# 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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## PUBLIC CHILDREN

### Whether mother wrongly deprived of opportunity to demonstrate change in parenting abilities

***Re S (a child) [2015] EWCA Civ 489, [2015] All ER (D) 147 (May)***

**BFLS 3A[2201.1]; CHM 9[78.1]; Rayden Noter up[T49.88]**

The proceedings concerned the youngest of the mother's ten children, D, who was almost two years of age. All of her children had the same father. D's two

eldest siblings were in long-term foster care and his seven immediate elder siblings have all been adopted. Care proceedings were instituted immediately upon D's birth and he was removed from his mother. In December 2013, he was placed in the care of his parents. He thrived and apparently established a good attachment to them. His parents co-operated with, and were subject to close monitoring by, care professionals. Home standards were consistently acceptable. There were no reported concerns.

In May 2014, serious allegations of sexual abuse were made against the father by three of his younger siblings said to have occurred during their childhood and adolescence in the 15 years up to 2001, and therefore covering the time when he was in a relationship with the mother and with her had at least two children of his own. He was subsequently charged and awaited trial on offences, including vaginal and anal rape. The father had a previous conviction for indecent assault of a nine-year-old boy. At the outset, the mother was disbelieving and angry at what she perceived to have been malicious lies. Nevertheless, she entered into a written agreement not to allow contact between D and his father, unless supervised by the local authority (the May agreement). She breached that agreement, to the knowledge of the authority. In June, a second agreement was entered into. The mother was again warned of the likely consequences of breach. Subsequently, the adoptive parent of one of D's siblings contacted the authority, concerned by a letter sent by the parents to the relevant child to the effect that they, the parents, were living together and had a child. The authority initiated care proceedings.

An interim care order was made and D was removed to a foster placement. At a case management hearing, it was noted in the order made that, inter alia, the authority had made a referral for an assessment of the mother and for safe care work to be commenced. Directions were given, including that the local authority was to serve an assessment of the mother. However, it transpired that the resource was not available to parents against whom proceedings had already been initiated. An alternative resource was in the process of being sought when sightings and other evidence of the couple continuing to see each other became known to the authority. Consequently, the authority abandoned its search and applied to place D for adoption. The judge determined that the risks inherent in returning D to his mother's care were very high and that it was unlikely to be long, if D was in her care, before she went behind the back of professionals and permitted the father contact and exposed D to the risk of sexual abuse. A placement order was made. The mother appealed.

The issue was whether the mother had been wrongly deprived of an opportunity to demonstrate a sea change in her parenting abilities and her capacity to be a sole carer by the absence of a safe parenting assessment previously approved/directed by the judge and, subsequently, abandoned by the authority, in order to establish that there had been a viable and realistic alternative to adoption for D. The appeal was dismissed on the basis that:

(1) The judge had been satisfied that there had been a risk and no appropriate services had been available that would minimise it sufficiently in light of the mother's lack of insight and attendant dishonesty. She had clearly articulated her reasons for having so concluded, none of which had been remotely perverse.

(2) The mother's submission that the balance had to be in favour of giving D a chance to be raised by her, by allowing her the opportunity of completing the assessment, had to be seen in the context of the judge's findings and the decision in *Re R (a child)* [2014] EWCA Civ 1625, [2014] All ER (D) 179 (Dec), which laid to rest any misconceptions that had existed since the reporting of *Re B (a child) (care order: proportionality: criterion for review)* [2013] UKSC 33, [2013] 2 FCR 525, and *Re B-S (children) (adoption: application of threshold criteria)* [2013] EWCA Civ 1146, [2013] 3 FCR 481, that only once every possible option had been investigated, regardless of prospects of success or realistic application to the known facts, could an interference with respect for the family life of the subject child and his parents be justified by the making of a placement order.

(3) D's future welfare had required the judge to make a realistic appraisal of the mother's prospect of acquiring sufficient and genuine insight into the risk the father presented in the short and medium term and being amenable to support throughout and thereafter to sustain her separation from him. The judge had made significant adverse findings against the mother in that regard and in a manner that simply could not be categorised as wrong. She had been plainly right.

