Butterworths Family and Child Law Bulletin

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MEDIA ACCESS

Whether reporting restrictions order should be varied

***S v H [2015] EWHC 3313* (*Fam*), *[2015] All ER* (*D*) *162* (*Nov*)**

BFLS 1A[100]; CHM 11[21]; Rayden Noter up [T49.102]–[T49.103]

The proceedings concerned a child, aged almost two years at the time of the proceedings, who had been conceived as a result of a private arrangement between a male couple and a woman. A dispute arose between them as to who should raise the child. The judge who heard the proceedings, Russell J, was very concerned about a considerable amount of publicity which had related to the proceedings, particularly on social media. In January 2015, during the early part of the hearing, Russell J made an order which placed considerable restrictions upon the mother's freedom to communicate information about the proceedings, and put her under a duty to use her best endeavours to prevent others from disseminating information about the case (the January order). In April, in her final judgment, Russell J put in place a reporting restrictions order to protect the identity of the child and her carers (the reporting restrictions order). The substantive order under the Children Act 1989 (ChA 1989) repeated, but in more restrictive terms, the January order (the April order).

The April order contained an express provision that 'the parties and any persons affected by any of the restrictions …may make application to vary or discharge it to Ms Justice Russell on not less than 48 hours' notice.' In May, a publisher, Associated Newspapers Ltd (ANL), issued an application for a variation of the terms of the reporting restrictions order. On the day that the application was due to be heard, ANL withdrew its application. However, at the same time, the mother informed the court that she wished to make an application to vary both the reporting restrictions order and the restrictions placed on her by the April order. She was given permission to make her application, which was funded by ANL.

The child's guardian submitted a position statement which explained that, while she was very concerned about anything that might reveal the identity of the child, she recognised that injunctions in the wide and very restrictive terms of those that had been made in the present case were not easy to justify. The judge made clear that, as the application had not been before Russell J as the judge named in the order, he was not willing to adjudicate on any disputed matters which, in his view, could only be the subject of adjudication by Russell J or, ultimately, the Court of Appeal. However, if there was some degree of consensus between the parties, ANL and the guardian as to some re-drawing of the scope of the injunctions, then orders could be made by consent.

The court ruled that:

(1) The essence of the agreement between those represented or interested in the proceedings was that there was no opposition to the mother being able to communicate with the press, or indeed other media, with regard to the facts and circumstances of the case, provided that nothing was published which was likely directly or indirectly to identify the child or the fathers or other identifying aspects of any of them. It was further agreed that the mother could supply, and the press could publish, a photograph or photographs both of herself and of the child, provided that it was sufficiently pixelated or otherwise obscured so that it was impossible to identify or recognise either her or the child.

(2) Accordingly, to reflect those areas of agreement, a fresh reporting restrictions order would be made by consent, which would be substituted for the reporting restrictions order, and the reporting restrictions order would then be discharged. In order to give effect to the new order, an order would be made, to a limited extent, that relaxed and varied the April order.

Comment: An example of the practical steps that may be taken where a reporting restriction order has been made to ensure that restrictions remain in place so that the child is not identified, while also having regard to transparency and media access in family proceedings, and also as to the approach that may be taken by a judge where a previous judge has put reporting restrictions in place. Holman J indicated that he was not willing to adjudicate on any disputed matters, and that 'If anyone is to reconsider the language and scope of [the] orders at first instance, then it should be [Roberts

J]'. Holman J also made it clear that he was not treating the applications as an appeal from the orders made by Roberts J and that the application was '… merely an exercise by the mother of the liberty to apply that was expressly given in the orders of Russell J' albeit that liberty apply provision had reserved the matter to Roberts J and Holman J heard the application as the 'Applications Judge' sitting that day. In any consideration of the appropriateness, or otherwise, of a reporting restrictions order the court will have regard to the balance between the child's European Convention on Human Rights, article 8 rights (right to respect for private and family life) and those of the media under article 10 (freedom of expression). In this case a compromise was struck between the competing rights. See also the recent decision in *Medway Council v L* [2015] EWHC 3262 (Fam), [2015] All ER (D) 129 (Nov).

