NINESTJOHNSTREET
FAMILY & MENTAL HEALTH

9SJS Family Team Newsletter

SPRING 2021

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Ped McKinstry

Introduction

by Team Leader Ped McKinstry

As we pass a full year since the global pandemic brought us our first lockdown in March 2020, there finally seems to be some light at the end of the tunnel. The roadmap to recovery is bringing hope along with planned measures to ease the restrictions that have become part of our everyday lives.

With this promise of better days to come we are seeing the days once getting longer, brighter and there is a genuine sense of positivity, rather than dread of previous false dawns, as we push forwards back to some sort of normality both personally and professionally.

The long Easter weekend has given us the opportunity to reflect on some of the challenges we have overcome in the last year. Family Law has been at the forefront of facing these obstacles head on and adapted swiftly to changes such as remote hearings, conferences and seminars, working with paperless bundles and becoming experts in which fast fibre broadband providers work best in your area.

During this period, the Family team at 9SJS has continued to be busy with work and managed the impressive feat of maintaining team growth. The addition of Sandra Pope in 2020 and new pupil, Georgia Richardson, due to begin in 2021, bolstering and strengthening our high performing and talented team.

We are looking forward to inviting clients and contacts to some in person social events later this year and will continue to provide video seminars with the latest content. One example of the products we are creating to keep you informed and engaged with the latest in Public and Private Law Updates is this Spring Newsletter. With input from Emma Greenhalgh, Kate Pye-Jones, Caroline Leggeat, Holly Platt and Joanne Oakes, we hope you continue to find the content interesting and would be grateful of any comments or suggestions for any improvements we could make.

There will be a further Video Seminar to follow next week in relation to Re: H-N 2021 provided by Sarah Kilvington and Joanne Oakes so keep an eye out for that.

Public law update

Cumbria CC v T (Discharge of Interveners) [2020] EWFC 58

Kate Pye-Jones

CASE LINK

Brief background

M alleged that F, as well as the interveners in this case, had sexually abused the child. LA did not pursue findings against F or the interveners but pursued findings against M that either she had fabricated the allegations or held an unreasonable belief that the child had been sexually abused. M sought to pursue findings against F and the interveners of sexual abuse and filed a Scott Schedule to that effect.

When should the court determine a disputed fact?

MacDonald J set out the relevant case law:

- *A County Council v DP, RS, BS (By the Children's Guardian)* [2005] 2 FLR 103,
- *Re F-H (Dispensing With Fact-Finding Hearing)* [2008] EWCA Civ 1249, [2009] 1 FLR 349
- *Re W (Care Proceedings: Functions of Court and Local Authority)* [2014] 2 FLR 431
- *A Local Authority v X, Y and Z (Permission to Withdraw)* [2018] 2 FLR 1121

It is ultimately a matter for the court to decide what facts should be determined. MacDonald J confirmed that the principles set out in *A County Council v DP*, RS, BS [2005] continue to apply:

i. the interests of the child (which are relevant but not paramount);

ii. the time that the investigation will take;

iii. the likely cost to public funds;

iv. the evidential result;

v. the necessity or otherwise of the investigation;

vi. the relevance of the potential result of the investigation to the future care plans for the child;

vii. the impact of any fact finding process upon the other parties;

viii. the prospects of a fair trial on the issue;

ix. the justice of the case.

MacDonald J determined that it was not necessary to determine M's allegations as this would not assist in making the welfare decision the court was required to make. Further, there were significant evidential difficulties in proving M's allegations. MacDonald J also had regard to the delay which would result, the cost to the public purse and "The Family Court Covid-19 – The Road Ahead" guidance which makes clear that parties will not be allowed to litigate every issue and an oral hearing will encompass only that which is necessary to determine the application before the court.

Should interveners be discharged when no findings were being sought against them however allegations would be put to them in the context of them appearing as witnesses?

