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.

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ADOPTION

Whether judge misapplied relevant legal and procedural framework

***Re W* (*children*) (*adoption proceedings: leave to oppose*) *[2015] EWCA Civ 403, [2015] All ER* (*D*) *208* (*Apr*)**

BFLS 3A[4285.12]; CHM 10[306]; Rayden Noter up [T47.134]

In January 2013, HHJ Cleary made care orders in relation to five children. For the youngest two, B and M, he approved plans for adoption and made

placement orders. In February 2014, applications by the father and mother for revocation of the care and placement orders in relation to B and M were dismissed. Another child, Je, was born in September 2013. Care proceedings followed. A paternal aunt who lived in Belgium put herself forward as a carer for Je. In May, B and M's separate foster placements became, in each case, adoptive placements. On the same day, adoption applications, funded by the local authority, were filed in relation to B and M. Both parents attended a hearing on 21 August 2014, making clear that they wished to oppose the making of adoption orders in relation to both B and M and, in the case of the father, that he sought contact with them. They produced a letter from the aunt confirming that she agreed and wished to care for B and M.

On 1 September, HHJ Cleary gave judgment following what had been intended to be the final hearing in relation to Je. He directed, inter alia, a further assessment of the aunt and ruled out both parents as carers for Je. On 10 September, the father made a witness statement setting out the change of circumstances he relied upon for the purpose of his application under s 47 of the Adoption and Children Act 2002 (ACA 2002). He said that he wished also to put forward the aunt as potential carer of B and M. On 24 September, the father made a further statement, in which he expressly drew attention to the aunt's willingness to care for B and M as being a change in circumstances. On 29 September, the cases concerning B and M were heard by HHJ Watson. The order, dated 29 September 2014 (the order), provided, so far as material, that: (i) the application for direct contact by the father was dismissed; (ii) the court made an adoption order in respect of B to the applicants to be made seven days from that date; and (iii) had the court approved an adoption order in respect of M, such order to be made upon notification that he had undertaken a procedure for circumcision. The father appealed.

The authority filed a respondent's notice, seeking to appeal on grounds overlapping with, but narrower, than those being relied upon by the father.

The issues before the court included, first, HHJ Watson's handling of the applications under ACA 2002, s 47(5) for leave to oppose the making of adoption orders. The father contended, inter alia, that the judge had mis-stated the relevant test and, therefore, misdirected herself in law. He drew attention to the fact that, at various points in her judgment, she had used the phrases 'solid and significant changes', 'significant change', and 'a sea change', each of which, he submitted, was a higher test than that contemplated by ACA 2002. Further, having identified the aunt's offer to care for B and M as 'a significant matter', the judge had made no further reference to the aunt. The second issue concerned the propriety of the order, a complaint on which the father and the authority made common cause. The court considered *Re W (a child) (adoption order: leave to oppose)* ([2014] 1 FCR 191) (*Re W*).

The appeal was allowed on the basis that:

(1) As the judge's handling of the applications for leave to oppose the making of adoption orders, the court agreed with the father's complaint as to the test to be applied, though it questioned whether it could really

have had much impact on the outcome in relation to the parents, given the totality of the material available to the judge at first instance and which she had been entitled to accept, as she had. However, it was clear as a matter of law that the aunt's arrival on the scene as a prospective carer for B and M had been capable of being a 'change in circumstances'. What HHJ Watson had known was that HHJ Cleary had not ruled out the aunt as a potential carer for Je. Indeed, HHJ Cleary had directed a further assessment of the aunt, which had not been concluded by the date of the hearing before HHJ Watson. The father had been putting the aunt forward as a potential carer for B and M, and the aunt had been willing to act in that role. HHJ Watson had, therefore, been required to consider whether that had been a 'change in circumstances', but she had not done so, not having addressed the point in her judgment at all. That was a fatal omission and, on that ground alone, her decision in relation to the applications under ACA 2002, s 47(5) could not stand. It followed, inevitably, that the appeal in relation to paras 2 and 3 of the order had to succeed (ie the adoption orders in relation to B and M).

