Butterworths Family and Child Law Bulletin

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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.

Butterworths Family Law Service Please file *Butterworths Family and Child Law* Bulletin 196 immediately after the Bulletins guide card, and in front of Bulletin 195. **Remove Bulletin 184**. If desired, Bulletin 184 may be retained outside the binder for future reference. Binder 7 should now contain Butterworths Family and Child Law Bulletins 185–196.

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LEAVE TO REMOVE

Departure from expert evidence

Re D (a child) [2015] EWFC 4, [2015] All ER (D) 190 (Jan)

BFLS 3A[1217]; CHM 2[619]; Rayden 1(1)[T5.75]

The proceedings related to a child D, who was born in 2012 and was 2½ years old. He was a dual British and Russian citizen who had spent just under a year of his life in Russia and the remainder in England. His parents' short

marriage broke down in April 2014 and since June his time has been divided equally between them in consequence of a series of court decisions. His father sought a child arrangements order under which D would live with him or continue to be cared for by both parents in England. His mother sought permission to relocate with him to live in Moscow, her native city and D's birthplace, with contact with the father occurring in England and in Russia. Expert evidence of an independent social worker was that she considered that D would be disrupted by a move to Russia.

The main issue was whether D should be permitted to relocate to Russia with the mother having regard to the features of the welfare checklist under s 1(3) of the Children Act 1989 (ChA 1989), such as D's feelings, his background, his needs and his parents' capacity to meet them, and the effect of a change in his circumstances. A further consideration was the powers of the court. When the court has expert professional advice, it had to have reasons to depart from it.

The court ruled that an application to relocate permanently had its own distinctive and far-reaching consequences. Amongst the issues were principally to scrutinise:

(1) the proposals of the applicant bearing in mind that in a going home case that might be a less arduous undertaking than if it was an entirely new venture;

(2) the motives of the applicant in making the application and, in particular, considering whether or not a significant motivation was to exclude the other parent from the life of the child;

(3) the motives of the left behind parent who objected, in particular to check that the reasons for objection are truly child-centred and are not simply part of an adult battle about rights;

(4) the impact of relocation upon the left behind parent and his or her extended family whilst of course recognising that relocation might bring benefits in terms of widening the network of extended family by including the proposed country of return; and

(5) the court should scrutinise the impact on the applicant of the order being refused or on the respondent of the order being granted, but the impact would be relevant generally only in so far as it impacted on the child.

D's background was as a child of a transnational marriage with a strong heritage and cultural identity in each country. As to parental capacity, it was important to have regard to short and long term aspects of the question. In the short term, both parents had broadly equal capacity to meet D's needs. However, there was that there was a distinct difference between them in terms of their capacity to meet his longer term needs. To require the mother to remain in England for at least the next 15 years would leave her with a justifiable sense of bitterness that was not in D's interests. The effect on the father of D moving to Moscow would be one of extreme disappointment and

sadness in the short term. In the longer term, however, the father would reassess his situation. If he was to be in a position to set an example for D and even to support him financially, he needed to regain control over his life and maximise his chances of rebuilding his situation, in particular by getting a job. That was not likely to happen if he was relying on D to give meaning to his life, when it was D who should be relying on him.

The expert evidence was rejected as it focused unduly upon D's 'here and now', prioritising the preservation of something recently achieved, rather than considering the significance of the past arrangements and looking at the realistic prospects for his long term future. The court would therefore make a child arrangements order providing for the current arrangements to continue until the mother and D left England. The court would grant permission to the mother to remove D on a date to be fixed in the light of further submissions.

Comment: In reaching his decision Peter Jackson J succinctly pulled together the key considerations of the court in exercising its discretion in a relocation case as detailed in the leading cases of *Payne v Payne* [2001] EWCA Civ 166, [2001] 1 FCR 425, *K v K (relocation: shared care Arrangement)* [2011] EWCA Civ 793, [2011] 3 FCR 111 and *Re F (relocation)* [2012] EWCA Civ 1364, [2012] All ER (D) 261 (Oct). Those cases establish the following propositions:

(1) that the child's welfare remains the court's paramount consideration;

(2) the court is to have regard to the checklist applicable in ChA 1989, s 1(3) in discharging the obligation to make the child's welfare paramount;

(3) that the court should not categorise cases in accordance with the concepts of primary or shared care, but should use the facts of the case and the answers arrived at in consideration of the checklist to describe the arrangements for care on the ground as they have been, as they are at the date of the hearing, and as the parties intended them to remain had it not been for the question of relocation (per Black LJ in *K v K* and Munby LJ in *Re F*); and

(4) that there are certain issues which are specific to an application for permission to relocate permanently ie each application has its own distinctive and far-reaching consequences.