MacDonald J sets out the relevant case law:

- *Re S (Care: Residence: Intervener)* [1997] 1 FLR 497 CA)
- *Re BJ (Care: Third Party Intervention)* [1999] Fam Law 613

- *Re H (Care Proceedings: Sexual Abuse)* [2000] 2 FLR 499
- *Re H (Care Proceedings: Intervener)* [2000] 1 FLR 775
- *Re T (Children)* [2011] EWCA Civ 1818

In short, it depends upon the facts of each individual case.

In this case, MacDonald J discharged the interveners having considered the Overriding Objective, Section 98 Children Act 1989, "The Family Court and Covid-19 – The Road Ahead" Guidance, the fact that LA did not seek findings against the interveners, that M was not permitted to pursue the findings she sought against the interveners and that their interests were sufficiently protected by LA and F. The case could be dealt with fairly without the need to maintain their intervener status.

K (Children: Placement Orders) [2020] EWCA (Civ) 1503

Kate Pye-Jones

CASE LINK

Jackson LJ reiterated the basic principles to be applied when determining whether to make care and placement orders and discussed the significance of lies in the context of welfare and the impact of lies when assessing the future risk of harm.

Brief background

Proceedings had been ongoing for a number of years. LA initially issued care proceedings in December 2017 following an alleged non accidental injury to the child, followed by dishonesty and lack of co-operation from the parents. M then fled the jurisdiction with the child and ultimately, following orders being made for the return of the child and publicity being given to the return order, M was located in USA when giving birth to another child, which she had concealed from LA. In 2018 the children were returned to the UK and placed into foster care. The parents continued to deceive professionals resulting in the court making a number of findings at 2 hearings, not only that one of the parents had caused the initial injury to the child but also in respect of their deceit, lack of remorse and remote prospects for positive change. J made care and placement orders, in essence due to the parents' deceit and irrational and extreme reactions to the involvement of the local authority.

Jackson LJ allowed the appeal on the basis that the judgment did not adequately identify the harm the children would be likely to suffer if returned to the care of the parents. The matter was re-mitted for a re-trial in respect of the welfare decision only. Jackson LJ warned the parents, however, that ultimately the welfare outcome may be the same.

Jackson LJ confirmed that adoption should only be considered as a last resort (*Re B (A child) (Care Proceedings: Threshold Criteria* [2013] UKSC 33) and that a rigorous and reasoned evaluation of all realistic options must be carried out before it can be concluded that adoption is necessary and proportionate (*Re B-S (Children)* [2013] EWCA Civ 1146).

Jackson LJ stated that lies must be strictly assessed for their likely impact on the child. The court must spell out why dishonesty creates a risk of significant harm and what weight should be given to that dishonesty in the welfare evaluation.

Jackson LJ reiterated the questions the court should ask itself when assessing risk of future harm, as set out in *Re F (Child) (Placement Order: Proportionality)* [2018] [2018] EWCA Civ 2761 :

1. What is the type of harm that might arise?
2. What is the likelihood of it arising?
3. What consequences would there be for the child if it arose?
4. What steps could be taken to reduce the likelihood of harm arising or to mitigate the effects on the child if it did?
   The answers are then placed alongside other factors in the welfare equation so that the court can ask itself:
5. How do the overall welfare advantages and disadvantages of the realistic options compare, one with another?
6. Ultimately, is adoption necessary and proportionate – are the risks bad enough to justify the remedy?

G (A Child) [2020] EWCA Civ 282

Kate Pye-Jones

CASE LINK

Case looks at the factors to consider when ordering a section 38(6) assessment, especially when there are allegations of non-accidental injury and the relevance of the delay principle.

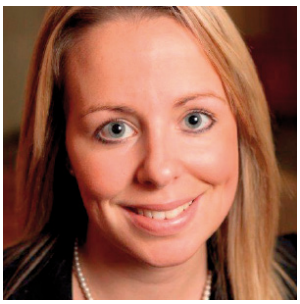
Brief background

In this case serious injuries had been caused to a child. The mother was in the pool of perpetrators. She sought to be assessed in a residential unit with the child, which would include a psychological assessment to consider the attachment between the mother and child. The finding of fact / composite final hearing had not yet been listed.

