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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APPEALS

Matters to be considered on an application for permission to appeal out of time

***Re H* (*children*) (*application to extend time: metrics of proposed appeal*) *[2015] EWCA Civ 583, [2015] All ER* (*D*) *140* (*Jun*)**

BFLS 3A[5705]; CHM 3[143]; Rayden Noter up [T51.57]

Prior to the commencement of care proceedings, the father had four of his children in his care, including the youngest, W. The mother had accepted that

she was unable to care for the children. The local authority applied for full care orders in relation to all four children. Its plan was for the eldest two children to be placed in long-term foster care, but for the younger two to be placed for adoption. On 19 September 2013, the district judge rejected the authority's proposals as to the three eldest children and, instead, entrusted them to the care of their father under supervision orders. However, he concluded that a full care order should be made in respect of W and he made an order authorising the authority to place W for adoption.

On 30 October, the father issued a notice of appeal, 20 days outside the 21 days provided for filing a notice of appeal under the Family Procedure Rules 2010 (FPR 2010), 30.4(2)(b). The order in respect of that application stated that the appeal was out of time and there were no grounds set out as to why that time should be extended. In any event, if the notice of appeal had been lodged in time, permission would have been refused. Despite the indication that an oral renewal of the permission application could be made, the father did not apply for an oral renewal hearing of his permission application within the seven days established by FPR 2010, 30.3(6).

In January 2014, W was placed with prospective adopters who, in May 2014, issued an adoption application. The father subsequently applied for leave to oppose the making of an adoption order. The application was refused. The father sought permission from a circuit judge to appeal that refusal. He also applied to renew the application for permission to appeal the original placement and care orders made in September 2013. In the circumstances, it was necessary for him to apply to the court for an extension of the time for appealing by invoking the jurisdiction in FPR 2010, 4.1(3)(a). In November 2014, the applications were heard. The judge approached the application to extend time as being one for 'relief from sanctions' to which FPR 2010, 4.6 applied. Permission to appeal against the September 2013 orders was refused, but the appeal on the issue of opposition to adoption was successful. The father was subsequently given leave to oppose the adoption application. The father appealed against the judge's decision regarding his proposed appeal against the September 2013 order.

The main issue was: when considering an application to extend the time for appealing in a family case relating to children, what regard, if any, should be had by the judge to the overall merits of the proposed appeal. The father submitted that the judge had erred in failing to evaluate the merits of the proposed appeal and to broker that evaluation into his overall determination as to whether relief from sanctions should be granted. He contended, *inter alia*, that the overall merits of the underlying appeal were extremely strong and he pointed to the lack of any real evaluation of the case regarding W in the district judge's judgment. The authority conceded that the father's submissions as to the underlying merits of the appeal would succeed if permission to appeal were granted. It accepted that, in having regard to 'all the circumstances of the case', a judge might have some regard to the underlying merits. However, it submitted that the merits should not become a magnetic factor which inexorably dictated the outcome of the sanctions relief application.

The appeal was allowed on the basis that:

(1) While the new statutory provisions regarding the requirement for every public law child case to be disposed of within 26 weeks and the extension of that time limit did not expressly apply to appeals, the timetable for any appeal in a public law child case plainly had to be established in a manner which was compatible with the general principle that any delay in determining any question with respect to the upbringing of a child was likely to prejudice the welfare of the child, read in the light of the new statutory 26-week deadline.

(2) In that context, the general time limit of 21 days for the issuing of civil appeals, which applied to appeals within and from the Family Court, took on an enhanced importance. As a matter of law, if no notice of appeal was lodged during the 21 days permitted for the filing of a notice, a local authority should be entitled to regard any final care order and order authorising placement for adoption as valid authority to proceed with the task of placing the child for adoption. If that process had to be put on hold to allow a late application for permission to appeal to be determined, the impact upon the welfare of the child was also too plain to contemplate.