In the instant case the court was also concerned with the expert evidence, and on departing from the expert's recommendations is an example of the maxim 'the expert advises; the judge decides' (per *Re AB (a minor) (child abuse: expert witnesses)* [1995] 1 FCR 280). It is an established principle that a judge is not expected to suspend judicial belief simply because the evidence is given by an expert, but should always give reasons for disagreeing with the expert's conclusions or recommendations (per *Re FS (minors) (care proceedings)* [1996] 1 FCR 666).

FINANCIAL PROVISION – OVERSEAS DIVORCE

Whether appropriate to set aside grant of leave or strike out proceedings

***AA v BB* (*application for financial remedy*) *[2014] EWHC 4210* (*Fam*), *[2015] All ER* (*D*) *148* (*Jan*)**

BFLS 4A[3115]; Rayden Noter up [T26.9]

The parties were formerly husband and wife. They had considerable assets in England and Slovenia. In 2008, the wife began divorce proceedings in Slovenia, which dealt only with the parties' wealth that was inside Slovenia. The marriage was dissolved in November 2011. In October 2013, the wife applied for financial remedy orders (the orders) in the English court in regard to herself and their child, CC. The husband sought to strike out the leave to apply for the orders granted by the English court.

The husband contended that the court should stay the wife's financial remedy application and/or set aside the grant of leave. He relied on the provisions of arts 12 and 13 of Council Regulation (EC) No 4/2009 (on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations) (the Regulation). He submitted that the wife had misled the court as to the nature of the proceedings pending in Slovenia and her involvement in them and, accordingly, the grant of leave to apply for the orders should be set aside.

The court ruled:

(1) Jurisdiction was not fixed for all time in one member state, to the exclusion of any other, simply because it had been seised and had made a determination. The provisions as to jurisdiction were those which had to be applied for the purposes of determining whether a member state had substantive jurisdiction. On the authorities, art 12 of the Regulation did not apply either to the wife's claim for maintenance for herself or her claim for CC. Regarding the Slovenian proceedings, they were not dealing with that part of the wealth that was situated outside Slovenia. That in itself was sufficient justification for refusing to stay the proceedings or decline jurisdiction pursuant to art 13 of the Regulation.

(2) Although the wife had made misleading statements to the court, there would be no merit in setting aside leave and requiring the wife to make a fresh application, which the court would then grant. That would not be a proportionate response to what had taken place.

Comment: It is an established principle that a grant of leave under MFPA 1984, Pt III may only be set aside on an application by the respondent where a 'knock-out blow' is established per Lord Collins in the leading Supreme Court decision in *Agbaje v Agbaje* [2010] UKSC 13, [2010] 2 FCR 1. In *Agbaje* the following key aspects as to the court's approach were established:

(1) primary consideration has to be given to the welfare of any children of the marriage;

(2) it would never be appropriate to make an order which gave the claimant more than they would have been awarded had all proceedings taken place within England and Wales; and

(3) where possible the order should have the result that provision was made for the reasonable needs of each spouse.

As to jurisdiction (also per *Agbaje*) no choice between jurisdictions is involved: the whole basis of MFPA 1984, Pt III is that it might be appropriate for two jurisdictions to be involved, one for the divorce and one for financial provision.

NON-MATRIMONIAL PROPERTY

Whether husband having legal and beneficial interest

***AM v SS* (*WS intervening*) *[2014] EWHC 2887* (*Fam*), *[2015] All ER* (*D*) *95* (*Jan*)**

BFLS 4A[1202]; Rayden 1(1)[T25.5]

The proceedings concerned the determination of preliminary questions concerning the husband and wife's respective interests in three properties. Two of the properties were in England and one was in Cairo. The first of the English properties had an agreed value of £5.36m. The second English property was valued at £1.25m, and was the present home of the husband's sister, the intervenor. It was agreed that that property had been bought in the husband's name and one of the reasons for that had been that the intervenor and her father had not, at the time, been on very good terms. It was also agreed that the property had been found by the intervenor and her husband, that the particulars for the property had been sent by the intervenor to her brother (the husband in the present case) and that all the money for the purchase price had emanated from the husband's father. The property in Cairo had an agreed value of approximately £3m.

