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1KBW PUBLIC LAW MONTH

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WEEK FOUR

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Ashley is regularly instructed in complex public and private law proceedings, and has advised internationally on the application of the Children Act.

Her practice is wide ranging, representing parents, local authorities, children, extended family members and interveners. She regularly appears in the High Court and has had a number of successes over the years in the Court of Appeal. Ashley advises on Human Rights issues and Judicial Review both for and against local authorities.

Ashley was appointed as a family Recorder in 2018, dealing with both private and public law hearings.

Working Group on Medical Experts in the Family Court

The final report of the Working Group on Medical Experts in the Family Courts was published on Thursday 5 November 2020.

Mr Justice Williams was appointed to chair the working group, with representation from the legal profession, Royal Medical Colleges and other interested parties.

The working group was established in autumn 2018, prompted by feedback the President had received on his travels to various court centres which identified a particular problem with the availability of medical experts, most particularly in relation to the cause of injuries which were the subject of fact-finding hearings. Later surveys identified a much wider problem with the availability of medical and allied professions, in particular psychologists.

President of the Family Division, Sir Andrew McFarlane, said: "*In recent years it has become increasingly difficult for the Family Justice system to find experts who are willing to give evidence in Family Court proceedings. The shortage has not only been of clinical experts but also allied health professionals and independent social workers. Expert evidence is often necessary in order to decide cases justly and the reduction in available experts therefore presents a serious problem. In autumn 2018 I asked Mr Justice David Williams to convene a Working Group drawn from the legal and health professions to investigate the problem and to suggest solutions.*

"The report of Williams J's group, which is published today, is a most thorough piece of work which makes 22 recommendations aimed at reducing expert shortages. Some of these recommendations include the development of online training resources, engagement of professional bodies, amendments to legal aid

guidance in payment provision, as well as the requirement for greater efficiency in court paperwork and processes, and better local and regional co-ordination. Helpfully the working group discerned a silver lining in the COVID-19 cloud in that remote hearings demonstrated real advantages in making attendance at court hearings less disruptive of clinical practice and also in the convening of multi-disciplinary meetings.

"The work of the Group has already led to changes in the Legal Aid Agency processes that will improve witness participation. The Family Justice Council will take many of the recommendations forward, encouraging health and other professionals to put their expertise to use in the family courts.

"It is my hope that a reinvigorated expert witness workforce will enable the Family Court to continue to deliver the best outcomes for children, young people and families. Mr Justice Williams and I will be monitoring the implementation these recommendations over the next 12 months to make sure we retain the quality and quantity of experts needed."

The feedback and recommendations from the report are addressed in the second part of today's lecture by Emma Wilson and Elle Tait.

Non-accidental Injuries: Summary of the Law

Burden & Standard of Proof

The standard of proof is the ordinary civil standard of balance of probabilities. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. ***Re B (Care Proceedings: Standard of Proof) [2008] 2 FLR 141***.

In the context of care proceedings the lack of any logical or necessary connection between seriousness and probability applies with particular force to the identification of the perpetrator. It may be unlikely that any person looking after a baby would take him by the wrist and swing him against a wall, causing

multiple fractures and other injuries. But once the evidence is clear that this is indeed what happened, it ceases to be improbable. Someone looking after the child at the relevant time must have done it. The inherent improbability of the event has no relevance to deciding who that was. The simple balance of probabilities test should be applied. ***Re S-B (Children) [2010] 1 FLR 1161 SC*.**

The legal burden of establishing the existence of the threshold conditions in s.31(2) rests on the applicant local authority. This trite principle of law is worth emphasising in cases of alleged non-accidental injury as the court must be careful not to reverse the burden of proof by requiring a parent to prove that the injuries in question have an innocent explanation as opposed to requiring the local authority to prove that they do not. ***Re M (Fact-Finding Hearing: Burden of Proof) [2013] 2 FLR 874.***

However, the fact that the local authority relies on the lack of a satisfactory explanation for the injuries does not amount to a reversal of the burden of proof. ***Re M-B (Children) [2015] EWCA Civ 1027***.

The absence of any history of a memorable event where such a history might be expected in the individual case may be very significant. Medical and other professionals are entitled to rely upon such knowledge and experience in forming an opinion about the likely response of an individual child to the particular injury, and the court should not deter them from doing so. The weight that is then given to any such opinion is a matter for the judge. ***Re BR (Proof of Facts) [2015] EWFC 41.***

Where a parent seeks to prove an alternative explanation, but does not prove that alternative explanation, that failure does not, of itself, establish the local authority's case, which must still be proved to the requisite standard. ***The Popi M, Rhesa Shipping Co SA v Edmunds, Rhesa Shipping Co SA v Fenton Insurance Co Ltd [1985] 1 WLR 948***

It is important to guard against a reversal of the burden of proof; the lack of a parental explanation does not necessarily mean that there is no satisfactory benign explanation, or that there must be a malevolent explanation (Ward LJ in ***Re M [2012] EWCA 1580***).

This principle was re-affirmed in ***Re B (Care Proceedings: Finding of Fact Hearing: Skull Fractures) [2017] EWFC B30*** in which HHJ Clifford Bellamy reiterated that the parents do not have to 'prove' anything.

> *"The father says that the injuries were caused as a result of him dropping B onto a wooden floor whilst he was chasing W. I do not have to be satisfied on the balance of probability that the explanation does in fact account for B's injuries. The more appropriate question for the court to ask is whether the father's explanation is sufficiently credible for the court to be able to say that the local authority has not made out its case to the requisite standard. In* ***Re Y (Children) (No 3) [2016] EWHC 503 (Fam)*** *Sir James Munby P made the point that –*
>
> *"20. Thirdly that the fact, if fact it be, that the respondent (here, the parents) fail to prove on a balance of probabilities an affirmative case that they have chosen to set up by way of a defence, does not of itself establish the local authority's case. As His Honour Judge Clifford Bellamy recently said in* ***Re F M (A Child): Fractures: bone density) [2015] EWFC B26 para 122****, and I respectfully agree:*
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> *"It is the local authority that seeks a finding that FM's injuries are non-accidental. It is for the local authority to prove its case. It is not for the mother to disprove it. In particular it is not for the mother to disprove it by proving how the injuries were in fact sustained. Neither is it for this court to determine how the injuries were sustained. The court's task is to determine whether the local authority has proved its case on the balance of probability. Where, as here, there is a degree of medical uncertainty and credible evidence of a possible alternative explanation*

> *to that contended for by the local authority, the question for the court is not "has that possible alternative explanation been proved" but rather it should ask itself "in the light of that possible alternative explanation can the court be satisfied that the local authority has proved its case on the simple balance of probability."*

The court must look at each possibility, both individually and together, factoring in all the evidence before deciding whether the '*fact in issue more probably occurred or not*'. The court arrives at its conclusion by considering whether, on an overall assessment of the evidence, the case for believing that the suggested event happened was more compelling than the case for not reaching that belief (which was not the same as believing positively that it did not happen) and not by reference to percentage possibilities or probabilities ***Re A (Children) [2018] EWCA Civ 1718.***

<u>The Approach to Medical Evidence</u>

The court will not conclude that an injury has been inflicted merely because known or unknown medical conditions are improbable: that conclusion will only be reached if the entire evidence shows that inflicted injury is more likely than not to be the explanation for the medical findings. ***Re BR (Proof of Facts) [2015] EWFC 41***

When considering the medical evidence with respect to the child's presentation, the court must bear in mind, to the extent appropriate in the given case, the possibility of an unknown cause for that presentation **R v Henderson and Butler and Others [2010] EWCA Crim 126** and **Re R (Care Proceedings: Causation) [2011] EWHC 1715 Fam.**

In **R v Henderson** (above) Lord Justice Moses noted:

> *"Where a prosecution is able, by advancing an array of experts, to identify a non-accidental injury and the defence can identify no alternative cause, it is*

tempting to conclude that the prosecution has proved its case. Such a temptation must be resisted. In this, as in so many fields of medicine, the evidence may be insufficient to exclude beyond reasonable doubt an unknown cause. As Cannings teaches, even where, on examination of all the evidence, every possible known cause has been excluded, the cause may still remain unknown."

R v Cannings [2004] EWCA 1 Crim was a criminal prosecution of a mother convicted of the murder of two of her children who had simply stopped breathing. The mother's two other children had experienced apparent life-threatening events taking a similar form. The Court of Appeal quashed her convictions. There was no evidence other than the repeated incident of breathing having ceased and there was serious disagreement between the experts as to the cause of death. There was fresh evidence as to hereditary factors pointing to a possible genetic cause. In those circumstances, the Court of Appeal held that it could not be said that a natural cause could be excluded as a reasonable possible explanation, as Lord Justice Judge observed:

"What may be unexplained today may be perfectly well understood tomorrow. Until then, any tendency to dogmatise should be met with an unanswering challenge."

The Court must always be on guard against the over-dogmatic expert. Caution is required in a case where medical experts disagree (Butler-Sloss P in ***Re LU & LB 2 FLR 263***).

When hearing expert evidence from medical specialists, appropriate attention must be paid to those expert opinions, but those opinions remain but one part of a wider canvass of evidence. **A County Council v KD & L [2005] EWHC 144 Fam**, per Mr Justice Charles:

"*It is important to remember that (1) the roles of the court and the expert are distinct and (2) it is the court that is in the position to weigh up the expert evidence against its findings on the other evidence. The judge must always remember the he or she is the person who makes the final decision."*

As Mr Justice Ryder observed in **A County Council v A Mother and others [2005] EWHC Fam 31:**

> *"A factual decision must be based on all available materials, i.e. be judged in context and not just upon medical or scientific materials, no matter how cogent they may in isolation seem to be."*

Examining the Wider Canvass

When a judge considers the evidence, he must take all of it into account and consider each piece of evidence in the context of all the other evidence, and, to use a metaphor, examine the canvass overall. ***Darlington BC v M, F, GM & GF [2016] 1 FLR 1; Re J (A Child) [2015] EWCA Civ 222; Re R (Children) [2015] EWCA Civ 167.***

In determining whether the local authority has discharged the burden upon it the court looks at what has been described as 'the broad canvass' of the evidence before it. The role of the court is to consider the evidence in its totality and to make findings on the balance of probabilities accordingly. Within this context, the court must consider each piece of evidence in the context of all of the other evidence. **Re T [2004] 2 FLR 838** including the opinions of the medical experts per Dame Elizabeth Butler-Sloss, President:

> "*Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to the other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion of whether the case put forward by the Local Authority has been made out to the appropriate standard of proof."*

Findings of fact must be based on evidence not on speculation. The decision on whether the facts in issue have been proved to the requisite standard must be based on all of the available evidence and should have regard to the wide context of social, emotional, ethical and moral factors **A County Council v A Mother, A**

Father and X, Y and Z [2005] EWHC 31 (Fam).

