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Butterworths Family and Child Law Bulletin

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Butterworths Family and Child Law Bulletin provides an immediate updating service for the main text of *Butterworths Family Law Service* and *Clarke Hall and Morrison on Children*. The Bulletin is published every month and sent to subscribers to those publications and is also available to download from LexisWeb (www.lexisweb.co.uk).

References to BFLS and CHM above each case are to the relevant paragraphs in *Butterworths Family Law Service* and *Clarke Hall and Morrison on Children*. References are also included, where relevant, to *Rayden & Jackson on Divorce*: these cross-references are to the bound volumes of *Rayden*, unless otherwise indicated, in which case they are to the looseleaf Noter-up Service.

Butterworths Family Law Service Please file *Butterworths Family and Child Law* Bulletin 202 immediately after the Bulletins guide card, and in front of Bulletin 201. **Remove Bulletin 190**. If desired, Bulletin 190 may be retained outside the binder for future reference. Binder 7 should now contain Butterworths Family and Child Law Bulletins 191–202.

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SUMMER BUDGET 2015

Contributed by Sarah Deeks, FCA, LLB, tax editor of Butterworths Family Law Service.

Following the General Election in May 2015 the Chancellor of the Exchequer, George Osborne delivered a Summer Budget on 8 July 2015. Finance Bill 2015 was published on 15 July 2015. The following notes summarise the principal changes to the taxation of families.

Income tax

Tax Rates and Basic Rate Threshold 2016/17 (Revised) and 2017/18

BFLS 4A[4014]

The rates of income tax will not increase above a basic rate of 20%, higher rate of 40% and additional rate of 45% for the duration of the Parliament in England, Wales and Northern Ireland.

The basic rate threshold will be £32,000 in 2016/17 and £32,400 in 2017/18. As a result no one will pay higher rate tax unless their income is above £43,000 (2016/17); £43,600 (2017/18).

Dividend Allowance – 2016/17

BFLS 4A[4016]

From 6 April 2016 the dividend tax credit will be replaced by a £5,000 dividend allowance for all taxpayers. This means that all individuals can receive up to £5,000 of dividend income tax-free. Where dividend income exceeds the allowance the rates of tax will be 7.5% for basic rate taxpayers, 32.5% for higher rate taxpayers and 38.1% for individuals paying additional rate tax.

Personal Allowance – 2016/17 (Revised) and 2017/18

BFLS 4A[4040]–[4046]

The personal allowance for 2016/17 will be £11,000 instead of the previously announced figure of £10,800. The personal allowance will rise to £11,200 in 2017/18. The governments' aim is for the personal allowance to be £12,500 by 2020 and once it reaches this level an individual working 30 hours a week on the National Minimum Wage won't pay any income tax.

Restricted Pension Annual Allowance for Top Earners – 2016/17

BFLS 4A[4285]

Individuals with income including pension contributions of over £150,000 (£110,000 excluding pension contributions) will have the tax relief on their pension contributions restricted from 6 April 2016 by tapering the annual allowance by up to £30,000 (from £40,000 to £10,000). The three-year carry forward rules for unused annual allowance continue to apply subject to special rules for 2015/16. Consultation will take place on wider reform of the tax relief on pension contributions.

Annual Investment Allowance

BFLS 4A[4290.11]

From January 2016 the annual investment allowance will be £200,000.

Childcare Payments

BFLS 4A[4290.25]

The childcare payments scheme due to come into effect from autumn 2015 will not now be introduced until early 2017 as the result of an unsuccessful challenge to the legality of the measures in the Supreme Court by organisations involved in the existing Employer Supported Childcare scheme (*Edenred (UK Group) v HM Treasury* [2015] UKSC 45).

Non-Domiciles and the Remittance Basis Charge

BFLS 4A[4487.10]

From April 2017 permanent non-domiciled status will be abolished. From then on anyone who is UK resident for 15 out of the previous 20 years is considered to be UK domiciled and an individual born in the UK to UK domiciled parents cannot claim non-domiciled status if they are UK resident.

