



Albion Chambers CHILD LAW NEWSLETTER

Mars and Venus

Police disclosure in the Family Division

Lurching towards Christmas, getting myself together for a trial in the first week of the New Year, a memory stick was thrust into my hand with the immortal three little words care practitioners long to hear: “the police evidence”. We’d been waiting for “it” for months, the trial depended on “it” and, to the sound of less than triumphant fanfares, here “it” was. Except that within twenty-four hours it was apparent that the stick could not be opened by Macs, the photographs contained were not in a format that could be dated, timed or cross referenced, phone messages contained legally privileged material and the much-awaited Facebook diatribe didn’t even feature. It led me to contemplate what the definition of police disclosure was these days, and whether handing a local authority an impenetrable stick with useless material discharged the police’s duty. If not, whose duty was it to pull it all together with around two weeks to go until an already adjourned, and out of time, Fact Finding hearing? What were we to do?

In *Lancashire County Council v A, B and Z (A Child Fact Finding Hearing Police Disclosure)* [2018] EWHC 1819 (Fam), Knowles J, employed her razor-sharp reserves to review the legal and practical outworkings of police disclosure, and made recommendations in relation to the efficient process of disclosure between the criminal and family jurisdictions. The judgment stands as a practical guide

to the interface of the efficient working of disclosure between the criminal and family divisions.

Lancashire details the “legal and practice” framework for disclosure, with reference to the Family Procedure Rules 2010, Part 21.2, specifying the rules in relation to the disclosure of documents and the parallel common law provisions provided for in the Civil Procedure Rules 1998. Knowles J also considered the 2013 Protocol and Good Practice Model concerning cases involving criminal investigations and concurrent family cases, which came into effect on 1 January 2014.

Applying Knowles J’s analysis as a benchmark of the operation of the protocol, the following observations, had they been complied with, may have spared my Christmas debacle:

■ Have the police disclosure team produced a list detailing the totality of the material possessed by them? If so, was this updated fourteen days before the IRH or directions hearing before any FF? (paragraph 31, paragraph 48(iv) and paragraph 52(vii) of *Lancashire*)

■ Has the Local Authority solicitor checked with the local police force to see what data-management system is being used to record and collate information where disclosure into family proceedings is required, and checked whether the disclosure team has access to the relevant system? (paragraph 34 of *Lancashire*)

■ Do the police understand what material is needed for the LA Fact Find? “Disclosure is requested by those who don’t know what there is from those who don’t know what is needed. Thus, parties

to family proceedings don’t know what material is held by the police... Conversely, the police have a poor understanding of the wide evidential canvas upon which the family court makes decisions, and inevitably view the question of relevance through the narrow prism of criminal proceedings. In good faith, the police provide what they think the family court needs, but the reality is that they are ill-placed to judge.” (paragraph 36 of *Lancashire*)

■ Has there been a recorded meeting between the LA and the police? What has been the ongoing liaison between the police and LA to give effect to the order? (paragraph 50 of *Lancashire*)

■ Was there a meeting between the LA solicitor and police disclosure team five days before the IRH or directions hearing before Fact Finding hearing to check the status of the police disclosure? (paragraph 53 of *Lancashire*)

■ What steps has the Local Authority been able to take to ensure that disclosure provided by the police is complete? (paragraph 45 of *Lancashire*)

■ Did the police provide a signed declaration prior to the Fact Finding hearing to the effect that the court’s order for disclosure had been complied with?

Absent proper discussion, practical planning and effective, readable, fully accessible disclosure of the style indicated in *Lancashire*, it is difficult to see how Fact Finds in the Family Division that rely on digital disclosure from the police can ever be timely and effective. It is only through police and local authority solicitors having this kind of discussion that evidential requirements can be truly understood.

What happened to me show-cased Knowles J’s point that the police usually have absolutely no idea what we need and why we need it and sadly, in my experience, those charged with seeking the disclosure are all too often insufficiently immersed in the case to understand what they need to ask for and why they needed it.

Interesting points arise as to whether disclosure within the terms of the Family Proceedings’ Rules had been effected by handing over an unreadable stick. No doubt

in a digital age, with Rules that appear to bear little twenty-first century rigour, the FPR urgently needs to be re-framed. Likewise, I understand that the Legal Aid Agency does not even have funding codes available for instructing forensic experts to undertake the primary evidence-gathering tasks ordinarily undertaken by the police and, even if they did, the dreaded *A Local Authority v DS* [2012] EWHC 1442 (Fam) underlines the LAA's almighty power to say 'no.'

