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 197 immediately after the Bulletins guide card, and in front of Bulletin 196. **Remove Bulletin 185**. If desired, Bulletin 185 may be retained outside the binder for future reference. Binder 7 should now contain Butterworths Family and Child Law Bulletins 186–197.

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PRACTICE

Compliance with requirements of the bundles practice direction

Re L (a child) [2015] EWFC 15, [2015] All ER (D) 21 (Mar)

BFLS 3A[4671]; CHM 9[1]; Rayden Noter up [T6.7]

Care proceedings had been issued by the local authority in relation to three children. The father (K) of the oldest child, L, a girl aged eight, was a citizen

of and resident in Slovenia. The mother, L, the two younger children and their father lived in the United Kingdom. The proceedings related essentially to what had happened in the UK and, specifically, to the care given to L and her half-siblings in the UK by the mother and the younger children's father. K did not read or speak English. His native tongue was Slovene. He had not at the time of the hearing received a single document in the court bundle in his own language. Although he had the benefit of a solicitor who spoke Slovene, he contended that he could not participate properly in the proceedings unless all the essential documents were translated into Slovene.

The issue came before the district judge who made an order to the effect that a schedule of documents considered to be essential would be translated. The scheduled documents ran to 591 pages extracted from a court bundle which at that stage contained 989 pages. The cost of translating the 591 pages would be in excess of £23,000 as on average each page costs about £38 to translate. The Legal Aid Authority's (LAA's) response was that bearing in mind the requirement of the Family Procedure Rules 2010, SI 2010/2955, PD 27A, para 5.1 which stated that 'Unless the court has specifically directed otherwise, being satisfied that such direction is necessary to enable the proceedings to be disposed of justly, the bundle shall be contained in one A4 size ring binder or lever arch file limited to no more than 350 sheets of A4 paper and 350 sides of text', it was at first blush surprising that the court bundle in the present case was well over two-and-a-half times that size and that the number of pages to be translated was so greatly in excess of the bundle page limit.

The matter was re listed before the family court to decide what to do in the light of the local LAA's decision. The court ruled that the idea that it was 'necessary' for all the 591 pages to be translated was quite impossible to justify. It was merely 'necessary' for K to be able to read in his own language those documents, or parts of documents, which would enable him to understand the central essence of the local authority's case or which related or referred specifically to him. The remaining documents needed only to be summarised for him in his own language. The district judge had been had been wrong in his evaluation of what was indeed necessary in the present case. It was necessary for K to see in translation, either in whole or in part, only 51 pages.

Comment: In the instant case the President of the Family Division, Sir James Munby, referred to his judgment in *Re X and Y (bundles) (failure to comply with Practice Direction)* [2008] EWHC 2058 (Fam), [2009] 1 FCR 468 (together with the more recent decisions in *J v J* [2014] EWHC 3654 (Fam), [2014] All ER (D) 153 (Nov) and *Seagrove v Sullivan* [2014] EWHC 4110 (Fam), [2014] All ER (D) 61 (Dec)) and again highlighted the importance of compliance with FPR 2010, PD 27A, making the following key points:

(1) it was essential, that the test of what was 'necessary' was not watered down in practice: if a judge declared in an order that something was 'necessary' everyone should be confident that it really was necessary;

(2) the endemic failure of the professions to comply with PD 27A had to end and defaulters could have no complaint if they were exposed;

(3) defaulters might find themselves exposed to financial penalties or other sanctions: it was no use the court continuing feebly to issue empty threats; and

(4) that if compliance with PD 27A did not improve, the President might be driven to consider setting up a special delinquents' court.

This is now a familiar theme for practitioners, and the practical effect of the judgment in the instant case may be judicial instructions to court staff to refuse bundles that do not comply with PD 27A, and in some cases, the President indicated, bundles may be destroyed if not taken away by the defaulter.

COSTS

Whether local authority entitled to costs order against interpreting services company

Re Capita Translation and Interpreting Ltd [2015] EWFC 5, [2015] All ER (D) 45 (Feb)

BFLS 3A[4698]; Rayden Noter up [T52.21]

A mother and father, who were Roma from the Slovak Republic, had applied for leave to oppose the making of adoption orders in relation to two of their children. The parents required the assistance of interpreters. A judge ordered that Her Majesty's Courts and Tribunals Service provide two interpreters for the final hearing. That hearing was unable to proceed as, although the court had followed the appropriate procedures with the translation and interpreting company (Capita) to book the interpreters, none were present. Consequently, the hearing was adjourned. That was against a background of multiple occasions when Capita had failed to provide an interpreter in the present case.