Where the remittance basis charge applies the government will not introduce a minimum claim period as previously suggested.

Anti-avoidance

General Anti-Abuse Rule Penalties (*GAAR*)

BFLS 4A[4305]

Penalties for breach of GAAR will be introduced together with tougher measures such as publishing the names of serial avoiders.

Inheritance tax

Nil Rate Band

BFLS 4A[4489]

The nil rate band for will be frozen at £325,000 until April 2021.

Main Residence Nil Rate Band

BFLS 4A[4489.3]

From April 2017 a main residence nil rate band will be introduced to enable the family home to be passed on to lineal descendants without an inheritance tax (IHT) charge arising. The additional nil rate band will be phased in as follows:

2017/18 – £100,000;

2018/19 – £125,000;

2019/20 – £150,000; and

2020/21 – £175,000.

The main residence nil rate band will be added to the original nil rate band to give an individual a total nil rate band of £500,000 by 2020/21. Unused nil rate band can be transferred to a surviving spouse or civil partner meaning that eventually a family home worth up to £1m can be passed to children and grandchildren IHT free. The relief will only apply to one home. Where there is more than one residential property the personal representatives can nominate which property is the 'qualifying residential interest'. The allowance will be progressively withdrawn for estates worth £2m and over at the rate of £1 for every £2 over the threshold. Consultation will take place on how the relief will apply when an individual downsizes or ceases to own a home on or after 8 July 2015 and assets of the equivalent value are passed on to direct descendants.

IHT on UK Residential Property Owned by Non-Domiciles

BFLS 4A[4489.4]

From April 2017 IHT is payable on all UK residential property owned by non-domiciles regardless of their residence status including property held indirectly via an offshore structure. A non-domiciled individual is deemed to be domiciled for IHT purposes if they are UK resident for 15 or more years out of the past 20 years.

Simplification of the Inheritance Tax Rules for Trusts

BFLS 4A[4500]

Finance Bill 2015 includes measures simplifying the inheritance tax rules for trusts.

Tax credits

Child and Working Tax Credits – from 2016/17

BFLS 4A[8032], BFLS 4A[8044] and BFLS 4A[8068]

In 2010 90% of families were eligible for tax credits. Currently 60% of households are entitled. By 2016/17 half of all families will be supported by tax credits. A number of measures were announced to restrict tax credits as follows:

— tax credits will be frozen for four years from 2016/17 with the exception of the disability elements which will be uprated in line with the Consumer Prices Index (CPI);

— the taper rate will increase from 41% to 48% and the income threshold will be reduced from £6,420 to £3,850 a year from 6 April 2016;

— the income disregard when household income rises will fall from £5,000 to £2,500 from 6 April 2016;

— from April 2017 the family element of CTC will no longer be awarded to those starting a family; and

— Child Tax Credit will be limited to two children for children born on or after 6 April 2017. This means that no child element will be awarded for third and subsequent children. Children with disabilities will continue to receive the disabled elements according to their needs. There will be special rules to protect cases of multiple births and where a birth results from rape or in exceptional circumstances.

Recovery of Tax Credit Debt

BFLS 4A[8120]

HMRC will be given increased powers to improve the recovery of tax credit debts in the following ways:

— tax credits will be able to be recovered directly from claimants' bank and building society accounts and cash ISAs;

— overpaid Working Tax Credits will be able to be recovered from Child Tax Credits and vice versa; and

— private sector debt collectors will be used to recover tax credit debt over £3,000 that has already passed through HMRC's debt collection processes without success.