Ultimately, we need a primary system of evidence gathering that works for crime and family, not yet more costly experts. As the rules stand, if the police chose to be unhelpful in terms of what they are willing to provide and how they are willing to provide it, the Family Division would have little timely and effective recourse to getting the primary evidence we need and perhaps, in these straightened budget-pinching days, further thought needs to be given to that.

Editorial

When Edward Enniful beat me to my dream editorial job I decided to look for an alternative publication. And so, on a somewhat gloomy winter morning, an opportunity arrived in my inbox. It was an opportunity that arrived out of need (desperation perhaps) rather than a selection based on predisposed ability – “would you like to become the editor of the Albion Child Law newsletter?” – “try to stop me”, I replied.

My first job is to announce that we have two new heads of the Family Team: James Cranfield and Ben Jenkins. They step into the shoes of Stuart Fuller who has led the team so skilfully and sagely for a number of years. Those of you who know James and Ben will no doubt agree that they both have the qualities and ability to lead a team and to inspire... no pressure.

I would also like to welcome to the team the excellent Sophie Knapp. We are delighted that she has decided to make Albion her home and add her considerable skill to our collective expertise.

I am extremely grateful to Jo Lucas, Rachael Morton and Yasmine El-Nazer who have contributed articles dealing with a range of issues from the difficulties of digital disclosure, the thorny issue of top-up fees for experts, to the steps to be taken when considering the placement of children outside of the jurisdiction. Enjoy.

Fiona Farquhar

But, on the ground, emails and protocols are no substitute for professionals from both divisions sitting down with a coffee and going through the investigation. The focus has to be on finding practical solutions to set in train a process whereby the Court can be assured that it has all relevant and accurately-referenced material before it undertakes a rigorous examination of all relevant evidence to establish the facts

that will need to be found in order to work out the most appropriate care plans for children.

Interestingly, when the police were summoned to attend on day one of our aborted fact find, they could not have been more practical, helpful or obliging: it was as if no-one had ever explained what was needed. Imagine that!

Rachael Morton

‘It all comes from the same pot anyway?’

Who should pay the ‘top-up fee’ for experts who charge outside legal aid rates?

It has become an increasingly common trend for courts in public-law matters to direct local authorities to pay experts’ “top-up” fees where experts are charging above the legal aid rates set out in The Civil Legal Aid (Remuneration) (Amendment) Regulations 2013. This article shall explore what options are available to local authorities who tend to bear the brunt of this problem.

In the recent paper by The Rt. Hon. Sir Andrew McFarlane, President of the Family Division, titled: “*A view from the Presidents Chambers*” published in January 2019, he noted that the availability of experts in, for example, paediatric radiology and neuro specialists are becoming rarer. He noted this problem required immediate attention. This issue was also previously raised in the Legal Aid Agency’s report titled: “*Guidance on the remuneration of experts*” April 2015. As a consequence of their limited availability, experts in these niche fields are beginning to charge more to complete their reports. This is due to their increased workload, meeting court deadlines and the expert’s knowledge that they are one of the few of the only suitably qualified experts in their field.

In cases where experts are charging fees above the legal aid rates, prior authority is required from the Legal Aid Agency (LAA) to confirm that they will fund the additional expense of the instructed experts. The prior authority application is made by the legally-aided parties’ solicitors. If prior authority is not sought from the LAA, then those solicitors can be liable to pay those fees.

In the report titled: “*Guidance on the remuneration of experts*” at para. 2.5, p4; examples are set out where higher payments have been granted by the Legal Aid Agency:

- Paediatricians where the children who were subject to care proceedings had an unusual genetic disorder;
- Paediatric endocrinologists, paediatric ophthalmologists and paediatric neuroradiologists where there was no other suitably qualified expert available;
- Interpreters where there was a scarcity of interpreters due to an unusual language or dialect; and
- Sexual abuse cases where there is a scarcity of risk assessments experts with exceptional expertise to deal with serious sexual offenders.

Sir Nicholas Wall P in *DS and others (children)* [2012] EWHC 1442 (Fam) at para.38, clarified that the Legal Services Commission has the power, given to it by Parliament, to refuse to fund the instruction or to fund the instruction in part only. They may fund the whole or part of an expert’s fees that fall outside legal aid rates in “exceptional circumstances”. In exercising their discretion, the LAA has to consider the criteria set out in Article 5(2)(e)(ii) Funding Order, as follows:

“...exceptional circumstances are where the expert’s evidence is key to the client’s case and either a) the complexity of the material is such that an expert with a high level of seniority is required, or b) the material is of such a specialised and unusual nature that only very few experts are available to provide the necessary evidence.”