(3) While accepting the inevitability of that source of, in some cases, highly adverse impact on the welfare of a child, every effort should be made to avoid its occurrence.

(4) It was of note that while the underlying merits of a proposed appeal were not specified as a factor in the list in FPR 2010, 4.6(1), in having regard to all the circumstances of the case, a judge might have some regard to the underlying merits.

In agreeing that permission to appeal should have been granted in the present case, it was regarded as an exceptional case. The significance of the manner in which W's life had moved on in consequence of the district judge's orders was of a high order. On the basis that the district judge's order stood, W had been welcomed into the family of her prospective adopters on the basis that that was to become her family for life and they and she had, no doubt, engaged upon establishing a close and loving relationship of that high order. On the particular facts of the case, however, those very substantial factors were outweighed by two opposing factors, namely, the acceptance that the district judge's analysis was insupportable and, second, the fact that, on a subsequent occasion, the judge had granted the father leave to oppose the adoption and there was to be a full re-evaluation of W's welfare needs in the light of all of the present circumstances. The judge had fallen into error in two respects. He had underestimated the underlying merits of the father's appeal, considering that the new grounds of appeal had been merely arguable when, in truth, they had been unanswerable. That flawed analysis had caused him to attribute no real weight to the underlying merits in his relief from sanction analysis. The present case was one where the court could see, without much investigation, that the proposed grounds of appeal were very

strong and the merits had a significant part to play when it came to balancing the various factors that had to be considered.

The final care order and placement for adoption orders were set aside and replaced with an interim care order.

Comment: a decision of interest as to compliance with FPR 2010 by litigants in person, the civil decision in *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) was applied, in which the Court of Appeal ruled that the mere fact of being unrepresented does not provide a good reason for not adhering to the rules. In addition the court had regard to the approach to be taken when an appeal is made out of time, and the impact of the underlying merits of the appeal when regard is had to all the circumstances of the case. The appellant was successful in the instant case but it should be noted that the case was described as 'exceptional' and that a less meritorious application for permission to appeal made out of time will be unlikely to succeed – the point was made that the fact that an application relating to a child in public law procedure was out of time should be regarded as a very significant matter when deciding whether to grant relief from sanctions or an extension of time for appealing. Also highlighted was the 26-week timescale now applicable in public children proceedings and in what way the aim of concluding proceedings within that period may be impacted by an appeal. The Court of Appeal suggested a practical solution ie, for the judge, in every case where a final care and placement for adoption order is made, to spell out to the parties the need to file any notice of appeal within 21 days and for the resulting court order to record that that information had been given to the parties by the judge.

MCKENZIE FRIENDS

Whether civil restraint order should be set aside

Re Baggaley [2015] EWHC 1496 (Fam), [2015] All ER (D) 149 (Jun)

BFLS 1[4874]; Rayden 1(1)[T4.47]

B was a pertinacious litigant. He was also the moving spirit behind two limited liability companies that provided legal advice and legal services. B was also a McKenzie friend and had a *Facebook* account. B had no relevant professional training or qualifications and his previous employment was in the 'security industry' as a bouncer. In 2011, B was involved in 12 actions in the Nuneaton County Court. A general civil restraint order had been made against B and the order, which listed the county court actions, recited that B had persistently issued claims which had been totally without merit and had been struck out and provided that B was forbidden for a period of two years from the date of the order (until 16 March 2014) from issuing any new application appeal or other process in any of the actions and from issuing any further proceedings or further applications in any action.