PUBLIC CHILDREN

Whether judge erring in finding no risk of significant harm in relation to sibling

Re L-K (children) (care proceedings: errors in fact-finding) [2015] EWCA Civ 830, [2015] All ER (D) 332 (Jul)

BFLS 3A[3063.1]; CHM 9[28]; Rayden 1(1)[T31.56]

The appeal concerned two children, R (aged six years old) and M (aged 16 months). The mother's partner was M's father. R and M were taken into foster care and the local authority commenced care proceedings. A consultant paediatrician was instructed and provided with photographs that had been taken at an earlier medical examination of R. Some 40 bruises or marks were identified in different places on R's body. The mother asserted that R had fallen down the stairs and that was cause for at least some of the bruising. The paediatrician considered whether the bruises might have been caused by R rushing around and knocking into people and objects and/or by physical restraint applied when he was out of control at school. Consideration was given to what R had said about his bruises, but not all of his accounts had been consistent.

The consultant paediatrician accepted that there were probably some accidental injuries in the mix, but her opinion was that the majority of the

bruises recorded were most likely the consequence of physical abuse. The Recorder made two findings of inflicted injury that had the character of abuse, namely, that R had been struck across the buttocks with a linear object and that he had bruising to his upper thigh that had been caused by at least two deliberate slaps. He was unwilling to find it established that what had happened to R had been 'abuse'. The parents denied that they had been responsible for the injuries but did admit to having made R stand in a corner for more than two hours when he was naughty. The Recorder found that the parents knew who had been responsible for the injuries but that they had agreed to stick together to protect one another. After he had made his findings in relation to the injuries individually, the Recorder then addressed the overall picture and found that, on the balance of probabilities, it could not be said that because of the number, description or position of R's injuries that he had been subjected to an attack or attacks beyond those individual injuries that he had found to have been inflicted. In addressing whether the threshold criteria in s 31 of the Children Act 1989 (ChA 1989) had been met, the Recorder found the threshold crossed in relation to R on the basis that he would have suffered significant harm. He found that the threshold was not met in relation to M because he was not at risk in his parents' care on the grounds that he was a very different child who had not suffered any harm so far. There was no evidence of psychological difficulty nor evidence of a problem with M in foster care. The difference between the children was such that the findings made in respect of R could not lead to a finding that M was at risk. The local authority appealed.

The local authority submitted:

(1) In the light of the findings that R had been beaten with an implement and slapped sufficiently hard to leave bruising and had been excessively punished by being made to stand in a corner for a prolonged period, the Recorder had been wrong to conclude that there was no risk of significant harm to M. What those facts indicated was that, at times of stress or challenging behaviour from one of the children, the parents might harm their child whether by way of discipline or simple loss of control. The Recorder had placed too great a weight on the difference between the two boys as a protective factor for M and failed also to take account of the fact that M was more vulnerable because of his young age and might also become more challenging as he grew older.

(2) That the Recorder had been wrong to have declined to make findings in relation to the injuries to R's face, neck/chest and thigh, and a finding that he had been abused. It submitted that he had gone wrong because he had failed to look at the totality of the picture, instead considering the injuries only individually. The findings that he had made, while not probative of the other injuries, had been capable of being corroborative and supportive evidence in respect of them. Also relevant to the overall evaluation, it was submitted, was the parents' dishonesty.

The appeal would be allowed on the basis that:

(1) The Recorder had not made any findings on the issue of whether M had been present during the punishments of R and whether he had been emotionally harmed by what he had seen and there had been no evidence that M himself had suffered any physical harm. The threshold in relation to M, therefore, had depended on whether he was 'likely to suffer significant harm'. It had been plainly satisfied on the facts that the Recorder had found. Given the nature of the Recorder's findings in respect of R, and the parents' failure to acknowledge or explain what had happened and why, the factors that the Recorder had relied upon in differentiating between the two boys had not, in fact, provided any reassurance in relation to the risk to M for threshold purposes. The Recorder's dismissal of the proceedings in relation to M would be substituted with a finding that the threshold criteria were satisfied in his case on the basis of likely harm.