**Comment:** A decision that brings into focus the requirement to consider every option, whether likely to be successful or realistic, but with regard to the child's welfare throughout its life (as opposed to only in the short term) as emphasised by Munby P in *Re R* when he said (per curiam at paras 54–55):

'I repeat and emphasise: At the end of the day, the court's paramount consideration, now as before, is the child's welfare 'throughout his life.' Nothing that was said in *Re B-S* was intended to erode or otherwise place a gloss upon the statutory requirements of section 1 [of the Children Act 1989] and section 1 [of the Adoption and Children 2002]. On the contrary, the exhortation for courts to undertake a balancing exercise which pits the pros and cons of each realistic option against the others was aimed precisely at discharging the court's statutory duty under section 1. In particular, before making a decision relating to a child's welfare, a court is required to have regard to, amongst other matters, the factors set out in the relevant "welfare check-list".'

*Re R* provided practitioners with a reminder that the law had not fundamentally changed following *Re B* and *Re B-S* albeit those two cases had brought about a change in approach and practice.

In relation to adoption services generally, the Queen's speech included a Schools and Adoption Bill containing new powers to force authorities to

merge local adoption services with the stated purpose of increasing the pool of potential adopters and reducing waiting times.

## CHILD ABDUCTION

### Whether exceptions operating to prevent return of child

***Re J* (*child abduction: consent: grave risk of harm*) *[2015] EWHC 1160* (*Fam*), *[2015] All ER* (*D*) *89* (*May*)**

**BFLS 5A[2352]; CHM 5[462]; Rayden Noter up[T45.68]**

The parents met in late 2006 and were involved in a relationship which led, in 2007, to the birth of J. The father lived in Texas. In 2009, the parties separated and proceedings followed in the district court of Texas relating both to financial matters and welfare arrangements for J. In 2014, the mother wrote to the father to notify him that she together with her older daughter and J were going to live in the United Kingdom. The father applied to the Texan Court who ordered the mother to deliver J to the court by a certain date. The mother did not comply. At a further hearing on 5 March at which the mother was represented she was ordered to hand J over to the father at Heathrow Airport. Again, the mother did not comply. There were then proceedings under the Children Act 1989, initiated by the mother, in the UK in which she sought a specific issue and prohibited steps order. That application was stayed by agreement between the parties in circumstances where the proceedings brought by the father under the Hague Convention on Civil Aspects of International Child Abduction (the Convention) had been commenced and were listed for hearing on 20 March 2015.

The matters for decision under the Convention were in regard to 'consent' in art 13A and 'grave risk of … harm or other intolerability' in art 13B. In relation to 'consent' the mother submitted that the father had wanted them to go for some time and had made clear to her, prior to the departure, that he was agreeable. In relation to 'grave risk', the situation faced by J on return depended crucially upon the protective measures which could be implemented so as to avoid the risk that the child would be harmed or otherwise face an intolerable situation. Consideration was given to emails between the parties and a transcribed phone call.

The court ruled that:

(1) It was established principle that consent to the removal of the child had to be clear and unequivocal. Consent could be given to the removal at some future but unspecified time or upon the happening of some future event. Such advance consent had to, however, still be operative and in force at the time of the actual removal. The happening of the future event had to be reasonably capable of ascertainment. The condition had not to have been expressed in terms which were too vague or uncertain for both parties to know whether the condition would be fulfilled. Fulfilment of the condition had not to depend on the subjective determination of one party. On the evidence, the father had not

clearly and unequivocally consented to the removal of J. The answer was strikingly obvious and transparently clear. The evidence led incontrovertibly to the conclusion that consent, clear and unequivocal, had never been given.

(2) It was established principle that 'grave' qualified the 'risk' of harm rather than the 'harm' itself but there was a link between the two concepts.