What seems to be happening time and time again is that the LAA are rejecting prior authority applications, having not considered the experts proposed to them to meet the “exceptional” criteria set out in Article 5(2)(e)(ii). In *Re DS & Others (children)* at para.45 (viii) the LAA’s reasons for refusal are allowed to be “concise” and, therefore, lengthy reasons for refusal are not required. This can be rather annoying for those representing local authorities and legally-aided parties who considered the proposed expert to meet the criteria under Article 5(2)(e)(ii).

Where does this leave local authorities? As it stands, the only way to challenge the LAA’s decision is by way of judicial review. There is no right of appeal. This action can only be taken by those solicitors representing the legally-aided parties. As local authorities are not involved in writing or making the applications for prior authority, they do not have locus to judicially review the decision of the LAA. Where the solicitors do not intend to judicially review the matter, local authorities therefore have no choice but to bring the matter before the court for a decision to be made as to who should fund the experts “top up” fees, in particular where the local authority has no legal obligation to do so. In the majority of cases, local authorities will then be directed by the court to fund that outstanding cost. What is more, the quantification of the expert’s fees, governed by the Civil Legal Aid (Remuneration) Regulations 2013, does not deal with the issue of apportionment and whether the LAA can be ordered to pay some of the top up fees alongside the Local Authority.

In *Re J (Care Proceedings: Apportionment of Experts’ fees)* [2017] HHJ Bellamy stated:

“In my judgment there is an important difference between a judicial decision concerning an hourly rate and a decision concerning the apportionment of responsibility for payment of an expert’s fees. Whereas the quantification of an expert’s fees is clearly governed by the Civil Legal Aid (Remuneration) Regulations 2013 the issue of apportionment is not dealt with by those or any other regulations. The issue of apportionment is at large. It is a decision for the court to make. It is a decision that can be appealed. Is it, though, a decision that can effectively be rendered nugatory by a decision of an administrative body? Does the Legal Aid Agency have the power to refuse to comply with a court’s decision concerning apportionment? For my part, I have some doubts. However, that is a question for

another court on another day.”

As it stands, the only way that a local authority can challenge the decision of the LAA, is by way of appealing the matter in the family court. Even at an appeal hearing, the question will be: ‘can the court compel the LAA to fund the top up fees?’ According to s.51 Senior Courts Act 1981 where it states: *“the court shall have full power to determine by whom and to what extent the costs are to be paid”*... it seems the court can! Whether this is done in practice is unknown and is not clarified in case law.

In circumstances where a local authority refuses to pay the “top-up” fee, a court may direct a LAA representative to attend court and confirm why they took the stance they did before ordering who should pay the outstanding fee. It is highly likely that this course of action will cause further delay, incur additional costs and, rather more seriously, avert the focus of the proceedings away from the child/children involved.

Another solution for local authorities could be to ask the court at the initial case management hearing whether or not it deems the proposed expert to meet the “exceptional criteria” set out in Article 5(2)(e)(ii) Funding Order. In *Re J (Care Proceedings: Apportionment of Experts’ fees)* [2017] HHJ Bellamy considered the instruction of expert neuroradiologist, Dr. Stoodley and his fees to be “entirely reasonable”. In his judgment, he stated:

“Neuroradiology is a highly specialised field. In a case such as this the complexity of the material to be considered is such that an expert with a high level of seniority is required. The pool of senior consultant neuro-radiologists available to undertake medico-legal work in family cases is small. For both of those reasons, in my judgment, there are ‘exceptional circumstances’ which justify payment to Dr. Stoodley of an hourly rate above that set out in the Table in paragraph 1 of Schedule 5 to the Civil Legal Aid (Remuneration) Regulations 2013. An hourly rate of £180 is entirely reasonable.”

In that matter, HHJ Bellamy directed a copy of his judgment to be sent to the LAA alongside the legally-aided parties’ application for prior authority. In another case where issues arose as to who paid the expert’s fees, Lord Justice Fulford in *JG v the Lord Chancellor* [2014] EWCA Civ 656 at para.132 stated: *“I would simply add that when judges are called upon to deal with the sort of difficult issues that have arisen here, it would be prudent for them to explain their*

reasons for each decision that they take in a short judgment and for their orders to be precisely spelled out.” This might be a solution for all parties involved at the initial case management hearing where an expert charging outside legal aid rates is considered and instructed. It essentially puts the onus on the court to make the decision for the LAA. However, the question then becomes, as noted by Sir Nicholas Wall P in *DS & Others*, *“whether an administrative body can effectively render nugatory a judicial decision taken in what the court perceives as the best interests of a child”*...? Likewise, is the court, by making what is effectively the decision of the LAA, acting “ultra vires”?

In the event the LAA refuses to pay the top up fees and the court directs the Local Authority to pay, then the issue remains as to whether the Local Authority should consider appealing the decision or not. It appears to be only a matter of time before a local authority considers this course of action.

