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Butterworths Family and Child Law Bulletin provides an immediate updating service for the main text of *Butterworths Family Law Service* and *Clarke Hall and Morrison on Children*. The Bulletin is published every month and sent to subscribers to those publications and is also available to download from LexisWeb (www.lexisweb.co.uk).

References to BFLS and CHM above each case are to the relevant paragraphs in *Butterworths Family Law Service* and *Clarke Hall and Morrison on Children*. References are also included, where relevant, to *Rayden & Jackson on Divorce*: these cross-references are to the bound volumes of *Rayden*, unless otherwise indicated, in which case they are to the looseleaf Noter-up Service.

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PUBLIC CHILDREN

Whether judge adequately assessed evidence

Re T **(*children*)** ***[2014] EWCA Civ 1549, [2014] All ER*** **(*D*)** ***40*** **(*Dec*)**

BFLS 3A[4258]; CHM 9[18]; Rayden Noter up [T47.141]

The mother had six children. The two youngest children were J, who was 30 months old, and O, who was 17 months old. In April 2013, bruising was seen to the lower part of J's body. The paediatrician was concerned that the

bruising was non-accidental and that the mother had been trying to keep the social worker away from J. In June, care proceedings were issued. Meanwhile, further concerns arose when the eldest child alleged that he had been kicked and punched by J and O's father (the father). By that time, the father was regarded not only as a significant danger to the children, but the mother had also been seen with bruising to her face. The local authority sought interim care orders for the removal of the children. J and O were placed with foster carers. At trial, the judge heard evidence from a social worker. She had concluded that adoption was in the best interests of J and O, and confirmed that adoption was the authority care plan in respect of them.

The judge found that the future welfare of the children could not be safeguarded by them living with their mother and other alternatives would have to be considered. He concluded that if the children were placed with the mother, they would remain at grave risk of neglect. In February 2014, the judge made care and placement orders in respect of J and O, dispensing with the consent of the parents to the placement order.

The mother appealed and submitted that the judge had not adequately assessed the evidence in relation to her ability, with appropriate support, to provide a home for J and O. In having failed to do so, the judge had failed to follow the guidance in *Re B-S (children) (adoption: leave to oppose)* [2013] EWCA Civ 1146, [2013] 3 FCR 481 (*Re B-S*).

The appeal was dismissed as there was no basis on which it could be said that the judge had been wrong in having reached the conclusion he had and that:

(1) The judge, having recognised that the care plan of the authority had been one of adoption, thereafter had asked himself the right question, namely, whether the permanent separation from the natural family and relatives and the severance of legal ties was necessary or whether there was any other realistic option. Whilst not corralled in one section of the judge's judgment, the positives and negatives of both rehabilitation and of adoption were threaded through the judgment and they were no less a part of the *Re B-S* exercise for that.

(2) The judge, as he had been entitled to do, had answered the question he had posed and decided, on the facts and in the light of his careful welfare analysis, that the children's future welfare could not be safeguarded with the mother and, therefore, other alternatives had to be considered. It had been accepted that, given the ages of the children and the absence of any family members to care for them, adoption had been the only realistic alternative to rehabilitation. Where the judge had had only two options available to him, his decision-making process was not rendered 'linear' simply by virtue of his conclusion that rehabilitation was not in the best interests of the children, so having left adoption as the only realistic option for the children concerned.

(3) The holistic consideration to be applied in applications for adoption had been implicitly, if not explicitly, conducted through the careful weighing up of the benefits for and against rehabilitation, and for and against adoption, which were found within the body of the judgment.

Comment: A further decision arising from the apparent confusion as to the application of the guidance in *Re B-S* (on which see also the clarification of the President of the Family Division, Sir James Munby, in *Re R (a child)* [2014] EWCA Civ 1625, [2014] All ER (D) 179 (Dec) at page 9 of this bulletin), the Court of Appeal in the instant case also considered the decision in *Re M (a child: long-term foster care)* [2014] EWCA Civ 1406, [2014] All ER (D) 23 (Nov) in which the first instance decision was overturned on the basis that a decision to make a placement order requires the clearest of reasoning. Such reasoning was absent from the recorder's judgments in that case as it could not reliably be seen whether he had proceeded as he had done in order to leave open the possibility of the subject child going home to one of her parents if therapy were to prove successful or because he had considered that her relationship with them had been such as to require preservation through contact, notwithstanding the disadvantages of long-term foster care, which would be the inevitable corollary of that.