(2) The order providing for the adoption of M, such order to be made upon notification that he had undertaken a procedure for circumcision, was irretrievably flawed. It had been in a form which had been wrong as a matter of substance. No adoption order could be made expressed to be subject to satisfaction of a condition precedent. Accordingly, in relation to that part of the order, the appeal had to be allowed on that ground also. In respect of the part of the order concerning B, there were two problems. First, the application of a mere seven days' delay (assuming that the order had not, in fact, taken immediate effect) was not in line with the requirements spelt out in *Re W*. Second, and much more fundamentally, the court was left wholly unclear as to the outcome: whether an adoption order had, in fact, been made in relation to B and, if so, when. That was not satisfactory. Quite apart from all the other human consequences of such confusion and uncertainty, that was a matter that went to status. Whenever the court made an order in relation to status, the order had to be pellucid as to what the court was doing and when, for, to take the case of adoption, much could subsequently turn on knowing the precise date when the child had been adopted. Accordingly, in relation to para 2 of the order, the appeal had to be allowed on that ground also. Further, in the circumstances, and given the various defects in the process, it could not be seen how the part of the order providing for the dismissal of the father's application for direct contact could stand.

The entire matter, which included every matter dealt with by HHJ Watson, would be considered afresh by HHJ Cleary.

Comment: In reaching its decision the Court of Appeal applied the guidance set out by the President of the Family Division, Sir James Munby, in *Re W (a child) (adoption order: leave to oppose), Re*; *H (children) (adoption order: application for permission for leave to oppose)* [2013] EWCA Civ 1177, [2014]

1 FCR 191. In *Re W* the President sought to clarify the correct approach to adoption following the decision in *Re B-S (children) (adoption: leave to oppose)* [2013] EWCA Civ 1146, [2013] 3 FCR 481. Points pertinent to the instant case from *Re W* are:

(1) Could it be said, on a fair reading of the judgment taken as a whole that the judge had directed their mind to, and had provided answers to, the key questions? In the instant case the willingness of the aunt to care for the children had not been adequately addressed.

(2) The judgment must make clear that the judge had the two-stage process in mind, ie by answering first, whether there had been a change in circumstances (if the answer to the first question was 'no', that was the end of the matter), and, if so, the second question of whether leave to oppose should be given.

(3) In evaluating the parent's ultimate prospects of success if given leave to oppose, the judge had to remember that the child's welfare was paramount and consider the child's welfare throughout their life.

In *Re W* the President also had regard to the approach of the appeal court in the event that the judge's order refusing leave to oppose was set aside. Consideration should be given to whether the appeal court should go on to give leave itself, or whether the question should be remitted for determination by the judge. If the proper outcome was clear on the papers, then it might be appropriate for the appeal court to decide the issue, but if the matter was not clear then it had to be remitted to the judge (as in the instant case). It is a necessary corollary of an appeal against a judge's refusal to give leave to oppose being successful that the adoption order which follows has to be set aside.

SPECIAL GUARDIANSHIP

Whether judge erring in law regarding welfare analysis

***Re E-R* (*a child*) (*child arrangements order: existence of natural parent presumption*) *[2015] EWCA Civ 405, [2015] All ER* (*D*) *203* (*Apr*)**

BFLS 3A[1827.3]; CHM 6[808]; Rayden Noter up [T36.25]

The mother and father were in a relationship from 2007. When T was born in 2009, the father's name appeared on the birth certificate and, therefore, he had parental responsibility throughout T's life. In March 2011, the parents separated. In September, the mother was diagnosed with terminal breast cancer. An attempt to reconcile in the light of the mother's diagnosis was short-lived. The separation was acrimonious. In November 2012, the relationship finally came to an end and, not long after that, the father moved away. To all intents and purposes, the father then lost contact with T and did not see her again until November 2014.