The court directed that Capita's relationship director (SF) file a written statement, with statement of truth, explaining why no interpreters had been provided. The costs of the hearing were reserved to the adjourned date for consideration of whether Capita should be liable. SF filed her witness statement which explained that Capita did not employ interpreters, but that they were self-employed contractors who were free to accept or reject bookings and there was no way to compel them to accept an assignment or to honour an engagement that they had accepted. At the adjourned hearing, the interpreters were present but Capita was not represented. Both the local authority and the children's solicitor indicated that they sought orders that Capita pay them their costs of the abortive hearing. Those applications were adjourned, to enable Capita to consider the case against it, with a direction that the costs of the two hearings were reserved for determination.

The present proceedings concerned the applications for costs. As the children's solicitor had not pursued the application due to the limits of the legal

aid certificate, but had not abandoned the application either, the court declined to make an order. The authority submitted:

(1) that Capita's failure to provide the interpreters at the first hearing had been a breach of its agreement with the Secretary of State;

(2) Capita was, in principle, amenable to the court's jurisdiction under s 51 of the Senior Courts Act 1981 to order a non-party to pay costs; and

(3) on a proper application of established principles, the order sought should be made.

Consideration was given to the decision of the Court of Appeal, Criminal Division, in *R v Applied Language Solutions Ltd* [2013] EWCA Crim 326, [2013] All ER (D) 239 (Mar) (ALS) and to the wider context of Capita's overall 'success rate' in providing interpreters requested by courts and tribunals as published by the Ministry of Justice in 'Statistics on the use of language services in courts and tribunals: Statistical bulletin, 30 January 2012 to 31 December 2013'.

The application was allowed on the basis that:

(1) It was established in *ALS* that Capita had undertaken far more than a booking facility. It was bound to provide interpreters on each occasion unless there was a force majeure that affected the company. A failure by an interpreter to attend did not avail the company unless that interpreter had been prevented by force majeure; if there was no force majeure on which the interpreter could rely, Capita had failed to discharge its obligation. That decision was clear authority for the proposition that a failure by Capita to discharge its obligations under its agreement with the Secretary of State exposed it, in principle, to the making of a non-party adverse costs order.

(2) By having failed to provide interpreters at the first hearing, Capita had failed to discharge its obligations under its agreement with the Secretary of State. There had been serial failures by Capita in the present case against a background of wider systemic problems. Applying established principles, it was just in all the circumstances to make the order sought. The failures had been, not minor but extensive, and, at two different stages of the litigation they had had a profound effect on the conduct of the proceedings.

The decision was based on the particular facts of the present case and not to be taken as suggesting that Capita would be liable for each and every failure to provide an interpreter or, more specifically, a Slovak interpreter. However, it was just, on the facts, for Capita to pay the costs incurred by the local authority in relation to the first hearing excluding those costs which would have had to be incurred in any event for the hearing that did eventually take place.

Comment: In addition to *R v Applied Language Solutions Ltd*, the court also applied the principles in *HB v PB* [2013] EWHC 1956 (Fam), [2013] 3 FCR 318 where a wasted costs order was made against a local authority where its

failures were extensive and had had a profound effect on the conduct of the proceedings. In that case the local authority had failed fundamentally to investigate, address or analyse serious issues raised in the case and its failure was of a systemic nature. The local authority's hard-pressed financial resources did not constitute an excuse releasing it from its clear statutory responsibility to investigate and its failings comfortably carried the case over the 'exceptionality' threshold laid down in *Globe Equities Ltd v Globe Legal Services Ltd* [1999] BLR 232, [1999] All ER (D) 226.

PUBLIC CHILDREN

Whether judge erring when making final care orders at case management hearing

***Re S-W* (*children*) (*care proceedings: final care order at case management hearing*) *[2015] EWCA Civ 27, [2015] All ER* (*D*) *10* (*Mar*)**

BFLS 3A[4603]; CHM 9[160]–[165]; Rayden 1(1) [T37.31]

The appeal concerned three children: ES aged 14; LW aged 11; and AW aged 10. The family had been known to the local authority for some years as there were concerns around the general neglect of the children against a backdrop of alcohol and drug use, together with the mother's inability to break free from a violent relationship. The children were removed from the mother's care and accommodated under an agreement pursuant to section 20 of the Children Act 1989 (ChA 1989). ES and AW lived with grandparents, but LW had a number of foster placements and wanted to return to his mother. The authority issued care proceedings and sought orders in respect of all three children.

