Albion Chambers, Broad Street, Bristol BS1 1DR

Telephone 0117 927 2144
Fax 0117 926 2569
DX 7822 Bristol

clerks@albionchambers.co.uk

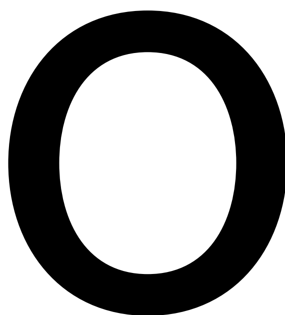
www.albionchambers.co.uk

Number 1 April 2016

Albion Chambers CHILD LAW NEWSLETTER

Musings on F words

Facts, families and falls



Over the last few months – like President Obama who went to Ireland trying to locate the missing apostrophe – I have travelled to some of this country's finest cities looking for lost facts. In Oxford, Exeter, Yeovil and Bristol I have been engaged in fact finding. Not ascertaining the truth but finding the facts on the balance of probabilities.

It has become apparent that the lifestyles of many of the families involved in fact finding hearings are very similar, no matter which part of the country is involved. The families are often large, they tend to live close to one another, and alcohol, unemployment and a dependence on state benefits are the norm. Peculiar attitudes to punishment and discipline exist which extend from "old school" methods to simple cruelty. In addition memories are poor and crucial facts go unremembered.

The hapless, often very young, victims tend to have the misfortune to find themselves cared for by families where their safety is disregarded, where alcohol and drugs are consumed in shocking quantities and any assistance offered to the families is seen as interference.

Add to this heady cocktail the failure of crucial members of the cast (aka the pool of perpetrators) to remember anything much and the court is often placed in an impossible situation. Those "in the frame" are also often placed in the unenviable position of having a possible police prosecution hanging over them. In these circumstances a lack of memory is often more effective in avoiding the criminal courts than would be providing a proper explanation.

In the civil court the availability of a "Lancashire" verdict – namely a finding that while it is not possible to name the perpetrator a "pool of perpetrators" can be identified – means that judges do not have to "strive" to identify a perpetrator. Indeed they are urged not so to do. Unfortunately a "Lancashire finding" – namely that there is a likelihood or real possibility that an individual is in the "pool of perpetrators" places the ball firmly back in the court of the Local Authority who then have to carry out risk assessments without really knowing who did what.

On the other hand, as the standard of proof is the balance of probabilities (more likely than not) then the court can make a "finding" without "striving" and without being "sure" (the criminal test). In such circumstances findings are made which are rarely accepted by the perpetrator who has been so identified. Denial after findings is more common than not.

Faced with denials – even after findings are made – the Local Authority is often left having to assume that the child is surrounded by risky people, at which point a search of the extended family begins, special guardians are found and, with any luck, the child can remain within his or her own family. (Please note the new Department of Education's 2016 Statutory Guidance with regard to SGOs amending the existing regulations).

There is an entirely different category of fact finding where a baby presents with symptoms indicative of their having been shaken. Babies with subdural haemorrhages (SDH), brain swelling and retinal haemorrhages – often accompanied by fractured ribs – become the subject of the most detailed of investigations and theories galore designed to show the innocence of the carers.

This is, of course, dangerous ground as the very recent findings of the Medical Practitioners Tribunal Service (MPTS) against Dr Waney Squier from the Radcliffe Hospital in Oxford have shown. Many of her theories about allegedly shaken babies were accepted – wrongly it seems – by the courts, but not all attempts by experts to explain/excuse injuries which have more obvious likely causes are accepted by judges.

In the recent case of *Cumbria County Council v KW, GM and others* [2016] EWHC 26 (a case with some interesting but obiter guidance about how the Children's Guardian should be represented in fact finding hearings - para 58) Hayden J was presented with expert evidence from Mr. Peter Richards (an eminent paediatric neurosurgeon also from the John Radcliffe hospital. He offered some support to the mother's evidence that a low-level fall backwards (from cushions placed on the floor) had caused the brain injuries and retinal haemorrhages to a baby aged about nine months.

The learned judge however stated at para 18 "I have not found it easy consistently to follow Mr. Richard's analysis, or to identify the logical nexus between his analysis and the apparent conclusions in his report".

