adoption and Children Act 2002 may be exercised by the court with respect to that or any other child; or

(b) an address or school as being that of a child involved in any such proceedings.

(3) In any proceedings for an offence under this section it shall be a defence for the accused to prove that he did not know, and had no reason to suspect, that the published material was intended, or likely, to identify the child.

(4) The court or the Lord Chancellor may, if satisfied that the welfare of the child requires it and, in the case of the Lord Chancellor, if the Lord Chief Justice agrees, by order dispense with the requirements of subsection (2) to such extent as may be specified in the order.

(5) For the purposes of this section—

"publish" includes—

(a) include in a programme service (within the meaning of the [Broadcasting Act 1990](#));

(b) cause to be published; and

"material" includes any picture or representation.

(6) Any person who contravenes this section shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale.

(6A) It is not a contravention of this section to—

(a) enter material in the Adoption and Children Act Register (established under [section 125](#) of the [Adoption and Children Act 2002](#)), or

(b) permit persons to search and inspect that register pursuant to regulations made under [section 128A](#) of that Act.

(7) [...]

(8) [...]

(9) The Lord Chief Justice may nominate a judicial office holder (as defined in [section 109\(4\)](#) of the [Constitutional Reform Act 2005](#)) to exercise his functions under subsection (4).

Section 12 of the Human Rights Act 1998

Freedom of expression.

(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

(2) If the person against whom the application for relief is made (*"the respondent"*) is neither present nor represented, no such relief is to be granted unless the court is satisfied—

(a) that the applicant has taken all practicable steps to notify the respondent;
or

(b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

(a) the extent to which—

- (i) the material has, or is about to, become available to the public; or
- (ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

(5) In this section—

"court" includes a tribunal; and

"relief" includes any remedy or order (other than in criminal proceedings).

LORD STEYN in *Re S (a child)* [2004] UK 47 at [17]

"17. The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in *Campbell v MGN Ltd* [2004] 2 WLR 1232. For present purposes the decision of the House on the facts of *Campbell* and the differences between the majority and the minority are not material. What

does, however, emerge clearly from the opinions are four propositions. First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test. This is how I will approach the present case."

Greg Callus
Adam Wolanski
5 Raymond Buildings

The Independent Press Standards Organisation (IPSO), as regulator, is charged with enforcing the following Code of Practice, which was framed by the Editors' Code of Practice Committee and is enshrined in the contractual agreement between IPSO and newspaper, magazine and electronic news publishers.

Preamble

The Code – including this preamble and the public interest exceptions below – sets the framework for the highest professional standards that members of the press subscribing to the Independent Press Standards Organisation have undertaken to maintain. It is the cornerstone of the system of voluntary self-regulation to which they have made a binding contractual commitment. It balances both the rights of the individual and the public's right to know.

To achieve that balance, it is essential that an agreed Code be honoured not only to the letter, but in the full spirit. It should be interpreted neither so narrowly as to compromise its commitment to respect the rights of the individual, nor so broadly that it infringes the fundamental right to freedom of expression – such as to inform, to be partisan, to challenge, shock, be satirical and to entertain – or prevents publication in the public interest.

It is the responsibility of editors and publishers to apply the Code to editorial material in both printed and online versions of their publications. They should take care to ensure it is observed rigorously by all editorial staff and external contributors, including non-journalists.

Editors must maintain in-house procedures to resolve complaints swiftly and, where required to do so, cooperate with IPSO. A publication subject to an adverse adjudication must publish it in full and with due prominence, as required by IPSO.

1. Accuracy

- i) The Press must take care not to publish inaccurate, misleading or distorted information or images, including headlines not supported by the text.
- ii) A significant inaccuracy, misleading statement or distortion must be corrected, promptly and with due prominence, and – where appropriate – an apology published. In cases involving IPSO, due prominence should be as required by the regulator.
- iii) A fair opportunity to reply to significant inaccuracies should be given, when reasonably called for.
- iv) The Press, while free to editorialise and campaign, must distinguish clearly between comment, conjecture and fact.
- v) A publication must report fairly and accurately the outcome of an action for defamation to which it has been a party, unless an agreed settlement states otherwise, or an agreed statement is published.

2. *Privacy

- i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications.
- ii) Editors will be expected to justify intrusions into any individual's private life without consent. Account will be taken of the complainant's own public disclosures of information.
- iii) It is unacceptable to photograph individuals, without their consent, in public or private places where there is a reasonable expectation of privacy.

3. *Harassment

- i) Journalists must not engage in intimidation, harassment or persistent pursuit.
- ii) They must not persist in questioning, telephoning, pursuing or photographing individuals once asked to desist; nor remain on property when asked to leave and must not follow them. If requested, they must identify themselves and whom they represent.
- iii) Editors must ensure these principles are observed by those working for them and take care not to use non-compliant material from other sources.

4. Intrusion into grief or shock

In cases involving personal grief or shock, enquiries and approaches must be made with sympathy and discretion and publication handled sensitively. These provisions should not restrict the right to report legal proceedings.

5. *Reporting suicide

When reporting suicide, to prevent simulative acts care should be taken to avoid excessive detail of the method used, while taking into account the media's right to report legal proceedings.

6. *Children

- i) All pupils should be free to complete their time at school without unnecessary intrusion.
- ii) They must not be approached or photographed at school without permission of the school authorities.
- iii) Children under 16 must not be interviewed or photographed on issues involving their own or another child's welfare unless a custodial parent or similarly responsible adult consents.
- iv) Children under 16 must not be paid for material involving their welfare, nor parents or guardians for material about their children or wards, unless it is clearly in the child's interest.
- v) Editors must not use the fame, notoriety or position of a parent or guardian as sole justification for publishing details of a child's private life.

7. *Children in sex cases

1. The press must not, even if legally free to do so, identify children under 16 who are victims or witnesses in cases involving sex offences.
2. In any press report of a case involving a sexual offence against a child –
 - i) The child must not be identified.
 - ii) The adult may be identified.
 - iii) The word "incest" must not be used where a child victim might be identified.
 - iv) Care must be taken that nothing in the report implies the relationship between the accused and the child.

8. *Hospitals

- i) Journalists must identify themselves and obtain permission from a responsible executive before entering non-public areas of hospitals or similar institutions to pursue enquiries.
- ii) The restrictions on intruding into privacy are particularly relevant to enquiries about individuals in hospitals or similar institutions.

9. *Reporting of Crime

- i) Relatives or friends of persons convicted or accused of crime should not generally be identified without their consent, unless they are genuinely relevant to the story.
- ii) Particular regard should be paid to the potentially vulnerable position of children who witness, or are victims of, crime. This should not restrict the right to report legal proceedings.

10. *Clandestine devices and subterfuge

- i) The press must not seek to obtain or publish material acquired by using hidden cameras or clandestine listening devices; or by intercepting private or mobile telephone calls, messages or emails; or by the unauthorised removal of documents or photographs; or by accessing digitally-held information without consent.
- ii) Engaging in misrepresentation or subterfuge, including by agents or intermediaries, can generally be justified only in the public interest and then only when the material cannot be obtained by other means.

11. Victims of sexual assault

The press must not identify victims of sexual assault or publish material likely to contribute to such identification unless there is adequate justification and they are legally free to do so.

12. Discrimination

- i) The press must avoid prejudicial or pejorative reference to an individual's, race, colour, religion, sex, gender identity, sexual orientation or to any physical or mental illness or disability.
- ii) Details of an individual's race, colour, religion, gender identity, sexual orientation, physical or mental illness or disability must be avoided unless genuinely relevant to the story.

13. Financial journalism

- i) Even where the law does not prohibit it, journalists must not use for their own profit financial information they receive in advance of its general publication, nor should they pass such information to others.
- ii) They must not write about shares or securities in whose performance they know that they or their close families have a significant financial interest without disclosing the interest to the editor or financial editor.
- iii) They must not buy or sell, either directly or through nominees or agents, shares or securities about which they have written recently or about which they intend to write in the near future.

14. Confidential sources

Journalists have a moral obligation to protect confidential sources of information.

15. Witness payments in criminal trials

- i) No payment or offer of payment to a witness – or any person who may reasonably be expected to be called as a witness – should be made in any case once proceedings are active as defined by the Contempt of Court Act 1981. This prohibition lasts until the suspect has been freed unconditionally by police without charge or bail or the proceedings are otherwise discontinued; or has entered a guilty plea to the court; or, in the event of a not guilty plea, the court has announced its verdict.
- *ii) Where proceedings are not yet active but are likely and foreseeable, editors must not make or offer payment to any person who may reasonably be expected to be called as a witness, unless the information concerned ought demonstrably to be published in the public interest and there is an over-riding need to make or promise payment for this to be done; and all reasonable steps have been taken to ensure no financial dealings influence the evidence those witnesses give. In no circumstances should such payment be conditional on the outcome of a trial.
- *iii) Any payment or offer of payment made to a person later cited to give evidence in proceedings must be disclosed to the prosecution and defence. The witness must be advised of this requirement.

16. *Payment to criminals

- i) Payment or offers of payment for stories, pictures or information which seek to exploit a particular crime or to glorify or glamorise crime in general, must not be made directly or via agents to convicted or confessed criminals or to their associates – who may include family, friends and colleagues.
- ii) Editors invoking the public interest to justify payment or offers would need to demonstrate that there was good reason to believe the public interest would be served. If, despite payment, no public interest emerged, then the material should not be published.