The court considered that the situation faced by J on return depended crucially upon the protective measures which could be implemented so as to avoid the risk that the child would be harmed or otherwise face an intolerable situation. The father had offered a series of undertakings so as to provide J with a 'soft landing' and mitigate the impact upon both her and the mother of a return to Texas. The father agreed to meet the cost of J's return flight to the US and also to arrange for and provide suitable accommodation within the proximity of Austin, Texas for the mother and J to a level, of $900 per month. There was nothing which had caused the court to conclude there had been any situation awaiting the child in the US which could be described as intolerable. There had been no proper basis for claiming either that J would be at grave risk of psychological or physical harm or that she would be placed in an intolerable situation if a return order was made. She would go back with her mother, either with or without her older sister. Her mother's presence would provide J with much needed security. The father would once more play an important part in her life by spending appreciable periods of time with J. J's removal from the State of Texas was unlawful. There was no sustainable basis on the evidence for establishing either, or indeed any, of the exceptions to a mandatory return.

**Comment:** In art 13(b) cases (ie a grave risk of physical or psychological harm to the child as a result of the return or of being placed in an intolerable situation) the respondent may, as it appears in the instant case, rely on practical issues, that they say mean that the child would be at risk of harm or of being placed in an intolerable situation by a return taking effect, for example: there is nowhere for the respondent and child to live on return, or the respondent does not have the funds to purchase flight tickets. These types of issues are often improved by the applicant offering undertakings to address the practical issues such as offering to pay maintenance on the return or offering to arrange accommodation: see *Re Y (a child) (abduction: undertakings given for return of child)* [2013] All ER (D) 133 (Jan) regarding the recognition of undertakings.

Regarding the significance of the word 'grave' and that it relates to the level of risk rather than the level of harm, the court applied the Supreme Court decision in *Re E (children) (wrongful removal: exceptions to return)* [2011] UKSC 27, [2011] 2 FCR 419, ie at para 33:

> '… the risk to the child must be 'grave'. It is not enough, as it is in other contexts such as asylum, that the risk be 'real'. It must have reached such a level of seriousness as to be characterised as 'grave'. Although 'grave' characterises the risk rather than the harm, there is in ordinary

language a link between the two. Thus a relatively low risk of death or really serious injury might properly be qualified as 'grave' while a higher level of risk might be required for other less serious forms of harm.'

## EVIDENCE

### Whether judge wrongly assessing evidence purporting to identify mother as sole perpetrator

***Re BK-S* (*children*) (*expert evidence and probability*) *[2015] EWCA Civ 442, [2015] All ER* (*D*) *64* (*May*)**

**BFLS 3A[4769.6]; CHM 11[224]; Rayden Noter up[T37.34]**

The proceedings concerned findings of fact made in public law children proceedings brought by the local authority in relation to four children of the mother. The findings concerned one of the children, Z, who, at the time of the events, was six months old. Z had been discovered to have had the anti-psychotic prescription drug Olanzapine in his body on three occasions. It had not been prescribed to any relevant person. Z was admitted to hospital on three occasions: 15 July 2013, 21 July and 5 August. The first admission was thought to have been for gastroenteritis. The second and third admissions were for an undiagnosed illness, with an overlay of altered consciousness. The results of the blood test, taken on the third occasion, were available on 13 August and showed a concentration of Olanzapine in Z's blood as at 5 August 2013. On 13 August, Z was taken into care. On 14 August, Z was re-tested and a smaller concentration of Olanzapine was found. The court's examination focussed on who had been in contact with Z and who might have had the opportunity to administer the drug. Z was in the primary care of his mother at all material times and had contact with his father and his paternal grandmother from 12 noon to 4 pm on five occasions, the last having been 11 August.

An expert toxicologist was instructed to analyse the test results and to give an opinion on the window of opportunity. Although it was common ground that the half-life of the drug would vary between individuals, the question was whether a safe bracket or range of half-life predictions could be identified so that it could be used to interpolate a time for administration from the test results and timings that had been recorded (for the expert's evidence and calculations, see paras 12–17 of the judgment). Having considered the evidence the judge decided that Z's mother was the sole perpetrator. The mother appealed.