Some individuals argue that the money used to finance the expert’s top-up fees and paid for by the Local Authority comes from “the same pot anyway”; that pot being the Government’s purse. This is not the point. Local authorities’ financial resources are becoming more and more limited. The Local Government Association webpage noted on 3 July 2018 that by 2020, local authorities will have faced a reduction to core funding from the Government of nearly £16 billion over the preceding decade. For every penny used to mop up the inadequacies of the LAA funding, it is arguably a penny less to spend on vital services for children and families across the UK.

Another option for local authorities could be to ensure that a list of experts that charge within legal aid rates are brought to court for the parties to consider, and only those individuals are instructed. At first blush, this appears to be a good solution. However, the difficulty then lies in the quality of the expert chosen in that list who may operate at a cheaper rate, but who also may not be as recognised or as experienced as an expert charging at higher rates. The choice of expert could have a real impact on the conclusion and outcome of the case.

To conclude, perhaps it is time for the LAA to review what rates they are willing to pay their experts. Only Parliament can review this.

The battle lines are drawn.

Yasmine El-Nazer

What is the appropriate legal framework when a local authority seeks to assess potential kinship carers, with the subject child, outside of the jurisdiction?

Practitioners will be familiar with cases where the parents are asked to put forward prospective kinship carers, and they identify a family member living outside of the jurisdiction. The manner in which such a family member is assessed will often depend on where in the world they are living, and the availability of resources. Children and Families Across Borders (a member of the International Social Services Network) are often able to identify partner agencies who are able to conduct viability and fuller assessments as required, with the family member, in their own country. CFAB are not always able to assist. When they are not, the next port of call is often the ICACU (International Child Abduction Agency), who are able to make a request for assistance via the Central Authority of the country in question.

Whilst the assessment process can often be frustratingly slow, the real challenge can arise when a preliminary assessment has been successful, and the Local Authority wishes to place the child with the carers for a further period, to 'test things on the ground'. What is the appropriate legal framework in such circumstances? The answer, as it so often is in care cases, is, it depends.

I recently acted for the Local Authority in a case where this question arose. The case was heard by Christopher Sharp QC, sitting as a Deputy High Court Judge. It has been reported on Lawtel as *Re HA [2019] 1 WLUK 291*.

The application concerned a five-year-old child, who was the subject of an interim care order. The Local Authority wished to place the child, with his paternal grandparents, in AJK (the semi-autonomous region of Pakistan, also known as Kashmir) for three months, for an assessment as to whether it was in his best interests to live permanently with his father's family. No party opposed the child travelling to AJK for the purposes of that assessment.

The child had been in foster care since 2018. The child's mother had learning difficulties and, following a fact-finding hearing, it was found that it would be wrong for her to care for the child in the future as a result of deficient care given to the child and his siblings, her lack of insight and her inability to protect her children from her partner, who was not the child's father. The parties agreed that the best option was a placement with the child's paternal family in AJK. The Local Authority had hoped to take him to AJK in November 2018 but, just before his departure, the mother's partner alleged that the paternal family were planning to sell the child to the maternal family in Pakistan. The paternal family and the mother's sister denied the partner's allegations. The Local Authority, having carried out inquiries in AJK, rejected the allegations as having been made maliciously and relied on threats made by the partner to the child's social worker as affecting his credibility and providing context for the making of the allegations. He had been sentenced for threatening to abduct the child.

The child had previously travelled to AJK, accompanied by the allocated social worker, for an introductory visit to meet his paternal family. He had been made a Ward of Court for the period of this visit. At subsequent hearings, when the possibility of a further extended period of assessment was proposed, the appropriate legal frame work was mooted. It was felt by the parties that the court had two real options available to it, namely for the court to grant permission under the existing Interim Care Order, pursuant to s.33(7) and para. 14 of schedule 2 of the Children Act 1989; or for the child to again be made a Ward of Court.

The case was further complicated by the fact that Pakistan (and AJK in particular) is not a recognised signatory to The Hague Convention 1996. Whilst the Convention was signed in Pakistan in 2016, the country is not a recognised signatory within the EU, and accordingly has no meaningful applicability. The result is that The Hague Convention would offer no remedy in the event of difficulties in securing the return of the child. An approach would have to be

made to the Pakistani authorities under the UK-Pakistan Judicial Protocol on Children Matters of 2003, which whilst influential, is not legally binding.

The Local Authority had secured legal advice from a Pakistani lawyer in relation to the best way to secure the child's placement with the paternal family, if the assessment period was successful. The most appropriate legal framework to secure the interim three months, fell for determination by the court.