The order was made in B's absence, and accordingly drew his attention to the fact that he could apply to set it aside and that any such application should be made within seven days. No such application was made. Between October and December 2013, B acted on behalf of the mother in private law proceedings. Before the hearing there had been an incident in the court corridor involving B and the father's counsel. There were also other allegations and witness of B's behaviour. A judge considered B's behaviour and whether to extend the civil restraint order. He decided that it was not appropriate to extend that order. In relation to B's behaviour as a McKenzie friend, he said that B's behaviour in court and out of court had been unacceptable and demonstrated a total lack of understanding of the role of a McKenzie friend. The judge made a civil restraint order preventing him from acting as a McKenzie friend in any family proceedings. The order was expressed to be an interim order. B applied to set aside both orders. The matters came before another judge who decided that the matter could not be finally determined then and there, he did however made a further interim order on February 2014, extending the restraints imposed on B. The order was intended to control B's conduct when acting for others and not when acting as a litigant on his own behalf.

The court ruled that:

(1) The basis on which the general civil restraint order had been made was that B had 'issued' the county court actions, all of which had been 'struck out' as being 'totally without merit'. An examination of the files showed that that had not been entirely so. The court did not see how it could properly extend or continue that order. The basis set out in the order, on the facts meant that the judge had not been justified in doing so. Although B's application to set aside the order had been made long out of time, the order could not stand.

(2) On the evidence, B had not understood, or, if he had done had chosen not to confine himself to, the proper role of a McKenzie friend. The court corridor was not the entrance to a nightclub, and those going about their lawful business in a court building did not expect to be treated as if by a 'bouncer'. The court was not just dealing with a single 'one off' incident but was confronted with a lengthy list of incidents the cumulative effect of which left the court in no doubt that the court had to exercise its inherent powers not just to protect itself but also to protect those lawfully going about their business from behaviour which was inimical to the proper and efficient administration of justice. As a McKenzie friend, B's was serious and an order was required.

The court set aside the first order and extended indefinitely the later order.

Comment: with an increasing numbers of litigants in person, there has been a consequential increase in McKenzie friends. The instant case dealt with an extreme set of facts, however it serves as a reminder of the ability of the court to make a civil restraint order against a McKenzie friend in an appropriate case:

(1) Civil Procedure Rules 1998, 3.11, supplemented by PD3C, enables the court to make a civil restraint order, but only against 'a party to proceedings' who has 'issued claims or made applications which are totally without merit'. This jurisdiction is not therefore exercisable against a McKenzie friend, because a McKenzie friend is not a party to the proceedings in which they are assisting.

(2) Pre-dating the existence of the statutory powers, the High Court has a separate inherent jurisdiction to prevent behavior such as that in the instant case. This jurisdiction is, in principle, available not only against a party to proceedings but also against a non-party, such as a McKenzie friend (see *Paragon Finance plc v Noueiri (Practice Note)* [2001] EWCA Civ 1402, *Her Majesty's Attorney General v Tobiasinsky* [2004] EWHC 1111 (Admin), and *Her Majesty's Attorney General v Chitolie* [2004] EWHC 1943 (Admin)), ie the court can '… prevent an individual acting as a "McKenzie friend" from continuing to act as such where the assistance given is inimical to the efficient administration of justice' (per Silber J in *Her Majesty's Attorney General v Tobiasinsky*).

(3) The jurisdiction is not confined to the bringing (or assisting in the bringing) of hopeless claims and may be exercised because of and to restrain personal misbehaviour on court premises (see *HM Attorney-General v Ebert* [2001] EWHC Admin 695).

(4) In cases where a party is assisted by a McKenzie friend, regard should always be had to *Guidance for McKenzie Friends (Civil and Family Courts)* [2010] All ER (D) 169 (Jul) and the recent guidance issued by the Bar Council, CILEx and the Law Society regarding litigants in person in June 2015.