PUBLIC CHILDREN

Whether judge erring in his analysis of the evidence

***Re D* (*a child*) *[2015] EWCA Civ 1150, [2015] All ER* (*D*) *161* (*Nov*)**

BFLS 3A[2201.1]; CHM 9[48.1]; Rayden Noter up [T40.11]

The proceedings concerned a two-year-old child, J. The mother and J had had a number of changes of accommodation since he was born and that was one of social services' central concerns. It featured as the first item on the schedule of threshold findings, it being alleged by the local authority on its application for care and placement orders, that the mother had not provided stable and consistent accommodation for J and that she 'leads a chaotic lifestyle and J has been subject to instability and inconsistency in routine, primary carers and potentially inappropriate persons as a result'. While agreeing that there had been a number of moves, the mother disputed that the fault for that was all hers, or that the moves were all avoidable. She did not accept, among other things, that moves of accommodation were likely to continue, pointing to the period of 'significant stability' while she had been living with the grandmother in the run up to the hearing, which she said would continue for the foreseeable future.

Although the judge had commented that he was 'struck by the mother's honesty on occasions in her evidence', he stated that: 'If the evidence conflicts with the evidence of the mother I prefer the evidence of the professionals'. The judge found, accepting the evidence of the professionals, that the mother had not, in fact, provided constant, stable and consistent accommodation for J. J had had numerous changes of accommodation in his life, and the judge was not at all certain that the placement with the grandmother would be sustainable. He also found that, although there had been improvements acknowledged by everybody and by the court, the mother had led, since the date of the proceedings, something of a chaotic life style. That had led inevitably, in the judge's judgment, to instability and inconsistency in routine for J. The judge further found it established that, among other things, the mother could not prioritise J's needs over her own. The judge made care and placement orders in respect of J.

The mother appealed on the basis that the process by which the judge had reached his findings on the facts was inadequate and the findings themselves deficient. The principal criticism of the process was that the judge had failed to conduct a careful analysis of the disputed factual issues and to arrive at a reasoned and clear factual determination. The mother submitted, among other things, that the judgment had failed also to deal properly with the positive things that could be said about her and that the judge had erred in assuming that matters would remain constant.

The appeal was allowed on the basis that:

(1) It was very important that care and placement proceedings should be concluded with expedition, and that the focus should be kept on the things which really mattered to the court's decision. However, that was not a licence not to observe proper procedure. Some factual issues could not be resolved merely on hearsay evidence relayed by social workers. A local authority had to establish its factual case and, if that case was challenged, it had to adduce proper evidence to establish the fact that it sought to prove.

(2) The judge's explanation of his acceptance of the evidence ranged against the mother had been insufficient. Although the mother had accepted some shortcomings on her part, she had by no means accepted the whole of the authority's case and the judge had needed to analyse the evidence and make clear and reasoned findings about it. Given that there had been good things to be said about the mother's care of J, as well as criticisms to be made of it, it had been particularly important not only that findings should be made, but also that they should be sufficiently nuanced to enable proper weight to be attributed to them when the judge had come to make decisions about what the future was likely to hold if J remained with the mother. Only in that way could he have struck a proper welfare balance and decided whether the orders that the authority sought had been justified.

(3) In the light of the central role that the housing issue had had in the authority's case, an examination had been required of the reasons why each placement had failed, in order to establish the extent to which that had been attributable to the mother and the extent to which similar problems would be likely to recur in future. That was absent from the judgment. The judgment was significantly undermined by the absence of a more detailed determination of what had caused the mother's sequence of moves and what the future held in the light of the facts so established.

(4) The judgment was not devoid of any reference to features of the case which had favoured the mother; elements of that kind could be found in the judge's summary of the evidence of the various professionals. However, it did not convey the reality that emerged from the contemporaneous records. In respect of the judge's welfare evaluation, at that point, a rounded and accurate picture of the mother's relationship with J and her care of him had needed to have been put into the balance.