The Local Authority was anxious to secure the child's welfare during the proposed extended period of assessment, and, in particular, to offer the greatest protection in the event the assessment did not proceed as anticipated, and it became necessary to secure the child's return to the UK. It was submitted that the UK-Pakistan Protocol did not offer sufficient protection. It was therefore proposed that the interim care order be discharged and replaced with an order making the child a Ward of Court under the inherent jurisdiction, and granting permission for him to make the trip, in order to protect him in the event that his paternal family did not cooperate with his return to the UK, if it became necessary.

The relevant law is best summarised within the judgment of Rec. Sharp QC:

15. *S.33(7) of Children Act 1989 ('the Act') provides that while a care order in respect of a child is in force no person may remove the child from the UK without the written consent of every person with parental responsibility or the leave of the court. Until recently the mother opposed this move so the local authority had to seek the court's permission.*

16. *It is clear from s.100(2)(c) of the Act that no Court may exercise the High Court's inherent jurisdiction with respect to a child so as to make a child, who is subject to a care order (which includes an interim care order), a ward of court.*

17. *S.100(3) provides that no application may be made by a local authority for a court to exercise its inherent jurisdiction with respect to a child unless the authority has obtained leave of the court which by s.100(4) may only be granted if (a) the court is satisfied that the result which the authority wish to achieve could not be achieved through the making of an order of a kind to which s.100(5) applies and (b) if the inherent jurisdiction is not exercised there is reasonable cause to believe that the child is likely to suffer harm. I take the expression "likely to suffer" as being interpreted in the same way that that expression has been interpreted where it appears in s. 31 as explained in *re B (Care Proceedings: Appeal) [2013] 2 FLR**

1075 and previously in *re S-B (Children)* [2010] 1 FLR 1181, that is to say “a real possibility, a possibility that cannot sensibly be ignored” having regard to the feared harm in the particular case. It will be for the local authority to prove such likelihood of harm and the more significant the harm the less the required level of likelihood (and vice versa). Abduction would, in my judgment, be significant harm and therefore the threshold of likelihood may be lower. However, the test is “reasonable cause to believe” which in my judgment imports the same grounds as are necessary under s.38(2), that is to say that there must be concrete evidence rather than mere speculation. Thus I must ask myself upon what basis can I find that there is reasonable cause to believe that HA will be abducted (which for current purposes means, in effect, not returned by the paternal family at the end of the assessment period or if it breaks down)?

18. S.100(5) applies to any order which is made other than in the exercise of the court’s inherent jurisdiction (so, for instance, an order made within the provisions of Part IV of the Act), and which the local authority is entitled to apply for (assuming leave were granted where necessary). No such alternative has been suggested to me, save an order made pursuant to paragraph 19 of Schedule 2 to the Act

19. Paragraph 19 provides (so far as relevant):

(1)

(2) (3)

A local authority may only arrange for, or assist in arranging for, any child in their care to live outside England and Wales with the approval of the court.

The court shall not give its approval under sub-paragraph (1) unless it is satisfied that:

- living outside England and Wales would be in the child’s best interests;
- suitable arrangements have been, or will be, made for his reception and welfare in the country in which he will live;
- the child has consented to living in that country; and
- every person who has parental responsibility for the child has consented to his living in that country.

Where the court is satisfied that the child does not have sufficient understanding to give or withhold his consent, it may disregard sub-paragraph (3)(c) and give its approval if the child is to live in the country concerned with a parent, guardian, special guardian, or other suitable person.

(4)

5

(5)

Where a person whose consent is required by sub-paragraph (3)(d) fails to give his consent, the court may disregard that provision and give its approval if it is satisfied that that person:

- cannot be found;
- is incapable of consenting; or
- is withholding his consent

unreasonably.

Where a court decides to give its approval under this paragraph it may order that its decision is not to have effect during the appeal period.

In sub-paragraph (7) “the appeal period” means:

■ where an appeal is made against the decision, the period between the making of the decision and the determination of the appeal; and

■ otherwise, the period during which an appeal may be made against the decision.

The court was referred, by the Local Authority, to *Islington LBC v EV* [2011] 1 FLR 1681, a decision of King J. The facts were very similar to the present case, save that the country in question was Turkey, a full and effective signatory to The Hague Convention. In that case, King J declined to make the child a Ward in advance of the proposed assessment, pointing to the remedies available in the event of difficulties, as outlined at para. 64:

“These courts are familiar with abduction cases. There is a swift and well recognised procedure and raft of orders which can be obtained almost instantly, day or night, for use in such situations whether directly through the Central Authority or (in the event of a country not being a Hague signatory or in exceptional circumstances) under the umbrella of the court’s inherent jurisdiction and Wardship.”

The court was ultimately satisfied that it was in the best interests of the child to be placed with his paternal family for three months, but disagreed with the Local Authority’s application to make the child a Ward, to enable the period of assessment.