A children's guardian was appointed. Her initial evaluation brought to the court's attention three significant matters:

(1) that she had not seen any of the children, each of whom expressed a desire to return to their mother;

(2) her concern for LW and the need for the authority to explore all available options for him, whether within the family or with a foster carer experienced in providing therapeutic support; and

(3) that she wished to have the opportunity to read the social work records and wanted to see a wide range of documents ranging from school reports to viability assessments of kinship carers.

Prior to the case management hearing (CMH), an advocates' meeting was held which resulted in agreement, subject to the judge's approval, of directions for progression of the case, in particular, with a view to seeing if LW could be returned, in whole or in part, to the mother, for an authority funded drugs hair strand test for the mother (there having previously been inconsistent results between her hair strand tests and urine tests), and for a slimmed down number of documents to be disclosed to the guardian to enable her to

carry out a full case review. The guardian could not attend court on the day of the hearing, but was available by telephone. All parties anticipated that the matter would be dealt with by way of a directions hearing which would provide for an early issues resolution hearing (IRH) and which would record on the face of the order that the IRH might well be treated as a final hearing. The authority's interim care plans were outdated and did not reflect, inter alia, the possibility that LW might be placed with the mother. The plan in respect of ES and AW was more straightforward as it was intended that special guardianship orders would be made by consent which would allow them to remain with their grandparents.

The judge decided at the CMH to make final care orders in respect of all three children in circumstances where the mother had recently had a positive drugs test. The judge was scathing of the guardian's request for further information. In relation to LW, he stated that all future decisions as to his care would be made by the authority through the looked-after children review process. The mother appealed.

The authority and the guardian did not seek to uphold the orders. Consideration was given to ChA 1989, s 31A and to the terms of the revised Public Law Outline (PLO). The appeal was allowed on the basis that, inter alia:

(1) A court was required, under ChA 1989, s 31A to consider permanence plans but, save as to contact, it was 'not required' to consider the remainder of the care plan. The fact that the court was 'not required' to consider certain other aspects of the plan did not mean it was prohibited from doing so. Where a care plan anticipated that a child would live permanently with a family or friend, the identity and sufficient information about that family member or friend had to be before the court. Without such information the court would be unable properly to consider the proposed permanency provisions. Such an approach chimed with the position, as it had been for many years, in relation to the treatment of long term foster placements.

(2) Exceptionally, it might be that, if all parties consented, or there was otherwise a clear case for it, then a court would make final orders at a CMH but, unless the decision went by concession or consent, it would only be exceptionally, in unusual circumstances and on rare occasions, that that could ever be appropriate.

(3) For a final order to be made at the CMH would, in reality, be appropriate only occasionally and in any event, where there remained any significant issue as to threshold, assessment, further assessment or placement, it would not be appropriate to dispose of the case at CMH. In addition, it could never be appropriate to dispose of the case where the children's guardian had not at least had an opportunity of seeing the child or children in question and to prepare a case analysis in which they considered the ChA 1989, s 31A care plan of the authority. Also, where, unusually a case was to be disposed of at CMH, adequate notice

had to be given to the representatives of the parents and guardian; reluctance on their part would ordinarily be fatal to the proposed course.

All parties agreed that the judge, in his desire to embrace and put into effect the family justice reforms, had unilaterally disposed of a case prematurely in circumstances where such a summary disposal had been not only unfair to the mother but contrary to the interests of the children with whom he had been concerned. The matter was therefore remitted.

Comment: A decision of interest not only as to the consideration as to why final orders should not have been made in the instant case but also due to the consideration of circumstances in which it may indeed be appropriate for such orders to be made. King LJ suggested that in exceptional circumstances, it might be appropriate to make final orders at the CMH where the outcome was considered to be inevitable and the child's need for an immediate resolution to the proceedings was critical to their welfare. She added however that while appreciating the ever-increasing burden on family court judges in the preparing and giving of judgments there had to at least be a short judgment/reasons noting the available options, the positions of the parties and confirming that the outcome for the child was in their best interests and was proportionate and therefore compliant with the European Convention on Human Rights.