However, even such positive features as had been identified in the course of the judge's summary of the evidence did not feature in the welfare section.

(5) It had been necessary for the judge to analyse the material that had been available, balancing all the various features of it, and reaching conclusions as to what had occurred in the past and what was likely in the future, and it was not sufficiently apparent from the judgment that he had done that. The inadequacy of the factual findings and of the welfare analysis dictated that the appeal should be allowed. The judgment had not laid the ground sufficiently for the judge's conclusion that adoption had been required and that conclusion had been insufficiently reasoned.

The orders were set aside and the case remitted to the Family Court for rehearing.

Comment: The Court of Appeal in the instant case emphasised the need for a local authority to prove its case. It referred to the decision in *Re P (a child)* [2013] EWCA Civ 963, [2013] 3 FCR 159 when Black LJ said 'The assessment and opinions of social workers and those of other professionals will only hold water if the facts upon which they proceed are properly identified and turn out actually to be facts', and that threshold statements should not '… get bogged down in the detail of what occurred on this or that particular day or recite the contents of material from the bundle but instead expose the essential nature of the problems which have led the local authority to consider that intervention into the family's life should be contemplated'. Also relevant is the guidance of Munby P in *Re A (a child)* [2015] EWFC 11, [2015] All ER (D) 234 (Feb) ie that the local authority has to establish its factual case, and if that case is challenged it must adduce proper evidence to establish the fact it seeks to prove, an approach that was not followed by either the local authority or by the judge in the instant case, with the appeal court noting that, 'Some factual issues cannot be resolved merely on hearsay evidence relayed by the social workers'.

FINANCIAL PROVISION AFTER OVERSEAS DIVORCE

Whether there had been a court settlement as defined the EU Maintenance Regulation

Ramadani v Ramadani [2015] EWCA Civ 1138, [2015] All ER (D) 115 (Nov)

BFLS 4A[3101]; Rayden Noter up [T26.22]

The parties had both been born in Kosovo but had lived in Slovenia for much of their married life. In 2008, the wife and four children of the marriage moved to live in England and Wales. By the time of the present proceedings, the children were all aged over 20. One month after moving, the wife commenced divorce proceedings in Slovenia. Among other things, she sought maintenance for the two younger children. She subsequently made a further

application to include a claim for maintenance for herself. An order of the Slovenian court in 2010 recorded that the wife had revoked her claim for payment of monthly maintenance and that the husband agreed to that revocation. In 2011, an order dissolving the marriage was made by the Slovenian court. That order recorded the withdrawal of the claim for maintenance.

The wife was given leave by the High Court to apply for financial remedy orders under Part III of the Matrimonial and Family Proceedings Act 1984 (MFPA 1984). The husband applied to set aside or strike out the leave that the wife had been granted or, alternatively, for an adjournment and stay. Within his overall submissions, the husband's case with regard to spousal maintenance was that that issue had been determined in Slovenia and that that determination was entitled to recognition under Council Regulation (EC) 4/2009 (the EU Maintenance Regulation).

The husband's applications were refused. In respect of the issue of maintenance, the judge found that there were no proceedings pending in Slovenia and that the proceedings had been stopped, thus there had been no 'decision' within the meaning of art 2(1) of the EU Maintenance Regulation because the claim had been stopped before the court had made any decision. The judge then held that the court in England and Wales had jurisdiction in respect of maintenance at the commencement of the wife's application because she had been habitually resident in England and Wales at the time of her application and since. The husband appealed.

The issue for determination by the Court of Appeal was whether there had been an existing 'decision' or 'court settlement' for the purposes of art 2(1) of the EU Maintenance Regulation that had required recognition and enforcement under that Regulation which had prevented the judge from exercising jurisdiction under the MFPA 1984 with respect to maintenance.

The appeal was dismissed on the basis that:

(1) While it might be that there were other means by which it was possible for there to be a 'decision' by a court, a process of adjudication or determination was normally characteristic of a court making a decision.