PRIVATE CHILDREN

Impact of allegations of domestic abuse on contact

***Re A* (*a child: wardship: fact finding: domestic violence*) *[2015] EWHC 1598* (*Fam*), *[2015] All ER* (*D*) *94* (*Jun*)**

BFLS 3A[4656.1]; CHM 2[372]; Rayden Noter up [37.90]

The parents met in 2004 and were married in India in 2005. In 2006, they came to England on six-month visas. They became 'overstayers' when those visas expired and they decided not to return. In 2007, their only child, A, was born. It was the mother's case that after about three months the marriage became unhappy – a situation which continued until the final separation in 2013. The father, by contrast, maintained they were very happy until about 2011. In 2013, the mother left the marital home for a few weeks. At about that time, divorce proceedings were begun and there was an attempt at salvaging the marriage. The mother maintained, but the father denied, that she moved out because he beat and kicked her out of the house. According to the father's evidence, the mother returned to the family home in early March.

In 2013, a ticket was purchased for the mother to fly alone to India on 8 April. Overnight between 23 and 24 March there was an incident between the father and mother at the family home. The police were involved and the father was charged with common assault. On 28 March, the mother made a police witness statement making clear that she did not wish to go to court or give evidence against her husband. The circumstances of the mother's departure for India on 8 April were contested. She claimed she was tricked into going on the strength of her husband's promise that he and their son would follow. The father's case was that although he earnestly wished to re-join his wife he was prevented from so doing as the result of difficulties in securing a passport for A. A lived with his father, along with others who shared that household, between April 2013 and October 2014. In July 2014, the mother travelled to England and sought asylum on the basis that while in India and living with the paternal family she was physically abused.

On 26 September 2014, the mother attended at A's school. She met the father and A at the gates and asked to spend time with A. The father agreed. Between then and mid-October, there were two or three visits including one occasion of overnight contact. On 17 October, there was an incident between the parents in A's presence which resulted in the mother calling the police. The father was arrested for common assault. He was released on bail with conditions that he did not contact the mother or A. A was interviewed by the police on 28 October. On 29 October, the father issued wardship proceedings seeking A's return to his care and various orders so as to prevent the mother from taking A abroad. In the context of the wardship proceedings it was necessary to resolve disputed allegations of serious domestic violence as well as abusive behaviour towards the child himself.

The mother described the father's nature as very aggressive and violent. The father's claim was that in the early part of the marriage he and the mother had been happy but that the relationship had deteriorated. The father denied he had ever been violent. He said he had been told by a cousin that the mother was having an affair. It was the father's case that none of the mother's allegations against him were true. He contended that he never saw the mother with any marks or injuries. The father's claim was that the mother had made up stories against him.

The court ruled that it was established law that when deciding the issue of residence or contact the court should, in the light of any findings of fact, apply the individual matters in the welfare checklist with reference to those findings; in particular, where relevant findings of domestic violence had been made, the court should consider any harm which the child had suffered as a consequence of that violence and any harm which the child was at risk of suffering if an order for residence or contact was made and should only make an order for contact if it could be satisfied that the physical and emotional safety of the child and the parent with whom the child was living could, be secured before during and after contact.

The parent against whom allegations were made, did not have to prove anything. The standard of proof in finding the facts necessary to establish

any factual issue in the case was the simple balance of probabilities, nothing more and nothing less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof in determining the facts. On the evidence, A had suffered the trauma of witnessing events of considerable violence between his parents. There was not punitively harsh treatment of A of the kind that would merit the term physical abuse. The court was certain that from early on in the marriage, as the mother claimed, there was real unhappiness caused by the father's actual violence. Further, the father had admitted in cross-examination that he had told lies.

Whether it would be in A's best interests to seek to rebuild some kind of relationship with his father would depend on the father's reaction to the judgment.

Comment: the court applied the decision in *Re W (children) (contact order: domestic violence)* [2012] EWCA Civ 528, [2012] All ER (D) 125 (Aug) in which the Court of Appeal emphasised that the court should consider the conduct of both parents towards each other and towards the child with particular regard to:

(1) the effect of the domestic violence which had been established on the child and on the parent with whom the child was living;

(2) the extent to which the parent seeking residence or contact was motivated by a desire to promote the best interests of the child or might be doing so as a means of continuing a process of violence, intimidation or harassment against the other parent;

(3) the likely behaviour during contact of the parent seeking contact and its effect on the child;

(4) the capacity of the parent seeking residence or contact to appreciate the effect of past violence and the potential for future violence on the other parent and the child; and

(5) the attitude of the parent seeking residence or contact to past violent conduct by that parent; and in particular whether that parent had the capacity to change and to behave appropriately.