VARIATION

Whether jurisdiction to make orders

Mann v Mann [2014] EWCA Civ 1674, [2014] All ER (D) 237 (Dec)

BFLS 4A[1115]; Rayden 1(1)[T18.2]

Following the parties' separation, an order was sealed by consent which provided, inter alia, for the payment to the wife of periodical payments during the parties' joint lives, until the wife's remarriage or further order. The husband twice applied for a downward variation of the order. In 2005, the court ordered that the wife's periodical payments be capitalised and that the husband pay the outstanding arrears.

The parties submitted to mediation and agreed financial contributions. The wife issued a statutory demand for payment of approximately £2m. Eventually, the wife's claim was compromised and both parties, who had been legally represented, signed a written agreement on 2 November 2011 (the November agreement). In summary, the parties had agreed to enter into a binding mediation as to the outstanding balance due and terms as to the payment of instalments. In the meantime, the husband was to pay a monthly sum to the wife until an agreement was mediated, a lump sum, and the deposit and rent on a specified property. The mediation failed and the husband discontinued payment of the wife's rent.

The wife applied, pursuant to rule 33.3(2)(b) of the Family Procedure Rules 2010 (FPR 2010), seeking such method of enforcement as the court considered appropriate. In February 2014, the substantive application came on for hearing. The judge found that the clauses in the November agreement that contained financial arrangements qualified those as a maintenance agreement, albeit that the clauses that related to mediation could not be so classified. The wife's application was adjourned to allow for mediation. The wife did not engage in mediation. On 12 May, the matter was restored to the

judge, who made orders regarding the payment of interim periodical payments and the payment of arrears of maintenance. The husband failed to pay the arrears. The judge directed the parties to appear before him again so that the husband could be examined as to his means and to show cause why he should not be committed to prison for having refused or neglected to pay the sums due where he had the means to do so.

The husband applied to appeal the order of 12 May. A stay was granted and permission to appeal was given. The judge interpreted the stay as precluding him from proceeding to commit the husband immediately to prison, but not from conducting the necessary judicial investigation itself. The present court intervened to prevent him from taking that course. On 12 June, the judge re-characterised the periodical payments order he had made on 12 May as a 'scheduled court directed part payment of the outstanding lump sum' and ordered that the husband be allowed only to make payment to his solicitor if he paid a corresponding sum on each occasion to the wife in partial discharge of his debt to her.

The husband appealed against the orders of 12 May and 12 June. The main issue for determination was whether the judge had had jurisdiction to have ordered the husband to make payments to the wife, other than after the determination of the wife's enforcement proceedings in accordance with FPR 2010, 33.16(1) or (2). The wife submitted that, in the absence of an express direction pursuant to Matrimonial Causes Act 1973 (MCA 1973), s 31(7B)(c) she was not estopped from making further application for periodical payments in the circumstances of the husband's failure to pay the lump sum capitalisation of her previous order. Consequently, the judge had had jurisdiction to order interim periodical payments in anticipation of such an application. Further consideration was given to MCA 1973, s 35.

The husband's appeals were allowed on the basis that:

(1) MCA 1973, s 31(7B)(c) was expressed to relate to the whole of the sub-section, therefore, it related to applications made for variation or discharge of orders other than periodical payments or secured periodical payments including lump sums payable by instalments, pension sharing provisions, settlements and sale of property. The jurisdiction of the court to make further order had ceased in 2005. Section 31(7B)(c) was not limited in the way contended for by the wife. Further, the order made in 2005 had been entirely unambiguous, and accorded with the judge's intention to frame an order to aid enforcement and prevent the husband's continual applications for downward variation.

(2) The judge's recharacterisation of the May order as a 'scheduled court directed part payment of the outstanding lump sum' was not a legitimate response other than upon an application for variation of a lump sum directed to be payable by instalments, which was an order amenable to variation, or else in response to a judgment summons pursuant to FPR 2010, 33.16(1) and (2). Neither of those situations appertained in

the present case. The judge had not sought to justify the orders made in May and June 2014 as being by way of alteration of a subsisting maintenance agreement.