The mother's principal submission was that the judge had wrongly attributed a set time for the excretion of Olanzapine from Z's body and had wrongly conducted a calculation for the time of the likely dose which had purported to identify the mother as the sole perpetrator of its administration. The appeal was dismissed on the basis that:

(1) The judge had had opinion evidence before him, which he had accepted (and which had not been contradicted), which had predicted the effect

on a child of an administration during the father's last contact with Z. Balanced against that opinion evidence was the factual evidence that Z had not shown any signs of illness during the contact with his father and paternal grandmother, and perhaps more importantly, had not been reported by his mother to have been showing signs of illness when he had been returned to his mother's care on 11 August 2013. That had left the judge with two options: either Z's mother had failed to report Z's symptoms at that time, or the Olanzapine that had been identified by the test taken on 14 August 2013 had been administered after 11 August 2013.

(2) The judge's conclusion about the administration of the Olanzapine discovered in Z's system by the test taken on 14 August 2013 had, accordingly, been neither his own speculation nor an unwarranted calculation or deduction of his own. It had been a proper inference drawn from the available factual evidence and the uncontradicted scientific opinion evidence. His conclusion was, accordingly, unassailable. Given the material that he had had, the judge had been able to make a safe finding as to perpetration relating to the period from 11 to 14 August 2013. He had drawn inferences from that finding and other circumstances, including the symptoms reported on 21 July 2013, to come to the conclusion that the mother had been the perpetrator. It had not been a case of two or more improbable propositions having been inappropriately elided together to make a probable conclusion. The inherent improbability of a parent poisoning a child had done nothing to dislodge the actual evidence that had been available and relied upon by the judge.

**Comment:** A decision that turns largely on its facts and the evidence available to the judge at first instance, but also raises the issue of the court's approach when there is a potential pool of perpetrators by way of a split hearing. In his leading judgment Ryder LJ said that the decision to deal with the matter by way of a split hearing in the instant case cannot have been right given that the issue to be decided was perpetration in the context of an incident of harm, rather than whether the harm occurred. He referred to the guidance in *In the matter of S (a child)* [2014] EWCA Civ 25, [2014] 1 FCR 477 (at paras 27–31) which he described as 'repeatedly given by this court but just as repeatedly ignored', ie:

(1) A decision to have a 'split hearing', where discrete facts are severed off from their welfare context, is wrong in principle in public law children proceedings unless the basis for such a decision is reasoned so that the inevitable delay is justified. A split hearing is only justifiable where the delay occasioned is in furtherance of the overriding objective in the Family Procedure Rules 2010, SI 2010/2955, r 1.1.

(2) Even where it is asserted that delay would not be occasioned, the use of split hearings should be confined to those cases where there is a stark or discrete issue to be determined and where an early conclusion on that issue would enable the substantive determination (ie whether a statutory order was necessary) to be made more expeditiously.

(3) The reasons for that are, inter alia, that to remove consideration by the court of the background and contextual circumstances (including factors relevant to the credibility of witnesses), deprives the court of the very material (ie secondary facts) upon which findings as to primary fact and social welfare context are often based and tends to undermine the safety of the findings thereby made.

(4) A decision to undertake a split hearing should be reasoned in court at the case management hearing and the reasons should be recorded on the face of the case management order.

## APPEALS

### Whether serious procedural errors occurring

***Re D* (*children*) (*placement order: procedural irregularities on appeal*) *[2015] EWCA Civ 409, [2015] All ER* (*D*) *39* (*May*)**

**BFLS 3A[5501]–[5701]; CHM 11[411]; Rayden Noter up[T51.38]**

The appellant local authority commenced care proceedings in respect of five children, the youngest of which was L. Subsequently, another child, T, was born, who was the subject of separate proceedings that followed on from the main proceedings. The initial issue of proceedings rested almost entirely upon allegations by the four eldest children of physical abuse by way of over-chastisement. In October 2013, at a fact-finding hearing, District Judge Maughan (the district judge) made findings of fact which were largely in accordance with the children's allegations. On 27 June and 7 November 2014, care orders and placement for adoption orders were made in relation to, respectively, L and T. Three weeks after the making of the order of 27 June regarding L, the parents applied for permission to apply to revoke that order. The district judge, apparently with the agreement of the parents who were, at that point, acting as litigants in person, re-cast the application into one for permission to appeal against that order and then refused the application.

