4pb For Family

PRIVATE CHILDREN LAW UPDATE

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Emma's practice covers all aspects of private family law and she is regularly instructed in both the financial and children aspects arising from a relationship breakdown. She is repeatedly instructed in difficult children matters, often involving serious allegations of sexual abuse, violence and parental alienation, as well as cases with a long history of intractable or repeat litigation. Emma has been described in the legal directories as a 'Brilliant Advocate' who makes excellent 'excellent judgment calls'.

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Mani is known for his experience in 'stranded spouse' cases and is the author of 'A Practical Guide to Stranded Spouses in Family Law' which is available for purchase here. He also co-authored an article in The Times about this topic. Further, Mani has published a book in respect of 'A Practical Guide to Exercising the Inherent Jurisdiction' which can be purchased here.

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Miriam appears in the High Court in child abduction matters and represents parents in applications for leave to remove to Hague and non-Hague Convention countries. Miriam appeared in PG v PR [2018] EWFC 85 where she represented the respondent father in an application for the summary return of a child to Portugal. Miriam also appeared in SZ v DG & PG v LG [2020] EWHC 881 (Fam) seeking permission to make an Article 21 application whilst a Section 91(14) order was in place against her client. She has also represented parties in committal applications following non-compliance with passport orders.

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Dispute Resolution Appointments

1. How far should the court go at a Dispute Resolution Appointment? That was the essential question that came before MacDonald J in **P v F [2023] EWHC 2730 (Fam)** where he was considering an appeal by a litigant in person father against orders made at a DRA which provided only for indirect contact between himself and his children and which prohibited him under section 91(14) Children Act 1989 from making further applications in respect of them for a period of two years. Those orders were made in line with the recommendations of the Cafcass officer, but, as the father made clear on appeal, he challenged those recommendations, did not consent to those orders being made at the DRA and had expected the case to be listed for final hearing.

2. MacDonald J allowed the father's appeal. He was satisfied that the Judge was wrong to make a final child arrangements order at a DRA when the father was clearly not consenting to a final order for no direct contact being made and that, in circumstances where he did not agree that order and challenged the Cafcass report, the hearing was unfair and in breach of the father's procedural rights – in particular depriving the father of the opportunity to present his evidence and argument with respect to the Cafcass report. Addressing the proper remit of a DRA, MacDonald J made the following clear:

   > *"41. … Whilst a Judge undertaking a Dispute Resolution Appointment is required to consider the extent to which the remaining issues between the parties can be resolved at that hearing, and to assist the parties to do so with a frank evaluation of the evidence, this cannot extend to making final orders where it is clear that a party continues to contest the matter and to seek a different outcome. Where a party continues to dispute the outcome of the proceedings at the Dispute Resolution Hearing, PD12B provides a clear way forward, either in the form of hearing evidence at the Dispute Resolution Appointment in order to resolve or further narrow the issues or in the form of final case management directions towards a final hearing."*

3. MacDonald J was further satisfied that the Judge's imposition of a section 91(14) order was wrong in circumstances where none of the procedural requirements necessary to establish a fair process with respect to a litigant in person were followed and the Judge gave no judgment in support of making the order.

Rules of Evidence and Fairness

4. The proper rules of evidence and the sanctity of fair process were at the heart of the appeal in **M & another v B & another (Rules of evidence) [2024] EWHC 288 (Fam)**,[1] a case which also highlights the difficulties faced by Judges dealing with cases where all parties represent themselves.

5. This was an appeal, heard by MacDonald J, against an order refusing the appellant paternal grandfather and step-grandmother face-to-face contact with their grandchild/step-grandchild, even though that had been recommended by the Cafcass officer's section 7 report.

6. The appeal, which was opposed by the resident mother, was mounted on two grounds of unfairness of process and a large number of welfare grounds. But in the event MacDonald J considered it neither necessary nor desirable to consider the latter, having concluded that the appeal must be allowed on the former.