(3) The wife's failure to participate in mediation had rendered the November agreement as at an end. MCA 1973, s 35 only permitted applications to alter subsisting maintenance agreements. Whilst the outcome of the June order might have resulted in the husband's non-representation at committal proceedings, that intent was not reflected in the substance of the judgment, which had clearly revealed the judicial objective to have been payment of outstanding sums. If that interpretation was wrong, then clearly, without articulation of the manner in which he had purported to exercise his discretion, the judgment had been liable to be interpreted as punitive and not for the purpose of ensuring procedural justice.

(4) The appeals were allowed and the matter would be listed before a different judge.

Comment: A useful reminder that the general enforcement provisions introduced by FPR 2010, 33.3(2)(b) are not a universal panacea. As was central to the instant case, for an order to be varied it must be capable of variation. The court applied *Minton v Minton* [1979] 1 All ER 79 as to the jurisdiction to vary a consent order incorporating terms agreed between spouses in which the House of Lords set out the following principles:

(1) On the true construction of MCA 1973, s 23(1) the court is empowered to make a final order for a spouse's financial provision, and where the court has made a final order it has no jurisdiction to make any subsequent order for financial provision (except where the order is capable of variation under MCA 1973, s 31).

(2) Where, therefore, on an application for financial provision as to the terms of an agreement made between spouses, the court must deal with the application on its merits and either make an order dismissing the application by consent on terms recited in the court's order, or make a consent order incorporating the financial provisions agreed on by the spouses – the court has no jurisdiction to make any subsequent order for financial provision.

(3) It is inconsistent with the principle of 'the clean break' after divorce if the court's order is regarded as final only if it dismisses the application for financial provision.

Similarly the court applied *G v G (periodical payments: jurisdiction)* [1997] 1 FCR 441 (a case concerned with a periodical payments order where the Court of Appeal held that an order comes to an end not only when it is expressly dismissed but also when it ceases or is discharged, or after a party has complied with all their obligations, in which case there is no continuing order capable of variation or discharge under MCA 1973, s 31) and *Hamilton v Hamilton* [2013] EWCA Civ 13, [2013] 2 FCR 343 (an important decision as

to the distinction between a lump sum payable by instalments, which is capable of variation, and a series of lump sums, which is not).

JURISDICTION

Whether mother accepted jurisdiction unequivocally

Re LR (a child) (jurisdiction: Brussels II Revised) [2014] EWCA Civ 1624, [2014] All ER (D) 199 (Dec)

BFLS 5A[122]; CHM 1[950]–[955]; Rayden Noter up [T2.45]

From her birth in 2005 until February 2011, LR lived with her mother (and during the very early part of her life, with her father) in the United Kingdom. In February 2011, she moved with her mother to live with her relatives in Germany. In April 2012, the mother moved back to the UK, leaving LR in Germany with her grandparents and aunt. In February 2013, LR and her grandparents and aunt began living in a Luxembourg property during the week and their German property at weekends. At Easter, LR came back to the UK for a few days, during which she had contact with her father, before returning abroad. Initially, LR was at school in Germany, but, since 2013, she had been at school in Luxembourg.

The father made a private law application in respect of LR. The question before the judge was whether the court had jurisdiction to hear the proceedings in accordance with Council Regulation (EC) 2201/2003 (concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility) Regulation (Brussels II revised). The judge ordered that the court had jurisdiction. He held, first, that there was 'a strong argument' that, under art 8 of Brussels II Revised, LR was still habitually resident in the UK and, secondly, that, in any event, the court had jurisdiction in accordance with art 12 of Brussels II Revised. In that respect, he found that the mother had not 'expressly' accepted the English court's jurisdiction, but went on to hold that she had done so 'in an unequivocal manner'. In support of that conclusion, he relied, in particular, on the parties' pre-proceedings correspondence and the mother's acknowledgement of proceedings. The judge found that neither party had raised the issue of jurisdiction. Further, the judge held that acceptance of jurisdiction was in the superior interests of the child.