PLACEMENT ORDER

Test to be applied as to change in circumstances

Re G (a child) [2015] EWCA Civ 119, [2015] All ER (D) 256 (Feb)

BFLS 3A[4274]; CHM 10[151]; Rayden Noter up [T47.135]

The first judge made care and placement orders in respect of a young child. The mother applied, pursuant to section 24(2)(a) of the Adoption and Children Act 2002 (ACA 2002), for leave to apply for the revocation of the placement order. The second judge, in hearing the application, did not have a transcript of the first judge's judgment, nor did she have a copy of the agreed threshold criteria. However, she placed reliance upon counsel for the local authority's unapproved note of the final hearing. The second judge summarised the law applicable to the application as a two-stage test: (i) whether there had been a sufficient change of circumstances; and, if so (ii) whether she should exercise her discretion to grant leave. The second judge made no findings on the disputed issues of fact, some of which had founded the basis of the authority's opposition to the mother's application, nor did she indicate that, for the purpose of the application, she accepted the factual basis of the mother's submissions. In the result, she determined that the first stage of the test had not been met and she did not go on to articulate whether, but for that, she would have exercised her discretion to grant leave. The application was refused and the mother appealed.

The mother submitted, inter alia, that the second judge:

(1) had set the bar too high and had been wrong on the facts to have found that there had been no relevant change of circumstances; and

(2) had been wrong to have proceeded on the basis that the authority's disputed allegations in relation to her conduct had been true. The court considered the authority's submission that the nature and degree of the change of circumstances which a parent did successfully establish was demoted by it having been a recent change.

The appeal was allowed on the basis that:

(1) Apart from the issues which had been raised in the grounds of appeal, the second judge had been disadvantaged in the absence of the first judge's judgment and agreed threshold criteria, and had been wrong to have accepted counsel's unapproved note of the hearing as a sufficient substitute, even though she had been well-intentioned in having sought to avoid delay. She could not possibly have established the true base line in the absence of the agreed threshold criteria document, which itself had recorded some issues of fact and differing interpretation of others, without reconstructing the evidence that had been available in the court below.

(2) In doing so, she had appeared to have relied entirely upon the reports submitted by the social worker and guardian. Even accepting, for the point of argument, that the second judge had been able to satisfactorily reconstruct the situation at the time the placement order had been made, in the present case, she would have been incapable of forming a valid judgment about the change in the mother's circumstances without making findings on the disputed facts before her, for they had all been pertinent to the criticisms voiced against the mother in the hearing before the first judge. That she had implicitly found against the mother appeared to be confirmed by the decision she had made. If not, it was difficult to argue, on the basis of the earlier reports and the part of counsel's note from which she had quoted, that the mother's written evidence, if accepted, had not demonstrated a change in her circumstances to the required degree to provide the gateway for her application.

(3) The submission that the nature and degree of the change of circumstances which a parent did successfully establish was demoted by it having been a recent change was not accepted. That added gloss to the words of the statute and should be resisted. The second judge had not done so and, thereby, had set the bar too high at that first stage.

The second judge's order was set aside and an order made for the mother's application to be heard by a different court, without reference to the judgment of the second judge.

Comment: The court applied *Re P (a child) (adoption order: leave to oppose making of adoption order)* [2007] EWCA Civ 616, [2007] 2 FCR 407 in reaching its decision where Wall LJ (as he then was) succinctly set out the

two-fold test to determine whether an application to set aside a placement order may succeed based on changed circumstances, ie:

(1) first, the court has to be satisfied that there has been a change in circumstances within ACA 2002, s 47(7): if there has been no change in circumstances, that is the end of the matter, and the application fails;

(2) second, if there has been a change in circumstances within ACA 2002, s 47(7), the door to the exercise of a judicial discretion to permit the parents to defend the adoption proceedings is opened, and the decision as to whether or not to grant leave is governed by ACA 2002, s 1 and the paramount consideration of the court is the child's welfare throughout their life.

Wall LJ added that when deciding either limb, the judge has a discretion whether or not to hear oral evidence although it is not necessary for the judge to conduct a full welfare hearing unless the issues that arose positively required such a hearing.

