PARK
SQUARE

BARRISTERS

FAMILY LAW – GENERAL UPDATE – OCTOBER 2017

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So, Where to start?

- PD 12J – Domestic Abuse
- Came into force on 2nd October 2017
- See also – [2017] Fam Law 225

- PD12J – Applies to all tiers of Judges, including lay justices, whether sitting in the family court or the High Court
- Supplements FPR Part 12, and supersedes the President's Guidance in relation to Split Hearings (May 2010) as it applies to proceedings for CAO's

So what is new?

- Number of amendments – Not all set out here
- Couple of key points;
- A) There is an expanded definition of “domestic abuse” (previously “domestic violence”) – see para 3

- B) There are mandatory requirements for inclusion of certain specified matters in the court’s order – See para’s 8,14, 15, 18, 22, 29

- Para’s 35-39 set out the factors to be taken into account when determining whether or not to make child arrangements orders in all cases where domestic abuse has occurred

- PD12J – May require further adjustment if and when proposed legislation restricting cross examination of alleged victims by alleged perpetrators is enacted

PUBLIC LAW CASE UPDATE

- ***S-F (A Child) [2017] EWCA Civ 964***
- Appeal from decision to make care order not placement order
- Main conclusion: The proportionality of interference in family life that an adoption represents must be justified by EVIDENCE, NOT ASSUMPTIONS

- Practitioners were reminded of the relevant regulatory scheme as highlighted in ***K v London Borough of Brent [2013] EWCA Civ 926 and Surrey County Council v S [2014] EWCA Civ 601***

- The permanence report and the agency decision maker’s record of decision contain the analysis and reasoning which are necessary to support an application for a placement order
- They should be scrutinised by the Children’s Guardian

High Bar to overturn adoption orders

- ***Re W (A Child) [2017] EWHC 829 (Fam) and W (A Child – No 4) [2017] EWHC 1760 (fam)***
- Net result of these cases is that child remained with adoptive parents

Procedural Unfairness

- ***Re J (Children) [2017] EWCA 398***
- Successful appeal from final care orders based on procedural unfairness
- Court below had used the IRH as a final hearing against the wishes and expectations of the parties

- Relevant case to cite is ***Re S-W (Care Proceedings: Case Management Hearing) [2015] EWCA Civ 27*** – Macur LJ

Permission to Vaccinate

Re SL (Permission to Vaccinate) [2017] EWHC 125 (Fam)

- MacDonald J found it was in the best interests of the child to receive vaccinations
- Look at weight to be given to views of natural parent where diametrically opposed to medical evidence

Useful Reminder of PII test

- ***Re C (A Child) [2016] EWHC 3171 (Fam) and Re C (A Child) No. 2 – (Application for Public Interest Immunity) [2017] EWHC 692 (Fam)***
- In the first case – application to discharge order for disclosure into care proceedings was refused

- In the second case, the SSHD applied for public interest immunity in relation to the information held;
- Useful decision for the procedure and legal test to be applied in such applications and the interplay between open and closed information

- ***M (Children) [2017] EWCA Civ 891***
- Court of Appeal dealing with issues of enforcement of a private law order made in Estonia
- Relevance to public Law: No power to order a local authority or CAFCASS to supervise contact under domestic law relating to private proceedings

Can CAFCASS be committed to prison?!!

- ***S v SP and CAFCASS [2016] EWHC 3673 (Fam)***
- Application to commit CAFCASS Officer to prison for contempt of court
- Baker J held that rule 23.73 FPR 2010 must be given a broad interpretation

- The rules permitted disclosure of information by CAFCASS to a police officer in a conversation that arose in the course of investigation by the Police
- So, the answer is, highly unlikely that CAFCASS can be committed to prison!!

Article 15 Transfer Applications and the ‘Best Interests’ test.

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Article 15 (1)

- Article 15 of Regulation No 2201/2003, headed ‘Transfer to a court better placed to hear the case’, provides:
- ‘1. **By way of exception**, the courts of a Member State having jurisdiction as to the substance of the matter may, if they consider that a court of another Member State, with which the child has a particular connection, would be better placed to hear the case, or a specific part thereof, and where this is in the best interests of the child:
- (a) stay the case or the part thereof in question and invite the parties to introduce a request before the court of that other member state in accordance with paragraph 4; or
- (b) request a court of another Member State to assume jurisdiction in accordance with paragraph 5.