The public interest

There may be exceptions to the clauses marked * where they can be demonstrated to be in the public interest.

1. The public interest includes, but is not confined to:
 - i. Detecting or exposing crime, or the threat of crime, or serious impropriety.
 - ii. Protecting public health or safety.
 - iii. Protecting the public from being misled by an action or statement of an individual or organisation.
 - iv. Disclosing a person or organisation's failure or likely failure to comply with any obligation to which they are subject.
 - v. Disclosing a miscarriage of justice.
 - vi. Raising or contributing to a matter of public debate, including serious cases of impropriety, unethical conduct or incompetence concerning the public.
 - vii. Disclosing concealment, or likely concealment, of any of the above.
2. There is a public interest in freedom of expression itself.
3. The regulator will consider the extent to which material is already in the public domain or will or will become so.
4. Editors invoking the public interest will need to demonstrate that they reasonably believed publication – or journalistic activity taken with a view to publication – would both serve, and be proportionate to, the public interest and explain how they reached that decision at the time.
5. An exceptional public interest would need to be demonstrated to over-ride the normally paramount interests of children under 16.

PRACTICE DIRECTION 12I

APPLICATIONS FOR REPORTING RESTRICTION ORDERS

- 1.1** This direction applies to any application in the Family Division founded on Convention rights for an order restricting publication of information about children or incapacitated adults.

Applications to be heard in the High Court

- 2.1** Orders can only be made in the High Court and are normally dealt with by a Judge of the Family Division. If the need for an order arises in existing proceedings in the county court, judges should either transfer the application to the High Court or consult their Family Division Liaison Judge. Where the matter is urgent, it can be heard by the Urgent Applications Judge of the Family Division (out of hours contact number 020 7947 6000).

Service of Application on the National News Media

- 3.1** Section 12(2) of the Human Rights Act 1998 means that an injunction restricting the exercise of the right to freedom of expression must not be granted where the person against whom the application is made is neither present nor represented unless the court is satisfied –

- (a) that the applicant has taken all practicable steps to notify the respondent, or
- (b) that there are compelling reasons why the respondent should not be notified.

- 3.2** Service of applications for reporting restriction orders on the national media can now be effected via the Press Association's CopyDirect service, to which national newspapers and broadcasters subscribe as a means of receiving notice of such applications.

- 3.3** The court will bear in mind that legal advisers to the media –
- (i) are used to participating in hearings at very short notice where necessary; and
 - (ii) are able to differentiate between information provided for legal purposes and information for editorial use.

Service of applications via the CopyDirect service should henceforth be the norm.

- 3.4** The court retains the power to make without notice orders, but such cases will be exceptional, and an order will always give persons affected liberty to apply to vary or discharge it at short notice.

Further Guidance

- 4.1** The Practice Note 'Applications for Reporting Restriction Orders' dated 18 March 2005 and issued jointly by the Official Solicitor and the Deputy Director of Legal Services, provides valuable guidance and should be followed.
- 4.2** Issued with the concurrence and approval of the Lord Chancellor.

A

Senior Courts

***Practice Guidance (Interim Non-disclosure Orders)**

B

Practice — Injunction — Interlocutory — Applications for interim injunctive relief to restrain publication of information — Derogations from principle of open justice — Proper form of applications — Giving advance notice of applications — Hearing of applications — Explanatory notes accompanying applications and orders — Applicant's continuing duty to keep respondent or non-party subject to order informed of developments in proceedings — Active case management — Notes of hearings and judgments — Appeals — Proper form of interim non-disclosure orders — Human Rights Act 1998 (c 42), s 12, Sch 1, Pt I, arts 8, 10 — CPR r 25.3; Practice Direction 25A, paras 4.3(3), 5.1, 9.2

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(1) GUIDANCE

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1 This guidance sets out recommended practice regarding any application for interim injunctive relief in civil proceedings to restrain the publication of information: an interim non-disclosure order. It is issued as guidance (not as a practice direction) by Lord Neuberger of Abbotsbury MR, as Head of Civil Justice. Such applications may be founded on rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”), or on grounds of privacy or confidentiality. They may also be made in respect of a threatened contempt of court, a threatened libel or malicious falsehood, harassment, or a *Norwich Pharmacal* application (see *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133) in support of such actions. All such orders will seek to restrict the exercise of the article 10 Convention right of freedom of expression through prohibiting the disclosure of information.

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2 It also provides guidance concerning the proper approach to the general principle of open justice in respect of such applications and explains the proper approach to the model interim non-disclosure order a copy of which is attached to this guidance.

3 The law set out in this guidance is correct as at 1 August 2011.

Statutory provisions

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4 Applications which seek to restrain publication of information engage article 10 of the Convention and section 12 of the Human Rights Act 1998 (“HRA”). In some, but not all, cases they will also engage article 8 of the Convention. Articles 8 and 10 of the Convention have equal status and, when both have to be considered, neither has automatic precedence over the other. The court’s approach is set out in *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 17.

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5 Section 12 of the HRA applies whenever the court is considering whether to grant relief which might affect the exercise of the article 10 Convention right. Section 12(2) of the HRA requires advance notice to be given to persons against whom the application is made, except in the exceptional circumstances set out in section 12(2)(a)(b).

6 Section 12(3) of the HRA requires the applicant to satisfy the court that they are likely to establish, at trial, that publication should not be

allowed. Guidance on the application of section 12(3) is set out in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253, paras 22–23. A

7 Section 12(4) of the HRA requires that court to have particular regard to the fundamental importance of the article 10 Convention right of freedom of expression, where proceedings relate to material which a respondent claims, or which appears to the court, to be journalistic, literary or artistic material, or conduct connected with such material, the extent to which the material has or is about to become available to the public, or it is or would be in the public interest for it to be published. It also requires the court to have regard to any relevant privacy code. The code of the Press Complaints Commission is one such code. B

Civil Procedure Rules

8 CPR r 25.3 and paragraph 5.1(1)–(5) of Practice Direction 25A—Interim Injunctions supplementing CPR Pt 25 apply to all interim injunction applications, including those for interim non-disclosure orders. C

Open justice

9 Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders are, public: see article 6.1 of the Convention, CPR r 39.2 and *Scott v Scott* [1913] AC 417. This applies to applications for interim non-disclosure orders: *Micallef v Malta* (2009) 50 EHRR 920, para 75ff; *Donald v Ntuli (Guardian News & Media Ltd intervening)* [2011] 1 WLR 294, para 50. D

10 Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. They are wholly exceptional: *R v Chief Registrar of Friendly Societies, Ex p New Cross Building Society* [1984] QB 227, 235; *Donald v Ntuli* [2011] 1 WLR 294, paras 52–53. Derogations should, where justified, be no more than strictly necessary to achieve their purpose. E

11 The grant of derogations is not a question of discretion. It is a matter of obligation and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test: *M v W* [2010] EWHC 2457 (QB) at [34]. F

12 There is no general exception to open justice where privacy or confidentiality is in issue. Applications will only be heard in private if and to the extent that the court is satisfied that by nothing short of the exclusion of the public can justice be done. Exclusions must be no more than the minimum strictly necessary to ensure justice is done and parties are expected to consider before applying for such an exclusion whether something short of exclusion can meet their concerns, as will normally be the case: *Ambrosiadou v Coward* [2011] EMLR 419, paras 50–54. Anonymity will only be granted where it is strictly necessary, and then only to that extent. G

13 The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence: *Scott v Scott* [1913] AC 417, 438–439, 463, 477; *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103, paras 2–3; *Secretary of State for the Home Department v AP (No 2)* H

- A [2010] 1 WLR 1652, para 7; *Gray v W* [2010] EWHC 2367 (QB) at [6]–[8]; and *H v News Group Newspapers Ltd (Practice Note)* [2011] 1 WLR 1645, para 21.

B 14 When considering the imposition of any derogation from open justice, the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings. It will also adopt procedures which seek to ensure that any ultimate vindication of article 8 of the Convention, where that is engaged, is not undermined by the way in which the court has processed an interim application. On the other hand, the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which the party relying on their article 8 Convention right is entitled. The proper approach is set out in C *H's case* [2011] 1 WLR 1645.

D 15 It will only be in the rarest cases that an interim non-disclosure order containing a prohibition on reporting the fact of proceedings (a super-injunction) will be justified on grounds of strict necessity, i.e., anti-tipping-off situations, where short-term secrecy is required to ensure the applicant can notify the respondent that the order is made: *T v D* [2010] EWHC 2335 (QB). It is then only in truly exceptional circumstances that such an order should be granted for a longer period: *Terry v Persons Unknown* [2010] EMLR 400, para 41.

Consent orders

E 16 Interim non-disclosure orders which contain derogations from the principle of open justice cannot be granted by consent of the parties. Such orders affect the article 10 Convention rights of the public at large. Parties cannot waive or give up the rights of the public. The court's approach is set out in *H's case* [2011] 1 WLR 1645, para 21.

Application

F 17 The applicant should prepare (a) the application/claim form; (b) a witness statement or statements justifying the need for an order; (c) legal submissions; (d) a draft order; and (e) an explanatory note: see para 33 below. In the rare or urgent case where it is not possible to prepare such documentation prior to the hearing, the applicant should file a statement at the earliest practicable opportunity, setting out the information placed orally before the court.