Jackson LJ reiterated the applicable law, namely that the court can only order an assessment under section 38(6) CA 1989 when the assessment is necessary to enable it to resolve the proceedings justly: **Section 38(7A) CA 1989**. The court should have particular regard to the factors set out in **Section 38(7B) CA 1989**.

Jackson LJ determined that the first question to be answered was who caused the injuries to the child. The trial judge was right to consider the delay principle however the starting point in this case was who caused the injury. It was not clear how the assessment in a residential unit and a psychological assessment would assist in answering that question at this stage of proceedings. The assessment could therefore not assist in assessing the risk M posed at this stage in proceedings. The nature of any psychological assessment would also be different depending upon whether she had caused injury to the chid.

Jackson LJ stated that, prior to considering what assessments were necessary, the court should have determined whether a separate finding of fact hearing or a composite final hearing was necessary. This would have assisted in answering the question of what assessments were necessary at this stage.



Emma Greenhalgh

In the cases of Lancashire County Council v G (unavailability of secure accommodation) (2020) EWHC 2828 Fam and J (2020) EWHC 2395

CASE LINK 1

CASE LINK 2

The issue: S25 v The Inherent Jurisdiction:

In the cases of *Lancashire County Council v G (unavailability of secure accommodation)* (2020) EWHC 2828 Fam and *J* (2020) EWHC 2395 Fam the court utilised the inherent jurisdiction to overcome the hurdle of endorsing a secure placement in premises which were not approved.

Brief background

In both cases the subject children were extremely vulnerable and for entirely different reasons, the court accepted that in the absence of a deprivation of their liberty, their respective lives were at risk.

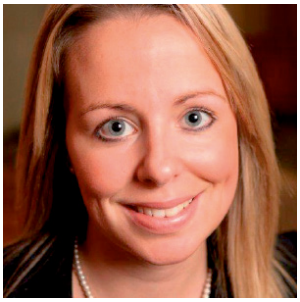
Both young people required secure accommodation but owing to the lack of available approved premises, the local authorities had no alternative but to suggest they were accommodated in unapproved premises and thus deprived of their liberty. Therefore, s25 could not be applied and the court invoked the powers of the inherent jurisdiction. In both cases the court referred to the Presidents Guidance in relation to placements in unregistered children's homes in England and unregistered care home services in Wales.

https://www.judiciary.uk/publications/practice-guidance-placements-in-unregistered-childrens-homes-in-england-or-unregistered-care-home-services-in-wales/

Notes for practice:

- Placements cannot meet the criteria set out in s25 CA 1989 if they are not approved by Ofsted or CIW;
- Therefore, a party may need to invite the court to invoke its powers under the inherent jurisdiction (IHJ) when a placement is proposed which is tantamount to secure accommodation but where there isn't the availability of an approved premises and;
- There is an urgent need for accommodation;
- When making an application to invoke the IHJ to deprive a child of its liberty and place in an unapproved premises, the applicant needs to specify where or not the placement is registered;
- Inform the court if the placement is exempt from registration or if it is taking steps to become registered;
- The applicant must make state if and why it deems the placement safe and suitable.

K (Threshold – Cocaine Ingestion – Failure to give evidence) (2020) EWHC 2502 (Fam)



Emma Greenhalgh

CASE LINK

The issue: Failing to give evidence at a contested hearing:

Brief background

The case involved the tragic death of a toddler as a result of Cocaine ingestion in the family home. During the course of the fact-finding process which lasted 4 weeks, the mother made the decision not to give evidence.

Williams J undertook a balancing exercise with specific consideration of the approach to be taken in relation to hearsay evidence and further, what weight could be attached to the mother's evidence notwithstanding the absence of her oral contribution. The court noted the following:

- Family proceedings are inquisitorial rather than adversarial;
- The legal framework permits the admission of hearsay evidence;
- There is a spectrum in relation to lies and the court must adopt a measured approach in relation to a Lucas direction.