Article 15(2)

In every case (with a European Dimension) the court will need to consider whether the case should be transferred to another member state.

Article 15 (2) provides that the court of origin may transfer the case to a court of another country.

A transfer may take place:-

- on application from a party, or
- of the court's own motion, if at least one of the parties agrees, or
- on application of a court of another Member State, if at least one of the parties agrees.

Early consideration

- Under the revised PLO the court is obliged to consider jurisdiction on Day 1 of the proceedings. It should be considered both at gatekeeping and CMH – not later in the proceedings.

- **S20** – should be avoided unless absolutely necessary in cases with an international element. If it has to be used as a short term measure then still issue as soon as possible.
- See Mr. Justice Moylan in ***Leicester City Council v S & Others*** **[2014] EWCH 1575** where he said "*where it appears that jurisdiction (including under Article 15) is likely to be a substantive issue in relation to care proceedings, the local authority, absent very good reasons, should commence proceedings expeditiously so that a forum is available for such issues to be determined as early as possible in the child's life*".

Article 55

- A party seeking for another Member State to assume jurisdiction, should, at the earliest opportunity, make a focused request to ICACU (International Child Abduction and Contact Unit) pursuant to article 55.
- This task will usually fall to the LA.
- This is needed to assist the judge in arriving at a decision when applying the 3 stage test as set out on AB v JLB

Transfer – The 3 stage test

- **Set out in the case of AB v JLB (Brussels II Revised: Article 15) [2008] EWCH 2965 (Fam)**
- **Reiterated in Re E (A Child) (Care Proceedings: European Dimension) [2014] EWCH 6 (Fam)**

- 1) Does the child have, within the meaning of Article 15 (3), 'a particular connection' with the relevant other Member State?

  2) Will the court of the other Member State 'be better placed to hear the case or a specific part thereof' (Article 15 (1))?

  3) Would it be in the child's best interests to transfer the proceedings? (Article 15 (1)).

- Sequential – i.e. if fails at 2 no need to consider 3.

Stage 1 – Particular Connection

- **Does the child have, within the meaning of Article 15 (3), 'a particular connection' with the relevant other Member State?**

- Essentially a matter of fact and the most straightforward part of the test.

- The child must have a “particular connection” with the other Member State. Article 15.3 enumerates the five situations where such connection exists according to the Regulation:-
- - the child has acquired habitual residence there after the court of origin was seised; or
- - the other Member State is the former habitual residence of the child; or
- - it is the place of the child’s nationality; or
- - it is the habitual residence of a holder of parental responsibility; or
- - the child owns property in the other Member State and the case concerns measures for the protection of the child relating to the administration, conservation or disposal of this property.

Stage 1 - It is the place of the Child's Nationality?

- What exactly does this mean?
- Does the child need to hold a passport in that country?
- Was the child born in that country?
- Were the parents born in the country?

- (example – the child who obtains a passport after proceedings issued and taken into foster care)
- See Re N – both girls were born in England and lived all their lives here but were considered nationals of Hungary, not the UK.

Stage 2 – Is the other court better placed?

2) **Will the court of the other Member State 'be better placed to hear the case or a specific part thereof'?**

- Answering this question is "an exercise in [practical] evaluation, to be undertaken in the light of all the circumstances of the particular case" (AB v JLB para 28)
- The judicial and social care arrangements in other member States are to be treated by the UK courts as being equally competent (Re T – 2013)
- It *is not for the courts of this or any other country to question the "competence, diligence, resources of efficacy of either the child protection services of the courts" of another state* (Re N) [2016], Re M (BRII revised: article 15) [2014]

Stage 2 – better placed factors.

- Ryder LJ, in Nottingham City Council V LM [2014] EWCA Civ 152
- “Without wishing to prescribe an exhaustive list, these factors might include:-
- -the availability of witnesses of fact,
- - whether assessments can be conducted and if so by whom(ie not a comparative analysis of welfare perceptions and principles but, for example whether an assessor will have to travel to another jurisdiction to undertake an assessment and whether that is a lawful and/or professionally appropriate course)
- - whether one court’s knowledge of the case provides an advantage, for example by judicial continuity between fact finding and evaluation and so on.”