G *Notice of application*

18 Applicants must comply with the requirements set out in section 12(2) of the HRA, CPR r 25.3(2)(3), and paragraph 4.3(3) of Practice Direction 25A.

H 19 Section 12(2) of the HRA applies in respect of both (a) respondents to the proceedings and (b) any non-parties who are to be served with or otherwise notified of the order, because they have an existing interest in the information which is to be protected by an injunction: *X v Persons Unknown* [2007] EMLR 290, paras 10–12. Both respondents and any non-parties to be served with the order are therefore entitled to advance notice of the application hearing and should be served with a

copy of the application notice and any supporting documentation before that hearing. A

20 Applicants will need to satisfy the court that all reasonable and practical steps have been taken to provide advance notice of the application. At the hearing they should inform the court of any non-party which they intend to notify of the order as the court is required to ensure that the requirements of section 12(2) of the HRA are fulfilled in respect of each of them. A schedule to any interim non-disclosure order granted should provide details of all such non-parties. B

21 Failure to provide advance notice can only be justified, on clear and cogent evidence, by compelling reasons. Examples which may amount to compelling reasons, depending on the facts of the case, are: that there is a real prospect that were a respondent or non-party to be notified they would take steps to defeat the order's purpose (*RST v UVW* [2010] EMLR 355, paras 7, 13), for instance, where there is convincing evidence that the respondent is seeking to blackmail the applicant: *G v A* [2009] EWCA Civ 1574 at [3]; *T v D* [2010] EWHC 2335 at [7]. C

22 Where a respondent, or non-party, is a media organisation only rarely will there be compelling reasons why advance notification is or was not possible on grounds of either urgency or secrecy. It will only be in truly exceptional circumstances that failure to give a media organisation advance notice will be justifiable on the ground that it would defeat the purpose of an interim non-disclosure order. Different considerations may however arise where a respondent or non-party is an Internet-based organisation, tweeter or blogger, or where, for instance, there are allegations of blackmail. D

23 Where notice of the application is to be given to a media organisation it should be effected on the organisation's legal adviser, where it has one. The court will bear in mind that such legal advisers are: (i) used to participating in hearings at short notice where necessary; and (ii) able to differentiate between information provided for legal purposes and information for editorial use. E

Notice and undertakings to the court—non-parties

24 In order to provide effective protection of private and/or confidential information and information contained in private and/or confidential documents provided by applicants to non-parties: (i) where an applicant is to provide advance notice of an application to a non-party; or (ii) where an applicant notifies a non-party of an order, material supplied to the non-party by the applicant shall be supplied upon the applicant receiving an irrevocable written undertaking to the court that the material and the information contained within it, or derived from such material or information, will only be used for the purpose of the proceedings. A standard form of wording for the undertaking is set out in the notes to clause 13 of the model order, contained in the model order guidelines. F G

25 Where an applicant is to provide advance notice of an application to a non-party they should first provide the non-party with a copy of the explanatory note, which may where strictly necessary refer to the applicant and/or respondent by three anonymised initials. If the non-party is willing to provide the irrevocable written undertaking, the applicant should then supply the materials, including the applicant's and respondent's names, to the non-party upon receipt of the undertaking. Where the non-party is H

- A unwilling to provide the undertaking, no further information need be supplied by the applicant. (Information concerning when and where the application is to be heard should be set out in the explanatory note.)

- 26 Where an applicant notifies a non-party of an order, which should contain the provision set out in clause 13 of the model order, provision of material to a non-party shall be effected promptly by the applicant upon request, and upon receipt of the irrevocable written undertaking. Prior to notifying the non-party of the order and where urgency does not preclude it, the applicant should ascertain whether the non-party will require a copy of any materials referred to in clause 13 of the model order. Where the non-party indicates it will do so, it should at that stage provide the applicant with the written irrevocable undertaking. The applicant will then be in a position to, and should, serve a copy of the order and the relevant materials together. Where the non-party is unwilling to give the undertaking in advance of service of the order, the applicant will not be required to supply any relevant materials to the non-party until such time as the undertaking is given or further order of the court.

- 27 The undertaking should be provided on behalf of the non-party by its legal adviser where it has one. It should be provided by the non-party itself where it has no legal adviser. Breach of the undertaking may be held to be a contempt of court, which would render the non-party liable to imprisonment, a fine or having their assets seized.

28 For the purpose of para 24, material includes: the application and any supporting documentation; and a copy of any materials specified under paragraph 9.2 of Practice Direction 25A.

E *Hearing—scrutiny of application*

29 The onus is on the applicant to satisfy the court that an interim non-disclosure order is justified. Where the applicant seeks derogations from open justice reference should be made to paras 8–13 of this guidance.

- 30 Particular care should be taken in every application for an interim non-disclosure order, and especially where an application is made without notice, by applicants to comply with the high duty to make full, fair and accurate disclosure of all material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case. The applicant's advocate, so far as it is consistent with the urgency of the application, has a particular duty to see that the correct legal procedures and forms are used; that a written skeleton argument and a properly drafted order are prepared personally by her or him and lodged with the court before the oral hearing; and that, at the hearing, the court's attention is drawn to unusual features of the evidence adduced, to the applicable law and to the formalities and procedure to be observed including how, if at all, the order submitted departs from the model order.

- 31 Applications, especially those which seek derogations from open justice, must be supported with clear and cogent evidence which demonstrates that without the specific exception, justice could not be done.

- 32 Each application shall be subject to intense scrutiny. The need for intense scrutiny is particularly acute on without notice applications, or where non-parties are or have been served with orders containing restrictions on access to documents, because, for instance, the order contains derogations from paragraph 9.2 of Practice Direction 25A.

Explanatory notes

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33 It is helpful if applications and orders are accompanied by an explanatory note, from which persons served can (a) readily understand the nature of the case, (b) ascertain whether they wish to attend the application hearing, and/or be legally represented at it, or, (c) where the application was heard without notice, whether they wish to challenge the order.

34 Where an interim non-disclosure order contains restrictions on access to documents it must be accompanied by an explanatory note when served on any non-party who was not present at the hearing of the application.

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35 An example of an explanatory note is attached to this guidance.

Applicant's continuing duty

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36 Where an interim non-disclosure order is granted applicants are required to keep any respondent or non-party subject to the order, informed of any developments in the progress of proceedings which affect the status of the order. They are required to do so in order to satisfy the court that there has been compliance with the obligation imposed by CPR r 1.3 and any requirements specified in any order or directions given by the court. Applicants are particularly required to inform any non-parties whom they have served with the order when it ceases to have effect.

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Active case management

37 Interim non-disclosure orders, as they restrict the exercise of the article 10 Convention right and, whether or not they contain any derogation from the principle of open justice, require the court to take particular care to provide active case management.

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38 Active case management requires the court to ensure that a return date is specified in such orders and that, as a general rule, the return date is kept. The applicant is required to inform the court at the return date which, if any, non-parties have been served with any interim non-disclosure order granted at an earlier, without notice, hearing.

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39 It will not always be necessary for any parties to attend court on the return date: the hearing could be dealt with by the court on the papers, provided that sufficient material is before the court to enable scrutiny and effective case management to take place: see *Goldsmith v D* [2011] EWHC 674 (QB) at [60]–[62]. Any order should however be given in public and be publicly available.

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40 A return date is particularly important where an order contains derogations from the principle of open justice. It is the means by which the court ensures that those derogations are in place for no longer than strictly necessary. It is also the means by which the court ensures that the interim non-disclosure order does not become a substitute for a full and fair adjudication: *X v Persons Unknown* [2007] EMLR 290, para 78.

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41 Where an interim non-disclosure order, whether or not it contains derogations from open justice, is made, and return dates are adjourned for valid reasons on one or more occasions, or it is apparent, for whatever reason, that a trial is unlikely to take place between the parties to proceedings, the court should either dismiss the substantive action, proceed

- A to summary judgment, enter judgment by consent, substitute or add an alternative defendant, or direct that the claim and trial proceed in the absence of a third party: *A v News Group Newspapers Ltd* [2010] EWHC 3174 (QB) at [13]; *Gray v W* [2010] EWHC 2367 at [37]; *Terry v Persons Unknown* [2010] EMLR 400, paras 134–136.

B *Hearing notes and judgments*

42 The court's approach to judgments and hearing notes is set out in *Terry's* case [2010] EMLR 400, para 4; *H v News Group Newspapers Ltd* (Practice Note) [2011] 1 WLR 1645, paras 21(9), 35.

- C 43 It is of particular importance that a full and accurate note of the hearing is taken of a without notice hearing: *G v Wikimedia Foundation Inc* [2010] EMLR 364, paras 28–32. It is the duty of counsel and solicitors to ensure that such a note is taken during the hearing, or, if that is not possible, to prepare such a note after the hearing is over. The note should be drafted so that anyone supplied with a copy of it is properly informed of: what documents were put before the court at the hearing; which legal authorities were relied on by the applicant; and what the court was told in the course of the hearing.

- D 44 Where, and to the extent, strictly necessary hearing notes may be redacted, if they are to be supplied under paragraph 9.2 of Practice Direction 25A to a non-party who is served with an order but who is unwilling or unable to provide a written irrevocable undertaking.

- E 45 The court should wherever possible give a reasoned, necessarily redacted, judgment. Where a judgment of the type given in *Terry's* case [2010] EMLR 400 or *H's* case [2011] 1 WLR 1645 would be disproportionate in terms of time or cost a short note or judgment should be given setting out any points of general interest, the reason why those points were raised and brief reasons for the decision: see *I v The Person Known as "Lina"* [2011] EWHC 25 (QB).

