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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PRIVATE CHILDREN

The extent of judicial discretion

Re Q (a child) [2015] EWCA Civ 991, [2015] All ER (D) 136 (Sep)

BFLS 3A[4664.1]; CHM 9[174]; Rayden Noter up [37.31]

The proceedings concerned a child, Q, born in 2007. His parents' relationship ended in February 2008. Since then, Q had lived with his mother. Litigation began in May 2008. It had been going on ever since, driven by the father's

desire to have a meaningful relationship with his son and prolonged by the seemingly insuperable difficulties in achieving that with more than fitful frequency. The present impasse was not for want of enormous efforts by the judge who, down the years, had invited appropriate assistance from a variety of professionals. The matter came before the judge in August 2014. The judge found that Q had suffered significant emotional harm which continued to go unaddressed while he was living in an atmosphere which was so hostile to his father and there was clearly a case that Q needed therapeutic intervention, as he was unlikely to recover from the emotional harm unless such steps were taken. The judge was persuaded that Q needed a cessation of the proceedings for that therapeutic intervention to be effective. The order the judge made included, among other things: (i) a specific issue order that both parents were to cooperate in the referral to a centre for an assessment of the psychiatric and emotional well-being of Q, together with such treatment as required; and (ii) a direction that there was to be no further order in respect of child arrangements. The father appealed.

The father's case was that:

(1) The judge had been wrong summarily to have determined the application and to have brought the proceedings to an end at a one-hour review hearing without having heard oral evidence from the parties, having allowed cross-examination of the guardian and having allowed him to cross-examine the mother.

(2) The judge had been wrong in having brought the proceedings to an end without having made a child arrangements order. Given his own findings, he should have directed a report, under s 37 of the Children Act 1989 (ChA 1989) (the s 37 report), and pursued the strategy he had set out as recently as January 2014 and approved in June 2014. He had failed to explain why he had been departing so radically from a strategy so recently approved.

(3) In the circumstances, and having regard to all those matters, the process had not been compatible with his rights under arts 6 and 8 of the European Convention on Human Rights. Consideration was given to *Re C (a child) (suspension of contact)* [2011] 3 FCR 208 (*Re C (suspension of contact)) and Re C (family proceedings: case management)* [2013] 3 FCR 399 (*Re C* (*case management*)).

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

(1) The judge, faced with an almost impossible situation, had taken a course which was not merely open to him, but which had been, in reality, probably the only course that had stood the slightest chance of achieving what had been so pressingly needed, namely, the resumption of Q's relationship with his father.

(2) He had been acutely conscious of the desperate position in which Q and his parents found themselves and, faced with what he had realised had been the reality, ie that the strategy he had hitherto adopted had not worked, in circumstances where there was no reason to think that

that strategy would work in future, he had been realistic in his appraisal, securely founded in the materials before him, that any further attempt to enforce contact by force of law had been almost bound to fail and, at the same time, be harmful to Q.

(3) He had been entirely justified in having concluded that a further hearing, with or without a s 37 report, was most unlikely either to tell him anything he had not already known or to bring about any change in parental attitudes and had been sensible in having thought that therapy might achieve what all previous interventions had failed to achieve and justified in having decided that that had been the best way forward.

The judge had thus been entitled to decide as he had and for the reasons he had given. In having decided to proceed as he had, the judge had been acting well within the latitude afforded him by the principles explained in *Re C (children) (residence order: application being dismissed at fact-finding stage)* [2013] 3 FCR 399 and he had not offended the principles set out in *Re C (suspension of contact)* [2011] 3 FCR 208. His decision to proceed as he had had not been premature. The judge had not been abdicating his responsibility to do everything in his power to attempt to promote contact. The judge had not been abandoning the ongoing judicial duty to reconstitute the relationship between Q and his father. He had been engaging with an, albeit non-judicial, method which he had hoped might prove effective where merely judicial methods had failed. The very terms of his order showed that the judge had contemplated a future role for the court. The complaint that there had been a breach of either art 6 or 8 of the Convention was rejected.