The father was in a new relationship and lived with his partner of two years, JB, and her two teenage children from an earlier relationship. The appellant

husband and wife were friends of the mother. As her condition worsened, the mother and T increasingly relied upon them for support. In June 2014, as the mother's condition deteriorated, they moved to live with the appellants at their home. The mother, in preparation for her death, named the appellants as testamentary guardians of T. In August 2014, the appellants applied for a special guardianship order. The father issued a cross-application for a residence order. In January 2015, the matter was tried. The judge concluded that the argument in favour of the status quo was not strong enough to displace the proposition that the father, as a capable parent, should assume T's care upon the mother's death. The application for a special guardianship order was dismissed. The judge made provision for T to spend increasing amounts of time in the care of the father and JB, and ordered that, upon the mother's death, primary care should shift to the father and JB. The appellants appealed only against the child arrangements order. In April 2015, the mother died.

The principal issue in the appeal was whether the judge had erred in law, having conducted his welfare analysis on the basis that there had been 'a broad natural parent presumption in existence under our law'.

The appeal was allowed on the basis that:

(1) In the same way that the fact that a person was a natural parent did not in itself create a presumption in favour of that person in the proceedings, neither did the fact that a child had been living with a party for a significant period of time. Each were factors of significance which would be taken into account and given appropriate weight by a court when determining the best interests of a child. Whether any such factor was determinative of a particular case would depend on the unique facts of that case.

(2) Where there was a dispute between potential carers following the death of a parent with parental responsibility, the court would, in the absence of an agreement, make a decision as to that child's future living arrangements, which arrangements would often be reflected in a child arrangements order. The making of the decision by the court would be governed by the welfare principle informed by the application of the welfare checklist.

(3) The fact that a dying parent had expressed, by the appointment of a testamentary guardian, her strong desire that her child should live with a particular person following her death, did not generate a preferential position in favour of the proposed testamentary guardian. Rather, the fact of the appointment was another significant matter which would be taken into account and given appropriate weight by a court when determining the best interests of the child.

The judge had wrongly conducted his analysis of T's best interests on the basis that there was a presumption in law in favour of a natural parent. On that basis alone, the appeal had to be allowed. The matter would be remitted in the first instance to the Family Division liaison judge for the Western

Circuit for case management directions, including consideration as to future interim contact with the father and as to whether T should be separately represented.

Comment: The Court of Appeal applied the House of Lords decision in *Re G (children) (residence: same-sex partner)* [2006] UKHL 43, [2006] 3 FCR 1, a case in which the court was concerned with a same-sex relationship and the issue of a 'natural parent' was explored as to the weight to be given a child living with their natural/biological parent. In his supporting judgment in *Re G* Lord Nicholls said: 'A child should not be removed from the primary care of his or her biological parents without compelling reason. Where such a reason exists the judge should spell this out explicitly'. The leading judgment by Baroness Hale set out the principles to be applied, ie that the fact of parentage is to be regarded as an important and significant factor in considering which proposals better advanced the welfare of the child. In the instant case the judge at first instance had placed the primary focus on the first part of the principles set out in *Re G*, but with insufficient regard to the second aspect, ie the welfare of the child. Baroness Hale also referred in *Re G* to 'social and psychological parenthood', ie the relationship which develops through the child demanding and the parent providing for the child's needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later at the more sophisticated level of guiding, socialising, educating and protecting.

As found in the instant case, there is no presumption in favour of a natural/biological parent: the welfare test is paramount. Biological parentage is an important and significant factor, but only one factor to be considered within the assessment of welfare. In the instant case the facts were relatively unusual (as was also the case in *Re G*) and the court took the view that the various factors in play had not been sufficiently balanced against the welfare checklist and thus the appeal was allowed with the matter remitted for further consideration.

CONTACT

Whether court correct to make indirect contact and s 91(14) orders

Re H-B (children) (contact) [2015] EWCA Civ 389, [2015] All ER (D) 202 (Apr)

BFLS 3A[2101]; CHM 2[731]; Rayden 1(2)[T37.8]

The mother and father had two children, J and K. Following their separation, the children lived with the mother and had contact with the father. Following an incident in June 2008, the mother applied for a residence order in her favour and for the suspension of contact. The father responded by seeking contact. As the Cafcass officer reported, the girls were saying that they did not want to see the father. When the case came before the court in July 2009, the parties agreed that J, and later also K, should have therapy as a matter of

urgency. In February 2010, the therapy process came to an abrupt halt, following the children making allegations against their father during a therapy session. At a fact-finding hearing in December 2010, the judge rejected as untrue or exaggerated much of what the mother alleged against the father, as well as the allegations made by the girls. However, he criticised the father for acting unwisely in a number of respects.