Appeals

- F 46 Any appeal from an interim non-disclosure order may be expedited: *Unilever plc v Chefaro Proprietaries Ltd* (Practice Note) [1995] 1 WLR 243, 246–247. It will depend on the circumstances of each case whether, and to what extent, expedition is necessary.

(2) MODEL ORDER—GUIDELINES

- G The following guidelines should be read in conjunction with the model interim non-disclosure order.

Penal notice

- H The penal notice should make clear that where the intended defendant or respondent is an individual they may be imprisoned as well as being liable to a fine or asset seizure. Where the intended defendant or respondent is a corporate defendant or respondent it should make clear that they can be fined or have their assets seized.

The penal notice should also make clear the effect it may have on non-parties who know of the order under the *Spycatcher* principle: see *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109.

The order will only bind non-parties who are notified of it while it is in force: *Jockey Club v Buffham* [2003] QB 462. A

Clause 2(b)

Reference should be made to paras 18–28 of the practice guidance.

Clause 3 (Anonymity)

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This clause is *optional*. Reference should be made to paras 9–14 of the practice guidance. Anonymity is an exception to the principle of open justice. It can only be ordered where it is strictly necessary. Guidance is set out in *H v News Group Newspapers Ltd (Practice Note)* [2011] 1 WLR 1645, para 21.

Clause 4(a)(ii) (Access to documents)

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The court may need to decide which documents, e.g, statements of case, should not be available for public inspection. This decision may be prospective since there may be little if any opportunity to apply to court before some documents are served. While it may be the case that the claim form could be made anodyne by reference to a confidential schedule (subject to anonymity), subsequent statements of case or other documents in a case are unlikely to be dealt with so easily given that the purpose of the action, amongst other things, will be to seek a permanent injunction relating to the material protected on an interim basis under the order, and will involve a specific explanation of the material, how it is said to engage the applicant's article 8 Convention rights and the effect such threatened disclosure would have if it is not so restrained: *Terry v Persons Unknown* [2010] EMLR 400, para 23; *G v Wikimedia Foundation Inc* [2010] EMLR 364, paras 14, 17 and 20; *ABC Ltd v Y (Practice Note)* [2012] 1 WLR 532, paras 8–10. D

(In respect of any non-party notified or served with the order paragraph 9.2 of Practice Direction 25A applies: see clause 13 of the model order.) E

Clause 5(a) (Service of the claim form where defendant is not known or whereabouts unknown)

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Where the respondent or defendant's identity is not known, or their whereabouts are unknown, there may be considerable problems in locating them in order to serve the claim form. This may necessitate an extension of time for service beyond the four-month period. The court, by way of active case management, is required to ensure that the action is pursued with expedition. Indefinite extensions of time for service cannot be granted: *Terry's case* [2010] EMLR 400, para 143. A long-stop date may be inserted instead. G

Clause 6 (Injunction)

Paragraph 5.1 of Practice Direction 25A states that unless the court orders otherwise, the order must provide for a *return date* if the application was made without notice. The need for, and importance of, a return date as a means to ensure the court can monitor the claim's progress and ensure it progresses properly was considered in *G v Wikimedia Foundation Inc* [2010] EMLR 364, paras 21–27; and in *Terry's case* [2010] EMLR 400, H

- A paras 134–136. Reference should be made to paras 37–41 of the practice guidance.

While there may be considerable practical and costs reasons which might render a return date in a claim against persons unknown unnecessary, especially given the safeguard of the liberty to vary or discharge provisions (*X v Persons Unknown* [2007] EMLR 290, para 73), the court should ensure that the order contains provision for periodical review by the court to ensure that the claim progresses, for instance, to default judgment, summary judgment, or to a trial in the absence of the persons unknown.

Clause 6(b)

This clause is *optional*. See clause 3 above. This provides a possible solution to the problem which arises from a jigsaw identification of the claimant if the fact of the injunction is not prevented from being published: *T v D* [2010] EWHC 2335 (QB) at [36]–[39]. There should be a clear delineation in the order of what information can be released as to the fact of an order having been made.

Clause 7 (Reporting restriction)

This is the super-injunction element. It is an *optional* clause. It is only likely to be necessary for example to prevent the respondent or a third party being tipped off before the order is served, possibly precipitating disclosure of the information or destruction of evidence: see *Terry's case* [2010] EMLR 400, para 138; *G v Wikimedia Foundation Inc* [2010] EMLR 364, para 41. If the proceedings are anonymised, and an injunction is granted restraining disclosure or publication of the private information, there is generally no reason in principle to prohibit in addition any report of the fact that an order has been made: *Donald v Ntuli (Guardian News & Media Ltd intervening)* [2011] 1 WLR 294. Consideration should be given to the risk of jigsaw identification if no reporting restriction is imposed: *T v D* [2010] EWHC 2335.

Clause 13 (Provision of documents and information to third parties)

Paragraphs 9.1 and 9.2 of Practice Direction 25A require any person served with the order not present at the application hearing to be provided with the order and supporting material read by the judge, and a note of the hearing. This is the norm. Such notice is an elementary principle of natural justice: *Kelly v British Broadcasting Corpn* [2001] Fam 59, 94–95:

“if one party wishes to place evidence or other persuasive material before the court the other parties must have an opportunity to see that material and to address the court about it. One party may not make secret communications to the court. It follows that it is wrong for a judge to be given material at an ex parte, or without notice, hearing which is not at a later stage revealed to the persons affected by the result of the application.”

G v Wikimedia Foundation Inc [2010] EMLR 364, para 30:

“where an order relates to freedom of expression, or may have the effect of interfering with freedom of expression, those applying for

interim relief at a hearing at which the respondent or defendant is not present should generally provide the respondent with a full note, whether or not the respondent asks for it.”

Exceptions to the norm are exceptions to the principle of open justice, and natural justice, and are therefore only permissible where strictly necessary. If there is concern that information is particularly sensitive or confidential, it can be included in a separate witness statement which the court may agree should be specifically exempted from having to be provided under paragraph 9.2 of Practice Direction 25A, thus enabling as much information as possible to be provided to those, such as non-parties who request a hearing note under paragraph 9.2(2), not present at the application hearing.

Clause 13 (Irrevocable written undertaking)

The following standard wording should be used by third parties in respect of the irrevocable undertaking to be given to the court under para 24 of the practice guidance and in respect of clause 13 of the model order. Breach of the undertaking may amount to contempt of court. The wording provides for a claimant to agree to information and material subject to the undertaking provided by the third party to be supplied, by the third party, to other parties in order, for instance, to ensure that the prohibition on disclosure is not inadvertently breached by that other party.

Undertaking to the Claimant and to the court

The title of action or intended action is

1. I, [insert name, occupation] [for and on behalf of . . .] (hereinafter “the receiver”) promise that in consideration of the Claimant disclosing the material to the receiver, the receiver: will preserve the material in a secure place; use any material or information contained therein, or derived from such material or information, only for the purposes of the Proceedings except where: (a) the information has been read to or by the court, or referred to, at a hearing which has been held in public; (b) *the court gives permission*; or (c) there is agreement in writing by the Claimant and by any other person who claims to be entitled to rights of property, privacy or confidentiality in respect of the information or the documents in which it is recorded; and will only copy, disclose or deliver the material, or information contained therein or derived from such material or information, to the receiver’s legal advisers, or as required by law, by order of the court or by agreement of the Claimant and by any other person who claims to be entitled to rights of property, privacy or confidentiality in respect of the information or the documents in which it is recorded.

2. Save as provided in paragraph 1, this undertaking is irrevocable, and shall continue in force both before and after the conclusion of the Proceedings.

3. The receiver will give to the court an undertaking in writing in the same terms as herein, as soon as a judge is available to receive that undertaking.

4. For the purpose of this undertaking, “Material” refers to: (i) any claim form or application notice or statement of case (whether in draft or final form); (ii) any evidence, whether in the form of witness statements or

- A otherwise, in support of the proceedings, and any exhibits thereto; (iii) and the material specified in paragraph 9.2 of Practice Direction 25A—Interim Injunctions supplementing CPR Pt 25; “Claimant” includes an intended claimant; “Proceedings” means the proceedings identified above.

- B 5. For the avoidance of doubt this promise only applies to those parts of the Material which contain the information alleged by the Claimant to be private and does not preclude the receiver (or anyone else) from making lawful use of any information that was already known to them prior to it being disclosed to the receiver pursuant to this undertaking, or of any information which is, or shall have come into, the public domain.

Clause 14 (Hearing in private)

- C This clause is *optional*. Reference should be made to paras 9–14 of the practice guidance. Private hearings can be reported without fear of contempt unless the material comes within the protection of section 12 of the Administration of Justice Act 1960. A specific order is required to prevent reporting under section 11 of the Contempt of Court Act 1981: *Clibbery v Allan* [2002] Fam 261; *McKennitt v Ash* [2008] QB 73. Section 11 orders should only be made when strictly necessary. This also incorporates the proviso, referred to in *H v News Group Newspapers Ltd* (Practice Note) [2011] 1 WLR 1645, para 42, regarding disclosure of material etc referred to in open court or in open judgments.
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Clause 15 (Public domain)

- E Orders will not usually, but may sometimes in cases of private information, prohibit publication of material which is already in the public domain. See *Terry v Persons Unknown* [2010] EMLR 400, para 50.