See also the decision in *Re A (a child) (supervised contact order: assessment of impact of domestic violence)* [2015] EWCA Civ 486, [2015] All ER (D) 198 (May) at page 11 of this Bulletin as to the application of the principles set out by the Court of Appeal in *Re L (a child) (contact: domestic violence)* [2000] 4 All ER 609 regarding contact in cases involving domestic abuse.

FINANCIAL PROVISION

Improperly obtained documents

Arbili v Arbili [2015] EWCA Civ 542, [2015] All ER (D) 228 (May)

BFLS 4A[2130]; Rayden Noter up [T17.51]

In 2005, the husband and wife married. They had one child, A. In 2012, decree nisi was pronounced. A's main residence was to be with the wife. In

financial remedy proceedings, the judge made transfer of property, lump sum and periodical payments orders to the wife and for the benefit of A (the order). He calculated that the division resulted in a 54% division in favour of the wife, but considered that the small departure from equality was justified by need. Subsequently, the husband sought to set aside the order on the basis of information illegally obtained from the wife's computer account. The judge refused to grant his application to adjourn the proceedings to enable him to file evidence of the contents of the electronic documents he had seen before surrendering them to the wife's solicitors. His application to set aside the order on the basis of the alleged material non-disclosure by the wife was effectively dismissed. The husband appealed against both the order and the effective dismissal of his application to set aside the order.

The husband challenged the order on the basis of an unfair division of the assets predicated on, inter alia, the unequal treatment of two French properties, one, Villa 15, nominally owned by the husband but occupied by his parents, and the other, St Paul de Vence, owned by the wife's parents, but in usufruct and subject to a family trust, which would benefit the wife and her two siblings equally on their parents' death. In that regard, the husband contended that, on the one hand, he had been found to have been morally responsible for housing his parents, but the funds locked into Villa 15 had seemingly been taken into account. On the other, St Paul de Vence had been left out of account. The husband's challenge to the effective dismissal of his set aside application relied upon an alleged procedural irregularity, in that the judge had refused: (i) to allow him an adjournment to file a statement, despite a significant triable issue being raised on the papers; and (ii) to read the annex to a position statement, which had set out his instructions of what had been contained within the wife's e-mail account. Consideration was given to Pt 1 of the Family Procedure Rules 2010 (FPR 2010).

The appeals were dismissed on the basis that:

(1) As to the appeal against the order, there was nothing in the grounds of appeal that amounted to anything other than a complaint that the judge had not found in favour of the husband's case. There was no viable support for any argument to the effect that the judicial evaluation of the evidence or the subsequent exercise of discretion had been perverse. The only possible arguable issue could be the apparent disparity in the treatment of the two French properties. There was no discernible legitimate and fair reason to adopt a different approach to the properties. The judge's explanation, that he had differentiated between the two since the wife's shared ownership with her siblings was to be contrasted with the husband's 'simple ownership', was not sufficient. However, reading the judgment on the financial award as a whole undoubtedly established that the judge had considered it to have been a 'needs' case. The concept of sharing had to cede to the wife and A's needs, 'generously interpreted' in terms of their accommodation. The reality of the present case clearly indicated that the judge had assessed the fairness of the case to be needs not equality. In those circumstances, the discretion afforded to the judge had been able to

have been legitimately deployed without the need to create an illusion of the same. He had given adequate reason for the departure from equality.