(2) In the absence of the court having made its own adjudication or determination it was necessary to look with care at any alternative means by which it was suggested that, nevertheless, there had been 'a decision in matters relating to maintenance obligations given by a court'. The facts of the present case fell a long way short of establishing that the Slovenian court had made a 'decision' or that there had been a 'court settlement' with respect to spousal maintenance. The sequence of events in Slovenia had not amounted to a decision of the court there. The decision had been one, made by the wife, to withdraw her claim to spousal maintenance. It had not been 'a decision … by a court' as required by art 2(1)(i) of the EU Maintenance Regulation.

The Court of Appeal looked to the reality of the situation which was, as the judge had held, that there had been no 'decision' in Slovenia because the wife's claim had been discontinued before the court had made any decision with respect to it. It was the husband who asserted that there had been a 'court settlement' with respect to the withdrawal of the wife's maintenance claim and it was for him to establish that that was the case. All he could point to was the fact that she had withdrawn the claim and he had been recorded as having been in agreement with that course. The decision of Moylan J (*AA v BB (application for financial remedy)* [2014] EWHC 4210 (Fam), [2015] All ER (D) 148 (Jan)) was affirmed.

Comment: While the leading authority on the approach to claims under MFPA 1984, Pt III is the Supreme Court decision in *Agbaje v Agbaje* [2010] UKSC 13, [2010] 2 All ER 877, the court in *Agbaje* did not determine what the position would be under if the previous order had been a maintenance order made in another Member State. At that time the relevant provision was Brussels I Regulation (EC) 44/2001, but the EU Maintenance Regulation subsequently replaced Brussels I in relation to matters of maintenance, with effect from 18 June 2011. The instant case also does not determine that point as there was no 'decision' of the court in Slovenia, the wife having withdrawn her application before a determination was made, thus while it serves as a useful guide where there is no concurrent decision in another Member State, the full extent of the interaction between MFPA 1984, Pt III and the EU Maintenance Regulation is yet to be determined.

CAPACITY

Whether court should sanction deprivation of liberty

A local authority v D [2015] EWHC 3125 (Fam), [2015] All ER (D) 36 (Nov)

BFLS 3A[2701]; CHM 6[231]; Rayden Noter up [T49.55]–[T49.56]

The proceedings concerned a 14-year-old child, AB. He had a moderate severe learning disability and attention deficit hyperactivity disorder, for which he was prescribed medication. AB resided at a children's home, under the auspices of an interim care order. AB's circumstances at the children's home were set out in the statement of his allocated social worker. She stated, among other things, that AB was under the continuous supervision of staff, who were aware of his whereabouts at all times. AB was residing in a care setting where he was not free to leave unsupervised and he was not able to contact his family independently. The parties were agreed that the circumstances in which AB lived at that establishment amounted to a deprivation of his liberty. AB's parents were respondents to the care proceedings and to the present application for permission, by the local authority, to seek to invoke the inherent jurisdiction of the court to authorise AB's placement.

The issues included: (i) whether AB was deprived of his liberty at the children's home; (ii) if so, whether the parents and/or the authority were

entitled to consent to the same; and (iii) if not, whether the court would sanction the deprivation of liberty and, if so, under what provision, power or jurisdiction. The parties submitted that there were two possible routes to authorise the deprivation of liberty, namely: (i) the use of s 25 of the ChA 1989; or (ii) the inherent jurisdiction of the court. Consideration was also given to ChA 1989, ss 20 and 100(4) and to art 5 of the European Convention on Human Rights (ECHR).

The court ruled that:

(1) Applying settled principles to the factual circumstances of AB's life at the children's home, he was deprived of his liberty, as opposed to his liberty merely having been restricted. While he could, when he was well behaved, leave the home from time to time for specified periods, overall, he was the subject of continuous supervision and control to a degree which amounted to a deprivation of his liberty.