At a hearing in September 2011, the judge did not see how direct contact could take place until the girls understood that the allegations they had made against the father had been rejected by the court as false. He took the view that, if they were forced to have contact immediately, it would be highly likely to cause long-term harm to their trust in adults, including their mother, and the court and would be likely to eradicate any chance of consensual contact in the future. The judge's order was preceded by a recital that it was agreed that the children would undertake therapy. It was recorded that, at an appropriate time during the therapy, the therapist would 'discuss with the girls the outcome of the finding of fact hearing'. No direct contact was ordered; there was to be indirect contact. The proceedings were to come to an end, but the judge made clear that case could be brought back before him by means of a fresh application. Therapy did not commence until March 2012 and ended after only four sessions. In November, the father restored the matter to court by applying for contact.

In September 2013, the judge concluded once again, in line with the advice of the new children's guardian, that there should be only indirect contact between the father and the children every two months. In July 2014, the issue of contact was revisited. The judge reaffirmed the 12 reasons why he had found, in September 2013, that contact could not take place, adding to the list the failure of mediation. He clearly considered whether it would be feasible just to order direct contact but rejected the idea because it would be futile, positively damaging to the children, and against all the professional opinion that had been advanced over the many years of the litigation. The reasons for refusing the application for direct contact were, in his view, overwhelming. He made an order, under section 91(14) of the Children Act 1989 (ChA 1989), prohibiting any further applications by the father for child arrangements orders for a specified period. The father appealed against those orders. The mother and daughters opposed the appeal.

The primary focus of the grounds of appeal was the failure to inform the girls of the findings of fact made in December 2010. The judge was criticised for not having ordered the appointment of a suitably qualified expert to advise and assist him to ensure the children were informed and the mother was criticised for failing to inform the children herself. By implication, the judge was criticised for having brought the proceedings to an end prematurely, when further steps to achieve contact had been possible and should have been taken. The making of the ChA 1989, s 91(14) order was said to have been wrong in the circumstances. Further, the father sought to liken the case to that of *Re A (intractable contact dispute: human rights violations)* ([2013] All ER (D) 62 (Sep)) (*Re A*), arguing that there had been, inter alia, too many hearings, too many judges involved, too much delay, and an absence of strategy and robust action.

The appeal was dismissed on the basis that:

(1) It might appear, looking back, as if there had been times when the court process could have proceeded with greater despatch or when a different judge might possibly have chosen a different course, but it was very difficult to criticise when one had not been there and had not experienced the practical problems or had to deal with the recurrent ancillary applications. There was nothing in the chronology of the proceedings that would lead the court to criticise the way in which the legal system had handled the case. It had not been a situation, as in *Re A*, where there had been wholesale failings which had necessitated the case starting all over again. The appeal could only proceed, therefore, as a challenge to the decisions made by the judge in July 2014.

(2) As to the father's complaint as to the court's handling of the girls' ignorance of the findings with regard to their allegations, it was quite wrong to suggest that the judge had done nothing about that. In his July 2014 judgment, the judge had been very much alive to the children's mistaken perceptions, that they had now gone on for at least six years and had been an ingrained feature of their understanding. There had still been no suggestion of any way to address that. It was not fair to criticise the judge for not having devised a way to unblock the impasse himself. Given his experience of all that had been attempted and his clear understanding of the issues in the case, he had been entitled to have proceeded upon the basis that everything that had been practical had been tried and to conclude that the children, given their age and stage in life, had required a release from the perpetual litigation that had dogged their childhoods. The judge had made no mistake in his understanding of the law, which it was obvious he had had well in mind at all stages of his involvement with the proceedings.

Therefore the order that the judge had made in relation to contact and the ChA 1989, s 91(14) order had been open to him in accordance with that law and nothing that had been said in argument had persuaded the court that he had erred in proceeding as he had. On that basis it would be wrong to interfere with the judge's careful evaluation of the prospects of establishing direct contact and of what would serve the best interests of the girls.