Confidential schedule 2, paragraph (2)

See the notes to clause 13 (Provision of documents and information to third parties).

- F (3) MODEL EXPLANATORY NOTE

Smith v Jones

or

*AAA v BBB**

Application for an interim non-disclosure order

- G *Explanatory note*

1. The applicant is a well known professional sportsperson who has been in a long-term relationship with another person [XX]. A person [BBB/YY as appropriate] [or persons unknown] have threatened to take a story to the media about a relationship the applicant is alleged to have had with another person [YY], since the relationship with XX commenced.

- H 2. An interim non-disclosure order has been [applied for/made] to protect the applicant’s [right to privacy and/confidentiality] in respect of the information referred to in paragraph 1. This does not [will not] restrict publication of information which was in the public domain in England and Wales prior to this application being made or which is permitted by any order of the court to the extent permitted by the court.

3. The [applicant applies for the application to be heard/the application was heard] in private. Judgment [will be/was] given in [public/private]. [The proceedings were anonymised.] [A private hearing/anonymity was applied for/granted on the grounds of strict necessity because . . .]. A

4. On [insert date] the application [will be heard by/was heard by] [Mr/Mrs Justice] in the High Court of Justice, [Queen’s Bench Division/Chancery Division]. B

*Where the application is made or intended to be made in anonymised form, three initials should be used.

MODEL ORDER

IN THE HIGH COURT OF JUSTICE Claim No: [] C

[QUEEN’S BENCH/CHANCERY] DIVISION

BEFORE THE HONOURABLE [MR][MRS] JUSTICE [] [(IN PRIVATE)]
Dated: []

BETWEEN: D

“AAA”

Intended Claimant/Applicant

- and -

(1) “BBB” E

(2) [] NEWSPAPERS LIMITED

(3) THE PERSON OR PERSONS UNKNOWN

who has or have appropriated, obtained and/or offered or
intend to offer for sale and/or publication the material
referred to in Confidential Schedule 2 to this Order F

Intended Defendant(s)/Respondent(s)

PENAL NOTICE

IF YOU THE RESPONDENT DISOBEY THIS ORDER YOU MAY BE
HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED
(IN THE CASE OF THE FIRST AND THIRD DEFENDANTS) OR FINED
OR HAVE YOUR ASSETS SEIZED. G

ANY PERSON WHO KNOWS OF THIS ORDER AND DISOBEYS THIS
ORDER OR DOES ANYTHING WHICH HELPS OR PERMITS ANY
PERSON TO WHOM THIS ORDER APPLIES TO BREACH THE
TERMS OF THIS ORDER MAY BE HELD TO BE IN CONTEMPT OF
COURT AND MAY BE IMPRISONED, FINED OR HAVE THEIR ASSETS
SEIZED. H

A NOTICE TO ANYONE WHO KNOWS OF THIS ORDER

You should read the terms of the Order and *Practice Guidance (Interim Non-disclosure Orders)* [2012] 1 WLR 1003 very carefully. You are advised to consult a solicitor as soon as possible. This Order prohibits you from doing the acts set out in paragraphs 6[, 7] and 10 of the Order and obliges you to do the acts set out in paragraphs 8, 9, and 11 of the Order. You have the right to ask the Court to vary or discharge the Order. If you disobey this Order you may be found guilty of contempt of court and you may be sent to prison or fined or your assets may be seized.

THIS ORDER

1. This is an Injunction, with other orders as set out below, made against the Defendants on [insert date] by the Judge identified above (“the Judge”) on the application (“the Application”) of the Claimant. The Judge:

- C (a) read the witness statements referred to in Schedule A at the end of this Order, as well as the witness statements referred to in Confidential Schedule 1 [or “was given information orally by Counsel on behalf of the Claimant”];
- (b) accepted the undertakings set out in Schedule B at the end of this Order; and
- D (c) considered the provisions of the Human Rights Act 1998 (“HRA”), section 12.

2. This Order was made at a hearing without notice to those affected by it, the Court having considered section 12(2) HRA and being satisfied:

- (a) that the Claimant has taken all practicable steps to notify persons affected; and/or
 - (b) that there are compelling reasons for notice not being given, namely: [set out in full the Court’s reasons for making the order without notice].
- The Defendants (and anyone served with or notified of this Order) have a right to apply to the Court to vary or discharge the Order (or so much of it as affects them): see clause 17 below.

[ONLY TO BE GRANTED IN AN EXCEPTIONAL CASE WHERE ANONYMITY IS STRICTLY NECESSARY]

F ANONYMITY

3. Pursuant to section 6, HRA, and/or CPR r 39.2 the Judge, being satisfied that it is strictly necessary, ordered that:

- (a) the Claimant be permitted to issue these proceedings naming the Claimant as “AAA” and giving an address c/o the Claimant’s solicitors;
- (b) the Claimant be permitted to issue these proceedings naming the [First] Defendant as “BBB” [and the Third Defendant as “Person or Persons Unknown” and, once it is known to the Claimant, notifying the Defendant’s home address by filing the same in a sealed letter which must remain sealed and held with the Court office subject only to the further order of a Judge or the Senior Master of the Queen’s Bench Division/Chief Chancery Master];
- (c) there be substituted for all purposes in these proceedings in place of references to the Claimant by name, and whether orally or in writing, references to the letters “AAA”; and
- H (d) if necessary, there be substituted for all purposes in these proceedings in place of references to the Defendant[s] by name once identified and whether orally or in writing, references to the letters “BBB” [and any subsequent letters of the alphabet].

[ONLY TO BE GRANTED IN AN EXCEPTIONAL CASE WHERE A RESTRICTION ON ACCESS TO DOCUMENTS IS STRICTLY NECESSARY]

ACCESS TO DOCUMENTS

4. *Upon the Judge being satisfied that it is strictly necessary:*

(a) *(i) no copies of the statements of case; and (ii) no copies of the witness statements and the applications, will be provided to a non-party without further order of the Court;*

(b) *any non-party other than a person notified or served with this Order seeking access to, or copies of the abovementioned documents, must make an application to the Court, proper notice of which must be given to the other parties.*

SERVICE OF CLAIM FORM WHERE DEFENDANT NOT KNOWN OR WHEREABOUTS NOT KNOWN

5. (a) The Claim Form should be served as soon as reasonably practicable and in any event by [] at the latest, save that there shall be liberty for the Claimant to apply to the Court in the event that an extension is necessary; and

(b) any such application referred to in 5(a) must be supported by a witness statement. Such application may be made by letter, the Court having dispensed with the need for an application notice.

INJUNCTION

6. Until [] (the return date)/the trial of this claim or further Order of the Court, the Defendants must not:

(a) use, publish or communicate or disclose to any other person (other than (i) by way of disclosure to legal advisers instructed in relation to these proceedings (“the Defendants’ legal advisers”) for the purpose of obtaining legal advice in relation to these proceedings or (ii) for the purpose of carrying this Order into effect) all or any part of the the information referred to in Confidential Schedule 2 to this Order (“the Information”);

(b) publish any information which is liable to or might identify the Claimant as a party to the proceedings and/or as the subject of the Information or which otherwise contains material (including but not limited to the profession [or age or nationality of the Claimant]) which is liable to, or might lead to, the Claimant’s identification in any such respect, provided that nothing in this Order shall prevent the publication, disclosure or communication of any information which is contained in [this Order other than in the Confidential Schedules] or in the public judgments of the Court in this action given on [insert date].

[ONLY TO BE GRANTED IN AN EXCEPTIONAL CASE WHERE A REPORTING RESTRICTION IS STRICTLY NECESSARY]

REPORTING RESTRICTION/SUPER-INJUNCTION

7. *Until service of the Order/ the return date/ [] the Defendants must not use, publish or communicate or disclose to any other person the fact or existence of this Order or these proceedings and the Claimant’s interest in them, other than:*

- A *(a) by way of disclosure to the Defendants' legal advisers for the purpose of obtaining legal advice in relation to these proceedings; or*
 (b) for the purpose of carrying this Order into effect.

INFORMATION TO BE DISCLOSED

8. The Defendants shall within [24] hours of service of this Order disclose to the Claimant's solicitors the following:
- B (a) the identity of each and every journalist, press or media organisation, press agent or publicist or any other third party with a view to publication in the press or media, to whom the Defendants have disclosed all or any part of the Information [since [insert date]]; and
- (b) the date upon which such disclosure took place and the nature of the information disclosed.

- C 9. The Defendants shall confirm the information supplied in paragraph 8 above in a witness statement containing a statement of truth within seven days of complying with paragraph 8 and serve the same on the Claimant's solicitors and the other parties.

PROTECTION OF HEARING PAPERS

- D 10. The Defendants[, and any third party given advance notice of the Application,] must not publish or communicate or disclose or copy or cause to be published or communicated or disclosed or copied any witness statements and any exhibits thereto and information contained therein that are made, or may subsequently be made, in support of the Application or the Claimant's solicitors' notes of the hearing of the Application ("the Hearing Papers"), provided that the Defendants[, and any third party,]
- E shall be permitted to copy, disclose and deliver the Hearing Papers to the Defendants' [and third party's/parties'] legal advisers for the purpose of these proceedings.

11. The Hearing Papers must be preserved in a secure place by the Defendants' [and third party's/parties'] legal advisers on the Defendants' [and third party's/parties'] behalf.