Attempts by the doctor to rely on some dubious Japanese research (Aoki – 1984) were rejected by the court. Also rejected were attempts to describe as "evidence" theories to the effect that there must be lots of babies with undetected head injuries who never get scanned because the falls they have suffered have not appeared significant enough to carers to bring them to the attention of medics.

Mr. Richards tried to persuade the court that a "benign enlargement of the subarachnoid spaces" (accounting for a larger than average head) made the sustaining of brain injury more likely from a low-level fall. However there was no "scientific validation" (para 25) for this and the court rejected the theory, disbelieved the

mother's account and found instead that in a momentary loss of control mother had injured the child.

What was particularly interesting about the rejection of Mr. Richard's evidence in this case (The Cumbria case) was that in *Re A (Care Proceedings; Learning Disabled Parent* [2013] EWHC3502 [2014] 2FLR 591 Baker J also heard evidence from Mr. Richards. In a judgment delivered on 1 July 2013 at para 48 the learned judge said:

"Mr. Storey Q.C. on behalf of the father explored with Mr. Richards the possibility that these injuries may have occurred as a result of a low-level fall. That is a topic about which Mr. Richards and other colleagues have developed a close interest as a result of a number of medico-legal cases in which this explanation has been proffered in recent years. In addition Mr. Richards alluded to a recent case from his own clinical experience in which a child with hydrocephalus, who suffered a low-level fall, was found to have sustained a subdural haemorrhage. It is too early to draw any further conclusions from this case, save that all doctors and courts must now recognise that there may be cases in which intracranial injuries are sustained as a result of low-level falls".

The Cumbria case is certainly not one of those cases. It is, however, a shot over the bows of those representing Guardians in fact finding hearings, as Hayden J for one "strongly deprecates (the adopting of) a position of neutrality motivated solely by desire to appear independent and objective in the eyes of the parents" because this loses sight of the primary professional obligation to the child".

Geraint Norris

Committal

Dotting the Is and crossing the Ts

Those practitioners who have represented family members alleged to have been complicit in the removal of children in breach of court orders know that any tribunal, particularly a High Court Judge, can be unforgiving.

As observed by McFarlane LJ in *Re: K (Return Order: Failure to Comply: Committal: Appeal)* [2014] EWCA Civ 905, the judge in such a situation may be justified in presenting a "very robust demeanour".

Nevertheless, it is essential that there is clarity about the alleged contempt. There must be precision in the procedure followed, and the safeguards owed to a potential contemnor must be protected in any committal application.

The Court of Appeal underlined these requirements in the recent case of *Re: L (A Child)* [2016] EWCA Civ 173. The Appellant, Mr. Oddin, was L's uncle. L was made the subject of care and freeing orders in 2004, but abducted by her parents and removed from the jurisdiction shortly thereafter. A collection order was subsequently made against Mr. Oddin and several other family members requiring them to provide the Tipstaff with information about L's whereabouts and all matters known to them that would assist the Tipstaff in locating L. L was subsequently made a Ward of Court.

Fast forward to July 2015; Keenan J required Mr. Oddin to attend court under the inherent jurisdiction to be examined about the welfare and whereabouts of L, and the whereabouts of her parents. Mr. Oddin attended before the Judge on 8 October 2015 and, perhaps because he was "a mere witness" [1], was unrepresented. Before he gave evidence, the Judge warned Mr. Oddin that he could be found to be in contempt of court if the Judge took the view that he had not told the truth or provided all the information he had about L's whereabouts.

At the end of that hearing, the Judge made it clear that he did not think Mr. Oddin had told him the truth. Accordingly, the Judge listed a committal hearing and stated that Mr. Oddin was to show cause because he had not provided all the information he had about the whereabouts of the parents' and L's whereabouts and welfare.

The Local Authority subsequently issued a committal application as a vehicle to ensure that Mr. Oddin had public funding to be represented.

The committal hearing eventually took place on 18 January 2016. At the outset, Counsel for Mr. Oddin sought to clarify the contempt that her client faced: breach of the collection order (providing information about L's whereabouts) or whether he had been untruthful when he gave evidence to the Court on 8 October 2015 (when he was asked to provide information about L's whereabouts *together with* the information about her welfare and the whereabouts of her parents).