Comment: Of note is that at the time of the appeal the eldest child was age 16 thus, as highlighted by Munby P in his leading judgment, while a child arrangements order may be made with regard to a child up to the age of 18, ChA 1989, s 9(6) provides that the court may not make a section 8 order that is to have effect for a period which will end after the child has reached the age of 16 unless it is satisfied that the circumstances of the case are exceptional. A section 8 order made in respect of a child who is younger than 16 ceases to have effect when the child reaches 16 save in exceptional circumstances. Therefore any order that may have been made in relation to the eldest child would have been for a very limited period unless the circumstances of the case were considered to be exceptional.

As to the protracted nature of the proceedings, Munby P indicated that it is vital not to look back, 'with the arrogance of hindsight, and criticise a judge for failing to proceed in one way rather than another unless it really is very plain that he or she should have known to make different decisions'.

The courts have emphasised that ChA 1989, s 91(14) orders should be made sparingly and with great care (see *Re F (child orders: restricting applications)* [1992] 2 FCR 433). The making of an s 91(14) order must be exceptional and not made 'too casually' (per *Re C (a child) (order: restriction on applications)* [2009] EWCA Civ 674, [2009] All ER (D) 52 (Sep)). The purpose of an s 91(14) order is to prevent unnecessary and disruptive applications being made to the court, where it is in the child's best interests to prevent unmeritorious applications. In the instant case such an order was considered appropriate with regard to the history and facts, both at first instance and on appeal.

FUNDING

Whether constructive notice of restriction

ABC v PM [2015] EWFC 32, [2015] All ER (D) 122 (Apr)

BFLS 1A[78]; Rayden Noter up [T16.19]

The husband and the wife were both in their late 50s. Their marriage fell into difficulties and they finally separated in 2010. The wife later issued her divorce petition which included a prayer for a property adjustment order. She applied for financial remedies in Form A, including an application for a transfer of property order in relation to Z property. She applied to the Land Registry the same day and secured two restrictions against the title to the property.

The wife's application for financial remedies and transfer of property order was heavily contested. Serious allegations of non-disclosure were made by her against the husband. The hearing of the wife's applications began before the judge. She sought the outright transfer of Z property to her, among other orders. By that time there was an execution of a charge against Z property in favour of ABC solicitors in order to pay the husbands legal fees. The wife had not been informed in advance of the intention to execute the charge. She applied to set the charge aside, pursuant to s 37 of the Matrimonial Causes Act 1973 (MCA 1973). She registered a further restriction to the effect that the charge should not be registered except under a further order of the court.

At the hearing, the judge found that the husband had significant resources. He transferred Z property to the wife absolutely. He also ordered the transfer of some further properties in Y country and ordered the husband to pay the wife's costs in the sum of £167,850. At a later hearing, the judge set aside the legal charge, pursuant to MCA 1973, s 37 on the basis that ABC had constructive notice of the wife's claim. The husband appealed on the basis that the judge had been wrong to find ABC was fixed with constructive notice of the husband's intention to defeat the wife's claims.

The husband's appeal was dismissed on the basis that:

(1) Where there was a restriction, it was always incumbent on a solicitor to give notice of an intention to execute such a charge over real property. If no action was taken by the other side by the expiry of a reasonable period, the solicitor was then in a position to proceed to execute the charge without fear that it would subsequently be set aside.

(2) On the facts and evidence, the court was satisfied that ABC firm knew something that ought to have stimulated enquiry. It followed that the court could not fault the judge's conclusion that he remained satisfied from the evidence that was before him that the solicitors knew something which should have put them on further enquiry, which would have revealed had they thought properly about it that the payment of their fees from the husband.

Comment: In the instant case Moor J highlighted on a per curiam basis that: '… this is an important area of the law, particularly in the context of the removal of legal aid by LASPO and the need for spouses to fund matrimonial litigation. Solicitors are entitled to be paid and the court must be well aware of the dangers of setting aside transactions entered into in good faith' (at para [40]). A decision that further highlights the cautious approach to be taken in relation to deferred payment of fees arrangements and the security for such arrangements following on from the decision in *Sandler v Sandler* [2010] EWHC 1415 (Fam), [2011] All ER (D) 299 (Mar) where the court gave priority to a spouse's claim to 'set off' orders for costs made in their favour against a lump sum payable to the other spouse in financial remedy proceedings and against which the other spouse's solicitors had sought to argue a prior and preferential claim arising under such an agreement.