- F 12. The Defendants[, and any third party given advance notice of the Application,] shall be permitted to use the Hearing Papers for the purpose of these proceedings provided that the Defendants' [third party's/parties'] legal advisers shall first inform anyone, to whom the said documents are disclosed, of the terms of this Order and, so far as is practicable, obtain their written confirmation that they understand and accept that they are bound by the same.
- G

PROVISION OF DOCUMENTS AND INFORMATION TO THIRD PARTIES

13. The Claimant shall be required to provide the legal advisers of any third party [where unrepresented, the third party] served with advance notice of the application, or a copy of this Order promptly upon request, and receipt of their written irrevocable undertaking to the Court to use those documents and the information contained in those documents only for the purpose of these proceedings:
- H

(a) a copy of any material read by the Judge, including material read after the hearing at the direction of the Judge or in compliance with this Order

[save for the witness statements referred to in Confidential Schedule 1 at the end of this Order] [the witness statements]; and/or
(b) a copy of the Hearing Papers.

[ONLY TO BE GRANTED IN AN EXCEPTIONAL CASE WHERE HEARING THE APPLICATION IN PRIVATE IS STRICTLY NECESSARY]

HEARING IN PRIVATE

14. *The Judge considered that it was strictly necessary, pursuant to CPR r 39.2(3)(a)(c)(g), to order that the hearing of the Application be in private and there shall be no reporting of the same.*

PUBLIC DOMAIN

15. For the avoidance of doubt, nothing in this Order shall prevent the Defendants from publishing, communicating or disclosing such of the Information, or any part thereof, as was already in, or that thereafter comes into, the public domain in England and Wales [as a result of publication in the national media] (other than as a result of breach of this Order [or a breach of confidence or privacy]).

COSTS

16. The costs of and occasioned by the Application are reserved.

VARIATION OR DISCHARGE OF THIS ORDER

17. The parties or anyone affected by any of the restrictions in this Order may apply to the Court at any time to vary or discharge this Order (or so much of it as affects that person), but they must first give written notice to the Claimant's solicitors. If any evidence is to be relied upon in support of the application, the substance of it must be communicated in writing to the Claimant's solicitors in advance. The Defendants may agree with the Claimant's solicitors and any other person who is, or may be bound by this Order, that this Order should be varied or discharged, but any agreement must be in writing.

INTERPRETATION OF THIS ORDER

18. A Defendant who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement.

19. A Defendant which is not an individual which is ordered not to do something must not do it itself or by its directors, officers, partners, employees or agents or in any other way.

[In the case of an Order the effect of which may extend outside the jurisdiction]

PERSONS OUTSIDE ENGLAND AND WALES

20. (1) *Except as provided in paragraph (2) below, the terms of this Order do not affect or concern anyone outside the jurisdiction of this Court.*

(2) *The terms of this Order will affect the following persons in a country or state outside the jurisdiction of this Court—*

- (a) the Defendant or his officer or agent appointed by power of attorney;*
- (b) any person who— (i) is subject to the jurisdiction of this Court; (ii) has been given written notice of this Order at his residence or place of business*

A *within the jurisdiction of this Court; and (iii) is able to prevent acts or omissions outside the jurisdiction of this Court which constitute or assist in a breach of the terms of this Order; and*

(c) any other person, only to the extent that this Order is declared enforceable by or is enforced by a court in that country or state.

PARTIES OTHER THAN THE CLAIMANT AND THE DEFENDANT

B 21. *Effect of this Order*

It is a contempt of court for any person notified of this Order knowingly to assist in or permit a breach of this Order. Any person doing so may be imprisoned, fined or have their assets seized.

NAME AND ADDRESS OF THE CLAIMANT'S LEGAL REPRESENTATIVES

C 22. The Claimant's solicitors are—
[Name, address, reference, fax and telephone numbers both in and out of office hours and e-mail.]

COMMUNICATIONS WITH THE COURT

D 23. All communications to the Court about this Order should be sent to:
 Room WGo8, Royal Courts of Justice, Strand, London, WC2A 2LL,
 quoting the case number. The telephone number is 020 7947 6010.
 The offices are open between 10 a m and 4.30 p m Monday to Friday.

SCHEDULE A

The Claimant relied on the following witness statements:

E 1.
 2.

SCHEDULE B

UNDERTAKINGS GIVEN TO THE COURT BY THE CLAIMANT

F (1) If the Court later finds that this Order has caused loss to the Defendants, and decides that the Defendants should be compensated for that loss, the Claimant will comply with any order the Court may make.

(2) If the Court later finds that this Order has caused loss to any person or company (other than the Defendants) to whom the Claimant has given notice of this Order, and decides that such person should be compensated for that loss, the Claimant will comply with any Order the Court may make.

G [(3) By 4.30 p m on [] the Claimant will (a) issue a Claim Form and an Application Notice claiming the appropriate relief [and (b) cause a witness statement or witness statements to be made and filed confirming the substance of what was said to the Court by the Claimant's Counsel and exhibiting a copy of the Hearing Papers].

H [(4) The Claimant will use all reasonable endeavours to identify and serve the Defendants within four months of the date of this Order and in any event will do so by [] at the latest. Once identified the Claimant will serve upon the Defendant together with this Order copies of the documents provided to the Court on the making of the Application and as soon as practicable the documents referred to in (3) above.]

(5) On the return date the Claimant will inform the Court of the identity of all third parties that have been notified of this Order. The Claimant will use all reasonable endeavours to keep such third parties informed of the progress of the action [insofar as it may affect them], including, but not limited to, advance notice of any applications, the outcome of which may affect the status of the Order. (6) If this Order ceases to have effect or is varied, the Claimant will immediately take all reasonable steps to inform in writing anyone to whom he has given notice of this Order, or whom he has reasonable grounds for supposing may act upon this Order, that it has ceased to have effect in this form.

SCHEDULE C

[This should contain details of who the Claimant has given advance notice of the application to, including how and when and by what means this was done.]

SCHEDULE D

[The detail required by para 20 of the practice guidance should go in here.]

SCHEDULE E

[The detail required by para 38 of the practice guidance should go in here.]

CONFIDENTIAL SCHEDULE 1

The Claimant also relied on the following confidential witness statements:

1.

2.

CONFIDENTIAL SCHEDULE 2

Information referred to in the Order

Any information or purported information concerning:

(1) [Set out the material sought to be protected]

(2) [Any information liable to or which might lead to the identification of the Claimant (whether directly or indirectly) as the subject of the proceedings or the material referred to above, [the fact that he has commenced these proceedings or made the application herein].]

LORD NEUBERGER OF ABBOTSBURY MR

1 August 2011

Adam Wolanski

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5RB

Adam Wolanski is a leading junior at 5RB, specialising in libel and privacy. He has particular expertise in reporting restrictions and in claims involving privacy and confidence in family proceedings. He has appeared and advised in most of the main cases in this field, including:

- *Venables v News Group Newspapers* [2001] Fam 430;
- *Kent CC v B (a child)* [2004] 2 FLR 142;
- *BBC v Rochdale MBC* [2006] EMLR 6;
- *Clayton v Clayton* [2006] Fam 83
- *Re Webster* [2007] EMLR 7;
- *Imerman v Imerman* [2010] 2 FLR 752;
- *Morgan v A Local Authority (Rr X, Y and Z)* [2011] EWHC 1157
- *Lykiardopulo v Lykiardopulo* [2011] Fam 237
- *Re Child X (Rights of media attendance - FPR Rule 10.28(4))* [2009] EWHC 1728 (Fam)
- *Cooper-Hohn v Cooper-Hohn* [2015] 1 FLR 19;
- *Appleton v Gallagher* [2016] EMLR 3;
- *V v Associated Newspapers* [2015] EWCOP 83, *Re C (deceased)* [2016] EWCOP 21 & [2016] EWCOP 29 (the 'Sparkly Lady' cases);
- *Ciccone v Ritchie* [2016] 1 WLR 3545;
- *Westminster CC v M* [2017] EWHC 122 (Fam).
- *Norman v Norman* [2017] EWCA Civ 49

He is co-author of *The Family Courts: Media Access and Reporting*, published in July 2011 by the Family Division of the High Court, the Judicial College and the Society of Editors.

Greg Callus

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5RB

Greg Callus is a junior at 5RB, specialising in libel, data protection, privacy and commercial breach of confidence. He has experience of privacy injunctions relating to court proceedings and other reporting restrictions in the Crown Court, all three divisions of the High Court, Coroner's Inquests, and Employment Tribunals, most recently *Alcott v Ashworth (No 2)* [2016] EWHC 2414 (Fam) on reporting restrictions in Hague Convention proceedings.

He is also the Editorial Complaints Commissioner at the *Financial Times*, and is completing a part-time PhD in conflicts of law and jurisdiction in the context of cryptocurrencies and other digital technologies.



Section 10

Schedule 1 and TOLATA:

Unmarried to Money, to have and to keep

Charles Hale QC, Julia Townend, Pippa Sanger

SCHEDULE 1, CA 1989 AND TOLATA 1996

"From WAGs to Riches"

CONTEXT

1. TNT and Row L never married and have two children together. During the course of the relationship, a house was purchased in TNT's sole name but Row L spent very substantial sums of her own money renovating, extending and furnishing it with an extensive art collection. In addition TNT's has a large house held in the name of a BVI company.
2. Following the breakdown of the relationship Row L wishes to secure capital and income such that she may house and maintain Messi and Leppard.
3. The ONS indicated that cohabiting couple families grew by 29.7% between 2004 and 2014. Cohabiting or unmarried couples do not have the same legal protections as married couples. Largely relief stems from **Schedule 1 to the Children Act 1989** and remedies pursuant to the **Trusts of Land and Appointment of Trustees Act 1996**.