7. The first ground of appeal centred on the first instance Judge's decision to permit into evidence at final hearing a further 'statement of evidence' from the mother in the following circumstances and with the following consequences:
   - The mother had been allowed to rely upon a further 'statement of evidence' (referred to in the appeal judgment as a 'document' as it did not contain a statement of truth), which was dated shortly before the final hearing.
   - The mother had no permission to file a further witness statement as no such statement had been directed by the Judge at the DRA nor by the court otherwise.
   - The appellants had not been served with the document ahead of the final hearing and only learned of its existence at the final hearing.
   - The appellants were accorded 20 minutes to read and consider the document (produced to them without exhibits) before start of the final hearing, at which the paternal grandfather was cross-examined on the contents of the document.
   - The document contained a serious allegation against the paternal grandfather of aiding a breach of bail conditions, which allegation had not previously been raised in the proceedings and which was disputed.
   - The appellants were given no opportunity to adduce written evidence in answer to the new allegation.
   - Based on this new document and giving no account of what other evidence had been considered and balanced, the Judge made a serious finding against the paternal grandparent of aiding a breach of bail conditions and used that finding to inform a wider finding against both appellants of a willingness to lie and a finding that the mother's overall perception of them was justified.
   - The Judge used those findings, together with further extracts from this new document regarding the mother's perceptions of the appellants, when reaching

[1] Piers Pressdee KC and Mani Singh Basi appeared pro bono for the successful appellants.

her central conclusion that it was not in the child's best interests to have any contact with them beyond indirect contact, given their personalities, their attitude to the mother and the mother's experience of the appellants in real life.

8. The second ground of appeal centred on the failure of HMCTS to make available (to the Judge, the parties and the Cafcass officer) a hearing bundle two days prior to the final hearing, even though that had been specifically directed by the Judge at the DRA. A failure which meant that, alone among the parties, the appellants were deprived of the safeguarding letters from the previous child arrangements and enforcement proceedings involving the mother and the father and the exhibits to the mother's first and second 'statements of evidence' within these proceedings. McDonald J records the thrust of this ground of appeal as follows:

> "*Mr Pressdee and Mr Basi submit that it was incumbent on the Judge to ensure that the appellants had the means to present their case effectively and to participate in proceedings effectively by ensuring that the appellants had in their possession the same material that the court and each of the other parties had received. Mr Pressdee and Mr Basi further submit that, in circumstances where the appellants were not provided with a bundle, the process adopted was unfair per se and so compromised the final hearing as to make the proceedings as a whole unfair.*"

9. MacDonald J had little hesitation in allowing both 'fairness' grounds of appeal. Having conducted an extensive review of the relevant evidential rules contained within the Family Procedure Rules and of the pertinent Strasbourg jurisprudence, he held as follows:

> *"62. Accordingly, fairness demands that a party knows the case being made against them, including the evidence that is to be adduced, and has the ability to answer that case effectively, including time to prepare, the opportunity to adduce their own evidence and the opportunity to challenge the evidence of the other party, in a way that does not place them at a substantial disadvantage compared to that other party. In this regard, in addition to fairness per se, the appearance of fairness will also be important. In considering fairness, the seriousness of what is at stake is a relevant consideration."*

10. Whilst MacDonald J had sympathy for the difficulties faced by the first instance Judge, dealing with a case in which no party was represented, if anything this accentuated the need for the proper rules of evidence to be followed:

> *"78. In concluding, it is important once again to acknowledge the difficult situation that the Judge faced in this case. The Judge was presented with the now ubiquitous difficulty created by litigants who are without the benefit of legal advice and representation sending documents to the court without regard to the requirements of the FPR 2010 or the case management orders made by the court. This situation means, however, that in seeking to achieve fairness it is all the more important that the rules of evidence set out in FPR 2010, including those concerning the filing and*

serving of witness statements set out in FPR 2010 Part 22, are applied by the court to represented and unrepresented litigants alike."

Step-parent Adoption

11. **H (Step-Parent Adoption: Human Rights) [2023] EWHC 3186 (Fam)** is an interesting case decided by the President last summer which was only published early this year. It involved the successful argument, adopted by all parties, that the court should use the Human Rights Act 1998 to modify provisions of the Adoption and Children Act 2002 so as to allow a step-parent adoption to be made in a case where the child's natural parent had died before the application was made. In consequence, section 51(2) of the ACA 2002 is now to be read as follows, with the words in parenthesis added:

    "An adoption order may be made on the application of one person who has attained the age of 21 years if the court is satisfied that the person is the partner of a parent of the person to be adopted (or was the partner until the time of the parent's death)."