It fell to be determined, first, in respect of the first of the English properties and the Cairo property, whether, as the wife contended, she and the husband had been given them as part of a generous wedding gift by the husband's father or whether, as the husband contended, they had at all times been the husband's father's property. Secondly, as regards the second of the English properties, whether, as the wife contended, the property was in the husband's sole name and he had, accordingly, both the legal and, ultimately, the beneficial interest in that property, subject, perhaps, to the intervenor's right to occupy it while her children were growing up or whether, as the husband contended, it was beneficially owned by the intervenor and had always been her property beneficially. In that regard, the court considered whether the husband had been holding the property for his sister qua beneficiary or

merely as a trustee for her use in some more vague sense whilst a roof had been required over the head of the children.

The court ruled that:

(1) There was no cogent evidence to displace the primary evidence that the first of the English properties was and always had been the father's property. The wife's evidence had changed from time to time and she had not been wholly clear as to when the gift was said to have taken place. She was very short on any kind of detail which, it seemed, was vital to enable her to establish that that extremely valuable property had been given to her and the husband. In respect of the Cairo property, the wife's evidence on that aspect of the case was thin and inconsistent, and again nowhere near sufficient to displace the basic legal position, which had been, and was accepted to have been, that the property had belonged in every sense to the husband's father. Accordingly, the Cairo property was and remained the property of the husband's father.

(2) As to the second of the English properties, given the evidence about the derivation of the purchase price and the express understanding as to why the property had been placed into the husband's name, it would be wholly unconscionable to allow the husband to assert that it had been his property beneficially and he had not for one moment done so. All the surrounding evidence pointed in one direction. Accordingly, the husband held the beneficial interest in the second of the English properties for his sister, the intervenor, and she could, if she chose to do so, call for it to be transferred to her.

Comment: In reaching its decision the court applied *De Bruyne v De Bruyne* [2010] EWCA Civ 519, [2010] 2 FCR 251, where the Court of Appeal considered that for a common intention constructive trust to be created, the court had to be satisfied that it would be unconscionable for the legal owner to assert their legal interest in the property to the exclusion of the alleged beneficiaries. In the instant case that was established, the wife failing to convince the court, despite the complexity of the dealings, that the properties had been gifted to her and the husband. Inevitably trusts issues will be determined by reference to the facts of the case, and evidence of dealings and intention will be crucial. In *Drake v Whipp* [1996] 2 FCR 296 the Court of Appeal considered that where a constructive trust is established by reason of a common understanding or intention acted on to the detriment of one party, it is not necessary to show that there is a common intention as to the respective shares to be taken by the intended beneficial owners; in the instance case the evidence submitted on behalf of the wife fell far short of that criteria.

CHILD ABDUCTION

Court's discretion notwithstanding objections of child

***Re S* (*a child*) (*habitual residence and child's objections*) (*Brazil*) *[2015] EWCA Civ 2, [2015] All ER* (*D*) *46* (*Jan*)**

BFLS 5A[4364]; CHM 5[425]–[430]; Rayden Noter up[T45.74]–[T45.75]

The proceedings were brought under the Hague Convention on the Civil Aspects of Child Abduction 1980 and the inherent jurisdiction of the High Court, seeking the return of a child, G, to Brazil. G, aged 12, had been born in the United Kingdom and lived in the country until August 2013, when following the parent's separation, the mother, who was Brazilian, obtained permission to relocate to Brazil with G and her brother, J. The children returned to the UK for the summer holidays in 2014, when G decided that she did not want to go back to Brazil. In the High Court the judge decided that, at the material time, G was habitually resident in the UK. It followed that it was not wrongful for her not to be returned to Brazil. The judge nevertheless went on to consider how she would have exercised her discretion had there been a wrongful detention and concluded that it would not have been appropriate to return G in any event. The mother appealed.

The issues were: (i) whether the judge had erred in concluding the G was not habitually resident in Brazil at the relevant time; and (ii) if so, whether the court ought to exercise its discretion to order a return to Brazil notwithstanding G's objections. Consideration was given to, among other things, an email written by G to her father in the spring of 2014 in which she expressed her happiness with her school in Brazil.