Comment: The principles as to the discretionary role of the judge were set out in *Re C (children) (residence order: application being dismissed at fact-finding stage)* [2013] 3 FCR 399 and followed in the instant case. In *Re C* the Court of Appeal set out the 'generous ambit of discretion' as follows:

(1) in family proceedings, it is fundamental that the judge has an essentially inquisitorial role, their duty being to further the welfare of the children which is, by statute, their paramount consideration;

(2) for that reason, a judge exercising the family jurisdiction has a much broader discretion than they would in the civil jurisdiction;

(3) the judge will always be concerned to ask whether there is some solid reason, in the interests of the children, as to why they should embark upon a course of action, or having embarked upon a course, why they should continue to explore the matters raised by one or other of the parents;

(4) it is pre-eminently a matter for the trial judge to determine the form of procedure which would best meet the welfare needs of the children; and

(5) a judge is not obliged, merely because one parent or the other wishes them to do so, to listen to evidence if it becomes apparent to them that the process is not going to be of any advantage to the children.

In the instant case the course of action taken by the judge was in accordance with his discretion and could not be criticised.

MEDIA ACCESS

Whether blanket restriction on reporting necessary

Appleton v Gallagher [2015] EWHC 2689 (Fam), [2015] All ER (D) 131 (Sep)

BFLS 1A[100]; CHM 11[1]; Rayden 1(1)[T17.50]

The proceedings concerned the ability of the press to report ancillary relief proceedings that it was allowed to attend. The parties to the proceedings had been married and had one child together. The father also had three other children. The parties, who were famous, had been granted a divorce. In a subsequent ancillary relief hearing at the Family Court, both parties applied for an order excluding the press, pursuant to the Family Procedure Rules 2010 (FPR 2010), SI 2010/2955, 27.11(3). An issue arose as to whether only the High Court could make a reporting restriction order in the present case. The matter came before the Family Division for consideration. The following day, a judge in the Family Division granted an injunction, restricting the reporting by the press of the ancillary relief proceedings between the parties (the order). Paragraph (a) of the order allowed the parties to be named, but no one else. Paragraph (b) of the order restricted reporting of the parties' financial information. The Family Division further considered reporting restrictions in respect of the case.

The issue for consideration was whether the order should be lifted or modified at the present stage. Consideration was given to FPR 2010, 25.2(1) and 27.11(3), PD 27B and PD 12I, the latter of which provided that only the High Court could make orders restricting the publication of information about children or incapacitated adults.

The court ruled that:

(1) the terms of FPR 2010, 27.11(3) and of PD 27B made clear that the power to exclude was vested in the court of trial;

(2) a court of trial had full power to make a reporting restriction order in proceedings which were not 'children proceedings', within the terms of FPR 2010, 25.2(1), and the only financial remedy proceedings which qualified as children proceedings were those which related wholly or mainly to the maintenance of upbringing of a minor;

(3) children proceedings fell squarely within PD 12I and so any reporting restriction order in such proceedings could only be made by the High Court, otherwise, the court of trial was fully vested with the power to control the reporting of the proceedings before it;

(4) information compulsorily extracted by one party from the other was subject to an implied undertaking that it would not be published or used for any purpose other than the proceedings; and

(5) the change in the rule that proceedings for ancillary relief were to be heard in chambers, attended only by the parties or their representatives, was not intended to abrogate the core privacy provided by the implied undertaking and the hearing of the proceedings in chambers.

In ancillary relief proceedings, the press had to justify why the core privacy, maintained and endorsed by Parliament, should be breached. If the parties were well known, the press had to be able to identify them and the fact that they were engaged in ancillary relief proceedings. The name of the case would be publicly published in the cause list, and the parties would be seen by the public arriving and leaving court. The fact of the divorce and of the impending ancillary relief might well have been the subject of press reports. On the other hand, if the parties were not well known, an order for anonymisation should readily be granted.

In the present case, the fact of the divorce and of the impending ancillary relief had been the subject of press reports. Therefore, it would be absurd to ban publication by the press of those facts. Paragraph (a) of the order had not been very happily drafted as it allowed the parties to be named, but no one else, which was unreal given the press comment on the marriage and its collapse thus far. There was no reason why the press should not be able to name, not only the parties, but also their partners, past and present. Those names were to be found all over the internet. The children's names were also to be found there, but in the context of the reporting of the case, it would be contrary to their interests for them to be named. The real question was whether para (b) of the order should be continued, modified or revoked. At present, it was strictly confined to financial information. The present case was not one where the parties had manipulatively invoked the press to fight their causes. Nor was it a case where there had been previous proceedings in open court where a lot of financial material had been aired. Most of the financial information would have been compulsorily extracted and was subject to the implied undertaking, which was the bedrock of the right to privacy, and which collaterally bound the observing journalists. There was no good reason to release them from its effect. The order would continue for the time being, save that para (a) of the order would be replaced by an order preventing the naming of the children.