12. Whilst a sole-person adoption order was always available, that order would destroy the child's legal relationship with their deceased birth parent and their wider kin relationships stemming from that birth parent. This statutory construction avoids that undesirable outcome.

Wider And Flexible Powers of The Family Court: Correct Allocation and Orders Which Are Incidental or Supplemental to Substantive Orders

13. In **Re K (Children) (Powers of the Family Court) [2024] EWCA Civ 2**, the President of the Family Court gave the lead judgment from the Court of Appeal following an appeal by the Guardian within public proceedings which had 'sprang' from longstanding private law proceedings against a decision of a Circuit Judge (HHJ Gargan) not to make injunctive orders against the father to take action to ensure that he was no longer able to remotely access the children's phones. The Judge concluded that, notwithstanding any merits, she did not have the power to make the orders sought.

14. The President, in his judgment, is characteristically crystal clear with guidance for courts where there is a query raised as to the power of the court to make a particular order. In doing so, he offers the following stepped questions:

    (1) Are these properly issued family proceedings?

(2) Is the order sought one that is incidental or supplemental to the substantive orders that are sought in the proceedings?
(3) Is the remedy one that is reserved to a higher level of judge by the Schedule to the Rules or by the 2014 Guidance?
(4) Is the application one that is reserved to the High Court by the Rules or by the 2018 Guidance?

15. The President's further comment, in concluding his judgment underpins this issue where it occurs from time to time:
"37. The conclusion to be drawn is that judges of the family court should not be deterred from making incidental and supplemental orders that are beneficial and fair. They should approach the matter on the basis that they have the power to make such orders unless it is shown by reference to the Rules and Guidance that they do not. In this way, effective orders can be made in appropriate cases and delay, expense and duplication of effort can be minimised."

Delays and Control: A Reminder About Effective Case Management

16. In **Ms X v Mr Y [2023] EWHC 3170 (Fam)**, Lieven J was faced with applications from the mother which were far reaching and final, including: (a) removal of the fathers' parental responsibility (b) orders for the children to have no contact with the father (c) for the children to live with her as a final order (d) for a prohibited steps order to be made preventing the father from moving removing the children from the jurisdiction (e) specific issue orders to change the children's name and (f) for a s91(14) order to be made.

17. The father was serving prison time after a conviction in the Crown Court of Domestic Abuse against the mother. He refused to get out of the prison van to attend the final hearing on account of a purported illness. The Judge decided against an adjournment in circumstances where the delay was significant already (3 years since the beginning of proceedings), where there was already 'copious material' before the court from the parents and from various professionals (including the probation service), and where the father's refusal to get out of the prison van to attend the hearing, in the context of his conviction for coercive and controlling behaviour led the judge to believe that his actions were 'simply another manifestation of his effort to the control' (paragraph 46) the mother. The Judge proceeded to hear the case, making the orders the mother sought (save for the application to change the children's' names).

18. The resonance of the authority is linked to the growing need for the Family Court to apply 'effective and proportionate' case management given the extraordinary pressures on the family court. Notwithstanding the arguably far-reaching issues in the

case, proceedings must not be allowed to continue indefinitely. The judgment reminds us that there is no 'right' within Family proceedings to cross examine a witness pursuant to Article 6: a fair trial is achieved through the Judge's approach to exercising their wide case management powers. Lieven J concluded as follows at paragraph 71-72:

> *"Thirdly, it is essential that courts list cases with short and proportionate time estimates. The exhortation to "Make Cases Smaller" applies just as much if not more in private law cases as in public law ones. The time estimates must focus on the issues in the case and not the amount of time that the parties, and/or their advocates wish to take. There is a duty on the advocates to assist the court in focusing on the real issues in the case and setting a proportionate timetable.*
>
> *"Once the F's conviction was made then the case only justified at the most, fairly short evidence from the mother, father and the Cafcass officer. In fact it was not necessary to call the Mother or the Father given their written statements and what was obvious from the papers. One day was the appropriate time estimate in this case."*

Parental Responsibility and the Hague Convention 1996

19. Hot on the heels of Re A (Parental Responsibility) [2023] EWCA Civ 689 has come another parental responsibility decision, this time with an international dimension. The circumstances of **B v C (No. 2) (1996 Hague Convention Art 22) [2023] EWHC 2524 (Fam)**[2], which was heard by MacDonald J, were unique to say the least.