The appeal was dismissed on the basis that:

(1) The judge had not attached sufficient importance to the contemporaneous material in reaching the conclusion that G had doubts about the move to the extent that it could be said that the degree of integration in a social and family environment in Brazil required for habitual residence had been absent. Taking the indicators of the position in the spring and early summer of 2014 together with the whole picture of the move and G's connections with and life in Brazil, the judge had been wrong to find that G had been habitually resident in England throughout.

(2) In the circumstances, there was no reason to interfere with the judge's decision as to how she would have exercised her discretion were she to have found G habitually resident in Brazil. Accordingly, it was not necessary to remit the case for the question of direction to be reheard.

The judge's determination on habitual residence was set aside and replaced with a finding that G was habitually resident in Brazil at the material time. The order refusing a return of G to Brazil would stand on the judge's alternative basis.

Comment: Applying the House of Lords decision in *Re M (children) (abduction)* [2007] UKHL 55, [2008] 1 FCR 536, the appeal court in the instant case had particular regard to wider issues on degree of integration. On the issue of the court's discretion, the House of Lords in *Re M* gave the following guidance:

(1) The circumstances in which return might be refused were themselves exceptions to the general rule. That in itself was sufficient exceptionality. When a court came to exercise its discretion, it was entitled to take into account the various aspects of the convention policy, alongside the circumstances which gave the court a discretion in the first place and wider considerations of the child's rights and welfare.

(2) It is not the case that the convention objectives should always be given more weight than the other considerations. Sometimes they should and sometimes they should not. The further away one got from the speedy return envisaged by the convention, the less weighty those general convention considerations would be.

(3) Where a child's objection was raised, only two conditions needed to be met for such an exception to be brought into play: first, that the child herself objected to being returned and second, that they had attained an age and degree of maturity at which it was appropriate to take account of her views.

COMMITTAL

Whether court should make immediate committal order

Cherwayko v Cherwayko [2014] EWHC 4252 (Fam), [2015] All ER (D) 33 (Jan)

BFLS 4A[3298]; Rayden Noter up [T30.20]

In October 2014, the court had made an order (the order), para 3 of which provided that, by a specified date and time, the respondent husband should serve a statement and documentary evidence setting out various matters. At the time that order was made, the husband owed the applicant wife the better part of £1.5m, which was the first instalment of an award which had been incorporated into the court's earlier order of February 2014 (the primary order). The husband was fully aware of his obligations under the order and his solicitors later asked for further time to deal with his obligations under the order, citing his health as a reason for why there had not been compliance by that point. In the absence of any disclosure, the wife applied for the committal of the husband.

It fell to be determined whether the husband was in breach of the order. If he was, the issue was whether, as the wife contended, the court should make an immediate committal order. The court considered that the husband had recently paid £510,000 to the wife and that it was said that a further £552,000 would shortly be received by the wife, leaving around half a million pounds

of the primary order unpaid. It also considered that the committal application had been served on the husband, by virtue of the period of time it had taken for the court to process the paperwork, a few days after it had been intended to be served.

The court ruled that:

(1) The steps that had been taken by the wife had resulted in two-thirds of the first instalment having been paid to her. Whether one would characterise what the husband had done as acts of good faith or as the product of coercion imposed on him by the court at the suit of the wife, was debateable. However, that did not excuse at all a blatant and defiant contempt committed by the husband in respect of para 3 of the order. That he was in contempt was sure beyond a reasonable doubt. That the committal application had, in fact, been served on him, by virtue of the period of time it taken for the court to process the paperwork, a few days after it had been intended, did not afford him any kind of technical defence for punishment for that contempt. While there was no principle that the court should normally not move straight to direct committal, but should halt at the stop marked 'suspended order', there was certainly a practice to that effect. Notwithstanding the defiant contempt of the husband, it would be disproportionate, at the present stage, to imprison the husband for six months.

(2) The appropriate order was to mark the court's displeasure at the scale of the husband's contempt by sentencing him to imprisonment for six months. However, the warrant for his arrest and incarceration would be stayed, provided that he pay £500,000 by a specified date and time, and provided that, also by that date, he had complied fully with para 3 of the order.