A judge considering non-accidental injuries always has to consider the whole picture before determining causation. The court must ask itself what was the context in which this alleged non-accidental injury came to be sustained and entertain the totality of the evidence before the court. ***Re B (Children) [2017] EWCA Civ 265.*** So, an injury that might be accepted as accidental if it stood alone might take on a wholly different aspect if it is only one of a number of injuries. ***Re L-K (Children) [2015] EWCA Civ 830.***

Parents' Evidence

The evidence of the parents and carers is of utmost importance and it is essential that the court forms a clear assessment of their credibility and reliability. **Re W and Another (Non-Accidental Injury) [2003] FCR 346**.

The court is likely to place considerable reliability and weight on the evidence and impression it forms of them. In this regard, it is important to bear in mind the observations of Leggatt J in **Gestmin SGPS SA v Credit Suisse (UK) Ltd Anor [2013] EWHC 3560 (Comm)** at [15] to [21] and, in the context of public law children proceedings, of Peter Jackson J in **Lancashire County Council v M and F [2014] EWHC 3 (Fam)** that:

> *"To these matters I would only add that in cases where repeated accounts are given of events surrounding injury and death, the court must think carefully about the significance or otherwise of any reported discrepancies. They may arise for a number of reasons. One possibility is of course that they are lies designed to hide culpability. Another is that they are lies told for other reasons. Further possibilities include faulty recollection or confusion at times of stress or when the importance of accuracy is not fully appreciated, or there may be inaccuracy or mistake in the record keeping or recollection of the person hearing or relaying the account. The possible effects of delay and repeated questioning upon memory should also be considered, as should the effect on one person of hearing accounts given by others. As memory fades, a desire to iron out wrinkles may not be unnatural*

– a process that might inelegantly be described as "story-creep" may occur without any necessary inference of bad faith."

As to the issue of lies, the court must always bear in mind that a witness may tell lies in the course of an investigation and the hearing. The court must be careful to bear in mind that a witness may lie for many reasons, such as shame, misplaced loyalty, panic, fear and distress. The fact that a witness has lied about some matters does not mean that he or she has lied above everything **R v Lucas [1982] QB 720.** Within this context, it is important to note that, in line with the principles outlined in the **R v Lucas**, in seeking to determine whether a person is a perpetrator, or should be included within the pool of possible perpetrators, it is essential that the court weighs any lies told by that person against any evidence that points away from them having been responsible **H v City and Council of Swansea and Others [2011] EWCA Civ 195.**

It is also important when considering its decision as to the findings sought that the Court takes account of the presence or absence of any risk factors and any protective factors which are apparent on the evidence. In **Re BR [2015] EWFC 41** Peter Jackson J sets out a useful summary of those factors drawn from information from the NSPCC, the Common Assessment Framework and the Patient UK Guidance for Health Professionals.

<u>Identifying a Perpetrator</u>

It is in the public interest that those who cause non-accidental injuries be identified. ***Re K (Non-Accidental Injuries: Perpetrator: New Evidence)[2005] 1 FLR 285, CA.*** The court should not, however, 'strain' the evidence before it to identify on the simple balance of probabilities the individual who inflicted the injuries. In assessing whether the evidence is sufficient to lead to a finding, it is not necessary to dispel all doubts or uncertainty. ***Re D (A Child) [2017] EWCA Civ 196.*** If it is clear that identification of the perpetrator is not possible and the judge remains genuinely uncertain, then the judge should reach that conclusion. ***Re D (Care Proceedings: Preliminary Hearing) [2009] 2 FLR 668, CA.***

If the judge cannot identify a perpetrator or perpetrators, it is still important to identify the possible perpetrators by asking whether the evidence establishes that there is a likelihood or 'real possibility' that a given person perpetrated the injuries in question. ***Re S-B (Children) [2010] 1 FLR 1161, SC.*** In such circumstances, it is all the more important to scrutinize the evidence carefully and consider whether anyone, and if so who, should be included as a possible perpetrator ***Re S (A Child) [2014] 1 FLR 739, CA.***

Principles derived from the recent authorities ***Re B (A Child) [2018] EWCA Civ 2127*** *and* ***Re B (Children: Uncertain Perpetrator) [2019]EWCA Civ 575*** suggest the following approach [Red Book 2020 2.282[17]:

- the court should first consider whether there is a 'list' of people who had the opportunity to cause the injury;
- The court should then consider whether it can identify the actual perpetrator on the balance of probability and should seek, but not strain, to do so.
- This will involve considering the individuals separately and together and comparing the probabilities in respect of each of them
- The right question is not 'who is the more likely' but rather 'does the evidence establish that this individual probably caused the injury?'
- Only if the court cannot identify the perpetrator to the civil standard of proof should it then go on to ask of each of those on the list whether there was a likelihood or real possibility that they caused the injuries. Only if there is, should that person be considered a possible perpetrator.

<u>The Welfare Stage</u>

In these 'uncertain perpetrator' cases, the correct approach is for the case to proceed at the welfare stage on the basis that each of the possible perpetrators is treated as such. The House of Lords held that it would be grotesque if, because neither parent had been proved to be the perpetrator, the court had to proceed at the welfare stage as though the child were not at risk from either parent, even

though one or other of them was the perpetrator of significant harm. ***Re O and N: Re B [2003] 1 FLR 1169, HL.***

The threshold pursuant to s 31(2) of the Children Act 1989 may still be satisfied where the court finds that significant harm was caused by one or other or both of the parents but is unable to identify which parent is the perpetrator or that they both are. In **Lancashire CC v B [2000] 1 FLR 583** at 588 Lord Nicholls observed as follows:

> *"In the present case the child is proved to have sustained significant harm at the hands of one or both of her parents or at the hands of a daytime carer. But, according to this argument, if the court is unable to identify which of the child's carers was responsible for inflicting the injuries, the child remains outside the threshold prescribed by Parliament as the threshold which must be crossed before the court can proceed to consider whether it is in the best interests of the child to make a care order or supervision order. The child must, for the time being, remain unprotected, since s 31 of the Children Act 1989 and its associated emergency and interim provisions now provide the only court mechanism available to a local authority to protect a child from risk of further harm. I cannot believe Parliament intended that the attributable condition in s 31(2)(b) should operate in this way. Such an interpretation would mean that the child's future health, or even her life, would have to be hazarded on the chance that, after all, the non-parental carer rather than one of the parents inflicted the injuries. Self-evidently, to proceed in such a way when a child is proved to have suffered serious injury on more than one occasion could be dangerously irresponsible."*

The courts have also issued notes of caution in circumstances where 'failure to protect' is pleaded as part of threshold against the non-perpetrator partner. ***L-W (Children) [2019] EWCA Civ 159***, judgment of King LJ at paragraphs 62-64.

> " 62. *Failure to protect comes in innumerable guises. It often relates to a mother who has covered up for a partner who has physically or sexually abused her child or, one who has failed to get medical help for her child in order to protect a partner, sometimes with tragic results. It*

is also a finding made in cases where continuing to live with a person (often in a toxic atmosphere, frequently marked with domestic violence) is having a serious and obvious deleterious effect on the children in the household. The harm, emotional rather than physical, can be equally significant and damaging to a child.

63. Such findings where made in respect of a carer, often the mother, are of the utmost importance when it comes to assessments and future welfare considerations. A finding of failing to protect can lead a Court to conclude that the children's best interests will not be served by remaining with, or returning to, the care of that parent, even though that parent may have been wholly exonerated from having caused any physical injuries.

64. *Any Court conducting a Finding of Fact Hearing should be alert to the danger of such a serious finding becoming 'a bolt on' to the central issue of perpetration or of falling into the trap of assuming too easily that, if a person was living in the same household as the perpetrator, such a finding is almost inevitable."*

There has to be a causative link between the facts and the alleged risk to the child.

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Emma Wilson

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Emma joined chambers as a tenant in October 2019, following successful completion of her pupillage under the supervision of Richard Castle, Stephen Jarmain and Jennifer Perrins. Emma accepts instructions in all areas of family law and has experience appearing at all levels up to and including the High Court.

Prior to joining chambers, Emma was a paralegal at a top London family law firm. She managed a busy caseload and gained experience in multiple areas of family law including matrimonial finance, private law children and international child abduction proceedings.

Elle Tait

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Elle specialises in all areas of family law. She joined chambers as a tenant in October 2019 following completion of her pupillage.

During pupillage, Elle was supervised by Jennifer Perrins, Richard Castle and Stephen Jarmain and witnessed child abduction, private law children and complex matrimonial finance matters. She has also gained experience in public law children work.

PUBLIC LAW UPDATE

Aside from the rapid adoption of remote hearings, there have been a number of important and significant cases and developments in public law throughout 2020. We have chosen a range of these to focus on, either because they are issues that are likely to arise in practice, because they have not been considered by certain courts before or simply because they are interesting to public law practitioners.

Contents

(1) Local authority powers when a child is in care – s33 Children Act 1989

The following section outlines two recent cases, both addressing the scope of local authority powers under s33(3) Children Act 1989. This legislative provision gives the local authority (who has parental responsibility for a child in its care) power to "determine the extent to which the parent may meet his [the child's] parental responsibility" (s33(3)(b)). With some exceptions and safeguards (i.e., ascertaining the wishes and feelings of the child and his parents) the extent to which a local authority may exercise its parental responsibility is unlimited, provided that it is acting in order to safeguard or promote the welfare of the child in its care.

The following cases demonstrate on the one hand (**Re H**) the power of the local authority to overrule parents on important decisions (i.e., vaccination) if this is considered to be in the best interests of the child, without the need for the local authority to apply to the High Court for leave to invoke its inherent jurisdiction. On the other hand, **Re Y** reminds us of the clear limits of s33(3) when it comes to "momentous" decisions (change of citizenship) with "profound" consequences.

Re H (A Child) (Parental Responsibility: Vaccination) [2020] EWCA Civ 664

Summary

1. The Court of Appeal considered whether a local authority had the power to arrange for the vaccination of a child in care pursuant to s33(3) Children Act 1989 where the parents objected to the vaccination or whether the issue should be referred to the High Court for determination.

Facts

2. The case concerned H, a child, in respect of whom Hayden J had made care and placement orders in January 2020. H's parents objected to H receiving routine vaccinations. Their objections (and particularly those of the father) were driven by the 'fundamental belief that neither the court nor the State, through the arm of the Local Authority has any jurisdiction to take decisions in relation to his children'. At first instance (**Re T (A Child) [2020] EWHC 220 (Fam)**) the parents relied upon a range of objections described by Hayden J as 'both tenuous and tendentious'.