The parents approached the court office which issued an 'application notice' using Form D11 (designed for use within proceedings for divorce, nullity or judicial separation). The notice was stated to be a challenge of the decision regarding L's adoption and the refusal to allow the parents to apply to revoke the placement order. On 21 October, the case came before HHJ Plunkett (the judge). He treated the parents' application as an application for permission to appeal against the final orders made by the district judge on 27 June. The application was adjourned to 21 November. Very shortly before that hearing, the parents had issued a notice of appeal, in proper form, seeking to challenge the district judge's decision regarding T. The application for permission to appeal with respect to T was not formally listed before the judge on 21 November, although he was told of its existence. At the conclusion of the hearing, the judge adjourned the case to a further hearing, at which he indicated that he might hear additional submissions or move straight to judgment.

Further submissions were filed on behalf of the authority and the children's guardian, but neither of those documents touched upon the grounds that formed the basis of the judge's decision to allow the appeal. When the case came back, the judge handed down a written judgment in which he concluded that the fact-finding determination was not sustainable, primarily because the district judge had not considered whether one or more of the children who were making the allegations should be called to give oral evidence at the hearing. The judge was also critical of the district judge's failure, both in October 2013 and June 2014, to take any account of the information about retractions made by one or more of the children with respect to their allegations. He therefore granted permission to appeal and went on immediately to allow the appeal. The final care orders and placement for adoption orders were set aside in relation to both L and T. The local authority appealed.

The local authority contended that:

(1) there had been a number of procedural irregularities in the conduct of the appeal – consideration was given to *Re W (children) (family proceedings: evidence)* ([2010] 2 All ER 418) (*Re W*) and Part 30 of the Family Procedure Rules 2010, SI 2010/2955 (FPR 2010); and

(2) the judge had erred in law in holding that Art 6 of the European Convention on Human Rights and/or *Re W* had established a mandatory requirement on the district judge to consider the question of the children giving oral evidence, whether or not the point had been specifically raised by any of the parties.

The appeal was allowed on the basis that, inter alia:

(1) Appellate judges hearing an appeal in the Family Court are bound to apply the provisions of FPR 2010, Pt 30 and utilisation of the simple structure of Pt 30 is likely to assist the parties and the judge to process a challenge to a first instance decision in an effective and straightforward manner. The three core elements: grounds of appeal, permission to appeal and appeal hearing, should enable all involved in the proceedings to know with clarity what the issues are and what stage the process has reached at any particular time.

(2) Adherence to the requirements for the appeal notice to state the grounds of appeal, and for there to be no amendment of an appeal notice without the permission of the court, provides both flexibility and clarity to enable the basis of an appeal to develop but, at the same time, ensure that at each stage all those involved know what is, and what is not, a live issue that falls to be addressed within the appeal.

(3) If permission to appeal is granted on a basis outside the pleaded grounds, then those grounds should be amended by permission under FPR 2010, Pt 30.9 and the appeal can proceed with all parties fully aware of the situation. The fact that an applicant for permission to appeal is a litigant in person might cause a judge to spend more time explaining the process and the requirements, but that fact is not, and

should not be, a reason for relaxing or ignoring the ordinary procedural structure of an appeal or the requirements of the rules.

(4) The failure of the judge to ensure that the pleadings had kept pace with his developing thoughts, much more than simply being a slip in sticking to the rules, had led to a process which had been unclear and unfair to the parties and had given rise to genuine confusion. Further, the parents had been legally represented at the fact-finding hearing, yet the issue of calling any of the children to give oral evidence had not been raised with the district judge and it had not been, apparently, considered to be a matter to be brought on appeal immediately following the fact-finding hearing. The question of whether the parents should have been given an extension of time a year later to bring the point by way of appeal had, therefore, plainly arisen. In the absence of a process that had required the parents' appeals on that point to be properly pleaded, the issue of an extension of time had never sufficiently crystallised so that it had been addressed by the parties or the judge.