The court heard evidence from the paternal family, and stated at para. 37:

“However, all the evidence I have received points to a level of commitment, love and care, and a respect for the authority of this court, and a wish to pursue whatever course is deemed by professionals to be in HA’s best interests, which justifies that level of faith in the grandparents and father, who have all, expressly and on oath, confirmed to me that they will co-operate in the boy’s

return, although separately and individually expressing the hope that it will not be necessary. On the evidence I have received there is no basis for rejecting their undertakings.”

The court, therefore, concluded that that was no reasonable cause to believe the child will suffer significant harm if the inherent jurisdiction was not exercised. On this basis, the Local Authority did not satisfy the second limb of the test in s.100(4). Further, the court considered that the safe placement of the child could be achieved by other means, namely by granting permission under the existing Interim Care Order. It was noted that if the child were to be made a Ward, the ICO would have to be brought to an end, meaning the Local Authority would not share parental responsibility whilst the child was in AJK. The time spent in AJK was likely to be intense, with assessment periods with both the allocated social worker, and the local agency nominated by CFAB, due to take place. It would, in the court’s view, be wholly artificial for such an assessment to take place without the Local Authority sharing parental responsibility.

The court rejected the Local Authority’s attempt to distinguish the present case from *Re EV* [2011] as being insufficient to overcome s.100(4)(a), in light of the existence of the UK-Pakistani Protocol. It was highlighted that an application under the inherent jurisdiction was still available to the Local Authority, in the unlikely event of difficulties in securing the return of the child.

Accordingly, the application for the child to be made a Ward of Court was rejected, and the Local Authority was granted permission to place the child in AJK under s.33(7) and para. 19 of schedule 2 of the Children Act 1989. It was directed that the judgment accompany the orders, to enable the background and basis for the orders to be clarified, should any issues arise before the courts in Pakistan or AJK.

Conclusions

Whilst the above case may seem unusual, it makes for important reading. Practitioners should be aware of the various mechanisms that exist to allow a child to be placed in a foreign jurisdiction for an interim period, and be alive to the hurdles they must overcome if it is felt that the safest option is to make the child a Ward of Court. It must be remembered that, as identified by King J in *Re EV*, there is a swift and well-recognised procedure to secure the return of a child from a foreign jurisdiction, should the worst happen.

Joanna Lucas

Nothing else will do?

Adoption v natural family placement

have recently been involved in two cases where the court has had to decide whether the natural family caring for a child who has already been placed for adoption. They are cases fraught with emotion for all parties and must be handled incredibly carefully. I have been

fortunate to appear before two of our local judges who have dealt with such cases in an exceptionally incisive and sensitive way.

Although the law on this point is now reasonably well established, a summary of it, and how it has developed, may assist those advising family members or adopters in the future.

The first case on point was the case of *A & B v Rotherham* [2014] EWFC 47 (5 December 2014) in which an aunt succeeded in opposing an adoption order for a child aged 20 months. The child had been placed with the adopters since the age of seven months. Holman J described the decision as the most harrowing in his time on the bench. Permission to appeal that decision was refused by the Court of Appeal.

Then came the case of *M'P-P (children)* [2015] EWCA Civ 584 (June 2015) which was an appeal on similar issues as *A & B*. The judge at first instance had found in favour of the aunt over the adopter. One of the two children had been placed with the adopter since just twelve-months old. The Court of Appeal overturned the decision on narrow, judgment-specific grounds without giving guidance beyond what is already known.

Next in line was Russell J who had to determine similar issues in *Re W (Adoption Application: Reunification with Family of Origin)* [2015] EWHC 2039. In this case, the Court of Appeal had allowed the father's appeal out of time against the making of the care and placement orders (*Re H* [2015] EWCA Civ 583). The child was 2½-years old and had been placed with adopters since the age of 16 months. The three older siblings remained with the father. The child was settled and happy with the adopters.

Russell J described the legal test in this way:

"The result of the Supreme Court and subsequent decisions of the Court of

Appeal is that that this court can only make an adoption order if it is necessary to do so and it is not enough that it would be better for this child to be adopted than to live with her original or birth family as Lord Wilson said in *Re B*:

34. ... Yet, while in every such case the trial judge should ... consider the proportionality of adoption to the identified risks, he is likely to find that domestic law runs broadly in parallel with the demands of Art 8. Thus domestic law makes clear that:

a) it is not enough that it would be better for the child to be adopted than to live with his natural parent; Re S-B (children) Care Proceedings: standard of proof [2010] 1 FLR 1161, para [7]; and

b) a parent's consent to the making of an adoption order can be dispensed with only if the child's welfare so requires (s 52(1)(b) of the Adoption and Children Act 2002)

The same thread, therefore, runs through both domestic law and European Convention law, namely that the interests of the child must render it necessary to make an adoption order. The word 'requires' in s 52(1)(b) 'was plainly chosen as best conveying ... the essence of the Strasbourg jurisprudence; Re P (Placement Orders: Parental Consent [2008] EWCA Civ 535 [2008] 2 FLR 625, para [125]).'