Notes for practice:

- Explore the reason/s why a witness does not want to give evidence;
- Is there any available evidence to support their rationale? If not, can evidence be obtained?
- Can special measures be used to encourage the witness to give evidence;
- Can the witness prepare a statement dealing with their failure/inability to give evidence and/or amplify their position;
- Consider where on the spectrum of lies, where the witness falls and whether any inferences should apply.

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

Caroline Leggeat

CASE LINK

The Issue: Notification of Fathers and other Family Members of Babies Relinquished for Adoption

Brief Background

The Court of Appeal heard 3 appeals as to the approach of the courts when the mother seeks her child to be adopted without notification to the father or the wider family. Jackson LJ gave the leading judgment in which he reviewed the relevant statutory provisions and domestic and European case law and clarified that there is no single test for distinguishing between cases in which notification should and should not be given. Although the maintenance of confidentiality is the exceptional course of action, particularly where a father has PR or where there is family life under Article 8 "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 consideration of fairness to others means that the balance will often fall in favour of notification."

Although the welfare of the child is relevant, it is not paramount, and the decision as to notification should be made following a balancing exercise of the factors in the individual case:

- Parental responsibility
- Article 8 rights
- The substance of the relationship between the parents and/or the relatives
- The likelihood of a family placement being a realistic alternative to adoption
- The physical, psychological or social impact on the mother or on others
- Cultural and religious factors
- The availability and durability of confidential information
- The impact of delay
- Any other relevant factors

These guiding principles established by the Court of Appeal have been subsequently applied to the specific facts in 4 cases with different outcomes

- *Re L (Adoption Order :Identification of Possible Father)* [2020] EWCA Civ 577,
  Case link: https://www.bailii.org/ew/cases/EWCA/Civ/2020/577.html
- *A Local Authority v EL and Others* [2020]EWHC 3140 (Fam),
- *A Local Authority v JK & Anor* [2021] EWHC 33 Fam
  Case link: https://www.bailii.org/ew/cases/EWHC/Fam/2021/33.html
- OX44/2020 [2021] EWHC 91(Fam)

Notes for practice:

- The procedure to be adhered to by the local authority needs to be urgent and thorough
- Reasons given for non-notification and the facts of the case should be objectively and thoroughly assessed, mindful of the often limited and one sided nature of the information given. All information that can be discovered

without compromising confidentiality should be gathered and respectfully scrutinised

- The local authority should ensure that it explains carefully to the mother every stage of the proposed adoption process and the non-notification procedure, setting out the competing factors and considerations – a mother should not be given false assurances
- Applications should be brought within weeks rather than months of birth
- The application for non-notification will be made under FPR Part 19. Rule 14.21 was amended with effect from April 2020 to enable directions on the need to give notice to fathers without parental responsibility to be given by the Family Court. However, applications in respect of wider family members will continue to need to be made under the inherent jurisdiction to the Family Division of the High Court.
- See also the Greater Manchester Adoption sub-committee Guidance published in 2019

Re 0 (A Child) (Judgment: Adequacy of Reasons) [2021] EWCA Civ 149

Joanne Oakes

CASE LINK

The Issue – Appeal against findings that the father sexually abused his daughter. Appeal allowed due to the judge's analysis being insufficient and flawed. Case remitted for rehearing. When to ask for clarification of a judgment and when to apply to appeal the decision.

Brief Background

This is a case where public law proceedings arose from private law proceedings where a father had an application for contact with his daughter. The parents had separated before the child's birth in January 2016 and it was found that the mother had not been supportive of the father's contact. The mother alleged in November 2018 that the father had sexually abused O and a subsequent s.47 investigation found 'very little evidence' to support this. The father made an application for contact and this led to contact in the community. The father took O swimming on the 27 July 2019 and on the 2 August 2019 the mother noticed blood on the toilet paper when wiping O's bottom.