(5) It was all too plain that the procedure followed had departed so radically from the requirements of the rules that the process, taken as a whole, could not be regarded as either fair or effective. It was only just possible with the aid of the transcript to trace the development of the judge's thoughts upon the ground that was to become the basis upon which he had ultimately allowed the appeal and set aside the fact-finding decision. At no stage had any party, even the parents, made any submissions to the court on that ground. At no stage had the judge stated that he had been engaged upon hearing both the application for permission and the appeal itself during the November hearing. The court order expressly stated that the only issue being considered was that of permission to appeal. The supplemental written submissions and the judge's judgment demonstrated that the advocates and the judge had been totally at cross purposes as to the procedural status of the process in which they had been involved. Therefore, the process adopted by the judge had failed to afford a fair or proper hearing of the parents' appeals.

The Court of Appeal considered that while the court was entirely at one with the judge in identifying the potential importance of the issue of children giving oral evidence in a case such as the present, it differed from him in his elevation of that aspect of good practice to a free-standing obligation upon the court, breach of which established, almost of itself, that the whole fact-finding hearing had been conducted in breach of art 6. The judge had overstated the position and had done so without the support of any authority. While the approach taken by the district judge to the children's complaints had to fall to be considered as part of an analysis of the proceedings as a whole in the context of any fresh appeal, that one aspect, taken in isolation, had not of itself established a breach of art 6 as a matter of law and justified allowing the appeal on that ground alone. It followed that, in so far as the judge had considered that, as a matter of law, the district judge had been obliged to make her own determination on the question of

oral evidence from the children, and that a failure to do so had been, of itself, sufficient to render the proceedings unsafe and unfair, he had acted in error. Accordingly, the order of the judge would be set aside and the parents' appeals with respect to T and L would have to be reheard by a different tribunal.

**Comment:** A decision that brings clarity to the approach to be taken as to compliance with the FPR 2010 where a party is a litigant in person, in this case specifically as to Pt 30 but presumably with the potential for a wider application. Practitioners will be familiar with the harder line taken of late by the family judiciary as to compliance with the FPR 2010 (eg, *Re L (a child)* [2015] EWFC 15, [2015] All ER (D) 21 (Mar) as to bundles and *Re W (children)* [2014] EWFC 22, [2014] All ER (D) 25 (Aug) as to extension of timetables in public children cases).

The Court of Appeal applied the civil case of *R (on the application of Hysaj) v Secretary of State for the Home Department; Fathollahipour v Aliabadienisi; May v Robinson* [2014] EWCA Civ 1633, [2014] All ER (D) 165 (Dec) in which the following was said:

(1) shortage of funds does not provide a good reason for delay;

(2) the fact that a party is unrepresented is of no significance at the first stage of the enquiry when the court is assessing the seriousness and significance of a failure to comply with the rules: the more important question is whether there is a good reason for the failure which has occurred;

(3) whether there is a good reason for the failure will depend on the particular circumstances of the case, but the court cannot, or should not, accept that the mere fact of being unrepresented provides a good reason for not adhering to the rules; and

(4) in most cases, the court should decline to embark on an investigation of the merits and firmly discourage argument directed to them.

## FINANCIAL PROVISION

### Whether inheritance invalidated basis, or fundamental assumption, on which consent order made

***Critchell v Critchell [2015] EWCA Civ 436, [2015] All ER (D) 16 (May)***

**BFLS 4A[1471]; Rayden 1(1)[T18.35]**

The husband and wife separated. The husband moved out of the former matrimonial home, leaving the wife living there with their two children. He bought himself a home using £85,000 borrowed from his father and £63,000 taken on mortgage. The parties agreed the terms of a consent order which provided, inter alia, for the former matrimonial home, which was in joint names, to be transferred to the wife, subject to the mortgage on it, for which

she was to take over responsibility. There was to be a charge in favour of the husband for a lump sum equal to 45% of the net proceeds of sale of the property. The charge would not take effect until the earliest of four trigger events specified. Within a month of the consent order, the husband's father died, leaving him a sum of money. The wife sought to appeal against the consent order.