(2) As to the appeal against the effective dismissal of the set aside application, the husband's argument simply did not withstand the reasoned exposition by the judge of the factors in the particular application which had led him to dismiss it without recourse to the material and which accorded with the guidance in previous authority. The manner in which the materials had been obtained, the husband's persistent failure to candidly describe the means utilised to do so, the wife's subsequent and corroborated disclosure, apparent lack of or minimal relevance to the issues in the case, the delay and the costs – financial and emotional – had all pointed to stopping the matter from proceeding further. The judge's conscientious inquiry into the facts and relevant jurisprudence was well demonstrated in the course of the proceedings and his judgment then delivered. The time taken in determining the matter did not lend itself to any suggestion of a peremptory disposal, but indicated robust case management, as required by FPR 2010, Pt 1. The judge's decision had fallen well within the reasonable band of discretion afforded to him. It had not been incumbent upon him to read the materials in order to reject them. It had not been necessary for him to afford the husband additional time to put his application in order, if he could.

Comment: in the instant case the court applied *Imerman v Tchenguiz* [2011] 1 All ER 555. The husband's set aside application had been dismissed in accordance with principles established in *Imerman* (which swept away the previous *Hildebrand* approach) which are that:

(1) any of the unlawfully obtained materials must be returned;

(2) the recipient's duty to make any relevant disclosure arising from them within the proceedings is triggered; and

(3) the ability of the wrongdoer, or their principal, to challenge the sufficiency of the disclosure, is confined to evidence of their memory of the contents of the materials but is admissible.

In *Arbili* the court noted that while the court can admit improperly obtained evidence, it has power to exclude it if unlawfully obtained, including the power to exclude documents whose existence has only been established by unlawful means. In exercising that power, the court will be guided by what is necessary to dispose of the application fairly or with regard to costs. Factors to be taken into account will include: the importance of the evidence; the conduct of the parties; and any other relevant factors, including the normal case management aspects. Ultimately, this requires the court to carry out a balancing exercise.

DOMESTIC ABUSE

Whether judge ignoring guidance on impact of domestic abuse

***Re A* (*a child*) (*supervised contact order: assessment of impact of domestic violence*) *[2015] EWCA Civ 486, [2015] All ER* (*D*) *198* (*May*)**

BFLS 3A[1783]; CHM 9[54]; Rayden 1(1)[T39.73]

The appeal concerned R, who was three years old. The mother and father had married in 2009, but finally separated in January 2014. Prior to his last contact with R in February 2014, the father applied for a contact order, under s 8 of the Children Act 1989 (ChA 1989). The mother filed a form, setting out details of the three incidents of domestic violence subsequently found proved. In March, the father issued a revised application, seeking greater time with R under a shared residence order. Later that month, the mother reported to the police that she had been raped and sexually assaulted in the course of her marriage, and those were the allegations which she subsequently made within the family proceedings.

At a fact-finding hearing in September, the judge found that the father had been guilty of abusive sexual conduct towards the mother, including marital rape, during the course of their marriage. He also made more limited findings as to three incidents of 'low level' domestic violence and, more generally, to the father's inability, at times, to control his anger. The judge concluded that there was not a sexual risk to R and there was no evidence, and no finding was sought, that there was a physical risk to R or the mother. Therefore, the findings did not rule out direct contact. He stated that he was not minimising anything which he had found. At the subsequent welfare hearing in January 2015, the judge had a report from a psychiatrist, M, regarding the mother. M's key finding was that the mother had experienced significant problems with her mental health as a result of the abuse she suffered during her relationship with the father, which would fit with a diagnosis of post-traumatic stress disorder. M's advice was that the mother required cognitive behavioural therapy (CBT) and suggested that there should, if possible, be six sessions of CBT before the introduction of contact. The judge accepted the diagnosis provided by M and that the mother should have therapy. The judge made an order providing for R to have supervised contact with her father once a week, initially for one hour. The mother appealed and sought to replace the decision with an order for no direct contact between father and R for the time being or at least until she had undertaken a course of CBT.