3. Hayden J was invited to consider whether the decision of MacDonald J in **Re SL (Permission to Vaccinate) [2017] EWHC 125** was correct and whether the scope of the local authority's powers under s33(3) Children Act 1989 extended to authorising vaccination. MacDonald J had held in Re SL that this particular decision was of such gravity that the local authority could not properly use s33(3) for this purpose (see **[32]** of Re SL). Hayden J rejected the reasoning in Re SL and held that:

> *"(v)accinations are not, in my view, properly characterised as 'medical treatment'. They are a facet of public preventative healthcare intending to protect both individual children and society more generally"* **[12].**

4. In contrast to the 'life and death' issues coming before the Family Division, Hayden J determined that the issue of vaccination lies 'at the least intrusive end of the scale of intervention' which was not regarded as a 'grave issue outside the scope of s33(3) CA' **[14].** He added that the risks contingent upon not vaccinating the child (a healthy infant) significantly outweighed the benefits; there were "no contra-indications" for the child from the vaccines proposed **[20]**.

5. Hayden J declared that the local authority had lawful authority pursuant to s.33(3) to consent to and make arrangements for the vaccination of the child, despite the objections of his parents. Notwithstanding his equivocal view re s33(3), the Judge "for the avoidance of doubt" made declarations under the inherent jurisdiction of the court pursuant to s.100 Children Act 1989. Given the impact of his decision on the scope of s33(3) and given the clear conflict of High Court authorities, Hayden J granted permission to appeal to the Court of Appeal.

Decision of the Court of Appeal

6. There were two grounds of appeal: 1) Hayden J was wrong to declare that the local authority had power under s33(3)(b) to consent to the vaccinations notwithstanding the parents' objections; and 2) Hayden J was in any event wrong to give the local authority permission to arrange for the child to be vaccinated. By the time the case reached the Court of Appeal, the vaccination issue had fallen away, and the Court was tasked with considering the procedural route to be adopted in these cases. The Court gave a comprehensive overview of the law and the medical research in this area. In particular, the Court set out the now-discredited link between the MMR vaccine and autism (see paras **[40] – [56]**).

7. King LJ giving the lead judgment said the following in relation to immunisations:

> "I cannot agree that the giving of a vaccination is a grave issue (regardless of whether it is described as medical treatment or not). In my judgment it cannot be said that the vaccination of children under the UK public health programme is in itself a 'grave' issue in circumstances where there is no contra-indication in relation to the child in question and when the alleged link between MMR and autism has been definitively disproved." **[85]**

8. The Court held that the local authority could appropriately use s33(3)(b) to make decisions about vaccinations. Medical evidence had established that vaccination was generally in the best interests of otherwise healthy children. The court concluded:

> "…the local authority could have used its statutory power to consent to [H] receiving routine immunisations at the appropriate times without the need to seek court approval. Any legal challenge the parents might have made would inevitably have failed. All that has been achieved by their opposition has been more delay and public expense." **[103]**
>
> *"under s.33(3)(b) CA 1989 a local authority with a care order can arrange and consent to a child in its care being vaccinated where it is satisfied that it is in the best interests of that individual child, notwithstanding the objections of parents."* **[104]**

9. The Court addressed some of the issues regarding the use of s100 Children Act 1989 and the Court's inherent jurisdiction, namely s100(4) which requires the court to conclude that a child is likely to suffer significant harm if the inherent jurisdiction is not invoked. The Court concludes that it is neither necessary nor appropriate for a local authority to refer the matter to the High Court in every case where a parent opposes the proposed vaccination of their child; to do so involves the expenditure of scarce time and resources and the unnecessary instruction of expert medical evidence and the use of High Court time which could be better spent dealing with urgent and serious matters **[104]**.

10. Further, the Court remarked that whilst parental views should be taken into account, the strength of that view is not determinative unless it has a real bearing on the child's welfare. A parent could make an application to invoke the inherent jurisdiction and seek an injunction in respect of the proposed vaccinations. However, this was "unlikely to succeed unless there is put before the court in support of that application cogent, objective medical and/or welfare evidence demonstrating a genuine contra-indication to the administration of one or all of the routine vaccinations" **[103]**.

11. Further helpful remarks about the law and practice in this area are as follows:

    - The feature of previous judgments in this area (including Hayden J's) which had categorised vaccinations as either 'medical treatment' or 'preventative healthcare' was not helpful. The critical issue was whether immunisations should be regarded as 'grave' or 'serious' in the context of the exercise of parental responsibility by a local authority such as to require the sanction of the court when a dispute arises **[81]; [83]; [84]**.

    - In this particular case, the issue of immunisation arose in the context of already-completed care proceedings which had resulted in the making of care and placement orders. Where the sole issue in a case concerns the serious medical treatment, it would be more appropriate for the relevant NHS trust to make an application **[64]; [65]**. Care proceedings were only appropriate in serious medical treatment cases when there are other issues involved.

    - Taken in isolation, failing to vaccinate is unlikely to reach the 'significant harm' threshold in s31 Children Act 1989. However, it may be used as part of the wider threshold allegations in relation to general neglect. **[21]**

    - Subject to credible developments in medical science or peer-reviewed research to the opposite effect, the proper approach to be taken by a local authority or court is that the benefit in vaccinating a child in accordance with the Public Health England guidance can be taken to outweigh the long-recognised and identified side-effects. Any expert evidence should ordinarily be limited to a case where a child has an unusual medical history and to consideration of whether their own circumstances throw up and contra-indications. **[55]**

<u>Points to consider</u>

12. This case resolves the question of the power of a local authority to overrule the parents on the issue of vaccination if they consider this to be in the best interests of a particular child. This applies equally to a child subject to an *interim* care order **[25]**. The authority effectively broadens local authority responsibility in matters which are important, although cannot be regarded as 'serious' or 'grave' **[104]**. The effect of the judgment is likely to shift the burden of bringing proceedings onto the parent seeking to resist vaccination. Such an application for an injunction under s8 Human Rights Act 1998 is likely to fail without 'cogent, objective medical and/or welfare evidence demonstrating a genuine contra-indication to the administration of one or all of the routine vaccinations' **[102]**.

13. This decision is important in the context of the now-discredited 1998 *Lancet* report by Andrew Wakefield *et al* which suggested that the MMR vaccine may predispose children to behavioural

regression and pervasive development disorder. The report received wide publicity and MMR vaccination rates began to drop drastically because parents were concerned about the risk of autism after vaccination. Although the report was immediately refuted by epidemiological studies, the damage was done; vaccination rates have not recovered to pre-Wakefield rates with the inevitably risk to the children whom the vaccinations are designed to protect. King LJ indicates her wish to "bring an end" to the need for endless expert evidence in vaccination cases and the Court of Appeal's judgment represents significant judicial approval of the efficacy of immunisation in accordance with the current weight of scientific evidence.

14. The timing of the decision is particularly pertinent in light of the COVID-19 pandemic and the news of the arrival of a COVID vaccine. Local authorities may find themselves facing challenges from parents in public law proceedings who oppose the administration of the vaccine. This judgment represents a significant judicial approval of the wisdom and efficacy of immunisation in accordance with the current weight of scientific evidence.

15. However, local authorities must bear in mind the Court of Appeal's call for caution; there is the need to continue to involve parents in the decision-making process and s33 does not absolve a local authority of their responsibilities in this regard **[99]**. An individualized welfare analysis would need to be undertaken in each case.

Re Y (Children in Care: Change of Nationality) [2020] EWCA Civ 1038

Summary

The Court of Appeal considered a local authority's statutory powers under s33(3) Children Act 1989 in relation to changing the nationality of children in care, against the wishes of the parents. Unlike the issue of immunisations as detailed in **Re H** above, the decision to change a child's citizenship/nationality was a 'momentous' step with profound and enduring consequences. Independent judicial scrutiny would be necessary.

Facts

1. The case concerned children ages 11 and 9 who were Indian nationals, born in the UK. The children's parents who came to the UK in 2004 were unsuccessful in obtaining leave to remain. In August 2015 the children were removed from their parents and placed in foster care. The search for adoptive parents for the children was unsuccessful and in December 2018, the local authority applied to discharge the placement orders. The parents responded with an application to discharge the underlying care orders. HHJ Tucker in December 2019 discharged the placement orders but refused to discharge the care orders. The plan for the children was thus to remain in long-term foster care.

2. During the course of the original proceedings, the local authority stated that it would seek to secure the children's immigration status by making applications for British Citizenship, which would have the effect of removing their Indian nationality. The social work statement included a paragraph outlining that: "It is the intention of Birmingham Children's Trust to seek British Citizenship for the children and…the legal advice obtained is that the process is generally straightforward given that Birmingham Children's Trust are corporate parent for the children and hold parental responsibility to make decisions relating to their immigration". Despite immigration being a key issue in proceedings, the final care plans submitted by the local authority made no reference to the children's immigration status or to the issue of citizenship.

3. On appeal, it was accepted by the local authority that the court did not have the evidence that would have been expected when there was an immigration issue of this nature, nor had any distinction been drawn between immigration status, passports and travel documentation and citizenship **[16]**. The local authority sought to argue that the decision about a change of citizenship was not one of such magnitude that it had to be put before the court; it was akin to routine vaccination and not to serious medical treatment. The local authority submitted that the Judge was entitled to sign off on the care plan without giving specific consideration to the issue and was entitled to assume that the local authority would deal with the matter under s33. It was said that requiring family courts to scrutinise the care plan in all cases where the child's immigration status was doubtful would have profound consequences for the conduct of care proceedings.

4. The Court of Appeal was tasked with considering the nature of the local authority's parental responsibility under s33 Children Act 1989 which *prima facie* appears to permit a local authority to make profound and irreversible decisions about children who are in care. **[13]** The Court touched upon case law including the aforementioned **Re H [2020] EWCA Civ 664** whereby King LJ stated the following:

> "…local authorities and the courts have for many years been acutely aware that some decisions are of such magnitude that it would be wrong for a local authority to use its power under s.33(3)(b) to override the wishes or views of a parent. Such decisions have chiefly related to serious medical treatment, although in *Re C (Children)* [2016] EWCA Civ 374; [2017] Fam 137 (Re C), the issue related to a local authority's desire to override a mother's choice of forename for her children. The category of such cases is not closed, but they will chiefly concern decisions with profound or enduring consequences for the child."