Comment: Largely of interest in relation to the highlighted issue of whether or not a committal order should be suspended. As noted by Mostyn J in the instant case, as a matter of practice a committal order will generally be suspended at first instance, however the seriousness of even a suspended order was emphasised by the Court of Appeal in the civil case of *Broomleigh Housing Association Ltd v Okonkwo* [2010] EWCA Civ 1113, [2010] All ER (D) 137 (Oct) where it was said that any committal order 'is a serious step … to be undertaken simply as a matter of routine without enquiring into the nature of the contempt and the circumstances in which it has been committed and giving reasons, at any rate briefly, for the decision' (at para 21). Since 22 April 2014 the rules relating to committal orders in family proceedings are contained in a new Part 37 and PD 37A to the Family Procedure Rules 2010. It should be noted that when a party has been in contempt, but has remedied the breach before the hearing, the court will not or should not make a committal or a suspended committal order (per *Bluffield v Curtis* [1988] 1 FLR 170). FPR 2010, PD 37A, para 13.1 provides that a court may strike out a committal application if it appears to the court that there has been a failure to comply with a rule, practice direction or court order but the court may waive any procedural defect in the commencement or conduct of a committal

application if satisfied that no injustice has been caused to the respondent by the defect (PD 37A, para 13.2) as in the instant case.

FUNDING

Whether funding to be met by HM Courts and Tribunals Service

Re D (a child) (no 2) [2015] EWFC 2, [2015] All ER (D) 26 (Jan)

BFLS 1A[71]; CHM 5[346]; Rayden 1(2)[T53.13]

The underlying issue in the proceedings concerned whether a child should live with his parents or, if they could not adequately look after him, with other members of his wider family, or, as the local authority argued, be adopted outside the family. In the course of proceedings, an issue as to the availability of legal aid for the parents arose. At a hearing in November 2014, an order was made which recorded the court's view as to the use of the father's money to fund the mother's legal aid contribution.

At the next hearing in December, the court made an order which recorded, at that stage, each parents' position in respect of legal aid. With respect to both parents' applications for the assistance of an intermediary, the order provided that each was to file separately, by a specified date, the outcome of an expert assessment of whether they each required the assistance of an intermediary in relation to the final hearing. Further, the costs of each of those assessments would be born, respectively, by the father and the mother's public funding certificates. It also fell to be determined how the cost of funding an intermediary would be met.

The court ruled that:

(1) The use of an intermediary was becoming increasingly frequent, as the court became ever more alert to the need for 'special measures' in appropriate cases. The cost of funding an intermediary in court properly fell on HM Courts and Tribunals Service (HMCTS), because an intermediary was not a form of 'representation', but a mechanism to enable the litigant to communicate effectively with the court and, thus, analogous to translation, so should, therefore, be funded by the court.

(2) Where the services of an intermediary were required otherwise than during a court hearing, the cost fell on the Legal Aid Agency (LAA). Further, the cost of obtaining a report from an expert as to capacity and competence and/or as to the extent of any special measures required, as opposed to the cost of providing services from an intermediary, likewise fell on the LAA.

Accordingly, the cost of funding an intermediary in court would fall on HMCTS (see [17] of the judgment).

Comment: One of a series of recent judgments by the President on the Family Division, Sir James Munby, highlighting funding issues that have arisen since

the coming into force of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The President previously highlighted funding issues in *Q v Q* [2014] EWFC 31, [2014] All ER (D) 40 (Aug) when he referred to (in that case, which was three cases conjoined) the desperate need for access to skilled legal advice without which the judge would deprived of adversarial argument. Further that if a party was denied access to legal advice both before and during the hearing, there had to be a very real risk of rights under art 6 and 8 of the Human Rights convention being breached. In *Q v Q* the President said that there might be circumstances in which the court could properly direct that the cost of certain activities should be borne by HMCTS, but it would be an order of last resort and no order of that sort should be made except by or having first consulted a High Court judge or a designated family judge. See also *Re K and H (children: unrepresented father: cross-examination of child)* [2015] EWFC 1, [2015] All ER (D) 23 (Jan) where Judge Clifford Bellamy (Sitting as a deputy High Court judge) proceeded to make an order for the funding of representation by HMCTS in order to safeguard Convention rights and to ensure compliance by the court with its own duty to act in a way which was compatible with Convention rights, noting that it was the first duty of judges sitting in the Family Court to ensure that proceedings were conducted fairly. Failure to do so might lead to the court itself acting unlawfully.

CARE PROCEEDINGS

Whether findings inadequate

Re P (a child) [2014] EWCA Civ 1648, [2015] All ER (D) 12 (Jan)

BFLS 3A[4258]; CHM 9[75]; Rayden Noter up [T40.11]

In 2011, S was born to the mother and father. Care proceedings were commenced and S was accommodated in foster care from her birth on a voluntary basis. S was later placed in the full-time care of her parents and a 12-month supervision order was made. However, S was subsequently placed back with her original foster carers on a voluntary basis. In 2013, a second set of care proceedings were issued. The care plan was for adoption. The social worker and the guardian, having assessed the father as a single carer, concluded that adoption was in the best interests of S.