WARDSHIP

Applications where risk of young people leaving United Kingdom to travel to ISIS countries

London Borough of Tower Hamlets v M [2015] EWHC 869 (Fam), [2015] All ER (D) 25 (Apr)

BFLS 2A[33]; CHM 8[994]; Rayden 1(2)[T42.1]

Two cases were before the court, both of which were brought on ex parte application by local authorities who were concerned that a number of young people, all minors in their areas, were at risk of leaving the United Kingdom to travel to ISIS countries, particularly Syria. The families of the children were, in each case, in the authority's assessment, unlikely adequately to protect them from leaving the UK. The young people were at risk of significant harm in the sense contemplated by section 31(ii) of the ChA 1989. In both sets of proceedings, the court made the young people wards of the High Court. Accordingly, all major decisions relating to the young people for the period of the operation of the wardship required the approval of the High Court. Pursuant to that jurisdiction, the court made orders relating to

the retrieval of the passport of each of the young people concerned in order to use the full powers at the court's disposal to endeavour to prevent the young people leaving the UK.

In one of the cases the passport orders remained suspended and the wardship extant in order to see what could be achieved cooperatively on the ground. As a result a considerable number of passports were lodged with solicitors where they would remain until further order of the court. The court subsequently handed down its judgment, giving its reasons and highlighting key principles including that the removal of an individual's passport, even on a temporary basis, was a very significant incursion into the individual's freedom and personal autonomy. It was never an order which could be made lightly. Guidance as to the approach to be taken was set out by Hayden J as follows:

(1) Where only the State, in the present case through the arm of the local authority, appeared in court, the court required a very high degree of candour on the part of all those involved.

(2) That very high degree of candour had to also be accompanied by careful consideration as to whether the facts presented a real degree of urgency, which of themselves necessitated an application being made on an ex parte basis.

(3) Among the core principles were that: (i) all involved had to recognise that in the particular process it was the interest of the individual child that was paramount and that could not be eclipsed by wider consideration of counter terrorism policy or operations, although it had to be recognised that the decision the court was being asked to take could only be arrived at against an informed understanding of that wider canvas; (ii) justified interference with the rights of a minor under art 8 of the European Convention on Human Rights would always require public scrutiny at some stage in the process; (iii) recognising that there would be an urgency to such applications, careful attention, in advance of the hearing, should be given to the framework of reporting restrictions required to protect the child from publicity; and (iv) the importance of coordinated strategy, predicated on open and respectful cooperation between all the safeguarding agencies involved, simply could not be overstated.

The court was satisfied on the evidence, both that the measures sought were proportionate and that there were strong grounds for believing that the situation was urgent.

Comment: A relatively rare example of the use of wardship proceedings in which Hayden J commented on a per curiam basis:

> 'Here, the type of harm I have been asked to evaluate is a different facet of vulnerability for children than that which the courts have had to deal with in the past. What, however, is clear is that the conventional safeguarding principles will still afford the best protection. Once again, this court finds it necessary to reiterate the only open dialogue, appropriate sharing of information, mutual respect for the differing roles

involved and inter-agency cooperation is going to provide the kind of protection that I am satisfied that the children subject to these applications truly require.' (at paras **[50]**–**[51]**).

Hayden J confirmed that the approach taken by Munby J (as he then was) in *Re S (child: ex parte orders)* [2000] All ER (D) 1559 was correct in emphasising that in granting ex parte (now without notice) injunctive relief in the Family Division, the applicant or applicant's solicitor would be required to give a series of undertakings which relate to service. Reference should also be made to the President's subsequent guidance on without notice applications dated 13 October 2014 ([2014] 3 FCR 402).