Decision

5. Peter Jackson LJ giving the lead judgment stated that every local authority will encounter situations where action is needed to secure the immigration position of a child in its care, i.e., an application for leave to remain or a 'dual-citizenship' case. These cases involved the child "gaining a benefit and losing nothing" and such cases were to be contrasted with cases where a child may lose his or her original nationality. In the latter scenario, "the issue is of a magnitude that cannot in my view be resolved by a local authority acting in reliance upon its general statutory powers. In the absence of parental consent, it requires a decision of the High Court under its inherent jurisdiction. That is so whether the issue arises within or outside proceedings". **[18]**

6. The Court expressed concern that the children had been in the care of the local authority for several years, yet no steps had been taken to regularise their immigration position. The children's immigration status, as opposed to the question of nationality, could and should have been addressed within the existing proceedings; this important question did not receive the attention it required. The court would have approved steps being taken to regularise the children's immigration position, short of an application for citizenship and such steps could now be taken by the local authority under its s33 powers.**[20]**

7. The local authority had sought some advice about citizenship, but there was no evidence before the court about the options for securing the children's position in the UK through applications short of an application for citizenship. There was a general understanding that the

granting of British citizenship would lead to the loss of the children's Indian citizenship but there was no formal evidence to this effect and no acknowledgment of the "intrinsic gravity of a change of nationality" to the extent that the issue did not feature in the care plans or in the. Judgment. No consideration was given by each of the agencies to any disadvantages that might flow to the children from the loss of their nationality of birth. **[21]**

8. The judge should have made clear that the question of change of citizenship could not be decided within the proceedings before her. If the local authority wished to pursue a change of citizenship at this stage, they could make an application under the inherent jurisdiction which should have been referred to a judge of the Family Division or a judge sitting as a deputy judge of the High Court under s9 Senior Courts Act 1981. Meanwhile, it was open to the judge to give directions for the necessary evidence of UK and Indian law to be gathered. **[22]**

9. The court rejected the arguments presented by the local authority and held at **[23(1)]** that:

> "the characterisation of a change of citizenship as akin to routine vaccination is misplaced. Changing a child's citizenship is a momentous step with profound and enduring consequences that requires the most careful consideration. Recognising that fact does not have far-reaching consequences for the conduct of care proceedings, as claimed, and it is not asking too much of a local authority to put its case before the court for scrutiny. This case, in which local authority has arrived at a settled position without any of the necessary data, provides a good example of why such scrutiny is needed."

10. It was no answer to say that the remedy for dissenting parents is to take legal action against the local authority. For many parents and particularly those whose immigration status is insecure, that would not be an effective remedy. They will only have legal representation within care proceedings and they may have neither the knowledge nor the means to seek an injunction under the Human Rights Act or to bring judicial review proceedings. An application to discharge the care order would be disproportionate. Further, the children themselves have a central interest in the matter and in the absence of proceedings they will not have a Children's Guardian and will not be legally represented **[23(2)]**.

11. The court was not persuaded that the local authority would be prevented from seeking a judicial ruling by the terms of s100 Children Act 1989. The very existence of s100(3) and (4) demonstrated that there will be residual cases where the local authority's statutory powers under s33 are inadequate. In the present case, the local authority would require leave to apply for the court to exercise its inherent jurisdiction and the court could only grant leave if the result sought could not be achieved by other means (ss 4(a)) and where there is reasonable cause to believe the children would be likely to suffer significant harm if the inherent jurisdiction was not exercised (ss4(b)). Both conditions were likely to be met in this case. **[23(3)]**

12. Substantively, the care orders remained undisturbed and the appeals were dismissed. However, reflecting on the appellants' success on the issue of law that led to permission to appeal being granted, the Court made a declaration that: "*s.33 CA 1989 does not entitle the local authority to apply for British citizenship for these children, in the face of parental opposition and where that may lead to a loss of their existing citizenship, without first obtaining approval from the High Court.*"

Points to consider

13. This case is an interesting contrast to the above decision of Re H and shows the clear limits of local authority powers pursuant to s33 Children Act 1989. Whereas Re H was dealing with decisions which were not "grave" or "serious", changing a child's citizenship "*is a momentous step with profound and enduring consequences that requires the most careful consideration"; High Court approval would be needed.*

14. *The court gave useful advice on timing in this case. Once it is concluded that the question of a change of citizenship is one that should be judicially decided at High Court level by reason of its importance and potential complexity, the question of timing should not be overlooked* ***[23(4)].*** *Depending on expert advice, it may not need to be made as a matter of urgency and consideration might be given to whether it should be taken at a time when the children are more able to express their own views. That does not, however, prevent an application being made sooner rather than later, as it is open to the court to approve an application being made at a later date.*

15. The local authority in this case were criticised for arriving at their position without any of the necessary evidence in support of their position; this must be given careful thought by anyone acting in a case where immigration/citizenship issues arise. Where a child is to lose his or her original nationality, the local authority cannot act under section 33. Absent parental consent, this decision will require High Court approval.

(2) Withdrawing care proceedings

***GC v A County Council & ors* [2020] EWCA Civ 848**

Facts

1. The case concerned a little girl referred to as 'G'. She had been living with her mother ("M"), with the maternal grandparents. Her father ("F") lived separately, but shortly before events leading to proceedings M obtained a rented flat at which F would occasionally stay.

2. On 2 January 2020, G was in the care of M and the maternal grandmother ("MGM") until the evening. Thereafter, she was in the sole care of MGM until the morning of 3 January. In the early afternoon, MGM said she noticed a swelling on G's head and took her to the pharmacist, GP and then the hospital. The parents joined MGM at the latter. When examined, doctors found that G "had a small displaced oblique fracture of the right parietal bone with a 5mm subgaleal haematoma overlying the fracture site". None of the family members could provide an explanation for the injuries and so doctors suspected non-accidental injury.

3. The local authority sought a finding that "the mother and/or the father are unable or unwilling to account for this injury and they are either responsible for causing this injury to G and/or know who was responsible for causing this injury and are withholding this information, thus failing to protect G whilst in their care or the care of another".

4. The mother reported that G had fallen off a bed in mid-December and had fallen onto a toy truck shortly after Christmas. The grandparents also informed a social worker that G had fallen while pushing a walker and hit the side of her head on a play table on 3 January and that they had told a nurse about this.

5. A neuroradiologist and retired paediatrician reported on the injuries. They agreed that the injuries probably occurred at the same time. The experts considered the grandparents' accounts. The paediatrician Dr Rylance described the incident set out by the grandparents as a 'plausible cause' of the injuries. The neuroradiologist Dr Saunders said it was not a 'likely' cause but could not be excluded as a remotely possible cause. At an experts' meeting, Dr Saunders said the fall was 'highly unlikely but not impossible' to have caused the injuries. Dr Rylance concluded he could not exclude it.

Decision

6. Under 29.4(2) of the FPR 2010, a local authority requires the permission of the court to withdraw an application for a care order. The Court of Appeal noted that this requirement, or an earlier version of it, had been in force since the implementation of the Children Act 1989. However, although considered a number of times by the Family Division, it had only been considered by the Court of Appeal once, back in 1993.

7. The Court of Appeal endorsed the approach adopted by the High Court previously, which was as follows. They stated that there are two categories of applications to withdraw (echoing the observation of Hedley J in **Redbridge London Borough Council v B and C and A [2011] EWHC 517 (Fam))**:
    a. Where the LA cannot satisfy the threshold criteria – this inability must be "*obvious*"[1];

[1] The Court of Appeal here adopted the words of Cobb J in *Re J, A , M and X (Children)* [2017 EWHC 4648 (Fam)

b. Where it is possible for the LA to satisfy the threshold criteria.

8. In the second category, the application should be determined by:
    a. Whether withdrawal will promote or conflict with the welfare of the child concerned; and
    b. The overriding objective under the FPR.

9. The Court stated that:

> "…The relevant factors will include those identified by McFarlane J in *A County Council v DP* which, having regard to the paramountcy of the child's welfare and the overriding objective in the FPR, can be restated in these terms:
>
> (a) the necessity of the investigation and the relevance of the potential result to the future care plans for the child;
> (b) the obligation to deal with cases justly;
> (c) whether the hearing would be proportionate to the nature, importance and complexity of the issues;
> (d) the prospects of a fair trial of the issues and the impact of any fact-finding process on other parties;
> (e) the time the investigation would take and the likely cost to public funds.

10. The Guardian appealed on the basis that, in short, the judge concluded that the case fell into the first category of cases, and as a result failed to properly analyse the factors relevant to the second category.

11. The Court of Appeal stated that this case was a "paradigm example of a case where a judge needs to hear all the evidence to assess whether the lay witnesses' evidence is truthful, accurate and reliable, and evaluate the medical opinion evidence, tested in cross-examination, in the context of the totality of the evidence. It is simply not possible for the judge to reach a conclusion as to the cause of G's injuries on the basis of the written evidence alone." **[34]**

12. They identified that the outcome of the fact-finding hearing would be relevant to the future care plans for the child and so was necessary in the child's best interests and found that there were no significant disadvantages.

Implications/points to consider

13. The approach to be taken when care proceedings are withdrawn has not in fact changed, but we do now have a Court of Appeal authority on the topic which sets out the guidance in comprehensive detail. Any time withdrawal is being considered, this should be referred to.

14. It seems unlikely that there will be dispute in relation to cases falling under the first category – the inability to meet the threshold criteria will be plain.

15. Where the threshold criteria are such that findings would impact the planning for the child, it is likely that an application to withdraw would not succeed.

(3) Paternity and related issues of informing third parties

There have been two cases this year relating to the notification or identification of fathers or relatives of children being placed for adoption. This issue arises particularly where the birth mother wishes to have the child placed for adoption, rather than where care proceedings are taking place.

A, B and C (Adoption: Notification of Fathers and Relatives) **[2020] EWCA Civ 41**

Facts

1. The mothers in these three cases had all kept their pregnancies secret from the fathers and the paternal family. In A's case, his mother was a student who had a history of depression. She did not feel physically or emotionally able to care for A and said she expected A's father to agree with the decision for him to be adopted. In B's case, the pregnancy had also been kept secret from the maternal family. In C's case, the mother was married to the father but had concealed the pregnancy. She alleged that the child was conceived via a rape and that to disclose the existence of the child would be traumatic for her.

Decision

2. The Court of Appeal considered the relevant provisions of the Children Act 1989 and the provision for consensual adoption under the Adoption and Children Act 2002. They note that the procedural rules provide for a specific process for considering the interests of a father without parental responsibility, under Part 19 of the Family Procedure Rules:

   > Rule 14.21 reads: "Where no proceedings have started an adoption agency or local authority may ask the High Court for directions on the need to give a father without parental responsibility notice of the intention to place a child for adoption."

3. The Court of Appeal states: "as Cobb J notes, the statutory material as a whole provides strong indicators of the importance of engagement of the wider family in the adoption process. In the circumstances, any request for an adoption that excludes a father or close family members will naturally be carefully scrutinised by social workers and the court. That instinct is reinforced by the established domestic and European case law that emphasises that non-consensual adoption can only be approved if, after consideration of the realistic options, nothing else will do." **[33]**

4. The relevant ECHR case law was also considered, as well as the domestic case law about disclosure of information in an adoption context. The Court considered that there was broad consistency in the approach to date and there was a need to balance the competing interests.