The Judge replied that the contempt was for breach of the collection order made in December 2004, but went on to say that Mr. Oddin's evidence on 8 October 2015 was relevant because, if the Judge did not accept that evidence (and, remember, he had not accepted that evidence on 8 October 2015) then he was entitled to find that Mr. Oddin knew more than he had said, and was in breach of the collection order.

Mr. Oddin gave further evidence at the committal hearing, but to no avail. The Judge was satisfied that Mr. Oddin had information that he had not disclosed to the Court, which would assist in locating L. He found Mr. Oddin in contempt of court and sentenced him to a six-month custodial sentence.

The Court of Appeal allowed Mr. Oddin's appeal. The President gave the leading judgment and found that Mr. Oddin had been required to attend the committal hearing in relation to his untruthful evidence to Keehan J on 8 October 2015, and not in relation to the collection order.

The President had no criticism of the way in which the Judge conducted the hearing on 8 October 2015, a view that I shall return to shortly, but observed that the use he made of the evidence given by Mr. Oddin at that hearing fatally undermined the way in which he conducted the committal hearing.

The President reminded himself of the safeguards which anyone facing committal proceedings are entitled to. These include the absolute right of a person accused of contempt to remain silent, which carries with it the absolute right not to go into the witness box. This right is established in *Comet Products UK Ltd v Hawkex Plastics Ltd* [1971] 2 QB 7.

As the President observed, this right should be distinguished from the privilege against self-incrimination (and from legal professional privilege), which may entitle a witness to decline to answer a question but does not entitle the witness to refuse to give evidence.

The President also agreed with the view of Moses LJ in *Hammerton v Hammerton* [2007] EWCA Civ 248, that if the committal

[1] Paragraph 17 of judgment

application is heard at the same time as other issues about which the alleged contemnor needs to give evidence then he is placed in a position where he is deprived of the right to silence.

Mr. Oddin had been forced to give evidence on 8 October 2015. Indeed, the President noted that his evidence had been "extracted from him under compulsion". Mr. Oddin had been denied the safeguards he was entitled to: the right to remain silent and the right to refuse to go in the witness box. His evidence on that date had subsequently been used against him in support of committal proceedings in relation to the collection order.

Returning to the hearing on 8 October 2015, the President also touches upon the fact that, although Mr. Oddin was a compellable witness, he was still entitled to rely on the privilege against self-incrimination. Mr. Oddin was unrepresented at that hearing and the Judge failed to advise him of that right. The President, rather generously, overlooks this on the basis that "nothing…. turns on this fact".

The President sidestepped the question of whether Keenan J should have heard the committal application given that he was the Judge at the hearing on 8 October 2015. He does, however, quote with approval the comments of McFarlane LJ in *Re: K (Return Order: Failure to Comply: Committal: Appeal)* that:

"…difficulty... can arise… if and when the court is later required to hear committal proceedings arising out of an alleged breach of an earlier order… The more robust the judge has been in delivering a coercive message at the earlier hearings, and the more the judge has emphasised the consequences of the breach, the more inappropriate (or impossible) it will be for the same judge to conduct the committal process".

It is of note that in the checklist set out in her supporting judgment (see below), Mrs. Justice Theis recommends that the Judge specifically consider whether the committal hearing should be heard by someone else.

The President identifies other fatal flaws to the procedure followed in this case, including an absence of evidence that Mr. Oddin had been served with the collection order and the fact that the penal notice was not prominently displayed on the first page of the collection order (echoing the observations of Hollman J in *Re: DAD* [2015] EWHC 2655 (Fam)).

As Lord Justice Vos says in his supporting judgment, the process of committal is highly technical for a reason; "namely the importance of protecting the rights of those charged with contempt of court". Mrs Justice Theis, in her supporting judgment, helpfully provides a checklist, set out below in full, which should be at the forefront of the Court's mind before it embarks on hearing a committal application:

(1) There is complete clarity at the start of the proceedings as to precisely what the foundation of the alleged contempt is: contempt in the face of the court, or breach of an order.