The mother appealed and the issues to be determined were, first, whether LR was habitually resident in the UK in accordance with art 8 of Brussels II Revised, and secondly, whether, in relation to art 12 of Brussels II Revised: (i) the jurisdiction of the English court had been accepted expressly or otherwise in an unequivocal manner by the mother at the time the court had been seised; and (ii) the exercise of jurisdiction by the English court was in the best interests of LR.

The mother's appeal was allowed on the basis that:

(1) Since, at the latest, April 2012, LR had not been habitually resident in the UK. It was plain that she was habitually resident, either in

Germany or in Luxembourg and not in the UK. That sufficed to determine the question of jurisdiction under art 8 of Brussels II.

(2) The various factors identified by the judge had not, whether taken individually or together, began to demonstrate an unequivocal acceptance of jurisdiction. It could not be seen how the parties' correspondence began to demonstrate an unequivocal (or, indeed, any) acceptance of the jurisdiction by the mother in 2013, particularly at a time when no proceedings had commenced and, not least, having borne in mind that when the proceedings had begun it had been at the suit of the father and not the mother. Further, it could not been seen how the mother's failure to raise the question of jurisdiction could be said to have amounted to an unequivocal acceptance of jurisdiction.

(3) The judge's answer to the question of whether it was in LR's best interests was unsupportable on his own reasoning. Everything pointed to it having been in LR's best interests for her future to be decided locally, in the court of the country of her habitual residence and not in the court of a country where she had not lived since 2011.

The judge's order was set aside and in its place, it was declared, in accordance with Brussels II Revised, that the English court did not have jurisdiction to determine the father's application.

Comment: In the instant case the court applied *Bush v Bush* [2008] EWCA Civ 865, [2008] All ER (D) 320 (Jul) as to the issue of unequivocal consent. In *Bush* the filing of a statement of arrangements for children form as part of the divorce procedure (as was then a requirement) was insufficient, as that was an integral part of the procedure that must be followed and pertained to the exercise of the court's jurisdiction to dissolve the marriage; it could not therefore be said that the court's jurisdiction in any matter relating to parental responsibility was seised by the filing of the statement of arrangements. Thorpe LJ commented in *Bush* that the court's jurisdiction would however be seised by a Children Act 1989 application. The court in the instant case also applied *Re A (children) (jurisdiction: return of child)* [2013] UKSC 60, [2013] 3 FCR 559 in which Lady Hale said, on a per curiam basis, that habitual residence is a question of fact and not a legal concept such as domicile. There is no legal rule akin to that whereby a child automatically takes the domicile of his parents. It was the purpose of the Family Law Act 1986 to adopt a concept which was the same as that adopted in the Hague and European Conventions. Brussels II Revised must also be interpreted consistently with those Conventions. The test adopted by the European court is 'the place which reflects some degree of integration by the child in a social and family environment' in the country concerned. This depends upon numerous factors, including the reasons for the family's stay in the country in question.

ADOPTION

Whether judge wrongly exercised discretion

Re R (a child) [2014] EWCA Civ 1625, [2014] All ER (D) 179 (Dec)

BFLS 3A[4258.10]; CHM 10[307]; Rayden Noter up [T47.102]

The proceedings concerned ES, who was two years old. In the autumn of 2013, care proceedings were commenced in respect of ES. In November, when she was just over one year old, ES was removed from her mother's care by police exercising their protective powers. Thereafter, she remained in foster care and subject to care proceedings. The local authority care plan, which was supported by the children's guardian, was for ES to be adopted. No alternative option, such as placement with another family member, was put forward.

In his judgment, the judge made findings of fact which were not challenged in the present proceedings. Those included that the mother was still grappling with her long-standing problem of alcohol abuse, and had a vulnerability as a result of a propensity to enter into and remain in abusive relationships. Having found those facts, the judge went on, first, to analyse the case within the framework of the welfare checklist in s 1(3) of the Children Act 1989 (ChA 1989). He concluded that placement with the mother would be fraught with difficulty because, partly, of the insecure attachment between the mother and ES and, partly, it would be impossible to supervise the mother's care of ES satisfactorily, unless a supervisor lived in the mother's home all of the time. Further, because of the mother's past lies and his conclusion that she could not be trusted in the future, such a level of support was required but, for obvious reasons, it would be unrealistic to regard that as a tenable way of alleviating the risks. At the conclusion of that analysis, the judge held that he had to approve the care plan for adoption and make the care order sought by the authority. He then turned to the application for a placement order. He analysed the factors in the case within the structure of the adoption welfare checklist in s 1(4) of the Adoption and Children Act 2002 (ACA 2002). He concluded that the child's welfare required the court to dispense with the parents' consent and to make a placement order. The mother appealed.