In the instant case, Macur LJ highlighted on a per curiam basis that the change in circumstances specified in ACA 2002, s 24(3) is not confined to the parent's own circumstances: depending upon the facts of the case, the child/ren's circumstances may themselves have changed in the interim, not least by reason of any failure on the part of the local authority to place them for adoption in a timely fashion. She added however that she would regard it as unlikely for there to be many situations where the change in the child's circumstances alone would be sufficient to open the gateway under ACA 2002, ss 24(2) and (3) and did not suggest that there needs to be an in-depth analysis of the child/ren's welfare needs at the first stage of the test (which are more aptly considered at the second stage).

CHILD ABDUCTION

Exercise of discretion where child objects to return

Re U-B (a child) [2015] EWCA Civ 60, [2015] All ER (D) 67 (Feb)

BFLS 5A[2211]; CHM 5[434]; Rayden 1(2) [T45.78]

The proceedings concerned E, who was 14 years old. E's parents separated when he was about 18 months old. From 2003, until the summer of 2014, he lived with his mother in Spain. He used to regularly to see his father, who lived in England. In July 2014, he came to England for an extended stay and was due to return to Spain in August. He did not do so. In September, his mother made an application to the English High Court, pursuant to the Hague Convention on the Civil Aspects of International Child Abduction 1980 (the Convention) for an order that he be returned to Spain. The judge refused to order E's return. He considered that the circumstances fell within the child's objection exception in art 13 of the Convention and that the appropriate exercise of the resulting discretion was to decline to make the order sought. The mother appealed.

The mother submitted that, inter alia:

(1) in respect of the judge's conclusion that E had objected to a return to Spain, the ten out of ten score that E had given to remaining in England had not been consistent with his recognition that there were positive features about life in Spain;

(2) the judge had failed to analyse and give weight to that evidence and to the Cafcass officer's evidence that she expected that E would, in fact, return to Spain if that was required and the judge had failed to analyse whether E's view had been formed in the 'bubble of respite'; and

(3) the judge had failed to approach the exercise of his discretion properly, in particular, the factors which had not been approached properly or weighed sufficiently included: (i) E's views, which, it was argued, were the product of influence; (ii) E's educational interests; (iii) the impact on E's relationship with his mother of not being ordered to return; and (iv) Convention policy considerations.

The appeal was dismissed on the basis that:

(1) The judge had not failed to take account of the material referred to by the mother. The features on which the mother relied were not inconsistent with E objecting to a return and the judge had been entitled to find that he had. Further, in so far as the reference to a 'bubble of respite' indicated that the context in which a child's views were expressed could potentially be relevant in an evaluation of those views, it was helpful. It was not, however, a separate test that had to be applied when determining whether the child's objections exception was established. The judge was acutely aware of the features that might have been making life in England more appealing for E than a return to Spain. There was no basis for the argument that the judge had failed to have had the relevant consideration in mind.

(2) The judgment allowed one to be satisfied that the judge had had the relevant features well in mind and had balanced them in a way that had been open to him. The judge had been entitled to have taken the view that he had of the question of influence. The judge had not erred in his treatment of the education issue either. Further, the judge had not erred in his treatment of the impact of his order on E's relationship with his mother. Furthermore, the judge had not failed to give proper consideration to the Convention policy factors to which, in fact, he had referred expressly.

Comment: As referred to in the instant case the child's objection exception in Hague Convention cases was considered by the Court of Appeal in *Re M (children) (Republic of Ireland) (child's objections) (joinder of children as parties to appeal)* [2015] EWCA Civ 26, [2015] All ER (D) 03 (Feb) which concluded that:

(1) the gateway stage should be confined to a straightforward and fairly robust examination of whether the simple terms of the Convention

were satisfied, in that the child objected to being returned, and had attained an age and degree of maturity at which it was appropriate to take account of their views; and

(2) sub-tests and technicality of all sorts should be avoided, in particular, the approach in *Re T (abduction: child's objections to return)* [2000] 2 FCR 159 to the gateway stage should be abandoned (ie as to the approach taken in that case was to ascertain the reasons why the child objects at the gateway stage rather than at the discretion stage).

Following *Re M (children)* and the instant case the approach should now be the simpler gateway test of whether the child objects to a return, with regard to the child's degree of maturity. If that first stage is not satisfied, the art 13 exception will fail. If it succeeds the court may then move to the second stage of discretion.