(2) Prior to the hearing, the alleged contempt should be set out clearly in a document or application that complies with FPR rule 37 and which the person accused of contempt has been served with.

(3) If the alleged contempt is founded on breach of a previous court order, the person accused had been served with that order, and that it contained a penal notice in the required form and place in the order.

(4) Whether the person accused of contempt has been given the opportunity to secure legal representation, as they are entitled to.

(5) Whether the judge hearing the committal application should do so, or whether it should be heard by another judge.

(6) Whether the person accused of contempt has been advised of the right to remain silent.

(7) If the person accused of contempt chooses to give evidence, whether they have been warned about self-incrimination.

(8) The need to ensure that in order to find the breach proved the evidence must meet the criminal standard of proof, of being sure that the breach is established.

(9) Any committal order made needs to be set out what the findings are that establish the contempt of court, which are the foundation of the court's decision regarding any committal order.

The President commends this checklist and associates himself expressly with Mrs. Justice Theis's reminder to Counsel and solicitors of their duty to assist the court, particularly when considering procedural matters where a person's liberty is at stake.

Poor Mr. Oddin was no doubt relieved that the appeal succeeded but seems to have spent five weeks in prison before it was heard and, moreover, due to the old style collection order, his passport had been withheld from him from December 2004 until the appeal was allowed in March 2016.

Jonathan Wilkinson

[2] The new form of order was introduced in July 2013

Bundles, bundles, bundles

A discussion of Practice Direction 27A

In February the DFJ issued a message regarding Practice Direction 27A of the Family Procedure Rules 2010, which stated that all judges in the Family Court must now ensure compliance with the practice direction. This followed hot on the heels of January's message from the President of the Family Division, which proposed various amendments to PD27A aimed at limiting the length of certain documents, to ensure the court bundle remained within the 350-page limit. It's clearly a topic of interest for the judiciary, so this article looks briefly at what PD27A requires of the practitioner, before going on to consider what the consequences of non-compliance might be.

PD27A is drafted to include pretty much every hearing in family proceedings in the Family Court and High Court, whether that is private law, public law, finance or some other hearing. It's incredibly wide in its application, as it applies to without notice hearings, first hearings and repeat hearings. 'Hearings' itself is defined as 'all appearances before the court' (para 2.2).

Importantly, at para 4.1 the Practice Direction directs that documents such as medical records, police disclosure, contact notes and foster carer logs must not be included in the bundle unless specifically directed by the court. This is perhaps in contrast to the common practice of including such disclosure at a tab at the back of a hearing bundle. For those dealing with such disclosure, these documents can be disclosed to the other parties, but should not form part of the core bundle unless the court specifically directs.

A controversial requirement of PD27A is the list of documents set out at para 4.3, referred to as preliminary documents. Before each hearing, the Practice Direction states that at the front of the bundle there should be an updated case summary, statement of issues, position statement from each party, chronology, list of essential reading and time estimates for that reading and the hearing as a whole.

The difficulty with this aspect of PD27A is that it's a 'one-size-fits-all' approach to all hearings in family proceedings, and very often it's simply not possible to comply. Invariably instructions need to be taken at court, issues don't become clear until the morning of the hearing and time estimates expand or reduce depending on the level of contest.

Fortunately the judiciary seem to recognise this, saving their criticism for only the most flagrant breaches of the Practice Direction. The remainder of this article looks at what might happen to the practitioner who fails to comply.

At para 12.1 of PD27A, the 'penalties for failure to comply' are made explicit, and include having the case put back or taken out of the list, and the possibility of a wasted costs order being made against the non-compliant party. While each of these sanctions is an option, the judiciary have tended to favour public criticism, although it seems their patience is wearing thin.

Take, for example, the judgment of HHJ Bellamy in *Re D and R (Children)* [2015] EWFC B198 where in November last year he stated that *"over recent years I have variously encouraged, cajoled, berated and condemned the profession to try to ensure their compliance with the requirements of PD27A. I have failed"*. His solution was to order a certificate of readiness for every case, signed by the solicitor with conduct of the case and responsibility for preparing the bundle, to confirm it was PD27A compliant.