Comment: Mostyn J considered, inter alia, his earlier decision in *DL v SL* [2015] All ER (D) 114 (Sep), a case that involved parties who were not well known, where he said 'It is my opinion that the law concerning the presence of the media in these private proceedings, which is contained in FPR 27.11 and PD27B, is to enable the press to be the eyes and ears of the public so as to ensure that the case is conducted fairly and to enable the public to be educated in an abstract and general way about the processes that are deployed, but does not extend to breaching the privacy of the parties in these proceedings that Parliament has given to them'. Expanding on that point on the instant case, it is notable that Mostyn J commented that if the parties are not well known, an order for anonymisation should 'readily be granted'. As the parties were well known in this case, the extended privacy for the children together with the implied undertakings as to the financial information meant

that no further restrictions on the press were considered necessary. Mostyn J commented: 'To say that the law about the ability of the press to report ancillary relief proceedings which they are allowed to observe is a mess would be a serious understatement'. An opposing view as to the approach in such cases may be found in the decision of Roberts J in *Cooper-Hohn v Hohn* [2014] All ER (D) 252 (Jul) where financial proceedings were described as a 'special category'.

ADOPTION

Whether prospective adopters should have been given leave to apply for adoption order and joined as parties

Re T (a child) (early permanence placement) [2015] EWCA Civ 983, [2015] All ER (D) 118 (Sep)

BFLS 3A[2519.7]; CHM 9[139]; Rayden 1(2)[T40.40]

The proceedings concerned T, who was born in November 2014. A married couple had been approved as adopters by the local authority (the prospective adopters). Shortly before T's birth, they had been invited by the authority, and agreed, to care for T, on his birth, as foster carers with a view to adopting him if adoption was required. The day after his birth, T's parents signed an agreement, in accordance with the ChA 1989, s 20, and T was placed the same day with the prospective adopters.

In December, the authority commenced care proceedings, with a plan for adoption. The prospective adopters signed an early permanence placement agreement. Later that month, an interim care order was made. It remained in place and T remained with the prospective adopters. At an adjourned case management hearing in January 2015, the father indicated that he did not wish to be assessed as a carer for T, but he put his parents forward for assessment. An initial viability assessment of the paternal grandparents was positive, as was a full kinship assessment. Following a professionals' meeting in May, the authority told the prospective adopters that it had abandoned its plan for adoption in favour of a placement with the paternal grandparents under a special guardianship order. That plan was supported by both the mother and the father.

The prospective adopters issued an application for leave to apply for an adoption order, under the Adoption and Children Act 2002 (ACA 2002), ss 42(4) and 44(4). The judge gave the prospective adopters leave to apply for an adoption order. She also joined them as parties to the care proceedings. The father appealed against the order joining the prospective adopters as parties to the care proceedings. The authority appealed against the order giving the prospective adopters leave to apply for an adoption order.

The court considered, firstly, whether the judge had been wrong to have joined the prospective adopters as parties to the care proceedings, and secondly whether the judge had been wrong to have given the prospective adopters leave to apply for an adoption order.

The appeal was allowed on the basis that:

(1) From the very earliest days of the ChA 1989, the court had set its face against the joinder in care proceedings of foster parents or prospective adopters. The care judge was concerned, at most, with consideration of adoption in principle, not with evaluating the merits of particular proposed adopters. There was no need for the prospective adopters to be joined, for it was the children's guardian who had the task, indeed was under the duty, of subjecting the authority's care plan to rigorous scrutiny and, where appropriate, criticism.

(2) There was nothing in the status or function of an early permanence placement foster carer which either justified or required any change in the conventional and long-established approach. Further, there was a very real risk that, if the forensic process was allowed to become, in effect, a dispute between the prospective adopters and the birth family, the court would be diverted into an illegitimate inquiry as to which placement would be better for the child. That was not the question before the court.