20. The mother met the biological father of the child on Tinder, whilst they were both living and working in Spain. The mother knew the biological father to be a man called 'D' in which name he possessed a passport. The child's birth was registered accordingly at the Civil Registry Office in Spain.

21. It transpired that the biological father was, unbeknown to the mother, a fugitive – wanted in the UK in connection with serious child sex offences, having absconded whilst on bail awaiting trial for the same some years earlier. The biological father was not in fact 'D' – he was 'C' – C had been using a stolen passport of a stranger, D. C was extradited to the jurisdiction of England and Wales where he was convicted of 12 child sex offences and sentenced to 23 years in prison. In the meantime, the mother and the child had returned to the UK where it was agreed the child was now habitually resident.

22. Article 16(3) of the Hague Convention 1996 meant that by virtue of the registration of

[2] Michael Gration KC and Julia Townend represented the applicant mother on a pro bono basis

D as the child's father on the birth certificate in Spain, that stranger acquired parental responsibility in relation to the child pursuant to Spanish law (as confirmed by two court-appointed experts). Interestingly the child's biological father, C, did not hold parental responsibility. The mother sought to ensure that D, the stranger, did not continue to hold parental responsibility in relation to the child. D was served with notice of the proceedings but did not engage. Four methods by which the English court could divest D of his parental responsibility were posited:

1. Reading down section 4(2A) of the Children Act 1989 so as to allow the mother to apply to terminate D's subsisting parental responsibility notwithstanding that it did not arise by registration under the Births and Deaths Registration Act 1953;
2. Exercising the inherent jurisdiction of the High Court to terminate D's parental responsibility;
3. Relying on Article 22 of the Hague Convention 1996 to refuse to apply Spanish law as designated by Article 16(3) of the Hague Convention 1996 on the grounds that to do so would be manifestly contrary to public policy taking into account the child's best interests as a primary consideration;
4. Making a declaration that section 4(2A) of the Children Act 1989, when operating in conjunction with Article 16(3) of the Hague Convention 1996, is incompatible with the ECHR .

23. Ultimately, and perhaps unsurprisingly, MacDonald J concluded that it would be manifestly contrary to public policy to apply Spanish law in the circumstances of this case and declined to do so pursuant to Article 22 of the Hague Convention 1996. Article 22 specifically enjoins the competent authority to take account of the best interests of the child when considering the question of public policy.

24. Consequently, the stranger does not have parental responsibility in this jurisdiction of England and Wales. The application of Article 22 meant that the question of whether the domestic provisions pertaining to the revocation of parental responsibility should be read down, substituted with the inherent jurisdiction or declared incompatible with the ECHR evaporated. Curiously, D will continue to have parental responsibility for the child in Spain. It was hoped that the English High Court's declaration that D is not the father of the child will enable rectification of the Spanish Civil Registry records.

Qualified Legal Representatives

25. In **Re: Z (Prohibition on Cross-examination: No QLR) [2024] EWFC 22** the President set out guidance for circumstances where the Family Court has determined that a QLR should be appointed for a party pursuant to Part 4B of the Matrimonial and Family Proceedings Act 1984 (applicable to proceedings issued after 21 July 2022) but no QLR can be found. A fact-finding hearing proceeded with both parties acting as litigants in person and no available QLRs on the basis that the President would ask all of the questions of each of the two parties. This was described as a 'tricky' process.

26. The judgment reviews the legal background to QLRs being introduced and cites various statistics pertaining to training and remuneration.