Judges in previous cases have made various threats. In *J v J* [2014] EWHC 3654 (Fam) Mostyn J had threatened to set up a court for 'delinquents' to be summoned to appear before the President. The President himself thought that was a marvellous idea, but decided in *Re W* [2015] EWCA Civ 403 to settle for identifying the 'delinquent local authority' in his judgment. In the later case of *Newcastle City Council v WM* [2015] EWFC 42, Cobb J reminded the parties of the court's powers under para 12.1 of PD27A, but in the end decided to settle for publicly criticising the local authority in his judgment.

Invariably, it seems it is local authorities who will come in for criticism in public law cases when the bundle is not compliant with PD27A. That of course is to be expected; given the local authority will generally have responsibility for the preparation of the bundle as the applicant. With a heightened judicial interest in PD27A in recent months, it will clearly pay to become familiar with its precise requirements before the judiciary start to take more drastic steps in public law cases.

Alexander West

Child Assessment Orders?

Section 43 CA 1989 is not a commonly used section of the Act and one that may therefore be overlooked by practitioners. This article is intended to serve as a reminder of what is available and to whom under this section.

What is a child assessment order?

A child assessment order is an order for an assessment of a child's health or development, or of the way in which he has been treated.

The guidance[1] states:

"It is intended to allow the local authority to find out enough about the state of the child's health or development, or the way in which he has been treated, to decide what further action, if any, it should take. It should not be used where the circumstances of the case suggest that an application for an EPO or a care supervision order would be more appropriate."

Who can apply?

Unlike an application for an emergency protection order, an application for a child assessment order can only be made by a local authority or an authorised person. An authorised person means an officer of the NSPCC, or any other person authorised by the Secretary of State to bring care proceedings. At present, no one else is so authorised. An application must be made on notice. There is no provision for an ex parte application to be made.

The child

As per the *Gillick* principle it seems that a child of sufficient maturity and understanding should be invited to consent to such an assessment, even though his parents do not agree. If he is of sufficient understanding to make an informed decision, he may refuse to submit to such an assessment. In any event, the child (of any age) should be given notice of the application for a child assessment order (so far as is reasonably practicable).

A children's guardian must be appointed for the child, unless the court is satisfied that it is not necessary to do so in order to safeguard the child's interests. A solicitor may be appointed by the court to represent the child if he is not represented and:

- there is no children's guardian appointed; or
- the child has sufficient understanding to instruct a solicitor and wants to do so; or
- it appears to the court that it would be in the child's best interests for him to be represented.

Grounds for an order

To make a child assessment order the court must be satisfied that:

- the applicant has reasonable cause to suspect that the child is suffering, or is likely to suffer, significant harm;
- an assessment of the state of the child's health or development, or of the way in which he has been treated, is required to enable the applicant to determine whether or not the child is suffering, or is likely to suffer, significant harm; and
- it is unlikely that such an assessment will be made, or be satisfactory, in the absence of an order.

If the court considers that the above grounds are made out it must then consider:

- whether an order should be made, applying the paramountcy principle;
- whether making the order would be better for the child than making no order.

The court may treat an application under this section as an application for an emergency protection order and indeed section 43(4) stipulates that a child assessment order must not be made if the court is satisfied that there are grounds for making an EPO and that it out to make an EPO rather than a child assessment order.

How long will the order last for?

The court has the power to order an assessment of a child for a maximum of

[1] The Children Act 1989 Guidance and Regulations Volume 1 Court Orders, (2008) para 4.10

seven days. The assessment period, and therefore the order, may be for a shorter period. The commencement date must be specified.

Can repeat applications be made?

Once there has been one application for a child assessment order no further application for a child assessment order may be made, without leave of the court, until six months have elapsed since the disposal of the previous application.

Relationship with public law orders

An application for a child assessment order won't be needed if a care order is in force as the required assessment can be arranged without the need for an order under this section. Where a supervision order is in force the supervisor can seek a direction under that order that an assessment takes place.

Terms of the order

A child assessment must specify:

- the date by which the assessment is to begin;
- how long the order will last for (no longer than seven days);
- name of who is going to produce the child (if production of the child is required);
- if the child is going be kept away from home during the assessment, the relevant period/s, the relevant directions, any directions as the court thinks fit with regard to the contact which the child must be allowed to have with other persons while away from home;
- any directions relating to the assessment as the court thinks fit.