APPEALS

Father seeking to re-open proceedings following criminal acquittal

***Re U* (*children*) *[2015] EWCA Civ 334, [2015] All ER* (*D*) *57* (*Apr*)**

BFLS 3A[3412]–[3600]; CHM 9[46]; Rayden Noter up [T51.14]–[T51.20]

In May 2013, care proceedings were commenced in relation to four of the appellant father's children, AU, BU, and twins CU and DU. The eldest, ZU, was not subject to care proceedings, given her age, but featured in the case, having made an allegation that the father had sexually abused her when she was 14 or 15 years old. In December, the fact-finding hearing was heard. At the conclusion of the trial, the judge made findings of physical and emotional abuse, and domestic violence. In relation to the allegation by ZU alone that she had been sexually abused by her father, the judge, having considered, inter alia, reasons why ZU might have made up the allegations, concluded that they were true and made the findings. Following the final hearing in July, care orders were made in respect of AU, BU, CU and DU and placement orders in relation to the twins, who were subsequently placed for adoption.

In September, the father stood trial in respect of the allegations of rape against ZU. He was acquitted. The father sought a stay in respect of the care and placement orders and a rehearing of the care proceedings, pursuant to section 31F(6) of the Matrimonial and Family Proceedings Act 1984. The basis for seeking a rehearing, as set out in the father's application notice, concerned his criminal trial, in particular, the evidence given by ZU under cross-examination, the judge's direction to the jury and the not guilty verdict. The local authority did not accept the accuracy of the summary in the application notice in the absence of a transcript of the evidence or summing up. Accordingly, when the matter came back before the court, the application was adjourned by consent until 12 December to allow a transcript to be obtained. On 12 December, the transcript remained unavailable. The father applied for a further adjournment. Having weighed up all factors, the judge concluded that a delay to the next hearing (which he identified as having been unable to take place until February or March 2015), could not be countenanced and refused the application. The judge proceeded to hear the application for a rehearing, which he also refused. The father appealed.

It fell to be determined whether, first, the judge had erred in:

(1) refusing the application for an adjournment; and

(2) dismissing the application for a rehearing of the care proceedings.

The court ruled:

(1) The judge had been entitled to conclude that the balance lay in favour of refusing the application for a further adjournment. He had properly identified the competing arguments and weighed each one up briefly, but with care. He clearly had had at the forefront of his mind the importance of the application and the potential prejudice to the father's case which would result from a refusal.

(2) The judge had had the advantage of conducting a lengthy trial and of making his own assessment of the parties prior to making the findings of fact to the civil standard of proof. He had appropriately considered the father's case at its highest and had properly borne in mind the other extensive findings, which had been unaffected by the criminal trial and which had, in themselves, been serious, before concluding that the further substantial delay which would be occasioned by a further adjournment could not be countenanced in the interests of the children.

(3) The judge had conducted the appropriate balancing exercise and had reached a conclusion which could not be categorised as wrong and, accordingly, the grounds of appeal which related to the refusal to adjourn would be dismissed.

The appeal court agreed with the analysis of the judge, who had been well aware that his decision meant that the father would be unable to challenge the findings of sexual abuse. Given the totality of the unimpeachable findings and the need for finality in the interest of the four children, it could not be seen on what basis it could be concluded that the earlier findings needed revisiting in order for a court to reach the right decision in the interests of the children. Accordingly, the father's appeal in relation to the substantive application for a rehearing of the fact-finding hearing would be dismissed.