There was clearly some hope for 'late comers' with a wish to be assessed to care for a child that had been placed for adoption, but it would appear that there has now been a slight shift in the sand.

The most recent case in 'the series' is that of *Re W (A Child)* [2016] EWCA Civ 793. McFarlane LJ summarised the issues under consideration in this way:

"This appeal raises the following issues which may be of general importance:

■ The approach to be taken in determining a child's long-term welfare once the child has become fully settled in a prospective adoptive home and, late in the day, a viable family placement is identified;

■ The application of the Supreme Court judgment in *Re B* [2013] UKSC 33 ("nothing else will do") in that context;

■ Whether the individuals whose relationship with a child falls to be considered under Adoption and Children Act 2002, s 1(4)(f) is limited to blood relatives or should

include the prospective adopters;

■ Whether it is necessary for a judge expressly to undertake an evaluation in the context of the Human Rights Act 1998 in such circumstances and, if so, which rights are engaged."

The background to the case was as follows:

The child (A) was born on 1 May 2014 and neither of her parents were able to look after her. The child-protection process commenced on the day of her birth and she was placed with foster carers when only one-day old.

On 21 October 2014 a care order was made, coupled with an order authorising the Local Authority to place A for adoption. Due to the non-cooperation of the parents and the maternal family, the social workers did not have any knowledge of the paternal family and were, consequently, unable to trace them.

In December 2014, A, then aged seven months, was placed with prospective adopters (the X family). In April 2015 Mr and Mrs X applied for adoption of A. In June 2015 the paternal grandparents were located as a result a further set of care proceedings relating to a second child (A's full sibling). They indicated their willingness to care for A and sought to oppose the adoption of her. The evidence was that A was well and securely placed with the X family. J was placed with the paternal grandparents and a third sibling (K) was placed with a paternal aunt. The High Court (Bodey J) dismissed the adoption application by the X family and made a special guardianship order in favour of the paternal grandparents. The X family appealed.

In giving the lead judgment in the Court of Appeal, McFarlane LJ was heavily critical of the Guardian. The initial analysis was "downright wrong" in places and "wholly inadequate". The determinative factor in the Guardian's analysis was that the paternal grandparents could care for A which then dictated (for the Guardian) that adoption was not in A's best interests. The high-quality care A was already receiving on the basis that it was intended to be a permanent arrangement was evident, yet the Guardian saw that the placement with the natural family had become the paramount consideration without the need for a wider review. Placement with the natural family was only one of the factors in the case, albeit an important factor. Further, the Guardian failed to deal with the level of attachment that A must have established with the adopters and the wider implications for the child's welfare in both the short and long term, of breaking that attachment in preference for placement with the natural family.

The ISW assessor (of the parental grandparents) was also criticised. The assessor had felt it appropriate to conclude that there was an accord with the Local Authority and the Guardian in that as there were now natural family members ready to 'step forward', that there could be "no justification for a child to be adopted outside the family" and that "she had the basic right to be brought up by her family unless there was absolutely *no other option*".

Upon the evidence, Bodey J at first instance determined, that "The fact that she has formed close attachments will, however, enable her to form close attachments with her family and the fact remains that she is not the adoptive child of her prospective adopters and she has family who are willing and desperate to provide her with a high level of care where she will be brought up with her brother, will share family events with her close-knit extended family who are totally committed to her. This is, therefore, not a case where "nothing else will do", and it is not my opinion that placement outside her birth family is necessary and proportionate in the interests of the welfare of the child."

On appeal McFarlane LJ agreed that Bodey J had rightly summarised section 1(4)(f) ACA 2002, but that his references were to the relationship that the child has with "relatives", whereas the statute is not limited to relationships with "relatives" but applies to relationships "with any other person in relation to whom the court... considers the relationship to be relevant". Mr and Mrs X fall into the wording of the statutory language of s1(4)(f) ACA 2002.

In analysing the judgment of Bodey J the Court of Appeal concluded that it was a good example of the comprehensive evaluation of the pros and cons of two competing options that is required by the modern case law.

The central points of the judgment are as follows:

■ "Placing a child for adoption is an act of altogether higher significance than arranging a foster home under the umbrella of a care order... the establishment of a firm and secure attachment is not one of the primary aims of the [foster] placement, in contrast with adoption."