O was seen by a GP and a paediatric forensic physician who concluded that there were signs of penetrative anal abuse.

Public law proceedings followed and an independent consultant paediatrician was instructed, Dr Crawford. O had subsequently alleged that her maternal grandfather may have sexually abused her and he was joined as an intervenor.

A finding of fact hearing was heard over 8 days. Each party's position was as follows:

Local authority – sought findings that O had been sexually abused by the mother or father;

Mother – sought findings that O had been sexually abused by the father;

Father – sought findings that O had been sexually abused by the mother, had failed to protect her, encouraged O to believe she was abused by the father and alienated O against the father;

No party sought findings against the maternal grandfather.

The judgement wasn't handed down until the 16 November 2020, the hearing having concluded in August 2020. The judge made findings that the injuries were caused by the father and he had behaved in a sexually inappropriate way towards O in 2018 and 2019. The court made a Child Arrangement Order supported by an Interim Supervision Order for O to live with her mother. The father applied to the court of appeal.

Peter Jackson LJ granted permission to appeal and stayed the orders.

Appeal

The Court of Appeal overturned the findings of sexual abuse and the matter was to be reheard.

Notes for practice:

The interesting analysis from this case is where to ask for clarification on a judgement and where the judgement is so flawed that an application to appeal is appropriate.

Baker LJ set out the earlier relevant decisions and the current practice direction and held that:

> "...where the omissions [from the judgment] are on a scale that makes it impossible to discern the basis for the judge's decision, or where, in addition to omissions, the analysis in the judgment is perceived as being deficient in other respects, it will not be appropriate to seek clarification but instead to apply for permission to appeal."

Peter Jackson LJ held that:

> "It is of course the responsibility of the trial judge to give sufficient reasons. But all judgments are capable of improvement and where there has been what the Practice Direction refers to as 'a material omission from a judgment' the court is required to 'provide additions', either on its own initiative or on request. That will be particularly suitable where an issue has escaped attention or where a part of the reasoning is not fully clear or needs amplification. Where the line is to be drawn will depend on the circumstances, but there will come a point where what would be required would not be additions but foundations. In those circumstances, the difficulties in returning to the trial judge were explained by Wall LJ in *Re M-W (Care Proceedings: Expert Evidence)* [2010] EWCA Civ 12, when, speaking of that case, he said:
>
> > "47. The difficulties about the Emery Reimbold solution are, in my judgment, legion. I put on one side the fact that this was a reserved judgment. What strikes me with greater force – if my analysis is correct – is that the judge has made up his mind without properly considering the evidence of Dr. T, Messrs M and F and the guardian. Were we thus to invite him to reconsider, he would be bound to reject their evidence. To put the matter another way, the conclusion which he has reached would render impossible a proper judicial discussion of that evidence. Equally, were the judge to change his view and find the threshold satisfied, neither the mother nor the father would have any confidence in the judge's final conclusion.'"

Private law update

Holly Platt

Re H-N and Others (children) (domestic abuse: finding of fact hearings) [2021] EWCA Civ 448

CASE LINK

Court of Appeal guidance in domestic abuse finding of fact hearings

Brief background

The court was concerned with four appeals from orders made in private law Children Act 1989 proceedings each of which involved allegations of domestic abuse (DA). The Court of Appeal (CA) took the opportunity to provide guidance in relation to the proper approach of the court regarding the following issues:

1. Whether there should be a finding of fact hearing;
2. The use of Scott Schedules;
3. The approach to controlling and coercive behaviour; and
4. The relevance of criminal law concepts.

This summary will focus on the guidance provided by the CA rather than the four appeals themselves. The full judgment is 48 pages in length and is a must read.