The recorder determined that the threshold criteria pursuant to s 31(2) of the Children Act 1989 (ChA 1989) had been met. The 'schedule of basis of threshold criteria' appended to the order recorded his findings, which included that, at the relevant date, S was likely to suffer significant harm attributable to the care given to her by her parents. The basis of the finding of the likelihood of significant harm was, inter alia, that: (i) the mother and father exposed S to their volatile relationship; (ii) the relationship included the mother making allegations of domestic violence and rape, subsequently retracted and revived, which gave rise to fears of emotional abuse if true, or instability and further volatility if fabricated; and (iii) S exhibited some developmental delay.

Before deciding to make any orders, the recorder directed himself to *Re B (a child) (care order: proportionality: criterion for review)* [2013] UKSC 33, [2013] 2 FCR 525 and referred to the exceptional nature of adoption orders. He said, in terms, that it had to be 'necessary' to make an adoption order and that the child should not be separated from its parents unless it was 'necessary and proportionate'. He found that it was necessary and proportionate and, therefore, that a care order together with a placement order should be made.

The father appealed and contended that the recorder had failed to: (i) make any or any adequate findings of fact, particularly in relation to the allegations made by the mother that he had been violent to her; (ii) make reference to the welfare checklist in ChA 1989, s 1(3) or to the welfare factors in s 1(4) of the Adoption and Children Act 2002 (ACA 2002); (iii) consider the placement application separately from the care application; (iv) consider ACA 2002, s 52(1)(b) and to give reasons for having dispensed with the consent of the parents; and (v) give adequate consideration to the strengths and weaknesses of his application to care for S and the support that the local authority should and could provide to him to assist with that and to facilitate contact with the mother. The court also gave consideration to the fact that the recorder had given his judgment prior to *Re B-S (children) (adoption: leave to oppose)* [2013] EWCA Civ 1146, [2013] 3 FCR 481.

The appeal was dismissed on the basis that:

(1) The recorder had engaged with the essence of the case and his judgment had contained the essential ingredients necessary for there to be a proper determination of the issues. It was clear that, notwithstanding the difficulties inherent in the judgment, all the material necessary for a proper determination of the case had been before the recorder and tested in cross-examination. While the finding in relation to developmental delay could not stand, there had, nevertheless, been more than adequate findings to allow the threshold criteria to be satisfied and, therefore, the court to proceed to consider what, if any order, should be made.

(2) The recorder had been entitled, having heard the evidence, to accept the recommendation of the guardian. The evidence before the recorder had addressed the available options and he had taken into account the father's strengths as well as weaknesses. The recorder had given his reasons for having concluded that it had not been in the best interests of S to be rehabilitated to her father. Whilst the recorder had failed to state in terms that he had made a care order before having moved on to consider the placement order application, it had been implicit that, having determined that S could not return to the only parent who had been a realistic option, a care order would follow.

(3) The conditions necessary for the making of a care order had undoubtedly been made out. Further, the necessary information had been available to the recorder for the welfare analysis within the extended assessment of the guardian. He had noted the exceptionality of the