27. The President cited his June 2023 'View from the President's Chambers' in which he suggested that if no QLR is found within 28 days, the court should list the case for directions and direct HMCTS to provide summary information about the difficulties faced. At that juncture the principal options facing a court are likely to be:
    1. A further adjournment in the hope a QLR will be found;
    2. An adjournment to allow one or both parties to engage their own advocate;
    3. Reviewing the need for the vulnerable party to give oral evidence and be cross-examined (including reviewing whether a fact-finding hearing is necessary);
    4. Consideration of any other alternative means of avoiding in person cross-examination between the relevant parties;
    5. The court itself asking questions in place of the in person party (against the backdrop of PD3AB paragraph 5.3 which is not black-letter law).

28. Ultimately if the court abandons further attempts to secure a QLR, the court should discharge the previous direction for an appointment and provide reasons for the same.

29. At paragraph 41 the President offered a list of practical points for courts to consider either when appointing a QLR or when preparing to put questions itself.

30. The President concluded his judgment stating: whilst it is to be hoped that, in time, the continued training programme and the ability to claim travel expenses will increase the availability of QLRs, there will inevitably remain some cases where there is no alternative but for the court to ask the questions itself. Unsatisfactory though that process plainly is, in such cases it will be necessary in order to deliver a just, fair and timely conclusion to proceedings. Where that is the case, the advice in this judgment is intended to assist the court in navigating the tricky path between ensuring that the opposing case is put fully, fairly and properly, but doing so without entering the arena.

Father's Appeal Against Progress of His Contact Which Was Dependent Upon His Engagement with Psychotherapy Dismissed

31. In **G (Children) (Supervised Contact) [2023] EWCA Civ 1453**, the Court of Appeal granted permission to the father to appeal the order of Williams J, who had, put into place a complex programme for the progression of the father's contact. The contact had initially been supervised but the plan was for it to progress first to unsupervised contact for increasingly lengthy periods, and then onto overnight stays, with, unusually a review hearing in 9 months' time. The arrangements and the progression of contact were wholly dependent upon the father engaging in therapy with a psychiatrist who was also a qualified psychotherapist.

32. This conclusion followed on from a welfare hearing which followed a bitterly fought fact-finding hearing. At the fact-finding stage the Judge found that the nature of the father's relationship with the mother was 'permeated by emotional abuse of the mother and children arising from the father's obsessive, anxious and rigid behaviour where his needs dominated the household.' That he 'behaved at times in a physically and emotionally abusive way towards the boys by his dictatorial behaviour, his shouting at them and his occasional use of excessive physical force as a result of him losing his temper with them.' As a result the Judge felt that unless the father addressed the flaw in his character the risk to the children of contact unless supported or supervised was too great.

33. At the welfare hearing, the court heard evidence from the jointly instructed experts; Dr Judith Freeman, psychiatrist and Ms Elena Sandrini, ISW. Dr Freeman concluded the father had narcissistic personality traits and whilst the experts did not entirely agree as to the extent of the risk the father presented to the children, they both agreed he would benefit from psychotherapy; that this should commence for a three-month period, although should not be limited to that period. They also agreed that contact should be ordered against the background of this therapeutic need.

34. The issue for the court at appeal was whether the Judge had failed adequately to identify the type and likelihood of risk in the future and had (at the expense of other evidence) placed too much weight on the evidence of Dr Judith Freedman, and that as a consequence, the orders imposed a disproportionate requirement on the father to continue to engage in therapy for many months before his contact could further develop.

35. The appeal was dismissed. The court held that the Judge had a wide discretion to put into place the structure for the progression of contact that he had, based on his serious findings and also not to bring proceedings to an end but to list for a review hearing. The court concluded that:

'The judge had not been 'blinded' by the label of narcissistic personality traits but had focussed on the father's behaviour and traits that had led to his abusive behaviour and the risks that stemmed from those.'

36. It was in no one's interest for an entirely new welfare hearing to take place; that whilst the father had still not acknowledged the serious findings made against him, he had nevertheless made progress with therapy and contact had already, by the time of the appeal progressed to unsupervised.