(2) There was no doubt that, when it came to considering the possible causes of the other marks that had been found on R, attention had had to be paid to the fact that the parents had (i) beaten R with an implement causing bruising, (ii) smacked him to the extent that bruising had been caused, and (iii) lied in an attempt to conceal what they had done. Regard should also have been had to the excessive punishment which the parents conceded had been imposed on R. The fact that one injury was inflicted did not prove that others were non-accidental, but it changed the context in which the child came by the other injuries from a home which might be beyond reproach to one in which it was known that there had been, at the least, excessive physical punishment. It had been the case that R had had injuries which were accepted to be accidental. That fact had been relevant too, but it had not removed the potential significance of the findings of non-accidental injury. The fact that the parents had lied about what they had done had also been relevant to their credibility in relation to other matters. The Recorder's approach had not paid proper regard to those factors as part of the overall picture he had been surveying. The Recorder had been wrong to conclude that there had been nothing but the paediatrician's suspicions in relation to the other injuries. His own positive findings and the paediatrician's expert evidence about what, in her view, the overall picture had revealed had been important too. It had not been a foregone conclusion that they would have led to a different conclusion as to the other injuries, but they had needed to be put into the equation and considered with the rest of the evidence.

The court would not interfere with the findings of fact that the Recorder had found proved, but his determination would be set aside in relation to the balance of the authority's allegations. The case would be remitted for an urgent directions hearing.

Comment: In reaching its decision the court followed the House of Lords guidance in *Re H (minors) (sexual abuse: standard of proof)* [1996] 1 FCR 509 as to the standard of proof required for the court to make an order where a child has not suffered abuse but it has made a finding as to the abuse of another child within the family, ie:

(1) In ChA 1989, s 31(2) Parliament had stated the minimum conditions which must be present before the court could look more widely at all the circumstances and decide whether the child's welfare required that a local authority should receive the child into their care and have parental responsibility for him. The court must be satisfied that the child was already suffering significant harm or was likely to do so in the future. This did not require a finding that such harm was more likely than not. In s 31(2) the word 'likely' was being used not to mean 'probably' but in the sense of a real possibility: a possibility that could not sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case.

(2) The burden of proof in establishing the existence of the relevant conditions lay on the applicant for a care order and the standard of proof was the preponderance of probability, usually referred to as the balance of probability.

(3) A court's conclusion that the threshold conditions prescribed by ChA 1989, s 31(2) were satisfied must have a factual base: an alleged but unproved fact, serious or trivial, was not a fact for this purpose. Nor was judicial suspicion because that was no more than a judicial state of uncertainty about whether or not an event had happened. The range of facts which might be relevant when the court was considering the threshold conditions included family history and relationships, proposed changes within the membership of the family, parental attitudes; omissions which might not reasonably have been expected just as much as actual physical assaults; threats; abnormal behaviour by a child; and unsatisfactory parental responses to complaints or allegations. Facts which were minor or even trivial if considered in isolation, when taken together might suffice to satisfy the court of the likelihood of future harm. The court would attach to all the relevant facts the appropriate weight when coming to an overall conclusion on the crucial issue.

In *Re H* the House of Lords found that since the judge had rejected the only allegation (in relation to the eldest child of the family) that had given rise to the applications for care orders, it was not open to him to go on and consider the likelihood of harm to the three younger children. In the instant case the Recorder had found the threshold criteria to be satisfied in relation to the eldest child and should therefore have gone on to consider the factors relating to the younger child more widely.

EMERGENCY PROTECTION ORDERS

Orders where risk of children being removed from United Kingdom to war zone

Re X (children) and Y (children) (emergency protection orders) [2015] EWHC 2265 (Fam), [2015] All ER (D) 340 (Jul)

BFLS 3A[1221]; CHM 2[689]; Rayden Noter up [43.46]

There were two cases before the court (the X case and the Y case). The X case involved four children: X1, a boy born in 2002, X2, a girl born in 2008, X3, a girl born in 2010, and X4 a boy born in 2012. The parents were MX (the mother) and FX (the father). In March 2015, the mother and the four children, together with the maternal uncle and maternal grandmother, were detained at an airport in the United Kingdom as they were about to board a flight to Turkey. The three adults were arrested by the police and had since been released. In March 2015, the local authority (local authority A) applied for, and was granted, emergency protection orders in relation to all four children, they were placed with foster carers. The local authority applied for care orders in relation to all four children and interim care orders were made with the order recording that 'the mother neither consents to nor opposes the making of interim care orders in respect of the children'. A fact-finding hearing was directed to determine the mother's intention when boarding the plane to Turkey.