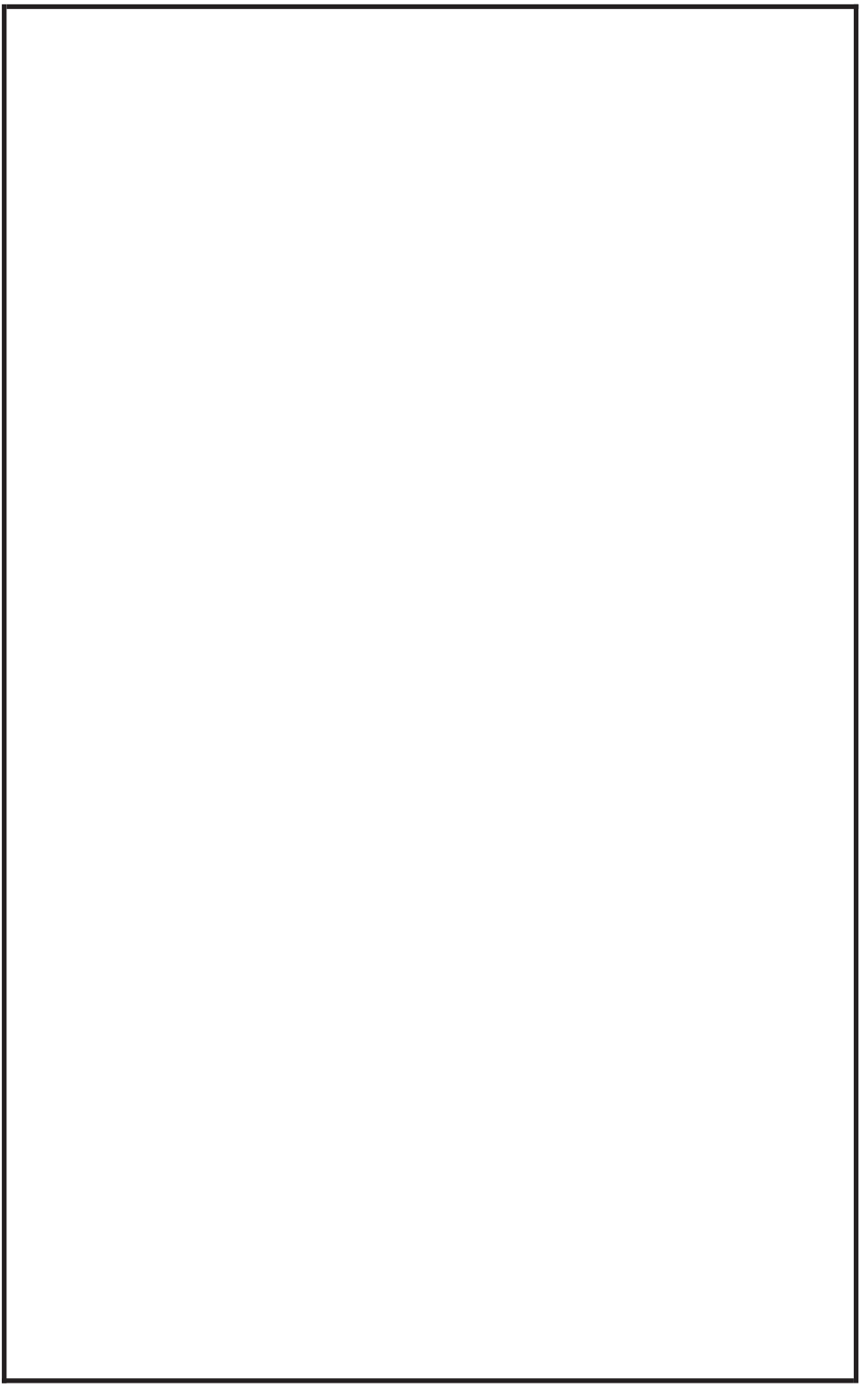
order sought and had said that the making of such an order had been 'necessary'. Even though the case had been heard before *Re B-S*, the recorder had taken into account the importance of the order for adoption being 'proportionate' and importantly, that it was not enough to say that 'it would be better for the child to be adopted than to live with his natural parents'. Once the recorder had concluded that it had not been in S's best interests to be returned to the care of either parent then, given her age and need for a secure, stable and permanent home, it could not be regarded as wrong for the recorder who had heard the case to conclude that her welfare had required an adoption order to be made.

Comment: In reaching its decision the Court of Appeal had regard to *Re W (a child) (adoption order: leave to oppose); Re H (children) (adoption order: application for permission for leave to oppose)* [2013] EWCA 1177, [2013] All ER (D) 217 (Oct) where the Munby P specifically addressed the issue of appeals relating to pre-*Re B-S* decisions highlighting that:

(1) In the case of judgments given before the decision in *Re B-S*, the Court of Appeal had to have regard to and make appropriate allowance for that fact. The focus had to be on substance rather than form.

(2) Consideration should be given to whether the judge's approach, as it appeared from the judgment, engaged with the essence of *Re B-S* and whether it could be said, on a fair reading of the judgment taken as a whole – a fair and sensible reading, not a pedantic or nit-picking reading – that the judge had directed their mind to and had provided answers to the key questions.

See also the President's later decision in *Re R (a child)* [2014] EWCA Civ 1625, [2014] All ER (D) 179 (Dec) providing clarification as to the implications of *Re B-S* (Bulletin No 195, January 2015).



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