FINANCIAL PROVISION

Procedure for variation of foreign financial order

***AB v JJB* (*EU Maintenance Regulation: modification application procedure*) *[2015] EWHC 192* (*Fam*), *[2015] All ER* (*D*) *81* (*Feb*)**

BFLS 5A[1071]; Rayden Noter up [T28.106]

The husband was born in Germany and the wife in America. The husband remained a German national and the wife had dual English and American nationality. In 2000, they divorced for the second time in Germany. The German court made orders under German domestic law in relation to the maintenance of the wife. In 2007, the husband applied to the District Court in Germany. He sought to reduce his ongoing financial commitment to the wife. That application was refused. In 2013, the husband's solicitors wrote to the magistrates' court in Maidenhead requesting the decision of the German court be registered in England, and that his application for downward variation be transferred to the Principal Registry of the Family Division as it raised international law issues. He was informed that such an application was not within the court's direct jurisdiction but would need to be channelled through the Central Authority established in Germany for the purpose of European Council Regulation (EC) 4/2009 (the EU Maintenance Regulation).

Article 57 of the EU Maintenance Regulation specifies that 'an application under Article 56 shall be made using the form set out in Annex VI or in Annex VII'. Annex VII was entitled 'application form to obtain or have modified a decision in matters relating to maintenance obligations', intended to initiate applications either to establish an original or to modify an existing decision by way of the EU Maintenance Regulation. That route was not followed by the husband, but instead a Form A was issued in March 2014 seeking by that means to empower the English court to deal with his

modification application by a direct approach to the court, and without invoking the assistance or intervention of the Central Authority either in Germany or in London.

The Form A gave notice of the husband's intention to proceed with an application for a financial order, namely an application to vary a periodical payments order under the Family Procedure Rules 2010, SI 2010/2955, 2.3 (FPR 2010) with the jurisdiction existing under the Matrimonial Causes Act 1973. The wife applied to dispose of the Form A by striking it out, or to dismissing it for want of jurisdiction, or as an abuse of the court's process.

The main issue was whether a modification application by direct approach was envisaged or authorised by the EU Maintenance Regulation and complied with the procedural requirements for a modification application which were imposed as a matter of English domestic law.

The court ruled that:

(1) The husband's intended application fell within art 56(2)(c) of the EU Maintenance Regulation. In relation to modification applications, there was only one route laid down by the EU Maintenance Regulation ie via Central Authorities, and no permissible short-circuit option by application direct lodged by the applicant in any court in the member state where the respondent to the application (or the creditor) was habitually resident was allowed.

(2) The Form A sent on behalf of the husband had not been effective to seize that court with power to determine his intended modification application. That court had no power to make the orders which it had done and the proceedings purportedly thus commenced and pursued had now be struck out.

Comment: A decision that considers the lesser known aspect of the EU Maintenance Regulation, that of the modification/variation of an existing order made in another member state. As commented by Sir Peter Singer in the instant case, the EU maintenance Regulation is 'far and away primarily concerned with cross-border enforcement between member states of the European Union of maintenance obligations, rather than their modification' and on making an informal enquiry of the Reciprocal Enforcement of Maintenance Orders Unit (REMO), he ascertained that modification applications are scarce when compared to applications for enforcement, comprising around 0.5% of applications in a one-year period. The primary goal of the EU Maintenance Regulation is to enable a maintenance creditor in a member state to more easily obtain a decision that will be automatically enforceable in another member state without further formalities. Nonetheless, art 56(2)(c) provides that an application for modification may also be made under the EU Maintenance Regulation with the resulting consequence of the involvement of the Central Agency (REMO).

The relevant law is not without complexity (or confusion). The domestic legislation facilitating the application of the EU Maintenance Regulation is the Civil Jurisdiction and Judgments (Maintenance) Regulations 2011,

SI 2011/1484. Family Procedure Rules 2010 (FPR 2010), PD 34C (supplementing FPR 2010, Pt 34 as to the reciprocal enforcement of maintenance orders) is entitled 'Applications for Recognition and Enforcement to or from European Member States'. Article 8(1) of the EU Maintenance Regulation sets out the basic rule as to habitual residence requirements for a maintenance debtor that: 'Where a decision is given in a Member State or a 2007 Hague Convention Contracting State where the creditor is habitually resident, proceedings to modify the decision or to have a new decision given cannot be brought by the debtor in any other Member State as long as the creditor remains habitually resident in the State in which the decision was given', but is subject to a number of exceptions set out at art 8(2) and a maintenance creditor is not so restricted.