The Y case involved four children: Y1, a girl born in February 2004, Y2, a boy born in July 2006, Y3, a boy born in July 2011, and Y4, a boy born in November 2013. The mother of Y1 and Y2 as MY1. The father was dead. The mother of Y3 and Y4 was MY2 and their father was FY2. The children were related, because FY2 was an older son of MY1. On 27 March 2015, MY1, FY2, MY2 and the four children left the United Kingdom and flew to Turkey. They were detained by the Turkish authorities close to the border with that part of Syria controlled by ISIS. On the application of a local authority B, an order was made making Y1 and Y2 wards of a court and a separate order likewise warding Y3 and Y4. The three adults and the children returned to the country. The three adults were arrested and remained in custody until 18 April 2015. The children were placed in two separate foster placements, where they remained. A fact-finding hearing was ordered. The two cases involved many points of similarity, the court therefore gave one judgment.

The central focus in each of the cases was:

(1) the magnitude of the risk that the parents would, if their children were returned to their care, be minded to remove them to Syria;

(2) the magnitude of the risk that, if they had done, they would be able to evade the protective measures put in place by the court and designed to prevent their departure from this country; and

(3) the magnitude of the consequences for the children if, in the event of their parents attempting to remove them to Syria, they were able to evade those protective measures.

The parents submitted that the appropriate order was in each case, an order discharging the interim care orders, making the children wards of court, and placing them in the care and control of their parents, subject, however, to a raft of stringent protective orders. What the parents proposed was an order containing:

(1) passport orders in the usual wide-ranging form and an all-ports alert;

(2) injunctions restraining the parents removing the children from the jurisdiction and requiring them to live with the children at a specified address; and

(3) provisions for the monitoring of the parents and the children by a combination of unannounced visits by the local authority, regular reporting to a specified police station or local authority office and, in the case of the parents, electronic tagging.

It was also proposed that the order should include a provision requiring the parents to swear on the Quran that they would abide by each and every provision of the order and that the order should spell out the consequences (including but not limited to committal for contempt of court) in the event of any non-compliance.

The court ruled that:

(1) When a court was considering whether to remove a child for their interim protection, or declining to return the child, the question to ask was whether the children's safety required removal, and whether removal was proportionate in the light of the risks posed by leaving them where they were.

(2) In evaluating the 'risk of harm' in a 'temporary leave to remove for a foreign holiday removal case' the court would need to assess not only the magnitude of risk of breach of the order but also the magnitude of the consequence of breach of the order.

The risk that the parents would, if their children were returned to their care, be minded to remove them to Syria was at present unknowable and unquantifiable but potentially very great indeed. Given the potential consequences if the parents, being minded to flee with the children, were able to achieve their objective, a very high degree of assurance was needed albeit falling some way short of absolute certainty, that the protective measures put in place would be effective to thwart any attempted flight. The comprehensive and far-reaching package of protective measures proposed had provided the necessary very high degree of assurance that the court needed if the children were to be returned to parental care. Taking into account all the points the court was persuaded to make the orders the parents sought, and essentially for the reasons they had articulated. The risk of flight was so small that it was counter-balanced by the children's welfare needs to be returned to parental

care. In relation to their welfare, (leaving flight risk on one side), the benefits all of the children would derive from being returned to their parents clearly, outweighed any and all of such contrary welfare arguments.

The court made orders essentially in the terms proposed.