SCHEDULE 1, CA 1989

KEY FACTS

- **Application:** Form A1.
- **Applicable rules:** Contained within specific chapters of FPR 2010, Part 9.
- **Type of work:** Family business, assigned to the Family Court.
- **Costs:** Clean sheet principle (i.e. discretion of court).
- **Provision for legal services payment by party:** Yes. Pursuant to common law.

TOP TIPS FOR PRACTITIONERS

- A party may apply if they are a parent of a child, a guardian/special guardian of the child, an adult child or any person who holds an order prescribing that the child shall live with them.
 - No relief may be sought by or against a cohabiting step-parent.
 - Be wary if a child's living arrangements are 'up in the air' – see **N v C [2013] EWHC 399**.

- For circumstances in which a sperm donor may be deemed to be a parent for these purposes see **Re B (Minors) (Parentage) [1996] 2 FLR 15.**
 - An order may not be made against a same-sex former partner where there is no biological relationship or no civil partnership – see **T v B [2010] 2 FLR 1966.**
- Where the applicant has a Schedule 1, CA 1989 claim against more than one father the court should ensure the applicant establishes each of their respective liabilities at consolidated/consecutive hearings – see **Morgan v Hill [2006] EWCA Civ 1602.**
- The court may make (secured) periodical payments orders (including interim orders), lump sum orders, settlement of property or transfer of property orders. There is no concept of a clean break and multiple applications may be made. However only one order for settlement/transfer of property may be made against the same person in respect of the same child – see **Phillips v Pearce [2005] 2 FLR 1212.** If an application is made by an adult child, the court may not order transfer/settlement of property but may order periodical payments and/or a lump sum to meet their needs.
- As a practitioner, use the provision for lump sums imaginatively – the courts have interpreted their powers broadly including ordering lump sums to clear the mother's debts from moving house, for a family car, for moving costs, to reimburse mortgage payments, for internal decorations, to furnish a home, for hospital costs and for nursing costs.
- If your case involves an application relating to a property for the resident parent and the child:
 - If for the applicant, obtain property particulars which the client has viewed and which are justifiable on the basis of the applicant's support network/place of work/the child's school etc. Ensure the size of the property will be appropriate up to and including the child's teenage years. Seek the costs of purchase (including stamp duty, conveyancing costs, renovation costs and furnishing costs) when calculating the housing fund. Ensure provision is made for the sharing of building and contents insurance and maintenance costs.
 - If for the respondent, carefully consider property particulars. Consider cheaper houses in the same area which still meet the child's needs. It is pointless proposing a property which your client loathes or will prove difficult to sell as it will revert to the respondent in the future.

Properties managed by a freehold company may offer reassurance that the communal areas/building will be maintained. If your client wishes to try to avoid a future application for school fees, identify properties within catchment areas for good state/grammar schools.

- Remember that child periodical payments may only be made by the court in certain circumstances, e.g. where the payer enters the 'top up' territory by virtue of a child support maximum assessment, where the CSA lacks jurisdiction etc. If the payer is within 'top up' territory and lives in this jurisdiction and your client believes they may wish to make an application ask the payer at an early stage to concede that the court has jurisdiction to adjudge the quantum of child periodical payments (in writing, with at least a nominal order being made as soon as possible).
- Remember that the section 25, MCA 1973 criteria are not reproduced expressly. The relevant criteria in paragraph 4(1), Schedule 1, CA 1989 omit the standard of living, the age of each party and the duration of the marriage, any physical or mental disability of either of the parties to the marriage, contributions and conduct. But be aware of all the case law which does take some of these considerations into account. Consider also the authorities dealing with consideration of the child's welfare *as a constant influence*.
- Calderbank letters/offers remain admissible in Schedule 1, CA 1989 proceedings. Do them and argue costs - as a shield as well.

RECENT CASES

<u>MG v FG (Schedule 1 – Application to strike out Estoppel Legal Costs Funding) [2016] EWHC 1964 (Fam)</u>	The mother applied for a legal services funding order and the father applied to strike out her Schedule 1, CA 1989 application (on the basis that the parties had entered into 'binding agreements' in Australia about financial provision and her Part III, MFPA 1984 application in England had been dismissed). Cobb J held that the Schedule 1, CA 1989 application should not be struck out. He held that he had jurisdiction to make a legal services funding order but did not do so in the circumstances.
<u>BC v DE [2016] EWHC 1806 (Fam)</u>	An order was made for payment of both historic and prospective costs by way of legal services payment order in proceedings pursuant to both Schedule 1 and Section 8, CA 1989.
<u>DB v PB [2016] EWHC 3431 (Fam)</u>	A wife had a backup Schedule 1, CA 1989 application where there were issues of jurisdiction and pre-nuptial agreements in relation to the parties' divorce. The court made orders pursuant to Schedule 1, CA 1989 to supplement the provision to the wife which was otherwise limited.

<p><u>Green v Adams [2017] EWFC 24</u></p>	<p>The mother successfully applied pursuant to Schedule 1, CA 1989 for further capital provision (£20,600 to replace her car, pay for trips by the child and other capital purchases for him) in relation to her 16-year-old son. Her claims for periodical payments were dismissed in the absence of a CSA maximum assessment (Mostyn J urged the government to consider urgently reinstating the 'assets' ground of variation under the child support legislation which had previously been removed). An award had already previously been made. Given the father's financial dealings (demonstrative of his determination to seek to insulate his assets from a claim by the mother) Mostyn J made an immediate absolute order pursuant to section 3(1), Charging Orders Act 1979.</p>
<p><u>G v S [2017] EWHC 365 (Fam)</u></p>	<p>The parties agreed Heads of Agreement to settle a Schedule 1, CA 1989 claim shortly prior to a PTR (summarised at paragraph 10 of the judgment). The court was asked to determine several unresolved issues of implementation and substance (see detail in judgment). One issue was whether the mother was restricted from purchasing a property outside England and Wales within a specified timeframe (i.e. to prevent an external relocation with the child). Hayden J held this was wrong in principle and the order could not seek to bind welfare decisions pertaining to a child in the future.</p>

TOLATA 1996

KEY FACTS

- **Application:** Form N208 plus witness statement (if no substantial dispute of fact so CPR 1998 Part 8 procedure) or Form N1 plus particulars of claim (if substantial dispute of fact so CPR 1998 Part 7 procedure).
- **Applicable rules:** CPR 1998.
- **Type of work:** Chancery business, assigned to the County Court (in the first instance and subject to value/substantial disputes of fact).
- **Costs:** Costs follow the event (i.e. the unsuccessful party pays).
- **Provision for legal services payment by party:** No jurisdiction.

TOP TIPS FOR PRACTITIONERS

- At the very outset:
 - Obtain Land Registry OCE, Form TR1 and conveyancing file to check for declarations of trust.
 - Check whether any declaration of trust has been made at a later date.
 - Obtain unequivocal instructions from the client as to the category/purpose of any payments made. Was the payment a direct or indirect contribution to the purchase price of a property, a direct or indirect contribution to a cost or expense connected with the property, a gift or a loan etc?

- Forward plan and ensure that the 'flesh' accompanies the 'bones' so your case is consistent throughout (even before the pre-action protocol letter).
- Be very careful about litigation by correspondence – every sentence in a letter to the other side should be carefully considered as it may be used as suggestive of an acceptance of something at trial.
- Ensure that the particulars of claim are drafted to the highest possible standard. This document will be crucial and form the basis of the case. Errors in this document may fundamentally undermine your client's case.
- The devil is in the detail and a 'generalised and vague' approach is unlikely to succeed. A forensic approach to evidence is essential – every document with potential value should be carefully scrutinised and every word is important. Think about communications between the parties, receipts and bills, mortgage applications or documentation, insurance policies, whether either party has prepared a will etc.
- Given the potential costs consequences, ensure that instructions are always very clear and documented in attendance notes.
- Consider civil-style mediation with lawyers present.
- Remember to think about other causes of action beyond express/implied trusts, including proprietary estoppel, unjust enrichment, equitable accounting/occupation rent etc.