■ "Where an adoptive placement has been made and significant time has passed so that it can be seen that the looked-for level of secure, stable and robust attachment has been achieved, the welfare balance to be struck where a natural family claimant comes forward at this late stage to offer their young relative a home must inevitably reflect these changed circumstances."

■ "In a case such as the present, where the relationship that the child has established

with new carers is at the core of one side of the balancing exercise, and where the question of what harm, if any, the child may suffer if that relationship is now broken must be considered. The court will almost invariably require some expert evidence of the strength of the attachment that exists between the particular child and the particular carers and the likely emotional and psychological consequences of ending it."

■ McFarlane LJ reminded himself of his judgment in *Re M/P-P* [2015] EWCA Civ 584 and the balance between a family placement and the "status quo" that may unusually be established in a public law case. There is a useful reminder of the historic status quo cases and also a grounding of modern attachment theory within the terms of the Adoption and Children Act 2002. Section 1(4)(f), which "places emphasis upon the 'value' of the relationship that the child may have with a relevant person [and] is particularly important."

■ The phrase 'Nothing else will do' is: "...meaningless, and potentially dangerous, if it is applied as some freestanding, shortcut test divorced from, or even in place of, an overall evaluation of the child's welfare. Used properly, as Baroness Hale explained, the phrase "nothing else will do" is no more, nor no less, than a useful distillation of the proportionality and necessity test as embodied in the ECHR and reflected in the need to afford paramount consideration to the welfare of the child throughout her lifetime (ACA 2002 s 1). The phrase "nothing else will do" is not some sort of hyperlink providing a direct route to the outcome of a case so as to bypass the need to undertake a full, comprehensive welfare evaluation of all of the relevant pros and cons (see *Re B-S* [2013] EWCA Civ 1146, *Re R* [2014] EWCA Civ 715 and other cases)."

■ "The repeated reference to a 'right' for a child to be brought up by his or her natural family, or the assumption that there is a presumption to that effect, needs to be firmly and clearly laid to rest. No such 'right' or presumption exists. The only 'right' is for the arrangements for the child to be determined by affording paramount consideration to her welfare throughout her life...."

■ In human-rights terms the present case may be unusual and out of the norm. As is well established, the existence of "family life" rights under Article 8 is a question of fact. It must be beyond question, as a matter of fact, that the relationship that now exists between Mr and Mrs X and A is sufficient to establish family life rights that justify respect under Article 8 in relation to all three of them. It does not, however, follow, as night follows day, that the paternal grandparents have any Article 8 family-life rights with respect to

A at all. They have never met her. She does not know of their existence. They have no relationship whatsoever. Their son, A's father, has never had parental responsibility for A. The same is likely to be the case with respect to family life rights of A with respect to her grandparents. It may well be, however, that A has some "private-life" rights with respect to her natural family.

The Court of Appeal continues to press the point, post *Re B/Re B-S*, that the legal test in care proceedings, where placement orders are sought, has not changed; it is simply the use of language that has altered.

The only certainty is that all such cases are determined on their own specific facts, and that where a child is placed with adopters (especially in the more commonplace foster-to-adopt placements) the promotion of a natural family member post adoption must be treated with some caution.

Fiona Farquhar

Albion Chambers Child Law Team

Team Clerks

Michael Harding
Julie Hathway
Marcus Harding



Adam Vaitilingam QC
Call 1987 QC 2010
Recorder



Kate Brunner QC
Call 1997 QC 2015
Recorder
Upper Tribunal Judge



Louise Price
Call 1972



Gerraint Norris
Call 1980



Sorrel Dixon
Call 1987



Tanya Zabihi
Call 1988



Sophie Knapp
Call 1990



Hayley Griffiths
Call 1990



Claire Rowsell
Call 1991



Libby Harris
Call 1992



Rachael Morton
Call 1995



Hannah Wiltshire
Call 1998



Charlotte Pitts
Call 1999



Linsey Knowles
Call 2000



James Cranfield
Call 2002
Team Leader



Stephen Roberts
Call 2002



Fiona Farquhar
Call 2002



Caroline Middleton
Call 2002



Benjamin Jenkins
Call 2004
Team Leader



Joanna Lucas
Call 2004



Gemma Borkowski
Call 2005



Monisha Khandker
Call 2005



William Heckscher
Call 2006



Sarah Pope
Call 2006



Jonathan Wilkinson
Call 2006



Alice Darian
Call 2006



Stuart Fuller
Call 2007



Philip Baggley
Call 2009



Emily Brazenall
Call 2009



Kevin Farquharson
Call 2011



Yasmine El-Nazer
Call 2015



Lucy Taylor
Call 2016



Emily Heggadon
Call 2017