Comment: While the factual matrix in the instant case may not be relevant in a significant number of cases, the court's approach in applying the Court of Appeal decision in *Re A (a child) (prohibited steps order)* [2013] EWCA Civ 1115, [2014] 1 FCR 113 is of wider interest. In Re A the court was concerned with the mother's application for the temporary removal of the child for a holiday to Kenya. On the mother giving undertakings to court to return the child by way of notarised agreement and surrender of passports to Kenyan High Commission, the judge had made an order allowing for the temporary removal of the child. The father's appeal against the order, on the basis that the judge had failed properly to carry out the assessment of risk and balancing exercise, was successful and the Court of Appeal set out the following principles to be applied (as adopted in the instant case):

(1) The overriding consideration for the court in deciding whether to allow a parent to take a child to a non-Convention country is whether the making of that order would be in the best interest of the child.

(2) Where there is some risk of abduction and an obvious detriment to the child if that risk were to materialise, the court has to be positively satisfied that the advantages to the child of them visiting that country outweighs the risks to their welfare that the visit would entail. That will routinely involve the court in investigating what safeguards can be put in place to minimise the risk of retention and to secure the child's return if that transpires. Those safeguards ought to be capable of being easily accessed by the UK-based parent.

(3) There is a need in most cases for the effectiveness of any suggested safeguard to be established by competent and complete expert evidence which deals specifically, and in detail, with that issue. If in doubt the court ought to err on the side of caution and refuse to make the order. If the judge decides to proceed in the absence of expert evidence, then very clear reasons are required to justify such a course.

(4) It is an established principle that applications for temporary removal to a non-Convention country will inevitably involve consideration of three elements: (i) the magnitude of the risk of breach of the order if permission is given; (ii) the magnitude of the consequence of breach if it occurs; and (iii) the level of security that might be achieved by building all of the available safeguards in to the arrangements. It is necessary for the judge considering such an application to ensure that all three elements are in focus at all times when making the ultimate welfare determination of whether or not to grant leave.

See also *Re R (children: temporary leave to remove from jurisdiction)* [2014] EWHC 643 (Fam), [2014] All ER (D) 165 (Mar) in which the Court of Appeal similarly considered safeguards for removal to a non-Hague Convention country.

MARITAL AGREEMENTS

Effect of agreement on assessment of husband's needs

WW v HW [2015] EWHC 1844 (Fam), [2015] All ER (D) 167 (Jul)

BFLS 4A[867]; Rayden 1(1)[T16.76]

The parties met in 2000 and married in 2002. They had two children, born in 2001 and 2004. The husband had never generated any substantial income from his chosen profession and his only significant capital was a house which he sold at the outset of the relationship to generate an equity of £474,000. The wife had come into a significant inheritance as a child and, at the time that the agreement was signed, the wife's disclosure showed assets worth over £16m, together with future inheritance prospects and income. Prior to the marriage, the parties signed an agreement by which they acknowledged and agreed, among other provisions, that:

(1) the marriage was conditional upon the agreement being executed;

(2) the parties intended that the agreement should be legally binding upon them;

(3) they had each received independent legal advice and were fully aware of the right that they each were acquiring or surrendering;

(4) neither would make any claim against the other on dissolution of the marriage, and would enter into a consent order to that effect, without prejudice to their right to make such a claim in respect of a child; and

(5) neither would make any claim against the other's separate property, or against any trust interest, in the event of dissolution of the marriage (see [6] of the judgment). They separated in 2012. At the time of the present proceedings, in which the husband sought financial provision, the husband's assets consisted of a share in the parties' home, savings in his bank accounts and his interest in his production company, FF. FF had some value but was subject to a very significant tax issue and there was an investigation by the Revenue and Customs Commissioners (the Revenue). The value of the wife's assets was around £27m.

The principal issue was how the parties' agreement and other surrounding factors should affect the assessment of the husband's needs.

The court ruled that:

(1) In the circumstances, significant weight ought to be afforded to the agreement. Both parties had understood the agreement, had had the opportunity for full advice about its contents, had entered into it freely and intended that it should be binding upon them at the point when it was executed. Both parties had been comparatively mature, and neither had sought to exploit a dominant position. Just as in those circumstances it might be perfectly fair for the husband to place weight on the agreement, it would be unfair to the wife not to do so. She had entered

into the marriage on the basis that the agreement would be and had been signed. The husband's own case acknowledged that his claim could be no more than needs based, in any event, given that the property against which he claimed was substantially non-matrimonial in nature.