RECENT CASES

<p><u>Bagum v Hafiz & Another</u> <u>[2015] EWCA Civ 801;</u> <u>[2016] 2 FLR 337</u></p>	<p>Confirmed that the court has no power under section 14 TOLATA 1996 to order or direct that one beneficiary under a trust of land sell or transfer their beneficial interest to another beneficiary. That is not a function of the trustees of land.</p> <p>However, sale of the trust property to particular beneficiaries, without the consent of a beneficiary to whom the land is not being sold, is permitted. The fact that it has broadly the same economic effect as a compulsory transfer does not mean it lies outside the scope of the trustees' powers.</p>
<p><u>Davies v Davies [2016]</u> <u>EWCA Civ 463; [2016]</u> <u>Fam Law 815</u></p>	<p>Sets out the applicable principles in relation to proprietary estoppel claims and quantification of the same. Paragraph 38 is particularly useful.</p> <p>These are helpfully repeated in paragraph 16 of <u>Moore v Moore [2016]</u></p>

	<u>EWHC 2202 (Ch); [2016] Eld LJ 388.</u>
<u>Liden v Burton [2016]</u> <u>EWCA Civ 275</u>	The requirements of proprietary estoppel were established as between cohabitants. The figure was quantified comprising a partial refund of monthly contributions made plus interest.
<u>Wodzicki v Wodzicki</u> <u>[2017] EWCA Civ 95</u>	Dismissal of an appeal in which a beneficial interest in a property was asserted by virtue of an alleged common intention constructive trust or alternatively by way of proprietary estoppel.
<u>Marr v Collie [2017]</u> <u>UKPC 17</u>	<p>The Privy Council considered whether the <u>Stack v Dowden</u> approach should apply where the personal relationship between the parties has a commercial element.</p> <p>A helpful review of <u>Stack v Dowden</u>, <u>Laskar v Laskar</u> and <u>Jones v Kernott</u> was conducted at paragraphs 36 to 56.</p> <p>It was held that <u>Laskar v Laskar</u> is not authority to say that the <u>Stack v Dowden</u> 'equity follows the law' unless the contrary is proven principle only applies in the domestic context - the court in former authority did not intend to draw a strict line of demarcation between a family home purchase and an investment purchase, regardless of the circumstances in which that purchase took place.</p> <p>As to whether the <u>Stack v Dowden</u> starting point (beneficial interest follows legal ownership) conflicts with the presumption of a resulting trust where parties have contributed unequally, Lord Kerr concluded that one presumption does not trump the other – what matters is the context. At paragraph 54 he held:</p> <p><i>"If it is the unambiguous mutual wish of the parties, contributing in unequal shares to the purchase of a property, that the joint beneficial ownership should reflect their joint legal ownership, then effect should be given to that wish. If, on the other hand, that is not their wish, or if they have not formed any intention as to beneficial ownership but had, for instance, accepted advice that the property be acquired in joint names, without considering or being aware of the possible consequences of that, the resulting trust solution may provide the better answer".</i></p>

INTERPLAY BETWEEN SCHEDULE 1, CA 1989 AND TOLATA 1996

- Where a party seeks to issue both claims it should do so **at a court which exercises both family and civil jurisdictions**. Generally the (newish) CFC will not issue a TOLATA 1996 claim (regardless of being linked to a live Schedule 1, CA 1989 application).
- These applications are **governed by different sets of legal rules** – Schedule 1 applications by the Family Procedure Rules 2010 and TOLATA applications by the Civil Procedure Rules 1998. There is no set of rules and no Practice Direction which assists the practitioner in resolving conflicting provisions or court arrangements.
But see for guidance in cases with both types of application **W v W (Joinder of Trusts of Land Act and Children Act Applications) [2003] EWCA CIV**

6. The different sets of rules have practical repercussions, which include the following:
- a. The **pre-action protocols** differ. There is a requirement to attend a MIAM in relation to Schedule 1, CA 1989 proceedings.
 - b. The **disclosure provisions** are different in each jurisdiction. FPR 2010, Part 9 sets out the applicable disclosure rules (mandatory exhibits to Form E1, often followed by questionnaires etc) in Schedule 1, CA 1989 matters. CPR 1993, Part 31 (and accompanying Practice Directions) set out the civil rules applicable to TOLATA 1996 with standard disclosure (often by list with provision for inspection).
 - c. The **bundle rules** are different (FPR 2010, PD27A as against CPR 1998, PD39A). Family practitioners will be aware of the '350 page bundle limit' – the same restriction does not apply in the civil jurisdiction.
 - d. Schedule 1, CA 1989 applications are generally held in **private** whereas TOLATA 1996 claims are heard in **open court**.
 - e. The **costs rules** are different (FPR 2010, Part 28 applies to Schedule 1, CA 1989 applications adopting the 'clean sheet' principle whereas the CPR 1998 approach of the unsuccessful party paying the successful party's costs applies to TOLATA 1996 cases). Moreover, in Part 7 CPR 1998 multi-track claims a process of costs budgeting for the future of the claim applies for the court to scrutinise which does not apply in family cases.
 - f. The **types and framework of court hearings** are not automatically the same, e.g. the Financial Dispute Resolution Appointment is well-known to family practitioners but not to civil cases.
 - g. The availability of **orders for the payment of legal services** is not the same – they can be sought and obtained in Schedule 1, CA 1989 proceedings (albeit under common law and not section 22ZA, MCA 1973) but they are not available in the civil jurisdiction for TOLATA 1996 claims.
 - h. The rules as to the **instruction of experts** differ. Applications pursuant to Schedule 1, CA 1989 fall within the stricter rules which apply to expert instructions in children proceedings (governed by FPR 2010, Part

25 and specifically PD25C) whereas TOLATA 1996 proceedings are governed by the rules pertaining to experts in CPR 1998, Part 35).

7. The **focus of statements and other evidence may be very different.**
TOLATA 1996 cases are often detail-heavy and a lot may depend on what was said a significant period of time ago and a meticulous analysis of documentary evidence. Schedule 1, CA 1989 applications are more forward-looking and less likely to turn on issues of this kind. \
8. DON'T FORGET: you can arbitrate both and together and decide which rules to apply with the arbitrator.

PRACTICAL ADVOCACY: THE CMC IN THE CASE OF ROW L AND TNT

9. Row L's applications pursuant to Schedule 1, CA 1989 and pursuant to TOLATA 1996 are listed for a **Case Management Conference** in the Family Court at Barnet.

<p style="text-align: center;">The Judge: Charles Hale QC Counsel for Row L: Julia Townend Counsel for TNT: Pippa Sanger</p>

10. The issues before the Court:
 - a. Should the Schedule 1, CA 1989 application and the TOLATA 1996 application be consolidated? How should the applications be heard?
 - b. Should the proceedings be heard in private or in open court?
 - c. How should issues of disclosure be dealt with?
 - d. What hearing(s) should be listed? Should the court list a Financial Dispute Resolution Appointment?
 - e. What if any role should the civil concept of costs budgeting and its role in the proceedings?
 - f. Administrative issues in relation to bundles.
 - g. Clarity as to what orders each party is seeking ultimately?

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CHARLES HALE QC

JULIA TOWNEND

PIPPA SANGER



Section 11

Members List

Barristers

4 Paper Buildings is 'a go-to chambers; whether it is Children Act, TOLATA, family finance or international children work, the expert barristers are all equally friendly, helpful and highly skilled advocates, leaving you confident you are in good hands when you have someone from this set on your team'

The Legal 500, 2016

Barristers



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



Jonathan Cohen QC
Call: 1974 | Silk: 1997



Henry Setright QC
Call: 1979 | Silk: 2001



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



Kate Branigan QC
Call: 1985 | Silk: 2006



Jo Delahunty QC
Call: 1986 | Silk: 2006



Michael Sternberg QC
Call: 1975 | Silk: 2008



Catherine Wood QC
Call: 1985 | Silk: 2011



Rex Howling QC
Call: 1991 | Silk: 2011



Teertha Gupta QC
Call: 1990 | Silk: 2012



David Williams QC
Call: 1990 | Silk: 2013



Charles Hale QC
Call: 1992 | Silk: 2014



Christopher Hames QC
Call: 1987 | Silk: 2015



Alison Grief QC
Call: 1990 | Silk: 2015



John Tughan QC
Call: 1991 | Silk: 2015



Cyrus Larizadeh QC
Call: 1992 | Silk: 2016



Brian Jubb
Call: 1971



Amanda Barrington-Smyth
Call: 1972



Robin Barda
Call: 1975



Dermot Main Thompson
Call: 1977



Jane Rayson
Call: 1982



Mark Johnstone
Call: 1984



Elizabeth Coleman
Call: 1985



Alistair G Perkins
Call: 1986



Stephen Lyon
Call: 1987



James Shaw
Call: 1988



Mark Jarman
Call: 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



Justin Ageros
Call: 1993



Rob Littlewood
Call: 1993



Paul Hepher
Call: 1994



Cliona Papazian
Call: 1994



Judith Murray
Call: 1994



Ruth Kirby
Call: 1994



Nicholas Fairbank
Call: 1996



Justine Johnston
Call: 1997



James Copley
Call: 1997



Oliver Jones
Call: 1998



Hassan Khan
Call: 1999



Lucy Cheetham
Call: 1999



Cleo Perry
Call: 2000



Rebecca Foulkes
Call: 2001



Harry Gates
Call: 2001



Rhiannon Lloyd
Call: 2002



Katie Wood
Call: 2001



Kate Van Rol
Call: 2002



Ceri White
Call: 2002



Matthew Persson
Call: 2003



Francesca Dowse
Call: 2004



Dorothea Gartland
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



Duncan Maxwell-
Stewart
Call: 2007
Associate Tenant



Andrew Powell
Call: 2008



Chris Barnes
Call: 2008



Sophie Connors
Call: 2009



Joanne Porter
Call: 2010



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



Jonathan Rustin
Call: 2013



Pippa Sanger
Call: 2015

Door Tenants



Baroness Scotland QC
Call: 1977 | Silk: 1991



Paul Hopkins QC
Call: 1989 | Silk: 2009



Professor Marilyn
Freeman PhD
Call: 1986



Sarah Lewis
Call: 1995



Elizabeth Couch
Call: 2003

Pupils



Charlotte Baker
Call: 2014



Adele Cameron-
Douglas
Call: 2015



Abigail Bridger
Call: 2016