The mother submitted, first, that, despite having made significant findings of fact against the father, the judge had gone on, at the welfare hearing, systematically to minimise the sexual abuse and had failed to take any account of the multi-dimensional (sexual, physical, emotional and psychological) and prolonged nature of that abuse. In doing so, the judge had ignored the guidance on the impact of domestic abuse in *Re L (a child)*

(contact: domestic violence) [2000] 4 All ER 609 (*Re L*) and paras 35–37 of the Family Procedure Rules 2010, PD 12J. Second, the judge had failed to give any, or sufficient, consideration to the consequent risks posed by the father either to R or the mother, beyond the identified problem of impact on her mental health. Third, the judge had failed to give sufficient weight to the psychiatric evidence and, in his balancing exercise, had effectively set it aside because it offered no concrete prediction of how the already extant adverse impact might have been made worse.

The appeal was dismissed.

(1) Any court dealing with a case where domestic violence or abuse was established was required to afford appropriate weight to such findings in accordance with *Re L* and to conduct a risk assessment in accordance with paras 35–37 of PD 12J. So that there could be no doubt that the court had approached matters in the required manner, it was wise for some express reference to be made, at least, to PD 12J in the judgment or record of decision. In some cases, the circumstances might justify descending to detailed reference to the terms of paras 35–37 of PD 12J in the judgment. The judge had not made any express reference to *Re L* or to PD 12J, however, it could be seen that, notwithstanding the lack of any express reference to those provisions, the judge had conducted his analysis in a manner which had been fully compatible with those requirements.

(2) It was hard to accept the submission that the judge had proceeded to determine the welfare outcome without any real regard to the serious findings that he had made against the father. From the mother's, erroneous, perspective, in which she continued to hold to allegations, or aspects of the factual matrix, which had not been found proved by the judge, the judge's approach, which was not to take account of such matters, might seem, therefore, to minimise them. However, those matters, which almost entirely related to the physical, rather than sexual, findings could not be taken into account in the context of the present appeal in the absence of any appeal by the mother against the fact-finding judgment itself.

(3) In relation to the physical findings, those were appropriately accepted to have been 'low level' and could not, of themselves, constitute a reason for refusing face-to-face contact between the father and R. The concluding remarks made by the judge at the end of the fact-finding judgment had not been anything other than a justified and sensible observation to the effect that the findings made did not establish that the father presented as any sexual or physical risk to R, or as a continuing physical risk to the mother. The judge expressly said that he was not minimising what he had found, but he also stated that those findings did not rule out direct contact. There was plainly a difference between 'not ruling out' direct contact and actually ordering the resumption of contact. With respect to the latter, the judge had said nothing at the fact-finding stage and his judgment at that stage did not

indicate that he had reached an improperly premature conclusion on the issue. Having analysed the central arguments in the mother's appeal, it was clear that the judge had given full and proper consideration to each of the relevant factors necessary for the risk assessment required by ChA 1989, s 1 and PD 12J. His conclusion that face-to-face contact was in R's best interests, in a supervised setting, had been justified on the basis of that risk assessment and, in the context of an appeal, it was a conclusion that had been well within the range of justifiable welfare determinations.

(4) It was not correct to say that the judge had failed to give the psychiatric opinion sufficient weight. The opinion featured prominently in the judgment and was the only substantial factor on the other side of the balance of whether contact should re-commence immediately. In the end, the judge had concluded that it had been outweighed by the need not to delay and the judge's pragmatic appraisal of just how long the process of establishing therapy for the mother would take. That had been a decision that the judge had been entitled to take and the fact that he had decided against the psychiatric opinion did not establish that, in having done so, he had failed to accord proper regard to it.

Comment: in addition to a consideration of FPR 2010, PD 12J, the court also applied the Court of Appeal decision in *Re L (a child) (contact: domestic violence)* [2000] 4 All ER 609 in which the following principles were set out:

(1) The general principle that contact with the non-resident parent is in the interests of the child may sometimes have discouraged sufficient attention being paid to the adverse effects on children living in a household where violence has occurred. It will be necessary to scrutinise allegations of domestic violence, which may not always be true or may be grossly exaggerated.