(2) It would be fair to hold the husband to the parties' agreement, unless his needs should dictate a different outcome. In those circumstances, it was necessary to consider: (i) how the husband's needs should be assessed in the light of the agreement; and (ii) how the husband would be left once his claim as father of the children had been considered, and whether in those circumstances he could be seen to be in a predicament of 'real need'.

(3) Even where there was an agreement, fairness would not necessarily equate to near destitution. The level at which a party's needs should be assessed, if they were not met by an agreement which might otherwise be binding upon them, had to depend upon all the circumstances of the case, among which the fact of the agreement might feature prominently as a depressing factor. However, each case would be different. Further, just as the fact of the agreement was capable of affecting what was fair, so too could the parties' conduct, provided that the conduct in question was obvious and gross, and such that it would be inequitable for the court to disregard it.

In the present case, any provision that the wife made would not have a significant effect on the quality of the children's lives while they were with her. However, any award to meet need, even absent the agreement, was being made from non-matrimonial assets and those assets had been specifically protected by the agreement which the husband had willingly entered into. There was consequently no obvious basis for any generosity in the interpretation of those needs. The husband's behaviour had been irresponsible and dishonest in making untrue statements in the accounts about the nature of the receipts into FF's accounts. The way in which he had conducted himself in relation to the HM Revenue and Customs (HMRC) was conduct capable of bearing upon the level at which his needs should be met going forward. In determining the amount that the husband would have at his disposal to meet need, it was possible, in fairness to avoid being overly protective of him, especially where uncertainties created by that conduct in the way of penalties were the biggest risk to his future financial security.

A housing fund would be made available in the sum of £1.7m. The fund would be provided for the husband's life, reverting to the wife's estate in due course, and subject to a trade down when the children ceased to be dependant. On the basis that the husband exercised the earning capacity attributed to him by the court, it was reasonable for him to have a net income of £50,000 per annum. The lump sum required from the wife to bring his assets to that total was rounded to £215,000. A step-down in accommodation would be fair. The return of 45% of the fund to the wife in August 2027 was fair, in circumstances where she had incurred very significant costs in the HMRC proceedings, quite apart from the costs of the present proceedings.

Comment: In giving his judgment, Mr Nicholas Cusworth QC, sitting as a deputy High Court judge, said on a per curiam basis: 'If there were ever a paradigm case which demonstrates the need for more certainty in the law of financial remedies and nuptial agreements, this is surely it.' He went on to apply the principles established in *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42, [2010] 3 FCR 583 but with a particular focus on the husband's needs. Of note is that the husband's irresponsible and dishonest behaviour as to the nature of the receipts into his company, and the way in which he had conducted himself in relation to the Inland Revenue and Customs, was considered to be conduct capable of bearing on the level at which his needs should be met going forward. Section 25(2)(g) of the Matrimonial Causes Act 1973 provides that the court may have regard to the conduct of a party if that conduct is such that it would 'in the opinion of the court be inequitable to disregard it'. Conduct will only be relevant in a very small minority of cases and usually involve more extreme types of behaviour. It is relatively rare for financial conduct to be taken into account but examples include *Martin v Martin* [1976] 3 All ER 625 and *Thiry v Thiry* [2014] EWHC 4046 (Fam), [2014] All ER (D) 45 (Dec).