5. The Court also considered whether the welfare checklist applied to a local authority or court when deciding whether to notify a putative father of the existence of a child. Although the court stated that "child welfare, prompt decision-making and a comprehensive review of all relevant factors are central to the notification decision, regardless of whether they are directly mandated by statute" **[82]**, they found that the notification decision was not expressly engaged by those provisions, for the following reasons:
   - Regarding the CA 1989, the decision was not one relating to the upbringing to the child;
   - The same was true of the ACA 2002: it was not a decision relating to the adoption of a child;

- The terms of s1(7) ACA 2002 apply only to decisions by the court and do not lead to a different conclusion – per **Re P (Adoption: Leave Provisions) [2007] EWCA Civ 616**, it does not deal with a Part 19 application but addresses the coming to a decision about the substance of the application;
- The court considered that was consistent with the distinction between decisions that did and did not engage the welfare principle;
- **Re C v XYZ County Council [2007] EWCA Civ 1206** did not bind the court (though the court stated it was correctly decided);
- The decision of **Re A (Father: Knowledge of Child's Birth) [2011] EWCA Civ 273** does not support the application of the welfare principle;
- "There is no reported decision of which I am aware in which the outcome has been dictated by the court finding that the welfare of the child trumps all other considerations; instead, there is an unbroken body of case law in which the outcome has been determined by a balancing of the rights and interests of all the individuals concerned."

6. The court thought it was important that social workers and courts took a consistent approach on this, and that the outcome should be governed by the facts of a case rather than the particular relative in issue or whether proceedings had been brought.

7. It was emphasised that the local authority should act with speed where this seemed to be in issue:

> "**[86]** Where the mother requests confidentiality, it will need to decide at a very early stage whether an application to court should be made to determine whether or not the putative father or relatives should be informed and consulted. There will be cases where, applying the principles summarised in this judgment, the local authority can be very clear that no application is required and planning for placement on the basis of the mother's consent can proceed. But in any case that is less clear-cut, an application should be issued so that problems concerning the lack of notification do not arise when adoption proceedings are later issued. In relation to a putative father, that application will be under Part 19 unless issues of significant harm have made it necessary to issue proceedings for a care or placement order; I would suggest that an equivalent application under the inherent jurisdiction can be made where a local authority has doubts about notification of a close relative."

8. At **[88]**, the court also gave guidance on how an application should be dealt with if it were issued:
   - Identity of judge: If the application is under Part 19, it must be heard in the High Court and appropriate listing arrangements must be made. Upon issue, the application should immediately be referred to the DFJ for consultation with the FDLJ as to whether the application should be allocated to a High Court Judge or a section 9 Deputy High Court judge.
   - Identity of parties: (a) It is not mandatory for a respondent to be named in the application, although it will usually be appropriate for the mother to be identified as a respondent; (b) directions should be given on issue joining the child as a party and appointing a CAFCASS officer to act as Children's Guardian in the application; (c) neither a father (with or without parental responsibility) nor members of the wider maternal/paternal family are to be served with or notified of the application or provided with any of the evidence filed in support of an application.

- Case management: The application should be listed for an urgent CMH, ideally attended by the CAFCASS officer. At the hearing, consideration should be given to the need for any further evidence, the filing of the Guardian's analysis and recommendations, the filing of written submissions and the fixing of an early date for the court to make a decision.
- Receiving the mother's account: It is a matter for the court as to whether it should require written or oral evidence from the mother. Given the importance of the issue, the court will normally be assisted by a statement from the mother, whether or not she gives oral evidence, rather than relying entirely upon evidence from the local authority at second hand.
- The listing of the hearing of the application should allow time for whatever evidence and argument may be necessary, and for a reasoned judgment to be given. Even allowing for the pressure on court lists, these decisions require prioritisation.

9. The applicable principles were then set out in **[89]** and bear repeating in full:
    - The law allows for 'fast-track' adoption with the consent of all those with parental responsibility, so in some cases the mother alone. Where she opposes notification being given to the child's father or relatives her right to respect for her private life is engaged and can only be infringed where it is necessary to do so to protect the interests of others.
    - The profound importance of the adoption decision for the child and potentially for other family members is clearly capable of supplying a justification for overriding the mother's request. Whether it does so will depend upon the individual circumstances of the case.
    - The decision should be prioritised and the process characterised by urgency and thoroughness.
    - The decision-maker's first task is to establish the facts as clearly as possible, mindful of the often limited and one-sided nature of the information available. The confidential relinquishment of a child for adoption is an unusual event and the reasons for it must be respectfully scrutinised so that the interests of others are protected. In fairness to those other individuals, the account that is given by the person seeking confidentiality cannot be taken at face value. All information that can be discovered without compromising confidentiality should therefore be gathered and a first-hand account from the person seeking confidentiality will normally be sought. The investigation should enable broad conclusions to be drawn about the relative weight to be given to the factors that must inform the decision.
    - Once the facts have been investigated the task is to strike a fair balance between the various interests involved. The welfare of the child is an important factor but it is not the paramount consideration.
    - There is no single test for distinguishing between cases in which notification should and should not be given but the case law shows that these factors will be relevant when reaching a decision:
        (1) *Parental responsibility*. The fact that a father has parental responsibility by marriage or otherwise entitles him to give or withhold consent to adoption and gives him automatic party status in any proceedings that might lead to adoption. Compelling reasons are therefore required before the withholding of notification can be justified.
        (2) *Article 8 rights*. Whether the father, married or unmarried, or the relative have an established or potential family life with the mother or the child, the right to a fair

hearing is engaged and strong reasons are required before the withholding of notification can be justified.

(3) *The substance of the relationships.* Aside from the presence or absence of parental responsibility and of family life rights, an assessment must be made of the substance of the relationship between the parents, the circumstances of the conception, and the significance of relatives. The purpose is to ensure that those who are necessarily silent are given a notional voice so as to identify the possible strengths and weaknesses of any argument that they might make. Put another way, with what degree of objective justification might such a person complain if they later discovered they had been excluded from the decision? The answer will differ as between a father with whom the mother has had a fleeting encounter and one with whom she has had a substantial relationship, and as between members of the extended family who are close to the parents and those who are more distant.

(4) *The likelihood of a family placement being a realistic alternative to adoption.* This is of particular importance to the child's lifelong welfare as it may determine whether or not adoption is necessary. An objective view, going beyond the say-so of the person seeking confidentiality, should be taken about whether a family member may or may not be a potential carer. Where a family placement is unlikely to be worth investigating or where notification may cause significant harm to those notified, this factor will speak in favour of maintaining confidentiality; anything less than that and it will point the other way.

(5) *The physical, psychological or social impact on the mother or on others of notification being given.* Where this would be severe, for example because of fear arising from rape or violence, or because of possible consequences such as ostracism or family breakdown, or because of significant mental health vulnerability, these must weigh heavily in the balancing exercise. On the other hand, excessive weight should not be given to short term difficulties and to less serious situations involving embarrassment or social unpleasantness, otherwise the mother's wish would always prevail at the expense of other interests.

(6) *Cultural and religious factors.* The conception and concealed pregnancy may give rise to particular difficulties in some cultural and religious contexts. These may enhance the risks of notification, but they may also mean that the possibility of maintaining the birth tie through a family placement is of particular importance for the child.

(7) *The availability and durability of the confidential information.* Notification can only take place if there is someone to notify. In cases where a mother declines to identify a father she may face persuasion, if that is thought appropriate, but she cannot be coerced. In some cases the available information may mean that the father is identifiable, and maternal relatives may also be identifiable. The extent to which identifying information is pursued is a matter of judgement. Conversely, there will be cases where it is necessary to consider whether any confidentiality is likely to endure. In the modern world secrets are increasingly difficult to keep and the consequences, particularly for the child and any prospective adopters, of the child's existence being concealed but becoming known to family members later on, sometimes as a result of disclosure by the person seeking confidentiality, should be borne in mind.

(8) *The impact of delay.* A decision to apply to court and thereafter any decision to notify will inevitably postpone to some extent the time when the child's permanent placement can be confirmed. In most cases, the importance of the issues means that the delay cannot be a predominant factor. There may however be circumstances where delay would have particularly damaging consequences for the mother or for the child; for example, it would undoubtedly need to be taken into

account if it would lead to the withdrawal of the child's established carers or to the loss of an especially suitable adoptive placement.

(9) *Any other relevant matters.* The list of relevant factors is not closed. Mothers may have many reasons for wishing to maintain confidentiality and there may be a wide range of implications for the child, the father and for other relatives. All relevant matters must be considered.

- It has rightly been said that the maintenance of confidentiality is exceptional, and highly exceptional where a father has parental responsibility or where there is family life under Article 8. However exceptionality is not in itself a test or a short cut; rather it is a reflection of the fact that the profound significance of adoption for the child and considerations of fairness to others means that the balance will often fall in favour of notification. But the decision on whether confidentiality should be maintained can only be made by striking a fair balance between the factors that are present in the individual case.

10. In regards to the decisions:
    a. Case A: the local authority was criticised for the delay in issuing its application, as in doing so (a) the child had formed bonds with his carers and (b) the decision that adoption was in his best interests had been decided before family notification was considered. The mother was also not directly involved, which was less than ideal. The court did not find that the mother's account provided an objective basis for discounting the father as a carer without further investigation.
    b. Case B: this was a look more at the maternal family, in light of uncertainties about the child's paternity, and the judge had been unwilling to discount their potential role on the basis of the mother's account and vulnerabilities allowed. The court found that they could not depart from the judge's reasoned conclusion.
    c. Case C: although the judge took the mother's case at its highest and considered the distressing circumstances of C's conception, the court agreed that that had to be set aside the fact that the father had parental responsibility and it would be an "extremely strong course" to proceed without notifying him of the birth.

***L (Adoption: Identification of Possible Father)* [2020] EWCA Civ 577**

11. Peter Jackson LJ summarised the issue in this case for the Court as follows:

> "In A**, B and C (Adoption: Notification of Fathers And Relatives) [2020] EWCA Civ 41** this court considered the approach to be taken where a mother wants a baby to be placed for adoption without notice being given to the child's putative father. This appeal raises two related questions. First, to what extent does the same approach apply where there is uncertainty about the child's paternity? And second, what should the response of the court be to a proposal that paternity should be investigated by carrying out DNA testing on other children of the mother without reference to the possible father? I will call this 'sibling testing' although it begs the question of whether there is shared parentage."

Facts

12. The background is as follows: M had two older children, whose father was Mr C. He had parental responsibility for one, but not both, of the children, although had contact with both. The case concerned M's third child, K. M had concealed the pregnancy and informed her midwife that she wished to place the baby for adoption at birth. She told the LA Mr C was the father but was critical of him and refused to consent to social workers contacting him. When M gave birth, she left hospital without seeing K, named K when she was two days old and signed a s20 agreement. M confirmed she would not provide information

about Mr C. She later told social workers that Mr C was *not* the father but K was conceived as a result of a 'drunken one night stand'. K has been with early permanence foster carers in July 2019 and M signed her consent to the adoption in October 2019.

13. The local authority applied for a declaration that it need not identify or locate K's father in December 2019, but also sought DNA testing of Mr C. The inconsistency was accepted and explained as due to a breakdown in communication within the LA.