Court's Approach to Domestic Abuse

37. The case of **TRC (Father) v NS (Mother) [2024] EWHC 80** (Lieven J), highlights the court's approach to allegations of domestic abuse in child arrangements proceedings and reminds practitioners that where the factual matrix and issues of welfare are closely bound, separate fact-finding hearings are often neither necessary nor helpful. That it can in fact be difficult and unhelpful to compartmentalise matters of fact and welfare issues and that considering the evidence in a holistic way, rather than trying to separate fact from welfare may be much more useful.

38. The mother appealed the decision of the Justices, who, despite initially considering a fact-finding hearing necessary later vacated the hearing on the basis that the father had since made admissions, both parties had provided statements and there was a wealth of evidence including recordings and transcripts before the court which would provide Cafcass with a factual matrix with which to prepare a s7 report. They determined that a fact-finding hearing would no longer assist in determining the child arrangements. Part of the mother's appeal was based on a failure by the Justices to consider PD12J.

39. Lieven J dismissed the appeal. The court found that the Justices were entitled to place weight on the father's admissions and take a view, in light of the evidence, that a separate fact-finding hearing was no longer necessary. We are reminded that PD12J provides guidance to which the court must have regard but it is not a formal process that must be followed. Further, following K v K [2022] EWCA Civ 468 the court has considerable discretion in determining whether a fact finding hearing is necessary and proportionate, depending on the facts of the case and the relevance of those facts.

40. There was nothing unreasonable nor wrong about the Justices change of approach. It is important that Justices provide sufficient reasons for their decision even if only in short terms but to impose a complex duty to give reasons would significantly impede the administration of justice where these types of cases often appear in busy lists. It was further held that the Justices decision to change their mind was not a procedural irregularity but a case management decision that they were entitled to make.

41. The court further determined that whilst the mother's application for permission to appeal was procedurally out of time, in the overall circumstances it was appropriate for time to be extended. She held that the principles in Denton v TH White Ltd. [2014] EWCA Civ 906 (a case under the "CPR" rather than "FPR") applied, commenting that:

    'The interests of the child, both in general and in this specific case, are strongly in favour of minimising delay and dealing with cases efficiently. Therefore the stricter and more rigorous approach to issues of non-compliance set out by the Court of Appeal in Denton is, in general, strongly in the interests of the children in Family Court proceedings.'

The Court's Approach to Orders Post-16

42. The judgment in **T (a child) (s9(6) Children Act 1989 orders: exceptional circumstances: parental alienation [2024] EWHC 59 (Fam)** centred around whether a contact order should be made for a child until they were 18. The mother had spent a decade convincing the children that their father was an abusive and violent man. The litigation had been ongoing with no less than 70 hearings. The court determined the mother had undermined the children's relationship with their father and most of the findings the mother sought were not made out; but the children, now 15 and 18 wanted no contact with him. Mother's position was that contact orders should be terminated. Father wanted them to continue until the youngest child's 18th birthday. The judgment was written in order to be read by those children so they could understand what had actually happened to them and their relationship with their father at some point in the future. It details the various decisions by the various judges over a decade and gives a clear chronology of the conclusions drown by each tribunal about the mother's behaviour and credibility.

43. Despite the 'exceptionality' of the case Arbuthnot J concluded that the child's clear wishes and feeling could not be ignored in light of his age and it would be futile to extend an order until his 18th birthday. However, she was not prepared to make no order, as that would inevitably mean contact would cease immediately, so she made an order until the child turned 16. The case seems to confirm that where a child's wishes and feelings are clear, it does not matter how exceptional the circumstances of the case may be, an order post 16 will not follow. This is particularly frustrating for parents who may have been wrongly demonised and alienated by the other parent; it seems there is no place to use an order to set an expectation for contact or give a child a non-parental mandate for contact if it seems clear that this will not happen on the ground. It does raise the question as to whether the bar for exceptional circumstances is currently being raised too high.