Appeal

There is a right of appeal against the making of, or the refusal to make, a child assessment order.

Alice Darian

Relinquished babies

The foreign element

Stephen Roberts and I respectively represented the child and the local authority in the "AO part" of *Re JL and AO (relinquished babies)* [2016] EWHC 440 (Fam). Baker J provides helpful guidance in respect of a number of issues that arise from time to time in relinquished baby cases, especially those with a foreign element.

JL was a London case; *AO* was a Western Circuit case. Baker J was asked by the President to hear the two cases together as they had a number of points in common, and between them raised a collection of issues in respect of which the President considered it would be useful to have some clear guidance.

JL – the facts

JL is an Estonian baby. His mother came to the UK in November 2014 to work for a catering company, no doubt on a very low wage – she is described as supplementing her income by working for an agency at weekends. She was already pregnant when she arrived here, and gave birth in March having successfully concealed her pregnancy. JL's mother told the London Borough ("the LB") that she wanted the baby to be adopted in England. On 16 July she signed advance consent to placement for adoption, pursuant to s19 Adoption and Children Act 2002. She agreed to her family in Estonia being informed about the baby, but it was only when she was told by the LB that her family might be able to challenge the adoption if they weren't first assessed that she agreed to such assessment. In the event, the family members who had shown an interest subsequently withdrew. Adopters were quickly identified in England and, were it not for what happened next (namely lawyers, not to put too fine a point on it), the match was due to be approved by Panel on 9 December.

For reasons that never became entirely clear, the LB on 12 October issued an application for a placement order. That application found its way to Baker J for a directions hearing in November 2015, listed alongside AO. Baker J directed the LB to contact the Estonian consulate (the LB having not realised the need to do so). The Estonian response is interesting and, as will be seen, is the opposite of the Hungarian response in AO. The Estonian authorities said in an email to the LB that it would not be possible to arrange an adoption for JL in Estonia within his timescales, and continued:

"We are very happy for the baby for finding new parents. For child growing up and being responsible and good person, it does not matter where have you born and where do you live – all what matters is love and care you get from your parents who will be around you."

JL's case was then listed for hearing on 21 December, alongside AO's case.

AO – the facts

AO's Hungarian parents came to England in 2014 to "seek a better life" which turned out to be working in a seaside hotel and living in accommodation shared with other workers. In early June 2015 the LA received a referral from a midwife. AO's mother was seeking a termination, but was already at 25 weeks. The midwife was worried that the mother (aged 21 and with no English) was always brought to appointments by an older woman whose role was unclear. The LA investigated and went into pre-proceedings mode. At meetings in August and again in early September, with interpreters and lawyers present for the parents, both parents said that they could not care for the baby, that they wanted the baby to be adopted, that they wanted the adoption to take place in England so that the baby could have the better life that they had been seeking for themselves, that they did not want their relatives in Hungary to be told about the baby and that they did not want the baby to have information about her origins. The father did not want to see the baby, the mother wanted no post partum skin-to-skin contact, and at that time they did not want to know the gender of the baby.

In accordance with DfE Guidance published in June 2014 the LA informed the Hungarian Embassy and the Hungarian Central Authority (in mid September) of its involvement with AO's parents. The response from the Hungarian CA (which is part of the Ministry of Human Resources) was:

"The expectant are Hungarian citizens... the baby will also be Hungarian citizen... only Hungarian authorities have the right to decide adoption of Hungarian baby... as Hungarian citizen's adoption by English authorities is not allowed by our national law we plan to bring him/her into Hungary by child protection colleagues and place

the baby in Hungary..."

The LA rightly took the view that the "which country" issue needed swift resolution, but (mistakenly, as it turned out) took the view that habitual residence was the key. An ante natal inherent jurisdiction application (a very rare species) was made. Hungary was invited to attend the first hearing (28 September) but chose not to do so; in fact neither Estonia nor Hungary was represented at any of the hearings. The LA was given advance permission to place AO with foster carers and it was ordered that she be made a ward of court upon her birth.