14. HHJ Marston directed the mother to provide Mr C's contact details, but she instead filed a witness statement describing his "*unpleasant behaviour*", expressing her fear if he was made aware of the birth and saying she was certain he was not the father.

15. HHJ Marston then ordered the mother *again* to provide contact details and provided for DNA testing. M then obtained advice on appeal and moved to the position that 'sibling' testing should be used to establish if Mr C was K's father.

Decision

16. The court identified that this case differed slightly from the cases in A, B and C given that Mr K was a possible father, not a putative father. They considered that "such uncertainty about paternity is to be regarded as one of the other relevant matters referred to at sub-paragraph 6(9) of the summary at paragraph 89 in A, B and C. If the court, on all the available information, considers that there is a substantial possibility that a person may be the child's father, that will be a factor to be taken into account alongside other factors bearing on the decision concerning notification. The weaker the possibility, the less likely the court will be to direct an investigation of paternity that compromises the mother's wish for privacy" **[21].**

17. Although the ethics of sibling testing were not considered, the court expressed a view that "covert testing of another child may amount to an unlawful breach of the Article 8 rights of that child's father and of the child. Social workers will need to take account of these legal and ethical issues when making a judgement about the appropriateness of such testing. For its part, a court should in my view be extremely cautious before approving the testing of possible siblings as a means of clarifying the parentage of a child whose mother seeks adoption. It should reflect on the fact that in the presence of one secret (the birth of the child) it is, as a public body, being asked to endorse another secret (covert testing). It should think beyond the testing to the possible consequences. The inherent ethical objections to sibling testing are therefore only likely to be overcome in compelling circumstances where the clarification of parentage is necessary and where standard paternity testing is for some reason not an acceptable option. In any case, such a course should only be contemplated after a thorough analysis that takes full account of the interests of the possible siblings" **[24].**

18. The court therefore thought that the judge was correct here to resist the proposal for sibling testing as it would be a disproportionate interference with the children's rights and those of their father, as they would "unwittingly become involved in the secrecy requested by the mother" even though "the factors speaking against informing Mr C of K's birth are not by any means strong enough to justify taking that course".

Implications/points to consider

19. So what do these cases teach us? The key lesson is **promptitude**. The courts have emphasised that issues around paternity and notification of relatives should be determined

swiftly. It is particularly important in cases of relinquishment, because it is crucial to avoid delay for babies where the path otherwise seems clear. Whether acting for a parent or local authority, if there appears to be an issue about family members being unaware, it is important to draw this to the court or local authority's attention as early as possible.

20. If an application to the court looks likely, it should be made at an early stage, not just when the issue becomes pertinent. The parties can also point the court to the advice in this case about case management.

21. It is also important to recognise that the child's interest in remaining within their birth family if possible is a forceful consideration. However, we would say that these cases contain milder concerns about notification – it might be that if the concerns were more serious and/or the impact on mother would be more profound, the court would adopt a different consideration of the balance at play.

(4) Costs

Re W (A Child) [2020] EWCA Civ 77

The Court of Appeal ordered the local authority to pay the costs of the great-aunt in care proceedings after finding that the local authority had not been "even handed" in its approach. This was the case both in respect of the local authority's presentation of the case to the Judge at first instance, and thereafter the failure of the local authority to recognise that the judgment as drafted could not justify the order that was made.

Facts

1. The substantive appeal in this matter is **W (a Child) [2019] EWCA Civ 1966**; hereafter 'the 2019 judgment'. The appellant was the great-aunt of a child, J, who was the focus of care proceedings that commenced in 2017. Proceedings eventually concluded on 3 May 2019 with HHJ Bush making care and placement orders in respect of J. J's great-aunt sought permission to appeal the making of such orders. It is important to understand the background of that decision in order to understand the Court of Appeal's subsequent decision re costs.

2. King LJ in the 2019 judgment describes the "lengthy and tortuous progress towards trial" in this case **[5]**. Very early in proceedings, J's mother accepted that she was unable to care for J and soon thereafter identified J's great-aunt as a potential long-term carer. The court approved the instruction of an ISW who in May 2018 filed a substantial and 'finely-balanced' report setting out the strengths and weakness of the great-aunt but recommending against placement of J with her. The local authority the sought placement of J through adoption. The great-aunt made an application seeking party-status.

3. In November 2018, an addendum ISW report showed 'much cause for encouragement of the great-aunt'. The ISW recommended further assessment and the court approved the proposal to increase contact and put in place a transition plan for J to be placed with his great-aunt. At that stage, the local authority sought to withdraw their application for a placement order. However, days later, the local authority resiled from its stated position to indicate that J should be placed under a care order with the great-aunt. At this stage, the great-aunt remained unrepresented and her application to become a party had not been resolved.

4. In December 2018 (week 51 of proceedings) the local authority *again* changed their stance to support the ISW's recommendation for a further report seeking an increase in contact between J and the great-aunt prior to final evidence being filed. The independent contact observer/supervisor 'DJ' supervised some 75% of contact sessions and the Court of Appeal deemed that his observations were "relevant and of the greatest importance to the outcome of the case" **[33]**. The Court observed that it was unfortunate that 'DJ' was not called at trial; it was no answer for the local authority to say in its defence that the (unrepresented) great-aunt did not require 'DJ' to be called or that his role was not to assess but to supervise **[32]**.

5. The final evidence filed by the social worker put forward an entirely different picture to that painted by 'DJ'. The Court of Appeal noted that the local authority have a duty to put an even-handed case before the judge. The judge only had evidence that the great-aunt still required 'prompting' at all contact visits, which was demonstrably untrue. 'DJ' should have been called to give evidence and his notes should have been available to the judge and the ISW. It was "disingenuous" to say that DJ's role was mere supervision and that he was not assessing contact in circumstances where he was supervising most of the contact and was writing up a

full detailed log in respect of every visit. Even if the outcome was ultimately the same, the result was that the great-aunt might reasonably feel that an uneven picture had been presented to the judge **[39]**.

6. The great-aunt was made a party ten months after she had applied to be joined. The ISW filed a further addendum report which concluded that the great-aunt was still not ready or capable of meeting J's needs and the local authority issued another placement application. The Guardian's report was 'heavily reliant' upon the report of the ISW and King LJ stated that the Guardian "does not seem fairly to reflect the very positive aspects of the great-aunt's care which were highlighted by the ISW and does not adequately reflect just how finely balanced the decision whether or not to place J with the great-aunt had been" **[44].**

7. At trial, HHJ Bush (who had had no previous involvement in the case) decided against the great-aunt and made a placement order for J. The Court of Appeal was critical of the judgment and found that it:
    a. Contained very little background or detail of the evidence heard;
    b. Did not deal specifically with the oral evidence of the ISW; and
    c. Contained a finding that seemed to be wholly contrary to the totality of the written evidence of the ISW which represented a profound defect in the judgement.

8. When criticising the great-aunt, the judge misunderstood or misinterpreted the evidence. The Court of Appeal allowed the appeal of the great-aunt. The care and placement orders were set aside with the matter remitted to Keehan J who ordered that J be placed with the appellant great aunt under a transitional plan.

Decision re costs

9. The matter then came before the Court of Appeal on the specific issue of costs in: **Re W (A Child) [2020] EWCA Civ 77.**

10. The Court set out the well-established principles regarding costs orders as considered by the Supreme court in **Re T (Children) [2012] UKSC 36** and then in **Re S [2015] UKSC 20** which concerned appeals. Baroness Hale confirmed that "costs orders should only be made in unusual circumstances" i.e. where "the conduct of a party has been reprehensible or the party's stance has been beyond the band of what is reasonable" (per Wilson J as he then was in ***London Borough of Sutton v Davis (Costs) (No 2)*** **[1994] 2 FLR 569]**.

11. The Court of Appeal sets out the relevant principles at paragraph 29 of Re S:

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

appeal. But in my view that does not alter the principles to be applied: it merely alters the application of those principles to the circumstances of the case."

12. Of particular relevance were Baroness Hale's further comments:

> "…The object of the exercise is to achieve the best outcome for the child. If the best outcome for the child is to be brought up by her own family, there may be cases where real hardship would be caused if the family had to bear their own costs of achieving that outcome. In other words, the welfare of the child would be put at risk if the family had to bear its own costs. In those circumstances, just as it may be appropriate to order a richer parent who has behaved reasonably in the litigation to pay the costs of the poorer parent with whom the child is to live, it may also be appropriate to order the local authority to pay the costs of the parent with whom the child is to live, if otherwise the child's welfare would be put at risk."

13. The local authority had submitted that the lower Judge's brief judgment provided "sufficient detail for the parties to understand why the judge had concluded adoption was the only order which would meet his [the child's] needs". However, as above, the Court of Appeal had concluded that the local authority, notwithstanding their duty to put an even-handed case before the judge, had provided the judge with an "uneven picture".

14. Further, this was a case (as identified by Baroness Hale) where the child would be in a family placement. It was accepted that the great-aunt had spent substantial sums of her own money in renovating her home to provide a safe and appropriate environment for the child. She did this in good faith at a time when no one could have known whether the child would be ultimately be placed with her. Whilst the court had not and would not seek financial disclosure from the great-aunt, it was inevitable that the costs of the appeal would have had a significant financial impact upon her in addition to the sums already spent on her property.

15. The local authority emphasised the strain on local authority resources and submitted that they had not had a proper opportunity to 'take stock'. In support of this submission, they gave details of delays in providing bundles, late filing of skeleton arguments and other procedural mishaps on the part of the appellant. King LJ stated that "whilst sympathising with the frustration of the local authority" regarding delays and late filing, in her judgment "the basis of the appeal and the deficiencies in the judgment were at all times, completely apparent" **[8]**.

16. King LJ directed herself to both **Re T** and **Re S** and additionally, the more recent Court of Appeal authority of **LR v (1) a local authority (2) a mother (3) a father (4) RP (by her children's guardian) [2019] EWCA Civ 680** in which the Court of Appeal declined to make an order for costs notwithstanding that the "conduct of the local authority and guardian fell short of the standard expected in care proceedings".

17. The Court emphasised that each case must turn on its facts. In this case, there was a failure to be even-handed on the part of the local authority in their presentation of the case to the Judge at first instance. Thereafter, there was a failure to recognise (save to a very limited extent) that the judgment as drafted could not justify the order that was made. In those circumstances and in the unusual circumstances of the case, the local authority were ordered to make a contribution to the costs of the great-aunt **[10]**. The local authority were ordered to pay a contribution of £12,000 inclusive of VAT. Henderson LJ and Moylan LJ agreed.

Points to consider

18. This case should read as a cautionary tale to local authorities (and indeed all parties) in care proceedings and the need to be "even-handed" throughout proceedings. The chronology of the care proceedings makes for concerning reading, with the local authority putting forth an entirely unbalanced and ever-changing case against an unrepresented litigant who for a substantial part of proceedings was not a party. Regardless of for whom you are acting in care proceedings, the issue of joinder must not be left to slip. This can have a disastrous effect on the timetable.