The Court's Approach to Transparency

44. In **T (a child) (No. 2) (Transparency: Publication of the Party's Names) [2024] EWHC 161** Arbuthnot J dealt with publication arguments following the judgment summarised above. Whilst the parties agreed the judgment should be published, there were issues over the extent of anonymisation and also whether a fully un-anonymised judgment should be published when the children turned 18. The children were against publication of an un-anonymised judgment. Arbuthnot J looked at how the case law has developed and in particular the more recent push to increased transparency to enable the public to see the workings of the family court. As always, these arguments engaged the balancing of the children's right to privacy against the public interest in seeing a judgment which sets out over a decade or so, how the family court has operated.

45. Of significant weight in the Judges view was the particular nature of this case, namely the father's need to put the record straight in circumstances where the mother, over a protracted period of time, controlled and misrepresented the narrative of their lives and as such had destroyed the children's relationship with their father. Anonymisation would have hampered the father's ability to speak about the case and correct the false narrative. However, competing against that was the impact on the children of publication and the anxiety they may feel against their stated wish to not have their private life laid bare in the public domain.

46. Arbuthnot J felt that at this stage the children's right to privacy trumped the public interest argument which meant that any publication of the judgment now would have to be anonymised. Similarly, she felt that even at 18 they should not be named, this would avoid for example a keyword search using their names bringing up the judgment and so protect them from the embarrassment this may bring in the future for example if an employer was searching for them. However, she found that the public interest in knowing the names of the parents did trump the article 8 rights as it enabled the children to have full insight into their case, with which to make informed choices for the future, and without the children being identified, the impact on their privacy would be relatively limited.

The Court's Approach To PD12J Paragraph 36

47. **Griffiths v Kniveton & another [2024] EWHC 199 (Fam)** is another instalment in the litigation between former MP Andrew Griffiths and his ex-wife Kate Kniveton MP, following the *Griffiths v Tickle* judgment of last year. This time the court was determining a number of substantive contact issues, change of name, a restriction on F's parental responsibility and a s91(14) order.

48. Lieven J, while making observations about Mr Griffiths in the witness box, notes that the admiration and respect he stated to have for the mother while giving evidence was in direct contrast with his vehement pursuit of contact with the child whatever the impact might be on the mother's emotional health. Much of the focus in the judgment is on the impact of contact on the mother, despite the fact that the child was still having video contact with the father which they enjoyed. PD12J paragraph 36 is front and centre in the Judge's analysis. Of some significance in the Judge's reasoning is the father's lack of acceptance about some of the more serious findings and his desire to use contact to show the child 'what he was really like'. This indicated to Lieven J that the father will not be able to resist the temptation to try and impose his narrative when unconstrained by court proceedings and that he shows little insight into the impact on the mother and what she is still going through. Mother's trauma and distress at contact tipped the balance in favour of an order for no direct contact. Similarly, the father's lack of thought for the impact of the proceedings on the mother, which Lieven J concluded did not go so far as being a further means of coercively controlling behaviour, was enough to justify the s91(14) order for three years, to give the mother a break from the litigation and relieve the strain on her as the child's primary carer.

49. Lieven J categorised the change of name dispute as 'arid' in circumstances where the child will simply choose to use the name they want to in due course. Neither did she support the airbrushing of father out of the child's consciousness by removing his surname completely. She did support the mother's surname being added without a hyphen.

Special Guardianship Orders

50. For those wondering why there has been a recent spate of applications for special guardianship orders in the Birmingham area, the decision of Lieven J in **AB v XX & another (Special Guardianship Orders) [2023] EWFC 287** provides the answer.

51. The case concerned an application for leave to make an application for a SGO made by the maternal uncle of two young children, who often collects them from their school and looks after them afterwards because their parents, through college and work, are not always able to do so.

52. In a short but trenchant judgment, reproduced in material part below, Lieven J dismisses the application for leave, describing it as an abuse of the special guardianship jurisdiction, and providing a reminder that special guardianship orders are orders of importance whose purpose is to give greater permanence for the child and greater security in a placement.