The CA made it clear that there is a limit to the extent it can give general guidance. In part, this is due to the various initiatives already in train (the implementation of the *Harm Panel Report*, the Domestic Abuse Bill currently before Parliament and the recommendations of the President of the Family Division's Private Law Working Group (2nd report) which are beginning to be piloted in the courts). But also because there is plainly and properly a limit to what a constitution of the CA, determining four individual appeals, can, and as a matter of law should, say about the issues which do not strictly arise in any of those appeals [2].

Domestic abuse

Before addressing the four issues referred to above, the judgment discusses there are many cases in which the allegations are not of violence, but of a pattern of behaviour which it is now understood is abusive. This has led to an increasing recognition of the need in many cases for the court to focus on a pattern of behaviour [25]. The judgment goes on to consider the definitions of DA and the various references within PD12J to a pattern of acts, and highlights that it is now understood that specific incidents, rather than being seen as free-standing matters, may be part of a wider pattern of abuse or controlling or coercive behaviour [27]. The CA concluded that PD12J is and remains fit for the purpose for which it was designed, namely to provide the courts with a structure enabling the court first to recognise all forms of DA and thereafter how to approach such allegations in private law proceedings. The challenge relates to the proper implementation of PD12J [28].

Coercive and / or controlling behaviour

Reference is made to Hayden J's recent judgment in *F v M* [2021] EWFC 4 following a two week finding of fact hearing concerning allegations of coercive and / or controlling behaviour. The CA endorse the judgment and state it is of value both because of the illustration that its facts provide of what is meant by controlling and coercive behaviour and also because of the valuable exercise undertaken by the judge in highlighting the statutory guidance published by

the Home Office pursuant to section 77(1) of the Serious Crime Act 2015 which identified paradigm behaviours of controlling and coercive behaviour [30]. The CA goes on to state that a pattern of abusive behaviour is as relevant to the child as to the adult victim and sets out the specific ways in which a child may be harmed [31].

Patterns of behaviour

Having considered what is controlling and coercive behaviour and emphasised the damage it can cause to children, the judgment goes on to consider the approach of the court where a pattern of coercive and / or controlling behaviour is alleged by one of the parties. The CA indicates that although the principal focus of the judgment has been on coercive and controlling behaviour, the definition of DA makes reference to patterns not only in respect of controlling and / or coercive behaviour but to all forms of abuse including physical and sexual violence, and that the court's observations therefore apply equally to all forms of abuse [33].

The approach of the court

1. The need for and the scope of any fact-find hearing
   The judgment quotes extensively from the relevant paragraphs of PD12J [35] and highlights the need for procedural proportionality and the key word "necessary". The word "necessary" is a word that also sits at the core of the President's Guidance, *The Road Ahead* (June 2020) [36]. The judgment also highlights the importance of keeping the overriding objective, FPR 2010, r 1.1, in mind. At paragraph 37 the CA provides a summary of the proper approach to deciding whether a finding of fact hearing is necessary:

   37. The court will carefully consider the totality of PD12J, but to summarise, the proper approach to deciding if a fact-finding hearing is necessary is, we suggest, as follows:

   i) The first stage is to consider the nature of the allegations and the extent to which it is likely to be relevant in deciding whether to make a child arrangements order and if so in what terms (PD12J.5).

   ii) In deciding whether to have a finding of fact hearing the court should have in mind its purpose (PD12J.16) which is, in broad terms, to provide a basis of assessment of risk and therefore the impact of the alleged abuse on the child or children.

   iii) Careful consideration must be given to PD12J.17 as to whether it is 'necessary' to have a finding of fact hearing, including whether there is other evidence which provides a sufficient factual basis to proceed and importantly, the relevance to the issue before the court if the allegations are proved.

   iv) Under PD12J.17 (h) the court has to consider whether a separate fact-finding hearing is 'necessary and proportionate'. The court and the parties should have in mind as part of its analysis both the overriding objective and the President's Guidance as set out in 'The Road Ahead'.