- Other possible factors:-
- - future contact with full half-siblings – see Re N – paras 20 & 21
- - language of parents
- - child’s cultural and linguistic needs

Stage 3 – Is transfer in the best interests of the child?

3) Courts must be convinced that a transfer is in the best interests of the child:

BUT – What exactly is ‘Best Interests’?

- Mr. Justice Mostyn - ***Re T (A Child) (Care Proceedings: Request to Assume Jurisdiction) [2013] EWHC 521 (Fam)***, [2013] 2 WLR 1263, a line of authority developed which suggested that the assessment of best interests pursuant to Article 15 involved an 'attenuated' welfare enquiry, limited to the issue of forum and without a 'profound investigation of the child's situation and upbringing'
- NB - Now appears to have been superseded by the Supreme Court Decision in Re N (2016) and more recent 2017 CJEU case of C&FA vD(R intervening)

The ‘Attenuated’ Approach

- Attenuated = weakened – “reduce the force, affect or value of”
- 'attenuated' approach to welfare led to a resistance to considering, in any meaningful way, what the transfer of jurisdiction would mean for the subject child.
- It didn't properly consider the following questions:-
- - The impact of children being moved from their current placement.
- - What circumstances would meet them in the requested Member State?
- - What was going to happen to them in the short-term and the long-term, and would those arrangements be in their best interests or contrary to them?
- These kinds of considerations risked, so that approach suggested, trespassing into the 'quite different' substantive welfare question of the right outcome for the subject child [***Nottingham City Council v LM***]

Re N – The Background

- Leading Case now is *Re N (Children) (Adoption: Jurisdiction)* [2016]UKSC 15 – on appeal from [2015] EWCA Civ 1112
- Hungarian Roma parents – moved to UK when M pregnant with 1st child. J born in 2012 and E in 2013.
- J and E taken into care following E's birth as family living in extreme squalor. Also concerns about DV.
- LA was going to EPO but parents agreed to S20 – this was in May 2013.
- Contact was 3x per week initially – reduced during 2013 due to poor attendance etc.
- In Jan 2014 the LA finally issues care proceedings and ICO made in February.

Re N

- When the case of *Re N* was considered at first instance, HHJ Bellamy decided to request pursuant to Article 15 that the Hungarian court assume jurisdiction in relation to the case. He declined to take into account the fact that transfer would entail the removal of the children from their current, settled placement in England into the unfamiliar environment of foster care in Hungary (***Re J and E (Children) (Brussels II Revised: Article 15)*** **[2014] EWFC 45**) [94].

- The children's Guardian appealed, but the Court of Appeal upheld HHJ Bellamy's approach and endorsed the attenuated welfare test as the correct approach to Article 15 Brussels IIa. (Re N - [2015] EWCA Civ 1112)

- The Guardian appealed to the Supreme Court who allowed the apeal.

  Lady Hale, giving the judgment of the court, rejected the notion that the best interests inquiry in the context of an Article 15 transfer should be narrow or 'attenuated', but at the same time confirmed that the focus of the best interests inquiry is on the impact of transfer not the eventual outcome for the child.

Re N - continued

- When looking at the factors that the court should consider when deciding whether it is in a child's best interests to transfer jurisdiction to another Member State, Lady Hale said, at [44]
- "…there is no reason at all to exclude the impact upon the child's welfare, in the short or the longer term, of the transfer itself. What will be its immediate consequences? What impact will it have on the choices available to the court deciding upon the eventual outcome? **This is not the same as deciding what outcome will be in the child's best interests.** It is deciding whether it is in the child's best interests for the court currently seised of the case to retain it or whether it is in the child's best interest for the case to be transferred to the requested court."
- The court decided that the first instance judge was wrong to decide that the Hungarian court was better placed to hear the case without considering:-
- a) That the short-term consequence of the transfer was the removal of the children from their settled placement in England where they had lived for some time, to a foster placement that they did not know in an unfamiliar country with an unfamiliar language;
- B) That the long-term consequence would be to "rule out one possible option for their future…remaining in their present home on a long term legally sanctioned basis, whether through adoption, or through a special guardianship order, or through an ordinary residence order" [45].
- So when deciding whether or not to request that the courts of another Member State assume jurisdiction on behalf of the child, the court should consider the impact of transfer – or non-transfer – on the child, in both the short and long term.