(2) With respect to consent, at one extreme, an agreed reception into care of a child, that was beneficial and for a short-lived period, where the parent and the local authority were working together co-operatively in the best interests of the child, might be an appropriate exercise of parental responsibility. Thus, it would be appropriate for that parent to consent to the child residing in a place for a period and in circumstances which amounted to a deprivation of liberty. At the other extreme, there would be cases where children had been removed from their parents' care, pursuant to a ChA 1989, s 20 agreement, as a prelude to the issue of care proceedings and where the authority contended the threshold criteria were satisfied. In such an event, it was difficult to conceive of a set of circumstances where it could properly be said that a parent's consent to what, otherwise, would amount to a deprivation of liberty, would fall within the zone of parental responsibility of that parent. That parent's past exercise of parental responsibility would, perforce of circumstances, have been seriously called into question and it would not be right or appropriate, within the spirit of previous authority, to permit such a parent to so consent.

(3) Where a child or young person was in the care of a local authority and was subject to interim or care orders, that reasoning applied with even greater force, and the authority, in the exercise of its statutory parental responsibility, could not consent to what would otherwise amount to a deprivation of liberty. In taking a child into care and instituting care proceedings, the authority was acting as an organ of the state. To permit an authority in such circumstances to consent to the deprivation of liberty of a child would: (i) breach ECHR, art 5 of the Convention; (ii) not afford the 'proper safeguards which will secure the legal justifications for the constraints under which they are made out'; and (iii) not meet the need for a periodic independent check on whether the arrangements made for them were in their best interests.

(4) In respect of the powers of the court, the use of ChA 1989, s 25 did not provide an appropriate mechanism for the authorisation of a deprivation of liberty. In any event, on the facts, AB did not satisfy the criteria

of s 25(1)(a) or (b). Thus, the court was left with its powers under the inherent jurisdiction. The authority could only be granted permission to invoke the inherent jurisdiction to seek an authorisation of AB's deprivation of liberty if the provisions of ChA 1989, s 100(4) were satisfied. The result which the authority wished to achieve could not be achieved by the making of any other kind of order. Further, if the court's jurisdiction was not exercised, AB was likely to suffer significant harm.

Absent a deprivation of liberty authorisation, AB's continued placement at the children's home would be unlawful and in breach of ECHR, art 5. The authority, as a public body, was required not to act in a way which was incompatible with a Convention right. Accordingly, AB would have to move to another establishment, where he would not be under constant supervision and control. Such a move would not be in his welfare best interests and it was likely he would suffer significant harm as a result. AB, at the time of the present proceedings, did not wish to move to another residential establishment. Thus the court determined that, in all of the circumstances, the authority would be granted permission to invoke the inherent jurisdiction and AB's deprivation of liberty at the children's home would be authorised. In the first instance, that authorisation would be for a period of three months.

Comment: A decision also of note for the per curiam comments of Keehan J that the issue of whether a child or young person is deprived of their liberty is highly fact specific and, therefore, inter alia:

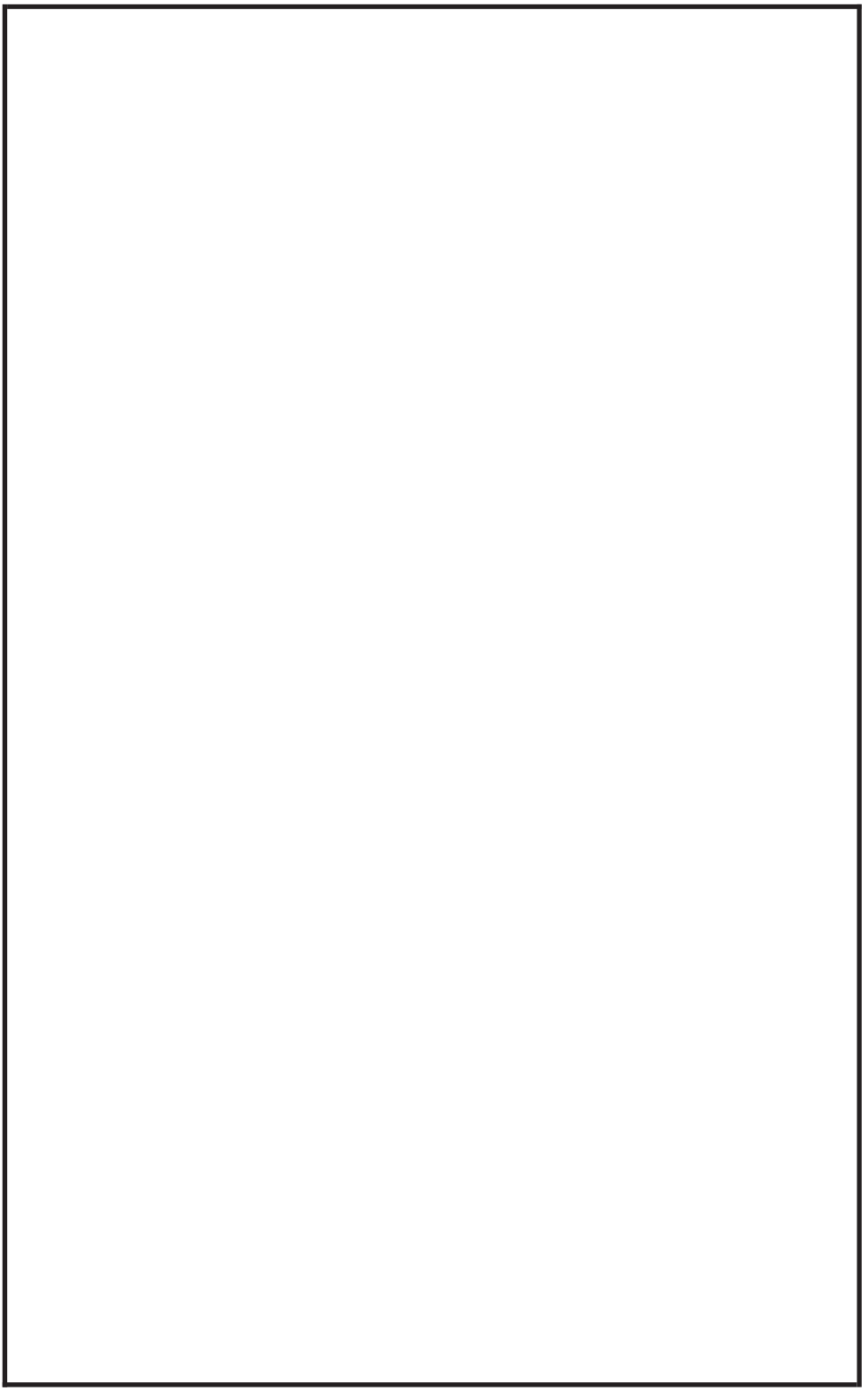
(1) local authorities are under a duty to consider whether any children in need, or looked-after children, are, especially those in foster care or in a residential placement, subject to restrictions amounting to a deprivation of liberty;

(2) the *P v Cheshire West and Chester Council*; *P v Surrey County Council* [2014] UKSC 19, [2014] 2 All ER 585 criteria must be rigorously applied to the individual circumstances of each case;

(3) the comparison to be made is not with another child of the same age placed in foster care or in a residential home, but simply with another child of the same age;

(4) a deprivation of liberty will be lawful if warranted under statute; for example, under ChA 1989, s 25 or the Mental Health Act 1983 or under the remand provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, or if a child has received a custodial sentence under the Powers of Criminal Courts (Sentencing) Act 2000; and

(5) irrespective of the means by which the court authorises the deprivation of a child's liberty, whether under ChA 1989, s 25 or the inherent jurisdiction, the local authority should cease to impose such deprivation as soon as the s 25 criteria are not met, or the reasons justifying the deprivation of liberty no longer subsist – authorisation is 'permissive and not prescriptive'.



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