2. Scott Schedules
   The CA noted that within the dozen oral submissions heard, there was effective unanimity that the value of Scott Schedules in DA cases had declined to the extent that, in the view of some, they were now a potential barrier to fairness and good process, rather than an aid [43]. Concerns were raised on two different bases: one of principle [44] and the other more pragmatic [45], both of which highlighted the limitations of adequately considering whether there has been a pattern of coercive and controlling behaviour. At paragraph 46 the CA accepts that an alternative means is now required:

   46. For our part, we see the force of these criticisms and consider that serious thought is now needed to develop a different way of summarising and organising the matters that are to be tried at a fact-finding hearing so that the case that a respondent has to meet is clearly spelled out, but the process of organisation and summary does not so distort the focus of the court proceedings that the question of whether there has been a pattern of behaviour or a course of abusive conduct is not before the court when it should be. This is an important point. Everyone agrees.

The judgment acknowledges that the form of any replacement pleading raises a difficult question [48] and it will be for others, outside the crucible of an individual case or appeal, to develop suggestions into new guidance or rule changes [49]. In practice that work is likely, in the first instance, to be done though the Private Law Working Group together with the Harm Panel's implementation group whose final recommendations may lead to changes to the FRP or in the issuing of fresh guidance through the medium of a Practice Direction [49].

3. Approach to controlling and coercive behaviour
The CA states that in the meantime, cases must still be heard and with an increased focus on controlling and coercive behaviour [50]. The approach of regarding controlling and coercive incidents occurring during the parties' relationship as being "in the past", and therefore of little or no relevance in terms of establishing a risk of future harm, should be considered to be "old fashioned" and no longer acceptable [52].

   The importance of focussing on a pattern of coercive and / or controlling behaviour and the implications of this on other, more specific, factual allegations is set out at paragraph 59:

   59. Where one or both parents assert that a pattern of coercive and/or controlling behaviour existed, and where a fact-finding hearing is necessary in the context of PD12J, paragraph 16, that assertion should be the primary issue for determination at the fact-finding hearing. Any other, more specific, factual allegations should be selected for trial because of their potential probative relevance to the alleged pattern of behaviour, and not otherwise, unless any particular factual allegation is so serious that it justifies determination irrespective of any alleged pattern of coercive and/or controlling behaviour (a likely example being an allegation of rape).

4. The relevance of criminal law concepts
The judgment notes that when considering DA, it will not infrequently be the case that the alleged behaviour will be such that it is capable both of being the subject of prosecution in the criminal courts and being the focus of consideration in the family courts as justification for the implementation of protective measures.

Criminal law has developed a sophisticated and structured approach to the analysis of evidence of behaviour to determine whether guilt has been proved to the requisite standard. This raises the question of the degree to which the Family Court, if at all, should have regard to and deploy criminal law concepts in its own evaluation of the same or similar behaviour in the context of family proceedings [61]. This issue has been considered by the CA previously in *Re R (Care Proceedings: Fact-finding Hearing)* [2018] EWCA Civ 198 [62–64]. The judgment confirms Re R is the correct approach [66]. Paragraphs 71–72 are particularly helpful:

71. Hickinbottom LJ observed during the hearing in Re R, 'what matters in a fact-finding hearing are the findings of fact' [paragraph 67]. The Family court should be concerned to determine how the parties behaved and what they did with respect to each other and their children, rather than whether that behaviour does, or does not, come within the strict definition of 'rape', 'murder', 'manslaughter' or other serious crimes. Behaviour which falls short of establishing 'rape', for example, may nevertheless be profoundly abusive and should certainly not be ignored or met with a finding akin to 'not guilty' in the family context. For example in the context of the Family Court considering whether there has been a pattern of abusive behaviour, the border line as between 'consent' and 'submission' may be less significant than it would be in the criminal trial of an allegation of rape or sexual assault.