19. The general rule remains that costs orders should only be made in "unusual circumstances" and each case will turn on its facts. However, there remains both a substantive and procedural duty to 'take stock' during proceedings. If it becomes apparent following judgment that there are deficiencies in the court's judgment and that the judgment could not justify the order made, action must be taken. Thereafter, maintaining an unreasonable stance on appeal is conduct that could well justify the making of a costs order.

(5) Remote Hearings

The past eight months have posed an unprecedented challenge to the Family Courts of England and Wales. Much progress has been made since March/April 2020 and many hotly-contested, lengthy and complex hearings are taking place remotely by video and telephone. However, clear problems remain, particularly in public law cases.

The following section will address the guidance in relation to remote hearings, most notably the two reports of the Nuffield Family Justice Observatory (NFJO) which outline the response of court users (parties, legal representatives, experts, the judiciary) to remote hearings and the areas of improvement that have been suggested.

Lastly, a selection of remote cases are summarised to signpost the reader in the direction of important authorities that have arisen during the pandemic.

The 'first' Nuffield Report

1. Following the outbreak of the COVID-19 pandemic, the family courts in England and Wales were forced to adapt to using telephone and video hearings. The President of the Family Division asked the NFJO to undertake a rapid consultation on the use of remote hearings in the family court. The consultation ran for a two-week period in April 2020 and more than 1,000 people responded. A summary of the NFJO's report by Frances Stratton can be found at: https://www.1kbw.co.uk/views/a-summary-of-the-nuffield-family-justice-observatorys-report-remote-hearings-in-the-family-justice-system-a-rapid-consultation/

2. Eight broad questions aimed at eliciting the pros and cons of remote working were asked of participants (including everyone from lay parties to the judiciary) with responses given via email or telephone. Other organisations undertook their own consultation over the same period, sharing their responses with the NFJO. At the time, most respondents considered that remote hearings were justified for *some* cases given the circumstances, and that telephone/video hearings may continue to be the way forward for certain hearings in the future.

3. However, many respondents expressed serious concerns about the fairness of telephone or video hearings, particularly for: parents in care or related proceedings; parties with disabilities affecting communication and understanding; and those attending courts without legal representation. Further, practitioners and members of the judiciary had significant concerns about the ability of Judges to communicate complex information in a sensitive and humane manner. Concerns were raised about the appropriateness or contested final hearings and cross-examination taking place remotely.

4. Further, numerous concerns were raised about the lack of access to appropriate technology and the limited IT support and training available. The report sets out practical suggestions (page 39 onwards) together with requests for further guidance. The President gave a written response in May 2020 with his 'View from The President's [Remote] Chambers'. He made clear that Judges would need to consider whether hearings can go ahead on a case by case basis. There would be no blanket ban on the hearing of particular categories of cases remotely.

'The Road Ahead'

5. This was followed by the President's Guidance on 'The Road Ahead' dated 9 June 2020. It had become clear that the notion that 'this would all be over by July' had evaporated and that social distancing measures would be around to stay The document sought to establish a broad framework for the Family Court by attempting to chart the road ahead over the next c.6 months. The President was assisted by the NFJO report, together with detailed feedback from each Designated Family Judge and the Family Division Liaison Judge, HMCTS, Cafcass, the FLBA, the Law Society, the ALC and others.

6. The President outlined that in the early weeks of the COVID crisis, most contested fact-finding or final welfare hearings were adjourned, with the hope that normal working would resume relatively soon with delay kept to a minimum. It subsequently became clear that 'it is unlikely that anything approaching a return to the normal court working environment will be achieved before the end of 2020 or even the spring of 2021'. Apparent potential unfairness which justified a case being adjourned for a short period of time must now be re-evaluated against this much longer timescale **[Para 6]**. The need to achieve finality in decision-making for children and families, the detrimental effect of delay and the overall impact on the wider system of an ever-growing backlog must form important elements in judicial decision making alongside the need for fairness to all parties.

7. A change was made to previous guidance (i.e. the Heads of Jurisdiction letter to Judges dated 9 April 2020). It was no longer the case that "in all other cases where the parents and/or other lay witnesses etc are to be called, the case is unlikely to be suitable for remote hearing". Instead, the case "may not" be suitable for a fully remote hearing, but consideration should be given to conducting a hybrid hearing (with one or more of the lay parties attending court to give their evidence) or a fully attended hearing. Where this is not possible, the court *may* proceed to hold a remote hearing where, having regard to the child's welfare, it is necessary to do so. In such a case the court should make arrangements to maximise the support available to lay parties **[Para 17]**.

8. The key message was as follows (**[41]** onwards):
    - Delay in determining a case is likely to prejudice the welfare of the child and all public children cases were still expected to be completed within 26 weeks;
    - There would need to be a very radical reduction in the amount of time a court affords to each hearing. Parties appearing before the court should expect the issues to be limited to only those which it is necessary to determine to dispose of the case;
    - Clear, focused and very robust case-management would be vital. Adjourning the case to await a full face-to-face hearing was unlikely to be an option;
    - The court should consider what options are available to support lay parties and enhance their ability to engage in a remote hearing. The options may include attendance at a venue away from the party's home (i.e. a room at court, solicitor's office, chambers, a local authority facility); arranging for at least one of the party's legal team to accompany them; and establishing a second channel of communication between the lay party and their lawyers.

9. A COVID case management 'checklist' was set out at para 49, and the President also endorsed the 'Best Practice' section of the initial NFJO report at section 6.

NFJO: Follow Up Consultation September 2020 – 'Remote hearings in the family justice system: reflections and experiences.

10. The NFJO published a follow up consultation report. The full report can be found here: **https://www.nuffieldfjo.org.uk/app/nuffield/files-module/local/documents/remote_hearings_sept_2020.pdf.**

11. The follow-up report was published following a consultation process undertaken between 10 and 30 September 2020. 1,306 respondents completed a survey, several organisations submitted additional information and focus groups and interviews were undertaken with parents. The report gives a more up-to-date view of how the courts are coping with the pressures of COVID-19 some months after the first government 'lockdown'.

12. The President's comments on the follow-up report included the following:

> "This important piece of independent research, which holds a mirror up to the system, is a most valuable reflection after six months of remote working. Encouragingly, most professionals, including judges, barristers, solicitors, Cafcass workers, court staff and social workers, felt that, overall, the courts were now working more effectively and that there were even some benefits for all to working remotely.
>
> "However, the report highlights a number of areas of concern that need to be addressed. There are clearly circumstances where more support is required to enable parents and young people to take part in remote hearings effectively. It is worrying that some parents report that they have not fully understood, or felt a part of, the remote court process. Whilst technology is improving, there is clearly still work to be done to improve the provision of Family Justice via remote means. I am very alert to the concerns raised in this report, and I will be working with the judiciary and the professions to develop solutions."

13. The updating report makes clear that many concerns about remote working continue. Prevailing concerns relate to whether proceedings are perceived as 'fair' by parties. The majority of parents and family members who responded to the survey had concerns about the way their case had been dealt with; just under half said they had not understood what had happened during the hearing. Further, professionals continued to share concerns about the difficulties of being sufficiently empathetic, supportive and attuned to lay parties during remote hearings. This was exacerbated by communication difficulties during hearings, and the need for parties to have to use more than one device. This was even more pertinent with parents who require interpreters or who have a disability.

14. A particular concern in public law proceedings was the halt in face-to-face contact between infants and parents in interim care proceedings. This was in addition to the lack of support to new mothers involved in interim care order applications. **Section 4.9** of the report details the particular concerns of respondents regarding the removal of babies shortly after birth, which tends to happen with mothers attending the hearing over the phone from hospital. There were considerable concerns that mothers have frequently not been able to have any physical contact with their babies following their removal. Responses indicated that a small number of local authorities have been facilitating physical contact with babies throughout the period of the pandemic, but responses to the survey suggested that in the vast majority of cases, contact had

been virtual with some limited face-to-face contact starting to be allowed. Respondents also noted that there were considerable differences in practices between local authorities.

15. Further, respondents continued to express concerns about the nature and format of final hearings where care orders (particularly where adoption was the plan for the child) or placement or adoption orders were made. Again, responses indicated that many such hearings are still taking place by phone or in video hearings accessed by parents on their telephone. This only added to the perceived unfairness of such decisions. Responses to the survey showed that parents predominantly participate in remote and hybrid hearings via phone (64%) even where other parties have joined by video link. This may mean parents miss out on important visual information or participate less fully than other participants in hearings that may make significant decisions about their lives. The Transparency Project reported that problems accessing bundles and documents had increased for parents since the April 2020 survey.

16. The report concludes with suggestions and examples of good practice to ensure that remote and hybrid hearings work well and are fair and just. For example:

    - Technological improvements to enable hybrid hearings to work well;
    - Support in person for all vulnerable parties to be able to fully participate in hearings;
    - National guidelines regarding the safety of face-to-face contact for parents who have infants removed due to care proceedings;
    - Clarity about who is responsible for supporting parties to have access to hardware and have good connectivity and to be able to navigate software to participate in hearings;
    - Ensuring hearings are listed with sufficient notice to allow parties to have an advocates' meeting before the hearing;
    - Trying out the technology first to ensure all involved can hear/see;
    - Ensuring there is a navigable PDF bundle for al participants;
    - Ensuring lay parties can communicate with their solicitor/advocate/intermediary during the hearing;
    - Starting hearings with a clear explanation about how the hearing will run so parties can engage effectively.

17. On 1 November 2020 came a message from the Lord Chief Justice Lord Burnett of Maldon following the new COVID-19 restrictions following the so-called 'second lockdown'. The message made clear that the work of the courts and tribunals would be exempted from the 'lockdown'. It was stated that 'the legal profession, parties, and judges are all key workers, vital to the continued running of the courts and tribunals'. It was felt that the experience since March had left court users 'much better prepared'. The message stated that remote attendance together with requirements for social distancing had led to a significant reduction in footfall in all court buildings, and this would continue to be necessary during this 'next phase'.

18. It is clear that during what has become 'the new normal', practitioners will need to keep abreast of the most recent guidance so as to ensure that hearings can take place fairly so as to avoid delay to parties and children. The 'best practice' guidance emerging from the most recent NFJO report should be followed to ensure that the significant decisions being made by tribunals are made justly and are understood by all involved.