AO was born on 16 October. She was immediately removed from her mother's care and on discharge from hospital was placed with foster carers. Her parents have had no contact with her. AO's case was listed before Baker J in Bristol on 21 December.

JL and AO – the hearing

Counsel for the LB, leading and junior counsel for JL and leading and (two) junior counsel for AO's parents were reluctant to venture as far west as Bristol. (To be fair, Frank Feehan QC, Grainne Mellon and Katherine Dunseath all appeared pro bono for AO's parents). Stephen and I, and our respective teams, were therefore with Baker J in court at the Palais de Justice while everybody else was at the RCJ and appeared by TV link. It worked – until there was a power cut in Bristol (no doubt confirming London counsels' views about the hazards lurking in the West Country). After normal service was resumed it all became somewhat hurried, some issues were not fully argued and in the end it was necessary to have a further hearing (this time by telephone) on 21 January.

The issues and the outcome

Jurisdiction

Article 8 of Brussels IIA provides that the courts of a member state shall have jurisdiction in matters of parental responsibility concerning a child who is habitually resident in that state at the time the court is seised. Article 13 provides a safety net to the effect that where habitual residence cannot be determined (and in certain other circumstances) the mere presence of the child in the member state is sufficient for the courts to have jurisdiction. However, Article 1(3)(b) provides that BIIA shall not apply in certain circumstances including with regard to "decisions on adoption or measures preparatory to adoption."

From *Re N (Children) (Adoption: Jurisdiction)* [2015] EWCA Civ 1112 we know that although prospective adopters have to fulfil domicile/habitual residence requirements there are no such requirements in respect of the subject child or of her parents. However, when considering the welfare of the child, one matter to which the court must have regard is the child's links to other countries and "what risk there is that any adoption order that it makes may not be universally recognised and...the practical implications of this for the child" – beware of creating a so-called "limping adoption."

The Vienna Convention

As we all learnt from the President in *Re E (Brussels II Revised: Vienna Convention: Reporting Restrictions)* [2014] EWHC 6 (Fam), Articles 36 and 37 of the Vienna Convention on Consular Relations 1963 have implications in public law children proceedings (and in fact in some private law cases). Article 36 requires that the consular authorities of the sending state be informed if a national of that state is, among other things, "detained" and Article 37 requires the provision of information "where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending state."

Baker J found that where a child is relinquished for adoption and therefore voluntarily accommodated by a local authority (and thereof not "detained") no Article 36 obligation arises. However, Baker J added three caveats:

1. He reminds us of the parameters around s20 accommodation and points out that the breach of rights occasioned by the use of s20 where there should in fact be care proceedings will be compounded by the LA thereby avoiding its Article 36 obligations.
2. Depending on the circumstances of the case, the LA in a relinquishment case might still need to contact the foreign authorities so as to further its understanding of matters relevant to the s1(4) ACA 2002 checklist.
3. "Guardian" in Article 37 includes "Children's Guardian" and therefore in any proceedings to which the child is a party there will be an Article 37 obligation to inform the consular authorities of the sending state.

"Nothing else will do" – extended family – "realistic options"

Baker J found that the Re B and Re B-S approach that adoption should happen only if "nothing else will do" is founded on the application of proportionality and is specific to non-consensual adoption. It therefore does not apply to relinquishment cases, because in such cases the degree of interference with the Article 8 rights of parents and child is less than in cases of non-consensual adoption. However, even in relinquishment cases the LA must still "carry out a thorough analysis of all the realistic options for the child."

The local authority in a relinquishment case having carried out its "thorough analysis of all the realistic options" the outcome is likely to be one of the following:

Adoption in this country

If this is the way forward, appropriate consents can be given under s19 (placement) and s20 (adoption) ACA 2002. A placement order application is not only unnecessary but is in fact not possible (the preconditions in s22 not being satisfied). This was the outcome for JL, the Estonian child. Only if a Children's Guardian is appointed in the adoption proceedings is it necessary to inform the foreign consulate under Article 37 of the Vienna Convention.

Placement in this country with family members or foster carers

Section 20 CA 89 may be used so long as the necessary informed consent is forthcoming.