Child and Family Agency v D (R intervening) (Case C 428/15); [2017] 2 WLR 949

- On a reference for a preliminary ruling from the Irish Supreme Court, the CJEU was asked, inter alia, how the concepts of 'better placed' and 'best interests' in Article 15 were to be interpreted and how they related to each other.
- The CJEU was asked several questions, including:-
- Does Article 15 – apply to care proceedings? Yes
- How are ‘better placed’ and ‘best interests of the child’ to be interpreted?’

C&FA v D - continued

- The CJEU said:
- Article 15 (1) is a "special rule of jurisdiction" which "must be interpreted strictly" [48]
- If a court is going to seek an Article 15 transfer of jurisdiction, it has to be able to rebut the "**strong presumption**" in favour of jurisdiction remaining in the State of the child's habitual residence [49]. Article 15 operates as an **exception** to the general rule of jurisdiction.
- Article 15 (3) contains an exhaustive list of factors which can indicate proximity with another Member State (or a 'particular connection' – Article 15(1).

C&FA v D - continued

- **Better Placed**
- The existence of one or more of the Article 15(3) factors does not in itself indicate that the courts of another Member State would be 'better placed' to hear the case. The court with jurisdiction has to make an assessment of whether transferring the case would give a "genuine and specific added value, with respect to the decision to be taken in relation to the child' compared to the case remaining where it is" [57].

- deciding whether the requested court is 'better placed' to hear the case, the court with jurisdiction should not take into consideration the substantive law of the requested state. Considering the law of the requested Member State would offend against the principles of mutual recognition of judgments and mutual trust between Member State which forms the basis of the Regulation.

- When deciding the 'better placed' question the court can consider, inter alia, "the rules of procedure" applicable in that Member State e.g. for the taking of evidence, but must not consider the substantive law of that Member State (*Child and Family Agency v D (R intervening)* [57].

C&FA v D - continued

- **Best Interests**
- When considering whether transfer will be in the 'best interests' of the child, the court must be satisfied that transfer is **"not liable to be detrimental to the situation of the child'** [58]. The court **must** 'assess any negative effects that such a transfer might have on the familial, social and emotional attachments of the child concerned in the case or on that child's material situation" [59].
- The court should be satisfied that transfer is not detrimental to the 'situation of the child' The court should consider the "short and long term" consequences for the child of transferring jurisdiction – and of not transferring jurisdiction (*Re N* [45]).

If transfer is granted.

- If the three questions above have been answered in the positive, the court ***may*** request that the other Member State assume jurisdiction (Article 15 (1) (b)).
- There is a discretion, however, as Mrs. Justice Pauffley noted in *Re J* "…*since the discretion is exercisable only if the court has satisfied itself both that the other court is 'better placed' to deal with the case … and that it is in the best interests of the child to transfer the case****, it is not easy to envisage circumstances where, those two conditions having been met, it would nonetheless be appropriate not to transfer the case****.”*

- If the other Member State does not assume jurisdiction **within six weeks of its seisure, or declines jurisdiction,** or if the parties do not introduce the request within the time limit specified, the court first seised will continue to exercise jurisdiction as before (Article 15 (5)). (**So best not to assume transfer will actually take place even if Article 15 application is succesful!)**

The Future – the Impact of Brexit!

- Irrespective of what happens to Brussels IIa following Brexit, the 1996 Hague Child Protection Convention applies between all Member States of the European Union.
- A question still remains about the interplay between Brussels IIa and the 1996 Hague Convention where a child is habitually resident in a Member State (see Article 61 Brussels IIa), but nonetheless the courts are likely to look to authorities on Article 15 transfers when applying the similar provision in Article 8 and 9 of the 1996 Hague Convention

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