Relying on the principle in *Barder v Caluori* [1987] 2 All ER 440 (*Barder*), the wife's case was that the inheritance was a *Barder* event and invalidated the basis or fundamental assumption upon which the consent order had been made. Permission to appeal was granted. It was conceded that the second to fourth *Barder* conditions were satisfied, ie:

(1) that the new events occurred within a relatively short time of the order having been made;

(2) that the application for leave to appeal out of time was made reasonably promptly in the circumstances of the case; and

(3) that the grant of leave to appeal out of time did not prejudice third parties.

Thus, the issue on appeal was the first *Barder* condition, ie that a new event had occurred since the making of the order invalidating the basis, or fundamental assumption, upon which the order was made. The inheritance was agreed to be about £180,000 and, in addition, the husband's liability to repay the £85,000 to his father was extinguished. The judge considered that the consent order had been based upon need and that, whereas the wife's need had remained the same, the husband's inheritance meant that he no longer needed his share in the former matrimonial home. In those circumstances, she was satisfied that the *Barder* principle applied. The judge allowed the wife's appeal and varied the consent order by extinguishing the husband's charge over the former matrimonial home, which was to be the wife's sole property. The husband appealed.

The husband submitted that the first *Barder* condition was not satisfied and that the judge should not have interfered with the consent order. His inheritance had not so changed the picture, either in relation to the parties' assets or the family's needs, as to justify a finding that it had invalidated the basis, or fundamental assumption, on which the consent order had been made. Further, the object of the consent order had been to meet the needs of the wife; it had achieved that and that had not changed as a result of his inheritance. The judge had fallen into error, on his submission, by substituting her own view of what had been a fair order in the circumstances as they had been at the time of the hearing before her, when there had been no justification to interfere with the consent order.

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

(1) The judge had not erred in finding that the death of the husband's father and the husband's consequent inheritance had invalidated the basis or fundamental assumption upon which the consent order had

been made and had been correct to have analysed the consent order, as she had, as having been the only way, in the circumstances then prevailing, that the husband could be enabled to pay off his debts at a future date, leaving the parties in fairly equal capital positions in terms of the equity in their properties.