Selected case law on remote hearings

The pandemic has seen a flurry of case law on the issue of remote justice. The authorities are too numerous to list here and a selection are summarised for further reading:

1. **Re A (Children) (Remote Hearing: Care and Placement Orders) [2020] EWCA 583**. The first COVID 'remote hearing' case to reach the Court of Appeal. The judgment summarises the then-guidance as set out in the President's Guidance on Remote Hearings (19 March 2020) and in the message sent by the Lord Chief Justice, Master of the Rolls and the President of the Family Division to all circuit and district judges concerning remote working during the 'lockdown'. The Court of Appeal highlights that the appropriateness of proceeding with a particular form of hearing must be individually assessed applying the principles and guidance to the unique circumstances of the case **[11]**. In addition to the need for there to be a fair and just process for all parties, there is a separate need, particularly where the plan is for adoption, for the child to be able to know and understand in later years that such a life-changing decision was only made after a thorough, regular and fair hearing **[12].**

    - Summary by Lucia Crimp at: https://www.1kbw.co.uk/views/re-a-children-remote-hearing-care-and-placement-orders-2020-ewca-civ-583/

2. **Re B (Children) (Remote Hearing: Interim Care Order) [2020] EWCA Civ 584.** Judgment from the President of the Family Division overturning the making of an interim care order with the removal of a child to foster care following an urgent telephone hearing. The judgment cautions practitioners against confusing the urgency of a remote hearing with urgency for a child. The court was wrong to go ahead in highly pressurised circumstances.

    - Summary by Millicent Benson at: https://www.1kbw.co.uk/views/b-childrenremote-hearing-interim-care-order-2020-ewca-civ-584/

3. **A Local Authority v Mother & Others [2020] EWHC 1086 (Fam)**. Judgment from Lieven J at a fact-finding hearing concerning non-accidental injury. The judgment concerns the decision whether to proceed with lay evidence remotely or whether to adjourn the case after the medical evidence. On the particular facts of the case, the technology had been proven to work and there was confidence that both lay parties could use it effectively. It was appropriate to continue and not to adjourn. The judgment concludes that it is not possible to say as a generality whether it is easier to tell whether a witness is telling the truth in court rather than remotely.
    - Summary by Emma Wilson at: https://www.1kbw.co.uk/views/case-summary-of-a-local-authority-v-mother-ors-2020-ewhc-1086-fam/

4. **Re P (A Child: Remote Hearing) [2020] EWFC 32:** The President held that a fact-finding hearing relating to Fabricated and Induced Illness would not be heard remotely in the context of the mother's objection.

5. **Re Y (A Child) (Leave to oppose Adoption) [2020] EWCA Civ 1287:** The case concerned a remote hearing involving a litigant with hearing difficulties; the first such case before the Court of Appeal. It was not appropriate to give general guidance for managing cases involving litigants suffering from such disabilities in the new landscape of remote and hybrid hearings.

Such issues would be referred to the President of the Family Division for consideration as to whether the current guidance required amendment.

6. **Re D-S (Contact with children in care: Covid-19) [2020] EWCA Civ 1031:** the Court of Appeal held that the ordinary principles governing applications for contact with children in care under s34 Children Act 1989 continued to apply during the COVID-19 pandemic, despite the fact that outcomes may be affected by the practical difficulties facing local authorities.

7. **NP v A Local Authority [2020] EWCA Civ 1003:** the court was dealing with the removal of children in urgent circumstances via remote hearing. The Court of Appeal outlined that the case demonstrated the difficulties facing courts during the pandemic. Particular care had to be exercised when making such important decisions under sub-optimal conditions. The recorder was faced with a series of decisions and applications which, if granted, would have removed three small children from the family home for the first time.

(6) The expert witness report

The Working Group on Medical Experts in the Family Courts published their final report on 5 November 2020. The report can be found here https://www.judiciary.uk/publications/the-president-of-the-family-division-working-group-on-medical-experts-in-the-family-courts-final-report/ At 123 pages, it's a comprehensive and full overview of the issue. It sets out the responses to a survey from both medical professionals and the legal profession, identifying the barriers to doctors becoming expert witnesses and making recommendations to improve this.

The problems

1. This working group was set up following the appointment of Sir Andrew Macfarlane as President of the Family Division; he was made aware of a problem with the availability of medical experts in relation, particularly, to the cause of injuries subject of fact-finding hearings, but also with experts in allied professions e.g. psychologists. The working group was headed by Mr Justice Williams and had representation from the legal profession, Royal Medical Colleges and other interested parties e.g. CAFCASS, the Legal Aid Agency and the British Medical Association.

Shortages

2. The survey revealed that there were difficulties in securing expert witnesses across the country and across specialisms. This had impact on the duration of the proceedings, with delay being the main impact of these shortages. The shortages were most acute in respect of:
    - Child and family psychiatrists and psychologists;
    - Paediatricians;
    - Radiologists and neuroradiologists;
    - Neurosurgeons;
    - Opthalmologists;
    - Haematologists;
    - Neonatologists; and
    - Geneticists.

The disincentives and barriers

3. Interestingly, there were mismatches between the legal and medical perspectives as to reasons why medical professionals did not wish to act as expert witnesses.

4. The primary factors disincentivising the work were:

- Remuneration linked:
    - Delays in payment;
    - The payment system i.e. multiple invoices required, submission through solicitors;
    - Tax and pension implications;
    - The LAA rates.
- Court processes:
    - Inflexibility in court timetabling, both in terms of timing to do the reports and witness scheduling;
    - Volume of material provided.
- Lack of support and training:
    - Not supported by NHS trusts.
- Perceived criticism by lawyers, judiciary and the press:
    - Coming through in cross-examination;
    - Publication of reports leading to media coverage.

5. The report identified that these concerns were more wide-ranging than was expected, and some of them would require engagement at a more senior level as well as with a number of external agencies. The senior NHS, Department of Health, Ministry of Justice and Treasury would all need to be engaged to make change on some of these areas. However, the report also points out that there was interest from the medical profession in undertaking expert work and the involved 'agents of change' were enthusiastic about bringing about improvements.

The recommendations

6. The working group made 22 recommendations with a view to reducing shortages, by addressing the disincentives and creating incentives to expert work. The principal recommendations, identified by the group in their executive summary, were as follows:
    - Action by the Royal Colleges/Professional bodies to create online resources to support expert witness work and to increase awareness of existing training in the field provided by organisations such as the Academy of Experts and the Expert Witness Institute.
    - Encouragement to the Royal Colleges/Professional bodies to engage with commissioners and or trusts to promote a more supportive environment to medical professionals/allied health professionals who wish to undertake expert witness work.
    - The Royal Colleges/Professional bodies and the FJC to engage with NHS England and clinical commissioning groups to seek changes to contracting arrangements to enable healthcare professionals to undertake expert witness work within the parameters of their employment contracts.
    - Amending the Legal Aid Agency's guidance in respect of the granting of prior authority and payment to experts to simplify the process to enable an expert to render one invoice.
    - Seeking changes to the rates of remuneration for certain experts and the prescribed number of hours in respect of some categories of assessments to more properly reflect the amount of work involved.
    - Ensuring legal professionals including judiciary adhere to the provisions of FPR Part 25 in relation to expert instructions.
    - Ensuring that the instruction to experts was more efficiently undertaken to ensure only the necessary paperwork was sent to the expert to consider and a unified point of contact to ensure more effective and efficient communication.
    - Ensuring that experts were only required to give evidence where the court was satisfied an issue existed in relation to their report, to guarantee if their participation was required that it was fixed and not susceptible to last-minute change and to enable experts to attend by video conferencing app or video- link as the default position unless personal attendance was necessary.
    - Ensuring that experts are treated appropriately during court hearings, within judgments and thereafter to support constructive engagement and feedback.
    - Creating a sub-committee of the Family Justice Council to support and maintain the implementation of the recommendations by a programme of on-going liaison with other stakeholders such as the Royal Colleges, Professional bodies NHS commissioners, the Legal Aid Agency, training organisations and by overseeing and supporting regional committees.
    - Creating regional committees based on Family Division circuits and NHS regions to promote interdisciplinary cooperation, training and feedback.
    - Create greater training opportunities for medical professionals/allied health professionals including mini pupillages with judges, cross-disciplinary training courses

with medical and legal professionals, and mentoring, peer review and feedback opportunities.

- Promote greater awareness within legal professionals including by means of training, of best practice in relation to expert witnesses.

Points to consider

7. As legal professionals, many of these are beyond our gift – as much as we would like to have a hand in setting LAA rates. However, there are issues identified in the report that should be borne in mind when dealing with expert witnesses, either at the pre-instruction or instruction stage, up until hearings themselves. These are likely to be particularly important for whichever party is the lead for the instruction.

8. For example:
    - Part 25 compliance
        - Ensuring that experts are identified at the first CMH or as early as possible;
        - The court should approve both the questions and letters of instruction to avoid delay. This also means that Part 25 applications should be as comprehensive as possible, so that the questions and letters can be dealt with at the CMH;
    - Timetabling
        - When suggesting experts, information should be obtained about their timescales to ensure that the court timetable can be formulated to work with their availability;
        - Part 25 of the FPR sets out a 10-day limit for questions to be raised – this is to be complied with;
    - Instruction being efficient
        - One suggestion was to have an approved list of documents included in the order when the expert is appointed, to be approved by the judge;
        - When large volumes of medical records are being provided, the report suggests considering appointing a service provider to rationalise and order these chronologically[2];
        - The lead solicitor should be clearly identified so the expert knows who to contact with any queries.
    - Giving evidence
        - Experts should only be required to give evidence where the court was satisfied an issue existed in regard to their report – it should not be the norm and should be identified as soon as possible;
        - If an expert does need to give evidence, a time and date should be fixed and adhered to – the court and parties should consider interposing witnesses and otherwise being flexible with the overall timetable to ensure this can be done;
        - To enable a convenient time to be fixed, the expert's availability should be obtained at the earliest opportunity, pre-IRH (or pre-trial review) so it can be factored into the timetabling;
        - Video attendance should be the norm, unless personal attendance is necessary. This is one advantage of COVID;
        - If an expert is going to be criticised, they should be put 'on notice' in some way, perhaps by provision of a position statement or skeleton argument;

[2] The report also recommends that this should be available via the Legal Aid Agency without prior authority, so as to make it a practical option.

- At the conclusion of the hearing, there should be a direction that the lead solicitor sends a copy of the judgment or summary of the outcome to the expert.

9. We cannot do justice to this comprehensive report in this handout or our short talk, but it is clearly a thorough look at the issues and makes a range of suggestions to improve the situation. We have tried to identify the possible day-to-day changes that we can incorporate, but there are suggestions of specialist expert witness training for lawyers, mentoring schemes for medical experts, joint training programmes and efforts to raise the profile of expert work in hospital trusts. Those would entail much broader structural changes to expert work and will need support at all levels of the justice system and hospital system.

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Tadhgh specialises in all areas of family law. He joined chambers as a tenant in October 2020 following completion of his pupillage.

During his pupillage Tadhgh witnessed complex matrimonial finance, private and public law children work, and child abduction matters while supervised by Nicholas Anderson, Victoria Green, Peter Newman and Charlotte Hartley.

Prior to law Tadhgh worked as an Actor and an Educational Consultant. He has extensive experience of working with international and high net worth families, as well as those with children who have special educational needs and specific health or religious requirements.

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