The principal issue before the court was whether the judge had failed to conduct the welfare analysis in a manner which had been compatible with the guidance given in *Re B-S (children) (adoption: leave to oppose)* [2013] EWCA Civ 1146, [2013] 3 FCR 481 (*Re B-S*). The mother submitted, inter alia, that the judge had, first, adopted a 'linear' approach. Secondly, he had relied unduly upon the mother's dishonesty. Thirdly, he had wrongly exercised his discretion, in that, any risk assessment had to be broken into four components, namely: (i) identification of the risk; (ii) assessment of the risk; (iii) consideration of whether the risk could be managed; and (iv) consideration of whether the risk could be reduced. Whilst he had considered the risk at point (i), he had not gone on to undertake any of the other three stages described.

The appeal mother's appeal was dismissed on the basis that, inter alia, the submission as to the linear nature of the judge's approach had to fail. There had only been two options for ES. Either ES was to go home on some basis to be cared for by her mother or, given her age, an adoptive placement was to be sought. Looked at as a whole, which was the perspective that had to be applied, it was simply not possible to say that the judge had compartmentalised his analysis so as to render his approach worthy of criticism on the basis described in *Re B-S*. Dealing with the reality of the case, the judge's findings as to the impossibility of the mother providing a good enough home for ES, save with 24-hour support, were such as to move the option of placement with the mother outside the list of 'realistic' options for the child in the manner described in *Re B-S*.

Comment: A decision largely of interest due to the per curiam comments of the President of the Family Division, Sir James Munby, with the stated objective of clarifying the much analysed impact of *Re B-S*, specifically that:

(1) *Re B-S* was not intended to change and has not changed the law. Where adoption is in the child's best interests, local authorities must not shy away from seeking, nor courts from making, care orders with a plan for adoption, placement orders and adoption orders. The fact is that there are occasions when nothing but adoption will do, and it is essential in such cases that a child's welfare should not be compromised by keeping them within their family at all costs.

(2) That the law in this country permits adoption in circumstances where it would not be permitted in many European countries is neither here nor there. The Adoption and Children Act 2002 permits, in the circumstances there specified, what can conveniently be referred to as non-consensual adoption and so long as that remains the law as laid down by Parliament, local authorities and courts, like everyone else, must loyally follow and apply it.

(3) The court's paramount consideration, now as before, is the child's welfare 'throughout his life'. Nothing that was said in *Re B-S* was intended to erode or otherwise place a gloss upon the statutory requirements of ChA 1989, s 1 or ACA 2002, s 1. On the contrary, the exhortation for courts to undertake a balancing exercise which pits the pros and cons of each realistic option against the others was aimed precisely at discharging the court's statutory duty under those sections. In particular, before making a decision relating to a child's welfare, a court is required to have regard to, amongst other matters, the factors set out in the relevant 'welfare check-list'. The evaluation of options described in *Re B-S* must be undertaken with those factors in full focus.

FINANCIAL PROVISION

Whether post-divorce assets part of marital acquest

Cooper-Hohn v Hohn [2014] EWHC 4122 (Fam), [2014] All ER (D) 166 (Dec)

BFLS 4A[902]; Rayden 1(1)[T16.71]

There was before the court a final hearing of a wife's claim for financial remedy orders. The assets which were available for division between the parties were worth between US$1.35b and US$1.6b. In addition to the wealth which the parties held personally, a further sum of US$4.5b had been channelled into a charitable foundation. In terms of their personal wealth, the husband contended that much represented post-separation accrual, having been accumulated or 'earned' during the ensuing years of separation since 2012 at a time when the wife's contributions as a spouse had ceased. For that reason, the husband contended that there should be a departure from equality in terms of the share of the wealth that the wife should receive at the end of the marriage. He also contended that his creation of wealth fell to be considered as a special and unmatched contribution which was further justification for a reduction in the wife's entitlement. His case was that the wife should receive no more than one-third of the assets as they stood in April 2012 when the marriage effectively came to an end and one half of one third of the post-separation accrual which has been achieved since then.