Placement with family members in the country of origin

If consensual, no (English) court order is required. Absent parental agreement, a care order will be required and the approval of the court under CA 89 Schedule 2 para 19 must be obtained.

Baker J considered the question of whether a local authority in a relinquishment case has a duty to contact the parents' wider family against the wishes of the parents, something to which AO's parents are implacably opposed. It appears that there is no definitive answer.

In *Z County Council v R* [2001] 1 FLR 365 Holman J said *"There is, in my judgment, a strong social need, if it is lawful, to continue to enable some mothers...to make discreet, dignified and humane arrangements for the birth and subsequent adoption of their babies, without their families knowing anything about it if the mother, for good reason, so wishes"* [underlining supplied].

In *C v XYZ County Council* [2007] EWCA Civ 1206 Arden LJ said *"I do not consider that this court should require a preference to be given as a matter of policy to the natural family of a child...In some cases, the birth tie will be very important, especially where the child is of an age to understand what is happening or where*

there are ethnic or cultural or religious reasons for keeping the child in the birth family." Lady Justice Arden emphasised that delay was an important factor.

Neither of the above cases involved a child of foreign parents. Baker J concluded that the views of the parents are important but that each case will turn on its own facts, with the child's welfare always being the court's paramount consideration. *"In some cases an analysis of the circumstances will lead the LA to conclude that it is not necessary to inform the natural family, but in other cases the authority will decide that it must contact the extended family in order to carry out the necessary evaluation of the realistic options."*

Interestingly, in AO's case the Hungarian Central Authority has stated clearly that in Hungary a confidential adoption would be perfectly acceptable.

Placement with prospective adopters in the country of origin. This may be achieved under s84 of the 2002 Act (giving parental responsibility prior to adoption abroad) and the Adoption with a Foreign Element Regulations 2005.

Placement in country of origin with a view to that country arranging adoption. This was the LA's and the CG's preferred option for AO. It was not achieved.

The CG had argued for an Article 15 transfer of the proceedings to Hungary. This was precluded by the court finding that the inherent jurisdiction proceedings were "preparatory to adoption" and therefore outwith the scope of BIIA [6].

My unsuccessful argument for the LA was that the court could use its inherent jurisdiction to authorise placement of AO in the care of the Hungarian authorities pending the arrangement of a Hungarian adoption. This did not find favour because (a) it would have been using the inherent jurisdiction to "cut across the statutory scheme" and (b) s85 ACA 2002 prohibits removing a child from the UK for the purposes of adoption save in s84 cases.

For AO, therefore, the only route by which she can be placed in Hungary (absent parental consent) is the making of a care order and the granting of authority under Schedule 2 para 19. A care order can of course only be made if the s31 threshold criteria are satisfied. Authority to place abroad can only be granted if the parents are regarded as unreasonably withholding their agreement to such placement. Watch this space.[7]

Stuart Fuller

[6] NB that care proceedings where the plan is to place for adoption are not regarded as "preparatory to adoption" and are therefore subject to BIIA – per Court of Appeal in *Re N*.

[7] Since this article was written the Supreme Court has given its ruling in *Re N* [2016] UKSC 15. It is an important case on the welfare aspect of Article 15, but it doesn't affect *Re JL and AO*.

Albion Chambers Child Law Team

Team Clerks
Michael Harding
Julie Hathway
Marcus Harding

Nkumbe Ekaney QC
Call 1990
QC 2011

Louise Price
Call 1972

Gerraint Norris
Call 1980

Claire Rowsell
Call 1991

Hannah Wiltshire
Call 1998

Charlotte Pitts
Call 1999

Linsey Knowles
Call 2000

James Cranfield
Call 2002

Stephen Roberts
Call 2002

Fiona Farquhar
Call 2002

Benjamin Jenkins
Call 2004

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
Team Leader

Philip Baggley
Call 2009

Emily Brazenall
Call 2009

Erinna Foley-Fisher
Call 2011

Kevin Farquharson
Call 2011

Alexander West
Call 2011

Alexander Small
Call 2012

Any comments made or views expressed on the law within any articles in this newsletter are the views of the writer and are not necessarily the views of any other member of chambers and should not be relied upon as legal advice.