> *"4. The Applicant, supported by the mother and the father, say that they need a Special Guardianship Order, so that the uncle can collect the children from school and look after them.*
> *5. However, when I asked a few questions of the mother and the maternal uncle, it became clear to me that the real reason for this application was to support the maternal uncle's application to remain in the United Kingdom.*
> *6. The law on Special Guardianship Orders is set out at section 14A of the Children Act 1989. The maternal uncle does not fall within section 14A(5), as a person who is entitled to apply for an SGO and, therefore, leave must be granted.*
> *7. It is clear, both from the statute and the case law, in particular Re S (Adoption Order or Special Guardianship Order) [2007] 1 FLR 819 and Re T (A Child: Refusal of Adoption Order) [2020] EWCA Civ 797, that Special Guardianship Orders are important orders, in order to give greater permanence for the child and greater security in a placement. It is wholly unnecessary for a Special Guardianship Order to be made in order for a family member to be able to collect children from school or to look after them at home. Such arrangements are extremely common in the United Kingdom and are no possible justification for the making of a Special Guardianship Order.*
> *8. Indeed, it would be disproportionate, and a misuse of both court and local authority resources, to allow such an application to proceed on this basis. All that needs to happen, for the uncle to be able to collect the children from school, is for the mother and father to write a letter to the school, saying that the uncle has permission to collect the children.*
> *9. Further, it is apparent to me, from asking questions of the mother and the maternal uncle, that the true purpose of this application is to present evidence to the Home Office to support the uncle's immigration case. That is an abuse of the Special Guardianship Order jurisdiction.*

10. I am publishing this judgment, because it has been drawn to my attention that the Birmingham Family Court has had a number of similar applications. It is therefore important to have clarity about the correct approach.
11. In those circumstances, I refuse leave for this application, and it should not have been brought."

Habeas Corpus

53. A child is "a person" within the meaning of the Children Act 1989. Well, who knew? It may seem surprising that this point would ever need to be judicially determined, but it forms the central ratio of the Court of Appeal decision in **AB (A Child: Habeas Corpus) [2024] EWCA Civ 105**

54. The case concerned a young child who initially lived with her mother after her parents' separation, who was then reported missing by her father and who, following her location more than a year later, had been living with her father ever since pursuant to child arrangements order made in his favour.

55. The appeal addressed the refusal of Poole J to accede to the mother's writ for 'habeas corpus' by which she sought the return of her daughter to her care, and, as permission to appeal is not required. And it was dealt with substantively by the Court of Appeal because, with a writ of habeas corpus relating to the liberty of the subject, permission to appeal against the refusal to make an order does not require the granting of permission to appeal. Hence the mother was able to appeal as of right, with no advance consideration as to whether the appeal would have a real prospect of success or whether there was some other compelling reason for it to be heard.

56. At the heart of the mother's case on appeal were two central propositions:
    (1) that her daughter is not a person for the purposes of the Children Act 1989 and consequently the courts have no jurisdiction to make any orders in respect of her under that Act; and
    (2) that in those circumstances her daughter was being "unlawfully detained" by her father, notwithstanding the child arrangements and prohibited steps orders made that provided for her to live with her father and have no contact with her mother.

57. The mother's first central proposition purported to rely upon Schedule 1 of the Interpretation Act 1978, which provides that "'Person' includes a body of persons corporate or unincorporate", arguing that, if the Act had meant for a child (or any individual human being) to be a person (rather than just bodies of persons), it would have expressly said so. This argument was given short shrift by Poole J, as it was by the Court of Appeal. Referencing Bennion, Bailey and Norbury on Statutory Interpretation , the Oxford English Dictionary and the recent Court of Appeal decision in Savage v Savage [2024] EWCA Civ 49, King LJ held that the reference in the Interpretation Act 1978 to 'person' including "a body of persons corporate or

unincorporate" is not intended to limit the ordinary meaning of the word by excluding human beings, but rather to include in the definition a class, namely "a body of persons corporate or unincorporate" who, on the ordinary meaning of the word, would not otherwise be within the class. Judging the mother's submission to be misconceived, she added:

> *"31. Common sense alone would tell one that where an Act was introduced as "An Act to reform the law relating to children" with the welfare of children under eighteen years stated to be the paramount consideration (section 1(1) CA 1989), the definition of a child as a 'person' "under the age of eighteen" must inevitably and could only be, by reference to the ordinary meaning of the word."*

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