(3) As had been said in previous authority, family ties could only be severed in very exceptional circumstances. It was not enough to show that a child could be placed in a more beneficial environment for their upbringing. The effect of the ACA 2002, s 44(2) and (3) was to impose a period of three months' delay, an appropriate aspect of the statutory scheme in relation to private law adoptions, that would sit most uncomfortably if the statutory scheme under the ACA 2002 was to be run in tandem with the quite separate statutory scheme in relation to care proceedings under the ChA 1989, required, by the recently amended ChA 1989, s 32(1)(a)(ii), to be concluded within a total period of only 26 weeks.

(4) It would turn the *Re B-S* learning on its head to assert that, in a case where the authority was not seeking any order which brought *Re B-S (children) (adoption: application of threshold criteria)* [2013] 3 FCR 481 into play, the requirement to consider every realistic option justified, let alone required, the joinder of a party to argue for the adoption for which the authority itself was not applying. The *Re B-S* learning applied where the authority was inviting the court either to approve a care plan for adoption or to make a non-consensual placement order or adoption order. It did not apply where the authority was seeking none of those things.

Accordingly, the prospective adopters' joinder to the care proceedings was inappropriate. There was no need for them to be parties to the care proceedings to demonstrate that they were suitable prospective adopters for T, for they had already been positively assessed. Putting on one side the prospective adopters' role as early permanence placement foster carers, and without in any way wishing to belittle or diminish all that they had done for T, the present was a case where there had been an unexceptional period of time caring for an unexceptional child in an unexceptional case. It was not an

exceptional case justifying any departure from the general approach. The reality was that the 'status quo' and attachment did not differ significantly from what was found in the many similar care cases where a child had been successfully fostered for a short period.

The court held that the prospective adopters ought not therefore have been joined as parties to the care proceedings and the father's appeal had to be allowed.

Regarding the local authority's challenge to the order giving the prospective adopters leave to apply for an adoption order, the application had been premature, as had been the judge's decision. First, it had been an application which had properly fallen to be considered after the conclusion of the care proceedings and once the court had concluded, if it did, that T's welfare had required his adoption. That was the approach which was generally applicable and nothing in the statutory early permanence placement scheme justified any different approach. The second reason was graphically illustrated by the forensic difficulty in which the judge had found herself. She had not had the materials which she had needed to have had if she had been properly to determine their application in accordance with ACA 2002, ss 42(4) and 44(4). Accordingly, the prospective adopters ought not to have been given leave to apply for an adoption order and the authority's appeal was allowed.

The two orders made by the judge were therefore set aside.

Comment: A decision that highlights the friction in practice between the government's 'fostering to adopt' policy, ie to designate an approved adopter as a local authority foster carer, either generally or for a named child, for a temporary period, where the local authority considers it likely that the child will remain there and be adopted, even though the child is only subject to an interim care order and there has been no determination by the court on the civil standard of proof that the child should be adopted. Munby P sounded a note of caution as to such arrangements on a per curiam basis, saying 'Without, I emphasise, expressing any view as to what was actually going on, I merely note what I would hope is obvious: that in every case of an early permanence placement there must, from the outset and at every stage thereafter, be complete frankness coupled with a robust appraisal of the realities' (para [67]).

EMBRYOLOGY

Administrative errors occurring in relation to consent to parenthood

***Re Human Fertilisation and Embryology Act 2008* (*cases A, B, C, D, E, F, G and H*) *[2015] EWHC 2602* (*Fam*), *[2015] All ER* (*D*) *57* (*Sep*)**

BFLS 3A[331.2]; CHM 1[1]; Rayden Noter up [35.13]

The couples in each of the eight cases with which the present proceedings were concerned had received treatment at various fertility clinics. Each case

had been brought to light following an audit by the Human Fertilisation and Embryology Authority (the HFEA) and each raised the question of whether there had been valid consents, as required by Pt 2 of the Human Fertilisation and Embryology Act 2008 (HFEA 2008).

Two fundamental prerequisites to the acquisition of parenthood by the partner of a woman receiving such treatment were that:

(1) Consents had to be given in writing before the treatment, both by the woman and by her partner. The forms required for that, in accordance with directions given by the HFEA, were Form WP, to be completed by the woman, and Form PP, to be completed by her partner.

(2) Both the woman and her partner had to be given adequate information and offered counselling. A number of clinics also used, for internal purposes, a consent form (Form IC) based on a form circulated by the HFEA prior to HFEA 2008 coming into effect in April 2009.