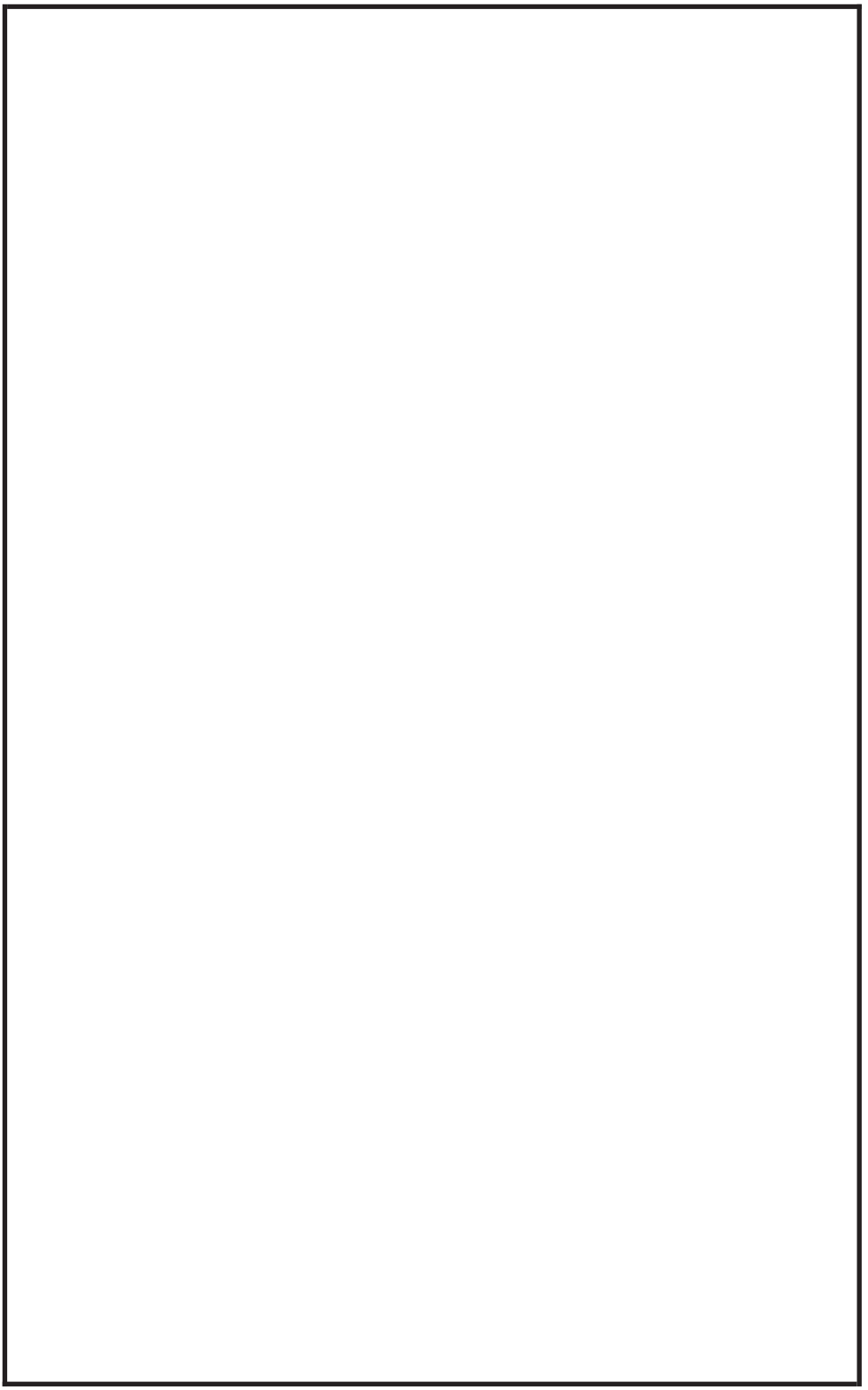
(2) The impact of the inheritance so soon after the hearing had been, as the judge had observed, that the husband no longer needed his interest in the former matrimonial home to discharge his indebtedness because it had either been wiped out (in the case of the debt to his father) or could be discharged from the inheritance (in the case of the mortgage).

(3) That had represented a change in the basis, or fundamental assumption, upon which the consent order had been made. It had not been so much that the value of the parties' assets had gone up but, rather, there had been a fundamental change in the needs for which provision had had to be made. The judge had, therefore, been entitled to substitute her own order for the consent order and the order she had devised had been wholly unexceptionable.

**Comment:** The instant case is a rare example of a successful *Barder* appeal and turned on the basis on which the original order had been framed so as to meet the parties' needs together with the relatively short period of time within which the supervening event occurred (within a month) and the prompt application by the wife (within six months). More commonly an appeal on *Barder* grounds will not succeed; in *Richardson v Richardson* [2011] EWCA Civ 79, [2011] 2 FCR 301 Thorpe LJ said (at para 86):

> 'Cases in which a *Barder* event, as opposed to a vitiating factor, can be successfully argued are extremely rare, should be regarded by the specialist profession as exceedingly rare, and should not be thought to be extendable by ingenuity or the lowering of the judicially created bar.'

More general changes in the value of assets are unlikely be sufficient, as explained in *Myerson v Myerson* [2009] EWCA Civ 282, [2009] All ER (D) 05 (Apr): '… the natural process of price fluctuation whether in houses, shares or property, and however dramatic, do not satisfy the *Barder* test.' Foreseeable, even if mistaken, events will also not suffice (per *Walkden v Walkden* [2009] EWCA Civ 627, [2009] All ER (D) 266 (Jun) and *Judge v Judge* [2008] EWCA Civ 1458, [2009] 2 FCR 158 as to a liability that was a 'known unknown').



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