ADOPTION

Whether leave to oppose should be granted to consider a family placement

Re LG (a child) [2015] EWFC 52, [2015] All ER (D) 257 (Jun)

BFLS 3A[4287.9]; CHM 10[309]; Rayden Noter up [47.134]

The child, L, was born in 2014. On discharge from hospital, the mother and L went to a mother and baby foster placement, but after a few days the placement broke down. The mother signed an agreement under s 20 of the ChA 1989 and L moved to a different foster placement. The local authority started care proceedings. The final hearing of the care proceedings took place with the making of care and placement orders; the local authority having failed to identify any person within the wider family network who had the potential to look after the child. The father had disengaged from contact some months earlier and L had her final contact with her mother in September 2014. Later that month, she was placed with prospective adopters, Mr and Mrs A.

The extended paternal family had no knowledge of L's existence during the currency of the care proceedings. It was the father's case that he declined to tell his family about L's existence because he felt 'scared' to tell them as 'he had embarrassed and shamed [his] family and let them down again'. In December 2014, the father finally informed his family about L's existence. Members of the family immediately contacted social services to express their wish to care for the child. There were positive assessments of the father's family carried out by an independent social worker.

In January 2015, Mr and Mrs A filed an application for an adoption order in respect of L. On the following day, members of the father's family had an

initial meeting with L's social worker, AD, at which they were informed about developments and that the local authority planned to support the proposed adoption. The father applied for leave to oppose the adoption order under s 47(5) of the Adoption and Children Act 2002 (ACA 2002). The court could not give leave under that subsection unless satisfied that there had been a change in circumstances since the placement had been made ACA 2002, s 47(7). Under ACA 2002, s 1(1), when coming to a decision relating to the adoption of a child, the court had to apply the provisions of ACA 2002, s 1(2)–(4).

The application was allowed on the basis that it is established law that analysis of the statutory language in ACA 2002, ss 1 and 47 lead to the conclusion that an application for leave to defend the adoption proceedings under ACA 2002, s 47(5) involves a two-stage process:

(1) first the court must be satisfied, on the facts of the case, that there has been a change of circumstances within ACA 2002, s 47(7) – if there has been no change in circumstances, that would be the end of the matter, and the application fails; and

(2) if there has been a change in circumstances within ACA 2002, s 47(7), then the door to the exercise of a judicial discretion to permit the parents to defend the adoption proceedings is opened, and the decision whether or not to grant leave is governed by ACA 2002, s 1.

The court was satisfied that there had been a change of circumstances of a nature and degree to 'open the door' to the evaluative exercise. There was nothing in the statute to limit the change of circumstances to a change in the parents' circumstances. The developments that had occurred in the case were of very great significance. The discovery that the father's relations were in fact able and willing to offer L a home, was manifestly a change of circumstances of a degree sufficient to satisfy ACA 2002, s 47(7). The prospects of an adoption order being refused were good. Although L had been with the prospective adopters for over eight months and was likely to suffer a degree of emotional distress and harm if removed from their care, she was probably still young enough to be moved successfully with care and support. It could not be said with certainty that the adoption application would be successfully opposed if leave were granted, but the father and his family plainly had strong arguments, given the very positive assessment carried out by the independent social worker and the endorsement of analysis of the local authority and guardian. Having carried out the evaluative exercise the court concluded that there were strong welfare reasons for granting the father leave to oppose the adoption application.

Comment: As noted by the court in the instant case, ACA 2002, s 1(4) provides that the court should have regard to the ability and willingness of any of the child's relatives to provide the child with a secure environment in which the child could develop, and otherwise to meet the child's needs. The option of a family placement should be thoroughly explored before a final decision is taken as to the child's long term future. This decision is of note due to the late stage at which the decision to grant leave to oppose was made,

however the rarity of such decisions was noted by Baker J in his judgment, on a per curiam basis, when he said: '… anyone reading this judgment will realise that the circumstances of this case (the father's deceptive and misleading conduct, and the subsequent discovery that the birth family is, on the written evidence, manifestly able to care for the child) are very unusual. I hope, therefore, that prospective adopters will not be discouraged from coming forward as a result of this case …Applications for leave will only be made in a minority of cases and in most cases are unlikely to succeed, but Parliament has allowed the right to apply for leave to oppose adoption applications in such circumstances and all prospective adopters should be advised that this is the law.'

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