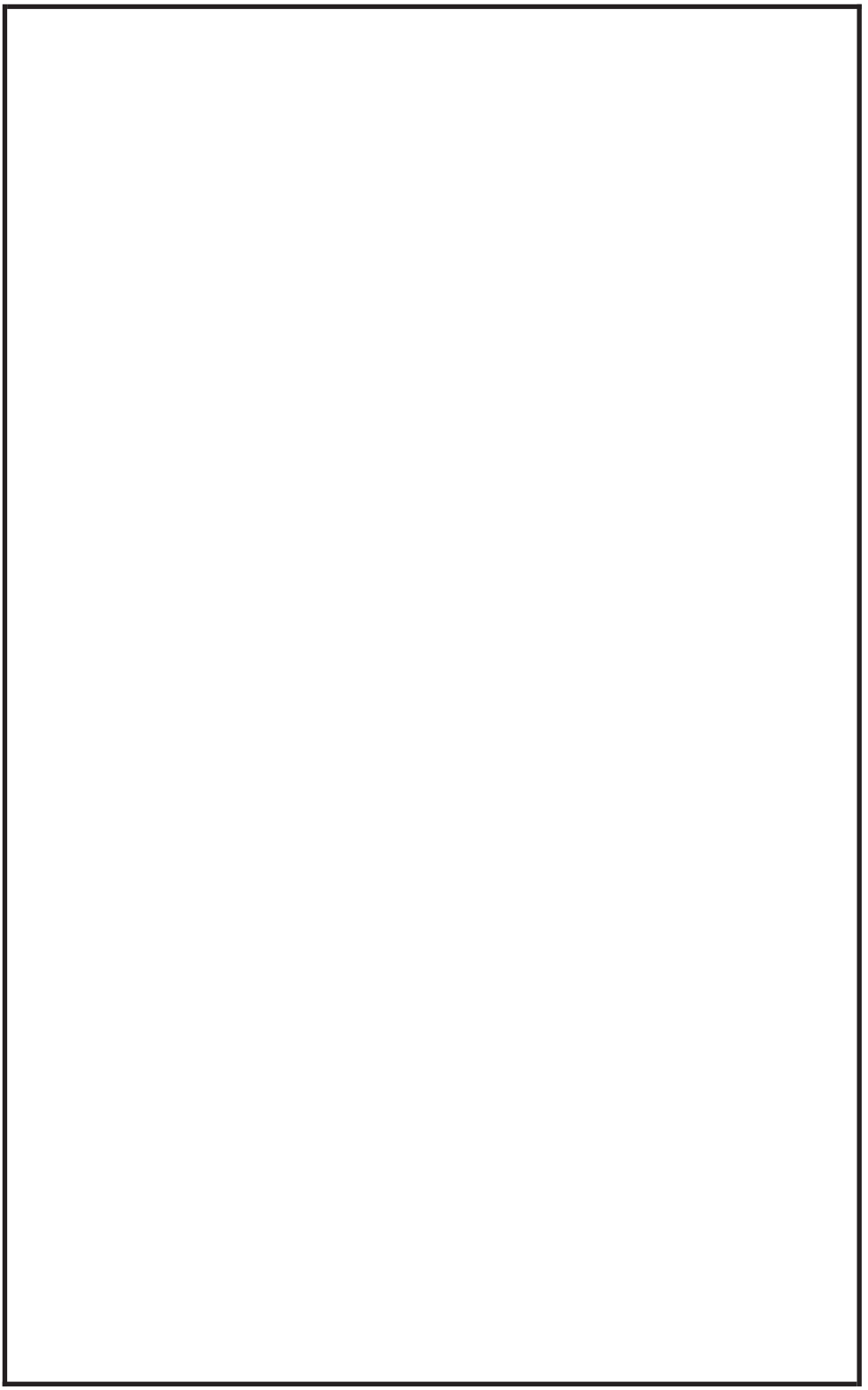
Comment: In reaching its decision the court had regard to the House of Lords majority decision in *Re B (a child) (care order: proportionality: criterion for review)* [2013] UKSC 33, [2013] 2 FCR 525 (in which Lady Hale and Lord Kerr dissented), ie:

(1) the correct approach of an appellate court to the making of a care order is to treat the exercise as an appellate exercise by way of review and not as a fresh determination of necessity or proportionality;

(2) appellate review of a determination whether the threshold is crossed should be conducted by reference simply to whether it was wrong; and

(3) the criterion for appellate review of an ultimate determination to make (or to refuse to make) a care order is, as in respect of the threshold, whether it was wrong (or vitiated by serious irregularity).

Subsequently in *Re B (a child) (care proceedings: appellate judge's power to remake decision)* [2014] EWCA Civ 565, [2014] 3 FCR 129 the Court of Appeal reiterated that on an appellate review, the judge's first task is to identify the error of fact, value judgement or law sufficient to allow the appellate court to interfere.



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