In each of the present cases, the relief sought was a declaration of parentage, in accordance with s 55A of the Family Law Act 1986, that was, a declaration that the applicant (in case F, the respondent) was the child's parent. In no case was the grant of that relief challenged by the other partner, by the child's guardian or by the relevant clinic. Case G had been adjourned.

The issues for determination included three points of general principle:

(1) The first (which arose in cases A, B, E, F and H) was whether it was permissible to prove by parol (ie oral) evidence that a Form WP or Form PP, which could not be found, had, in fact, been executed in a manner complying with Pt 2 of HFEA 2008 and whether, if that was permissible, and the finding was made, the fact that the form could not be found prevented it being a valid consent, as involving a breach by the clinic of its record-keeping obligations.

(2) The second issue (which arose in cases D and F) was the extent to which errors in a completed Form WP or Form PP could be 'corrected', either as a matter of construction or by way of rectification. A similar point (which arose in cases E and F) was the extent to which errors in a completed Form IC could be 'corrected'.

(3) The third issue (which arose in cases A, C, D, E, F and H) was whether a properly completed Form IC was capable of operating as consent for the purposes of HFEA 2008, ss 37 and 44.

The court considered whether the declarations sought in each case should be granted and ruled:

(1) The court could act on parol evidence to establish that a Form WP or a Form PP, which could not be found, had, in fact, been properly completed and signed before the treatment had begun.

(2) The court could 'correct' mistakes in a Form WP or a Form PP either by rectification, where the requirements for that remedy were satisfied or, where the mistake was obvious on the face of the document, by a

process of construction without the need for rectification. A Form IC, if it was in the form of the Barts Health NHS Trust Form IC or the Manchester Fertility Service clinic Form IC, would, if properly completed and signed before the treatment had begun, meet the statutory requirements without the need for a Form WP or a Form PP.

(3) It followed from that that the court had the same powers to 'correct' a Form IC as it would have to 'correct' a Form WP or a Form PP.

In each case, having regard to the evidence, it was found as a fact that:

(1) the treatment which had led to the birth of the child had been embarked upon and carried through jointly and with full knowledge by both the woman (W) and her partner;

(2) from the outset of that treatment, it had been the intention of both W and her partner that her partner would be a legal parent of the child;

(3) each had been aware that that had been a matter which, legally, had required the signing by each of them of consent forms, and each of them had believed that they had signed the relevant forms as legally required and, more generally, had done whatever had been needed to ensure that they would both be parents;

(4) from the moment when the pregnancy had been confirmed, both W and her partner had believed that her partner had been the other parent of the child and that had remained their belief when the child had been born;

(5) W and her partner, believing that they had been entitled to, and acting in complete good faith, had registered the birth of their child, as they had believed the child to be, showing both of them on the birth certificate as the child's parents, as they had believed themselves to be;

(6) the first they had known that anything had been or might have been 'wrong' had been when they had been subsequently written to by the clinic;

(7) the application to the court was wholeheartedly supported by the applicant's partner or, as the case might be, ex-partner;

(8) they did not see adoption as being a remotely acceptable remedy; and

(9) there was no suggestion that any consent given had not been fully informed consent. Nor was there any suggestion of any failure or omission by any of the clinics in relation to the provision of information or counselling.

In the circumstances, the applicant in each of cases A, B, C, D, E, F and H was entitled to the declaration sought.

Comment: *A set of circumstances that caused Munby P great concern and led him to set out, per curiam, a range of practical steps that should be taken in such cases, inter alia:*

(1) That the proper completion of both Form WP and Form PP, at the right time, is a fundamentally important with requirement, and the potentially dire legal consequences of non-compliance should be expressed in more emphatic, indeed stark, language and, in addition, highlighted by appropriate typography, e g in bold or italic type, the use of red ink; and the flagging up of key points by the use of 'warning' or 'alert' symbols.

(2) The imperative need for all clinics to comply, meticulously and all times, with the HFEA's guidance and directions, including, in particular, in relation to the use of Form WP and Form PP.

(3) As to practice within clinics, that a completed Form WP and a completed Form PP surely needs to be checked by one person (probably a member of the clinical team) and then rechecked by another person, entirely separate from the clinical team, whose sole function is to go through the document in minute detail and to draw attention to even the slightest non-compliance with the requirements – all this, of course, before the treatment starts.

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