(2) If there is a firm basis for finding that violence has occurred, psychiatric advice becomes very important. There is not, however, nor should there be, any presumption that, on proof of domestic violence the offending parent has to surmount a prima facie barrier of no contact.

(3) As a matter of principle, domestic violence of itself cannot constitute a bar to contact. It is one factor in the difficult and delicate balancing exercise of discretion. The court deals with the facts of a specific case, in which the degree of violence and the seriousness of the impact on the child and on the resident parent have to be taken into account.

(4) In cases of proved domestic violence, as in cases of other proved harm or risk of harm to the child, the court has the task of weighing in the balance the seriousness of the domestic violence, the risks involved and the impact on the child, against the positive factors, if any, of contact between the parent found to have been violent and the child. In this context, the ability of the offending parent to recognise their past conduct, to be aware of the need to change and to make genuine efforts to do so, will be likely to be an important consideration.

(5) The court always has the duty to apply the principle in ChA 1989, s 1, namely that the welfare of the child is paramount.

(6) The court should consider the conduct of both parties towards each other and towards the children, the effect on the children and on the residential parent of the violence, and the motivation of the parent seeking contact.

(7) On an application for interim contact, when the allegations of domestic violence have not yet been adjudicated upon, the court should give particular consideration to the likely risk of harm to the child, whether physical or emotional, if contact is granted or refused. The court should ensure, as far as it can, that any risk of harm to the child is minimised and that the safety of the child and the residential parent is secured before, during and after any such contact.

See also the decision in *Re A (a child: wardship: fact finding: domestic violence)* [2015] EWHC 1598 (Fam), [2015] All ER (D) 94 (Jun) at page 6 of this Bulletin regarding the significance of the behaviour of the parents towards each other in such cases and the application of *Re W (children) (contact order: domestic violence)* [2012] EWCA Civ 528, [2012] All ER (D) 125 (Aug).

INHERITED ASSETS

Whether inheritance invalidated basis or fundamental assumption of consent order

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

BFLS 4A[1471]; Rayden 1(1)[T18.36]

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 later came to terms about ancillary relief. A consent order was made 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 was not to bite until the earliest of four trigger events.

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*), her case was that the inheritance was a *Barder* event, which 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. Thus, the issue on appeal was the first

Barder condition and the judge, therefore, focused upon whether the husband's inheritance had invalidated the basis of the consent order. The inheritance was agreed to be about £180,000 and, in addition, such liability as the husband had 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.

He 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 appeal was dismissed on the basis that:

(1) The judge had not erred in having found 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.

(2) The judge 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.

(3) 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). That had represented a change in the basis, or fundamental assumption, upon which the consent order had been made.

(4) 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: a relatively rare example of a successful appeal on *Barder* grounds. The four conditions to be satisfied are that:

(1) new events must have occurred since the making of the order invalidating the basis, or fundamental assumption, on which the order was made, so that, if leave to appeal out of time were to be given, the appeal would be certain, or very likely, to succeed;

(2) the new event occurred within a relatively short time of the order being made;

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

(4) the grant of leave to appeal out of time will not prejudice third parties who had acquired, in good faith and for valuable consideration, an interest in the property which was the subject matter of the relevant order.

In the instant case the parties agreed that all but the first condition were satisfied, and the court found that the first condition was satisfied in addition, ie the fundamental assumption on which the order was made was undermined by the husband's inheritance in that the husband 'had no need of his interest' in the family home and therefore the 'basis of the [original] order was wrong'. It remains, however, that an appeal on *Barder* grounds should be approached with caution and in *Critchell* Black LJ issued a reminder that a successful *Barder* appeal will be rare and exceptional.

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