The wife sought what she contended to be her entitlement to a full and equal share in what had been built up to date. She brought her claims from the foot of substantial and valuable contributions which she claimed matched those made by the husband, even if they were different in kind and quality to his wealth creating function. To seek to discount her 50% entitlement would, she claimed, amount to clear discrimination in terms of the evaluation of those contributions.

The issues before the court were therefore to what extent did the relevant assets fall to be considered as part of the marital acquest or, alternatively, to what extent had they been generated (or added to) in the period between separation and the date of trial (the marital acquest or post-separation accrual issue). In particular, was a departure from equality justified on the facts. Consideration was also given to s 25 of the Matrimonial Causes Act 1973.

The court ruled that:

(1) The law required the court to consider the value of the assets as they stood as at the date of trial. The relevance of the date of separation and/or the effective demise of the marriage lay in the interruption of the spousal contributions which each of the parties had been making up to that point in time. Each case was necessarily fact specific. There was no presumption of equal division. Nor was there any bias in favour of the money-earner and against the home-maker and child-carer.

There was a principle in case law of departure from equality on the basis of a special contribution. Whilst the reasons justifying a departure from equality would inevitably prove too many and too varied to permit of listing or classification, they had included acquisition of wealth through the exercise of some special individual skill and effort.

(2) In the instant case, there had been, on the facts, post-separation accrual and there would be significant departure from equality in the husband's favour which was entirely justified by the compounding factors of post-separation accrual and special contribution. The financial returns had been achieved by the activist investment strategies deployed by the husband. Whatever connections the wife might have been able to exploit, there was no guarantee that she would have matched the returns which had been achieved. Wealth creation on the scale achieved by the husband came about by his ability to identify a new investment opportunity and make it work. The new work and new investments created by the husband in the period after the parties separated fell at a point too distant from the essential character of the matrimonial partnership to qualify.

(3) A fair outcome in the instant case had to reflect some departure from equality of division in order to reflect the contributions made by the husband in the two or more years since their separation. It would not be fair to treat the wealth creation after the breakdown of the marriage as simply part and parcel of the marital acquest in which the wife should be entitled to an equal share. There had been a special contribution made by the husband and such contribution should and would be reflected in a departure from equality in terms of the overall award which the court proposed to make. It was not that the wife should receive no share of the assets which fell outside the marital acquest. She would receive a share and that share would form part and parcel of the overall award.

The court ordered that the wife receive an award of US$530m from the available assets of just under US$1.5b. That sum represented 36.12% of the global resources. From that sum, the wife would bear her share of any of the contingent tax risks which materialised and she had to also make provision for the escrow which will be established in respect of the tax indemnity. An award at that level properly reflected her contributions and her entitlement to a fair share of both the marital acquest and the post-separation accrual in the case.

Comment: A relatively rare outcome where the court was satisfied that the husband had made a special contribution that should be reflected by a departure from equality. The court applied *Cowan v Cowan* [2001] EWCA Civ 679, [2001] 2 FCR 331 in which a 'stellar contribution' argument was recognised as valid, where the husband's 'genius' in relation to his business enabled the court to depart from equality in his favour. More commonly such an argument is limited by the approach set out in *Lambert v Lambert* [2002] EWCA Civ 1685, [2002] 3 FCR 673 when it was held that:

(1) discrimination is inevitable if the courts look merely at the size of the breadwinner's fortune, as there is no equivalent way for a homemaker to demonstrate their success;

(2) in most cases a detailed analysis of each party's conduct during the marriage will be irrelevant and distasteful; and

(3) special contribution is a 'legitimate possibility but only in exceptional circumstances', though the court declined to define what those circumstances were.

The approach in Lambert was confirmed in *Miller v Mille*r; *McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 FCR 213 when Lord Nicholls advised that contributions should be approached in much the same way as conduct and will be irrelevant in the great majority of cases.

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