72. That is not to say that the Family courts and the parties who appear in them should shy away from using the word 'rape' in the manner that it is used generally in ordinary speech to describe penetrative sex without consent. Judges are not required to avoid using the word 'rape' in their judgments as a general label for non-consensual penetrative sexual assault; to do otherwise would produce a wholly artificial approach. The point made in Re R and now in this judgment is different; it is that Family courts should avoid analysing evidence of behaviour by the direct application of the criminal law to determine whether an allegation is proved or not proved. A further example can be drawn where the domestic

abuse involves violence. The Family Court may well make a finding as to what injury was caused, but need not spend time analysing whether in a criminal case the charge would allege actual bodily harm or grievous bodily harm.

M v H (private law vaccination) [2020] EWFC 93

Holly Platt

CASE LINK

SIO application for children to receive vaccinations, necessary expert evidence and Article 8

Brief background

F initially applied for a SIO for P and T, aged six and four respectively, to receive the MMR vaccination. F's application was subsequently extended to include each of the childhood vaccinations that are currently included on the NHS vaccine schedule, the vaccinations that may be required in relation to future travel abroad and vaccination against COVID-19. M opposed F's application.

Future travel vaccinations

MacDonald J determined it would not be appropriate to make an order in respect of travel vaccinations that may or may not be required at some unspecified point in the future [3]. Essentially, F's application was premature.

COVID-19 vaccination

MacDonald J also declined to make an order in respect of the vaccination against COVID-19. He emphasised that his decision to defer reaching a conclusion on this issue did not signal any doubt on the part of the court regarding the probity or efficacy of the vaccine. Rather, it would be premature to make such a decision given it currently remains unclear as to when children will receive the vaccination, which vaccines they will receive in circumstances where a number of vaccines are likely to be approved and what the official guidance will be in relation to children. However, MacDonald J stated that it would be very difficult to foresee a situation in which a vaccination against COVID-19 approved for use in children would not be endorsed by the court as being in a child's best interests, absent peer-reviewed research evidence indicating significant concern for the efficacy and / or safety of one or more of the COVID-19 vaccines or a well evidenced contraindication specific to that subject child [4].

NHS schedule of vaccinations

MacDonald J applied *Re H (A Child) (Parental Responsibility: Vaccination)* [2020] EWCA Civ 664. The CA made it clear in *Re H* that a court will be unlikely to conclude that vaccinations recommended by Public Health England and set out in the routine immunisation schedule are not in a child's best interests absent (a) credible development in medical science or new peer-reviewed research indicating significant concern for the efficacy and / or safety of one or more of the vaccines that is subject to the application and / or (b) a well evidenced medical contraindication specific to the subject child(ren) [44]. Persuading the court in relation to (a) would require, at a minimum, the existence of new, peer-reviewed research conducted by a reputable specialist or institution. This would likely need to be the subject of a jointly instructed expert report authored by an expert in field of immunology, instructed pursuant to FPR Part 25 [45]. MacDonald J found that M had failed to demonstrate either (a) or (b).

MacDonald J went on to highlight that tendentious, partial and partisan material gathered from the Internet (what Sedley LJ in *Re C (Welfare of Child: Immunisation*) [2003] EWCA Civ 1148 accurately characterised as "junk science"), and placed before

the court to support a personal belief regarding the probity and / or efficacy of vaccinations is insufficient to demonstrate to the required standard a significant concern for the efficacy and / or safety of any vaccines currently listed on the NHS vaccine schedule [46].

MacDonald J rejected M's submission that making a SIO requiring the children to receive the vaccinations set out in the NHS schedule of vaccinations would constitute a disproportionate interference in the Article 8 rights of P and T. The objective of vaccination is to protect the children from the consequences of the diseased vaccinated against and to protect the population more widely from the spread of such diseases. This objective is sufficiently important to justify the limitation of a fundamental right. MacDonald J held that the SIO requiring the vaccinations strikes a fair balance between the rights of P and T and the interests of the community [49]. MacDonald J granted a SIO requiring the children to receive the vaccinations in accordance with the NHS vaccination schedule.

Disclaimer

These articles are not to be relied upon as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.