HUMAN RIGHTS

Whether and to what extent parties entitled to damages

Northamptonshire County v AS and others [2015] EWHC 199 (Fam), [2015] All ER (D) 52 (Feb)

BFLS 5A[4305]; CHM 1[271]; Rayden Noter up [T49.18]

On 30 January 2013 DS, then aged 15 days old, was placed with foster carers by the applicant local authority. His mother agreed to him being accommodated pursuant to the Children Act 1989 (ChA 1989), s 20. There were many concerns regarding the mother's ability to care for her baby. Despite that it was not until 23 May 2013 that the local authority made the decision to initiate care proceedings. Further it was not until 5 November – some five-and-a-half months later and nine months after DS had been taken into care – that the local authority issued care proceedings. The matter had come before the court in April 2014, when the authority were ordered to file and serve by 4pm on 4 April 2014: (i) a letter from the director of social services explaining the delay in issuing proceedings in relation to DS and why the authority had failed, from time to time, to comply with the orders of the Northampton County Court, (ii) a letter from the solicitor with conduct of the case explaining the failure of the authority legal team to respond to emails sent, from time to time, by solicitors for the child.

The relevant extracts of the explanatory letter were set out at para [12] of the judgment and in it the authority acknowledged that what had happened was unacceptable and had resulted in permanency being delayed. Thereafter the case was further delayed by the failures of the authority: (i) to undertake assessments of the mother, of the maternal grandparents, who resided in Latvia, and of the paternal grandparents, who resided in Spain; (ii) to undertake any proper or consistent care planning for DS; and (iii) to comply timeously or at all with court orders for the filing and service of assessments, reports and statements. The mother issued proceedings against the local authority claiming damages for various alleged breaches of her rights art 6 and art 8 of the European Convention on Human rights.

The court ruled that:

(1) The Family Court would not tolerate a party, let alone a public body charged with the care of very young children, ignoring court orders. The result of so doing was a wholly unnecessary and harmful delay in the planning and placement of the child. At the very final stage of the case the authority accepted its wholesale failure to DS and his family. The catalogue of errors, omissions, delays and serial breaches of court orders in the case was truly lamentable. They would be serious enough in respect of an older child but they are appalling in respect of a 15-day-old baby. Each day, each week and each month in his young life was exceedingly precious. Where so young a child was removed from the care of his mother or father his case had to be afforded the highest priority by the local authority.

(3) The use of the provisions of ChA 1989, s 20 to accommodate was, seriously abused by the authority in the instant case. There would be no circumstances where it would be appropriate to use those provisions to remove a very young baby from the care of its mother, save in the most exceptional of circumstances and where the removal was intended to be for a matter of days at most. The accommodation of DS under a s 20 agreement deprived him of the benefit of having an independent children's guardian to represent and safeguard his interests. Further, it deprived the court of the ability to control the planning for the child and to prevent or reduce unnecessary and avoidable delay in securing a permanent placement for the child at the earliest possible time.

The local authority agreed to pay damages to DS in the sum of £12,000; to the mother in the sum of £4,000; and to pay a sum of £1,000 to the maternal grandparents to assist them in their care of DS.

Comment: Articles 6 and 8 are engaged in every application by a local authority under ChA 1989, Pt IV and the parties should identify such issues at the outset to be considered by the court during case management. In care proceedings there is a wide margin of appreciation but, the following principles must, inter alia, be applied:

(1) any interference in family life must be proportionate to the objective of protecting private and family life (see *Re O (a child) (supervision order: future harm)* [2001] 1 FCR 289); and

(2) the court and local authority must also give enough consideration to additional means of support as an alternative to separating the child and parents (see *Re B (children) (care: interference with family life)* [2004] 1 FCR 463).

Generally, taking a young baby into care is harsh, draconian measure requiring exceptionally compelling justification. Since a local authority is a 'public authority' for the purposes of HRA 1998, it is unlawful for it to act in breach of the human rights, such as arts 6 or 8, of any of the parties, including the child. Damages were justified in the instant case but it will be

rare that a court will award damages, given the wording of HRA 1998, s 8(3), especially if the breach is purely procedural.

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